

# INTERNATIONAL LAW

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## THE SANCTION OF EXPULSION FROM THE STATE OF VIETNAM

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### **Abstract**

The sanction of expulsion is a significant coercive measure that a State has to remove unwanted persons from its territory. Such powers should not be used arbitrarily, but rather in the situations which the legislature decrees, by properly defined and regulated practices. Not least of the reasons for this is the need for legal certainty and avoiding being subject to the sanction of expulsion. Nonetheless a “big data” review of the 92 Vietnamese decrees which provide for this sanction reveals a number of inconsistencies. These are reviewed and analysed in detail. In doing so, the anomalous and parallel sanction of “compelled exit” is also reviewed, together with situations where the person who is the competent authority to order expulsion or compelled exit — either does not have the power to do so, or does not have sufficiently clear guidance on how to decide if these sanctions are appropriate.

The author draws a number of specific conclusions on the changes which should be implemented to correct this situation — and proposes a new Code for the handling of Administrative Offences, similar to that in the Russian Federation. In doing so, he identifies the need for an incremental approach to solving this problem, such that the Government and Legislative Assembly come to a mutual understanding of the problems to be resolved and the nature of the work to achieve this.

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From the angle of sanction of administrative violations, expulsion means compelling foreigners who have committed acts of administrative violations in Vietnam to leave the territory of the Socialist Republic of Vietnam. On the basis of reference to the laws of some countries in the world on the issue of expulsion, the author made some comments and suggested directions to perfect the form of expulsion under Vietnamese law.

### **Keywords**

The administrative sanctions, sanction forms, expulsion, remedial measures, Vietnam, big data, decree

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## **I. INTRODUCTION**

Expulsion is a coercive measure of the State in order to compel a foreigner who breaks the law to leave the territory of a certain country. Depending on the law of each country, the expulsion is considered as a sentence provided in the Criminal Law or an administrative coercive measure regulated by the Administrative Law. The aim of this sanction is to eliminate and prevent foreigners from breaking the law. It is also used to protect the rights and interests of citizens and organisations. In Vietnam, expulsion is considered as a sentence provided in the Criminal Law or an administrative coercive measure regulated by the Administrative Law.

## II. EXPULSION IN VIETNAMESE LAW

Article 37 of *Vietnamese Criminal Code in 2015* (amended and supplemented in 2017) stipulates the expulsion sentence applicable to foreigners who commit criminal offences in the Vietnamese territory. Article 27 of the *Law on Handling of Administrative Violations in 2012* also provides the sanction of expulsion for foreigners committing administrative violations in the Vietnamese territory. However, there should be a distinction between the sanction of expulsion defined in Article 27 of *Law on Handling of Administrative Violations in 2012* with the sentence of expulsion defined in Article 37 of the *Criminal Code in 2015* (amended and supplemented in 2017).

As for the method of expulsion, expulsion in criminal cases and expulsion in administrative cases are similar in that the foreign offender (criminal or administrative) must leave the territory of Vietnam. Under the regulation of the criminal law and administrative law, international treaties shall be applied to foreigners who commit breaches of regulations of law, except otherwise provided for by international treaties of which the Socialist Republic of Vietnam is member.

In addition, both criminal and administrative law allow the adjournment of the expulsion sentence and the sanction of expulsion for severely ill foreigners, for emergencies or for health reasons, and in cases where force majeure prevents the carrying out of the decision on expulsion. However, the legal nature of the expulsion in the criminal law is decided by the court completely different from the sanction of expulsion decided by the Director of the Immigration Management Department or the Directors of provincial-level Police Departments.

Specifically, the expulsion sentence is recorded in the penalty system as provided for in the *Criminal Code in 2015* (amended and supplemented in 2017) while the expulsion in administrative cases is regulated in the *Law on Handling Administrative Violations in 2012* and decrees on sanction of administrative violation in a number of areas.

The expulsion sentence is one of the strictest coercive measures of the State applicable to foreign individuals committing one of the crimes defined in the *Criminal Code in 2015* (amended and supplemented in 2017). The expulsion sentence is defined in Article 37 of the *Criminal Code in 2015* (amended and supplemented in 2017), which is not

regulated by any other article in the *Criminal Code in 2015* (amended and supplemented in 2017).<sup>2</sup> That means the expulsion sentence shall be applied to any offence set forth in the Crimes Offence of the Criminal Code in 2015 (as amended and supplemented in 2017).<sup>3</sup> Meanwhile, the sanction of expulsion is the coercive measure for foreigners committing administrative violations in Vietnam. The sanction of expulsion shall be applied to the specific administrative violations prescribed in the decrees on sanction of administrative violations. The expulsion sentence shall be applied according to the judicial procedures while the sanction of expulsion shall be applied according to the administrative procedures.

In addition, a person to whom the expulsion sentence is applied as a result of a criminal conviction is an offender. On the other hand, a person whom is subject to expulsion as an administrative sanction does not have a conviction. Foreigners who are subject to the expulsion, will be allowed to re-enter Vietnam after 3 years.<sup>4</sup> However, there are now no specific regulations on whether foreigners who are subjected to the expulsion sentence for criminal reasons could be allowed to return to Vietnam or not.

The following table highlights the distinction criteria, the sanctions of expulsion, and the sentence itself.

Distinction criteria	Sanction of expulsion	Expulsion sentence
1	2	3
Application conditions	To be applied to the specific administrative violations prescribed in the decrees on sanction of administrative violation	To be applied to any offence set forth in the Crimes Offence of the Criminal Code 2015 (amended and supplemented 2017)
Legal bases	Law on Handling of administrative violations in 2012	Criminal Code in 2015 (amended and supplemented 2017)

<sup>2</sup> Criminal Code in 2015 (amended and supplemented in 2017) regulates 538 offenses.

