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THE LIMITATION ON FAIR TRIAL RIGHTS IN SUMMARY CRIMINAL PROCESSES:

IMPLICATIONS FOR VIETNAM FROM THE EXPERIENCE OF ENGLAND AND WALES

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STATEMENT OF CANDIDATE

This thesis is submitted in the fulfilment of the requirements for PhD degree at Macquarie University.

I hereby declare that this thesis is my own work, except where due acknowledgements and references are made. I certify that the work in this thesis has not been submitted previously for any other degree at any other university or institution.

The format of the thesis conforms to the Macquarie University Thesis by Publication Guideline.

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1. Bui, Dat T., 'Procedural Proportionality: The Remedy for An Uncertain Jurisprudence of Minor Offence Justice' (published online: 10 March 2017) *Criminal Law and Philosophy* (DOI: 10.1007/s11572-017-9413-1)
2. Bui, Dat T., 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights' [439] (2015) 41(3) *Commonwealth Law Bulletin* (DOI: 10.1080/03050718.2015.1075414)
3. Bui, Dat T., 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law' [382] (2016) 19(3) *New Criminal Law Review* (DOI: 10.1525/nclr.2016.19.3.382)

ABSTRACT

Minor offences account for the vast majority of criminal cases and for the most part they are subject to few of the protections of fair trial rights. The extent to which procedural rights can be limited in dealing with these offences is controversial and has not been rigorously examined. This thesis aims to investigate this issue in order to propose reforms to the Vietnamese minor offences legal framework, by offering and drawing upon a critical analysis of the experience of the United Kingdom (and in particular, the criminal jurisdiction of England and Wales). The analysis reveals a natural convergence between the cases of the England-Wales and Vietnam, concerning the expansion, fragmentation and due-process evasion of minor offence justice.

Regarding a theoretical framework, this study seeks an account of crime and criminal processes that is most suitable for practice, and most compatible with the broad notion of a criminal charge under international human rights instruments. It is argued that minor offences should be considered forms of public wrong that warrant a short period of imprisonment or a non-custodial punishment. The fragmentation of minor offences into several groups calls for a suitable approach to procedural proportionality: the procedure for each type of offence should be proportionate to the severity of the punishment and should ultimately be fair as a whole. Procedural proportionality is endorsed as key for the constitutionality of summary processes.

To assess the constitutionality of limitations on fair trial rights, the thesis develops two analytical tools, serving as prerequisites for the overall balancing of the proportionality test. First, it proposes a form of reasoning about three models of two-stage overall fairness and analyses their suitability for different types of offences. Second, it makes a suggestion about the inviolable core of procedural due process, the latter being comprised of several absolute elements of the right to a fair trial.

As a contribution to Vietnam's legal reform, the thesis analyses the challenges of incorporating a human-rights-limitation principle into the 2013 Constitution and argues for an extension of fair trial rights to minor offence justice. By examining the useful lessons of the English system, this study advocates the idea of treating minor offences as types of criminal offence, and embracing procedural pragmatism and procedural proportionality in Vietnam, rather than a due-process-evading form of justice.

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CHAPTER 1

INTRODUCTION

I. SIGNIFICANCE AND AIMS OF THE THESIS

This study investigates the extent to which fair trial rights ought to be limited in processes dealing with minor offences. Current literature has neither paid due attention to minor offence justice nor provided a satisfactory answer with regard to procedural designs for summary minor offence processes. Although the media, movies, as well as the criminal law scholarship, have tended to focus on serious crimes such as murder, rape, and robbery, the vast majority of crimes and criminal cases relate to minor crimes. In England and Wales, a common law jurisdiction, approximately 95% of criminal cases deal with summary-procedure minor offences.[1] Likewise, in Vietnam, a civil law jurisdiction, it has been unofficially estimated that about 90% of cases concerning crimes and offences deal with administrative minor offences.[2]

Interestingly, the so-called minor crimes may not necessarily be trivial in the popular understanding of the term. Due to the rise of the crime control goals in the world, some groups of minor offences are punishable by large fines (up to millions of US dollars) or even by imprisonment (up to a few years) and other forms of deprivation of liberty. Despite the quite severe punishments to which offenders are subject, minor offence justice is characterised by summary procedures in which many procedural rights are limited or removed. For the sake of crime prevention and efficiency, minor offence justice has been facing a trend towards increasing reduction of procedural rights. Many jurisdictions such as England-Wales and Vietnam have been trying to seek a balance between fair trial rights and the public interest in dealing with those offences. Problematically, in both England-Wales and Vietnam, minor offences have been largely disguised as non-criminal cases to avoid criminal fair trial rights, reflecting a due-process-evading justice.

Because of the possibility of massive limitations on procedural due process, the examination of minor crime justice could provide useful perspectives for answering a theoretical question about the extent to which fair trial rights ought to be limited. This

[1] John Sprack, *A Practical Approach to Criminal Procedure* (Oxford University Press, 13 ed, 2011) 164.
[2] Viet Q. Nguyen, 'The Role of the Act on Handling Administrative Offences and Its Relation to Criminal Law - Major Contents of the Act on Handling Administrative Offences ('Vi tri, vai tro cua Luat Xu ly vi pham hanh chinh, moi quan he voi phap luat hinh su. Nhung noi dung chu yeu cua Luat Xu ly vi pham hanh chinh')' (Paper presented at the Directions for Making the Act of Handling Administrative Offences, Hanoi, 2008) 16.

thesis is therefore committed to exploring this topic by examining the two prototypical cases of England and Vietnam. The project has two main objectives. First, it aims to propose the extent to which fair trial rights ought to be limited in summary criminal processes (minor offence processes). Second, it aims to propose reforms in Vietnamese minor offence justice, based on the experience of England and Wales. Furthermore, if we look at the broader picture beyond the scope of this thesis, the experiences of England and Vietnam can provide useful lessons for other Common Law and Civil Law jurisdictions, and possibly for other types of legal system as well. If the thesis achieves those aims, it could make a significant contribution to legal scholarship. By examining the procedural design of minor offence justice, the thesis engages with a worldwide debate on due process, both substantively and procedurally. In particular, it will evaluate the application of the proportionality test as well as propose additional ways of reasoning to assess the constitutionality of limiting fair trial rights in minor offence processes.

II. LITERATURE REVIEW, GAP AND RESEARCH QUESTION

2.1. Introduction

Minor offence justice is characterised by significantly reduced protection of procedural rights. Bronitt and McSherry claim that there is little legal scholarship on minor offence processes.[3] With regard to the scholarship on procedural due process generally, there has been little development in theories of procedural justice,[4] so the question about what constitutes a 'fair' trial or 'due' process has not been answered satisfactorily.[5] The arguments of Solum, Bronitt and McSherry are particularly convincing in the context of minor offence justice, where procedural due process has not been taken seriously due to the widely alleged non-seriousness of the offence. There has been a theoretical gap in the discussion about the extent to which fair trial rights ought to be limited in dealing with the so-called minor offences. This thesis therefore proposes to systematically analyse the restriction on fair trial rights for minor offence justice in the United Kingdom (through the criminal jurisdiction of England and Wales) and Vietnam.

To answer the research question, theories of procedural fairness and due process and the doctrine of proportionality have been chosen as the main analytical tools. England and Wales, a common law criminal jurisdiction, is focused upon because it has a tradition of

[3] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 43.
[4] Lawrence B. Solum, 'Procedural Justice' [181] (2004) 78 *Southern California Law Review* 181, 183.
[5] Bronitt and McSherry, above n 3, 117.

respect for due process rights. The experiences from England and Wales are relevant to Vietnam, which has offered few guarantees of procedural rights.

2.2. Literature review

This literature review provides a brief exploration of the discussion on procedural due process for minor offences in the world, particularly in the contexts of the United Kingdom (UK) and Vietnam.

Worldwide discussion on procedural due process for minor offences[6]

A due-process-evading justice system for minor offences

In many countries, including developed and developing ones, the Common Law and Civil Law, have been coping with common problems in dealing with minor offences. For example, there has been much evidence of alarming crises regarding the 'overloaded criminal justice' in Europe,[7] the 'subversion of human rights' in the UK,[8] the 'crushing defeat for due process values' in Ireland,[9] 'broken misdemeanor courts' in the United States (US),[10] the 'drive for efficiency' and 'technocratic justice' in Australia[11] and the non-conformity to due process of law in Vietnam.[12]

By tracing the conceptual framework, it is suggested that minor crime/offence is a loose concept in legal scholarship. Each jurisdiction has its own definition of types of crimes with the characteristics of minor offences. There is a variety of confusing terminologies for types of minor offences: summary offence, misdemeanour, petty offence, regulatory offence, administrative offence, simple offence, infraction, infringement, etc. In domestic law, statutes often focus types of minor crimes, so it is rare to find a statutory definition of minor offences. An interpretation of the Irish Supreme Court provides criteria to differentiate between minor and non-minor ones: (i) 'the severity of the penalty'; (ii)

[6] Further examination of the literature on the world-wide discussion on minor offence justice is made in Chapter 2 of this thesis.
[7] Jorg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006).
[8] Andrew Ashworth, 'Social Control and "Anti-social Behaviour": the Subversion of Human Rights?' (2004) 120 *Law Quarterly Review* 263.
[9] Dermot Walse, 'The Criminal Justice Act 2006: a Crushing Defeat for Due Process Values?' (2007)(1) *Judicial Studies Institute Journal* 44.
[10] National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (2009).
[11] David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 4th ed, 2011) 117.
[12] Dung Dang Nguyen, 'On the Vietnamese Legal Framework of Administrative Handling ('Ve phap luat xu ly hanh chinh cua Viet Nam')' [6] (2011)(20) *Legislative Studies Journal* 6, 9.

'the moral quality of the act'; (iii) 'the state of the law at the time of enactment of the statute in question or the Constitution'; (iv) 'the state of public opinion at that time'.[13]

Generally speaking, minor offences are less serious crimes enjoying significantly simplified procedures in comparison with serious crimes. Although the scopes of minor offences differ in legal jurisdictions, these offences are always dealt with by reduced procedural rights. More than thirty years ago, in her influential monograph, *Conviction: Law, the State and the Construction of Justice*, Doreen J. McBarnet analysed the phenomenon of 'two tiers of justice' in which 'summary justice is characterised precisely by its lack of many of the attributes of the ideology of law, legality and a fair trial'.[14] This monograph showed the remarkable procedural differences between the higher court, which deals with indictable serious offences, and the lower court, which deals with summary minor offences.

Problematically, the reduction of procedural rights in summary minor offence processes has been abused, becoming a due-process-evading justice. Indeed, it is common that both Common Law jurisdictions and Civil Law ones have ignored the standards of a fair trial as much as possible in dealing with minor offences which are not always trivial. Even Common Law jurisdictions, which have a tradition of due process rights protection, have been finding more effective and efficient mechanisms, such as administrative/civil sanctions, because of overloading of the courts. The reduction of procedural protection varies from state to state. There are at least two levels: reducing the protection of due process rights, as in the US, the UK, Ireland and Australia, or almost demolishing the value of due process rights, as in China and Vietnam. This has caused much worldwide debate about keeping the balance between the value of due process rights and the goals of crime control and efficiency.

The priority of crime control over due process

Five decades after Herbert Packer's famous analysis of *'Two Models of the Criminal Process'*,[15] the debate about the Crime Control Model and the Due Process Model have not come to an end. The Crime Control Model prefers efficiency and is willing to sacrifice due process values. In contrast, the Due Process Model is in favour of strongly protected due process rights. Understandably, the Crime Control Model has more impact on minor crime

[13] The Law Reform Commission (Ireland), *Consultation Paper on Penalties for Minor Offences* (2002) 11-2, commenting on the case of *Melling v Ó Mathghamhna* (1962) IR 1.
[14] Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1981) 138.
[15] Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pensylvania Law Review* 1.

justice. Besides Packer's work, there are two influential monographs, among many other studies, which have emphasised advantages and disadvantages of these two models. In a study on the criminal process in a lower criminal court (*The Process is the Punishment: Handling Cases in a Lower Criminal Court*), Malcolm Feeley has argued that the process in minor cases could itself be a punishment for affected persons.[16] The cost of due process rights therefore should not outweigh the cost of the damage caused by an offence. Moreover, in *Justice Without Trial: Law Enforcement in Democratic Society*, Jerome Skolnick has revealed a threat of 'justice without trial' in the tendency towards efficiency, especially in minor offence cases.[17]

In reality, minor offence justice prioritises crime control and efficiency over the values of due process and human rights protection. As noted by Skolnick, the concern about 'justice without trial' was raised many years ago when the adjudicating power was diverted from the court to the police or the prosecutor. Furthermore, nowadays a huge range of trivial and regulatory offences are adjudicated by administrative agencies rather than criminal courts. It is undeniable that today the economic model of criminal justice 'prioritises administrative processes over formal legal procedures'.[18] This reality has been proved in many jurisdictions in Europe.[19] It can be said that contemporary criminal justice systems, both Civil Law and Common Law, have the priority of efficiency in common.[20] Most alarmingly, due process rights have been described as as unnecessary for minor crime justice, using the argument that full protection of procedural rights would result in unreasonable costs to society. To cope with this threat, Jenny McEwan has affirmed that fair trial rights should not be diminished or lost but must be respected even in non-adversarial legal traditions.[21]

Discussions on procedural fairness for minor offences in the United Kingdom[22]

England and Wales have experienced the increased use of 'managerialist techniques' of a regulatory state in summary trials - techniques characterized by efficiency rather than

[16] Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, 1992).
[17] Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (MacMillan College Publishing Company, 3rd ed, 2011).
[18] Bronitt and McSherry, above n 3, 46 (footnote 187).
[19] Jehle and Wade (eds) above n 7.
[20] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transtion' (2011) 31(4) *Legal Studies* 519, 520.
[21] Ibid. 546.
[22] Further examination of the literature on procedural fairness for summary offences in England and Wales is provided in Chapter 3, Chapter 5 and Chapter 6 of this thesis.

justice.[23] Ashworth and Zedner are in favour of a 'liberal model of criminal law and criminal trial', which is challenged by a due process reduction of preventative, civil, administrative and hybrid orders.[24] They therefore suggest a democratic constitutional change in order to reconcile the conflict between human rights values, prescribed in the European Convention on Human Rights (ECHR) as well as the Human Rights Act 1998 (HRA), and the efficacy.[25]

Like many other jurisdictions, in England and Wales the vast majority of crimes are considered non-major and non-serious, therefore, they are handled by summary proceedings. The past two decades have witnessed a change towards crime control values and, simultaneously, a sacrifice of traditional values of due process. Half a century after Packer's work, the debate between the two values is still current, particularly regarding minor offence processes. It is observed that four levels of procedural rights have been applied to four types of minor offence processes - i.e., the traditional summary process in the criminal court, the hybrid civil-criminal process for preventive orders, the out-of-court disposal process for trivial offences, and administrative process for regulatory offences. These will now be examined.

The traditional summary process in the criminal court

In 1967, the UK abolished the common law's traditional classification of crimes which included three types: treason, felony and misdemeanour.[26] Instead, crimes are now classified as indictable and summary offences with the aim of distinguishing between serious crimes and minor ones. It has been argued that this classification is also for procedural purposes.[27] Accordingly, some offences are triable only on indictment in a Crown Court, some are triable only on summarily in Magistrates Court, and some are triable either way. The most important difference between the two types of offences is that there is a jury in the indictment trial, but not in the summary trial.[28] This shows that the criminal process for minor offences has been simplified.

Procedural guarantees for summary offences are generally lower than those for indictable offences. The classic work of McBarnet, as noted above, has argued that many

[23] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 39-40.
[24] Ibid. 45.
[25] Ibid. 48.
[26] John Smith, *Smith & Hogan Criminal Law* (Butterworths, 1999) 25.
[27] David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press, 13th ed, 2011) 32.
[28] Smith, above n 26, 22-3.

elements of fair trial rights are not available in summary process;[29] however, elements of procedural rights that are limited and the justification for those limitations have not been fully explored. More recently, in *Human Rights, Serious Crime and Criminal Procedure*, Andrew Ashworth has claimed that although all crimes, regardless their seriousness, are entitled to minimum procedural safeguards according to the ECHR,[30] more serious offences enjoy a higher level of rights protection.[31] This is appropriate and practical, but the theme of this book focuses on serious offences rather than minor ones. Due process rights for minor offences were therefore not analysed rigorously in this monograph.

The hybrid civil-criminal process for preventive orders

Although the summary procedure has generally attracted less attention, the Anti-Social Behaviour Order (ASBO), one of the hybrid civil-criminal orders[32], has provoked an interesting debate. The ASBO has been a hot topic for debates between liberalism and communitarianism, due process model and crime control model, rights and efficiency. Most literature on this theme is related to procedural fairness (i.e. the extent of fair trial rights for hybrid civil-criminal mechanisms), with little sign of agreement emerging.

Many works have accused the ASBO scheme of a 'subversion of human rights' because it accepts civil standards to deal with criminal offences.[33] For the sake of community protection, a sacrifice of procedural rights is apparently represented in the ASBO. Arguably, the criminal justice system in the UK has been moving away from its adversarial tradition[34] and has been changing steadily towards 'crime control'.[35] Indeed, with the plan for simpler mechanisms to deal with summary offences, the mechanism of ASBO has been considered 'a tool for crime control'.[36]

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[29] McBarnet, above n 14, 138.
[30] Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, 2002) 109.
[31] Ibid. 111.
[32] In 2008, hybrid civil-criminal orders, which are still called "civil preventative orders", included 12 orders: Anti-social behavior orders, restraining orders, non-molestation orders, exclusion from licensed premises orders, football spectator banning orders, travel restrictions orders, sexual offences prevention orders, foreign travel orders, risk of sexual harm orders, drinking banning orders, serious crime prevention orders and violent offender orders. (Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 4th ed, 2010) 410).
[33] Roger Hopkins Burke and Ruth Morrill, 'Anti-Social Behaviour Orders: An Infringement of the Human Rights Act?' (2002) 11 *Nottingham Law Journal* 1; Ashworth, 'Social Control and "Anti-social Behaviour": the Subversion of Human Rights?', above n 8; Geoff Pearson, 'Hybrid Law and Human Rights - Banning and Behavior Orders in the Appeal Courts' [125-145] (2006) 27 *Liverpool Law Review* 125.
[34] McEwan, above n 20, 519.
[35] Celia Wells and Oliver Quick, *Reconstructing Criminal Law: Text and Materials* (Cambridge University Press, 2010) 90.
[36] Wim Huisman and Monique Koemans, 'Administrative Measures in Crime Control' [121] (2008) 1(5) *Erasmus Law Review* 121, 122.

There is a view that considers ASBO as an 'administrative measure' for tackling crimes and an 'extension of criminal justice'.[37] It is the idea that the criminal process might be an obstacle to crime control that brought about the proposal of ASBO, which is a hybrid of administrative and civil procedures.[38] Administrative agencies such as local authorities and the police can apply to a Magistrates' Court for an ASBO to prevent further offences.[39] Breach of the ASBO is a criminal offence punished by a maximum 5-year custodial sentence. The ASBO process is much simpler than criminal procedure because hearsay evidence and not just criminal evidence is accepted.[40]

Robin M. White has argued that this order is one type of 'civil penalties', and that there was no full evaluation of this issue.[41] White concludes that civil penalties were designed for the sake of efficiency rather than procedural fairness, as prescribed in Article 6 of the ECHR; therefore, they are an 'oxymoron, chimera and stealth sanction'.[42]

Notwithstanding many objections, in 2014 the UK Government replaced the regime of ASBO with a truly civil measure called the Injunction to Prevent Nuisance and Annoyance (IPNA). Kevin Brown argues that the IPNA is a continuation of the undermining of due process, which cannot be a solution to the ASBO.[43] Arguably, ASBO does not have a firm legal status in the UK justice system.

The out-of-court disposal process for trivial offences

For the sake of toughness and efficiency in the criminal justice system, England-Wales has diverted a significant proportion of trivial offences from the court-based process to the out-of-court process.[44] It has been estimated that out-of-court disposals accounted for around 50% of all criminal cases,[45] but, surprisingly, they have attracted little research.[46] Some studies have raised concerns about the transparency[47] and appropriateness[48] of those

[37] Ibid. 121, 142.
[38] Ibid. 122.
[39] Pearson, above n 33, 128.
[40] Huisman and Koemans, above n 36, 128.
[41] Robin M. White, '"Civil Penalty": Oxymoron, Chimera and Stealth Sanction' [593] (2010) 126 *Law Quarterly Review* 593, 596.
[42] Ibid. 616.
[43] Kevin J. Brown, 'Replacing the ASBO with the Injunction to Prevent Nuisance and Annoyance: A Plea for Legislative Scrutiny and Amendment' (2013) 8 *Criminal Law Review* 623, 639.
[44] Office for Criminal Justice Reform, *Initial Findings from a Review of the Use of Out-Of-Court Disposals* (2010) 3.
[45] Robin M. White, 'Out of Court and Out of Sight: How Often are "Altenatives to Prosecution" Used?' (2008) 12 *Edinburg Law Review* 481, 482.
[46] Nicola Padfield, 'Out-of-court (Out of Sight) Disposals' (2010) 69(1) *Cambridge Law Journal* 6, 8.
[47] Ibid. 8.
[48] Ashworth and Zedner, above n 23, 49.

out-of-court disposals. Nevertheless, a full analysis of fair trial rights related to all types of disposals has not been adequately explored.

The administrative process for regulatory offences

For the purpose of better regulation, a large proportion of the so-called regulatory offences which have been regarded as part of criminal law,[49] are now being dealt with by a non-court-based procedure. An important consultation report by the Law Commission, *Criminal Liability in Regulatory Contexts*, confirms the 'criminal liability' for regulatory offences in 'regulatory contexts'.[50] Moreover, Richard Macrory, in two influential reviews on regulatory justice (*Regulatory Justice: Sanctioning in a post-Hampton World*[51] and *Regulatory Justice: Making Sanctions Effective*)[52] admits the criminal nature of regulatory offences. The problem is mostly about the procedure to handle those offences. Notably, Julia Black has pointed out a threat of regulatory agencies as a superpower that play the roles of investigator, prosecutor, judge and jury in dealing with regulatory violations.[53] So far, existing studies have not paid due attention to the application of fair trial rights in the regulatory offence justice, particularly in comparison with processes in dealing with other types of minor offences.

The application of the principle of proportionality

It is undoubtedly true that the principle of proportionality can be applied to reasoning about fair trial rights in accordance with European human rights law as well as the HRA. Gould et al. argue that fair trial rights have a high likelihood of competing with other rights and interests.[54] The European Court of Human Rights (ECtHR) has reasoned that many sub-rights of fair trial rights can be restricted, and can therefore be analysed by a proportionality test.[55] In fact, the UK has tended to use a 'broad brush balancing approach' rather than a true proportionality analysis.[56]

There has been a rare use of the proportionality test in many critiques of the ASBO regarding procedural matters. Four years after the enactment of the Criminal and Disorder Act 1998, which first introduced the ASBO, Burke and Morrill argued that the Act

[49] Anthony Ogus, 'Regulation and Its Relationship with the Criminal Justice Process' in Hanna Quirk, Toby Seddon and Graham Smith (eds), *Regulation and Criminal Justice* (Cambridge University Press, 2010) 29.
[50] Law Commission, *Criminal Liability in Regulatory Contexts* (2010) 134.
[51] Richard Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World* (2006).
[52] Richard B. Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) .
[53] Law Commission, (2010) above n 50 161.
[54] Benjamin Gould, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice Research Series, 2007).
[55] Ibid. 31.
[56] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) 353.

infringed the ECHR because its limitations on the fair trial rights were disproportionate to the aim of defending the community.[57] The authors pointed out that some rights relating to evidence, legal aid, and witness examination were reduced to a civil standard.[58] Burke and Morrill supported the legitimacy of the ASBO, but suggested a re-consideration of human rights towards a 'higher civil standard'.[59] In addition, in the monograph *Anti-Social Behaviour Orders: A Culture of Control?*, Jane Donoghue emphasises that the key issue is resolving the conflict between the victim and the defendant's rights.[60] This means that the ASBO is not a good measure ,and the balance of rights still needs to be addressed by a theory of the limitation of rights.

In the broader context of criminal justice, Andrew Ashworth also shows concern over the principles of proportionality and procedural fairness. He asserts that serious measures applying to minor infringements break the principle of proportionality.[61] He supports a balancing analysis which considers individual rights as 'trumps' over the public interest.[62] Ashworth proposes a closer consideration of fairness, but he disagrees with the problematic rebalancing toward victim's rights.[63] As such, his studies have referred to incorporating the proportionality approach to rebalancing rights and interests, but these are just recommendations rather than providing a full analysis of limitations on fair trial rights in minor offence justice.

It should be highlighted that the recent expansion of summary minor offence justice in England and Wales could be a great opportunity to examine the effectiveness of the proportionality test in reasoning about limitations on many elements of fair trial rights. By taking procedural proportionality into account, this thesis will show that current studies have not provided a satisfactory design for procedural rights for several kinds of minor offence processes. The design of procedural rights lacks a principled approach, leading to uncertainty, arbitrariness and disproportionality.

Discussions on procedural fairness for minor offences in Vietnam[64]

Like England and Wales, a legislative definition of minor offence does not exist in the Vietnamese legal system. If minor offences are conceptualised as types of crimes that are

[57] Burke and Morrill, above n 33, 11, 13.
[58] Ibid. 12.
[59] Ibid. 16.
[60] Jane Donoghue, *Anti-Social Behaviour Orders: A Culture of Control?* (Palgrave Macmillan, 2010) 152.
[61] Andrew Ashworth, 'Criminal Justice Reform - Principles, Human Rights and Public Protection' (2004) *Criminal Law Review* 516 531.
[62] Ashworth, *Human Rights, Serious Crime and Criminal Procedure*, above n 132.
[63] Ashworth, 'Criminal Justice Reform - Principles, Human Rights and Public Protection', above n 61, 532.
[64] Further examination of the literature on procedural fairness for administrative offences in Vietnam is provided in Chapter 4, Chapter 5, Chapter 6 and Chapter 7 of this thesis.

less serious and dealt with by simplified procedures compared with serious offences, three types of minor offence processes can be found in this socialist country: the summary procedure for less serious crimes in criminal courts; the administrative procedure for administrative offences; and the procedure for administrative handling measures.

The summary procedure for less serious crimes in criminal court

In Vietnamese law, the legislative definition of 'crime' only denotes the several hundred crimes prescribed by the Criminal Code. Within this ambit of crimes, less serious crimes are dealt with by a summary procedure, which is basically characterised by a one-judge trial rather than a trial council in serious crime cases. The 2013 Constitution[65] and the Criminal Proceedings Code 2015[66] confirm this mechanism. Dung Q. Vu, among others, advocates this procedural reform, arguing that the one-judge trial neither adversely affects the defendants nor violates democratic values.[67]

The administrative procedure for administrative offences

The Socialist Republic of Vietnam, as well as other socialist countries, have been significantly influenced by the Soviet model of administrative offences. In such jurisdictions, the topic of administrative offences has been discussed in administrative law[68] rather than criminal law (as in many common law systems). However, it is important to note that theories of administrative offences have essentially originated from criminal law. As the former Minister of Justice Loc Dinh Nguyen admits, the regime of administrative sanctions has inherited the scholarship of criminal law and criminal procedural law.[69]

In China, Fu Hualing reveals that while there are approximately 100,000 criminal trials each year, millions of minor offences are administratively solved.[70] He argues that this mechanism is 'characterized by relative severity in penalty, lack of representation and due process, and uncertain legislative authorization'.[71] Consequently, this can be considered one type of 'crime control model' which 'requires that primary attention be paid to the managerial efficiency with which the criminal process operates to screen

[65] *2013 Constitution* Article 103(1)(4).
[66] *Criminal Proceedings Code 2015* Article 463(1), Article 465(1).
[67] Dung Q. Vu, *Summary Procedure in Criminal Proceedings: Theory and Practice in Hanoi City* Vietnam National University Hanoi, 2008) 103-4.
[68] The official Textbook of Administrative Law of Law School within Vietnam National University Hanoi has a chapter, namely 'Administrative Liability', on administrative offences.
[69] Loc Dinh Nguyen, 'Codificating the Legal Framework of Handling Administrative Offences – A Ripe Issue ('Phap dien hoa phap luat ve xu ly vi pham hanh chinh - Van de da chin muoi')' (Paper presented at the Directions for Making the Act of Handling Administrative Offences, Ministry of Justice and UNDP, 2008).
[70] Fu Hualing, *The Varieties of Law* <http://lawprofessors.typepad.com/china_law_prof_blog/2011/06/>.
[71] Ibid.

suspects, determine guilt and secure appropriate dispositions of persons convicted of crimes'.[72]

Regarding the procedural principle, crime control has been a predominant objective, so the theory of due process is almost never applied to administrative offences. To deal with administrative offences, administrative agencies rather than courts have the exclusive right to impose administrative sanctions on the offender. Moreover, the agencies also have the authority to arrest and to put somebody in detention. As a result, too many powers granted to the executive branch may lead to the abuse of power. To some extent, the right to a fair trial is prescribed in the 2013 Constitution.[73] However, this provision is only applied to criminal process, not administrative offences. Thus the mechanism for dealing with administrative offences may not satisfy numerous principles of procedural fairness.

In Vietnamese legal literature, most studies have paid attention to substantive issues rather than procedural ones regarding the administrative sanctioning mechanism. Recently, the issue of procedural due process for that regime has been taken more rigorously into account, most notably, Dung Dang Nguyen. He has argued that the regime of administrative offences reflects the non-separation between three branches of state power in that administrative agencies have the rights of law-making, enforcement, and adjudication.[74] He also objects to the fact that procedural due process has been largely ignored in the administrative sanctioning design.[75] Hence he raises the need for a reform of administrative sanctioning procedure towards the rule of law.[76] His claims are reasonable in the context of 'global developments in due process',[77] in which values of fair trial rights are placed among the essential components of the rule of law.

The procedure for administrative handling measures

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[72] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).
[73] See: Article 20(2); Article 22(3); Article 31, Article 103(2)(5)(6).
[74] Dung Dang Nguyen, 'Other Administrative Handling Measures in the Bill on Handling of Administrative Offences ('Cac bien phap hanh chinh khac trong Du thao Luat Xu ly vi pham hanh chinh')' (Paper presented at the Improving the Law on Handling of Administrative Offences in Vietnam, Tam Dao, Vinh Phuc, 26-27 September 2011); Hoan Khanh Truong, 'Some Ideas about the Judicialisation of Education in Reform School and Education in Compulsory Educational Institution ('Mot so y kien ve tu phap hoa bien phap dua vao co so giao duc va truong giao duong')' (Paper presented at the Improving the Law on Handling of Administrative Offences in Vietnam, Tam Dao, Vinh Phuc, 26-27 September 2011); Duc Xuan Bui, 'Entrusting the District-level People's Court to Decide the Application of Other Administrative Handling Measures ('Giao Toa an nhan dan huyen quyet dinh ap dung cac bien phap xu ly hanh chinh khac') ' (Paper presented at the Improving the Law on Handling of Administrative Offences in Vietnam, Tam Dao, Vinh Phuc, 26-27 September 2011); Ministry of Justice, *Assessment Report on the System of Legal Documents on Handling Administrative Offences* (2007) 167-8.
[75] Nguyen, above n 9.
[76] Ibid. 11.
[77] Richard Vogler, 'Due Process' In Michel Rosenfeld and András Sajó (eds), *The Oxford Hanbook of Comparative Constitutional Law* (Oxford University Press, 2012) 938.

Although an administrative offence can be considered a minor crime, repeat administrative offence violators may be deemed dangerous to society and therefore may be subject to isolated educational measures, called administrative handling measures, according to the legislation. In the past decade, many studies have strongly criticised the regime pertaining to administrative handling measures without trial, and supported 'judicialisation'.[78] The Act on Handling Administrative Offences 2012 marks a success for these proposals by bringing most administrative handling measures to the court.

Although the guarantee of procedural rights has been strengthened, it is still a problem that the precise nature of administrative handling measures is unclear. Interestingly, this regime has characteristics of administrative law, civil law, and criminal law. Scholarly work has neither evaluated this mix satisfactorily nor provided a persuasive design for the procedure.

The application of the principle of proportionality

Discussions on human rights limitations have recently arisen in Vietnam in the context of the constitutional amendment. Nguyen and Bui have proposed a constitutional principle of rights restriction based on international human rights law as well as other constitutions' lessons.[79] However, this is just an initial recommendation and does not focus on the topics of fair trial rights and minor offences. Furthermore, Jack Tsen-Ta Lee has critiqued the fact that fundamental human rights can easily be infringed, in view of the fact that the 1992 Vietnamese Constitution did not require any test of appropriateness or necessity when bills that limited basic rights were passed.[80] Lee thus suggested Vietnam should adopt the doctrine of proportionality to avoid authoritarian acts.[81] It is a promising sign that the 2013 Constitution has for the first time recognised a human-rights-limitation principle. This has great potential to open the door for the proportionality doctrine. Indeed, discussions about the human-rights-limitation principle have increasingly appeared in Vietnamese legal

[78] E.g., Nguyen, above n 74; Truong, above n 74; Bui, above n 74; Ministry of Justice (2007), above n 74, 167-8.
[79] Dung Dang Nguyen and Dat Tien Bui, 'Reforming the Regulations on Fundamental Rights and Obligations of Citizens in the 1992 Constitution in Accordance with the Principle of Respect for Human Rights ('Cai cach che dinh quyen và nghia vu co ban cua cong dan trong Hien phap 1992 theo nguyen tac ton trong quyen con nguoi')' (2011)(8) *Legislative Studies Journal* 5, 9.
[80] Jack Tsen-Ta Lee, *The Doctine of Proportionality in Interpreting Constitutional Rights: A Comparison between Canada, the United Kingdom and Singapore and Implications for Vietnam ('Thuyet can xung trong van de giai thich cac quyen hien dinh: So sanh giua Canada, Lien hiep Anh voi Singapore va nhung goi y cho Viet Nam')*, The Institution of Economy and the Institution of Culture, Education, Science and Technology in the 1992 Vietnamese Constitution: Values and the Demand for Amendment ('Che dinh kinh te va che dinh van hoa, giao duc, khoa hoc va cong nghe trong Hien phap Viet Nam 1992 – Nhung gia tri va nhu cau sua doi, bo sung') (Ho Chi Minh City) 355.
[81] Ibid. 358.

forums.[82] Nevertheless, these studies have not touched on the issue of limitations on fair trial rights in dealing with minor offences.

2.3. Theoretical gap and research question

There has been a huge number of legal works discussing three topics relevant to this thesis: fair trial rights, limitations on rights, and minor offences. However, most studies investigate each of these topics separately. In order to theorize procedural due process for minor offences, it is necessary to examine the three parts together.

There has been much discussion on serious crimes. Studies on fair trial rights have mainly focused on rights for all offences, or on major offences rather than minor ones. The Packer's classic work '*Two Models of the Criminal Process*'[83] focused on criminal justice overall rather than on minor offence cases. This is one of the most influential studies in the area of criminal process, and has continued to provoke discussion.[84] The Packer's and other authors' critiques of models of criminal process, although emphasising the role of due process in models of criminal procedure, have not pointed out clearly the extent to which elements of fair trial rights should be granted to minor crime proceedings.

In contrast with non-minor crimes, there has been inadequate attention given to minor offence procedure. This issue has been theoretically and practically taken into account because of court overload and the high demand for public order protection. In the 1960s, Skolnick's *Justice Without Trial: Law Enforcement in Democratic Society*[85] characterised the abuse of police power in criminal cases as 'justice without trial' and a factor that negatively affected due process. Nevertheless, the issues of fair trial rights and minor crimes were not Skolnick's main concern. In 1979, Feeley published an important monograph on the low-level criminal process: *The Process is the Punishment: Handling*

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[82] Most notable works are: Tuan Minh Nguyen et al, *Legitimate Limitations on Human Rights, Citizens' Rights in International Law and Vietnamese Law ('Gioi han chinh dang doi voi cac quyen con nguoi, quyen cong dan trong phap luat quoc te va phap luat Viet Nam')* (Hong Duc Publishing House, 2016); Dat T. Bui, 'The Constitutionalization of the Principle on Human Rights Limitation: Necessary but Insufficient ('Hien phap hoa nguyen tac gioi han quyen con nguoi: can nhung chua du')' [3] (2015)(6) *Legislative Studies Journal* 3; Giao Cong Vu and Huong Thuy Thi Le, 'The Principle of Limitations on Human Rights and Citizens' Rights in the 2013 Constitution ('Nguyen tac gioi han quyen con nguoi, quyen cong dan trong Hien phap 2013')' in Uc Tri Dao and Giao Cong Vu (eds), *A Commentary on the 2013 Constitution of the Socialist Republic of Vietnam ('Binh luan khoa hoc Hien phap nuoc Cong hoa Xa hoi chu nghia Viet Nam')* (Labour-Society Publishing House, 2014).

[83] Packer, 'Two Models of the Criminal Process', above n 15.

[84] Kent Roach, 'Four Models of the Criminal Process' (1999) 89(2) *The Journal of Criminal Law and Criminology* 671; Keith A. Findley, 'Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process' (2008) 41 *Texas Tech Law Review* 133; Stuart Macdonald, 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes' (2008) 11(2) *New Criminal Law Review* 257; McEwan, above n 20.

[85] Skolnick, above n 17.

Cases in a Lower Criminal Court.[86] He discussed the problem of an overloaded procedure for the lower court, which was certainly related to minor crimes. After that, McBarnet's *Conviction: Law, the State and the Construction of Justice*[87] argued for the need to reduce due process in summary offences cases. These three works, albeit written several decades ago, are still of current relevance. These three authors succeeded in identifying a separate theoretical framework for minor offences process. However, they did not propose any model of due process rights for minor crimes. At this stage, therefore, we are still left with Bronitt and McSherry's queries about what a 'fair' trial is, or what 'due' process is, for minor offences.[88]

Another problem is that recent research on minor offences lacks an overall investigation on all types of minor offences as well as all elements of due process rights. In the context of the UK, the most notable works on anti-social behaviours and low-level offences are those of Burke and Morrill,[89] Andrew Ashworth,[90] Geoff Pearson,[91] Huisman and Koemans,[92] Robin W. White,[93] and Andrew Cornford.[94] With regard to European countries, worthy of note are two edited books on administrative offence sanctions: *Administrative Sanctions in the European Union*[95] and *Defence Rights during Administrative Investigations: A Comparative Study into Defence Rights during Administrative Investigations against EU Fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland*.[96] These two books provide a useful analysis of how administrative offences are conceived and dealt with in numerous European jurisdictions. It is undeniable that these important studies have successfully provoked lawyers to pay more attention to low-level criminal justice and administrative offence sanctioning mechanisms. Nevertheless, these works have generally focused on one type of minor offence or one type of process rather than offering an entire picture of them.

Moreover, legal scholarship has paid little attention to theoretical approaches to the limitation on rights regarding minor offence justice. This is a significant gap in the

[86] Feeley, above n 16.
[87] McBarnet, above n 14.
[88] Bronitt and McSherry, above n 3, 43, 117.
[89] Burke and Morrill, above n 33.
[90] Ashworth, 'Social Control and "Anti-social Behaviour": the Subversion of Human Rights?', above n 8.
[91] Pearson, above n 33.
[92] Huisman and Koemans, above n 36.
[93] White, '"Civil Penalty": Oxymoron, Chimera and Stealth Sanction', above n 41.
[94] Andrew Cornford, 'Criminalising Anti-Social Behavior' (2012) 6 *Criminal Law and Philosophy* 1.
[95] Oswald Jansen (ed), *Administrative Sanctions in the European Union* (Intersentia, 2013).
[96] Oswald Jansen and Philip M. Langbroek (eds), *Defence Rights during Administrative Investigations: A Comparative Study into Defence Rights during Administrative Investigations against EU Fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland* (Intersentia, 2007).

literature, because without such an approach, it is difficult to establish the extent to which fair trial rights should be limited. In rare cases, as in the studies of Burke and Morrill, Ashworth and Gould et al., there is an attempt to the role of the proportionality principle in guaranteeing procedural fairness.[97] But, these studies focus on serious offences and anti-social behaviour rather than minor offences. The most notable recent work on ways of reasoning about limiting fair trial rights is the monograph *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* by Ryan Goss.[98] Admittedly, this work is an impressive investigation into how the ECtHR case law has developed reasoning about limiting the Article 6 rights. However, it does not focus on minor offence procedures. Another study that should be mentioned here is a newly published paper, '*Administrative Sanctions: Between Efficiency and Procedural Fairness',* by Maciej Bernatt. By examining the balancing problem between efficiency and procedural rights in dealing with administrative offences, this paper touches on the topic most relevant to this thesis. The paper's contribution is significant. However, it does not purport to focus on the application of legal methods (like the proportionality analysis) to the design of procedural rights. Nor does it provide an overall picture of minor offence justice, as it excludes minor crimes tried by the criminal court as well as minor-offence-related preventive measures.

As far as Vietnam is concerned, to date there has been no study investigating the restriction on fair trial rights for minor offence justice. Worldwide, in fact, comparative criminal law has been given less attention in comparison with other areas of law possibly due to the criminal law's close association with state sovereignty.[99] Dung Dang Nguyen has recently raised concerns about procedural fairness with regard to administrative offences,[100] but, his work does not fully analyse the matter. The legal framework for this issue has been slowly improved in Vietnam. In the age of global human rights law, in general, and due process rights reform, in particular, regarding the aim of protecting procedural fairness, Vietnam needs to meet international standards and to gain experience from other jurisdictions by applying a 'functionalism'[101] approach.

[97] Burke and Morrill, above n 33; Ashworth, 'Criminal Justice Reform - Principles, Human Rights and Public Protection', above n 61 531; Gould, Lazarus and Swiney, above n 54.
[98] Ryan Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart Publishing, 2014).
[99] Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 1288.
[100] Nguyen, above n 12.
[101] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press) 343.

Briefly, current scholarship has paid inadequate attention to the limitation of fair trial rights for minor offences. I agree with Natapoff's argument that there has been no 'principled basis' for deciding the extent of the resources minor crimes require.[102] Thus, it is necessary to investigate all types of minor offence processes as a whole as well as the distinguishing features of each type from the perspective of limitations on procedural rights. Although it is generally accepted that minor offence cases deserve less due process rights than more serious ones, there is still an unanswered question: *To what extent should fair trial rights be limited in dealing with minor offences?* In other words, how can fair trial rights in minor offence justice be balanced against, as well as with other competing rights and interests? By examining the two cases of England and Vietnam (as explained in part 3.3 below), the research question that this thesis raises and answers is: *To what extent should fair trial rights be limited in summary criminal processes: the implications for Vietnam of the experience of England and Wales?* (Section 4 of the Introduction will point out six sub-questions and explain how they will be addressed in six articles).

2.4. Conclusion

The Crime Control Model and the Due Process Model are two theoretical extremities between which, all criminal justice systems are in fact situated on a spectrum. The allocation of due process values varies according to the seriousness of crimes. Due to the variation in seriousness, minor offences also have several variants of due process. Designing proper forms of due process for those offences is a challenging task.

The flexibility of the right to a fair trial is likely to cause diversity in limitations of these rights. The first reason for this is that the bundle of many fair trial rights essentially makes up a great variety of forms of rights restriction. Arguably, the right to a fair trial is one of the most complicated. Indeed, the challenge in limiting these rights derives from the fact that they not only conflict with other external interests but also compete internally among themselves. Moreover, this right seems to have the status of being the least protected one. In the US, due process rights are in the group that receive minimum scrutiny.[103] In particular, the sheer number of minor offences, as well as their alleged triviality, gives rise to strong pressure to limit procedural obstacles.

Therefore, without an appropriate principle, fair trial rights have a high risk of being interfered with arbitrarily and unconstitutionally. The doctrine of proportionality, despite

[102] Alexandra Natapoff, 'Misdemeanors' (2012) 85 *Sounthern California Law Review* 1313, 1350.
[103] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Wolters Kluwer Law & Business, 4th ed, 2011) 552.

its imperfection, is generally considered the best method of reconciling competing interests properly.[104] Through the perspective of proportionality, it should be possible to determine the rationality of the many forms of fair trial rights limitation. The available scholarship has paid little attention to this approach.

Thus, there has been no rigorous study examining the extent to which fair trial rights can be limited in dealing with minor offences. The fact that restrictions on fair trial rights is one of the most controversial issues[105] has caused difficulties in addressing the question. So, the objective of this thesis is to answer the question by investigating the cases of the UK and Vietnam in seeking a 'universal jurisprudence'.[106] More specifically, the project will (i) systematically analyse the doctrine of proportionality regarding the limitations on fair trial rights for minor offences in the UK and Vietnam and make a proposal regarding the extent to which procedural rights ought to be limited in summary criminal processes, and (ii) point out implications that are applicable for reforming Vietnam's minor offence justice system by comparative methods.

This thesis aims to contribute new insights and theoretical perspectives to legal scholarship. First, it offers a systematic analysis of all kinds of minor offences as well as types of minor offence processes. Second, it evaluates the application of the proportionality doctrine for assessing the constitutionality of limitations on fair trial rights for minor offence processes. Third, the study suggests ways of reasoning in addition to the proportionality test for assessing this constitutionality. Fourth, it makes a comparative study of research on England-Wales and Vietnam, providing useful lessons for Vietnam, in particular.

III. METHODOLOGY

3.1. Research paradigm

As is traditional and common in legal studies, doctrinal methodology[107] is the research paradigm for this PhD project. Accordingly, research is conducted in seven steps: '(1) selecting research questions; (2) selecting bibliographic or article databases; (3) choosing

[104] Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 38.
[105] Clayton and Tomlinson (eds) above n 56, 707.
[106] Dubber, above n 99, 1288.
[107] Doctrinal methodology is used for 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'. (Pearce D, Campbell E and Harding D ("Pearce Committee"), *Australian Law School: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987), vol 3, 17 (as cited in Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 2010) 7).

search terms; (4) applying practical screening criteria; (5) applying methodological screening criteria; (6) doing the review; (7) synthesising the results'.[108]

3.2. Comparative methods

To address the research question, it is appropriate to use some of the approaches of comparative law. This is because the chosen methods need to meet the purpose of the research.[109] Moreover, there is a tendency in criminal law's to give insufficient attention to comparative criminal law.[110] Within the ambit of criminal law, the procedure for minor offences has not been adequately taken into account, when compared with the serious offence process.[111] Thus five major comparative methods will be used in this project: contextualist, functionalist, universalist, convergence and legal transplant approaches. Among these, the convergence approach will be used for Chapter 2, Chapter 7, and particularly Chapter 5. The legal transplant approach will be employed for Chapter 7. The contextualist, functionalist, and universalist approaches will be widely used throughout the thesis.

The contextualist and functionalist approaches

Across jurisdictions, there are a variety of overlapping and confusing terms that denote types of minor offence. In England and Wales, some relevant terms are 'summary offence', 'regulatory offence', 'low-level offence' and 'anti-social behaviour'. In Vietnamese law, some related terms are 'less serious crime' and 'administrative offence'. In spite of differences, the ways that England-Wales and Vietnam conceptualise and deal with these offences are comparable. Common law jurisdictions have the tradition of due process rights protection; therefore minor offences are generally brought to a trial in court. However, this causes overloads. Thus there is a search for more effective and efficient mechanism (i.e., administrative sanctions, civil sanctions). Meanwhile, the Vietnam legal system, which uses a post-Soviet Civil Law model, does not have a tradition of due process rights protection; on the contrary, it has the tradition of a powerful executive. For this reason, minor offences (administrative offences) are judged by a variety of administrative agencies. This approach can lead to abuse of power and violations of human rights.

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[108] Fink A, *Conducting Research Literature Review: From the Internet to Paper* (2 ed Sage: Thousand Oaks) in McConville M and Chui WH (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 22, 23 (as cited in ibid. 37).
[109] Ibid. 23
[110] Dubber, above n 99, 1288.
[111] Bronitt and McSherry, above n 3, 43.

The contextualist approach[112] is employed in this thesis to identify the historical and traditional issues that have affected the development of summary minor offence justice in the two jurisdictions. Moreover, a functionalist approach helps to gain at least the following objectives. First, it helps to clarify the legal rules and institutions[113] for dealing with minor offences in some common law jurisdictions. Second, it provides tools to achieve comparability[114] between Vietnam's mechanism and those of other common law jurisdictions. Third, it contributes to the determination of better law[115] in the compared jurisdictions. Fourth, it leads the way to a critique[116] of the compared mechanisms. Research using the functionalist method may be able to propose a theory for dealing with minor offences while achieving a balance between due process rights protection and efficiency.

The universalist approach

With the increasing promotion of global human rights law, the 'global revolution in due process'[117] is vigorously represented by the right to fair trial in the International Covenant on Civil and Political Rights as well as some regional conventions (eg., European Convention on Human Rights). Such international and regional legal frameworks have led to a belief in the convergence in the criminal process.[118] Indeed, in Europe, under the influence of the European Convention on Human Rights and the ECtHR, traditional adversarial and inquisitorial criminal models have witnessed a 'realignment' towards ensuring 'the participatory standards of proof'.[119] The fact that adversarial due process has spread across Western Europe and many other regions[120] proves its 'spectacular' impacts.[121]

International law, particularly through the interpretation of the United Nation Human Rights Committee and the ECtHR, confirms that fair trial rights are an important constitutional basis for criminal procedure in dealing with all kinds of crimes, including

[112] Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Hanbook of Comparative Constitutional Law* (Oxford University Press, 2012) 54; Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 67.
[113] Michaels, above n 101, 363.
[114] Ibid. 363.
[115] Ibid. 363.
[116] Ibid. 363.
[117] Richard Vogler, *Due Process* in Rosenfeld and Sajó (eds)above n 77, 943.
[118] B. S. Markesinis (ed), *The Gradual Convergence* (Clarendon Press, 1994) 30.
[119] John D. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68(5) *Modern Law Review* 737.
[120] Richard Vogler, *Due Process* in Rosenfeld and Sajó (eds)above n 77, 945-6.
[121] Richard Vogler, *Due Process* in ibid. 943.

minor offences.[122] As aforementioned, Common Law systems such as in the UK, Ireland, the US and Australia have been trying to reduce the traditional due process values of common law to achieve more efficient crime control. An issue that can be raised is the threshold of the reduction of due process in common law jurisdictions. In Vietnam, on the other hand, the suggestion has been to 'debureaucratise' its highly-bereaucratised system and come closer to international standards of fair trial.[123] For Vietnam, the issue is the extent to which procedural due process should be applied.

The convergence approach

There has been a negotiation between due process and efficiency in the criminal process. With the aim of balancing the Due Process and Crime Control models, new models have been proposed such as 'managerialism' in the UK[124] and the 'Reliability Model' in the US.[125] This could lead to a convergence model. However, it seems that there is still no theory of 'due' process to deal with minor offences. Thus the convergence approach could help to identify similarities among differences between different systems[126] as well as developmental trends. In this way, a theory of applying fair trial rights for minor crimes could be suggested.

The legal transplant approach

Today, it is difficult to find a pure legal system; in other words, 'legal families are no longer tenable, all systems are mixed'[127] and all criminal justice systems are 'hybrid'.[128] This may be caused by functionalist comparisons and legal transplants. While functionalism is the 'basic methodological principle',[129] legal transplant is 'a central paradigm'[130] of comparative law. As a consequence of identifying better systems using the functional approach,[131] legal transplants could be applied.

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[122] United Nations Human Rights Committee, CCPR/C/GC/32, *General Comment No. 32: Article 14 - Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007) [15]; *Engel v Netherlands* (1976) 1 EHRR 647 [82]; *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 [36].
[123] Nguyen, above n 12, 9.
[124] McEwan, above n 20.
[125] Findley, above n 84.
[126] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 411.
[127] Jacques du Plessis, 'Comparative Law and the Study of Mixed Legal Systems' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 481.
[128] McEwan, above n 20, 522.
[129] Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (Tony Weir trans, Oxford University Press, 3rd ed, 1998) 343.
[130] Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions ' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 443.
[131] Michaels, above n 101, 363.

Some foreign regimes for minor offence processes which have proved effective in the protection of procedural fairness are applicable to the Vietnamese system in the form of legal transplant. The experiences of common law jurisdictions could contribute to the reform of the legal framework of administrative offences in Vietnam for the protection of due process rights.

3.3. Why the United Kingdom (through the criminal jurisdiction of England and Wales) and Vietnam?

The purpose of comparative legal enquiry: solving the problem of procedural fairness for minor offences

Before conducting comparative research, it is essential to identify its purpose. This thesis aims to solve the problem of procedural fairness for minor offences. This represents an objective that is one of five purposes of comparative legal enquiries.[132] It also follows an 'inference-oriented research design' in order to propose a new theory based on a causal analysis.[133] Expected research outcomes of this case selection are to provide: (1) a contrast between two models, (2) a convergence of due process standards, (3) implications for the reform of Vietnamese law and (4) lessons for similar jurisdictions.

There are five reasons for the selection of two specific cases of England-Wales and Vietnam: (1) They are exemplars for the most-different cases; (2) They are exemplars for prototypical cases; (3) There have been increasing similarities between two systems; (4) The role of the proportionality doctrine in these two systems; (5) Both jurisdictions have experienced diverse types of summary minor offence justice, which can give useful analysis, reasoning and lessons. These reasons are explained as follows.

Most-different and prototypical cases:[134] ***a contrast between the Crime Control Model and the Due Process Model, between a Common Law and Civil Law***

'Most different cases' logic

As I have remarked, the Crime Control Model and Due Process Model are two theoretical extremities: in fact all criminal justice systems are situated between them on a spectrum. However, each system is generally closer to either the Crime Control or Due Process Model. Vietnam and the UK are two exemplars of this contrast.

Differences

[132] Dannemann, above n 126, 403.
[133] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) *American Journal of Comparative Law* 125, 131.
[134] Ibid. 126.

In terms of its legal system, Vietnam has many characteristics of Civil Law, while the UK is the origin of Common Law. Thus, Vietnamese criminal justice is inquisitorial, and that of the UK is adversarial. Significant differences between the two countries are obvious. Furthermore, the fact that Vietnam has been considered as an authoritarian state[135] broadens this gap. Like China, Vietnam's authoritarian criminal justice system[136] uses criminal law as a tool to control crime and in general to keep society stable, rather than to protect human rights. This type of criminal justice has traditionally offered only a weak protection of fair trial rights. In contrast, the UK has been a democratic country for a few centuries and has respected due process as a guarantee of individual rights since the Magna Carta.

Similarities

A legal comparison is meaningless where there is nothing in common. The 'most different cases' logic does not mean there is no commonality. The notion of the right to a fair trial prescribed in international human rights law has brought about a degree of convergence between criminal justice systems. Universal due process has constitutionalised criminal procedures towards a new constitutionalism. Indeed, UK and Vietnam, while they have different traditions of procedural protection, seem to converge in reversal trends. From a tradition of adversarial criminal justice characterized by a high level of due process protection, the UK has increasingly come closer to the goal of crime control. In contrast, Vietnam, which has had weak protections of procedural rights for administrative offence cases for many decades, is attempting to meet international standards of a fair trial. There is a need for 'mutual recognitions' between jurisdictions to avoid differences in interpreting and implementing due process rights.[137]

Prototypical exemplars

The selection of Vietnam and the UK for comparison represents not only a 'most different cases' logic but also one of prototypical exemplars. The case of Vietnam also helps to illuminate other authoritarian criminal justice systems such as China's. The case of the UK is a lesson for the Common Law.

Among many of the most different cases, there are many pairs of jurisdictions that can be usefully compared. Vietnam is focused upon here because it has weak safeguards for

[135] Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge University Press, 2008) 47.
[136] Richard Vogler, *A World View of Criminal Justice* (Ashgate, 2005) 91.
[137] Jacqueline Hodgson, 'EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition' (2011) 37 *North Carolina Journal of International Law and Commercial Regulation* 307.

due process in dealing with administrative offences. Vietnam needs to reform this legal framework with special attention to procedural fairness. Fair trial rights within the 2013 Vietnamese Constitution seem not to apply to administrative offences. Furthermore, while constitutional provisions of rights limitation have appeared, they do not have an adequate theoretical basis. Without a doctrine of rights restriction as well as an effective mechanism for constitutional review, fair trial rights could be interfered with seriously, particularly in administrative offence cases. Among authoritarian criminal systems, Vietnam has appeared to conduct vigorous constitutional reforms, especially in recognising a principle of rights limitation. This presents an opportunity for Vietnam to take the theory of rights limitation seriously.

One strategy is to gain experience from countries which have a tradition of adversarial criminal justice and which also adopt the proportionality doctrine. Among common law countries, the UK (through the criminal jurisdiction of England and Wales) has been chosen in virtue of its commitment to applying the ECHR's proportionality analysis as well as its useful practice of minor offence processes.[138] The UK originally had no bill of rights. However, it has experienced enormous changes in constitutional rights since the Human Rights Act 1998 (HRA). Fair trial rights, in particular, have developed dramatically due to the frequent interaction between the ICCPR, the ECHR, ECtHR cases, the Human Right Act 1998, other Acts and judicial cases.[139] The development of due process rights has been an attempt to solve problems arising with the summary criminal court in general as well as quasi-criminal mechanisms. This development is most notable in the criminal jurisdiction England and Wales,[140] which has witnessed significant changes in minor offence justice over the past two decades.

IV. STRUCTURE OF THESIS

Taking the form of a thesis by publication, this thesis is comprised of an introduction (Chapter 1), six articles (Chapters 2 to 7) and a conclusion (Chapter 8).

Chapter 1: Introduction

The Introduction of the thesis provides an overview of the whole thesis. It includes four sections: (1) the Motivation, Aim and Significance of the thesis; (2) Literature review, Gap and Research question; (3) Methodology; and (4) Structure of the thesis.

[138] These are reasons for examining the jurisdiction of England and Wales instead of other Common Law jurisdictions in Asia such as Singapore and Hong Kong.
[139] Both the UK and Vietnam are members of the ICCPR. The UK is also a member state of the ECHR and the European Union.
[140] The United Kingdom has three different criminal systems: England and Wales, Scotland and Northern Ireland.

The thesis as a whole will answer the research question, as raised in Section 2.3 of the Introduction: *To what extent should fair trial rights be limited in summary criminal processes: the implications for Vietnam of the experience of England and Wales?* To address this question, chapters 2 to 7 deal in turn with six sub-questions, as follows.

Chapter 2 (Article 1): Procedural proportionality: the remedy for an uncertain jurisprudence of minor offence justice (Accepted for publication in the *Criminal Law and Philosophy*)

This article aims to answer sub-question 1: *What should be the theoretical framework for addressing the uncertain jurisprudence of minor offence processes*? This first sub-question reflects the need for a theoretical framework suitable for solving the jurisprudential problem of minor offence processes. This theoretical framework will be the foundation of the whole thesis. Accordingly, with a focus on the common law jurisdiction of England and Wales and the civil law jurisdiction of Vietnam, this article provides an analytical framework for addressing the uncertain jurisprudence of minor offence justice. The article's approach is to seek an account of crime and criminal processes that is most suitable in practice and most compatible with the broad notion of 'criminal charge' under international human rights instruments.

Chapter 3 (Article 2): How many tiers of criminal justice in England and Wales? An approach to the limitation on fair trial rights *(Published in the Commonwealth Law Bulletin, Volume 41, Issue 3, 2015, DOI: 10.1080/03050718.2015.1075414)*

This article aims to answer sub-question 2: *How are fair trial rights applied to different types of summary criminal processes in England and Wales?* With a theoretical framework for the thesis having been found in Chapter 2, this article explores procedural designs for minor offence processes (summary criminal processes) in England and Wales.

Chapter 4 (Article 3): Due-process-evading justice: the case of Vietnam

This article aims to answer sub-question 3: *How are fair trial rights applied to different types of summary criminal processes in Vietnam?* The article analyses procedural designs for minor offence processes (summary criminal processes) in Vietnam.

Chapter 5 (Article 4): The expansion and fragmentation of minor offence justice: A convergence between the Common Law and the Civil Law *(Published in the New Criminal Law Review, Volume 19, Issue 3, 2016, DOI: 10.1525/nclr.2016.19.3.382)*

This article aims to answer sub-question 4: *What are the similarities, differences, and trends in the development of summary criminal justice in England and Vietnam?* After

analysing the way fair trial rights are applied to different types of summary criminal processes in both England and Vietnam, the article offers a comparative study of the two jurisdictions.

Chapter 6 (Article 5): Assessing the overall unfairness of limitations on fair trial rights in summary criminal processes: A remedy for the due-process-evading justice

This article aims to answer sub-question 5: *What analytical tools should be used to assess the overall unfairness of limitations on fair trial rights in summary criminal processes?* On the basis of the answers from the previous four sub-questions, this fifth sub-question touches the core of the thesis' research question, namely, to what extent should fair trial rights be limited in summary criminal processes? Accordingly, this article develops ways of reasoning to assess the overall unfairness of limitations on fair trial rights in summary criminal processes.

Chapter 7 (Article 6): A quest for due process doctrine in Vietnamese law: from Soviet legacy to global constitutionalism

This article aims to answer sub-question 6: *Which lessons can the Vietnamese legal system learn from the English experience in order to entrench the constitutionality of limitations on fair trial rights in dealing with minor offences?* This sixth sub-question touches on the second important part of the thesis's research question, that is, what are implications for Vietnam from the experience of England and Wales? By learning from the English experience in the design of summary minor offence justice, this article makes recommendations for the reform of Vietnam's minor offence processes in the context of recent Vietnamese constitutional developments.

Chapter 8: Conclusion

The conclusion of the thesis confirms the significance of the research and summarises the claims made in Chapters 2 to 7. In addition to summarising the scholarly contribution of the thesis, the chapter also acknowledges the limited scope of the thesis. The conclusion furthermore suggests relevant issues to be explored by future research.

CHAPTER 2 (ARTICLE 1)

PROCEDURAL PROPORTIONALITY: THE REMEDY FOR AN UNCERTAIN JURISPRUDENCE OF MINOR OFFENCE JUSTICE

Publication status

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Contribution to the thesis

This article aims to answer sub-question 1: *What should be the theoretical framework for addressing the uncertain jurisprudence of minor offence processes?* The first sub-question reflects the need of a theoretical framework suitable for solving the jurisprudential problem of minor offence processes. The theoretical framework will be a foundation for the whole thesis. Accordingly, with a focus on the common law jurisdiction of England and Wales and the civil law jurisdiction of Vietnam, this article provides an analytical framework to address the uncertain jurisprudence of minor offence justice. The article's approach is to seek an account of crime and criminal process that is most suitable for practice and most compatible with the broad notion of 'criminal charge' under international human rights instruments.

