Detention of Children under Vietnamese Administrative Law: Is it criminal?

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Abstract: In the Socialist Republic of Vietnam the administrative law system permits executive authorities to detain children who have committed minor violations of the law for up to two years in reform schools. Under Vietnamese law these children have not committed a criminal offence and remain outside the protections of article 14 of the International Covenant on Civil and Political Rights (ICCPR). However, the Human Rights Committee allows for the full application of Article 14 and the right to a fair trial to situations where individuals are charged with offences under laws distinct from the criminal law, but which are nevertheless ‘criminal’ in nature. This article will pose the question: are children under Vietnamese administrative law being charged with a ‘criminal’ offence. This paper finds that Vietnamese authorities must treat the administrative detention of juveniles as a ‘criminal’ punishment and accord these children their article 14 rights.

Keywords: Vietnam; criminal charge; administrative law; administrative detention; appreciably detrimental.

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Introduction

To gain entry to the criminal law system and benefit from the human rights protections that follow, one must commit a crime or at least be caught doing so. More importantly, one must be charged with a crime under the criminal law system of the State. This seems a fair statement, but does in fact present a significant flaw. For those who are charged with offences renamed or classified as “administrative”, “regulatory”, or “disciplinary” the same legal protections granted to those charged with a “criminal” offence may prove elusive. For example, a person, immediately fined for failing to have a valid ticket on board a bus may be charged under administrative law. Does he or she have a right to appeal this decision? Or what about the prisoner, who finds himself/herself accused of harming a fellow prisoner and facing the punishment of isolation under prison regulations: does the prisoner have the right to defend him or herself through a legal representative and is the board required to presume the innocence of this prisoner? These persons have found themselves in the situation where a State has either removed offences from the criminal law sphere and reclassified them as something else (in for example an effort of decriminalisation) or where the State has created offences distinct from the criminal law to regulate the behaviour of a certain group of persons or situation. Seemingly, these persons have not been charged with a criminal offence and if taken on its face would not entitle them to the due process protections accorded to individuals falling under article 14 of the International Covenant on Civil and Political Rights (ICCPR).1

How then do we ensure the due process rights of persons accused of offences that sit outside the criminal law sphere? Does the mere fact that these offences do not belong to the criminal law of the State justify the loss of such rights? Do all offences classified as distinct from the criminal law system warrant such protections? These questions bring us to one of the goals of this article: to understand how we are to distinguish between offences that are “criminal” and those which are not? Through an analysis of the case law of the Human Rights Committee and to an extent, the European Court of Human Rights this article will explore the concept of a criminal charge under article 14 and article 6 of the ICCPR and the European Convention on Human Rights respectively and examine the criteria developed by these two bodies to determine the meaning of a criminal offence.2 In short, the Committee and the Court, with the purpose of ensuring States are unable to avoid their due process obligations by merely classifying an offence as something other than a “criminal offence”, use the principle of autonomous interpretation to require an examination of substance over form. Essentially the Committee poses the question: Is this offence by its character a

criminal one? In undergoing this assessment the Committee will examine the classification of the offence under the domestic law of the State; the scope of the norm; nature of the offence including the purpose of the penalty; and/or the nature and severity of the penalty, otherwise known as the Engel criteria.\textsuperscript{3} This criterion was adopted in the recent case law of the Human Rights Committee, namely \textit{Osiyuk v Belarus}.\textsuperscript{4}

To illustrate the application of these criteria, the case of the administrative detention of juveniles in Vietnam will be examined. In the Socialist Republic of Vietnam, two distinct systems exist to handle children who come in conflict with the law – the criminal law system under the Vietnam Penal Code and the administrative law system. The latter is the system most commonly used by Vietnamese government authorities and has seen the detention of thousands of children in reform schools under Article 24 of the Ordinance on the Handling of Administrative Violations, the Ordinance.\textsuperscript{5} The Ordinance is soon to be replaced by the Law on Handling Administrative Violations, Law No 15/2012/QH13, which comes into force 1 July 2013, the Law.\textsuperscript{6} As under the previous system, Articles 3(2)(a) and 92 of the Law allow executive authorities to detain children who have committed both serious and minor violations of the law for up to two years with very little procedural safeguards to protect their rights, providing a suitable environment for arbitrary detainment. Reforms schools are characterised by regimes of re-education, training and forced labour. According to official statistics, 1,831 children were sentenced to reform schools in 2006.\textsuperscript{7} One source states in 2007 the four reforms schools in Ninh Binh, Da Nang, Dong Nai and Long An held over 4000 children in total, with numbers likely to be higher now.\textsuperscript{8} Thus, in applying the Engel Criteria, this case study will determine to what extent the sending of juveniles to reform schools under Vietnamese administrative law deals with ‘criminal’ charges.

Analysis of the Engel Criteria is not a novel exercise however, this paper is able to contribute to existing literature in a number of ways.\textsuperscript{9} Firstly, the paper introduces the \textit{Osiyuk v Belarus} case, which although not the first case under the ICCPR which identifies the autonomous nature of the ‘criminal’ charge, is the most comprehensive expression of

\begin{itemize}
  \item \textsuperscript{3} Engel and others \textit{v} The Netherlands [1976] 22 ECHR (ser A) para 81 (‘Engel and Others’)
  \item \textsuperscript{5} Pháp lệnh xử phạt vi phạm hành chính [Ordinance on Handling of Administrative Violations] (Socialist Republic of Vietnam) No. 44/2002/PL-UBTVQH10, 2 July 2002 (’Ordinance’)
  \item \textsuperscript{6} Luật Xử lý vi phạm hành chính [Law on the Handling of Administrative Violations] (Socialist Republic of Vietnam) (’the Law’).
  \item \textsuperscript{8} Letter received by email. Anonymous. 2011. Statistics should be studied with caution.
  \item \textsuperscript{9} See for example, Emmerson, Ashworth and Macdonald, \textit{Human Rights and Criminal Justice}, 3\textsuperscript{rd} ed (UK, Sweet & Maxwell, 2012).
\end{itemize}
the criteria by the Human Rights Committee. Thus, these principles which have long been articulated and expanded upon under the European Convention are now expressly applicable under article 14 of the ICCPR and can encompass those States which do not fall under this regional treaty. Secondly, this article provides a more practical demonstration of the Engel criteria by gathering case law under each of the criterions relevant for its application in one particular context: administrative offences maintaining public order, safety and order and leading to detention. Through this approach this article is able to provide a thorough analysis of the ‘appreciably detrimental’ test, highly relevant in situations of detention. The ‘appreciably detrimental’ test is presented as a potential tool for human rights lawyers to argue the existence of a criminal charge where detention for the purpose of punishment and deterrence is hidden under the guise of an alternative purpose for example rehabilitation.

