

Examining Human Rights Derogation in State Emergencies: Insights from Vietnam's COVID-19 Control Policies

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Abstract

Safeguarding human rights is the obligation of every nation under international human rights laws. However, some situations require a nation to restrict individual rights to protect public interests. Responding to COVID-19 provided a great example for Vietnam to review its legal ground for regulating limitations on human rights to prevent its expansion. However, the question remains: what are the legal grounds for executive agencies to limit citizens' rights under the international standards on human rights protection? These precautionary measures support the prevention of the risks and damage caused by illegal acts or emergency cases, such as national disasters. Vietnam encounters legal issues, including the absence of comprehensive legal frameworks and delegating legislative authority during state emergencies. It also encounters inefficient mechanisms for reviewing the rationality and viability of preventive measures imposed by executive bodies. Consequently, safeguarding human rights according to international norms poses a significant challenge. This study explores Vietnam's solutions for handling the COVID-19 pandemic and suggests reforms to the country's legal framework regarding preventive measures.

Keywords: *State Emergency, Enforcement Measures, Legal Issues, Derogation of Human Rights, Vietnam*

I. BACKGROUND OF HUMAN RIGHTS DEROGATION IN STATE EMERGENCY IN VIETNAM

1. Social Context of Vietnam

Recognition of human rights is becoming increasingly important for nations seeking to develop a legal framework that better safeguards these rights. A nation is considered a duty bearer: responsible for implementing essential measures that allow its citizens to exercise their rights without undue restrictions.¹ In essence, can a nation derogate the rights guaranteed by its laws to its citizens? Article 4 of the International Covenant on Civil and Political Rights (ICCPR) states that “State Parties may take measures derogating from their obligations” in the event of a “public emergency that threatens the life of the nation.” Therefore, the ICCPR provides a legal basis for a nation to limit the rights of its people in emergencies. In addition, the Guidance on Emergency Measures and COVID-19 determines that certain rights can be derogated or suspended in case of a state emergency; however, it is the last option for a nation to restrict or limit certain rights if the situation cannot be solved by other measures.² Within their constitutions, each nation must generally outline the conditions for declaring a state emergency and supervising the state organs in such cases.

Vietnam has followed a single party policy since its establishment in 1945. Article 4 of the Constitution of 2013 determines that the Communist Party of Vietnam (CPV) is the force leading the state and society. Human rights have gained attention from the CPV as the country pursues international integration. Vietnam has joined most of the major UN human rights conventions.³ Hence, Vietnam has carried out legal reforms to better the protection of human rights since 1992. Significantly, the 2013 amendment of the Constitution of Vietnam strongly sanctions building a rule-of-law state and a democratic society.

1 Walter Kälin & Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press, 2019) at 90

2 UN Human Rights - Office of the High Commissioner, *State emergency and Covid 19: Guidance*, 2020, https://www.ohchr.org/sites/default/files/Documents/Events/EmergencyMeasures_COVID19.pdf, accessed 8 May 2024.

3 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights on 24 September 1982; the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) on 9 June 1982; Convention on the Elimination of all Forms of Discrimination Against Women on 17 February 1982; Convention on the Rights of the Child and on 20 December 2001, Optional Protocols on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography; International Convention on the Suppression and Punishment of the Crime of Apartheid, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; Convention on the Rights of Persons with Disabilities.

Although Vietnam does not follow the separation of power principle, there is a clear distribution of functions among state organs. The National Assembly holds legislative power to enact the Constitution and laws, whereas the government holds executive power to provide a guideline for law implementation in practice. Significantly, since Vietnam officially introduced the term “human rights” under the 2013 amendment, the protection of human rights has been discussed comprehensively.⁴ Article 14 (2) of the 2013 amendment defines that “*Human rights and citizens’ rights shall only be restricted when prescribed by law in imperative circumstances for the reasons of national defense, national security, social order and security, social morality, and community well-being.*” According to this regulation, the National Assembly shall enact the law to restrict the rights of people to protect national security. The National Assembly has the authority to make decisions regarding war and peace. Additionally, it can declare a state of emergency and implement other special measures to ensure national defense and security.⁵ Therefore, international and national laws allow certain limitations on, or even the suspension of, certain human rights in some situations that threaten a nation’s survival.

In addition, clauses 9 and 10 of Article 74 provide that the Standing Committee of the National Assembly holds the decision-making power to declare a state of war if the National Assembly is not in session and to declare or cancel a state of emergency throughout the country or in a particular locality. According to this provision, only the National Assembly holds powers to determine states of emergency, which serves as the legal ground for imposing preventive measures to restrict human rights.

In principle, the Constitution determines the powers of each state organ by providing specific tasks and powers of each branch (legislative, executive, and judicial branches). Although Vietnam does not follow the separation of powers like other countries, the 2013 amendment also clearly determines the functions of the three branches. Fundamentally, the government serves as the executive arm of the National Assembly and does not possess the authority to restrict human rights. However, preventive measures are not confined solely to states of emergency. They also extend to administrative sanctions, or the prevention of potential risks, enforced by executive organs in specific situations. Examples include temporarily suspending business activities, the forced destruction of poultry (harmful to human health), or closing borders to prevent the spread of diseases or smuggling. In such cases, executive organs exercise discretionary power to curtail the rights of individuals by issuing decisions to implement preventive measures. Notably, Vietnam lacks an independent mechanism for constitutional review. This raises concerns about the legality of preventive measures imposed by executive organs and how to safeguard people’s rights if the decision proves unconstitutional. Nonetheless, the government wields significant discretionary power and plays a crucial role in addressing societal concerns. Therefore, the implementation of new policies under specific circumstances (such as during the COVID-19 pandemic) is

4 Giau Cong Vu & Kien Tran, “Constitutional Debate and Development on Human Rights in Vietnam” (2016) 11:2 *Asian J Comp Law* 235–262.

