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VIET NAM'S FIRST MODERN PENAL CODE

JOHN QUIGLEY*

Our people are in the first stage of the transition period. Socialist construction is taking place in our country against a very complicated international situation. The country is confronting many serious difficulties. The struggle between the socialist and capitalist roads is intense, and the struggle between ourselves and the enemy is also very fierce. The relics of the old societies have yet to be wiped out completely.¹

With these words, the Communist Party of Viet Nam called for public discussion of Viet Nam's draft penal code. The Socialist Republic of Viet Nam Code (the "Code"), enacted by the National Assembly of Viet Nam in 1985,² is the first penal code to be in force throughout

* John Quigley is a Professor of the College of Law, Ohio State University. He is grateful to Dr. Nguyen Phuong-Khanh, Senior Legal Specialist, Library of Congress, Washington, D.C., for documentation and consultation; to Dean Stephen B. Young, Hamline University School of Law; to Stephen Denney, Indochina Studies Project, Institute of East Asian Studies, University of California at Berkeley; to the S.R.V. Permanent Mission to the United Nations; to the Viet Nam Lawyers Association; and to numerous individual members of that Association who facilitated the author's study of Vietnamese penal law during his stays in Vietnam in 1978 and 1979. He is indebted to Andrea Panaritis, then of the Indochina Project, Washington, D.C., for providing Code drafts; and to Ilene Cohn, J.D. 1985, Ohio State University, for extensive research in, and analysis of, Vietnamese penal law.

1. Editorial, *Nhan Dan*, Nov. 8, 1984, translated into English in Foreign Broadcast Information Service, Vietnam, Nov. 19, 1984, at K7.

2. The S.R.V. Code was adopted by the Seventh National Assembly of the Socialist Republic of Viet Nam, Ninth Session, June 27, 1985 [hereinafter CODE]. It entered into force Jan. 1, 1986. It was published in the newspaper *Nhan Dan*, July 12, 15, 16, 17, 1985, from which it was translated into English in *Vietnam: S.R.V. Criminal Code*, Joint Publications Research Service, Southeast Asia Report, JPRS-SEA-85-135, Sept. 3, 1985.

the territory of Viet Nam since the nineteenth century. It is the product of a history that has seen Viet Nam's penal legislation adopted by or under the influence of two foreign states—China and France. The period since 1975 is the first time in which Viet Nam has been in a position to enact legislation of its own choosing. Because of this history, drafters of the 1985 penal code had no definite moorings in devising its form and content.

The Code is also the first code in any field of law to be enacted by the government of the Socialist Republic of Viet Nam (the "S.R.V."). It is thus the first code of any kind for the entire country of Viet Nam since the nineteenth century. As the first S.R.V. code, it sets a pattern for other codes planned to follow, including criminal procedure and civil law codes.

The Code is in the continental style, and it draws heavily on the penal legislation of socialist countries. At the same time, it addresses the contemporary situation of Viet Nam. This article explores the motivation and philosophy behind the Code and seeks to place it within the complex historical and political context within which its drafters worked. In so doing, it draws extensively on the drafters' explanation.

This Article analyzes: (1) the Code's historical antecedents in Viet Nam; (2) the reasons for its adoption; (3) its definition of an offense; (4) its abolition of punishment by analogy; (5) detention permitted outside the Code; (6) types of punishment permitted in the Code; (7) outside influences on the Code; and, finally, (8) the Code's treatment of offenses against the state; (9) offenses related to the socialist economy; and (10) other acts punishable as crimes under the Code.

I. ANTECEDENTS OF THE S.R.V. CODE IN VIETNAMESE PENAL LAW

Vietnamese penal law has developed under strong foreign influence, first from China, and later from France. It began independent development only after 1945.

For an English translation, with introduction, see *Phuong-Khanh*, 13 *REV. OF SOCIALIST L.* 103 (1987); for a French translation of the Special Part see *Trinh Ho Thi & Cu Dinh Lo*, 1 *BULL. DE DROIT* 38 (1986), a journal of the Viet Nam Lawyers Association. A French translation of the draft version of the General Part appears in 1 *BULL. D'INFORMATION JURIDIQUE* 86 (1983). (This is the former name of the *BULL. DE DROIT* of the Viet Nam Lawyers Association). Code language quoted in this article represents the author's translation from the French translation.

A. Vietnamese Penal Legislation to 1945

The 1985 code is the first penal code adopted for the entire country of Viet Nam since the 1812 code of Emperor Gia Long of the Nguyen Dynasty (1802-1945). The Gia Long Code covered many fields of law. Its penal provisions were a "faithful copy of China's Ch'ing Code,"³ representing "a conscious effort at imitation."⁴ The Gia Long Code followed closely the Code of China's Ch'ing Dynasty, both in content and structure.⁵ Like the Ch'ing Code, the Gia Long Code attributed little significance to *mens rea*, focusing instead on harm caused. Also, in imitation of the Ch'ing Code, the Gia Long Code contained elaborate distinctions in theft and homicide on the basis of the familial relationship between perpetrator and victim.⁶

Viet Nam's only prior major code, the Hong Duc Code of 1483, of the Le Dynasty (1428-1788), drew heavily from the Chinese codes of the T'ang and Ming Dynasties.⁷ China controlled Viet Nam (then consisting of what is now the extreme northern portion only) from the second century B.C.E., formally annexing it in 111 B.C.E. It was governed by China for the next thousand years as China's province of Giao Chi. The Chinese government called it An Nam, meaning "pacified south." Chinese-style government, through a bureaucracy administered by mandarins, was instituted during this period.⁸

In 939 C.E., Viet Nam overthrew Chinese rule but remained a tributary, rendering payments for investiture of Viet Nam's rulers by China's emperor.⁹ Nevertheless, Viet Nam retained Chinese-style government.

After France colonized Viet Nam in the late nineteenth century,¹⁰ it introduced three penal codes—one in each of the three sectors into which it divided Viet Nam—Cochinchina (south),¹¹ Annam (center),¹²

3. Tai, *Vietnam's Code of the Le Dynasty (1428-1788)*, 30 AM. J. COMP. L. 523, 525 (1982).

4. M. HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA 80 (1978).

5. *Id.* at 86-89. Mau, *Introducción al Derecho Vietnamita*, REVISTA DEL INSTITUTO DE DERECHO COMPARADO (Barcelona), no. 22-23, at 38, 40 (1964).

6. M. HOOKER, *supra* note 4, at 89-91.

7. Tai, *supra* note 3, at 525.

8. R. JUMPER & M. NORMAND, *Vietnam*, in GOVERNMENT AND POLITICS OF SOUTHEAST ASIA 375-76 (G. McTurnan Kahin ed. 1964).

9. M. HOOKER, *supra* note 4, at 94.

10. On Viet Nam's status as a colony of France, see NGUYEN HUU TRU, QUELQUES PROBLÈMES DE SUCCESSION D'ETATS CONCERNANT LE VIET-NAM 43 (1970).

11. MODIFIED PENAL CODE, Dec. 31, 1912, which remained in force until 1972; see also Mau, *supra* note 5, at 56.

12. HOANG-VIET CRIMINAL CODE, Decree No. 43 (1933); see also Mau, *supra* note 5, at 56.

and Tonkin (north).¹³ These codes were modeled on France's penal code.¹⁴ "The Indochinese legal system was clearly part of the French state system."¹⁵

B. Vietnamese Penal Legislation 1945-1985

At the end of Japan's World War II occupation in 1945, the government of the Democratic Republic of Viet Nam (the "D.R.V.") emerged in the north of Viet Nam. As a result of warfare in Viet Nam, from that time until 1975, the D.R.V. enacted no comprehensive legislation in any field. It instituted some penal legislation, though not a comprehensive code. As for institutions of justice, despite continuing hostilities, it "in relatively short order, succeeded in establishing the basis of a modernized legal edifice in the country."¹⁶ In 1954 the area it controlled became fixed by a demarcation line following the 17th parallel.

South of the 17th parallel, the government of the Republic of Viet Nam came into being after 1954, replacing the French administration. It continued to use the French code until it adopted a new code in 1972 which was in force only until 1975, when the Provisional Revolutionary Government (the "P.R.G.") assumed power in the south. The P.R.G. enacted a set of penal laws in March 1976.¹⁷

A National Assembly for the entire country met for the first time in July 1976 and established a unified government called the Socialist Republic of Viet Nam.¹⁸ Thereafter, D.R.V. legislation was applied throughout Viet Nam. Between 1976 and 1985, the S.R.V. government enacted a number of penal laws on particular topics.¹⁹

13. CODE OF 1917, revised in 1921; see also Mau, *supra* note 5, at 56.

14. Mau, *supra* note 5, at 56; see also N. HUY & T. TAI, 1 THE LE CODE: LAW IN TRADITIONAL VIETNAM, A COMPARATIVE SINO-VIETNAMESE LEGAL STUDY WITH HISTORICAL-JURIDICAL ANALYSIS AND ANNOTATIONS 31 (1987).

15. NGUYEN HUU TRU, *supra* note 10, at 46.

16. Ginsburgs, *The Genesis of the People's Procuracy in the Democratic Republic of Vietnam*, 5 REV. SOCIALIST L. 187, 200 (1979).

17. REPUBLIC OF VIETNAM CRIMINAL CODE, Decree-Law No. 026-20-12-1972, Dec. 20, 1972. Decree of the Provisional Revolutionary Government, March 15, 1976, reprinted in part in KESING'S CONTEMPORARY ARCHIVES, Aug. 20, 1976, at 27895.

18. LA RÉPUBLIQUE SOCIALISTE DU VIET NAM: STRUCTURES ET FONDEMENTS (DOCUMENTS DE LA PREMIÈRE SESSION DE L'ASSEMBLÉE NATIONALE DU VIET NAM RÉUNIFIÉ - JUIN-JUILLET 1976) 5 (1976).

19. See, e.g., Law on Punishing Persons Engaged in Speculation, Smuggling, Producing Fake Goods or Illegal Business, June 30, 1982, reprinted in Nhan Dhan, July 13-14, 1982 and in Foreign Broadcast Information Service, Vietnam, July 20, 1982, at K4; Law on Punishment for Bribery Offenses, May 23, 1981, reprinted in Foreign Broadcast

Work began in 1976 on drafting a penal code. The Council of Ministers appointed a drafting committee, composed of representatives of a number of government ministries and of several citizen and professional organizations such as the Viet Nam Confederation of Trade Unions, Viet Nam Women's Union, Communist Youth Union, and Viet Nam Lawyers Association. Drafts were considered by the National Assembly and its Judiciary Committee, beginning in 1982,²⁰ and were circulated widely for public discussion.²¹ The National Assembly adopted the Code on June 24, 1985. Thus, the immediate predecessors to the 1985 Penal Code are the penal legislation of the Democratic Republic of Viet Nam, and a smattering of S.R.V. penal legislation which was adopted following the formation of that government in 1976.

Until 1955 the Democratic Republic of Viet Nam continued to use the French codes. A 1945 decree specified:

Pending the promulgation of legal codes for all of Viet Nam, all actual legislative texts still in force in North, Central and South Vietnam are provisionally maintained, when not contrary to the provisions laid down in the present decree. Pending the promulgation of such codes any urgent change will be made by decree.²²

This meant that the three French codes remained in force in the areas under control of the Democratic Republic of Viet Nam. A caveat regarding use of the French codes was introduced by Article 12 of the Decree: "Articles of old legislative texts provisionally kept by the present decree are only applicable if not contrary to the principle of Viet

Information Service, Vietnam, May 28, 1981, at K4; Military Obligation Law discussed in Editorial, *Scrupulously Implement the Law on Military Service*, Nhan Dan, July 7, 1982, reprinted in Foreign Broadcast Information Service, Vietnam, July 14, 1982, at K5.

20. Report to National Assembly on drafting of the penal code by Nguyen Huu Tru, General Secretary of the Council of Ministers, June 23, 1982, reprinted in Nhan Dan, June 25, 1982, translated into English under the title *National Assembly Hears Report on Penal Code*, Foreign Broadcast Information Service, Vietnam, July 20, 1982, at K2.

21. Directive of the Secretariat of the Central Committee of the Viet Nam Workers Party urging discussion in state agencies and social organizations, reported by Hanoi Domestic Service, reprinted in Foreign Broadcast Information Service, Vietnam, Nov. 19, 1984, at K6.

22. D.R.V. Decree No. 47, Oct. 10, 1945, art. 1; see also Huong, *Penal Law in AN OUTLINE OF INSTITUTIONS OF THE DEMOCRATIC REPUBLIC OF VIET NAM* 185, 192 (1974), English translation of APERÇU SUR LES INSTITUTIONS DE LA RÉPUBLIQUE DÉMOCRATIQUE DU VIET NAM (1972); I. ANDREEV, OCHERK PO UGOLOVNOMY PRAVU SOTSIALISTICHESKIKH GOSUDARSTV [Outline of the Criminal Law of Socialist States] 28 (1978), a Russian translation and revision of I. ANDREJEW, ZARYS PRAWA KARNEGO PANSTW SOCJALISTYCZNYCH (1975).

Nam's independence and to the democratic republican regime."²³ The D.R.V. government promulgated a number of penal enactments in its first few years of existence.²⁴ Finally, in 1955, use of the French codes, including the French penal code, ended. An Instruction issued by the Ministry of Justice, June 30, 1955, indicated:

The old legislation can no longer serve as a juridical basis for popular tribunals to determine infringements, in any case whatsoever When a new text is available it must be applied If there are only provisions of the old penal code at hand, no reference should be made to them. In the latter case, the tribunal has to base itself on general directives concerning trial and judgment, on general requirements concerning the kind of matters to be judged and concrete requirements of the case under consideration.²⁵

While no governmental decree appears to have been issued to terminate the effect of the French code, the People's Supreme Court followed the Ministry's Instruction. In a directive of July 10, 1959, the Court stated:

[I]n Viet Nam's present situation articles of law adopted under imperialist and feudalism oppression should not be applied even in a new spirit. To judge civil and penal cases, reference should be made to the legislation of the Democratic Republic of Vietnam (laws, decrees, circulars, circular No. 556), the Party's political line, the government's policy, [and] the People's Supreme Court rulings. In case no solution can be reached a report should be made to the People's Supreme Court for its views.²⁶

In 1967 and 1970 decrees were adopted defining certain categories of crime: counter-revolutionary crimes, crimes against socialist ownership, and crimes against personal ownership.²⁷ These were elaborate decrees,

23. Huong, *supra* note 22, at 192.

24. *Id.* at 193; see also I. ANDREEV, *supra* note 22, at 28-29.

25. Huong, *supra* note 22, at 194; see also I. ANDREEV, *supra* note 22, at 29.

26. Huong, *supra* note 22, at 194.

27. Decree-Law, Oct. 30, 1967, "On the Repression of Counter-Revolutionary Crimes," English translation, reprinted in Joint Publications Research Service, JPRS No. 45611, CA 106, at 103-10 (1967), and in Foreign Broadcast Information Service, Vietnam, Oct. 23, 1979, at K1, re-published in Nhan Dan, Oct. 16, 1979; Decree-Law, Oct. 21, 1970, "On the Repression of Infringements on Socialist Property"; Decree-Law, Oct. 21, 1970, "On the Repression of Infringements of the Private Property of Citizens" (French translations of the three statutes were made available to the author by the Viet Nam Lawyers Association).

phrased like provisions of a penal code.