In the Vietnamese context, past research on the detention of children in reform schools has been scarce and focused mostly on the conditions within, rather than the procedural requirements present or absent before detention. The administrative system for detaining children has been criticised as to the lack of due process rights and the call for greater procedural safeguards has been made, by both the Vietnamese Government and international organisations. This paper answers these calls and is of practical importance to those researching and working on human rights in Vietnam, in particular in the juvenile justice field. By asking the question: is the administrative offence created under article 92 of the Law a ‘criminal’ charge, this paper provides the necessary key for gaining entry to the procedural protections under article 14 of the ICCPR – the existence of a criminal charge. This exercise may also be relevant to other persons falling under the Law, for example, those detained in compulsory education institutions under article 94 as well as

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other States which rely on administrative law to secure public order. In the broader context of Vietnam, this analysis argues for a State which gains legitimacy through the operation of autonomous law rather than repressive law;\textsuperscript{12} where in a time of moral panic and growing youth crime, legitimacy is sought through the administrative law system which allows the fast tracking of youth into institutions.\textsuperscript{13}

The review of the concept of a ‘criminal charge’ will be made with reference to case law of the Human Rights Committee (HRC) under the ICCPR to which Vietnam acceded to on 24 September 1982. Case law of the ECtHR will also be drawn upon due to its abundance of jurisprudence on this matter and similarities in interpretation of article 14 and article 6 of the ICCPR and ECHR respectively.\textsuperscript{14} Examination of the Vietnamese context will be made with reference to legislation, scholarly articles, and reports from government and non-governmental organisations. Since the recent enactment of the Law, some subordinate legislation such as decrees and circulars operating under the previous Ordinance will also be referenced as new versions are yet to be available. As there is very little difference between the Law and Ordinance, this does not present a significant issue. Section one will describe the criteria developed by the Court and the HRC in determining whether an offence is ‘criminal’. In Section two we examine the Vietnamese handling of juveniles against this criteria followed by a discussion of the results.

The concept of a criminal charge

Autonomy and introduction of the criteria

The concept of a ‘criminal’ charge within the meaning of Article 14 of the ICCPR has been recognised as possessing autonomous meaning by both the ECtHR and the HRC, thus functioning independent of any meaning given to it by the domestic legal system of a State. Consequently, when a State designates an act or offence as ‘administrative’ or ‘disciplinary’, the autonomous character of a criminal charge opens the door to scrutiny of the act or offence as to its true nature. The HRC or the Court is able satisfy itself that the acts classified by the State party as falling outside the scope of the criminal law system do not in fact encroach upon it. Having the possibility to make such an assessment, the Court developed criteria to examine the true nature of an offence or act created by a State, which was later confirmed in \textit{Osliyuk v Belarus} by the HRC. \textit{Osliyuk v Belarus} is the HRC’s most


\textsuperscript{13} Cox, ‘History and Global Criminology: (Re)Inventing Delinquency in Vietnam’ (2011) \textit{British Journal of Criminology} 1-15.

recent and detailed case on the meaning of ‘criminal’ charge. The Author, Ivan Osiyuk, was charged and convicted under the Code on Administrative Offences for illegally crossing the border. The Author was fined 700,000 roubles and had his vehicle confiscated. The HRC found the administrative offence was by its nature a criminal charge and Mr Osiyuk was therefore entitled to the protections of article 14.

The criteria, introduced in Engel and others, can be divided into three parts; identification of the classification of the offence under the domestic law of the State; followed by examination of the scope of the norm and nature of the offence, including the purpose of the penalty; and/or determination of the nature and severity of the penalty. The criteria set by the HRC follows the same direction for example in General Comment No. 32 on Article 14, the HRC deems the ‘purpose, character and severity’ as relevant factors to be considered when determining the penal nature of the sanction. The criteria were further developed by the HRC in Osiyuk v Belarus. The failure to consider the third criterion in Osiyuk v Belarus, the nature and severity of the penalty, may be due to jurisprudence stating the second and third criterions are alternative and not cumulative. Thus, if the second criterion is satisfied, there is no need to assess the third criterion. It should be noted as was in Lauko v Slovakia, however, that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion.

In line with HRC and the Court’s jurisprudence, the analysis of the ‘criminal’ charge criterion below will be divided into: the classification of the offence, the scope of the norm and nature of the offence, and the nature and severity of the penalty.

Classification of the offence

The first criterion to be applied to the question of whether a ‘criminal charge’ is being dealt with by the HRC is its classification under the domestic law of the State. Here, the HRC must ask, under what type or body of law is the offence created and defined? The first criterion is a relatively straightforward one. If the offence is designated under the domestic criminal law of the State, Article 14 will apply and no analysis of its criminality is necessary. On the other hand, if the offence is contained under ‘administrative’, ‘disciplinary’ or other non-criminal bodies of law, further examination of the offence is required to ascertain whether Article 14 is applicable. Thus, the classification of the offence under the domestic law is no more than a starting point.

Scope of the norm

Analysis of the scope of the norm requires examination of the persons or audience the offence attempts to encompass. The Court and the HRC have recognised a distinction

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15 Human Rights Committee, General Comment No. 32, para 15
16 Lauko v Slovakia (1998) VI ECHR para 58 (‘Lauko v Slovakia’).
between the scope of a norm associated with criminal offences, and the scope of a norm under truly disciplinary, administrative or regulatory laws. According to the Court and the HRC the criminal law is, in general, aimed at the population as a whole. For example, in assessing the scope of the norm in Öztürk v Germany, the Court found the regulatory offence applied to ‘all citizens in their capacity as road-users’. Similarly, the HRC in Osiyuk v Belarus found the administrative sanction applied to ‘everyone in his or her capacity as individuals crossing the national frontier of Belarus’. Thus, an offence that applies to the general population as a whole is found to possess a scope consistent with the scope of criminal law offences.