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ORIGINAL PAPER

Procedural Proportionality: The Remedy for an Uncertain Jurisprudence of Minor Offence Justice

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Abstract With a focus on the Common Law jurisdiction of England and Wales and the Civil Law jurisdiction of Vietnam, this article provides an analytical framework to address the uncertain jurisprudence of minor offence processes. The article's approach is to seek an account of crime and criminal process that is most suitable for practice and most compatible with the broad notion of 'criminal charge' under international human rights instruments. It is argued that minor offences should be considered forms of less serious crimes that are subject to short periods of imprisonment or non-custodial punishments and dealt with by summary procedures. The fragmentation of minor offences demands an approach to procedural pragmatism and procedural proportionality; that is, the procedure for each type of offence should be proportionate to the severity of punishment and fair as a whole.

Keywords Proportionality · Fair trial rights · Summary justice · Minor offences · Misdemeanours

1 Introduction

All jurisdictions have to deal with a large number of non-serious public wrongs (or minor offences) by summary procedures regardless of legal denominations.[1] The regime of minor offences, which is sometimes deemed 'inaccessible and unknowable',[2] accounts for the vast majority of crimes as well as the vast majority of prosecutions.[3] The explosion of such offences has raised concerns that 'the paradigm of the criminal law and the criminal trial is

[1] For a comparative study of European jurisdictions, see: Jehle and Wade (2006).

[2] Stevenson and Harris (2008).

[3] In England and Wales, 95% of criminal cases are summary ones (Sprack 2011, 164).

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being eroded by the state as it pursues other agendas such as greater regulation, an emphasis on prevention, and an authoritarianism linked closely with penal populism and the demand for public protection'.[4] It is clearly not the morality-based serious offences that are widely considered 'truly criminal',[5] but the uncertain group of minor offences that has triggered the debate about the concept of crime[6] and the scope of criminal law.[7]

Although many jurisdictions distinguish the procedure for non-serious offences from that of serious offences, the jurisprudence of summary minor offence justice is uncertain and poorly theorised. The uncertainty is manifested in terminological complexity and in the debate about whether non-traditional offences like regulatory violations or preventive measures are crimes. This substantive uncertainty has led to procedural uncertainty, such as uncertainty as to whether summary criminal justice applies to non-traditional offences and how to deal with the challenging hybrids between criminal and civil justice, and between criminal and administrative justice. It is a danger that this procedural uncertainty may result in procedural arbitrariness.

The aim of this study is not to develop a theory of crime or criminalisation. Rather, its aim is to solve the problem of minor offence processes, seeking an account of crime and criminal processes that is most suitable for practice and most compatible with the broad notion of 'criminal charge' under international human rights instruments. Following the present section (Sect. 1), in Sect. 2, I will address the uncertain jurisprudence of minor offence justice. This part will raise substantive problems concerning terminological complexity and uncertain classification in the realm of minor offences. Section 2 will then raise procedural problems concerning the fragmentation and uncertainty of processes dealing with minor offences. The central argument of this article, which I will analyse in Sect. 3, proposes a principled approach to procedural proportionality, which is described in three claims, as follows. First, minor offences should be considered forms of less serious public wrongs (crimes/criminal charges) that are subject to short periods of imprisonment or non-custodial punishments (mostly fines) and dealt with by summary procedures. Accordingly, I reject the view that crimes are limited to morality-based offences. Second, the ambit of minor offences has no homogeneous essential features but comprises several groups, each of which has distinctive features. Third, the fragmentation of minor offences demands an approach to procedural pragmatism and procedural proportionality—that is, the procedure for each type of offence to be proportionate to the severity of punishment, and, ultimately, fair as a whole.

While this article focuses on the Common Law jurisdiction of England and Wales and the Civil Law jurisdiction of Vietnam, some parts make comparisons with other Common Law and Civil Law systems. It should be noted that this article is not an extensive comparative study of the English and Vietnamese summary minor offence processes, which is a subject of another article.[8] However, because the Common Law and the Civil Law differ significantly in their conceptualisations of so-called 'minor offences', it is worth investigating the overlapping and confusing terms regarding minor offences used in these legal systems (as I will analyse in Sect. 2.1). England and Vietnam have been chosen as

[4] Ashworth and Zedner (2008).

[5] Simester et al. (2013, 180).

[6] E.g., see: Lamond (2007), Law Commission of Canada (2004), Cf. Melissaris (2014), Cf. Hörnle (2014).

[7] E.g., see: Duff et al. (2010), Ashworth and Zedner above n 4, Ashworth (2000), Husak (2008, 104), Guinchard (2005), Slobogin (2005).

[8] Bui (2016).

they reflect proto-typical and the most different comparative logic.[9] These reflections on the English and Vietnamese summary minor offence processes contribute to the understanding of so-called 'minor offences' and the processes to deal with them in the Common Law and the Civil Law.

2 An Uncertain Jurisprudence of Minor Offence Justice

The notion of minor offences is unclear for three reasons. First, jurisdictions vary in conceptualising which offences are considered 'minor'. An offence can be deemed serious in one jurisdiction, but legislated as less serious in another jurisdiction, and vice versa. Second, there are different terms denoting minor offences across jurisdictions. Civil Law scholars may not have a correct understanding of the so-called 'public-welfare' regulatory offences or the fact that numerous minor offences are a kind of crime in Common Law countries. Likewise, Common Law lawyers may be confused about the notion of administrative offences in Civil Law jurisdictions. Third, even within a single jurisdiction, the range of minor offences is diverse and fragmented into several groups characterised by different procedures. In many countries, the legislation does not provide a definition of 'minor offences'. Rather, groups of minor offences are legislated in different acts. A functionalist approach is therefore necessary to identify which kinds of offences should be considered minor ones.

Because of terminological complexity and the uncertain classifications of minor offences, it is worth thoroughly examining the terms widely used in both the Common Law and the Civil Law. This part begins with tracing the common understanding of minor offences, then seeking the conceptualisation of summary offences, regulatory offences, trivial offences, administrative offences, and preventive measures (the offence of dangerousness). I then explain the fragmentation and uncertainty of minor offence processes. I will show that conceptualisations of the above-mentioned groups of offences and measures can affect the procedure designed to deal with them.

2.1 A Substantive Problem: Terminological Complexity and Uncertain Classification

2.1.1 Minor Offences: A Loose Concept in both Civil Law and Common Law Systems

In many jurisdictions, the term 'minor offence' has no statutory definition but refers to types of offences that are non-serious and handled by simplified procedures. Traditionally, 'minor offence' has been understood to mean 'misdemeanour' or 'summary offence' in Common Law systems, or 'administrative offence' in Civil Law systems. In the United States (US), it is understood that '[m]isdemeanors are the less serious offenses, for which punishment is generally limited to one year in jail'.[10] The *Black's Law Dictionary* defines 'misdemeanor' (also termed 'minor crime'; 'summary offense') as a 'crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement (usu. for a brief term) in a place other than prison (such as a county jail)'.[11] Recently,

[9] Hirschl (2005).

[10] National Association of Criminal Defense Lawyers (2009, 11).

[11] Garner (2009, 1089).

misdemeanour justice has attracted significant studies in the US.[12] However, these works largely focus on the range of misdemeanours dealt with by the lower criminal courts, and do not pay attention to other kinds of misdemeanours such as regulatory offences and infractions, which are handled by administrative agencies. The *Australian Law Dictionary* explains the notion of summary offence as follows:

> A minor offence … relating to good order. Formerly, summary offences consisted mostly of what are known as police offences, law and order offences or street offences, many of which have the status of a victimless crime … or state of affairs offences … The summary offences that remain on the statutory books are generally distinguished from serious crimes (indictable offences).[13]

In Vietnam, an '[a]dministrative offence is a faulty act, committed by an individual or organization, violates the state management law but does not constitute a crime and, therefore, must be administratively sanctioned in accordance with law', according to Article 2(1) of the Act on Handling of Administrative Offences 2012.

As a general rule, the regime of minor offences represents two aspects of proportionality: substantive proportionality and procedural proportionality. It has been well established that substantive proportionality requires that the severity of punishment must be proportionate to the seriousness of the offence,[14] which is gauged by degrees of harmfulness and culpability.[15] Procedural proportionality, on the other hand, requires not only that the procedure must be proportionate to the seriousness of offence but also that the procedure must be just as a whole.[16] Accordingly, minor offences are dealt with by simplified procedures, which reflect a limited level of fair trial rights.

As crime is a positivistic, political-social phenomenon,[17] jurisdictions differ in their notions of minor offence in particular as well as crime in general. 'Minor offence' is a loose concept, there being no consensus on the ambit of this type of crime.[18] The notion of 'minor' is inherently vague and therefore the law-maker has discretion as to what level of seriousness as well as which specific act is considered a minor offence. Thus offence X could be deemed serious in jurisdiction A but minor or even non-criminal in jurisdiction B. Actual practice shows that, while in some countries (such as the US, the United Kingdom (UK)) misdemeanours/summary offences include offences punishable by one-year/six-month imprisonment, in Vietnam offenders regarding administrative offences are not subject to imprisonment. According to the jurisdiction of the European Convention on Human Rights (ECHR), minor offences are not punishable by imprisonment.[19]

The massive expansion of minor offences and the fragmentation of minor offence procedures have arguably been the major causes of the above-mentioned criminal law's inaccessibility and unknowability.[20] While the number of serious offences is quite

[12] See: Natapoff (2012, 2015), Kohler-Hausmann (2013, 2014).

[13] Mann (2013, 694–695).

[14] von Hirsch and Ashworth (2005, 132).

[15] Ibid. 186.

[16] E.g., see: *Criminal Procedure Rules (England and Wales) 2014* Rule 1.1 (Overriding Objective).

[17] Finkelstein (2000), Stuntz (2001).

[18] Cf. Volokh (2004).

[19] Council of Europe (1984, [18]).

[20] Stevenson and Harris, above n 2.

stable, thousands of minor offences have been created in recent decades.[21] The processes for minor offences are not homogeneous but fragmented into different procedures applied to different types of offences. This can be observed in England and Wales where summary justice has been *de facto* fragmented into four groups: the traditional summary process at Magistrates' Courts, the process for out-of-court disposals, the process for regulatory sanctions, and the process for civil preventive orders at Magistrates' Courts. The case of Vietnam represents a lower level of fragmentation, where there are three groups of summary justice: the procedure for administrative sanctions, the procedure for preventive administrative measures, and the emerging summary procedure at criminal courts. I will analyse this fragmentation in the discussion to follow about summary offences, regulatory offences, trivial offences, administrative offences, and preventive measures.

2.1.2 Summary Offences: Its English Origin

In England and Wales, the term 'summary offence' replaced its synonym 'misdemeanour' in 1967. The Criminal Law Act 1967 abolished the terms 'felony' and 'misdemeanour'. Today, for procedural reasons, crimes are officially classified into three groups: indictable-only offences, triable-either-way offences, and summary-only offences. According to the Interpretation Act 1978, 'summary offence' means an offence which, if committed by an adult, is triable only summarily'.[22] More specifically, these words refer to a criminal offence that is tried by the Magistrates' Court and subject to up to six months' imprisonment and/or a fine of up to £5000 and/or a community sentence.[23] As such, the realm of summary offences is officially attached to Magistrates' Courts and their fines cannot exceed £5000. It should be noted that, according to the official and traditional realm of summary offences, a wide range of regulatory offences that are punishable by fines of more than £5000, as well as a series of out-of-court disposals, may be excluded from traditional summary justice.

In Vietnam, although there is no official conceptualisation of the term 'summary offence', an official tier of summary criminal process was established by the 2013 Constitution. Prior to the 2013 Constitution, there was a recognition of summary procedure by the Criminal Proceedings Code 2003, but it was characterised by technical simplifications rather than limitations on the right to a jury and the right to free legal assistance, as in the case of the British system. There are four conditions for the application of summary procedures: (1) the accused is caught red-handed; (2) the facts are simple with obvious evidence; (3) the alleged offence is a *less serious*; and (4) the accused has a clear identity.[24] In principle, fair trial rights are guaranteed as in the normal criminal procedure.[25] In contrast to the previous 1992 Constitution, the 2013 Constitution makes a distinction regarding the composition of the trial council between less serious crimes and more serious crimes. Less serious crimes are crimes that cause no great harm to society and the

[21] In the 10-year period between 1997 and 2006, the Labour Government created more than 3000 new offences in England and Wales (Kirsty Walker, *3000 New Criminal Offences Created Since Tony Blair Came to Power* DailyMail. http://www.dailymail.co.uk/news/article-400939/3-000-new-criminal-offences-created-Tony-Blair-came-power.html.

[22] *Interpretation Act 1978* sch. 1 (b).

[23] UK Government, *Criminal Courts*. https://www.gov.uk/courts/magistrates-courts.

[24] *Criminal Proceedings Code 2003* Article 319.

[25] Ibid. Article 324(2)(5).

maximum penalty bracket for such crimes is three years of imprisonment.[26] It can be inferred from Article 103(1)(4) of the 2013 Constitution that the summary procedure for less serious crimes is implemented by only one judge. Therefore, somewhat as is the case with summary justice in England and Wales, the right to a competent tribunal is limited, as compared to the serious crimes process. However, these constitutional provisions can only be effective with an amendment to the Criminal Proceedings Code. It can be expected that a new tier of summary criminal processes will appear in the near future by the enactment of the Criminal Proceedings Code 2015.

2.1.3 *Regulatory Offences: A Contentious Intersection between Criminal Law and Regulation*

In the Common Law world, the realm of so-called 'regulatory offences' has in the last several decades risen dramatically for the sake of better regulation. The two terms 'regulatory offence' and 'public welfare offence' are synonyms. The former is widely used in the UK and Canada; the latter is more commonly used in the US.[27] Admittedly, most minor offences, in particular, but also most criminal offences, in general, are regulatory. James Chalmers and Fiona Leverick are right in warning that '"[r]egulatory" criminal law is all but ignored by most criminal law texts and journals but … it dominates the criminal law'.[28] Generally speaking, a regulatory offence has the following characteristics:

1. it plays a role in regulating certain social activities[29] with the rise of the regulatory state[30];
2. it is mostly resolved by regulatory agencies[31];
3. it is an 'artificial' crime[32] or *malum prohibitum* (a morally neutral offence), which is different from a 'real' crime or *malum in se* in traditional criminal law[33]; and, therefore,
4. it incurs strict liability[34] and reverse onus of proof.[35]

There has been a long-running debate about the nature of regulatory offences. In a nutshell, minimalist theorists have claimed that regulatory offences, which are characterised as *mala prohibita*, strict liability, and lacking of inherent moral wrongness, are not commonly and traditionally viewed as crimes and therefore should be decriminalised.[36] This is in contrast to strong arguments non-minimalists give for thinking that many *mala prohibita* offences deserve criminalisation for the common interest.[37] Louis Michael

[26] *Criminal Code 1999* Article 8(3).

[27] Brown (2014, 863).

[28] Chalmers and Leverick (2013).

[29] Ashworth, above n 7, 228.

[30] Hyde (2012, 4). http://www.bailii.org/uk/other/journals/WebJCLI/2012/issue4/hyde4.html.

[31] Ashworth, above n 7, 228.

[32] Thornburgh (2007).

[33] Green (1997).

[34] Sayre (1933).

[35] Ashworth, above n 7, 228.

[36] Hart (1958), Lamond, above n 6, 631–632, Thorburn (2011, 105), Tadros (2010), Husak, above n 7, 119, Luna (2005), Thornburgh, above n 32.

[37] Duff (2010b), Duff (2007, 92), Green, above n 33, Cartwright (2004, 244–249), Ferguson (2011).

Seidman soundly summarises the two competing theses: '[f]ormalism asserts that the purpose of the criminal law should be to assign moral fault, while realism asserts that it should be to control behavior'.[38]

In the era of the regulatory state, which is characterised by a 'reliance on administrative agencies for law making and decisionmaking',[39] the concept of crime has been revisited. Going beyond fault-based formalism, most regulatory offences arguably are crimes in nature, as they are public wrongs that affect large public groups, result in blameworthiness, and deserve a punitive and deterrent response.[40] A.P. Simester, on the one hand, admits the difference between regulatory offences and 'true crimes' but, on the other hand, recognises regulatory offences as 'quasi-criminal offences' or 'quasi-criminal regulations'.[41] Simester cites the case of *Pearks, Gunston & Tee Ltd. v Ward,* according to which 'quasi-criminal offences' are forms of conduct that 'are forbidden by law under a penalty … and the reason for this is that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done'.[42] In other words, the prosecution of quasi-criminal offences does not require *mens rea*. Given the criminal nature, or at least quasi-criminal nature, of regulatory offences, the process of dealing with regulatory offences is essentially different from civil law and administrative law. The essential distinction here is that, once someone has committed a prohibited public wrong, the offender merits a punishment/penalty imposed by the representative of the public (i.e., the state). The terms 'civil penalty/sanction' and 'administrative penalty/sanction' refer to measures that are arguably intended to avoid a formal criminal process rather than adopt a true civil or administrative process.

It is not clear whether regulatory offences should be viewed as forms of minor crimes. Although many regulatory offences resulting in small fines could be accepted as minor crimes, a significant number of regulatory offences are not 'minor' in the common understanding of the term when they can cause serious harm[43] and are punishable by fines of thousands or even millions of US dollars. Even in a developing country like Vietnam, the highest fine applicable in the case of an administrative offence is VND 1,000,000,000 (equivalent to approximately USD 47,000) for individuals, and VND 2,000,000,000 (equivalent to approximately USD 94,000) for organisations. Thus if the penalties are presumed to be proportionate to the seriousness of the offences, it is somewhat unreasonable to consider regulatory offences as a form of minor crime. Andrew Ashworth argues that 'reference to an offence as "regulatory" should not be taken to imply that it is a non-serious offence'.[44] However, interestingly, the European Court of Human Rights (ECtHR) still regards a large fine for a regulatory offence as a *minor* criminal sanction,

[38] Seidman (1996).

[39] Biber and Ruhl (2014, footnote 4).

[40] Norris and Phillips (2011, 95).

[41] A.P. Simester, 'Is Strict Liability Always Wrong?' in A.P. Simester (ed), *Appraising Strict Liability* (Oxford University Press, 2005) 21.

[42] *Pearks, Gunston & Tee Ltd. v Ward* (1902) 2 KB 1 [11].

[43] Cartwright, above n 37, 69.

[44] Ashworth, above n 7, 228 (footnote 12). Ashworth also confirms this idea in his later work: 'Sometimes the connotation is that this class of offenses is less serious, but that cannot be accepted, since there are … plenty of offenses in environmental protection or in financial market regulation that carry significant maximum sentences such as five or seven years imprisonment' (Ashworth 2008).

suitable for summary procedures.[45] In the ECtHR's perception, it seems that the notion of a minor criminal sanction does not necessarily mean the minor nature of the crime or sanction, but refers to any crime/sanction that is 'outside the hard core of the criminal law'.[46]

2.1.4 Trivial Offences: An Artificial Range of Trivialities

In England and Wales, for the sake of efficiency, a group of least serious offences, mostly punishable by warnings or small fines, have been dealt with by so-called 'out-of-court disposals'—a more simplified process than the traditional summary process.[47] This group of trivial offences tends to be referred to by *prima facie* non-criminal terms, such as 'infraction', 'violation', 'infringement', and so on.

The delineation of out-of-court disposals is arguably artificial and positivistic for a 'swift and sure justice'.[48] Offences under this regime comprise both regulatory offences (e.g., littering offences, minor traffic offences) and fault-based violations (e.g., shoplifting, minor assault), provided that these offences are only subject to small penalties. This could create confusion and raise concerns about the justification for the existence of a specific procedure for such a group of offences.

What is the justification for the regime of out-of-court disposals? The simple answer is: efficiency. There is no statutory definition or doctrinal concept of a 'trivial' offence. In fact, offences under out-of-court disposals are, officially, summary offences, and tried by Magistrates' Courts. But under the pressure of caseload, many summary offences punishable by small penalties have been dealt with by diversionary measures in the first instance, and the criminal court is the last resort, in the case of appeals. This difference of process targets the group of least serious offences, which I term 'trivial' offences. Trivial offences are often equated with minor offences but, according to the regime of out-of-court disposals in England and Wales, trivial offences can be understood as the least serious offences among summary offences. Not minor offences in general, but the group of least serious offences truly illustrates Doreen McBarnet's notion of the 'triviality' of summary justice.[49]

2.1.5 Administrative Offences: A Distinguishing Feature of Civil Law Systems

In the linguistic sense, the two words 'regulatory' and 'administrative' are synonymous and therefore the two phrases 'regulatory offence' and 'administrative offence' are interchangeable. However, these two terms can be understood a bit differently in the context of different legal traditions. In Anglo-American legal systems, a regulatory offence (public-welfare offence) is '[a] minor offense that does not involve moral delinquency and is prohibited only to secure the effective regulation of conduct in the interest of the community'.[50] Meanwhile, in Civil Law systems, an administrative offence can be deemed a

[45] See: *A. Menarini Diagnostics S.R.L. v Italy* (2011) (ECtHR) [59].

[46] Oliver (2012).

[47] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (2012), HM Government and College of Policing, *Consultation on Out of Court Disposals* (2013), Office for Criminal Justice Reform (2010).

[48] Ministry of Justice, above n 47.

[49] McBarnet (1981).

[50] Garner, above n 11, 11.

non-criminal one that is dealt with administratively by administrative agencies. The scope of administrative offences could be broader than that of regulatory offences because administrative offences include both regulatory-purpose offences and non-regulatory-purpose ones. In Vietnam, like many Civil Law jurisdictions, the realm of administrative offences includes non-regulatory-purpose offences, such as minor assault and minor theft, that are morally wrong and generally deemed part of traditional criminal law. From a comparative angle, the Vietnamese regime of administrative sanctions corresponds to the English regimes of regulatory penalties and out-of-court disposals.

2.1.6 Preventive Measures: The Offence of Dangerousness

Hybrid civil-criminal measures have existed for many years in different legal traditions. Exemplars are the regimes of preventive detention in the Common Law world[51] and administrative detention in socialist justice systems.[52] Traditionally, the Anglo-American model of preventive detention has been designed to target individuals who have the potential to commit specific serious offences, such as sexual offences violent offences, or terrorist offences; whereas the socialist model of administrative detention has been criticised as an authoritarian justice system without due process, which targets individuals who have the potential to make ambiguous threats to society or the state. Interestingly, in the last fifteen years, the English preventive justice model has been accused of being a version of the authoritarian justice model, where individuals can easily fall into the trap of an anti-social behaviour order (ASBO) or similar measure. The regime of ASBO, which shares some common features with the authoritarian socialist model of administrative detention, has been an odd development in the Common Law world. Stuart Green claims that in the US there is no similar measure to the English ASBO.[53]

Preventive measures are broad, being concerned with serious crimes, non-serious crimes, and even non-criminal conduct. The existence of preventive measures in England and Vietnam involving a wide range of minor offences and anti-social behaviours is a rare and interesting legal phenomenon that needs to be thoroughly examined. An individual who is deemed 'dangerous' to society could be subject to a preventive measure, which is a variation of a criminal charge. Ashworth and Lucia Zedner soundly reason that 'any deprivation of liberty (e.g., through imprisonment) is significant' and the 'possibility of imprisonment is a fairly conclusive reason to find that the proceedings are in essence criminal'.[54] In England and Wales, a person who has 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household'[55] may be issued an ASBO and afterwards may incur up to five years' imprisonment if he/she breaches the order. In Vietnam, a person who has been punished for committing two administrative offences in six months may be subject to deprivations of liberty in criminal-like forms called 'education in a reform school' (for juveniles) or 'education in a

[51] Robinson (2001), Slobogin (2003), Husak (2011).

[52] Peerenboom (2004), Biddulph (2007).

[53] Green (2008).

[54] Ashworth and Zedner, above n 4, 46.

[55] *Crime and Disorder Act 1998*s. 1(1)(a).

compulsory educational institution' (for adults).[56] Substantively, these English and Vietnamese forms of preventive measure arguably represent the phenomenon of 'undercriminalisation',[57] as such conduct should actually be criminalised.[58] Susan Dimock has proposed that states might create an offence of 'dangerousness' as a way to preventatively criminalize anti-social behaviour.[59]

Given the terminological complexity and uncertain classification of minor offences analysed in this section, in Sect. 3.1, I will propose a conceptualisation of minor offences as less serious public wrongs that should be subject to a short period of imprisonment or non-custodial punishment and handled by simplified procedures.

2.2 A Procedural Problem: The Fragmentation and Uncertainty of Process

As a consequence of artificially classifying some groups of minor offences as non-criminal, their processes have been diverted away from formal criminal procedures and have come closer to administrative justice or civil justice. However, this does not mean these diverting measures are true forms of administrative justice or civil justice. In reality, we can see hybrids somewhere in between the criminal process and administrative/civil process. In other words, in the range of due process principles, which have been split into three groups (criminal due process, civil due process, and administrative due process), we can see some measures that are not purely criminal/civil/administrative but hybridised. These combinations might be arbitrary, as a result of poor theorising. The question about how much due process such measures represent has not been convincingly addressed.

2.2.1 Administrative Sanctions/Civil Penalties: Criminal Process or Administrative Process?

A major difference between the two systems was that, while Common Law's criminal courts dealt with misdemeanours/summary offences, Civil Law's administrative agencies dealt with administrative offences. For this reason, it can be argued that Common Law jurisdictions showed more respect for due process values because the right to a competent, independent, and impartial tribunal was better protected. However, in recent decades, many Common Law jurisdictions have showed less dependence on the criminal courts and an increased use of administrative bodies in dealing with minor offences. Thus the two traditions now have much in common.

Their common feature is that both systems grant administrative bodies the judicial power to judge cases, provided that an independent, competent, and impartial tribunal can review the administrative bodies' decisions. These administrative bodies play extremely powerful roles as investigators, prosecutors, judges, and juries in tackling trivial offences and regulatory contraventions.[60] While the decision-makers are entitled to judge criminal cases, they are not considered to be criminal tribunals. The decision-making process is

[56] *Act on Handling of Administrative Offences 2012* Articles 90, 92, 94; *Decree 111/2013/ND-CP on the Application of the Administrative Handling Measure—Education in Commune, Ward or Township 2013,* Article 4.

[57] Ashworth and Zedner (2010).

[58] Cornford (2012).

[59] Dimock (2015).

[60] Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate (2011. 24); Law Commission (2010, 161).

purely 'administrative' and tends to ignore criminal fair trial rights. The English system has been trying to correct this mistake.[61]

In the appeal stage, English and Vietnamese practice takes three different forms. First, in England and Wales, *normal criminal courts* can fully review trivial-offence cases that were previously handled by out-of-court disposals. This protects the highest level of fair trial rights to the highest degree but, interestingly, it is for trivial offences. Second, for regulatory offences, England employs a separate tribunal system that undertakes *merit reviews* of cases. This process can be described as a judicial review of administrative action with some criminal procedural safeguards (e.g., criminal standards and burden of proof). Third, Vietnam uses the general *administrative court* to review just the legality of initial decisions. This is a purely judicial review of administrative action. (Judicial reviews of administrative decisions on administrative offences are similar to judicial reviews of any other administrative decisions.)

2.2.2 Preventive Measures: Criminal Process or Civil Process?

In England and Wales, the civil law status of preventive measures like ASBO has given rise to the application of civil-proceedings procedural safeguards. However, this 'civilisation' of criminal charges has been strongly criticised.[62] Moreover, the regime of so-called 'civil preventive measures' is not purely civil in practice when the criminal standard of proof is used.[63] On the other hand, the Vietnamese version of preventive justice, which is officially called 'administrative measures', has an uncertain procedural jurisprudence. While such measures are characterised as 'administrative', they share common features with criminal charges and are dealt with by the court system.

To address the uncertainty of minor offence processes, in Sect. 3.2 I will suggest an approach of procedural proportionality for the design of summary processes.

3 Towards a principled approach to procedural proportionality

This part is devoted to proposing a way of addressing the uncertain jurisprudence of minor offence justice. It starts with the suggestion that minor offences are a kind of crime/public wrong/criminal charge and then provides a re-conceptualisation of summary offences and summary processes towards procedural proportionality.

3.1 Minor Offences are a Kind of Crime

3.1.1 A Defence of the View that Crimes should be Perceived as Public Wrongs

This study does not claim to develop a theory of crime or criminalisation. Rather, I seek an account of crime and the criminal process that is as compatible as possible with the broad notion of 'criminal charge' as prescribed by international human rights instruments and is suitable for common practice. Admittedly, this broad notion might properly reflect the

[61] Macrory (2013), Maurici and Macrory (2009); *Environmental Civil Sanctions (England) Order 2010.*

[62] Ashworth (2004), Ashworth and Zedner, above n 57, Brown (2013).

[63] *R. (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea Royal London Borough Council R (McCann & others) v Crown Court at Manchester and another* (2002) UKHL 39.

consequence of the unavoidable rise of the regulatory, preventive state and, at the same time, the decline of the idea of the minimal state. The minimalist approach, which supports the *ultima ratio* principle,[64] is an attractive one, but may be unfeasible, given the function of the state today. While it advocates the idea that criminalisation should be limited to public wrongs that are sufficiently grave,[65] the minimalist account has not convincingly answered the thorny question of how we should deal with public wrongs that are *not* sufficiently grave. Abolish them? I am sceptical of the possibility that any state can totally abolish all forms of regulatory and preventive offences. If keeping less grave public wrongs is inevitable, we must consider the legal consequences for the offenders. Furthermore, the minimalist account has not adequately explained how much due process should be maintained with minor public wrongs.

William Blackstone famously made a conception of crimes as public wrongs. He reasoned that:

> [p]rivate wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social, aggregate capacity.[66]

Public wrongs do not necessarily occur in public space. Whether they occur in public or in private, they require a response from the state, which is representative of the public, because these wrongs 'harm the public collectively or the polity as a whole'.[67] Grant Lamond, although a minimalist, persuasively reasons that crimes are 'public wrongs not because they are wrongs *to* the public, but because they are wrongs that the public is responsible for punishing'.[68] This conception of crime has also been supported by the legal republicanism school.[69]

Moreover, a public wrong need not be inherently immoral. As Lindsay Farmer claims, 'criminal offences are not necessarily formed around, or do not reflect, a preconceived idea of moral wrong, but are articulated through changing practices of policing and transformations in the social order of modernity'.[70] The fact that regulatory offences are traditionally not considered immoral does not mean they can never become immoral and culpable. First, some regulatory offences that officially require *mens rea*[71] are not *mala prohibita*.[72] Second, according to surveys, many regulatory offences are perceived to be as culpable as traditional crimes.[73] Many *mala prohibita* offences (e.g., dangerous driving, drunk driving, the dumping of toxic substances) have become so commonplace that the public may widely view them as infringements of moral values. Third, even when the public does not deem *mala prohibita* offences to be moral wrongs, one can still argue that

[64] See: e.g., Husak (2004), Jareborg (2004).

[65] Lamond, above n 6, 627–628.

[66] Blackstone (1897, 585).

[67] Duff, above n 37, 140–141.

[68] Lamond, above n 6, 629.

[69] Dagger (2009).

[70] Farmer (2010, 233).

[71] E.g., *Trade Descriptions Act 1968* s.14(1).

[72] Green, above n 33, 1574.

[73] Tyler (1990, 44).

committing *mala prohibita* offences is immoral in the sense that the offenders have disrespected their moral duties to obey the law.[74] As Ronald Dworkin wrote:

> the law has no general purpose to condemn only blameworthy acts … it might be wrong, even though the act condemned is not wrong in itself, just because the law forbids it … it might still be true that once the law is passed everyone has a moral obligation to obey it.[75]

This view may be a return to the ideas of *mala in se* and *mala prohibita*. *Mala in se* refers to conduct that is wrongful irrespective of the existence of law, whereas *mala prohibita* refers to conduct that is not wrongful prior to the existence of law.[76]

In the modern era, the traditional moral-based borderline between *mala in se* and *mala prohibita* has increasingly become unclear. Daniel Ohana concludes that a philosophical distinction between true crimes and administrative offences is unattainable.[77] Likewise, according to Thomas Weigend, there is a 'lack of an ontological difference between criminal offenses and administrative violations'.[78] More decisively, Mireille Hildebrandt claims with good reason that the 'understanding the difference between criminal and regulatory offenses in essentialist terms, such as the medieval *malum in se* and *malum prohibitum*, does not make sense'[79] and thus 'in a constitutional democracy *mala prohibita* must aim to become part of the *mala in se*, understood as the social construction of a shared normativity'.[80] Although I incline towards the school of legal republicanism, which argues that, within the general conception of crimes as public wrongs, it is necessary to distinguish between *mala in se* as 'primary crimes' and *mala prohibita* as 'derivative crimes'.[81] I advocate a theoretical conception of crimes as public wrongdoings, but I do not deny that in practice it may be legitimate to describe (but not to consider) such derivative crimes in non-criminal terms, such as 'regulatory/administrative/civil' offences in order to reflect their non-traditional culpability and a low level of condemnation.

3.1.2 The Danger of Procedural Decriminalisation for Minor Offences

Decriminalisation includes substantive decriminalisation and procedural decriminalisation. I acknowledge that, if crimes are regarded as traditionally serious offences, one can explain material criminalisation by saying that some offences are to be considered administrative offences rather than criminal ones and dealt with by administrative procedures.[82] But if crimes are perceived as public wrongs (as discussed above), substantive decriminalisation means that an act is no longer considered to be (or likely to be) harmful to society. This kind of substantive decriminalisation is the phenomenon of 'pure' decriminalisation, where '[l]egislatures and courts sometimes formally remove all criminal penalties attached to

[74] Green, above n 33, 1573.

[75] Dworkin (1977, 9).

[76] Husak, above n 7, 104–105; Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, above n 37, 90.

[77] Ohana (2014, 1085–1086).

[78] Weigend (1988).

[79] Hildebrandt (2009, 44).

[80] Hildebrandt (2011, 526).

[81] Dagger, above n 69, 155, Feinberg (1986, 19–22), Braithwaite and Pettit (1993, 94).

[82] Jehle and Wade (eds), above n 1, 33.

specific conduct and leave that conduct unregulated by law'.[83] Procedural decriminalisation means that an act is no longer dealt with by formal criminal process although the act is formally considered a crime.[84] In reality, procedural decriminalisation, rather than substantive decriminalisation, has given rise to the debate and concern about how much due process ought to be in place for those offences. This is the result of the fact that 'much of decriminalization is only partial', 'retain[ing] many punitive features while stripping defendants of counsel and other procedural protections'.[85]

One may argue for the substantive or procedural decriminalisation of minor offences for the sake of efficiency,[86] better regulation,[87] or crime prevention,[88] but this could cause several dangers. The first is that all criminal procedural rights could be circumvented. On the face of it, Article 6(1) of the ECHR, when using the expression '[i]n the determination of his civil rights and obligations or of any criminal charge against him', has seemed to create a dichotomy between the determination of a criminal charge and the determination of civil rights and obligations. Accordingly, if some minor offences are procedurally decriminalised, the offenders may be protected only by a purely civil process. This is risky because all exclusively criminal procedural protections could be removed. Civil process is also inadequate for public wrongs, which are distinct in nature from civil liability. This problem might be called *procedural undercriminalisation*, where many elements of criminal procedural safeguards are, unreasonably, no longer applied, when the offence is essentially criminal.[89] Once minor offences are understood as a form of public wrong and therefore punished by the state,[90] the defendants deserve to enjoy the appropriate level of criminal fair trial rights to preclude the state's abuse of power. I admit that 'employing the criminal sanction to regulate behaviour may be a way of respecting the rights of citizens by ensuring that they are not subject to state-imposed adverse consequences without the requirements of due process'.[91] R.A. Duff also warns that 'while a shift to non-criminal regulation removes the threat of criminal stigmatization, it also removes some of the protections that criminal law provides: … there might be a higher risk of being penalized when legally or morally "innocent"'.[92] The second danger is that decriminalisation may be unacceptable for some groups of minor offences with severe consequences. It is unreasonable to decriminalise summary offences that are punishable by deprivation of liberty. It is also unfair to decriminalise regulatory offences that are punishable by a large fine. For this reason, in *Menarini Diagnostics v Italy*, the ECtHR considers a six-million Euro fine for an Italian company breaching competition law as a criminal sanction.[93]

The ECtHR has developed an anti-procedural-over-decriminalisation doctrine to prevent member states from merely naming some groups of public wrong as non-criminal

[83] Woods (2015), Cf. Natapoff, 'Misdemeanor Decriminalization', above n 12, 1065.

[84] Jehle and Wade (eds), above n 1, 33.

[85] Natapoff, 'Misdemeanor Decriminalization', above n 12, 1077–1078.

[86] E.g., see: Guinchard, above n 7, 730.

[87] E.g., see: Macrory (2006).

[88] E.g., see: *R. (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea Royal London Borough Council R (McCann & others) v Crown Court at Manchester and another* (2002) UKHL 39.

[89] Cf. Natapoff, 'Misdemeanor Decriminalization', above n 12, 1055.

[90] Lamond, above n 6, 629.

[91] Ferguson, above n 37, 275.

[92] Duff (2010c) 104.

[93] *A. Menarini Diagnostics S.R.L. v Italy* (2011) (ECtHR) [59].

(e.g., civil/administrative offences) to avoid criminal fair trial rights.[94] This doctrine originated from the case of *Engel v Netherlands*, which provides criteria for 'criminal charge' prescribed by Article 6 of the ECHR. According to this case, conduct, regardless of its qualification in domestic law, is deemed deserving of a criminal charge if that conduct qualifies according to at least one of three criteria: (i) the state officially defines the offence as criminal; (ii) the nature of the offence; (iii) the severity of the penalty.[95] Sharing this view, the United Nations Human Rights Committee interprets the notion of criminal charge as one that 'may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity'.[96] This doctrine has led to the recognition that many kinds of regulatory offences (both trivial and great) are considered to be criminal.[97] The *Engel* case had no intention of providing a doctrinal concept of crime through the notion of criminal charge, since this case focused more on preventing procedural over-decriminalisation. Having been influenced by *Engel*, the British court has argued that 'surely a state can no more escape criminal classification and thereby the protections of Article 6 by artificially separating out a defence from the substance of the allegation, than by classifying offences as "regulatory" instead of "criminal"'.[98] The *Engel* doctrine could be considered a guardian of criminal due process in Europe, where many Civil Law jurisdictions have shown to be compatible with this doctrine.

3.1.3 Towards Procedure-based Terminologies of Criminal Offences: A Need for Broader Concepts of Summary Offences and Summary Processes

As a practical approach, it has been argued that the concept of crime and the classification of crimes should be taken into consideration through the lens of the criminal process.[99] Glanville Williams has argued that '[a] crime is an act of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal'.[100] Indeed, there has been a change from a seriousness-based classification of crimes to a procedure-based one. Although the US still keeps the term 'misdemeanor', many jurisdictions (such as the UK, Australia, and New Zealand) prefer the term 'summary offence', which is characterised by a summary procedure compared to a serious offence process. Prior to 1967, England used the regime of misdemeanour, which meant 'less serious offence'. But now England and many other Common Law jurisdictions use the term 'summary offence', which means that the offence is handled by summary procedure.[101] Moreover, this summary procedure may apply to triable-either-way offences. Likewise, the term 'administrative offence', which is used in

[94] *Engel v Netherlands* (1976) 1 EHRR 647. Andrew Ashworth describes this as 'anti-subversion doctrine' (Ashworth, 'Social Control and "Anti-social Behaviour": The Subversion of Human Rights?', above n 62, 268).

[95] *Engel v Netherlands* (1976) 1 EHRR 647 [82].

[96] United Nations Human Rights Committee (2007, [15]).

[97] E.g., breaches of traffic law (*Öztürk v Germany* (1984) 6 EHRR 409); breaches of competition law (*A. Menarini Diagnostics S.R.L. v Italy* (2011) (ECtHR)).

[98] *International Transport Roth GmbH & Ors v Secretary of State For the Home Department* (2002) EWCA Civ 158 [37] (*per* Brown LJ).

[99] Ormerod (2011, 15).

[100] Williams (1955).

[101] Sprack, above n 3, 125.

many Civil Law jurisdictions, means that the offence is handled by administrative procedure. For instance, in Germany, '[l]egal consequences imposed by administrative bodies are called administrative sanctions'.[102] Obviously, in many circumstances, the terms describe the characteristics of the procedure rather than the nature.

The rapid explosion of what have been named 'misdemeanours/summary offences' in Common Law systems or 'administrative offences' in Civil Law systems demands the most appropriate term for that phenomenon. First, the term 'administrative offence'/'regulatory offence' may leave out offences that are handled by preventive, hybrid civil-criminal processes. Second, the concept of 'derivative crimes', as argued by Joel Feinberg, John Braithwaite and Philip Pettit,[103] may be a good replacement for *mala prohibita*, but this concept does not embrace all summary offences, of which there are a group of less serious true crimes (e.g., offences triable in England and Wales in the first instance by Magistrates' Courts). Third, the term 'minor offence'/'misdemeanour' may underestimate the potentially harsh consequences for offenders. However, if we perceive the notion of minor offence not in terms of triviality but as punishable by a short custodial sentence or other type of punishment, such as a fine, the term 'minor offence' is still useful. Alternatively, from the perspective of procedure, the term 'summary offence', which refers to an offence that has a *legitimate aim* to be handled in *summary* procedure as compared with formal procedure, might be the most appropriate choice. Accordingly, summary processes should be broadened to include groups of offences that are handled by simplified processes (including preventive orders, regulatory offences, trivial offences), rather than just attaching to Magistrates' Courts in England and Wales. Likewise, in Vietnam the term 'summary offences' should refer to less serious crimes triable by criminal court, 'administrative offences', and administrative-offence-related preventive measures.

3.2 An Approach to Procedural Proportionality for the Design of Summary Processes

3.2.1 Procedural Pragmatism

One may be concerned about the broad notion of criminal charge (such as the ECtHR's interpretation) and the heavy reliance on the criminal law and the formal criminal procedure. The purist school may argue that:

> the criminal law concerns itself with a core of seriously wrong conduct, and that full procedural protections (consistent with Article 6 of the European Convention) are applicable in such cases. Minor wrongdoing and other anti-social conduct should be dealt with outside the criminal law, through streamlined procedures in administrative or civil law and without a criminal conviction or a severe sanction.[104]

However, regardless of the fact that groups of non-traditional public wrongs are formally criminalised, given the label of 'criminal', and made subject to a criminal procedure, the practice of many jurisdictions (both Common Law and Civil Law) shows that at least some criminal procedural rights need to be applied to the procedures for these public wrongs. Although there are claims that strict liability, regulatory offences, and preventive

[102] Dannecker (2013, 222).

[103] Feinberg, above n 81, 19–22; Braithwaite and Pettit, above n 81, 94.

[104] Ashworth and Zedner, above n 4, 45.

measures are not crimes by nature,[105] no one has argued for a purely non-criminal process for those measures. Of course, for some offences, the victims can use the remedies of purely civil justice, such as suing for damages in order to claim compensation. But, obviously, in terms of the response to public wrongs, the state must actively deal with cases through non-civil procedures, regardless of civil lawsuits.

In English practice, regulatory justice still employs some criminal procedural safeguards, such as criminal burden and standard of proof,[106] and preventive justice still uses criminal standard of proof.[107] Even European jurisdictions—which have a long tradition of making a clear distinction between crimes and so-called 'purely preventative administrative reactions'[108] (both substantive and procedural)—have been seeking an appropriate use for criminal due process in the regime of administrative sanctions.[109] Similarly, although the Vietnamese system has considered the regime of administrative sanctions and administrative measures, which was deeply influenced by socialist law (particularly that of the Soviet Union), as a separate jurisprudence from the criminal law, it is interestingly admitted that that regime has inherited the scholarship of criminal law and criminal procedural law.[110] As a result of this due-process-evading justice, many commentators have raised concerns about summary processes and argued for the appropriate application of the common fair-trial principle to such procedures.[111] Summary processes reflect *limitations* rather than *removals* of criminal fair trial rights.

The rise of summary processes for some groups of public wrongs has made the rigid civil-criminal divide[112] obsolete and raised the need for procedural pragmatism. Here, the idea of procedural pragmatism is borrowed from the theory of legal pragmatism, in the sense that '[t]he ultimate criterion of pragmatic adjudication is reasonableness'.[113] As Simon Brown LJ has said: 'the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial'.[114] It should be recognised that the border between crime and civil liability is inherently unclear[115] and the distinction between 'real' crime and other public wrongs is somewhat artificial. The taxonomy arguably serves the procedural pragmatism more than substantive nature. Ashworth seems to support the minimalist school when arguing that 'the wrongdoing should be … *serious enough* to justify punishment'. However, he proposes a flexible, practical (and quite ambivalent) approach to the regulatory offence

[105] Lamond, above n 6, 631; *R. (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea Royal London Borough Council R (McCann & others) v Crown Court at Manchester and another* (2002) UKHL 39.

[106] *Environmental Civil Sanctions (England) Order 2010* s. 10(2); Food and Rural Affairs Department for Environment, *Civil Sanctions for Environmental Offences* (2010) [6.8].

[107] *R. (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea Royal London Borough Council R (McCann & others) v Crown Court at Manchester and another* (2002) UKHL 39.

[108] Spencer and Pedain (2005, 239).

[109] Jansen (2013), Jansen and Langbroek (2007).

[110] Nguyen (2008).

[111] E.g., Hildebrandt, above n 79, 67; Guinchard, above n 7, 734, Nguyen (2011).

[112] Mann (1992).

[113] Posner (2003, 59).

[114] *International Transport Roth GmbH and Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [33].

[115] Simester et al, above n 5, 7.

process, arguing that 'better approaches would be either to move this conduct out of the criminal law into a genuinely civil or administrative structure, or to accept that (some of) these offenses belong in the criminal law and therefore to extend proper fault requirements and due process rights to them'.[116]

Procedural pragmatism can go beyond the long-running debate between formalism and realism, and make room for the application of proportionality doctrine (substantive and procedural). Duff implicitly supports proportionality when proposing 'modest and non-oppressive trials and punishments for relatively minor wrongs'.[117] It is recognised that the argument for removing regulatory offences from the scope of criminal law is not primarily grounded on the substantive issue (i.e., the disproportionality of penalty to seriousness of offence), but is motivated mainly by a concern that the expense of the formal criminal procedure is 'a disproportionate response' to this type of offence.[118] I contend that this concern could be addressed by the proportionality doctrine, which has long been recognised as a major principle of European law. The proportionality doctrine could be a theoretical framework for making the process fit minor offences when 'the distinctive nature of criminal punishment is harder to discern and thus the distinctive procedures reserved for its imposition are harder to apply and to defend'.[119] As Green argues, the traditional 'one-size-fits-all criminal procedure model' has been replaced by a proportionally variable model, where 'procedural rights are allocated proportionally, varying according to the seriousness of the charge brought'.[120] Thus instead of thinking minor offences deserve non-criminal charges, which easily leads to inadequate procedural protections, the recognition of criminal processes for all kinds of public wrongs (with proportionate limitations on fair trial rights) is a more cautious approach to this type of offence. According to the ECtHR's assertion of the principle of procedural proportionality for a criminal charge, '[t]he general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex',[121] but 'what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case'.[122]

3.2.2 *The Expansion of Tiers of Summary Processes: Its Relevance to Procedural Proportionality*

Although I support procedural pragmatism, it is necessary to avoid the risk of procedural 'over-pragmatism'. It is unmanageable, or even impossible, to design thousands of procedures for thousands of offences with different degrees of seriousness and different characteristics. There are usually a few types of procedures corresponding to groups of offences. As, Donald Dripps argues, '[p]rocedural law is generally transsubstantive, i.e. police powers and adjudicatory processes do not vary from one offence to another, although distinctions are made between large categories of the lesser and greater

[116] Ashworth, 'Conceptions of Overcriminalization', above n 44, 409, 424 (emphasis added).

[117] Duff, above n 37, 144.

[118] Tadros, above n 36, 164.

[119] Steiker (1997).

[120] Green, above n 53, 54.

[121] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 [36]. See also: *Saunders v United Kingdom* (1997) 23 EHRR 313 [74].

[122] *O'Halloran and Francis v United Kingdom (G.C.)* (2008) 46 EHRR 397 [53].

crimes'.[123] Each group consists of offences with common features concerning their natures and punishments. Each type of procedure can be described as a tier of criminal justice that has a distinctive level of limitations on fair trial rights. The practice of 'two tiers of justice'[124] has been transformed into several tiers. Accordingly, it can be seen that summary justice comprises four tiers in England (the traditional summary process at Magistrates' Courts, the preventive order process, the out-of-court disposal process, and the regulatory sanctions process) and three tiers in Vietnam (the emerging summary process at criminal courts, the preventive administrative process, and the administrative sanctions process). The approach to the diverse summary processes as a whole would fail to determine the extent to which due process should be used. Rather, the idea of tiers of criminal justice serves not only as a practical tool for criminal proceedings but also as an analytical one for the proportionality analysis of limitations on procedural rights.[125]

What then is the justification for designing those several tiers of summary justice? As a general principle, the process must be proportionate to the severity of punishment, which, as previously assumed, must be proportionate to the seriousness of the offence. Furthermore, procedural proportionality requires not only that the process must be proportionate to the seriousness of offence but also that it must be just as a whole. That is to say, apart from the seriousness of the offence, the procedure must consider other factors that contribute to a fair administration of justice, such as the complexity of the case, the interests of the affected, the severity of the consequences for the effected, efficiency, and the requirements of other cases.[126] In examining the Polish regime of administrative sanctions, Maciej Bernatt submits a quite similar proposal. He argues for an efficiency-procedural fairness reconciliation, in which the 'complexity of the given area of administrative law' and 'the severity of the sanctions' are taken into account.[127]

Take the jurisdiction of England and Wales as a useful example to illustrate the practice of several tiers of summary justice. First, the tier of less serious offences within primary crimes warrants the lowest level of limitations on fair trial rights. The morality-based nature of these offences and the use of custodial punishment demand a true criminal court in the first instance. Nevertheless, the feature of a short period of imprisonment (up to six months) and the major caseload legitimise a few limitations on due process. Second, the tier of preventive orders warrants the second lowest level of limitations on fair trial rights. The potential of deprivation of liberty means that courts are still necessary for the first instance. However, the preventive purpose legitimises more rights limitations than the first tier. Third, the tier of regulatory offences deserves the second highest level of limitations on fair trial rights. The regulatory nature and the unavailability of custodial punishment make courts unnecessary in the first instance. Yet the potential of substantial fines demands true criminal courts for the appeal procedure. Fourth and finally, the tier of trivial offences deserves

[123] Dripps (2011, 410).

[124] McBarnet, above n 49, 123.

[125] For an analysis of tiers of criminal justice in England and Wales, see: Bui (2015).

[126] See: *Criminal Procedure Rules (England and Wales) 2014* Rule 1.1 (Overriding Objective).

[127] Maciej Bernatt, 'Administrative Sanctions: Between Efficiency and Procedural Fairness' (2016) 9(1) *Review of European Administrative Law* 5, 5.

the highest level of due process limitations.[128] The requirement of efficiency and the small fines legitimise great reductions in procedural rights.

4 Conclusion

In this article, I have investigated the ambit of so-called 'minor/summary offences', which are characterised by terminological confusion, expansion, fragmentation, and uncertainty. The article has shown that the conceptualisation of minor offences affects the ways of dealing with these offences in Common Law and the Civil Law jurisdictions (as seen in the examples of England-Wales and Vietnam). The expansion of minor offences has posed two controversial questions: (1) are these minor offences crimes? and (2) how much due process should be designed for them?

As to the first question, ideally we would support the liberal idea of a minimal state in which criminal law only regulates a limited number of inherently immoral forms of conduct. Nevertheless, we must face the inevitable rise of the regulatory, preventive state, which leads to the expansion of the criminal law into the realms of preventive and regulatory justice. This expansion has created a range of public wrongs that is much larger than the range of crimes as classically understood. Today, we cannot deny the 'regulatory function of the criminal law'.[129] The reality demands that the classic notion of 'crime' should be revisited. Accordingly, the broad concept of crimes as public wrongs is both compatible with the interpretation of 'criminal charge' under international law and suitable for the modern development of criminal law. The criminal law is not limited to inherently immoral conduct but more broadly reflects state sanctions for those infringing public rules.[130] Within the ambit of crimes, the two terms 'minor offences' and 'summary offences' are synonyms, referring to those offences that are deemed less serious, punishable mostly by fines or a short period of imprisonment, and dealt with by summary procedures. The use of 'minor offences' emphasises the degree of seriousness of the offences, while the use of 'summary offences' emphasises the procedural characteristics of convictions.

With respect to the second question, it is acknowledged that the realm of summary offences has no homogeneous essential features but fragments into several groups (less serious offences within primary crimes, preventive orders, regulatory offences, and trivial offences), which are characterised by distinct features and warrant different procedures. This fragmentation demands a procedural pragmatism approach that seeks to determine the reasonableness/proportionality of minor offence processes rather than sticks to a rigid civil-criminal divide. Thus I argue that procedural pragmatism leads to a requirement of procedural proportionality—that is, the procedure should be proportionate to the severity of the punishment and fair as a whole. The transformation of one tier into four tiers of summary processes in England-Wales in the past two decades confirms the need for developing a theory of procedural proportionality, which—so it has been argued—is be the remedy for the uncertainty of minor offence justice.

[128] On the contrary, in England and Wales, the tier of trivial offences (out-of-court disposals) is enjoying a higher level of fair trial rights in comparison with the tier of regulatory offences. (See: Bui 2017).

[129] Melissaris, above n 6, 364.

[130] Husak, above n 51, 1181.

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CHAPTER 3 (ARTICLE 2)

HOW MANY TIERS OF CRIMINAL JUSTICE IN ENGLAND AND WALES?

AN APPROACH TO THE LIMITATION ON FAIR TRIAL RIGHTS

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This article aims to answer sub-question 2: *How are fair trial rights applied to different types of summary criminal processes in England and Wales?* After finding the theoretical framework for the thesis, this article explores procedural designs for minor offence processes (summary criminal processes) in England and Wales, which is one of two jurisdictions that this thesis examines.

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How many tiers of criminal justice in England and Wales? An approach to the limitation on fair trial rights

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This article proposes a recognition of five tiers of criminal justice reflecting five degrees of limitation on fair trial rights instead of the traditional notion of two tiers of indictable and summary processes in England and Wales. Over the last 15 years, the radical transformation of summary criminal processes has challenged the idea of 'two tiers of justice'. Such measures as preventive orders, out-of-court disposals and regulatory offences process, which are characterised by higher levels of restriction on due process rights in comparison with the traditional summary process in Magistrates' Court, should be considered new tiers.

1. Introduction

Many jurisdictions distinguish procedure of non-serious crimes from that of serious crimes. In the common law world, Doreen McBarnet's analysis of the 'two tiers of justice'[1] reflects a traditional differentiation between two types of criminal process. The usefulness of this idea is the recognition of a significant procedural distinction between serious and minor crimes (indictable and summary offences). In England and Wales, the first tier attaches to the Crown Court and the second tier attaches to the Magistrates' Court.[2] More than three decades ago, McBarnet observed that 'summary justice is characterised precisely by its lack of many of the attributes of the ideology of law, legality and a fair trial'.[3] Summary justice[4] is not only simpler and faster than indictable justice, but also, more gravely, deemed to be a process where many elements of the principle of due process are denied.[5] Thus, the notion of two tiers of justice mainly represents a

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[1]Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan 1981).

[2]Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010) 323; R Auld, *A Review of the Criminal Courts of England and Wales* (2001) 71.

[3]McBarnet (n 1) 138.

[4]In this article, the term 'summary process' or 'summary justice' does not necessarily only refer to processes for minor offences or processes in Magistrates' Courts, but, more broadly, it implies all criminal processes where fair trial rights are significantly simplified for large groups of wide-ranging offences. These simplifications are reductions regarding fair trial rights rather than technical procedures regarding time, steps, documents, etc.

[5]McBarnet (n 1) 139; Rod Morgan, *Summary Justice: Fast – but Fair?* (2008) 7.

remarkable differentiation of fair trial rights between two types of criminal offences processes. It is generally accepted that fair trial rights are not absolute, so they can be limited[6] even in the first tier of serious crimes procedure. In comparison with the first tier, fair trial rights in the second tier are more significantly limitable.

Over the last 15 years in England and Wales, the dramatic transformation of summary criminal processes[7] has challenged the idea of 'two tier of justice'. Except for a small proportion of minor offences, which are still dealt with under the traditional summary process in Magistrates' Courts, the others are handled by new measures: preventive orders, out-of-court disposals and regulatory offences process. These measures, supported by a governmental scheme for policies of being 'tough on crime, tough on the causes of crime'[8] and 'delivering simple, speedy, summary justice',[9] are characterised by higher levels of restriction on due process rights. Accordingly, procedures for several groups of offences are even more 'summary' than the traditional summary process. This transformation conforms to the general trend towards simplification of criminal procedures, recommended by the Council of Europe since the late 1980s.[10] This radical change of summary process has made the notion of two degrees of due process for two tiers of criminal justice antiquated. The idea of tiers of criminal justice is arguably still useful, but it needs to go beyond two tiers. Some scholars have already referred to the reality of 'two or more tiers'[11] but they have neither affirmed the number of tiers nor examined the differences between them adequately.

A decisive recognition of five tiers of criminal justice along with five levels of fair trial rights limitation is necessary to reflect the reality. By proposing criteria to define what constitutes a tier of criminal justice,[12] three new tiers originating from summary justice are identified. In addition to the two traditional tiers of indictable and pure summary process, the three new tiers include: the preventive civil-criminal process (for preventive orders), the administrative-criminal process (for out-of-court disposals) and administrative process (for regulatory offences). These three processes, which have posed threats to fair trial rights due to higher degrees of limitation on rights than the traditional summary process, should be given due consideration. Alexandra Natapoff has questioned how many resources should be granted to minor offences process.[13]

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[6]Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (2nd edn, Oxford University Press 2009) 707.

[7]Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 CLP 21.

[8]Labour Party, 'Manifesto,' (1997) <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>.

[9]Home Office, Department for Constitutional Affairs and Attorney General's Office, *Delivering Simple, Speedy, Summary Justice* (2006).

[10]Council of Europe, *Recommendation No R (87) 18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice* (1987).

[11]Morgan (n 5) 9; Nicola Padfield, Rod Morgan and Mike Maguire, 'Out of Court, Out of Sight? Criminal Sanctions and Non-judicial Decision-making' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, Oxford University Press 2012) 957.

[12]See Part 2.

[13]Alexandra Natapoff, 'Misdemeanors' (2012) 85 SCLR 1313, 1350.

Specifically, Part 2 argues that the notion of tiers of criminal justice reflects different degrees of limitation on flexible due process rights. Parts 3 and 4 prove the existence of five levels of limitation on fair trial rights corresponding to two traditional tiers and three emerging tiers of criminal justice. Parts 3 and 4 also examine the justification for the restriction on fair trial rights in four tiers of summary justice.

2. The notion of tiers of justice – different degrees of limitation on due process rights

The distinctions between types of crimes as well as between crimes and non-crimes mainly reflect procedural consequences.[14] About 300 years ago, the issue of limitation on due process was clearly delineated through the distinction between felony (serious crime) and misdemeanour (minor crime), and accordingly, the procedural differentiation between them.[15] Since the abolition of the substantive and procedural classification between felony and misdemeanour in 1967, this distinction has been manifested in two tiers of indictable process (for indictable/either-way offences) and summary process (for summary/either-way offences). Summary justice was considered a violation of justice where the value of Magna Carta due process was no longer respected.[16] Hence, the notion of two tiers of justice mainly reflects a significant difference in procedural safeguards between tiers.[17]

However, the notion that due process is denied in summary justice should be avoided because it could lead to an arbitrary application of procedural rights. Instead, the approach of deliberate restrictions on fair trial rights should be an analytical tool. This approach enjoys three advantages. First, the principle of restriction on rights legitimises the trend to a simpler, faster and more efficient summary process but not a mere unworthiness of due process. Second, it prevents a potential arbitrariness of fair trial rights because the European Convention on Human Rights (ECHR) jurisprudence requires the overall fairness of procedure – irrespective of levels of limitation. Third, the principle could recognise different degrees of limitation on fair trial rights within summary justice.

I propose three criteria to recognise a tier of criminal justice. First, a similar model of procedures should be used for a significant proportion of wide-ranging offences rather than only for some specific offences such as those related to terrorism or illicit drugs. Therefore, the notion of tiers excludes the procedural limitations for particular offences. The second criterion is that the process has a broad effect on public sense of justice. Third, and most importantly, as noted above, there must be a significant procedural difference in comparison with other tiers. Tiers represent a hierarchy of limitation on rights. If there is no significant

[14]Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95)* (2002) 64, 66, 116.
[15]Summary process managed by Magistrates' Courts was established in early eighteenth century and developed to the modern function in 1855 (Martin Winn, 'The Structure and Functions of the English Magistrates' Court: A Study in Historical Sociology' (Unpublished PhD thesis, University of Warwick 1986) 328, 336).
[16]McBarnet (n 1) 141.
[17]These differences will be discussed in the next parts.

distinction of procedural rights for a group of offences, it should not be a separate tier. A model of the criminal process must meet all three criteria to be considered a tier of criminal justice. The detailed identification of three new tiers and the proportionality analysis of their procedures will follow.[18]

The recognition of five tiers, in which there are four tiers of summary justice, reflects the idea of making the procedure suit the crime deliberately. This deliberate restriction on fair trial rights provides a solution for the contentious fact that procedures for particular groups of offences have become more 'summary' than the traditional summary process. What makes the limitation of due process rights contentious? The reason is that the principle of a fair trial comprises many rights applied to a wide range of offences – no other constitutional right is as varied. As a result, there is also likely a diversity of restriction on fair trial rights for many groups of offences. In order to design a flexible but principled application of procedural rights, it is reasonable to arrange similar offences to one tier of justice with similar procedural safeguards. Several tiers of justice corresponding to their characteristics of procedural rights might be more useful and feasible than a perspective of too many degrees of limitation on rights for every offence or group of offences.

