

SPEAK UP, OR NOT: LACK OF FREEDOM OF SPEECH
PROTECTION IN VIETNAM, ITS GLOBAL IMPACT, AND
PROPOSED SOLUTIONS FOR ADEQUATE REMEDIES

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TABLE OF CONTENTS

I.	INTRODUCTION	804
II.	BACKGROUND	806
	<i>A. Historical Background and the Government's Structure..</i>	806
	<i>B. Case Studies: Arbitrary Arrests of Peaceful Protestors....</i>	808
	<i>C. Legal Background and the Legitimacy of the Arrests</i>	811
III.	ANALYSIS: ADEQUACY OF REMEDIES	814
IV.	THE GLOBAL IMPACT AND INTERNATIONAL RESPONSES.....	821
V.	PROPOSED SOLUTIONS	828
VI.	CONCLUSION	831

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I. INTRODUCTION

On August 16, 2018, Le Dinh Luong (Luong) was put on trial in Vietnam and sentenced to twenty years in prison under charges of subversion in violation of Article 79 of the 1999 Penal Code.¹ A veteran and Catholic activist, Luong had publicly criticized Formosa Ha Tinh Steel, the Taiwanese corporation responsible for dumping toxic waste into the ocean, which caused a major marine environmental disaster off Vietnam's central coast in 2016,² as well as the lack of an adequate response from the Vietnamese government.³ He had been targeted by authorities and was taken into custody in July 2017. It was not until early July 2018, after almost a year of detention without a family visit, that Luong was granted permission to be represented by a defense lawyer for his trial scheduled a month later.⁴ The trial lasted one day with the judgment based entirely on the testimony of two witnesses for the government, neither of whom were "fit to testify."⁵ One of the witnesses later came forward to recant his testimony, claiming that he was beaten into making the forced confession.⁶ However, the court still upheld Luong's prison sentence.⁷

Luong was only one of many journalists and activists who were prosecuted for peaceful protesting or merely criticizing the Vietnamese government. Vietnam is a one-party state ruled by the Communist Party of Vietnam (*Dang Cong San Vietnam*, CPV). According to Human Rights Watch, many basic rights, including freedom of speech and the press, are restricted.⁸ The state controls all print and broadcast media, and authorities have actively and

¹ *Vietnam: Drop Charges Against Environmental Activist*, HUMAN RIGHTS WATCH (July 26, 2018), <http://www.hrw.org/news/2018/07/26/vietnam-drop-charges-against-environmental-activist> [hereinafter HRW Luong]; *Vietnam Sentences Activist to 20 Years Prison Amid Dissent Crackdown*, REUTERS (Aug. 16, 2018), <https://uk.reuters.com/article/uk-vietnam-dissident/vietnam-sentences-activist-to-20-years-prison-amid-dissent-crackdown-idUKKBN1L10RD>.

² HRW Luong, *supra* note 1.

³ *Vietnamese Bloggers Gets 20-Year Jail Sentence*, REPORTERS WITHOUT BORDERS (Aug. 16, 2018), <http://rsf.org/en/news/vietnamese-blogger-gets-20-year-jail-sentence>.

⁴ The Procuracy granted Luong permission in early July and the trial was scheduled on July 30. See HRW Luong, *supra* note 1.

⁵ Richard Finney, *Vietnamese Activist Given 20-Year Term for Seeking Regime "Overthrow"*, RADIO FREE ASIA (Aug. 16, 2018), <http://www.rfa.org/english/news/vietnam/overthrow-08162018144518.html>.

⁶ *Vietnamese Videographer Beaten and Harassed in Prison*, COMM. TO PROTECT JOURNALISTS (Aug. 20, 2018), <http://cpj.org/2018/08/vietnamese-videographer-beaten-and-harassed-in-pri.php>.

⁷ *Id.*

⁸ *Vietnam*, HUMAN RIGHTS WATCH, <https://www.hrw.org/asia/vietnam> (last visited Oct. 12, 2018).

increasingly silenced journalists and bloggers through arrest, prosecution, and other means of harassment.⁹

Article 25 of the Vietnamese Constitution states that citizens “shall enjoy the right to freedom of opinion and speech, freedom of the press, of access to information, to assemble, [freedom to] form associations and [freedom to] hold demonstrations. The practice of these rights shall be provided by the law.”¹⁰ When prosecuting individuals in spite of this constitutional provision, the government often masks the charges under “flagrant offense” to go around the Constitution, which requires a decision by a court or prosecutor to arrest any individual.¹¹ This approach provides the government with vast authority to arrest and detain persons “for significant periods of time under vague national security provisions of the penal code”¹² without judicial process.

Freedom of speech protection is often taken for granted in many Western countries, for it is always associated with democracy. It is perplexing then, that a non-democratic country like Vietnam would include this protection in the law. A scholar has come up with three possible explanations: freedom of speech assists with “enforcing central authority,” “alleviates pressures for political change[s],” and “lend[s] legitimacy to a government.”¹³ Considering the structure of the Vietnamese government and the treatment of peaceful protestors, the explanations seem eerily accurate.

This Note argues that Vietnam needs a more effective system of enforcing freedom of speech protection given the frequent arrests of activists and bloggers for peaceful protesting and the insufficient remedies available. This is a long-standing issue that has affected Vietnam in many other ways. However, implementation efforts may be futile or resisted because the root of the issue lies at the structure of the government, which is under heavy influence by the

⁹ A month after *Tuoi Tre Online*, a local news website in Hanoi, published an article titled “Vietnamese President agrees on issuing Demonstration Law,” Vietnamese authorities suspended the newspaper for publishing what they deemed “untrue” content. Vo Hai, *Major Online Newspaper Suspended for Three Months in Vietnam*, VN EXPRESS INT’L (July 17, 2018), <http://e.vnexpress.net/news/news/major-online-newspaper-suspended-for-three-months-in-vietnam-3778939.html>.

¹⁰ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 25, *translated in* THE CONSTITUTE PROJECT, http://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013.pdf?lang=en (Version: As Amended in 2013 - English). The same provision was codified under chapter V of the 2001 version. *See* HIEN PHAP VIETNAM (2011) [HPVN] [CONSTITUTION], ch. V, art. 69, *translated in* WORLD BANK GRP., https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Vietnam_Constitution_1992_amended%202001_EN.pdf (Version: As Amended in 2001 - English).

¹¹ *See* HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 20.

¹² U.S. DEP’T OF STATE, VIETNAM 2017 HUMAN RIGHTS REPORT 6 (2017), <https://www.judice.gov/eoir/page/file/1057101/download> [hereinafter U.S. STATE REPORT].

¹³ Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 60 (2015).

CPV. Part II of the Note will provide a brief historical background of Vietnam and an overview of the CPV and the structure of the government to illustrate this influence. Then Part II will then look at some case studies involving peaceful protests, as well as the government's reactions and its treatment of detained protestors. Finally, Part II will conclude by discussing the legal background and the legitimacy of the arrests.

Part III will identify possible remedies available for the protestors after they are detained. In particular, Part III will analyze whether or not the remedies are adequate or effective. Part IV of the Note will discuss the global impact of the lack of effective freedom of speech protection in Vietnam and the international responses considering that Vietnam is a member of the United Nations. Part V will advance proposals for certain changes and implementations, based on the legal structure in Vietnam and the global pressure, in order to better safeguard and enforce freedom of speech protection. Ultimately, the Note will conclude that, because of the rigidity of the government and the CPV's pervasive influence, many of these measures will be ineffective or impossible to implement.

II. BACKGROUND

A. *Historical Background and the Government's Structure*

Vietnam declared its independence on September 2, 1945,¹⁴ but the French were still seeking to re-establish their control of the country. Following World War II, French troops landed in Saigon under the pretense of helping the British "disarm the Japanese," while in fact, two years later, instigating a war that lasted until 1954.¹⁵ After fighting off the French, Vietnam had to carry out another war against the United States until 1975.¹⁶ At the heart of the conflict during the Vietnam War, or as it is called in Vietnam the "War Against the Americans to Save the Nation" (*Chiến Tranh Chống Mỹ Cứu Nước*),¹⁷ was North Vietnam's desire "to unify the entire country under a single communist regime modeled after those of the Soviet Union and China."¹⁸ By the end of

¹⁴ Anh Luu, *Vietnam Legal Research*, GLOBALEX (July 2006), <http://www.nyulawglobal.org/globalex/Vietnam.html>.

¹⁵ Andrew L. Odell & Marlene F. Castillo, *Vietnam in a Nutshell: A Historical, Political and Commercial Overview*, 21 INT'L L. PRACTICUM 82, 83–84 (2008).

¹⁶ *Id.* at 83.

¹⁷ Tim Nash, *Vietnam War Summary*, FINER TIMES (Nov. 2, 2008), <https://www.thefinertimes.com/summery-of-vietnam-war>.

¹⁸ Ronald H. Spector, *Vietnam War*, BRITANNICA, <https://www.britannica.com/event/Vietnam-War> (last visited Oct. 12, 2018). The Geneva Accord in 1954 temporarily divided the country into two parts with separate administrations, pending an election scheduled in 1956: the northern part is the Democratic Republic of Vietnam and the southern part is the Republic of Vietnam. See Claude Rohwer, *Progress and Problems in Vietnam's*

the war in 1975, the north prevailed and the unified country was later renamed the Socialist Republic of Vietnam.¹⁹

To understand the reasons for the peaceful protests and arrests of the activists, it is necessary to look at Vietnamese government and political structure. As the name suggests, Vietnam has a socialist regime and is one of the few remaining countries where the Communist Party is dominant.²⁰ The Constitution states that the CPV “is the leading force of the State and society.”²¹ While only a political organization and not part of the State’s institution, the CPV has a central role in the government as well as in the social and legal system in Vietnam.²² It has a close relation to the government and influences the government through the “election . . . of the National Assembly (*Quốc hội* similar to Congress in the U.S.), the operation of the administration, and the function of the judicial system.”²³ On a day-to-day basis, the Political Bureau (Politburo) and the Central Committee of the CPV exert their influence by proposing legislation and regulations.²⁴ Then, every five years, the Party holds a national congress to “outline the country’s overall direction and future course as well as to formalize policies.”²⁵

Under Article 69 of the Constitution, the National Assembly, a 498-member committee,²⁶ is the highest state organization and possesses a wide range of constitutional and legislative powers.²⁷ “The Supreme People’s Court, [the Supreme People’s Procuracy], and the Government are all on equal constitutional footing just below the National Assembly,”²⁸ which has authority to monitor these institutions²⁹ as well as to appoint their heads.³⁰ The National Committee and the Standing Committee (which is empowered to act on behalf of the Assembly) are constitutionally the most important bodies in the government, and both operate on the principle of “democratic centralism.”³¹ This principle limits the debates and decision-making within the bounds

Development of Commercial Law, 15 BERKELEY J. INT’L L. 275, 276 (1997); see also Luu, *supra* note 14.

