Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
http://ajee-journal.com

RESEARCH ARTICLE

Research Article

PRE-TRIAL RESTRICTIONS ON THE RIGHTS OF THE ACCUSED IN A TRANSITIONAL CRIMINAL PROCEDURE SYSTEM: VIETNAM IN THE LIGHT OF EUROPEAN HUMAN RIGHTS LAW

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DOI:
https://doi.org/10.33327/AJEE-18-9.2-a000192

Date of Submission: 13 Dec 2025
Date of acceptance: 9 Mar 2026
Online First Publication: 20 Apr 2026

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ABSTRACT

Background: *This article examines the human rights limitations imposed on suspects and accused persons in criminal proceedings in Vietnam. The focus is on pre-trial practice. This stage concentrates on the most intrusive measures. It directly affects liberty, privacy, and defence rights. The article uses European standards as the main benchmark. It draws on the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR). The core test is familiar: measures must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. Necessity is read together with proportionality and robust safeguards against arbitrariness. Against these standards, the article poses a single guiding question: How do Vietnamese criminal-procedure law and practice design, apply, and justify limitations on the rights of*

suspects and accused persons, and what gaps remain when such limitations are assessed against European requirements of legality, necessity, proportionality, and safeguards against arbitrariness? The study is situated in Vietnam's commitment to building a rule-of-law state, advancing judicial reform, and strengthening the protection of human rights in line with the international obligations to which it has acceded.

Method: *The study combines doctrinal and functional-comparative analysis with a practice-facing assessment. It first reconstructs the European rights-limitation framework under the ECHR and ECtHR case law (legality, legitimate aim, necessity, proportionality, and safeguards against arbitrariness). It then analyses Vietnam's constitutional and criminal procedure rules on coercive and investigative measures restricting liberty, privacy, and defence rights, and contrasts their operationalisation, judicial authorisation, structured reasoning, time limits, and remedies with recurring patterns in Vietnamese practice.*

Results and Conclusions: *The study finds partial convergence between Vietnam's framework and European human rights standards, but also persistent gaps. Normatively, Vietnamese criminal procedure does not consistently operationalise a structured test of legality, necessity, and proportionality for coercive measures. In practice, pre-trial decision making remains strongly detention-oriented, with limited use of less restrictive options and uneven case specific-reasoning. Institutionally, independent judicial scrutiny at the investigative stage is relatively weak, and key safeguards emphasised in European jurisprudence, such as early access to defence, meaningful review, and effective remedies, are not always robust.*

The article concludes that closer alignment is feasible if Vietnam shifts toward a criteria-based limitations model. This requires codified necessity and proportionality tests, stronger and more intrusive measures of sensitive judicial control, structured reasoning, prioritisation of options other than detention, and enforceable consequences for unlawful restrictions.

1 INTRODUCTION

There are two approaches to human rights. The first approach views them as "conditions that human nature requires to exist adequately"[1] or as "universal legal guarantees" that protect individuals and groups against actions or omissions that interfere with fundamental freedoms, entitlements, and human dignity.[2] The second approach views rights from the perspective of rights limitation, whereby the State does not permit rights holders to enjoy such rights in an absolute manner.[3] This second approach is particularly visible in criminal procedure, where the State applies coercive measures that restrict the rights of suspects and accused persons in order to detect and process crime and to protect the community. Yet restriction is not a negation of rights, but rather a part of the

1 Ayn Rand, *Journals of Ayn Rand* (David Harriman ed, Dutton 1997).
2 Leah Levin, *Human Rights: Question and Answers* (6th edn, UNESCO 2012).
3 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 102.

mechanism for rights protection.[4] Properly understood, rights limitation marks the point where public power must stop, and it supplies safeguards to prevent abuse of power and arbitrary interference with human rights.

This article adopts the rights-limitation approach and focuses on restrictions imposed on suspects and accused persons in criminal proceedings, with emphasis on the pre-trial stage. This stage concentrates the most intrusive measures and directly affects liberty, privacy, and defence rights. The need for a limitation-based analysis is reinforced by the practical reality that extensive pre-trial coercion can generate severe individual harm and systemic pressure, including prolonged deprivation of liberty and wider institutional costs that challenge the legitimacy of the justice system.

A large body of scholarship has approached the rights of the accused from a traditional direction. It primarily focuses on conceptualising rights, listing and describing rights, and presenting procedural guarantees as the main language of protection. A typical formulation is that "as traditionally conceptualised in criminal procedure scholarship, the rights of suspects and defendants are framed as procedural safeguards within the criminal process rather than as instances of the restriction of pre-existing human rights."[5] Much of the literature also concentrates on regulating arrest, detention, questioning, and trial guarantees, rather than analysing the legality and legitimacy of interferences with pre-existing human rights as such. Another influential line of work highlights that the classic distinction between the "crime control" and "due process" models is primarily concerned with balancing efficiency and fairness within the process, rather than developing a general theory of rights limitation.[6]

This article differs from that traditional view. It approaches the issue from the perspective of rights limitation theory and treats interference with the human rights of the accused during the pre-trial stage as a manifestation of rights restriction subject to strict principles. In general terms, the test requires that restrictive measures must be prescribed by law, pursue a legitimate aim, be necessary in a democratic society, and be proportionate to the aim pursued.[7] In this framing, rights restriction is intended to prevent excessive impact from public authority through abuse of power and arbitrary infringement upon the human rights of the accused. The focus is therefore not only on whether the State has competence and follows procedure, but also on whether a restrictive measure is justified by structured criteria that can be publicly explained, scrutinised, and reviewed.

4 *UNCHR, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (E/CN.4/1985/4, 28 September 1984) https://www.refworld.org/legal/resolution/unchr/1984/en/57200 accessed 15 February 2026.

5 Andrew Ashworth and Mike Redmayne, *The Criminal Process: An Evaluative Study* (4th edn, OUP 2010).

6 Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 1, doi:10.2307/3310562.

7 Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 Revus 51, doi:10.4000/revus.2783.

Limitations on the rights of the accused are not only a domestic issue. They are expressed in international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the UN Convention against Torture and other universal and regional instruments.[8] Based on the view that interpretation is not merely a transfer of international law, but a process of translation from international standards into national law,[9] this study focuses on interpreting theoretical norms and international legal requirements regarding human rights restrictions, and on examining how those requirements can be transposed into domestic criminal procedure.

Vietnam provides a particularly relevant setting for this inquiry. The country has been transforming its political and judicial institutions in line with rule-of-law standards, while criminal procedure remains a domain in which State power is exercised most intensively through coercive measures. In Vietnam, the 2013 Constitution approached the issue of human rights limitations for the first time by stipulating that "Human rights and citizens' rights may only be restricted by law in cases of necessity.[10] This constitutional recognition creates expectations for a principled approach to limiting rights. However, constitutional language does not automatically produce an operational limitation framework within criminal procedure. In reality, the Vietnamese criminal procedure law has not been designed on the basis of a rights-limitation theory and does not yet meet international standards for human rights restrictions; factors still exist that may render limitations arbitrary and lead to infringements on the human rights of the accused.

Against this background, the article proceeds from an overarching hypothesis: Vietnamese criminal procedure law is not in line with international standards regarding limitations on the rights of the accused and continues to face significant challenges in both law and practice. The purpose of the study is to build a structured analytical basis for evaluating pre-trial restrictions and to identify where Vietnam converges with, and departs from, the requirements of a principled rights limitation regime. It asks how the restriction of the rights of the accused should be understood in theory and international law, how far Vietnamese criminal procedure complies with international standards on pre-trial restrictions, and what reforms are necessary for a transitional criminal justice system. The article's significance is therefore twofold. It reframes pre-trial coercive measures as rights

8 International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200A (XXI)) [1983] UNTS 999/171; Council of Europe, *European Convention on Human Rights: As amended by Protocols Nos 11, 14 and 15, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2013); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46) [1996] UNTS 1465/85.

9 Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32(2) New York University Journal of International Law and Politics 501.

10 Constitution of the Socialist Republic of Vietnam (adopted 28 November 2013) art 14 [in Vietnamese] https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx accessed 15 February 2026.

restrictions that require strict justification and effective safeguards against arbitrariness, and it offers a basis for evaluating and improving Vietnam's law and practice during a period of rule of law and judicial reform. We believe this study may be of interest to other jurisdictions and provide experience for nations currently in the process of adopting international standards on fair trials.

2 APPROACH AND RESEARCH METHODOLOGY

To address the issue of human rights restrictions in Vietnamese criminal procedure, we adopt a human rights limitation perspective rather than limiting ourselves to an analysis of the content of the accused's rights. Rights limitation, if designed correctly, is not a violation of human rights, but a measure to protect human rights from the abuse of public power.

This study narrows the comparative framework to Europe because the European Convention on Human Rights and the case law of the European Court of Human Rights provide the most detailed and operational guidance on pre-trial rights restrictions, structured around legality, legitimate aim, necessity, proportionality, and safeguards against arbitrariness. The analysis is complemented by the International Covenant on Civil and Political Rights (1966) as the universal baseline for liberty and fair-trial guarantees. Europe is also an appropriate focus because it offers a dense body of practical standards on pre-trial detention, intrusive investigative measures, and effective judicial review, allowing human rights principles to be translated into workable decision criteria rather than remaining at an abstract level.

This approach helps identify the degree of compatibility between Vietnamese law and universal standards while highlighting differences that require further improvement. We also apply doctrinal analysis to clarify concepts such as "the accused", "human rights restriction", "proportionality principle", and "necessity". The author analyses the content of the 2013 Constitution, the 2015 Criminal Procedure Code, the 2015 Law on Temporary Detention and Custody, and International human rights treaties to which Vietnam is a party.

The study employs a comparative method involving functional and historical comparisons to identify similarities and differences between Vietnam and other countries in establishing the grounds, procedures, and scope of application for human rights restriction measures. This approach helps explain the causes of differences and assess the appropriateness of Vietnamese law in the context of international integration.

An empirical - normative review was applied, drawing on official data from the Supreme People's Procuracy and the Judicial Committee of the National Assembly on arrest, custody, temporary detention, prosecution, and adjudication during the 2015-2025 period. These data are used to contrast norms with practical application, thereby evaluating the level of compliance with principles of human rights restriction.