3. Limitation on fair trial rights in two traditional tiers of criminal processes

The differentiation between serious and non-serious (minor) crimes has existed not only in England and Wales but also in many other jurisdictions regardless of legal denominations. These two types of crimes groupings are named as offences triable only on indictment (indictable offences) and offences triable only summarily (summary offences) in England and Wales as well as some English-influenced jurisdictions such as Australia. Substantively, it represents a distinction of seriousness between alleged serious and non-serious offences. This boundary varies in jurisdictions, particularly regarding moderate offences. Some offences could be regarded as serious in one jurisdiction but minor in others, and conversely. England and Wales, therefore, established a group of moderate offences termed offences triable either way (either-way offences). Procedures for this group are flexible when it could be tried in either indictable or summary process in accordance with courts' or defendant's choice. Arguably, although there are three groups of offences, in principle there are only two kinds of criminal processes, which can be called indictable justice and summary justice. As noted above, these two types of processes lead to the notion of 'two tiers of justice'. The classification of crimes somewhat serves a procedural purpose besides a real distinction of the offences' seriousness. As a practical approach, David Ormerod argues, the issues of what crime is and classification of crimes should be taken into consideration in relation to the criminal process.[19]

[18]See Part 4.
[19]David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, Oxford University Press 2011) 15.

3.1. *Limitation on fair trial rights in the first tier (indictable process)*

Undoubtedly, the indictable process in higher courts (Crown Courts) has played an important role in implementing justice. According to Criminal Justice Statistics by Ministry of Justice, in one-year period between January 2013 and December 2013, there were 294,138 convictions of indictable offences in 10 groups (25.1% of all convicted offences).[20] Being a matter of public concern, the indictable process was described as an 'arena where the ideology of justice is put on display'.[21] For this reason, ideally, this tier must apply a highest level of due process, albeit not absolutely. To put it differently, the level of limitation on fair trial rights for this tier should be minimised.

Here, limitations of procedural rights are rare. The United Kingdom (UK) courts, directed by ECHR case law, have strictly specified legitimate aims to restrict fair trial rights in serious offences process for public interests: prevention of terrorism, drug control, protection of complainants in rape cases and prevention of drunk-driving.[22] More specifically, the privilege to a presumption of innocence could be restricted in cases of terrorism,[23] illicit drugs[24] and drunk-driving[25] when a reverse burden of proof is acceptable. The restriction on the right to cross-examination is accepted for rape cases.[26]

Although the limitations on fair trial rights for those offences are significant, their processes do not qualify for (a) new tier(s) of criminal justice. These processes could meet two criteria of a significant level of limitation and public effect; however, they do not meet the requirement of a remarkable proportion of wide-ranging offences. The number of convictions of sexual offences was 5659 in one year (just 1.9% of totally 294,138 convictions of indictable offences – Statistics in December 2013).[27] Drug offences took up a quite high proportion with 56,987 convictions in one year (19.4% of totally 294,138 convictions indictable offences – Statistics in December 2013),[28] but they were drug-related offences only. These figures excluded 19% of sexual offences and 67% of drug offences that were solved by out-of-court disposals. These measures are not pure indictable processes but ways of diversion from the court and therefore should be regarded as the fourth tier of hybrid administrative-criminal process.[29]

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[20]Ten groups are: Violence against the person; Sexual offences; Robbery; Theft Offences; Criminal damage and Arson; Drug offences; Possession of weapons; Public order offences; Miscellaneous crimes against society; Fraud Offences (Ministry of Justice, 'Criminal Justice Statistics Quarterly: December 2013 ' (30 June 2014) <https://www.gov.uk/government/statistics/criminal-justice-statistics-quarterly-december-2013> accessed 18 September 2014).

[21]McBarnet (n 1) 153.

[22]Alan Brady, *Proportionality and Deference under the UK Human Rights Act* (Cambridge University Press 2012) 176–81.

[23]*R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326.

[24]*R v Lambert [2001] UKHL 37*; [2002] 2 AC 545.

[25]*Brown v Stott [2003] 1 AC 681*; and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264.

[26]*R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.

[27]Ministry of Justice, Criminal Justice Statistics Quarterly: December 2013, (n 20).

[28]Ibid.

[29]Out-of-court disposals will be discussed in Part 4.

3.2. *Limitation on fair trial rights in the second tier (traditional summary process)*

Linguistically and legally, summary process is faster and simpler than indictable process. This represents a compatibility between the seriousness of offences and the procedure because summary cases are generally characterised as straightforward issues with easy guilty plea and minor consequences.[30] However, the development of summary justice shows that Magistrates' Courts have been increasingly entitled to deal with a number of non-minor crimes. For this reason, summary justice should not be understood as a process for minor offences only but also for relatively serious offences (even though such offences are still called summary offences).

With the aim of 'delivering simple, speedy, summary justice',[31] a majority of summary offences have been handled with more simplified procedures that should be considered new tiers of justice. These new tiers are little or no longer involved in normal criminal process.[32] This part only concerns the traditional or pure summary process, which has had its characteristics of due process in hundreds of years prior to diverting measures in the early twenty-first century. While the proportion of summary cases, including the three new tiers, has been stable in accounting for 95% of criminal cases,[33] that proportion of classic summary offences must be much less. The figure of pure summary offences convictions in 12 months (from January 2013 to December 2013) was 877,830 (74.9% of all convicted offences).[34]

Some studies have argued the lack or even erosion of due process in summary justice is for the sake of crime control[35] but none have clearly pointed out and adequately analysed the number and the extent that fair trial rights are limited. The notion of the lack or erosion of due process is more likely to be understood as the reality of miscarriage of justice than an issue of limitation on rights. In truth, only two rights are commonly infringed in the traditional summary process: the right to be entitled to a competent tribunal and the right to legal assistance.

As far as the right to a hearing by a competent tribunal is concerned, the absence of the jury and the role of lay magistrates do not undermine the essence of this right. The right is explicitly prescribed by art 14(1) of the International Covenant on Civil and Political Rights (ICCPR) but it is implicit in art 6(1) of the ECHR. The notion of competence is indirectly defined through the meaning of 'tribunal' in *Belilos v Switzerland*: 'a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within

[30]Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, Oxford University Press 2010) 502.
[31]Home Office, Department for Constitutional Affairs and Attorney General's Office (n 9).
[32]Discussed in Part 4.
[33]John Sprack, *A Practical Approach to Criminal Procedure* (13 edn, Oxford University Press 2011) 164.
[34]Ministry of Justice, Criminal Justice Statistics Quarterly: December 2013, (n 20). It should be noted that the statistics exclude preventive orders and regulatory offences, otherwise the proportion of pure summary offences may be far less than 74.9%.
[35]McBarnet (n 1) 153; Winn (n 15) 383.

its competence on the basis of rules of law and after proceedings conducted in a prescribed manner'.[36] This implicitness has led to the lack or inadequacy of analysing the right to a hearing by a competent tribunal. Among three requirements of the right,[37] the competence of individual judicial officers is the most notable factor in assessing summary courts' competence. Competent judicial officers could be understood as 'suitably qualified and experienced persons to act as judicial officers'.[38] Provisions of international human rights instruments do not refer to the jury or professional judge because this reflects 'each State's history, tradition and legal culture'.[39] The presence of a jury or a professional judge is not the core of the right to a hearing by a competent tribunal. A trial can still be fair without their presence. In a survey of models of lay adjudication in 46 European jurisdictions, Jackson and Kovalev discover that all models (including England and Wales) are compatible with the ECHR provided that the independence and impartiality of tribunal are guaranteed.[40]

Nevertheless, in the context of British legal culture, the absence of juries in summary justice is a reduction of fairness and democracy. Lord Griffiths once emphasised the significance of the jury:

> The basic reason why criminal cases are heard by juries rather than by a judge alone is that our society prefers to trust the collective judgement of 12 men and women drawn from different backgrounds to decide the facts of the case rather than accept the view of a single professional judge.[41]

As such, the jury ideally should appear in all criminal cases. In reality, only 1% of criminal cases are tried by both the judge and the jury due to two reasons: the removal of the jury in non-indictable cases (95%) and the non-involvement of jury in indictable cases as a result of 'guilty plea' or 'judge order' or 'directed acquittal'.[42] Andrew Sanders claims that the justification of no-jury summary justice is not the unsuitability of juries to Magistrates' courts but the match between the 'core value of efficiency' and the 'ideology of triviality'.[43] He concludes that with the appreciation of efficiency, summary justice 'fails to accord with most of the core values of fairness and democracy'.[44]

More specifically, it can be argued that the right to a hearing by a competent tribunal is limited in Magistrates' Courts in comparison with Crown Courts. Obviously, the trial by lay magistrates, which has been accepted in hundreds of

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[36]A 132 (1988); 10 EHRR 466, para 64.
[37]Three requirements are: Competence of individual judicial officers; Competence to make a binding decision; Jurisdictional competence of courts and tribunals (OSCE Office for Democratic Institutions and Human Rights, *Legal Digest of International Fair Trial Rights* (2012) 56).
[38]Ibid., 56.
[39]Ibid., 56.
[40]John Jackson and Nikolay Kovalev, 'Lay Adjudication and Human Rights in Europe' (2006) 13 CJEL 83, 100.
[41]*R v H* [1995] 2 AC 596.
[42]Sanders, Young and Burton (n 30) 554.
[43]Andrew Sanders, 'Core Values, the Magistracy, and the Auld Report' (2002) 29 JLS 324, 329.
[44]Ibid., 334.

years in England and Wales, is not as good as the trial by professional judges and juries. Within summary trial, reports also revealed professional District Judges are more efficient than legally unqualified magistrates in dealing with court affairs.[45] This limitation on the right has never been declared incompatible with the ECHR. Beyond the EHCR jurisprudence, the United Nations Human Rights Committee has commented on the requirement of legitimate aim for such restriction:

> The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.[46]

Indeed, the 'proper administration of justice' would be a legitimate aim. The right of trial by jury is also limited to serious crimes only in other common law jurisdictions. Section 80 of the Australian Constitution provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'. Section 24(e) of the New Zealand Bill of Rights Act notes that:

> [e]veryone who is charged with an offence… shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more.

In the Unites States, although the Constitution seems to provide for the trial by jury in all crimes, the Supreme Court restricted this so that trial by jury is not applicable to 'petty offence'.[47]

The second limited element of fair trial rights is the right to free legal assistance. Article 6(3) of the ECHR notes that the defendant has the right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. The right to free legal assistance is not absolute because of its requirement of necessity. The 'necessity' test embodies the 'means' test and the 'interests of justice' test (merits test). The means test aims at assessing the accused's financial eligibility of public funding such as income

[45]Ipsos MORI and Ministry of Justice, *The Strengths and Skills of the Judiciary in the Magistrates' Courts* (2011) 3.
[46]United Nations Human Rights Committee, *General Comment No 32: Article 14 – Right to Equality before Courts and Tribunals and to a Fair Trial* (CCPR/C/GC/32, 23 August 2007) para 18.
[47]*District of Columbia v Clawans* 300 US 617, 624 (1937).

and family circumstances.[48] The interests-of-justice test determines the legitimacy of legal aid based on the merits of the case.[49] The European Court of Human Rights (ECtHR) also held that when examining the merits test, three important factors should be taken into account: the seriousness of the offence and the severity of the penalty; the complexity of the case and the social and personal situation of the defendant.[50] Thus, in Magistrates' Courts the defendant must pass both tests to receive free legal aid, whereas all Crown Court's accused persons are entitled to free legal assistance in reference to income contribution. In most summary cases, the nature of non-serious offences and straightforwardness do not necessarily demand legal aid of public funding. Nevertheless, it should be noted that free legal aid is essential to some circumstances in the UK Magistrates' courts. For example, in *Benham v United Kingdom*, when the applicant was sentenced to 30 days' imprisonment by a Magistrates' court for not paying the community charge, the ECtHR held that 'where deprivation of liberty is at stake, the interests of justice in principle call for legal representation'.[51]

A wide margin of appreciation has a right place to be used when the right to free legal aid is implemented differently in accordance with states' budget. There are significant variations in the scope of this right as well as the means and merits tests between states.[52] However, the Commission of the European Communities noted an ultimate principle: 'Member States are free to operate the system that appears to them to be the most cost effective as long as free legal advice remains available when it is in the interests of justice'.[53]

4. Limitation on fair trial rights in three new tiers of summary processes

In the early years of the twenty-first century, due to the overload of cases and the tough-on-crime policy, summary process and even indictable process have witnessed a dramatic and rapid change towards a more efficient criminal justice, characterised by substantial reductions of rights. New measures and procedures have been used particularly for a large proportion of summary offences and even for indictable offences. The rationale for this transformation, as Ashworth and Zedner point out, is the rise of the regulatory state, the preventive state and the authoritarian state. They argue that England and Wales have experienced an

[48]Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (2010) 156.

[49]For example, a series of 'Widgery Criteria' is assessed: 'It is likely that I will lose my liberty'; 'It is likely that I will suffer serious damage to my reputation' etc. (Legal Aid Agency, 'Work out Who Qualifies for Criminal Legal Aid ' (1 June 2014) <http://www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/crime-eligibility/interests-of-justice-test> accessed 17 September 2014.

[50]*Quaranta v Switzerland* (1991) ECHR 33; *Bentham v United Kingdom* (1996) 22 EHRR 293; *Twalib v Greece* (1998) 33 EHRR 584; *Gutfreund v France* (2003) 42 EHRR 1076.

[51]*Bentham* (n 50) para 61.

[52]Laurens van Puyenbroeck and Gert Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU' (2011) 60 ICLQ 1017, 1034.

[53]Commission of the European Communities, *Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union* (COM(2004) 328 final, 28 April 2004) para 61.

increasing use of 'managerialist techniques' of a regulatory state in summary trials, which are characterised as efficiency rather than justice.[54] As a result, the criminal justice system in the UK has been moving away from its adversarial tradition[55] and transforming steadily toward the values of crime control model.[56] Although attracting much attention, studies have rarely examined the existence of three new tiers of criminal justice.

4.1. *Limitation on fair trial rights in the third tier (civil-criminal preventive process)*

Although the Magistrates' Courts procedure has attracted less attention, the Anti-Social Behaviour Order (ASBO), one of hybrid civil-criminal preventive orders,[57] has provoked a huge discussion on a variety of issues of substantive law, procedural law, human rights law and policy-making. It has been a hot topic for debates between liberalism and communitarianism, due process model and crime control model, due process and efficiency. Most literature on this theme has paid attention to procedural fairness, whose core issue has not come to an agreement: the extent of fair trial rights for civil-criminal preventive mechanisms. By examining the regime of ASBO and its trend of reform, this part contributes to the discussion about the existence of a tier of preventive criminal justice as well as the justification of limitation on fair trial rights for preventive orders.

I defend the qualification of preventive orders for a separate tier of justice despite the fact that, to date, such measures have not been regarded to be within the ambit of criminal justice. Governmental reports and statistics of criminal justice exclude ASBO and similar orders because ASBO has been classified as civil rather than criminal according to *Clingham* and *McCann*.[58] The legal framework of ASBOs was introduced by the Crime and Disorder Act 1998 and came into effect in April 1999. According to this Act, 'anti-social manner' is not a crime,

[54]Ashworth and Zedner, Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions, (n 7) 38–44.

[55]Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transtion' (2011) 31 LS 519, 519.

[56]Celia Wells and Oliver Quick, *Reconstructing Criminal Law: Text and Materials* (Cambridge University Press 2010) 90.

[57]Ashworth and Zedner have listed 12 hybrid civil-criminal preventive orders: Anti-social Behaviour Orders, Non-Molestation Orders, Exclusion from Licensed Premises Orders, Football Spectator Banning Orders, Travel Restrictions Orders, Sexual Offences Prevention Orders, Foreign Travel Restrictions Orders, Risk of Sexual Harm Orders, Drinking Banning Orders, Serious Crime Prevention Orders, Violent Offender Orders, and Terrorism Prevention and Investigation Measures (Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) 75–76). For the objective of this paper, purely civil preventive injunctions and preventive orders on conviction are excluded. Preventive injunctions (like ASBI – Anti-social Behaviour Injunctions) are not examined because they are purely civil measures. Preventive orders on conviction (like CRASBO – criminal ASBO or ASBO on conviction) are not examined because they are not independent orders but are attached to a conviction of criminal offence.

[58]*R (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea Royal London Borough Council*; *R (McCann & others) v Crown Court at Manchester and another* [2002] UKHL 39; [2003] 1 AC 787.

but 'a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household'.[59] Some administrative agencies[60] can apply to a Magistrates Court for an ASBO to prevent further anti-social acts in a minimum period of two years. A breach of ASBO is a criminal offence punished by a maximum 5-year custodial sentence.

I share a common view with the argument that considers the two steps of civil order and criminal procedure in relation to ASBO as a continuous criminal process.[61] The first rationale is that the ASBO is much more coercive than the civil injunction and even harsher than many criminal sanctions. Secondly, the allegedly civil step is effectively backed by the truly criminal proceedings. Statistics showed that a majority of ASBOs were breached,[62] leading to a criminal case. Contrary to the House of Lords' judgement, it can be argued that the accusation of an ASBO is essentially a 'criminal charge' mentioned in Article 6 of the ECHR in the light of the *Engel* criteria.[63] The definition of ASBO is vague,[64] so almost anything can be anti-social behaviour that could duplicate or overlap with the ordinary criminal law. While other preventive orders regulate a particular behaviour or a specific group of behaviours,[65] ASBO can involve a wide range of criminal offences even though most of them are minor ones. Magistrates' Courts resolve ASBO in the first step but in the second step either Magistrates' Courts or Crown Courts deal with the case depending on the level of custodial accusation. Thus, preventive orders are neither a part of traditional indictable nor summary process but they constitute a separate type that has a close relationship with Magistrates' Courts. As Andrew Ashworth suggests, preventive orders should be considered as 'exceptional measures'.[66] It could be concluded that ASBO and other similar preventive orders meet the first criterion for a separate tier of criminal justice.

As far as the second criterion of a tier is concerned, preventive orders have a significant influence on public sense of justice despite a limited number of applica-

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[59]Crime and Disorder Act 1998, s1 (1) (a).

[60]Local Government Authority, Police, Registered Social Landlord, Housing Action Trust, British Transport Police, Transport for London, Environment Agency (Home Office and Ministry of Justice, 'Anti-social Behaviour Order Statistics: England and Wales 2013 ' (18 September 2014) <https://www.gov.uk/government/statistics/anti-social-behaviour-order-statistics-england-and-wales-2013> accessed 18 September 2014).

[61]Andrew Ashworth and Lucia Zedner, *Preventative Orders: A Problem of Undercriminalization?* (RA Duff and others eds, Oxford University Press 2010); RA Duff, 'Perversions and Subversions of Criminal Law' in RA Duff and others (eds), *The Boundaries of Criminal Law* (Oxford University Press 2010).

[62]The number of breaches was 58% (Home Office and Ministry of Justice (n 60)).

[63]Three criteria are: (1) the classification of the proceedings under domestic law; (2) the nature of the offence; (3) the severity of the penalty (*Engel v Netherlands* (1976) 1 EHRR 647, para 82; Also see *Öztürk v Germany* (1984) 6 EHRR 409; *Cambell and Fell v United Kingdom* (1985) 7 EHRR 165).

[64]Andrew Ashworth, 'Social Control and "Anti-social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263, 263.

[65]This is the reason why those preventive orders cannot make a separate tier.

[66]Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2009) 108.

tions. There were 1349 ASBOs issued in 2013 among 24,427 ASBOs issued over the period between 1 April 1999 and 31 December 2013.[67] In contrast with the figure, Peter Squires, among others, emphasised the ASBO's significance: '[m]uch time, energy and resources have already been invested in the ASB and Respect initiatives, the issue has entered popular consciousness and discourse, it is frequently in the news and evidently raises widespread concern'.[68] Understandably, since any over-10-year-old's anti-social behaviour resulting in harassment, alarm or distress is easily subject to an ASBO, the order is likely to become the public's permanent concern.

As to the third criterion, preventive orders show a sacrifice of procedural rights for the sake of community protection. The mechanism of ASBO is not only considered 'a tool for crime control'[69] but also drastically accused of perversions and subversions of human rights and criminal law.[70] Two limitations on procedural rights in pure summary justice are also obviously applied to ASBO proceedings in the Magistrates' Court. However, if a breach of ASBO constitutes an offence that is subject to over six months up to five years' imprisonment, the case is heard by the Crown Court which uses an adequate protection of due process. According to statistics, most custodial sentences for breaching an ASBO were under six months[71] so they involved the Magistrates' Court only. Not only that, ASBO is a scheme to evade protections of constitutional rights further. It shows a lower safeguard of procedural rights than the classic summary justice. The seemingly civil cover of a criminal measure is an innovative and efficient method to cope with crimes as well as to escape from the binding of criminal procedural rights. So far, in *Clingham and McCann*, the House of Lords has held that ASBO is civil as it is a preventive measure rather than a punitive one, and therefore it relates to 'civil rights and obligations' rather than 'criminal charge'.[72] Hearsay evidence is accepted but Article 6 ECHR for non-criminal process still applies. As such, the House of Lords declared the ASBO's limitations on fair trial rights were constitutional or compatible with the ECHR.

ASBO has been somewhat defended because of its necessity for preventing crimes as well as protecting the community. The Crime and Disorder Act itself explains that 'such an order is necessary to protect relevant persons from further anti-social acts'.[73] The House of Lords believed that 'the criminal law offered insufficient protection to communities' while anti-social behaviours had been 'a

[67]Home Office and Ministry of Justice (n 60).
[68]Peter Squires, 'Conclusion: The Future of Anti-social Behaviour' in Peter Squires (ed), *ASBO Nation – The Criminalisation of Nuisance* (The Policy Press 2008) 360.
[69]Wim Huisman and Monique Koemans, 'Administrative Measures in Crime Control' (2008) 1 ELR 121, 122.
[70]Roger Hopkins Burke and Ruth Morrill, 'Anti-Social Behaviour Orders: An Infringement of the Human Rights Act?' (2002) 11 NLJ 1; Ashworth, 'Social Control and "Anti-social Behaviour": The Subversion of Human Rights?' (n 64); Geoff Pearson, 'Hybrid Law and Human Rights – Banning and Behavior Orders in the Appeal Courts' (2006) 27 LLR 125; Duff (n 61); Robin M White, '"Civil Penalty": Oxymoron, Chimera and Stealth Sanction' (2010) 126 LQR 593.
[71]6,220 under-six-month sentences out of 7503 cases (Home Office and Ministry of Justice (n 60)).
[72][2002] UKHL 39; [2003] 1 AC 787, paras 72, 76.
[73]Crime and Disorder Act 1998, s 1(b).

serious social problem'. ASBO is, therefore, necessary to protect individuals from potential anti-social behaviours.[74] Burke and Morrill confirm the legitimacy of ASBO when the communitarian policy has been increasingly influential in criminal justice.[75] Peter Ramsay argues that preventive orders are reasonable means of protecting the right to security and the vulnerable autonomy.[76] Some other scholars have discussed the views that public security legitimates the state's violence[77] and preventive justice is more effective to tackle anti-social behaviour and to prevent crime than the traditional desert-based criminal justice.[78] Therefore, the ASBO, as well as other preventive orders, have legitimate aims to address the 'root cause of crime' as claimed by the 'broken windows' doctrine.[79] Instead of the entirely criminal safeguards, the simpler civil-criminal proceedings suffice for dealing with the ASBO.

Although the House of Lords confirmed the civil nature of ASBO in *Clingham* and *McCann*, it could be argued that such a preventive order has a criminal or at least a quasi-criminal status because of its serious consequences.[80] The House of Lords made an ASBO's equivocal status when the criminal standard of proof 'beyond a reasonable doubt', instead of the civil standard of proof 'balance of probabilities', was applied. Moreover, ASBO is enjoying the status of criminal legal aid.[81] It is unconvincing that a purely civil process has criminal characteristics. Instead, it is more reasonable to defend ASBO as a special part of criminal procedure, which has significant limitations on fair trial rights. In principle, the ASBO's civil status leads to the possibility that except some procedural protections (Article 6(1), the criminal standard of proof and criminal legal aid), all other criminal safeguards can be removed and the standard of protection only conforms to requirements of civil proceedings. Indeed, many rights can be completely restricted: the privilege to be presumed innocent; the right to be informed promptly of the nature and cause of the accusation; the right to have adequate time and the facilities for the preparation of defence and the right to examine witnesses. They are enormous limitations in comparison with the criminal process. Geoff Pearson criticises the ASBO civil proceedings for a violation of due

[74]Clingham and McCann (n 58) para 16.
[75]Burke and Morrill (n 70) 16.
[76]Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012) 54, 215; Peter Ramsay, *The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders*, vol Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law (Bernadette McSherry, Alan Norrie and Simon Bronitt eds, Hart Publishing 2009).
[77]Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in favour of a Preventive State' (2007) 9 PS 301, 310.
[78]Christopher Slobogin, 'The Civilization of the Criminal Law' (2005) 58 VLR 121, 165.
[79]James Q Wilson and George L Kelling, 'Broken Windows: The Police and Neighborhood Safety' (1982) <http://www.manhattan-institute.org/pdf/_atlantic_monthly-broken_windows.pdf> accessed 17 September 2014.
[80]Clingham and McCann (n 58) paras 81–83.
[81]The Criminal Legal Aid (General) Regulations 2013, pt 3(9).

process rights based on the Human Rights Act and the ECHR.[82] Arguably, the ASBO infringes proportionality principle in two aspects: substantively, the sanctions are too coercive[83] and, therefore, unsuitable for the seriousness of the offence; procedurally, the overwhelming restrictions on fair trial rights are not appropriate to the harshness of sanctions. There have been recommendations that such disproportionality is essentially caused by the 'undercriminalization'[84] of ASBO and thus can be resolved by 'criminalising'[85] it.

Notwithstanding many objections, the Government has introduced a purely civil measure called Injunction to Prevent Nuisance and Annoyance (IPNA) to replace ASBO.[86] Hoffman and MacDonald have proposed this as a kind of 'wholly civil ASBO' as it clearly differentiates between civil and criminal processes.[87] Is a purely civil injunction IPNA entirely isolated from the criminal charge of Article 6 and, therefore, free from requirements of the criminal process? If so, a tier of civil-criminal preventive justice would have no reason to exist in the criminal justice system. I am sceptical about the transformation of ASBO from a civil-criminal order to a purely civil injunction.

IPNA cannot be considered a purely civil injunction because of its characteristics. Although IPNA is issued by civil proceedings, the contempt of court as a result of breach of IPNA belongs to the criminal sphere. The UK case law has affirmed that all types of criminal or civil contempt of court (including breaches of civil injunctions) amount to a criminal charge.[88] Thus, it can be noted that all forms of preventive orders may belong to the regime of 'punitive civil sanctions', which are 'middleground sanctions' between criminal and civil law.[89] Their objective of crime prevention and their ultimate resort to criminal law make such measures not have a purely civil nature but have a middle position between 'civil rights and obligations' and 'criminal charge'. For this reason, the so-called purely civil injunction IPNA cannot be absolutely isolated from the article 6's criminal due process. In many circumstances, it is difficult to clearly identify the border between civil and criminal so it is more practical to design appropriate elements of fair trial rights for such hybrid forms. Simon Brown LJ has mentioned this idea: 'the classification of proceedings between criminal and

[82]Pearson (n 70) 133.
[83]Alec Samuels, 'Anti-social Behaviour Orders: Their Legal and Jurisprudential Significance' (2005) 69 JCL 80, 230.
[84]Ashworth and Zedner, *Preventative Orders: A Problem of Undercriminalization?* (n 61).
[85]Andrew Cornford, 'Criminalising Anti-social Behavior' (2012) 6 CLP 1.
[86]IPNA has appeared in the Anti-social Behaviour, Crime and Policing Bill, which was introduced in May 2013 by the Government. The Bill received Royal Assent on 13 March 2014.
[87]Simon Hoffman and Stuart MacDonald, 'Should ASBO be Civilized?' (2010) 6 CLR 457, 472–73.
[88]*R v MacLeod* [2001] CrimLR 589, CA; *R v Dodds* [2003] 1 CrAppR 60, CA; *Wilkinson v S* [2003] 1 WLR 1254, CA; *Newman v Modern Bookbinders Ltd* [2000] 1 WLR 2559, CA; *Mubarak v Mubarak* [2001] 1 FLR 698; *Raja v Van Hoogstraten* [2004] 4 AllER 793, CA; *Daltel Europe (in liquidation) v Makki* [2006] 1 WLR 2704.
[89]'Middleground sanctions include any form of legal process that combines elements of both civil and criminal law' (Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101 YLJ 1795, 1799). See also Susan R Klein, 'Redrawing the Criminal-civil Boundary' (1999) 2 BCLR 679.

civil is secondary to the more directly relevant question of just what protections are required for a fair trial'.[90]

Although IPNA has been designed as less harsh than ASBO, it still breaks the proportionality of limitation on fair trial rights. There are two reductions of harshness. First, the breach of IPNA is considered a civil contempt of court rather than a criminal offence with a criminal record. Second, the maximum penalty for a breach is 2 years' imprisonment or an unlimited fine rather than 5 years' imprisonment for breach of ASBO.[91] However, as Kevin Brown argues, the possibilities of restrictions on liberty and the punishable penalties for breach are still severe.[92] IPNA is little less serious than ASBO, but it disproportionately abolishes all elements of criminal safeguards when the test of 'just and convenient' replaces the test of necessity and the civil standard of proof 'balance of probabilities' replaces criminal standard of proof 'beyond a reasonable doubt'.[93] IPNA cannot have the same features with other civil injunctions like Anti-social Behaviour Injunction (ASBI) because it regulates an extremely broad range of conducts that are 'capable of causing nuisance or annoyance to any person'.[94] This parameter is even more ambiguous and more widely applicable than ASBO. Traditionally, the regime of civil injunctions has existed for many years in England and Wales as well as other jurisdictions but it has only regulated a specific group of anti-social behaviours.

Consequently, I share Brown's view that the proposal of IPNA is a continuation of due process undermining so it cannot be a solution for ASBO.[95] This proves that the ASBO does not have a firm status in the UK legal system. I claim that preventive measures, due to their objective of crime prevention and their back-up of criminal law, cannot be separate from criminal justice. They constitute a tier of criminal justice that is characterised by a hybridity of civil and criminal process. Some criminal fair trial rights are removed or limited, but some select ones are guaranteed, as Klein, Ashworth and Zedner argue.[96] The ASBO regime, albeit unintentionally, somewhat reflects this idea when, as argued above, it accepts criminal standard of proof.

4.2. *Limitation on fair trial rights in the fourth tier (administrative-criminal process)*

In a strategy of increasing the toughness and efficiency of the criminal justice system, along with civil-criminal preventive orders, England and Wales have

[90]*International Transport Roth GmbH and Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, para 33.
[91]Pat Strickland and others, *Anti-social Behaviour, Crime and Policing Bill* (2013) 19.
[92]Kevin J Brown, 'Replacing the ASBO with the Injunction to Prevent Nuisance and Annoyance: A Plea for Legislative Scrutiny and Amendment' (2013) 8 CLR 623, 632.
[93]Strickland and others (n 91) 19.
[94]Ibid., 19.
[95]Brown (n 92) 639.
[96]Klein (n 89) 721; Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventative Rationales and the Limits of the Criminal Law' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 297.

diverted a large proportion of the least minor offences from court's procedure to out-of-court process. These orders, which are called out-of-court disposals (OOCDs), were established to 'provide simple, swift and proportionate ways of responding to antisocial behaviour and low-risk offending and to save courts the time of listening to minor and undisputed matters'.[97] These kinds of measures are not completely new as Fixed Penalty Notice (FPN) and Simple Caution have existed for decades. Similar measures have gradually extended and have particularly expanded in the last 15 years under New Labour's policy. Robin M White views OOCDs as a representative of 'crime control' values that encourage an early admission of guilty plea.[98]

The development of OOCDs has been diverse with many varying measures. The legal framework of OOCDs involves a series of legislation and has developed according to time in an ad hoc and complicated way.[99] Interestingly, to date there has been no governmental report discussing all OOCDs. In 2010, the report by Office for Criminal Justice Reform 'Initial Findings from a Review of the Use of Out-Of-Court Disposals' shows that OOCDs are classified into two categories for adult and youth. Adult OOCDs include Cannabis Warning, Penalty Notice for Disorder (PND), Simple Caution and Conditional Caution and youth OOCDs comprise Youth Restorative Disposal, PND, Reprimands and Warnings, and Youth Conditional Caution.[100] In 2013, a report by HM Government and College of Policing 'Consultation on Out of Court Disposals', which only focused on adult category, added two measures: Fixed Penalty Notice and Community Resolution.[101] In contrast with an increase in the number of measures within the adult category, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has simplified the youth category to two measures: Youth Caution and Youth Conditional Caution. It is quite early to evaluate this change, which came into effect in April 2013.[102] For this reason, this paper mainly analyses the category of adult orders because it has stable legal status and sufficient statistics.

The regime of OOCDs has changed the traditional criminal justice significantly and fulfilled the criteria of a separate tier. While civil-criminal preventive orders seem to be excluded from criminal justice system, OOCDs are officially recognised as diverted criminal processes. Indeed, OOCDs exist in criminal justice statistics and apply to a wide range of offences, but parameters of orders differ.[103] The police and the Crown Prosecution Service (CPS) in principle can use Simple Caution[104] for any offence but mostly for non-serious ones. They also can issue Conditional Caution[105] for summary non-motoring offences and a few

[97]Office for Criminal Justice Reform, *Initial Findings from a Review of the Use of Out-Of-Court Disposals* (2010) 3.
[98]Robin M White, 'Out of Court and Out of Sight: How Often are "Altenatives to Prosecution" Used?' (2008) 12 ELR 481, 481.
[99]HM Government and College of Policing, *Consultation on Out of Court Disposals* (2013) 6, 28–33.
[100]Office for Criminal Justice Reform (n 97) 4, 5.
[101]HM Government and College of Policing, Consultation on Out of Court Disposals, (n 99) 10.
[102]HM Government and College of Policing, *Review of Simple Cautions* (2013) 11.
[103]Office for Criminal Justice Reform (n 97) 40–47.
[104]No statutory basis.
[105]Criminal Justice Act 2003, ss 22–27.

designated either-way offences. Police and limited regulatory agencies can give PND[106] to some notifiable minor offences such as theft, criminal damage, causing harassment, alarm and distress, cannabis possession and drunk. Police and a wide range of regulatory agencies can apply FPN[107] to certain low-level offences such as road traffic and environmental offences. Police officers can issue Cannabis Warning[108] only to possession of cannabis. Police and statutory bodies can use Community Resolution[109] to deal with less serious crimes and anti-social behaviours. In sum, OOCDs mostly deal with low-level (trivial) offences and a limited number of indictable offences in relation to illicit drugs and theft. Not only do OOCDs theoretically involve any offence, but also practically account for a large proportion of recorded crimes. According to the latest statistics, the annual number of OOCDs is about more than 300,000, which is equal to one third of that of defendants proceeded against summary offences in Magistrates' Courts[110] – a remarkable proportion although it excludes 1.5 million FPNs.[111] As such, the OOCDs' qualification for the first and second criteria of tier of criminal justice is justifiable.

Some scholars have somewhat recognised a new tier of OOCDs. Ashworth and Zedner accept a 'new tier of administrative offences' like PND,[112] a popular measure among OOCDs. However, their studies have not investigated the justification of a new tier thoroughly. To be more persuasive, it is essential to assess the third criterion – characteristics of limitation on fair trial rights for the measures.

Like the preventive orders, OOCDs are characterised as a hybrid process. Step two takes place at the criminal court in case the out-of-court order is challenged. Accordingly, defendant's procedural safeguards at the second stage are normal for pure indictable or summary processes. Marked differences are represented at the initial out-of-court stage. These differences make OOCDs not only separate from the pure indictable/summary processes but also distinctive of the hybrid preventive measures like ASBO. While preventive orders blur the boundary between civil and criminal processes, OOCDs blur the boundary between administrative and criminal law. Nevertheless, I contend that these two models of procedures are two forms among many of civil-criminal middle-ground measures.[113] The notion of 'civil' in common law systems would broadly mean 'non-criminal'. Indeed, 'civil rights and obligations' would involve traditional

[106]Criminal Justice and Police Act 2001, ss 1–11.
[107]A wide array of legislation.
[108]No statutory basis.
[109]No statutory basis.
[110]In the 12-month period between January 2013 to December 2013, there were 331,062 OOCDs and 1,062,699 defendants proceeded against summary offences. The OOCDs figure, which is officially used, only counts four measures: Simple Caution, Conditional Caution, PND and Cannabis Warning (Ministry of Justice, 'Criminal Justice Statistics Quarterly: December 2013 ' (n 20)).
[111]HM Government and College of Policing, *Consultation on Out of Court Disposals* (n 99) 12.
[112]Ashworth and Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (n 7) 49.
[113]As discussed in Part 4.1. Civil-criminal middle ground also includes the regulatory justice discussed in Part 4.3.

civil law like torts as well as administrative law and anything else that is non-criminal.[114]

OOCDs have been promoted with the aim of reducing the courts' overload, improving efficiency and saving resources. The latest Government White Paper on criminal justice policy emphasises the principle 'justice delayed is justice denied' originated from Magna Carta.[115] The White Paper also identifies the problem that the process of criminal justice system is slow, and it serves the system itself rather than the public interest. Therefore, the Government promotes a 'swift and sure' criminal justice for the sake of balance between efficiency and fair process.[116] The idea that the criminal process in criminal court is last resort is considered to be legitimate and appropriate to the least minor crimes.[117] According to some surveys, the public also prefers OOCDs to the criminal trial for minor offences.[118] The recent consultation on OOCDs continues to affirm their necessity and usefulness:

> OOCDs are a valuable tool to the police and others. They can reduce bureaucracy and keep police on the front line at a time when resources are constrained. Used correctly, they can represent a proportionate and effective response to anti-social behaviour and low level criminality. Research indicates that, where they form part of an OOCD, reparative and restorative responses to low-level offending result in generally high levels of victim satisfaction. They can re-engage individuals with the justice system and improve public confidence.[119]

Accordingly, three groups of procedural rights are restricted at the out-of-court stage of all measures. First, the right to be entitled to a competent, independent and impartial tribunal is significantly limited. The crucial point of a swift justice, declared by the Government, is extending the 'police-led prosecution' to a wider range of low-level offences.[120] Therefore, the police are becoming the 'hub' of the criminal justice system to deal with the least minor offences. Police officers and prosecutors are becoming 'hidden courts' when they are entitled to decide either bring the case to the ordinary court or use OOCDs. Arguably, these two bodies replace the judge and the jury.[121] More precisely, they control the stage when they are allowed to do three roles in one case: detect, accuse and judge a culprit. For this reason, this step can be called 'administrative process' that

[114]Audrey Guinchard, 'Fixing the Boundaries of the Concept of Crime: The Challenge for Human Rights' (2005) 54 ICLQ 719, 719.
[115]Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (2012) 3.
[116]Ibid., 5.
[117]Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate, *Exercising Discretion: The Gateway to Justice* (2011) 7.
[118]Office for Criminal Justice Reform (n 97) 27.
[119]HM Government and College of Policing, *Consultation on Out of Court Disposals* (n 99) 6.
[120]Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (n 115) 6.
[121]Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate (n 117) 24.

implies the non-involvement of criminal court. Admittedly, such hidden courts cannot be as competent, independent and impartial as regular tribunals like the Crown Court and the Magistrates' Court. It is the price for the sake of legitimate efficiency. The Government acknowledges the risk that 'public confidence in the effectiveness or appropriateness of this system can be damaged by the perception that significant numbers of serious or violent offences have been wrongly dealt with by means of an out of court disposal'.[122] Second, the right to a public hearing and the implied right of access to court,[123] are no longer guaranteed at the first stage of proceedings. The term 'out-of-court disposal' itself reflects the non-involvement of court in such administrative processes. Bringing the case to court is the last option. While the first stage of preventive orders still appears at Magistrates' Courts, the first stage of administrative-criminal measures is diverted from courts. Third, this diversion also leads to a series of limitations on the rights to equality of arms and rights to a fair hearing. Without the courts' involvement, Richard Young deems this stage the 'police-imposed summary justice'.[124]

Apart from those limitations for all OOCDs, some other rights can be restricted for some specific offences, for example, the privilege against self-incrimination can be removed in cases of traffic offences (speed excess,[125] drunk driving[126]). However, this limitation is not common in the fourth tier. Interestingly, traffic offences in the Road Traffic Act 1998 are addressed by two quite different regimes: either FPN or regulatory justice.[127] It appears that the traffic offences process is heading towards regulatory justice for the sake of higher efficiency.[128]

4.3. *Limitation on fair trial rights in the fifth tier (regulatory process)*

All of the aforementioned tiers of justice still have to resort to the ordinary court from the beginning or after OOCDs. It is reasonable to consider them as tiers of 'criminal' justice. Nevertheless, it is more complex when a large proportion of

[122]HM Government and College of Policing, *Consultation on Out of Court Disposals* (n 99) 6.
[123]*Golder v UK (1975); 1 EHRR 245.*
[124]Richard Young, 'Street Policing after PACE: The Drift to Summary Justice' in Ed Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Hart Publishing 2008) 150, 188.
[125]*O'Halloran and Francis v United Kingdom (GC)* (2008) 46 EHRR 397.
[126]*Brown* (n 25); *Sheldrake* (n 25).
[127]Regulatory justice is the fifth tier that will be discussed next part.
[128]After *Brown* and *Sheldrake*, traffic offences have been increasingly supported to addressed by the regulatory regime (See: Richard Glover, 'Sheldrake Regulatory Offences and Reverse Legal Burdens of Proof' [2006] Web Journal of Current Legal Issues). Particularly, the Government has recently proposed the establishment of traffic courts (See: Ministry of Justice and The Rt Hon Damian Green MP, 'Traffic Courts in Every Area' (17 May 2013) <https://www.gov.uk/government/news/traffic-courts-in-every-area> accessed 17 September 2014; Ministry of Justice and The Rt Hon Damian Green MP, 'Traffic Courts Up and Running in 29 Areas ' (13 December 2013) <https://www.gov.uk/government/news/traffic-courts-up-and-running-in-twenty-nine-areas> accessed 17 September 2014.

so-called regulatory offences, which have been regarded as part of criminal law,[129] are being addressed by a nearly complete non-involvement of ordinary criminal court. The Tribunals, Courts and Enforcement Act 2007 (TCEA) and the Regulatory Enforcement and Sanctions Act 2008 (RESA) have markedly transformed the intertwined ambit between criminal law and regulation. Interestingly, the two Acts have established a regime of regulatory process that is entirely separate from ordinary criminal process. Official statistics of criminal justice no longer comprise an enormous proportion of millions of regulatory infringements.[130] As the Auld's review recommended, 'certain types of financial and regulatory offences' should be transferred from the criminal justice system to the 'regulatory and disciplinary control'.[131] An infringement is called a 'regulatory non-compliance' rather than an offence and sanctions applied to a non-compliance are termed 'civil sanctions' rather than criminal ones. Notably, regulatory offences are not limited to summary only but also expand into either-way and indictable only offences.[132] However, the current policy aims at a more efficient mechanism to deal with the overwhelmingly trivial offences.[133]

Indeed, the regime of regulatory offences differs from those of other crimes. Regulatory offences are public wrongs, but they serve the aims of regulation. The governmental agencies use criminal measures in regulatory contexts to 'enforce standards of conduct in a specialised area of activity'.[134] For example, civil sanctions are usually used for the regulation of environmental protection, food safety, health, trade, road traffic, etc.[135] The distinction originates from the characteristic of regulatory offences. Richard Hyde describes regulatory crime as 'a notoriously elusive and difficult concept' so it is impossible to draw the exact territory of this group of crime.[136] Generally speaking, regulatory crime has the following characteristics: (1) It is different from 'real crime' of traditional criminal law and develops under the rise of regulatory state[137]; (2) It plays a role in regulating certain social activities[138]; (3) It is mostly resolved by regulatory agencies rather than the police[139] and (4) it incurs strict liability and reverse onus of proof.[140] Among these,

[129]Anthony Ogus, 'Regulation and Its Relationship with the Criminal Justice Process' in Hanna Quirk, Toby Seddon and Graham Smith (eds), *Regulation and Criminal Justice* (Cambridge University Press 2010) 29.
[130]According to statistics in 2006, administrative agencies issued more than 2.6 million enforcement actions each year: 2.8 million inspections, 400,000 warning letters, 3400 formal cautions, 145,000 statutory notices and 25,000 prosecutions (Richard B Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) 6).
[131]Auld (n 2) 382, 384.
[132]Julie Norris and Jeremy Phillips, *The Law of Regulatory Enforcement and Sanctions: A Practical Guide* (Oxford University Press 2011) 120.
[133]Law Commission, *Criminal Liability in Regulatory Contexts* (2010) 4, 5.
[134]Ibid., 3.
[135]Regulatory Enforcement and Sanctions Act 2008, s 4(2).
[136]Richard Hyde, 'What is "Regulatory Crime"? – An Examination of Academic, Judicial and Legislative Concepts' <http://www.bailii.org/uk/other/journals/WebJCLI/2012/issue4/hyde4.html> accessed 17 July 2014.
[137]Ibid.
[138]Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 228.
[139]Ibid., 228.
[140]Ibid., 228.

the first and second features are the most important because they constitute the distinguishing characteristics of regulatory crime.

Despite that characteristic, no one has once been able to deny the relevance of regulatory non-compliance to the notion of 'criminal charge' and fair trial rights protected by Article 6 of the ECHR.[141] In an important consultation report 'Criminal Liability in Regulatory Contexts', the Law Commission soundly accepts a kind of 'criminal liability' for regulatory offences in special 'regulatory contexts'.[142] It can be argued that most regulatory offences are crimes in nature as they aim at regulating large public groups, causing blameworthiness and delivering punitiveness and deterrence.[143] Moreover, Richard Macrory, the author of two influential reviews on regulatory justice – *Regulatory Justice: Sanctioning in a Post-Hampton World*[144] and *Regulatory Justice: Making Sanctions Effective*,[145] has admitted regulatory offences that are subject to variable penalties should be deemed to be criminal because '[t]he penalties are potentially very high, and under the system are intimately linked to defined criminal offences'.[146] As such, the regime of regulatory offences meets the *Engel* criteria of 'criminal charge'.[147] Consequently, the application of fair trial rights for the regulatory regime is appropriate regardless of terminologies provided by domestic law. Like preventive orders, the so-called 'civil sanction' or 'civil penalty', which means non-criminal measure, is essentially an evasion of the rigorous criminal proceedings rather than a purely civil order. The civil or administrative penalty regime is a major issue in the above-mentioned influential studies of Mann and Klein on 'punitive civil sanctions'.[148] Again, it is important to note that the differentiation between 'real crime' and 'regulatory crime' is somewhat artificial and it serves the purpose of procedure more than substance. The Law Commission's report also suggests the procedural fairness of regulatory regime should be of concern.[149] Instead of regarding the process for regulatory offences as non-criminal, it is more reasonable to accept them as a tier of criminal justice and justify the remarkable limitations on fair trial rights applied to them. This fifth tier is subject to the lowest level of procedural protections.

Objectives of efficiency and effectiveness are familiar justifications for the radical change of the whole criminal justice as well as regulatory justice. Macrory commented on the inefficiency and ineffectiveness of regulatory sanctions in England and Wales:

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[141]See: European Court of Human Rights, A Menarini Diagnostics SRL c Italie (Requête No 43509/08), judgment of 27 September 2011; *Han v Commissioners of Customs and Excise* [2001] EWCA Civ 1040, [2004] All ER 687; *International Transport Roth GmbH & Ors v Secretary of State For the Home Department* [2002] EWCA Civ 158, [2003] QB 728.
[142]Law Commission (n 133) 134.
[143]Norris and Phillips (n 132) 95.
[144]Richard Macrory, *Regulatory Justice: Sanctioning in a Post-Hampton World* (2006)
[145]Macrory, Regulatory Justice: Making Sanctions Effective (n 130).
[146]Richard Macrory, 'Sanctions and Safeguards: The Brave New World of Regulatory Enforcement' (2013) 66 CLP 233, 256.
[147]*Engel* (n 63).
[148]Mann (n 89); Klein (n 89). Discussed in Parts 4.1, 4.2.
[149]Law Commission (n 133) 38.

> Current tools are not sufficient to deter the 'truly' criminal or rogue operators, and equally when cases do reach the courts, sentences imposed are not considered by industry to be a sufficient deterrent or punishment for the offences in question.[150]

He mentioned the cause of that situation was the 'heavy reliance on criminal sanctions'.[151] As a result, the transformation from the regime of criminal sanction to the civil/administrative penalty[152] is to make a more flexible, more efficient and more effective way to deal with regulatory infringements. Arguably, the first requirement of proportionality is satisfied.

In terms of procedural matters, the current regime utilises a massive limitation on fair trial rights, particularly for the pre-appeal or pre-tribunal stage. As Julia Black pointed out, regulatory agencies play a supra-powerful role as investigators, prosecutors, judges and juries in tackling regulatory contraventions.[153] David Garland has somewhat justified this kind of discretionary function:

> The early modern idea of 'police' referred not to the specialist agency that emerged in the nineteenth century but to a much more general programme of detailed regulation, pursued by urban authorities in their efforts to create an orderly environment for trade and commerce. The aim of this kind of 'police' regulation was to promote public tranquillity and security, to ensure efficient trade and communications in the city, and to enhance the wealth, health, and prosperity of the population.[154]

To achieve the ultimate goal of regulation, many procedural rights are no longer guaranteed absolutely when administrative agencies deal with regulatory infringements. It is a rational connection between the aim and the medium. Firstly, fair hearing rights[155] are limited in the first step when the regulator makes a decision on the non-compliance. These limitations are relatively akin to those of OOCDs. Prior to the enactment of RESA, the bill was questioned about its constitutionality. It is necessary to note Albert Venn Dicey's writing on the importance of the right of access to a court:

> [N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[156]

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[150]Macrory, *Regulatory Justice: Sanctioning in a Post-Hampton World* (n 144) 14.
[151]Macrory, Regulatory Justice: Making Sanctions Effective (n 130) 15.
[152]In the Review *Regulatory Justice: Making Sanctions Effective* which was fully accepted by the government, Macrory suggests to use the term 'administrative penalty' rather than 'civil penalty' which is used by RESA.
[153]Law Commission (n 133) 161.
[154]David Garland, *The Culture of Control: Crime and Social Order in Comtemporary Society* (University of Chicago Press 2001) 31.
[155]More specifically, these include five rights: the right of access to courts and tribunals; the right to a hearing by a competent, independent and impartial tribunal; the right to a public hearing; the right to a timely hearing and the right to equality of arms.
[156]AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Indianapolis: Liberty Fund 1982) 110.

Whereas, Lord Lyell of Markyate stated that the bill:

> transfers enormous powers … away from the supervision of the independent courts and puts them into the hands of officials … creating a parallel system of justice, entirely run by officials, with its only safeguard being an ultimate right of appeal, if the subject can afford it, to an independent and expert tribunal.[157]

Second, the first stage limits the right to examine witnesses to speed up the process. Third, the limitation on the right to be presumed innocent is the result of the application of strict liability doctrine. Most regulatory offences do not require *mens rea* as they are *mala prohibita* rather than *mala in se*.[158] Fourth, the limitation on the privilege against self-incrimination is a consequence of the reverse burden of proof. As the RESA is silent on the burden of proof, there is a possibility that the onus is on the offenders to prove their innocence before the regulator. Fifth, the criminal standard of proof 'beyond reasonable doubt' is partly restricted. Even though the criminal standard is still maintained for imposing fixed monetary penalties and discretionary requirements, lower standards are used for other measures (i.e. 'reasonable suspicion' for enforcement undertakings and 'reasonable believes' for stop notice).[159] The sixth and seventh limitations are the right to be informed of the accusation against them and the right to defence by themselves or through legal assistance. These two restrictions led the Constitution Committee to criticise the bill of infringing the fundamental principle of natural justice: *audi alteram partem* (hear both sides before making a decision).[160] Notably, these six limitations (the second to the seventh) do not widely exist in the regime of OOCDs.[161]

With regard to the tribunal stage, the regulators' decisions to impose civil sanctions are subject to appeal to the First-tier Tribunal, then to the Upper Tribunal, and in limited circumstances, to the Court of Appeal.[162] However, the appeal procedures are not criminal proceedings but quite similar to a full (merits) judicial review of administrative decisions. Provisions of Article 6 ECHR for cases related to 'civil rights and obligations' rather than 'criminal charge' are employed. This leads to the possibility of limiting all fair trial rights for criminal cases. While the imposition stage by the regulators still maintains the criminal standard of proof 'beyond reasonable doubt', the appeal stage is purely administrative adjudication.

Thus, it can be assumed that the English regulatory justice wishes to treat judicial review of administrative sanctions like judicial review of other administrative actions, which involve 'civil rights and obligations' instead of 'criminal charge'. Accordingly, that the right of access to a tribunal is preserved as the last resort suffices for overall fairness. In *Bryan v United Kingdom*, as an affirmation of the case

[157]HL Deb, Vol 698, col GC327 (30 Jan 2008).
[158]Law Commission (n 133) 155.
[159]Norris and Phillips (n 132) 120, 133.
[160]Constitution Committee, *First Report of Session 2007–2008* (2007) para 11.
[161]As noted in Part 4.2, the privilege against self-incrimination is limited in several OOCDs in relation to drug offences and traffic offences.
[162]Tribunals, Courts and Enforcement Act 2007, ss 11(2) and 13; Regulatory Enforcement and Sanctions Act 2008, s 54(1)(a).

Albert and Le Compte v Belgium,[163] the Strasbourg Court permits the principle of rectifiability that an adequate appeal or judicial review in tribunals can remedy the lack of a fair hearing at the imposition stage by regulators:

> [E]ven where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 para 1 (art 6–1) in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para 1' (art 6–1).[164]

The notion of 'full jurisdiction' means the appealed tribunal has 'jurisdiction to examine the merits of the matter'[165] or 'jurisdiction to examine all questions of fact and law relevant to the dispute'.[166]

In the UK, the principle of rectifiability was summarised by Lord Mackay of Drumadoon in the Court of Session in *Tehrani v United Kingdom v Central Council for Nursing Midwifery and Health Visiting*:

> In my opinion, cases such as *Le Compte*, *Van Leuven and De Meyere*, *Albert and Le Compte* and *Bryan* establish that, as far as such tribunals are concerned, no breach of the Convention arises if the tribunal is subject to control by a court that has full jurisdiction and itself complies with the requirements of Article 6(1). In other words, when dealing with a disciplinary tribunal, such as the PCC, a right of appeal to a court of full jurisdiction does not purge a breach of the Convention. It prevents such a breach from occurring in the first place.[167]

In *Begum*, Lord Hoffman, on the one hand, emphasises the crucial role of judiciary in dealing with 'breaches of the criminal law and adjudications as to private rights', but on the other hand, acknowledges regulatory functions do not necessarily require 'a mechanism for independent findings of fact or a full appeal'. The rationale is mainly to promote efficient regulation.[168]

5. Conclusion

In an era of efficient justice, new summary processes, albeit considered legitimate, are challenging due process rights. The processes for most minor offences and even for a proportion of serious offences have been more simplified than the traditional summary procedure. In England and Wales, the procedural limitations are disguised in various ways, such as preventive orders, out-of-court disposals and civil/administrative penalties. Such measures have posed threats to due process principle and raised a question about whether the processes are proportional. Pessimistically, Robin M. White considers these measures as a general term 'civil penalties' and claims that they are designed for the sake of efficiency rather than

[163] *Albert and Le Compte v Belgium* (1983) 5 EHRR 533.
[164] *Bryan v United Kingdom* (1995) 21 EHRR 342, para 40.
[165] *W v United Kingdom A 121-A* (1987) 10 EHRR 293, para 82.
[166] *Terra Woningen BV v Netherlands* (1996) 24 EHRR 456, para 52.
[167] *Tehrani v United Kingdom v Central Council for Nursing Midwifery and Health Visiting* [2001] IRLR 208; [2001] ScotCS 19, para 55.
[168] *Begum v London Borough of Tower Hamlets* [2003] 2 AC 430, paras 42–47.

procedural fairness prescribed in Article 6 of ECHR; therefore, they are forms of 'oxymoron, chimera and stealth sanction'.[169] However, the existence of these kinds of 'punitive civil sanctions' or 'middleground sanctions', as Kenneth Mann's terms,[170] is inevitable to achieve efficiency and effectiveness. Those measures, notwithstanding differences of terminologies, should be considered criminal or at least quasi-criminal in nature. They necessitate appropriate protection of fair trial rights, which is a hybrid of civil/administrative and criminal procedures. The idea of the middle-ground procedures does not conflict with the Article 6 separation between 'civil rights and obligations' and 'criminal charge'. It is because the ECtHR jurisprudence recognises the possibilities of rights limitation that can make processes for some kinds of 'criminal charge' come closer to 'civil rights and obligations'. In other words, the ECtHR jurisprudence accepts the middle-ground procedures.

An acknowledgement of five tiers, in which there are four tiers of summary justice, can make the complex phenomenon of middle-ground procedures become clearer. This also reflects precise observation of today's English criminal justice. Instead of an inadequate notion of two tiers of justice, it is necessary to concede a pyramid of five tiers that are characterised by five degrees of fair trial rights limitation. The existence of five tiers is arguably more complex than two tiers but it precisely reflects the general trend in criminal justice. In descending order, five tiers include the indictable process (for serious offences), the traditional summary process (for minor offences), the preventive civil-criminal process (for preventive orders), the administrative-criminal process (for out-of-court disposals) and the administrative process (for regulatory offences). Generally speaking, the lower tier has less procedural safeguards. If we can design appropriate procedural safeguards, the number of tiers does not matter.

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[169]White, '"Civil Penalty": Oxymoron, Chimera and Stealth Sanction' (n 70) 616.
[170]Mann (n 89).

Appendix 1. Table of limitations on fair trial rights in five tiers of justice

	Elements of fair trial rights	Strict limitations in Tier 1 – indictable process (only for some specific offences)	Common Limitations in Tier 2 – traditional summary process	Common limitations in Tier 3 – civil-criminal preventive process				Common limitations in Tier 4 – administrative-criminal process		Common limitations in Tier 5 – regulatory process	
				ASBO		IPNA					
				1st stage	2nd stage	1st stage	2nd stage	1st stage	2nd stage	1st stage	2nd stage
1	Rights of access to justice and equality in the administration of justice ICCPR 14(1), ECHR 6(1)										
1.1	Access to courts and tribunals							✓		✓	✓
1.2	Equality before courts and tribunals										
2	Right to a hearing by a competent, independent and impartial tribunal established by law ICCPR 14(1), ECHR 6(1)		✓	✓		✓		✓		✓	
3	Right to a public hearing ICCPR 14(1), ECHR 6(1)							✓		✓	
4	Right to be presumed innocent and privilege against self-incrimination ICCPR 14(2)(3g), ECHR 6(2)	✓		✓		✓				✓	✓
5	Burden and standard of proof	✓				✓				✓	✓
6	Equality of arms and rights to a fair hearing ICCPR 14(1)(3), ECHR 6(1)(3)										
6.1	Equality of arms			✓		✓		✓		✓	
6.2	Instruction concerning rights during trial			✓		✓				✓	
6.3	Adequate preparation			✓		✓					
6.4	Timely hearing							✓		✓	
6.5	Right to be heard							✓		✓	
6.6	Right to defend oneself		✓	✓		✓		✓		✓	
6.7	Calling and examining witnesses	✓		✓		✓				✓	
6.8	Interpretation and translation										
7	Conviction or acquittal in a criminal trial ICCPR 11, 14, 15; ECHR 7, Article 1 of Protocol 4, Article 3, 4 of Protocol 7										
7.1	No punishment without law			✓	✓	✓					
7.3	Sentencing upon conviction			✓			✓				
7.4	Prohibition against double jeopardy				✓						
7.5	Compensation for miscarriage of justice										
8	Right to a public, reasoned and timely judgement ICCPR 14(1); ECHR 6(1)										
8.1	Pronouncement of judgement							✓		✓	
8.2	Reasoned judgement										
8.3	Timely judgement and decisions										
9	Right to appeal ICCPR 14(5); ECHR Article 2 of Protocol 7										
9.1	Right to appeal before a higher tribunal according to law										
9.2	Genuine review										✓

Notes:

In general, the notion of fair trial rights is viewed consistently under international instruments of human rights. However, there is no consensus on the classification of elements of fair trial rights. There may be three reasons. First, the principle of fair trial is complex and includes many rights. Second, elements of fair trial rights are not only provided by the text of international instruments of human rights, but also derived from case law and other interpretative sources. Third, legal literature varies in classifying elements of fair trial rights because of different approaches. This table basically follows the classification in *Legal Digest of International Fair Trial Rights.*[171]

Common limitations on fair trial rights in Tier 2, 3, 4, 5 exclude particular limitations for specific offences and in specific circumstances.

Strict limitations on fair trial rights in Tier 1 are only for some specific offences and exclude particular limitations in specific circumstances.

[171]OSCE Office for Democratic Institutions and Human Rights (n 37).

CHAPTER 4 (ARTICLE 3)

DUE-PROCESS-EVADING JUSTICE: THE CASE OF VIETNAM

Publication status
Under review
Contribution to the thesis
This article aims to answer sub-question 3: *How are fair trial rights applied to different types of summary criminal processes in Vietnam?* This article analyses procedural designs for minor offence processes (summary criminal processes) in Vietnam, which will be compared with England and Wales.

DUE-PROCESS-EVADING JUSTICE: THE CASE OF VIETNAM

Dat T. Bui*

Abstract

Having been strongly influenced by the Soviet model, the Vietnamese regimes of administrative offence sanctions and administrative measures have been deemed to be technically outside criminal justice. Due to a narrow conception of crimes, as those prescribed in the Criminal Code, criminal procedural rights have not been taken seriously into account in designing procedures for such minor offence regimes. Given the official recognition of administrative status, the values of administrative due process prevail over those of criminal due process in dealing with administrative-offence-related measures.

From a functional perspective that identifies all types of criminal charge regardless of denomination, this article argues that the regimes of administrative sanctions and administrative measures reflect an evasion of due process and should be considered as criminal charges in nature. This functional approach demands careful consideration in designing fair trial rights for the procedures of those measures. What is required is a paradigm shift regarding Vietnam's summary minor offence justice in the context of the challenges of universal due process.

