



ANALYZING PROGRESS IN IMPLEMENTING THE RIGHT TO GENDER REASSIGNMENT UNDER VIETNAMESE LAW

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Abstract: *In Vietnam, issues related to gender reassignment surgery and gender identity have arisen during the implementation of the 1995 Civil Code. However, the Code did not have any provisions to regulate these issues. Therefore, in order to protect the legal rights and interests of individuals and adjust social relationships that arise in reality, the 2005 Civil Code for the first time stipulated that individuals have the right to determine their gender as a personal right. This right is currently recognized in the 2015 Civil Code, creating an important legal basis for specifying relevant provisions in specialized legal documents. Although there are still limitations, the provisions on the right to determine gender in the current period are a legal advancement, with a significant role and impact on the lives of millions of people with congenital gender disabilities in Vietnam.*

Keywords: *Gender reassignment, congenital disabilities, legal rights, Civil Code.*

INTRODUCTION

With the purpose of expressing respect and protecting the legitimate rights and interests of individuals in society, the Civil Code (CC) has recognized the personal rights of individuals. According to Article 25 of the 2015 CC, personal rights are understood as civil rights attached to each individual, which cannot be transferred to others except when other related laws provide otherwise [10]. To adapt to the increasingly diverse, complex, and practical social relationships that arise under current conditions, the National Assembly of the Socialist Republic of Vietnam passed the CC in 2005, which for the first time stipulated the right to determine gender and continued to be regulated in the 2015 CC (Article 36). This regulation has significant meaning, demonstrated by the timely adjustment of legislative agencies to social relationships arising in social life, especially the increasing trend of gender conversion currently occurring in Vietnam. The issue of determining a person's gender has legal regulations and is respected and protected by the law. As society becomes increasingly modern and developed, it also brings with it increasing issues, one of which is related to the gender of individuals, such as determining gender and gender reassignment surgery. Gender is one of the factors that belong to personal identity, closely related to each individual. Gender is a product of nature and also carries the characteristics of each society. In different cultures and political regimes, there are unique characteristics of gender in human beings. The laws of each country also regulate different rights and obligations for each specific gender. It can be said that the gender of individuals is an important issue, directly affecting the rights and interests of each individual and of society as a whole. Therefore, to ensure the legitimate rights of individuals, each person needs to live correctly and authentically with their gender [11].

Gender is understood as the physiological characteristics that are associated with each person as a natural factor, which means that humans are born with a certain gender. However, in reality, it is not always the case that a person's gender is fully developed when they are born. There are many cases where a person's true gender does not match the outward expression of their reproductive organs as seen by others. Some people may have genital defects that make it difficult to determine whether they are male or female, while others may appear outwardly male or female but have their body change to the opposite gender later in life. Cases like these are called congenital gender defects in medicine. This has a significant impact on their lives and psychological well-being, and they may



be plagued by self-doubt and shunned by their family, friends, and society. Therefore, these individuals need medical intervention to regain their true gender. However, if they are only given biological intervention to restore their gender without legal recognition, social respect, and family support, the process of reidentifying their gender will not be meaningful. Therefore, for someone with a congenital gender defect, it is important and necessary to have legal recognition, respect, and protection of their rights to re-identify their gender, in addition to medical intervention.

In the past, Vietnamese law did not allow individuals with gender dysphoria or gender defects to reidentify their gender. As a result, many had to travel abroad for surgery to regain their true gender. However, upon returning to Vietnam, they were not entitled to the same rights as their gender, such as changing their name, gender, etc. in personal papers. Nowadays, with the development of society and integration with the world, our perception of individuals with gender defects is becoming more open. Particularly, the recognition of Vietnamese law allowing some cases to re-identify their gender has marked a new development in legal thinking in Vietnam. This shows the progress and keeping up with the times of lawmakers, thereby contributing to the best protection of citizens' rights, especially those with congenital gender defects, and for all Vietnamese citizens in general.

1. Gender and gender reassignment rights

Gender is understood as "the biological difference between males and females. Gender is the identical characteristics that we are born with and cannot change" [9]. However, at some stage or era, gender is not always understood as a natural factor belonging to humans, formed naturally within humans. Humans in general and human gender, in particular, undergo changes in cognitive perception through different stages of human development. In the underdeveloped social era, everything is explained according to the notion of idealism, that is, the sky, earth, society, and humans are brought about by supernatural forces, nothing is natural. That notion believed that humans were created by God or the Higher Power and gender was determined at birth, such as the case of Adam and Eve. In the next stage of human development, the scientist Charles Robert Darwin, who is considered the father of the theory of evolution, proved the origin of humans and made initial observations about gender and the difference between males and females. Darwin's studies confirmed that gender division into males and females in all living things, and men or women in humans, originated from the objective requirements for their existence and development, not due to the power of nature or some divine authority.

