

# Sex and gender review: Intersex case

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## ABSTRACT

This article analyzes the sex/gender concept, values its contribution to recent law and policy reforms and criticise the concept for obstructing the interests of intersex people. It also discusses the two primary models attempt to answer settle the gender inequality: the equal treatment model and the sex difference model, namely the equal treatment model and the sex differences model. In ordinary language, the terms 'sex' and 'gender' have been used interchangeably. Feminists claim the distinction between the two. Sex/gender equips feminists with a means to advocate for gender equality. The result brought by sex/gender distinction can be considered to be generally positive so far. However, sex/gender distinction also causes the underinclusion of some minority groups such as intersex people who do not neatly fit the binary sex brought by feminists. In a time when fewer people are getting married and same-sex marriage is legal, feminism has to sit well with the LGBTQ movements. In the Vietnamese context, the distinction of sex/gender is embodied in the law since 2007 by Article 5 of Gender Equality Act 2006. Nevertheless, the traditional binary sex belief prevails. The law on the identity of intersex persons are not clear. Intersex people are either declared male or female. Ultimately, the author calls for legal reform of Art.5 Gender Equality Act 2006. While sex/gender is helpful for feminists to advocate for women's social justice; it, however, leaves other minority groups such as intersex and LGBTI+ groups behind. To have feminism and transsexualism coexist, the solution may be to construe sex as another spectrum as gender. Possibly, Viet Nam's Article 5 of Gender Equality Act 2006 and all sex/gender guidances issued by the government need to be amended to make it friendly for intersex persons.

**Key words:** Sex/gender, Equality Act, Intersex, LGBTQ, LGBTI+

## INTRODUCTION

Before the sex and gender theory, it was believed that the biological facts were determinants of social roles and behaviours: women are fitted for domestic works; men are born for public works. Geddes and Thompson argue that the metabolic state was the determinant of social psychological and behavioural traits. Women are anabolic, they are supposed to converse energy; as a result, women are passive, sluggish, stable and uninterested in politics. Men are katabolic, they expend their surplus energy; therefore, men are eager, energetic, passionate, and thereby interested in political and social issues<sup>1</sup>. Therefore, nineteenth-century politicians utilized these biological facts to justify the behavioural differences, social roles and political arrangements between women and men. They denied women's political rights as the proponents believe that women naturally do not need political rights.

Second-wave feminists were motivated to counter the view that biology is destiny. The early adoption of sex and gender distinction was accomplished by Simone de Beauvoir who devoted "one is not born, but rather become a woman"<sup>2</sup>. Feminist theorists advanced that biological facts should not be associated with gender

roles; these are two separate notions. They employed the term 'sex' (male or female) to refer to biological aspects - chromosomes, hormones, etc; the term 'gender' (woman or man) refers to social construction relating to behaviours and attributes based on labels of masculinity and femininity. A person's sex and gender only complement each other. Therefore, an individual can see themselves as a man, a woman, as having no gender, or as having a non-binary gender. The distinction is helpful to define what are biological facts (i.e sex), what are socially produced and changeable (i.e gender).

The term "gender socialisation" was employed to explain the process of social construction. According to Rubin, women are oppressed as women by having to be women<sup>3</sup>. So-called gender socialisation is the process through which individuals learn about the social expectations, attitudes and behaviours associated with one's gender. As people attain a sense of their own gender identity from childhood (i.e., knowing whether they are a girl or a boy, they pay heightened attention to information related to gender norms). This gender awareness that has formed since the early exposure to gender from multiple sources such as par-

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### History

- Received: 03-10-2021
- Accepted: 15-4-2022
- Published: 13-8-2022

DOI : 10.32508/stdjelm.v5iS12.1068



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**Cite this article :** Loi P T N. **Sex and gender review: Intersex case.** *Sci. Tech. Dev. J. - Eco. Law Manag.*; 5(S12):24-30.

ents, siblings and peers as part of the socialisation process, brings immediate consequences on a person's attitudes and behaviours toward members of their own and other gender groups. Gender socialisation begins at birth, intensifies during adolescence and contributes to gender inequalities in a variety of aspects of one's life such as education, employment, income, empowerment in life<sup>4</sup>.