5 National Assembly of Vietnam, Constitution 2013, Article 70 (13).

contingent upon the legal mandates of various state entities and the prevailing political climate in each nation. Preventive measures have generated contentious debates in Vietnam, both amid the COVID-19 crisis and in the post-pandemic period.

2. Restriction of Human Rights during the COVID-19 Pandemic in Vietnam

Many scholars argue that the restriction of human rights must comply with international standards.⁶ Typically, ordinary restrictions on individual rights are enabled by incorporating provisions within a human rights treaty, which allow interference under specific qualifying conditions.⁷ The United Nations Office of the High Commissioner for Human Rights (OHCHR) provided that governments had the power to enact extraordinary actions targeted at protecting public health even in the absence of a formal state of emergency declaration. In turn, this may impose limitations on specific human rights. However, these restrictions must adhere to the principles of legality, necessity, and proportionality and should not involve any form of discrimination.⁸ During the COVID-19 epidemic, fundamental rights such as the freedom of assembly, organization, and travel were frequently suspended as part of control measures (which are commonly restricted). The discussion continues to focus on how to identify the legality, necessity, and proportionality of the measures in the specific context of Vietnam.

To prevent the expansion of COVID-19 following the World Health Organization (WHO)'s guidance, the government promulgated a variety of policies to impose enforcement measures. Social distancing was significantly introduced as an effective freedom-restricting measure to prevent the increase of positive cases in big cities, such as Hanoi and Ho Chi Minh City.

Social distancing measures restricted people's access to vital services such as healthcare, education, and other essential support services. The government implemented various preventive measures, including social distancing, adherence to the "5 K's" of actions, and imposing strict administrative penalties. The "5 K's", comprising five actions starting with the letter "K" in Vietnamese, was introduced as practical and accessible measures for the general populace. These include wearing face masks, ensuring disinfection, maintaining social distancing, refraining from gatherings, and adhering to health declarations.⁹ Nevertheless, these measures have significantly impacted the mental well-being of individuals, leading to increased stress, feelings of

6 ICCPR, Article 4; The European Convention on Human Rights, Article 15; American Convention on Human Rights, Article 27; 1961 European Social Charter, Article 30.

7 Emanuele Sommario, "Ordinary and Extraordinary Limitations on Human Rights Introduced to Tackle CBRN Threats" in *Int Law Chem Biol Radio-Nucl CBRN Events* (Brill Nijhoff, 2022) 501 at 508.

8 UN Human Rights Office of the High Commissioner, *Emergency Measures and Covid-19: Guidance*,

9 Le Huu Nhat Minh et al, "COVID-19 Timeline of Vietnam: Important Milestones Through Four Waves of the Pandemic and Lesson Learned" (2021) 9 *Front Public Health*, online: <<https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2021.709067/full>>.

overwhelm, and ultimately negative emotions.¹⁰ Furthermore, these measures have also had detrimental effects on various business sectors. The market risk experienced significant increases during specific periods from March 2020 to July 2021, coinciding with the peaks of the four waves of COVID-19 in Vietnam. Notably, during the initial wave, the oil and gas sector demonstrated the highest level of risk among all sectors, whereas the services sector exhibited a significant level of risk during the second wave. The stringent social distancing measures and travel restrictions imposed by the Vietnamese Government likely contributed to these elevated risk levels in these two sectors.¹¹

Neither the National Assembly nor the President of Vietnam declared that the COVID-19 pandemic was a state emergency. However, executive organs carried out discretionary power in determining enforcement measures based on related laws and regulations. To respond to the COVID-19 pandemic, the Vietnamese Government enacted policies and regulations to apply enforcement measures, which limited the rights of individuals and organizations. Both central and local governments enacted decisions and carried out preventive measures based mainly on the Law on Prevention and Control of Infectious Diseases 2007.

Particularly, Directive No.16/CT-TTg (dated 31 March 2020) imposed the social distancing policy requiring local authorities to apply strict preventive measures. This directly affected freedom of movement and freedom of business. Based on this directive, in three situations, people might go outside (1) to buy food, medicine, and other necessities; (2) for emergencies like medical examinations, treatments, fires, et cetera; and (3) to work at facilities, units, armed forces, diplomatic missions, and authorized agencies.¹² Local governments and relevant ministries issued guidance on the list of essential goods to carry out this directive. For instance, the Ministry of Trade and Commerce issued Administrative Guidance No. 4481/BCT-TTTN (dated 27 July 2021), which listed essential goods and services.