C. Role of Supreme Court in Defining Crimes

In addition to these decrees, there also appeared directives of the People's Supreme Court concerning certain offenses. The Court issued these directives pursuant to a power granted it in the Law on the Organization of the Popular Tribunals of July 26, 1960 to "guide lower people's tribunals in the application of laws, of the political line, and of procedure."²⁸

The Court was quite active in issuing such directives, many of which elucidated general principles of penal law, such as intent, age of criminal responsibility, complicity, the aims of criminal punishment, deprivation of certain rights, and sentencing on multiple convictions.²⁹ Other directives dealt with particular offenses, either further defining offenses provided for by D.R.V. legislation, or acting, in effect, as a substitute for legislation. Directives were issued concerning looting, theft, embezzlement, breach of trust, swindling of socialist property, poor management of socialist property, moonshining, speculation, and crimes against the person.³⁰ These directives were explained to lower court judges at annual meetings held by the People's Supreme Court. They also served as a basis for drafting legislation.³¹

II. REASONS FOR ADOPTION OF THE CODE

The lack of broad-scope penal legislation was recognized as undesirable in a 1955 instruction of the Council of Ministers:

[T]he diversity in court practice in different regions has resulted in a situation in which the methods of case consideration are not precise and correct, and in certain regions they do not comply with published rules. Therefore it is necessary to generalize this court practice by publishing a single enactment that indicates how punishments are to be imposed for different criminal offenses.³²

No code was enacted, however, prior to that of 1985.

28. Law on the Organization of People's Tribunals, July 26, 1960, art. 21 (French translation was made available to the author by the Viet Nam Lawyers Association).

29. Huong, *supra* note 22, at 195.

30. *Id.* at 195-96.

31. *Id.* at 196. On the desirability of a code, see *id.* at 193, 207.

32. Circular No. 442, D.R.V. Council of Ministers, Jan. 19, 1955, reprinted in I. ANDREEV, *supra* note 22, at 28-29.

The preamble to the 1985 Code recites that "[t]his penal code is a continuation and development of the criminal laws applied by our state since the August revolution. It sums up the experiences of our country in the struggle against and prevention of infractions over the past few decades, while providing for future infractions."³³ The influence of D.R.V. legislation is evident in the Code.

The aim behind adoption of a code is to bring the law into line with the current situation of Viet Nam and to fill gaps in existing legislation. Phan Hien, S.R.V. Minister of Justice, referring to the D.R.V. statutes, said that "some of them are no longer suitable. Besides, no ordinances have been enacted with regard to a large number of offenses, and the policy of the State in the field of criminal law is not yet comprehensive."³⁴ He further stated:

The legislative texts of penal law promulgated from 1945 to the present . . . are all in the form of separate laws, each aimed only at certain offenses or groups of offenses. That is why they, at a general level, are not systematic, in some areas they lack unity, and they do not provide for all offenses. Some of them are not in keeping with the needs of the present situation.³⁵

The individual penal statutes provided, moreover, few articles typically found in the general part of a penal code to resolve issues applicable to all specific offenses.

Phan Hien also sees a penal code as useful for attaining economic and social objectives:

[T]he promulgation of a penal code . . . will assist in the fulfillment of our two strategic tasks (to build socialism and defend our socialist homeland), our three revolutions (revolution in production relations, scientific and technological revolution, and ideological and cultural revolution), and in the safeguarding of Party leadership, the people's right to collective mastery, and effective administration by the State.³⁶

33. CODE, *supra* note 2, preamble, para. 3.

34. Hien, *The Penal Code of the Socialist Republic of Vietnam*, VIETNAM COURIER, no. 9, at 4 (1985).

35. Hien, *Le Code Pénal de la République Socialiste du Vietnam*, 1 BULL. DE DROIT 18 (1986).

36. Hien, *supra* note 34, at 4.

III. THE CODE'S DEFINITION OF A PUNISHABLE OFFENSE

The S.R.V. Code, in the tradition of codes of socialist states,³⁷ defines an offense in a dual fashion—from its formal aspect and from its material aspect. This is done in Article 8. That article first defines an offense as an act forbidden by the Code. This is the formal aspect. But it further defines an offense in its material aspect, namely, by specifying the social interests infringed by an offense. Article 8, paragraph 1, reads:

An offense is a socially dangerous act provided for in the present Code, whether committed intentionally or not, by a person capable of penal responsibility, that threatens the independence, sovereignty, unity, or territorial integrity of the country, that threatens the socialist state system, that threatens economic institutions or socialist property, that threatens the life, health, property, liberty, honor, dignity, or other fundamental rights of citizens, or that threatens other aspects of the socialist legal order.³⁸

The Soviet codes,³⁹ like the S.R.V. Code, identify, in their definition of the concept of crime, the social interests protected by penal law. Some socialist codes omit such a listing but all include the characterization of crime as "socially dangerous."⁴⁰

In contrast, Western European penal codes typically define an offense from the formal aspect only—as an act provided for in the code. They do not refer to its socially dangerous character or to interests threatened by it.⁴¹

37. "Socialist state" is used to designate states governed by a communist party espousing a historical materialist analysis; see *infra* notes 54-61 and accompanying text.

38. CODE, *supra* note 2, art. 8, para. 1.

39. Reference will be made throughout to "Soviet codes," as in the USSR, structured as a federation. Penal legislation is found in a code for each of the fifteen republics that constitute the federation. While some provisions are enacted by the federation and reproduced in the republic codes, most are formulated at the republic level. Frequent reference will be made to the Ugolovni Kodeks RSFSR [hereinafter UK RSFSR], which is the Criminal Code of the Russian Soviet Federated Socialist Republic, one of the fifteen constituent republics. The fifteen Soviet penal codes reflect substantial similarity with each other.

40. Horvath, *The Concept of Crime: Categories of Criminal Acts*, in SOVREMENNYE TENDENTSI RAZVITIYA SOTSIALISTICHESKOGO UGOLOVNOGO PRAVA [Contemporary Tendencies in the Development of Socialist Criminal Law] 12, 14-18 (V. Kudriavtsev ed. 1983); see also I. ANDREEV, *supra* note 22, at 56.

41. I. ANDREEV, *supra* note 22, at 58; see also Pomorski, *Communists and Their Criminal Law: Reflections on Igor Andrejew's "Outline of the Criminal Law of Socialist States,"* 7 REV. SOCIALIST L. 7, 16 (1981).

Inclusion of the material element in the definition of crime serves three functions: 1) public education; 2) limiting crime to situations where social danger exists; and 3) portraying crime as a threat to a particular social class.

A. Public Education

Inclusion of the material element stresses to the public the reason why the legislature has chosen the acts included in the Special Part; those acts threaten the enumerated interests. The inclusion thus has the intended impact of convincing the public to obey the law by explaining the importance of the interests protected. As stated by one socialist jurist:

[O]ne must remember the educational and prevention role of the general concept of crime. It consists in the fact that citizens, on the basis of the indicators included in this concept, receive a conception about what kinds of acts are considered by the law to be negative. Thus a correct definition of crime exerts a positive force on formation of the ethical system of values of the citizens.⁴²

This function of law as it should operate under socialism was identified by the Italian Marxist philosopher Antonio Gramsci, who saw in the carrying out of a legal norm a propagation by those obeying it of the validity of the norm.⁴³

"[T]he aim of the Penal Code" is said to be "not only to punish, but also to educate."⁴⁴ The Code here follows socialist penal codes, which assume a role of educating the citizenry in values that must be held if society is to progress through the state of socialism to that of communism.⁴⁵ This public education aim is not new to Vietnamese law. A 1960 D.R.V. statute on the courts stated that "the activities of the people's courts has as an aim the education of citizens in a spirit of loyalty to the country, to the people's democratic system, respect for public property, observance of laws, labor discipline, and the rules of life in society."⁴⁶

The government actively uses legal documents like the penal code

42. Horvath, *supra* note 40, at 15.

43. Cain, *Gramsci, the State and the Place of Law*, in *LEGALITY, IDEOLOGY AND THE STATE* 95, 102-03 (D. Sugarman ed. 1983).

44. Minh, *La Partie Générale du Code Pénal Vietnamien*, 1 *BULL. D' INFORMATION JURIDIQUE* 58, 62 (1983).

45. H. BERMAN, *JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW* 282-84 (1963). On the historical stages, see *infra* notes 54-61 and accompanying text.

46. Law on the Organization of People's Tribunals, *supra* note 28, art. 1, para. 4.

in public education work. In 1982, Justice Minister Phan Hien directed Ministry personnel to disseminate information to the public about new legal texts and to use the penal code then in draft form:

Legal propaganda⁴⁷ and education is an important work Try to do properly the work of making propaganda about the new legal documents dealing with organization of the state machinery, the regulation on considering complaints, the military obligation law and the laws about market management and the protection of socialist properties and security and social order. Get prepared for making propaganda about the criminal code.⁴⁸

B. Limiting Character of Material Element

Inclusion of the material element limits application of the Code to those acts that threaten the enumerated interests and that are socially dangerous. An offense is defined, in a technical sense, not only by the words used in a particular provision of the Special Part, e.g., use of force or threat thereof to obtain socialist property,⁴⁹ but also by the socially dangerous quality of the act and by the fact that it threatens one of the enumerated interests—in this example, socialist ownership.

This means that an act is not an offense if, though it constitutes the act as defined in the Special Part, it is not socially dangerous. This could be the case because in the particular situation there was social utility to the act, or because the degree of social danger was minimal.⁵⁰ The latter possibility is provided for in most socialist penal codes,⁵¹ including the S.R.V. Code. Article 8, para. 3 provides: "Although containing the elements of an offense, acts representing insignificant social danger shall not be considered as such but shall be handled by other means."

In another article, the Code provides for exemption from criminal liability if an act, while socially dangerous at the time of its commission, has lost that character prior to trial "as [a] result of a change in the situation" that renders either the act or the suspect non-dangerous.⁵²

47. "Propaganda" is used in a non-perjorative sense to indicate propagation of knowledge.

48. Circular No. 3831/TP, Ministry of Justice, June 11, 1982, reprinted in PHAP CHE XA HOI CHU NGHIA, Apr.-June 1982, no. 2, at 8.

49. CODE, *supra* note 2, art. 129.

50. I. ANDREEV, *supra* note 22, at 58-60.

51. Horvath, *supra* note 40, at 21.

52. CODE, *supra* note 2, art. 48, para. 1.

In prosecution of criminal cases, the socially dangerous character of an act is at least *prima facie* assumed from the fact that the act contains the elements of the offense as defined in the Special Part. The prosecution does not bear a burden of presenting evidence of an act's socially dangerous character.⁵³ If the judges or the accused raise the issue, then the burden of persuasion rests on the prosecution to prove social dangerousness.

C. *Historical-Materialist Character of Material Element*

Inclusion of the material element also places the penal code in the context of the social order in which it operates. The several references to socialism indicate that the purpose of the code is to protect the socialist social order. These references are a product of the historical materialist philosophy underlying the socialist penal codes. "[T]he idea of the material content of crime connects the concept of criminal law with the principles of historical materialism."⁵⁴

Penal law, in a historical materialist analysis, protects the order of a particular society. Historical materialism views society as passing through stages, beginning with a non-state order, labelled primitive communism. With the emergence of private ownership of productive goods, a state develops, and it uses law, penal law included, to protect the social order based on private ownership.⁵⁵ "[I]n any social-economic formation an act declared a crime in the final analysis threatens the interests of the ruling class."⁵⁶

In the first historical stage so identified, slave-holding society, penal law protected the property of the slave owners. In the second stage, feudalism, penal law protected the property of the feudal lords. In the third stage, capitalism, penal law protected the property of the bourgeoisie.

After overthrow of the bourgeoisie, the working class exercises a dictatorship over the bourgeoisie. During that period, penal law protects the working class. Then commences a period in which the state no longer represents an identifiable class but all of society. This stage is "developed socialism"—where socialism has been achieved and the society is transforming itself in the direction of communism, a society in which government and law disappear because the lack of class division removes the need for law as a mechanism of domination:

53. Horvath, *supra* note 40, at 23.

54. I. ANDREEV, *supra* note 22, at 56.

55. See generally F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1972).

56. Horvath, *supra* note 40, at 13.

Recognition of a particular act as criminal in the period of transition from capitalism to socialism in a socialist state is determined by the interests of the working class and of all workers, and in the period of transition from socialist to communism by the interests of the entire people, who are building communist society under the leadership of the working class.⁵⁷

In the stage of "developed socialism," socialist jurists argue, penal law remains class-based. But that concept loses significance because there is no longer a division of society into classes:

In developed socialist society criminal law retains its class character. Its task is protection of the state, social and economic order, [and] defense of the interests and rights of all citizens from socially dangerous infringement. The class essence of crime continues. Crime in developed socialist society, where there are no antagonistic classes, where there is found a close link, a commonality of basic interests of the working class and of all working people, is in the full sense of the word "an act dangerous for society," and not simply an act dangerous for the interests of the ruling class.⁵⁸

Drafters of the S.R.V. Code operate within the historical materialist tradition. They view Viet Nam as not having achieved "developed socialism" but as remaining at the stage of dictatorship of the proletariat over the bourgeoisie: "It [the Code] must be the effective instrument of the dictatorship of the proletariat, contributing to guaranteeing Party direction, the working people's right of collective mastery, and the efficiency of state administration."⁵⁹ "Within the exploiting state," writes Phan Hien, "crimes are actions that disrupt the social order established by the exploiting classes; progressive, revolutionary actions are considered crimes."⁶⁰ Referring to Viet Nam, he identifies five categories of interests that penal prohibitions protect: 1) the independence, sovereignty, unity and territorial integrity of the fatherland; 2) the socialist state system; 3) the socialist economic system and socialist ownership; 4) the life, health, property, freedom, honor, dignity and other fundamental rights of the citizens; and 5) other fields of socialist legal order.⁶¹

57. A. PIONTKOVSKII, 2 KURS SOVETSKOGO UGOLOVNOGO PRAVA [Course in Soviet Criminal Law] 26 (1970).

58. Horvath, *supra* note 40, at 13.

59. Hien, *supra* note 35, at 19.

60. *Id.*

61. *Id.*

IV. ABOLITION OF PUNISHMENT BY ANALOGY

One major change over prior law is the Code's abandonment of punishment by analogy. That principle had permitted characterization of an act not prohibited by legislation as a crime, if the court found the act socially dangerous. Punishment was pronounced under an "analogous" criminal statute.