<sup>3</sup> Cao Vu Minh (2018). Recommendations on Expulsion penalty in Vietnamese Criminal Law. Internal Affairs Magazine. No 57.

<sup>4</sup> Law on Entry, exit, transit, and residence of foreigners in Vietnam in 2014, Art. 21 (5).

1	2	3
Authority to apply	Directors of provincial-level Police Departments; Director of the Immigration Management Department	People's Courts at all levels
Expression form	Decision on expulsion	Judgment on expulsion
Consequence	No conviction	Conviction
Executory subject	The Immigration Management Department (Ministry of Public Security) The immigration management sections (The provincial-level Police Department)	The criminal sentence execution authority
Capable of returning Vietnam	After 3 years from the effective date of expulsion	No specific regulation

An expulsion sentence which is specified in the *Criminal Code in 2015* (amended and supplemented in 2017) could create a unified law application. Meanwhile, the sanction of expulsion is not specified in the *Law on Handling Administrative Violations in 2012*, which is adduced to the decrees on sanction of administrative violations. However, these decrees themselves are even not clear, creating inadequacies in the application process. Therefore, within this paper, the author focuses on analysing the sanction of expulsion in the *Law on Handling Administrative Violations in 2012* and the decrees on sanction of administrative violations.

### III. THE SANCTION OF EXPULSION IN THE LAW ON HANDLING ADMINISTRATIVE VIOLATIONS IN 2012 AND THE DECREES ON SANCTION OF ADMINISTRATIVE VIOLATIONS

#### 3.1. The Statistics of the Government's Decrees on Regulating the Expulsion

Article 27 of the *Law on Handling of Administrative Violations in 2012* provides that “Expulsion is a sanction which compels a foreigner who commits an administrative violation in Vietnam to leave the territory of the Socialist Republic of Vietnam.” Therefore, the *Law*

*on Handling Administrative Violations in 2012* briefly stipulates the sanction of expulsion and delegates the right to regulate in details the application of the form of expulsion to the Government. Based on that, the Government shall regulate which administrative violations shall be subject to the form of expulsion; the conditions for application of this sanctioning form.

By surveying the Government's decrees on regulating the sanction of administrative violations in a number of areas, we have some statistics as follows:

— The total number of surveyed decrees: According to statistics of the Ministry of Justice of Vietnam, by the year 2018, the Government of Vietnam has issued 92 different decrees on sanctioning administrative violations in the fields.<sup>5</sup> Therefore, a survey was conducted on 92 decrees.

— The number of decrees on regulation on sanction of administrative violation is 11 decrees (accounting for 11,9 %). These are Decree No 55/2009/ND-CP on sanctioning of administrative violations of gender equality<sup>6</sup>; Decree No 107/2013/ND-CP on regulating sanction of administrative violations in atomic energy<sup>7</sup>; Decree No 138/2013/ND-CP on penalties for administrative violations pertaining to education (amended and supplemented 2015);<sup>8</sup> Decree No 159/2013/ND-CP on providing for administrative penalties for violations arising in the realm of journalism and publishing<sup>9</sup>; Decree No 167/2013/ND-CP on regulations on sanction of administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence<sup>10</sup>; Decree No 174/2013/ND-CP on regulations sanctioning administrative violations in the field of postal, telecommunications, information technology and radio frequency

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<sup>5</sup> Ministry of Justice's, Report No 09/BC-BTP on summarizing 5 years of implementing the Law on Handling Administrative Violations in 2012 (from 2013 to 2018).

<sup>6</sup> Decree No 55/2009/ND-CP dated June 10, 2009.

<sup>7</sup> Decree No 107/2013/ND-CP dated September 20, 2013.

<sup>8</sup> Decree No 138/2013/ND-CP dated October 22, 2013 (amended and supplemented by Decree No 79/2015/ND-CP dated September 14, 2015).

<sup>9</sup> Decree No 159/2013/ND-CP dated November 12, 2013.

<sup>10</sup> Decree No 167/2013/ND-CP dated November 12, 2013.

(amended and supplemented 2017)<sup>11</sup>; Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulates<sup>12</sup>; Decree No 64/2013/NĐ-CP on penalties for administrative violations against the laws on scientific activities and technology transfers **(amended and supplemented 2014)**<sup>13</sup>; **Decree No 95/2013/ND-CP on penalties of administrative violations in labor, social insurance and overseas manpower supply by contract (amended and supplemented 2015)**<sup>14</sup>; Decree No 103/2013/ND-CP on stipulating the handling of administrative violations in fisheries fields (amended and supplemented 2017)<sup>15</sup>; and Decree No 67/2017/ND-CP on regulations on sanction of administrative violation in the field of petroleum<sup>16</sup>.

Criteria	The total number of surveyed decrees	The number of decrees on regulation on sanction of administrative violation
Amount	92	11
Percentage	100 %	11,9 %

— Among 11 decrees on regulating the sanction of expulsion, one of these decrees prescribes expulsion as a principal sanction (accounting for 9 %). This is Decree No 95/2013/ND-CP (amended and supplemented by Decree No 88/2015/ND-CP).

— Among 11 decrees on regulating the form of expulsion, seven of these decrees prescribe expulsion as an additional sanctioning form (accounting for 64 %). These are Decree No 107/2013/ND-CP; Decree No 138/2013/ND-CP (amended and supplemented 2015); Decree No 159/2013/ND-CP; Decree No 174/2013/ND-CP (amended

<sup>11</sup> Decree No 174/2013/ND-CP dated November 13, 2013 (amended and supplemented by Decree No 49/2017/ND-CP dated April 4, 2017)

<sup>12</sup> Decree No 176/2013/ND-CP dated November 14, 2013.