The philosophy of Marx and Engels views humans from the perspective of nature and society: "humans are a unified entity between nature and society, always carrying the social-historical nature" [13]. Marxists believe that humans are primarily the products of the natural world, born with the characteristics inherent in nature, but when they are born and integrate with the world under the influence of the society in which they live, they are not just simple products of nature anymore. They also carry the characteristics and attributes of the society in which they live. Gender of humans is not outside that law, even though gender is initially just a natural issue at birth, but when it is born and grows up, it carries the social characteristics of the environment in which they live. Usually, when a child is born, people will rely on the external characteristics of the reproductive organs to determine whether the child is male or female, from which appropriate ways of nurturing and educating can be provided for the social environment where the child is born and grows up. However, due to the influence of society, each child with different genders will have different social characteristics. Therefore, in many cases, to distinguish gender, people do not only consider natural factors, meaning looking at the external manifestations of the reproductive organs to recognize whether someone is male or female. Because if only considering that natural factor, in many cases, it is not accurate because the gender of human beings also carries social characteristics. Therefore, to accurately determine the gender of human beings, the following factors also need to be considered:

First, in terms of genetic factors, the natural gender of human beings is determined based on the structure of the chromosome set of the zygote (formed after the female gamete or egg is fertilized by the male gamete or sperm).



Second, in terms of anatomical structure, there are two criteria. Firstly, according to the internal reproductive gland, if a person has ovaries, they are female, and if they have testicles, they are male.

Third, in terms of biology, it is based on characteristics such as men having testicles and women not having them, and conversely, women having menstrual periods monthly while men do not.

Fourth, in terms of psychology and society, people also consider and recognize the gender of human beings through characteristics such as voice, external appearance, gestures, behavior, and manners. Starting from the individual gender characteristics that society has defined, corresponding behaviors and conduct have been established for each gender, or to put it more accurately, each gender has its own unique social characteristics and attributes. It is precisely because of these unique characteristics that the law has established rights and obligations corresponding to each gender. This not only helps protect the rights and interests of individuals and citizens but also helps them escape the obsession of not being treated like other normal people. Therefore, it is really necessary and appropriate for the law to regulate individuals' right to redefine their gender in the current stage of social development.

In addition, the term "intersexuality" refers to unclear gender characteristics in people [15]. The American Psychological Association (APA) defines intersex conditions as "referring to all conditions leading to atypical development of gender and physiological characteristics on the body. These conditions may involve atypical genitalia, internal reproductive organs, sex chromosomes, or gender hormones" [1]. Furthermore, the Intersex Society of North America (ISNA) defines intersex as a general term "referring to a variety of conditions in which a person is born with a body that doesn't fit the typical definitions of male or female" [8]. Some examples of intersex conditions include:

- Ambiguous genitalia: not easily classified as male or female.
- Incomplete or abnormal development of internal reproductive organs.
- Inconsistency between external genitalia and internal reproductive organs.
- Abnormal sex chromosome characteristics.
- Undescended testes or undeveloped ovaries.
- Production of gender hormones above or below typical levels.
- Inability of the body to respond normally to gender hormones.

Therefore, intersex individuals do not necessarily have the characteristics of "having two genitalia" or "ambiguous genitalia". Gender characteristics are also expressed in organs that are not visible externally, such as testes, uterus, endocrine glands, chromosomes, and hormones. A person born with external genitalia (penis, vagina) that looks completely normal can still be intersex [12]. Intersex individuals need to be diagnosed and surgically determined as male or female. Therefore, surgical gender reassignment is only part of the issues that intersex individuals have to go through. The current trend in the world is to help intersex individuals live comfortably with their condition and see it as a natural state.

According to traditional beliefs, there are two genders in society, male and female, which are often reflected in personal documents such as identity cards, birth certificates, driving licenses, etc. Vietnamese law only recognizes two genders, male or female [9]. Article 2, Clause 1 of Decree No. 88/2008/ND-CP dated August 5, 2008, of the Government on the reassignment of gender (Decree No. 88/2008/ND-CP) stipulates that "*Congenital defects related to gender are abnormalities in the genitalia of a person from birth, expressed in one of the forms of pseudohermaphroditism male, pseudohermaphroditism female or true hermaphroditism*" [6].