Preventing and controlling the expansion of COVID-19 became especially pertinent in April 2021, during its fourth wave in Ho Chi Minh City. Thus, the Communist Party of Ho Chi Minh City enacted Directive No. 12 CT/TU (dated 22 July 2021). This strengthened certain measures to implement Directive 16/CT-TTg of the Prime Minister on the prevention and control of COVID-19 in the city. According to the Communist Party's Directive, the following enforcement measures shall apply to individual people in Ho Chi Minh City. These measures were divided into two groups, including in lockdown areas and the quarantine areas. Colloquially, the motto "person-to-person, family-to-family isolation" emerged, emphasizing absolutely no direct contact with people around.

¹⁰ Ibid

¹¹ Hung Quang Bui et al, "The impacts of the Covid-19 pandemic, policy responses and macroeconomic fundamentals on market risks across sectors in Vietnam" (2022) 17:8 PLOS ONE e0272631.

¹² Vietnam Social Security, *Guidance on the Implementation of Directive No. 16/CT-TTg on Urgent Measures for Prevention and Control of COVID-19*, "External Information", online: <<https://vss.gov.vn/english/news/Pages/external-information.aspx?CateID=0&ItemID=9252>>.

People were only allowed to leave their homes during medical crises and to purchase basic food at lockdown markets twice a week, using shopping coupons supplied by the local authorities. In certain high-risk areas, households could only stay at home, and the authorities would bring necessities to them. These measures isolated people and limited their freedom of movement. Consequently, people could not access any essential services and basic needs.¹³ The limitation additionally applied to organizations, such as those in business sectors. This also caused notable impacts on not only the revenue of organizations but also the income of employees. The business sectors were required to suspend construction, production, business activities of construction sites, and traffic works that were not urgent. In addition, tightened business operation policies were also applied for some business sectors with specific requirements while ensuring the pandemic safety protocols. These sectors included (1) businesses in health care, pharmaceuticals, food, catering for hospitals, quarantine areas, admission and treatment areas; (2) electricity, water, gas, postal, telecommunications, public sanitation, transportation of essential goods; and (3) state treasury, funeral services, and several other essential services regulated by competent authorities. Other manufacturing enterprises were only allowed to operate if they followed the pandemic safety protocols and strictly adhered to the principles of "three-on-spot" and "one route, two destinations." Cases that did not meet pandemic prevention and control requirements would be immediately stopped and severely punished.

In addition, the prevention measure also applied to traditional market activities, with strict regulations and rigorous control. Regulations included strictly enforcing social distancing rules via an open, airy space with a barrier between buyers and sellers, with prices quoted and encouraging sales in pre-packed grocery bags. Additionally, it only allowed trading in food and essential goods and reduced the scale to about 30. Business households would also be relegated to operating alternately on even-odd days to minimize the number of people interacting.¹⁴ All prevention measures limited the freedom of movement and people's right to work. Consequently, many people (especially in the informal sector) faced difficulties such as unemployment or no access to essential services.

Like Ho Chi Minh City, the People's Committee of Hanoi City also enacted Directive No.17/CT-UBND (dated 23 July 2021) on implementing social distancing measures. This directive required people to stay at home unless it was necessary, such as for food, medicine, emergency help, medical services, vaccination, or during an emergency. Official work and commercial activities were permitted in specific locations such as workplaces, office buildings, factories, and organizations supplying necessary goods and services. It was stressed to keep a minimum distance of two meters when

13 F0 is the person who has positive result of COVID-19 test, and F1 who have close contact with the F0 in the same area (less than 2 meters).

14 Communist Party of Ho Chi Minh City, Directive No.12/CT-TU dated 22 July 2021 on strengthening certain measures for implementation of the Directive 16/CT-TTg of the Prime Minister on the prevention and control of COVID-19 in the City, Session 2.3.

interacting with others and to avoid gathering in groups of more than two persons outside of office buildings, schools, hospitals, and public places.¹⁵ Hence, the city introduced the travel permit certificate as a measure to control COVID-19 and prevent people from going out unnecessarily.¹⁶ Significantly, this certificate was amended several times, causing problems for individuals and business sectors. For example, it was a rigorous requirement that travel permits be approved by the ward or commune where the enterprises are located rather than the businesses themselves. Consequently, everyone would be required to submit evidence to justify the necessary purposes to commune authorities, as well as to show working schedules and work-related documents at the checkpoints.¹⁷ Anyone who violated this regulation would be imposed a fine ranging from VND 5 million to VND 10 million (USD 200 to USD 450). The basis for the fine would be failure to comply with measures for the prevention and control of infectious diseases at the request of competent authorities (except in the cases prescribed in Articles 5 through 13).¹⁸ According to this provision, a person who goes out without a travel permit would be imposed a fine of VND 7 million (USD 350).

In addition, Hanoi promulgated documents on the prevention and control of COVID-19, such as Plan No. 243/KH-UBND (dated 29 October 2021) to implement provisional regulations on “Safe, flexible adaptation to and effective control of COVID-19.” This plan classifies the level of the pandemic including four levels: level 1, Low Risk (new normal) or “Green”; level 2, Average Risk or “Yellow”; level 3, High Risk or “Orange”; and level 4, Very High Risk or “Red.” Hence, commune authorities became responsible for epidemic-level assessment, as stipulated by Session II, clauses 1 and 2: Epidemic levels shall be assessed at the commune level. To ensure flexibility and efficiency, assessments should be conducted on the smallest scale possible (below the commune level). According to the epidemic assessment level, the preventive measures provided by the Ministry of Health would be applied accordingly. Hence, local governments at the commune level must, by themselves, determine risk levels and decide the application of enforcement measures. As a result, the commune government could not carry out these tasks. The above policies were introduced and applied during the pandemic without assessment of the necessity and proportionality, as it was quickly adopted and changed depending on the situation of COVID-19. Therefore, the standards of derogation of human rights were not reviewed carefully as required by UN guidance.