<sup>13</sup> Decree No 64/2013/NĐ-CP dated June 27, 2013 (amended and supplemented by Decree No 93/2014/ND-CP dated October 17, 2014).

<sup>14</sup> Decree No 95/2013/ND-CP dated August 22, 2013 (amended and supplemented by Decree No 88/2015/ND-CP dated October 10, 2015).

<sup>15</sup> Decree No 103/2013/ND-CP dated September 12, 2013 (amended and supplemented by Decree No 41/2017/ND-CP dated April 5, 2017).

<sup>16</sup> Decree No 67/2017/ND-CP dated May 25, 2017.

and supplemented 2017); Decree No 64/2013/NĐ-CP (**amended and supplemented 2014**); Decree No 103/2013/ND-CP (amended and supplemented 2017); and Decree No 67/2017/ND-CP.

— Among 11 decrees on regulating the form of expulsion, three of the decrees prescribe expulsion as a principal or an additional sanction (accounting for 27 %). These are Decree No 55/2009/ND-CP; Decree No 167/2013/ND-CP; and Decree No 176/2013/ND-CP.

Criteria	The number of decrees on regulation on sanction of administrative violation	The number of decrees prescribes expulsion as a principal sanction	The number of decrees prescribe expulsion as an additional sanction	The number of decrees prescribe expulsion as a principal or an additional sanction
Amount	11	1	7	3
Percentage	100 %	9 %	64 %	27 %

— Among 11 decrees on regulating the form of expulsion, five of them clearly prescribe the competence to apply the form of expulsion right in these decrees (accounting for 46 %). These are Decree No 167/2013/ND-CP; Decree No 174/2013/ND-CP (amended and supplemented 2017); Decree No 176/2013/ND-CP; Decree No 95/2013/ND-CP (amended and supplemented 2015); and Decree No 103/2013/ND-CP (amended and supplemented 2017).

— Among 11 decrees on regulating the form of expulsion, two of them do not clearly stipulate the competence to apply the form of expulsion right in these decrees (accounting for 18 %). These are Decree No 138/2013/ND-CP (amended and supplemented 2015); and Decree No 67/2017/ND-CP.

— Among 11 decrees on regulating the expulsion as a sanctioning form, four of the decrees are adduced to the Law on Handling of Administrative Violations in 2012 on the competence to apply the expulsion as a sanctioning form (accounting for 36 %). These are Decree No 55/2009/ND-CP; Decree No 107/2013/ND-CP; Decree No 159/2013/ND-CP; and Decree No 64/2013/NĐ-CP (**amended and supplemented 2014**).



Criteria	The number of decrees on regulation on sanction of administrative violation	The number of decrees clearly prescribe the competence to apply the sanction of expulsion right in these decree	The number of decrees do not clearly stipulate the competence to apply the sanction of expulsion right in these decrees	The number of decrees are adduced to the Law on Handling of Administrative Violations in 2012 on the competence to apply the expulsion as a sanction
Amount	11	5	2	4
Percentage	100 %	46 %	18 %	36 %

### 3.2. Specific Violations are Subject to Expulsion

Decree No 55/2009/ND-CP on sanctioning of administrative violations of gender equality prescribing the application of the principal sanction or additional sanction is the expulsion of foreigners from administrative violations of gender equality in the Vietnamese territory.

Decree No 107/2013/ND-CP on regulating sanction of administrative violations in atomic energy prescribing the application of the additional sanctions of expulsion to the following acts: *“appropriation, sabotage, transfer, illegal use of source nuclear materials, nuclear materials and nuclear equipment”*.

Decree No 138/2013/ND-CP (amended and supplemented 2015) on penalties for administrative violations pertaining to education, prescribing the application of the additional sanctions of expulsion to the following acts: *“organize enrollment of educational programs with foreign elements without being licensed to carry out in the territory of Vietnam.”*

Decree No 159/2013/ND-CP on providing for administrative penalties for violations arising in the realm of journalism and publishing, prescribing the application of the additional sanctions of expulsion to

the following acts: *“storing and distributing publications with contents banned in publishing activities.”*

Decree No 167/2013/ND-CP on regulations on sanction of administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence, prescribing the application of the additional sanctions of expulsion to the following acts:

- Stealing assets;
- Openly appropriating the others' assets;
- Using deceitful tricks or running away to appropriate the others' assets;
- Illegally using the others' assets;
- Crossing national border without entry or exit procedures as prescribed;
- Evading, organizing or helping the others hide in the entry or exit vehicles for entering Vietnam or going abroad;
- Permitting the others to use their Passports or valuable papers in lieu of Passports to perform acts in contradiction with regulations of law;
- Using Passport or other valuable papers in lieu of Passport of others for entry, exit or transit;
- A foreigner fails to register his/her temporary residence as prescribed or uses a temporary residence certificate, temporary residence card, or permanent residence card which has expired for 16 days or more without the permission of a competent authority;
- Foreigners have been issued with permanent residence card but changed their address without notification for re-issue;
- Illegally gambling which are lost or won in cash or in kind;
- Gambling with machine or illegal electronic games;
- Betting in cash or in other forms in sports competition, entertainment or other activities;
- Selling illegal lottery sheet or printed matters used for playing illegal lottery;
- Failing to fully and promptly fulfill the written requirements on fire prevention and fighting from the competent authority;

— Failing to appoint responsible persons to take part in the inspection team of fire prevention and fighting;

— Failing to organize self inspection of fire prevention and fighting as prescribed;

Decree No 174/2013/ND-CP (amended and supplemented 2017) on regulations sanctioning administrative violations in the field of postal, telecommunications, information technology and radio frequency, prescribing the application of the additional sanctions of expulsion to the following acts:

