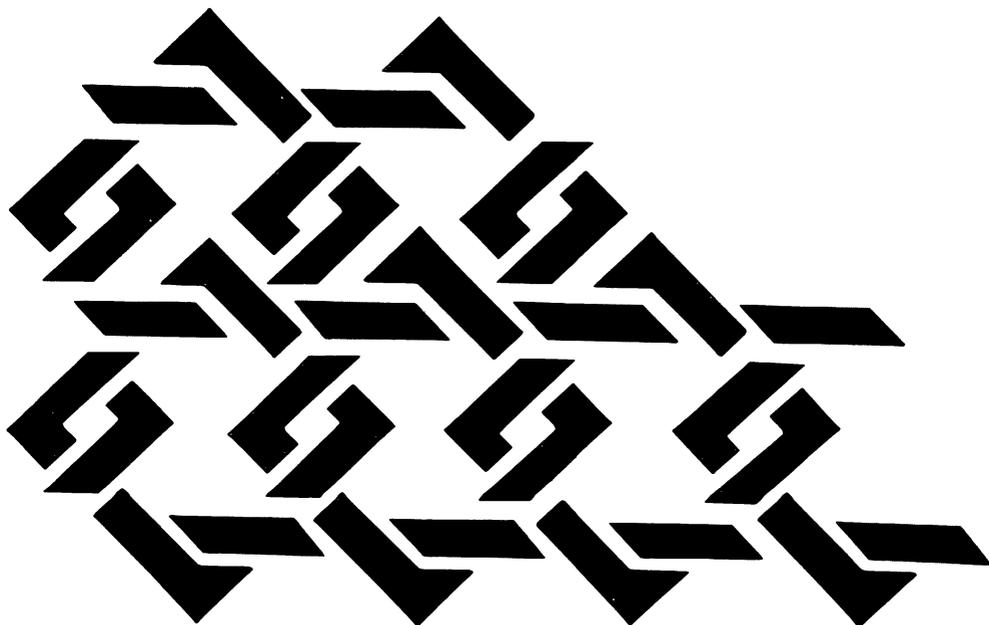




INSTITUTE OF EAST ASIAN STUDIES
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The Vietnamese Tradition of Human Rights

TA VAN TAI



**INSTITUTE OF EAST ASIAN STUDIES
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Foreword

The title of this book may induce the thought that this is another monograph on the topic of Vietnam after so many already in print since the 1960s. But the scholarly contributions of this volume qualify it as a major treatise encompassing not only the legal-social-political history of Vietnam and the legal tradition of East Asia but also the human rights issues debated in contemporary international law as well as in modern constitutional and criminal law of Western democracies.

This breadth of coverage reflects the author's variegated academic and professional experience in Vietnamese history, political science, and law—as well as continental European law, American common law, and international law. This multifaceted study mirrors the interdisciplinary nature of human rights issues, which occur within the context of a social-political-cultural system.

The author's two important goals, set forth at the end of the Introduction, are also the book's two principal scholarly achievements. First, this is a legal history of human rights in traditional Vietnam, enriched with a wide range of relevant political, economic, social, and cultural data, with the sort of detail that Dr. John Whitmore, an authority on Vietnamese history at the University of Michigan, describes as “rarely available to students and the general public, . . . a major resource for the study of Vietnamese historical development.” This description of the human rights record of an East Asian polity, if seen from the perspective of comparative research on Asia, can even be viewed as a preliminary survey of data to be found in imperial China, Korea, and Japan, which had similar Confucianist-legalist traditions. Indeed, the author's findings about old Vietnam's statutory law and official practice on human rights can also be, by implication, preliminary working hypotheses on China, Korea, and Japan, at least when similar statutory laws were found in the codes of the T'ang, the Ming, the Ch'ing, the Yi (Korea), and Tokugawa Japan (influenced by the Ming Code). Comparative studies on the other traditional Asian countries can be conducted along similar lines.

Second, the book, as a case study using international human rights standards as tools for data compilation and analysis of a traditional society, has vindicated the universality and timelessness of modern international

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human rights standards. In measuring the human rights performance record of the Vietnamese dynasties against present-day international law criteria on human rights, the author has stuck relentlessly, point by point, to a rigorous and balanced analytic program. This methodology of using the comprehensive list of human rights standards (classified into four broad categories: The integrity of the person, equality, civil and political rights, and economic-social-cultural rights) contained in the international documents—which are politically neutral and not suspect as culturally biased as using Western bills of rights—may, after successful application in the Vietnam case, become a blueprint for research for the human rights record of any country. The systematic framework of the organizing concepts and the measuring standards serves as both the tool and the touchstone for compiling and analyzing data on any legal, social, and political system. Professor Alexander Woodside of the University of British Columbia, another of the few authorities on Vietnamese history, has considered this book “an important, timely and daring piece of scholarship” and as “highly original both in its general conception and in the specific analytical tasks it performs along the way. The comparison of the medieval Vietnamese law code with twentieth-century international law is a first.” The idea of using international standards for empirical research and policy analysis is as fruitful as such social science methodological innovations as Talcott Parson’s three organizing concepts of personality, culture, and social system used in analyzing any system of action.