¹⁹ Luu, *supra* note 14.

²⁰ Odell & Castillo, *supra* note 15, at 85.

²¹ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. I, art. 4.

²² Luu, *supra* note 14.

²³ *Id.*

²⁴ Brian J.M. Quinn, *Legal Reform and Its Context in Vietnam*, 15 COLUM. J. ASIAN L. 219, 225 (2002).

²⁵ *Government Structure*, EMBASSY OF THE SOCIALIST REPUBLIC OF VIET., <http://vietnam.embassy-usa.org/vietnam/politics/government-structure> (last visited Oct. 12, 2018).

²⁶ *Id.*

²⁷ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. V, art. 69.

²⁸ Quinn, *supra* note 24, at 226.

²⁹ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. V, art. 70, cl. 2.

³⁰ *Id.* at cl. 7.

³¹ HPVN (2001) ch. I, art. 6. The language is removed in the 2013 amendment. See HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. I, art. 6.

established at the central level, effectively prohibiting matters not on the agenda.³² Under this regime “all questions before the National Assembly must originate from the Standing Committee” which receives its direction from the Politburo.³³ This system “guarantees that the [CPV] can maintain firm control over the agenda [and policy setting].”³⁴

The judicial branch is similarly under heavy influence from the CPV. First off, judges are appointed and subject to a five-year term, same as the National Assembly,³⁵ and the requirements “remain to protect ‘socialist legality’ and ‘the socialist regime’ (by nodding in the direction of prevailing Party policies) and to answer to political bodies.”³⁶ Phung Van Tuu, Vice-Chairman of the National Assembly, publicly advocated for CPV’s leadership over judicial agencies in policy making, trial, and the assignment of cadres, and he stated that judicial independence “[did] not mean the separation from the Party’s leadership.”³⁷ As a result, judges are very sensitive towards the possibility of reacquiring their positions, and in particular, “‘uncooperative’ judges can find themselves without an appointment at the end of their five-year term.”³⁸ In addition, the judges need to petition for reappointment to the Judge Selection Council, which is comprised of representatives from various government departments.³⁹ This setup incentivizes judges to “[lobby] among [members] from other organizations . . . for their reappointment”⁴⁰ and likely cater to the government opinion in cases of political interest. Given the role of the CPV, the government places a high priority in protecting the Party’s image. As shown in the section below, any actions or statements criticizing the Party or the government’s conduct are often met with harsh punishment, such as detention, arrest, or long-term imprisonment.

B. Case Studies: Arbitrary Arrests of Peaceful Protestors

In response to the perceived corruption of the government and many injustices, a large number of citizens have engaged in peaceful protesting and demonstrations. Nguyen Huu Vinh (also known as Anh Ba Sâm), after leaving

³² Quinn, *supra* note 24, at 226 n.14.

³³ *Id.*

³⁴ *Id.* at 226.

³⁵ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. VIII, art. 105, cl. 1.

³⁶ PER BERGLING, LEGAL REFORM AND PRIVATE ENTERPRISE THE VIETNAMESE EXPERIENCE 140 (Umea Universitet 1999).

³⁷ *Id.*

³⁸ Quinn, *supra* note 24, at 240.

³⁹ Dinh Thanh Phuong & Nguyen Thi Hang Diem Mi, *Revised Law on Courts: Why Term of Office of Judges Should Be Extended*, VIET. L. & LEGAL F. (Sept. 26, 2014), <http://vietnamlawmagazine.vn/revised-law-on-courts-why-term-of-office-of-judges-should-be-extended-3971.html> [hereinafter *Revised Law on Courts*].

⁴⁰ *Id.*

the police force in the Ministry of Public Security in Hanoi, started writing several blogs regarding social, political, economic, and cultural issues in Vietnam.⁴¹ He was detained in May 2014, held in prison throughout 2015, then put on trial in March 2016 for “abusing rights to freedom and democracy to infringe upon the interests of the state.”⁴² He was then sentenced to five years in prison.⁴³ The judge held that the articles that he had written presented a pessimistic view and negatively affected people’s confidence in the CPV, which “[went] against the interests of the nation.”⁴⁴ Similarly, Nguyen Ngoc Nhu Quynh, a blogger under the pen name “Mother Mushroom” (*Mẹ Nấm*), was arrested on similar charges.⁴⁵ She wrote on social and political issues, including land confiscation and investigation on deaths of suspects in police custody, and she had participated in numerous public protests regarding the environment and human rights.⁴⁶

The U.S. State Department reported that in 2017, the government arrested for peaceful protesting some “30 individuals . . . includ[ing] members of the pro-democracy group[s] . . . , and those involved in expressing dissent or organizing demonstrations related to the 2016 industrial spill by the Taiwanese-owned Formosa Ha Tinh Steel[.]”⁴⁷ For instance, in a footage of the fishermen march to file a lawsuit against the Formosa, activist Hoang Duc Binh narrated that the fishermen were stopped and beaten by authorities.⁴⁸ He was arrested, and at trial, denied committing any crime because what he said was true.⁴⁹ The court, however, deemed the comments “untrue” and slanderous toward authorities and sentenced the activist to fourteen years in prison.⁵⁰ As mentioned above, activist Le Dinh Luong was also arrested for his involvement in similar protests and was given a twenty-year sentence.

The best-case scenario for a detained journalist is the revocation of press credentials and fines for publishing harmful materials to national interests if

⁴¹ Editorial Board, *Free Speech Is Under Siege in Vietnam*, WASH. POST (Apr. 22, 2016), http://www.washingtonpost.com/opinions/free-speech-under-siege-in-vietnam/2016/04/21/76ec3c94-fb5a-11e5-9140-e61d062438bb_story.html?

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Vietnam: Drop Charges Against “Mother Mushroom”*, HUMAN RIGHTS WATCH (Nov. 30, 2017), <http://www.hrw.org/news/2017/11/30/vietnam-drop-charges-against-mother-mushroom> [hereinafter HRW Mother Mushroom].

⁴⁶ *Id.*; see also CPJ Awardee “Mother Mushroom” Faces Threats, Poor Prison Conditions, COMM. TO PROTECT JOURNALISTS (July 3, 2018), <http://cpj.org/2018/07/cpj-awardee-mother-mushroom-faces-threats-poor-pri.php>.

⁴⁷ U.S. STATE REPORT, *supra* note 12, at 6.

⁴⁸ *Vietnam Jails Environmental Blogger for 14 Years*, VOA NEWS (Feb. 6, 2018), <http://www.voanews.com/a/vietnam-jails-activist-for-livestreaming-pollution-march/4240930.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

such violations “are not serious enough for criminal proceedings.”⁵¹ More often than not, the protestors are merely bloggers and activists, and what awaits them is a short, unfair trial following a lengthy period of detention without any contact or representation by counsel. Case in point, lawyer Nguyen Van Dai, founder of Brotherhood for Democracy, a group aiming to defend human rights and promote democracy in Vietnam, was arrested in December 2015 for producing anti-state propaganda.⁵² It was not until December 2017 that he was assigned an attorney, who was not one his family had chosen, and in fact, the three lawyers selected by his family “had not been permitted to meet with Dai during his twenty-four months of pretrial detention.”⁵³

Worse yet, some do not even make it to the court room. Nguyen Huu Tan, a Hoa Hao Buddhist follower charged with distributing anti-state documents, died while in police custody.⁵⁴ The authorities, after a questionable investigation, announced that he committed suicide, even with evidence that indicated otherwise.⁵⁵ In another incident, land rights activist Trần Thị Thúy continued to be denied medical treatment for her tumor and open wound “unless she ‘confess[ed]’ to the crimes for which she was convicted.”⁵⁶

Given the dire state of the arrests and subsequent treatment of detainees, several important questions arise. First, were those arrests legitimate? Put another way, did the government have a valid legal basis to imprison the activists? Next, how can a detainee navigate the court system? How the courts work and what remedies are available is information not often readily accessible, and even when it is a discrepancy exists between the “law on paper” and the “law in reality.”⁵⁷ The legal system in Vietnam allows all three branches (legislature, judiciary, executive) to produce legislation, predictably engendering “the inherent problem of a jungle of regulations, which is both inconsistent and fragmented.”⁵⁸ Furthermore, when faced with unfamiliar cases, instead of trying to construe the language of the statutes, judges often defer to and seek

⁵¹ U.S. STATE REPORT, *supra* note 12, at 18.

⁵² *Nguyen Van Dai: Vietnam Jails Activist Lawyer and Five Others*, BBC (Apr. 5, 2018), <http://www.bbc.com/news/world-asia-43659830>.

⁵³ U.S. STATE REPORT, *supra* note 12, at 10.

⁵⁴ Joshua Lipes, *Family of Vietnam Hoa Hao Buddhist Questions Death in Custody Ruled Suicide*, RADIO FREE ASIA (May 4, 2017), <http://www.rfa.org/english/news/vietnam/suicide-05042017153429.html>.

⁵⁵ *See id.* (raising doubts based on the extent of the injuries, the blurry CCTV video, and the prison uniform).

⁵⁶ *Urgent Action: Growing Health Fears for Prisoner of Conscience*, AI Index ASA 41/5727/2017 (Feb. 17, 2017), <https://www.amnesty.org/download/Documents/ASA4157272017ENGLISH.pdf> [hereinafter *Urgent Action*].

⁵⁷ Quinn, *supra* note 24, at 222.