To strengthen internal validity, the article explicitly links its doctrinal benchmarks to the empirical–normative review by operationalising the European criteria-based test, legality, legitimate aim, necessity, proportionality, and safeguards against arbitrariness, through corresponding observable indicators. The official statistics are used as system-level proxies for how far these criteria operate in practice (e.g., reliance patterns, review outcomes, time-discipline, and corrective measures). These indicators do not establish unlawfulness in every individual case; they support a principled assessment of whether the standards function as substantive constraints or merely as formal labels. Normative recommendations are advanced only where doctrinal requirements and the empirical indicators jointly point to a persistent implementation gap.

3 RESTRICTIONS OF HUMAN RIGHTS IN INTERNATIONAL LAW

3.1. The Accused and the Rights of the Accused

We begin with the concept of "the accused". This concept is not uniform across international law and domestic systems, including Vietnam. Clarifying it is necessary to identify when rights-restricting measures are triggered and when procedural safeguards must apply. In the ECtHR's case-law, illustrated by *Blokhin v. Russia* (Application No. 47152/06), the relevant trigger is the existence of a "criminal charge" within the meaning of Article 6, which is an autonomous Convention concept. Domestic classification is relevant but not decisive: a "criminal charge" may arise from the official notification by a competent authority that a person is alleged to have committed a criminal offence, or from any measure that substantially affects the individual's situation. From that point, the person is treated as "the accused" for Article 6 purposes, and the corresponding safeguards must be activated.[11]

In *Deweer v Belgium*, the Court emphasised that, for the purposes of Article 6, a person is to be regarded as "the accused" from the moment a "criminal charge" arises within the meaning of the Convention.[12] That moment may be identified in two situations: (i) when a competent authority officially notifies the individual that he or she is alleged to have committed a criminal offence; or (ii) even in the absence of any formal notification or designation, when measures taken by the authorities substantially affect the individual's legal position and interests, thereby placing him or her in a position of having to confront the prospect of criminal prosecution. From that point onwards, the individual must be treated as an accused person for Article 6 purposes, and the corresponding procedural safeguards must be put in place. Similarly, in *Eckle v. Germany*, the Court reiterated that

11 *Blokhin v Russia* App no 47152/06 (ECtHR, 23 March 2016) para 179 https://hudoc.echr.coe.int/eng?i=001-161822 accessed 15 February 2026.

12 *Deweer v Belgium* App no 6903/75 (ECtHR, 27 February 1980) para 46 https://hudoc.echr.coe.int/eng?i=001-57469 accessed 15 February 2026.

Article 6 safeguards apply from the moment an individual is "substantially affected" by a suspicion that has been officially communicated.[13] We argue that, while the ECtHR adopts a substantive (fact-sensitive) approach to determining whether a "criminal charge" exists, its case-law does not provide a single, ex ante operational threshold capable of guiding public authorities in a uniform manner. Consequently, the point at which a "criminal charge" arises remains highly context-dependent and is assessed case-by-case. This reduces ex ante predictability and creates scope for discretionary or inconsistent practice at the domestic level.

We find that Dutch criminal procedure provides a particularly effective supplement to the ECtHR's concept of a "criminal charge" by offering a clear legal basis for determining the status of the person concerned. Under Article 27 of the Dutch Code of Criminal Procedure, a person is regarded as a suspect (*verdachte*) where there is a reasonable suspicion that he or she has committed a criminal offence.[14] Moreover, Dutch legal terminology does not draw a sharp formal distinction between a "suspect" and an "accused or defendant" at later stages: the same term *verdachte* is commonly used both before and after indictment. This statutory, stage-spanning concept enhances ex ante clarity as to when procedural rights apply in domestic practice, compared with the Convention approach, which is more fact-sensitive and is often reconstructed on a case-by-case basis.[15]

In Vietnam's 2015 Criminal Procedure Code, the notion of a "charged person" is shaped through officially designated procedural statuses. The Code expressly states: "Charged persons include persons being arrested, held in temporary custody, the accused and the defendant."[16] This definition effectively links "charged person" status to the existence of a formal procedural decision or a coercive measure (for example, arrest, emergency custody, detention, or a decision to prosecute or designate an individual as the accused, defendant). Accordingly, where the authorities merely institute a criminal case without identifying a specific person or imposing coercive measures, there is, technically, no "charged person" under this status-based model.

In Vietnam's 2015 Criminal Procedure Code, the notion of a "charged person" is defined in formal procedural terms: "Charged persons include persons being arrested, held in temporary custody, the accused and the defendant."[17] In practice, this means that a person

13 *Eckle v Germany* App no 8130/78 (ECtHR, 15 July 1982) para 73 https://hudoc.echr.coe.int/eng?i=001-57476 accessed 15 February 2026

14 Dutch Code of Criminal Procedure 'Wetboek van Strafvordering' (amended 1 January 2026) https://wetten.overheid.nl/BWBR0001903/2026-01-01 accessed 15 February 2026.

15 Karolina Krenmans, 'The Protection of Accused International Criminal Law According to Human Rights Law Standard' (2011) 1(2) Wroclaw Review of Law Administration & Economics 26, doi:10.2478/wrlae-2013-0026

16 Criminal Procedure Code of the Socialist Republic of Vietnam no 101/2015/QH13 (adopted 27 November 2015) art 4 (1) [in Vietnamese] https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Bo-luat-to-tung-hinh-su-2015-296884.aspx accessed 15 February 2026

17 ibid

is more likely to receive "accused-type" safeguards only after the authorities have taken an official step that assigns one of these statuses. This can create a timing problem: investigative actions may already interfere with a person's interests or reputation before the law clearly treats the person as "charged". Compared with the European approach, where fair-trial safeguards are expected to operate from the earliest meaningful stage of State accusation, Vietnam's later activation point risks leaving a protection gap during early or "free investigation" stages, unless safeguards (especially early access to counsel and the practical effect of the presumption of innocence) are provided in substance even before formal status is conferred.

To analyse what rights should apply once a person is "charged", modern criminal-procedure theory distinguishes between (i) general human rights that limit State coercion and (ii) specific procedural rights of the accused that rebalance the inherent asymmetry between the individual and prosecuting authorities. As Trechsel and Ashworth emphasise: Modern criminal procedure is structured around a dual relationship between general human rights, which set outer limits to State coercion, and specific rights of the accused that seek to rebalance the inherent asymmetry between the individual and the prosecuting authorities.[18] Under the first category, restrictions are permissible only for qualified rights and only under strict conditions.[19] The ICCPR framework further separates qualified rights from absolute (non-derogable) rights, which cannot be limited or justified by balancing; these include freedom from torture or inhuman treatment, slavery, imprisonment for failure to fulfil a contractual obligation, and retrospective criminal laws, reflected in ICCPR Articles 6, 7, 8, 11, 15, 16, and 18.[20] The second category, procedural rights, forms the core of fair-trial guarantees and aims to provide safeguards more immediately rather than wait for the close of proceedings against them. Such guarantees are not merely interests that may be restricted; they function as structural safeguards to balance State coercive power and the accused's vulnerability.[21] They also imply corresponding State responsibilities, especially duties to protect right-holders and to implement positive measures giving full effect to rights. His analytical distinction has important normative implications in contemporary criminal justice and human rights research, particularly when assessed through ICCPR Articles 9, 14, and 17 and the Human Rights Committee's General Comment No. 32 on Article 14.[22]

18 Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell 2002); Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 45.

19 Barak (n 3) 27.

20 International Covenant on Civil and Political Rights (n 8).

21 Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides, *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 174.

22 International Covenant on Civil and Political Rights (n 8); CCPR, *General Comment No 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial)* (CCPR/C/GC/32, 23 August 2007) https://digitallibrary.un.org/record/606075?ln=en accessed 15 February 2026.

3.2. International Principles and Standards on Restricting the Rights of the Accused

Restricting the human rights of the accused is invariably a problem of balancing individual liberty against the aims of criminal law, crime prevention, punishment, and the protection of society.[23] Under the Siracusa Principles, the limitation clauses of the ICCPR are designed to prevent arbitrary exercises of state power, rather than to furnish the state with a legal "tool" to curtail rights at will.[24] Accordingly, rights may be restricted only where this is genuinely necessary to safeguard public order and security.[25] In criminal proceedings, the accused occupies a structurally vulnerable position: the state may need to apply coercive measures to secure investigation, prosecution, adjudication, and public safety, yet it must still preserve a minimum core of essential entitlements (humane detention conditions, access to medical care, and effective contact with counsel and family). Coercive measures, therefore, should not be understood simply as "violations" of rights, but as restrictions with clear legal boundaries, subject to checks and balances, and constrained by absolute limits such as the prohibition of torture and cruel, inhuman, or degrading treatment. Put differently, the doctrine of permissible restrictions proceeds from the premise that restrictions are not meant to expand state power; rather, they form part of the human-rights framework intended to prevent arbitrariness and to protect the rights and lawful interests of others and of the community. This premise is operationalised through core standards of international human rights law: legality, a legitimate aim, necessity, and proportionality.[26]

3.2.1. The Principle of Legality

This is the starting point for any analysis of restrictions on the accused's rights. In practice, the risk of arbitrary restrictions in criminal proceedings is pervasive; moreover, substandard detention conditions or inhuman treatment can effectively disable the exercise of fundamental procedural rights, most notably the right of access to a lawyer and the right to adequate time and facilities to prepare a defence. For this reason, compliance with law and procedure is foundational to the imposition of arrest and detention measures, and it also

23 Elena Maculan and Alicia Gil, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts' (2020) 40(1) Oxford Journal of Legal Studies 132, doi:10.1093/ojls/gqz033.

24 *UNCHR, The Siracusa Principles* (n 4).

25 Ronald Bayer, 'The Continuing Tensions Between Individual Rights and Public Health' (2007) 8(12) EMBO Reports 1099, doi:10.1038/sj.embor.7401134.