On the other hand, the scope of an offence that is truly disciplinary, administrative or regulatory is aimed at a particular group of people. Both the HRC and the Court has described this group as a group ‘possessing a special status’. This qualification enables the scope of a disciplinary or administrative law norm to be distinguished from the scope of a criminal law norm. The question then is; what gives a group this ‘special status’? Do groups such as adults, or guardians, spouses or civil servants qualify as a group possessing a ‘special status’? Van Dijk et al argues that the defining characteristic is not the number of members, but their quality as members of a particular group, in combination with the interests of that group the offence attempts to protect. The need for internal regulation has been seen as a distinguishing characteristic of a group with ‘special status’. Certain professions such as military servicemen, civil servants, members of the judiciary, parliamentarians, prisoners, electoral candidates have been classified as groups with ‘special status’ due to the need for internal regulation of the group.

The second criterion for determining whether a sanction is a ‘criminal charge’ is cumulative. Therefore it is necessary for us to examine the nature of the offence in order determine whether the sanction is ‘criminal’.

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17 Öztürk v Germany (1984) 73 ECHR (Ser A), para 53
18 Osiyuk v Belarus para 7.4
19 Osiyuk v Belarus 2009, para 7.3; Lauko v Slovakia para 54
21 See the following cases in regards to groups possessing special status due to the need for internal regulation: Engel and Others [1976] ECHR, para 82; Case of Weber v Switzerland (1990) 177 ECHR (Ser A) para 33 (‘Weber v Switzerland’); Case of Demicoli v Malta (1991) 210 ECHR (Ser A) para 33 (‘Demicoli’); Human Rights Committee Views: Communication No. 1001/2001, 76th Sess, UN Doc CCPR/C/76/D/1001/2001 (1 November 2002) para 7.3 (‘Strik v The Netherlands’); Case of Campbell and Fell v The United Kingdom (1984) 80 ECHR (Ser A) para 72 (‘Campbell and Fell’); Case of Pierre-Bloch v France (1997) VI Eur Court HR 2223 [56], [58] (‘Pierre-Bloch’).
22 Osiyuk v Belarus 2009 para 7.4; Öztürk v Germany 1984, para 53
Nature of the offence

The nature of the offence involves an assessment of two aspects which are heavily related – the character of the offence itself and the purpose of its corresponding penalty. I will begin with a discussion of the purpose of the penalty.

The HRC and the Court have identified two purposes, which are capable of pushing a sanction into the criminal sphere due to their analogy with the criminal law. Punishment was found by the Court in Öztürk v Germany to be a ‘customary distinguishing feature of criminal penalties’ as was deterrence of the offender in Lauko v Slovakia.23 Similarly, punishment and deterrence were viewed by the HRC as purposes which are ‘analogous to the criminal law’.24 In finding that punishment and deterrence are purposes analogous to the criminal law, the Court and the HRC reasoned that administrative or regulatory sanctions that possess this purpose are in fact criminal. For example, in Öztürk v Germany, despite the reclassification of the traffic offence into an Ordnungswidrigkeit or ‘regulatory offence’, the purpose of fining offenders who breached the traffic regulations continued to be both punitive and deterrent and thus within the ‘criminal’ sphere.25 Likewise, when assessing the purpose of the administrative sanctions in Osiyuk v Belarus, the Committee found the offence had the aim of repressing particular behaviour, serving as a deterrent for others and punishing the author. As these objectives were ‘analogous to the general goal of the criminal law’, the administrative offence was in fact ‘criminal’.26 A sanction which pursues distinctive criminal law goals and which is directed towards all citizens and not towards a group possessing a special status, will be deemed a ‘criminal charge’, attracting the application of Article 14.

The Court has demonstrated an offence of criminal character will attract a punitive penalty, regardless of the Government’s stated purpose thus making the nature of the offence itself highly relevant. In Öztürk v Germany decriminalisation did not change the content or the general criminal character of the offence, only the procedure and range of penalties available. The purpose of the penalty was found to be punitive.27 The fact that the disciplinary offence in question could also amount to an offence under the criminal law was used to refute the penalty’s ‘maintenance of prison order’ purpose in Campbell and Fell.28 Administrative offences in Sergey Zolotukhin v Russia served to ‘guarantee the protection of human dignity and public order, values and interests which normally fall within the sphere of protection of criminal law’. In light of the criminal nature of the

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23 Öztürk v Germany, para 53.
24 Osiyuk v Belarus, para 7.4
25 Öztürk v Germany, para 53.
26 Osiyuk v Belarus, para 7.4
27 Öztürk v Germany, para 53.
28 Case of Campbell and Fell v The United Kingdom (1984) 80 ECHR (Ser A) para 72 (‘Campbell and Fell’).
offence itself, the purpose of the penalty was found to be punitive. Therefore, an offence adopts a ‘criminal’ character when exhibiting parallels with criminal law offences. It follows: a criminal law offence attracts a criminal law penalty. Seeing as punishment and deterrence are distinguishing features of criminal law penalties, a strong link is created between sanctions exhibiting parallels with the criminal law and a punitive and deterrent penalty. This reasoning works also in reverse where the Court has found offences lacking parallels with criminal offences are associated with non-punitive or non-deterrent penalties.

**Nature and severity of the penalty**

Assessment of the nature and severity of the penalty is the third criterion when evaluating whether a sanction is a ‘criminal charge’ under Article 14 of the ICCPR. Assessment of the third criterion is capable of pushing the sanction into the criminal sphere, if evaluation of the second criterion does not do so.

It is important not to confuse the nature of the penalty with the purpose of the penalty, examined under the second criterion. The nature of the penalty refers to the type or form of the penalty, for example imprisonment, fine, disqualification of a licence and so on. On the other hand, the purpose of the penalty refers to the aim of the penalty; punishment, deterrence, compensation or compelled adherence to certain group regulations. The severity of the penalty requires an evaluation of its harshness or intensity. When assessing this criterion, it is not the penalty that was imposed which is of relevance, but the maximum penalty, that is, what the offender stands to lose if found guilty of the offence.