⁵⁸ Bui Thi Bich Lien, *Legal Interpretation and the Vietnamese Version of the Rule of Law*, 6 NAT'L TAIWAN UNIV. L. REV. 321, 326 (2011), http://www.law.ntu.edu.tw/ntulawreview/articles/6-1/11-Article-Bui%20Thi%20Bich%20Lien_p321-337.pdf.

an informal opinion from the government.⁵⁹ Such an interpretation is unreliable when the government has “an obvious stake in the outcome.”⁶⁰ The vague language used in the law on paper, coupled with the courts’ deference to the government, has left great discretion to the local officials and other enforcement agencies.

C. *Legal Background and the Legitimacy of the Arrests*

Before discussing the legitimacy of the arrests, it is helpful to first look at the Constitution of Vietnam. Throughout history, Vietnam has changed and adopted four versions of its constitution in 1946, 1959, 1980, and 1992.⁶¹ Since then, any revisions have been incorporated directly into the constitution, with the latest being the 2013 amendments. On the surface, the revision process seemed inclusive with the creation of a Constitutional Drafting Committee, which gathered millions of citizens’ comments on the first draft and held public gatherings and discussions.⁶² The result, however, largely reflected a disregard for the public voice and instead reinforced the role of the CPV.⁶³

The freedom of speech protection is listed in Chapter II of the constitution, which enumerates the citizens’ fundamental rights.⁶⁴ Under Article 25, citizens are entitled to “the right to freedom of opinion and speech, freedom of the press, . . . [and t]he practice of these rights shall be provided by the law.”⁶⁵ The basic premise is substantively the same as in the previous revision. Nonetheless, it is interesting to note two major modifications. First, this protection was put under Chapter V, titled “Basic Rights and Obligations of Citizens” in the 2001 amendment, whereas the entire section was moved to Chapter II, which was renamed “Human Rights and Citizens’ Fundamental Rights and Duties” in the 2013 amendment.⁶⁶ This change suggests the government’s recognition of the inherent nature of these rights as applicable to everyone present in the country, not just exclusive to Vietnamese people with valid citizenship status. It also suggests placing a stronger emphasis on establishing

⁵⁹ Quinn, *supra* note 24, at 240.

⁶⁰ *Id.* at 240–41.

⁶¹ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], pmb1.

⁶² Rodion Ebbighausen, *Vietnam’s New Constitution Shows Limits of Reform*, DW NEWS (Jan. 6, 2014), <http://www.dw.com/en/vietnams-new-constitution-shows-limits-of-reform/a-17344033>.

⁶³ Compare HIEN PHAP VIETNAM (2001) [HPVN] [CONSTITUTION], art IV (stating that only the CPV is the vanguard of the working class), with HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], art. IV (adding “simultaneously the vanguard of labourers and of the Vietnamese nation”).

⁶⁴ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 25.

⁶⁵ *Id.*

⁶⁶ HPVN (2001) ch. V, art. 69; HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 25.

legal protection. This argument is bolstered by the distinct uses of “citizens,” “all citizens,” “everyone,” “no one,” as contrasted with “Vietnamese citizen[s].”⁶⁷ The second major change was the implementation of Article 14, clause 2, which expressly restricts human rights and citizen’s rights “in imperative circumstances for the reasons of national defense, national security, social order and security, social morality and community well-being.”⁶⁸ Since there is no qualification in scope such as “subject to” or “limited to” a certain provision, this Article has a broad application to all other Articles, essentially giving the authorities the ability to override the constitutional guarantees of human rights when the situation fits the exception.⁶⁹

There are two immediate issues. First, on what basis will the circumstances be evaluated as “imperative”⁷⁰ for the purpose of this Article, given the broad range of possible violations? Second, what is the process if the circumstances are determined to be “imperative”?⁷¹ For the first issue, an average person may be able to perceive the threshold over which conduct would impose upon national security and national defense. In fact, most everyday acts or speeches are not likely to pose such a threat. However, in the presence of vague terms such as “social morality” and “community well-being” it becomes problematic to safeguard against a possible arbitrary standard. As professor Quynh Thi Nhu Nguyen has pointed out, Vietnamese value systems are affected by five main values layers,⁷² and even the government is “confused and trapped with vast issues such as what, how and why particular values should be promoted.”⁷³ There is also little guidance from the legislature. Unlike in many other countries such as the United States, where the Constitution only enumerates a small number of provisions to set a foundation, the Vietnamese Constitution has over one hundred articles attempting to address all issues, inevitably creating confusion in applying the law. Moreover, Vietnam is a civil law jurisdiction and the doctrine of precedents has not been accepted.⁷⁴ Court opinions are very short and not written in detail and not publicly published, which makes it hard to “follow the legal reasoning that prevailed in the judgment.”⁷⁵

⁶⁷ See HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 15–17, 19–20.

⁶⁸ *Id.* at ch. II, art. 14, cl. 2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Quynh Thi Nhu Nguyen, *The Vietnamese Values System: A Blend of Oriental, Western and Socialist Values*, 9 INT'L EDUC. STUD. 32, 34 (2016).

⁷³ *Id.* at 32.

⁷⁴ Andrea Anderson, *Judicial Independence and the Vietnamese Courts* 35 (Mar. 2012) (unpublished M.A. thesis, Lund University), <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2760334&fileId=3129618>.

⁷⁵ *Id.*

With the likelihood that the constitutional protection for freedom of speech may be easily curtailed, the second issue regarding the process arises. Article 20 of the constitution requires a decision by the People's Court or a decision or sanction of the People's Procuracy (equivalent to a warrant) before an arrest can be made.⁷⁶ However, as is the case in other articles, the constitution also allows an exception here whereby a decision by the court or procuracy office is waived if the alleged wrongdoing is a "flagrant offense."⁷⁷ Again, the law fails to provide any guidance or instruction as to what kind of conduct would amount to a flagrant offense and instead leaves the interpretation of the terms entirely up to the police who have the discretion to make a snap judgment at the scene.⁷⁸ Possibly to avoid potential contest regarding charges that might seem less serious to qualify as "flagrant," the government often resorts to Chapter XI of the Vietnam Penal Code, which provides for crimes of "infringing upon national security."⁷⁹ In particular, the accusations are likely under Article 79 for activities "aimed at overthrowing the people's administration" or Article 88 for "propaganda against the [state]."⁸⁰ Both of these charges carry severe prison punishment, but require little particularized factual allegations.⁸¹ Either of these two Articles is used in tandem with, or often subsequent to, charges under Article 258 of the Penal Code for "[a]busing democratic freedom to infringe upon the interests of the state."⁸² This upgrade in charges could subject a convicted individual to an additional seven years in prison, since a judgment under Article 79 or 88 would guarantee that the offense satisfies the "serious circumstances" test in Article 258.⁸³

⁷⁶ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 20, cl. 2.

⁷⁷ *Id.*

⁷⁸ See *infra* discussion in pt. III on contesting the legitimacy of arrests.

⁷⁹ LUAT HINH SU VIETNAM [PEN. C.], No. 15/1999/QH10, ch. XI, translated in WORLD INTELLECTUAL PROP. ORG.: VIET., <http://www.wipo.int/edocs/lexdocs/laws/en/vn/vn/vn017en.pdf> (Version: 1999 – English).

⁸⁰ Those found guilty of carrying out activities aimed at overthrowing the People's administration are sentenced to at least twelve years in prison, in some cases even life imprisonment or death. See *id.* at art. 79, cl. 1. Those convicted of conducting propaganda against the state could be sentenced up to twelve years in prison, or up to twenty years in "particularly serious crimes." See *id.* at art. 8, 80.

⁸¹ A twenty-four-year-old student was arrested and charged with propaganda against the state merely for posting anti-corruption blogs aimed at government leaders. See Richard Finney, *Vietnamese Blogger Phan Kim Khanh Given Six-Year Prison Term*, RADIO FREE ASIA (Oct. 25, 2017), <http://www.rfa.org/english/news/vietnam/blogger-10252017154340.html>.

⁸² PEN. C., ch. XX, art. 258; see Joshua Lipes, *Vietnam Jails Activist Blogger for Seven Years Over Formosa Protests*, RADIO FREE ASIA (Nov. 27, 2017), <http://www.rfa.org/english/news/vietnam/blogger-11272017160528.html> (describing that the activist blogger was initially arrested under Article 258 of the Penal Code, but the charges were later upgraded to the more severe Article 88).

⁸³ See PEN. C., ch. XX, art. 258, cl. 2 (increasing the prison sentence to between two and seven years in serious circumstances).

The laws of Vietnam provide protection for freedom of speech and at the same time create various tools to pierce that protection. They describe the process and procedure for arresting a suspected wrongdoer and simultaneously include provisions to dispense with the warrant requirements. The arrests of the peaceful protestors are constitutionally permissible, yet susceptible to abuse. The vague language used, coupled with virtually no guidance in legal interpretation, has allowed the police and the government at large, wide latitude to construe the law to serve their needs. What results is the legal protection for the government's action at the expense of the people.

III. ANALYSIS: ADEQUACY OF REMEDIES

This part of the Note will attempt to answer the critical question of whether the currently available remedies for protestors who have been arrested and detained are adequate or effective. The analysis will start with contesting the legitimacy of the arrests to the Prosecutor's office and to the courts. Then, this part will examine the court system, the trials, the roles of judges and jurors, and the influence of the CPV on the effectiveness of trials.

The first remedy is prosecutor review of the arrests. The terms of the constitution grant the Supreme People's Procuracy of Vietnam (*Viện kiểm sát nhân dân tối cao*, a national-level public prosecutor's office) authority to review actions taken by the police force,⁸⁴ including allegations of abuse. In essence, the Procuracy acts as a check to the police's power in case of improper arrest and is fully authorized to order the release of the detainee. For instance, the police could make an arrest in urgent circumstances, such as when a person almost committed a crime or was in the process of conducting the act, and the Procuracy has twelve hours to issue a decision whether or not to approve such arrest.⁸⁵ Additionally, a decision to initiate a formal criminal investigation must be issued within three days of the arrest, with the possibility of extending to six days in total, otherwise the police must release the suspect immediately.⁸⁶ In theory, this power check is effective because it works to discourage police from skipping steps in the process, risking a reversal decision from the People's Procuracy, and potential criminal liability.⁸⁷

⁸⁴ See HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. VIII, art. 107, cl. 3 (prescribing the responsibility of the People's Procuracy as including the protection of human rights, citizen's rights, and "ensuring that laws are strictly and uniformly observed.").