Sex and gender theorists believe that gender is mutable and alterable by political and social reform that would ultimately bring an end to women's subordination. The sex and gender gave feminists a language with which to describe (what they saw as) how societies render women subordinate to men through norms of femininity and masculinity. Thus, femininity could be redefined so that it ceases to require deferential behaviours; sex differences can be incorporated into legal analysis and law reforms to achieve gender equality.

Sex and gender are incorporated into Viet Nam's legal framework by Gender Equality Act 2006. Article 5 of Gender Equality recognises the differences between gender and sex: Art.5(1) gender refers to the characteristics, social roles of men and women and Art.5(2) defines sex as the biological characteristics of male and female. In many government's guidances, sex is present from birth, is identical and does not change without medical intervention<sup>5</sup>. Since the early days of Viet Nam Socialist Republic, gender equality is always emphasised in the Constitution. Per Constitution 2013, Art. 16 writes '1. Everyone is equal before the law' and '2. No one shall be discriminated in political, civil, economic, cultural and social life.' Article 26 of Constitution 2013 writes "1. Male and female citizens are equal in all respects. The State has policies to ensure equal rights and gender equality opportunities. 2. The State, society and family create conditions for women to develop comprehensively and promote their roles in society. 3. Any gender discrimination is prohibited." In addition to this, Article 36 of the Civil Code 2015 gives Vietnamese citizens the right to sex reassignment. Specifically, under art.36(1), an individual has the right to reassign their sex where the person is born with a birth defect or their sex has not been identified correctly and medical intervention is needed to determine their sex. However, the limitations of these provisions are that firstly, an individual can only change their sex due to a congenital defect or medical intervention needed - they cannot change their sexes simply because their minds speak so; and secondly, there is only two categories of sex: male or female. It can be seen that although Viet Nam has made a great deal of effort to promote gender equality

in legislation; nevertheless, there is little or no consideration of the third sex or intersex people. The ideology in relation to sex embedded in Viet Nam legislation is the binary one - there can be only male or female citizens.

## MATERIALS-METHODS

The author utilises the doctrinal research methodology. The main materials are found in books, articles, statutes, judgments and academic writings. The author also chooses comparative research methodology. This is because the concept of sex/ gender derives from second-wave Western feminists' literature and has been adopted to Viet Nam's legislation since early 2000s. This means it would be fair to examine effects of the sex/gender concept to combat gender equality in Western laws and policies.

## RESULTS

The author finds that sex and gender theory has been considered by law makers. After the birth of the concept, there has been a shift in legal frameworks from merely equal treatment model to sex differences model. Viet Nam may have enjoyed the fruits of Western second-wave feminists without having gone through as many legal reforms as those states did since the first day of its formation post Viet Nam War. However, since its first adoption of sex and gender concept in 2005 regulation, there has been little or no update on the concept so that Viet Nam's gender equality laws and policies have failed to be comparable with those of Western states.

## DISCUSSION

### From equal treatment model to sex differences model:

Two primary models attempt to answer settle the gender inequality: the equal treatment model and the sex difference model. Even though equal treatment and sex differences models recognise the differences between sexes, they reach contradictory conclusions concerning the legal significance of those differences. The applicability of sex/gender perhaps is the women's special rights approach.

### Equal treatment model

The equal treatment model undervalues sex differences, proponents of this model believe that those differences can be reconciled with similarities<sup>6</sup>. Gender-neutral legislation has more positive effects on women than on men. Examples are the UK-enacted Education Act 1944 which hugely improved women's

position by providing free full-time education for both sexes up to the age of 15<sup>7</sup>. For equal treatment models, what women sought was the removal of the oppressive and unjust laws that gave men the power to dominate, exploit and exclude women to control their property and bodies. The equal treatment model overcomes the weakness of the sex differences model that gender-specific legislation excludes and discriminates against men by assuming that job-protected disability leave may be exclusively designated for women<sup>8</sup>. From the first days of the Socialist Republic of Viet Nam, gender equality was affirmed in the first constitution. Article 1 of the 1946 constitution wrote “all power in the country belongs to the entire Vietnamese people, regardless of race, gender, rich or poor, class and religion; article 9 confirmed that “women are equal to men in all respects”. The latest constitution of Viet Nam wrote: “Male and female citizens are equal in all respects. The State has policies to ensure equal rights and opportunities for gender; the State... create conditions for women to develop comprehensively and promote their roles in society; gender discrimination is strictly prohibited”, which further the liabilities of Viet Nam’s parliament to ensure gender equality<sup>9</sup>.