— *Trading, exchanging, displaying and propagating postage stamps with contents, images, symbols, signs of agitation and enmity between peoples, ethnic groups and religions; there is wrong content on Vietnam's national territorial sovereignty.*

— *Using, leasing and lending subscriber terminal equipment, specialized telecommunication goods to transfer international telephone traffic in contravention of law provisions.*

— *Use telecommunications services to perform prohibited acts in telecommunications activities.*

Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulates, prescribing the application of the principal sanction or the additional sanctions of expulsion to the following acts:

— *Practicing without a practicing certificate.*

— *Practicing at the time of revocation of practice certificate, practice suspension.*

Decree No 64/2013/ND-CP (**amended and supplemented 2014**) on penalties for administrative violations against the laws on scientific activities and technology transfers, prescribing the application of the additional sanctions of expulsion to the following acts:

“*Technology transfer of the list of technologies banned from the transfer.*”

**Decree No 95/2013/ND-CP (amended and supplemented 2015)** on penalties of administrative violations in labour, social insurance and overseas manpower supply by contract, prescribing the application of the principal sanction of expulsion to the following acts:

— *Work but do not have a work permit in accordance with the law, unless it is not a work permit;*

— *Use the expired work permit.*

\* Decree No 103/2013/ND-CP (amended and supplemented 2017) on stipulating the handling of administrative violations in fisheries fields, prescribing the application of the additional sanctions of expulsion to the following acts:

*“Fishing activities in Vietnamese waters without a fishery operation license”.*

\* Decree No 67/2017/ND-CP on regulations on sanction of administrative violation in the field of petroleum, prescribing the application of the additional sanctions of expulsion to the following acts:

— *Conducting oil and gas exploration and exploration activities in the State sector, declaring the prohibition or temporary prohibition without giving out any illegal benefits or profits of under 100,000,000 VND.*

— *Trespassing territorial waters, contiguous regions, exclusive economic zones and continental shelf of the Socialist Republic of Vietnam in order to study and search for oil and gas exploration without generating resources or illicit profits of less than 100,000,000 VND.*

— *Trespassing in the land, islands, internal waters, territorial waters, contiguous regions, exclusive economic zones and continental shelf of the Socialist Republic of Vietnam in order to exploit oil and gas.*

### **3.3. Some Practical Issues of Expulsion in Vietnam**

Firstly, with the clear provision that “The Government shall detail the application of the sanction of expulsion,” Law on Handling Administrative Violations in 2012 is still actually an intransitive law. This means this law is only a general provision of a larger Code on sanction of administrative violation.

This also means that National Assembly does not fully perform legislative duties. Delegating to prescribe in detail the sanction of expulsion to the Government is somewhat contrary to the spirit of the Constitution of 2013 because the issues relating to human rights, fundamental rights and obligations of citizens need regulating in law.<sup>17</sup> With this delegation, the Government may lack the actual basis or arbitrarily prescribe which behavior and conditions applied to the sanction of expulsion without fearing of the control from the National Assembly.<sup>18</sup>

The issue is why the act of *“foreigners travelling in the territory of Vietnam without Passport or valuable papers in lieu of Passport”* shall be imposed the sanction of expulsion.<sup>19</sup> By comparison, the act of *“foreigners entering border areas or border belts having no prescribed papers”* cannot be imposed the sanction of expulsion — which is surely anomalous.<sup>20</sup>

Considering the correlation, the act of *“foreigners enter border areas and border belts having no prescribed papers”* still has the nature and extent which is surely more dangerous than that of *“foreigners in the territory of Vietnam travelling without Passport or valuable papers in lieu of a passport.”*

Further, why do Decree No 138/2013/ND-CP (amended and supplemented 2015) on penalties for administrative violations pertaining to education, Decree No 64/2013/ND-CP (**amended and supplemented 2014**) on penalties for administrative violations against the laws on scientific activities and technology transfers, and Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulate and regulate the application of the sanction of expulsion?

<sup>17</sup> Nguyen Canh Hop (2015), Comment on Law on Handling Administrative Violations in 2012, Publisher HCMC National University, para. 213.

<sup>18</sup> Do Hoang Yen (2007). Law on handling administrative violations in some countries in the world. Legislative Studies. No 107.

<sup>19</sup> Decree No 167/2013/ND-CP, Art. 17 (1).

<sup>20</sup> Decree No 169/2013/ND-CP, Art. 6 (2).

Meanwhile, matters directly relating to national security and territorial sovereignty have arguably more important objects to protect such as the management and protection of national borders,<sup>21</sup> waters, islands and continental shelf<sup>22</sup> — where there is not a stipulation of the application of the sanction of expulsion? Why are there only 11 Government's decrees (accounting for 18 %) on sanction of administrative violation in a number of areas which “boldly” regulate the application of the sanction of expulsion? Why is there only one Governmental decree regulating expulsion imposed as a principal sanction?

Then, what is the nature and extent of violations which may be sanctioned in the form of expulsion suitably? All in all, this is the most important issue of the law on sanctioning administrative violations, not the general issues stipulated in the *Law on Handling of Administrative Violations in 2012*. It can be affirmed in reality, the sanctioning of violations is based only on specific decrees and not on general provisions passed by the National Assembly in the *Law on Handling of Administrative Violations in 2012*. Therefore, the issues relating to the sanction of expulsion is still only adjusted in the subordinate laws.

*Secondly*, many violations have the same composition but have different forms of sanctions. Some violations shall be subject to sanction of expulsion, some of them shall not be subject to this sanction.

Due to the specific violations regulated in the specialised decrees, there are a lot of decrees issued, resulting in the same behaviour, with the same offending composition, but adjusted in many different decrees. The problem is that with the same violation, there is a decree to apply the sanction of expulsion while others decrees do not regulate the application of this sanction.