The Code abolishes punishment by analogy by requiring that only acts prohibited by the Code shall be offenses. Article 2 recites: "Only offenders of the crimes stipulated in the penal code are subject to penal responsibility."⁶² Article 8 defines an offense as an act that, *inter alia*, is "provided for in the present Code."⁶³

Professor Nguyen Ngoc Minh, Director of the Institute of Law, explained the reason for use of analogy in Viet Nam: "It is quite understandable for a country that had to struggle endlessly against aggression and a thousand other hostile acts of the enemy, against the sometimes bloody reaction of the overthrown exploiting classes while the system of legislation was not yet sufficiently elaborated."⁶⁴ He said, however, analogy is no longer required in Viet Nam:

But now the situation is quite different. The socialist system is consolidated, the country is reunified, the struggle against crime over the past forty years has given important results and brought valuable experience. The new constitution and many laws and ordinances have been promulgated, which has permitted this relatively elaborate codification that corresponds to the needs of the present situation and that of the years to come. In these conditions, maintenance of the principle of analogy is no longer necessary.⁶⁵

Phan Hien further explained that analogy carried dangers to the rights of accused persons:

[T]he General Part specifies clearly that an offense must be provided for in the Penal Code. Thus, the principle of analogy is formally excluded from penal law. Previously, since the law had not provided for all offenses, the courts were authorized to apply, in certain cases, the principle of analogy. That was necessary for the struggle against criminality but could lead to arbitrariness threatening the right of collective mastery of the

62. CODE, *supra* note 2, art. 2. This article is cited as having the effect of abolishing analogy. Minh, *supra* note 44, at 63.

63. CODE, *supra* note 2, art. 8.

64. Minh, *supra* note 44, at 63.

65. *Id.*

people. Since the Penal Code foresees all offenses, it is rational to abandon the principle of analogy and thus to conform to the principle of socialist legality.⁶⁶

In its report on the Code, the S.R.V. Council of Ministers also explained why analogy was being abolished: "The abolition of the principle of analogy is in keeping with progressive tendencies in law throughout the world, and particularly in the fraternal socialist countries. All are unanimous in seeing in the abolition great progress in the penal legislation of Vietnam."⁶⁷

Punishment by analogy was characterized as a practice that "could lead to arbitrariness in court trials and to violation of basic civil rights."⁶⁸ The abolition of punishment by analogy is a "new point" in Vietnamese penal law.⁶⁹ The Council of Ministers' report explained that if new crimes need to be created, it will be done by the National Assembly: "Naturally, in the future, if through evolution of the situation new offenses appear, the legislature will supplement the Code. That is normal work for any state."⁷⁰

A. *Analogy in Socialist Penal Law*

Viet Nam had a long tradition of using analogy in its penal law.⁷¹ The Gia Long Code, like China's Ch'ing Dynasty Code, permitted punishment by analogy.⁷² The movement away from analogy is typical of developments in the penal law of other socialist states.⁷³ The USSR used analogy until 1958: "[T]he legislation of the state that first built socialism, in the absence of appropriate experience, could not define precisely the scope of criminal behavior; therefore, possible gaps in criminal law regulation had to be filled by the agencies applying the law."⁷⁴ Of the states that subsequently became socialist in Europe,

66. Hien, *supra* note 35, at 20.

67. Minh, *supra* note 44, at 63.

68. Minh, *Obshchaia chast' UK S.R.V.* [The General Part of the Criminal Code of the Socialist Republic of Viet Nam], SOVETSKOE GOSUDARSTVO I PRAVO [Soviet State and Law], no. 8, 89-90 (1984).

69. Minh, *supra* note 44, at 62.

70. *Id.*

71. D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES* 176 (1967); see also Meijer, *The New Criminal Law of the People's Republic of China*, 6 REV. OF SOCIALIST L. 125, 132 (1980).

72. D. BODDE & C. MORRIS, *supra* note 71, at 176; see also Giovanetti, *The Principle of Analogy in Sino-Soviet Criminal Laws*, 8 DALHOUSIE L.J. 382, 384-85 (1984).

73. For analysis of analogy in socialist states, see Pomorski, *supra* note 41, at 10-11.

74. Horvath, *supra* note 40, at 26.

some never introduced analogy (Poland, German Democratic Republic, Czechoslovakia, Hungary). "The European countries of people's democracy that began the path of socialist development after the Second World War, relying on the experience of the Soviet Union, could work out complete criminal-law legislation without gaps and therefore had no need to apply analogy."⁷⁵ Albania, Yugoslavia, Bulgaria, and Rumania, however, did use analogy for the first few years after their revolutions.⁷⁶ Analogy has been more widely used in the Asian socialist states, where Mongolia and the Democratic People's Republic of Korea employed it for a time,⁷⁷ and where it is still in use in the People's Republic of China.⁷⁸

B. Prior Law in Viet Nam Relating to Analogy

A 1955 D.R.V. decree authorized courts to punish by analogy.⁷⁹ A number of D.R.V. penal statutes had provided that crimes of the given category not prohibited by the enactment could be prosecuted by analogy to a prohibition contained in the enactment. For example, a decree-law on counter-revolutionary crimes provided: "With regard to counter-revolutionary crimes not foreseen in this decree-law, articles on analogous crimes foreseen in this decree-law shall be applicable."⁸⁰ A decree-law on crimes against socialist property provided: "As for infringements of socialist property not foreseen in this decree-law, the dispositions of this decree-law shall be applied by analogy."⁸¹ A decree-

75. I. ANDREEV, *supra* note 22, at 62; *see also* Horvath, *supra* note 40, at 26.

76. I. ANDREEV, *supra* note 22, at 62; *see also* Pomorski, *supra* note 41, at 11.

77. I. ANDREEV, *supra* note 22, at 62; *see also* Pomorski, *supra* note 41, at 11. In Mongolia, analogy was introduced in the penal code of 1934, continued in the penal code of 1942, and abolished in the penal code of 1961. V. MARKELOV, *UGOLOVNOE PRAVO MONGOL'SKOI NARODNOI RESPUBLIKI* [Criminal Law of the Mongolian People's Republic] 116 (1960); *MONGOLIA CRIMINAL CODE* art. 4 (1961), *reprinted in* W. BUTLER, *THE MONGOLIAN LEGAL SYSTEM: CONTEMPORARY LEGISLATION AND DOCUMENTATION* 572 (1982).

78. Pomorski, *supra* note 41, at 11; *see also* Giovanetti, *supra* note 72, at 396-99. Article 79 states: "Those who commit offenses not explicitly defined in the specific provisions of the present law may be convicted and sentenced according to the most approximate article in the present law. However, approval must be obtained from the Supreme People's Court." *CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA* art. 79 (1979) [hereinafter *P.R.C. CRIMINAL LAW*], *reprinted in* 7 *REV. OF SOCIALIST L.* 199 (1988).

79. Decree, Government of the D.R.V., Jan. 19, 1955, *CONG BAO*, No. 12, item 170 (1955), *reprinted in* Dao Chi Uk, *Ugolovnaia politika Sotsialisticheskoi Respubliki V'etnam* [Penal Policy of the Socialist Republic of Vietnam], *SOVETSKOE GOSUDARSTVO I PRAVO* [Soviet State and Law], no. 10, at 103, 105 (1984).

80. Decree-Law, "On the Repression of Counter-Revolutionary Crimes," *supra* note 27, art. 21. A previous statute on counter-revolutionary crimes (Jan. 20, 1953) had also called for punishment by analogy. Huong, *supra* note 22, at 201.

81. Decree-Law, "On the Repression of Infringements on Socialist Property," *supra*

law on crimes against property of citizens provided: "As for infringements on a citizen's private property not foreseen in this decree-law, the dispositions of this decree-law shall be applied by analogy."⁸² A similar analogy provision appeared in a decree-law on crimes concerning economic planning.⁸³

A commentator of that period explained the need for analogy:

At the present time [1974], not only has no penal code yet been elaborated in the D.R.V.N. but our penal legislation is still imperfect. Our social and economic situation is undergoing a complete change because socialist transformation has not yet come to an end and socialist construction is only just beginning. But we could not remain powerless in face of actions which constituted great social dangers but were not expressly dealt with by any legislative text.⁸⁴

These provisions did not specify how a court was to determine what type of act might be analogous to an act prohibited in one of the decrees. The government's 1955 decree on analogy characterized it as an exceptional procedure, and other legislative authorizations of analogy counseled caution in its use.⁸⁵ Phan Hien characterized use of analogy in the D.R.V. as infrequent: "In a few cases that arose in the past, in order to punish crimes that had not been specifically defined, it was necessary to apply laws on crimes that were similar in nature to the unregulated crime."⁸⁶

A need for use of analogy in the D.R.V. was obviated to a considerable extent by the issuance by the People's Supreme Court of directives defining crimes. The frequency of such directives reduced the need to define crime by analogy. In effect, the People's Supreme Court, like English courts, defined criminal conduct through case law. Such determinations were binding on lower courts.

1. Statutory Analogy

One authoritative commentator characterizes these statutory provisions on analogy as true examples of statutory analogy (*analogie de*

note 27, art. 24, para. 1.

82. Decree-Law, "On the Repression of Infringements on Private Property of Citizens," *supra* note 27, art. 20, para. 1.

83. Decree-Law, June 15, 1956, *reprinted in* Huong, *supra* note 22, at 195.

84. Huong, *supra* note 22, at 201.

85. Dao Chi Uk, *supra* note 79, at 105.

86. Hien, *A New Step Forward in Drafting the Laws of Our State*, TAP CHI CONG SAN [Communist Review], no. 6, at 25 (1984).

la loi).⁸⁷ While the commentator did not specify how that principle was to be applied, that term had a fixed meaning in civil law systems and had been applied in penal law in the USSR, until 1958.⁸⁸ In the USSR statutory analogy meant that an act could be found punishable though not specified in a penal enactment if: 1) the act was determined to be socially dangerous; 2) the act was not prohibited by a penal enactment; and 3) there existed among penal enactments a provision prohibiting an act similar by type of conduct and by degree of dangerousness.⁸⁹ An example of application of statutory analogy in Soviet law is a decree of the Plenum of the USSR Supreme Court. In that decree, a 1937 law requiring that dwelling space be reserved for six months for a person who departs temporarily from his family was held applicable by analogy also to a tenant sentenced to deprivation of freedom for up to six months.⁹⁰

That definition, however, does not resolve the issue neatly. The second branch of the definition is the only one of the three that presents no difficulty. It is included to prohibit use of analogy to punish more severely than intended by the legislature. For example, if both theft and robbery are prohibited by penal enactments, an act of theft could not be punished by analogy to robbery.⁹¹

The first and third branches of the definition do present difficulty. How does a tribunal determine that an act is socially dangerous, and if it makes that determination, how does it decide whether one or another penal enactment is similar to it by type of offense and by degree of dangerousness?⁹²

2. Analogy of Law

In addition to statutory analogy, Vietnamese courts were authorized to define criminal conduct via the much broader principle of analogy of law (*analogie de droit*).⁹³ This principle permits analogizing not

87. Huong, *supra* note 22, at 201.

88. See *supra* text accompanying note 74.

89. 1 IURIDICHESKII SLOVAR' [Legal Dictionary] 33 (P. Kudriavtsev ed. 1956).

90. Decree of Dec. 12, 1940, reprinted in Berman, *Analogy*, in 1 ENCYCLOPEDIA OF SOVIET LAW 46 (F. Feldbrugge ed. 1973).

91. IURIDICHESKII SLOVAR', *supra* note 89, at 33. For an argument that such raising or penalty constituted the principal way in which analogy was applied under the Ch'ing Code in China, see generally Quigley, Book Review, 83 HARV. L. REV. 699 (1970) (reviewing D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES (1967)).

92. A Vietnamese procurator hypothesized to the author that an act of sodomy could be punished by analogy to a provision on sexual assault. Disagreeing, a higher procuracy official told the author that the two acts are too dissimilar.

93. Huong, *supra* note 22, at 195.

to a statute but to general principles of law. It is thus more expansive than statutory analogy, and no similar statute need be found. Nevertheless, determining the appropriate penalty is a problem, as there is no other statute whose penalty provision may be used.

In the USSR, analogy of law was not permitted in penal law, and only statutory analogy was used. This was indicated by the Code article on analogy, which stated: "If a particular socially dangerous act is not specified directly in this Code, then the elements and limits of responsibility for it shall be determined by those articles of the Code which specify crimes similar in kind."⁹⁴ A 1956 Soviet legal encyclopedia states that analogy of law was rarely used in the USSR (even in civil cases) and that it was "widely used when the law [was] in [the] process of formation, as, for example, occurred in our country during the period of the Great October Socialist Revolution or in countries of people's democracy at the first stage of their development."⁹⁵

Thus, Vietnamese tribunals were permitted greater latitude in fashioning new offenses than was true of Soviet tribunals under the 1927 Soviet penal legislation. However, as indicated, the use of analogy was circumscribed by the issuance of law-defining directives by the People's Supreme Court.

C. Significance of Use of Analogy

The significance of the existence of either type of analogy in penal law should not be overdrawn. English penal law developed for centuries primarily through judge-fashioned law, and British judges continued to define "common law" offenses. *Nullum crimen, nulla poena sine lege* gained currency only with the French Revolution and emergence of the concept that penal provisions should be defined by a legislative body. The Danish Criminal Code, enacted in 1930, uses statutory analogy: "Only acts punishable under a statute or acts of entirely similar nature shall be punished."⁹⁶ Interestingly, that provision is seldom used.⁹⁷ Norwegian courts have defined offenses using statutory analogy, though the Norwegian penal code contains no provision permitting analogy.⁹⁸ Analogy was used frequently in Norway in the early years of the Norwegian code, being invoked, for example, to punish neglect of

94. UK RSFSR art. 16 (1927).

95. IURIDICHESKII SLOVAR', *supra* note 89, at 33.

96. CRIMINAL CODE OF DENMARK art. 1.

97. Waaben, *Criminal Law*, in *DANISH LAW: A GENERAL SURVEY* 353 (H. Gammeltoft-Hansen, B. Gomard, & A. Philip eds. 1982).

98. J. ANDENAES, *THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY* 108 (1965).

children by analogy to a statute prohibiting cruelty to animals.⁹⁹

In France, which, like Norway, has no statute calling for analogy in penal law, courts have reached decisions through statutory analogy. In one case, a person charged with making a false report of crime to a magistrate was convicted by analogy to Article 222 of the Penal Code, which prohibits insults to magistrates.¹⁰⁰

V. DETENTION FOR RE-EDUCATION

Detention for re-education is permitted by law in Viet Nam through processes administered outside the courts. This detention is not considered a criminal penalty, though it may extend a number of years. Like socialist and many European countries, Viet Nam handles many minor offenses as "administrative" rather than "criminal," using a non-court procedure for imposition of sanctions, typically in the form of a fine or a few days incarceration.¹⁰¹ Less serious road traffic offenses are an example.

Government ministries are empowered to impose on their own employees disciplinary sanctions for violation of ministry rules. Proceedings are conducted by a hearing within the ministry, and penalties include confinement in a re-education camp.¹⁰²

A 1961 decree of the D.R.V., still in force, permits three years detention, renewable for additional periods of three years without a stated maximum, for re-education of "counter-revolutionary elements who have persisted in carrying culpable acts that threaten public security."¹⁰³ Later in 1961, the D.R.V. Council of Ministers adopted a

99. *Id.* at 107.