Key words: due process, fair trial rights, minor offences, administrative sanctions, administrative measures

I. INTRODUCTION

This article investigates the design of procedural rights for minor offences in Vietnam. Across the world, the ambit of minor offences is uncertain. This is because the delineation between minor offences and serious offences as well as procedural design for minor offences vary across jurisdictions. As in many other countries, Vietnamese law says nothing about the definition of minor offences in the broadest sense. As argued elsewhere, I conceptualise minor offences as those that are less serious and subject to simpler procedures, as compared to serious offences.[1] These two characteristics make minor offences analogous to summary offences in some Common Law systems, such as that in

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[1] See: Dat T. Bui, 'Procedural Proportionality: The Remedy for An Uncertain Jurisprudence of Minor Offence Justice' (published online: 10 March 2017) *Criminal Law and Philosophy*.

the United Kingdom (UK). Some countries, like the United States, use the term 'misdemeanor', which implies a less serious crime,[2] while some other countries, such as the UK and Australia, prefer the term 'summary offence', which emphasises the simplified procedures applied to less serious crimes.[3] For this reason, minor offence processes reflect summary criminal justice. There has been a common problem in many countries, including Vietnam, that several groups of minor crimes are disguised in non-criminal terminologies to evade criminal fair trial rights.[4] As a result, fair trial rights tend to be disproportionately limited in minor offence processes.

In Vietnam, summary criminal justice merely reflects a partial picture of minor offences. Indeed, summary criminal process is officially limited to the procedure applying to a group of less serious crimes prescribed in the Criminal Code rather than to all kinds of minor offences. Having been strongly influenced by the Marxist-Leninist (Soviet) model, the regimes of administrative offence sanctioning and administrative-offence-related educational measures have been deemed to be technically outside criminal justice and attached to administrative justice. Accordingly, in such regimes the values of administrative due process prevail over those of criminal due process. Nevertheless, from a functional perspective that identifies all types of criminal charge regardless of denomination, it should be recognised that summary criminal justice spreads to mechanisms of administrative sanctions and administrative measures. This functional approach demands serious consideration when it comes to designing fair trial rights for the procedures of administrative sanctions and administrative measures.

The incorporation of fair trial rights into summary criminal processes is necessary in light of the movement towards global constitutionalism in general and global due process in particular. Since 1986, Vietnam has been gradually developing a Vietnamese-style rule of law, which is a hybrid of the socialist state and western-style rule of law. Over the past three decades, the influence of modern constitutionalism on Vietnam's legal reform has been increasing profound.[5] As a result, human rights discourse has been exposed to

[2] Bryan A. Garner, *Black's Law Dictionary* (West, 9th ed, 2009) 1089; National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (2009) 11.
[3] *Interpretation Act 1978* sch. 1(b).
[4] See further: Dat T. Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights' [439] (2015) 41(3) *Commonwealth Law Bulletin* 439; Dat T. Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law' [382] (2016) 19(3) *New Criminal Law Review* 382.
[5] Son N. Bui, 'Constitutional Developments in Vietnam' in Albert H.Y. Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014) 217; Thiem H. Bui, 'Liberal

universal values and liberal constitutionalism.[6] Moreover, the implementation of international human rights instruments necessitates a radical legal reform. Accordingly, Vietnam has the obligation to respect the right to a fair trial affirmed by the International Covenant on Civil and Political Rights (ICCPR), of which Vietnam is a member. It is well recognised that fair trial rights have been increasingly promoted by the scholarship of global constitutional law (particularly 'global revolution in due process')[7] and global administrative law.[8]

However, due to a narrow conception of crime, due process rights have not been seriously taken into account in designing procedures for mechanisms of administrative sanctions and administrative measures. Vietnamese legal scholarship on this issue is hardly considerable. A constitutional framework on administrative due process does not exist, making for an arbitrary administrative law. Since the 1986 *doi moi* (reform/renovation),[9] and especially since the incorporation of the 'socialist law-based state' doctrine into the 1992 Constitution in 2001, liberal constitutionalism has had an increasing influence. The regimes of administrative sanctions/measures, however, remain largely aligned with the 1980s Soviet model. A critique offered by Dung Dang Nguyen, a leading constitutional law scholar in Vietnam, argues that Vietnamese law is very different from that of many countries, in that the regime of administrative sanctions and the mechanism of human rights restriction do not conform to the standards of due process.[10] Hence, he claims, it is necessary to transfer administrative sanctions from the jurisdiction of administrative agencies to the courts, thus moving Vietnam towards the rule of law and closer to the legal systems of other countries.[11]

Following the Introduction, this article has two main parts. Firstly, Part II analyses three tiers of summary minor offence processes (the summary process in criminal courts, the administrative sanctioning process and the process for handling administrative measures) and claims that the regimes of administrative sanctions and administrative

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Constitutionalism and the Socialist State in an Era of Globalisation: An Inquiry into Vietnam's Constitutional Discourse and Power Structures' [43] (2013) 5(2) *Global Studies Journal* 43, 52.

[6] Thiem H. Bui, 'Decontructing the "Socialist" Rule of Law in Vietnam: the Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process' (2014) 36(1) *Contemporary Southeast Asia* 77, 78-95; Bui, above n 5, 217.

[7] Richard Vogler, 'Due Process' In Michel Rosenfeld and András Sajó (eds), *The Oxford Hanbook of Comparative Constitutional Law* (Oxford University Press, 2012) 943.

[8] Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' [187] (2006) 17(1) *European Journal of International Law* 187.

[9] This reform has been mostly economic. Political reform is secondary.

[10] Dung Dang Nguyen, 'On the Vietnamese Legal Framework of Administrative Handling ('Ve phap luat xu ly hanh chinh cua Viet Nam')' [6] (2011)(20) *Legislative Studies Journal* 6, 9.

[11] Ibid. 11.

measures should be considered as criminal charges in nature. Secondly, Part III argues for a paradigm shift from a due-process-evading justice to a due-process justice for minor offence processes in the context of universal due process. The shift could be realised by recognising that a certain number of criminal fair trial rights apply to procedures dealing with minor offences, which are viewed as crimes/criminal charges. Additionally, different levels of criminal fair trial rights are designed for different groups of minor offences correspondingly.

II. THREE TIERS OF SUMMARY MINOR OFFENCE PROCESSES IN VIETNAM

Since this study aims to explore the design of procedural rights for minor offences, this part will examine three types (tiers) of summary procedures for dealing with minor offences. As I argued previously, the notion of tiers of criminal processes reflects variations of fair trial rights for different types of offences.[12] This notion will help me to explore how fair trial rights are limited in different ways, according to three tiers of summary minor offence processes in Vietnam.

Although the Vietnamese legal system does not provide a legislative definition of minor offences, it is evident that the so-called minor offences are comprised of two groups of offences. The first group consists of less serious crimes prescribed by the Criminal Code and dealt with by the criminal courts. The process dealing with these crimes is officially called summary procedure, which is the first tier of summary minor offence processes. The second group consists of administrative offences prescribed by the law on administrative sanctions and dealt with mostly by administrative agencies. The process dealing with administrative offences is a kind of administrative procedure. This is the second tier of summary minor offence processes. It is to be noted that the repetition of administrative offences could provoke what have been called administrative handling measures. This process, which exists essentially in order to address criminal preventive orders, can be considered as the third tier of summary minor offence processes.

2.1. The emerging summary procedure for less serious crimes in the criminal court

The conception of a crime

The Vietnamese criminal law, which, as I have emphasised, has been influenced by Soviet law, has used a much narrower concept of ‘crime’ than the notion of a ‘criminal

[12] Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 4.

charge' as interpreted by the United Nations Human Rights Committee and European Union jurisprudence.[13] Article 8(1) of the Criminal Code 1999 defines a crime as follows:

> A crime is an act that is dangerous to the society prescribed in the Criminal Code, committed intentionally or unintentionally by a person having the capacity of criminal liability, infringing upon the independence, sovereignty, unity and territorial integrity of the Fatherland, infringing the political regime, the economic regime, culture, defence, security, social order and safety, the legitimate rights and interests of organizations, infringing the life, health, honour, dignity, freedom, property, as well as other legitimate rights and interests of citizens, and infringing other areas of socialist legal order.

This concept of crime corresponds to the notion of true/mainstream/primary crime (crime in the narrow sense) in common law systems. Its first feature is that it conceives of a crime as an act that is gravely harmful to the society (*actus reus)*. This reflects the high-level harm principle. In a textbook on criminal law, the harmful character of crime is further explained by a crime being an event which 'causes or is likely to cause damage to interests of the people protected by the criminal law'.[14] Second, it conceives of a crime as an act that may be committed intentionally or unintentionally. This suggests the requirement of a fault element (*mens rea*).

The recent Criminal Code 2015 generally inherits the Criminal Code 1999's structural concept of crime but broadens the notion of those who might commit crimes to include commercial legal entities such as companies and corporations. Article 8(1) of this new legislation defines a crime as:

> an act that is dangerous to the society prescribed in the Criminal Code, committed intentionally or unintentionally by a person having the capacity of criminal liability or by a commercial legal entity, infringing upon the independence, sovereignty, unity and territorial integrity of the Fatherland, infringing the political regime, the economic regime, culture, defence, security, social order and safety, the legitimate rights and interests of organizations, infringing the life, health, honour, dignity, freedom, property, as well as other legitimate rights and interests of citizens, and

[13] Poland, a post-socialist Civil Law country, also has a narrow understanding of crimes (Maciej Bernatt, 'Administrative Sanctions: Between Efficiency and Procedural Fairness' [5] (2016) 9(1) *Review of European Administrative Law* 5, 16).

[14] Cam Le, 'The Concept of Crime and the Taxonomy of Crimes ('Khai niem toi pham va phan loai toi pham')' in Cam Le (ed), *Textbook on Vietnamese Criminal Law - General Part ('Giao trinh Luat Hinh su Viet Nam - Phan chung')* (Vietnam National University Hanoi Publishing House, 2007) 118.

infringing other areas of socialist legal order, according to which this Code demands criminal prosecution.

The Vietnamese conception of a crime is much narrower than the notion of a public wrong (a crime in the broad sense). Conduct that is officially considered a crime is strictly defined in the Criminal Code, excluding such public wrongs as administrative offences and administrative measures.[15] The differentiation between crimes and other legal violations is based on the seriousness rather than the nature of the offence.[16] This seriousness-based way of differentiating between forms of illegal conduct, which was developed in the Soviet Union, has led to the idea that 'one type of misconduct may have several forms depending upon the degree of social dangerousness'.[17] In Soviet law, crimes, if understood by nature, were comprised of three groups: ordinary crimes, administrative crimes and administrative infractions.[18] These three groups differed in their degree of dangerousness and procedural consequences. As in many systems, crimes were the most serious form of illegal conduct, punishable by imprisonment and even the death penalty (among other punishments), and tried by criminal courts using formal procedures. Administrative crimes were less serious than ordinary crimes, but more serious than administrative infractions, which were punishable by 30-day administrative arrest (among other punishments) and dealt with by a single judge, who was a member of an administrative body rather than a court.[19] Lastly, administrative infractions were the least serious form of illegal behaviour. Many were simply traffic infractions. Administrative infractions were punishable by non-custodial penalties (mostly fines), and handled by an administrative commission or the police.[20]

The summary process for less serious crimes

[15] The regimes of administrative offences and administrative measures will be discussed in Part 2.2 and Part 2.3 respectively.
[16] Le, above n 14, 130. Viet Cuu Nguyen, *Textbook on Vietnamese Administrative Law ('Giao trinh Luat Hanh chinh Viet Nam')* (Vietnam National University Hanoi Publishing House, 2014) 573; Viet T. Trinh and Hanh T. Tran, 'Common Features between Administrative Offences and Crimes and the Issue of Improving the Concept of Crime in the Vietnamese Criminal Code (Nhung diem chung giua vi pham hanh chinh voi toi pham va van de hoan thien khai niem toi pham trong Bo luat Hinh su Viet Nam)' [101] (2012) 28 *Vietnam National University Hanoi Science Journal (Law)* 101; Son T. Dang et al, *Theoretical and Practical Foundations for Developing A Model of the Act on Handling Administrative Offences in Vietnam ('Co so ly luan va thuc tien xay dung mo hinh Bo luat Xu ly vi pham hanh chinh o Vietnam')*, Institute of Legal Studies, Ministry of Justice No (2007) 19.
[17] Ger P. Van Den Berg, *The Soviet System of Justice: Figures and Policy* (Martinus Nijhoff Publishers, 1985) 44. For a similar observation, see: Nicolet Wijnvoord-Van Es, 'Special Procedures in Soviet Administrative and Criminal Law' in F. J. M. Feldbrugge (ed), *The Emancipation of Soviet Law* (Kluwer Academic Publishers, 1992) 233.
[18] Berg, above n 177, 33.
[19] Ibid. 33-5.
[20] Ibid. 43-6.

According to the 2013 Constitution, the People's Courts, when exercising judicial power, have jurisdiction over criminal cases.[21] In the first-instance hearing of normal cases (for serious crimes, very serious crimes and particularly serious crimes),[22] the trial council comprises one judge and two assessors or two judges and three assessors.[23] During the trial they are of equal status.[24] While judges are professionally trained and carefully selected, assessors who are elected or appointed do not work as a profession.[25] The participation of assessors in the trial council represents the ideology of people's involvement in the trial.[26] This has always been an important principle in the Vietnamese model of criminal proceedings.

A mechanism of summary procedure for less serious crimes originated from the Criminal Proceedings Code 2003.[27] The notion of 'less serious crimes' is defined in Criminal Codes. According to Article 8(3) of the Criminal Code 1999, 'less serious crimes are crimes which cause no great harm to society and the maximum penalty bracket for such crimes shall be three years of imprisonment'. Now Article 9(1) of the Criminal Code 2015 redefines less serious crimes as 'crimes which cause no great harm to society and according to this Code the maximum penalty bracket for such crimes shall be fine, non-imprisoned re-education or three years of imprisonment'. Despite the recognition of summary procedure in the Criminal Proceedings Code 2003, it is important to note that this simplification is a technical reduction regarding time and steps of the procedures rather than the restrictions on procedural rights. In principle, fair trial rights are guaranteed as normal.[28] At the time the Criminal Proceedings Code 2003 was promulgated, the 1992 Constitution, which protected the principle of collective trials, was an obstacle to one-judge-trial reform.

With the enactment of the 2013 Constitution, we can see an emergence of rights-limitations summary procedure in criminal courts with a judge acting without assessors

[21] See: Article 102 and Article 31.
[22] Serious crimes are crimes which cause great harm to society and the maximum penalty bracket for such crimes shall be from over three years to seven years of imprisonment; very serious crimes are crimes which cause very great harm to society and the maximum penalty bracket for such crimes shall be from over seven years to fifteen years of imprisonment; Particularly serious crimes are crimes which cause exceptionally great harms to society and the maximum penalty bracket for such crimes shall be from over fifteen years to twenty years of imprisonment, life imprisonment or capital punishment. (*Criminal Code 2015* Article 9(2)(3)(4); *Criminal Code 1999* Article 8(3)).
[23] *Criminal Proceedings Code 2003* Article 185.
[24] Ibid. Article 15.
[25] Son T.M. Hoang (ed), *Textbook on Vietnamese Criminal Proceedings Law (Giao trinh Luat To tung hinh su Viet Nam)* (People's Public Security, 2011) 71.
[26] Ibid. 70.
[27] See Chapter XXXIV of this Code.
[28] *Criminal Proceedings Code 2003* Article 324(2)(5).

(lay judges). In comparison with the 1992 Constitution, the 2013 Constitution determines the composition of the trial council according to less serious crimes and more serious crimes. The text of Article 103(1)(4) of the Constitution allows us to infer that the summary procedure for less serious crimes is implemented by only one judge. In other words, the right to a competent tribunal is limited in comparison with the process for serious crimes. This type of one-judge summary procedure existed in the Soviet Union's model of administrative crimes, as noted in Part II.2. Among others, Dung Q. Vu advocates this procedural reform, arguing that one-judge trials neither infringe defendants' rights nor violate democratic values.[29]

Recently, the Criminal Proceedings Code 2015 has been promulgated to replace the Criminal Proceedings Code 2003. Similarly to the Criminal Proceedings Code 2003, the Criminal Proceedings Code 2015 requires four conditions for the application of summary procedures: (1) the accused is caught red-handed or makes a confession; (2) the facts are simple with obvious evidence; (3) the alleged offence is a *less serious one*; (4) the accused has a clear identity.[30] Based on the 2013 Constitution, the Criminal Proceedings Code 2015 affirms the one-judge system of summary criminal procedure.[31] It is clear that summary procedure under this legislation involves not only technical reductions regarding time or steps of the procedure, but also a transformation from a trial by a council to a trial by a judge. A new tier of summary criminal processes will officially appear when the Criminal Proceedings Code 2015 comes into effect.

Along with a one-judge trial, for the proceedings of less serious crimes, free legal aid is not available to all defendants. In other words, the right to free legal assistance is significantly limited in summary proceedings. Legal aid is both free and compulsory for juvenile defendants[32] and persons with a disability;[33] and it is free (but not compulsory) for those who meet the criteria for being poor, or for or for having contributed to the revolution, or for being old and destitute, or for being an orphaned child, or for being a member of an ethnic minority in a poor socio-economic area.[34]

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[29] Dung Q. Vu, *Summary Procedure in Criminal Proceedings: Theory and Practice in Hanoi City* Vietnam National University Hanoi, 2008) 103-4.
[30] *Criminal Proceedings Code 2015* Article 456(1).
[31] Ibid. Articles 463(1), 465(1).
[32] *Criminal Proceedings Code 2003* Articles 57, 58, and 305; *Joint Circular No. 01/2011/TTLT-VKSNDTC-TANDTC-BCA-BTP-BLDTBXH between Supreme People's Prosecuracy, Supreme People's Court, Ministry of Public Security, Ministry of Justice, and Ministry of Labour, War Invalids & Social Welfare on Guidelines of Some Provisions of the Criminal Proceedings Code about Juvenile's Participation in Criminal Process 2011* Article 9(4).
[33] *Criminal Proceedings Code 2003* Article 57(2).
[34] *Legal Aid Act 2006* Article 10.

In a way that is similar to some other jurisdictions, such as England and Wales,[35] the Vietnamese version of summary proceedings for less serious crimes shows the lowest level of procedural rights restrictions, as compared with other types of summary procedure (as we will see below). Indeed, the restrictions on the right to a competent tribunal and the right to legal aid do not abandon typical features of a criminal court in dealing with less serious crimes.

2.2. The summary procedure for administrative offences

The conception of administrative offence

Administrative offences in Vietnam are fairly similar to a group of summary minor crimes in other jurisdictions. It is evident that since the 1980s Vietnam acquired the Soviet model for dealing with minor crimes.[36] The current mechanism for handling administrative offences was first established by the Ordinance on Penalising Administrative Offences 1989 (Ordinance 1989)[37] and now regulated by the Act on Handling Administrative Offences 2012 (Act 2012). The word 'administrative offence', which has the same meaning as the term 'administrative infraction' in Soviet law, first appeared in the 1989 Ordinance to replace the word 'minor offence', which was defined in the Minor Offences Sanctioning Regulations 1977 (Regulations 1977). Despite the terminological difference, in essence, under both the regimes of minor offence under Regulations 1977 and administrative offence under Ordinance 1989, these offences were perceived as public wrongs that were less serious than crimes under the Criminal Code.[38]

Although the legal framework for handling administrative offences has been changed in terms of legal documents, core principles for this area are nearly unchanged. The Act on Handling Administrative Offences 2012 defines an administrative offence as 'a faulty act, committed by an individual or organization, violates the state management law but does not constitute a crime and, therefore, must be administratively sanctioned in accordance with law'.[39] Like true crimes, *mens rea* (fault) and *actus reus* (illegal act) are two essential elements of administrative offences. The fault element includes both intentional and

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[35] See further: Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 4.

[36] Loc Dinh Nguyen, 'Codificating the Legal Framework of Handling Administrative Offences – A Ripe Issue ('Phap dien hoa phap luat ve xu ly vi pham hanh chinh - Van de da chin muoi')' (Paper presented at the Directions for Making the Act of Handling Administrative Offences, Ministry of Justice and UNDP, 2008).

[37] This act was substantially amended (and replaced) three times in 1995, 2002 and 2012.

[38] See: Article 2 of the Minor Offences Sanctioning Regulations 1977 (as attached to the *Decree 143 on Minor Offences Sanctioning Regulations 1977*); *Ordinance on Penalising Administrative Offences 1989* Article 1.

[39] *Act on Handling of Administrative Offences 2012* Article 2(1).

unintentional fault.[40] According to the statutory definition, conduct must violate 'the state management law' to be considered an illegal act. Viet C. Nguyen argues that this expression is vague and may include any illegal act, and therefore, an act violating 'the state management law' means illegal act.[41] As such, violating 'the state management law' is not only a breach of regulation, but it is also regarded as causing harm to society. This feature of administrative offence is similar to that of a crime.

Arguably, the notions of crime and administrative offence have much in common: both kinds of offence are (1) fault-based (2) public wrongs that (3) are harmful to society. As Viet Nguyen contends, 'both crimes and administrative offences are illicit forms of conduct which are harmful to society'.[42] As noted, the only criterion of differentiation is the seriousness of offences. Accordingly, crimes are deemed less harmful to society than administrative offences. Some have admitted that the distinction between these two types of public wrong is relative and may change according to the legislative strategy.[43] For example, drink driving is now an administrative offence but it has been suggested that this offence should be criminalised by amending the Criminal Code. Thus there is concern about the criteria for delineating the range of administrative offences.[44] There is no clear theoretical basis for doing so.

It can be argued that the distinction between crimes and administrative offences is mostly artificial. This is manifested, according to this argument, in the fact that many illegal acts (theft, burglary, robbery, assault, etc.) have a dual status: they can be crimes or administrative offences. That is, there is a threshold of the interests (in terms of quantity, level of harm, amount of money, etc.) that an illegal act violates for determining whether it is a crime or an administrative offence.[45] Moreover, many crimes are instances of repeated administrative offences.[46] Viet Nguyen therefore argues that crimes and administrative offences have many close similarities that may cause confusion.[47]

However, traditionally, legislation has distinguished between administrative offences and crimes according to certain substantive characteristics. First, only non-custodial

[40] Nguyen, above n 16, 535-6.
[41] Ibid. 528
[42] Ibid. 572.
[43] Dang et al, Institute of Legal Studies, Ministry of Justice No (2007) above n 16, 19; Nguyen, above n 16, 528-9, 573; Nguyen, above n 37, 13.
[44] Nguyen, above n 37, 13.
[45] E.g., A theft of VND 2,000,000 (equivalent to approximately US$ 90) or higher amount is a crime, a theft of less than VND 2,000,000 is an administrative offence (See: *Criminal Code 1999* Article 138; *Criminal Code 2015* Article 173; *Decree 73/2010 on Penalising Administrative Offences regarding Public Security, Order and Safety 2010* Article 18(1)).
[46] E.g. The act infringing the privacy of mail, telephone, etc. (*Criminal Code 1999* Article 125).
[47] Nguyen, above n 17, 571-2.

sentences (warning, monetary fine, licence/professional disqualification, vehicle/exhibit seizure, expulsion) are applicable to the former.[48] Second, not only individuals but also organisations are subject to administrative offences.[49] Third, no criminal record attaches to those who commit administrative offences.

The legal consequences of administrative offences (pre-imposition measures, penalties and compensatory coercions) can be quite severe. First, the maximum monetary fine is high in relation to Vietnam's GDP per capita (US$ 1,910.5 in 2013).[50] An individual may be subject to a fine of up to VND 1,000,000,000 (equivalent to approximately US$ 45,000) and a legal entity (such as an organisation) may be subject to a fine of up to VND 2,000,000,000.[51] Second, other penalties such as licence/professional suspension, vehicle/exhibit seizure or expulsion could harshly affect an offender' life. Third, compensatory coercion,[52] although this is not an official penalty, is a hidden punishment that may be more serious than official penalties. Fourth, pre-imposition measures for the prevention and guarantee of penalising administrative offences[53] may seriously infringe the rights, property and liberty of offenders. Finally, repeated administrative offences may lead to a conviction for a crime or the application of an isolated educational measure.[54]

Administrative justice instead of criminal justice

Regarding the procedural principle, the Vietnamese model of dealing with administrative offences was a legal transplantation from the Soviet model, which was analogous to many civil law systems. In this model, minor crimes, which include

[48] *Act on Handling of Administrative Offences 2012* Article 21(1).
[49] However, the new Criminal Code 2015 has recently broaden criminal liability to commercial legal entities, as noted above.
[50] World Bank, *GDP per capita* <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.
[51] *Act on Handling of Administrative Offences 2012* Article 23(1).
[52] Compensatory coersions include: (1) Forcible restoration of the original state; (2) Forcible dismantlement of construction works or construction work Parts built without license or at variance with construction licenses; (3) Forcible application of measures to remedy environmental pollution or spreading of epidemics or diseases; (4) Forcible bringing out of the territory of the Socialist Republic of Vietnam or forcible re-export of goods, Article or means; (5) Forcible destruction of goods or Article harmful to human health, domestic animals, plants and environment, or cultural products with harmful contents; (6) Forcible correction of untruthful or misleading information; Forcible correction of untruthful or misleading information; (7) Forcible removal of infringing elements from goods, goods packages, business means or Article; Forcible recall of products or goods of inferior quality; (8) Forcible refund of illicit profits earned through the commission of administrative violations or money amounts equivalent to the value of administrative violation material evidences or means which have been illegally sold, dispersed or destroyed; (9) Other remedial measures provided by the Government (ibid. Article 28(1)).
[53] These measures include: (1) Holding of persons in temporary custody; (2) Escorted transfer of violators; (3) Temporary seizure of administrative violation material evidences and means, licenses and practice certificates; (4) Search of persons; (5) Search of means of transport and objects; (6) Search of places where administrative violation material evidences and means are hidden; (7) Management of foreigners violating the Vietnamese law pending the completion of expulsion procedures (ibid. Article 19).
[54] Discussed further in Part 2.3.

administrative crimes and administrative infractions, are administratively dealt with by a single judge (in an administrative body), administrative commission and police rather than courts.[55] This is an effective solution for dealing with the vast number of minor offences, , which requires efficiency. In 2008, it was estimated that the annual number of administrative offences convicted was approximately 300,000 – ten times higher than that for crimes convicted.[56] Similarly, in China, Fu Hualing has revealed, there are approximately 100,000 criminal trials each year while millions of minor offences are administratively decided.[57]

A variety of administrative officials[58] (within administrative agencies) have the discretion to deal with administrative offences through administrative procedures. Administrative agencies rather than courts have exclusive rights to impose administrative sanctions on an offender. Moreover, the agencies also have the authority to arrest and detain individuals. Thus minor crimes are called 'administrative' offences and the law of administrative offences is considered part of administrative law. In Soviet-influenced jurisdictions like Vietnam, theories of administrative offence belong in the field of administrative law, not criminal law, like in common law systems. In legal education, the issue of administrative offences belongs in textbooks on administrative law.[59]

To date, crime control has been a predominant objective, so the theory of due process is applied almost not at all to administrative offences. Fu Hualing argues that this system is 'characterized by relative severity in penalty, lack of representation and due process, and uncertain legislative authorization'.[60] Consequently, this can be considered one type of the 'crime control model' which 'requires that primary attention be paid to the managerial efficiency with which the criminal process operates to screen suspects, determine guilt and secure appropriate dispositions of persons convicted of crimes'.[61] Too many powers granted to the executive branch may lead to the abuse of power. To some extent, the right to a fair trial exists in Article 31 of the 2013 Constitution. However, these provisions are only applied to criminal proceedings and not to the handling of administrative offences.

[55] Berg, above n 17, 33-5, 43-6; Es, above n 17, 233.
[56] Viet Q. Nguyen, 'The Role of the Act on Handling Administrative Offences and Its Relation to Criminal Law - Major Contents of the Act on Handling Administrative Offences ('Vi tri, vai tro cua Luat Xu ly vi pham hanh chinh, moi quan he voi phap luat hinh su. Nhung noi dung chu yeu cua Luat Xu ly vi pham hanh chinh')' (Paper presented at the Directions for Making the Act of Handling Administrative Offences, Hanoi, 2008) 16.
[57] Fu Hualing, *The Varieties of Law* <http://lawprofessors.typepad.com/china_law_prof_blog/2011/06/>.
[58] *Act on Handling of Administrative Offences 2012* Articles 38-51.
[59] The official Textbook of Administrative Law of Law School within Vietnam National University Hanoi has a chapter 'Administrative Liability' on administrative offences (Nguyen, above n 16).
[60] Hualing, above n 57.
[61] Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

Thus the mechanism for dealing with administrative offences has the potential of being out of alignment with fair trial principles.

Recently, a significant proposal of procedural reform has been put forward by Dang Dung Nguyen.[62] He argues that the legal framework for administrative offences manifests an unclearness between three branches of state power, where the executive has rights of law making, enforcement and adjudication.[63] In terms of procedure, Vietnamese law is very different from many countries, in that the sanctions imposition and human rights restriction do not conform to the standards of due process of law.[64] There has been a lack of clear rules guaranteeing offenders' rights and interests.[65] Hence it is necessary to 'de-bureaucratize' the mechanism of administrative sanctions and reduce the difference between Vietnam and other countries with regard to the rule of law.[66]

The criminal nature of administrative offences

The Vietnamese government's commitment to the implementation of international human rights law has given rise to the adherence of administrative-offence-related measures to the due process principle. The text of international human rights instruments as well as widely accepted interpretations of the notion of criminal charge and the principle of a fair trial should be rigorously taken into account. Arguably, the universal notion of a crime is based on the interpretation of the term 'criminal charge', where criminal charges are subject to criminal fair trial rights prescribed in Article 14 of the ICCPR.[67] According to the United Nations Human Rights Committee (UNHRC), the understanding of the term 'criminal charge' 'may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity'.[68] Likewise, the European Court of Human Rights (ECtHR)[69] has developed an extensive doctrine of criminal charges since the important case of *Engel v Netherlands*. According to this case, a sanction or measure or whatever

[62] Law and Development Institute of Policy, *Assessment on the Actualities of the Legal Framework of Administrative Offences Handling* (2011); Law and Development Institute of Policy, Imroving the Legal Framework of Administrative Offence Handling in Vietnam; Nguyen, above n 10.
[63] Nguyen, above n 10, 7.
[64] Ibid. 9.
[65] Hoan K. Truong, 'Administrative Sanctions Procedure in the Bill on Handling Administrative Offences' [31] (2011)(20) *Legislative Studies Journal* 33.
[66] Nguyen, above n 10, 11.
[67] Similarly, see Article 6 of the European Convention on Human Rights.
[68] United Nations Human Rights Committee, CCPR/C/GC/32, *General Comment No. 32: Article 14 - Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007) [15].
[69] Although the jurisprudence of the ECtHR does not apply to Vietnamese law, it is a very useful reference to understand the notion of 'criminal charge' and the application of fair trial rights to criminal charges. The ECtHR case law regarding these issues could be considered supplementary sources to the UNHRC's interpretation.

terms in domestic law, is deemed a criminal charge if the conduct of the accused qualifies according to at least one of three criteria: (i) the state officially defines the offence as criminal; (ii) the nature of the offence; (iii) the severity of the penalty.[70] The ECtHR further explains that '[t]he general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex',[71] and therefore illegal conduct that is called administrative/regulatory/minor offence in domestic law might, in virtue of its nature, be a criminal charge.[72] This conception of a criminal charge is broad enough to reflect the idea of crimes as public wrongs, which means conduct that 'harm[s] the public collectively or the polity as a whole'.[73]

In the Vietnamese context, theories of administrative offence essentially have originated from criminal law. Former Minister of Justice Loc Dinh Nguyen admits that while administrative offences are not considered crimes in terms of their level of seriousness, these two regimes have much in common.[74] Practice has also proved that the law of administrative sanctions has inherited its scholarship from criminal law and criminal procedural law.[75] It has also been noted that administrative sanctions/measures, although less serious than criminal sanctions, undeniably infringe fundamental rights and liberty.[76] Commentators in China, a country with socialist model similar to that of Vietnam, have seen further similarities between the ICCPR's notion of criminal charge and administrative sanctions/measures.[77]

Arguably, as in some European civil law jurisdictions such as Germany and France, the Vietnamese concept of an administrative offence is essentially a criminal charge interpreted by the UNHRC and the ECtHR. An administrative offence can be considered a criminal charge on the basis of its nature and the severity of sanctions.[78] There are five rationales for this argument. First, the legislation recognises administrative offences as less

[70] *Engel v Netherlands* (1976) 1 EHRR 647 [82].
[71] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 [36]. See also: *Saunders v United Kingdom* (1997) 23 EHRR 313 [74].
[72] E.g., Breaches of traffic law (*Öztürk v Germany* (1984) 6 EHRR 409); Breaches of competition law (*A. Menarini Diagnostics S.R.L. v Italy* (2011) (ECtHR).
[73] RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007) 140-1.
[74] Nguyen, above n 36, 4.
[75] Ibid. 4-5.
[76] Dang et al, Institute of Legal Studies, Ministry of Justice (2007), above n 16, 53; Nguyen, above n 35, 7.
[77] Jixi Zhang and Xiaohua Liang, 'The Scope of Application of Fair Trial Rights in Criminal Matters - Comparing ICCPR with Chinese Law' [1] (2010) *Arts and Social Sciences Journal* 1.
[78] *Engel v Netherlands* (1976) 1 EHRR 647; *Öztürk v Federal Republic of Germany* (1984) 6 EHRR 409.

serious *public wrongs*.[79] Second, although no explicit recognition of the criminal character of administrative offences exists, the legislation recognises that some *criminal* fair trial rights may be applied to the administrative sanctioning procedure. The Act on Handling Administrative Offences 2012 legislates some fair trial rights in dealing with administrative offences: reasonable time (Art 3(1)(b)); fairness (Art 3(1)(b)); publicity (Art 3(1)(b)); no punishment without law (Art 3(1)(d)); the prohibition of double jeopardy (Art 3(1)(d)); the right of the accused not to be compelled to testify against himself or to confess guilt (Art 3(1)(đ) - the authority 'has the duty to prove the commission of an administrative offence'); compensation (Art 13(2)); and the right to review by a tribunal (Art 15(1)). These two features show an implicit recognition of the criminal character of administrative sanctions. Third, even though no imprisonment applies to administrative offences, some criminal-like searches and seizures are allowed in the pre-imposition stage, which is analogous to pre-trial criminal proceedings, albeit less harsh. Here, search and seizure are infringements of many fundamental rights and liberty. Fourth, the fine could be even more severe than the monetary punishment applicable in criminal law. Finally, a repeated administrative offence could result in a criminal charge.

2.3. The summary procedure for administrative measures

Preventive justice is not strange in the world. In legal discourse, the Anglo-American model of preventive detention and the socialist model of administrative detention are two remarkable exemplars of preventive justice targeting individuals who may potentially bring 'dangerousness' to society.[80] Traditionally, while the Common Law model is aimed at persons who are likely to commit a specific offence, such as a sexual or violent offence, the socialist model regulates all offences that are deemed dangerous to the public.

Administrative handling measures: an extreme version of legal paternalism

In Vietnam, a preventive administrative measure is officially termed the 'administrative handling measure',[81] which has been deemed to be outside criminal justice. The Act on Handling of Administrative Offences 2012 defines this vague term as 'a measure applicable to an individual who violates the law on security, order and social

[79] See the statutory definition of administrative offence, as mentioned above.
[80] See: Paul H. Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' [1429] (2001) 114(5) *Harvard Law Review* 1429; Christopher Slobogin, 'A Jurisprudence of Dangerousness' [1] (2003) 98(1) *Northwestern University Law Review* 1; Douglas Husak, 'Lifting the Cloak: Preventive Detention as Punishment' [1173] (2011) 48 *San Diego Law Review* 1173; Randall Peerenboom, 'Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China' [991] (2004) 98(3) *Northwestern University Law Review* 991; Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge University Press, 2007).
[81] *Act on Handling of Administrative Offences 2012*.

safety that does not constitute a crime'.[82] Although this measure is regulated by the law on 'handling administrative offences', it relates not only to administrative offences but also to crimes and drug-addict-related measures. Here, the conception of dangerous people includes those connected with crimes, administrative offences and drug addiction.

Administrative measures were legally established in 1961 by Resolution 49 of the National Assembly Standing Committee on 'isolatedly re-educating persons harmful to society'. It was at the time when the socialist model began to be strongly incorporated into the Vietnam Democratic Republic's legal system. Resolution 49 aimed to 'preserve public order and security', and to 'protect the interests of the state and the people' as well as to 're-educate persons harmful to society in order to become honest labourers'.[83] It can be concluded that the measure's objective was originally to 're-educate' (*cai tao*)[84] 'dangerous' individuals. Notably, the educational administrative measure was highly political, as it originally aimed to isolate, without trial, individuals who threatened national security.[85] Section 2 of Resolution 49 expressly recognised that although 'educated persons are not considered prisoners', they 'do not have citizens' rights'. This type of measure reflects the socialist philosophy of law as a teacher or parent, who has the right and responsibility to educate each member of society.[86] It is an extreme form of legal paternalism, which aims to 'rectify' individuals' thought and behaviour coercively.[87] Indeed, according to Resolution 49 (sections 2 and 3), 'harmful' persons, who had not improved after normal educational methods, were subject to isolated re-education so as to 're-educate' their 'thoughts' to 'become honest citizens'. The socialist-influenced Vietnamese version of isolated re-education is quite similar to the regime of education through labour in China, which has been analysed and critiqued by many English-language studies.[88] The Vietnamese regime is also comparable, though not analogous, to the Soviet 'anti-parasite law', in which '[p]ersons may be sentenced… by the judges of the regular courts in a *summary procedure* and without right of appeal, or else by general meetings in

[82] Ibid. Article 2(3).
[83] See: the Preamble of the *Resolution 49/1961/UBTVQH on Isolatedly Re-educating Persons Harmful to Society 1961*.
[84] In Vietnamese, *cai tao* is not just 'educate' but has a negative meaning of 're-educating' bad persons.
[85] Nguyen, above n 16, 510; Specifically, Resolution 49 targeted at two types of dangerous persons: headstrong anti-revolution persons who harm the public security and professional ruffians. (See: Part 1 of the *Resolution 49/1961/UBTVQH on Isolatedly Re-educating Persons Harmful to Society 1961*).
[86] Harold J. Berman, *Justice in the U.S.S.R.* (Vintage Books, Revised ed, 1963) 284.
[87] Cf. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton University Press, 1980) 110.
[88] E.g., Biddulph, above n 80 (Particularly Chapter 6); Peerenboom, above n 80; Veron Mei-ying Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?' [303] (2003) 41(2) *Columbia Journal Of Transnational Law* 303.

the factories or collective farms with review by the local municipal council'.[89] According to the Soviet law, these kinds of measures were 'administrative rather than penal', because 'the offences are not crimes, the measures are not applied by courts, there are no criminal records, and the conditions for early release are different from those used in the case of crimes'.[90]

Today, the word 're-educate' (*cai tao*) has been replaced by the more courteous word 'educate' (*giao duc*). It has been recognised that administrative measures have contributed to 'convert[ing], educat[ing] many individuals to [becoming] good, law-respecting citizens', so as to 'protect national security [and] guarantee public order'.[91] It is reasoned that a disciplined arrangement of labour and education in isolation would make the educatees 'correct their mistakes and become helpful persons'.[92] As applied to the Soviet anti-parasite law, this argument truly reflects the 'Soviet conception that it is a primary function of law to help form the character of the people, including *their consciousness of their legal and moral obligations* to society'.[93] On the face of it, the political function of administrative measures disappears in the text of the legislation. Since the enactment of the Ordinance on Handling of Administrative Offences 1995, educational measures established by Resolution 49 fragmented into five so-called 'administrative handling measures': (i) non-isolated education in a commune, ward or township; (ii) isolated education in a reform school; (iii) isolated education in a compulsory educational institution; (iv) isolated compulsory detoxification; and (v) administrative surveillance. In 2007, administrative surveillance, which regulated national-security-risk persons, was abolished.

According to current legislation, there are four administrative handling measures applied to four groups of people for educational purposes. The application of these measures is illustrated in Table 1 and Diagram 1 as follows.

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[89] Berman, above n 86, 84 (emphasis added).
[90] R. W. Makepeace, *Marxist Ideology and Soviet Criminal Law* (Barnes & Noble Books, 1980) 257.
[91] Vietnamese Government and UNDP, *Assessment of Administrative Handling Measures and Recommedations for the Act on Handling Administrative Offences ('Danh gia ve cac bien phap xu ly hanh chinh khac va khuyen nghi hoan thien trong Luat Xu ly vi pham hanh chinh')* (2010) 3, 7-8. See also: Ministry of Justice, *Assessment Report on the System of Legal Documents on Handling Administrative Offences* (2007) 128, 132.
[92] Ministry of Justice (2007), above n 91, 132.
[93] Berman, above n 86, 297 (emphasis added).

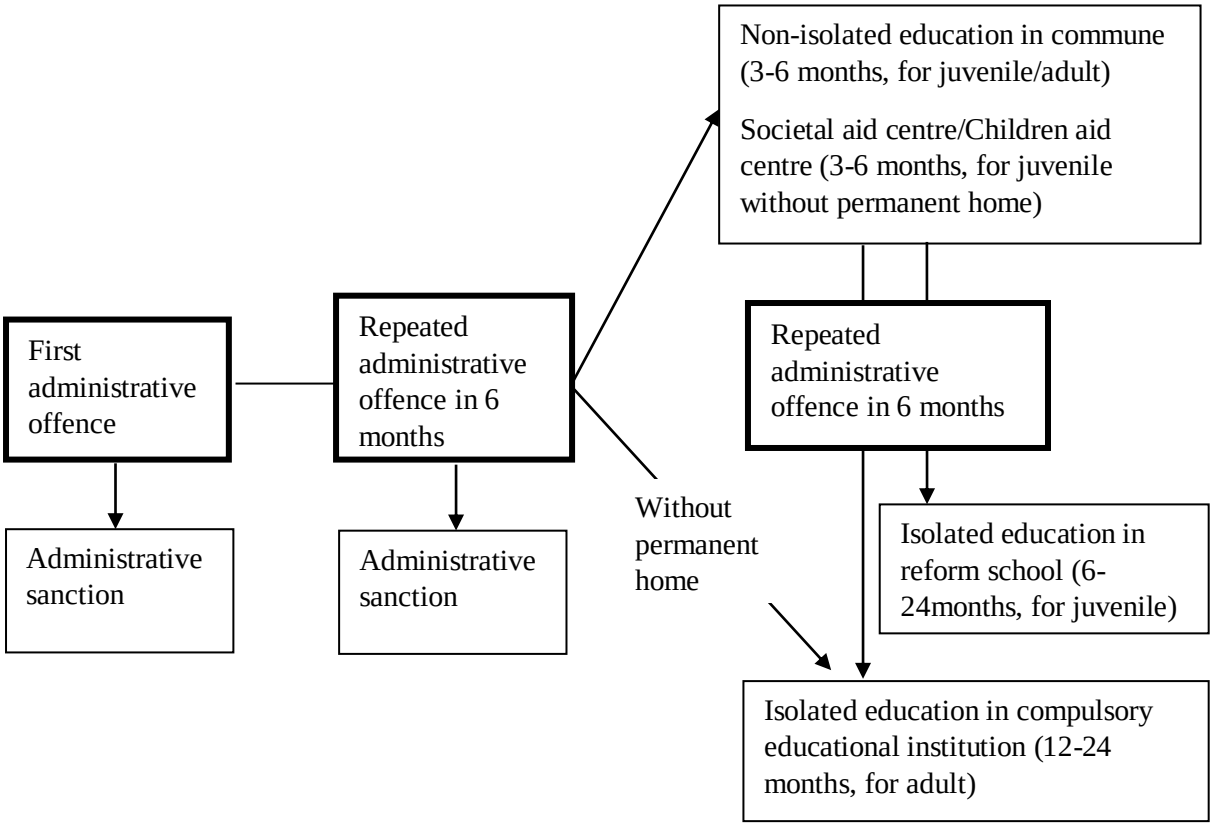
Table 1: The use of administrative handling measures

Measures[94] / **Groups**[95]	*Measure 1*: Non-isolated education in commune, ward or township (3-6 months)	*Measure 2*: Isolated education in reform school (6-24 months)	*Measure 3*: Isolated education in compulsory educational institution (12-24 months)	*Measure 4*: Isolated compulsory detoxification (12-24 months)
Group 1: a juvenile who is under the age of criminal responsibility and commits a serious, very serious or particularly serious crime	X	X		
Group 2: a juvenile who has been punished for twice committing specific administrative offences (theft, fraud, gambling, disturbing the peace) in a period of 6 months, where these actions are not subject to a criminal charge	X	X		
Group 3: an adult who has been punished for twice committing administrative offences in a period of 6 months, where these actions are not subject to a criminal charge	X		X	
Group 4: a drug-addicted adult	X			X

Note regarding the table: The present part of this thesis only focuses on administrative-offence-related individuals (groups 2, 3; measures 1,2,3). Thus crime-related individuals (group 1) and drug-addicted individuals (group 4) are excluded from the analysis.

[94] *Act on Handling of Administrative Offences 2012* Article 2(3).
[95] Ibid. Articles 90, 92, 96, 96; *Decree 111/2013/ND-CP on the Application of the Administrative Handling Measure - Education in Commune, Ward or Township 2013* Article 4.

Diagram 1: The connection between administrative sanctions and administrative handling measures (as applied to administrative-offence-related individuals only)



Judicialisation

In the context of the application of a purely socialist model from 1960s to 1980s, the regime of administrative measures was understandably perceived as an effective tool for dealing with individuals who were accused of causing danger to the community. However, since 1986, under the influence of the rule-of-law doctrine, this mechanism has been slowly improved. Substantively, there remain a tendency to 'undercriminalisation'[96] – conduct that deserves to be criminalised is not criminalised. Procedurally, this means an evasion of criminal fair trial rights. Many studies have strongly criticised the regime of administrative handling measures without trial, and have supported moving cases to the courts.[97]

[96] Andrew Ashworth and Lucia Zedner, *Preventative Orders: A Problem of Undercriminalization?* (Oxford University Press, 2010).

[97] E.g., Dung Dang Nguyen, 'Other Administrative Handling Measures in the Bill on Handling of Administrative Offences ('Cac bien phap hanh chinh khac trong Du thao Luat Xu ly vi pham hanh chinh')' (Paper presented at the Improving the Law on Handling of Administrative Offences in Vietnam, Tam Dao, Vinh Phuc, 26-27 September 2011); Hoan Khanh Truong, 'Some Ideas about the Judicialisation of Education in Reform School and Education in Compulsory Educational Institution ('Mot so y kien ve tu phap hoa bien phap dua vao co so giao duc va truong giao duong')' (Paper presented at the Improving the Law on Handling of Administrative Offences in Vietnam, Tam Dao, Vinh Phuc, 26-27 September 2011); Duc Xuan Bui,

Interestingly, arguments for granting jurisdiction to the courts has not been primarily based on the criminal nature of the measures, but has paid attention to the intuitive principle of fair procedure/due process/fairness.[98] Some scholars reason that the derivation of individual's liberty must be decided by the judiciary to achieve procedural fairness.[99] Accordingly, the main theme in these discourses was 'judicialisation',[100] which means that the jurisdiction over administrative sanctions is diverted from administrative agencies to courts. The judgement should be based on an *adversarial* process between two parties.[101]

As a replacement for the Ordinance on Handling Administrative Offences 2002, which reflected a tradition of justice without trial, the Act on Handling Administrative Offences 2012 is a radical development, in that it recognises the People's Court, apart from the People's Committee, as the decision-maker. Nevertheless, it is important to note that most cases are first handled by the administrative agencies through a measure called non-isolated education in a commune (for juvenile/adult with permanent home) or through a societal aid centre/children aid centre (for juvenile without permanent home).

The People's Committee - an administrative agency, which plays the role of a tribunal in deciding measure 1 (see Table 1), is highly unlikely to be competent, independent and impartial. Compared to criteria of a tribunal, the People's Committee lacks independence and impartiality. It can be argued that this lack can be rectified by judicial reviews of administrative action if there is an appeal. This kind of a quasi-tribunal, which is acceptable in measure 1, is not a criminal process.

Identity lost: administrative, civil or criminal justice?

There have been concerns about lost paradigms describing a blur between criminal sanctions and punitive civil sanctions.[102] This is indeed the case in the Vietnamese regime of administrative sanctions, as noted in part II.2. The problem is even worse in the regime of administrative measures: here there is confusion between administrative, civil and criminal justice.

'Entrusting the District-level People's Court to Decide the Application of Other Administrative Handling Measures ('Giao Toa an nhan dan huyen quyet dinh ap dung cac bien phap xu ly hanh chinh khac') ' (Paper presented at the Improving the Law on Handling of Administrative Offences in Vietnam, Tam Dao, Vinh Phuc, 26-27 September 2011); Ministry of Justice (2007), above n 91, 167-8.

[98] E.g., Bui, above n 97; Truong, above n 97.

[99] Nguyen, above n 97, 49-50; Truong, above n 97, 93-4; Vietnamese Government and UNDP (2010), above n 91, 22-3.

[100] E.g., Nguyen, above n 97, 49-50; Truong, above n 97, 93-4; Vietnamese Government and UNDP (2010), above n 91, 53; Ministry of Justice (2007), above n 91, 167-8.

[101] Vietnamese Government and UNDP (2010), above n 91, 66.

[102] John C. Coffee, 'Paradigms Lost: the Blurring of the Criminal and Civil Law Models. And What Can be Done About It' [1875] (1992) 101 *Yale Law Journal* 1875.

The legislation does not explicitly identify the nature of the measures - whether they are administrative, civil or criminal. Interestingly, and confusingly, it can be observed that there are signs of administrative, civil *and* criminal justice. Regarding administrative characteristics, it can be inferred that these particular processes are administrative, as the legislation speaks of the term 'administrative handling measure' to be decided by the court. The legislation also avoids some terms used in criminal/civil proceedings: it speaks of a 'meeting' instead of the trial to decide the case; of the 'suggester' instead of the prosecutor/plaintiff; of the 'suggested person' instead of the accused or the defendant.[103] Furthermore, the administrative measures appear to be educational ones that represent forms of restorative justice. As defined by the Act on Handling of Administrative Offences 2012, the objective of administrative measures is to administer and educate individuals under the government's supervision (through Commune-level People's Committees, reform schools and compulsory educational institutions).[104] As illustrated in Diagram 1, in most circumstances the case is judged by the Commune-level People's Committee without the involvement of judicial bodies. But if the case is brought to, and decided by, the court (measures 2,3), the process shows signs of civil justice. This reflects the idea of judicialisation, as discussed above.

Besides administrative and civil characteristics, criminal features are manifested in the Act on Handling of Administrative Offences. Substantively, Art. 2(3) defines administrative handling measures as a response to individuals *violating the law on public order and security*. This implies that this type of violation is a form of *public wrong*, which is synonymous with the notion of a crime in the broad sense. Procedurally, some elements of fair trial rights can be found in the Act: reasonable time (Art 3(1)(b)); fairness (Art 3(1)(b)); publicity (Art 3(1)(b)); the right not to be compelled to testify against oneself or to confess guilt (Art 3(2)(d) – since the authority 'has the duty to prove the commission of an administrative offence'); the right to review by a tribunal (Art 15(1)). However, many other criminal fair trial rights are still absent or limited because of the operative conception of 'administrative' measures. Many other important procedural rights are absent, such as the right to legal assistance and the right to be informed of the accusation.

The criminal nature of administrative handling measures

Similarly to, but even more so, than administrative offence sanctions, administrative measures reflect restrictions on human rights and liberty akin to criminal punishments.

[103] *Ordinance on the Procedures of Examining, Deciding the Application of Administrative Handling Measures in the People's Court 2014* Article 2.
[104] Articles 89, 91, and 93.

Among three administrative measures related to administrative offences, non-isolated education in communes is a non-criminal measure by nature, as it is a 'community-based educational' one.[105] Thus it is appropriate to deem this measure to be outside the criminal justice area. In contrast, forms of isolated education (measure 2 and 3) qualify by the *Engel* criteria as criminal charges, due to the nature of the offence and the severity of the penalty.[106] More specifically, these measures show four features characteristic of criminal measures. First, conduct subject to administrative handling measures is a form of public wrong, as noted above. Second, the legislation implies the criminal nature of the accused by providing several *criminal* procedural rights (as listed above) to those who commit repeated administrative offences, although less extensively ones than those associated with administrative sanctions. Third, the consequences of these measures are very harsh, as the offender must serve up to two years of isolated education, which approximates to prison. A two-year period of isolation is undeniably a serious deprivation of liberty. Ashworth and Zedner rightly claim that a significant deprivation of liberty such as imprisonment 'is a fairly conclusive reason to find that the proceedings are in essence criminal'.[107] Some commentators have shown that these isolated educational schools/institutions are same ones that serve both regimes, although the regimes are *prima facie* substantially different: they are judicial measures in criminal law and administrative handling measures in administrative law.[108] Furthermore, and interestingly, the legislation recognises a conversion from the period in isolated education to the period of imprisonment.[109] Fourth, disobedience to such coercive administrative measures may qualify as a crime.[110]

I contend that preventive character of administrative measures cannot hide their association with criminality – that is, the state's punitive response to public wrongs. Ultimately, all coercive measures of the state are to some extent preventive. But measures differ in their levels of preventiveness as compared to their other functions. A great number of state's actions are purely for preventive purposes. However, we also see many other measures that are both punitive and preventive. Arguing that criminal sanctions serve

[105] Vietnamese Government and UNDP (2010), above n 911, 63.
[106] *Engel v Netherlands* (1976) 1 EHRR 647.
[107] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21 46 (footnote 115).
[108] Vietnamese Government and UNDP (2010), above n 911, 11.
[109] *Act on Handling of Administrative Offences 2012* Article 116. According to this provision, if the individual is charged with a crime during the implementing an isolated administrative measure, the measure is abolished and the case is transferred to criminal proceedings. As a result, 1.5 days of isolated education is equivalent to 1 day of imprisonment.
[110] *Decree 02/2014/ND-CP on Application, Implementation of Administrative Handling Measures Regarding Reform School and Coercive Educational Institution 2014* Article 6 and Article 36(2).

punitiveness does not exclude their other functions. Criminal punishments are multi-purposive (preventive, educative, deterrent, punitive) but they are mainly punitive. Nevertheless, while most true crimes are largely punitive and to some extent preventive, some preparatory ones, although highly condemnatory, are 'created especially for preventive reasons'.[111] Another example is the range of regulatory offences, where we can observe 'the use of regulation as a means of preventing relatively minor wrongs'[112] as well as punitive penalties for offenders. So, what are the purposes of the Vietnam's administrative measures? Arguably, these measures are disguised as 'educational' coercions, which can be perceived as preventive, to hide their being punitive reactions to repeated administrative offences.

Isolation administrative measures not only are essentially criminal but also pose a serious problem as to their legitimacy. Such a regime is not just a coercive preventive measure, as analysed by Ashworth and Zedner[113] but reflects features of authoritarian justice. Traditionally, coercive preventive measures are acceptable only as a response to significant physical threats such as violent, sexual harms.[114] But the Vietnamese version of preventive justice violates three principles of legitimate law. The first involves the problem of substantive proportionality. The current regime permits isolated education - a serious restriction of human rights and liberty - in response to two administrative offences inherently unpunishable by imprisonment. This is illegitimate as anti-social administrative offences are not dangerous enough to warrant deprivation of liberty. The second involves the problem of vagueness. The application of isolated education could be inappropriately broad because, according to the legislation, the scope of anti-social administrative offences is vague and infinite. An infinite list of behaviours could be considered as 'violating the property of public or private organisations; the property, health, honour, dignity of citizens or foreign persons; violating public order and safety'.[115] The third involves the problem of arbitrariness. If an individual commits an administrative offence twice during the period of six months, there are two ways that the authorities can respond: either with a proposal for isolated educational measure under the Act on Handling of Administrative Offences, or with an accusation of a criminal offence under the Criminal Code and the Criminal

[111] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 96.
[112] Ibid. 116.
[113] Ibid. 1.
[114] Ibid. 22.
[115] *Act on Handling of Administrative Offences 2012* Article 90(5).

Proceedings Code.[116] These problems, which were of concern before the enactment of the Act on Handling of Administrative Offences,[117] have not been addressed so far.

III. A PARADIGM SHIFT IN VIETNAM'S SUMMARY MINOR OFFENCE JUSTICE IN THE CONTEXT OF UNIVERSAL DUE PROCESS

While the officially-recognised summary procedure for less serious crimes is compatible with international human rights instruments, the regimes of administrative sanctions/measures raise significant concerns about disproportionate limitations on fair trial rights.

3.1. Due-process-evading justice

As argued above, administrative offences and administrative measures are criminal in nature. However, in pursuit of social control and procedural efficiency, and under a socialist model of legal paternalism, such regimes have been disguised as non-criminal measures. We can see here a case of 'labelling fraud',[118] which is manifested in the systematic use of terminologies seemingly irrelevant to traditional criminal law. Those terminologies help to hide the nature of these measures, as well as to reduce the level of culpability, harm, and stigma associated with them. The term *hanh chinh* ('administrative') normally attaches to the business of administrative bodies rather than that of judicial bodies dealing with criminal offences. The term *vi pham* ('offence', 'infringement' or 'violation') has softer associations than *toi pham* ('crime'). Instead of *hinh phat* ('punishment'), negative consequences for administrative offences are called *phat* ('penalty'/'sanction'), which sounds less serious. Similarly, the word *bien phap* ('measure'), which suggests preventiveness or reparation rather than punitiveness,[119] is used to denote the negative consequences for individuals who are likely to be dangerous. The use of non-criminal terminology for those two regimes is intended to avoid strict constraint on criminal justice, both substantive and procedural, reflecting the phenomenon of 'undercriminalisation'[120] or due-process-evading justice.

Tracing the history, there are four main reasons for this due-process-evading strategy: matters of legal transplantation, political ideology, constitutional framework and legal interpretation. First of all, although the current model is not a duplicate of the Soviet model

[116] As analysed in Part 2.2, for some specific illegal conducts, a repeated administrative offence can be transferred to a criminal offence.
[117] Vietnamese Government and UNDP (2010), above n 911, 11-2.
[118] Carlo Enrico Paliero, 'The Definition of Administrative Santions - General Report' in Oswald Jansen (ed), *Administrative Sanctions in the European Union* (Intersentia, 2013) 31.
[119] Adrienne de Moor-van Vugt, 'Administrative Santions in EU Law' in Oswald Jansen (ed), *Administrative Sanctions in the European Union* (Intersentia, 2013) 613.
[120] Ashworth and Zedner, *Preventative Orders: A Problem of Undercriminalization?*, above n 966.

of the 1960s to the 1980s,[121] Soviet jurisprudence has had a profound impact on the Vietnamese regimes of administrative sanctions/measures. In the 1960s, Soviet law utilised the idea of the non-criminal status of administrative penalties/measures to avoid the application of formal criminal procedures.[122] In the years of the socialist bloc, the spread of socialist jurisprudence across socialist countries was one of the most remarkable and successful of legal transplantations, and Vietnam was no exception. It could be said that the Vietnam has maintained the Soviet regimes of administrative sanctions/measures for such a long time that it has had difficulty in making reforms towards modern constitutionalism. Pre-2012 legislative amendments were primarily technical and trivial. Only recently, with the drafting of the Bill on Handling of Administrative Offences 2012, have issues of legitimacy and due process rights been seriously taken into account. Secondly, Marxist-Leninist political ideology legitimised the current model since 1960s. A refusal to support communism was subject to draconian criminal sanctions and administrative penalties.[123] As discussed in part II, socialist objectives have always trumped human rights, leading to an arbitrary application of due process. In addition, the Vietnam War (1955-1975) and its consequences in later decades was used to justify a draconian justice without trial and without procedural rights.

Thirdly, there has been the lack of a constitutional framework for administrative sanctions/measures. Although Vietnamese constitutional history has recognised defendant's rights applied to what is called a crime, constitutions have not acknowledged any principle such as the Due Process Clauses under the United States' constitution imposing restraints on the state's powers including administrative procedures. Furthermore, an independent constitutional review mechanism has not existed under the socialist doctrine of non-separation and unification of state powers. As a result, the legislation on administrative sanctions/measures/processes has not been bound by constitutional principles. Lastly, without an effective and sound mechanism of legal interpretation, the concepts of 'crime', 'administrative offence', and 'administrative handling measure' have never been interpreted on the basis of their nature. Law textbooks and legal discourses still dogmatically assume that administrative offences and

[121] In a broader context, the Vietnamese justice system, however was substantially transplanted from the Soviet justice system, has not been an exact copy. For example, the Soviet regime of Comprades Courts, which were entitled to deal with some minor offences, was not duplicated in Vietnam (see: Penelope Nicholson, *Borrowing Court Systems: the Experience of Socialist Vietnam* (Martinus Nijhoff Publishers, 1997) 189-90).
[122] Berman, above n 86, 84-5.
[123] Ibid. 84.

administrative measures are parts of administrative law and are distinguished from crimes in the criminal law. This has also had an influence on legal education.[124]

3.2. Paradigm shift: A demand for the extension of due process rights

The major shortcoming of the Vietnamese regimes of administrative sanctions/measures is that the criminal nature of such regimes has not been explicitly recognised in either academic discourse or legislation. The implicit recognition of these measures' criminal nature, as discussed in part II, does not suffice for a rigorous consideration of criminal procedural rights. Although there has been increasing awareness of the role of procedural law in protecting human rights and preventing abuses of discretion,[125] in legal discourse, the relation between administrative sanctions/measures and due process/fair trial/defendants' rights is almost non-existent. This is the result of a due-process-evading justice that disconnects fair trial rights with administrative sanctions/measures processes.

Arguably, the Vietnamese model of summary criminal justice is even worse than the model to be found in Soviet summary jurisprudence. The Soviet Union system, like continental European systems,[126] has not rejected the idea that the jurisprudence of administrative offences derives from that of crimes. In the Soviet Union, administrative crimes are simply described as 'petty crimes administratively considered', and, therefore, in dealing with those crimes they are called 'administrative criminal cases'.[127] It is not denied that this regime represents an intersection between criminal law and administrative law.[128] The regime could be called 'administrative penal law'[129] or 'punitive administrative law',[130] which makes clear that criminal law is handled through administrative bodies.

