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

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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

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

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,"

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 antisocial 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 antisocial 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

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]ntisocial 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

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

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

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

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.