26 *UNCHR, The Siracusa Principles* (n 4); CCPR, *General Comment* No 27: *Article 12 (Freedom of Movement)* (CCPR/C/21/Rev.1/Add.9, 2 November 1999) https://www.refworld.org/legal/general/hrc/1999/46752 accessed 15 February 2026; CCPR, *General Comment No 35: Article 9 (Liberty and Security of Person)* (CCPR/C/GC/35, 16 December 2014) https://digitallibrary.un.org/record/786613?ln=en accessed 15 February 2026; Barak (n 3) 119-45. See also, ECtHR case law on "prescribed by law" in *Sunday Times v United Kingdom (No 1)* App no 6538/74 (ECtHR, 26 April 1979) https://hudoc.echr.coe.int/eng?i=001-57584 accessed 15 February 2026.

serves to curb the overuse of pre-trial detention and its systemic consequences, including overcrowding and undue pressure on penitentiary systems.[27] Historically, the idea of legality can be traced back to Magna Carta (Clause 39), with its well-known formulation that no one shall be arrested, imprisoned, dispossessed, outlawed, exiled, or otherwise destroyed except by the "lawful judgment of his peers or by the law of the land."[28]

In modern human rights law, the legality principle is reflected in the requirement that an interference be "prescribed by law" or "in accordance with the law" under the ICCPR and the ECHR, but the key question remains what qualifies as "law" The ECtHR has consistently held that "law" must be accessible and foreseeable, formulated with sufficient precision, and accompanied by safeguards against abuse, standards developed in *The Sunday Times v United Kingdom (No 1)*[29] and applied in secret-surveillance cases such as *Kruslin v France* and *Huvig v France.*[30]

3.2.2. The Principles of Necessity

In the context of pre-trial restrictions on liberty, the requirement of necessity cannot be reduced to the mere existence of a legal rule authorising arrest or detention. The decisive question is whether the deprivation of liberty is genuinely required in the circumstances of the individual case. Under European human-rights law, a clear distinction must be drawn between the justificatory threshold for the initial arrest and that for continued pre-trial detention. At the initial stage, Article 5 § 1(c) ECHR permits arrest or detention only where there is a "reasonable suspicion" that the person has committed an offence. This threshold functions as a basic safeguard against arbitrariness by requiring objective facts or information capable of persuading an objective observer that the person concerned may have been involved in the alleged crime.[31]

27 Piet Hein van Kempen, 'Pre-Trial Detention in National and International Law and Practice: A Comparative Synthesis and Analysis' in Piet Hein van Kempen (ed), *Pre-Trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law* (Intersentia 2012) 3.

28 *Nullus liber homo capiatur, vel inprisonetur, aut dissaisatur, aut utlaghetur, aut exuletur, aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iuditium parium suorum vel per legem terre.* See, Magna Carta (1215) art 39 https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/ accessed 15 February 2026; Joshuac C Tate, *Power and Justice in Medieval England: The Law of Patronage and the Royal Courts* (Yale UP 2022) 139.

29 *Sunday Times v United Kingdom* (n 26).

30 *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) https://hudoc.echr.coe.int/eng?i=001-57626 accessed 15 February 2026; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) https://hudoc.echr.coe.int/eng?i=001-57627 accessed 15 February 2026.

31 Council of Europe, *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security* (ECtHR 2025) https://ks.echr.coe.int/documents/d/echr-ks/guide_art_5_eng accessed 15 February 2026.

However, once the process moves from initial deprivation of liberty to the question of whether detention should continue, the legal standard becomes more demanding. The persistence of reasonable suspicion remains a necessary starting point, but it is no longer sufficient on its own to justify prolonged custody. At that stage, the competent authorities must provide relevant and sufficient reasons for continuing detention in the concrete circumstances of the case. In Strasbourg jurisprudence, such reasons normally relate to identifiable procedural risks, including absconding, interference with evidence, pressure on witnesses or victims, collusion, or the risk of further offending; importantly, they must be grounded in an individualised assessment rather than in abstract assumptions or formulaic references to the seriousness of the charge.[32]

This detention-specific logic is reinforced by international human-rights standards beyond the ECHR. General Comment No. 35 of the Human Rights Committee stresses that pre-trial detention should be the exception rather than the rule and must be based on an individualised determination that it is both reasonable and necessary in all the circumstances. Detention pending trial is justified only to the extent that it is required to prevent flight, interference with evidence, recurrence of crime, or other comparable risks, and States must consider whether less intrusive measures would suffice in the particular case.[33] In the same vein, the Siracusa Principles support a narrow approach to restrictions on liberty by requiring that limitations pursue a legitimate aim, respond to a pressing need, and remain strictly proportionate to that aim. Within the pre-trial context, this supports a preference for non-custodial alternatives whenever they are capable of securing the legitimate procedural objective.[34]

Accordingly, the critique of pre-trial detention in human-rights terms is not exhausted by the abstract language of proportionality. More precisely, the legal defect lies in the failure to satisfy the detention-specific requirements of necessity, individualised reasoning, and non-arbitrariness**.** A person may not be kept in pre-trial detention merely because the alleged offence is serious, because suspicion exists, or because detention is administratively convenient. Where the authorities do not demonstrate concrete, and case-based reasons why summons, bail, supervision, or other less restrictive alternatives would be inadequate, continued detention becomes difficult to reconcile with Article 5 ECHR and Article 9 ICCPR. On this understanding, necessity operates not as a rhetorical formula but as a substantive discipline of justification: it requires the State to explain, by reference to the facts of the particular case, why deprivation of liberty remains indispensable and why no less restrictive measure can adequately secure the proper administration of justice.[35]

32 ibid

33 CCPR, *General Comment No 35* (n 26).

34 *UNCHR, The Siracusa Principles* (n 4).

35 Council of Europe, *Guide on Article 5 (n 31).*

Finally, even where detention is lawfully imposed and shown to be necessary in this narrow sense, the State remains bound by non-derogable obligations toward the detainee. No balancing logic can legitimise torture, cruel, inhuman, or degrading treatment, or detention conditions incompatible with human dignity. Thus, the requirement of necessity in pre-trial detention must always be understood within the broader structure of human-rights protection: it limits the State's power to resort to custody, while absolute rights set an outer boundary that no justificatory framework may cross.[36]

3.2.3. The Principle of Proportionality

The principle of proportionality is closely connected to substantive due process and the requirement of substantive reasonableness: it is not sufficient that a legal rule formally authorises arrest or detention; the content of that rule must itself be reasonable and capable of objective justification. Such substantive reasonableness is assessed by reference to standards including the State's legitimate need to perform its functions, the importance of the interest pursued, and the urgency of that need. On this logic, any restriction of the accused's rights must remain proportionate to the nature and seriousness of the alleged offence. Typically, the pre-trial detention of an accused charged with a less serious offence is regarded as a violation of this principle because it is unnecessary.[37]

Accordingly, in the pre-trial context, proportionality cannot be understood merely as an abstract correspondence between the seriousness of the charge and the severity of the measure imposed. It also requires the State to demonstrate that detention is truly a measure of last resort, in the sense that no less intrusive measure would be sufficient to secure a legitimate procedural objective in the circumstances of the individual case. Before maintaining a deprivation of liberty, the competent authorities must therefore give genuine consideration to alternatives such as summons, bail, judicial supervision, reporting duties, or other non-custodial restrictions. On this understanding, pre-trial detention cannot be justified by a general invocation of the gravity of the alleged offence alone; rather, it must be tested against the stricter question whether less intrusive means would adequately secure the accused's appearance, prevent interference with the proceedings, or address other concrete procedural risks.

This point is especially clear in *Letellier v France*, where the European Court of Human Rights held that continued detention is compatible with Article 5 § 3 ECHR only where the domestic authorities provide reasons that are both relevant and sufficient to show why the deprivation of liberty remains necessary.[38] The Court accepted that, at certain stages, the

36 Council of Europe, *European Convention on Human Rights (n 8).*

37 Hung Dinh The, 'Due Process, from Magna Carta to the Transitional Criminal Procedure Models-The Case of Vietnam' (2025) 29 Journal of Law & Social Deviance 2.

38 *Letellier v France* App no 12369/86 (ECtHR, 26 June 1991) https://hudoc.echr.coe.int/?i=001-57678 accessed 15 February 2026.

seriousness of the offence and the disturbance caused to public order might be taken into account, particularly where a real threat to public order persists; however, those considerations cannot by themselves sustain continued detention unless they are supported by specific facts showing that release would genuinely endanger the proceedings or public order. In other words, *Letellier* makes clear that the justification for detention must evolve and be reassessed over time rather than rest indefinitely on the seriousness of the accusation or on the initial existence of reasonable suspicion.

The same approach is reinforced by General Comment No. 35 of the UN Human Rights Committee on Article 9 ICCPR, which treats pre-trial detention as exceptional and requires an individualised determination that detention is reasonable and necessary in all the circumstances. Detention pending trial is justified only to the extent that it is needed to prevent flight, interference with evidence, recurrence of crime, or comparable risks, and the State must consider whether less restrictive alternatives would suffice. Accordingly, where the authorities fail to demonstrate concrete, case-specific risks or fail to explain why summons, bail, supervision, or other options are inadequate, pre-trial detention ceases to satisfy the strict requirement of necessity and becomes vulnerable to characterisation as arbitrary detention.

The legal criticism in such cases, therefore, is not confined to the abstract claim that detention is "disproportionate." More precisely, the defect lies in the failure to satisfy the detention-specific standards governing pre-trial custody, namely necessity, the duty to give reasons, individualised assessment, the requirement to prefer the least intrusive sufficient measure, and the prohibition of arbitrariness. On this view, proportionality at the pre-trial stage does not permit detention to be maintained merely for administrative convenience or by abstract reference to the seriousness of the offence. Rather, it requires the authorities to explain, at each stage of the proceedings, why continued detention remains genuinely necessary and why no less restrictive measure can adequately protect the proper administration of justice.

Finally, whatever justificatory framework is invoked to support restrictions at the pre-trial stage, the State must never encroach upon absolute rights, most notably the prohibition of torture and of cruel, inhuman, or degrading treatment or punishment. Even where detention is lawfully imposed and deemed necessary in the narrow procedural sense, the State remains under a non-derogable obligation to protect the detainee's life, bodily integrity, and dignity; no balancing logic may be used to legitimise violence, inhuman detention conditions, or treatment destructive of the essence of protected rights.

Although legality and necessity are often presented as transparent constraints on state power, scholarly debate has shown that balancing-based reasoning in human-rights adjudication is not always neutral in operation and may, in practice, legitimise coercive forms of state control. For that reason, the application of these principles to the accused at the pre-trial stage should not be treated as a purely descriptive matter, but examined in light of the broader debates outlined below.