Thus, the differentiation between administrative offences/measures and criminal offences does not deny the similarities between them. Whatever terminologies are used, administrative offences and administrative measures should be considered types of

[124] Regimes of administrative sanctions and administrative measures have long been subjects of administrative law and therefore have been placed in administrative law textbooks, while issues on crime have been extensively investigated by criminal law books.
[125] Nguyen, above n 16, 580.
[126] Like the Soviet Union and Vietnam, many Civil Law European countries have adopted the regime of minor offences that is dealt with administratively.
[127] Berg, above n 17, 35.
[128] K. K. Babaev, 'Sovetskoe obshchenarodnoe pravo: sushchnost' I tendentsii razvitiia' (1980)(6) *SgiP* 9 (as cited in Peter H. Juviler, 'Diversion from Criminal to Administrative Justice: Soviet Law, Practice, and Conflicts of Policy' in F. J. M. Feldbrugge and William B. Simons (eds), *Perspectives on Soviet Law for the 1980s* (Martinus Nijhoff Publishers, 1982) 164).
[129] Thomas Weigend, 'The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law' [57] (1988) 59 *Revue Internationale de Droit Pénal* 57.
[130] Paliero, above n 118, 7.

criminal offence and thus criminal fair trial rights should apply to them.[131] Indeed, the continental European practice proves that fair trial rights can get on well with regimes of administrative sanctions and administrative measures.

The recognition of the criminal nature of the Vietnamese regimes of administrative offences/measures, which are characterised by weak application of procedural rights, clearly demands an extension of due process rights into these regimes. This is not merely an incorporation of fair trial rights, but, more significantly, *a paradigm shift*. The jurisprudence of administrative sanctions/measures must be reconceptualised as follows.

(i) Criminal character in the broad sense. The conception of 'criminal charge' under ICCPR covers the notions of 'crime', 'administrative offence' and isolated 'administrative measures' in Vietnamese law. Therefore, in principle criminal fair trial rights under the ICCPR and the Vietnamese Constitution must apply to administrative sanctions/measures. In other words, the jurisprudential relationship between administrative sanctions/measures and criminal fair trial rights must be rigorously reinforced.

(ii) A distinction for procedural purpose. The distinction between crimes and administrative sanctions/measures on the grounds of the nature of the conduct in question is not justified. In fact, the distinction made between them is mainly for procedural purposes. Thus we should dismiss the distinction viewed as differentiating between the nature of offences, but we can preserve it for the sake of procedural efficiency.

(iii) Procedural proportionality. It has been rightly held that the due process principle must apply to any deprivation of life, liberty or property,[132] regardless of legal denominations in domestic law. The United Nations Human Rights Committee warns that any deprivation of liberty 'must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections'.[133] Traditionally, procedural due process is separated into three fields: criminal due process, civil due process and administrative due process. But today there has been an increasing acknowledgement of an intersection between criminal, civil and administrative justice, one which can be called the middle-ground[134] or hybrid process. The Vietnamese regime of administrative offences/measures is an example of a regime falling under this intersection, where selective elements of criminal fair trial rights apply. I contend that the

[131] Cf., ibid. 8.
[132] See: The Fifth and Fourteenth Amendments of the US Constitution.
[133] United Nations Human Rights Committee, *General Comment No. 35 - Article 9 (Liberty and Security of Person)* (2014) [14] (citation omitted).
[134] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(8) *Yale Law Journal* 1795.

doctrine of proportionality is the most appropriate method for determining the level of limitations on criminal fair trial rights for those measures. This approach might be called procedural proportionality. The United Nations Human Rights Committee has confirmed the relevance between the principle of proportionality and deprivation of liberty:

> An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of *reasonableness*, *necessity* and *proportionality*.[135]

The recent recognition of a general rights limitation clause in the 2013 Constitution is a key factor for incorporating the proportionality doctrine as well as examining the limitation on due process rights in summary processes.

This paradigm shift may face several challenges. First, even though fair trial rights are enhanced, it is still legitimate for summary processes that many rights may be remarkably restricted. The extent of limitations on fair trial rights is a thorny question. Second, it is quite challenging to design appropriate procedures for several tiers of summary justice, which differ in purpose and the seriousness of offences. These two challenges are common to all legal systems regardless of legal traditions. Furthermore, the shift must overcome the constitutional obstacle that there is no due process clause or constitutional recognition of natural rights in the Vietnamese Constitution. Indeed, constitutionally-recognised procedural rights seem mostly to apply to the criminal process prescribed by the Criminal Proceedings Code. Accordingly, criminal fair trial rights are likely to be considered irrelevant to civil/administrative proceedings and particularly administrative procedures. This approach to Constitution-based procedural rights is primarily limited to criminal proceedings as interpreted by the Criminal Proceedings Code rather than referring to procedural due process applicable to all actions of the state depriving individual's rights. Without constitutional recognition of the natural rights principle, which protects fundamental rights not explicitly mentioned in the Constitution, the scope of fair trial rights is likely to be fixed by the constitutional text.

Any constitutional loopholes could be remedied by constitutional interpretations and constitutional amendments. Once the doctrine of the law-based state is entrenched in the Constitution, the due process doctrine, as an essential feature of the rule of law, or even an

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[135] United Nations Human Rights Committee, *General Comment No. 35 - Article 9 (Liberty and Security of Person)* (2014) [12] (emphasis added, citations omitted).

approximation of the rule of law, must be recognised. Accordingly, due process requires substantive due process, which is manifested in the rights limitation clause in the Constitution, and procedural due process, which demands proportionate procedures for any deprivation of rights and liberty.

IV. CONCLUSION

In Vietnam, summary criminal justice, if conceived as processes with significant limitation on fair trial rights in dealing with so-called less serious crimes, includes three tiers: the summary process in criminal court, the process for administrative sanction and the process for administrative measures. The two regimes of administrative sanctions and administrative measures, which were artificially detached from the criminal law for the sake of more effective social control and an extreme form of legal paternalism, reflect an evasion of due process. The incorporation of human rights values into the Vietnamese legal system has been potentially leading to a paradigm shift, which demands a recognition of the criminal nature of such measures as well as the application of the proportionality doctrine in designing appropriate procedures for those regimes.

CHAPTER 5 (ARTICLE 4)

THE EXPANSION AND FRAGMENTATION OF MINOR OFFENCE JUSTICE:

A CONVERGENCE BETWEEN THE COMMON LAW AND THE CIVIL LAW

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Contribution to the thesis
This article aims to answer sub-question 4: *What are the similarities, differences, and trends in the development of summary criminal justice in England and Vietnam?* After analysing the way fair trial rights are applied to different types of summary criminal processes in both England and Vietnam, this article is a comparative study between the two jurisdictions.

THE EXPANSION AND FRAGMENTATION OF MINOR OFFENSE JUSTICE: A CONVERGENCE BETWEEN THE COMMON LAW AND THE CIVIL LAW

*Dat T. Bui**

This article claims that minor offense processes in the common law and the civil law, as examined through two prototypical exemplars of England and Vietnam, have been converging at a more rapid pace and in a reverse trend compared to the convergence in the mainstream, serious crime processes. Because of the notion of nonseriousness, a natural convergence between the two systems in minor offenses is more obvious and less challenging than the convergence in the process for serious crimes. It is commonplace that the goals of regulation, prevention, and efficiency have predominated over the ideal of adversarialism, even in an adversarial system like England's. This natural convergence is accompanied by a due-process-evading justice, in which criminal fair trial rights could be disproportionately limited by ideas of triviality and the so-called noncriminal character. The article also suggests a convergence in the jurisprudential framework as minor offense justice reflects limitations on fair trial rights in dealing with less serious public wrongs.

Keywords: *summary justice, minor offenses, fair trial rights, convergence*

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INTRODUCTION

Comparative legal scholarship tends to focus on the significant differences between common law and civil law criminal justice. Notably, the former is characterized as an adversarial model, and the latter as an inquisitorial one.[1] Nowadays, there is no purely adversarial system nor purely inquisitorial system; thus, every jurisdiction is a mix of them.[2] However, the taxonomy of two traditions is still reasonable in that, generally, some jurisdictions are characterized by more adversarial values while others employ more inquisitorial values. The United Kingdom and Vietnam are two exemplars for the former and the latter, respectively. Although recently the difference has been curtailed, as the common law model has reduced adversarial values and concurrently the civil law model has adopted more adversarial characteristics, the difference between two systems is still significant as there remains resistance to adversarialism in civil law systems.[3]

This article emphasizes that today the adversarial-inquisitorial dichotomy plays a little role in summary criminal processes, which deal with minor offenses (misdemeanors).[4] Although it is commonly understood that both

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1. Michael Louis Corrado, *The Future of Adversarial Systems: An Introduction to the Papers from the First Conference*, 35 N.C. J. INT'L L. & COM. REG. 285, 289 (2010); Markus Dirk Dubber, *Comparative Criminal Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 1308 (Mathias Reimann & Reinhard Zimmermann eds., 2006); JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 106 (2012).

2. RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE (2005); Thomas Weigend, *Criminal Law and Criminal Procedure*, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 224 (Jan M. Smits ed., 2006); JILL HUNTER & KATHRYN CRONIN, EVIDENCE, ADVOCACY AND ETHICAL PRACTICE: A CRIMINAL TRIAL COMMENTARY 25 (1995); Cf. JOHN MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 127 (3d ed. 2007).

3. For instance, see the case of Italy in: Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C. J. INT'L L. & COM. REG. 297, 308 (2010); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000); William T. Pizzi & Mariangela Montagna, *The Battle to Establish An Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429 (2004); Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. U. GLOBAL STUD. L. REV. 567 (2005).

4. In common law jurisdictions, three terms are synonyms: "minor offense," "misdemeanor," and "summary offense." However, as analyzed in Part I.A following, the author of

adversarial and inquisitorial processes are grounded in the central role of a criminal court, a trial in criminal proceedings, most cases are decided not by traditional criminal courts but by civil/administrative courts and quasi-tribunals such as the police and administrative agencies in contemporary summary criminal processes. Indeed, as Máximo Langer reveals,

> the comparison of adversarial and inquisitorial processes may result in highlighting differences in institutions and actors such as the prosecutor, the courts, and the bar, rather than other institutions and actors such as the police, diversion/probation officers . . . and administrative agencies that play a role in the criminal process.[5]

Legal scholarship has not paid sufficient attention to the role of administrative agencies[6] and civil/administrative courts in dealing with crimes. Therefore, an appropriate approach to summary justice should go beyond the adversarial-inquisitorial dichotomy. This article employs the due-process-rights-based approach instead of the adversarial-inquisitorial paradigm.

The main argument of this study is that minor offense processes in the common law and the civil law, as examined through two prototypical exemplars, England and Vietnam, have been converging at a more rapid pace and in a reversal trend compared to the convergence between the two traditions in a mainstream serious crime process. The more rapid pace is manifest in the fact that whereas the convergence between the common law and the civil law in serious crime proceedings has been taking much time and faced considerable resistance, it has taken about two decades for a convergence between England and Vietnam in dealing with minor/summary crimes. Furthermore, a noticeable trend is that the reduction in traditionally adversarial due process values in England is more substantial than the increase in procedural fairness in Vietnam. This trend is opposite of the convergence of serious crime procedures, in which civil law systems have tended to follow the common law adversarialism.

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this article prefers the term "summary offense" as the article pays attention to procedural matters of minor offenses, in which many procedural rights are simplified. Thus, the procedures to deal with minor offenses/misdemeanors are called "summary criminal processes" or "summary criminal justice."

5. Máximo Langer, *The Long Shadow of Adversarial and Inquisitorial Categories, in* OXFORD HANDBOOK OF CRIMINAL LAW 908 (Marcus D. Dubber & Tatjana Hörnle eds., 2014).

6. *Id.* at. 908.

With regard to the methodology used in this article, traditionally, the United Kingdom and Vietnam are two prototypical exemplars for the most different cases,[7] as manifested in several dichotomies: common law and civil law, adversarialism and inquisitorialism, due process model and crime control model, strong and weak protection of due process rights, liberalism and authoritarianism. To perform this comparison, the article employs a combination of contextualist, functionalist, and universalist methods.[8] First, the contextualist approach is used to identify the historical, traditional issues that have affected the development of summary criminal justice in these two countries. Second, the functionalist approach helps to explore how the two systems have addressed common issues, regardless of legal lenses they have used. Last, the universalist method examines summary criminal justice through the lens of fair trial rights, which provides useful tools to analyze and solve problems. These three methods are not mutually exclusive, but mutually interactive.

Part I analyzes common challenges that the expansion of summary justice has presented in these two jurisdictions, England (and Wales)[9] and Vietnam. First, this part investigates an expansion of an artificial and uncertain realm of minor offense and summary processes. Second, this part also acknowledges a tier-based fragmentation of summary criminal justice. That is, summary justice is not a homogeneous process but fragmented into three to four groups of procedures (tiers) corresponding to different kinds of offenses. Therefore, examining the summary justice is quite complex as it is very important to ascertain the distinctive features of each tier.

Part II argues that regarding fair trial rights guarantees, the contemporary development of summary criminal justice shows increasing similarities, apart from inherent differences between the two traditions. Because of the notion of minor offenses, natural convergence between the two systems in

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7. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

8. Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, *in* THE OXFORD HANBOOK OF COMPARATIVE CONSTITUTIONAL LAW 54 (Michel Rosenfeld & András Sajó eds., 2012); Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 67 (Sujit Choudhry ed., 2006).

9. In the United Kingdom, England and Wales constitute one criminal jurisdiction. For convenience, this article uses the short form "England" to refer to both England and Wales.

summary processes is more obvious and less challenging than the process for serious crimes. It is commonplace that in summary processes, the goals of regulation, prevention, and efficiency have predominated over the ideal of adversarialism, even in an adversarialism-based system like England. Moreover, the natural convergence is accompanied by a due-process-evading justice, in which criminal fair trial rights in summary processes could be disproportionately limited for measures hiding their criminal nature to evade criminal due process. Due to the ideas of triviality and the so-called non-criminal character, there is a danger that a great group of minor offenses has been substantively or/and procedurally decriminalized. This part also suggests a jurisprudential convergence in the conceptual framework that the summary criminal justice reflects limitations on fair trial rights in dealing with less serious public wrongs. The growth of minor/summary offenses has led to the reconsideration of the traditional conception of crime as well as the conventional design of criminal process.

I. EXPANSION AND FRAGMENTATION OF SUMMARY CRIMINAL JUSTICE

Expansion and fragmentation of summary criminal justice are common realities as well as common challenges in England and Vietnam. This results in increasing similarities between these two jurisdictions, which have been inherently placed in different criminal justice traditions.

A. Expansion of an Artificial, Uncertain Realm of Minor Offense and Summary Processes

Many jurisdictions are coping with a common crisis, the great increase in minor offenses. Much work has discussed this crisis: the "overloaded criminal justice" in Europe,[10] the "subversion of human rights" in the United Kingdom,[11] the "crushing defeat for due process values" in Ireland,[12] the

10. JORG-MARTIN JEHLE & MARIANNE WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE (2006).

11. Andrew Ashworth, *Social Control and "Anti-social Behaviour": The Subversion of Human Rights?*, 120 L.Q. REV. 263 (2004).

12. Dermot Walsh, *The Criminal Justice Act 2006: A Crushing Defeat for Due Process Values?*, 1 JUD. STUD. INST. J. 44 (2007).

"broken misdemeanor courts" in the United States,[13] the "drive for efficiency" of "technocratic justice" in Australia,[14] and the lack of due process in Vietnam.[15]

Broadly, common law jurisdictions view the terms "minor offense," "misdemeanor," and "summary offense" as largely synonymous[16] even though each term is preferred in specific circumstances. The United States retains the traditional common law term "misdemeanor" as an official legal term, England and some English-influenced jurisdictions such as states in Australia prefer the term "summary offense."[17] In academic discourse, these words are interchangeable, depending on the authors' approach. "Minor offense" and "misdemeanor" tend to denote less serious offense, whereas "summary offense" denotes the summary procedure to which minor offense is subject.[18] In other words, the notion of minor offense focuses on the substantive aspect, whereas the idea of summary offense focuses on the procedural aspect. In sum, regardless of terminologies, those offenses reflect the fact that groups of less serious offenses are dealt with by summary processes, and more serious offenses are dealt with by formal process. Thus, it could be concluded that the category of minor offenses has a close connection with the category of summary processes.

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13. Robert Boruchowitz, Malia N. Brink, & Marueen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, National Association of Criminal Defense Lawyers (2009).

14. DAVID BROWN ET AL., CRIMINAL LAWS: MATERIALS AND COMMENTARY ON CRIMINAL LAW AND PROCESS OF NEW SOUTH WALES 117 (5th ed. 2011).

15. Dung D. Nguyen, *On Vietnam's Legal Framework of Administrative Offences Handling [Ve phap luat xu ly hanh chinh cua Viet Nam]*, LEGIS. STUD. J. 9 (No. 20, 2011).

16. The Black Law Dictionary defines "misdemeanour," which is "also termed minor crime or summary offense," as a "crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement (usu. for a brief term) in a place other than prison (such as a county jail)"; BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1089 (9th ed. 2009).

17. The Australian Law Dictionary explains the notion of summary offense as follows: "A minor offence . . . relating to good order. Formerly, summary offences consisted mostly of what are known as police offences, law and order offences or street offences, many of which have the status of a victimless crime . . . or state of affairs offences. . . . The summary offences that remain on the statutory books are generally distinguished from serious crimes (indictable offences)"; AUSTRALIAN LAW DICTIONARY 694–95 (Trischa Mann & Audrey Blunden eds., 2nd ed. 2013).

18. According to the Interpretation Act of 1978, sch. 1(b), "'summary offence' means an offense which, if committed by an adult, is triable only summarily."

One of the most confusing issues is the parameter of minor offenses. Theoretically, there may be several approaches. First, minor offenses are public welfare offenses or regulatory offenses, or *mala prohibita*. Second, minor offenses are noncustodial ones. Third, minor offenses are trivial offenses. Fourth, minor offenses are offenses dealt with by summary procedures. But in fact, the first three approaches do not truly align with summary procedures. Although a large number of minor offenses are *mala prohibita*, in England many summary offenses dealt with by Magistrates' Courts are *mala in se*. English practice also disproves understanding of minor offenses as noncustodial in that when summary offenses are punishable by up to six months' imprisonment.[19] Moreover, *minor* offenses are not necessarily *trivial*, such as those punishable by a small fine, but also include offenses punishable by a large fine.[20] The notion of "minor" means "nonserious" rather than truly "trivial." Hence, the most appropriate approach should be the fourth, according to which minor, summary offenses are dealt with by summary procedure rather than formal criminal proceedings and punishable by a short period of imprisonment and/or other noncustodial punishments.

Admittedly, the rise of a regulatory and preventive state has led to the increase of minor offenses. Indeed, the vast majority of criminal offenses are minor ones. It has been estimated that the number of summary offenses accounts for 95 percent of all crimes in England and Wales, although this figure would have excluded millions of regulatory offenses.[21] In Vietnam, it was estimated in 2008 that the annual number of administrative offense sanctions accounted for approximately 90 percent of the total number of criminal and administrative offenses convictions.[22] It should be noted that

19. In England, "summary offence" refers to a criminal offense that is tried by Magistrates' Court and subject to a maximum 6-month imprisonment and/or up to £5,000 fine and/or community sentence (U.K. Government, *Criminal Courts* (Oct. 9, 2015), https://www.gov.uk/courts/magistrates-courts).

20. The amount of thousands or even millions of U.S. dollars could be a financial sanction for breach of economic regulation.

21. The vast number of regulatory offenses sanctioned by administrative agencies in England and Wales in 2006 was about 3.6 million enforcement actions (2.8 million inspections, 400,000 warning letters, 3,400 formal cautions, 145,000 statutory notices, and 25,000 prosecutions); Richard B. Macrory, *Regulatory Justice: Making Sanctions Effective* 6 (2006).

22. Viet Q. Nguyen, *The Role of the Act on Handling Administrative Offences and Its Relation to Criminal Law—Major Contents of the Act on Handling Administrative Offences* (*Vi tri, vai tro cua Luat Xu ly vi pham hanh chinh, moi quan he voi phap luat hinh su. Nhung noi dung chu yeu cua Luat Xu ly vi pham hanh chinh*), *in* DIRECTIONS FOR MAKING THE

if the number of less serious crimes in criminal courts and administrative measures are included, the proportion of minor offenses in the Vietnamese criminal justice is even larger.

B. Tier-Based Fragmentation of Summary Criminal Justice

The ambit of summary justice is not homogenous but fragmented into three to four different types of procedures, resulting in its complexity. The boundaries of summary justice in general and of each tier in particular are artificial and uncertain. For example, whereas summary offenses in Magistrates' Court in England are subject to up to six months' imprisonment, less serious crimes in Vietnamese criminal courts are subject to up to three years' imprisonment. Another artificiality is that the English category of regulatory offenses exists in both the regulatory sanctioning process and the out-of-court disposals process. Moreover, the ambit of administrative offenses in Vietnam as well as out-of-court disposals in England include both *mala prohibita* and *mala in se*.

If we perceive minor offenses as those based on summary procedures, we can recognize several tiers of summary processes for different groups of offenses. England has four tiers of summary justice: (1) summary process at criminal courts (Magistrates' Courts) for summary offenses; (2) administrative sanctioning process for regulatory offenses; (3) out-of-court process for summary offenses (administrative sanctioning process for trivial offenses); and (4) preventive process. Vietnam, however, has three summary-process-based tiers for minor offenses: (1) summary process at criminal courts (People's Courts) for the less serious crimes; (2) administrative sanctioning process for administrative offenses; and (3) preventive educational process. This section will compare the development of these tiers between the two jurisdictions, as illustrated in Table 1 and analyzed in the following text.

1. Summary Process in Criminal Court

A significant group of criminal offenses, albeit not deemed as serious ones, still deserves to be handled by criminal courts rather than by out-of-court diversionary measures. Hundreds of years ago, England established a system

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ACT OF HANDLING ADMINISTRATIVE OFFENSES 16 (Vietnamese Ministry of Justice & U.N. Development Programme, 2008).

Table 1. A comparison of tiers of minor offence processes between England and Vietnam

Tiers of minor offence justice			
	England and Wales	*Vietnam*	*Features*
1. Summary Process in Criminal Court	(a) Less serious offences within primary crimes	(a) Less serious offences within primary crimes	• *Lowest level of limitations on fair trial rights* • Primary crimes • Less serious offences: punishable by short period of imprisonment • Adjudicative body: criminal courts without jury/assessors
2. Preventive Measures Process	(b) Preventive orders	(b) Preventive administrative measures	• *Second lowest level of limitations on fair trial rights* • Preventive justice: offence of dangerousness • Deprivation of liberty • Adjudicative body: civil courts
3. Administrative Sanctioning Process	(c) Trivial offences		• *Second highest level of limitations on fair trial rights* (for England and Wales only) • Efficiency • Least serious offences • Penalty: mostly small fine, no imprisonment • Adjudicative body: (1st stage): police (mostly), administrative agencies; (2nd stage): criminal courts, administrative courts
	(d) Regulatory offences	(c) Administrative offences	• *Highest level of limitations on fair trial rights* • Better regulation; efficiency • Penalty: mostly fine, no imprisonment • Adjudicative body: (1st stage) administrative agencies, police; (2nd stage): administrative courts

of lower criminal courts (Magistrates' Courts) to deal with "misdemeanors," which are now called "summary offenses." Summary offenses are those tried by Magistrates' Courts and subject to up to six months' imprisonment and/or up to £5,000 fine and/or community sentence.[23] Apart from summary-only offenses, Magistrates' Courts may also deal with triable-either-way offenses that can be summary or indictable, in accordance with the defendant's selection. Nevertheless, it is important to note that today most summary offenses are no longer dealt with by Magistrates' Courts in the first instance but by administrative agencies and the police (as discussed below). Therefore, only a small proportion of summary offenses is still tried by Magistrates' Courts in the first instance. These offenses are, of course, less serious than indictable-only offenses, but they are not minor enough to be subject to diversionary out-of-court settlements.

Meanwhile, by the 2013 Constitution, Vietnam established a mechanism of summary criminal procedure, which is comparable to the Magistrates' Courts summary procedure in England, in the sense that a group of less serious crimes are tried in ordinary criminal courts with simplified procedural rights for the defendant. The Vietnamese version of summary criminal procedure applies to less serious crimes, defined as crimes that cause no great harm to society and carry a maximum penalty of three years' imprisonment.[24] Thus, compared to England (with maximum six months' imprisonment), the summary process in Vietnam covers a larger case load as it applies to rather more serious offenses (with maximum three years' imprisonment).

If we approach summary justice through a focus on how due process rights are designed, England and Vietnam have much in common. Except in particular cases, only two procedural rights are commonly restricted. First, the right to be tried by a competent tribunal is lessened because there is no participation of the people in the trial council. Indeed, there is the absence of a jury in both English Magistrates' Courts and people's assessors (lay judges) in Vietnamese summary criminal courts. In both systems, this absence is considered a significant difference compared to the serious offense process, in which public involvement in the trial is essential. Second, the right to free legal assistance is limited for the sake of saving financial resources. In England, defendants have to pass both the

23. U.K. Government, *Criminal Courts, supra* note 19.

24. Vietnamese Criminal Code, Art. 8(3) (1999).

"means" test and the "interests of justice" test (merits test) to have a free defense.[25] In Vietnam, for less serious crimes, legal aid is both free and compulsory for juvenile defendants[26] and persons with disability,[27] while free (but not compulsory) for those who meet the poverty criteria, for those who contributed to the revolution, for the elderly without family, for orphan children, and for ethnic minority people in economically socially depressed areas.[28]

Arguably, although both jurisdictions provide free legal aid for limited cases in summary trials, the scope of free legal aid in England is broader than that in Vietnam. Whereas Vietnam focuses only on the means test, which mainly provides free legal aid for juvenile defendants,[29] England applies both the means test and the merits test, which broadens the eligible defendants. Another difference is that in England, following *Bentham v. United Kingdom* in the European Court of Human Rights (ECtHR), legal representation must be provided for the defendant who may be subject to any deprivation of liberty.[30] This is not a rule in Vietnam despite the fact that less serious crimes are punishable up to three years' imprisonment.

2. Administrative Sanctioning Process

a. Administrative sanctioning process for regulatory offenses. The civil law notion of administrative offenses emphasizes their procedural difference from major crimes; that is to say, *administrative* offenses are dealt with through *administrative* procedures by *administrative* bodies rather than formal judicial criminal procedures in criminal courts. Whereas, the

25. Legal Aid Agency, *Work Out Who Qualifies for Criminal Legal Aid* (Oct. 6, 2014), http://www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/crime-eligibility/interests-of-justice-test.

26. Vietnamese Criminal Proceedings Code, Arts. 57, 58, 305 (2003); Joint Circular No. 01/2011/TTLT-VKSNDTC-TANDTC-BCA-BTP-BLDTBXH, Art. 9(4) among Supreme People's Prosecuracy, Supreme People's Court, Ministry of Public Security, Ministry of Justice, and Ministry of Labour, War Invalids & Social Welfare on Guidelines of Some Provisions of the Criminal Proceedings Code about Juvenile's Participation in criminal process.

27. Vietnamese Criminal Proceedings Code, Art. 57(2) (2003).

28. Vietnamese Legal Aid Act, Art. 10 (2006).

29. Minh C. Doan, *Legal Aid in Criminal Proceedings Practice and Solutions* [*Thuc trang tro giup phap ly trong to tung hinh su va mot so giai phap*] (Jan. 7, 2014), *available at* http://vienkiemsatquangbinh.gov.vn/index.php/vi/news/Kiem-sat-vien-viet/THUC-TRANG-TRO-GIUP-PHAP-LY-TRONG-TO-TUNG-HINH-SU-VA-MOT-SO-GIAI-PHAP-159/.

30. Benham v. United Kingdom (1996), 22 EHRR 293¶ 61.

common law notion of regulatory offenses emphasizes their functional difference from major crimes, meaning that those *regulatory* offenses are created mainly for the sake of *regulation* rather than on the basis of traditional sense of moral wrongs.

Although the English conception of regulatory offenses and the Vietnamese conception of administrative offenses differ in the scope, their procedural mechanisms are very similar. Due to high caseload, both systems created an out-of-court diversionary mechanism to deal with regulatory/administrative offenses. Both jurisdictions deem this mechanism to be officially outside criminal justice, and do not combine the records of regulatory and criminal offenses. A historical difference is that England has recently established a unified system of regulatory offense sanctioning with the Regulatory Enforcement and Sanctions Act 2008, whereas Vietnam has applied the Soviet-style system of administrative offense sanctioning since the 1980s. The out-of-court sanctioning of administrative offenses that is well established in Vietnam is a new development in England.

As far as the sanctioning process is concerned, tens of administrative agencies, as well as the police, are empowered to initiate the case, collect evidence, and impose sanctions. These bodies are powerful, holding investigatory, prosecutorial, and judging authority. In other words, they act as the police, prosecutor, and judge,[31] so it can be claimed that no separation of powers exists. From the perspective of limitations on fair trial rights, a mass of procedural rights are totally removed or partially restricted: access to courts and tribunals; hearing by a competent, independent, and impartial tribunal; public hearing; right to be presumed innocent and privilege against self-incrimination; burden and standard of proof; equality of arms; instruction concerning rights during trial; timely hearing; right to be heard; right to defend oneself; calling and examining witnesses; pronouncement of judgment. Only a few rights are fully guaranteed: adequate preparation; no punishment without law; sentencing upon conviction; prohibition against double jeopardy.

In England, at this stage, while the criminal standard of proof is still maintained for the imposition of fixed monetary penalties and discretionary requirements, lower standards are used for other measures ("reasonable suspicion" for enforcement undertakings and "reasonable belief" for stop

31. U.K. Law Commission, Criminal Liability in Regulatory Contexts 161 (2010).

notice).[32] Meanwhile, Vietnamese legislation says nothing about the standard of proof in administrative sanctioning cases, like in criminal proceedings. It is a loophole that the standard of proof "beyond reasonable doubt" is evaded.

In both jurisdictions, at the review stage (if any), the guarantee of rights is enhanced as this phase is considered a curing process for the shortcomings and mistakes in the sanctioning stage.[33] Some important procedural rights are recovered: the right to a hearing by a competent, independent, and impartial tribunal; the right to a public hearing; equality of arms; instruction concerning rights during trial; timely hearing; the right to be heard; and pronouncement of judgement.

In both jurisdictions, the problem in the reviewing tribunal is that there is a lack of genuine review. Since the Regulatory Enforcement and Sanctions Act 2008, England established a unified tribunal system that is empowered to review the appealed regulatory sanctioning. But this is the judicial review of administrative actions rather than a full reconsideration (*de novo*) of the case, such as the appeal process in criminal proceedings. For this reason, some important criminal procedural safeguards are not provided: the use of the civil standard of proof, "balance of probabilities," instead of the criminal standard of proof, "beyond reasonable doubt"; the review of only law rather than the review of both facts and law. In Vietnam, the offender can initiate an administrative lawsuit against the sanctioning decision to the administrative court (within the People's Court). According to the legislation, this is an administrative suit rather than a criminal case,[34] so standards of civil litigation are applied.

b. Administrative sanctioning process for trivial offenses. The set of out-of-court disposals (OOCDs) is a distinct tier of criminal justice in England to deal with trivial offenses, whereas those offenses are still handled by the administrative sanctioning process for administrative violations in Vietnam. Officially OOCDs belong to the criminal justice system although

32. Julie Norris & Jeremy Phillips, The Law of Regulatory Enforcement and Sanctions: A Practical Guide 120, 133 (2011).

33. The ECtHR confirmed this theory of curing process in *Albert and Le Compte v. Belgium* (1983) 5 EHRR 533 and Bryan v. United Kingdom (1995) 21 EHRR 342¶ 40.

34. Vietnamese Handling of Administrative Offences Act, Art. 15 (2012); Administrative Proceedings Act, Arts. 3, 28 (2010).

their processes are much less formal than a court procedure.[35] Out-of-court settlements have been considered an international trend to deal with a mass of minor crimes for the sake of efficiency and saving resources.[36] Here, the manifestation of managerialism[37] is obvious.

Those minor offenses that may be called "trivial offenses" are an artificial group for the sake of efficiency in convictions. OOCDs are applied to a group of the least serious summary offenses that do not deserve to be dealt with by Magistrates' Courts. There are six types of OOCDs: Cannabis Warnings, Fixed Penalty Notices, Penalty Notices for Disorder, Simple Cautions, Conditional Cautions, Community Resolutions.[38] The artificiality is manifested in the fact that those trivial offenses do not have a homogenous character as they are comprised of both *mala in se* (e.g., minor theft, minor assault) and *mala prohibita* (e.g., littering and minor traffic offenses). The only common feature of those violations is their triviality. However, it shoud be noted that although in general OOCDs target at low-level offenses,[39] in exceptional circumstances, Simple Caution can be applied to serious offenses.[40] This further proves the artificiality of OOCDs to achieve efficiency.

The structure of OOCDs is unstable, complicated, and diverse, but demonstrates two common features. First, OOCDs are handled outside the criminal court at the sanctioning stage, in which many fair trial rights are removed or limited. Second, if there is an appeal, most cases are tried by the criminal court (mostly Magistrates's Courts), which provides normal criminal safeguards.

At the sanctioning stage, the case is diverted from courts to the police and a few administrative bodies. This explains why the administrative sanctioning process for trivial offenses is termed "out-of-court disposal,"

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35. U.K. Ministry of Justice, *A Guide to Criminal Court Statistics* 2 (2015).

36. South African Law Commission, *Simplification of Criminal Procedure: Out-of-court Settlements in Criminal Cases* 3 (2001).

37. Jenny McEwan, *From Adversarialism to Managerialism: Criminal Justice in Transtion*, 31 LEGAL STUD. 519 (2011); Jacqueline S. Hodgson, *The Future of Adversarial Criminal Justice in 21st Century Britain*, 35 N.C. J. INT'L L. & COM. REG. 319, 361 (2010).

38. U.K. House of Commons, Home Affairs Committee, *Out-of-Court Disposals - Fourteenth Report of Session 2014–15*, at 3 (Mar. 3, 2015) at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/799/79902.htm.

39. *Id.* at 14; U.K. Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* 37 (2012).

40. U.K. House of Commons, *supra* note 38, at 11.

which "can provide the police with simple, swift and proportionate responses to low-risk offending, which they can administer locally without having to take the matter to court."[41] At this stage, many procedural rights are limited: the right of access to courts and tribunals; the right to a hearing by a competent, independent, and impartial tribunal; the right to a public hearing; the right to be presumed innocent and privilege against self-incrimination; burden and standard of proof; timely hearing; the right to be heard; the right to defend oneself; the right to call and examine witnesses; the right to pronouncement of judgment.

Nevertheless, compared to the regulatory offense process, some rights are less restrictive: the right to be presumed innocent and privilege against self-incrimination; burden and standard of proof; the right to call and examine witnesses. Indeed, the right to be presumed innocent is limited through the application of standard of proof. Criminal standard of proof "beyond reasonable doubt" is reduced to "reasonable suspicion" (for Community Resolutions, Cannabis Warnings, Penalty Notices for Disorder) and "realistic prospect of conviction" (for Simple Cautions, Conditional Cautions).[42] But these standards of proof are still higher than civil standard, "balance of probabilities." Moreover, the fact that four types of OOCDs (Community Resolutions, Cannabis Warnings, Simple Cautions, Conditional Cautions) encourage the offender's admission of guilt[43] means the privilege against self-incrimination is restricted.

3. Preventive Measures Process

All states have to use coercive preventive measures to protect the public safety and security. This study excludes pure preventive measures that are not relevant to the state's punitive responses to public wrongdoings. In other words, this study is only concerned with preventive measures that closely relate to criminal charges.

Preventive measures as a means of crime prevention have been widely used in both the common law and the civil law. Preventive justice in common law systems has tended to be more liberal, mostly targeting dangerous

41. *Id.* at 3.

42. College of Policing, *Possible Justice Outcomes Following Investigation* (2015), *available at* http://www.app.college.police.uk/app-content/prosecution-and-case-management/justice-outcomes/.

43. *Id.*

individuals who have committed a quite serious offense and likely to commit that offense again in the future, such as sexual predators. Socialist systems' prevention policy has been more draconian, regulating dangerous individuals who have repeatedly committed minor antisocial offenses and are likely to be harmful to society, such as professional petty thieves.

But today, English preventive justice has become much more draconian as it has targeted at antisocial behavior that "caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household"[44] (in the replaced category of Anti-Social Behaviour Order, ASBO) or are "capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises" (in the current category of Injunction to Prevent Nuisance and Annoyance, IPNA).[45] Moreover, the ASBO mechanism allowed criminal conviction for any breach of an ABSO that was not necessarily a repetition of the first anti-social behaviour.[46] It has been argued that the "ASBO had been designed as an instrument of pre-emptive and potentially punitive behaviour regulation," and its "intention was to eliminate anti-social behaviour by applying tailored regulation to the activities of the individuals responsible for it, enforced by the threat of criminal sanctions."[47] These draconian features are very strange to common law's preventive structures. Thus, liberal preventive justice has been replaced by a more draconian practice as England has enabled a new preventive justice to intervene deeply in everyday anti-social behavior.

Meanwhile, the Vietnamese version of preventive justice accepts the application of an "administrative handling measure" for "an individual who violates the law on security, social order and safety that does not constitute a crime."[48] The measure aims to "convert" and "educate" them to "good, law-respecting citizens" in order to "protect national security, guarantee public order."[49] Hence, to some extent, the English preventive

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44. Crime and Disorder Act 1998, § 1(1)(a).

45. Anti-Social Behaviour, Crime and Policing Act 2014, ¶ 2.1, Part 1, Injunctions.

46. Phil Edwards, *New ASBOs for Old?*, 79 J. CRIM. L. 257, 257 (2015).

47. *Id.* at 264.

48. Act on Handling of Administrative Offences, Art. 2(3) (2012).

49. Vietnamese Ministry of Justice & U.N. Development Programme, *Assessment of Administrative Handling Measures and Recommendations for the Act on Handling Administrative Offences* [*Danh gia ve cac bien phap xu ly hanh chinh khac va khuyen nghi hoan thien trong Luat Xu ly vi pham hanh chinh*] 3, 7–8 (2010). *See also* Vietnamese Ministry of Justice,

justice is comparable to the socialist Vietnamese educational administrative measure in three aspects. First, both systems tackle alleged dangerous persons who commit minor antisocial offenses by coercive punitive restrictions on liberty and rights for the sake of crime prevention. Second, it is not required that the second offense leading to deprivation of liberty is exactly the same as the first offense. Third, it also seems that the English preventive system somewhat reflects the educational function when the ASBO category "would send a message both to the offender and more widely, *educating* the community in the importance of respecting society's dispproval of anti-social behaviour."[50]

Both jurisdictions recognize the legitimacy of preventive measures. As Phil Edwards admits, there is "paradoxical demand for urgent and *draconian* action to prevent *minor* and *non-criminal actions*."[51] As a result, *minor* antisocial behaviors are potentially subject to *punitive preventive* measures. For English preventive justice, preventiveness is expressed explicitly. But for the Vietnamese counterpart, preventiveness is linguistically hidden while the educational function is manifested in the legislative descriptions.[52] Socialist systems have been criticized for their preventive educational justice that exaggerates the dangerousness of trivial offense violators. But now this problem also exists in a liberal common law jurisdiction. It is evident that the idea of the preventive state has prevailed, irrespective of legal traditions. The significant danger is that everyone could be subject to a so-called preventive measure, which is actually a criminal charge (in the essential sense).[53] It appears in both systems that "[a]nti-social behaviour remains a high political priority, to be addressed as a matter of urgency and by any means necessary, however trivial a guise any given incident may wear."[54]

Assessment Report on the System of Legal Documents on Handling Administrative Offences 128, 132 (2007).

50. Edwards, *supra* note 46, at 268 (emphasis added).

51. *Id.* at 269 (emphasis added).

52. Non-isolated *education* in commune, ward, or township; isolated *education* in reform school; isolated *education* in compulsory *educational* institution.

53. U.N. Human Rights Committee, General Comment No. 32: Art. 14, Right to Equality before Courts and Tribunals and to a Fair Trial (Aug., 23 2007) at ¶ 15; Engel v. Netherlands (1976) 1 EHRR 647 at ¶ 82.

54. Edwards, *supra* note 46, at 269.

II. A CONVERGENCE OF SUMMARY CRIMINAL JUSTICE

The increasing commonality manifested in the expansion and fragmentation of summary criminal justice in England and Vietnam marks a natural convergence between the two systems. This natural convergence is accompanied by a due-process-evading justice, necessitating a jurisprudential convergence that might be able to approach and address the problems consistently.

A. Natural Convergence: Current Trends in Two Different Traditions

More than a decade ago it was observed that regarding out-of-court settlements in Europe, common law and civil law criminal justice systems were converging in many aspects.[55] This observation has been also proved by recent developments of summary processes in England and Vietnam. In the last two decades, English summary justice has departed from a pure criminal law origin and significantly applied characteristics of civil law and particularly features of administrative law and regulation. Conversely, Vietnamese summary justice has increasingly incorporated criminal justice values into its administrative law basis. Here, the notion of "natural convergence" is borrowed from the idea that as "societies become more like each other their legal systems will tend to become more alike."[56] The natural convergence between England and Vietnam confirms the argument that

> the civil law world has been away from the extremes and abuses of the inquisitorial system, and that the evolution in the common law world during the same period has been away from the abuses and excesses of the accusatorial system. The two systems, in other words, are converging from different directions toward equivalent mixed systems of criminal procedure.[57]

This section explores current trends that cause this convergence in two different traditions. Here, it should be noted that the natural convergence between English and Vietnamese summary criminal processes does not mean the two systems are the same, but reflects their increasing commonality.

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55. Hans Jörg Albrecht, *Settlements Out of Court: A Comparative Study of European Criminal Justice Systems* 51, 52, 54, South African Law Commission, Research Paper 19 (2001).

56. John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, STANFORD J. INT'L L. 357, 369 (1981).

57. MERRYMAN & PÉREZ-PERDOMO, *supra* note 2, at 127.

1. English Summary Justice: The Departure from a Pure Criminal Law Origin

Traditionally, in common law jurisdictions, the ambit of public welfare offenses belongs to criminal law,[58] and correspondingly these offenses are discussed in criminal law textbooks.[59] Also, the common law world has the tradition of due process rights protection; therefore, minor offenses have been generally brought to a trial in court. However, in the twenty-first century, many common law systems have found a more effective and efficient mechanism (i.e., administrative sanctions, civil sanctions) to tackle the overload of lower courts, so summary criminal justice can be seen as "administratized" and "civilized."

Due to the overload of court cases and the tough-on-crime policy, summary justice has had a dramatic and rapid change toward a more efficient criminal justice, and with more reductions of rights. New measures and procedures have been applied to a large proportion of summary offenses. The rationale for this transformation, as Ashworth and Zedner pointed out, is theories of the regulatory state, the preventative state, and the authoritarian state. They argue that England and Wales have experienced an increasing use of the "managerialist techniques" of a regulatory state in summary trials, which are characterized as efficient rather than just.[60] As a result, the criminal justice system in the United Kingdom has been moving away from its adversarial tradition[61] and has been transforming steadily toward "crime control."[62]

Except for summary proceedings in Magistrates' Courts, summary justice in England is no longer based on criminal courts, and thus it is neither

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58. Darryl K. Brown, *Public Welfare Offenses, in* OXFORD HANDBOOK OF CRIMINAL LAW 862, 864 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

59. For the United States, *see* Chapter 11 of JOSHUA DRESSLER, CRIMINAL LAW (LexisNexis 2012). For the United Kingdom, *see* A.P. SIMESTER ET AL., SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE 11 (2013). at 11. For Australia, *see* SIMON BRONITT & BERNADETTE MCSHERRY, PRINCIPLES OF CRIMINAL LAW, Ch. 1 (3d ed. 2010).; BROWN ET AL., *supra* note 13. at § 3.7.

60. Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions*, 2 CRIMINAL LAW AND PHILOSOPHY 38–44 (2008).

61. McEwan, *supra* note 37, at 519.

62. CELIA WELLS & OLIVER QUICK, RECONSTRUCTING CRIMINAL LAW: TEXT AND MATERIALS 90 (2010).

adversarial nor inquisitorial. There has been an increasing use of civil/administrative courts and quasi-tribunals such as the police and administrative agencies in three new tiers of summary criminal justice.[63] These forms of quasi-tribunals lack independence and impartiality, but they exercise judicial functions. Today summary justice is basically characterized as crime-control-based, regulation-based, and efficiency-based processes.

2. Vietnamese Summary Justice: The Incorporation of Criminal Justice Values into Administrative Law

The Vietnamese criminal justice system could be categorized either in the civil law or the socialist tradition because, according to Hoan N. Bui, "[t]he current Vietnamese legal system follows the Roman-Germanic, or Continental tradition, with French, Chinese, and socialist inheritances."[64] However, in general, socialist law can be considered a branch of the civil law tradition.[65] John Quigley made this point in 1989 when the socialist legal system still existed. Today, given the nonexistence of a socialist bloc,[66] socialist countries such as China and Vietnam are less socialistic in that they have adopted some values of capitalism and the rule of law. Hence, such socialist legal systems have arguably come closer to a typical civil law system. Specifically, socialist criminal justice is now quite similar to continental criminal justice.

For the past three decades, although the socialist characteristics have been reduced, some socialist features still influence Vietnamese criminal justice in general and the Vietnamese structure of administrative sanctioning/measures in particular. Unlike common law criminal justice, Vietnam's structure of administrative sanctions/measures is considered a branch of administrative law, and therefore, this topic is included in textbooks on

63. For a detailed analysis of three new tiers of summary criminal justice in England and Wales, see Dat T. Bui, *How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights*, 41 COMMONWEALTH L. BULL. 439 (2015).

64. Hoan N. Bui, *Vietnam, in* CRIME AND PUNISHMENT AROUND THE WORLD—ASIA AND PACIFIC 286 (Doris C. Chu & Graeme R. Newman eds., 2010).

65. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 808 (1989).

66. There is no longer a chapter on socialist law in the latest edition of the classic volume on comparative law: KONRAD ZWEIGERT & HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998).

administrative law.[67] One of the most significant differences of socialist law is the emphasis on the "educational role of the proceedings,"[68] as manifested in educational administrative measures. This educational role has been sometimes combined with the punitive function. Indeed,

> [t]he punitive approach has led to high levels of recidivism, particularly for those committing non-violent offences such as drug possession, shoplifting and non-payment of child support. Various "three strikes" laws effectively funnelled prisoners found guilty of minor offences into crowded, dangerous and oppressive conditions.[69]

In contrast with the trend of reducing due process in the United Kingdom, Vietnam's criminal justice in general, and summary justice in particular, have attempted to incorporate the values and standards of fair trial rights of the International Covenant on Civil and Political Rights (ICCPR). With the aim of solidifying the rule of law, Vietnam has an obligation to respect the right to a fair trial affirmed by the ICCPR, of which it is a member. Fair trial rights have been increasingly promoted in global constitutional law and global human rights law in general, as well as the "global developments in due process."[70]

For the first time, the 2013 Constitution has officially recognized that "*the adversarial principle shall be guaranteed in trials.*"[71] It may not mean that Vietnamese justice will transform to an adversarial model like common law, but it can be expected that values of the adversarial model will be increasingly applied. Another significant change is that the Constitution has endorsed the principle of rights limitation: "Human rights and citizens' rights may not be limited unless prescribed by law solely in the case of necessity for reasons of national defence, national security, social order and safety, social morality and community well-being".[72] Moreover, prior to

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67. For example, *see Administrative Coercion* (ch. 14) and *Administrative Responsibility* (Ch. 15), *in* VIET C. NGUYEN, TEXTBOOK ON VIETNAMESE ADMINISTRATIVE LAW [GIAO TRINH LUAT HANH CHINH VIET NAM] (2014).

68. William E. Butler, *Soviet Criminal Law and Procedure in English Pegagogical Perspective*, *in* JUSTICE AND COMPARATIVE LAW: ANGLO-SOVIET PERSPECTIVES ON CRIMINAL LAW, EVIDENCE, PROCEDURE AND SENTENCING POLICY 11–12 (William E. Butler ed., 1987).

69. MICHAEL HEAD, EVGENY PASHUKANIS: A CRITICAL REAPPRAISAL 244 (2008).

70. Richard Vogler, *Due Process*, *in* THE OXFORD HANBOOK OF COMPARATIVE CONSTITUTIONAL LAW 938 (Michel Rosenfeld & András Sajó eds., 2012).

71. Vietnamese Constitution 2013, Art. 103(5) (emphasis added).

72. *Id.* at Art. 14(2).

the enactment of the new Constitution, the Act on Handling of Administrative Offenses 2012 has improved fair hearing rights by replacing administrative bodies with courts to deal with preventative measures in relation to the criminal charge. There have been recommendations on the "judicialisation" of preventive administrative measures,[73] and even more radically on the "judicialisation" of administrative sanctioning.[74] Thus, arguably those developments have "criminalized" and "civilized" the system of administrative sanctions/measures in administrative law.

However, the positive change is just a starting point. The Vietnamese constitutional recognition of fair trial rights is still inadequate compared to ICCPR and the European Convention on Human Rights (ECHR). Moreover, the fact that Vietnam lacks an effective constitutional interpretation and review lead to poor protection of fair trial rights. The notion of a criminal charge seems to be equivalent to the concept of crime, which completely depends on the Criminal Code's definition, and therefore, it would exclude the principle of a fair trial for preventative measures and administrative offenses. The notion of a tribunal seems to be equivalent to the concept of court, which is limited to the People's Court system, so it does not take account of quasi-tribunals. Constitutional provisions on the principle of human rights limitation show a progress of constitutionalism, but without effective constitutional interpretation, they are too vague to be applicable, and without a mechanism of constitutional review, they can be arbitrarily interpreted by legislators.

Interestingly, the convergence between England and Vietnam has been occurring at a more rapid pace and in a reverse trend in comparison with the convergence between the two traditions in serious crimes process. It has taken about two decades for a convergence between English and Vietnamese summary processes, whereas the convergence between the common law and

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73. *See* papers presented at the conference "Improving the Law on Handling of Administrative Offences in Vietnam," Tam Dao, Sept. 26–27, 2011: Dung D. Nguyen, *Other Administrative Handling Measures in the Bill on Handling of Administrative Offences* [*Cac bien phap hanh chinh khac trong Du thao Luat Xu ly vi pham hanh chinh*]; Hoan K. Truong, *Some Ideas about the Judicialisation of Education in Reform School and Education in Compulsory Educational Institution* [*Mot so y kien ve tu phap hoa bien phap dua vao co so giao duc va truong giao duong*]; Duc X. Bui, *Entrusting the District-level People's Court to Decide the Application of Other Administrative Handling Measures* [*Giao Toa an nhan dan huyen quyet dinh ap dung cac bien phap xu ly hanh chinh khac*]. *See also* Vietnamese Ministry of Justice, *supra* note 49, at 167–68.

74. Vietnamese Ministry of Justice, *supra* note 49, at 167–68.

the civil law's serious crime processes has been taking much time under considerable resistance. A noticeable trend is that the reduction in traditionally adversarial due process values in England is more substantial than the increase in procedural fairness in Vietnam. This is in contrast to the convergence in serious crime processes, in which civil law systems have been enhancing due process rights adopted in the "perceived superiority of the adversary system."[75]

3. Due-Process-Evading Justice

It is clear that summary processes reflect the flexibility, elasticity, and adaptability of procedural rights, as Justice Frankfurter noted: "due process is not a technical conception with a fixed content unrelated to time, place and circumstances . . . it cannot be imprisoned within the treacherous limits of any formula."[76] As this article views summary criminal justice through the due-process lens, it has investigated how procedural due process is curtailed in summary processes. In a negative sense, it is sufficient to conclude that in both jurisdictions, the elasticity of procedural rights has led to a due-process-evading summary justice, which tends to hide criminal character and avoid criminal procedural rights.

There is a disguise of criminal charges by a systematic use of noncriminal terms: *violation*, *administrative/regulatory*, *measure/order/penalty/sanction*, *preventive/educational*, among them, instead of *crime*, *criminal*, *punishment*, *punitive*, and the like. At first glance, typically summary measures are noncriminal. That use of noncriminal terms somewhat aims to affirm the noncriminal character and the nonpunitive purpose. However, this defense for the noncriminal character is not convincing. Both the United Nations Human Rights Committee and the ECtHR hold that the understanding of a criminal charge relies mostly on the nature of the state's response to a public wrong rather than only on the denomination of domestic law.[77] The British courts also follow this interpretation, for example, in the case of *International Transport Roth GmbH*.[78] In Vietnamese jurisprudence, even

75. Corrado, *supra* note 1, at 289.

76. Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123 (1951).

77. U.N. Human Rights Committee, *supra* note 53, at ¶ 15; Engel v. Netherlands (1976) 1 EHRR 647 at ¶ 82.

78. International Transport Roth GmbH & Ors v. Secretary of State For the Home Department, [2002] EWCA Civ 158, [2003] QB 728 ¶ 37, per Brown LJ.

though there has always been a legal distinction between crimes and administrative offenses/measures, the legislation somewhat implicitly recognizes administrative offenses/measures as public wrongs/criminal charges by guaranteeing a limited number of criminal procedural rights.

The result of that disguise of criminal charges is an evasion of procedural due process. This evasion implies that, along with many reasonable due process limitations on fair trial rights, a number of unreasonable, disproportionate limitations make the process as a whole unfair. The trend of less reliance on traditionally public courts and increasing use of quasi-tribunals, such as police and administrative agencies, has eliminated many procedural safeguards inherently attached to courts. This trend seems to be justified for the sake of efficiency:

> From an economic and efficiency point of view, the symbolistic ritual of the public trial is costly, time consuming and in many respects simply wasteful. And the greater the emphasis on efficiency, the greater the pressure to abandon the trial in favour of quicker and less onerous solutions. The decline of the trial can thus be explained as one of many emanations of a general tendency of modern societies to reduce cost and to increase system efficiency.[79]

And even when the case might be challenged and then reviewed by an independent and impartial tribunal, as happens in England, the system of regulatory sanctioning still does not satisfy the requirement of a genuine review, which demands the review tribunal consider both matters of facts and law. This is also the case in Vietnam where the administrative court just examines the legality (matter of law). Moreover, both jurisdictions employ so-called "civil"/"administrative" preventive measures that remove many fair trial rights despite the severe consequences.

B. Jurisprudential Convergence: A Conception of Summary Criminal Justice as Limiting Fair Trial Rights for Less Serious Public Wrongs

It can be observed that in the absence of an appropriate jurisprudential framework, natural convergence is accompanied by due-process-evading

79. Thomas Weigend, *Why Have a Trial When You Can Have a Bargain?*, *in* THE TRIAL ON TRIAL, VOLUME 2, JUDGMENT AND CALLING TO ACCOUNT 214 (Antony Duff et al. eds., 2006) (In this paper, Thomas Weigend focuses on criminal bargaining, but his argument I cite here is even more applicable to summary justice.).

justice in the two systems' summary criminal processes. Therefore, the natural convergence necessitates jurisprudential convergence to prevent due-process-evading justice. This section suggests a jurisprudential framework that can approach summary processes properly.

To identify the boundaries of summary criminal justice, it is necessary to seek a definition of summary criminal justice. Linguistically, summary justice is a process for dealing with minor offenses summarily, or in other words, the process for minor offenses is simplified. More than thirty years ago, Doreen McBarnet, who has had wide influence in the United Kingdom and Australia, argued that "summary justice is characterized precisely by its lack of many of the attributes of the ideology of law, legality and a fair trial."[80] In terms of procedural law, many due process values are omitted in summary justice.[81] One of the most important contributions of McBarnet is articulating the lack of many elements of fair trial rights in the summary process. This idea differentiates a tier of summary justice, which is characterized by rights-related simplified procedures, from other forms of simplified procedures on the basis of merely reducing time, steps, or documents (case management).

Today, McBarnet's idea is still meaningful, but the only tier of summary justice that is attached to lower criminal courts (Magistrates' Courts) no longer reflects recent developments. Many criminal procedures have been removed from criminal courts such as civil preventive orders, administrative out-of-court disposals, and the regulatory sanctioning process. Confusingly, England officially recognizes that out-of-court disposals are part of criminal justice but excludes preventive orders and regulatory sanctioning from the criminal justice system. This confusion necessitates revisiting the concept of summary criminal justice.

To conceptualize summary *criminal* justice, it is necessary to articulate the notion of *crime*. There has been a long-running debate about what is a crime and whether *mala prohibita* belong in this category. While minimalist theorists argue for an exlusion of *mala prohibita* from the ambit of crimes due to their lack of moral condemnation,[82] realist theorists defend

80. DOREEN MCBARNET, CONVICTION: LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE 138 (1981).

81. *Id.* at 139; Rod Morgan, *Summary Justice: Fast—but Fair?* 7, Centre for Crime and Justice Studies (August 2008).

82. Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Grant Lamond, *What is A Crime?*, 27 OXFORD J. LEGAL STUD. 609, 631–32 (2007);

the criminal status of *mala prohibita* on the grounds of public interest.[83] The realist conception of crimes as public wrongs may be supported for two reasons. First, it is compatible with the interpretation of "criminal charge" under ICCPR[84] and ECHR.[85] Second, it moreover helps to prevent the danger of procedural decriminalization, according to which a great number of minor public wrongs are decriminalized with the aim of avoiding criminal procedural safeguards. Arguably, such interpretations, made by the United Nations Human Rights Committee and the ECtHR, may make important contributions to a doctrinal convergence in conceiving crimes/criminal charges as public wrongs and in applying criminal fair trial rights for those wrongs.

In the discussion about *mala prohibita*, surprisingly and interestingly, Daniel Ohana, among others, argues that a philosophical distinction between criminal law and administrative penal law (in other words, between true crimes and administrative offenses) is not feasable.[86] In its legal history, England has not had the tradition of clearly distinguishing between crimes and administrative offenses.[87] Although regulatory offenses have been distinguished from real crimes to an extent, they are generally

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Malcolm Thorburn, *Constitutionalism and the Limits of the Criminal Law*, *in* THE STRUCTURES OF THE CRIMINAL LAW 105 (R.A. Duff et al. eds., 2011); Victor Tadros, Criminalization and Regulation, *in* THE BOUNDARIES OF CRIMINAL LAW (R.A. Duff et al. eds., 2011).; DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 119 (2008); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713 (2005); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM CRIM. L. REV. 1279 (2007).

83. R.A. Duff, *Towards a Theory of Criminal Law?*, 84 ARISTOTELIAN SOC'Y 1, 23–24 (2010); R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 92 (2007); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); PETER CARTWRIGHT, CONSUMER PROTECTION AND THE CRIMINAL LAW: LAW, THEORY, AND POLICY IN THE UK 244–49 (2004); Pamela R Ferguson, *"Smoke Gets in Your Eyes . . . ": The Criminalisation of Smoking in Enclosed Public Places, the Harm Principle and the Limits of the Criminal Sanction*, 31 LEGAL STUD. 259 (2011).

84. U.N. Human Rights Committee, *supra* note 53, at ¶ 15.

85. Engel v. Netherlands (1976) 1 EHRR 647 at ¶ 82.

86. Daniel Ohana, *Regulatory Offenses and Administrative Sanctions: between Criminal and Administrative Law*, *in* OXFORD HANDBOOK OF CRIMINAL LAW 1085–86 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

87. John McEldowney, *Country Analysis—United Kingdom*, *in* ADMINISTRATIVE SANCTIONS IN THE EUROPEAN UNION 588–89 (Oswald Jansen ed., 2013).

considered to be in the ambit of crimes in the broad sense (i.e., crimes as public wrongs). This theoretical nondistinction between *mala in se* and *mala prohibita* in their shared wrong-to-the-public nature could facilitate the English system's adoption of the ECtHR interpretation of "criminal charge," which is analogous to the conception of public wrong. Meanwhile, Vietnamese jurisprudence, despite distinguishing between crimes and administrative offenses as well as between criminal proceedings and administrative sanctioning procedures, implicitly admits the relevance of criminal law to the administrative sanctioning system. Indeed, both crimes and administrative offenses are considered public wrongs in the sense that both of them are acts that cause or are likely to cause harm to society.[88] Furthermore, the legislation on administrative offense processes, Act on Handling Administrative Offenses 2012, has adopted some of criminal fair trial rights.[89]

With regard to preventive justice, today both jurisdictions accept the state's preventive *punitive* response to the perceived dangerousness caused by *minor* offenses. It should be noted that the jurisprudence of dangerousness is not new to the common law world. For many decades, common law systems have applied coercive preventive measures to offenders who commit *serious* crimes such as terrorist, sexual, violent ones, and may re-commit those offenses in the future.[90] Nevertheless, the punitive deprivation of liberty to the dangerous who commit *minor* antisocial behaviors in England and Wales is a new development in common law jurisdictions. This kind of liberty deprivation is manifested in the system of civil preventive orders for

88. Criminal Code 1999, Art. 8(1); Act on Handling of Administrative Offences 2012, Art. 2(1).

89. Act on Handling of Administrative Offences 2012: reasonable time (Art 3(1)(b)); fairness (Art 3(1)(b)); publicity (Art 3(1)(b)); no punishment without law (Art 3(1)(d)); prohibition of double jeopardy (Art 3(1)(d)); the right not to be compelled to testify against himself or to confess guilt (Art 3(1)(đ); compensation (Art 13(2)); and the right to review by a tribunal (Art 15(1)).