100. R. DAVID, 2 *LE DROIT FRANCAIS* 312 (1960).

101. See, e.g., CODE, *supra* note 2, arts. 169, 170, 184, 206. Administrative sanctions are provided for by the Statute on Administrative Sanctions, CONG BAO, No. 9, item 94 (1977), reported in Dao Chi Uk, *supra* note 79, at 106. On other socialist countries, see I. ANDREEV, *supra* note 22, at 148-49.

102. See, e.g., Decree of Minister of Health, June 13, 1969, withdrawing the medical degree of a physician and sending him to a "labor camp for re-education," pursuant to a decision by the Health Ministry's Disciplinary Council that he had improperly performed two operations which resulted in the deaths of each patient, and that he refused to marry a nurse who became pregnant by him, reported in Phu Nu Viet Nam, July 1, 1969, at 23, reprinted in *Translations on North Vietnam No. 539*, Joint Publications Research Service, JPRS No. 48782, CA 121, Sept. 10, 1969, at 20-21.

103. Standing Committee, National Assembly, Resolution No. 49 NQ/TVQH, June 21, 1961. Language in text, quoted in HOANG SON, REEDUCATION CAMPS AND HUMAN RIGHTS, reprinted in VIETNAM COURIER, VIETNAM: WHICH HUMAN RIGHTS? 81, 86 (1980). Resolution No. 49, cited in AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL'S CONCERNS IN THE SOCIALIST REPUBLIC OF VIET NAM WITH SELECTED CASE HISTORIES OF

decree further defining "counter-revolutionary elements" and including among persons subject to re-education "professional scoundrels", which it defined to include a variety of persons who earned a living by criminal means—thieves, pimps, and recalcitrant hooligans, where persons in these categories had "refused to mend their ways" after being subjected to non-incarceration re-education measures.¹⁰⁴

Following its accession to power in the south in 1975, the Provisional Revolutionary Government interned in re-education camps substantial numbers of former military personnel of the Republic of Viet Nam, and it characterized this internment as a one-time measure necessitated by fear of possible efforts to overthrow the government. In May 1976, it issued a directive authorizing re-education camp detention for up to three years, to be followed by release for those who had reformed, and criminal trial for "die-hard agents of the former regime who committed numerous crimes against the people."¹⁰⁵ The S.R.V. government held many of these military persons beyond the three years indicated in the P.R.G. directive, citing security concerns, and particularly China's 1979 invasion of Viet Nam, but released most of them in 1987. It has indicated that it holds the current internees under the cited 1961 D.R.V. decree.¹⁰⁶

The continuing validity of administrative procedures leading to re-education detention was indicated by adoption in 1987 in Ho Chi Minh City of regulations on re-education. The people's committee of Ho Chi Minh City promulgated regulations, characterized as temporary, providing for re-education through forced labor of certain categories of persons, including:

[P]ast or present counter-revolutionary elements who, charged with many crimes, are still stubborn and refuse to be re-educ-

PRISONERS OF CONSCIENCE 3 (1983), and in Young, *The Legality of Vietnamese Re-education Camps*, 20 HARV. INT'L L.J. 519, 534-35 (1979). Resolution 49 continued in force after reunification. See HOANG SON, *supra* at 87. It provided three-year terms, which can be repeated. *Id.* at 93. It was used in the early 1970s to place "counter-revolutionary elements" in re-education. *Id.* at 90. It was stated in 1980 that none of those interned in the early 1960s remained in detention. *Id.* at 93.

104. Circular No. 121-CP, D.R.V. Council of Ministers, Sept. 8, 1961, cited in Young, *supra* note 103, at 535. For quoted language, see G. SAGAN & S. DENNEY, VIOLATIONS OF HUMAN RIGHTS IN THE SOCIALIST REPUBLIC OF VIETNAM APRIL 30, 1975-APRIL 30, 1983 18 (1983).

105. Directive of May 25, 1976, Foreign Broadcast Information Service, Daily Report, Asia and Pacific, June 11, 1976, Annex, at 1-2; Young, *supra* note 103, at 520-21, 534-35. AMNESTY INTERNATIONAL USA, *supra* note 103, at 3. Directive explained in HOANG SON, *supra* note 103, at 85. On the 1987 release, see SOUTH, Oct. 1987, at 7 (release of 6685, reduction in terms for 5320).

106. *Id.*

cated despite a lenient policy and repeated re-education efforts by the government; those professional hoodlums, perpetrators of ordinary crimes, thugs and hooligans who constantly disturb public order and security and who gather themselves for merry-making and brawling; those elements who are engaged in social vices—such as professional prostitutes and drug addicts—who have been arrested and sent to re-education centers but have escaped from these centers for the second time; those able-bodied people who refuse to earn an honest living, who specialize in speculation and in the hoarding of goods of which the circulation is banned, or who deal in counterfeit items; those hoodlums who have served jail terms for criminal offenses but still refuse to mend their ways; and those who are given favor for undergoing re-education locally or being put under house arrest but still refuse to respect the law.¹⁰⁷

Decisions under the regulations to send a person for re-education are made by the Ho Chi Minh City people's committee on the recommendation of precinct or district people's committees or of the director of the city's public security service and are approved by the Ministry of the Interior before becoming final. Re-education can be ordered up to a maximum of two years.¹⁰⁸

Many Third World countries employ detention without criminal charge, in part, out of concern that their justice institutions are not sufficiently well-funded and staffed to be able to prove criminal charges in court. That is likely a partial explanation of Viet Nam. There is also a philosophy that re-education in detention re-integrates into society those who are at odds with it. This kind of detention will likely continue to be authorized until Viet Nam stabilizes.

VI. PUNISHMENT UNDER THE CODE

Like the Criminal Code of the Soviet Union (the "UK RSFSR"), Chapter Four of the S.R.V. Code defines and explains the kinds of penalties provided in the Special Part for specific offenses. Here, too, the content is close to that of the Soviet codes. In particular, both Codes provide for a type of punishment known as "correctional tasks," which permits a convicted person to continue his or her previous employment with a deduction in wages for a period of time as a fine. Like the UK RSFSR, the S.R.V. Code permits as criminal punishment a

107. Saigon Giai Phong, July 4, 1987, translated into English in BRITISH BROADCASTING CORP, SUMMARY OF WORLD BROADCASTS, July 25, 1987, FE/8629/B/4 to FE/8629/B/5.

108. *Id.*

warning,¹⁰⁹ a money fine,¹¹⁰ requirement of residing in a determined area of the country,¹¹¹ prohibition against residence in a determined area of the country,¹¹² the death penalty,¹¹³ prohibition against assuming certain employment positions,¹¹⁴ deprivation of certain civil rights,¹¹⁵ and confiscation of property.¹¹⁶

A. Length of Incarceration

The S.R.V. Code authorizes longer imprisonment and more severe sanctions for many offenses than do most socialist penal codes. For theft of property of individuals, the S.R.V. Code provides for three-year maximum sentences, while the UK RSFSR provides for one-year maximum sentences.¹¹⁷ For theft of state property, the S.R.V. Code provides for five-year maximum sentences, while the UK RSFSR provides three-year maximum sentences.¹¹⁸ For speculation—buying goods with intent to re-sell at a profit—the S.R.V. Code provides five-year maximum sentences, while the UK RSFSR provides two-year maximum sentences,¹¹⁹ and if done with large quantities of goods the S.R.V. penalty increases to twelve-year maximum sentences, while the UK RSFSR penalty increases to seven-year maximum sentences.¹²⁰ For murder absent aggravating circumstances, the S.R.V. Code provides for fifteen-year maximum sentences, while the UK RSFSR provides ten-year maximum sentences.¹²¹

Provisions defining punishment for particular offenses typically provide a minimum—and often substantial—term of years.¹²² In Soviet codes, a minimum term is set for some offenses, but for most it is not. The S.R.V. Code in many provisions permits a more severe sentence if the offense is committed under “serious circumstances” or entails “serious consequences,” without defining such circumstances or

109. CODE, *supra* note 2, art. 22; cf. UK RSFSR art. 33.

110. CODE, *supra* note 2, art. 23; cf. UK RSFSR art. 30.

111. CODE, *supra* note 2, art. 30; cf. UK RSFSR art. 25.

112. CODE, *supra* note 2, art. 29; cf. UK RSFSR art. 26.

113. CODE, *supra* note 2, art. 27; cf. UK RSFSR art. 23.

114. CODE, *supra* note 2, art. 28; cf. UK RSFSR art. 29.

115. CODE, *supra* note 2, art. 31; cf. UK RSFSR art. 29.

116. CODE, *supra* note 2, art. 32; cf. UK RSFSR art. 35.

117. CODE, *supra* note 2, art. 155; cf. UK RSFSR art. 144.

118. CODE, *supra* note 2, art. 132; cf. UK RSFSR art. 89.

119. CODE, *supra* note 2, art. 165; cf. UK RSFSR art. 154.

120. CODE, *supra* note 2, art. 165; cf. UK RSFSR art. 154.

121. CODE, *supra* note 2, art. 101; cf. UK RSFSR art. 103.

122. A court may, however, impose a sentence lower than the minimum if it finds that “several” of the enumerated mitigating circumstances exist. CODE, *supra* note 2, art. 38.

consequences. The severity of the sentences is mitigated by the fact that the Code does not permit consecutive sentences where an accused is convicted of several offenses at a single trial."¹²³

Unlike most socialist penal codes, the S.R.V. Code permits life imprisonment. It allows a court to sentence an individual to a maximum of twenty years, or to life imprisonment.¹²⁴ Socialist codes typically do not permit life imprisonment, limiting imprisonment to a defined term of years ranging from fifteen to twenty-five.¹²⁵ Of the socialist states, only China and the German Democratic Republic permit life imprisonment.¹²⁶

Phan Hien explains why the code differs in this respect from other socialist codes: "Unlike several socialist countries, we have as well the punishment of life imprisonment, applicable to offenses for which the death penalty would be too severe but the punishment of 20 years imprisonment would be rather light."¹²⁷ He does not explain, however, why it was decided to deviate from the generally accepted socialist position that a life sentence violates the rehabilitative aim of criminal punishment. That position is elucidated by a Soviet scholar explaining why Soviet codes permit a sentence no longer than fifteen years:

This proposition of law reflects the well known statement of V. I. Lenin that the significance of punishment lies not in its severity but in the inevitability of its imposition. In fact a too-substantial term of deprivation of liberty can at times lead not to strengthening the educational impact of punishment but to its weakening, since a convicted person does not feel any real possibility of being freed and not infrequently becomes bitter. In itself a 10- or 15-year period of deprivation of freedom is sufficiently great to allow for application of all means and methods of corrective-labor rehabilitation. If in that period it has not been possible to achieve correction and re-education of the convicted person, it is not likely possible to achieve it through a longer term of incarceration.¹²⁸

123. CODE, *supra* note 2, art. 41.

124. *Id.* arts. 25, 26.

125. See, e.g., UK RSFSR art. 24 (for a 15-year maximum).

126. P.R.C. CRIMINAL LAW, *supra* note 78, art. 28; Strafgesetzbuch [StGB] art. 14 (E. Ger.).

127. Hien, *supra* note 35, at 20.

128. N. STRUCHKOV, 3 KURS SOVETSKOGO UGOLOVNOGO PRAVA [Course in Soviet Criminal Law] 79-80 (1970).

B. Death Penalty

Like other socialist codes,¹²⁹ the S.R.V. Code provides the death penalty for a number of serious offenses. As with the other codes, it characterizes the death penalty as an "exceptional punishment,"¹³⁰ but it omits the language found in some socialist codes declaring that the death penalty is in force only "until its total abolition."¹³¹ Thus, the Code provides no implication that the death penalty is temporary. The death penalty is provided for more offenses than in the penal codes of other socialist states.¹³² The increase is found primarily in crimes against the state, where the S.R.V. Code defines a larger number of offenses than the socialist codes and provides the death penalty for a number of them.¹³³

C. Reasons for Severity

The severity of the S.R.V. Code is a product of Vietnam's economic and political situation. Viet Nam has experienced a recent increase in crime: "In our country, crime has increased and changed in a complex manner in recent years."¹³⁴ Phan Hien identifies as criminogenic factors: (1) the final show of resistance by the toppled exploiting classes; (2) acts of sabotage by the imperialists and other international reactionary powers; (3) the influences of bourgeois and other non-proletarian ideas; (4) shortcomings in one aspect or another of the management of the country; (5) the failure of the system of law to keep pace with socio-economic developments at some times and places; and (6) shortcomings in crime prevention.¹³⁵

Concern over the situation resulting from this recent history is reflected in Phan Hien's statement that the Code pursues "a decisive struggle and without mercy against criminality" and that it reflects "the spirit of great severity that the present situation demands."¹³⁶ He

129. I. ANDREEV, *supra* note 22, at 126.

130. CODE, *supra* note 2, art. 27; UK RSFSR art. 23; see I. ANDREEV, *supra* note 22, at 126.

131. UK RSFSR art. 23.

132. In comparison with the Soviet codes, the single exception is for offenses committed by military personnel, where the Soviet codes provide the death penalty for more offenses than does the S.R.V. CODE. See, e.g., UK RSFSR art. 247 (death penalty for desertion to avoid military service); cf. S.R.V. CODE art. 259 (maximum 10 years imprisonment); UK RSFSR art. 249 (death penalty for self-mutilation by military personnel to avoid military duties); S.R.V. CODE art. 260 (maximum 10 years imprisonment).

133. See text accompanying notes 109-99.

134. Hien, *supra* note 86, at 25.

135. *Id.* at 25.

136. Hien, *supra* note 35, at 19.

characterizes those persons for whom the Code provides severe punishment:

With regard to counter-revolutionary elements, punishment must be resolute and severe. With regard to recalcitrant elements, hooligans, thugs and dangerous recidivists, there should be severe punishment. Severe punishment should also be meted out to degenerate cadres who abuse their power, commit grave violations of the people's right to collective mastery or who are guilty of embezzlement, corruption, collusion with bad elements.¹³⁷

A number of factors contribute to the high levels of crime in Viet Nam: 1) socialization of the economy; 2) division of Viet Nam; 3) impact on Society of the 1945-1975 war; 4) economic impact of the 1945-1975 war and of withdrawal of United States forces; 5) concern for security; 6) legacy of colonialism; 7) legacy of the Mandarins; and 8) Legacy of Confucianism.