3.2.4. European Debates on Rights-Limitation Principles

First, the principle of legality does not automatically guarantee procedural rigour or protection against arbitrariness. Formally, the requirements that arrest or detention be "provided by law" under the ICCPR and "in accordance with the law" or "prescribed by law" under the ECHR are often treated as safeguards against arbitrary deprivation of liberty. Yet the ECtHR's jurisprudence under Article 5 makes clear that formal compliance with domestic law does not, by itself, exclude arbitrariness: Convention "lawfulness" also requires fidelity to the rule of law and to the Convention's own guarantees. In that sense, legality is not exhausted by the mere existence of a statutory basis; it also depends on whether the legal framework possesses sufficient quality- especially accessibility, foreseeability, and safeguards against abuse, to discipline coercive power.[39]

At the same time, legality contains an important internal paradox. Detailed legal regulation of coercive measures may constrain state action, but it may equally normalise coercion by making restrictive practices appear lawful once prescribed steps have been formally observed. The critical issue, therefore, is not simply whether arrest, custody, and detention are regulated by law, but whether the law requires the State to justify those measures in a manner capable of genuinely restraining arbitrariness. Otherwise, legality risks sliding from a limit on power into a technique for legitimising power.[40] This, in turn, poses a difficult question for systems such as Vietnam: do detailed rules on arrest, custody, and detention primarily protect the accused, or do they also provide a legal infrastructure through which coercive measures may operate more smoothly in practice?

Second, in Strasbourg practice, legitimate aims such as "the prevention of disorder or crime", "public safety", or "national security" are often treated as relatively easy to invoke, with the real scrutiny shifting to legality safeguards and the necessity analysis.[41]

Against this background, the more persuasive view is that "legitimate aim" has real limiting force only when it is linked to a concrete burden of justification: the State should identify which protected interest is actually threatened, to what degree, and why

39 *Kruslin v France* (n 30); *Huvig v France* (n 30); *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015) https://hudoc.echr.coe.int/fre?i=001-159324 accessed 10 December 2025; *Sunday Times v United Kingdom* (n 26).

40 Barak (n 3); Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2016); Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) *International* Journal of Constitutional Law 468, doi:10.1093/icon/mop011. Critique of the neutrality of the balancing model and proportionality.

41 *Roman Zakharov v Russia* (n 39). See also, Council of Europe, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (ECtHR 2025) https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng accessed 10 December 2025. Noting that legitimate aims are often accepted/not disputed, while the decisive assessment concerns safeguards/necessity.

the chosen measure is directed to that specific risk, rather than relying on generic invocations of "security" or "order."[42]

Importantly, the Convention itself contains an additional backstop in Article 18 ECHR, which "restricts the restrictions" by prohibiting the use of permissible limitations for purposes other than those for which they were prescribed; this provides a doctrinal route for challenging measures that are formally framed as crime-control but in reality, pursue ulterior objectives.[43]

For pre-trial decisions affecting the accused, the implication is straightforward: it is not enough merely to invoke "detention to ensure prosecution"; decision-makers should specify the relevant risks, such as flight, interference with evidence, or reoffending, or other concrete procedural dangers, the factual basis for those risks, and whether such assertions are capable of verification.

Third, necessity and proportionality are both the strongest and the weakest points of the doctrine of rights limitation. At their strongest, they require a structured inquiry: whether the measure is suitable to achieve the stated objective, whether it is genuinely necessary in the sense that no less intrusive alternative would suffice, and whether a fair balance has been struck between the public interest and the burden imposed on the individual. In the context of pre-trial detention, this means that custody cannot be treated as a default response. The authorities must explain why summons, bail, judicial supervision, reporting obligations, or other alternatives are insufficient, and why detention remains the least intrusive measure capable of securing the proper administration of justice. The Strasbourg case law in detention cases such as *Letellier*, *Kudła*, *McKay,* and *Buzadji* points in precisely this direction.[44]

That same line of case law also shows that the justification for detention must become more demanding over time. While the initial deprivation of liberty may rest on reasonable suspicion, continued detention requires more than the persistence of that suspicion alone; it must be supported by relevant and sufficient reasons grounded in the concrete

42 Necdet Umut Orcan, 'Legitimate Aims, Illegitimate Aims and the ECtHR: Changing Attitudes and Selective Strictness' (2022) 7(1) *Bologna Law Review 7, doi:10.6092/issn.2531-6133/14860.*

43 Council of Europe, *Guide on Article 18 of the European Convention on Human Rights: Limitation on Use of Restrictions on Rights* (ECtHR 2025) https://ks.echr.coe.int/documents/d/echr-ks/guide_art_18_eng accessed 15 February 2026; 'Restrictions on the Right to Liberty and Security for Reasons Other than Those Prescribed by the European Convention on Human Rights' [2024] ECtHR Factsheet: Limitation on the Use of Restrictions on the Right to Liberty https://www.echr.coe.int/documents/d/echr/fs_article_18_restrictions_liberty_eng accessed 15 February 2026.

44 *Letellier v France* (n 38); *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000) https://hudoc.echr.coe.int/fre?i=001-58920 accessed 15 February 2026; *McKay v United Kingdom* App no 543/03 (ECtHR, 3 October 2006) https://hudoc.echr.coe.int/eng?i=001-77177 accessed 15 February 2026; *Buzadji v The Republic of Moldova* App no 23755/07 (ECtHR, 5 July 2016) https://hudoc.echr.coe.int/eng?i=001-164928 accessed 15 February 2026.

circumstances of the case. Read in this light, *McKay* is significant not only because it addresses prompt judicial control, but also because it clarifies the judicial character of the safeguard required under Article 5: the review must be independent and judicial in substance, not merely formal or confirmatory.[45] On that basis, this article argues that prosecutorial approval cannot simply be equated with independent judicial supervision. An authority that remains institutionally or functionally aligned with the prosecuting side lacks the structural distance necessary to serve as an external, impartial guarantor of liberty. If review is exercised from within, or too close to, the prosecutorial apparatus, the safeguard required by Article 5 is weakened at its core.

At the same time, necessity and proportionality are also the most vulnerable parts of the doctrine. If courts are satisfied with generic references to "balance", "public interest", "the seriousness of the offence", or "the needs of the investigation", almost any deprivation of liberty can be redescribed as proportionate. The problem, then, is not proportionality as such, but proportionality without strict evidential discipline, without concrete reasons, and without genuinely independent review. In that form, the language of rights limitation risks functioning less as a restraint on coercive power than as a legal technique for rendering that power acceptable.[46]

Finally, when these principles are considered in relation to transitional systems such as Vietnam, their practical force may be weakened by structural conditions. Vietnamese scholarship has described the pre-trial process as strongly crime-control oriented, with prosecutors playing a pivotal steering role in the pre-trial phase.[47] International human-rights materials have likewise raised concerns about limits on effective judicial oversight, while recent analyses of Vietnam's detention regime continue to note persistent implementation problems and an over-reliance on custody, including broad statutory grounds and the relative ease of extension in certain categories. These features risk entrenching detention as a routine investigative default rather than a genuine measure of last resort.[48]

Against this background, the central question is not merely whether Vietnamese law has incorporated the keywords of legality, legitimate aim, necessity, and proportionality into constitutional and criminal procedure texts. The more demanding question is whether those principles are institutionally and practically strong enough to transform detention from a routine coercive technique into an exceptional measure subject to strict and independent

45 *McKay v United Kingdom* (n 44).

46 *Buzadji v The Republic of Moldova* (n 44).

47 Minh Ky Vo, 'The Crime Control Model of Vietnam's Criminal Justice System: The Vital Role of Prosecutors and the Need for Plea Bargaining' (2025) 13(1) Vietnamese Journal of Legal Sciences 100, doi:10.2478/vjls-2025-0007.

48 Hien Thi Thu Tran and Tuan Van Vu, 'Some Reflections on Pre-trial Detention: Contrasting Vietnamese Legal Provisions with Established International Instruments' (2026) 26(1) International Criminal Law Review 137, doi:10.1163/15718123-bja10254.

justification. These tensions provide the foundation for the next part of this article, which evaluates Vietnamese law and practice not by checking formal textual convergence alone, but by asking whether the underlying safeguards have been substantively realised.

Thus, the discussion above has outlined the general doctrine of human-rights limitation and its implications for restrictions on the rights of the accused at the pre-trial stage. The following section compares these standards with the 2013 Constitution, the 2015 Criminal Procedure Code, and other legal rules on custody and detention in order to assess the extent to which Vietnamese criminal procedure law has incorporated, or failed to incorporate, the doctrine of rights limitation in the criminal field. In doing so, the article examines not only points of normative compatibility and gap, but also the institutional and practical conditions of a post-socialist procedural system in which pre-trial coercive measures are still often treated as ordinary investigative tools rather than as exceptional restrictions requiring strict justification.

4 ASSESSMENT OF THE COMPATIBILITY OF VIETNAMESE LAW WITH INTERNATIONAL STANDARDS ON RESTRICTING THE RIGHTS OF THE ACCUSED

4.1. Vietnam's Political-Legal Context

Prior to the 1992 Constitution, Vietnam's political institutions were deeply influenced by communist states utilizing a centralised power model based on Marxist theory; for a long period, bourgeois theories of the rule of law, such as the separation of powers, human rights, and judicial independence, were present only as subjects of criticism and were not deeply studied, leading to a theoretical gap. In previous Constitutions, the term "human rights" did not appear; instead, they referred to the rights and obligations of citizens. This avoidance of human rights issues is attributed to the strong influence of the 1977 Constitution of the Soviet Union.[49]

The transition toward a rule-of-law state began vigorously with the 2001 Constitutional amendments, which recognised that the Socialist Republic of Vietnam is a rule-of-law state of the people, by the people, and for the people.[50] This was a crucial starting point for Vietnam to accept rule-of-law values, particularly human rights. Consequently, research on the rule of law and human rights flourished starting in the 2000s, following the strong constitutional commitment to these principles. Legal science in Vietnam has since examined rule-of-law values, including human rights in terms of their theory and

49 *Hong Quy Mai, 'Human Rights, Fundamental Rights and Obligations of Citizens in the Constitutions of Vietnam and Orientations for Reform'* (2012) *7 Journal of Law 47 [in Vietnamese].*

50 Constitution of the Socialist Republic of Vietnam (n 10) art 2.

applicability. Vietnamese academia's research into the rule of law has yielded initial results, specifically in distinguishing between "Rule of Law" and "Rule by Law" and approaching international standards such as: declaring sovereignty belongs to the people, recognizing, guaranteeing, and protecting human rights; the rule of law, control of power, judicial independence,[51] the contents of human rights, including human rights in criminal procedure, carry a universal and international normative character that has been acknowledged, accompanied by provisions prohibiting the arbitrary restriction of human rights.[52]

It was not until the 2013 Constitution that the issue of limiting human rights was officially recognised. Compared with this provision, Article 29 of the UDHR fully embodies the spirit of the UDHR. This indicates that Vietnam pursues a relative theory of human rights. From this provision, a system of standards forms that the state must adhere to when limiting human rights, such as reason, legitimacy, necessity, proportionality, and specifically the requirement to be "according to law", covering both substantive and procedural processes.