For example, Decree No 167/2013/ND-CP regulates the act of “stealing assets; Openly appropriating the others’ assets; Using deceitful tricks or running away to appropriate the others’ assets” shall on conviction be a matter for which an offender is liable to a fine of

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<sup>21</sup> Decree No 169/2013/ND-CP sanctioning administrative violations in the field of national border management and protection.

<sup>22</sup> Decree No 162/2013/ND-CP (amended and supplemented by Decree No 23/2017/ND-CP) sanctioning administrative violations in the sea, islands and continental shelf of the Socialist Republic of Vietnam.

between 1,000,000 VND and 2,000,000 VND and may be sanctioned in the form of expulsion.<sup>23</sup> Meanwhile, the act of “*stealing, appropriate items, equipments or asserts in the restricted area of airport, airfield*” is only imposed a fine of from 5,000,000 VND to 10,000,000 VND without being expelled.<sup>24</sup>

After all, these two acts are stealing, appropriating asserts of individuals and organizations. These two acts are carried out on the territory of Vietnam, whether they are in “*airport, airfield*”, they are still in the territory of Vietnam.<sup>25</sup> And they are naturally administrative violations according to the law of Vietnam. In terms of nature and extent, the act of “*stealing, appropriate items, equipments or asserts in the restricted area of airport, airfield, airplane*” can not be less dangerous than those of “*Stealing assets; Openly appropriating the others’ assets; Using deceitful tricks or running away to appropriate the others’ assets.*” This is reflected in the logical thinking of the lawmakers when regulating the fine high or low based on these behaviours. But the unreasonable thing is that the violations with more serious nature and extent and with the higher fine can not be deported. Why is that the violations with less serious nature, extent and lower fine can be deported? Does the lawmaker consider that higher fine which are enough to deter or punish should not be expelled?

Similarly, Decree No 167/2013/NĐ-CP stipulates the acts “*illegally gambling which are lost or won in cash or in kind*” are liable to a fine of from 1,000,000 VND to 2,000,000 VND and may be sanctioned in the form of expulsion.<sup>26</sup> Meanwhile, the act of “*gambling or letting other people take advantage of the office or on the means of transportation in the area of airport, airfield or airplane*” shall be imposed a fine of from 5,000,000 VND to 10,000,000 VND, but without the the application of the sanction of expulsion.<sup>27</sup>

According to point b, clause 1, Article 6 of Decree No 169/2013/ND-CP, the act “*failure to declare or concealment or provision of Assistance*

<sup>23</sup> Decree No 167/2013/ND-CP, Art. 15 (1).

<sup>24</sup> Decree No 162/2018/ND-CP, Art. 26 (5).

<sup>25</sup> Law on the Handling of Administrative Violations in 2012, Art. 5 (1).

<sup>26</sup> Decree No 167/2013/ND-CP, Art. 26 (2).

<sup>27</sup> Decree No 162/2018/ND-CP, Art. 26 (5).

*for others to illegally travel or reside in the border area*” shall only be sanctioned as a caution or a fine of from 300,000 VND to 500,000 VND. Meanwhile, point a, clause 5, Article 17 of Decree No 167/2013/ND-CP stipulates the sanction of acts of “*helping, receiving, sheltering or enabling others to go abroad, stay abroad, enter Vietnam, stay in Vietnam or crossing national borders illegally*” brings with it a fine of between 15,000,000 VND and 25,000,000 VND and may be sanctioned in the form of expulsion.

However, these two acts are intersecting and difficult to distinguish clearly in all cases. The act of a foreigner concealing or providing assistance for others to illegally travel or reside in the border area can completely occur in the border area. Therefore, the competent authorities may discretionarily choose to impose fines under Decree No 169/2013/ND-CP or Decree No 167/2013/ND-CP.

The paradox is that when sanctioning according to Decree No 167/2013/ND-CP, the competent authorities can apply the sanction of expulsion. Conversely, when sanctioned according to the Decree No 169/2013/ND-CP, this form of sanction can not be applied. This inadequacy leads to the fact that the competent persons can “flexibly” apply the sanction of expulsion under Decree No 167/2013/ND-CP or Decree No 169/2013/ND-CP for the same violation.

The act of “*Failing to organise self inspection of fire prevention and firefighting as prescribed*”<sup>28</sup> shall bring a liability of a fine of from 300,000 VND to 500,000 VND and may be sanctioned in the form of expulsion. Conversely, the act “*failure to equip firefighting equipment at the office building or failure to conduct periodical inspection of firefighting equipment*”<sup>29</sup> brings a liability for a fine of from 40,000,000 VND to 50,000,000 VND but no sanction for expulsion. Meanwhile, “*failing to organise self inspection of fire prevention and fighting as prescribed*” is only a matter of larger legal scope of “*failure to equip firefighting equipment at the office building or failure to conduct periodical inspection of firefighting equipment.*” It is important to note that violations with lower fines can be expelled, while those with higher

<sup>28</sup> Decree No 167/2013/ND-CP), Art. 28 (2).

<sup>29</sup> Decree No 139/2017/ND-CP, Art. 67 (3).



finances can not be expelled. Why is that? All these issues are not answered thoroughly in the legal documents.

Thirdly, many decrees do not explicitly stipulate the conditions for imposing the sanction of expulsion.

Among the 11 decrees mentioned above, most of the decrees stipulate in details the violations that are subject to the sanction of expulsion. Specifically, foreigners who fall under these acts *“working without a work permit or using an expired work permit”*,<sup>30</sup> *“trading, exchanging, exhibiting or distributing postage stamps with contents, images, signs or symbols in contravention of social ethics, and traditional habits and customs of Vietnam”* shall be expelled.<sup>31</sup> These specific and clear regulations facilitate the application of legislation unitedly.