15 Prime Minister, Directive No.17/CT-UBND dated 23 July 2021 on social distancing in Hanoi for COVID-19 Prevention and Control. Session 2, requirement for people.

16 Ibid.

17 VnExpress International, “Hanoi businesses struggle to get new travel permits for employees - VnExpress International”, online: <<https://e.vnexpress.net/news/business/economy/hanoi-businesses-struggle-to-get-new-travel-permits-for-employees-4338430.html>>.

18 Government of Vietnam, Decree No.117/2020 on penalties for administrative violations in medical sector, dated 28 September 2020, Article 14.2.

II. LEGAL GROUND FOR INTRODUCING THE SOCIAL DISTANCING MEASURE

1. Legal Theory of Enforcement Measures

States of emergency present the greatest challenges to protecting fundamental rights and civil liberties. Derogation of certain rights is legally permitted during emergencies. However, suspending rights should be avoided if restrictions or limitations on certain rights can adequately address the situation.¹⁹ Article 4 of the ICCPR states that nations can temporarily deviate from their obligations during a severe public emergency, officially declared to protect the nation. However, this derogation must be strictly essential and consistent with other international responsibilities, with no discrimination based on race, color, gender, language, religion, or social origin. As a result, states may place restrictions on different rights for valid reasons. These are sometimes referred to as "ordinary" restrictions because they can be enforced permanently during normal periods.²⁰

An emergency is a situation that causes serious harm or damage to human rights and people's property. State emergency refers to a situation that puts a significant number of people in danger, such as war, natural disasters, or disease. Human rights laws are the grounds that a nation must follow when limiting people's rights in case of a state of emergency. In situations where it becomes necessary to restrict someone's freedom, states should consider this as a last resort. The law must set the grounds for deprivation of liberty as well as determine proper procedural safeguards for human rights. Particularly in an emergency, the deprivation of liberty must be reasonable, essential, and proportionate to the circumstances.²¹ In addressing the challenges posed by COVID-19, diverse efforts such as extraordinary or preventive measures have been implemented by states to temporarily suspend certain human rights despite being parties to common international agreements and facing similar public health issues. These states demonstrate distinct responses in their approaches. While some governments officially declared states of emergency, others informally exercised exceptional powers. Varied approaches exist, with certain states imposing restrictions on civil and political liberties while others exploit emergency powers to suppress dissent and curtail a wide range of fundamental rights.²² Hence, there were concerns about how to monitor state parties in the implementation of the prevention measures based on international standards to protect human rights. For example, discussions have been raised in the case of Indonesia,

19 OHCHR, *EmergencyMeasures_Covid19.pdf* at 4.

20 OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* at 814.

21 OHCHR, note 19 at 4.

22 Helfer, Laurence R., *Rethinking Derogations from Human Rights Treaties*, American Journal of International Law, 2021, 20-40, Duke Law School Public Law & Legal Theory Series No. 2020-53, Available at SSRN: <https://ssrn.com/abstract=3691630> or <http://dx.doi.org/10.2139/ssrn.3691630>

asking whether these preventive measures were implemented without proper balance and if they caused adverse effects on other human rights.²³

2. Implications of Inadequate Legal Grounds for Social Distancing Measures in Vietnam

The National Assembly, as the legislative body, has the authority to enact laws that restrict people's rights during a state of emergency. On the other hand, the central government, as executive organs, shall have discretionary power to act according to its own judgment. This supports the executive organ to respond quickly to state emergencies by providing policy and enforcement measures. Here, the viewpoint of executive branch officials dealing with these challenges can be taken into account. Primary considerations for these officials are likely to be domestic legal and political factors, including constitutional validity, legislative support, and the potential for legal challenges to rights suspensions.²⁴ The question arises: is it legally permissible to limit human rights and fundamental freedoms? Alternatively, what are specific measures to derogate human rights in a state emergency?

Like other countries, Vietnam has issued several laws to introduce preventive measures limiting the rights of people in state emergency cases. For example, the Law on Prevention and Control of Infection Diseases (Law on PCID) 2007, Article 2 (16) defines medical isolation (as an enforcement measure) as follows: “Medical isolation means the isolation of a person suffering from an infectious disease, a person suspected of suffering from an infectious disease or a pathogen carrier or articles possibly carrying agents of infectious disease to limit the spread of disease.” The Law on Border Guard 2020, Article 11 determines the cases of limiting or suspending activities at border belts, border areas, border crossings at border gates, and land border openings. In doing so, it seeks to prevent natural disasters, fires, floods, and epidemics from spreading across borders. In addition, the Law on Natural Disaster Prevention and Control 2013 (amended 2020), Article 2 defines “natural disaster” as an uncommon natural occurrence that has the potential to cause loss of life, property damage, harm to the environment, disruption to living conditions, and socio-economic activities. It encompasses a wide range of events, such as tropical storms, floods, landslides, droughts, wildfires, earthquakes, tsunamis, and various other natural calamities. This law also determines the jurisdiction of each state’s organs in preventing and controlling natural disasters. For example, According to Article 28 (2), Chairpersons of provincial-level People’s Committees have the authority to coordinate manpower, supplies, equipment,