This Constitutional provision is expected to curb arbitrary restrictions, especially in the current context where the Constitution and laws often lack direct applicability and require guidance documents for enforcement. However, we argue that limiting human rights through a statute enacted by the National Assembly, or legislation in general, is perhaps less important than the quality of such laws. A specific point of contention regarding the interpretation of "according to law" stems from research on Magna Carta, as Vietnamese jurists distinguish between "according to law" and "according to legislation". In Vietnam, "sources of law" in the broad sense include statutes and sub-law documents guiding their implementation, such as Government Decrees and Ministerial Circulars. If interpreted broadly, this would allow executive bodies and local authorities to arbitrarily impose regulations that limit human rights. Therefore, "according to law" is interpreted here as statutes enacted by the National Assembly.[53] In other words, the authority to enact statutes restricting human rights is exclusively vested in the National Assembly. It is noteworthy that the 1948 Universal Declaration of Human Rights, as well as the constitutions of many nations, employ the term 'law' rather than 'legislation', yet with the specific connotation of legislative acts promulgated by the legislature. This does not imply that limiting rights via legislation is inherently arbitrary. Crucially, any restriction, whether by statute or legislation generally, must have a mechanism for control and adjudication of unconstitutional legal documents. If such a mechanism exists, the distinction becomes less critical. More importantly, the legal provisions limiting rights, including those of the accused, must ensure substantive and procedural due process and strict enforcement.

51 Khanh Vinh Vo, 'The Principle of the Rule of Law: Theoretical Issues' (2017) 4 Journal of Law and Practice 1 [in Vietnamese].

52 Constitution of the Socialist Republic of Vietnam (n 10) art 14.

53 Cong Giao Vu and Quoc Toan Trinh (eds), *Implementation of Constitutional Rights in the 2013 Constitution* (Hong Duc 2015) 704 [in Vietnamese].

The provisions of the Constitution and laws restricting human rights have already been present and implemented in practice. For example, in Vietnam's criminal procedure in the past, there was the measure of emergency arrest of a suspect. Under this measure, the police had the authority to immediately arrest a suspect if there was clear evidence that they had committed a crime and to prevent them from fleeing. After the arrest, the police were required to report to the Procuracy for approval[54]; if rejected, the suspect would be released immediately. This was deemed unconstitutional because the Constitution mandates that no one may be arrested without a decision by the Court or a decision or approval by the Procuracy, except for flagrante delicto cases.[55] Arresting without prior Procuracy approval was thus unconstitutional. Consequently, the Criminal Procedure Code of Vietnam abolished this specific measure to align with the Constitution.

Thus we can see that the Constitution still leaves gaps regarding human rights in criminal procedure, with some rights not recognized as fundamental or lacking clear definition, such as: protection against retroactive application, the right to review the legality of arrest (habeas corpus), the right to silence or privilege against self-incrimination, the right to appeal, the right to bail, the right to use one's ethnic language, the right to call and examine witnesses, and the right not to be imprisoned for contractual inability.[56]

A debated issue on the restriction of human rights in Vietnam is the reason for the restriction. What constitutes public order, national security, or social morality? Due to the civil law tradition and lack of a constitutional interpretation mechanism, these concepts are not clarified by case law but left to specialised laws. Regarding the restriction of the accused's rights, what are the justifications? We will discuss this in a later part regarding coercive measures in criminal procedure in Vietnam.

Also, Vietnam has joined most international human rights conventions, including the UDHR, ICCPR, ICESCR, CRC, UNCAC, and UNTOC. However, Vietnam maintains reservations on certain conventions, such as Article 8, Clause 2, and Article 62, Clause 2, of UNCAC, and Article 30, Clause 2, of CAT.

54 See, Criminal Procedure Code of the Socialist Republic of Vietnam (n 16) art 81.

55 See, Constitution of the Socialist Republic of Vietnam (n 10) art 20.

56 Cong Giao Vu, 'Human Rights, Fundamental Rights and Obligations of Citizens' in Dang Dung Nguyen, Quoc Toan Trinh and Minh Tuan Dang (eds), *Scientific Commentary on the Constitution of the Socialist Republic of Vietnam 2013* (National Political Publishing House Truth 2016) 120 [in Vietnamese].

4.2. Assessment of Vietnam's Legal Framework on Restrictions of the Rights of the Accused

To evaluate restrictions on the rights of the accused in Vietnamese criminal procedure, this section applies a four-step framework grounded in European human rights reasoning: legality**,** legitimate aim, necessity, and proportionality. Accordingly, we examine whether arrest and related pre-trial restrictions are prescribed by law and embedded in an adequate legal framework.[57]

4.2.1. Legality

Notably, Vietnamese criminal procedure possesses the principle of legality (rule by law).[58] Principle of legality is understood as a requirement for all individuals and organisations to strictly comply with the regulations of the Constitution and statutes.[59] Accordingly, all criminal procedural activities, including the implementation of coercive measures, must be ensured in accordance with the law. Textually, this principle reflects the spirit of due process, meaning "according to law". However, in Vietnam, this principle is interpreted in the sense of rule by law rather than rule of law, which signifies not only following the law but also demanding high quality in the statutes themselves.[60] Rule by law implies strict adherence to the law without considering whether that law ensures fairness. In Vietnam, under rule by law, police may arrest and detain, whereas under the rule of law, arrest might not be strictly necessary. However, in practice, Vietnamese police refer to an idiom that we believe fully embodies the spirit of rule of law: "If an arrest is possible but not arresting is also possible, then absolutely do not arrest". Regarding this issue, the Human Rights Committee has explained that detention following a lawful arrest must not only be "lawful" but also "reasonable" and "necessary" in all circumstances for the stated purpose. The duty of the State Party concerned is to demonstrate that these elements are present in specific cases.[61]

In Vietnamese criminal procedure law, there are three groups of coercive measures that restrict the human rights of the accused, including: (i) preventive measures: arrest, temporary custody, temporary detention, prohibition from leaving the place of residence,

57 See: International Covenant on Civil and Political Rights (n 8) arts 9, 14; ; Council of Europe, European Convention on Human Rights (n 8) arts 5, 6; CCPR, *General Comment No 35* (n 26); *UNCHR, The Siracusa Principles* (n 4); UNODC, *Handbook on Pre-trial Detention: A Guide to Effective Use and Alternatives* (UN 2017); *Buzadji v The Republic of Moldova* (n 44); *Kudła v Poland* (n 44); *Letellier v France* (n 38); *McKay v United Kingdom* (n 44).

58 Criminal Procedure Code of the Socialist Republic of Vietnam (n 16) art 11.

59 Ngoc Hai Do, 'On Socialist Legality in the Context of Building and Perfecting the Socialist Rule-of-Law State in Vietnam' (2009) 12 Journal of State Organization [in Vietnamese].

60 ibid

61 CCPR Communication No 305/1988 *Hugo van Alphen v The Netherlands* (CCPR/C/39/D/305/1988, 15 August 1990) para 5.8 https://hrlibrary.umn.edu/undocs/session39/305-1988.html accessed 15 February 2026.

surety or guarantee, depositing money or valuables as security; (ii) coercive measures to collect evidence, including: search of persons, residences, workplaces, locations; examination of traces on the body; seizure of correspondence, telegraphs, parcels, packages; temporary seizure of objects as evidence, documents directly related to the case, access to electronic devices and data, wiretapping; and (iii) preventive measures to ensure investigative activities; asset distrainment; escorting the suspect/defendant; and temporary suspension of the suspect's position or office. Here, we primarily analyse the measure of arrest in Vietnamese criminal procedure, as this is the most common measure in the country's criminal proceedings (accounting for 83% of accused persons).[62]

Vietnam does not have measures for managing suspected persons or accused minors, house arrest, judicial supervision, or entrapment.[63] We believe that the application of specific measures depends on the practice and effectiveness of each measure chosen by each nation, provided that the principles of limiting human rights are ensured. However, if measures limiting human rights that do not involve deprivation of physical liberty can be diversified, the application of custodial measures, such as temporary custody and detention will be narrowed.

As set out above, Article 5 ECHR treats the legality of deprivation of liberty as more than the existence of a domestic legal basis: it also requires "quality of law" safeguards capable of preventing arbitrariness, including effective review and strict compliance with time limits. Building on that framework, Vietnam's criminal procedure regime largely satisfies the formal "prescribed by law" requirement. The 2015 Criminal Procedure Code (CPC) establishes a system of preventive measures and sets out comparatively specific grounds for pre-trial detention in Article 119. However, when legality is assessed in its substantive sense, legality in operation and protection against arbitrariness, several weaknesses remain, limiting overall alignment with European standards.

First, Article 119(1) of the CPC 2015 permits pre-trial detention for suspects or defendants charged with very serious or especially serious offences, without requiring additional risk-based conditions. This design risks conflating the gravity of the offence (or prospective penalty) with the threshold for imposing custodial measures. In contrast, the European legality logic demands case-specific justification grounded in concrete procedural risks (such as absconding, interference with proceedings, destruction of evidence, or reoffending). Where detention can be authorised primarily by reference to charge classification, the law's capacity to discipline discretion is weakened, and detention is more likely to operate as a default response rather than a narrowly tailored procedural measure.

62 Report of the Supreme People's Procuracy at the 4th Session of the 14th National Assembly, November 2024.

63 See, French Code of Criminal Procedure 'Code de procédure pénale' (amended 1 February 2026) https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/ accessed 15 February 2026; German Code of Criminal Procedure 'Strafprozeßordnung – stop' (amended 17 July 2025) https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html accessed 15 February 2026

Second, reported practice points to recurrent breakpoints affecting both the factual basis for detention and compliance with time limits, two core components of lawfulness. In particular, annual figures on persons placed in pre-trial detention who were later released following decisions to discontinue investigations remain consistently present over time: 179 cases (2018), 148 (2019), 124 (2020), 166 (2021), 199 (2022), 239 (2023), and 212 (2024).[64] While such numbers may be small relative to the overall volume of pre-trial detention, their persistence across consecutive years suggests that detention is sometimes authorised and approved when the evidentiary foundation or the individualised conditions for deprivation of liberty are insufficiently robust, leading to subsequent cancellation and release. Time-limit compliance concerns are also reflected in data on resolved instances of over-time detention, recorded as 138 cases (2018), 24 (2019), 14 (2020), 11 (2021), 0 (2022), 3 (2023), and 6 (2024).[65] In European terms, these patterns matter because detention may become unlawful where statutory limits are exceeded, or extensions are not supported by rigorous, transparent justification.