In addition to these improvements, some Governmental decrees do not provide specific conditions for the application of the sanction of expulsion. Specifically, Decree No 167/2013/ND-CP stipulates that *“foreigners who have acts of administrative violation specified, depending on the seriousness of the violation, may be sanctioned in the form of expulsion from the Socialist Republic of Vietnam.”*<sup>32</sup> Therefore, based on *“seriousness of violation”*, it is understood that the competent persons shall apply the sanction of expulsion or not on a case-by-case basis.

Similarly, Article 30 of Decree No 138/2013/ND-CP (amended and supplemented 2015) stipulates that *“any foreigner who commits any administrative violation in Clause 7 of this Decree which is liable to expulsion from Vietnam shall be handled according to the Decree of the Government on impoundment and escort under administrative procedures and suffer the penalty according to administrative procedures.”* As a result, not all foreigners who organise the enrolment

<sup>30</sup> Decree No 95/2013/ND-CP (amended and supplemented 2015), Art. 22 (1).

<sup>31</sup> Decree No 174/2013/ND-CP (amended and supplemented 2017), Art. 12.

<sup>32</sup> In Decree No 167/2013/ND-CP, Clause 6 Article 5, Clause 6 Article 12, Clause 6 Article 13, Clause 4 Article 15, Clause 5 Article 16, Clause 9 Article 17, Clause 5 Article 19, Clause 7 Article 21, Clause 3 Article 23, Clause 7 Article 26, Clause 5 Article 28, Clause 3 Article 29, Clause 8 Article 30, Clause 7 Article 31, Clause 8 Article 32, Clause 4 Article 33, Clause 5 Article 40, Clause 6 Article 42, Clause 5 Article 43 stipulates the application of expulsion penalties for foreigners violating.

for an international program without permission in Vietnam shall also be subject to the sanction of expulsion. On a case-by-case basis, based on the “*seriousness of violation*”, the competent persons will decide whether to impose the sanction of expulsion or not.

The issue is which criteria are to be used when deciding the “*seriousness of violation*”? Regrettably, the Law on Handling of Administrative Violations in 2012, the Decree No 167/2013/ND-CP and Decree No 138/2013/ND-CP (amended and supplemented 2015) do not contain any provisions defining or regulating the “*seriousness of violation*” as the basis for the application of the sanction of expulsion. So, when the foreigners violate the provisions on the application of form of expulsion, which criteria will be used by the competent authorities to define “*seriousness of violation*” as the basis for the execution of expulsion? With this discretionary regulation, it can be seen that, in many cases, the competent authority will also be anxious to make an expulsion decision because it is easy to violate the principle of “*objective and proper competence, ensure fairness, in accordance to law provisions*” specified in clause 1, Article 3 of the Law on Handling of Administrative Violations in 2012.

Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulates a fine of between 30,000,000 VND and 40,000,000 VND for the acts “*practicing without a practicing certificate; (or) Practicing while (a) practicing certificate is revoked or suspended.*”<sup>33</sup> Any foreigner that recommit one of the violations in point a and point b clause 5 of this Article is to be expelled from Vietnam. However, Decree No 176/2013/ND-CP does not stipulate that this sanction shall be applied as the principal sanction or additional sanction.

Accordingly, two possibilities for foreigners who recommit are: (i) being deported only because deportation is applied as the principal form (ii) being fined (principal sanction) and expulsion (additional sanction). This leads to a confusion of comprehension and application of law between competent authorities.

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<sup>33</sup> Decree No 176/2013/ND-CP, Art. 28 (5).

*Fourthly*, there are two Government's decrees which do not clearly define even the competence to apply the sanction of expulsion.

As stated, under clause 7, Article 8 of Decree No 138/2013/ND-CP (amended and supplemented 2015), foreigners shall be imposed fines of from VND 40,000,000 to VND 60,000,000 for the organisation of enrolment for an international program without permission in Vietnam (principal sanction) and shall be expelled from Vietnam (as an additional sanction). In cases where foreigners commit acts of organising the enrolment of international programs without permission in Vietnam, if being fined from 40,000,000 VND to 60,000,000 VND, the sanctioning competence may belong to the chairmen of the province-level People's Committees,<sup>34</sup> the Heads of the ministerial-level specialised inspection<sup>35</sup> or the Chief Inspector of Ministries<sup>36,37</sup>.

However, in cases where the foreigners are subjected to additional sanction such as expulsion, the competence may only belong to the Director of the Immigration Management Department. The paradox is that Decree No 138/2013/ND-CP does not regulate the sanctioning competence of the Director of the Immigration Management Department. Therefore, there will be a situation that the subject is liable to the application of the sanction of expulsion — but the competent person, the Director of the Immigration Management Department does not have the power to impose sanctions. This paradox, if not resolved, will result in the imposition of sanctions in practice reaching the deadlock.

According to Decree No 67/2017/ND-CP, foreigners committing acts of *“searching and exploring oil and gas in a banned area or temporarily banned area but without resulting in resources or illegal profits under 100,000,000 VND”* shall be imposed a fine of between 800,000,000 VND and 1,000,000,000 VND and an expulsion as additional sanction.<sup>38</sup> Similarly, under clause 9, Article 6 of Decree No 67/2017/ND-CP, foreigners who commit acts of *“infringing upon the territorial waters, contiguous zone, exclusive economic zones and*

<sup>34</sup> Decree No 138/2013/ND-CP (amended and supplemented 2015), Art. 28 (3).

<sup>35</sup> Decree No 138/2013/ND-CP (amended and supplemented 2015), Art. 28 (4).

<sup>36</sup> Decree No 138/2013/ND-CP (amended and supplemented 2015), Art. 28 (5).

<sup>37</sup> Law on the Handling of Administrative Violations in 2012, Art. 39 (7).

<sup>38</sup> Decree No 67/2017/ND-CP, Art. 6 (8).