There are many causes of congenital defects related to gender, one of which may be due to genetic mutations during pregnancy or genetic defects, leading to the inability to determine whether the newborn is male or female. Articles 5 and 6 of Decree No. 88/2008/ND-CP provide specific regulations on medical criteria for determining congenital defects related to gender and criteria for determining gender that have not been accurately defined [6].



2. The right to determine gender

2.1. *What is the law on the right to determine gender in Vietnam?*

Firstly, the right to determine gender is essentially a natural need of human beings. Like other subjects in society, the right to determine gender is first and foremost a natural need, ability, and privilege. This is reflected from two perspectives: fairness in the right to live and be free; the right to pursue happiness.

Regarding the right to live and be free, those who need to determine their gender are normal individuals like everyone else in society who are capable of fulfilling their obligations and entitled to equal rights and privileges as others. One of the most important rights is the right to be recognized and respected. Society needs to recognize individuals who need to determine their gender as normal individuals with full rights and obligations, not allowed to discriminate, offend, or treat them as mentally ill patients.

Regarding the right to pursue happiness, first of all, it is necessary to understand that pursuing happiness is a form of freedom, where individuals use their own abilities to seek happiness and values for themselves. This is evident in all political and social systems. One of those values is created through marriage, building a happy family and having that marriage relationship respected and protected by the state.

Secondly, the right to determine gender is a new right compared to human rights in general. The recognition and protection of the right to determine gender in different countries are not the same (recognized or not recognized, limited or restricted rights...). However, there are some rights that apply only to specific groups, namely the right to determine gender (for intersex individuals). This is a relatively specific right of intersex individuals arising from the characteristics of their gender identity and physical status. Thus, the right to determine gender for intersex individuals can be seen as including two main groups: common rights and specific rights.

In addition, other needs such as family affection, medical or legal treatment are also necessary and practical desires. These needs are legitimate and must be acknowledged and guaranteed to be carried out according to an appropriate legal mechanism to ensure that the right to determine gender of intersex individuals is lived in accordance with their human dignity. The law is the most effective tool to ensure the right to determine gender at present.

2.2. *Conditions for individuals to have the right to determine their gender*

Article 36 of the Civil Code of 2015 stipulates that individuals have the right to determine their gender [10]. Accordingly, determining one's gender is a personal right (attached to the individual) that involves medical intervention by a competent specialized agency to clarify one's gender and restore the actual gender of an individual who has a congenital disability or has not accurately determined their gender.

Regarding congenital disabilities related to gender, as mentioned above, the gender that has not been accurately determined is defined in Article 6 of Decree No. 88/2008/ND-CP as follows: "Sex chromosomes may be similar to cases of intersex pseudo-male or pseudo-female, or true intersex but with reproductive organs that have not been completely differentiated and cannot be accurately determined as male or female" [6].

Therefore, the condition for determining one's gender is only applicable to individuals who fall into one of the two categories of having a congenital disability related to gender or not accurately determining their gender. Those who have completed their gender development do not have this right. In other words, it can be affirmed that this is a conditional personal right. This is shown in the fact that a person is only entitled to request a determination of their gender if they have a congenital disability related to gender or have not accurately determined their gender. Only when they meet one of these conditions do they have the right to request medical intervention to accurately determine their gender. With these conditions, it can be seen that determining one's gender is not equivalent to arbitrarily changing one's gender. Instead, determining one's gender can only be carried out within the legal framework. This is entirely consistent with the good moral traditions and the current socio-economic development situation of Vietnam.



Determining one's gender must involve medical intervention by a competent specialized agency to be considered legal. After completing the gender correction, this specialized agency will issue a certificate to serve as a legal basis for affirming the gender and determining the gender again.

3. The current situation of Vietnamese legal regulations on the right to gender reassignment

It cannot be denied that the emergence of legal regulations on the right to gender reassignment in recent times has played a significant role in the lives of gender non-conforming individuals, particularly those with disabilities, and for society as a whole. The existence of these regulations has helped individuals with gender disabilities to confidently find themselves, but in reality, these regulations have exposed some shortcomings that make it difficult for people to exercise this right. These shortcomings include:

Firstly, legal documents have been issued too slowly compared to the rapidly changing society. Secondly, there has been a lack of awareness-raising activities to inform people about their right to gender reassignment and how to exercise it in practice.

Thirdly, there has been a failure to amend and supplement related legal regulations regarding the implementation of the right to gender reassignment, such as changes to citizenship, marriage, and employment.

Fourthly, current legal regulations have revealed shortcomings in that they only provide for two cases in which gender can be reassigned: congenital gender disabilities and ambiguous gender. Other cases also need to be considered to determine gender, such as:

Individuals who have completed gender development, have external reproductive organs and a physique consistent with their gender identity, but whose gender has changed due to external factors despite their reproductive organs remaining the same.