**The ‘appreciably detrimental’ test**

The ‘appreciably detrimental’ test was introduced in *Engel and others* which found that deprivations of liberty liable to be imposed as punishment belong to the ‘criminal’ sphere, except those which by their ‘nature, duration or manner of execution cannot be appreciably detrimental’. In fact the Court in *Ezeh and Connors* found that in instances of deprivation of liberty, a presumption lies in favour of a ‘criminal’ charge. This presumption can be ‘rebutted entirely exceptionally’ where the nature, duration and manner of execution is not ‘appreciably detrimental’. Therefore if the deprivation is proven to be ‘sufficiently unimportant or inconsequential’ it will displace the presumption in favour of a ‘criminal’

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29 *Case of Sergey Zolotukhin v Russia* (2009) ECHR para 55
30 *Bell v The United Kingdom*, 2007, para 38; *Young v The United Kingdom*, 2007, para 35; *Pierre-Bloch*, 1997, para 54
31 See *Weber v Switzerland* para 34
32 para 82
33 *Ezeh and Connors* (2003)ECHR, para 126
Although the ‘appreciably detrimental’ test was formed in the context of disciplinary proceedings, it has developed into a test applied to all instances of deprivation of liberty as a part of the third criterion. The test allows us to look deeper into the deprivation of liberty itself, identifying its qualities, the conditions under which subjects live, the manner by which the detention is applied and of course the severity of the detention in terms of duration. The Court in Ezeh and Connors v UK referred to this task as ‘concentrating on the realities of the situation’.

In instances where the scope of the norm is limited, the ‘appreciably detrimental’ test is utilised as part of a cumulative approach to show the punitive penalty imposed is significant or severe enough to warrant the finding of a ‘criminal’ charge. Both Engel and others and Ezeh and Connors are cases in point. More remarkably the test of ‘appreciably detrimental’ is capable of pushing a sanction found to possess a purpose other than punishment or deterrence into the criminal sphere due to its nature, duration and severity. Here the ‘appreciably detrimental’ test is applied alternate to the second criterion and expressed without any reference to the purpose of the penalty, whether punitive or not. For example, in Bell v The UK (2007), the offence in question was limited to members of the armed forces and aimed at the maintenance of discipline within the armed forces. The Court proceeded to the third criterion and in applying the ‘appreciably detrimental’ test found the deprivation of liberty of 28 days was appreciably detrimental and not capable of displacing the presumption in favour of a ‘criminal’ charge. Similarly in Young v The UK (2007) the Court found that despite the aim of the deprivation being to maintain discipline within the prison a liability of 42 days detention was considered ‘appreciably detrimental’. In both instances it was the nature, duration and manner of execution alone which brought the penalty into the criminal sphere. Therefore there exist deprivations of liberty imposed on individuals for purposes other than punishment or deterrence, which are capable of being appreciably detrimental and attracting the label of a ‘criminal’ charge.

The case of Vietnam and the administrative detention of children

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34 Ibid para 129.
35 See Engel and Others [1976] ECHR, para 64 as a case in point.
36 Ezeh and Connors v UK, para 123.
37 Bell v The UK, para 42.
38 Young v The UK, para 38.
**Classification under the domestic law**

The first criterion to be applied in the determination of a ‘criminal charge’ is the classification of the offence under the domestic law of the State. As a starting point, the measure of sending juveniles to reformatories is contained under Article 92 of the Law on the Handling of Administrative Violations, which forms part of the administrative law system in Vietnam. In dealing with juveniles who have come into conflict with the law, the administrative law system and the provisions of the Law are considered distinct from and alternative to the criminal law system.\(^{39}\) The Vietnamese Government refers to the handling of children in conflict with the law by ‘either’ the criminal law system or the administrative law system.\(^{40}\) With a classification distinct from the criminal law system, it is necessary to consider the second criterion in the concept of a ‘criminal’ charge.

**Scope of the norm and nature of the offence**

**Scope of the norm**

The very nature of the offence is of far greater weight than its classification under the law of Vietnam. The first step in assessing the nature of the offence involves the evaluation of the scope of the norm. In accordance with the Law, the scope of the norm, in Article 92 (1) is children aged between 12 and 14. In Article 92 (2) and (3), the scope is children between the age of 12 and 16. Article 92 (4) applies to children between the age of 14 and 18. In regards to the latter two, the children must have already been subject to education at the communes, wards or district towns, or who have not yet been subject to this measure, but have no place of residence. In light of these provisions, we can conclude only minors aged between 12 and 18 years old fall under the scope of the norm.

Do minors qualify as a group holding a special status? Although the Article 92 of the Law is aimed only at persons aged between 12 and 18, their quality as members of a group possessing a special status in accordance with jurisprudence concerning the meaning of a ‘criminal’ charge is doubtful. Minors do not form a specific group entrusted with particular functions and displaying the need for a distinct disciplinary system of rules and corresponding sanctions. Nor are minors a part of a distinct group of society with a special need for upholding discipline, like in the case of soldiers and prisoners. A minor is merely a human being at a certain age. The offences highlighted under Article 92 of the Law are not aimed at protecting any special interests of individuals aged between 12 to 18, but are aimed at protecting the interests of society as a whole. It is true that minors are often


equated with special status, or referred to by their status as minors. However, this is associated more with the need to protect minors as a group, rather than an internal need for regulation of the group in the sense required by the concept of ‘criminal’ charge. As members of a group, minors lack the quality required to distinguish them from the general population in the current context.

Consideration of Vietnamese minors as a ‘group possessing a special status’ within this particular context, where minors are dealt with under the administrative law, would be a step towards their effective removal from the full protection of Article 14 of the ICCPR. The HRC has made it clear that juveniles ‘are to enjoy at least the same guarantees and protection’ as adults under Article 14 of the Covenant, if not more (HRC, 2007: para 42). The possibility that minors handled under an administrative system could be excluded from the full protection of Article 14 due to their character as a ‘group possessing a special status’, would be counter to an effective interpretation of Article 14 in accordance with its object and purpose.

In light of the cumulative nature of the second criterion, an assessment of the very nature of the offence is now required.