23 Tampubolon, *M. Impoverishment of the Poor and Derogation of Human Rights During the Covid-19 Pandemic in Indonesia: Testing the Emergency Measure and Siracusa Principles in Large-Scale Social Restriction*. J. Hum. Rights Soc. Work 7, 2022, 91 - 103, <https://doi.org/10.1007/s41134-021-00174-0>

24 Helfer, Laurence R., *Rethinking Derogations from Human Rights Treaties*, American Journal of International Law, 2021, 20-40.

and essential resources from local organizations, households, and individuals for natural disaster response and emergency relief purposes.²⁵ According to these regulations, enforcement measures shall include a restriction to use properties or ownership limitations for civilians to serve in natural disaster response and emergency relief. However, it is worth noting that enforcement measures also apply in the case of handling violations. Law on Handling Administrative Violation in 2012 (amended in 2020), Article 21 provides administrative sanctions and remedial measures; Law on Public Officials and Cadres 2008 (amended in 2019), Article 79 provides disciplinary measures. Vietnam has indeed implemented several laws regarding the application of enforcement measures. Hence, there remains a lack of specific clarification regarding which cases warrant declaring a state emergency to apply prevention measures. Consequently, it cannot avoid an overreach of security measures to limit human rights. This ambiguity poses the initial challenge of establishing a legal basis for restricting human rights in alignment with international standards.

The Vietnamese Government introduced social distancing as an enforcement measure to limit freedom of movement, thus preventing the expansion of coronavirus in the whole country. Social distancing measures additionally prevent people from accessing essential services, such as education and healthcare. In principle, the limitation of human rights can be only implemented in some specific cases as prescribed under the law, for instance, in a state of emergency. However, Directive No. 16, issued by the Prime Minister to limit the rights of people, raised concerns related to legal grounds, its interpretation, and its implementation in the specific context of each province. Although the Constitution's 2013 amendment does not provide legislative powers for the executive to declare a state emergency, several related laws provide the powers of government in such cases.

First, the Law on Legal Normative Document Promulgation 2015 (amended 2020) determines that some essential matters fall under the purview of the National Assembly or its standing committee but have not yet been enacted into legislation or an ordinance. Before this kind of order is issued, the standing committee of the National Assembly must provide its approval.²⁶ This provision indicates that the government can promulgate a decree, without law or ordinance, to deal with necessary issues as approved by the Standing Committee of the National Assembly. Therefore, COVID-19 can be considered a necessary issue for the government to enact a decree to deal with it. In this case, there is no requirement for a state emergency declaration.

Second, the Law on PCID, Article 38.2.c defines that the Prime Minister shall announce epidemics to the provincial-level Peoples Committee for class-A infectious diseases that spread quickly and seriously affect human life and health from one province

²⁵ National Assembly of Vietnam, Law on Natural Disaster Prevention and Control 2013 (amended 2020),

²⁶ National Assembly of Vietnam, Law on Promulgation of Legal Normative Document, No. 80/2015/QH13, dated 22 June 2015, amended in 2020, Article 19.3

to another.²⁷ Therefore, based on this ground, the Prime Minister shall hold the power to declare COVID-19 as a pandemic at the national level. However, it is not considered a state emergency, as Article 42.2 of this Law determines that the National Assembly standing committee shall issue a resolution to declare a state of emergency at the request of the Prime Minister; in case the National Assembly standing committee cannot meet immediately, the President shall issue an order to declare a state of emergency. Consequently, the executive organ might, in theory, proclaim an epidemic condition but not a state emergency. Furthermore, the Prime Minister has the authority to establish regulations for implementing protective measures. For instance, social distancing (specified in Article 49) is one of the measures enforced. An example of such a measure is the obligation of isolation for individuals who are afflicted with an epidemic disease. The article also outlines the various forms of isolation, including home-based isolation and isolation at medical examination and treatment facilities. This article establishes a legal justification for the Prime Minister to declare the pandemic and implement social distancing (isolation measures) to prevent and control COVID-19. Similarly, local governments at the provincial level also hold the power to declare and apply enforcement measures at the local level. However, some legal issues emerged as a controversial discussion in Vietnam today concerning the human rights protection and jurisdiction of executive organizations in Vietnam.

The current Constitution and statutory provisions in Vietnam do not provide a clear definition of enforcement measures in state emergencies. Generally, enforcement measures refer to restrictions or limitations placed on the activities of individuals or organizations by competent authorities, accompanied by penalties. However, Vietnamese laws do not specify an exhaustive list of such measures, and competent organs determine the application of enforcement measures based on their jurisdiction and discretionary powers. Notably, Vietnamese law still lacks a legal framework for evaluating the propriety of enforcement actions.²⁸ Failure to comply with these measures may result in legal consequences such as criminal prosecution or administrative sanctions, as prescribed by applicable laws. These measures are typically formulated and stipulated by executive organs exercising discretionary powers during crises. Competent authorities issue decisions to implement enforcement measures in response to emergencies. Hence, there were significant discussions on the legality and necessity of these measures.

27 National Assembly of Vietnam, Law on Prevention and Control of Infectious Diseases, No. 03/2007/QH12, dated 21 November 2007.