Individuals with "gender dysphoria" [2]; who always feel that they belong to a gender opposite to the one they are assigned and desire to be of that gender. People who have gender dysphoria exhibit the following characteristics:

- Feeling that they belong to the opposite gender and that the existing biological sex is a mistake made by nature.
- Feeling discomfort with their own body to the point of being afraid of their own biological sex.
- Strongly desiring to have the appearance of the opposite gender, even to the point of wanting to undergo surgery.
- Wanting to be recognized by society as the opposite gender.
- Having a persistent feeling and belief that they are the opposite gender, often starting from childhood.
- Not having any physical or mental illness, such as schizophrenia.

The decision to undergo gender transition is not a spontaneous personal desire, but requires careful consideration by a group of experts including physicians and mental health professionals.

Despite allowing for gender reassignment for those with gender identity disorders and those whose gender identity has not yet been clearly defined, our current understanding of gender remains limited. There are cases where individuals have a gender abnormality but are not able to have their gender reassigned. With the current trend towards development and integration, it remains to be seen whether these regulations are effective in practice and truly benefit a significant number of people who need to redefine their gender at this time.

4. The right to redefine gender for intersex individuals in other countries' laws

Despite allowing for gender the right to redefine one's gender is a personal right that is part of human rights and civil liberties. Human rights are one of the earliest and most natural rights to emerge. Therefore, personal rights directly related to each individual in society, such as the right to redefine gender, are fully recognized in the regulations of each country.

The first country in the world to implement gender equality laws is South Africa. With the 2005 Legal Issues Amendment Act, the 2000 Promotion of Equality and Prevention of Unfair Discrimination Act was amended, which stated that "Intersex" means "a congenital condition involving atypical development of sex characteristics at any level" and "gender includes intersex" [3]. This law is truly



groundbreaking because, in addition to being the first law among gender equality laws, it was designed to include all intersex people within its definition and not leave anyone out.

In many countries, three gender options are allowed on personal identification documents: (F) for female, (M) for male, and (X) for other genders.

Many countries recognize legally non-binary gender classifications (neither male nor female). These classifications are often based on a person's gender identity. In some countries, such classifications may be reserved for people who are intersex and were born with gender characteristics "that do not fit typical definitions of male or female bodies".

Countries currently recognizing a gender other than male and female are Argentina, Austria, Australia, Belgium, Canada, Denmark, Germany, Iceland, India, the Netherlands, Nepal, New Zealand, South Africa, Pakistan, Taiwan, the United Kingdom, and the United States.

The third International Intersex Forum's Malta Statement in 2013 called for infants and children to be designated as male or female based on the understanding that identification may differ later:

- Register children of different genders as female or male, with the understanding that, like all people, they may grow up to identify with another gender.

- To ensure that gender or sex classifications can be modified through a simple administrative procedure at the request of concerned individuals, all adults and young adults will be able to choose between female (F), male (M), non-binary or multiple options. In the future, just like race or religion, gender or sex will not be a category on birth certificates or personal documents for anyone [14].

In March 2017, a statement by the Australian and New Zealand community called for an end to gender classification as a binary classification (only male and female genders), stating that other gender classifications beyond the binary are legal. It also called for criminalization of medical interventions for intersex individuals.

Like non-binary individuals, some intersex individuals may not identify themselves as female or just male. Social research in Australia, a country with an 'X' gender classification, shows that 19% of those born with atypical gender characteristics have chosen the option "X" or "other," while 52% are women, 23% are men, and 6% are uncertain. At birth, 52% of the people in the study were assigned female and 41% were assigned male [4].

In Argentina, on July 20, 2021, President Alberto Fernández signed an order (Decreto 476/2021) that the national registry agency allows the option of a third gender on all national identity cards and passports, marked as "X." This measure applies to both non-citizen residents who have Argentine identification documents. In compliance with the Gender Identity Law of 2012, this has made Argentina the first country in South America to legally recognize non-binary gender on all official documents, freely and at the request of the person [5].

On June 15, 2018, the Constitutional Court of Austria reached a decision, announced in a press release on June 29, that Article 8 of the European Convention on Human Rights (ECHR) guarantees recognition of gender beyond the male or female genders and individuals with gender development different from male or female must be allowed to leave the gender box blank and must be allowed to implement another positive input field. They also noted that current law does not conflict with these requirements and can be interpreted in a way that is compatible with the constitutional right to recognized gender identity through Article 8 of the ECHR. The court ruled that the national interest listed in Article 8.1 ECHR is not greater than the very reasonable interest of an individual in recognizing their personal life, including gender identity and other laws that may be adjusted if necessary. The court pointed out that administrative agencies may require evidence of the appropriateness of the change for entry and its relationship to the actual social life of the person, and Article 8.1 ECHR does not establish the right to arbitrarily name items.