Beyond the methodological contributions, the substantive results of the method, that is, the findings on the relatively good human rights record of even a traditional society in East Asia, also vindicate the international human rights standards as fundamental world values, that is, as universal and timeless values. Of course, this relatively good record of the Vietnamese dynastic state may be due in part to the inability of its relatively weak polity “to reach deeply into all spheres of life of the population” because “it did not have mass communications means and a large police force or prison system” (Introduction). However, this overall political situation in a traditional society, which actually decreased the risk to human rights in old Vietnam, does not weaken the reasonable conclusion that all modern states now claim that they adopt human rights norms as a confirmed article of faith of mankind (although some states may be more hypocritical than others).

In its 1983 annual report, the Center for the Study of Human Rights at Columbia University (under the direction of Professor Louis Henkin) conducted a large-scale survey of existing writings on human rights and concluded that there are urgent matters for future research, among them the universality of rights. At Harvard Law School, we are glad that this book

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can be one response to such urgent needs. Produced in the East Asian Legal Studies Program of the law school, it is also a building block for the school's Human Rights Program, established in 1983, by Professor Henry J. Steiner.

Given the above two dimensions of the book's scholarly contribution, it will predictably appeal to lawyers and legal scholars; historians or social scientists studying the legal, political, social, and cultural development of Vietnam; and Asianists in general. No doubt, it will also appeal to human rights activists, whether they are United Nations officers working in this field or human rights advocates in nongovernmental or private organizations. Finally, it will become a proud symbol for the Vietnamese people, particularly the one million or more of them who live abroad. Far from their homeland and scattered around the world as a minority among other peoples, they will appreciate this concrete, detailed, and objective evidence of their rich tradition so that they can be identified with it in their struggle to overcome group or individual identity crises. This book makes the case for their claim to an ancient humane civilization.

Special thanks are due Professor Robert A. Scalapino, director of the Institute of East Asian Studies, for agreeing to undertake the publication of this most important work, an appropriate initial collaboration between the Institute and the Harvard Law School.

Finally, I would like to thank the Ford Foundation for support and my colleague Jerome A. Cohen for initiating the research project on human rights in East Asia before he left Harvard for the world of practice.

Oliver Oldman
Learned Hand Professor of Law
Director, East Asian Legal Studies Program
Harvard Law School
1988

Preface

Under the publication series of our Indochina Studies Project headed by Douglas Pike, the Institute of East Asian Studies is pleased to sponsor this monograph by Ta Van Tai, a research associate of the Harvard Law School. With current human rights standards as his yardstick, the author traces in great detail the record of traditional Vietnam. In many respects, this is a truly unique study. Cutting across time and culture, it explores in depth how one premodern society handled issues relating to the rights and duties of its people. Ta Van Tai is fully aware of the fact that normative judgments are hazardous when applied to societies far distant from the modern era. Yet in his willingness to undertake detailed research on the practices of ancient and medieval Vietnam, he brings to us a new understanding of the foundations of one important traditional Asian society, a society deeply influenced by the Confucian ethos common to its region and yet with its own special traits. It is to be hoped that parallel studies relating to other traditional societies of Asia will be forthcoming. In the meantime, every student of Asia will learn much from this pioneer work.

Robert A. Scalapino
Director
Institute of East Asian Studies

Acknowledgments

My special thanks to Professor Jerome A. Cohen, former director of the East Asian Legal Studies Program at Harvard Law School, who launched the human rights project that was the origin of this book; to Professor Oliver Oldman, the present director, who, through his generous and consistent leadership, guided me in the final stages; and to Harvard Law School Dean of Graduate Studies Frederick Snyder; for their moral and material support for me as a student and as a research associate at the law school. That help was invaluable in enabling me to complete this book as well as providing legal training for my third professional life as an attorney in the United States (after the previous two—practitioner and scholar—in Vietnam and at Harvard). Finally, I greatly appreciate the enlightening critiques by Professor Alexander Woodside and Dr. John Whitmore, outstanding Western scholars on Vietnam.