The S.R.V. Code was drafted against a background of recent societal disorder. Viet Nam is undergoing in the south the early stages of socialization of industry, commerce and agriculture. This socialization process occurred in the north in the 1950's, where its most spectacular manifestation was reprisals by peasants against landowners. There, large groups of peasants on occasion conducted unstructured trials of landlords and then killed them. The government ultimately put an end to this process, criticizing the excesses.¹³⁸ For a time, the D.R.V. government used "special people's courts," empowered to impose a death sentence, to try "counter-revolutionary elements, criminal officials, and anyone carrying out activity directed against the agrarian or sabotaging it."¹³⁹

Land reform in the south after 1975 has avoided the upheaval generated in the north in the 1950's,¹⁴⁰ but conflict has nonetheless been

137. Hien, *supra* note 34, at 6.

138. KESSING'S CONTEMPORARY ARCHIVES, Jan. 26-Feb. 2, 1957, at 15349; *see also* B. FALL, *LE VIET-MINH: LA RÉPUBLIQUE DÉMOCRATIQUE DU VIET-NAM: 1945-1960*, at 106 (1960).

139. Decree No. 149/150, President of the D.R.V., Apr. 12, 1953, arts. 2, 11, "On the Organization of Special People's Courts," *reprinted in* O. ARTUROV, *DEMOKRATICHESKAIA RESPUBLIKA VIETNAM: KONSTITUTSII, ZAKONODATEL'NYE AKTY, DOKUMENTY* [The Democratic Republic of Vietnam: Constitutions, Legislative Acts, Documents] 315 (1955). On these courts, *see* B. FALL, *supra* note 138, at 101; Huong, *supra* note 22, at 189. The acts punishable in these courts were defined in Decree No. 151, President of the D.R.V., Apr. 12, 1953, "On Sanctions Against Landlords Violating the Laws," *reprinted in* O. ARTUROV, *supra*, at 320.

140. Marr, *Central Vietnam Rebuilds: An Eyewitness Account*, *INDOCHINA ISSUES*,

generated. Such a process has been turbulent in all the socialist countries: "The effectuation of socialist reforms—nationalization of industry, creation of collective, large-scale agriculture, etc.—has met resistance from the representatives of big capital and a part of the petty bourgeois elements, which frequently was expressed in criminal incursions against these reforms."¹⁴¹

Phan Hien indicates that one factor facilitating crime "shortcomings" is "management of the country." This is a reference to economic problems connected with socialization, like shortages of goods, which engenders theft and speculation. The Communist Party of Viet Nam since 1985 slowed the process of socialization in the south and has reopened a greater role for private production and commerce.

A major source of conflict is the different kinds of society found in the two halves of Viet Nam. The south has developed under French and United States influence, while socialist reforms took place in the north. In 1975, the two societies were thrown together. A highly individualist society and a substantially socialistic one were suddenly merged. Moreover, the two halves had been at war with each other, engendering the hostilities one finds in any country following a civil war.

Further, the south experienced social ills resulting from the fact that the war was fought primarily in that half of the country. The most serious is population shifts to urban areas by peasants escaping war in rural areas. Major cities in the south experienced a tripling of their populations.¹⁴² These cities were not equipped to provide housing or employment.

Viet Nam was divided not only between north and south, but also within the south, where extensive areas were held during the 1960's and early 1970's by the Provisional Revolutionary Government, the remainder being held by the government of the Republic of Viet Nam. Social differences developed between the two areas. As regards criminal justice, the P.R.G. was unable to maintain regular courts and corrections systems in the areas it controlled.¹⁴³

During the war many persons in the south made a living from the

July 1985, no. 59, at 1-2.

141. Pzshenosil, *Preduprezhdeniie—glavnoe napravlenie bor'by s prestupnost'iu v sotsialisticheskikh stranakh* [Prevention—the Main Direction in the Struggle Against Crime in Socialist Countries], in SOVREMENNYE TENDENTSII RAZVITIIA SOTSIALISTICHESKOGO UGOLOVNOGO PRAVA [Contemporary Tendencies in the Development of Socialist Criminal Law] 153, 160-61 (V. Kudriavtsev ed. 1983).

142. J. BUTTINGER, *A DRAGON DEFIANT: A SHORT HISTORY OF VIET NAM* 18 (1972).

143. Interview with Ngo Ba Thanh, attorney and member of the National Assembly, in Ho Chi Minh City (Dec. 6, 1978).

United States military, working for United States personnel as domestic servants, stealing from United States military commissaries or working as prostitutes. At the war's end, there were reportedly 300,000 prostitutes in the south of Viet Nam, half suffering from syphilis.¹⁴⁴ After departure of the United States troops, these people were without employment. The S.R.V. was unable to provide urban employment to this population. It endeavored, in part successfully, to get this population to move to farms it established in rural areas. Still, many remained without local ties and without a means of survival. This situation promoted crime. The fact that many in this group had existed by criminal means during the presence of United States forces meant that they were accustomed to such a life.

Drug use further encouraged crime. The Central Intelligence Agency had won the support of Laotian hill people by flying their opium crop to Saigon, with leading officials of the government of the Republic of Viet Nam being involved in the traffic there.¹⁴⁵ Drug use in Saigon grew at a rapid rate.¹⁴⁶ By the war's end, there were reportedly 150,000 drug addicts in the south of Viet Nam.¹⁴⁷

The four decades of war disrupted Viet Nam socially and physically.¹⁴⁸ Mass movement of population broke up traditional social groupings that had given order to Vietnamese society, and people found themselves living among strangers. Migration from rural to urban areas in many countries has created an *anomie* that is criminogenic. Viet Nam experienced this phenomenon on perhaps a greater scale than any other country in recent history. The rural pacification program of the government of the Republic of Viet Nam and the United States Army had moved villagers to new areas, while wide-scale aerial bombardment of rural areas created a flight to cities. During and after the war, thousands of children were left without supervision, which engendered street gang crime by juveniles.¹⁴⁹

While there were no substantial physical reprisals against person-

144. Paringaux, *Conséquence de la guerre: Hanoi doit faire soigner un million d'habitants du Sud atteints de maladies vénériennes et préparer la réinsertion sociale de trois cent mille prostituées*, *Le Monde*, June 2, 1977, at 3, col. 1.

145. A. McCoy, *THE POLITICS OF HEROIN IN SOUTHEAST ASIA* 247, 263 (1972).

146. Can, *L'Éradication de la Toxicomanie* [Eradication of Drug Addiction], *VIETNAM COURIER*, no. 6, at 25-26 (1985).

147. KEESING'S CONTEMPORARY ARCHIVES, Apr. 7, 1978, at 28911.

148. For an account of social dislocation in Ho Chi Minh City (Saigon) at the end of the war, see NGUYEN KHAC VIEN, *VIET NAM PATRIE RETROUVÉE* 109-44 (1977).

149. Dao Chi Uk, *Preduprezhdenie prestupnosti nesovershennoletnikh v S.R.V.* [Prevention of Juvenile Crime in the Socialist Republic of Vietnam], *SOVETSKOE GOSUDARSTVO I PRAVO* [Soviet State and Law], no. 12, at 100, 102-03 (1980).

nel of the R.V.N.,¹⁵⁰ fear of resumption of hostilities led the S.R.V. government to intern large numbers of former R.V.N. military personnel. In addition, termination of the war resulted in the demobilization of 1,250,000 soldiers and police of the Republic of Viet Nam.¹⁵¹ These persons were not readily absorbed into civilian occupations and most were not favorably inclined to the S.R.V. government. As a result, many became involved in crime.

The aerial bombardment and defoliation left much of the land unproductive, leaving the country in a condition of even worse poverty than it had known before. "Vast areas were repeatedly carpet bombed and sprayed with herbicides. Millions of central Vietnamese were uprooted from their villages and forced to cluster in refugee camps or urban slums."¹⁵² Fifteen percent of the land in the south was affected by toxic chemicals sprayed on it during the war.¹⁵³ This situation of general privation engendered cynicism among many, as the government was unable immediately to create conditions for life at reasonable levels of consumption.

The inability of many in the south to survive economically after departure of United States forces on whom they had depended was a major reason for departure of large numbers of Vietnamese from the country. That phenomenon also engendered crime, as unscrupulous persons promised transportation to other countries and then took money but failed to provide the transportation. Much violence resulted from this unscrupulous activity. The government, pressured by the international community, then tried to stop the outflow of population, which created a major police problem and more social conflict.

China's invasion in 1979 and continuing border incidents since that time have caused further concern about security. Additionally, Viet Nam's military involvement in Kampuchea in opposition to a government supported by China has kept China-Viet Nam relations tense. Some Vietnamese in the border area are believed by the government to have collaborated with the Chinese military in attacks into Viet Nam.

In addition to the disruption connected with its war, Viet Nam faces the problems of a colonial territory emerging into independence. That factor alone makes it difficult to erect a society based on rule of law. Colonial governments in Asia and Africa introduced formal court systems based on legislation, whereas in the past, society was regulated by less formal procedures and norms. This was true even of Viet Nam

150. KEESING'S CONTEMPORARY ARCHIVES, Apr. 7, 1978, at 28910.

151. Dao Chi Uk, *supra* note 149, at 102.

152. Marr, *supra* note 140, at 1.

153. Rogers, *Agent Orange in Vietnam: America's Shared Legacy*, INDOCHINA ISSUES, Sept. 1985, no. 60, at 2.

which, while it had Chinese-based penal legislation, relied extensively on informal processes for social regulation. Penal law based on French law was out of keeping with Vietnamese tradition.¹⁵⁴

Thus, the first experience of these territories with law in the European sense was a legal system established by the colonial power. Typically, the colonial power's principal objective was to use the natural resources and labor of the colonial territory. The law was often used to achieve that objective rather than to promote the interests of the local population. In Africa, law was used as a mechanism to induce the population into plantation labor.

Courts in Viet Nam, as in other colonial territories, were staffed by colonial-power nationals who typically did not know the local language and did not understand local ways.¹⁵⁵ The judiciary consisted of French nationals or naturalized French natives from other French possessions.¹⁵⁶ "The French magistracy rotated between the different colonies with such rapidity that it was not felt worth the effort to learn native languages and law."¹⁵⁷

The result of this introduction to law via colonialism is that the local population develops a perception of law as an alien-imposed structure that does not serve their interests. This has made it difficult for post-colonial governments to establish a rule of law.¹⁵⁸

This post-colonial phenomenon has been cited by Vietnamese jurists as engendering a "nihilistic attitude to[ward] law": "The nearly century-long rule of the French colonizers . . . gave nothing good in this respect as [a] result of the severity of colonial laws regarding natives and the maintenance with their assistance of ethnic discrimination and social injustice."¹⁵⁹

Even the court system that pre-dated France's had done little to engender respect for the rule of law. The Chinese-style, highly bureaucratic courts presided over by officials called mandarins had been considered a place to avoid rather than a place to find justice.¹⁶⁰

Finally, Viet Nam carries the legacy of Confucianism.¹⁶¹ This legacy was reflected in the Chinese-based penal codes, particularly in the

154. R. JUMPER & N. HUE, *NOTES ON THE POLITICAL AND ADMINISTRATIVE HISTORY OF VIET NAM* 126 (1962).

155. *Id.*

156. *Id.*

157. V. THOMPSON, *FRENCH INDOCHINA* 255 (1937).

158. See generally Shivji, *Law in Independent Africa: Some Reflections on the Role of Legal Ideology*, 46 OHIO ST. L.J. 689 (1985).

159. Dao Chi Uk, *supra* note 79, at 108.

160. R. JUMPER & N. HUE, *supra* note 154, at 28, 67.

161. Mau, *supra* note 5, at 41.

important role the Chinese attributed to status based on gender and family position. Confucian philosophy stressed living by rules of proper conduct, but in a highly hierarchical setting in which obedience was the key virtue.¹⁶² Loyalty to family prevailed over loyalty to rules imposed by political authority.¹⁶³ "Government by men" prevailed over "government by laws."¹⁶⁴ Vietnamese jurists cite this legacy as an impediment to the establishment of a rule of law: "In the past Viet Nam found itself under the influence of Confucianism, with its nihilistic attitude towards law."¹⁶⁵

The cumulative effect of these eight factors in Viet Nam's history and contemporary situation is difficulty in securing adherence to norms of law.

D. Rehabilitation as an Aim of Punishment

The Code's punishment philosophy is characterized as one of "applying extreme severity coupled with adequate leniency; and meting out proper punishment accompanied by due attention to education and reform."¹⁶⁶ In its characterization of the aim of punishment, the Code, despite its severe penalties, stresses rehabilitation:

Punishment is aimed not only at punishing the guilty person; it aims as well at his reform, in order to make of him a man useful to society, knowing how to obey the law and the rules of social life, and at prevention of new offenses that he might commit.¹⁶⁷

Leniency is to be shown towards "those who show sincere repentance, own up to their crime, denounce their associates, accomplish redeeming actions, [and] pledge to repair the damage caused."¹⁶⁸ Rehabilitation is based on "faith in the possibility of transforming man under the socialist regime."¹⁶⁹

As in other socialist countries, labor approximating labor done outside penal institutions is required of prisoners, on the theory that rehabilitation is fostered through labor. In Viet Nam, the primary work done by prisoners is agricultural.¹⁷⁰

162. V. THOMPSON, *supra* note 157, at 41-42.

163. Mau, *supra* note 5, at 53.

164. *Id.* at 41.

165. Dao Chi Uk, *supra* note 79, at 108.

166. Hien, *supra* note 34, at 5.

167. CODE, *supra* note 2, art. 20.

168. Hien, *supra* note 34, at 6.

169. Hien, *supra* note 35, at 19.

170. Interview with President of Province Court, Quang Ninh Province, in Ha Long,

Article 3 of the Code calls for leniency towards certain categories of offenders:

Those who have sincerely repented, have confessed, have denounced their accomplices, have made up for their mistake by meritorious acts, or who have voluntarily repaired the harm and losses caused shall be judged with leniency. To those who have for the first time committed an infraction belonging to the less serious category and who have repented, lighter penalties than imprisonment can be used; they can be entrusted to state agencies or social organization for re-education, or to their family undertaking a guarantee for their conduct.¹⁷¹

This approach is said to reflect "socialist humanism and faith in the possibility of transforming man under our system."¹⁷² It follows practices in other socialist countries, where non-incarceration sentences predominate.¹⁷³ It has antecedents in prior D.R.V. law. The 1960 law on the courts stated: "A penalty is not only punishment for a crime committed; it is intended as well to reform and re-educate the guilty party."¹⁷⁴ Early release is granted to prisoners "if they repent and prove it by their discipline, productive labor and political attitude."¹⁷⁵

In pursuit of rehabilitation, the Code makes extensive provision for re-education without detention,¹⁷⁶ a penalty that has been widely used in other socialist countries.¹⁷⁷ This penalty permits a person convicted of a minor offense to continue working; the other workers must agree to take responsibility for rehabilitation, and a 5% to 20% salary deduction as a penal fine is imposed. The maximum time for such an arrangement is two years.¹⁷⁸ Re-education without detention was first introduced in Vietnamese law in the 1981 Military Obligation Law.¹⁷⁹

Viet Nam (Dec. 9, 1978).

171. CODE, *supra* note 2, art. 3.

172. Minh, *supra* note 44, at 64.

173. Buchholtz & Den, *Certain Issues in the Theory of Punishment*, in SOVREMEN-NYE TENDENTSI RAZVITIYA SOTSIALISTICHESKOGO UGOLOVNOGO PRAVA [Contemporary Tendencies in the Development of Socialist Criminal Law] 76, 88 (V. Kudriavtsev ed. 1983).