5. Ensuring the right to redefine gender in Vietnam at the present

The act of redefining one's gender is not only theoretically meaningful but also has significant practical implications that directly affect the rights of individuals with gender disabilities, as well as the community as a whole. In essence, allowing a person to live according to their gender is allowing them to exercise their human rights, as gender is an inseparable part of human identity. Therefore, the laws of countries around the world that permit or recognize the right to redefine one's gender as



a civil right are in line with the laws of nature and society. In the context of Vietnam, to ensure the right to redefine gender is fully understood, and effectively implemented, this study proposes the following solutions:

Firstly, there is a need to promote the dissemination, education, and popularization of the law on personal rights in general and the right to redefine gender in particular to the people.

Secondly, amend laws and other relevant legal documents related to the right to redefine gender, such as Decree 88/2008/ND-CP, to expand the scope of cases that can be redefined, such as cases where the individual has already completed their gender but environmental impact, occupational accidents, and other factors have led to changes in their appearance, despite no change in their sexual organs; and another case that can be considered for gender redefinition is cases of "gender distress".

Thirdly, supplement regulations on the right to marry, adopt children, the rights of female workers, and the right to perform military obligations for individuals who have redefined their gender.

Fourthly, allow individuals who have undergone gender reassignment prior to the provisions of Article 36 of the 2015 CC to modify their citizenship registration. In each period of social development, the state will make adjustments to the laws to meet the demands of society and improve the rights of the people.

Fifthly, the law needs to recognize the right to determine the gender of transgender individuals. Regarding this issue, attention should be paid to the age at which a person has the right to undergo gender reassignment surgery, the techniques, and methods of determining gender.

Sixthly, the laws concerning other fields need to ensure the legitimate rights and interests of lesbian, gay, bisexual, transgender and intersex people (LGBTI): ensuring rights in criminal law; temporary detention, custody, and execution of criminal judgments; preventing and combating domestic violence; access to justice and legal aid; gender equality; policies and laws to protect children who are intersex, especially street children and vulnerable children.

Finally, it is necessary to issue a legal document to replace Decree No. 88/2008/ND-CP and Circular No. 29/2010/TT-BYT relating to gender identification. In which, attention should be paid to the following issues:

- Use the term "gender identification" instead of "re-identification of gender" to ensure a correct understanding of the nature of intersex people.
- Do not use the term "bisexual" because it is easy to misunderstand the characteristics of intersex people.
- Consider not allowing gender identification surgery for people under 16 or 18 years old who have not yet fully developed. Therefore, the request for gender identification must truly come from the intersex person themselves. If they do not experience any difficulties or discomfort with their body, no one can force them to have gender identification surgery. Let them decide for themselves about their gender and their body. In fact, many cases have shown that intersex people who were surgically assigned a gender at a young age were not satisfied with the assigned gender and have had to undergo surgery again. Therefore, gender surgery for intersex people should only be performed when they are mature enough and provided with all relevant information to make a decision for themselves [7]. The competent authorities need to issue decisions recognizing/appointing medical facilities that meet the conditions for medical intervention to determine gender. In addition, when deciding on gender identification surgery, it is necessary to choose a gender in which the person can perform reproductive functions; if there is no ability to reproduce, choose the gender that will most closely resemble their natural genitalia after surgery. This issue should be carefully considered during the counseling process for those who need gender identification.

CONCLUSION

Nature has gifted humans with two characteristic genders, male and female, so that they can have distinct privileges and advantages. Gender is one of the most important factors in forming an individual and is also a mandatory detail that must be expressed on a citizen ID in all countries. It can be said that gender is an important issue that directly affects the rights of each individual and



of society as a whole. Especially, in the legal systems of different countries, there are various regulations on rights and obligations that are specific to each gender. Therefore, to ensure individuals' legitimate rights before the law, each person needs to live correctly and truthfully with their gender, as well as ensuring their legitimate rights and benefits through the law.

The introduction of legal regulations on gender identity determination in Vietnam in the current period has demonstrated the viewpoint of the Party and the State of always promoting, respecting, and protecting human rights, protecting individual citizenship in society. Although there are still limitations and shortcomings, the current regulations on gender identity determination are a progress of the law on gender identity determination, which has a significant role and impact on the lives of thousands and millions of people with congenital gender defects.

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