Nevertheless, the equal treatment model receives criticism. In the Canadian case *Bliss v Attorney-General of Canada* (1979), Bliss wanted to claim entitlement to unemployment insurance benefits following the birth of her child<sup>10</sup>. The court used the account of sex/gender to decide on the case. Before the court, Stella Bliss’s inequality was created by nature, the Court identified the problem in terms of what is natural for women and for men<sup>11</sup>. The Court’s characterization defined equality so as to exclude any aspects of women’s experiences that differ from those of men. If pregnancy is something that happens to only one sex, then differential treatment (including less favourable treatment) cannot offend legal guarantees of equality in the Canadian Bill of Rights. In this way, men are the norm, and women are entitled to equality when they are the same as men, but not when they are different from them. A legislative provision precluding Stella from qualifying for unemployment insurance benefits after the birth of her child means that Stella Bliss’s case did not involve a comparison between women and men but rather a comparison between pregnant (women workers) and non-pregnant (men and women workers). Similarly, the US Supreme Court concluded that failure to cover pregnancy under state or employer disability insurance programs was not discrimination on the basis of sex, highlighting the distinction between pregnant

women and non-pregnant persons (*Geduldig v Aiello* (1974) and *General Electric Co v, Gilbert* (1976))<sup>12</sup>. *Brooks v Canada Safeway* (1989) appeared when a group of women found that the disability insurance plan provided more benefits to employees who temporarily interrupted their employment for any reason other than pregnancy. At the human rights tribunal and in the Manitoba court’s consideration of Brooks, the reasoning of the Bliss case was applied. At the supreme court, Lorna Turnbull’s argument that gender and pregnancy are inextricably linked and it is illogical to hold otherwise”, the Supreme Court’s decision in Brooks appears to respond much more favourably to feminist legal claims<sup>13</sup>. Despite the Court’s comments in Brooks about the importance of reproduction for society as a whole, nothing in the Court’s reasoning fundamentally shifted the disproportionate responsibility for reproduction that currently exists between women and men or between women and society as a whole. Women’s employers, through their workers’ disability insurance plans, are now required to treat pregnant women equally - an obligation that may only have indirect effects on individual men or on society. Though the basis of this argument is that men and women are the same, neither received disability insurance benefits due to pregnancy. Requiring disability programs to include pregnancy benefits for women would entitle them to special rights, rather than equal rights<sup>14</sup>. Nevertheless, male workers would never have to take a career break from pregnancy; whereas female workers in the child-bearing ages may have to experience unemployment due to pregnancy. By comparing pregnant workers and non-pregnant workers, the courts were erred to associate non-pregnant female workers (who can become pregnant, or go through a miscarriage at any time) with male workers (who are never posed to the risks). As a result, female workers would have to conform with the standards of male workers - someone would never have to take a short-term leave due to pregnancy.

### Sex differences model

Since sex and gender receives public recognition, feminists argue that sex differences should be legally taken into account. The sex differences approach requires real differences between sexes, such as pregnancy. The equal treatment or comparative model fails to achieve the goal where the use of either sex as the standard for comparison may operate to disadvantage the other sex.

The sex differences approach is mostly considered for laws in the workplace. For example, the US

Congress enacted the Pregnancy Discrimination Act several years later since these cases<sup>15</sup>. These policies would certainly have different impacts on female workers than on male workers. Viet Nam's Labour Law took the sex differences approach. Article 139 of the Labour Law 2019 entitles female workers six-month maternity leave and one additional month subject to negotiation with the employer. Under Article 80(3) Degree 145/2020/ND-CP, female workers are entitled to 30 minutes of rest every day during their menstrual period while men are not entitled to this law. Gender-specific maternity leave legislation would be an acceptable means to ensure that women are not additionally burdened because of pregnancy by inadequate leave policies under the gender-neutral approach. The legislators have relied on biological differences of women and men to make this provision to help female workers achieve the same comfort in working as men during their menstrual period. The sex differences approach targets structural discrimination in the workplace to achieve the goal of equal opportunities for women. Equality under the sex differences approach means that women are provided equal employment opportunities as men, rather than women enjoy the same benefits and detriments as men.