90. For instance, as Ramsay listed, a series of legislation in the UK permit the government use preventive orders for those carrying out serious offenses (Serious Crime Act 2007, §§ 1–37), terrorist offenses (Terrorism Prevention and Investigation Measures Act 2011, §§ 2–4), sexual offenses (Sexual Offences Act 2003, §§ 104–113, §§ 114–122; §§ 123–129), football hooliganism offenses (Football Banning Order, Football (Disorder) Act 2000, § 1), alcohol-related offenses (Violent Crime Reduction Act 2006, §§ 1–14), domestic violence offenses (Domestic Violence, Crime and Victims Act 2004, § 1) (Peter Ramsay, *Pashukanis and Public Protection*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW, n. 15 (Markus D. Dubber ed., 2014).

less serious antisocial behaviors.[91] This means that the jurisprudence of dangerousness has become much more intrusive, as it is expanded into the ambit of minor offenses. The population of the dangerous has increased. Meanwhile, for a long time such preventive, educational punitive measures have been largely used in socialist justice systems like Vietnam to combat repeat violators of minor offenses, who are deemed to cause danger to the public.[92] Here, it can be observed that a pure liberal state does not exist, and today the goals of the regulatory state, preventive state, and authoritarian state are increasing.[93] As Peter Ramsay points out, "Where the classical liberal legal order sought to protect abstract individual freedom notwithstanding its effects on vulnerable others, the contemporary order seeks to protect vulnerability notwithstanding its effect on others' individual freedom."[94]

No matter how scholars theorize and name the phenomenon of minor offenses/summary justice, summary criminal justice should be recognized as limiting fair trial rights when dealing with less serious public wrongs. Regardless of whether those measures are called criminal, civil, or administrative, punitive or preventive, punishments or penalties, they represent the state's coercive and punitive response to violations of public order (public wrongs) that demand being dealt with by the public's representative (the state). Once the state can deprive an individual's rights and liberty, the principle of procedural due process must be guaranteed. Indeed, both common law and civil law jurisdictions have applied certain amount of due process (i.e., a number of criminal fair trial rights) to those public wrongs, whether the law attributes "administrative" or "civil" instead of "criminal" to them. In this respect, those jurisdictions explicitly (such as England) or

91. For example, Anti-Social Behaviour Orders (Crime and Disorder Act 1998, § 1) was abolished and replaced by three statutes: Injunction to Prevent Nuisance and Annoyance (Anti-Social Behaviour, Crime and Policing Act 2014); Drinking Banning Orders (Violent Crime Reduction Act 2006, § 1); abd Football Spectator Banning Orders (Football Spectators Act 1989, § 14A).

92. *See*: Resolution 49/1961/UBTVQH on Isolatedly Re-educating Persons Harmful to Society; NGUYEN, TEXTBOOK, *supra* note 67; Vietnamese Government & U.N. Development Programme, *Assessment of Administrative Handling Measures and Recommendations for the Act on Handling Administrative Offences* (*Danh gia ve cac bien phap xu ly hanh chinh khac va khuyen nghi hoan thien trong Luat Xu ly vi pham hanh chinh*), at 3, 7–8 (2010). *See also* Vietnamese Ministry of Justice, *supra note 49*.

93. Ashworth & Zedner, *supra* note 60, at 38–44.

94. Ramsay, *supra* note 90, at 215.

implicitly (such as Vietnam) recognize the criminal status (in the broad sense) of *both* administrative offenses and apply preventive coercive measures. Thus, international law (mostly through the interpretation of fair trial rights under ECHR and ICCPR, as noted above) has significantly contributed to a doctrinal convergence of different legal traditions in the conception of summary criminal justice as limiting fair trial rights when dealing with less serious public wrongs.

This doctrinal convergence inevitably involves the application of procedural pragmatism and procedural proportionalism. As Simon Brown LJ claims, "the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial."[95] The principle of due process has been redefined from the perspective of discussing "the tripartite relationship between adversarial rights, rational efficiency and democratic participation in criminal justice."[96] Justice Brown's procedural pragmatism is not arbitrary and unpredictable if the propotionality doctrine is applied deliberately to the limitation on fair trial rights in the handling of minor offenses. The doctrine of proportionality has become increasingly prevalent in United Kingdom jurisprudence since the Human Rights Act 1998. For Vietnam, this doctrine has been newly adopted by the enactment of the 2013 Constitution, in which the human rights limitation clause[97] initiates the rigorous incorporation of the proportionality doctrine. The natural convergence between England and in Vietnam somewhat reflects both objective demand and subjective attempts to achieve proportional points in dealing with summary criminal justice.

CONCLUSION

This article reveals the obsoleteness of the common law adversarialism/civil law inquisitorialism dichotomy in summary procedures for minor offenses. Unlike serious offense processes, in which restrictions on fair trial rights are unusual, summary processes (for preventive measures, trivial offenses, and regulatory offenses) employ a considerable number of restrictions on the

95. International Transport Roth GmbH and Ors v, Secretary of State for the Home Department [2002] EWCA Civ 158, [2003] QB 728 at ¶ 33.

96. Vogler, *supra* note 70, at 947.

97. Vietnamese Constitution 2013, Art. 14(2).

rights, which are commonly applicable to several groups of criminal charges. This trend has been so commonplace that even the due-process-based system of England and Wales has increasingly shown striking similarities with the crime-control-based system of Vietnam in dealing with summary processes. In such jurisdictions, nonserious criminal charges are disguised as civil/administrative measures to evade criminal fair trial rights. The two jurisdictions provide noticeable models, which have both similarities and differences, in dealing with such measures.

Two cases of the United Kingdom (England and Wales) and Vietnam have demonstrated a convergence of the common law adversarial model and the civil law inquisitorial model in dealing with summary processes. Two summary justice models have been converging at a more rapid pace and in a reverse trend compared to the convergence between the two traditions in mainstream/serious crime processes. Although a convergence between civil law and common law criminal justice in dealing with serious crimes is still on a long, challenging road ahead, a convergence among two traditions in dealing with minor crimes by summary procedures is obvious. Remarkable similarities are: (a) the trial with only one judge in summary procedures for less serious crimes; (b) the quasi-criminal court for dealing with preventative measures that have features of criminal charge; and most strikingly, (c) the use of hidden, criminal quasi-tribunals for the least minor offenses and regulatory justice. This natural convergence also reflects a due-process-evading justice and necessitates jurisprudential convergence, which conceptualizes the summary criminal justice as limiting fair trial rights when dealing with less serious public wrongs.

CHAPTER 6 (ARTICLE 5)

ASSESSING THE OVERALL UNFAIRNESS OF LIMITATIONS ON FAIR TRIAL RIGHTS IN SUMMARY CRIMINAL PROCESSES: A REMEDY FOR THE DUE-PROCESS-EVADING JUSTICE

Publication status
Under review
Contribution to the thesis
This article aims to answer sub-question 5: *What analytical tools should be used to assess the overall unfairness of limitations on fair trial rights in summary criminal processes?* On the basis of the answers for the previous four sub-questions, the fifth sub-question touches the core of the thesis' research question, that is, 'to what extent should fair trial rights be limited in summary criminal processes?'. Accordingly, this article develops ways of reasoning to assess the overall unfairness of limitations on fair trial rights in summary criminal processes.

ASSESSING THE OVERALL UNFAIRNESS OF LIMITATIONS ON FAIR TRIAL RIGHTS IN SUMMARY CRIMINAL PROCESSES: A REMEDY FOR THE DUE-PROCESS-EVADING JUSTICE

Dat T. Bui*

Abstract

In an era of the preventive and administrative state, massive limitations on fair trial rights in summary minor offence processes (for preventive measures, trivial offences and regulatory offences) raise concerns about the extent of procedural rights, and the need to build in such rights for these procedures. Due to the nature of fair trial rights, overall balancing is the most meaningful sub-test, among four sub-tests of proportionality analysis, for assessing the overall fairness of limitations on procedural rights. However, it is acknowledged that applying a formulaic balancing process to a bundle of fair trial rights is an extremely difficult and even impossible task.

By examining the English and Vietnamese models of due-process-evading summary criminal processes, this article develops two analytical tools, which act as supplements to the overall balancing, so as to assess the overall unfairness of limitations on fair trial rights. First, apart from internal and external overall fairness, the article develops reasoning about two-stage overall fairness. Accordingly, the article identifies four models of two-stage processes and analyses their suitability for different measures. Second, the article suggests that it is crucial to determine the core of procedural due process, which is comprised of several essential elements of the right to a fair trial.

Key words: limitation on rights, fair trial rights, minor offences, proportionality

I. INTRODUCTION

In an era of the preventive and administrative state, massive limitations on fair trial rights in summary minor offence processes raise concerns about nature and the extent of procedural rights that ought to be designed for these procedures. Unlike the serious offence process, in which restrictions on fair trial rights are unusual, minor offence processes (for preventive measures, trivial offences and regulatory offences) employ a considerable

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number of procedural rights restrictions, which are commonly applicable to several groups of criminal charges.[1] This trend has been so commonplace that even a due-process-based system such as that of England and Wales has increasingly shown striking similarities with the crime-control-based system of Vietnam in dealing with minor offences.[2] In such jurisdictions, non-serious criminal charges are disguised as the so-called 'civil/administrative' measures to evade criminal fair trial rights. The two jurisdictions provide considerable models of summary processes, which confirm the idea of natural convergence,[3] in dealing with several groups of minor offences. Thus the English and Vietnamese models (as proto-typical types for the common law and the civil law)[4] are useful for exploring ways in which fair trial rights are used and limited in summary minor offence justice. Here, it is worth noting that this article will compare the legislative and practical aspects of these models of summary processes rather than compare the judicial reasoning behind limiting fair trial rights between the two jurisdictions. The reason behind this is that Vietnamese jurisprudence has not developed substantial interpretation or reasoning about fair trial rights and limitations on rights. Thus it would not be useful to compare Vietnamese jurisprudence with the English jurisprudence, which has had a long tradition of due process as well as being enriched by the European Courts jurisprudence.

Having accepted the legitimacy of preventive and efficient justice, the article seeks a method for assessing the overall (un)fairness of limitations on fair trial rights in summary processes. Arguably, assessing the constitutionality of limitations on fair trial rights is a difficult task, because the principle of a fair trial is made up of many component rights, which can be assessed separately, but ultimately must be put in the context of the fairness of the overall process.[5] A component right can be in conflict with other elements of fair trial rights or with other human rights.[6] Due to the nature of fair trial rights, overall

[1] See: Dat T. Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights' [439] (2015) 41(3) *Commonwealth Law Bulletin* 439.
[2] For an intensive comparison between the English summary minor offence justice and the Vietnamese one, see: Dat T. Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law' [382] (2016) 19(3) *New Criminal Law Review* 382.
[3] John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' [357] (1981)(2) *Stanford Journal Of International Law* 357, 369; John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 3rd ed, 2007) 127.
[4] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) *American Journal of Comparative Law* 125, 126.
[5] As the inventor of the overall fairness reasoning, the ECtHR has repeatedly confirmed this in many cases, for example, '[t]he fairness of the proceedings is assessed with regard to the proceedings as a whole' (*Pelissier and Sassi v France* (2000) 30 EHRR 715 [46]).
[6] Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 294, 302.

balancing is the most meaningful sub-test among four sub-tests of proportionality analysis, for evaluating the overall fairness of the limitations. As in *Al-Khawaja and Tahery v United Kingdom*, the European Court of Human Rights (ECtHR, or Strasbourg Court) has confirmed 'the traditional way in which the Court approaches the issue of the *overall fairness of the proceedings*, namely to *weigh in the balance the competing interests* of the defence, the victim, and witnesses, and the public interest in the effective administration of justice'.[7] However, it is acknowledged that applying a formulaic balancing process[8] to a bundle of fair trial rights is an extremely thorny and even impossible task. It might be achievable to conduct the formulaic balancing for a conflict between an element of fair trial rights and another human right or for a conflict between two elements of fair trial rights. But it is extremely difficult and might be impossible to weight the importance of each right and the reliability of the empirical assumptions when a large number of fair trial rights are in conflict with others and with public interests.

Following this Introduction, the article is divided into three main parts. Part II contends that the right to a fair trial is not absolute and argues for a rigorous application of proportionality analysis to fair trial rights limitations. Part III claims that overall balancing is the most meaningful sub-test among four sub-tests of proportionality analysis that can be used to assess the overall fairness of fair trial rights limitations. However, the fact that the formulaic balancing process faces a formidable challenge necessitates supplementary analytical tools to assess overall fairness.

By examining the English and Vietnamese models of due-process-evading summary minor offence processes, Part IV proposes two analytical tools to act as supplements for overall balancing, to assess the overall (un)fairness of limitations on fair trial rights. First, apart from internal and external overall fairness (which is to say, fairness between human rights), I develop reasoning about two-stage overall fairness (fairness between stages of procedure), which has been devised by the ECtHR[9] but is still inadequately examined. Accordingly, I identify four models of a two-stage process (a strong defect-curing model, a medium defect-curing model, a criminal preventive model and a criminal educational model), which are typical used for minor offence processes, and analyse their suitability for different kinds of offences and measures. Secondly, I argue that it is crucial to

[7] *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 [146] (emphasis added).
[8] For the weight formulae of balancing process, see generally: Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) 401-14; Carlos Bernal Pulido, 'On Alexy's Weight Formula' in Agustín José Menéndez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights* (Springer, 2006) ; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012).
[9] See particularly: *Öztürk v Germany* (1984) 6 EHRR 409 [56].

determine the core of procedural due process, which is comprised of several essential elements of the right to a fair trial. In sum, these two ways of reasoning developed in this part suggest the circumstances in which the process as a whole is unfair. With the aim of improving overall (un)fairness reasoning in the context of summary criminal processes, the approach of asking what restrictions of rights *cannot* violate could be more productive than asking what restrictions of rights *can* violate.

II. A GENERAL APPROACH TO LIMITATIONS ON FAIR TRIAL RIGHTS[10]

2.1. The flexibility of the fair trial principle

The conception of the fair trial principle under international human rights instruments[11] is comparable to the jurisprudence of procedural due process under American law. Confusingly, the principle of a fair trial right has a dual status: both as a *right* and as a bundle of *rights*. Some authors use the phrase 'right to a fair trial',[12] as in the title of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); while others prefer the phrase 'fair trial rights'.[13] These two phrases are interchangeable.

The right to a fair trial has been characterised by the complex jurisprudence of the ECtHR. Most cases are related to Article 6,[14] which is considered the most important provision among those on fair trial rights. Fair trial rights involve not only Article 6 but also several other articles of the ECHR as well as protocols of the Convention.[15] The ECtHR assures us that 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 §1 restrictively'.[16]

The right is so complex that there is still discussion on whether it is absolute or relative.[17] One could argue for the absoluteness of the right to a fair trial[18] on the basis of

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[10] As noted in the Introduction, regarding theories about limitations on fair trial rights, this article focuses on the ECtHR case law as well as the English jurisprudence. So far, the Vietnamese jurisprudence has been unable to provide meaningful reasoning about limiting fair trial rights.

[11] This article focuses on the European Convention of Human Rights, however, the jurisprudence of the United Nation Human Rights Committee in interpreting the ICCPR is sometimes mentioned.

[12] For example, see: Chapter 6 'Article 6: The right to a fair trial' of David Harris et al, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2009); Chapter 14 'Right to a Fair Trial' of Sarah Joseph and Melissa Castan, *The International Convenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013).

[13] For example, see: Chapter 11 'Fair trial rights' of Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009); Ryan Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart Publishing, 2014).

[14] Harris et al, above n 12, 329.

[15] The fair trial principle in European human rights instruments consists of several provisions such as Article 6, Article 7 of the ECHR, Article 1 of Protocol 4, and Articles 1, 2, 3, and 4 of Protocol 7.

[16] *Perez v France* (2005) 40 EHRR 39 [64].

[17] Don Mathias, 'The Accused's Right to a Fair Trial: Absolute or Limitable?' (2005) *New Zealand Law Review* 217.

three reasons: first, the ECHR describes provisions of fair trial rights in absolute terms; second, the ECtHR refers to an 'unqualified right' to fair trial;[19] third, the ECtHR always requires the overall fairness of the trial. However, these arguments are flawed because of an erroneous equation of the scope of a right and its essence. The scope and essence of absolute rights are the same while the scope of relative rights can be narrowed providing that the essence remains. As Robert Alexy argues, the essence or 'essential core' of relative rights must be guaranteed after a proportionality test of a limitation.[20]

The essence of the right to a fair trial is the *fair trial* or the *overall fairness of a trial*, as the ECtHR emphasizes '[t]he general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex'.[21] As such, the principle of a fair trial must be applied to all criminal procedures regardless of the offence's seriousness. However, this does not mean that the scope of fair trial rights is the same for all. Fair trial rights are flexible and adaptable to each type of offences but the overall fairness must be guaranteed.[22] This means the scope of fair trial rights may vary on condition that a 'fair' process is, in essence, ensured. It is important to acknowledge the flexibility of the fair trial principle. As the American judge, Justice Frankfurter, has written, 'due process is not a technical conception with a fixed content unrelated to time, place and circumstances… it cannot be imprisoned within the treacherous limits of any formula'.[23] In the United Kingdom (UK), Lord Bingham expresses this same idea in *Brown v Stott*:

> The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the

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[18] Ibid.; Kai Moeller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012) 280; Alan Brady, *Proportionality and Deference under the UK Human Rights Act* (Cambridge University Press, 2012) 171.

[19] In *O'Halloran and Francis v United Kingdom (G.C.)* (2008) 46 EHRR 397 [53], the Court held: '(w)hile the right to a fair trial under Article 6 is an unqualified right…'.

[20] Alexy, above n 8, 193.

[21] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 [36]. See also: *Saunders v United Kingdom* (1997) 23 EHRR 313 [74].

[22] Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice Research Series, 2007) 30; Stefan Sottiaux, *Terrorism and the Limitation of Rights - The ECHR and the US Constitution* (Hart Publishing, 2008) 332; F. Pınar Ölçer, 'The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights ' in Stephen C. Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer, 2013) 376; *Brown v Stott* (2003) 1 AC 681.

[23] *Joint Anti-Fascist Refugee Committee v McGrath* (1951) 341 US 123.

> court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree.[24]

The limitability of the right to a fair trial is self-evident. Many cases in the Strasbourg Court have confirmed that certain sub-rights of the right to a fair trial are adaptable and limitable to contexts. It could be reasoned that the relativity of just one sub-right is sufficient for the relativity of the right. In some cases, the ECtHR's talk of an 'unqualified right' to a fair trial does not mean the absoluteness of the right but that it is a requirement for overall fairness. For example, the Court has held that '(w)hile the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case'.[25] Both the ECtHR[26] and the UK courts[27] have affirmed that proportionality analysis is applied to Article 6 to resolve conflicts of rights. Lord Bingham held this position in *Brown*:

> The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for... The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.[28]

The limitation on procedural due process, which comprises many variables of a right, is a thorny issue. As Paul Roberts claims, '[i]t is truistic that legitimate criminal process for a modern democracy must balance the competing interests of individual participants, state and society. The real question is: how?'[29] Fair trial rights are limitable, but it is a challenge for legislators and judges to determine the extent of limitation that is suitable for each group of criminal offences. The principle of a fair trial has considerable potential for

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[24] (2003) 1 AC 681 [704].
[25] *O'Halloran and Francis v United Kingdom (G.C.)* (2008) 46 EHRR 397 [53].
[26] *Ashingdane v United Kingdom* (1985) 7 EHRR 528.
[27] *R v A (No. 2)* (2001) UKHL 25 [38] (*per* Lord Steyn) and [91] (*per* Lord Hope of Craighead); *R v Lambert* (2001) UKHL 37 [37]-[41] (*per* Lord Steyn) and [88] (*per* Lord Hope of Craighead).
[28] *Brown v Stott* (2003) 1 AC 681 [704].
[29] Paul Roberts, 'Comparative Criminal Justice Goes Global' [369] (2008) 28(2) *Oxford Journal of Legal Studies* 369, 391.

internal conflicts, as well as external conflicts with other human rights or public interests.[30] This difficulty may have led to inconsistency in the ECtHR's reasoning. At times, the Court refers to the *prima facie* absoluteness of the right, but it also allows limitations of sub-rights. Ölçer mentions flexibility as a factor: The Court has applied 'a broad and flexible umbrella test of balancing' in Article 6.[31] Moreover, Ölçer concludes as follows:

> [T]he Court's Art. 6 ECHR balancing is not always well-structured and is complicated by its at times unclear applications of what appears to be a well-conceived approach. This sometimes makes it difficult to ascertain how and why a particular outcome was reached in a concrete case.[32]

Thus, the debates on the proportionality of limitations on fair trial rights require further improvement in the ECtHR's case law, as well as in UK jurisprudence.

2.2. The application of the proportionality principle to fair trial rights under the United Kingdom's Human Rights Act 1998

Since the Human Rights Act 1998 (HRA) came into effect in October 2000, the doctrine of proportionality has gradually replaced *Wednesbury* unreasonableness[33] in constitutional review regarding rights. The UK courts have followed ECtHR jurisprudence, as Lord Hope confirms: 'All that the Convention really provides are the central principles and touchstones by which such a judgment can be made'.[34] However, a principled four-stage proportionality test has not been rigorously adopted by courts. The two early cases of *de Freitas* and *Daly* only mentioned a three-stage proportionality test.[35] Similarly, in *R v A (No. 2)* - the earliest case in relation to fair trial rights after the HRA, three stages, without the test of overall balancing, were assessed.[36] Practices in the UK courts have led to Goold, Lazarus and Swiney's argument that proportionality has been distorted into a concept of obscure (or 'broad brush') 'balancing' which is merely a utilitarian weighing of human

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[30] Brems, above n 6, 302.
[31] Ölçer, above n 22, 376.
[32] Ibid. 377.
[33] *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223.
[34] *International Transport Roth GmbH & Ors v Secretary of State For the Home Department (2002)* EWCA Civ 158, 754.
[35] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* (1999) 1 AC 69 [25]:

> In determining whether a limitation is arbitrary or excessive […] the court would ask itself:
> 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

Also cited by *Daly v Secretary of State for the Home Department* (2001) UKHL 26.
[36] *R v A (No. 2)* (2001) UKHL 25.

rights against public interests.[37] By reviewing a series of cases, Cora Chan has summarised several forms of distortion consequent upon applying the doctrine of 'margin of appreciation':[38]

(1) Bypassing one or more stages of the proportionality enquiry, often the third and fourth stages.

(2) Merging all four stages of the enquiry into one general question of whether the government has struck a fair balance or whether the measure is reasonable or permissible.

(3) Intervening only when the measure is manifestly disproportionate.

(4) Asking whether the measure can reasonably be considered as proportionate.

(5) Diluting the 'no more than necessary' question to whether the means is reasonably necessary to achieve the aim.[39]

These distortions of proportionality may be the reason why public security goals have often dominated rights.[40] In examining cases on criminal procedure, Paul Roberts came to the same conclusion: that an opaque proportionality would be 'a Trojan Horse in judicial reasoning' through which public interests would predominate over human rights.[41]

Although the UK version of proportionality is still being improved, it has become an official and important test in assessing limitations on rights. The House of Lords and the Supreme Court have made corrections by asserting that the UK proportionality test comprises all four stages.[42] Nevertheless, the significance of each stage arguably varies from right to right.

With regard to the limitation on fair trial rights in criminal cases, a four-stage proportionality test has been applied. There is a lack of UK jurisprudence on the sub-test of legitimate aim; however, the courts have followed the Convention text as well as the ECtHR's interpretation.[43] The sub-test of rational connection has sometimes been applied, albeit in combination with overall balancing on occasion.[44] In particular, Alan Brady

[37] Goold, Lazarus and Swiney, above n 22, 2.
[38] Clayton and Tomlinson (eds)above n 13, 314-23.
[39] Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33(1) *Legal Studies* 1, 9 (citations omitted).
[40] Goold, Lazarus and Swiney, above n 22, 2.
[41] Paul Roberts, 'Criminal Procedure, the Presumption of Innocence and Judicial Reasoning under the Human Rights Act' in Helen Fenwick, Roger Masterman and Gavin Phillipson (eds), *Judicial Reasoning under the Human Rights Act* (Cambridge University Press, 2007) 419, 422.
[42] *Huang v Secretary of State for the Home Department* (2007) UKHL 11; and *R (F) v Secretary of State for the Home Department* (2010) UKSC 17.
[43] Brady, above n 18, 176.
[44] Ibid. 181.

argues that the stage of assessing minimal impairment has played a significant role in most cases because there have usually been alternative options for evaluation available. As a result, he concludes the role of overall balancing has been small, as the courts have had no reason to take it into consideration when most cases have failed the minimal impairment sub-test.[45] In Part III, however, it will be argued that, on the contrary, the proportionality assessment of limitations on fair trial rights in summary processes is likely to rely heavily on the fourth sub-test of overall balancing.

III. CHALLENGES TO THE PROPORTIONALITY ASSESSMENT OF THE MULTI-TIERED LIMITATION ON FAIR TRIAL RIGHTS IN SUMMARY CRIMINAL PROCESSES

3.1. What is the most meaningful sub-test of proportionality in assessing the overall fairness of summary processes?

As far as limitations on fair trial rights are concerned, most of the existing literature has paid attention to the serious crimes process in the traditional criminal court, where just one or a few procedural rights are curtailed. But the expansion of summary processes for minor offences[46] has raised more concerns, regarding massive limitations of procedural rights allowed for those processes. It is not only the expansion of summary processes that is the problem, however. It can be seen that in England and Wales summary processes have been fragmented into several types of process corresponding with types of offences - summary offences tried by Magistrates' Courts, preventive orders decided by Magistrates' Courts, trivial offences dealt with by the police and administrative agencies, and regulatory offences handled by administrative agencies.[47] Thus, summary processes suggest interesting and useful observation regarding the flexibility of fair trial rights as well as different levels of limitation on these rights.

Both the ECtHR case law and European domestic laws accept a multi-level limitation on fair trial rights. It is recognised that procedural limitations for criminal cases differ from those for non-criminal ones. Not only that, but there are notable degrees of procedural safeguards within the range of criminal procedures vary according to groups of criminal offences, constituting tiers of criminal justice.[48] For this reason, in the Council of Europe's handbook on fair trial rights, Vitkauskas and Dikov argue for 'a *sui generis* proportionality

[45] Ibid. 183, 198, 208.
[46] See: Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law', above n 2.
[47] See: ibid.
[48] Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 1.

test' or 'the essence of the right test', which acknowledges varying levels of procedural protection for different types of offences.[49] Likewise, another useful example is the Polish law, which 'accepts differentiation of level of the guarantees depending on the procedure and the case decided'.[50] The recognition of numerous degrees of protection does not imply a fixed number but allows for adaption to adapt to each jurisdiction's circumstances. There can be a variety of models of procedural safeguards according to a wide range of offences. My previous study focuses on five degrees/tiers of limitation on fair trial rights for five popular groups of offences in the context of England and Wales, whose jurisdiction provides a good example for examining the theory of *sui generis* proportionality, as three new tiers have appeared in the past two decades. The five tiers constitute a hierarchy of five levels of due process limitation. The level of protection is gradually downgraded from the first to the fifth tier.[51]

Let us assume that we are conducting a proportionality test for the limitations on fair trial rights in dealing with summary processes in England and Wales. With regard to the first stage of the proportionality test, all tiers of criminal justice meet the test of legitimate aim. So far, the pressing need of those measures has rarely been opposed. The tier of indictable process does not accept a significant limitation on due process to a large extent, as it is a display of justice.[52] Among this group of offences, marked limitations are limited to terrorism and illicit drug offences, the latter reflecting a pressing need. In the four remaining tiers of summary justice, the necessity for widely significant limitations on due process is represented in three aspects. First, it is theoretically required that the level of procedural rights is in direct proportion to the seriousness of the offence. To put it differently, it is the idea of 'making the procedure fit the crime'.[53] Accordingly, less serious crimes go with less protection of procedural rights, and this is the foundation for summary justice. Nevertheless, it is important to note that this principle is not the sole

[49] Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (2012) 9.
[50] Maciej Bernatt, 'Administrative Sanctions: Between Efficiency and Procedural Fairness' [5] (2016) 9(1) *Review of European Administrative Law* 5, 11 (footnote 28).
[51] Those five tiers are: indictable process for serious offences at Crown Courts, summary process for less serious offences at Magistrates' Courts, preventive measures process at Magistrates' Courts, trivial offences process and regulatory offences process. For a detailed summary, see Appendix – Table of Limitations on Fair Trial Rights in Five Tiers of Justice in Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 1.
[52] Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1981) 153.
[53] E. Thomas Sullivan and Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford University Press, 2009) 113.

justification for all kinds of rights reductions.[54] The South African Constitutional Court has reasoned that 'the level of crime does not on its own justify any infringement of the bill of rights, no matter how invasive'.[55] Some groups of indictable offences are dealt with in ways akin to minor offences – a fact that is evident in all three new tiers. This is because efficiency, the second aspect, is a justification for all tiers, particularly for the fourth tier (out-of court disposals (OOCDs)) and the fifth tier (regulatory justice). The third aspect is the characteristic of offence, which explains the fact that the level of an offence's seriousness can have some procedural options in different tiers. For instance, harassment can be addressed by either Anti-social Behaviours Orders (ASBO) or OOCDs, and traffic and environmental offences can be addressed by either OOCDs or regulatory process. Crime prevention is a primary justification for stronger restrictions on rights in the case of civil-criminal preventive orders, as compared with the pure summary process. The low-level or trivial nature of offences is the basis for the fourth tier. Good administration is the ultimate goal in the case of regulatory offences. These reasonable objectives ensure that criminal legislation rarely face the obstacle of having to satisfy the first sub-test of proportionality, as Paul Roberts argues.[56]

Three new tiers of summary justice (the process for preventive orders, the process for trivial offences, and the process for regulatory offences) have few problems with the sub-tests of overall balancing. The procedural simplification obviously has a rational connection to the aim, so the second sub-test is satisfied. With regard to the third sub-test - of minimal impairment - Alan Brady argues that this is the most useful sub-test in assessing the constitutionality of limitations on criminal fair trial rights.[57] Brady's argument might be correct in the case of the serious crime process, but is not correct in the case of non-serious crime processes, where efficiency is the ultimate goal. This sub-test is only meaningful if there is an alternative that is less restrictive as well as capable of gaining the same level of public interest.[58] In many circumstances, it is difficult to find a less restrictive design for procedural rights that is capable of achieving the same level of efficiency. Understandably, the more protections of due process lead to less efficiency, so the third sub-test – of minimal impairment, which is viewed as the 'heart and soul' of

[54] Danny Friedman, 'From Due Deference to Due Process: Human Rights Litigation in the Criminal Law' (2002)(2) *European Human Rights Law Review* 216, 222.
[55] *State v Manamela* (2000) 5 LRC 65 [42].
[56] Roberts, 'Criminal Procedure, the Presumption of Innocence and Judicial Reasoning under the Human Rights Act', above n 41, 419.
[57] Brady, above n 18, 208-9.
[58] Ibid., 184, 196.

proportionality,[59] is likely to be passed in the case of summary processes. It is therefore necessary to adduce the fourth sub-test of overall balancing.

In the context of fair trial rights for summary processes, the most contentious and fundamental issue is the sub-test of overall balancing. This balancing process, which is regarded as the most important test of proportionality,[60] proves its significance in assessing the constitutionality of restrictions on fair trial rights. Notably, it is the nature of fair trial rights that reductions of process generally meet the first three sub-tests of proportionality. Therefore the fourth sub-test plays a vital role because in most circumstances it seems to be the only meaningful one for judging the proportionality of limiting fair trial rights. As Paul Roberts argues in the context of the right to be presumed innocent, 'in the end, the justifiability of breaches of Article 6(2) predictably boils down to a single question: are infringing legislative measures *proportionate* to the criminal harm they aim to prevent or punish?'[61] It is a thorny question whether limitations on fair trial rights create a fair balance. Thus I would emphasise the importance of a principled four-part proportionality test to assess the constitutionality of limitation on due process rights. It is crucial to avoid 'broad brush' balancing and therefore to consider the stand-alone test of overall balancing that is central to the proportionality test.

3.2. A formidable challenge to the overall balancing sub-test and the need for supplementary analytical tools

The ECtHR's approach to the 'proceedings as a whole' suggests that overall fairness is an ultimate goal of the proceedings as well as a kind of balancing process. Arguably, the ECtHR has well-developed reasoning on overall fairness as a kind of opaque balancing. In this sense, the notion of overall fairness is analogous to the conception of 'the right to a fair trial', which seems to focus on the fairness of the proceedings as a whole, regardless of the number of specific 'fair trial rights' that are protected. It should be noted that although the two expressions – 'the right to a fair trial' and 'fair trial rights' – are used interchangeably, to some extent they reflect different perspectives. It seems that while the phrase 'the *right* to a fair trial' implies the notion of the overall fairness of the process, the phrase 'fair trial *rights*' focuses on specific rights included in the broad notion of the right to a fair trial. While the overall fairness of the trial ('the right to a fair trial') is an ultimate goal of the

[59] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Doron Kalir trans, Cambridge University Press, 2012) 337.
[60] Ibid. 340.
[61] Roberts, 'Criminal Procedure, the Presumption of Innocence and Judicial Reasoning under the Human Rights Act', above n 41, 419 (original emphasis).

process – and it is possibly because of this that some writers consider the right to a fair trial as an absolute right,[62] – fair trial rights are not equal as some of them are strongly protected while the others can be limited by different degrees. As noted in Part 2.1, ECtHR jurisprudence reasons that despite the limitations on fair trial rights, the overall fairness of the proceedings must be guaranteed. It can be argued that 'fair trial rights' are secondary to 'the right to a fair trial'.

The practice of the ECtHR shows a lack of a transparent, coherent and effective reasoning on limitations of fair trial rights. The ECtHR has repeatedly affirmed that the goal of the whole process is overall fairness, saying, for example, that '[t]he fairness of proceedings is assessed with regard to the proceedings as a whole'.[63] Nevertheless, some commentators criticise the ECtHR for never having explained how it made this judgement on overall fairness persuasively, coherently and transparently.[64] There is doubt that the ECtHR has used a structured balancing method to judge the proportionality of limitations on due process rights.[65] It seems that the ECtHR's reasoning has been too flexible and intuitive rather than principled. Thus Ryan Goss argues that:

> if public interest balancing was to be thought inevitable, then it would be incumbent on the European Court to reject unstructured broad-brush balancing in favour of a form of rigorously-structured proportionality reasoning appropriate for the Article 6 rights, and to use that form of reasoning consistently across all Article 6 criminal cases.[66]

Likewise, the UK courts have followed the ECtHR[67] and had the same problem with reasoning on fair trial rights. In *Brown*, Lord Bingham confirmed the incorporation of the European Court's 'overall fairness' reasoning into British jurisprudence.[68] Like the ECtHR, the UK courts have not clearly explained which analytical tools they used to determine whether an infringement of Article 6 right had satisfied the requirement of fair balance or overall fairness. Ironically, and worse than the European Court, British

[62] Mathias, above n 17; Moeller, above n 18, 280; Brady, above n 18, 171.
[63] *Pelissier and Sassi v France* (2000) 30 EHRR 715 [46].
[64] Goss, above n 13, 124-39; Ölçer, above n 22, 377.
[65] Goss, above n 13, 115-200.
[66] Ibid. 204.
[67] Goold, Lazarus and Swiney, above n 22, 30.
[68] 'The jurisprudence of the European court very clearly establishes that while the *overall fairness of a criminal trial cannot be compromised*, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute... The court has also recognised the need for a *fair balance* between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention' (*Brown v Stott* (2003) 1 AC 681 [704], emphasis added).

jurisprudence has adopted a distorted version of proportionality, in which the fourth sub-test of overall balancing has been bypassed or mixed with other sub-tests.[69]

While the ECtHR's reasoning on overall fairness is still problematic, its case-law suggests several useful approaches that can supplement the proportionality test to access procedural fairness as a whole. Goss critically analyses these approaches in six points: 'proceedings as a whole', 'counterbalancing', 'defect curing', 'never fair', 'sole or decisive' evidence, and the 'very essence' of the right.[70] Among these, the 'very essence of the right' analysis has been of special interest to others. For example, Bernstorff and Hoyano propose an approach to the 'essence' (or 'substance'/'core') of a right instead of the balancing process.[71] Moreover, Vitkauskas and Dikov argue that 'the essence of the right test' for fair trial rights is 'a *sui generis* proportionality test'.[72] The US Supreme Court also rejects balancing in criminal due process reasoning and has developed an assessment of 'fundamental fairness', which is comparable to the core/essence approach to due process.[73] I am in favour of the overall-fairness goal, as defended by the ECtHR, but am concerned about the analytical tools for judging overall fairness. Goss rightly claims that 'the Article 6 case law ought to be more consistent, more coherent, and better explained'.[74]

I am not against the proportionality test in general and the overall balancing sub-test for limitations on fair trial rights. However, as explained above, applying a formulaic balancing process to a bundle of fair trial rights is challenging, especially in the case of summary criminal processes, in which numerous conflicts among procedural rights and between procedural rights and substantive rights occur. Thus, in the next part I will suggest analytical tools that act as supplements (not replacements) for formulaic overall balancing, which will help to determine factors that make the process unfair. My aim is to develop 'overall *un*fairness' reasoning in summary processes by seeking answers to the question of what restrictions on rights *cannot* violate rather than asking what restrictions on rights *can*

[69] Goold, Lazarus and Swiney, above n 22, 2; Chan, above n 39, 9.
[70] Goss, above n 13, 124-201.
[71] Jochen von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 67; Laura Hoyano, 'What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' [4] (2014)(1) *Criminal Law Review* 4.
[72] Vitkauskas and Dikov, above n 49, 9.
[73] Cf. Jerold H. Israel, 'Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines' [303] (2001) 45(2) *Saint Louis University Law Journal* 303.
[74] Goss, above n 13, 204.

violate. As Guido Calabresi has claimed, determining which process is unfair is easier than determining which process is fair.[75]

IV. SUPPLEMENTARY ANALYTICAL TOOLS FOR ASSESSING THE OVERALL (UN)FAIRNESS OF SUMMARY PROCESSES

4.1. Two-stage overall fairness

Internal and external overall fairness (fairness between procedural rights, between procedural rights and substantive rights/public interests)

In the context of the limitation on fair trial rights, it is well known that there are both internal and external conflicts between rights. An internal conflict is one between two procedural rights among fair trial rights. For example, Eva Brems analyses three clashes between fair trial rights: equality of arms v. reasonable time; the right to a public hearing v. the right to trial within a reasonable time; the right to examine witnesses v. the right to remain silent.[76] In addition to internal conflicts, procedural rights may also clash with substantive rights. Brems explores four examples: presumption of innocence v. freedom of expression; the right to examine witnesses v. human rights of the witnesses; the right to examine witnesses v. the right to protection of private life; the right of access to a court v. freedom of political expression.[77] Moreover, regarding external conflicts, it should be understood that fair trial rights may conflict with public interests such as crime prevention and efficiency. In both internal and external conflicts, the essence of fair trial rights, which is to say, overall fairness, must be preserved.[78]

Two-stage overall fairness in summary criminal processes (fairness between stages of procedure)

While internal and external overall fairness (fairness between human rights) is a usual approach to the limitation of fair trial rights, I would like to raise the need for an approach involving *two-stage overall fairness* (fairness between stages of the procedure), which is a common paradigm in summary processes for minor offences. It should be noted that serious offences proceedings at the criminal court involve a *one-trial-focused* process, even though the process may be split into a pre-trial stage and a trial stage. By contrast, summary processes often reflect a *two-trial* design.

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[75] Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, 1970) 26; Cf. J. R. Lucas, *On Justice* (Clarendon Press, 1980) 73.
[76] Brems, above n 6, 305-11.
[77] Ibid. 311-25.
[78] *Pelissier and Sassi v France* (2000) 30 EHRR 715 [46]; *Brown v Stott* (2003) 1 AC 681 [704].

The main characteristic of summary processes is that the process is designed in two stages for a defect-curing objective or a preventive objective. The two stages of summary processes are essentially connected. For the defect-curing objective, summary processes are, at the first-instance consideration, managed by police or administrative agencies, and many procedural rights are circumvented for the sake of efficiency, crime prevention and regulation. They are designed so that, in the second-instance, they are subject to an appeal or review by a tribunal and procedural rights are guaranteed at this higher level with the aim of correcting mistakes at the previous stage. Defect-curing models accept a sacrifice of procedural fairness at the first stage on the assumption that heightened procedural safeguards at the appeal/review stage are able to cure previous mistakes. For the preventive objective, the second stage is not aimed to cure the defects at the first stage, but instead, the first stage is a necessary condition which may provoke the second stage. The two stages of the preventive model are in principle separate but they are *de facto* connected in the sense that the enforcement of the previous measure is backed by the later measure, or the initiation of the later measure depends on the previous measure.

As illustrated in the following table and analysis, English and Vietnamese summary processes provide four models of two-stage overall fairness: a strong defect-curing model, a medium defect-curing model, a criminal preventive model and a criminal educational model. The models differ in the types of offences and procedures they are designed for.

Table 1: Four models of two-stage overall fairness in summary criminal processes

Model	**Types of offences**	**Level of procedural rights protection**	
		1st stage	2nd stage
A. The strong defect-curing model	E&W: out-of-court disposals for the least serious crimes (both real crimes and minor regulatory offences)	weak	strong
B. The medium defect-curing model (review model)	E&W: serious regulatory offences VN: administrative offences	weak	medium
C. The criminal preventive model	E&W: preventive orders for anti-social behaviours	medium	strong
D. The criminal educational model	VN: educational preventive measures for repeat minor offence violators	weak	medium

Note regarding the table:

- E&W: England and Wales; VN: Vietnam
- *Weak protection of procedural rights*: non-court adjudication (administrative agencies, police), many restrictions on criminal fair trial rights
- *Medium protection of procedural rights*: civil/administrative court adjudication, some restrictions on criminal fair trial rights
- *Strong protection of procedural rights*: full-function criminal court adjudication, no restrictions or exceptional restrictions on criminal fair trial rights

(A) The *strong defect-curing model* involving weak rights protection at the first stage and strong rights protection at the second stage. More than three decades ago in the case of *Öztürk v Germany*, the ECtHR confirmed the legitimacy and appropriateness of a two-step procedure in dealing with minor offences:

> Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6).[79]

Accordingly, for the sake of efficiency, the police (mostly) and administrative authorities instead of the courts, are entitled to examine cases relating to minor criminal offences at the first instance. This diversion is accompanied by a sacrifice of procedural fairness. In particular, the right to an impartial, independent and competent tribunal is no longer fully guaranteed. Furthermore, many other criminal due process rights have been removed or limited, such as the right to free legal aid and the right to a public hearing. Given these factors, procedural protection at this step is weak.

To justify poor procedural fairness at the first stage, the ECtHR allows the option that the accused has the right to challenge the case at a criminal court, which offers the guarantees of Article 6. Strong protection of procedural rights at the second stage aims at curing possible defects at the first stage. Arguably, this is a strong defect-curing model.

This model has been famously applied to the regime of administrative/regulatory offences (*Ordnungswidrigkeitengesetz*) in Germany. Recently, which is to say, since the early years of this century, the jurisdiction of England and Wales has widely adopted the

[79] *Öztürk v Germany* (1984) 6 EHRR 409 [56]. See also: *Hennings v Germany* (1993) 16 EHRR 83; *Lauko v Slovakia* (1998) 33 EHRR 994; *Malige v France* (1999) 28 EHRR 578.

strong defect-curing model for the regime of out-of-court disposals in dealing with the least serious offences.[80] Here it should be noted that this group of trivial offences under the regulation of out-of-court disposals only accounts for a proportion of minor/summary offences in England and Wales.

(B) The *medium defect-curing (or review) model* involving weak rights protection at the first stage and medium rights protection at the second stage. In *Bryan v United Kingdom* the ECtHR confirmed the principle of rectifiability in the judicial review of administrative actions, according to which,

> even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 para. 1 (art. 6-1) in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1' (art. 6-1).[81]

The notion of 'full jurisdiction' means that the appeal tribunal has 'jurisdiction to examine the merits of the matter'[82] or 'jurisdiction to examine all questions of fact and law relevant to the dispute'.[83] As the UK is a contracting party to the ECHR, the UK courts have followed the reasoning of the rectifiability principle.[84]

It is important to note that, in principle, the review model only applies to disputes regarding 'civil rights and obligations' rather than 'criminal charges'. Nevertheless, in many jurisdictions such as England and Vietnam, the sanctioning of regulatory/administrative offences is not considered a determination of a criminal charge but equated with other administrative actions of administrative bodies. This is the result of two theories. First, in the Common Law world, it has been recognised that regulatory offences are *mala prohibita*, which are different from *mala in se* (real crimes).[85] While

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[80] See: House of Commons Home Affairs Committee, *Out-of-Court Disposals - Fourteenth Report of Session 2014–15* (2015); HM Government and College of Policing, *Consultation on Out of Court Disposals* (2013); Office for Criminal Justice Reform, *Initial Findings from a Review of the Use of Out-Of-Court Disposals* (2010).

[81] *Bryan v United Kingdom* (1995) 21 EHRR 342 [40].

[82] *W v United Kingdom A 121-A* (1987) 10 EHRR 293 [82].

[83] *Terra Woningen B.V. v Netherlands* (1996) 24 EHRR 456 [52].

[84] *Tehrani v United Kingdom v Central Council for Nursing Midwifery and Health Visiting* [2001] IRLR 208; [2001] ScotCS 19 [55].

[85] For example, see: Henry M. Hart, 'The Aims of the Criminal Law' [401] (1958) 23(3) *Law and Contemporary Problems* 401; Grant Lamond, 'What is A Crime?' [609] (2007) 27(4) *Oxford Journal of Legal Studies* 609, 631-2; Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in R.A. Duff et al (eds), *The Structures of the Criminal Law* (Oxford University Press, 2011) 105; Victor Tadros, 'Criminalization and Regulation' in R.A. Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2011) ; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008) 119; Erik Luna, 'The Overcriminalization Phenomenon' [703] (2005) 54 *American*

mala in se are dealt with by strict procedural due process, *mala prohibita* are usually dealt with by loose procedures. Second, in socialist jurisprudence, for the sake of efficiency, administrative offences have been artificially detached from the category of crimes and are handled by administrative agencies. In the relevant conception of non-criminal measures, a reviewing tribunal under the mechanism of the judicial review of administrative actions is deemed to be appropriate for dealing with regulatory/administrative offences.

As in the strong defect-curing model, at the regulatory offence sanctioning stage conducted mostly by administrative agencies and the police, procedural guarantees for the offenders are weak. Then, if the case is challenged, a reviewing tribunal with 'full jurisdiction' provides the accused with procedural protections under Article 6(1). But, apart from Article 6(1), no other criminal due process rights are guaranteed. Therefore the review process of the review model is characterised by *medium* rights protections rather than the *strong* rights protections that exist under the case reconsideration process of the strong defect-curing model. This is the main difference between the strong and medium defect-curing models.

(C) The *criminal preventive model* involving medium rights protection at the first stage and strong rights protection at the second. While the ECtHR has said little about preventive measures, the UK has developed a controversial jurisprudence of preventive justice regarding minor offences. Since 1999, anti-social behaviour, which may not even amount to a minor offence, has been subject to 'two-step prohibitions'.[86]

In England and Wales there have been two variations of 'two-step prohibitions' justice. The first is the regime of ASBO, which existed from 1999 to 2014.[87] The second variation is the scheme of the Injunction to Prevent Nuisance and Annoyance (IPNA), which appeared in 2014.[88] At the first step, both ASBO and IPNA have regulated antisocial behaviour[89] through so-called *civil* orders/injunctions, according to which some restrictions of liberty are inflicted on perpetrators after so-called *civil* proceedings. However, it is

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University Law Review 703, 713; Dick Thornburgh, 'The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes' [1279] (2007) 44(4) *American Criminal Law Review* 1279.

[86] AP Simester and Andrew con Hirsch, 'Regulating Offensive Conduct through Two-Step Prohibitions' in Andrew con Hirsch and AP Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, 2006).

[87] Under the *Crime and Disorder Act 1998*.

[88] Under the *Anti-social Behaviour, Crime and Policing Act 2014*.

[89] An antisocial behaviour is understood as an act that 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household' according to the ASBO scheme (*Crime and Disorder Act 1998* s.1 (1) (a)) or as an act that is 'capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises' according to the IPNA scheme (*Anti-social Behaviour, Crime and Policing Act 2014* Section 2.1, Part 1 Injunctions).

important to note that these two types of civil orders are backed by the genuine criminal law, as violations of ASBO or IPNA can be subject to a criminal conviction at a normal criminal court. Thus it has been claimed that for ASBO, the civil-order-imposing step and the criminal-court step should be considered as a continuous criminal process.[90] This also applies to IPNA.

At the first stage, because of the notion of a *civil* order/injunction,[91] the procedure has been designed to be more civil than criminal. As some criminal fair trial rights are limited in a civil-court adjudication, the protection of procedural rights is arguably at the medium level. Here the medium protection of procedural rights at civil courts is milder than the strong safeguards at criminal courts (as in the case of the strong defect-curing model) but still more rigorous than the weak safeguard at administrative agency adjudications (as in the medium defect-curing model). At the second stage it is undeniable that strong rights protection is guaranteed at normal criminal courts.

(D) The *criminal educational model*, involving weak rights protection at the first stage and medium rights protection at the second stage. In Vietnam there has been a special kind of preventive justice called 'administrative handling measures', aimed at an 'individual who violates the law on security, order and social safety that does not constitute a crime'.[92] These measures can seriously deprive repeat minor offences violators of their liberty by sending them into isolation educational centres. The nature of these measures is vague as the legislation is unclear on this. Officially, isolation administrative handling measures are dealt with by the court, but the proceedings are considered to be neither criminal, nor civil, nor administrative in nature. However, as I claimed previously, these measures are reminiscent of ones associated with criminal charges, because there is a possibility of liberty deprivation and the application of some criminal due process.[93] I call this the 'criminal educational model' because the administrative handling measures are said to have an educational purpose but are in fact characterised by criminal features.

If we consider administrative handling measures through the lens of criminal due process, arguably the procedure reflects weak protection at the administrative-offence-

[90] Andrew Ashworth and Lucia Zedner, *Preventative Orders: A Problem of Undercriminalization?* (Oxford University Press, 2010); R.A. Duff, 'Perversions and Subversions of Criminal Law' in R.A. Duff et al (eds), *The Boundaries of Criminal Law* (Oxford University Press, 2010).
[91] *R. (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea Royal London Borough Council R (McCann & others) v Crown Court at Manchester and another* (2002) UKHL 39.
[92] *Act on Handling of Administrative Offences 2012* Article 2(3).
[93] The Act on Handling Administrative Offences 2012 protects several criminal due process rights such as reasonable time (Art 3(1)(b)), fairness (Art 3(1)(b)), publicity (Art 3(1)(b)), the right not to be compelled to testify against himself or to confess guilt (Art 3(2)(d)), and the right to review by a tribunal (Art 15(1)).

sanctioning stage and medium protection at the administrative-handling-imposing stage. As in the case of the criminal preventive model in England and Wales, the administrative-offence-sanctioning stage and the administrative-handling-imposing stage should be considered as a continuous process, as the first stage is a necessary condition of the second stage.

Two differences between the criminal preventive model in England and the criminal educational model in Vietnam should be noted here. First, while the first stage of the criminal preventive model is conducted by the court, which is separate from the administrative-offence-sanctioning stage, the first stage of the criminal educational model is initiated at the administrative-offence sanctioning stage by administrative bodies. This is because the criminal preventive model targets anti-social behaviour, which is not necessarily a minor offence, whereas the criminal educational model is concerned with repetitions of minor offences violations. The second difference is that while both stages of the criminal preventive model take place in courts (the civil court and criminal court), the criminal educational model begins with administrative sanctioning for a repetition of minor offences and ends at a hearing of the court to impose an administrative handling measure.

How to improve those models?

Although two-stage overall fairness models have proved to be legitimate in summary criminal processes, these models still need to be redesigned, as described in Table 2 and explained in the following texts.

Table 2: Proposal for a redesign of procedural rights in summary criminal processes

Model	**Type of offences**	**Level of procedural rights protection**	
		1st stage	2nd stage
A. The strong defect-curing model	trivial offences (E&W) *-> serious regulatory offences; minor real crimes*	weak -> *medium (quasi-court)*	strong
B. The medium defect-curing model (Review model)	serious regulatory offences (E&W) administrative offences (VN) *-> trivial offences (trivial real crimes + trivial regulatory offences)*	weak -> *medium (quasi-court)*	medium
C. The criminal preventive	the offence of dangerousness (E&W)	medium -> *strong*	strong

Model	Type of offences	Level of procedural rights protection	
		1st stage	2nd stage
model		*(quasi-criminal-court)*	
D. The criminal educational model	the offence of dangerousness (VN)	weak -> *medium (quasi-court)*	medium -> *strong (quasi-criminal-court)*

Note regarding the table: plain texts: current design; italic texts: proposal for redesign

(i) The suitability of two-stage overall fairness models for types of criminal charges. This part claims that the current use of defect-curing models is not appropriate for certain types of minor offences that the models deal with. It will be argued that the strong defect-curing model is not suitable for trivial offences but more suitable for serious regulatory offences and minor real crimes, and that the medium defect-curing model is not suitable for serious regulatory offences but more suitable for trivial offences. This part will also discuss the inadequacy of procedural safeguards in all four models, and argue for a strengthening of procedural rights protections.

Strong defect-curing model. Arguably, the strong defect-curing model is appropriate for non-trivial summary offences, which are comprised of serious regulatory offences and minor real crimes. For the sake of regulation and efficiency, it is understandable that the sanctioning procedure for regulatory offences and minor real crimes is first dealt with by administrative agencies and the police. Nevertheless, given the seriousness of many regulatory offences and the possibly severe consequences of many minor real crimes, strong procedural rights protections are required at the appeal stage. Insofar as the review stage serves as a cure for the sanctioning stage, the reviewing tribunal should act as a second instance judicial body and should consider all issues relevant to the case (including matters of fact and law). In principle, the remedial procedure must be strong enough to be able to cure the possible defects of the previous stage.

Interestingly, the regime of OOCDs in England and Wales, even if applied only to the least serious (trivial) offences, follows this model. As far as the test of proportionality in the narrow sense is concerned, the ECtHR has held that limitations on those rights are permitted once they satisfy the test of a legitimate aim and must not 'impair the very essence' of rights.[94] Nicola Padfield has also raised concerns about the transparency of out-

[94] *Ashingdane v United Kingdom* (1985) 7 EHRR 528 [57], [59].

of-court orders and suggested that these disposals should be handled in an open process in magistrates courts to increase community confidence in criminal justice.[95] Ashworth and Zedner have recommended three requirements of proportionality for OOCDs: (1) they should remain with the lowest offences; (2) the penalties should be justifiable; and (3) the right to court access should be guaranteed.[96] On these views, limitations on rights can be justified if the right to a fair and public hearing by a competent, independent and impartial tribunal enshrined in Article 6(1) is maintained at the second stage. This condition is necessary for all OOCDs. As Tom Hickman has emphasised: 'the right of access to the court is at the heart of the common law constitution and… the wellspring for the modern jurisprudence on fundamental common law rights'.[97]

OOCDs ensure the right to a fair hearing in a criminal court in different ways. A recipient of Penalty Notice for Disorder (PND) has 21 days to either pay a fixed amount of fine or request a criminal trial in Magistrates' Court. A similar mechanism is applied to the Fixed Penalty Notice with a longer period (28 days). Breach of a conditional caution leads to a criminal prosecution for the original offence. After a cannabis warning for a first possession offence, the second offence brings about a PND, and a criminal charge applies to a third offence. In sum, a criminal court is the last resort if OOCDs do not suffice. This mechanism is accepted by the Strasbourg Court's case-law, such as *Öztürk v Germany*.[98]

In contrast to the OOCDs for trivial offences, in both England and Vietnam, it is problematic that a large number of serious regulatory offences have been under the review model rather than the strong defect-curing model. In England, Lord Hoffman argues that regulatory functions do not necessarily require 'a mechanism for independent findings of fact or a full appeal' to promote efficient regulation.[99] Thus, if Lord Hoffman's argument is accepted, the test of least impairment for regulatory sanctions is passed. Furthermore, the test of proportionality in the narrow sense would also be met, since the current legal framework is likely to agree with Julia Black's view that 'on balance the advantages of regulatory or administrative sanctions outweigh their disadvantages as enforcement tools, as long as proper procedures are in place for their implementation'.[100]

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[95] Nicola Padfield, 'Out-of-court (Out of Sight) Disposals' (2010) 69(1) *Cambridge Law Journal* 6, 8.
[96] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, 49.
[97] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 298.
[98] *Öztürk v Germany* (1984) 6 EHRR 409. See also: *Hennings v Germany* (1993) 16 EHRR 83; *Lauko v Slovakia* (1998) 33 EHRR 994; *Malige v France* (1999) 28 EHRR 578.
[99] *Begum v London Borough of Tower Hamlets* [2003] 2 AC 430 [42]-[47].
[100] Law Commission, *Criminal Liability in Regulatory Contexts* (2010) 161.

On the contrary, however, I am sceptical about the proportionality of current regulatory process, for three reasons. Firstly, the present requirements of procedural protection at both stages may not be sufficient for non-minor contraventions. Macrory's report, as well as certain jurisdictions such as Australia, recognise a principle that administrative penalties are generally suitable for minor offences.[101] Indeed, the minor nature of offences would justify the substantial reduction of due process rights. However, as the Constitution Committee has shown, the Regulatory Enforcement and Sanctions Act 2008 (RESA) does not put a ceiling on the variable monetary penalty, while the imposable maximum fine in Magistrates' Courts is £5000.[102] Consequently, administrative penalties can be substantial, and regulatory offences should not be regarded as exclusively minor or low-level.[103] Secondly, at the imposition stage restrictions on the right to information and the right to defence are unacceptable, especially when no one can know all of the thousands of *mala prohibita* regulatory offences.[104]

A third concern is that procedural protection at the tribunal stage might be inadequate compared to that which pertains at the imposition stage. While the sanction stage explicitly employs the criminal standard of proof 'beyond a reasonable doubt', the appeal stage may use merely the civil standard of proof on the 'balance of probabilities'.[105] It is inconsistent that the first stage is dealt with at the level of a criminal charge while the second stage is dealt with merely at the level of a non-criminal standard. Insofar as the tribunal process is the last resort, it should be much more principled than the preceding process, and should be equipped with genuine criminal procedures to be able to correct possible errors. There have been some signs of applying more criminal safeguards to the appeal process. Macrory's view has recently changed from suggesting that the civil standard of proof should be used in the Regulatory Justice Review [106] to suggesting that the criminal standard should be

[101] Richard B. Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) 51; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC Report 95)* (2002) 83.
[102] Constitution Committee, *First Report of Session 2007-2008* (2007) [12]; Julie Norris and Jeremy Phillips, *The Law of Regulatory Enforcement and Sanctions: A Practical Guide* (Oxford University Press, 2011) 120.
[103] Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74(1) *Modern Law Review* 1 8; In the US, regulatory offences include both misdemeanours (mostly) and felonies (Paul H. Robinson and Michael T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve* (Oxford University Press, 2006) 191).
[104] Ashworth, above n 103, 10, 21.
[105] The RESA is silent on the standard of proof at the appeal stage so in principle the tribunal can determine the standard of proof.
[106] Macrory (2006), above n 101, 48.

used.[107] Particularly in the sphere of environmental regulation, a criminal standard of proof is required to prove the commission of an offence on appeal (except in the case of stop notices).[108] This positive development is expected to be incorporated into the RESA.

The appeal stage should be characterised by adequate protection of criminal procedural rights. As Ashworth and Zedner argue: '[a]ny such regulatory system would need to comply with the European Convention of Human Rights, but one way of ensuring that is to provide for an avenue of appeal to a criminal court with full Convention safeguards'.[109] If not, it is an infringement of the very essence of the right to a fair trial, as confirmed by the case of *Öztürk*.[110]

According to the Strasbourg Court's case-law, the concept of *minor* offences includes regulatory offences punishable by a large money penalty.[111] It is important to note that the *Öztürk* case calls for all the 'guarantees of *Article 6*' of the appeal tribunal, rather than merely the 'guarantees of *Article 6 para. 1*', as required by the *Bryan* case. Hence the current tribunal of regulatory justice would infringe the test of proportionality in the narrow sense.

Medium defect-curing model (Review model). As noted, this model is inappropriate for the regimes of regulatory offences in England and administrative offences in Vietnam, in the sense that, albeit their seriousness, a great number of these offences should fall under the review model instead of the strong defect-curing model. Arguably, the review model is only suitable for trivial offences, including trivial real crimes and trivial regulatory offences. Triviality justifies the abandonment of strong procedural protections at the reviewing stage. In contrast to the requirement of strengthening the rigour of summary processes (in accordance with one of the main arguments of this study), if the review model is redesigned to be applied to trivial offences only, rather than covering the much larger ambit of regulatory/administrative offences, a less rigorous review tribunal, compared to the current requirement of a 'full-jurisdiction' review tribunal, may suffice. Accordingly, the review process that just takes account of the law rather than matters of fact should be allowed. Obviously, it is a waste of resources that strong procedural

[107] Richard Macrory, 'Sanctions and Safeguards: The Brave New World of Regulatory Enforcement' (2013) 66 *Current Legal Problems* 233, 254.
[108] *Environmental Civil Sanctions (England) Order 2010* s 10(2); Food and Rural Affairs Department for Environment, *Civil Sanctions for Environmental Offences* (2010) [6.8].
[109] Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15(4) *New Criminal Law Review* 542, 568.
[110] *Öztürk v Germany* (1984) 6 EHRR 409 [56] (emphasis added). See also: *Hennings v Germany* (1993) 16 EHRR 83; *Lauko v Slovakia* (1998) 33 EHRR 994; *Malige v France* (1999) 28 EHRR 578.
[111] A six-million-euro sanction for an Italian company breaching competition law is considered minor criminal sanction. See: *A. Menarini Diagnostics S.R.L. v Italy* (2011) (ECtHR) [59].

protections are applied to the review of trivial penalties. This is simply a cost-benefit calculation. Article 2 of the Protocol No.7 to the ECHR may support this revision of the review model. Article 2 refers to the right of appeal in criminal matters, according to which '[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal'. In the *Explanatory Report to Protocol No.* 7, the Council of Europe grants a wide margin of discretion to member states, in the sense that the appeal tribunal may consider both matters of fact and law or just matters of law.