28 Thi Lan Huong PHAN, “Adoption of the Constitutional Council towards the Rule of Law State and Democratization in Vietnam” (2020) 5 Nagoya Univ Asian Law Bull 53–68 at 60.

III. LESSONS LEARNED FOR VIETNAM FROM EMERGING LEGAL ISSUES

1. Emerging Legal Issues during COVID-19 in Vietnam

The ICCPR, Article 6 defines every person's right to life as protected. States have a duty under the right to life to provide "sufficient conditions to safeguard the right to life." This involves implementing measures to ensure timely access for individuals to essential goods and services like food, water, housing, healthcare, electricity, and sanitation.²⁹ Therefore, states are required to guarantee essential human rights, such as the rights to equality, life, health, and science. These duties include essential core responsibilities that states party to international covenants must prioritize immediately, especially for marginalized communities and individuals. To prevent any infringement of these rights, states must refrain from impeding the realization of these rights and supervise private organizations, including enterprises. They also have a duty to take proactive steps toward achieving these rights completely and impartially.³⁰ The Vietnamese Government has offered assistance, including food and financial support, to individuals residing in social distancing zones, with particular attention to disadvantaged groups. However, the legal basis for Vietnam's executive organs to implement these policies and regulations restricting people's freedom during the pandemic raises questions. The reason for these actions is particularly unclear in the absence of legislation being delegated to the executive branch to determine a state emergency.

Four key legal issues emerged in relation to the legal grounds, jurisdiction, effectiveness, and efficiencies of enforcement measures in the specific context of Vietnam.

First, there is a lack of legal ground to delegate legislative power in case of a state emergency declaration.³¹ The National Assembly alone has the authority to declare a state of emergency under the democratic-centralist concept; the executive branch is not given this authority. Furthermore, the National Assembly's standing committee has the authority to declare a state of emergency in the event of contagious illnesses. As a result, the executive branch lacks the authority to proclaim a state of emergency. This indicates that the delegation of legislation is limited. The executive organ should be delegated power to declare a state emergency, as it is a requirement of the desertion powers of the executive. There is a legitimate concern regarding the potential violation of human rights when the executive enforces measures without proper regulations or supervision of

29 International Commission of Jurists, *Human Rights Obligations of States to not impede the Proposed COVID-19 TRIPS Waiver* (International Commission of Jurists, 2021) at 4.

30 *Ibid*, *Ibid* at 20.

31 Phan Thi Lan Huong, *A Role of Vietnamese Government in Legislation - In Comparison with Japan*, CALE Discussion Paper, No.14, 2014, accessed <https://cale.law.nagoya-u.ac.jp/wp/wp-content/uploads/2023/03/CALE-Discussion-PaperNo11.pdf>

delegated powers. National legislation must establish clear provisions that allow the government to temporarily adjust the scope of human rights to effectively manage different types of emergencies. Diverse emergencies would include public safety, disorder or crimes, health risks, or the protection of the rights and freedoms of others. However, it is crucial to note that these adjustments should be made without derogating from the fundamental principles underlying human rights.³² The existing Ordinance on State Emergency in Vietnam (established in 2000) lacks provisions encompassing the specific clauses mentioned above. Presently, state emergencies in Vietnam can be categorized into several types, including national defense emergencies, national security emergencies, serious disaster emergencies, and infectious disease emergencies. The National Assembly or, in some circumstances, the President alone has the right to proclaim a state of emergency, so there is a jurisdictional dispute over this power.³³ Consequently, these regulations fail to guarantee that the executive can swiftly respond to address such situations. Moreover, the existing laws should incorporate provisions focused on preventing human rights violations and enabling the executive to exercise its discretionary powers effectively and efficiently.

Second, the standard for reviewing the necessity of the prevention measures – applied in the whole nation, without careful consideration of the specific conditions of each province – was also a critical issue. It was evidenced that these preventive measures have caused a myriad of impacts on the daily lives of people and business sectors. For instance, the fourth COVID-19 wave in Vietnam has caused supply chain disruptions affecting national, regional, and international industries, affecting things like contraception and basic medical supplies. Significantly, the fourth wave since May 2021 has caused serious issues for women who are living in Ho Chi Minh, Hanoi Capital, and nearby provinces and cities. It reveals the issues and challenges for migrant workers, especially women. Because of a lack of social security, such workers would be left with no choice but to return to their hometowns.³⁴ COVID-19 poses a threat to initiatives focused on women’s health, especially sexual and reproductive health. It also has long-term effects on women's work, girls' involvement in school, and the upholding of women's rights.³⁵ This is compounded by the frequent reality that women spend twice as many hours as men working doing unpaid care and domestic work.³⁶ Lockdowns have led to an increased burden of childcare and elderly care for women, as schools have

32 Evan J Criddle, *Human Rights in Emergencies* (Cambridge University Press, 2016) at 65

33 Cao Vũ Minh, “Thẩm quyền của cơ quan nhà nước trong tình trạng khẩn cấp và những vấn đề cần hoàn thiện” (2021) 2 State Law J, online: <<https://sti.vista.gov.vn/tw/Lists/TaiLieuKHCN/Attachments/313831/CVv225S22021003.pdf>> at 6.

34 VnExpress International, *HCMC Sees Fresh Exodus of Migrant Workers*, accessed August 31, 2021, <https://e.vnexpress.net/news/news/hcmc-sees-fresh-exodus-of-migrant-workers-4340985.html>.