Hence, sex-difference legislations are necessary to eliminate the barriers that hinder women from equal participation in the workplace and equal employment opportunities where the equal treatment/comparison model fails to reciprocate.

### Sex and gender for the intersex

#### Binary sex as a problem for the intersex

Sandy Stone finds that *"under the binary phallographic founding myth by which Western bodies and subjects are authorised, only one body per gendered subject is right"*<sup>16</sup>. There are intersex people who were born with both vaginas and testicles. They are considered to be 'defected'; surgeries such as genital construction are carried out to 'correct' their sex out of the two sexes. Intersex people are registered male or female at birth.

In the EU, *Y v. France*, the European Court of Human Rights is invited to decide on the issue of non-binary sex/gender markers in official documents<sup>17</sup>. The applicant was born intersex. The applicant was registered as male in the birth certificate due to French law requirements. In the Court of Cassation, the Court found that mandatory binary sex/ gender registration was not disproportionate to ensure the legitimate aim, since the applicant seemed to third parties, to physically and socially act like a man. This meant that being

legally registered as a man did not disproportionately impact the applicant's private life. The Inter-American Commission on Human Rights (IACHR) argues that the binary system is stiff, it excludes some intersex people, and it has had "concrete and devastating effects on the lives of intersex persons" who endured unnecessary surgical and hormonal treatment, pressured to have the genitalia of the assigned sex<sup>18</sup>. The IACHR enlightened that intersex persons may identify as intersex, as men, as women, as neither or both. In a similar case in the US, MC's parents bought a lawsuit against doctor Aaronson of the Medical University of South Carolina, they argued that the doctors diagnosed their child with the incorrect sex<sup>19</sup>. MC, who was born intersex, got surgery to correct sex when she was a baby; however, even in her toddler MC felt and acted like a boy. MC's brother believes that MC was robbed of his right to live rightfully as a man. MC's brother is of the opinion that the surgery was unnecessary, unconsented, unjust and irreversible. The lawsuit between MC's parents has been settled out of court, regrettably, no judicial opinion can be reviewed from this case<sup>20</sup>.

The medical interventions on intersex people are often invasive, irreversible, and not performed for emergency reasons. The reality is that the procedures performed on intersex children can cause major problems, including pain, incontinence and lifelong psychological suffering. All this just to make children conform to society's idea of what a girl or boy should look like. This may constitute a human rights violation<sup>21</sup>. These interventions are often performed on children who are too young to meaningfully participate in decisions about their own bodies and their parents are not properly informed about the potential risks. States have a duty to combat harmful stereotypes about gender and diversity; nevertheless, many states choose to subject children to needless operations just to make them fit. Many doctors claim that doing sex assignments at younger ages can avoid painful scarring emotionally and physically. However, determining the 'true' sex of intersex people is not easy, human bodies are more complicated than the look of the genital; this includes hormones that later develop in people. There can be cases like MC and Saifa, who are confused about their sexes even after the surgeries. Initially, doctors believe that what they did is out of malice and adhered to the principle of nonmaleficence where a healthcare professional does no harm. Yet, others acknowledged the harm: "Eight years ago, I did irrevocable damage to the first intersex person... The psychological damage caused by intervention is just as staggering, as

evidenced by generations of intersex adults dealing with post-traumatic stress disorder, problems with intimacy and severe depression”<sup>22</sup>. Nowadays, genders are more open compared to the past when genders were kept private. Society is more likely to accept queer and intersex than it used to be. Therefore, the psychological benefits of pursuing the “norms” from sex assignments are possibly lesser than they used to be. Perhaps, medical interventions on intersex persons are not necessary.