174. Law on the Organization of People's Tribunals, *supra* note 28, art. 1, para. 5.

175. Huong, *supra* note 22, at 202; *see also* CODE, *supra* note 2, art. 49 (provides for early release).

176. CODE, *supra* note 2, art. 24.

177. I. ANDREEV, *supra* note 22, at 133-35; *see also* Buchholtz & Den, *supra* note 173, at 97.

178. CODE, *supra* note 2, art. 24, para. 1.

179. Minh, *supra*, note 44, at 67. For a discussion of the Military Obligation Law of December 30, 1981, *see* Pham, *Military Service Law*, Foreign Broadcast Information Service, July 9, 1982, at K5.

It is viewed as having an "essentially educational character,"¹⁸⁰ and its advantages are seen as several:

[T]he convicted person is not isolated from society, is not detained together with other more dangerous convicts who might exercise a bad influence on him. He will not be stigmatized and will have the opportunity to benefit from family education and from the oversight of the state agency or social organization of which he is a member. Thus he will have favorable conditions to return more rapidly to the honest life.¹⁸¹

Re-education without detention also has practical benefits, which is particularly important in a developing society: "It avoids additional expense to construct new prison buildings and to pay salaries of guard personnel."¹⁸² It also serves the socialist aim of giving over governmental functions to social organizations, viewed as a prerequisite for development of society from socialism to communism.¹⁸³ Only less serious offenders are eligible for the re-education without detention option.¹⁸⁴

This penalty is unique to socialist penal codes. It corresponds to a certain degree to probation in Western penal codes. However, it is probably more effective than probation, since the work group takes responsibility for re-education, which is typically not carried out to a substantial degree in Western states by a probation officer. It is the principal penalty used when a court decides on leniency.¹⁸⁵

The S.R.V. Code authorizes suspension of a sentence of imprisonment if such is deemed more rehabilitative than the serving of the sentence. This is permitted only if the sentence is for five years or less. The court fixes a probation period of one to five years¹⁸⁶ and entrusts the convicted person to the work collective, or to a social organization at the place of residence, "for the purpose of oversight and education."¹⁸⁷ Thus, the collective serves a role that in some Western states would be fulfilled by a probation officer. If the convicted person "achieves considerable progress" during the first half of the probation period, the court may, on motion of the collective, shorten the remaining probation period.¹⁸⁸

180. Hien, *supra* note 35, at 20.

181. Minh, *supra* note 44, at 68; *see also* Hien, *supra* note 35, at 20.

182. Minh, *supra* note 44, at 68.

183. *Id.*

184. CODE, *supra* note 2, art. 24, para. 1.

185. I. ANDREEV, *supra* note 22, at 133-35.

186. CODE, *supra* note 2, art. 44, para. 1.

187. *Id.* art. 44, paras. 1, 2.

188. *Id.* art. 44, para. 4.

Another rehabilitation mechanism common to socialist penal codes is expunging a convicted person's record, either by a court upon a showing of good character after a stipulated period, or, with less serious offenses, automatically. Those whose records are automatically expunged are persons completing a probation period without committing a new crime; those who do not commit a new crime for three years after completing a sentencing involving a warning, a fine, or re-education without detention; and those who do not commit a new crime for five years after completing a term of incarceration of up to five years.¹⁸⁹

The S.R.V. Code omits two rehabilitation-oriented procedures provided by other socialist codes—suretyship and transfer to a comrade's court. The UK RSFSR provides for a social organization to accept an accused on "surety," if the accused repents, and if the act caused no serious consequences.¹⁹⁰ This is done before trial. The accused is not put on trial, and thus is not convicted. As with education without detention, it is aimed at using the work collective for rehabilitation. It is, in effect, a milder form of re-education without detention, since the trial is circumvented. No provision is made for "suretyship" in the S.R.V. Code.

The Code also omits a procedure common in socialist codes of termination of proceedings prior to trial with transfer of the suspect to a lay court, typically called a "comrade's court," functioning in the suspect's apartment complex or workplace.¹⁹¹ This procedure is permitted only for first offenders charged with less serious offenses. The rationale is that in such cases, the individual may be more effectively convinced to avoid future lawbreaking by the social pressure brought to bear in a proceeding held before the suspect's residence or workplace colleagues. The comrade's court applies only minor penalties, which are not deemed criminal sanctions and it has no power to incarcerate.¹⁹² Viet Nam has no comrade's courts, though the thirty-family neighborhood groups that function in many locations handle minor disputes and in-

189. *Id.* art. 53.

190. UK RSFSR art. 52; see also Kelina, *Zamena ugolovnoi otvetstvennosti inymi merami vozdeistviia* [Replacement of Criminal Liability with Other Measures of Pressure] in *SOVREMENNYE TENDENTSI RAZVITIA SOTSIALISTICHESKOGO UGOLOVNOGO PRAVA* [Contemporary Tendencies in the Development of Socialist Criminal Law] 125, 131, 146-49 (V. Kudriavtsev ed. 1983) (other socialist code provisions for suretyship); I. ANDREEV, *supra* note 22, at 143-45.

191. UK RSFSR art. 51. On other socialist code provisions for transfer to a comrade's court, see Kelina, *supra* note 190, at 131, 144-46; see also I. ANDREEV *supra* note 22, at 146-48.

192. I. ANDREEV, *supra* note 22, at 146-48.

fractions, in addition to administrative functions.¹⁹³

E. Public Education as an Aim of Punishment

The Code identifies one additional purpose of punishment. It "aims as well at the education of others in respect for the law, in the struggle against and prevention of offenses."¹⁹⁴ This is a distinctly socialist approach—an explicit code statement that a purpose of punishment is education of the public.¹⁹⁵ The Soviet penal codes do not include such a statement of an educational purpose, but the Soviet criminal procedure codes do: "Criminal proceedings should further the strengthening of socialist legality, the prevention and eradication of crimes, and the education of citizens in a spirit of execution of Soviet laws and respect for the rules of socialist community life."¹⁹⁶ The S.R.V. statement is even more explicit about the educational aim, referring to those intended to be educated as "others," meaning persons other than the accused person.

Criminal punishment is viewed as contributing to a new legal consciousness to replace the negative public attitude about law that results from Viet Nam's history:

The formative and stimulating effect of criminal law is seen in . . . socialist legal consciousness. Like law in general, criminal law exerts on the members of society an informational and value-orienting effect. This means that through the enactment and application of laws, the content of the various criminal-law norms is brought to the attention of the population, and thereby demonstration is made of the intolerant attitude of the state and society to particular anti-social conduct and of a readiness to fight such conduct by the most decisive measures.¹⁹⁷

193. Interview by author with Tranh Tran Vy, Mayor of Hanoi, in Hanoi, Viet Nam, Dec 1. 1978.

194. CODE, *supra* note 2, art. 20.

195. H. BERMAN, JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW 282-84 (1963).

196. FUNDAMENTAL PRINCIPLES CRIM. P. OF THE USSR AND UNION REPUBLICS art. 2 (1958).

197. Dao Chi Uk, *supra* note 79, at 109.

F. *Strategy to Eliminate Crime*

Drafters of the Code, citing Marx and Engels, do not view criminal penalties as sufficient for eliminating crime: "to put an end to criminal acts . . . the only remedy is to abolish the system of exploitation of man by man."¹⁹⁸ They view long-term changes in society as the only mechanism for eliminating crime. "Since the bases for full elimination of crime are connected chiefly with further reform of society, punishment is, though a necessary means, nonetheless a subsidiary means in the struggle against crime."¹⁹⁹ This view derives both from the historical materialist approach and from Viet Nam's history. The social chaos in which Viet Nam finds itself must be remedied if criminal activity is to be stopped.

VII. OUTSIDE INFLUENCES ON THE CODE

The 1985 Code draws heavily from the legislation adopted by the D.R.V. It is firmly rooted in the socialist economic and political order of Viet Nam. Its opening article states the "tasks" of the Code as being those of "defending the socialist system and the people's right to socialist collective mastery, protecting the right of equality among nationalities, safeguarding the people's basic rights, protecting socialist law and order, combating all criminal acts."²⁰⁰ Its preamble states that the Code "embodies the right to socialist collective mastery of our people under the leadership of the working class."²⁰¹

Phan Hien sees the Code's origins as lying both within Viet Nam's own history and within the socialist family of law:

It [the Code] utilizes the experience acquired in the prevention of and struggle against crime in recent decades, continues in developing the tradition of Vietnamese penal law from the August [1945] Revolution to the present and has drawn on the experience of the fraternal socialist countries, notably the Soviet Union, in the elaboration of penal legislation.²⁰²

Influence from the socialist, and particularly the Soviet, codes is evident both in content and in structure. Similarity to the Soviet codes in format is particularly evident in Chapter One (Articles 1-19). These articles closely track the first chapter of the Soviet codes in content, as

198. Minh, *supra* note 44, at 65.

199. Buchholtz & Den, *supra* note 173, at 108-09.

200. Code, *supra* note 2, art. 1.

201. *Id.* preamble, para. 4.

202. Hien, *supra* note 35, at 19.

well as in subchapter breakdown and numerical sequence of the provisions. Like the Soviet codes, the S.R.V. Code proceeds as follows: 1) tasks of the Code;²⁰³ 2) limitation of penal responsibility to violation of acts prohibited by the Code;²⁰⁴ 3) territorial application;²⁰⁵ 4) application to offenses committed outside the state territory;²⁰⁶ 5) operation of the Code in time (prohibition against retroactive application);²⁰⁷ 6) concept of an offense;²⁰⁸ 7) offenses committed intentionally;²⁰⁹ 8) offenses committed without intent;²¹⁰ 9) offenses committed while insane²¹¹ or under alcoholic intoxication;²¹² 10) self-defense;²¹³ 11) choice of evil (emergency situations);²¹⁴ 12) inchoate offenses;²¹⁵ 13) voluntary withdrawal before completion of an offense;²¹⁶ 14) complicity;²¹⁷ 15) concealment of an offense;²¹⁸ and 16) failure to report crimes where a specific offense requires reporting.²¹⁹

Influence from Viet Nam's two thousand years of Chinese-based penal legislation is not apparent. The death penalty provision is one in which such an influence might appear, since Chinese law has an unusual procedure that permits reprieve after a period of time if the offender shows repentance. This procedure is followed even in contemporary Chinese law.²²⁰ No such procedure appears in the death penalty provision of the S.R.V. Code.²²¹

French penal law has exerted its influence upon the Code. French law was the law in force when the current senior generation of Vietnamese jurists was trained and many of them took their law studies in France. Under French administration, the judges were French, and French was the language of the courts. French was formerly the official language of the courts, and it remains the language of a law

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- 203. CODE, *supra* note 2, art. 1; cf. UK RSFSR art. 1.
 - 204. CODE, *supra* note 2, art. 2; cf. UK RSFSR art. 3.
 - 205. CODE, *supra* note 2, art. 5; cf. UK RSFSR art. 4.
 - 206. CODE, *supra* note 2, art. 6; cf. UK RSFSR art. 5.
 - 207. CODE, *supra* note 2, art. 7; cf. UK RSFSR art. 6.
 - 208. CODE, *supra* note 2, art. 8; cf. UK RSFSR art. 7.
 - 209. CODE, *supra* note 2, art. 9; cf. UK RSFSR art. 8.
 - 210. CODE, *supra* note 2, art. 10; cf. UK RSFSR art. 9.
 - 211. CODE, *supra* note 2, art. 12; cf. UK RSFSR art. 11.
 - 212. CODE, *supra* note 2, art. 12; cf. UK RSFSR art. 12.
 - 213. CODE, *supra* note 2, art. 13; cf. UK RSFSR art. 13.
 - 214. CODE, *supra* note 2, art. 14; cf. UK RSFSR art. 14.
 - 215. CODE, *supra* note 2, art. 15; cf. UK RSFSR art. 15.
 - 216. CODE, *supra* note 2, art. 16; cf. UK RSFSR art. 16.
 - 217. CODE, *supra* note 2, art. 17; cf. UK RSFSR art. 17.
 - 218. CODE, *supra* note 2, art. 18; cf. UK RSFSR art. 18.
 - 219. CODE, *supra* note 2, art. 19; cf. UK RSFSR art. 19.
 - 220. P.R.C. CRIMINAL LAW, *supra* note 78, art. 43.
 - 221. CODE, *supra* note 2, art. 27.

journal, *Bulletin de droit*, published by the Viet Nam Lawyers Association. That journal has carried French translations of the Code.²²² In addition, criminal procedure in Viet Nam reflects the style of the French courts.²²³

While the Code shows an influence from socialist penal codes, it must be recalled that those codes are similar in many respects to the French Penal Code, particularly as regards their General Part. Soviet penal law descends from nineteenth century Russian law that had borrowed heavily from Western Europe. Socialist codes retain much from their pre-revolution codes.

As with the French Penal Code, but unlike most socialist codes, the S.R.V. Code divides offenses into two categories, calling one "crime" and the other "delict." Article 8, paragraph 2 provides: "Serious offenses that cause great danger to society and for which the maximum applicable punishment is greater than five years of imprisonment, life imprisonment, or the death penalty, shall be denominated crimes. The remaining offenses of less seriousness shall be denominated delicts." The French Penal Code also divides offenses into crime and delict.²²⁴ The French Penal Code uses this distinction in its provision on attempted crime, penalizing an attempt at a crime, but not an attempt at a delict.²²⁵ The S.R.V. Code penalizes attempts at any offense, whether a crime or a delict. Unlike the French Penal Code, the S.R.V. Code penalizes preparation (seeking and preparing means or creating conditions) but here uses the crime-delict distinction, penalizing preparation for a crime only.²²⁶ The socialist penal codes have traditionally made no distinction between crime and delict.²²⁷ However, around 1970 four socialist states introduced such a distinction—Poland, Hungary, Czechoslovakia, and the German Democratic Republic.²²⁸

222. See *supra* note 2.

223. Based on the author's observation of criminal case hearings in Hanoi in 1978.

224. CODE PÉNAL [C. PEN.] art. 1 (Fr.). On the crime-delict distinction in S.R.V. CODE art. 8, see Kam, *Osnovnye cherty otshchei chasty UK SRV* [Essential Features of the General Part of the Criminal Code of the S.R.V.], SOVETSKAIA IUSTITSIYA, no. 9, at 27 (1987).

225. C. PEN. art. 2 (Fr.); see also H. DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE* 95 (1947). French procedure law handles crime differently from delict—the two are handled by different courts, and pre-trial investigation is more complex for crime. *Id.* at 93.

226. CODE, *supra* note 2, art. 15.

227. See, e.g., UK RSFSR art.7.

228. I. ANDREEV, *supra* note 22, at 63-65; see also Horvath, *supra* note 39, at 29-33. The German Democratic Republic [hereinafter G.D.R.] Code, like the French and S.R.V. Codes, uses the distinction in providing liability for attempt. StGB art. 1 (E. Ger.). The

The S.R.V. Code differs from most socialist codes by providing for life imprisonment.²²⁹ The French Penal Code permits life imprisonment,²³⁰ as does the P.R.C. Code.²³¹ The reason for the S.R.V. Code provision likely relates to domestic conditions, as indicated above, rather than to outside influence.