The criminal preventive model and the criminal educational model. A deprivation of liberty such as imprisonment or isolated detention always necessitates strong procedural protections. As Andrew Ashworth and Lucia Zedner claim, the 'possibility of imprisonment is a fairly conclusive reason to find that the proceedings are in essence criminal'.[112] Thus dangerous individuals, who may be subject to deprivation of liberty, should enjoy criminal-like procedural rights (strong procedural protections). However, it should be noted that a few procedural rights restrictions may be acceptable.[113]

(ii) Strengthening procedural rights protection: A recognition of the limited-criminal-tribunal status of civil/administrative courts and administrative agencies in deciding criminal charge. In all four suggested two-stage overall fairness models, there is a need for strengthening procedural rights protection, particularly at the first stage. As for the strong defect-curing model, there are four reasons for providing more procedural safeguards for offenders. First, the seriousness of the penalties demands a court-like degree of fairness instead of weak protection. Second, because most administrative sanctioning cases are not heard in court, the accused should enjoy adequate (i.e., medium) procedural protections at the first stage conducted by administrative agencies and the police. Third, as Kenneth Warren argues, in the event of the case being heard by a judicial body like a court or a tribunal, it is easier for the judicial body to hear the case if the previous procedures conducted by administrative bodies are trial-like processes.[114] Fourth, the strength of due process guarantees at the first stage may satisfy the offender's perception of procedural fairness, in which eventuality the case may not be taken to court. It has been shown that one of important factors making people obey the law is procedural fairness.[115] With regard to the medium defect-curing model, given the need for a review tribunal at the second

[112] Ashworth and Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions', above n 96, 46 (footnote 115).
[113] Even in normal criminal proceedings, there are exceptions that a few due process rights are limited.
[114] Kenneth F. Warren, *Administrative Law in the Political System* (Westview Press, 5th ed, 2011) 263.
[115] Tom R. Tyler, *Why People Obey the Law* (Yale University Press, 1990).

stage, which only considers matters of law, the previous sanctioning stage should exhibit court-like fairness with medium procedural protections to ensure a correct examination of facts. Concerning the criminal preventive model, as argued above, medium procedural protection at the first stage is not sufficient for those subject to deprivation of liberty. Thus this model demands strong procedural safeguards.

One of the major reasons that the first stage usually protects fewer procedural rights than it ought to do is that both in England and Vietnam administrative agencies, administrative tribunals and civil courts have not been considered criminal tribunals under Article 6 of ICCPR and Article 14 of ECtHR. In Vietnam, the notion of judicial tribunals only attaches to the court system.[116] As the 2013 Vietnamese Constitution confirms, '[t]he People's Courts are the judicial organ of the Socialist Republic of Vietnam, exercising judicial power'.[117] There has been a conventional understanding that a determination of a criminal charge requires a criminal trial/tribunal that guarantees criminal fair trial rights under international human rights law instruments. As Thomas Weigend explains, '*Nulla poena sine processu* - The state cannot punish its citizens without having determined guilt in proper proceedings. This maxim by itself guarantees the existence of criminal trials, because proper proceedings in criminal matters imply an official and public fact-finding before an impartial tribunal'.[118] Although handling criminal offences, administrative agencies, administrative tribunals and civil courts can escape many criminal fair trial safeguards because of their non-criminal-tribunal status. Philip Hamburger notes, critically, that '[e]ven if the executive could exercise the power that the Constitution gives to the courts and their judges, the executive cannot simultaneously enjoy judicial power in criminal matters and escape the constitutional limits on such power'.[119] This problem is common in summary criminal processes, which are mostly dealt with outside the traditional criminal courts.

As discussed above, the ECtHR has established a rectifiability principle which allows many administrative agencies to deal with criminal charges 'provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does

[116] Uc Tri Dao, 'Judicial Power in the State Power Mechanism under the 2013 Constitution (Quyen tu phap trong co che quyen luc nha nuoc theo Hien phap 2013)' in Uc Tri Dao and Giao Cong Vu (eds), *Comments on the 2013 Constitution of the Socialist Republic of Vietnam (Binh luan khoa hoc Hien phap nuoc Cong hoa xa hoi chu nghia Vietnam 2013)* (Labour - Society Publishing House, 2014) 480.
[117] Article 102(2).
[118] Thomas Weigend, 'Why Have a Trial When You Can Have a Bargain?' in Antony Duff et al (eds), *The Trial on Trial, Volume 2, Judgment and Calling to Account* (Hart Publishing, 2006) 208.
[119] Philip Hamburger, *Is Administrative Law Unlawful?* (The University of Chicago Press, 2014) 268.

offer the guarantees of Article 6'.[120] However, it is still problematic that the Strasbourg Court is not clear about the legal status of these administrative bodies, in the sense of noting whether they are a kind of tribunal or at least a quasi-tribunal. The ECtHR case law appears not to consider administrative bodies as tribunals under Article 6 of the ECHR,[121] while they nevertheless impose criminal punishments.

Here I would like to emphasise that the ECtHR has seemed to developed two different principles – the rectifiability principle and the appeal principle – that may cause confusion. These two principles are different in several ways. First, at the first stage, the rectifiability principle does not view administrative bodies as tribunals under Article 6 (as discussed above), while the appeal principle only applies to bodies considered as tribunals under Article 6. In the *Explanatory Report to Protocol No.* 7, the Council of Europe has confirmed this feature of the appeal principle:

> This article recognises the right of everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher tribunal… the word "tribunal" has been added to show clearly that this provision does not concern offences which have been tried by bodies which are not tribunals within the meaning of Article 6 of the Convention.[122]

Another difference between the two principles is that the second stage of the process is regarded as a *rectifying/curing* process in terms of the rectifiability principle, but viewed as an *appeal* process in terms of the appeal principle. Third, the rectifiability principle requires a full-jurisdiction review tribunal that can examine both matters of fact and law, whereas the appeal principle allows that the appeal tribunal just examines matters of law (as discussed previously), and even allows for ignorance of the appeal process. According to the *Explanatory Report to Protocol No.* 7, the right to appeal 'may be subject to exceptions in regard to offences of a minor character, as prescribed by law', and an important criterion of a minor offence is that the offence is not punishable by imprisonment.[123]

The two principles cause confusion, in the sense that for the same minor offence, there are two ways in which a two-step procedure may be applied. If the minor offence is first

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[120] *Öztürk v Germany* (1984) 6 EHRR 409 [56].
[121] For example, see: *Obermeier v Austria* (1991) 13 EHRR 290 [70] and *Vasilescu v Romania* (1998) ECHR 42 [39]-[41]. See also: Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002) 523.
[122] Council of Europe, *Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (1984) [17].
[123] Ibid. [20]-[21].

dealt with by an administrative body characterised by poor procedural guarantees, the case is subject to a remedial process characterised by strengthened procedural guarantees. But if the minor offence is first tried by a court characterised by Article 6 procedural guarantees, the appeal process can be removed as a result of an exception to the right to appeal.

To resolve this uncertainty, lessons from the US and France are helpful. Since the passing of the Administrative Procedure Act 1948 (APA), American administrative law has recognised a court-like administrative hearing, according to which '[t]he agency hearing, even a formal hearing, is not expected to be a copy of a formal trial, but hearings should reflect basic court procedures'.[124] Indeed, the APA requires administrative agencies to respect many procedural due process rights, which are guaranteed in courts.[125] The French courts, like the ECtHR, do not officially deem regulators to be tribunals under domestic law, but view independent regulators as tribunals, on the basis of the ECtHR's interpretation of the notion of a tribunal under Article 6.[126]

It is problematic that England and Vietnam do not recognise civil/administrative courts and administrative agencies as limited criminal tribunals when dealing with criminal charges. Here it is worth referring to the case of of *Baláž* made by the European Court of Justice, interpreting that 'a "court having jurisdiction in particular in criminal matters" is a court before which the person concerned will benefit from the rights guaranteed by Article 6(1), (2) and (3) of the European Convention on Human Rights when the case is tried'.[127] This case may support a quasi-criminal-tribunal status of those civil/administrative courts. Hamburger rightly claims that 'procedural rights developed most basically in response to prerogative proceedings, and they therefore were understood not merely as limits on the courts, but more generally as limits on the judicial power, whoever exercises it',[128] and that 'if the proceedings are criminal, then they surely are subject to the constitutional limits on criminal proceedings'.[129] In summary processes, civil/administrative courts and administrative agencies, in deciding criminal charges, should be considered limited criminal tribunals, and should therefore guarantee essential elements of fair trial rights, which will be discussed below.

4.2. The core (essential elements) of the right to a fair trial

[124] Warren, above n 114, 257.
[125] Ibid. 258.
[126] Dominique Custos, 'Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Gallicization' in Susan Rose-Ackerman and Peter L. Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010) 286.
[127] *Marián Baláž* (2013) C-60/12 (EUECJ) [90].
[128] Hamburger, above n 119, 499.
[129] Ibid. 268.

As argued previously, the level of fair trial rights guarantees gradually decrease as we descend the tiers of summary criminal processes.[130] Does this downgrading process stop when we reach the point of minimum criminal rights to a fair trial? The ECtHR, as well as the UK courts, have never answered this question adequately and systematically. Rather, they emphasise the essential 'overall fairness' of the process and point to the importance of specific rights in particular cases.

It could be argued that there have been three approaches to the core (or essential) elements of the right to a fair trial, which is almost never limited. First, the wording of international human rights law instruments such as the ICCPR and the ECHR suggests the notion of 'minimum guarantees'[131] or 'minimum rights'.[132] But in fact this approach is not about truly essential elements of the right to a fair trial, because the United Nations Human Rights Committee and the ECtHR, which are the two guardians and interpreters of the ICCPR and the ECHR respectively, have accepted restrictions on these minimum guarantees/rights in dealing with minor offences and even serious crimes.[133] Moreover, the list of minimum guarantees under the ICCPR slightly differs from the list of minimum rights under the ECHR.[134] Hence the ICCPR and the ECHR fail to provide a list of absolute, or at least essential, elements of fair trial rights.

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[130] Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 1.

[131] *International Covenant on Civil and Political Rights 1966* Article 14(3): 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.'

[132] *European Convention on Human Rights 1950* Article 6(3): 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

[133] Particularly, restrictions on fair trial rights are accepted for the sake of prevention of terrorism, drug control, protection of complainants in rape cases and prevention of drunk-driving (Brady, above n 18 176-81).

[134] The right not to be compelled to testify against himself or to confess guilt is a minimum guarantee in the ICCPR but not minimum rights in the ECHR.

The second approach is that the European Union made several attempts to create minimum procedural standards with the aim of promoting mutual recognition between different traditions of criminal justice.[135] However, such efforts seem to require that member states guarantee some due process rights that are normally disregarded, rather than to theoretically delineate minimum (or the non-removable) procedural rights. Furthermore, it is a significant flaw that such policies have not been concerned with minor offence procedures,[136] where fair trial rights are markedly lacking.

The third approach follows the reasoning about the very essence of a right developed by the ECtHR. The essence-of-rights theory seems to be very promising, as it is expected to delineate the core or essential elements/rights of fair trial rights. However, the notion of 'the very essence of the right' under ECtHR case law is unclear and confusing. The ECtHR has not created a firm and persuasive theory of the essence of rights in general or of fair trial rights in particular. On the one hand, it sometimes reasons that the protection of several procedural rights is essential (such as the right to access to courts[137] and the privilege against self-incrimination).[138] On the other hand, the ECtHR declares that these rights are not absolute but subject to limitations.[139] Another problem is that the Court has failed to provide a clear differentiation between essential and non-essential elements within a right, as Ryan Goss argues.[140] Goss also concludes that under the ECtHR case law, the process of determining the very essence of a right involves the process of a proportionality test.[141] Arguably, the ECtHR's theory of the very essence of a right is a version of the relative theory of the essential core of rights, as Robert Alexy explains.[142]

Because of the unpersuasiveness of the three noted approaches, this study aims to propose another method of reasoning on essential due process rights for summary criminal justice. First of all, it is necessary to provide an understanding of the core or essence of a right. According to Alexy, 'the essential core is what is left over after the balancing test has

[135] Laurens van Puyenbroeck and Gert Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU' (2011) 60 *International and Comparative Law Quarterly* 1017; Tjarda D.O. van der Vijver and Rufat R. Babayev, 'The Framework Dicision on Procedural Rights in Criminal Matters: One Small Step for Human Rights; A Giant Leap for Mutual Trust?' (2008) *Cambridge Student Law Review* 74; Robin Lööf, 'Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU' (2006) 12(3) *European Law Journal* 421.
[136] Vijver and Babayev, above n 135, 89.
[137] E.g., *Golder v United Kingdom* (1975) 1 EHRR 245.
[138] E.g., *Murray v United Kingdom* (1996) 22 EHRR 29 [49].
[139] E.g., *Ashingdane v United Kingdom* (1985) 7 EHRR 528.
[140] Goss, above n 13, 191.
[141] Ibid. 201.
[142] Alexy, above n 8, 193.

been carried out'.[143] If this is the case, I agree with Julian Rivers, who argues that the 'concept of "very essence" is practically useless'.[144] Indeed, the notion of the essential core is really only meaningful if it acts as a prerequisite for the proportionality test, for assessing the overall (un)fairness of limitations on fair trial rights. For this reason, I would argue that the essential core of fair trial rights should be conceptualised in the sense that, under normal circumstances, in the implementation of fair trial rights, the lack of an essential core leads in an obvious way to unfairness in the procedure as a whole. Here, 'normal circumstances' excludes emergency situations, in which fair trial rights are allowed to be derogated.[145] Thus the essential elements of a right are not necessarily absolute rights, which cannot be infringed in any circumstances. Under normal circumstances, obvious unfairness violates the never-fair principle, which has been developed by the ECtHR in serious crimes cases concerning the independence and impartiality of tribunals,[146] the use of evidence obtained by torture,[147] and access to a lawyer in the first interrogation.[148] Also, the never-fair reasoning may be useful for summary minor offences processes by different explanations, as follows.

The delineation of essential rights among fair trial rights should be done with caution because these rights are almost never limited. From the practice of summary justice, it can be seen that many important rights are restricted, such as the right to be presumed innocent, the right to protection against self-incrimination, and the right to access to a court. These are rights that have often been violated and need to be strongly protected rather than they are inherently absolute rights or essential rights in summary processes.

On the basis of the two-stage overall fairness reasoning previously discussed in Part 4.1, this article attempts to develop reasoning to help identify the core or essential elements of the right to a fair trial. Looking back at Table 2, it can be seen that the medium defect-curing model (or review model) employs the lowest level of procedural rights (medium level at both stages). This suggests that procedural rights that are essential in this model may be considered essential in other models too.

The experience of employing the medium defect-curing model in England leads to an argument that fair trial rights can be reasonably restricted, provided the limitations do not

[143] Ibid. 193.
[144] Julian Rivers, 'Proportionality and Variable Intensity of Review' [174] (2006) 65(1) *Cambridge Law Journal* 174, 187.
[145] *International Covenant on Civil and Political Rights 1966* Article 4; *European Convention on Human Rights 1950* Article 15.
[146] *Ciraklar v Turkey* (1998) 1998-VII [40]-[41].
[147] *Jalloh v Germany* (2007) 44 EHRR 32.
[148] *Salduz v Turkey* (2009) 49 EHRR 19 [55].

infringe the core or minimum procedural protections. To prevent violations of the never-fair principle, the essential core of fair trial rights includes six rights: (1) the right to equality of arms; (2) the right to a genuine review before a tribunal (including the right to be heard); (3) the right to be informed promptly of the nature and cause of the accusation; (4) the right to a defence (including the right to have adequate time and the facilities for the preparation of a defence); (5) the right to have the free assistance of an interpreter; (6) and the right to a reasoned judgment.[149] These requirements of minimum procedural protections impose a limit to limitation on fair trial rights.

It is an intuitive and reasonable thought that it is always unfair if procedures do not respect these six rights. First of all, the broad right to equality of arms must be protected as a general principle regardless of the seriousness of the offence. For summary processes, where a two-stage procedure is common, as discussed above, the right to equality of arms should be highlighted. Given the fact the many procedural rights of a traditional criminal court (particularly the right to an independent, impartial and competent tribunal) are no longer protected at the first stage of the proceedings, the administrative bodies and civil/administrative courts[150] dealing with minor offences should act as quasi-tribunals and quasi-criminal tribunals, respectively, and should therefore be bound by the necessary rights for guaranteeing equality of arms between offenders and the state.

Secondly, the right of access to a genuine review tribunal must be guaranteed as the last resort. Again, it should be affirmed that only through a genuine review tribunal can the right to be heard – which is 'regarded as an intrinsic element of a just trial' or 'an essential aspect of a fair trial'[151] – be effectively and adequately established. The guarantee of a genuine review is extremely important, as trivial offence justice is designed to minimise (or more usually exclude) unnecessary procedural rights, for the sake of the efficiency of the sanctioning process, provided the decision can be challenged and re-examined by a

[149] Comparatively, in a paper on the Polish regime of administrative sanctions, Maciej Bernatt reveals that The Polish Constitutional Court has come up with the essential values of procedural fairness, which is comprised of: (1) the right to be heard; (2) the right to have access to the file; (3) the right to comment on and to file a motion for evidence; (4) the right to a review by a tribunal; and (5) the reasonableness of the duration of the process (Bernatt, above n 50, 11-2). It can be seen that this list of the Polish Constitutional Court overlaps with the list I point out here. However, I thorough examination of the Polish case is beyond the scope of my paper.

[150] Here, 'criminal court', 'administrative court' and 'civil court' refer to common understandings of these terms. Also, these terms are normally used in legislation. Accordingly, criminal court deals with crimes, while administrative court has the function to review administrative actions, and civil court handles civil disputes and civil matters.

[151] Denise Meyerson, 'The Moral Justification for the Right to Make Full Answer and Defence' [237] (2015) 35(2) *Oxford Journal of Legal Studies* 237, 264-5.

tribunal. In other words, a genuine review is a condition for the sacrifice of procedural rights at the first stage.

Here I am not arguing that a genuine review tribunal leads to full criminal procedural rights (or what Ashworth and Zedner's call a 'full Convention safeguard').[152] On the contrary, the notion of necessary rights does not exclude appropriate limitations on rights. From the experience of the review model, a minimum requirement of this right is that an independent, impartial and competent tribunal can consider matters of law regarding the administrative sanctioning stage, provided that the administrative agencies have acted as quasi-courts and respected certain criminal fair trial rights. The review tribunal does not re-consider matters of fact, as it should trust the evidence collecting process carried out previously by the quasi-courts or administrative bodies. Reconsideration by the tribunal is a review process, which is a less intense process than a *de novo* consideration of an appeal.

The guarantee of the broad right to equality of arms and the right to a genuine review before a tribunal inevitably leads to the protection of the next four rights in the list. Arguably, without the right to be informed promptly of the nature and cause of the accusation, the right to defence, the right to have the free assistance of an interpreter and the right to a reasoned judgment, the accused cannot achieve equality of arms, as they could not then proactively participate in the process, particularly in the review stage.

V. CONCLUSION

This article has defended the view that the right to a fair trial is obviously not absolute, and has revealed significant limitations on elements of this right in summary minor offence processes. This fact raises a question about the extent to which procedural rights ought to be limited for summary processes. The context of minor offence processes is admittedly challenging, but provides a meaningful opportunity to address this theoretical issue.

Focusing on British jurisprudence and ECtHR case law, this article has argued that the proportionality test is likely to face a formidable obstacle when it comes to assessing the great limitations on fair trial rights in dealing with minor offences. The obstacle is that the balancing sub-test has simultaneously to address a series of conflicts, both internally (between fair trial rights) as well as externally (between elements of fair trial rights and substantive rights or public interests). The development of summary criminal processes in England and Vietnam has provided useful lessons on this matter. This study has shown that

[152] Ashworth and Zedner, 'Prevention and Criminalization: Justifications and Limits', above n 109, 568.

the proportionality test, despite its advantages, may not be sufficient in all circumstances and for all rights.

Hence, the article has proposed two analytical tools to act as supplements to the overall balancing process, for assessing the overall unfairness of limitations on fair trial rights in the context of minor offence justice. First, the article has identified four models of two-stage processes in the two jurisdictions, and has developed an argument for the suitability of each of the four models for dealing with different types of offence or measure. It is has also argued for a redesign of procedural rights protections for these models. Second, on the basis of the characteristics of two-stage overall fairness, the article has suggested several essential elements of the right to a fair trial that should be rigorously guaranteed in minor offence justice.

CHAPTER 7 (ARTICLE 6)

A QUEST FOR DUE PROCESS DOCTRINE IN VIETNAMESE LAW: FROM SOVIET LEGACY TO GLOBAL CONSTITUTIONALISM

Publication status
Under review
Contribution to the thesis
This article aims to answer sub-question 6: *Which lessons can the Vietnamese legal system learn from the English experience in order to entrench the constitutionality of limitations on fair trial rights in dealing with minor offences?* The sixth sub-question touches the second important part of the thesis' research question, that is, 'what are implications for Vietnam from the experience of England and Wales?'. By learning from the English experience in designing the summary minor offence justice, this article makes recommendations for the Vietnam's reform of minor offence processes in the context of recent Vietnamese constitutional developments.

A QUEST FOR DUE PROCESS DOCTRINE IN VIETNAMESE LAW: FROM SOVIET LEGACY TO GLOBAL CONSTITUTIONALISM

Dat T. Bui*

Abstract

Due process – the 'soul' of a modern constitution – was not seriously taken into account under purely socialist legal systems in general as well as in pre-2013 Vietnamese constitutions in particular. Since the 2013 Constitution, Vietnamese jurisprudence has incorporated the human-rights-limitation principle for the first time and strengthened the application of universal fair-trial rights. This constitutional development is the result of the fact that over the past two decades, the class-based perception of human rights has been increasingly less important and has been almost replaced by liberal universalism.

This article claims that by the influence of Soviet jurisprudence, the Vietnamese version of due process has been characterised by the fact that human rights could be arbitrarily trumped by public interests, and that fair trial rights have been problematically limited to criminal proceedings, and almost ignored in administrative procedures. The article analyses the importance of, and challenges involved in, incorporating the human-rights-limitation principle into the 2013 Constitution, and argues for an extension of procedural due process to minor offence justice in keeping with global constitutionalism. By examining the useful lessons of the English system, the article supports the idea of treating minor offences as types of criminal charge and recognising procedural pragmatism and procedural proportionality as against due-process-evading justice.

Key words: substantive due process, procedural due process, limitation on human rights, fair trial rights, administrative sanctions, administrative measures

I. INTRODUCTION

The doctrine of due process, which has been greatly enriched by the United States (US) constitutional law,[1] has gone beyond common law constitutionalism and become the 'soul' of any modern constitution. In the broadest sense, the due-process-of-law doctrine

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[1] According to the US Constitution, Due Process Clauses are prescribed in the Fifth Amendment ('No person shall be … deprived of life, liberty or property without due process of law …') and the Fourteenth Amendment ('…nor shall any State deprive any person of life, liberty, or property, without due process of law…').

reflects the values of the rule of law declared in the Magna Carta when it argued that the phrases 'rule of law' and 'due process' are synonyms[2] and interchangeable.[3] The ultimate role of due process is to protect individuals from the state's abuse.[4] In the US, albeit debatable, the idea of due process is manifested in both procedural due process and substantive due process.[5] In this article I hold that procedural due process aims to restrict executive and judicial powers when these affect human rights. At the same time, substantive due process aims to restrict legislative power by requiring an appropriate method to assess the reasonableness of acts that restrict human rights. Many other jurisdictions, influenced by international human rights instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), have approached procedural due process using the language of 'fair trial rights' or the 'right to a fair trial'.[6] Procedural due process or fair trial rights have been largely considered to be essential components of human rights in many constitutions. Meanwhile, substantive due process, which is reflected in human-rights-limitation principles in international human rights instruments, has increasingly been recognised, particularly in the context of a spread of the proportionality doctrine.[7] A human-rights-limitation principle requires that the state cannot interpret and implement constitutional rights arbitrarily, but has to give reasonable justifications for any limitation on rights. Notably, Article 29(2) of the UDHR prescribes:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

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[2] Geoffrey Marshall, 'Due Process in England' in J. Roland Pennock and John W. Chapman (eds), *Due Process* (New York University Press, 1977) 69.
[3] E. Thomas Sullivan and Toni M. Massaro, *The Arc of Due Process in American Constitutional Law* (Oxford University Press, 2013) 1.
[4] Ibid. xiii.
[5] Bryan A. Garner, *Black's Law Dictionary* (West, 9th ed, 2009) 575. For the debate about procedural due process and substantive due process, see: Ryan C. Williams, 'The One and Only Substantive Due Process Clause' [408] (2010) 120(3) *Yale Law Journal* 408; Nathan S. Chapman and Michael W. McConnell, 'Due Process as Separation of Powers' [1672] (2012) 121 *Yale Law Journal* 1672.
[6] See: *Universal Declaration Of Human Rights 1948* Articles 9, 10 and 11; *International Covenant on Civil and Political Rights 1966* Articles 9, 10, 11, 14 and 15; *European Convention on Human Rights 1950* Articles 5, 6 and 7; *Protocol No.7 to the European Convention on Human Rights 1984* Articles 2,3 and 4.
[7] Carlos Bernal Pulido, 'The Migration of Proportionality Across Europe' (2013) 11(3) *New Zealand Journal of Public and International Law* 483; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Doron Kalir trans, Cambridge University Press, 2012); Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73.

Practice has shown that the principle of due process was not seriously taken into account under purely socialist legal systems in general, or in pre-2013 constitutions in Vietnam. Indeed, in one of rare studies on due process in Vietnam, Dung Dang Nguyen – a prominent Vietnamese professor of constitutional law - has observed that terms in relation to the concept of 'due process' have infrequently appeared in Vietnamese legal forums.[8] Without a constitution-based human-rights-limitation principle (substantive due process), constitutional rights tended to be easily trumped by public interests, in which the state's promotion of communism was an ultimate goal. Moreover, the fair trial principle (procedural due process), which was perceived as an instrumental value in Marxist theory, was disconnected with some measures that seriously infringe human rights, such as administrative sanctions and administrative educational measures.

Since the 2013 Constitution, Vietnamese jurisprudence has incorporated the human-rights-limitation principle for the first time[9] and strengthened the application of universal fair-trial rights. This constitutional development is the result of the fact that over the past two decades, the class-based perception of human rights has been increasingly less important and has been largely replaced by liberal universalism. Dung Dang Nguyen claims that due process of law is a 'lawful process' that includes two requirements: (1) the 'substantive reasonableness or legitimacy' of legal norms; and (2) the 'procedural reasonableness of the state's powers'.[10]

Part II of this paper evaluates the influence of Soviet law on the Vietnamese conception and application of substantive and procedural due process. This part claims that under socialist jurisprudence, human rights could be arbitrarily trumped by public interests. Accordingly, fair trial rights have been problematically limited to criminal proceedings and almost ignored in administrative procedures. Part III examines the 2013 Constitution through the lens of the due process doctrine, which is well developed in American constitutional law as well as in international human rights instruments. This part first analyses the importance and challenges of incorporating the human-rights-limitation principle into the 2013 Constitution, which marks a shift in the protection of human rights towards global constitutionalism. I employ Law and Versteeg's idea of global constitutionalism as a trend in the development of modern constitutions in which

[8] Dung Dang Nguyen, 'Is the Rule-of-Law State the Spirit of Law or Due Process? ('Nha nuoc phap quyen la tinh than phap luat hay la dung quy trinh?')' [54] (2014)(1) *Vietnam National University Hanoi's Scientific Journal - Jurisprudence* 54, 60.

[9] Article 14(2) of the 2013 Constitution prescribes that '[h]uman rights and citizen's rights shall only be restricted by law in necessary circumstances for the reasons of national defence, national security, social order and security, social morality, and public health'.

[10] Nguyen, above n 8, 56.

fundamental rights have been increasingly recognised.[11] Accordingly, this paper focuses on two aspects of global constitutionalism in relation to constitutional rights: 'global revolution in due process'[12] and the 'migration of proportionality'.[13] Part III also raises the need to reconceptualise fair trial rights so as to extend them to the civil law and administrative law fields. In keeping with recent constitutional amendments, which have made a promising step towards global constitutionalism and universal due process, I support a rigorous incorporation of the due process doctrine into Vietnamese law.

Part IV raises the significance of a theory of substantive due process for procedural due process in the context of minor offence justice in Vietnam. The investigation of minor offence justice is helpful to understand the way substantive due process (rights-limiting methods) can been applied to numerous elements of procedural due process (fair trial rights). It is argued that the extension of procedural due process to minor offence justice is one of the demands of global constitutionalism which is supported by the 2013 Constitution. For a meaningful comparison, this article will examine summary criminal justice in the United Kingdom (through the criminal jurisdiction of England and Wales), which has a tradition of due process, but, has increasingly circumvented procedural safeguards for minor offence processes.[14] By examining the instructive practice of the English system, Part IV claims there are three lessons here for designing minor offence procedures in Vietnam: (1) treat minor offences as types of criminal charge, regardless of legal denominations; (2) recognise procedural pragmatism instead of due-process-evading justice; and (3) support procedural proportionality. A theory of procedural proportionality recognises different levels of rights for different types of minor offence. Accordingly, the assessment of the constitutionality of limitations on fair trial rights should be correspondent to each tier of minor offence processes. The assessment focuses on three ways of reasoning: (1) Essential elements of fair trial rights; (2) Two-step overall fairness; and (3) Proportionality analysis.

II. THE SOVIET LEGACY OF DUE PROCESS

2.1. Substantive due process: the limitation on human rights

[11] David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' [1163] (2011) 99(5) *California Law Review* 1163, 1170.
[12] Richard Vogler, 'Due Process' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) (particularly Part IV).
[13] Pulido, above n 7.
[14] See further: Dat T. Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights' [439] (2015) 41(3) *Commonwealth Law Bulletin* 439; Dat T. Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law' [382] (2016) 19(3) *New Criminal Law Review* 382.

Human rights in the socialist Vietnam: A brief summary

Since the establishment of the Democratic Republic of Vietnam in 1945, human rights has been a society-based idea guided by Marxism.[15] According to Marxist theory, law reflects the will of the ruling class (or the dictatorship of the proletariat)[16] and thus has been 'given an exclusively *instrumental* value as a means to pursue current policy and to fight against those who disagreed with this policy' in many socialist regimes.[17] The Soviet theory of state and law is comparable to the western school of legal positivism.[18] The individualist-naturalist notion of human rights has been disregarded[19] and sometimes considered as an obstacle to the socialist revolution.[20] As Karl Marx wrote in *On the Jewish Question*, 'the so-called rights of man, the rights of man as different from the rights of the citizen are nothing but the rights of the member of civil society, i.e. egoistic man, man separated from other men and the community'.[21] Therefore, as Steven Lukes claims, 'the Marxist canon provides no reasons for protecting human rights'.[22] Rights have tended to be easily trumped by state/public interests.[23] In preference to law, the state's association with communism was an ultimate goal.[24] Within this general perception of human rights, due process rights were understandably largely restricted in the Soviet Union, particularly in Stalin's era.[25] Having observed Marxism's influence on Vietnam, Dung D. Nguyen argues that Vietnam lacks a 'human rights tradition' like Western countries.[26] The impact of Marxist theory has been manifested in the idea that human rights are granted by the state.[27] This idea is seen in certain constitutional formulae regarding human/citizens' rights

[15] It is acknowledged that before 1975, liberalism influenced on the Vietnamese jurisprudence to some extent, particularly under the regime of Republic of Vietnam (1949-1975). But after the 1975 national unification, the Socialist Republic of Vietnam has made the Marxist theory of state and law play a predominant role.
[16] Hugh Collins, *Marxism and Law* (Oxford University Press, 1984) 27, 91; Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (Routledge-Cavendish, 2008) 22-3.
[17] Kosta Čavoški, 'The Attainment of Human Rights in Socialism' [365] (1981)(4) *PRAXIS International* 365, 370 (original emphasis).
[18] Harold J. Berman, *Justice in the U.S.S.R.* (Vintage Books, Revised ed, 1963) 91.
[19] John Gillespie, 'Evolving Concepts of Human Rights in Vietnam' in Randall Peerenboom, Carole J. Petersen and Albert H.Y. Chen (eds), *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France, and the USA* (Routledge, 2006) 477-8.
[20] Steven Lukes, 'Can a Marxist Believe in Human Rights?' [334] (1981)(4) *PRAXIS International* 334, 338.
[21] Karl Marx, *Karl Marx: Selected Writings* (Oxford University Press, 2nd ed, 2000) 60.
[22] Lukes, above n 20, 344.
[23] Čavoški, above n 17, 371-2.
[24] Berman, above n 18, 87.
[25] Čavoški, above n 17, 368-9.
[26] Dung Dang Nguyen, 'Approach (or Drafting Technique) to Human Rights in the Constitution ('Cach tiep can hay la cach thuc quy dinh nhan quyen trong Hien phap')' [41] (2011)(22) *Legislative Studies Journal* 41, 45-6.
[27] Ibid. 48.

such as 'citizen has the right to… according to law'[28] and 'citizens' rights are inseparable from their obligations'.[29] Furthermore, none of the Vietnamese constitutions have provisions asserting that the recognition of citizens' rights in the Constitution does not deny other fundamental rights that are not constitutionalised, as many other modern constitutions do.

From socialist-based human rights to state-based human rights

The socialist-based human rights framework in Vietnam was most clearly embraced in the era of the 1980 Constitution (1980-1992), which is considered a purely socialist Constitution.[30] Notably, Article 54 of the 1980 Constitution declares:

> Citizens' rights and obligations manifests the regime of collective mastery of the working people, the *harmonious combination* of the requirements of social life and individuals' legitimate freedoms, the *guarantee of agreement of interests* between the State, the collective and the individual in accordance with the principle that every one is for everyone, everyone is for every one. *Citizens' rights are inseparable from their obligations*. The State guarantees citizens' rights; the citizens must fulfil their obligations to the State and the society. (emphasis added)

Except for a few socialist terms such as 'regime of collective mastery of the working people', it is quite difficult to object to the idea of Article 54 in principle. It must be admitted that seeking a balance between individual rights and other interests has been done in every state, regardless of whether a state's constitution recognises a principle of balancing rights. Nevertheless, Vietnam under the 1980 Constitution era did not make a fair balancing but always prioritised the interests of the socialist state and the society over individual rights. For example, Article 67 of the 1980 Constitution demands that '[c]itizens enjoy freedom of expression, freedom of press, freedom of assembly, freedom of association, freedom of demonstration *in conformity with interests of socialism and the people*' (emphasis added). Article 67 further emphasises that '[n]o one may misuse democratic rights and freedoms to violate the interests of the State and the people'. This is the usual rationale for limiting rights, according to Mark Sidel.[31] It is problematic that without further reasonable justification, provisions like Article 54 and Article 67 have the potential to be interpreted arbitrarily. The 'rejection of political liberalization and

[28] E.g., See: *1992 Constitution* Article 57; *2013 Constitution* Article 25.
[29] See: *1992 Constitution* Article 51; *2013 Constitution* Article 15(1).
[30] Dung Dang Nguyen and Tuan Minh Dang (eds), *Textbook on Vietnamese Constitutional Law ('Giao trinh Luat Hien phap Viet Nam')* (Vietnam National University Publishing House, 2013) 78.
[31] Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart Publishing, 2009) 76.

democratization thus constitutes an outer limit to… the extent to which constitutional rights may become truly enforceable', as Gillespie and Chen claim.[32]

The socialist-based human rights framework transformed into a kind of state-based human rights framework in the era of the 1992 Constitution (1992-2013). Article 50 of the 1992 Constitution provides that '[i]n the Socialist Republic of Vietnam, human rights in the political, civil, economic, cultural and social fields are respected. They are being embodied in citizens' rights and are determined by the Constitution and law'. Here, socialist language as in Article 54 of the 1980 Constitution has disappeared, as Sidel has seen.[33] Article 51 of the 1992 Constitution also confirms the rights-and-obligations relationship principle, exactly as in Article 54 of the 1980 Constitution. Notably, Article 51 further emphasises the principle that '[c]itizens' rights and obligations are determined by the Constitution and law', which is viewed as a 'limiting language', according to Sidel.[34] Que T.K. Hoang has argued that although the 1992 Constitution did not provide a human-rights-limitation clause directly, it did indirectly provide parameters for the implementation of several rights such as Article 70 and Article 74.[35]

The clause 'rights… are determined by the Constitution and law' has been strongly criticised, as it could grant the National Assembly (which makes legislation) and the delegated legislators (which make other laws – i.e. legal documents including legal norms) unlimited authority to restrict constitutional rights. Accordingly, it is feared that constitutional rights could be circumvented arbitrarily.[36] The language of Articles 50 and 51 is extremely vague and arbitrary, and appears to grant the National Assembly and

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[32] John Gillespie and Albert H.Y. Chen, 'Comparing Legal Development in China and Vietnam' in John Gillespie and Albert H.Y. Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, 2010) 17.

[33] Sidel, above n 31, 92.

[34] Ibid. 93.

[35] Que Thi Kim Hoang, 'The Limitation on Human and Citizens' Rights and Freedoms and the Amendment of the 1992 Constitution ('Gioi hạn quyen va tu do cua con nguoi, cong dan va nhung van de dat ra trong sua doi, bo sung Hien phap 1992')' in Thai Hong Pham et al (eds), *The Amendment of the 1992 Constitution ('Sua doi, bo sung Hien phap 1992: Nhung van de ly luan và thuc tien')* (Hong Duc Publishing House, 2012) 116. Article 70 asserts that '[n]o one has the right to infringe on the freedom of faith and religion or to take advantage of the latter to violate State laws and policies; and Article 74 provides that '[a]ny violation of interests of the State of legitimate rights and interests of collective and citizens must be promptly and strictly dealt with… Retaliation against authors of complaints or denunciations and misuse of the right to lodge complaints and denunciations with the aim of slandering and harming others through false charges are strictly prohibited'.

[36] Among others, for example, see: Tuan Minh Dang, 'Debated points in the Draft of Amendments of the 1992 Constitution ('Nhung diem con bo ngo trong Du thao sua doi Hien phap 1992')' [52] (2013)(5) *Legislative Studies Journal* 54; Giao Cong Vu, 'Citizens' Rights and Obligations in the 1992 and Recommendations for Amendment ('Che dinh quyen, nghia vu cua cong dan trong Hien phap 1992 va goi y sua doi, bo sung')' in Thai Hong Pham et al (eds), *The Amendment of the 1992 Constitution ('Sua doi, bo sung Hien phap 1992: Nhung van de ly luan và thuc tien')* (Hong Duc Publishing House, 2012) 170; Cf. Hoang, above n 35, 118.

delegated legislators broad discretion to prescribe the essence and scope of any constitutional right. The language of state-granted rights reflects a kind of state-based human rights framework. These provisions are even more vague and arbitrary than Article 54 of the 1980 Constitution, which introduces the notions of a 'harmonious combination of the requirements of social life and individuals' legitimate freedoms' and the 'agreement of interests between the State, the collective and the individual'. But at least the ideas of 'harmonious combination' and 'agreement of interests' somewhat reflect a balancing process between rights and public interests.

2.2. Procedural due process: The narrow conception of fair trial rights as defendant's rights in criminal proceedings

The Vietnamese legal system has incorporated socialist legal theory not only from Soviet law but also from Chinese legal thought. With regard to procedural rights, Michael Palmer has made the noteworthy point that Mao Zedong 'view[ed] law as a tool which could be used to achieve essentially political and class goals' and that therefore, '[p]rocedural formalities were seen not as guarantees of due process but, rather, standing in the way of revolution and ideological work'.[37] Naturally, Mao Zedong endorsed the Marxist ideology of law, rights and due process exactly.

Defendants' rights in criminal proceedings are prescribed by the 2013 Constitution and numerous Acts. The 2013 Constitution inherits and develops the provisions on defendant's rights in previous Constitutions (1992, 1980, 1959 and 1946). The current constitutional recognition of fundamental due process rights includes: the right to proper searches and seizures; the right to presumption of innocence; the right to trial by an independent tribunal with the participation of assessors; trial within a reasonable time; a fair trial; a public trial; prohibition of double jeopardy; the right to defence; compensation; adversarial proceedings; and the right to appeal to a higher tribunal.[38] However, the fact that the constitutional framework on fair trial rights has not matched international standards, there have been demands for legislative supplements. Like the Criminal Proceedings Code 2003, the Criminal Proceedings Code 2015 further recognises some other important rights: the right to trial by an impartial tribunal;[39] the right to equality,[40] the right to free assistance of an interpreter.[41] The Criminal Code 2015 recognises the principle

[37] Michael Palmer, 'What Makes Socialist Law Socialist? - The Chinese Case' in F. J. M. Feldbrugge (ed), *The Emancipation of Soviet Law* (Kluwer Academic Publishers, 1992) 54.
[38] *2013 Constitution* Article 20(2), Article 22(3), Article 31, and Article 103(2)(5)(6).
[39] Article 21.
[40] Article 9.
[41] Article 29.

of no punishment without law.[42] The Legal Assistance Act 2006 protects the right to free legal assistance for eligible defendants.

There are several shortcomings regarding the incorporation of fair trial rights standards into the Vietnamese legal system. First, there is no general approach to the right to fair trial as a whole. The recognised procedural rights are all separate rights without the incorporation of the overall principle of a fair trial. More ironically, the right to a fair trial sometimes is partly analysed through 'the right not to be subject to arbitrary, authoritarian arrest and detention'.[43] This differs from the ICCPR approach. Even though the ICCPR does not formally refer to an overall principle of a fair trial, the United Nations Human Rights Committee affirms that Article 14 reflects the principle of equality before courts and tribunals and a fair trial.[44] Second, many fair trial rights have not been constitutionalised but just protected by legislation, as noted. Third, an important right - the right to be informed of the nature and cause of the charge – has not been affirmed. Fourth, due to a lack of effective mechanisms of constitutional interpretation and constitutional review, the debate about whether the right to silence is recognised still continues, and there is no explicit provision for it in the Constitution and Acts. The 2013 Constitution asserts that 'human rights… are recognised, respected and protected *by the Constitution and law*'.[45] Thus, criminal fair trial rights are merely ones recognised by law (that is, the constitution, along with acts or other legal documents). The fifth shortcoming, which is very important for this study, is that until now there has been no official interpretation on whether selective criminal fair trial rights apply to administrative sanctions/measures processes. In principle, criminal fair trial rights merely apply to crimes prescribed in the Criminal Code.

III. THE APPLICATION OF DUE PROCESS TOWARDS GLOBAL CONSTITUTIONALISM

3.1. A legal framework for the application of the human-rights-limitation principle

A shift in the protection of human rights towards global constitutionalism

Since the 1986 economic and political renovation (*doi moi)*, Vietnam has experienced three versions of human rights conceptual framework: a socialist-based human rights

[42] Article 2.
[43] Ngan Thi Kim Nguyen, Thang Toan Nguyen and Thu Thi Bui, *Assessment of the Vietnamese Legal Framework on Civil and Political Rights ('Bao cao nghien cuu Ra soat quy dinh phap luat Vietnam ve cac quyen dan su, chinh tri')*, Ministry of Justice (2013) 31.
[44] United Nations Human Rights Committee, CCPR/C/GC/32, *General Comment No. 32: Article 14 - Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007).
[45] Article 14(1) (emphasis added).

framework under the 1980 Constitution, a state-based human rights framework under the 1992 Constitution and a balanced human rights framework under the current 2013 Constitution.

It has witnessed a changing perception of human rights over the past two decades. The class-based socialist perception of human rights has been increasingly less important and has been almost replaced by liberal universalism.[46] More and more Vietnamese scholars have claimed that human rights are universal.[47] Likewise, the Vietnamese government accepts, or at least does not deny, this universality. The Vietnamese government's *White Paper on Human Rights*, on the one hand, declares that Vietnam 'understands the universality of human rights which reflect the common aspiration of humankind as enshrined in the United Nations Charter', but on the other hand, claims that human rights also represent the 'particularity of each society and community'.[48] This reflects the idea of the 'relative universality' of human rights, as Jack Donnelly terms them.[49]

Notably, according to Vietnam's leading constitutional commentators, the 2013 Constitution marks a shift in the protection of human rights towards global constitutionalism.[50] This new Constitution further confirms the change from the notion of

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[46] Thiem H. Bui, 'Decontructing the "Socialist" Rule of Law in Vietnam: the Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process' (2014) 36(1) *Contemporary Southeast Asia* 77, 91, 94-5.

[47] E.g., ibid. 96; Nghia V. Hoang, 'New Points on Human Rights in the 2013 Constitution (Nhung quy dinh moi ve quyen con nguoi trong Hien phap 2013)' [8] (2014)(24) *Legislative Studies Journal* 8, 9.

[48] Ministry of Foreign Affairs of Vietnam, *Achievements in Protecting and Promoting Human Rights in Vietnam (Thanh tuu bao ve va phat trien quyen con nguoi o Viet Nam)* <http://www.mofahcm.gov.vn/vi/mofa/nr040807104143/nr040807105001/ns050819141225>.

[49] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 3rd ed, 2013) 93-105. Donnelly argues that '[t]he universality of human rights is relative to the contemporary world. The particularities of their implementation are relative to history, politics, culture, and particular decisions… [U]niversal human rights not only may but should be implemented in different ways at different times and in different places, reflecting the free choices of free peoples to incorporate an essential particularity into universal human rights.'

[50] Many recent studies have confirmed this. See: Uc Tri Dao, 'The 2013 Constitution and the Development of Constitutional Thoughts ('Hien phap nam 2013 va viec phat trien nhan thuc ve hien phap')' in Hung Van Pham (ed), *The Constitution of the Socialist Republic of Vietnam - A Political and Legal Framework for the Complete Renovation of the Country in A New Period ('Hien phap nuoc Cong hoa XHCN Vietnam - Nen tang chinh tri, phap ly cho cong cuoc doi moi toan dien dat nuoc trong thoi ky moi')* (Labour-Society Publishing House, 2014) 97; Giao Cong Vu, 'The 2013 Constitution: Opportunities and Challenges to the State's Institutional Reform ('Hien phap nam 2013: Co hoi va thach thuc cai cach the che nha nuoc')' in Hung Van Pham (ed), *The Constitution of the Socialist Republic of Vietnam - A Political and Legal Framework for the Complete Renovation of the Country in A New Period ('Hien phap nuoc Cong hoa XHCN Vietnam - Nen tang chinh tri, phap ly cho cong cuoc doi moi toan dien dat nuoc trong thoi ky moi')* (Labour-Society Publishing House, 2014) 137; Phat Nhu Nguyen, 'Human Rights in the 2013 Constitution ('Quyen con nguoi theo Hien phap nam 2013')' in Hung Van Pham (ed), *The Constitution of the Socialist Republic of Vietnam - A Political and Legal Framework for the Complete Renovation of the Country in A New Period ('Hien phap nuoc Cong hoa XHCN Vietnam - Nen tang chinh tri, phap ly cho cong cuoc doi moi toan dien dat nuoc trong thoi ky moi')* (Labour-Society Publishing House, 2014) 173; Hung Van Pham, 'The 2013 Constitution and the Protection of Human Rights in Criminal Justice ('Hien phap nam 2013 voi che dinh bao dam quyen con nguoi ve tu phap hinh su')' in Hung Van Pham (ed), *The Constitution of the Socialist Republic of Vietnam - A Political and Legal Framework for the Complete Renovation of the Country in A New Period ('Hien phap*

granted citizens' rights to the notion of universal natural rights.[51] The constitutional recognition of human rights does not reflect state-bestowed rights but the state's duty to respect constitutional rights.[52] Indeed, the principle of state-granted rights, which can be inferred from the clause 'human rights are determined by the Constitution and law' under Articles 50 and 51 of the 1992 Constitution, has been replaced by the human-rights-limitation principle under Article 14 of the 2013 Constitution. As Que Hoang rightly claims, 'the limitation on human rights is required to be constitutionalised properly, adequately in accordance with the spirit of international human rights law as well as the trend of modern constitutionalism'.[53] Accordingly, the human-rights-limitation principle requires that the state is no longer permitted to grant rights arbitrarily but, on the contrary, it has to provide reasonable justification for any limitation on constitutional rights.

The Vietnamese approach to the limitation on human rights

The human-rights-limitation principle under Article 14 of the 2013 Constitution is a result of the Vietnamese state's commitment to incorporating international human rights law.[54] Article 14(2) provides that '[h]uman rights and citizen's rights shall only be restricted by law in necessary circumstances for the reasons of national defence, national security, social order and security, social morality, and public health'. This can be considered a significant development in Vietnamese constitutional thought.

The human-rights-limitation principle has long been recognised by international human rights law and many countries' domestic constitutional law. A general human-

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nuoc Cong hoa XHCN Vietnam - Nen tang chinh tri, phap ly cho cong cuoc doi moi toan dien dat nuoc trong thoi ky moi') (Labour-Society Publishing House, 2014) 180; Nghia Van Hoang, 'New Institutions of Human Rights in the 2013 Constitution ('Nhung che dinh moi ve quyen con nguoi trong Hien phap 2013')' in Hung Van Pham (ed), *The Constitution of the Socialist Republic of Vietnam - A Political and Legal Framework for the Complete Renovation of the Country in A New Period ('Hien phap nuoc Cong hoa XHCN Vietnam - Nen tang chinh tri, phap ly cho cong cuoc doi moi toan dien dat nuoc trong thoi ky moi')* (Labour-Society Publishing House, 2014) 205-6; Tuan Minh Nguyen, 'The Institution of Human Rights and Fundamental Citizens' Rights in the 2013 Constitution: Important Amendments ('Che dinh quyen con nguoi, quyen co ban cua cong dan trong Hien phap nam 2013: Van de sua doi va nhung diem moi co ban')' in Toan Quoc Trinh and Giao Cong Vu (eds), *Implementation of Constitutional Rights in the 2013 Constitution ('Thuc hien cac quyen hien dinh trong Hien phap nam 2013')* (Hong Duc Publishing House, 2015) 76.

[51] Giao Cong Vu, Tuan Minh Nguyen and Tuan Minh Dang, *Assessment of the Legislative Development Process in Vietnam since the Adoption of the 2013 Constitution* (2014) 13 (English version); Nguyen, Nguyen and Bui, Ministry of Justice (2013), above n 43, 93-4.

[52] For example, see: Nguyen, above n 50, 170-1; Vu, 'Citizens' Rights and Obligations in the 1992 and Recommendations for Amendment ('Che dinh quyen, nghia vu cua cong dan trong Hien phap 1992 va goi y sua doi, bo sung')', above n 36, 169.

[53] Hoang, above n 35, 117.

[54] Thanh Hong Chu, 'The 2013 Constitution and the Implementation of International Treaties on Human Rights in Vietnam ('Hien phap 2013 voi viec thuc thi cac dieu uoc quoc te ve quyen con nguoi cua Viet Nam')' in Toan Quoc Trinh and Giao Cong Vu (eds), *Implementation of Constitutional Rights in the 2013 Constitution ('Thuc hien cac quyen hien dinh trong Hien phap nam 2013')* (Hong Duc Publishing House, 2015) 17, 24; Hoang, above n 50 212-3; Nguyen, above n 50, 53.

rights-limitation clause appears in the UDHR[55] as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR).[56] Specific human-rights-limitation clauses for specific rights can be found in the ICCPR.[57] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provides more detailed guidelines for the implementation of those human-rights-limitation clauses.[58]

International human rights law, rather than American law, is a direct factor leading to the incorporation of the human-rights-limitation principle into the 2013 Vietnamese Constitution.[59] Compared to the Due Process Clauses of the US Constitution, international human rights instruments provide more detailed human-rights-limitation clauses. A typical example is Article 29(2) of the UDHR (as noted above), which is a general limitation clause. The language of those clauses manifests the idea that limitations on rights are exceptional and only apply in necessary circumstances. Overall, the UDHR provides several guidelines for the limitation: (1) Limitations are prescribed by law (Article 29(2)); (2) Limitations are to secure public interests (Article 29(2)); (3) Limitations are for the sake of a democratic society (Article 29(2)); (4) Limitations are consistent with the purposes and principles of the United Nations (Article 29(3)); (5) Limitations are not to destroy rights and freedoms (Article 30).

In the process of drafting the 2013 Constitution, there were proposals to constitutionalise the human-rights-limitation principle in order to prevent state abuse.[60] Que Hoang claimed that the lack of this constitutional principle was a significant defect of

[55] Article 29(2) provides that '[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

[56] Article 4 provides that '[t]he States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

[57] For example, Article 18(3) provides that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

[58] United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985).

[59] Vietnam ratified the ICCPR and the ICESCR on 24th Sep 1982.

[60] Dung Dang Nguyen and Dat Tien Bui, 'Reforming the Regulations on Fundamental Rights and Obligations of Citizens in the 1992 Constitution in Accordance with the Principle of Respect for Human Rights ('Cai cach che dinh quyen và nghia vu co ban cua cong dan trong Hien phap 1992 theo nguyen tac ton trong quyen con nguoi')' (2011)(8) *Legislative Studies Journal* 5; Hoang, above n 109; Hao Tri Vo, 'Improving Constitution-Making Techniques for Chapter V of the 1992 Constitution ('Hoan thien ky thuat lap hien doi voi Chuong V Hien phap 1992')' in Thai Hong Pham et al (eds), *The Amendment of the 1992 Constitution ('Sua doi, bo sung Hien phap 1992: Nhung van de ly luan và thuc tien')* (Hong Duc Publishing House, 2012) 139.

the 1992 Constitution.[61] The human-rights-limitation principle is an important basis for assessing the constitutionality of limitations on rights in infra-constitution norms. This principle is a remedy for the problem that, as Hao Tri Vo has argued, the 1992 Constitution lacked 'criteria to limit arbitrariness of legislators and delegated legislators when they make legal documents to concretise and implement constitutional rights'.[62] It can be argued that the prevention of arbitrary limitations on human rights is more important than constitutional recognition of human rights. Indeed, a constitution may incorporate and inherit international human rights instruments or other constitutions to make a good bill of rights. Nevertheless, those constitutional provisions are ineffective if infra-constitution legal documents circumvent constitutional rights arbitrarily. In this context, the human-rights-limitation principle provides a constitutional basis for the prevention of this arbitrariness, or in other words, for the better protection of rights.

As Jack Tsen-Ta Lee, among others, has argued, the constitutional formulae 'citizens have the right… according to law', which was used widely in the 1992 Vietnamese Constitution, can lead to human rights being easily limited.[63] By examining the cases of Canada, the United Kingdom and Singapore, Lee has suggested that the Vietnamese constitution needs to guarantee legitimacy and the essence of limitations on basic rights and freedom in a democratic society.[64] Drafters of the 2013 Constitution have accepted this proposal, as can be seen in the human-rights-limitation principle in Article 14(2).

The 2013 Constitution, while constitutionalising the human-rights-limitation principle for the first time, reflects a significant improvement in constitutional thought in accordance with the rule of law.[65] Article 14(2) of the 2013 Constitution can be considered a general clause expressing the Vietnamese version of substantive due process, which incorporates the spirit of human-rights-limitation clauses under international human rights law instruments. As well as the general clause, five specific rights-limitation clauses can be found in the 2013 Constitution. Firstly, a specific limitation clause can be found in Article

[61] Hoang, above n 35, 116.
[62] Vo, above n 60, 137.
[63] Jack Tsen-Ta Lee, *The Doctine of Proportionality in Interpreting Constitutional Rights: A Comparison between Canada, the United Kingdom and Singapore and Implications for Vietnam ('Thuyet can xung trong van de giai thich cac quyen hien dinh: So sanh giua Canada, Lien hiep Anh voi Singapore va nhung goi y cho Viet Nam')*, The Institution of Economy and the Institution of Culture, Education, Science and Technology in the 1992 Vietnamese Constitution: Values and the Demand for Amendment ('Che dinh kinh te va che dinh van hoa, giao duc, khoa hoc va cong nghe trong Hien phap Viet Nam 1992 – Nhung gia tri va nhu cau sua doi, bo sung') (Ho Chi Minh City) 355.
[64] Ibid. 358.
[65] For a general analysis of the role and the implementation of the human-rights-limitation principle in Vietnam, see: Dat T. Bui, 'The Constitutionalization of the Principle on Human Rights Limitation: Necessary but Insufficient ('Hien phap hoa nguyen tac gioi han quyen con nguoi: can nhung chua du')' [3] (2015)(6) *Legislative Studies Journal* 3.

32(3) regarding the right to property: 'In case of extreme necessity for the reasons of national defence, security and interests, in case of emergency or in response to natural calamities, the State can make a forcible purchase or requisition of organisations' and individuals' properties and pay compensation at market price'. Secondly, Article 54 makes two points (its points 3 and 4) permitting limitations on the right to the use of land, as follows:

> 3. The State may recover land currently used by organisations or individuals in case of extreme necessity prescribed by law for the purposes of national defence, national security or social-economic development in accordance with national, public interests.
>
> 4. The State may requisition land in cases of extreme necessity prescribed by law for the goals of national defence and security or during a state of war, emergency or natural calamities.

Thirdly, beyond Chapter II titled 'Human rights, fundamental rights and obligations of citizens', Article 103(3) of Chapter VIII limits the right to a public hearing by prescribing that 'In a special case which requires protection of state secrets, conformity with the fine customs and traditions of the nation, protection of minors or protection of private life and at the legitimate request of an involved party, the People's Court may hold a closed hearing'. Fourthly, Article 103(4) limits the right to a collective trial council with the participation of People's Assessors by providing that '[e]xcept in the case of a trial by summary procedure, the People's Courts shall try cases on a collegial basis and make decisions by a vote of the majority'.

One may be concerned about the fact that many of the provisions of the 2013 Constitution reflect the style of the 1992 Constitution. The first concern is that the phrases 'everyone has the right to' or 'citizens have the right to' are still common, appearing thirty times in Chapter II. However, these clauses are not problematic as they are normal forms of expression regarding human rights, as in the UDHR[66] or other human rights instruments.[67] A second concern is that the slightly worrying phrase 'determined by law' still appears several times in this Chapter II.[68] The phrase can be associated with the notion of state-bestowed rights as in the 1992 Constitution. Nevertheless, the negative consequences of this phrase may be neutralised by the human-rights-limitation principle in

[66] For example, see: Article 3 – 'Everyone has the right to life, liberty and security of person'.
[67] For example, see: Article 6(1) of the ICCPR – 'Every human being has the inherent right to life'.
[68] See: Articles 23, 25, 27, 47.

Article 14(2), to which any limitation on rights must conform, regardless of whether a constitutional right is explicitly required to be 'determined by law'.

Undeniably, the recognition of the human-rights-limitation principle is promising. However, there are significant challenges in interpreting and applying this principle.

Challenges in interpreting and applying the human-rights-limitation principle: (i) the notions of 'luat' (act/law) and 'phap luat' (law)

The word 'luat' within the limitation clause ('Quyen con nguoi, quyen cong dan chi co the bi han che theo quy dinh cua *luat*...' ('Human rights and citizen's rights shall only be restricted by *law*…)) (emphasis added) has caused linguistic confusion. On the one hand, 'luat' can be understood as 'phap luat' ('law'), which includes all kinds of legal norms; on the other hand, 'luat' can be defined more narrowly as 'dao luat' ('act'),[69] which is infra-constitutional legislation passed by the National Assembly. In Vietnamese, 'luat' means either 'law' in a broad sense, or 'act' in narrow sense, as Giao Vu and Huong Le point out in a commentary on the rights limitation clause.[70]

Besides linguistic confusion, the use of terminology in the 2013 Constitution is inconsistent. On the one hand, Article 14(2) provides the phrase 'theo quy dinh cua *luat*' (i.e. 'determined by *law/acts*' (emphasis added)). Following this usage, the term 'luat' is used in specific limitation clauses according to Article 19 ('No one shall be *illegally* deprived of his or her life'), Article 20(2) ('The arrest, holding in custody, or detention, of a person shall be prescribed by *law*'), Article 22(3) ('The search of homes shall be prescribed by *law*'), Article 27 ('The exercise of those rights shall be prescribed by *law*'), and Article 47 ('Everyone has the obligation to pay taxes in accordance with *law*'). On the other hand, several other articles use the term 'phap luat' (i.e. 'law'), such as Article 23 and 25, which says that '[t]he exercise of those rights shall be prescribed by law', and Article 33, which says that '[e]veryone has the right to freedom of enterprise in the sectors and trades that are not prohibited by law'. Thus, I am sceptical about the true meaning of the term 'luat' in Article 14(2). The text of the 2013 Constitution is not clear about this.

[69] The word 'dao luat' in Vietnamese has a correct translation as 'act' in English, however, in Vietnam it has been usually translated incorrectly as 'law'.

[70] Giao Cong Vu and Huong Thuy Thi Le, 'The Principle of Limitations on Human Rights and Citizens' Rights in the 2013 Constitution ('Nguyen tac gioi han quyen con nguoi, quyen cong dan trong Hien phap 2013')' in Uc Tri Dao and Giao Cong Vu (eds), *A Commentary on the 2013 Constitution of the Socialist Republic of Vietnam ('Binh luan khoa hoc Hien phap nuoc Cong hoa Xa hoi chu nghia Viet Nam')* (Labour-Society Publishing House, 2014) 230.

So far, both scholarly works and government officials incline to interpret the term 'luat' to mean acts of the National Assembly[71] rather than law in general, which includes any kind of legal norms. Experience of the 1992 Constitution shows that rights that can be restricted by law ('phap luat') have a high potential to be applied arbitrarily. One may be concerned about the fact that human rights can be violated uncontrollably if infra-constitutional legal documents (e.g. those of the Government, Ministries and local authorities) are empowered to limit rights and freedoms.[72] For this reason, some commentators claim that only acts ('dao luat') of the National Assembly should be empowered to limit human rights.[73] Among these, Kien Duy Tuong further differentiates the role of acts and the role of infra-acts legal documents in prescribing and implementing constitutional rights. According to Tuong, infra-acts legal documents are only empowered to 'prescribe *methods* to implement constitutional rights', and therefore the fact that infra-acts legal documents include rights-limiting provisions is considered to contradict the constitutional principle.[74] But this argument is not persuasive, as Tuong does not explain the difference between a limitation on constitutional rights and the unclear notion of 'methods to implement constitutional rights'. In a similar line of argument, Giao Vu and Huong Le distinguish between a limitation on rights and a concretisation of rights. According to their suggestion, only acts of the National Assembly are empowered to limit constitutional rights and, following the Constitution and acts, infra-acts documents are empowered to concretise constitutional rights.[75]

The fear of arbitrary infra-acts norms is understandable. However, the interpretation of the term 'luat' in Article 14(2) to mean acts of the National Assembly sets a challenging

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[71] For scholarly works, for example, see: Vu, Nguyen and Dang (2014), above n 51, 13-4; Kien Duy Tuong, 'The Intepretation of New Provisions on Human Rights and Citizens' Rights in the 2013 Constitution ('Cu the hoa cac quy dinh moi ve quyen con nguoi, quyen cong dan trong Hien phap nam 2013')' [3] (2016)(13) *Legislative Studies Journal* 3, 8; Hai Hung Hoang, 'Guarantee of Human Rights: the Main Idea of the 2013 Constitution ('Bao dam quyen con nguoi: Tu tuong chu dao cua Hien phap 2013')' in Toan Quoc Trinh and Giao Cong Vu (eds), *Implementation of Constitutional Rights in the 2013 Constitution ('Thuc hien cac quyen hien dinh trong Hien phap nam 2013')* (Hong Duc Publishing House, 2015) 70; Binh Hoa Nguyen, 'Guarantee of Human Rights and Citizens' Rights - A Major Principle of the 2015 Criminal Proceedings Code ('Bao dam quyen con nguoi, quyen cong dan - tu tuong xuyen suot trong Bo luat to tung hinh su nam 2015')' in Binh Hoa Nguyen (ed), *New Contents of the 2015 Criminal Proceedings Code ('Nhung noi dung moi trong Bo luat To tung hinh su nam 2015')* (National Politics - Truth Publishing House, 2016) 43; Nguyen, Nguyen and Bui, Ministry of Justice (2013), above n 43, 99. For the officials' comments, see: *Limitations Must Be Prescribed by Acts Rather Than Decrees*, <http://plo.vn/thoi-su/muon-han-che-gi-thi-dua-vao-luat-khong-dua-vao-nghi-dinh-612476.html>.