⁸⁵ See LUAT TO TUNG HINH SU VIETNAM [C. CRIM. PRO.], No. 19/2003QH11, art. 86–87, translated in THE ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46817432.pdf> (Version: As Amended in 2003 – English).

⁸⁶ *Id.* at art. 87 ("[T]he custody decision issuers may extend the custody time limit but for no more than three days.").

⁸⁷ See PEN. C., ch. XIII, art. 123 (subjecting those who make illegal arrests to warning, non-custodial reform, or even imprisonment of up to two years).

However, in reality police operate with little transparency and “sometimes act with impunity.”⁸⁸ The vague language problem in the Constitution and Penal Code gives the People’s Procuracy no reliable basis to evaluate the arrest, which in turn effectively rids the detainee of another layer of protection. Furthermore, even though Articles 119 and 120 of the Criminal Procedure Code limit the time for criminal investigation and temporary detention to two months for lesser offenses, they allow four months for “especially serious offenses,” with the possibility of extending to four months for three more times.⁸⁹ Authorities have routinely requested extensions with the purpose of punishing and pressuring the protestors to confess to the crimes.⁹⁰ This effectively translates, for a peaceful protestor who has been charged under Penal Code Article 79 or 88,⁹¹ to pretrial detention of up to sixteen months pending investigation.⁹² In fact, this period could even be longer if a protestor has been charged with multiple violations since the Code does not preclude the plausible interpretation that such time limit applies to *each* charge separately.⁹³

The second remedy comes in the form of judicial review, but contesting the basis of an arrest or lengthy detention before a court is also futile. While the law provides a detainee the right to counsel from the time of their detention,⁹⁴ in practice authorities could use bureaucratic tactics to delay such access, many times until shortly before the case goes to trial, leaving the counsel inadequate time to prepare.⁹⁵ Under most circumstances, the detainees are responsible for obtaining their own attorney, except in the case of minors or people with mental disabilities,⁹⁶ and for paying all legal costs.⁹⁷ The problem is exacerbated because once at trial, it is likely that the only issue argued is the criminality of the detainee’s conduct, not the legality of the government’s action.⁹⁸ Since the defense attorney does not challenge the government’s action, possibly due to lack of time and preparation, among other reasons, the

⁸⁸ U.S. STATE REPORT, *supra* note 12, at 7.

⁸⁹ C. CRIM. PRO., art. 119, cl. 2; art.120, cl. 2.

⁹⁰ *See Urgent Action*, *supra* note 56.

⁹¹ Article 79 proscribes activities that are aimed at overthrowing the People’s administration and Article 88 prohibits activities that constitute propaganda against the state. PEN. C., art. 79, 88. These allegations are likely bound up in “especially serious offense” category.

⁹² The language in both articles—“the investigation time limit may be extended three times, for no more than four months each”—afford twelve more months in addition to the original four months. *See* C. CRIM. PRO., art. 119–20.

⁹³ This is a possible explanation, as the State Department has reported that individuals could be detained pending investigation for up to twenty-four months. U.S. STATE REPORT, *supra* note 12, at 8.

⁹⁴ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 31, cl. 4.

⁹⁵ *See supra* text accompanying note 4.

⁹⁶ C. CRIM. PRO., ch. IV, art. 57.

⁹⁷ *Id.* at ch. VII, art. 99.

⁹⁸ *See* Anderson, *supra* note 74.

damages afforded by the Constitution for arrest and detention “in violation of the law”⁹⁹ fail to serve their function. The detainee’s ability to challenge the lawfulness of the arrest or detention before a court, which extends to the ability to seek compensation from such injustice, is hampered by the government’s maneuvers that are not prohibited by law. Thus, once again, the inconsistency of Vietnamese law manifests itself: a constitutional protection and remedy is readily available on paper but illusory in practice.

Since contesting the legitimacy of an arrest is not a feasible option, the detained protestors could seek remedies at trial. Like many countries, Vietnam also recognizes the right to a fair and public trial.¹⁰⁰ A judge panel (the bench) is set up for each trial, consisting of one judge and two people’s jurors (also called people’s assessors),¹⁰¹ who are constitutionally required to assess the case independently from each other “and shall only obey the law.”¹⁰² The unique feature of the Vietnamese trial system is that when considering a case, judges and jurors are “equal in [the] right to inquire, argue and vote in public,” and this three-member bench renders decisions “by [the] majority of votes.”¹⁰³ On its face, this system is democratic. After all, judges are appointed public servants, and jurors, who are designated by the People’s Council,¹⁰⁴ are the representatives of the lay people. Majority rule has also been well established as a fundamental principle of democracy.¹⁰⁵ Nonetheless, in reality, the system does not work as intended. The people’s jurors lack adequate legal training to perform their roles of “assist[ing] judges to reach a decision that reflect[s] the will of the people.”¹⁰⁶ In common law jurisdictions, jurors are often referred to as “factfinders” or “triers of fact” in a jury trial because they hear testimonies and make a ruling on factual issues.¹⁰⁷ Only the judges answer questions of law.¹⁰⁸ Therefore, jurors can be selected from a pool of lay people, none of whom is required to have any legal knowledge. In contrast, the people’s jurors in the Vietnamese legal system must make a determination on both questions of facts and questions of law, under the dual requirements of

⁹⁹ The constitution provides that any person who has been arrested, held in custody, or sent to jail in violation of the law shall be entitled to damages for injuries to his or her person and reputation. HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 31, cl. 5.

¹⁰⁰ *Id.* at ch. VIII, art. 103.

¹⁰¹ Nguyen Nien, *The Principle of Trial Independence in Vietnam Court*, ASEAN LAW ASS’N, http://www.aseanlawassociation.org/docs/w1_vietnam.pdf (last visited Oct. 22, 2018).

¹⁰² HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. VIII, art. 103.

¹⁰³ Nguyen, *supra* note 101.

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Majority Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁰⁶ Penelope Nicholson, *Judicial Independence and the Rule of Law: The Vietnam Court Experience*, 3 AUSTL. J. ASIAN L. 37, 43 (2001).

¹⁰⁷ *Fact-Finder*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁰⁸ *Trial*, BLACK’S LAW DICTIONARY (11th ed. 2019).

“independence” and “abidance by law only,” set forth in the Constitution.¹⁰⁹ Given this higher demand of responsibilities, the Standing Committee of National Assembly has established the standards for selection of the people’s jurors in the 2002 Ordinance on Judges and Jurors (The Ordinance), which require “Vietnamese citizens, who are loyal to the Fatherland and the Constitution . . . have good moral qualities, are incorrupt and honest, have legal knowledge, have the spirit to resolutely protect the socialist legal system, resolutely protect the interest of the State, the legitimate rights and interests of citizens”¹¹⁰ The Ordinance merely mentions “legal knowledge” without specifying any particular qualifications such as a bachelor degree in law or training in the field, which are prerequisites for a judge.¹¹¹ In fact, the people’s jurors “do not have to be law graduates”¹¹² or have to show any pertinent legal training. There is no transparent assessment for possession of legal knowledge, and this potential “lack of skills has been the subject of debate in Vietnam, with some lawyers calling for the abolition of the assessors.”¹¹³

Moreover, even judges are not always in the best position to answer or explain questions of law. First, there are still concerns regarding the sufficiency of the judges’ education and training. While the Ordinance indeed lists more stringent requirements for selection of judges, including a law degree, practical work experience,¹¹⁴ and endorsement by the Judge Selection Committee,¹¹⁵ these criteria are not applied consistently, if at all. As legal teachings only gained prominence in 1979, there is a shortage of qualified law graduates “clamoring to be judges,”¹¹⁶ which in turn has forced the State to “relax its requirements.”¹¹⁷ Specifically, following the passage of the 2002 Ordinance,

¹⁰⁹ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. VIII, art. 103, cl. 2; see Tran Duy Binh, *The Principle of Independence and Abidance by Law During Trial*, VIET. L. & LEGAL FOR. (June 29, 2012), <http://vietnamlawmagazine.vn/the-principle-of-independence-and-abidance-by-law-during-trial-3999.html>.

¹¹⁰ PHÁP LỆNH VỀ THÂM PHÁN VÀ HỘI THÂM TOÀ ÁN NHÂN DÂN [ORDINANCE ON JUDGES AND JURORS OF THE PEOPLE’S COURTS], No. 02/2002/PL-UBTVQH11, art. 5 cl. 2, *translated in* MINISTRY OF JUSTICE NORMATIVE LEGAL DOCUMENTS, http://moj.gov.vn/vbpq/en/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=9858 (Version: As Amended in 2002) [hereinafter ORDINANCE].

¹¹¹ *Id.* at art. 5.

¹¹² Nicholson, *supra* note 106, at 44.

¹¹³ *Id.*

¹¹⁴ ORDINANCE, *supra* note 110, at art. 5.

¹¹⁵ Nicholson, *supra* note 106, at 43.

¹¹⁶ *Id.* at 44. Another consequence following this shortage of qualified judges is the “reluctance on the part of the Vietnamese lawmakers to draft laws that leave any discretion to the courts.” Rohwer, *supra* note 18, at 280.

¹¹⁷ Penelope Nicholson & Nguyen Hung Quang, *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14 PAC. RIM L. & POL’Y J. 1, 9 (2005), <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/659/14PacRimLPolyJ001.pdf?sequence=1&isAllowed=y> [hereinafter Nicholson, *Politics of Appointment*].

the Standing Committee passed Resolution No. 131, explaining that although the law degree requirement “*should* be mandatory,” it would be “some time before this ideal can be met.”¹¹⁸ Thus, many judges, classified as “owing a ‘legal knowledge debt’ (*no kien thuc phap ly*),”¹¹⁹ typically have only acquired certificates in law and continued to receive training, which “occurs once [they have] been appointed.”¹²⁰ To repay this “debt,” the judges take classes offered by licensed attorneys, inherently creating a conflict of interest when such lawyers appear before them in court.¹²¹ Second, as discussed above, when faced with a novel or uncertain issue, judges often defer to the government for interpretation on questions of law.¹²² In cases in which the government has a stake, such as the arrests and detention of protestors, this approach effectively skews the outcome in favor of the government.