In intersex people’s opinion, they could not answer the question of whether they are a boy or a girl at times. Roshante was born with a vagina and internal testicles and he did not find out he was intersex until he was 11 years old. For years, he had experiences of being both man and woman<sup>23</sup>. Saifa Wall, an intersex who got his sex treated to become a girl and grew up as a girl until college. After the surgery, he felt like a man and decided to live as a man in his mid-twenties. Saifa now is an intersex activist calling medical institutions in the United States to denounce and further investigate intersex genital surgeries on infants. Eves and Charlie, two intersex activists also believe that “society must become more open to all the diversity that being a person means. And children must be able to grow up the way they are.” In 2012, intersex activists from 30 organisations came together to draw up the Malta Declaration, highlighting the demands and recommendations of the international intersex movement<sup>24</sup>. Turner quoted an anonymous author: “*The error was not in my body, nor in my sex organs, but in the determination of the culture, carried out by physicians with my parents’ permission to erase my intersexuality*”<sup>25</sup>.

### **Viet Nam’s stance and amendment proposals:**

Viet Nam’s laws on the identity of intersex persons are not clear. Intersex people are either declared male or female. They have the right to change their gender after they undergo a genital reconstruction of their ‘correct’ gender, rather than recognising them as intersex. A parent cannot claim the gender of their child as ‘other’ or ‘x’ - anything outside the categories of male or female. The traditional binary sex belief prevails. There is neither discussion on the human rights of intersex people, nor the legal framework protecting the identity and rights of intersex people. In contrast, California, Oregon and Washington D.C allow a third sex option “x” on state identification cards and driver’s licenses instead of the traditional “M” or “F”<sup>26</sup>.

There are two ways to resolve the uncomfortable identity of intersex people: one is to recognise “x” sex; another is to not register sex at birth. For long enough, there are concerns that possibly sex is not binary, sex could be on the spectrum just like gender<sup>27</sup>. As seen in *Corbett and Wilkinson v Kitinger*, “other” has been used to describe the sex that is outside the ordinary categories of male and female. Queer theory also places an emphasis on destructing these binaries foregrounding the constructed nature of sex, gender and sexuality classification systems. Corber and Valocchi observe other ‘deviant’ cases, or the anatomies, genders, sexual practices, and identities that do not neatly fit into either category of the binaries or that violate the normative alignment of sex, gender, and sexuality<sup>28</sup>. In the UK, the Future of Legal Gender explores the effect of decertification. Decertification would also allow people to live legally as agender - that is as formally outside of sex/gender classificatory systems<sup>29</sup>. Decertification of sex brings good food for thought among feminist academics. Nevertheless, without much data on the potential consequences, decertification would be a bold decision for a country to implement as a means to achieve gender equality.

### **CONCLUSION**

Arising in the context of industrial society and liberal policies in the late 19th and early 20th century, first-wave feminism was mainly concerned with access and equal opportunities for women. Then, second-wave feminism emerged in the 1960s to 1970s, second-wave feminism is closely linked to the radical voices of women’s empowerment and differential rights. Third-wave feminists are motivated by the need to develop a feminist theory and politics that honour contradictory experiences and deconstruct categorical thinking<sup>30</sup>. The fourth wave is underway, our generation is coming to accept the LGBTQ+ community and disregard traditional gender roles and expectations the mid-1900s held for both men and women. In a time when fewer people are getting married and same-sex marriage is legal, feminism nowadays has to sit well with the LGBTQ movements.

Sex/gender have come a long way to advance women’s rights; from equal sameness to special women’s rights policies. While sex/gender is helpful for feminists to advocate for women’s social justice; it, however, leaves other minority groups such as intersex and LGBTI+ groups behind. To have feminism and transsexualism coexist, the solution may be to construe sex as another spectrum as gender as Lord Hunter suggested<sup>31</sup>. Possibly, Viet Nam’s Article 5 of Gender Equality Act

2006 and all sex/gender guidances issued by the government need to be amended to make it friendly for intersex persons.

## ACKNOWLEDGEMENTS

The article in this Special Issue of the STDJELM is selected from the International Conference on Feminism, Gender and Law held virtually in October 29, 2021. The publication and the Conference were organized and sponsored by the University of Economics and Law, VNU-HCM, and the Rosa-Luxemburg-Stiftung Southeast Asia, Hanoi office.

## DECLARATION OF COMPETING INTEREST

The authors declare that they have no conflicts of interest.

## AUTHOR'S CONTRIBUTION

All content of the article is done by the author only.

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