[72] Cf. Vu, 'Citizens' Rights and Obligations in the 1992 and Recommendations for Amendment ('Che dinh quyen, nghia vu cua cong dan trong Hien phap 1992 va goi y sua doi, bo sung')', above n 36, 171.

[73] For example, see: Dang, above n 36, 54.

[74] Tuong, above n 71, 8 (emphasis added).

[75] Vu and Le, above n 69, 235-6. This argument is also confirmed through private discussion between Giao Cong Vu and the author of this article.

standard, one that is even higher than the requirements of international law, and very hard to meet in the context of Vietnam. Interestingly, the formula 'theo quy dinh cua phap luat' of the 1992 Constitution, which has received severe criticism, is consistent with the expressions 'determined by law', 'in accordance with law' or 'prescribed by law' used in the UDHR international human rights treaties and many other constitutions. The ECtHR interprets the notion of 'law' in the phrase 'prescribed by law' to include not only statute law but also European Community law, non-statutory regulations, common law, and rules of a national body.[76] According to the ECtHR, there are three requirements for a rights-limiting norm to qualify as law: (1) the limitation must be provided by domestic law; (2) the domestic law must be accessible; (3) the norm must be unequivocal and predictable.[77] It can be concluded that the notion of law according to the ECtHR is akin to the concept of 'legal norms' in Vietnam. Although the ECtHR case law obviously does not apply to the Vietnamese legal system, its interpretations can be a useful reference.

Because of the potential incompatibility between the current interpretation of the word 'law' within Article 14(2) and the notion of law in international law, this interpretation should be considered cautiously. It could be argued that the current understanding reflects too narrow a concept of 'law', which goes against the world trend. Furthermore, the idea that only acts of the National Assembly can restrict constitutional rights is unfeasible. No state could do that. The reality in Vietnam proves that it is impossible that infra-acts legal norms should not be permitted to restrict rights, once acts are still dependent on the concretisation of infra-acts legal documents. The Vietnamese case also suggests that once the local authorities are empowered to make legal norms that apply to a group of people, they may be able to impose unique limitations on a constitutional right for the sake of local general welfare.

I contend that the word 'luat' within Article 14(2) should be interpreted as 'law' or 'legal norms' rather than to mean acts of the National Assembly. It should be recognised that a regime of rights-limitation adjudication is more important than the number of rights recognised by the Constitution, the kind of rights-limitation legal documents that exist, and whether the phrase 'determined by law' is necessary or not. The most important issue is whether and how a limitation is reasonable, or in other words, whether it is constitutional. Therefore I am not persuaded by the argument of Vu and Le that despite the unfeasibility

[76] Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) 383.
[77] Ibid. 383.

of the notion of 'law' as 'acts', this interpretation is still necessary to prevent arbitrariness in rights circumvention in the context of Vietnam.[78]

Challenges in interpreting and applying the human-rights-limitation principle: (ii) legitimate purposes

The legitimate purposes of limitations on constitutional rights are embraced in the wording of Article 14(2) (in particular, in the words '…in *necessary* circumstances…'). This is compatible with general limitation clauses under international human rights instruments. Besides the notion of '*necessary* circumstances' under Article 14(2), interestingly, the Constitution requires a higher level of necessity, as expressed in the phrase 'in case of *extreme necessity*' in Article 54 regarding the limitation on the right to land use. Very importantly, Article 14(2) also provides five factors/reasons justifying the necessity of limitations on rights: (1) national defence; (2) national security; (3) social order and security; (4) social morality; (5) public health.

Apart from the general limitation clause under Article 14(2), it is important to note that Article 15 and specific limitation clauses under Article 32(3) and Article 54 add more reasons for restrictions on rights. Article 15 requires that '[e]veryone is obliged to respect others' rights' and the 'exercise of human rights and citizens' rights may not infringe upon national interests and *others' rights and legitimate interests*' (emphasis added). Arguably, Article 15 implicitly considers 'others' rights and legitimate interests' as legitimate purposes. Regarding the right to property, Article 32(3) permits that national interests, emergencies and natural calamities are legitimate purposes, as well as national defence and national security, as mentioned in Article 14(2). Regarding the right to land use, Article 54 adds more legitimate purposes, these being a 'state of war' and 'social-economic development in accordance with national, public interests' – in other words, kinds of public interest. Both Article 32(3) and Article 54 seem to equate national interests with public interests.

It is problematic that the general limitation clause under Article 14(2) is not clear about whether the public interest is a justification for limitations on rights. It is an important shortcoming if the public interest is not considered a reason for limitations. Articles 15, 32(3) and 54 should be considered amendments to Article 14(2), according to which the public interest in a broad sense is a legitimate purpose for limitations on constitutional rights. This understanding is consistent with Article 29(2) of the UDHR. After all, factors like national defence, national security, social order and security, social

[78] Vu and Le, above n 69, 235.

morality, public health, emergencies, natural calamities, a state of war, social-economic development, and individuals' rights and interests are kinds of public interest.

Hence I disagree with views which ignore public interests as legitimate purposes for restrictions on rights. A useful example is the debate about the limitation on the right to name prescribed in the Civil Code 2015. The Vietnamese Government initially proposed a limit on the length and modes of citizens' names, with the aim of guaranteeing social morality and the national interest. However, the National Assembly rejected this proposal for the reason that the length and modes of citizens' names did not affect national defence, national security, social order and security, social morality or public health, which are prescribed in Article 14(2) of the 2013 Constitution. Accordingly, a restriction on the length and modes of citizens' names (or in other words, a limitation on the right to names) was regarded as unnecessary.[79] But this argument is wrong, because it omits the public interest, which is widely viewed as a legitimate purpose for limitations on rights. Also, it wrongly disregards public interests as a factor that should be taken into consideration as a limitation, as mentioned in Article 15.[80]

Challenges in interpreting and applying the human-rights-limitation principle: (iii) a quest for the extent of a limitation, and the need for reasoning tools for the adjudication of limitations on rights

Despite the significant improvement of human rights recognition in the 2013 Constitution, it must be admitted that Vietnam only meets two among four basic criteria or pillars of a human-rights-protecting mechanism. These four criteria are: (1) constitutional recognition of basic rights and freedoms; (2) constitutional recognition of a human-rights-limitation principle; (3) effective adjudication on limitations on rights; (4) the application of theories in assessing the reasonableness/constitutionality of limitations on rights. Regarding the first criterion, in spite of the lack of some fundamental rights, the 2013 Constitution recognises the most important rights.[81] The absent rights could be supplemented with constitutional interpretation. The second criterion is also basically met,

[79] *Long Names Have No Negative Effect on the Society ('Dat ten qua dai khong anh huong gi den xa hoi')*, <http://dantri.com.vn/xa-hoi/dat-ten-qua-dai-khong-anh-huong-gi-den-xa-hoi-1434514620.htm>.

[80] This kind of argument has been repeated in the debate about restricting the number of cars that a person can own (*The Proposal that One Person is Allowed to Own One Car Does Not Conform to the Constitution ('De xuat moi nguoi so huu mot oto chua phu hop Hien phap')*, <http://tuoitre.vn/tin/chinh-tri-xa-hoi/20170123/de-xuat-moi-nguoi-so-huu-mot-oto-chua-phu-hop-hien-phap/1256812.html>).

[81] Not only the new Constitution, even the 1992 Constitution is regarded as one of constitutions recognising 'high number of rights' (see: Vu, Giao Cong, 'Human Rights, Citizens' Rights in Foreign Constitutions and Vietnamese Constitution: A Preliminary Comparison ('Quyen con nguoi, quyen cong dan trong Hien phap tren the gioi va Hien phap Viet Nam: So bo phan tich so sanh')' in Thai Hong Pham et al (eds), *The Amendment of the 1992 Constitution ('Sua doi, bo sung Hien phap 1992: Nhung van de ly luan và thuc tien')* (Hong Duc Publishing House, 2012) 50).

as manifested in Article 14(2). Nevertheless, the third and fourth pillars of a human-rights-protecting mechanism are still a jurisprudential black hole. Effective adjudication on limitations on rights is an adjudicative mechanism of constitutionality of infra-constitution legal documents. Disproportionate limitations on rights are a kind of unconstitutionality.[82] The lack of an independent institution of constitutional review may lead to the void of constitutional rights.[83]

Furthermore, the lack of reasoning tools (pillar 4) may neutralise the constitutional recognition of human rights (pillar 1) and the human rights-limitation principle (pillar 2). Pillars 1 and 2 are insufficient to prevent arbitrariness on the part of legislators. Indeed, legislation drafters may put an interpretation on public interests (e.g., 'national defence, national security, social order and security, social morality, and the health of the community' (Article 14(2)) for their own convenience. Moreover, even though the legislators may understand public interests well, they may propose unnecessary measures to achieve their purposes. And although their purposes might be legitimate and the measures necessary, the legislators may not consider the balance/proportionality between benefits and harms carefully enough.

In Vietnam, prior to the 2013 Constitution, limitation clauses under the UDHR, ICCPR and ICESCR were almost never applied, with the result that even the purposes of restrictions on rights could lack legitimacy. As Giao C. Vu argues, 'the restrictions of political freedoms imposed by the CPV are undoubtedly contrary to the basic democratic principles, and they are launched based on the political will of the CPV only'.[84] As in many other Asian countries, theories about limitations on human rights are unfamiliar in Vietnam, despite the fact that proportionality has been recognised by the UNHRC.[85] Only a few Asian jurisdictions such as South Korea, India and Hong Kong, have adopted the doctrine of proportionality.[86] So far, even though a mechanism of constitutional review has been discussed quite intensively in Vietnamese legal forums,[87] the discussion about reasoning tools for human rights adjudication has just started. There has been the positive sign that since the promulgation of the 2013 Constitution, theories about limitations on

[82] Cf. Barak, above n 7, 8.
[83] Dang, above n 36, 54-6.
[84] Giao Cong Vu, 'Anti-corruption versus Political Security: Reflection on the Vietnamese Context' [42] (2014) 2(1/2) *International Journal of Diplomacy and Economy* 42 62. Here, 'CPV' is an abbreviation of the 'Communist Party of Vietnam'.
[85] See: United Nations Human Rights Committee, *General Comment No. 35 - Article 9 (Liberty and Security of Person)* (2014) [12], [18] and [19].
[86] Barak, above n 7, 199-201.
[87] Vu, Nguyen and Dang (2014), above n 51, 110 (Vietnamese version).

human rights in general and the proportionality doctrine in particular have been taken into account. The most intensive work on this topic published in Vietnamese is the volume 'Legitimate Limitations on Human Rights, Citizens' Rights in International Law and Vietnamese Law'.[88]

It can be seen that the 2013 Vietnamese Constitution's text concerning human rights is not substantially different from that of other constitutions in jurisdictions where the proportionality doctrine is adopted. The term 'proportionality' appears unnecessarily in those constitutions. By this I mean that the proportionality principle need not be described by a constitutional text.[89] This principle generally exists as a doctrine, of which basic elements are represented by the constitutional recognition of a general limitation clause and constitutional interpretation. Arguably, Article 14(2) of the 2013 Constitution has established an important framework for incorporating the proportionality doctrine.

Recently there has been a promising sign regarding the adoption of the proportionality doctrine into Vietnamese law. The language of proportionality analysis has been discussed. Vu, Nguyen and Dang raise the question about the extent to which human rights can be limited provided that the essence of rights remains preserved.[90] This indicates a fear that the extent of a limitation on a right may be infinite. Therefore these scholars further claim that the government cannot limit human rights excessively.[91] Here, the notion of 'excessive' is related to the notions of 'appropriate', 'necessary' and 'proportionate', which reflect the language of proportionality analysis. Notably, according to Thanh Hong Chu, Article 14(2) only manifests a qualitative assessment and needs further quantitative analysis.[92] Arguably, Chu's argument raises the need for a fourth sub-test of proportionality analysis – namely, overall balancing. With regard to the current discussion on limitations on specific rights, elements of the proportionality test have to some extent been used.[93]

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[88] Tuan Minh Nguyen et al, *Legitimate Limitations on Human Rights, Citizens' Rights in International Law and Vietnamese Law ('Gioi han chinh dang doi voi cac quyen con nguoi, quyen cong dan trong phap luat quoc te va phap luat Viet Nam')* (Hong Duc Publishing House, 2016).

[89] In the European Union, where the proportionality doctrine is widely and rigorously used, the ECHR neither refers to the term 'proportionality' nor a general limitation clause (but only specific limitation clauses). In reality, the proportionality doctrine has been developed by the European Committee and the ECtHR (Jeremy McBride, *Proportionality and the European Convention on Human Rights* (Hart Publishing, 1999) 23).

[90] Vu, Nguyen and Dang (2014), above n 51, 110 (Vietnamese version).

[91] Ibid. 110 (Vietnamese version).

[92] Chu, above n 54, 34.

[93] For example, in the context of the right to association, see: Tuan Minh Dang and Duc Anh Nguyen, 'Freedom of Association in the International Covenant on Civil and Political Rights and the Compatibility of the Bill on Association ('Quyen tu do hiep hoi trong Cong uoc quoc te ve cac quyen dan su va chinh tri 1966 va su tuong thich trong du thao Luat ve Hoi')' in Giao Cong Vu (ed), *The Guarantee of the Right to*

Besides scholarly work, several writers in the media have referred to kinds of proportionality test. For example, in an op-ed article discussing errors in the 2015 Criminal Code, Nam Van Nguyen, a law professor, suggests four essential principles in law-making. First, the principle of legality and constitutionality requires the legitimacy of a legal norm. This principle demands consistency between a legal provision and the Constitution as well as the law in general. Second, the principle of necessity requires that a legal norm must be necessary for achieving its aim. Third, the principle of suitability questions whether a legal norm is suitable for achieving its aims as well as being suitable in reality. Fourth, the principle of appropriateness requires that the negative effect of a limitation on a right is acceptable.[94] As a more direct reflection on the principle of proportionality, I have offered the following comments. Article 14(2) of the 2013 Constitution suggests several requirements of a limitation on a right: (1) a limitation on a right shall be provided by transparent law; (2) a limitation on a right must have legitimate aims; (3) a limitation on a right must be appropriate for achieving its aims; (4) the benefits of the limitation must outweigh the harms and costs it causes.[95]

It can be seen that in recent constitutional developments, the Vietnamese legal system has to some extent incorporated a theory of substantive due process. Global constitutionalism also demands procedural due process, which is a constitutional guarantee of fair trial rights, as will be examined in the next part.

3.2. Re-conceptualising fair trial rights

Procedural due process as fair trial rights in criminal, civil and administrative fields

Procedural due process (sometimes referred to as procedural fairness, or fair procedures, or procedural rights) has been widely accepted and considered a universal value in global constitutionalism.[96] Indeed, it has witnessed the 'constitutionalisation' of criminal procedure[97] through the constitutional recognition of criminal fair trial rights. The values of universal fair trial rights have transformed the civil law inquisitorial criminal

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Association In Accordance With the 2013 Constitution: Theory and Pracrice ('Bao dam quyen tu do lap hoi theo Hien phap 2013: Ly luan va thuc tien') (Hong Duc Publishing House, 2016) 125-7; ibid. 143-5.

[94] Nam Van Nguyen, *Vietnam: the Criminal Code is Still Flawed ('Viet Nam: "Luat hinh su sai se mai con sai"')* <http://bbcvietnamese.com/vietnamese/forum/2016/09/160920_vn_criminal_code_comments>.

[95] Dat T. Bui, *Freedom Will Lead to Development ('Dat nuoc muon phat trien, con nguoi phai duoc tu do')* Vietnamnet <http://vietnamnet.vn/vn/tuanvietnam/dat-nuoc-muon-phat-trien-con-nguoi-phai-duoc-tu-do-259127.html>.

[96] Cf. Vogler, above n 12.

[97] Davor Krapac, 'Some Trends in Continental Criminal Procedure in Transition Countries of South-Eastern Europe' in John Jackson, Máximo Langer and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart Publishing, 2008) 120.

procedure towards adversarialism.[98] Common law jurisdictions have long recognised the doctrine of natural justice, which reflects procedural fairness. The core of natural justice is manifested in two principles: (1) Everyone has the right to be adequately informed of the charge against himself or herself and to enjoy a fair trial (*audi alteram partem*); (2) Adjudicator must be impartial (*nemo judex in causa sua*).[99]

While the US Constitution uses the term 'due process', international human rights instruments as well as many other constitutions incorporate the spirit of 'procedural due process' through terms such as 'right to a fair trial',[100] or 'fair trial rights' and 'defence rights'.[101] In legal forums, the terms 'the right to a fair trial' and 'fair trial rights' are more widely used than the term 'procedural due process', although they are essentially synonyms. This may be because the notion of procedural due process mostly appears in academic works, while the notion of fair trial rights is used in both academic and practical contexts in requiring that states respect international human rights law.

The UDHR,[102] ICCPR,[103] and other international and regional treaties such as the ECHR have some specific provisions on fair trial rights. These provisions focus on criminal proceedings, which are usually regarded as the core of fair trial rights. If we read the text of ICCPR, it seems that fair trial rights are equated with defendant's rights in criminal proceedings. However, this understanding is not correct because fair trial rights partly apply to civil proceedings and administrative procedures. The principle of procedural due process is applicable to any deprivation of an individual's liberty and rights, regardless of 'criminal', 'civil' or 'administrative' measures. Traditionally, procedural due process has been classified into three types: criminal due process rights (fair trial rights in criminal proceedings), civil due process rights (fair trial rights in civil and administrative proceedings), and administrative due process rights (fair trial rights in administrative procedures). Accordingly, fair trial rights are not just applied to criminal

[98] Cf. Ibid. 128.
[99] Paul Craig, *Administrative Law* (Sweet & Maxwell, 7th ed, 2012) 339.
[100] E.g., the phrase 'right to a fair trial' is mentioned in Article 6 of the European Convention on Human Rights as well as in Article 8 of the American Convention on Human Rights. There are 117 constitutions in the world embracing provisions on this right, regardless of whether the phrase 'right to a fair trial' is officially mentioned in the text. (see: https://www.constituteproject.org/).
[101] Only the 2013 Constitution of the Central African Republic mentions the phrase '[d]efence rights' (see: https://www.constituteproject.org/). However, the term is widely used in continental Europe. (E.g. see: Oswald Jansen and Philip M. Langbroek (eds), *Defence Rights during Administrative Investigations: A Comparative Study into Defence Rights during Administrative Investigations against EU Fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland* (Intersentia, 2007)).
[102] Articles 9, 10 and 11.
[103] Articles 9, 10, 11, 14 and 15.

proceedings but to any conduct of the state negatively affecting a person's liberty, rights and interests.

It is problematic in Vietnam that fair trial rights have been equated with the defendant's rights in criminal proceedings (as noted in Part 2.2), resulting in jurisprudential blackholes for civil due process rights and administrative due process rights. It seems that research on defendants' rights has been exclusive to the criminal law. Until recently, some scholars have recognised that fair trial rights are not only applicable to criminal law but also to non-criminal laws.[104] Unlike the age-old approach to the defence rights in criminal procedure,[105] recent studies have sought to examine the broader understanding of procedural rights in accordance with fair trial rights under international human rights law.[106]

Fair trial rights in civil proceedings. With regard to civil proceedings in the broad sense that includes administrative proceedings,[107] the Constitution says little about this, and says it unclearly. Fair trial rights in civil proceedings do not appear in Chapter II, which focuses on fundamental rights. Instead, Article 103 (in Chapter VIII) provides several procedural rights that can be applied to all kinds of proceedings including criminal and civil: the right to a public, independent court; the right to assessors' participation; the right to adversarial procedure; the right to appeal; the right to defence. Meanwhile, Article 14(1) of the ICCPR asserts:

> All persons shall be equal before the courts and tribunals. In the *determination* of any criminal charge against him, or of his *rights and obligations in a suit at law*, everyone shall be entitled to a *fair and public hearing by a competent, independent and impartial tribunal* established by law (emphasis added).

It can be seen from this provision that the ICCPR, like other human rights treaties, provides a condensed expression of the idea of fair trial rights in civil litigation, requiring

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[104] Tung Khanh La, 'The Right to A Fair Trial in International Law ('Quyen xet xu cong bang trong phap luat quoc te')' (2008)(17) *Journal of Procuracy* ; Chi Ngoc Nguyen, *Human Rights in Criminal Justice ('Quyen con nguoi trong linh vuc tu phap hinh su')* (Hong Duc Publishing House, 2016) 121.

[105] For discussions about the defence rights in Vietnam, see generally: Phuc Trong Nguyen, 'The Principle of Protecting Defence Rights in Vietnamese Criminal Proceedings Law ('Ve nguyen tac dam bao quyen bao chua trong Luat to tung hinh su Viet Nam')' [76] (2008)(2) *State and Law Journal* 76.

[106] Dat T. Bui, 'Due Process Doctrine and Human Rights Protection: International and Vietnamese Experience ('Hoc thuyet trinh tu cong bang va viec bao ve quyen con nguoi: Kinh nghiem quoc te va Vietnam')' [61] (2015)(11) *Legislative Studies Journal* 61, 64-68; Kieu Thi Do, *The Right to A Fair Trial and Its Implementation ('Quyen xet xu cong bang va van de bao dam quyen xet xu cong bang o Viet Nam')* Vietnam National University Hanoi, 2013); Huong Lien Thi Nguyen, *The Right to A Fair Trial in Vietnamese Criminal Proeedings ('Quyen duoc xet xu cong bang trong to tung hinh su Viet Nam')* Vietnam National University Hanoi, 2015); Nguyen, above n 104.

[107] In Vietnam, the regime of administrative proceedings is analogous to the process of judicial review of administrative actions in common law jurisdictions.

further interpretation. The European practice shows that the ECtHR has interpreted these rights through its case law. Admittedly, Article 14(1) of the ICCPR provides essential criteria of a fair trial in civil procedure. That is, the determination of one's rights and obligations must be conducted by an adjudicative body that is competent, independent, impartial and in accordance with fair procedures.

Fair trial rights in administrative procedures. Unlike criminal, civil and administrative proceedings, of which the essential procedures take place in courts, administrative procedures are managed by administrative agencies and reflect the relationship between individuals and those agencies. It should be noted that while the Vietnamese Constitution provides a handful of procedural rights in criminal and civil proceedings, it says nothing expressly about procedural rights in administrative procedures. This leaves a jurisprudential black hole for the administration of due process rights. Huong Nguyen, in a recent study on fair trial rights, still argues that those rights only apply to criminal and non-criminal proceedings,[108] and therefore, inferably, are irrelevant to administrative procedures.

Looking at international human rights law, the wording of Article 14 of the ICCPR seems only to mention procedures at courts and does not include administrative procedures of administrative bodies. Indeed, Article 14 does not refer to the word 'administrative' but uses terms in relation to criminal and civil proceedings such as 'criminal', 'civil', 'court' and 'tribunal'. This is also the case for Article 6 of the ECHR. Should we come to the conclusion that fair trial rights do not apply to administrative procedures? The answer is that fair trial rights do apply. The ECtHR accepts that the determination of rights and obligations in administrative actions may initially be dealt with by administrative authorities rather than judicial bodies, but those administrative decisions are subject to review/reconsideration by a judicial body that is competent, independent and impartial in accordance with Article 6.[109]

The overall fairness of a bundle of fair trial rights

Not only has Vietnamese law equated fair trial rights with defence rights in criminal proceedings, but it has viewed defence rights only as scattered rights. The 2013 Vietnamese Constitution does not refer to the right to a fair trial in general, but recognises some elements of the right in Article 31, which applies to criminal proceedings, and in Article 103, which applies to both criminal and civil proceedings. Article 31(2) uses to the

[108] Nguyen, above n 106, 95.
[109] *Le Compte, Van Leuven and De Meyere v Belgium* (1983) 5 EHRR 183 .

word ‘fairly’ in the sentence: ‘The accused must be tried by the Court within the time prescribed by law, *fairly*, publicly’ (emphasis added). However, arguably this is not a way of addressing the general principle of a fair trial.[110] As I have argued, on the one hand, the principle of a fair trial is best characterised as a bundle of different procedural rights, and on the other hand, it requires the overall fairness of procedures and relevant rights.[111]

The concept of overall fairness, which has been developed by the ECtHR, is a helpful way of reasoning that provides an opportunity for resolving the conflict between elements of fair trial rights. Given those dimensional conflicts,[112] a conception of overall fairness is not only a holistic approach to procedures but also facilitates negotiations between procedural rights and supports rights-balancing reasoning.

IV. SUBSTANTIVE DUE PROCESS FOR PROCEDURAL DUE PROCESS: THE CASE OF MINOR OFFENCE JUSTICE IN VIETNAM

4.1. The usefulness of examining minor offence justice

Since the 2013 Vietnamese Constitution, both substantive due process (i.e. involving the human-rights-limitation principle) and procedural due process (i.e. involving fair trial rights) have become significant. This is also true for many other constitutions. It could be said that due process is the ‘soul’ of any constitution. In a ‘culture of justification’,[113] substantive due process demands that the state provide reasonable arguments for limiting any constitutional right, while procedural due process demands that the state should respect the right to a fair trial, which is emphasised as the right that protects other rights.[114]

Interestingly, although due process is widely viewed as central to many constitutions, the issue of substantive due process for procedural due process (or in other words, the limitation on fair trial rights) has not been examined rigorously. Some writers still raise the question of what process is due.[115] This question is particularly challenging in the context of minor offence processes, in which a massive circumvention on procedural rights is

[110] For a comparison, Article 6 of the ECHR is named as the ‘right to a fair trial’, which means a general principle of fair trial comprised of numerous specific rights.
[111] Dat T. Bui, 'Assessing the Overall Unfairness of Limitations on Fair Trial Rights in Summary Criminal Processes: A Remedy for Due-Process-Evading Justice (unpublished paper)' (2017).
[112] Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 294.
[113] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 111.
[114] The practice of the ECtHR has paid particular attention to the right to a fair trial. The majority of cases dealt with by the ECtHR related to this right (David Harris et al, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2009) 201-2).
[115] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 43; Lawrence B. Solum, 'Procedural Justice' [181] (2004) 78 *Southern California Law Review* 181, 183.

employed due to the alleged nonseriousness of the offence, as examined in my previous papers.[116]

The limitation on fair trial rights in minor offence justice is a challenging but helpful puzzle. The first major challenge concerns the nature of fair trial rights, according to which we must simultaneously resolve many conflicts between elements of fair trial rights as well as conflicts between procedural rights and substantive rights.[117] The second major challenge is that minor offence justice demands massive limitations on procedural rights.[118] However, the usefulness of addressing the challenges is that minor offence justice offers various models of procedures that can potentially enrich legal reasoning. Also, it may help us to find out what the core is of the right to a fair trial, which should almost never be limited, even in dealing with minor offences.[119] Thus, examining the limitation on fair trial rights in dealing with administrative sanctions and administrative handling measures in Vietnam would contribute to the worldwide debate about the extent to which due process rights should be limited. In other words, this examination helps to develop a theory of substantive due process for procedural due process.

4.2. The extension of procedural due process to minor offence justice

The simplification of criminal procedures is a trend in many legal systems. As Krapac has rightly observed,

> [n]ew criminal procedures in transition countries show a strong tendency toward 'self-reduction' of criminal justice through a variety of summary procedures. Their popularity is undoubtedly attributed to the desire to speed up proceedings and reduce the backlog of cases in the criminal justice system, as poor in resources and personnel as that system is.[120]

In contributing to this discussion, I have argued that summary criminal procedures do not just exist in transition countries but are also a trend in developed common law countries like the United Kingdom.[121] However, it should be noted that there are reverse trends in the Civil Law and the Common Law. While Civil Law jurisdictions like Vietnam have

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[116] Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 14; Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law', above n 14.
[117] Brems, above n 112.
[118] See: Appendix of Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 14, 464.
[119] See: Bui, 'Assessing the Overall Unfairness of Limitations on Fair Trial Rights in Summary Criminal Processes: A Remedy for Due-Process-Evading Justice (unpublished paper)', above n 111.
[120] Krapac, above n 97, 131.
[121] Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law', above n 14.

increasingly incorporated procedural rights into minor offence processes, a Common Law jurisdiction like England-Wales has been departing from its due process tradition in favour of efficiency goals. These two reverse trends reflect the interesting fact that legal systems across the world have been seeking an appropriate level of procedural due process for minor offence justice.

Like previous Vietnamese Constitutions, the text of the 2013 Constitution shows no explicit sign of the connection between fair trial rights and minor offence justice. As I explained above, there are two main reason for this problem. First, the terms 'administrative offence' and 'administrative measure' have never existed in Vietnamese Constitutions. Second, there has been no official constitutional interpretation of the relationship between crimes and administrative offences/measures, or between administrative offences/measures and fair trial rights. For these reasons, the 2013 Constitution does not automatically have an effect on minor offence justice. This leads to the challenge of examining the constitutionality of minor offence processes.

However, in the Vietnamese context, the extension of procedural due process to minor offence justice is a response to the demand of global constitutionalism. As I have analysed it, the regimes of administrative sanctions and administrative handling measures manifest a due-process-evading justice, which artificially disconnects so-called administrative offences from crimes.[122] For this reason, fair trial rights have not been taken seriously in designing procedures for administrative sanctions and administrative handling measures. However, the incorporation of international human rights law into Vietnamese law requires a re-conceptualisation of the notion of administrative offences. Accordingly, minor offences, which are public wrongs, are conceived as a kind of criminal charge under international law.[123] Once minor offences are considered criminal charges, a reasonable level of fair trial rights applies to them. Although minor offence justice has legitimacy in demanding remarkable limitations on fair trial rights, it does not mean doing away with procedural fairness. The 2013 Constitution marks a shift, in which Vietnamese minor offence justice might change its perspective from viewing procedural due process as irrelevant to recognizing limitations on procedural due process. The human rights limitation in Article 14(2) is a useful tool for creating a reasonable level of procedural rights for minor offence processes.

[122] Dat T. Bui, 'Due-process-evading Justice: the Case of Vietnam (unpublished paper)' (2017) .
[123] United Nations Human Rights Committee, CCPR/C/GC/32, *General Comment No. 32: Article 14 - Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007) [15]; *Engel v Netherlands* (1976) 1 EHRR 647 [82].

4.3. The constitutionality of limitations on procedural rights in minor offence processes: lessons Vietnam can learn from a Common Law jurisdiction

As I have argued previously, an assessment of the constitutionality of limitations on procedural rights in minor offence processes is a very challenging task,[124] because of three main reasons. First, the range of the so-called minor offences is not homogenous, but fragmented into several types of procedures corresponding to several groups of offences. For instance, there are four tiers of summary minor offence processes in England and Wales - a Common Law jurisdiction,[125] while there are three tiers of minor offence processes in Vietnam – a Civil Law jurisdiction.[126] Second, minor offence justice normally employs a large number of limitations on fair trial rights. Thus while serious offence criminals enjoy the highest level of procedural rights in the criminal court,[127] minor offence violators are generally subject to a low level of procedural rights using mostly out-of-court channels. Third, the fair trial principle is not merely one right but a bundle of procedural rights, which potentially results in internal conflicts between them, as well as external conflicts between procedural rights and substantive rights.[128] A proportionality test for limitations on rights, which has been used widely in Europe and has been spreading across the world, could face considerable obstacles in dealing with multiple clashes of fair trial rights.

In the Vietnamese context, existing Vietnamese jurisprudence is unable to provide an answer, or even a meaningful approach, to the assessment of the constitutionality of limitations on procedural rights in minor offence processes. The reason for this, as I mentioned, is that Vietnamese law has created a disconnection between administrative offences and fair trial rights, and more ironically, in the pre-2013-Constitution era, Vietnamese law did not embrace any legal reasoning for limitations on rights.

This study has aimed to provide a feasible approach for examining the constitutionality of minor offence processes in Vietnam, by learning from the English experience of summary justice. The English experience is useful for three reasons. First, having originated from a tradition of respecting due process rights, the English legal

[124] Bui, 'Assessing the Overall Unfairness of Limitations on Fair Trial Rights in Summary Criminal Processes: A Remedy for Due-Process-Evading Justice (unpublished paper)', above n 111.
[125] Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 14.
[126] Bui, 'Due-process-evading Justice: the Case of Vietnam (unpublished paper)', above n 122.
[127] However, exceptionally, limitations on some fair trial rights may be applied to several groups of serious offences (e.g., drug offences, terrorist offences) at normal criminal courts and group of less serious offences at one-judge criminal courts.
[128] Brems, above n 112.

system could, on the one hand, demonstrate the significance of procedural rights, and on the other hand, suggest answers as to how and why procedural rights have been increasingly reduced for minor offence justice. Second, the diversity of the four tiers of English summary justice is able to reveal the reasons, justification and trends of the expansion and fragmentation of minor offence justice.[129] Third, the English application of the proportionality doctrine, also influenced by European jurisprudence, is a meaningful lesson in the use of proportionality reasoning in minor offence processes.

The first lesson of the English system that could be useful for the Vietnamese system is that minor offences are treated as types of criminal offence regardless of legal denominations. Accordingly, the connection between minor offences and fair trial rights is guaranteed, as a result of the application of Article 6 of ECHR as interpreted by the ECtHR. As the ECtHR confirms, '[t]he general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex'.[130] Likewise, the Vietnamese system is under the influence of Article 14 of the ICCPR and its interpretation by the United Nations Human Rights Committee.[131]

The second lesson is that instead of due-process-evading justice,[132] it is better to recognise procedural pragmatism. I agree with Simon Brown LJ's argument that 'the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial'.[133] The question of which fair trial rights should be applied cannot be answered in a simple way. In *Brown v Stott*, British jurisprudence confirms the need for a balance between procedural rights and the public interest for the sake of the 'overall fairness' of the procedures. That is,

> [t]he jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no

[129] Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law', above n 14.
[130] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 [36]. See also: *Saunders v United Kingdom* (1997) 23 EHRR 313 [74].
[131] United Nations Human Rights Committee, CCPR/C/GC/32, *General Comment No. 32: Article 14 - Right to Equality before Courts and Tribunals and to a Fair Trial* (23 August 2007).
[132] Bui, 'Due-process-evading Justice: the Case of Vietnam (unpublished paper)', above n 122.
[133] *International Transport Roth GmbH and Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [33].

> greater qualification than the situation calls for... The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.[134]

Likewise, for Civil Law jurisdictions, Krapac argues that the fair trial principle

> allows these countries to strike an acceptable balance between the need to protect society from crime and the need for human rights protection, in order to prevent the state's efforts in criminal proceedings to establish the "truth" in criminal proceedings from going too far'.[135]

With regard to the third lesson, the above-mentioned procedural pragmatism would result in a demand for procedural proportionality. This means that the design of procedures depends on the seriousness of the offences, as manifested by the severity of the punishments, and the requirement of procedural fairness as a whole.[136] The idea of procedural proportionality has been to some extent recognised by the reasoning of the ECtHR as well as the UK courts. As the ECtHR argues, '(w)hile the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case'.[137] In the UK, this idea is echoed in *Brown v Stott*:

> The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree.[138]

By examining English summary justice, I have developed a theory of procedural proportionality for minor offence processes.[139] Instead of seeking a common process for all kinds of minor offences, I argue for different levels of rights for different types of minor

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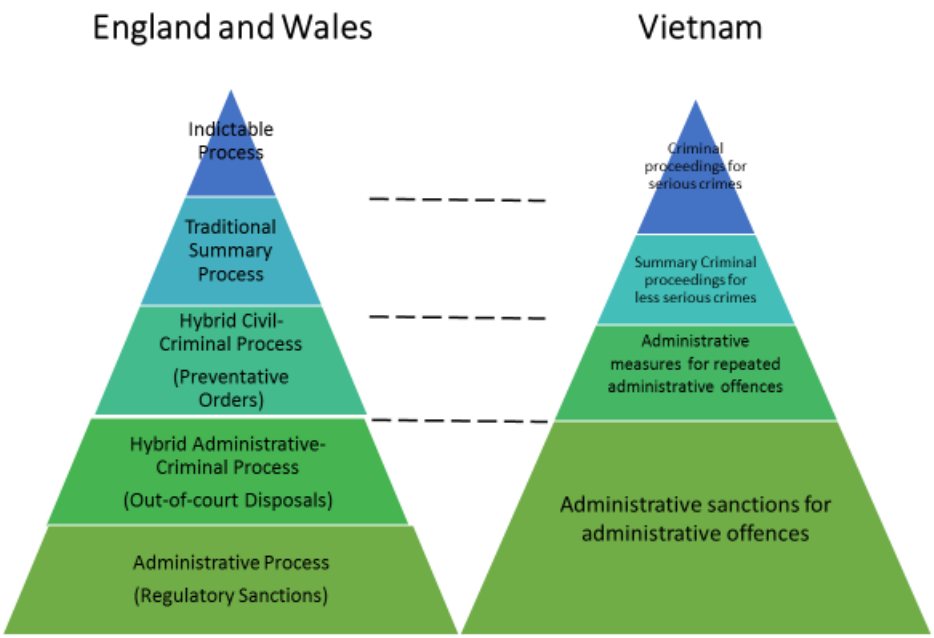
[134] *Brown v Stott* (2003) 1 AC 681 [704].
[135] Krapac, above n 97, 128.
[136] Dat T. Bui, 'Procedural Proportionality: The Remedy for An Uncertain Jurisprudence of Minor Offence Justice' (published online: 10 March 2017) *Criminal Law and Philosophy*.
[137] *O'Halloran and Francis v United Kingdom (G.C.)* (2008) 46 EHRR 397 [53].
[138] [2003] 1 AC 681 [704].
[139] This idea is proposed in: Bui, 'Procedural Proportionality: The Remedy for An Uncertain Jurisprudence of Minor Offence Justice', above n 136.

offences.[140] The English practice of summary minor offence processes provides a useful example in the fact that there are four types (tiers) of processes applicable for minor offences. In comparison with the most formal procedure for serious offences in the criminal court, four tiers of summary processes show four levels in the reduction of procedural rights, in descending order as follows: (1) the process for less serious offences dealt with in Magistrates' Courts; (2) the process for preventive orders at Magistrates' Courts; (3) the process for out-of-court disposals regarding trivial offences; and (4) the process for regulatory offences.[141]

Interestingly, these four tiers of English summary justice are basically comparable to the three tiers of the Vietnamese minor offence justice, showing a natural convergence between the two proto-typical systems (See Diagram 1 below). The Vietnamese system has just adopted a single-judge criminal court for less serious crimes, in which a few procedural rights are limited. It also has preventive educational measures dealt with by courts for repeat minor offence violators, for which several procedural rights are limited. Lastly, Vietnamese minor offence justice has employed massive limitations on procedural rights for administrative offences, which share common features with regulatory offences and trivial offences in England and Wales.[142] Arguably, the regime of administrative offences in Vietnam is too broad, in that one type of procedure is applied to both *mala prohibita* and *mala in se*, to both trivial offences and regulatory offences punishable by very heavy fine (i.e. tens of thousands of US dollars). Thus, the differentiation between regulatory offence process and trivial offence process in England and Wales is a useful lesson for Vietnam. This distinction could form the basis of revisions creating greater proportionality between the procedure and the seriousness of the offence.

[140] See details in: Bui, 'Assessing the Overall Unfairness of Limitations on Fair Trial Rights in Summary Criminal Processes: A Remedy for Due-Process-Evading Justice (unpublished paper)', above n 111.
[141] See details in: Bui, 'How Many Tiers of Criminal Justice in England and Wales? An Approach to the Limitation on Fair Trial Rights', above n 14.
[142] See details in: Bui, 'The Expansion and Fragmentation of Minor Offences Justice: A Convergence between the Common Law and the Civil Law', above n 14.

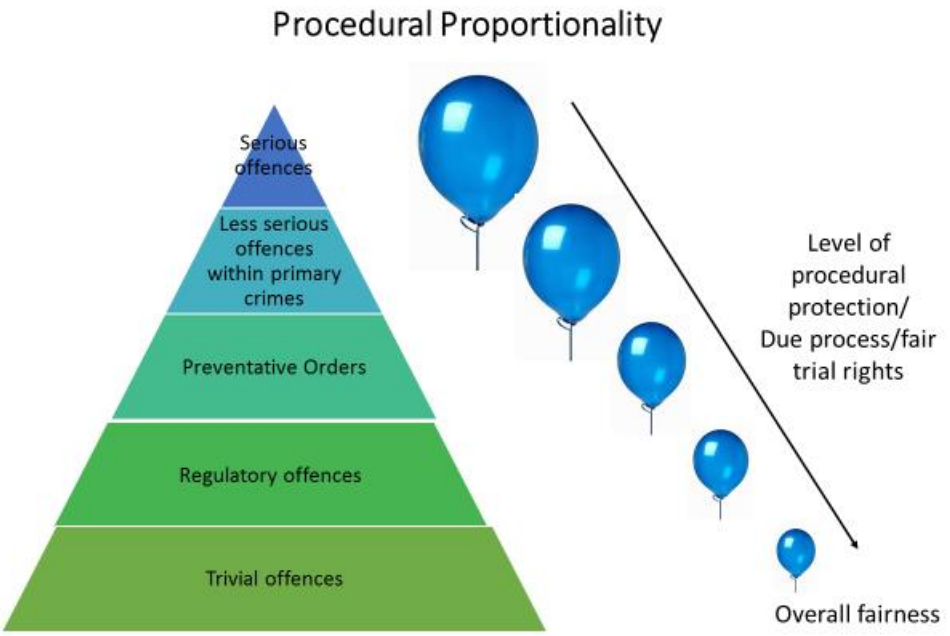
Diagram 1: Tiers of criminal processes in England-Wales and Vietnam



Like the English system, the Vietnamese regimes of administrative sanctions and administrative measures reflect a due-process-evading justice, in which procedural rights are not guaranteed as adequately as they ought to be.[143] I therefore I argue for a restructuring of the processes for administrative sanctions and administrative measures (see Diagram 2 below). First, the administrative sanctioning process should be split into two types applied to two groups of offences. That is, regulatory offences should be subject to higher level of procedural rights, while trivial offences should continue to enjoy largely the same level of procedural rights as they do under the current regime of administrative sanctions is. Second, the process for administrative measures should be subject to a higher level of procedural rights than civil or administrative proceedings. Here, the features of fair trial rights should be characterised as processes occupying a middle-ground[144] between criminal and civil proceedings.

[143] Bui, 'Due-process-evading Justice: the Case of Vietnam (unpublished paper)', above n 122.
[144] Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1992) 101(8) *Yale Law Journal* 1795.

Diagram 2: Redesign of summary criminal processes towards procedural proportionality



Both the English and Vietnamese systems confirm the idea that the constitutionality of minor offence justice should be examined through different tiers of processes characterised by different levels of procedural rights. Summary minor offence processes in both jurisdictions to some extent reflect the idea of procedural proportionality, according to which the procedure for a group of offences (tier) should be proportionate to the severity of the punishment, and should be exhibit overall fairness. But the problem is that the design of summary procedures is arbitrary and lacking in principled reasoning. Thus as I have proposed that in each tier the constitutionality of limitations on fair trial rights should be examined using three modes of reasoning: (1) those focusing on essential elements of fair trial rights; (2) those focusing on two-step overall fairness;[145] and (3) those using proportionality analysis. The first two modes of reasoning should be used as prerequisites for the proportionality analysis.

V. CONCLUSION

The doctrine of due process, which is manifested in both substantive due process and procedural due process, has become an important theoretical basis for modern constitutions. Having been supported by international human rights law, the values of

[145] The first two ways of reasoning are analysed in: Bui, 'Assessing the Overall Unfairness of Limitations on Fair Trial Rights in Summary Criminal Processes: A Remedy for Due-Process-Evading Justice (unpublished paper)', above n 111.

substantive due process (the human-rights-limitation principle) and procedural due process (fair trial rights) have to some extent penetrated into Vietnamese law, a socialist system.

This article has analysed the conception and application of the due process doctrine in Vietnam. The system has been characterised as being potentially arbitrary in its limitations on individual rights and inadequate in procedural due process. The article has also evaluated the opportunities and challenges facing Vietnamese jurisprudence following the incorporation of a human-rights-limitation principle into the 2013 Constitution. This Constitution, which strengthens the protection of human rights, will sooner or later demand the rigorous adoption of the due process doctrine.

This article has also examined the much debated and challenging issue of substantive due process for procedural due process – i.e., limitations on fair trial rights in the context of summary minor offence justice. It has been noted that an extension of procedural due process to minor offence processes should be advocated, and that a principled assessment of the constitutionality of limitations on fair trial rights for those processes will be needed. It has also been argued that the useful lessons of the English system may benefit the redesign of Vietnamese summary minor offence justice. Accordingly, minor offences should be considered as types of criminal offence and different types of such offences should be subject to different variations of procedural rights, such that they are proportionate to the characteristics of the offence and fair as a whole.

CHAPTER 8

CONCLUSION

This final chapter is devoted to indicating the significance of this research, summarising the way in which the thesis has answered the research question, and making suggestions for future research on the basis of the limitations of the present study.

I. SIGNIFICANCE OF THE RESEARCH

I have stressed and demonstrated the significance of the research topic: *The limitation on fair trial rights in summary criminal processes (or minor offence processes): Implications for Vietnam from the experience of England and Wales*. Despite the connotations of insignificance around the word 'minor', minor offence justice has a great influence on every society. Indeed, while the media and even academic studies have been mostly attracted to serious crimes, the vast majority of crimes and criminal cases involve minor crimes. The range of minor offences may be much broader than one imagines, numbering thousands. For example, in England and Wales most of the 3,000 new criminal offences that were newly created over the 10-year period between 1997 and 2006 were minor offences.[1] In Vietnam, if the estimation of the number of administrative offences[2] is correct, those offences numbered a few thousand. This is the reason why it is said that no-one can be said to fully understand the group of minor crimes, which has been called 'inaccessible and unknowable'.[3]

Not only is the group of minor offences vast, diverse and fragmented, but this has also deepened their 'uncertainty'.[4] Minor crimes are diverse because they include not just trivial offences (punishable by small fines - i.e., up to a hundred of US dollars) but also regulatory offences (subject to large fines - i.e., up to millions of US dollars) and even real crimes (subject to short periods of imprisonment - e.g., up to 6 months in England and Wales, or up to 3 years or other forms of deprivation of liberty in Vietnam). This thesis

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[1] Kirsty Walker, *3,000 New Criminal Offences Created Since Tony Blair Came to Power* DailyMail http://www.dailymail.co.uk/news/article-400939/3-000-new-criminal-offences-created-Tony-Blair-came-power.html.

[2] Viet Q. Nguyen, 'The Role of the Act on Handling Administrative Offences and Its Relation to Criminal Law - Major Contents of the Act on Handling Administrative Offences ('Vi tri, vai tro cua Luat Xu ly vi pham hanh chinh, moi quan he voi phap luat hinh su. Nhung noi dung chu yeu cua Luat Xu ly vi pham hanh chinh')' (Paper presented at the Directions for Making the Act of Handling Administrative Offences, Hanoi, 2008) 16.

[3] Kim Stevenson and Candida Harris, 'Inaccessible and Unknowable: Accretion and Uncertainty in Modern Criminal Law' [247] (2008) 29(3) *Liverpool Law Review* 247.

[4] Ibid.

therefore attempts to offer a conception of summary minor offences applicable for all jurisdictions. With regard to procedural design, minor crime justice has also been fragmented into several types of procedures for different groups of offences, reflecting the idea of tiers of criminal summary processes. Only a small group of less serious crimes are tried by the criminal court, while the large remaining groups of minor offences are dealt with by administrative agencies. The procedures are arbitrarily called 'criminal', 'civil' or 'administrative'. I believe the complex, uncertain procedures for the so-called minor offences are worthy of systematic exploration.

The thesis has identified and answered the research question: *To what extent should fair trial rights be limited in summary criminal processes: the implications for Vietnam of the experience of England and Wales?* This research question is examined through six sub-questions, which are in turn dealt with in six chapters or articles.

Sub-question 1: What should be the theoretical framework for addressing the uncertain jurisprudence of minor offence processes?

Sub-question 2: How are fair trial rights applied to different types of summary criminal processes in England and Wales?

Sub-question 3: How are fair trial rights applied to different types of summary criminal processes in Vietnam?

Sub-question 4: What are the similarities, differences, and trends in the development of summary criminal justice in England and Vietnam?

Sub-question 5: What analytical tools should be used to assess the overall unfairness of limitations on fair trial rights in summary criminal processes?

Sub-question 6: Which lessons can the Vietnamese legal system learn from the English experience in order to entrench the constitutionality of limitations on fair trial rights in dealing with minor offences?

As well as answering the above-mentioned research question, this thesis has offered suggestions for law reform and case law development in both the UK and Vietnam. After approximately two decades of radical changes in summary minor offence processes, it is worth reviewing the appropriateness and the effectiveness of all summary procedures. The UK may draw upon experiences of Civil Law systems such as those in Europe and even Vietnam in order to improve or redesign procedural models appropriate for different groups of minor offences. Furthermore, the UK Courts (and even the ECtHR and other courts influenced by it) may find reasonable suggestions about fair trial rights limitations

in this research. For Vietnam, this research has offered several recommendations for law reform in general as well as the redesign of minor offence justice in particular. These recommendations have focused on (1) the rigorous incorporation of the proportionality doctrine; (2) the recognition of minor offences as crimes/criminal offences; (3) the adoption of procedural proportionality – i.e., the redesign of procedural rights so as to be proportionate to the seriousness and other characteristics of offences.

II. CLAIMS OF THE THESIS

Chapter 2 (Article 1): Procedural proportionality: the remedy for an uncertain jurisprudence of minor offence justice

This article showed that the jurisprudence of minor offence justice is uncertain and poorly theorised. Uncertainty is manifested in terminological complexity and in the debate about whether non-traditional offences like regulatory violations or preventive measures are crimes. This substantive uncertainty has led to procedural uncertainty – that is, whether summary criminal justice spreads across non-traditional offences, and how to deal with the challenging hybrids between criminal and civil justice and between criminal and administrative justice. There is a danger that this procedural uncertainty may result in procedural arbitrariness.

Therefore, with a focus on the common law jurisdiction of England and Wales and the civil law jurisdiction of Vietnam, this article sought a theoretical framework to address the uncertain jurisprudence of minor offence processes (sub-question 1). The article's approach is to seek an account of crime and criminal processes that is most suitable for practice and most compatible with the broad notion of 'criminal charge' under international human rights instruments. The central argument of the article proposes a principled approach to procedural proportionality for minor offence justice. This argument is consolidated by three claims. First, minor offences should be considered forms of public wrongs (crimes/criminal charges) that warrant a short period of imprisonment or a non-custodial punishment (usually a fine). Accordingly, I reject the view that crimes are limited to morality-based offences. Second, the ambit of minor offences has no homogeneous essential features but comprises several groups, in which each group has distinctive features. Third, the fragmentation of minor offences demands an approach to procedural proportionality – that is, the procedure for each type of offences should be proportionate to the severity of the punishment, and ultimately fair as a whole.

Chapter 3 (Article 2): How many tiers of criminal justice in England and Wales? An approach to the limitation on fair trial rights

This article explored how fair trial rights are applied to different types of summary criminal processes in England and Wales (sub-question 2). Traditionally, the notion of two tiers of justice has mainly represented a significant difference in the fair trial rights associated with two types of criminal processes. Compared to the indictable process for serious crimes, the summary process for less serious crimes has been considered much less formal and lacks many elements of due process.

The article proposes that five tiers of criminal justice reflecting five degrees of limitation on fair trial rights be recognized, instead of the traditional notion of two tiers of indictable and summary processes in England and Wales. Over the last two decades, the radical transformation of summary criminal processes has challenged the idea of two tiers of justice. Such measures as preventive orders, out-of-court disposals and regulatory offence processes, which are characterised by higher levels of restriction on due process rights in comparison with the traditional summary processes in Magistrates' Courts, should be considered to constitute new tiers.

The recognition of five tiers of justice is not only a true reflection of reality but also helps to reconceptualise how fair trial rights have been designed; they are now structured in accordance with several groups of criminal offences. This fact confirms the flexibility of procedural due process, which is highly adaptable to circumstances. The increasing reduction of procedural due process for summary minor offences also touches a theoretical issue concerning the extent to which fair trial rights ought to be limited.

Chapter 4 (Article 3): Due-process-evading justice: the case of Vietnam

This article investigated how fair trial rights are applied to different types of summary criminal processes in Vietnam (sub-question 3). Vietnamese summary criminal justice only reflects a partial picture of minor offences as it is officially limited to the procedure applying to a group of less serious crimes prescribed in the Criminal Code. Having been influenced by the Soviet model, the Vietnamese minor offence regimes in relation to administrative offence sanctions and administrative measures have been artificially deemed to be outside the area of criminal justice. Due to a narrow conception of crimes as those prescribed in the Criminal Code, criminal fair trial rights have not been seriously taken into account in designing procedures for such minor offence regimes. Given the official recognition of administrative legal status, the values of administrative due process prevail over those of criminal due process in dealing with administrative-offence-related measures.

From a functional perspective that identifies all types of criminal charge regardless of denomination, the article argues that the regimes of administrative sanctions and administrative measures reflect an evasion of due process and should be considered criminal in nature. This functional approach demands rigorous consideration for designing fair trial rights for the procedures of those measures. What is required is a paradigm shift in facing the challenges of bringing Vietnam's summary minor offence justice in line with universal due process. The shift involves recognising that a certain number of criminal fair trial rights are applicable to procedures handling minor offences, which are considered as criminal charges. Moreover, different groups of minor offences are subject to correspondingly different levels of criminal fair trial rights.

Chapter 5 (Article 4): The expansion and fragmentation of minor offence justice: A convergence between the Common Law and the Civil Law

This article explored similarities, differences and trends in the development of summary criminal justice in England and Vietnam (sub-question 4), so as to make a meaningful contribution to comparative law. Recent literature on minor offence justice has largely focused on the Common Law world[5] and European countries.[6] These countries basically represent the West. For this reason, it is worth investigating a developing country outside these regions, such as Vietnam. This study does not just focus on a single jurisdiction but undertakes a proto-typical comparative approach looking at contrasting cases.[7] By doing this I explore the similarities, differences and developing trends of summary criminal justice in England and Vietnam.

The findings of the study were beyond my initial expectation. The most interesting point is that although English summary justice and its Vietnamese counterpart have had no historical relationship, the reverse trends in these two systems confirm the theory of natural

[5] For example, see: Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225; Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74(1) *Modern Law Review* 1; Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008); Alexandra Natapoff, 'Misdemeanor Decriminalization' [1055] (2015) 68(4) *Vanderbilt Law Review* 1055; Victor Tadros, 'Criminalization and Regulation' in R.A. Duff et al (eds), *The Boundaries of Criminal Law* (Oxford University Press, 2011).

[6] For example, see: Oswald Jansen (ed), *Administrative Sanctions in the European Union* (Intersentia, 2013); Oswald Jansen and Philip M. Langbroek (eds), *Defence Rights during Administrative Investigations: A Comparative Study into Defence Rights during Administrative Investigations against EU Fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland* (Intersentia, 2007).

[7] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) *American Journal of Comparative Law* 125 126.

convergence.[8] Because of the nature of minor offences, a natural convergence between the two systems of summary processes is more obvious and less challenging than any convergence in the process for serious crimes. It is well known that the goals of regulation, prevention and efficiency have predominated over the ideal of adversarialism, even in an adversarialism-oriented system like England's. This natural convergence is accompanied by a tendency to evade due process because criminal fair trial rights are disproportionately limited due to the supposed triviality and non-criminal character of minor offences. The two systems have shown that the demands of modern governance and the influence of international law can result in increasing similarities in legal systems that have traditionally been considered very different. It should be admitted, however, that minor offence justice raises questions and issues that many countries have in common. Other jurisdictions – Common Law, Civil Law and possibly others – can benefit from the comparison of English and Vietnamese experiences discussed in this research. The cases of English and Vietnamese summary processes suggest and require a common theory of procedural proportionality, which is the major theoretical framework of this thesis. The article argues for a jurisprudential convergence that the summary criminal justice reflects limitations on fair trial rights in dealing with less serious public wrongs.

Chapter 6 (Article 5): Assessing the overall unfairness of limitations on fair trial rights in summary criminal processes: a remedy for the due-process-evading justice

By seeking an answer to the question about the extent to which procedural rights ought to be restricted for minor offence justice (sub-question 5), this article gives a partial answer to the more widely debated issue of what due process is: what process is 'due'?[9] I contend that minor offence justice better illuminates the due process question than does serious crime justice. This is simply because a large number of fair trial rights are limited in dealing with minor crimes compared to the few procedural rights that are limited in dealing with major crimes in the criminal court. Experiences from *summary* criminal justice are helpful in bringing our attention to how *summary* the procedure should be. I hope this thesis will suggest new approaches to criminal processes and fair trial rights.

By examining the English and Vietnamese models of due-process-evading summary criminal processes, the article has developed two analytical tools, which act as prerequisites for the formulaic overall balancing of the proportionality test, for assessing the overall unfairness of limitations on fair trial rights. First, apart from internal and

[8] John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' [357] (1981)(2) *Stanford Journal Of International Law* 357 369.
[9] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 117.

external overall fairness, the article makes suggestions about two-stage overall fairness. Accordingly, it identifies three models of two-stage processes and analyses their suitability for different measures. Second, the article suggests that it is crucial to determine the inviolable core of procedural due process, which is comprised of several essential elements of the right to a fair trial.

Chapter 7 (Article 6): A quest for due process doctrine in Vietnamese law: from Soviet legacy to global constitutionalism

This article explored the lessons the Vietnamese legal system can learn from the English experience, in order to guarantee the constitutionality of limitations on fair trial rights in dealing with minor offences (sub-question 6). After offering a comparison between England and Vietnam in article 4, I realised that the English experience could provide more helpful lessons for Vietnamese minor offence justice than I had expected when the research began. The usefulness and relevance of comparing the two systems can be summarised in two points. First, in contrast to traditionally recognized differences between the criminal justice system of the Common Law and that of the Civil Law, summary justice in England and Wales and that of Vietnam have shown increasing commonalities that are surprising and interesting. Both systems of summary justice have fragmented into several tiers of processes for different types of offences and applied remarkable reductions of procedural rights. Arguably, the more similar the legal systems have become, the more useful are the lessons that can be learned, even though the systems belong to different traditions. Second, in addition to the natural convergence between the two systems, the United Kingdom, of which England and Wales is a criminal jurisdiction, has incorporated the doctrine of proportionality as a result of the Human Rights Act 1998. This doctrine has to some extent influenced the design of summary processes in England and Wales.[10] In the meantime, Vietnamese law has recently adopted a proportionality clause in Article 14(2) of the 2013 Constitution, which is expected to change the legislation in relation to limitations on human rights significantly. I believe that the design of Vietnam's summary minor offence justice can benefit from the English system, which has by and large applied the proportionality doctrine to limitations on fair trial rights.

This article has claimed that under the influence of Soviet jurisprudence, a Vietnamese version of due process developed in which human rights could be arbitrarily trumped by public interests, and fair trial rights were problematically limited to criminal proceedings, and almost ignored in administrative procedures. The article analyses the importance and

[10] For example, see: *Brown v Stott* [2003] 1 AC 681 [704].

challenges of incorporating a human rights limitation principle into the 2013 Constitution, and argues for an extension of procedural due process to minor offence justice that takes it closer to global constitutionalism. By examining the useful lessons of the English system, the article advocates the idea of treating minor offences as types of criminal charges and embracing procedural pragmatism and procedural proportionality instead of due-process-evading justice.

III. THE SCOPE OF THE THESIS AND SUGGESTIONS FOR FUTURE RESEARCH

Due to the nature of undertaking a PhD thesis, this research undeniably has limited scope. First, it could only focus on the two cases of England-Wales and Vietnam. I did not have the opportunity to examine other jurisdictions thoroughly, even though I have sometimes made brief references to the experiences of China, France, Germany, Italy, the United States, Australia, Ireland, and so on. Although the two cases of England-Wales and Vietnam provide a meaningful comparison of summary minor offence processes, I can see that further exploration of other jurisdictions such as France and Germany in continental Europe, or the United States and Australia in the Common Law world, or China in Asia, have the potential for teaching other useful lessons. In the European region, it would be worthwhile for future research to examine the classification of criminal offences into crimes, less serious crimes (*délit*), and minor offences (*contravention*) in France, as well as the regime of administrative offences (*Ordnungswidrigkeitengesetz*) in Germany. In these two countries, the application of the proportionality doctrine to procedural rights may have similarities with, as well as variations from, the English system. Besides European jurisdictions, it would also be very useful to investigate the regime of misdemeanours and petty offences/infractions in the United States, as well as the categories of regulatory justice and infringement/penalty notice in Australia. In Asia, the Chinese system of preventive educational measures deserves to be examined and compared with Soviet justice and that of other contemporary socialist countries.

The second limitation is that this research has not used any other current doctrines, methods or ways of reasoning than proportionality. The reason is that the thesis purports to analyse the strengths and weaknesses of the proportionality principle in order to assess the constitutionality of limitations on fair trial rights in summary minor offence processes. Here, one suggestion for future study that I can make is to explore the American and Australian methods further. These two Common Law cases may diversify ways of reasoning in restricting procedural rights. While Australia has used the reasonableness

doctrine, which is basically an echo of the English system,[11] the United States has used categorised tests, which include three levels (strict scrutiny, intermediate scrutiny, minimal scrutiny) applicable to three groups of constitutional rights.[12]

[11] William Gummow, 'Rationality and Reasonableness as Grounds for Review' in Debra Mortimer (ed), *Administrative Justice and Its Availability* (Federation Press, 2015) 26.
[12] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Doron Kalir trans, Cambridge University Press, 2012) 509; Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (4th edn, Wolters Kluwer Law & Business 2011) 553-4.

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