Third, supervisory outcomes further underline the fragility of legality in operation. Oversight activity in 2020 identified 1,242 instances of legal violations in the administration of temporary custody and detention. This indicates that, alongside decisions that comply with competence and formal procedure, there remain cases in which preventive measures are imposed without an adequate factual and legal basis, requiring remedial intervention and, in some instances, the annulment of detention and release of the affected individuals.

Finally, a structural constraint concerns the limited role of an independent judicial authority in controlling pre-trial detention at the earliest stage. The European legality model links safeguards against arbitrariness to prompt appearance before a judge or another independent judicial authority and to an effective avenue to challenge detention before a court. In Vietnam, control is centred on procuratorial approval and supervision, an internal check within the accusatorial system. This configuration can encourage file-driven and formalistic review, restrict meaningful adversarial engagement, and reduce the pressure to articulate and test individualised, case-specific grounds for detention.

In sum, Vietnam has a relatively developed statutory framework governing preventive measures, but its conformity with European legality standards remains constrained by: (i) a normative opening that allows detention to rest heavily on offence classification; (ii) year-on-year indicators of discontinuation-related releases and over-time detention, together with documented violations detected through oversight; and (iii) the absence of robust independent judicial control at the earliest stage to strengthen protection against arbitrariness.

64 'Annual Work Summary Reports of the People's Procuracy Sector, 2018–2024' (*Supreme People's Procuracy of Vietnam*, 2025) *[in Vietnamese]* http://vksndtc.gov.vn/> accessed 10 December 2025.

65 ibid

4.2.2. Legitimate Aim in Vietnam's Arrest and Pre-Trial Detention Regime

Next, we assess the substantive criteria governing human rights restrictions in Vietnamese criminal procedure (substantive due process), i.e., when custodial measures are applied**.** This inquiry is crucial for determining whether deprivation of liberty operates as a rights-respecting procedural safeguard or, conversely, becomes a matter of convenience that risks departing from international standards on legitimate aim, necessity, suitability, and proportionality, standards that are particularly salient in comparative criminal-procedure systems.

First, Vietnamese procedural theory and positive law conceptualise pre-trial detention as a coercive measure intended to secure the effective conduct of investigation, adjudication, and the execution of criminal judgments.[66] In principle, Vietnamese criminal procedure does not treat detention as mandatory for all offenders: preventive measures are to be applied only where necessary**,** signalling alignment with proportionality and necessity as structural constraints on State coercion.[67] This legislative statement matters normatively because it indicates that custodial interference must pursue a procedural objective (preserving the integrity of proceedings), rather than a punitive or symbolic purpose (pre-judging guilt, "sending a message," or satisfying public sentiment). However, the effectiveness of this "aim limitation" depends on how the statutory grounds are framed and applied. Where grounds are broadly formulated, decision-makers may satisfy the formal requirement of "procedural purpose" without demonstrating, on the facts and in an individualised manner, why detention is necessary in the particular case. Vietnamese law includes grounds such as a sufficient basis to believe a person is preparing to commit a very serious or especially serious crime, a likelihood of obstructing investigation, prosecution, or trial, and other grounds that, while intelligible, confer wide evaluative discretion on procedural authorities. In this design, the "aim" requirement risks becoming overly elastic: it may shift from a concrete, case-specific preventive objective (e.g., preventing flight or interference with evidence) to a general "safety-first" logic, under which detention is chosen as the default because it is administratively secure and institutionally risk-averse. Discretion, in itself, is not inconsistent with modern regulatory design. The comparative difference, however, is not simply the presence of discretion; it concerns how tightly the law links detention to specific operational objectives, and how robustly the system demands individualised justification and meaningful review. Many jurisdictions specify pre-trial detention grounds in more concrete terms, such as lack of stable residence, concealment or destruction of evidence, flight risk, or reasonable grounds to suspect flight (e.g., France, Germany).

66 Article 109 of the Vietnamese Criminal Procedure Code stipulates the purpose of applying preventive measures: to promptly prevent crime, or when there are grounds to prove that the accused will cause difficulties for investigation, prosecution, or trial, or will continue committing crimes, or to ensure the enforcement of judgments.

67 Nguyen Van Nguyen, *Preventive Measures and Issues of Improving Effectiveness* (People's Police 1995) 39 *[in Vietnamese]*.

Some systems go further by enumerating exhaustive statutory objectives for custodial measures thereby structuring decision-making and facilitating judicial control. In France, pre-trial detention is treated as a last resort and permitted only to achieve one or more listed aims: preserving evidence; preventing pressure on witnesses or victims (and their families); preventing collusion; protecting the accused; ensuring appearance before justice; ending the offence or preventing repetition; and ending an exceptional and persistent disturbance to public order; non-compliance with judicial-supervision obligations may also trigger detention.[68] Similar "aim-specification" can be found in other contexts: for example, a requirement to declare identity and risks relating to national security, public security, social order, self-harm, or flight are articulated as legally cognisable bases in certain systems.

The salient comparative point is that, beyond the seriousness of the accusation, custody is expected to be justified by a concrete procedural objective grounded in the circumstances of the individual case, rather than by broadly framed formulae.

Second, Article 119 of the Criminal Procedure Code: offence seriousness as a "proxy" and the risk of routinised detention. In Vietnam, the principal statutory framework for temporary detention is Article 119 of the Criminal Procedure Code. A critical issue arises where the provision permits detention for suspects or defendants charged with very serious or especially serious crimes in a manner that, in practice, may rely primarily on offence seriousness and the severity of anticipated punishment, rather than requiring additional, case-specific conditions demonstrating why detention is necessary to achieve a concrete procedural objective in that case. Illustratively, if a suspect is prosecuted for a crime punishable by up to fifteen years' imprisonment (very serious crime) or up to twenty years, life imprisonment, or the death penalty (especially serious crime), for example, homicide under Article 123(1) of the Penal Code, investigative authorities may issue a detention order without needing further conditions such as a specific flight risk, interference risk, or a structured necessity assessment.[69] This design has been criticised in Vietnamese legal commentary for effectively using charge gravity as a proxy for the "aim" of detention, thereby weakening the practical constraint that detention should be justified by necessity, suitability, and proportionality rather than by offence category alone.[70]

A predictable practical consequence is a pattern familiar to many systems: where detention is legally available on broad or charge-based grounds, authorities may follow an institutional "safety" logic, detention is possible, and non-detention is also possible, yet detention is chosen to minimise perceived responsibility should the suspect abscond or reoffend. Vietnamese research has explicitly linked this tendency to risk-averse decision-making and

68 French Code of Criminal Procedure (n 63) art 144.

69 Criminal Procedure Code of the Socialist Republic of Vietnam (n 16) art 110.

70 Duc Anh Nguyen, '*Arresting Suspects for Pre-Trial Detention under Vietnam's Criminal Procedure Law: Shortcomings and Recommendations*' [2024, 1 March] The Online Journal of the People's Courts [in Vietnamese] https://tapchitoaan.vn/bat-bi-can-tam-giam-theo-luat-to-tung-hinh-su-viet-nam-bat-cap-va-kien-nghi10385.html accessed 15 February 2026.

structural incentives to "maintain detention" in serious cases. In such circumstances, the "aim" requirement risks being reframed from a concrete procedural objective (ensuring appearance or preventing obstruction) into a general policy preference for incapacitation. From a rights perspective, this approach is difficult to reconcile with the presumption of innocence and the requirement that restrictions be justified by individualised necessity rather than by the nature of the accusation alone.[71]

Third, Empirical signals: custodial dominance over alternative preventive measures. This concern is not merely theoretical. Vietnamese empirical accounts consistently indicate that detention has long been applied at a high rate, suggesting the dominance of custodial measures over non-custodial alternatives. A recent peer-reviewed Vietnamese study reports that: The number of persons subjected to pre-trial detention also increased steadily over the years. In 2018**,** the number of persons placed in pre-trial detention was the lowest in the period under review, at 102,106**;** by 2024**,** the number of detainees had risen to 172,499. The proportion of suspects or defendants placed in pre-trial detention among all persons against whom criminal charges were initiated during 2018–2024 was relatively high (approximately 80.11%), whereas the number of charged persons not subjected to pre-trial detention was very small, accounting for only 19.89%.[72] These figures reflect a substantial reliance on custodial measures in a system that formally recognises deprivation of liberty as a measure to be used only when it is "necessary."

Equally important is the low rate of cancellation or replacement of detention orders. The same study reports that during 2012–2020, only 7.1% of detainees were released or had detention replaced by other preventive measures; during 2021–2023, the figure was 12.9%.[73] These numbers are analytically significant because where detention is rarely replaced or cancelled, it becomes harder to demonstrate that custodial interference remains continuously tethered to a concrete procedural objective that persists over time. Instead, detention may operate as a stable default condition throughout key procedural stages, even when the original rationale (e.g., preserving evidence) has weakened. Accordingly, the empirical profile reinforces the doctrinal critique of an Article 119-type design: where detention is readily available by offence category and rarely substituted by less restrictive measures, the "aim" requirement risks being satisfied by formulaic references to "procedural needs" rather than by an individualised demonstration that detention is genuinely necessary in the particular case.

71 Ngoc Kien Nguyen and Khanh Linh Nguyen, '*Abuse of Detention Measures in Criminal Proceedings and Prosecutorial Measures of the People's Procuracy*' (2025) 134(6C) Hue University Journal of Science: Social Sciences and Humanities 5, doi:10.26459/hueunijssh.v134i6C.7585 [in Vietnamese].

72 'Annual Work Summary Reports of the People's Procuracy Sector, 2018–2024' (n 64).

73 Nguyen NK and Nguyen KL (n 71). In sum, the foregoing limitations within Vietnam's legal framework create a structural vulnerability: detention may operate as a routine tool of risk management, rather than as a measure tightly justified and individually tailored to the circumstances of each case.