35 Security Council, “Women and peace and security- Report of the Secretary-General”, (2020), online: <<https://undocs.org/en/S/2020/946>> at paragraph 2.

36 International Labor Organization, *Gender and the labour market in Viet Nam * An analysis based on the Labour Force Survey*. https://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/--ilo-hanoi/documents/publication/wcms_774434.pdf, page 8 - 9.

remained closed for extended periods. Women also dedicate more time to caring for children and providing educational support, influenced by prevailing social norms.³⁷

In addition, the interpretation and application of enforcement measures under Directive No. 16/CT-TTg has caused many problems. In principle, the Law on the Promulgation of Legal Normative Documents does not include a directive issued by the Prime Minister as a mandatory legal instrument, such as rules and regulations. Therefore, the directive only includes policy on social distancing measures applied during the pandemic as medical isolation measures. However, this policy has been interpreted and applied differently from province to province in Vietnam. Consequently, this has caused problems in the daily lives of residents and business sectors. For example, during the second wave of COVID-19 in August 2020, Hai Duong implemented social isolation for the whole province according to Directive 16/CT-TTg. Subsequently, Hai Phong City requested to stop accepting all people and means of transport, including goods and passengers traveling from Hai Duong to Hai Phong City. If intentional violations were detected, they would be forced to enter the city's concentrated medical isolation area and must pay a fee.³⁸ Under these circumstances, it is critical to give clear guidelines for recognizing vital commodities and services. Individuals or organizations who sell or distribute items that are not on the list may face administrative penalties or be barred from entering the city. As a result, incidents have occurred where trucks transporting sanitary napkins and diapers were prevented from entering Ho Chi Minh City under the argument that these goods were not deemed essential. Similarly, in one instance, an individual was fined VND 2 million (USD 80.73) by a commune authority for simply going out to purchase bread. Furthermore, this individual faced additional repercussions from their employer in the form of a dismissal penalty.³⁹

Third, there lacks an effective mechanism to review the rationality and feasibility of enforcement measures, as provided by competent organs and public officials. The application of social distancing measures to limit the spread of the virus generated a discussion over the feasibility and need. These measures have also met the unintended consequence of limiting people's access to healthcare services. Social distancing has led to a decrease in health-seeking behaviors and reduced access to vital healthcare services at both hospitals and community health centers. This decline in seeking healthcare services is particularly concerning for pregnant women, as it is likely to increase maternal mortality rates. Reduced access to child healthcare services may have life-threatening

37 Oxfam in Vietnam, "Women's work and COVID-19: Caring for care workers | Oxfam in Vietnam", online: <<https://vietnam.oxfam.org/latest/stories/women%E2%80%99s-work-and-covid-19-caring-care-workers>>.

38 Quang Binh News, "Linh hoạt quản lý vận tải giữa 'bão' dịch COVID-19", online: *BaoQuangBinh* <<https://baoquangbinh.vn/kinh-te/202106/linh-hoat-quan-ly-van-tai-giua-bao-dich-covid-19-2190204/>>.

39 Thanh niên News, "'Bánh mì không phải thực phẩm thiết yếu' và nỗi buồn mất việc của nạn nhân | Đời sống | Thanh Niên", online: <<https://thanhnien.vn/doi-song/banh-mi-khong-phai-thuc-pham-thiet-yeu-va-noi-buon-mat-viec-cua-nan-nhan-1417174.html>>.

effects.⁴⁰ Furthermore, essential rights were considerably restricted as a result of social distancing measures, leading to challenges such as children's inability to receive education due to inadequate equipment and lack of internet access. Between February and May, the closure of schools had a significant impact on approximately 21.2 million children across the country, resulting in the loss of critical health and safety services, as well as subsidized school lunches.⁴¹ Despite the Vietnamese Government's efforts to address the adverse effects of COVID-19 on people's daily lives, numerous challenges persist in the post-pandemic period, including unemployment, school dropouts, and bankruptcy. As a response to the challenges posed by the pandemic, Vietnam has taken active measures to assist both individuals and businesses. For instance, Resolution No.24/2022/UBTVQH15 outlines a policy aimed at providing ongoing support of USD 41 million to workers affected by the pandemic. This demonstrates Vietnam's commitment to alleviating the difficulties faced by individuals and fostering economic recovery.

Fourth, there is no regulation on the form and procedures to enact policy and decisions of competent organs and individuals in case of state emergency. There are various forms of documents, including directives, plans, and decisions, as mentioned in the previous section. These include policy; however, there is no requirement for public comment or assessment on directives issued by the Prime Minister, as it is not a legal normative document prescribed under the Law on Promulgation on Legal Normative Document in 2015 (amended in 2020). In addition, there are also no standards for reviewing policies before enactment because, to this day, Vietnam does not have any regulation on administrative decision-making. Significantly, a reasonable standard is not yet determined as grounds for reviewing decisions or policies issued by competent authorities. Consequently, no one bears any legal liability when unreasonable and infeasible policies and decisions are issued. For example, the Hanoi authority enacted a decision related to travel permits during the social distancing period. According to these regulations, there were several changes in the application of the form and procedures to obtain a travel permit. However, there is no one responsible for this decision in case it cannot be applied effectively in practice or causes many troubles in the daily lives of people. Significantly, individuals or organizations cannot claim or bring these decisions to the court because the current Law on Complaint 2011 and Law on Administrative Case Proceeding 2015 (amended in 2019) only determine legality as the grounds for a complaint or lawsuit.⁴² As a result, executive organs have discretion powers in regulating and implementing policies on enforcement measures without effective supervision measures. In other words, there are no compulsory procedures, such as public hearings, in the case of imposed decisions or policies that negatively impact or restrict human

40 UN Vietnam, *UN analysis on social impacts of COVID-19 and strategic policy recommendations for Viet Nam.pdf* at 5.

41 *Ibid* at 7.