Nature of the offence

The offences created by Article 92 are criminal in nature. Article 92 can be divided into the measure and sanction - confinement in a reform school and the offences to which the measure is applied to, in paragraphs sub paragraphs 1 to 4. Article 92 does not explicitly identify each and every offence under its scope but refers to a category of offences. Individuals who commit acts with ‘signs of particularly intentional serious crimes’ in Article 92 (1) and ‘signs of very serious intentional crimes’ or ‘serious intentional crimes’ in Articles 92 (2) and (3) as ‘prescribed in the Penal Code’ are liable to confinement in reform schools. Acts of petty theft, petty swindle, petty gambling and public disorder are offences encompassed by Article 92 (4).

The basis for imposition of the measure under Article 92 is the committal of a very serious to minor criminal offence. Article 92 directly refers to offences which have their content in the Penal Code. The acts must show ‘signs of’ or ‘elements of’ offences under the Penal Code, coinciding with the general practice that administrative measures are applied to minor offences. The minor nature of the offence does not detract from its basis in the Penal Code or the application of article 14 of the ICCPR. The character of Article 92 can be compared with the case of Sergey Zolotukhin where the Court found in that Russia and similar legal systems ‘administrative’ offences embrace offences that have a ‘criminal

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41 Öztürk v Germany, para 53
connotation but are too trivial to be governed by criminal law and procedure’. 42 The criminal character of the offence is further evidenced by the significant role of the Police in the detection of the offence, arrest and detention of the child, collection of evidence, compilation of the dossiers and execution of the decision to send the child reformatories. 43

The requirement of intent implies a finding of culpability is required. Accordingly, the Law grants the individuals the right to they have not committed any administrative violation. 44 The Law allows consideration of mitigating and extenuating circumstances. 45 The above factors are indicative of the criminal nature of the administrative offences under Article 92. 46 Like in Sergey Zolotukhin the offences under Article 92 are aimed at securing public order, an aim commonly falling within the sphere of the criminal law. 47 Offences under Article 92 find their content and basis in the Penal Code of Vietnam showing more than mere parallels with criminal law offences, giving the offences a distinct criminal character. With the criminal nature of the offence in mind, the purpose of the corresponding penalty can be evaluated.

The purpose of the penalty must be one that is analogous to the criminal law for Article 24 to fall within the meaning of a ‘criminal’ charge. Punishment and deterrence are two goals identified as being consistent with the goals of criminal law penalties. So what then is the purpose of the penalty in Article 92 of the Law?

In accordance with the Article 92, the purpose of sending children to reform schools is to assist them in receiving general educational training and labour. 48 These activities constitute a method to achieve rehabilitation, coinciding with the overall aim of developing the child into a ‘useful citizen’. 49 The Constitution of Vietnam can be of assistance in discovering the qualities of a ‘useful’ or ‘good’ citizen. Citizens are duty bound to protect and respect the law, the Constitution, the rules of public life, and safeguard national security, social order and safety under articles 78 and 79. Although not an exhaustive list of obligations of a citizen, the rehabilitation or development of the child into a ‘useful’ citizen implies future fulfilment of one’s obligations to work, educate and more notably to abide by the law.

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42 Sergey Zolotukhin, para 54.
43 Law arts 99-100, 110.
44 Law art 3(2)(d).
45 Art 9.
46 See Ezeh and Connor (2003) ECHR para 105; See also Case of Ziliberberg v Moldova (2005) ECHR para 34 for similar factors which are taken to add to the criminal nature of the offence.
47 Sergey Zolotukhin, para 55.
48 Law art 91.
The stated purpose for sending children to reform schools must be understood in its historical context. Since the 1950s the governments of Vietnam have believed they could rehabilitate or reform Vietnamese citizens into ‘better’ or ‘useful’ citizens through the practice of re-education.\(^{50}\) In 1961, the Democratic Republic of Vietnam, DRV in the North, sanctioned the use of re-education camps as an administrative measure to be imposed on ‘counterrevolutionary elements’ and ‘professional scoundrels’.\(^{51}\) After its victory over the Republic of South Vietnam in 1975, the DRV applied re-education in the South, requiring individuals with ties to the regime to cleanse themselves of their wrongdoing and reshape themselves into ‘genuine’ Vietnamese citizens. The measure was regarded as a form of clemency, a method to achieve rehabilitation and for ensuring the stability of the new socialist state.\(^{52}\) Rehabilitation was to be achieved through forced labour and political education.\(^{53}\) The DRV did not consider re-education in camps as a penal punishment or the inmate as a criminal offender.\(^{54}\) However, when discussing re-education camps in 1978 Prime Minister Pham Van Dong stated high powered Southern officials had committed ‘grave crimes’, demonstrating past application of rehabilitative re-education to offences perceived as crimes.\(^{55}\)

Following the reasoning of relevant jurisprudence, the stated purpose of rehabilitation cannot be accepted in light of the criminal character of the administrative offences under Article 92. The criminal character of Article 92 offences as discussed above is capable of refuting the stated purpose of rehabilitation. Following the reasoning of the Court and the HRC and their recognition of the link between criminal offences and punitive and deterrent penalties, Article 92’s basis in the Penal Code of Vietnam and its distinct criminal character causes the corresponding penalty to attract a punitive and deterrent purpose, displacing the stated purpose of rehabilitation.

Rehabilitation as the stated purpose of Article 92 penalty is further undermined by its overlap with punitive and deterrent penalties, in what it attempts to achieve. Rehabilitation of the child into a useful citizen, that is, a law abiding citizen, is not easily distinguishable from the criminal aims of punishment and deterrence, designed also to secure future law abidance and the reintegration of the individual into society. In this instance, where the decision to send a child to a reform school for their rehabilitation, is

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\(^{55}\) Ibid 525.  
based on contravention of offences in the Penal Code the distinction is further blurred. To be convincing as a distinct method of securing future law abidance separate from punishment and deterrence depends largely on the nature of the rehabilitation and its manner of execution.

The HRC and the Court reasoned a non-criminal sanction designed for a purpose analogous to the criminal law, is ‘criminal’ in nature. This begs the question as to the purpose of Vietnamese criminal law penalties. The goal of the Penal Code as it specifically deals with juveniles aims ‘mainly to educate and help them redress their wrongs, develop healthily and become citizens useful to society (art 69(1))’. Immediately we see the Vietnamese criminal justice system adopting as its main goal the rehabilitation and reintegration of the child into society. This trend towards a more restorative or welfarist approach to juveniles has been observed by scholars following the Vietnamese juvenile justice system - where the view of crime is shifting to its perception as a product of ‘personal disadvantage, deprivation or shortcomings of some kind’, resulting in measures, which focus more on the needs of the offender and their victim’.  