4.2.3. Necessity in Vietnam's Arrest and Pre-Trial Detention Regime

Assessing the necessity of pre-trial detention cannot stop at stating that, in theory, the measure serves procedural objectives; the decisive question is whether detention is genuinely necessary in the individual case, and whether it remains necessary over time. As a matter of law, Vietnam's 2015 Criminal Procedure Code recognises that pre-trial detention is an exceptional measure, to be applied in principle only where procedural risks exist and detention is necessary to ensure the proper conduct of the proceedings. The core limitation, however, is not that the system is unaware of the necessity requirement, but that necessity has not been designed or operated as a mandatory, individualised, evidence-based test. Where statutory grounds are expressed through broad formulas (e.g., "there are grounds to believe…", "there is a possibility…", "there are indications…"), decision-makers may satisfy the formal requirement of "procedural risk" without having to demonstrate, on the case file and in an individualised manner, why deprivation of liberty is necessary in the particular case. As a result, "necessity" can readily drift toward a "safety-first" logic, under which detention becomes the default option because it is administratively secure and reduces institutional exposure, rather than a last-resort measure adopted only after serious consideration of less intrusive alternatives.

Drawing on the statistical data for 2018–2024, several limitations can be identified in the practical realisation of the "necessity" criterion. First, with respect to time discipline, a minimum component of "necessity over time", the data record 196 instances of "resolved over-detention", most of which arose at the trial stage (187 cases). In 2024, over-detention at trial was reported at 0.02% of the total detainee population. Although numerically small, this remains normatively significant: once the lawful temporal limits are exceeded, detention can no longer be justified as "necessary", and instead reflects the risk that custody becomes anchored to case-processing capacity or trial scheduling constraints. Notably, the data also record sixteen unresolved instances of "continuing over-detention" during 2018–2024.[74]

The persistence of this unresolved category indicates that detection-and-remediation mechanisms, and the duty to terminate or substitute detention once its basis no longer obtains, are not fully effective. Where there is no decisive temporal "cut-off", the "necessity" standard is liable to be displaced by file-management considerations.

Second, regarding the effectiveness of oversight, the number of instances in which the Procuracy did not ratify arrest-to-detain orders and detention orders during 2018–2024 was 2,291, equivalent to 0.65% of the ratified decisions. A low rejection rate does not automatically establish that every detention request was substantively sound; rather, from a necessity perspective, it serves as a proxy suggesting that the screening of grounds and necessity may not be sufficiently robust to provide a meaningful counterweight, particularly

74 'Annual Work Summary Reports of the People's Procuracy Sector, 2018–2024' (n 64).

where asserted risks (flight or obstruction) can be invoked through formulaic reasoning. An effective oversight mechanism should require the requesting authority to demonstrate, with reference to concrete case facts, why the risk is real and why detention is indispensable. If non-ratification remains negligible, the justificatory burden risks being diluted in practice.

Third, regarding risk calibration, the data record of 622 instances (2018–2024) in which defendants who were not detained absconded and became the subject of wanted notices. This figure confirms that flight risk is real while simultaneously reinforcing the core requirement of necessity: risk must be individualised and evidence-based, rather than presumed in general terms and then translated into a broad "safety-first" logic that makes detention routine. Finally, necessity must operate as a dynamic standard subject to periodic reassessment. Among 560,788 resolved detention cases (2018–2024), detention was cancelled in 6,536 cases (≈1.17%) and substituted with other measures in 58,846 cases (≈10.49%).[75]

Read against the requirement of regular review of both legality and necessity, these proportions suggest that reassessment leading to termination or downgrading of detention may not be sufficiently robust to ensure that custody is maintained only while procedural risks genuinely persist. In sum, even where the stated aims are legitimate, the combined patterns, over-detention, very low non-ratification rates, measurable absconding risk, and modest cancellation or substitution, indicate that the "necessity" standard in Vietnamese criminal procedure risks remaining declaratory, rather than functioning as a substantive constraint that compels authorities to justify- and continuously re-justify, the indispensability of pre-trial detention in each individual case.

4.2.4. A Cumulative Assessment of Proportionality

In the present analysis, proportionality is not treated as a wholly separate inquiry that merely repeats the tests of legality, legitimate aim, and necessity. Rather, it is derived from the combined evaluation of those three requirements and functions as a synthetic judgment on whether the Vietnamese framework, taken as a whole, keeps pre-trial detention within the bounds of what can genuinely be justified**.** Looked at in that cumulative way, the difficulty in Vietnamese law does not lie in the complete absence of legal grounds, procedural aims, or rights-oriented language. The deeper problem is that, once these elements are read together, the system still appears to authorise detention with a breadth and ease that sit uneasily with a strict last-resort logic. Broadly framed statutory grounds, the continuing weight attached to offence seriousness, the weak practical position of less intrusive options, and the comparatively permissive structure governing the continuation or extension of custody in certain categories of cases all contribute to a framework in which detention is not confined with sufficient rigour to situations of demonstrable and individualised necessity.

75 ibid

What emerges, therefore, is not simply a series of isolated shortcomings under separate doctrinal headings, but a broader pattern of structural disproportionality. Even where legality can formally be established, and even where detention is linked to aims such as securing the proceedings or preventing interference with the administration of justice, the overall framework still leaves substantial room for liberty to be restricted more readily, more extensively, and for longer than a strict rights-limiting model would warrant. The statistical picture discussed above reinforces that conclusion. The sustained scale of arrest and detention, the continuing predominance of custodial measures among preventive measures, and the existence of cases later resulting in release, cancellation, non-extension, or transfer to administrative handling together suggest that deprivation of liberty continues to operate not merely as an exceptional response to concrete procedural risks, but also, in practice, as a relatively routine technique of criminal procedure. From the standpoint of proportionality, that is the central concern: the combined design and operation of the current Vietnamese framework do not yet ensure with sufficient force that the degree, duration, and incidence of detention remain limited to what is strictly justified in the individual case.

5 CONCLUSION AND RECOMMENDATIONS

This article shows that restrictions on the rights of the accused in Vietnamese criminal procedure are situated within a relatively developed legal framework, yet their level of compatibility with European standards remains only partial. At the formal level, Vietnamese law has established legal grounds for arrest, temporary custody, and pre-trial detention, and recognises that such measures should be imposed only where necessary. However, when assessed against the substantive requirements of the rule of law and European standards on protection against arbitrariness, individualised justification for detention, preference for less intrusive alternatives, and independent judicial control, the limitations of the current model become increasingly apparent. In particular, pre-trial deprivation of liberty in Vietnam remains strongly shaped by a risk-management logic that is biased toward detention; the seriousness of the offence continues to play a significant practical role in justifying detention; non-custodial options remain weak in both design and application; and independent oversight at the early stages of the process is still insufficiently robust to function as an effective safeguard against arbitrariness. In addition, certain specific provisions of the Criminal Procedure Code do not fully reflect the spirit of the principles already recognised at the constitutional and statutory levels, especially with regard to the right of defence, equality of arms, and the conditions necessary for preparing adversarial proceedings from the investigation stage onward. Accordingly, the gap between Vietnam and European standards does not lie in the complete absence of a legal basis, but rather in the fact that the principles governing the restriction of rights have not yet been fully transformed into mechanisms of substantive control over prosecutorial and investigative power.

On the basis of these findings, the article advances four recommendations.

First, Vietnam should further develop a fuller, more coherent understanding of judicial power in a rule-of-law state and institutionalise it consistently. Under the 2013 Constitution, the courts exercise judicial power; however, the substantive implications of that constitutional principle have not yet been fully realised. A core requirement of human rights protection in criminal procedure is that serious interference with personal liberty should be decided by a court, or at a minimum, be promptly subjected to effective judicial scrutiny. In contrast, in Vietnam's pre-trial stage, the approval of arrest and detention measures still primarily rests with the Procuracy, which raises doubts about the objectivity, legitimacy, and reasonableness of such decisions and heightens concerns about arbitrariness. It is, therefore, necessary to continue strengthening the constitutional and institutional foundations of judicial protection by enhancing the effective powers of the courts in matters affecting human rights, while also amending the Criminal Procedure Code so that pre-trial deprivation of liberty is progressively brought within a framework of independent judicial control.

Second, the Criminal Procedure Code should be revised to codify more rigorously the mandatory tests of necessity and proportionality for arrest, temporary custody, and pre-trial detention. The competent authority should be required to demonstrate, by reference to specific reasons, why deprivation of liberty is genuinely necessary in the individual case, what concrete procedural risks are present, and why less restrictive alternatives, such as bail, prohibition on leaving one's place of residence, or financial security, would be insufficient to achieve the relevant procedural objectives. At the same time, the law should reduce its reliance on offence classification as a direct pathway to detention, thereby ensuring that restrictions on liberty are calibrated to individualised procedural risk rather than to the abstract seriousness of the charge.

Third, both the Criminal Procedure Code and the law on the execution of temporary custody and pre-trial detention should be further reviewed to ensure closer compliance with the Convention against Torture, especially in relation to the questioning and interrogation of detained persons. This is a procedural space in which the rights of the accused are particularly vulnerable to torture, coercion, and inhuman or degrading treatment. The law should, therefore, regulate in greater detail the conditions under which interrogation may be conducted, the assessment of the detainee's health before and during questioning, the place of interrogation, the timing and duration of questioning, the mandatory use of audio-video recording, the permissible scope of questions posed by competent authorities, and the suspect's or accused person's right to refuse to answer questions that are unrelated to the allegations against them. Such reforms should be accompanied by stronger guarantees of transparency, monitoring, and effective access by defence counsel, so as to reduce the risk of torture, coercion, and forced confessions.

Fourth, the legal framework should be improved to ensure the timely termination or suspension of arrest and detention measures that are no longer necessary or that have been imposed unlawfully, while also addressing inconsistencies between broad procedural principles and specific implementing rules governing the rights of the accused. Vietnamese criminal procedure law does not provide a clear mechanism to suspend the execution of arrest measures or promptly terminate detention when it is no longer justified. This is a gap that should be addressed, with due regard to comparative experience. At the same time, specific rules governing the right of defence, access to case files, the gathering of evidence, and preparation for adversarial proceedings at the investigation stage should be reviewed to ensure that principles such as the right of defence and adversarial proceedings do not remain merely declaratory, but are supported by effective mechanisms of implementation. Only under such conditions can restrictions on rights in criminal procedure truly be brought within a framework of criminal justice that is more respectful of human rights and more closely aligned with European standards.

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Competing interests: No competing interests were disclosed.

Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organisations.