42 Thi Lan Huong PHAN, "Adoption of the Constitutional Council towards the Rule of Law State and Democratization in Vietnam" (2020) 5 Nagoya Univ Asian Law Bull 53-68.

rights. This contradicts the rule of law standard. Although Vietnam has considered enacting the new law on the administrative decision in 2015, the draft law is to this day pending. In addition, the Communist Party also has played an active role in the process of guiding the prevention and control of COVID-19 through issuing the directive. These directives are the guidance for executive organs and public officials to follow. However, it indicates that there is no clear distribution of public administration in Vietnam between the State and the Communist Party.

2. Lessons Learned for Vietnam

Although COVID-19 has been curtailed with great effort by the government, it has revealed many social issues after the pandemic. These include unemployment, corruption, and the bankruptcy of small and medium-sized enterprises. For instance, many public officials, healthcare officials, and local government authorities were accused of corruption crimes by taking advantage of social distancing policies. These measures, including social distancing and medical isolation, have aimed to safeguard public health. Yet, they have also posed challenges in the daily lives of individuals and caused detrimental effects on the private sector. This situation has revealed several legal issues, such as the inconsistent interpretation and application of enforcement measures. It has also revealed the absence of effective mechanisms to assess reasonable feasibility and the lack of regulations delegating legislative powers to the executive for declaring a state of emergency. Consequently, there is a possibility of human rights violations, which requires Vietnam to reexamine the legal framework for managing a state of emergency.

In a rule-of-law state, the legislation model delegates special powers to the executive through legislatures to respond to a particular emergency's exigencies. Hence, there is a need for legal grounds to prevent the executive from imposing permanent changes to the legal order. However, the current regulations on derogation of human rights in state emergencies have not yet been determined by laws in Vietnam. Therefore, the question remains: when state powers exercise limitations on people's rights in emergency cases, how can human rights be protected? These restrictions should be clearly outlined in the laws and must adhere to specific criteria such as necessity, proportionality, and minimal imposition. What are the legal grounds for the executive to regulate and implement enforcement measures (which limit human rights in Vietnam) if a state emergency is not declared? The discussions surrounding COVID-19 in Vietnam have sparked controversy, emphasizing the need to analyze the existing legal framework regarding the executive's jurisdiction to manage the pandemic as a state emergency. This examination serves as a case study for the derogation of individual rights during a state emergency, with the perspective of building a rule of law state in Vietnam.

Hence, Vietnam should undertake several key actions to strengthen its legal framework and governance in handling state emergencies. First, it should promulgate a comprehensive law on state emergencies to replace the existing ordinance, clearly defining the scope and conditions for declaring a state emergency. This law should

delegate legislative power to the executive while encompassing various types of emergencies. Types should include those related to national security, defense, disasters, and diseases. Second, it should establish clear accountability mechanisms for executive organs and public officials involved in implementing enforcement measures. This can be achieved by incorporating feasibility and reasonability standards into the review of decisions and policies enacted by competent authorities. Relevant laws (such as the Law on Complaint 2011 and the Law on Administrative Case Proceedings) should be revised to ensure the right to file complaints or bring cases to court (when decisions or policies are deemed infeasible or unreasonable). Third, it should ensure meaningful public participation in the policy-making process. This should be done by making public hearings or public comments mandatory before issuing decisions or policies that directly impact the rights and legitimacy of individuals or organizations. This will foster transparency, inclusivity, and accountability in decision-making processes. By implementing these measures, Vietnam can enhance its legal framework, strengthen governance practices, and promote the rule of law when responding to state emergencies. Thereby, it can safeguard the rights and well-being of its citizens and foster a resilient society.

IV. CONCLUSION

The implementation of social distancing measures by the Vietnamese Government served as a chance to evaluate the legal justifications to curtail human rights. Numerous legal challenges arise when local administrations enforce preventive actions without adequate mechanisms to assess their rationale and practicability. Consequently, certain local authorities have imposed restrictions on mobility and access to essential services, potentially infringing upon individuals' rights. It is imperative to analyze Vietnam's existing legal framework regarding state emergencies *vis-à-vis* international human rights standards to formulate recommendations on implementing effective preventive measures within the socio-political context of Vietnam.

In summary, safeguarding human rights during emergencies poses a complex challenge worldwide. It necessitates the establishment of a dedicated domestic legal framework that clearly defines the executive's authority to declare and enforce emergency measures. These laws should include comprehensive regulations governing the ethical standards and accountability of executive bodies who formulate and implement such measures. Authorities must assume responsibility for evaluating the necessity of these measures and ensuring that they are implemented as last-resort solutions to address emergencies. It is crucial to implement robust oversight mechanisms to prevent the misuse of discretionary power by the executive, thereby safeguarding against human rights violations.

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