*continental shelves of the Socialist Republic of Vietnam to survey, search and explore oil and gas but without generating resources or illegal profits under 100.000.000 VND*” shall be imposed a fine of from 1.800.000.000 VND to 2,000,000,000 VND and an expulsion as additional sanction.

Based on the form and level of fine as above, the sanctioning competence may only belong to the Director of the Immigration Management Department. However, Article 74 of Decree No 67/2017/NĐ-CP only regulates the sanctioning competence of the Director of Department of Public Security, and does not provide for the sanctioning competence of the Director of the Immigration Management Department.

Article 74 of Decree No 67/2017/ND-CP does not stipulate the sanctioning competence (including the competence to apply the sanction of expulsion) to the Director of the Immigration Management Department. So, does the Director of the Immigration Management Department have the sanctioning competence to these acts in the reality?

It should be noted that while there are four decrees adducing to the *Law on Handling of Administrative Violations in 2012* on the competence to apply the sanction of expulsion, Decree No 138/2013/ND-CP and Decree No 67/2017/ND-CP do not have any adducible provisions. This results in the fact that the Director of the Immigration Management Department will have difficulties in finding the legal basis for the application of the sanction of expulsion for specific violations subject to the form of this sanction in the Decree No 138/2013/ND-CP and Decree No 67/2017/ND-CP.

Fifthly, administrative violations being subject to the sanction of expulsion and the acts being applied to compelled exit and remedial measures are unclear and in many cases, overlap.

Currently, in the Vietnamese legal system, in addition to the sanction of expulsion, the lawmakers also regulate something called compelled exit. According to clause 8, Article 3 of the *Law on foreigners' entry into, exit from, transit through and residence in Vietnam in 2014*, compelled exit is a case in which a competent Vietnamese person decides to compel a foreigner to leave the Vietnamese territory through a Vietnamese border gate. Compelled exit is imposed to foreigners in two cases: First, his or her temporary residence duration has expired

but he or she does not leave Vietnam; Second, for reasons of national defence, security, social order and safety.

It seems to be that the sanction of expulsion and compelled exit are not clearly distinguishable in application, in other words there is an overlap between form and content of application. As stated, compelled exit is to compel a foreigner residing in Vietnam to leave Vietnam through one of Vietnam's border gates and expulsion is also compelling foreigners to leave the territory of Vietnam – which of course must take place through the border gate of Vietnam. Therefore, compelled exit and expulsion overlap with each other on the form of implementation. Expulsion is applied to foreigners committing administrative violations in Vietnam, while compelled exits are applied to foreigners who have their temporary residence period expired but do not leave the country, which is also an administrative violation in Vietnam. Therefore, compelled exit and expulsion overlap with each other on the content of implementation. It is worth mentioning that compared with the sanction of expulsion, the compelled exit is not regulated in the *Law on the Handling of Administrative Violations in 2012* as an administrative coercive measure.

Besides, Decree No 103/2013/ND-CP (amended and supplemented 2017) provides for remedial measures “*compelling foreign fishing vessels and foreign crewmen to leave the territory of Vietnam*”. Under clause 4, Article 13 of Decree No 103/2013/ND-CP (amended and supplemented 2017), acts of “*harvesting in Vietnam's sea areas without permission*” will be subject to a fine of between 80,000,000 VND and 100,000,000 VND (principal sanction) and confiscation of fishing vessels, illegally exploited aquatic products, expulsion of foreign crewmen from the territory of Vietnam (additional sanction). However, this act was also applied to the remedial measure of “*compelling foreign fishing vessels and foreign crewmen to leave the territory of Vietnam*”.

It is very unreasonable because if the additional sanction such as the confiscation of fishing vessels, and the confiscation of illegally exploited fisheries are imposed, the offenders will no longer have fishing vessels to which can be applied the remedial measure of “*compelling violating fishing vessels to leave the Vietnamese territory*” by the competent persons. In addition, it is more absurd that when the sanction

of expulsion for foreign crews is applied, there is no need to apply remedial measure “*compelling foreign crewmen to leave the territory of Vietnam*” because the legal nature of the expulsion is to compel the foreigner committing administrative violations to leave the territory of Vietnam. Obviously, the same violation was imposed on both expulsion and remedial measure “*compelling to leave the territory of Vietnam*” in Decree No 103/2013/ND-CP (amended and supplemented 2017) is inaccurate because of overlapping scope and form of implementation.

#### IV. CONCLUSION

*Firstly*, with the current situation in Vietnam, a law on handling administrative violations has dozens of decrees regulating the sanctioning of specific violations, and it has proved unavoidable that the status of these decree is inconsistent to each other. From the perspective of the sanction of expulsion, the situation of violations of the same composition is similar, even the nature of the offense is the same, but some violations are subject to expulsion, and some are not.

The restrictions in the regulations on the competence, and procedures for expulsion have inconsistencies. The decrees on administrative violations in general and the decrees on the sanction of expulsion in particular are promulgated by the Government but the drafting agencies are different. The drafting agencies are the Ministries and their branches. Each Ministry and branch draft documents in the “local” direction with little regard for the documents of other Ministries and branches. As a result, administrative violations have become unstable, crowded, overlapped, and even contradictory.

Therefore, it is necessary in the author’s opinion to promptly bring in a Code on the Handling of Administrative Violations. This Code should have a defined General Part and a Special Part similar to the *Code of Administrative Offences of the Russian Federation*.<sup>39</sup> The Generally Part need to base on the provisions of the *Law on Handling of Administrative Violations in 2012* in order to raise the model in line with the General Part of the *Criminal Code*. The Special Part

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<sup>39</sup> Nguyen Canh Hop — Cao Vu Minh (2011). Improving the law on administrative violations from the experience of the Russian Federation. Legislative Studies. No 18.

will stipulate violations in specific areas. This Special Part should be formulated according to the principle that the types of administrative violations in a number of fields need to be handled unitedly and specific handling forms shall be prescribed in the law.