Finally, both the judges and the jurors are under immense influence from the Vietnam Fatherland Front (VFF), a political organization created under the constitution, and from the CPV by extension.¹²³ Since the selection requirements for judges and jurors include “good moral qualities” and “spirit to resolutely protect the socialist legal system,”¹²⁴ the VFF, which “represents and protects [the] legal and legitimate rights . . . of the people,”¹²⁵ takes up the responsibilities of vetting the candidates. The people’s jurors for the Supreme People’s Court are appointed by the Standing Committee based on recommendations from the VFF, while those for District and provincial levels are appointed by “the local equivalent of people’s council that act on the recommendation of the [VFF] at the local level.”¹²⁶ For judges, the Party influence is structured implicitly within the appointment process, as discussed above.¹²⁷ In addition, the traditional endorsement by the Party used to come in the form of “an ‘opinion letter from the Communist Party cell’ (*y kien cua cap uy*).”¹²⁸ While the law no longer expressly demands such endorsement, the courts nevertheless continue to seek those letters as a form of “assurance” so that the

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.*

¹²⁰ Nicholson, *supra* note 106, at 44.

¹²¹ *Id.*

¹²² See Bui, *supra* note 58, at 330–31.

¹²³ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. I, art. 9; See also LUAT 2015 MAT TRAN TO QUOC VIETNAM [THE 2015 LAW ON THE VIETNAM FATHERLAND FRONT], No. 75/2015/QH13, art. 1, *translated in* VIET. LAW & LEGAL FORUM, <http://vietnamlawmagazine.vn/the-2015-law-on-the-vietnam-fatherland-front-4931.html> (describing that the Vietnam Fatherland Front was founded and led by the Communist Party of Vietnam). Thus, the CPV could indirectly exert its influence via the Vietnam Fatherland Front.

¹²⁴ ORDINANCE, *supra* note 110, at art. 5.

¹²⁵ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. I, art. 9.

¹²⁶ Nicholson, *supra* note 106, at 43.

¹²⁷ See *supra* discussion in pt. II immediately preceding sec. B.

¹²⁸ Nicholson, *Politics of Appointment*, *supra* note 117, at 14 (footnote omitted).

“Party oversight over judicial appointments remains intact.”¹²⁹ As a result, it is rare for non-Party members to become judges. In fact, around ninety percent of the judges are CPV members, owing responsibilities to the party “above any duty to the development of the law.”¹³⁰ A Vietnamese attorney has said that the independence principle promulgated by the constitution “do[es] not mean detachment from the Party’s line and policies,” and that “an independent trial does not mean that trial is not subject to supervision.”¹³¹ Put in the context of the protestors being arrested and detained for alleged wrongful conducts against the State, and against the CPV, the independent trial structure serves more form than function.

In addition, the Vietnamese courts use an inquisitorial system where the judge takes on the role of asking questions, ascertaining facts, and even “framing outcomes as to reconcile litigants’ claims with state interests[.]”¹³² The defense attorneys, therefore, play a very limited role and are usually under severe time constraints to prepare for trial.¹³³ In the trial involving the arrest and detention of peaceful protestors, judges even “occasionally [silence] defense lawyers who [are] making arguments on behalf of their clients.”¹³⁴ Moreover, the Criminal Procedure provision that provides the defendants with the ability to cross examine witnesses¹³⁵ may often be of little use. The litigation procedure in Vietnam lacks disclosure and discovery requirements, leaving the defense counsel in the dark as to “which witnesses would be called.”¹³⁶ The law also allows the court, at its discretion, to use an absent witness’s prior statements that were given to the investigating authorities.¹³⁷ Unlike in the United States, cross-examination is merely a privilege and not a constitutional right that is guaranteed in Vietnamese courts.¹³⁸ This practice raises various concerns regarding the authenticity of evidence and whether the statement

¹²⁹ *Id.*

¹³⁰ *Id.* at 15.

¹³¹ Tran, *supra* note 109.

¹³² Bui, *supra* note 58, at 331.

¹³³ See *supra* text accompanying note 4; see also HRW Mother Mushroom, *supra* note 45 (raising concern that the defense lawyer was disbarred four days before the trial); Joshua Lipes, *Vietnam Upholds Decade-Long Jail Term for Activist Blogger Mother Mushroom*, RADIO FREE ASIA (Nov. 30, 2017), <http://www.rfa.org/english/news/vietnam/appeal-11302017162232.html> (noting that the defendant’s mother and supporters were all refused entry to the courtroom).

¹³⁴ U.S. STATE REPORT, *supra* note 12, at 12.

¹³⁵ C. CRIM. PRO., ch. XX, art. 211, cl. 2.

¹³⁶ U.S. STATE REPORT, *supra* note 12, at 12.

¹³⁷ C. CRIM. PRO., ch. XVIII, art. 192.

¹³⁸ Compare C. CRIM. PRO., ch. XX, art. 211, cl. 2 (“[D]efense counsels . . . may further ask the witnesses.”) (emphasis added), with U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”) (emphasis added).

should be admissible; this Note, however, does not dive deeper into these issues.

There are yet many other factors about the court that weigh heavily against the detainees in these cases. The low starting salary, coupled with the structured increase based on time spent in office,¹³⁹ renders judges susceptible to corruption. As an author has pointed out, it is common for “those involved in litigation to approach the court to explain the details of their case before it is actually heard.”¹⁴⁰ It is also “not unusual for judges to be offered a fee linked to the outcome of a particular case.”¹⁴¹ These cases in which protestors have been arrested and detained under Article 79 or 88 certainly fall squarely within this category. In the eyes of the public, the court acts as “an arbiter of contentious issues that is alert to the public’s attitude.”¹⁴² Thus, the supervision under which courts normally operate becomes scrutiny from the CPV, and the Party’s influence becomes even more pronounced. The state-controlled press can “bring substantial pressure on the courts to decide cases in a particular way.”¹⁴³

A scholar has observed that many people believe “the [mere] fact that a court decides to hear a case is in itself an expression of its consent to the views of the procuracy, and that it is a foregone conclusion that the case constitutes a crime.”¹⁴⁴ In the rare circumstances that the verdict is not what the government has expected, presumably because it is not harsh enough,¹⁴⁵ the procuracies reserve the right to protest against such judgments,¹⁴⁶ undoubtedly raising some concerns regarding judicial independence. The defendants also have the constitutionally guaranteed ability to appeal,¹⁴⁷ but such appeals are “done on the record without argument.”¹⁴⁸ In the two-tier system in Vietnam, if the appellate court affirms the lower court’s ruling, the verdict takes effect immediately,¹⁴⁹ although the dissatisfied defendant can petition for review to the Judges’ Council of the Supreme People’s Court (*Uy Ban Tham Phan Toa An*

¹³⁹ Nicholson, *Politics of Appointment*, *supra* note 117, at 23, 25.

¹⁴⁰ Nicholson, *supra* note 106, at 48–49.

¹⁴¹ *Id.* at 48.

¹⁴² *Id.* at 46.

¹⁴³ *Id.*

¹⁴⁴ Vu Cong Giao & Joel Ng, *The Socialist Republic of Vietnam, RULE OF LAW FOR HUMAN RIGHTS IN THE ASEAN REGION: A BASE-LINE STUDY*, HUMAN RIGHTS RES. CTR. 280, 294 (2015), <http://hrrca.org/wp-content/uploads/2015/09/11.-ROL-English-Vietnam.pdf>.

¹⁴⁵ Nguyen, *supra* note 101, at 6.

¹⁴⁶ C. CRIM. PRO., ch. XXIII, art. 232.

¹⁴⁷ *Id.* at art. 231; *see also* HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. VIII, art. 103, cl. 6.

¹⁴⁸ Quinn, *supra* note 24, at 229.

¹⁴⁹ Joshua Lipes, *Vietnam Appeals Court Upholds Jail Terms For Two Dissidents*, RADIO FREE ASIA (May 26, 2017), <http://www.rfa.org/english/news/vietnam/appeal-05262017133701.html>.

Nhan Dan Cap Cao).¹⁵⁰ The Council only grants petitions on a discretionary basis.¹⁵¹ As expected, it is unlikely that the Council will review decisions involving charges under the national security umbrella, and even in the hypothetical scenario that it does, rulings on such sensitive matters are “extremely difficult to overturn.”¹⁵² In other words, sentences by the trial court imposed upon a peaceful protestor who has been charged under Article 79 or 88 are, in virtually all cases, the final verdict.

To most people in any jurisdiction, navigating the legal maze is often an already complicated task. For a peaceful protestor in Vietnam who has been arrested and detained, that task is generally an impossible mission. The police enjoy wide discretion afforded by the vague language used in the law to justify their arbitrary arrests of the protestors under the broad national security charges. Once the arrest has been made, the government enjoys a vast selection of loopholes and bureaucratic tactics to exploit, including isolating the detainees for extended periods of time and delaying access to counsel. Throw into this mix an ineffective court system that is heavily influenced by politics,¹⁵³ judges and people’s jurors who are carefully handpicked by the State’s head political party, rulings that can be swayed and are not decided on proper bases, and the detained protestors face a perfect storm.

IV. THE GLOBAL IMPACT AND INTERNATIONAL RESPONSES

In isolation, the current law and the Vietnamese government’s treatment of peaceful protestors seem to have affected only the Vietnamese people. However, in this era of globalization, all nations are connected to, and their actions have effects on, each other, and Vietnam is no exception.

The first and perhaps most direct scenario arises when a citizen of a different country gets involved in peaceful protesting in Vietnam. For instance, William Nguyen, an American citizen from Houston, Texas, was arrested and held in jail for “disturbing the peace” when he participated in a demonstration against an economic zone proposal that would promote Chinese

¹⁵⁰ Quinn, *supra* note 24, at 229, 230.

¹⁵¹ *Id.*

¹⁵² Lipes, *supra* note 149 (noting that no cases related to national security have ever been reviewed by the Supreme Court after the appellate courts upheld the initial ruling).