While the S.R.V. Code is clearly within the family of socialist penal codes, the significance of its following of socialist approaches has the additional result of keeping the S.R.V. Code within the European tradition. That is, however, hardly a foregone conclusion, since the last previous penal code of Viet Nam was Chinese.

VIII. OFFENSES AGAINST THE STATE

Like other socialist penal codes, the S.R.V. Code penalizes a wide range of conduct as crimes against the state. It provides severe punishment, including the death penalty, for a number of offenses. The S.R.V. Code provides the death penalty for the following offenses: high treason;²³² subversive activity against people's power (organizing or being active in a group to overthrow government);²³³ espionage;²³⁴ infringement on territorial security (entry into the territory of Viet Nam followed by commission of sabotage);²³⁵ rebellion (armed activity against people's power);²³⁶ banditry (armed activity in a remote region involving murder, pillage, or property destruction, with intent to oppose people's power);²³⁷ terrorism (attempted murder with intent to oppose people's power);²³⁸ destruction of the material and technical bases of socialism (destruction of political or economic institutions with intent to oppose people's power);²³⁹ hijacking of ships or airplanes;²⁴⁰

G.D.R. Code also penalizes attempt at any crime, but attempt at only those delicts where the code provision defining the penalty for the delict specifies that attempt shall constitute an offense. *Id.* art. 43.

229. See CODE, *supra* note 2, arts. 25, 26; cf. UK RSFSR art. 24; see also text accompanying notes 117-28.

230. C. PEN. art. 7 (Fr.).

231. P.R.C. CRIMINAL LAW, *supra* note 78, art. 28.

232. CODE, *supra* note 2, art. 72. On treason in other socialist codes, see I. ANDREEV, *supra* note 22, at 88-89.

233. CODE, *supra* note 2, art. 73.

234. *Id.* art. 74.

235. *Id.* art. 75.

236. *Id.* art. 76.

237. *Id.* art. 77.

238. *Id.* art. 78.

239. *Id.* art. 79. On related offenses of sabotage and diversion in socialist codes, see I. ANDREEV, *supra* note 22, at 89-90.

240. CODE, *supra* note 2, art. 87.

manufacture, possession, distribution of false currency; destruction of currency (said acts under serious circumstances).²⁴¹

Amnesty International has criticized this section of the Code on grounds that it has "prescribed the death penalty for a wide variety of offenses including non-violent political offenses."²⁴² Of the offenses against the state carrying the death penalty, however, three can be charged without alleging violence: treason, espionage, and subversive activity. Treason is defined as providing intelligence information to a foreign power with intent to threaten the independence of Viet Nam.²⁴³ Espionage is defined as providing to a foreign power either intelligence information or information that, while not involving state secrets, can be used against Viet Nam.²⁴⁴ Subversive activity against the people's power (organizing or being active in a group to overthrow the government) carries the death penalty only for a person who is "the organizer, instigator, or a particularly active agent" of such a group or "who has caused serious consequences."²⁴⁵

Severity regarding crimes against the state was a feature of traditional Chinese and Vietnamese codes.²⁴⁶ But it is also a feature of socialist codes. With Viet Nam, as with other socialist states, this phenomenon is likely a result of its situation. As states espousing a radically different form of government, the socialist states have engendered opposition, both internally and from non-socialist states. Internally, their policies are opposed by many, particularly by those whose interests are threatened by socialization of productive property.

Internationally, their policies have been opposed by powerful states, which have on occasion used military force in an effort to remove socialist governments. Several states intervened militarily in Soviet Russia shortly after its socialist revolution.²⁴⁷ While that intervention was unsuccessful, it created a fear of subversion by outside forces and by internal forces that might collaborate with them. In 1961 the United States intervened militarily against Cuba (Bay of Pigs) to overthrow its government²⁴⁸ and in the 1950s and 1960s France and the United States attempted militarily to overthrow the government of the

241. *Id.* art. 98.

242. 1986 AMNESTY INTERNATIONAL REPORT 264 (1986).

243. CODE, *supra* note 2, art. 72.

244. *Id.* art. 74.

245. *Id.* art. 73.

246. M. HOOKER, *supra* note 4, at 74-75.

247. See B. WILLIAMS, THE RUSSIAN REVOLUTION, 1917-1921 67 (1987). See generally D. GEYER, THE RUSSIAN REVOLUTION (1987).

248. See generally T. HIGGINS, THE PERFECT FAILURE: KENNEDY, EISENHOWER AND THE C.I.A. (1987).

Democratic Republic of Viet Nam.²⁴⁹

The S.R.V. Code's provisions on crimes against the state are a product of that history, particularly as that history relates to Viet Nam itself:

Offenses against State security still occur due to the multi-faceted sabotage plots and actions of the external enemy, and the attempts of the class enemy and the reactionaries within the country to rear their heads. The Penal Code severely punishes crimes that are especially dangerous violations of State security (i.e. counter-revolutionary crimes) because they violate the country's independence, sovereignty, unity and territorial integrity, and threaten the very existence of our State and the socialist regime.²⁵⁰

Phan Hien characterizes Vietnam's contemporary situation as involving external and domestic danger of subversion:

Our country is in an exceptional situation. Though in a state of peace, we must confront trench war in many areas, led by Chinese expansionism and hegemonism in collusion with American imperialism and other reactionary forces. At the same time, we must keep ourselves ready to face the possibility of an aggressive war of great scope. Reactionaries inside the country as well are planning to take up their activities once again.²⁵¹

A number of trials in the 1980s have involved charges of conspiring with external enemies (China or Thailand) to commit sabotage or to plan overthrow of the government.²⁵²

The S.R.V. Code includes among offenses against the state "propaganda against the socialist regime," defined as "propaganda denigrating the socialist regime" or "production, possession, or distribution of documents or cultural articles whose content is directed against the socialist system." Both must be done "with intent to oppose people's power".²⁵³ Amnesty International has criticized the Code for providing

249. See generally G. KOLKO, *ANATOMY OF A WAR: VIETNAM, THE UNITED STATES, AND THE MODERN HISTORICAL EXPERIENCE* (1987); N. HANNAN, *THE KEY TO FAILURE: LAOS & VIETNAM* (1987); C. WHIPPLE, *THE WAR IN VIETNAM: A BRIEF HISTORY OF HOW THE U.S. BECAME INVOLVED IN VIETNAM* (1967).

250. Hien, *supra* note 34, at 5.

251. Hien, *supra* note 35, at 21.

252. *A Spy Ring Organized by China and Thai Army Intelligence Uncovered*, *VIETNAM COURIER*, no. 2, at 12 (1985). This recounts the trial and conviction of a group in Ho Chi Minh City in Dec. 1984 on charges of having worked with Chinese and Thai officials in organizing others to infiltrate into Viet Nam and commit sabotage. *Id.*

253. CODE, *supra* note 2, art. 82, para. 1(a).

imprisonment of people "for peacefully exercising their fundamental human rights," an apparent reference to this article.²⁵⁴

This provision is similar to provisions in other socialist penal codes. For example, the Soviet codes prohibit "agitation or propaganda, done to undermine or weaken Soviet authority;"²⁵⁵ the Cuban Code prohibits "incite[ment] against the social order . . . by oral or written propaganda or in any other form;"²⁵⁶ the Czechoslovakian Code prohibits "incite[ment] to revolt against the Republic" if done from a "hostile attitude to the people's democratic system;"²⁵⁷ and the German Democratic Republic Code prohibits "incite[ment] against worker-peasant authority."²⁵⁸ These provisions, acknowledged by socialist jurists to infringe rights of expression, are justified by the internal and external threats to the socialist order.

Flight abroad with intent to oppose people's power is punishable as a crime against the state.²⁵⁹ This provision does not further define the element of intent to oppose people's power. A comparable provision in the Soviet codes punishes flight abroad if done with intent to damage the independence of the state, the territorial integrity, or military power of the state.²⁶⁰ Intent to damage may be manifested by requesting political asylum in a capitalist state, by revealing state secrets to another state, or by working abroad in anti-Soviet organizations.²⁶¹ These S.R.V. and Soviet provisions do not punish flight abroad for the sole purpose of taking up residence abroad.²⁶² The S.R.V. provision differs from the Soviet provisions in that the latter include this offense within treason and punish it by death.²⁶³ The S.R.V. provision is a separate code section; the offense carries twenty years maximum imprisonment or life imprisonment if serious consequences result.

254. 1986 AMNESTY INTERNATIONAL REPORT, *supra* note 242, at 265.

255. See, e.g., UK RSFSR art. 70.

256. CODIGO PENAL [COD. PEN.] art. 108 (Cuba 1979).

257. CZECH. PENAL CODE art. 81.

258. G.D.R. Law on Additions to the Criminal Code, Dec. 11, 1957, art. 19; see also Stragesetzbuch [StGB] art. 90a (W. Ger.) ("whoever publicly . . . insults or maliciously maligns the Federal Republic of Germany . . . shall be punished by up to three years of imprisonment . . .").

259. CODE, *supra* note 2, art. 85.

260. UK RSFSR art. 64.

261. V. KURLIANSKII & M. MIKHAILOV, OSOBO OPASNYE GOSUDARSTVENNYE PRESTUPLENIA [Especially Dangerous Crimes Against the State] 85 (1963).

262. Emigration does require government permission, however. Exit for emigration without permission is punishable by a maximum of two years imprisonment. CODE, *supra* note 2, art. 89.

263. UK RSFSR art. 64.

IX. OFFENSES RELATED TO THE SOCIALIST ECONOMY

The most distinctively socialist aspect of the S.R.V. Code is its provisions protecting the state-run economy. Like other socialist codes, it treats infringements on state property separately from and more seriously than infringements on personally owned property; it punishes a variety of offenses involving mismanagement within the state-run economy; and it punishes abuse of power by officials.

A. *Offenses Related to State-Owned Property*

Similar to other socialist codes, the S.R.V. Code contains separate chapters dealing, respectively, with offenses threatening property in the socialized sector, and offenses threatening personally-owned property.²⁶⁴ The offenses defined in Chapter Four, "Offenses Threatening Socialist Property," and in Chapter Six, "Offenses Threatening the Property of Citizens," are similar. The principal difference is that penalties for offenses involving state property are more severe. For example, theft of socialist property carries five years maximum imprisonment,²⁶⁵ whereas theft of a citizen's property carries three years maximum.²⁶⁶ If the offense is committed under "particularly serious circumstances," twenty years maximum imprisonment is provided in the case of property of citizens,²⁶⁷ and twenty years or death in the case of socialist property.²⁶⁸

Theft by force (robbery) of socialist property carries fifteen years maximum imprisonment, and twenty years or death under defined aggravating circumstances.²⁶⁹ Theft by force (robbery) of a citizen's property carries ten years maximum imprisonment, and twenty years or death under the same aggravating circumstances.²⁷⁰ The aggravating circumstances are: commission by an organized group; use of weapons; infliction of serious injury or death; appropriation of items of great value; causing of serious consequences; and commission by a dangerous recidivist.²⁷¹

Intentional damaging of socialist property carries seven years max-

264. A few socialist codes treat offenses against socialist property in the same chapter with offenses against personal property. I. ANDREEV, *supra* note 22, at 92. For a recitation of the specific offenses defined in socialist codes relating to socialist property, see J. VEGA VEGA, *LA PROTECCIÓN JURÍDICO-PENAL EN EL SOCIALISMO* 214-37 (1983).

265. CODE, *supra* note 2, art. 132.

266. *Id.* art. 155.

267. *Id.*

268. *Id.* art. 132.

269. *Id.* art. 129.

270. *Id.* art. 151.

271. *Id.* arts. 129, 151.

imum imprisonment,²⁷² whereas intentional damaging of the property of citizens carries five years maximum imprisonment.²⁷³ "If the offense is committed under particularly serious circumstances," the penalty as regards the property of citizens is twenty years maximum imprisonment,²⁷⁴ whereas the penalty as regards socialist property is twenty years maximum imprisonment or death.²⁷⁵

Swindling of socialist property carries five years maximum imprisonment, and, if done under "particularly serious circumstances," life imprisonment.²⁷⁶ Swindling of a citizen's property carries three years maximum imprisonment, and fifteen years if done under "particularly serious circumstances."²⁷⁷

Embezzlement of socialist property, for which there is no comparable offense involving property of a citizen, carries seven years maximum imprisonment, which is increased to twenty years or death if committed "under particularly serious circumstances."²⁷⁸

The S.R.V. Code contains no provision comparable to the Soviet code provisions that call for the death penalty for theft, theft by force, embezzlement, or theft by fraud of state property "in particularly large amounts,"²⁷⁹ but presumably large amounts would make the circumstances "particularly serious."

The strict treatment of offenses involving socialist property is explained by Phan Hien:

We are building socialism beginning from an economy of small-size production which, moreover, has undergone the devastating effects of long wars. That is why socialist property needs strict protection. Chapter Four includes penalties appropriate to such offenses as appropriation by force, embezzlement, theft of socialist goods, all of which may be punished by the death penalty; swindling of socialist goods is, moreover, punished by life imprisonment.²⁸⁰

Viet Nam in this regard is at the stage in which the USSR found itself in the 1930s, when rapid socialization met with resistance, and severe criminal penalties were used to combat that resistance.

272. *Id.* art. 138.

273. *Id.* art. 160.

274. *Id.*

275. *Id.* art. 138.

276. *Id.* art. 134.

277. *Id.* art. 157.

278. *Id.* art. 133.

279. UK RSFSR art. 93.

280. Hien, *supra* note 35, at 22.

Theft and other unlawful acquisition of socialist property causes, in a socialist economy, damage to the system of economic planning. In that way, it represents a harm greater than that involved in an unlawful taking of a citizen's property. A Soviet scholar explains that through theft the state loses items "intended for use in the economy to create the material-technical base for communism."²⁸¹ It has also been stated: "social property to the means of production is the economic base of the socialist system, the source of the well-being of the people."²⁸²

Furthermore, the need for criminal repression may be greater in the case of socialist property. Even discounting situations of opposition to socialization, a prospective thief reluctant to steal from an individual may have less inhibition about stealing from a state-owned enterprise. First, the goods may be more available as a result of being less well guarded. Second, the taking of state property causes no direct injury to an individual, as the loss is spread through the society; thus, moral qualms about theft may be less troubling. Third, the state is more likely to be in possession of items that are marketable.

B. Non-Theft Offenses Involving the Socialist Economy

In addition to protecting socialist property, the S.R.V. Code punishes acts that threaten the state's role in the economy. These provisions are contained in Chapter Seven, "Offenses in the Economic Field," and are comparable to similar provisions in other socialist codes.