Abbreviations

CCPR	International Covenant on Civil and Political Rights
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social, and Cultural Rights
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
DPPT	Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman, or Degrading Treatment
UD	Universal Declaration of Human Rights

INTRODUCTION

International Human Rights Standards as a Framework for Analysis

Many scholars think of human rights as constitutional rights,¹ not without reason: In their minds, the rights recognized in constitutions would be enforceable and could be properly called “rights” in the strictly legalistic definition. As a consequence, they tend to consider human rights as originating with constitutionalism in the Western world. For example, Duchacek wrote in 1973:

Over two thirds of the existing national constitutions were drafted and promulgated in the last three decades. . . . Most modern founding fathers seem to be constitutional copycats. . . . The principal models for the content and style of bills of rights have primarily been the English Bill of Rights of 1689, the French Declaration of the Rights of Man and Citizen (enacted on August 26, 1789) and the American Bill of Rights (the first ten amendments of the Constitution, enacted in 1791). The English, French and American bills of rights have, of course, their antecedent and model too: The English Magna Carta of 1215. . . . The French and American lists of fundamental rights and liberties, echoing their English antecedents, have been circling in the constitutional orbit for nearly two centuries. The following chapters will examine their actual implementation or distortion and their modification in substance and style as well as their impressive increase in scope and length. All these changes have been made by political leaders—some honest and others less so—but all captives of different political cultures and all responding to changing times with their new challenges and unforeseeable dilemmas.²

Moreover, still according to the said dominant school of thought, this European and American—or, as some have put it, this North Atlantic Basin view of human rights—has also contributed much to the elaboration of international human rights under United Nations auspices. According to Louis Henkin, “International human rights, born during the Second World War, drew heavily on both American constitutional history and constitutional developments in Europe and Latin American.”³

Is it true that human rights are the product of Western civilization and that as for traditional Asia—or, more particularly, traditional Vietnam—there was only what some scholars have called “Oriental despotism”?⁴

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It seems that, like old China, traditional Vietnam was ignorant of the concept of rights—*quyền lợi* or, in abbreviation, *quyền*—until the arrival of Westerners. The Sino-Vietnamese term *quyền lợi* was derived from the Chinese *ch'üan li*, which, in turn, was recently adapted from the Japanese. The term means both “power” and “interest,” the very two concepts the Confucians despised and avoided because their value system emphasized personal virtues and the sense of duty. (The idea expressed in the German word *Recht* and the French word *droit* is not expressed or implied in either the Sino-Vietnamese or Chinese terms.)

Moreover, it also seems that although the general idea of the right of man and certain corresponding themes are shared by humanity's major value systems, no system provides a systematic and comprehensive list of rights comparable to those in the Western constitutions just mentioned. An international effort was made in the form of a book entitled *Le droit d'être un homme* (UNESCO, 1968), which tried to illustrate “the profound unity . . . and the universality in time and space of the assertion and claim of the right to be a man” (Preface, p. 7) by assembling—with the help of member states, international organizations, and specialists—the popular sayings and proverbs, the scholarly statements and dicta, the religious commands extracted from the sacred texts of Brahmanism, Buddhism, Judaism, Christianity, and also the norms of law codes ancient and modern, Western as well as Middle Eastern and Oriental. We find in the book a universal agreement on the general concept of the right to be a human and a number of common themes. We must say, however, that the major value systems of the world, whether formulated as ethics, religion, or traditional law, do not share a common comprehensive list of human rights.⁵ It is for this reason that some authors have maintained that the search for a commonality or a consensual basis for human rights among the main ethico-religious systems of the world, both Eastern and Western, is fruitless.⁶

Thus again, the question is: Is it true that only Western constitutions or the Western-inspired documents of the United Nations are imbued with a rich tradition of human rights and that an Asian country such as Vietnam does not have a comparable tradition of human rights?

To answer this question requires posing another, namely: What set of standards shall guide our data collection and evaluation of the condition of human rights in traditional Vietnam? If we use the tenets of the major ethico-religious systems as our guide for research, we would have to examine too many systems of thought, each of which does not cover comprehensively the total galaxy of human rights we are interested in. Our study would become unmanageable by using too many sets of reference standards.

Given the historical roles of the European and American bills of rights as models, should we use them as a reference framework to evaluate the performance of traditional Vietnam in the area of human rights? The major problem

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with this approach is the risk of incurring the charge of political and cultural bias. Twentieth-century Vietnam may be evaluated according to Western standards because the latter have exerted some influence on Vietnamese political development (French norms since the beginning of the colonial days, American ones since the 1956 South Vietnam Constitution). But traditional Vietnam cannot be judged fairly by sole reference to French and American standards. In any case, these standards, as Duchacek points out, have been modified and increased in scope and length by even those countries that imitated them.