¹⁵³ Some scholars have adopted a so-called “instrumentalist” view of the Vietnamese legal system, which acknowledges the existence of a body of law but argues that the socialist states “have promulgated law as a tool for political control.” Bui Ngoc Son, *The Law of China and Vietnam in Comparative Law*, 41 *FORDHAM INT’L L.J.* 135, 139 (2017). Regarding the legal system in Vietnam, Professor Nicholson has commented that the Vietnamese court is “concurrently a legal and political institution,” bound by law but must resolve issues under the party-state’s influence. *Id.* at 179.

investments.¹⁵⁴ Vietnam has since deported Nguyen,¹⁵⁵ but not before airing a videoclip of his admission to a violation of Vietnamese laws and his promise not to “join any anti-state activities anymore.”¹⁵⁶ Another American citizen, Michael Nguyen, was detained in July 2018 pending investigation of charges of “activity against the People’s government” without the ability to see family or lawyers.¹⁵⁷ It is entirely possible that the government did not know Michael was a foreigner, as officials “frequently detained human rights activists upon their return from overseas trips.”¹⁵⁸ While it is problematic for peaceful protestors to be arbitrarily arrested, American citizen protestors, unlike their Vietnamese counterparts, still have a remedy at their disposal—reliance on the U.S. government to take actions.¹⁵⁹

The second scenario manifests itself in the form of international responses. In 1977, Vietnam became a member state of the United Nations.¹⁶⁰ The international organization drafted the Universal Declaration of Human Rights (UDHR) in 1948, which set out “fundamental human rights to be universally protected.”¹⁶¹ Furthermore, in 1982, Vietnam acceded to the International

¹⁵⁴ Hannah Ellis-Petersen, *U.S. Calls on Vietnam to Release American Citizen Arrested in Protests*, GUARDIAN (June 15, 2018), <http://www.theguardian.com/world/2018/jun/15/u-s-calls-on-vietnam-to-release-american-citizen-arrested-in-protests>.

¹⁵⁵ *Vietnam to Deport U.S. Student Will Nguyen for “Public Disorder”*, BBC (July 20, 2018), <http://www.bbc.com/news/world-asia-44896125>.

¹⁵⁶ *Vietnam: U.S. Citizen in Televised “Confession”*, HUMAN RIGHTS WATCH (July 18, 2018), <https://www.hrw.org/news/2018/07/18/vietnam-us-citizen-televised-confession>. Sources have indicated that William Nguyen was not at the protest for any political agenda but simply to, ironically, “celebrate the right to free assembly” in Vietnam. See *Vietnam Launches Probe into American Detained for “Public Disorder” During Protests over Proposed Land Deal with China*, SOUTH CHINA MORNING POST (June 16, 2018), <http://www.scmp.com/news/asia/southeast-asia/article/2151121/vietnam-launches-probe-american-detained-public-disorder>.

¹⁵⁷ Joshua Lipes, *U.S. Citizen Michael Nguyen Confirmed Detained in Vietnam*, RADIO FREE ASIA (Aug. 2, 2018), <http://www.rfa.org/english/news/vietnam/detained-08022018164508.html>.

¹⁵⁸ U.S. STATE REPORT, *supra* note 12, at 9.

¹⁵⁹ See Roxana Kopetman, *American from Orange County Detained in Vietnam Prison; Congresswoman Threatens “Consequences”*, ORANGE CTY. REG. (Aug. 3, 2018), <http://www.oregister.com/2018/08/02/american-from-so-cal-detained-in-vietnam-prison-congresswoman-threatens-consequences/> (citing support for Nguyen from the county congresswoman who “will go as high as [she has] to,” and from other representatives); see also Hannah Ellis-Petersen, *Vietnam Jails Two Americans for 14 Years for Trying to “Overthrow State”*, GUARDIAN (Aug. 23, 2018), <http://www.theguardian.com/world/2018/aug/24/vietnam-jails-two-americans-for-14-years-for-trying-to-overthrow-state> (citing U.S. embassy’s statement regarding continued advocacy and support for two Americans who had been jailed in Vietnam for anti-state conduct).

¹⁶⁰ *Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/index.html> (last visited Oct. 21, 2019).

¹⁶¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

Covenant on Civil and Political Rights (ICCPR),¹⁶² a multilateral treaty monitored by the United Nations Human Rights Committee (UNHRC) which commits its state parties to fifty-three articles regarding human rights.¹⁶³ In 2014, Vietnam appeared before the United Nations Universal Periodic Review (UPR) and accepted 182 out of 227 recommendations from UN member countries.¹⁶⁴ The government has done little to honor its commitment—in some cases, such as detaining dissident journalists, it has made the situation even worse.¹⁶⁵

Since all UN members have “pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms,”¹⁶⁶ acts or conducts by any nation which deviate from that standard understandably trigger reactions from the UNHRC. It is important to note that these treaties and standards, without a formal enforcement authority, are more or less “soft law mechanisms.”¹⁶⁷ What this means is that a designated global institution, here the United Nations Working Group on Arbitrary Detention (WGAD), normally reviews a case, evaluates whether it is consistent with the norms articulated in UDHR and ICCPR, and then “advocates to encourage governments to implement its [non-binding] recommendation.”¹⁶⁸

As an illustration, in 2003, Dr. Nguyen Dan Que was arrested after sending out a statement via email criticizing the government’s claim to guarantee freedom of information and at the same time endorsing the “Freedom of Information in Vietnam Act” introduced in the U.S.¹⁶⁹ He was charged with possession and distribution of materials which contained “anti-Vietnam

¹⁶² *Depository Status of Treaties*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (last visited Oct. 21, 2019).

¹⁶³ See generally G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

¹⁶⁴ *Vietnam: Clean Up Abysmal Rights Record*, HUMAN RIGHTS WATCH (July 23, 2018, 4:18 PM), <http://www.hrw.org/news/2018/07/23/vietnam-clean-abysmal-rights-record> [hereinafter HRW UN Council].

¹⁶⁵ According to Reporters Without Borders, Vietnam became one of the world’s biggest five prisons for journalists in 2017. *Detained Journalists*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/detained-journalists> (last visited Oct. 21, 2019).

¹⁶⁶ UDHR, *supra* note 161, at pmb1.

¹⁶⁷ Jared M. Genser & Margaret K. Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice*, 39 COLUM. HUM. RTS. L. REV. 687, 688 (2008).

¹⁶⁸ *Id.* at 688–89.

¹⁶⁹ *Past Campaigns: Dr. Nguyen Dan Que Vietnam*, FREEDOM NOW, <http://www.freedom-now.org/campaign/dr-nguyen-dan-que/> (last visited Oct. 21, 2019) [hereinafter *Que Campaign*]; see also Comm’n on Human Rights, Civil and Political Rights, Including the Question of Torture and Detention, Opinion No. 19/2004 at ¶ 8, (Sept. 16, 2004), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/165/70/PDF/G0416570.pdf?OpenElement> [hereinafter Opinion No. 19/2004].

information” in violation of Article 80 of the Penal Code, potentially facing a long prison sentence or even death.¹⁷⁰ Freedom Now, a non-profit, non-governmental advocacy organization, petitioned to the WGAD’s “Urgent Action” procedure.¹⁷¹ The Working Group, in its opinion in September 2004, found that Dr. Que’s actions were a valid exercise of freedom of opinion and expression, which is recognized in both article 19 of UDHR and article 19 of ICCPR,¹⁷² “to which Viet Nam is a party.”¹⁷³ Therefore, deeming such an arrest arbitrary and in contravention with the international norms and principles, the Working Group proposed that Vietnam take actions to comply with the two agreements.¹⁷⁴

A fascinating development in this case was the significant advocacy and involvement from the international community. Before the opinion of the WGAD, twelve Nobel Laureates sent a letter to the Prime Minister of Vietnam urging the release of Dr. Que,¹⁷⁵ followed by his brother’s article “Freedom For Vietnam, Freedom For My Brother,” describing the circumstances of the

¹⁷⁰ *Petition to United Nations Working Group on Arbitrary Detention: In the Matter of Dr. Nguyen Dan Que*, FREEDOM NOW, sec. IV, subsec. 3, <http://www.freedom-now.org/wp-content/uploads/2010/10/Dr.-Que-Petition-to-the-WGAD-6-3-2004.pdf> (last visited Oct. 24, 2018); see PEN. C., ch. XI, art. 80 (“Those who commit . . . [spying] acts shall be sentenced to between twelve and twenty years of imprisonment, life imprisonment or capital punishment”).

¹⁷¹ This procedure is used when it is reliably alleged that a person may be detained arbitrarily and such violation “may be time-sensitive in terms of involving loss of life, . . . or ongoing damage of a very grave nature to victims in the event of the continuation of the detention.” *Individual Complaints and Urgent Appeals*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://www.ohchr.org/en/issues/detention/pages/complaints.aspx> (last visited Oct. 24, 2018).

¹⁷² See UDHR, *supra* note 161, at art. 19 (“Everyone has the right to freedom of opinion and expression”); ICCPR, *supra* note 163, at art. 19 (“Everyone shall have the right to freedom of expression”).

¹⁷³ Opinion No. 19/2004, *supra* note 169, at ¶ 16. Although the Opinion mentioned the government’s failure to provide Dr. Que a prompt public hearing, access to counsel, and notice of the charges against him, it did not state that such failure violated Article 11 of the UDHR and Article 14 of the ICCPR. *Id.* at ¶ 12. See UDHR, *supra* note 161, at art. 11(1) (“Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a *public trial* at which he has had *all the guarantees necessary* for his defense”) (emphasis added); ICCPR, *supra* note 163, at art. 14(3) (“[E]veryone shall be entitled to the following minimum guarantees . . . (a) To be informed . . . of the charge[s] against him; . . . (c) To be tried without undue delay; (d) . . . [T]o have legal assistance assigned to him”).

¹⁷⁴ Opinion No. 19/2004, *supra* note 169, at ¶ 18.

¹⁷⁵ See Letter from Kenneth J. Arrow et al., Nobel Laureates, to His Excellency Phan Van Khai, Prime Minister of Vietnam (Sept. 22, 2003) (on file with Freedom Now), <http://www.freedom-now.org/wp-content/uploads/2010/10/Dr-Que-Letter-from-12-Nobel-Laureates-9-23-04.swf>.

arrest,¹⁷⁶ and another letter from fifteen RFK Human Rights Award Laureates petitioning for his release to the Prime Minister and the President of Vietnam.¹⁷⁷ Notwithstanding the inaction from the government after the WGAD opinion, U.S. lawmakers joined in the efforts with a letter from forty-two Congress members and a second letter from twelve Senators, both criticizing the government's treatment of Dr. Que and emphasizing the "unnecessary irritant in U.S.-Vietnam relations" caused by his detention.¹⁷⁸ Against the continued silence, nine human rights organizations, including Freedom Now and Amnesty International, wrote a letter to the Secretary General of the United Nations (and enclosed copies to several members of the Vietnamese government), requesting his intervention "to ensure Vietnam complies with all relevant human rights instruments preventing arbitrary detention."¹⁷⁹ Shortly afterward, Dr. Que was released from prison, albeit under constant police watch.¹⁸⁰ The WGAD opinion, along with tremendous efforts from a foreign government (here, the United States) and various international organizations, made the release of Dr. Que possible.