Rehabilitation and the development of the child into a useful citizen is a purpose analogous to the Vietnamese criminal law system. As the Vietnamese criminal law and the administrative system share the same goal in their treatment of juveniles, the absence of a punitive or deterrent aim of Article 24 does not preclude the offence from being considered a ‘criminal’ charge.

In addition, exclusion of rehabilitation or education as an accepted purpose of the criminal law as it deals with juveniles is inconsistent with Article 14 and other human rights standards. The ICCPR requires procedures dealing with juveniles to ‘take account of their age and their desirability of promoting their rehabilitation’.  

The CRC explicitly states the traditional aims of criminal justice – repression and retribution, ‘must give way to rehabilitation and restorative justice objectives when dealing with juveniles’. Furthermore, the treatment of juveniles under the penal law must promote the child’s reintegration and assumption of a constructive role in society. It is evident that rehabilitation and facilitation of juveniles back into society is actively promoted by the ICCPR and CRC as an aim of juvenile justice systems. Thus its rejection as a purpose analogous with juvenile criminal law by the HRC would be inconsistent with Article 14 and provisions of the CRC. Such exclusion would allow States aiming to rehabilitate the child into a future law abider through non-criminal mechanisms to avoid the requirements under Article 14 of the ICCPR.

57 ICCPR art 14(4).
58 Committee on the Right to the Child, General Comment No. 10, Children’s Rights in Juvenile Justice, 44th Sess, UN.Doc CRC/C/GC/10 (25 April 2007)
Thus the child is afforded less protection, rather than the desired special protection.\(^{60}\) In cases where the administrative system deprives the juvenile of their liberty, such as in Article 92 of the Ordinance, this is especially dangerous.

The above factors and the general scope of the norm supports the conclusion children handled under Article 92 of the Ordinance are charged with a ‘criminal’ offence and therefore, worthy of the full protection of Article 14 of the ICCPR. In order to provide an overall and thorough assessment of Article 92, examination of the nature and severity of the penalty will follow. This is not to say a negative finding in the third criterion is capable of rebutting the finding of a ‘criminal’ charge under the second criterion.\(^{61}\)

**Nature and severity of the penalty**

The sending of juveniles to reformatories under Article 24 is by its nature, a deprivation of liberty referred to as the restriction of an individual’s freedom of bodily movement through the forceful detention of that person in a restricted location, such as a prison, other type of detention facility, mental institution, re-education camp and so on.\(^{62}\) Juveniles handled under Article 92 are to study, work and live ‘under the management and supervision of the school and its personnel’, indicating a state of constant supervision and strict control by reform officials.\(^{63}\) At night, juveniles are locked in collective rooms and staff members keep watch over the building.\(^{64}\) Furthermore, juveniles who escape the confines of the reform schools before the expiration of their detention period are hunted down and returned.\(^{65}\) Juveniles are not released from the reform school without an approved certificate of completion from the district-level Chairman of the People’s Committee.\(^{66}\) The above factors support a finding that juveniles under Article 92 are deprived of their liberty within reformatories, in that their freedom of bodily movement is heavily restricted.


\(^{61}\) Ziliberberg v Moldova (2007) ECHR, para 34. Cf with Sergey Zolotukhin where the Court, confusingly failed to qualify that the additional assessment of the ‘appreciably detrimental’ test under the third criteria did not detract from the ‘criminal’ nature of the offence discovered under the previous examination of the second criteria.


\(^{64}\) Ibid art 29.

\(^{65}\) Ibid art 19.

\(^{66}\) Law art 39.
The ‘appreciably detrimental’ test: Nature, duration and manner of execution of article 92

On its face, detention in a reform school is presumably not ‘appreciably detrimental’ as its nature and manner of execution reflects its rehabilitative purpose. In theory, rehabilitation in a reform school seeks to benefit the child by addressing their offending behaviour through treatment, equipping them with life skills and facilitating their development into a constructive member of society as opposed to punishing or causing detriment to the child for past wrongs. On paper, reform schools in Vietnam offer a regime of education, counselling and vocational training to juveniles. The provision and emphasis on these activities may distinguish a reform school from a typical prison setting designed by its nature and manner of execution to punish the offender. However, a closer evaluation of the education, counselling and vocational training provided in reform schools is necessary to determine the realities of the situation.

In regards to the nature and manner of execution in general, the execution, management and organisation of reformatories is notably under the control of the Ministry of Public Security, MPS who are also responsible for the administration of the police force and prison systems. Thus an additional parallel with the penal system is apparent. Adding further to the detrimental nature of reform schools under Article 9 is the lack of separation from juveniles convicted of crimes. Sources confirm that reform schools house a small percentage of children ‘sentenced by the Court’, referring to sentencing under the Penal Code.

The education component of detention in reform schools

Submission to education is a fundamental requirement for juveniles detained in reform schools under Article 92. However, the nature of education provided and its manner of execution undermines the argument that provision of education in reform schools is capable of diminishing the detriment of detention within the reform school.

In brief, juveniles in reformatory schools under Article 92 of the Ordinance, who have not completed primary education, are to study general knowledge under the program of the

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68 Volkman p. 33
69 VietnamNet, “Đã có học sinh nuốt kim(view the article)...” [“There once was a student who swallowed needle to suicide"] VietnamNet online, 29 April 2010, retrieved from <http://vietbao.vn/Giao-duc/Da-co-hoc-sinh-nuot-kim-vao-bung-de-tu-van/20906971/202/>
Ministry of Education and Training, MOET.\textsuperscript{70} The provision of primary education is undoubtedly consistent with rehabilitation and development into a ‘useful citizen’, in particular for those without access to primary education outside the reform school environment, for example, street children.\textsuperscript{71} Juveniles are also to study ‘citizen education programs…and other educational programs required by the Ministry of Public Security’.\textsuperscript{72} Content of the educational programs set by the MPS, are not specified in available sources but corresponds with reports of re-education and an emphasis on learning rules of state management. For example Burr (2006) witnessed the re-education of children within the reform schools through the political writings of Ho Chi Minh.\textsuperscript{73} Political education and learning of State rules coincides with its historical application in re-education camps of the 1970s as a method of rehabilitation. Although the child leaves aware of rules and doctrines of the State, this may have limited value in terms of development of productive educative tools for future use outside of the reform school. A focus on learning the rules of state management can also be interpreted as a method of deterrence or punishment, with the aim of securing future compliance with the laws.