Accordingly, specific groups of administrative violations, depending on their nature, should be delegated to the Government to specify, as well as how to handle them, but only in new cases, changes or emergencies. After that, these regulations of the Government must be reported to the National Assembly at the nearest meeting, and if appropriate, should be added to the Code.

The process of innovation can be implemented step by step. It cannot be done immediately.<sup>40</sup> Currently, the National Assembly of Vietnam does not have a plan to draft any such Code on the Handling of Administrative Violations. By the end of the 14th National Assembly term (2016–2021), it would be impossible to issue any such Code on the Handling of Administrative Violations.<sup>41</sup>

In the near future, it is necessary to change the way of making laws on sanctioning administrative violations in general and the sanctions in particular. In the near future, the Government should conduct a careful review of the violations under which it is deemed impossible to allow foreigners to remain in Vietnam and to regulate the application of expulsion as a sanction. This work — which is very important — is to limit the inaccurate application of this sanction, and the waste of human and material resources in the implementation.

At the same time, the National Assembly Standing Committee should review the Government's decrees on the sanctioning of administrative violations in the fields where the sanction of expulsion is prescribed. If this review is implemented well, the regulations relating to the application of the sanction of expulsion, there will be different opinions between the Standing Committee of the National Assembly and the Government. Through this review, the Government will have

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<sup>40</sup> Nguyen Cuu Viet (2009). *Renewing the law on administrative violations in Vietnam*. Legislative Studies. No 138.

<sup>41</sup> Resolution No 57/2018/QH14 dated September 6, 2018 of the National Assembly on the Program of developing laws and ordinances in 2019–2020.



effective “reverse” information channels to complete the legal provisions relating to the sanction of expulsion.

Secondly, the status of multiple violations with the same composition, but some violations shall be imposed an expulsion, some are not, is not sustainable longterm. This not only violates the rule of law, but also does not guarantee the general principle of formulating and promulgating legal documents mentioned in the Law on Promulgation of legal documents in 2015 as “*ensuring the constitutionality, legality and consistency of legal documents in the legal system*”.<sup>42</sup> Therefore, the Government should review and amend the sanctions in the decrees on sanctioning administrative violations regulating the sanction of expulsion in order to suitable for each other. This amendment is very important to ensure consistency in identifying the violations as well as imposing a sanctioning form of expulsion for specific violations.

Thirdly, according to the Law on Promulgation of legal documents in 2015, when issuing a decree, the Government must ensure transparency in such legal documents.<sup>43</sup> Therefore, the formula “*depending on the seriousness of the violations may be subjected to the form of expulsion*” or “*committing administrative violations to be being expelled*” is very discretionary and easy to create an abuse of authority, through arbitrary decision making. Consequently, the application of law will become inconsistent, very easy to violate human rights. Therefore, the Law on Handling of Administrative Violations in 2012 and the decrees on sanctioning administrative violations should clearly stipulate the specific criteria, conditions and acts upon which to apply the sanction of expulsion.

*Fourthly*, as stated, Decree No 138/2013/ND-CP (amended and supplemented 2015) and Decree No 67/2017/ND-CP do not provide for the sanctioning competence of the Director of the Immigration Management Department. This leads to the fact that these two decrees have the sanction of expulsion but are not applied in practice. Therefore, it is necessary to supplement Decree No 138/2013/ND-CP (amended and supplemented 2015) and Decree No 67/2017/ND-CP

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<sup>42</sup> Law on Promulgation of legal documents in 2015, Art. 5 (1).

<sup>43</sup> Law on Promulgation of legal documents in 2015, Art. 5 (3).



the competence to sanction administrative violations to the Director of the Immigration Management Department. In terms of legislative technology, Decree No 138/2013/ND-CP (amended and supplemented 2015) and Decree No 67/2017/ND-CP can be abducted to clause 7 of Article 39 of the Law on Handling of Administrative Violations in 2012 on the sanctioning competence of the Director of the Immigration Management Department, which is competence to apply the sanction of expulsion.

*Fifthly*, lawmakers need to review the legal basis of the measure “*compelled exit*”. Currently, the Law on Handling of Administrative Violations in 2012 does not consider “*compelled exit*” as an administrative coercive measure. That means this measure can not be imposed as a sanction to apply for foreigners committing administrative violations in Vietnam. In cases where “*compelled exit*” is a good measure to prevent and limit administrative violations, strict conditions must be prescribed to apply and avoid widespread application for the acts which shall not be applied. In the author’s view, if we recognize this measure, we should only apply “*compelled exit*” to foreigners for reasons of national defense, security, social order and safety, but without including “*fails to leave Vietnam after the expiration of the temporary residence period*” because in this case there is the sanction of expulsion. In other words, the sanction of expulsion is applicable to foreigners committing administrative violations.

Meanwhile, in order to stabilise national defense, security, social order and security, compelled exit may still apply to foreigners who do not commit administrative violations. If so, the sanction of expulsion and compelled exit may be the same as compelling foreigners to leave the territory of Vietnam but differ in terms of contents, subjects and authorities.

The parallel application of remedial measures “*compelling foreign fishing vessels and crew members to leave the territory of Vietnam*” with the sanction of expulsion, results in waste of legal provisions for the same purpose, form of implementation. Therefore, serious and careful research is required to determine what acts need to be applied remedial measures and what actions are subject to the sanction of expulsion. Thus, the legal issues surrounding the contents, purposes, competence,

procedures, limited periode of time and time limits for the application of the sanction of expulsion are clear, facilitating for law application in practice.

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