Vietnam's lack of true freedom of speech protection has negatively impacted not only the human rights of its citizens, but also its international economy. The adoption of the 1992 constitution has enabled Vietnam's transition to an open-market economy and allowed for a more progressive relation with the rest of the world.¹⁸¹ The development was further strengthened by the bilateral trade agreement with the United States in 2001, which was the "last

¹⁷⁶ Quan Nguyen, *Freedom for Vietnam, Freedom for My Brother*, NAT'L REV. (Mar. 17, 2004), <http://www.nationalreview.com/2004/03/freedom-vietnam-freedom-my-brother-quan-nguyen/>.

¹⁷⁷ See Letter from Lucas Benitez et al., Robert F. Kennedy Human Rights Award Laureates, to His Excellency Tran Duc Luong, President of Vietnam (Mar. 30, 2004) (on file with Freedom Now), <http://www.freedom-now.org/wp-content/uploads/2010/10/Dr-Que-Letter-from-15-RFK-Human-Rights-Award-Laureates-3-30-04.pdf>.

¹⁷⁸ See Letter from Christopher H. Smith et al., U.S. Members of Congress, to His Excellency Tran Duc Luong, President of Vietnam (Sept. 30, 2004) (on file with Freedom Now), <http://www.freedom-now.org/wp-content/uploads/2010/09/Dr-Que-Letter-from-42-members-of-Congress-9-30-04.pdf>; Letter from Sam Brownback et al., U.S. Senators, to His Excellency Tran Duc Luong, President of Vietnam (Oct. 6, 2004) (on file with Freedom Now), <http://www.freedom-now.org/wp-content/uploads/2010/09/Dr-Que-Letter-from-12-U.S.-Senators-10-6-04.pdf>.

¹⁷⁹ See Letter from Todd Howland, Director of Ctr. For Human Rights, Robert F. Kennedy Mem'l, et al. to The Honorable Kofi Annan, Secretary-General, United Nations (Jan. 28, 2005) (on file with Freedom Now), <http://www.freedom-now.org/wp-content/uploads/2010/09/Dr-Que-Letter-to-U.N.-Secretary-General-Kofi-Annan-from-nine-NGOs-1-28-05.pdf>.

¹⁸⁰ *Although Released, Nguyen Dan Que and Nguyen Dinh Huy Are Not Free*, REPORTERS WITHOUT BORDERS (Feb. 9, 2005), <https://rsf.org/en/news/although-released-nguyen-dan-que-and-nguyen-dinh-huy-are-not-free>.

¹⁸¹ Odell & Castillo, *supra* note 15, at 84.

step in a long reconciliation” between the two countries,¹⁸² and accession to the World Trade Organization (“WTO”) in 2007.¹⁸³ But how does the mistreatment of some individuals have a cross-borders effect? “Progress in development and on human rights goes hand in hand,”¹⁸⁴ and the international response to continued mistreatment demonstrates the cross-border effect. Foreign governments consider the issue of human rights violations during transactions and negotiations with other countries. For example, the EU-Vietnam Free Trade Agreement (EVFTA) was scheduled to be ratified in 2018, which would drastically boost Vietnam’s economy by, among other ways, eliminating tariffs for exports to Europe.¹⁸⁵ However, thirty-two members of the European Parliament decided to delay finalizing the deal due to “grave concerns” and “serious doubts about the country’s stated commitment to respect human rights.”¹⁸⁶ Specifically, in their letter sent to the EU’s Trade Commissioner Cecilia Malmstrom and High Representative Federica Mogherini, the members suggested that the EU should set out certain “human rights benchmarks” for Vietnam to meet “before the EVFTA is submitted to Parliament for approval.”¹⁸⁷ These benchmarks include the repeal of certain articles to conform with the ICCPR, release of peaceful protestors, and revisions of the law on cyber security, among others.¹⁸⁸ Similarly, human rights groups have also called on Australia to adamantly pursue these issues.¹⁸⁹ Continuing from the 2017 Australia-Vietnam Human Rights Dialogue where there were robust discussions on “a wide range of human rights issues,”¹⁹⁰ in 2018, Australia emphasized concerns regarding “ongoing restrictions on civil and political

¹⁸² Seth Mydans, *Relations at Last Normal, Vietnam Signs U.S. Trade Pact*, N.Y. TIMES (Nov. 29, 2001), <http://www.nytimes.com/2001/11/29/world/relations-at-last-normal-vietnam-signs-us-trade-pact.html>.

¹⁸³ *Accessions: Viet-nam*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm (last visited Oct. 26, 2018).

¹⁸⁴ Mike Jendrzeczyk, *Policy Issues: Human Rights in Vietnam*, 22 WHITTIER L. REV. 1059, 1061 (2001).

¹⁸⁵ Ralph Jennings, *Vietnam Expects Economic Boom from EU Trade Deal*, VOA NEWS (June 29, 2018), <https://www.voanews.com/a/vietnam-eu-trade-deal/4459763.html>.

¹⁸⁶ Letter from Ramon Tremosa i Balcells et al., Members of European Parliament, to Federica Mogherini, High Representative, European Union, & Cecilia Malmstrom, Trade Comm’r, European Union (Sept. 17, 2018), <http://tremosa.cat/noticies/32-meps-send-joint-letter-mrs-mogherini-and-commissioner-malmstrom-ask-more-human-rights-progress-vietnam> (last visited Oct. 26, 2018).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Nick Baker, *Human Rights Watch Calls on Australia to Talk Tough with Vietnam*, SBS (Aug. 27, 2018), <http://www.sbs.com.au/news/human-rights-watch-calls-on-australia-to-talk-tough-with-vietnam>.

¹⁹⁰ Madeline Keck, *Rights Group Urges Australia to Confront Vietnam over Human Rights Abuses*, GLOB. CITIZEN (Aug. 28, 2018), <https://www.globalcitizen.org/en/content/human-rights-watch-australia-vietnam/>.

rights” and “[the] arrest and detention of human rights activists,” following the signing of the Strategic Partnership with Vietnam.¹⁹¹ Using the economic carrot-and-stick to negotiate improvements on human rights is not a new tactic. It was, in fact, used effectively when Vietnam sought to join the WTO in 2007.¹⁹²

On the flip side, changes in international economic policy and social politics may undermine improvements or efforts on activism in Vietnam. For instance, one of President Trump’s first acts in office was to withdraw from the Trans-Pacific Partnership (TPP).¹⁹³ The rationale for the decision was that the treaty was “hurt[ing] American manufacturing,” and that it “would be a bad deal for American businesses, workers and taxpayers.”¹⁹⁴ While there are certainly financial consequences stemming from this event, withdrawal by the United States has freed the Vietnamese government from “conditions imposed by the Obama administration to join the trade pact.”¹⁹⁵ Moreover, it has also reversed the dynamic of social movement that was growing in Vietnam, resulting instead in a large oppressive crackdown on activists and peaceful protesters.¹⁹⁶ Vietnam’s ascension to the top five of the world’s biggest prisons for journalists in 2017¹⁹⁷ could be partially attributed to President Trump’s open condemnation of the news media,¹⁹⁸ which had already had a “trickle-

¹⁹¹ Press Release, Dep’t of Foreign Affairs & Trade, Austl. (Aug. 31, 2018), <http://dfat.gov.au/news/media/Pages/australian-statement-on-the-15th-annual-australia-vietnam-human-rights-dialogue.aspx>.

¹⁹² See *Pro-Democracy Dissident, Pham Hong Son, to Be Released Shortly*, ASIA NEWS (Aug. 28, 2006), <http://www.asianews.it/news-en/Pro-democracy-dissident,-Pham-Hong-Son,-to-be-released-shortly-7046.html> (commenting that the release of a dissident after publishing an article entitled “What is democracy?” was “the fruit of diplomatic pressure on Vietnam . . . as the [country] seeks to join the WTO.”). But see Simon Denyer & David Nakamura, *Ripple Effect: How a Trump Decision on Trade Became a Setback for Democracy in Vietnam*, WASH. POST (Oct. 11, 2018), http://www.washingtonpost.com/graphics/2018/world/how-a-trump-decision-on-trade-became-a-setback-for-democracy-in-vietnam/?utm_term=.5ae92ca6695d (citing spokesman for the National Security Council, Garrett Marquis, who commented that “trade treaties weren’t necessarily effective in achieving democratic reform” and in fact may delay liberalization by making the authoritarian party stronger).

¹⁹³ Denyer & Nakamura, *supra* note 192.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Sewell Chan, *Number of Jailed Journalists Hits Record High, Advocacy Group Says*, N.Y. TIMES (Dec. 13, 2017), <http://www.nytimes.com/2017/12/13/world/europe/journalist-s-jailed-committee-to-protect-journalists.html>.