One may face other problems in terms of choice: Why use either the English, French, or American model and not the other two (all differ from one another to a certain degree)? Why use them instead of the modified models of later periods in other and newer countries? Other problems of choice involve the *content* of rights: If the American model were used, for example, many of the economic and social rights we are discussing would not be found in the U.S. Constitution (although in practice the United States has slowly become a welfare state by grace of congressional act), and even some civil and political rights (freedom from slavery, equality, universal suffrage) only developed at a later stage of American history. Thus we are faced with the complicated issue of which rights to include and which to exclude from our discussion.

We come to the inevitable solution for choosing a comprehensive framework for analyzing human rights developments in Vietnam: namely, the international documents. These include the United Nations Charter, the Universal Declaration of Human Rights (UD), the International Covenant on Civil and Political Rights (CCPR), the International Covenant on Economic, Social, and Cultural Rights (CESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG). Through these international documents—at least judging by the universal adherence to the U.N. Charter and the Universal Declaration—we can say that there are human rights standards that have been accepted in principle as an article of faith by all countries in the world community.⁷ All governments recognize the legitimacy of human rights and their essential content as mentioned in the international documents, although there may be some controversy over their philosophical foundations.

In terms of origin, these international human rights standards have drawn inspiration not only from European and American traditions but also from constitutional developments in Latin America and the various socialisms of the nineteenth and twentieth centuries.⁸ In terms of impact, the international provisions have been cited as the justification for various United Nations actions or have exercised a significant influence on national constitutions and, in some cases, on court decisions. Thus they are truly universal standards that appeal to diverse political systems and cannot be easily attacked as having a political or

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cultural bias; we can apply them to the analysis of the Vietnam case, or to any other non-Western case, for that matter.⁹

Moreover, the comprehensive, systematic, and up-to-date list of human rights in the United Nations documents serves our purpose best: We do not have to worry, as would be the case if we were using a less complete framework, about whether the set of standards we use as touchstones is complete or not, current or obsolete.

Using those universal standards of human rights contained in the United Nations documents to evaluate modern or contemporary Vietnam could be considered sound and legitimate practice. Both the republican regime (1954–1975) in South Vietnam and the communist regime (1945–present) have been obliged to abide by the Universal Declaration; in particular, the Socialist Republic of Vietnam has become a U.N. member state with the concomitant legal obligations set forth in the Charter and the Universal Declaration, and it has also ratified the two international covenants on December 24, 1982.

But would we be justified in applying these universal human rights standards to traditional Vietnam? Would we be demanding too much from a traditional Asian society to expect it to measure up, centuries ago, to mainly Western-inspired standards of the twentieth century? Would we be unjust in evaluating an ancient Asian tradition in the light of present-day Western values?

We do not think so, because all traditions and all periods of history have witnessed at least a general concern for human rights, although the explicit enumeration of human rights standards has been indeed the product of the Western world. Moreover, if we use the contemporary universal standards strictly as research tools for measurement of performance without emphasis on approval or disapproval of the performance, then they become instruments for data gathering and analysis (or objective touchstones for research) without risk of issuing culturally biased judgments. In any case, there is no other way to attack the problem systematically. We will use the international human rights standards as the ideal or maximum gauge for measuring and analyzing Vietnamese performance in a detached and even-handed manner. This means, on one hand, we will not agree to a compromise of the standards for any given case, as called for by the relativists, to accommodate cultural and political differences (such a compromise would create “substandards for subhumans”) and, on the other, we will not judge too harshly the performance of various Vietnamese regimes, knowing that there are different degrees of measuring up to the international standards and—as delegates pointed out during the preparatory work for the International Covenant on Civil and Political Rights—no state could claim its legislation to be in complete harmony with all the provisions.

Our legal-historical analysis is mainly a measurement of traditional Vietnam’s practices against today’s international human rights standards. This is to

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avoid the risk of political and cultural bias, as stated earlier, which may arise from a comparison between old Vietnam with only one or more Western countries. From time to time, however, we compare traditional Vietnam with premodern European countries on an ad hoc basis to illustrate the point that our findings on Vietnam are particularly striking when we match them with historically comparable data from contemporaneous European societies.