Typical of socialist codes is a prohibition against "illegal speculation," defined as purchasing goods "with the intention of reselling them to make a profit."²⁸³ The S.R.V. provision carries a heavier penalty than the comparable Soviet provision. Whereas the Russian Republic penalty is two years maximum imprisonment, and seven years if in large quantities,²⁸⁴ the S.R.V. penalty is five years, but twelve years under certain defined aggravating circumstances, and twenty years or life imprisonment "in particularly serious cases." The severity of this sanction reflects the fact that Viet Nam is embarking on socialization of commerce. Particularly in the south, with its strong tradition of pri-

281. H. KRIGER, *BOR'BA S KHISHCHENIAMI SOTSIALISTICHESKOGO IMUSHCHESTVA* [The Struggle Against Theft of Socialist Property] 4 (1965).

282. I. ANDREEV, *supra* note 22, at 90.

283. CODE, *supra* note 2, art. 165; *see also* I. ANDREEV, *supra* note 22, at 95; J. VEGA VEGA, *supra* note 264, at 127-28.

284. UK RSFSR art. 154.

vate commerce, the state has difficulty in asserting its role to the exclusion of private traders.

Like other socialist codes, the S.R.V. Code makes it an offense for an official in the socialized sector who is responsible for product quality to release into circulation products of poor quality.²⁸⁵ The act must be done "for personal gain," it must be done either several times or with a large quantity of products, and it must cause "serious consequences."²⁸⁶ Maximum incarceration is three years for this offense.²⁸⁷

Conducting a prohibited industrial or commercial activity is punishable by either two years maximum imprisonment or seven years imprisonment if the person used state facilities or the name of an organization that does not exist, or conducted the activity on a large scale.²⁸⁸

Addressing a problem found in other socialist states, the Code makes it an offense for management personnel to give false information to superior organizations with respect to fulfillment of economic plan targets. The maximum punishment for the offense is three years imprisonment.²⁸⁹

The Code also punishes violation of the system of distribution in the socialized sector. It is an offense to violate the principles, policy, or system of distribution of materials, grains, food products, or other goods, causing serious consequences. This offense is aimed at diversion of goods in the state sector to destinations other than those stipulated by economic plans. The maximum penalty for this offense is three years imprisonment.²⁹⁰

This provision has no analogue in the Soviet codes. Neither does a broad provision that makes it an offense to "destroy or dispense goods or commit any other act impeding the carrying out of state regulations on socialist transformation." The maximum term of incarceration is three years, but it is raised to seven years if done by an official in abuse of power, or if done so as to cause serious consequences.²⁹¹

Professor Nguyen Ngoc Minh describes the context of Chapter Seven by stating that in the Vietnamese economy, particularly in the south, "crime has reached disturbing proportions."²⁹² He says that these problems result "from the fact that Viet Nam is progressing di-

285. CODE, *supra* note 2, art. 177; see also J. VEGA VEGA, *supra* note 264, at 125-26; I. ANDREEV, *supra* note 22, at 94.

286. CODE, *supra* note 2, art. 177.

287. *Id.*

288. *Id.* art. 168.

289. CODE, *supra* note 2, art. 176; see also J. VEGA VEGA, *supra* note 264, at 112-16.

290. CODE, *supra* note 2, art. 178.

291. *Id.* art. 164.

292. Minh, *supra* note 44, at 60.

rectly from a country of small production to socialism, without passing through the stage of capitalist development."²⁹³

Phan Hien explains Chapter Seven by reference to the government's effort to socialize the economy:

We are now in the first stage of the period of socialist transformation. The struggle between the two paths—the socialist path and the capitalist path—is being pursued hard and intensely. The enemy is undertaking, against us, sabotage of all kinds, particularly in the economic field. The Penal Code leads a resolute and vigorous struggle against sabotage. It severely punishes speculators, traffickers, manufacturers of counterfeit merchandise, those who conduct commerce or hoard prohibited merchandise, those who provoke disorder in the socialist market.²⁹⁴

C. Crimes by Officials

Chapter Nine of the Code, "Offenses Relative to Public Functions," covers acts by all types of officials but, in the socialist context, has particular relevance to officials in economic posts. "Any person who, through lack of responsibility, does not complete or improperly completes an entrusted task, thereby causing serious consequences" is subject to a maximum three years imprisonment.²⁹⁵ Abuse of power or exceeding of power by an official, if harm results to the state, society, or citizens, is subject to a maximum five years imprisonment.²⁹⁶ Giving or receiving a bribe is punished by a range of maximum terms of years, depending on the circumstances, with possible life imprisonment in "particularly serious cases."²⁹⁷ In regard to this Chapter, Phan Hien refers to the government's policy of promoting "the right of collective mastery of the people" and its struggle against "those who profit from their public functions and power to oppress people." This policy, he states, explains the serious penalties found in Chapter Nine.²⁹⁸

293. *Id.*

294. Hien, *supra* note 35, at 22-23.

295. CODE, *supra* note 2, art. 220; cf. UK RSFSR art. 172; see also I. ANDREEV, *supra* note 22, at 94-95; J. VEGA VEGA, *supra* note 264, at 106-11.

296. CODE, *supra* note 2, art. 221; cf. UK RSFSR art. 171.

297. CODE, *supra* note 2, arts. 226 (receiving a bribe), 227 (giving a bribe).

298. Hien, *supra* note 35, at 23.

X. OTHER OFFENSES

While the S.R.V. Code provides broad criminal liability in certain provisions, particularly as regards acts impeding socialist reforms, it is in many respects cautious in use of the criminal sanction.²⁹⁹ It has few "victimless" offenses, and it provides no liability for corporations or other legal persons.³⁰⁰ In addition, it requires proof of *mens rea* for all offenses, permitting no strict liability.³⁰¹

The Code's chapter on offenses against the person is unexceptional.³⁰² A chapter on offenses involving the family penalizes bigamy, incest, mistreatment of parents, inciting minors to commit crimes, child stealing, arranging child marriage, and compulsion of a person to marry. There is no prohibition relating to abortion or homosexual acts.³⁰³

A chapter on public safety punishes violation of environmental regulations;³⁰⁴ the causing of serious consequences in exercising the profession of a diviner or medium or following other forms of superstition;³⁰⁵ participation in games of chance;³⁰⁶ receiving stolen goods;³⁰⁷ promoting prostitution (this does not include engaging in prostitution);³⁰⁸ and promoting the use of illicit drugs (this does not include possession or use of drugs).³⁰⁹ The fact that engaging in prostitution and drug possession are not considered offenses is consistent with approaches in other socialist states which view those who engage in prostitution or use drugs as victims rather than criminals. Treatment and

299. Reduction in the number of offenses is a feature of socialist penal codes of the 1960s. Horvath, *supra* note 40, at 36.

300. Dierdy, *Ucheniie o vine v sotsialisticheskoy ugolovnoy prave* [Study of Guilt in Socialist Criminal Law], in SOVREMENNYYE TENDENTSIY RAZVITIYA SOTSIALISTICHESKOGO UGOLOVNOGO PRAVA [Contemporary Tendencies in the Development of Socialist Criminal Law] 40, 41 (V. Kudriavtsev ed. 1983).

301. CODE, *supra* note 2, arts. 9-10; see also Dierdy, *supra* note 300, at 41 (on rejection of strict liability in socialist codes), and especially at 47 (even negligence requires proof of *mens rea*); I. ANDREEV, *supra* note 22, at 70 (rejection of strict liability in socialist codes seen as protection against unjustified repression).

302. CODE, *supra* note 2, ch. 2, arts. 101-18, "Crimes Against the Life, Health, Dignity, and Honor of the Person."

303. *Id.* ch. 5, arts. 143-150, "Crimes Against Marriage and the Family and Crimes Against Minors;" see also J. VEGA VEGA, *supra* note 264, at 133, 213 (most socialist codes omit a prohibition of homosexual acts); *id.* at 143-45 (most prohibit performance of abortions under medically dangerous circumstances but permit performance in hospitals).

304. CODE, *supra* note 2, art. 195.

305. *Id.* art. 199.

306. *Id.* art. 200.

307. *Id.* art. 201.

308. *Id.* art. 202.

309. *Id.* art. 203.

job training has been instituted for drug addicts and former prostitutes.³¹⁰

A chapter on public security includes a broadly phrased disturbance of the peace offense—"provok[ing] trouble in a public place"—punishable by two years maximum imprisonment.³¹¹ There is no penalty comparable to that in some socialist penal codes prohibiting failure to engage in socially productive labor ("parasitism").³¹²

A chapter devoted to offenses against citizen rights³¹³ punishes unlawful arrest;³¹⁴ unlawful firing of a worker;³¹⁵ and violation of domicile,³¹⁶ of secrecy of correspondence or communication,³¹⁷ or voting rights,³¹⁸ of freedom of assembly and religion,³¹⁹ of women's right of equality,³²⁰ of authors' and investors' rights,³²¹ and of the right of citizens to petition the government for redress of grievances.³²² The Code omits a provision found in Soviet and a few other socialist codes that penalizes violation of regulations on separation of church and state.³²³

Another chapter that deals in part with citizen rights is Chapter Ten, "Offenses Threatening Judicial Activity."³²⁴ It is an offense for a

310. Interview by author with Nguyen Thanh Long, Vice-Chair, People's Committee, Quang Nam Da Nang Province, and member of the National Assembly, in Da Nang, Viet Nam, Dec. 7, 1978. The author visited a rehabilitation school for recovering drug addicts in Ho Chi Minh City. See Can, *supra* note 146, at 25-26 (discussion on rehabilitation of drug addicts); see also Paringaux, *supra* note 144 (discussion of on the job training for ex-prostitutes).

According to former R.V.N. Deputy Prime Minister Nguyen Xuan Oanh, who heads an economic planning agency in the Ho Chi Minh City administration, the policies have "removed the ugly side of the old Saigon, the mass prostitution, drug addiction and gangsterism." SOUTH, Oct. 1987, at 9.

311. CODE, *supra* note 2, art. 198; see also I. ANDREEV, *supra* note 22, at 105-06; J. VEGA VEGA, *supra* note 264, at 209-12.

312. I. ANDREEV, *supra* note 22, at 106-07.

313. CODE, *supra* note 2, ch. 3, arts. 119-128, "Crimes Against Citizens' Rights of Freedom and Democracy;" see also VIETNAM CONST., ch. 5, "Basic Rights and Obligations of Citizens" (lists the rights whose violation is prohibited by these articles); UK RSFSR, ch. 4, arts. 132-143, "Crimes Against the Political and Labor Rights of Citizens" (an example of a comparable chapter in a Soviet penal code that prohibits violations of citizens' rights).

314. CODE, *supra* note 2, art. 119.

315. *Id.* art. 123.

316. *Id.* art. 120.

317. *Id.* art. 121.

318. *Id.* art. 122.

319. *Id.* art. 124.

320. *Id.* art. 125.

321. *Id.* art. 126.

322. *Id.* art. 127.

323. UK RSFSR art. 142; see also I. ANDREEV, *supra* note 22, at 113-117.

324. CODE, *supra* note 2, arts. 230-248.

prosecuting officer or investigating magistrate to try to convict a person known to them to be innocent,³²⁵ for a trial judge or lay assessor intentionally to render an unlawful judgment,³²⁶ or for an official to pressure a judge to make an illegal decision.³²⁷ This chapter punishes use of torture in criminal investigations,³²⁸ pressuring a witness in a criminal investigation to make false statements,³²⁹ and alteration of a dossier in a criminal case by an investigating magistrate, prosecuting officer, magistrate, lay assessor or other judicial officer, or defense lawyer.³³⁰

Chapter Ten also punishes certain acts by officials in charge of detainees: negligence resulting in escape;³³¹ unlawful release of a person in custody;³³² and refusal to release a person for whom there is no further basis for detention.³³³ It also punishes acts violating the judicial process: refusal to carry out a court order;³³⁴ knowing falsification by a court translator or expert witness;³³⁵ refusal to give an opinion as an expert witness;³³⁶ and encouraging a witness to lie.³³⁷ Furthermore, it punishes the taking or destruction of items being used as evidence;³³⁸ concealment of certain enumerated serious offenses;³³⁹ and failure to report certain enumerated serious offenses.³⁴⁰

Like other socialist codes, the S.R.V. Code includes a chapter defining offenses by military personnel,³⁴¹ including refusal to obey an order,³⁴² absence without leave,³⁴³ and mistreatment of prisoners.³⁴⁴

Another chapter punishes war-related offenses that violate inter-

325. *Id.* art. 231.

326. *See id.* art. 232.

327. *See id.* art. 233.

328. *See id.* art. 234.

329. *See id.* art. 235.

330. *See id.* art. 236.

331. *See id.* art. 237.

332. *See id.* art. 238.

333. *See id.* art. 239.

334. *See id.* art. 240.

335. *See id.* art. 241.

336. *See id.* art. 242.

337. *See id.* art. 243.

338. *See id.* art. 244.

339. *See id.* art. 246.

340. *See id.* art. 247.

341. *See id.* ch. 11, arts. 249-276, "Criminal Responsibility of Military Personnel for Failure to Fulfill Their Duties and Responsibilities;" *see also* I. ANDREEV, *supra* note 22, at 43.

342. CODE, *supra* note 2, art. 250.

343. *See id.* art. 261.

344. *See id.* art. 275.

national law;³⁴⁵ waging a war of aggression;³⁴⁶ mass killing of persons (crimes against humanity);³⁴⁷ using unlawful methods of waging war;³⁴⁸ and recruiting or acting as a mercenary.³⁴⁹ All of these offenses, except for acting as a mercenary, carry a possible death penalty.

XI. CHARACTERIZATION OF THE CODE

Adoption of the 1985 Code places Viet Nam squarely within the socialist family of law in penal matters. But the Code reflects original approaches. The General Part closely follows those of other socialist codes. The Special Part follows that same pattern in structure and in much of its content, but the decision as to which acts are offenses, as well as the penalty structure, indicate consideration of the needs of Viet Nam.

The impact on the Code of Viet Nam's stormy history is strong. Contemporary socialist reform and Viet Nam's long years of war have left their mark on it. Adoption of the Code moves Vietnamese penal law from a formative stage to one of consolidation of the experimentation of the early years of socialist reform.

Just as the Code has been shaped by these events, so will later events determine its future. The extent to which severe penalties will be employed will be determined by the course of socialist reform and the degree of social conflict it generates. It will also be determined by the government's concern over Viet Nam's external situation, particularly its relations with China; so long as that tension continues, the government will find speech and action directed against it to be highly dangerous. The impact of disruptive factors related to the war will diminish over time, leading to a more stable society that presumably will require less use of criminal punishment for social ordering. As time passes, the attitudes towards law that developed as a result of Confucianism and colonialism will change.

The long-term prospect is for moderation. As Viet Nam becomes more stable, its penal policy will rely more on rehabilitation and less on severity of sanction.

345. See *id.* ch. 12, arts. 277-280, "Crimes Against Peace and Humanity and War Crimes." On similar offenses in other socialist codes, see I. ANDREEV, *supra* note 22, at 117-20.

346. CODE, *supra* note 2, art. 277.

347. See *id.* art. 278.

348. See *id.* art. 279.

349. See *id.* art. 280.