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EDITORS

ABOUT THIS ARTICLE

Cite this article
Dinh TH, 'Pre-Trial Restrictions on the Rights of the Accused in a Transitional Criminal Procedure System: Vietnam in the Light of European Human Rights Law' (2026) 9(2) Access to Justice in Eastern Europe 1-36 <https://doi.org/10.33327/AJEE-18-9.2-a000192> Published Online 20 Apr 2026

DOI: https://doi.org/10.33327/AJEE-18-9.2-a000192

***Keywords*:** *accused persons; limitation of rights; Vietnamese criminal procedure; arrest and pre-trial detention; European Convention on Human Rights; judicial control; proportionality.*

DETAILS FOR PUBLICATION

Date of Submission: 13 Dec 2025
Date of acceptance: 9 Mar 2026
Online First Publication: 20 Apr 2026
Last Publication: May 2026
Was the manuscript fast-tracked? - No
Number of reviewer reports submitted in the first round: 4 reports
Number of revision rounds: 2 rounds with major and minor revisions

Technical tools were used in the editorial process

Plagiarism checks - Turnitin from iThenticate
https://www.turnitin.com/products/ithenticate/
Scholastica for Peer Review
https://scholasticahq.com/law-reviews

AI DISCLOSURE STATEMENT

This article was prepared with the assistance of AI tools. Specifically, Grammarly was employed for proofreading during the drafting process (version reviewed: December 2025). The author confirms that all content, arguments, and conclusions were generated independently and remain their sole responsibility. No AI tool was used for generating original research findings or analysis.

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ДОСУДОВІ ОБМЕЖЕННЯ ПРАВ ОБВИНУВАЧЕНОГО В ПЕРЕХІДНІЙ СИСТЕМІ КРИМІНАЛЬНОГО ПРОЦЕСУ: В'ЄТНАМ У СВІТЛІ ЄВРОПЕЙСЬКОГО ЗАКОНОДАВСТВА У СФЕРІ ПРАВ ЛЮДИНИ

Хунг Дінь

АНОТАЦІЯ

Вступ. *У цій статті розглядаються обмеження прав людини, що накладаються на підозрюваних та обвинувачених у кримінальному провадженні. Основна увага приділяється досудовій практиці. Цей етап зосереджується на заходах, що найбільше обмежують права. Він безпосередньо впливає на свободу, право на приватність та захист. У статті європейські стандарти використовуються як основний орієнтир. Дослідження спирається на Європейську конвенцію з прав людини (ЄППЛ) та прецедентне право Європейського суду з прав людини (ЄСПЛ). Основний критерій такий: заходи повинні бути передбачені законом, мати законну мету та бути необхідними в демократичному суспільстві. Необхідність розглядається разом із пропорційністю та надійними гарантіями захисту від свавілля. Відповідно до цих стандартів, стаття ставить одне ключове питання: як кримінально-процесуальне законодавство та практика В'єтнаму розробляють, застосовують та обґрунтовують обмеження прав підозрюваних та обвинувачених, і які прогалини залишаються, коли такі обмеження оцінюються відповідно до європейських вимог законності, необхідності, пропорційності та гарантій захисту від свавілля? Дослідження зосереджено на зобов'язанні В'єтнаму побудувати правову державу, провести судову реформу та посилити захист прав людини відповідно до міжнародних зобов'язань, які він взяв на себе.*

Методи. *Дослідження поєднує доктринальний та функціонально-порівняльний аналіз з оцінкою, орієнтованою на практику. Спочатку реконструюється європейська система обмеження прав згідно з прецедентним правом ЄСПЛ та ЄСПЛ (законність, легітимна мета,*

необхідність, пропорційність та гарантії захисту від свавілля). Потім аналізуються конституційні та кримінально-процесуальні норми В'єтнаму щодо примусових та слідчих заходів, що обмежують свободу, недоторканність приватного життя та права на захист, та здійснюється їх порівняння з практикою застосування, зокрема щодо судового рішення, структурованого обґрунтування, строків та засобів правового захисту.

Результати та висновки. *Дослідження виявляє не тільки часткову конвергенцію між системою В'єтнаму та європейськими стандартами у сфері прав людини, але також і стійкі прогалини. Нормативно, в'єтнамський кримінальний процес не послідовно застосовує структурований тест на законність, необхідність та пропорційність для примусових заходів. На практиці, досудове ухвалення рішень залишається сильно орієнтованим на тримання під вартою, з обмеженим використанням менш обмежувальних альтернатив та нерівномірним обґрунтуванням конкретних справ. Інституційно, незалежний судовий контроль на стадії розслідування є відносно слабким, а ключові гарантії, на яких наголошується в європейській судовій практиці (зокрема ранній доступ до захисту, змістовний перегляд та ефективні засоби правового захисту) не завжди є надійними. У статті зроблено висновок, що тісніша відповідність можлива, якщо В'єтнам перейде до моделі обмежень, що ґрунтується на зазначених критеріях. Це вимагає кодифікованих тестів на необхідність та пропорційність, посиленого та більш інтенсивного судового контролю за заходами, що істотно обмежують права, структурованого обґрунтування рішень, пріоритетності альтернатив тримання під вартою та наслідків, що підлягають виконанню, за незаконні обмеження.*

Ключові слова. *Обвинувачені особи; обмеження прав; кримінальний процес у В'єтнамі; арешт та досудове ув'язнення; Європейська конвенція з прав людини; судовий контроль; пропорційність.*

TÓM TẮT BẰNG TIẾNG VIỆT*

Bài báo nghiên cứu

HẠN CHẾ ĐỐI VỚI QUYỀN CỦA NGƯỜI BỊ BUỘC TỘI Ở GIAI ĐOẠN TIỀN XÉT XỬ TRONG MỘT HỆ THỐNG TỐ TỤNG HÌNH SỰ ĐANG CHUYỂN ĐỔI: TRƯỜNG HỢP VIỆT NAM DƯỚI ÁNH SÁNG CỦA LUẬT NHÂN QUYỀN CHÂU ÂU

Hưng Đinh Thế

TÓM TẮT

Bối cảnh: *Bài viết này phân tích việc hạn chế quyền con người đối với người bị tình nghi và người bị buộc tội trong tố tụng hình sự, với trọng tâm là giai đoạn tiền xét xử. Đây là giai đoạn tập trung*

* The publication metadata in Vietnamese is presented as submitted by the authors.

những biện pháp can thiệp nghiêm khắc nhất và tác động trực tiếp đến quyền tự do, quyền riêng tư và quyền bào chữa. Bài viết sử dụng các tiêu chuẩn châu Âu làm cơ sở đối chiếu chủ yếu, dựa trên Công ước châu Âu về quyền con người (ECHR) và án lệ của Tòa án Nhân quyền châu Âu (ECtHR). Theo các tiêu chuẩn này, việc hạn chế quyền chỉ được chấp nhận khi được quy định rõ trong luật, nhằm theo đuổi mục đích chính đáng và là cần thiết trong một xã hội dân chủ. Yêu cầu về tính cần thiết phải được xem xét cùng với tính tương xứng và các bảo đảm hữu hiệu nhằm ngăn ngừa sự tùy tiện. Trên cơ sở đó, bài viết đặt ra câu hỏi trung tâm: pháp luật và thực tiễn tố tụng hình sự Việt Nam đang thiết kế, áp dụng và biện minh cho việc hạn chế quyền của người bị tình nghi và người bị buộc tội như thế nào, và còn tồn tại những khoảng trống gì khi các giới hạn này được đánh giá theo các yêu cầu của châu Âu về tính hợp pháp, tính cần thiết, tính tương xứng và các bảo đảm chống tùy tiện? Nghiên cứu được đặt trong bối cảnh Việt Nam cam kết xây dựng Nhà nước pháp quyền, thúc đẩy cải cách tư pháp và tăng cường bảo vệ quyền con người phù hợp với các nghĩa vụ quốc tế mà Việt Nam đã tham gia.

Phương pháp: *Nghiên cứu kết hợp phân tích học thuyết pháp lý, so sánh chức năng và đánh giá từ góc độ thực tiễn. Trước hết, bài viết tái dựng khuôn khổ giới hạn quyền theo ECHR và án lệ ECtHR, gồm các yếu tố: tính hợp pháp, mục đích chính đáng, tính cần thiết, tính tương xứng và các bảo đảm chống tùy tiện. Tiếp đó, nghiên cứu phân tích các quy định của Hiến pháp và pháp luật tố tụng hình sự Việt Nam về các biện pháp cưỡng chế và biện pháp điều tra hạn chế quyền tự do, quyền riêng tư và quyền bào chữa; đồng thời đối chiếu các quy định này với thực tiễn áp dụng, đặc biệt ở các khía cạnh như cơ chế phê chuẩn tư pháp, yêu cầu quyết định phải nêu rõ căn cứ và lý do, thời hạn áp dụng biện pháp, cũng như cơ chế xem xét lại và khắc phục vi phạm.*

Kết quả và Kết luận: *Nghiên cứu cho thấy pháp luật tố tụng hình sự Việt Nam có sự tương thích nhất định với các tiêu chuẩn nhân quyền châu Âu, nhưng vẫn còn những khoảng trống đáng kể. Xét về phương diện pháp lý, pháp luật tố tụng hình sự Việt Nam chưa quy định một cách nhất quán các tiêu chí đánh giá về tính hợp pháp, tính cần thiết và tính tương xứng đối với các biện pháp cưỡng chế. Về phương diện thể chế, cơ chế kiểm soát tư pháp độc lập ở giai đoạn điều tra còn tương đối hạn chế; đồng thời, những bảo đảm quan trọng được nhấn mạnh trong án lệ châu Âu, như quyền tiếp cận người bào chữa từ sớm, quyền được xem xét lại một cách thực chất và quyền được khắc phục hữu hiệu, chưa phải lúc nào cũng được bảo đảm đầy đủ.*

Bài viết kết luận rằng Việt Nam hoàn toàn có nền tảng pháp quyền để tiệm cận gần hơn với các chuẩn mực châu Âu nếu chuyển sang mô hình hạn chế quyền dựa trên các tiêu chí rõ ràng. Điều này đòi hỏi pháp luật phải quy định cụ thể các tiêu chí về tính cần thiết và tính tương xứng; tăng cường kiểm soát tư pháp theo hướng chặt chẽ hơn, phù hợp với mức độ xâm phạm của từng biện pháp; bảo đảm các quyết định tố tụng phải nêu rõ căn cứ và lý do áp dụng; ưu tiên các biện pháp thay thế tạm giam; và quy định rõ hậu quả pháp lý đối với các trường hợp hạn chế quyền trái pháp luật.

Từ khóa: *người bị buộc tội; giới hạn quyền; tố tụng hình sự Việt Nam; bắt và tạm giam trước xét xử; Công ước châu Âu về quyền con người; kiểm soát tư pháp; tính tương xứng.*