Consistent calls for improvement to the education program taught in reform schools indicate that its current implementation is not conducive to the goal of rehabilitation or reintegration into society. Such calls include the need for more ‘constructive re-education programs’, more ‘appropriate’ education programs and a review of the curriculum, and programs designed to provide more marketable skills in order to facilitate employment upon release.\textsuperscript{76}

**The counselling component of detention in reform schools**

The provision of counselling for children in reform schools must be treated with caution, in light of divergent approaches to counselling adopted in reform schools and other factors relating to its execution.\textsuperscript{77} Thus counselling cannot be fully relied upon as an argument that detention in reform schools under Article 92 is not ‘appreciably detrimental’.

The role of the police in the execution of counselling provides support for what Cox (2010) describes as the ‘illusory’ introduction of child counselling in reform schools and creates further parallels with the penal law system. Reform school programs are delivered by reform school staff, the majority of whom are police officers holding permanent

\textsuperscript{70} Decree 66/2009/ND-CP, para 4  
\textsuperscript{71} Burr, 2006: 206  
\textsuperscript{72} Decree 66/2009/ND-CP, para 19  
\textsuperscript{73} Burr, 2006, 146  
\textsuperscript{74} Cox, 2010: 233  
\textsuperscript{75} MOLISA & UNICEF, 2008: 36  
\textsuperscript{76} MOLISA & UNICEF, 2009: 78  
\textsuperscript{77} Cox, 2010: 236  
\textsuperscript{78} Ibid 239.
positions. The police officer as the counsellor raises doubt regarding professional training, and issues of trust and openness usually required in a counselling setting. These issues were highlighted by Cox (2010) with a startling example. In 2008, with the assistance of an INGO, a reform school permitted children access to a national child helpline and contact with counsellors specialising in child welfare and child rights operating outside the reform school environment. In practice, children wishing to use the helpline were required to state topics of discussion in advance to reform school officials, and conversations with helpline operators were conducted in the presence of a police officer sitting alongside throughout the telephone conversation. The presence of the police officer was justified as being necessary to help the child ‘make themselves understood’ and facilitate effective follow-up on the advice given. The heavy guarding of helpline sessions and the role of police in the execution of counselling questions the capacity of counselling within reform schools to facilitate rehabilitation of the child. An environment of supervision and strict control by the police adds to the punitive nature of detention in reform schools. The effectiveness of counselling provided by trained counsellors within the reform school is also questioned by Cox (2010).

The forced labour component of detention in reform schools

Forced labour is actively practiced in Vietnamese reform schools and supports a finding that detention of juveniles under Article 92 of the Law is appreciably detrimental and capable of attracting the safeguards under Article 14 of the ICCPR. Vietnamese authorities deny the existence of child labour or forced labour in reform schools, claiming juveniles are involved in ‘training’ or ‘vocational training’. The confusion between ‘vocational training’ and ‘labour’ is said to be deliberate, with ‘vocational training’ becoming a euphemism for what is in fact forced labour. Nevertheless, labour or lao động is clearly endorsed in Article 31 of Decree 142/2003, titled ‘Chế độ lao động của học sinh’ or ‘labor regime’. Vocational training is distinguished from forced labour here as training or education for the purpose of learning a trade or practical skill such as woodwork, mechanical or electrical skills. This type of training is offered in reform schools, however is limited and available only to a minority of children. On the other hand according to the Convention Concerning Forced or Compulsory Labour No. 29 art 2(1), forced labour is ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.

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79 Ibid 237
80 Cox, 2011, 11
81 Human Rights Watch, p 47
82 Letter, 2011
83 Convention concerning Forced or Compulsory Labour (No.29), opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).
International NGOs given rare access to work in the reform schools have documented, but not published the use of child labour in the schools. The practice of forced child labour has been confirmed in at least three of the four reform schools – Da Nang, Dong Nai and Long An. A recent Human Rights Watch Report (2011) highlighted the practice of forced labour in drug detention centres in Southern Vietnam. Sources confirm the culture of forced labour discovered in drug detention centres mirror that in reform centres. Children in reform schools ‘must participate in labour activities organised by reformatories’. Inmates highlighted by Human Rights Watch described the beatings they received on refusal to work, stating children in the centres were not immune from such treatment. One child described being sent to the punishment room with 41 others for over three months. Although testimony from inmates of drug detention centres, reference to a ‘penalty room’ in Circular 19/2011/TT-BCA indicates a similar punishment is available to children in reform schools. The threat of punishment for misbehaviour and the availability of the penalty room in itself provides further evidence for the detrimental nature of reform schools under Article 24.

Juveniles within reform schools are forced to perform hazardous, monotonous and low-skilled work. One example is the large scale manual peeling of cashew nuts for commercial sale causing skin rashes, burns, other allergic reactions from the oil of the cashew and respiratory problems. Other children were witnessed with bruising and burns to their faces, hands and arms due to poor protective gear and welding equipment. Other work performed by children in reform schools include mattress making, wood collecting, basic welding, farming and packing of shower caps for hotel chains. Such forms of work were criticised in MOLISA and UNICEF (2009) for failing to equip juveniles with appropriate skills for use outside of reformatories and ignoring children with higher aspirations than work in menial labour.

The maximum time to be spent on all compulsory reform programs – labour, education and vocational training – is seven hours in a day. Confusingly, time spent in vocational training is considered as time spent labouring. Juveniles can also be forced to

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84 Cox, 2011, p 47
85 Letter, 2011
86 Ibid.
87 Decree 142/2003 art 30(1).
88 Human Rights, p 66.
89 Ibid 68.
91 Letter, 2011; Human Rights Watch, 2011, p 39
92 Letter, 2011.
work overtime or night shifts. Evidence from the Human Rights Watch (2011) show children confined to drug detention centres were made to work eight hours a day, six days a week. The proportion of time spent on labour of this nature gives little time for education, counselling and vocational training and suggests the low prioritisation of these more valuable activities.