¹⁹⁸ Daniel Victor, *Trump, Calling Journalists “Sick People,” Puts Media on Edge*, N.Y. TIMES (Aug. 23, 2017), <http://www.nytimes.com/2017/08/23/business/media/trump-rally-media-attack.html> (noting the President’s “angry condemnation” of the news media during a rally worsens the fear among journalists that “verbal attacks on the profession could lead to physical attacks.”).

down consequence[] for state and local journalists,”¹⁹⁹ and very likely encouraged conservative foreign governments to justify their arrests and detention of dissidents.²⁰⁰

V. PROPOSED SOLUTIONS

The release of Dr. Que raises a hypothetical question, whether this could be the remedy for the arrested and detained protestors. Since none of the currently available approaches in Vietnam’s legal system prove feasible, perhaps gathering international aids is a feasible solution. This idea, however, is far removed from reality for two reasons. First, the WGAD could only provide non-binding recommendations in the form of opinions to the government and does not have authority to impose sanctions for violations of UDHR or ICCPR.²⁰¹ While its contribution to Dr. Que’s release was in no way trivial, a significant force that drove the decision was the collective pressure on Vietnamese government from the international community whose reaction was likely invoked in the first place thanks to Dr. Que’s reputation as “one of Vietnam’s most renowned democracy activists.”²⁰² In fact, he had received multiple human rights awards, including the Raoul Wallenberg Award and the RFK Human Rights Award,²⁰³ the latter of which positioned him in the circle of fellow RFK laureates. Put another way, his achievements have created a unique reputation and exposure for him, one that could influence worldwide movement. That is not the case for most detained protestors who are just everyday people without much connection or recognition, voicing their dissents over injustice. Second, from a policy perspective, this approach is inefficient and cumbersome, as it requires a large number of resources. As the case demonstrated, in addition to the investigation by Freedom Now and WGAD, twenty-seven laureates, more than fifty U.S. officials, and nine organizations were involved in the course of one year.²⁰⁴ Dr. Que’s release was certainly more the exception than the rule.

While international forces have proven to be effective in liberating detained peaceful protestors, such an approach cannot be relied on sustainably

¹⁹⁹ Jonathan Peters, *Trump and Trickle-Down Press Persecution*, COLUM. JOURNALISM REV. (Spring 2017) https://www.cjr.org/local_news/trump-and-trickle-down-press-persecution.php.

²⁰⁰ A Vietnamese attorney observes that the courts have passed down more severe sentences “perhaps because of weaker interventions from the outsiders and foreigners.” *Vietnam Jails Environmental Blogger for 14 Years*, *supra* note 48.

²⁰¹ See *Que Campaign*, *supra* note 169 and accompanying discussion.

²⁰² *Que Campaign*, *supra* note 169.

²⁰³ *Id.*

²⁰⁴ See *id.* (referencing the twelve Nobel Prize laureates, fifteen RFK Human Rights Award laureates, forty-two U.S. Congress members, twelve U.S. Senators, and nine NGOs).

for another reason: Vietnam and its citizens have no control over what other countries can and will do. Moreover, after the government acquiesces to diplomatic pressure and permits the releases, the protestors are often “exiled” and have to seek refuge in a Western country.²⁰⁵ That choice, however, is not favored by someone who wants to stay and exact change in Vietnam,²⁰⁶ and furthermore, a legal citizen should not have to pick between imprisonment or asylum merely for exercising a constitutional right. Thus, some fundamental changes in domestic law and policies are necessary.

The first proposal is an amendment to the right to counsel. Article 31 of the Constitution provides that any person “who has been arrested, held in custody, [or] prosecuted . . . has the right to self-defend or to seek the assistance of defense from lawyers[.]”²⁰⁷ Article 48 of the Criminal Procedure Code applies to persons held in custody and similarly grants them the right to “defend by themselves or ask other persons to defend them.”²⁰⁸ What is critically missing from both of these provisions is the timing of access to counsel. The normal practice in Vietnam following an arrest by the police is temporary detention pending an investigation,²⁰⁹ during which time the right to counsel is not enforceable. This practice is in compliance with the law in Vietnam, and in fact, is not exclusive to Vietnam. For example, in the U.S., where the right to counsel is embedded in the Sixth Amendment,²¹⁰ the Supreme Court has held that a defendant only gains this right “at or after the time that judicial proceedings have been initiated against him, ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”²¹¹ In *Moran v. Burbine*, the Supreme Court further clarified that the Sixth Amendment became effective “only when the government’s role shifts from investigation to accusation” because “it is only then that the assistance of one versed in the ‘intricacies . . . of law’ is needed.”²¹² Although following the same approach, it is less problematic in the U.S. than in Vietnam. The police in the United States risk facing sanctions as well as a multitude of torts claims from an American citizen who is detained unreasonably or for an unreasonable period

²⁰⁵ Lawyer Nguyen Van Dai, who was sentenced to fifteen years in prison, has been sent into exile in Germany “partly thanks to international pressure.” Denyer & Nakamura, *supra* note 192. Blogger Mother Mushroom, who had been sentenced to ten years in jail, was released in October 2018 and put on a plane to the U.S. See Austin Ramzy, *Mother Mushroom, Vietnamese Activist, Is Said to Be Released*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/world/asia/vietnam-blogger-mother-mushroom.html>.

²⁰⁶ Dr. Que had previously refused to leave Vietnam in hopes of rebuilding the country, “even under a Communist regime.” Nguyen, *supra* note 176. Upon being offered a release opportunity on the condition of exile, he replied, “forced exile is not freedom.” *Id.*

²⁰⁷ HIEN PHAP VIETNAM (2013) [HPVN] [CONSTITUTION], ch. II, art. 31, cl. 4.

²⁰⁸ C. CRIM. PRO., ch. IV, art. 48, cl. 2(d).

²⁰⁹ See *supra* note 92 and accompanying discussion.

²¹⁰ U.S. CONST. amend. VI.

²¹¹ *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

²¹² *Moran v. Burbine*, 475 U.S. 412, 430 (1986).

of time without charges.²¹³ As discussed above, this form of remedy is effectively not available for a Vietnamese detainee in Vietnam.²¹⁴ Therefore, the legislature should adopt an amendment enforcing the right to counsel after a specified threshold of time in detention, regardless of whether the investigation has concluded or the nature of the charges. This proposal will ensure that the defense counsel has sufficient time to prepare the case, and at the very least, prevent extended incommunicado detention which has been all too prevalent.

The second proposal is the establishment of an independent oversight agency. A perpetually lurking problem in these arrests is the wide discretion that the police have in enforcing the law and the lack of paper trails and accountability. Local and county governments could impose a procedure mandating details of each arrest and investigation, which would later be subject to review by an independent oversight agency. While the People's Prosecutor is the agency designed to limit the power of the government and review the legality of its action,²¹⁵ this function is not effective in the case of detained peaceful protestors due to vague statutory language and likely influence from the Party, as analyzed elsewhere in the Note. An independent oversight agency could assume the responsibilities of reviewing the arrest reports made by the police, assessing the situations of the case, assigning counsel as necessary, and holding the government accountable in cases of abusing its power. The selection step for the agency is vital. In order to be effective and independent, the members of the agency must be democratically elected and free from influence from the CPV, unlike the selection of jurors.²¹⁶ The election could be held with all candidates who are not members of the CPV and whose backgrounds are clearly established for lay people to consider in voting. This proposal certainly faces stiff resistance since the government will be reluctant to grant power to an agency without any CPV members.

The third proposal involves a fundamental change in the appointment and election of judges. Since the appointment process occurs every five years in the same cycle as the National Assembly, judges are often under pressure to lobby for their reappointment²¹⁷ as well as to decide some cases in certain ways to avoid not being appointed at the end of their terms.²¹⁸ Legislation that amends the current law to extend the apportionment term for qualified judges may, in the short run, alleviate this pressure. Vietnam could also adopt

²¹³ See 42 U.S.C.A. § 1983 ("Every person who, under color of any statute, ordinance . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities . . . shall be liable to the party injured in an action at law . . .")

²¹⁴ See *supra* discussion in pt. III, sec. B.

²¹⁵ Quinn, *supra* note 24, at 229, 241–42.

²¹⁶ See *supra* note 126 and accompanying discussion.

²¹⁷ *Revised Law on Courts*, *supra* note 39.

²¹⁸ See Quinn, *supra* note 24, at 210.

separate appointment and election processes for different levels of judges—in particular, judges for the Supreme People’s Court enjoy lifetime tenure while judges at lower courts are still subject to reelection process. This treatment is similar to the way Supreme Court justices are treated in the United States.²¹⁹ The rationale for this proposal is that, by completely eliminating the need to seek approval for reelection, judges at the highest level can independently decide cases according to the law without outside influence and can effectively provide guidance for judges in lower courts. On the other hand, this proposal is still susceptible to the CPV’s influence of the appointment process and may allow the Party state to have a lifetime control in the judicial system. There is currently no fix to the situation, as even in the U.S. model a political party circumvented the appointment of a Supreme Court Justice to wait for an appointee that fit the party’s needs better.²²⁰

On the international front, other nations could be part of the solution by delaying economic treaties and partnerships with Vietnam until human rights protection and remedies are guaranteed. As discussed above, this proposal has achieved some success. Another possible approach could be the revocation of Vietnam’s membership in the United Nations if the Vietnamese government does not take action to abide by the ICCPR standards for human rights, which threatens to take away Vietnam’s access to the United Nations’ aid and assistance. This proposal may require the United Nations to apply such disciplines uniformly to all of its members, thus risking resistance from other nations with situations similar to Vietnam. However, the rapid change in the global environment and the increasing diplomatic demands for human rights from the international community may be effective in driving these changes forward.

VI. CONCLUSION

The history of Vietnam is the history of people fighting for freedom. The establishment of the CPV serves as a reminder of that history and that the government will do anything to preserve the leadership of the Party. To prevent any threat that may undermine the CPV’s power or possibly overthrow the sovereign, regardless of how remotely plausible that threat may be, the government has taken extreme measures, including censoring the media and arbitrarily arresting and detaining peaceful protestors. Such measures have a negative impact on the lives of Vietnamese citizens as well as other aspects of the country and have invoked international responses. In order for Vietnam

²¹⁹ U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good behavior.”)

²²⁰ Amber Phillips, *Why Mitch McConnell Is Bragging About Holding up Merrick Garland from the Supreme Court, Two Years Later*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/05/why-mitch-mcconnell-is-bragging-about-holding-up-merrick-garland-from-the-supreme-court-two-years-later/?noredirect=on&utm_term=.5bc605e18a9a.

to move forward and develop relations with other countries, it must take human rights issues, particularly freedom of speech, seriously. The adoption of the first domestic proposal could provide a safeguarding remedy for the protestors who are already detained. The second domestic proposal would likely face resistance or may even prove futile, but the continued international pressure will help push it forward. Other nations could play a vital role in effecting these changes by employing a more decisive approach in economic negotiations with Vietnam, conditioning agreements on improvements in human rights treatment and protection. Freedom of speech is a fundamental right, and no other activists should have to face long-term imprisonment for exercising that right like Le Dinh Luong.