**Duration of the measure**

According to Article 91 (1)(2) of the Ordinance, children subject to the measure of sending to reformatories can be detained for six months to a maximum of two years. The minimum possible time for detention is irrelevant, as is the possibility for a reduction of time if the child has made marked progress. In light of previous case law regarding the length of detention required to set an administrative or disciplinary measure into the criminal sphere, the possibility of two years detention in a reform schools is lengthy enough to be considered appreciably detrimental.

**Conclusion**

With application of the criterion set out in *Engel and others*, which was later confirmed by the HRC in *Osiyuk v Belarus*, this paper found that despite its classification as an administrative offence and administrative handling measure, Article 92 of the Ordinance deals with criminal charges. The above jurisprudence requires an assessment of the classification of the norm, its scope, the nature of the offence, and the nature and severity of the penalty to provide an overall picture of the true character of the offence in question.

The following factors provide strong support for the finding of a ‘criminal’ charge. Examination of the scope of the norm revealed Article 92 applies to the general population as a whole, consistent with the general scope of criminal law offences. Despite Article 92’s limitation to persons aged between 12 and 18, minors do not constitute a group of special status within the meaning of a ‘criminal’ charge.

The nature of the offences incorporated under Article 92 is directly linked to the Vietnamese Penal Code, giving Article 92 a distinct criminal character. Thus in order to attract the penalty under Article 92 a child must contravene the Penal Code, albeit to a lesser degree. This basis in criminal law creates uncertainty regarding the purpose of the penalty. Jurisprudence shows a high correlation between a ‘criminal’ offence and a punitive and deterrent penalty. As a result of its criminal character Article 92 must attract a punitive penalty. Nevertheless, the stated purpose of the measure of sending children to

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93 Decree 142/2003 art 31(3)
94 Human Rights Watch 66-67
95 See Law art 112.
reformatories is to rehabilitate the child into a ‘useful’ citizen. This concept of a ‘useful’ citizen implies future adherence to laws of state management. Thus, rehabilitation of the child in this instance overlaps with punishment casting further doubt upon the true purpose of Article 92. In the alternative, although rehabilitation has not been confirmed by the HRC and the Court as a distinct purpose of the criminal law, Vietnamese criminal law as it deals with juveniles also aims to rehabilitate the child into a ‘useful’ citizen. If following the reasoning of the HRC and the Court, we can conclude that Article 92 possesses an aim analogous to that of the criminal law. Furthermore rejection of rehabilitation as a purpose analogous with the criminal law as it deals with juveniles would be inconsistent with an effective interpretation of Article 14(4) of the ICCPR.

As detention in a reform school under Article 24 constitutes a deprivation of liberty, the ‘appreciably detrimental’ test was adopted, allowing examination of the nature, duration and manner of execution of reformatories as an overall indication of severity. It was found that the provision of education, counselling and vocational training must be treated with caution if arguing detention in a reform school is not appreciably detrimental. More significantly, the practice of forced labour in reform schools and its prioritisation over other reform school activities provides strong support for a finding that detention under Article 92 is appreciably detrimental. The nature of forced labour itself gives detention in reform schools a punitive character and refutes any claim as to its rehabilitative worth. In light of the nature and manner of execution, detention in reform schools for up to two years is sufficiently severe to warrant a finding of ‘appreciably detrimental’. With that said and in light of previous findings casting doubt on the true purpose of Article 24, detention in a reform school must fall within the concept of a ‘criminal’ charge. The above findings regarding the scope of Article 92, the nature of the offences it encompasses, the purpose of the penalty and the nature, duration and manner of execution of reform schools supports a finding that Article 92 deals with ‘criminal’ charges and attracts the application of Article 14 of the ICCPR.

One might argue that the inability or ineffectiveness of Vietnamese authorities in achieving or providing meaningful rehabilitation is in itself not sufficient evidence for stating rehabilitation is not the true aim of the Article 92 measure. However, the concept of the ‘criminal’ charge and the test of ‘appreciably detrimental’ in particular, allow us to examine the realities of the situation and measure the overall severity of the deprivation in question. To accept the aim of rehabilitation on its face, without assessing the realities of its execution, is to fail to apply the test. Furthermore, whilst detention in reform schools continue to appear more punitive than rehabilitative, it must be made more difficult for authorities to impose such sanctions onto children. To use the inability of Vietnamese authorities to provide meaningful rehabilitative tools as justification for disregarding the punitive nature of confinement in reform schools would be to ignore the above need. The
insertion of Article 14 rights and their implementation in practice can serve as this additional barrier and check on the power of government authorities to impose such a severe penalty on children in conflict with the law.

The implications of the above findings require the insertion of Article 14 rights, in both the text of the Law and secondary legislation and in the practice of sending children to reformatories. In the current period of reform, both national and international actors must argue not only for due process rights under Article 9 but the fuller rights applicable to persons charged with a criminal offence under Article 14. In addition any future assessment of Article 92 and the process of sending children to reform schools against international human rights standards must include examination against Article 14 of the ICCPR.

This paper has attempted to challenge the character of Article 24 and its perception as an administrative and rehabilitative measure. It argues instead that the nature of Article 92 is criminal and punitive in character. In light of the historical use of reform institutions as places of rehabilitation this requires a significant change in perception on behalf of Vietnamese authorities. The text of the Law in comparison with the previous Ordinance and the explicit insertion of certain due process rights including the right to habeas corpus and the role of the lawyer indicate a great willingness on behalf of senior government officials to incorporate human rights standards into the process of sending children to reform schools. Amendments in this direction may also signify a change in perception of detention in reform schools as a measure, burdensome enough to require further checks and balances on the powers of local authorities. Following this, the paper provides a challenge to Vietnamese authorities to view and understand the measure of sending children to reform schools under Article 24 in light of the above analysis and the concept of a ‘criminal’ charge. This challenge can be extended in more general terms to other jurisdictions where offences are created outside of the criminal law system, but in fact encroach
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