The galaxy of human rights recognized in the international documents are rather comprehensive. For purposes of analysis, we may classify them into four major categories:

1. The integrity of the person, which includes the rights to life, liberty, and security in the legal process. These are the most important rights, because without their enjoyment the rights that follow would become moot as the person would be unable to benefit from them.
2. Equality before the law.
3. Civil and political rights.
4. Economic, social, and cultural rights.
5. We will also debate the critical issue of securing government compliance in the legal process for respecting these rights. Enforceability is a cardinal touchstone for a system of human rights. As we discuss the extent of each human right as embodied in the international documents, we will mention the limitations and derogations to such rights these documents have recognized as legitimate. But the overall impact of these limitations and derogations will be reviewed later in this Introduction when we take up the issue of government compliance. These limitations and derogations of human rights are parameters within which the degree of government compliance or noncompliance must be assessed in order to reach a balanced view of government performance.

The full but concise treatment of the carefully formulated and precisely delineated international human rights standards—with their elaborate hedgings or exceptions—is the necessary preparatory step toward a fair judgment of traditional Vietnam’s human rights performance record because this analytical framework will help take into account all the nuances and balancings of the factual and legal situations in the light of those standards and exceptions.

Standards: The Integrity of the Person

Article 3 of the Universal Declaration of Human Rights states: “Everyone has the right to life, liberty and the security of person.” These three basic rights can be subsumed under the common notion of the “right to the integrity of the person.”

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The Right to Life

Although Article 6 of the CCPR asserts, “Every human being has the inherent right to life,” the true meaning of this right to life is expressed in paragraphs 1 and 2:

No one shall be arbitrarily deprived of his life. . . . [S]entence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

Thus, with due process, both substantive and procedural (the conviction by a court for a serious crime defined in law), the right to life can be taken away. This due process or nonarbitrariness is both protection of, and limitation to, the right to life. The person condemned to death has the right to seek pardon or commutation of the sentence.

Although the concept of “serious crime” varies from one country to another, most of the U.N. Human Rights Committee members express doubt whether crimes against property (such as misuse of public funds or economic crimes) warrant the death penalty. The imposition of this penalty for nonviolent and political offenses is also condemned. From the *travaux préparatoires* of the CCPR, we know that the following acts will not be considered as arbitrary deprivation of life: (1) killing in self-defense against unlawful violence; (2) death resulting from lawful suppression of insurrection, rebellion, or riots; and (3) killing to effect lawful arrest or to prevent the escape of a person in lawful custody. The use of deadly force by the police, however, should be restricted.

The right not to be deprived of life arbitrarily is considered so fundamental and important to the enjoyment of other rights that no derogation from this right can be made even in time of public emergency (Article 4, par. 2, CCPR). When the arbitrary deprivation of life constitutes the crime of genocide (killing, conspiracy in killing, or attempt to kill members of a national, ethnic, or religious group), the state has to punish every person guilty of the crime—not only private individuals but also public officials and constitutionally responsible rulers (Article 6, par. 3, CCPR; Articles 2 and 4, CPPCG).

Even the nonarbitrary deprivation of life has to be deferred for pregnant women and cannot be imposed on children under eighteen years (Article 6, par. 5, CCPR).

Liberty or Freedom from Servitude or Forced Labor

Another international standard on the integrity of the person is the ban on all slavery or systems of servitude. Both the Universal Declaration and the

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CCPR provide that no one shall be held in slavery (ownership as chattel by another person) or servitude (indenture, serfdom, or bondage), and that slavery and the slave trade in all their forms shall be prohibited (Articles 4 and 8, respectively). This ban is absolute; there is to be no derogation from it, even in time of public emergency that threatens the life of the nation and that would normally permit the violation of most other human rights.

Even a milder form of loss of liberty, namely, “forced or compulsory labor,” is prohibited. The CCPR (Article 8, par. 3) stipulates that “no one shall be required to perform forced or compulsory labor.” The CCPR, however, excludes from the definition of “forced or compulsory labor” these forms of compulsory service: military draft or equivalent service for conscientious objectors, service exacted in case of emergency or calamity threatening the life or well-being of the community, and any work constituting a normal civil obligation. The CCPR also provides for some specific derogations from the general ban of compulsory labor: hard labor performed during the prison term by criminals sentenced by a competent court. Under some national laws, a person with no fixed abode and no means of subsistence may be guilty of vagrancy if he also does not have an occupation: in such case, he may be required to work to avoid the stigma of vagrancy.

Liberty cannot be deprived for failure to perform civil obligations. “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation” (Article 11, CCPR). No derogation from this ban is permitted even in time of public emergency. This ban, however, does not cover the nonfulfillment of obligations of public interest, which are imposed by statute or a court order such as tax, court-ordered alimony, or debt payment. Also a person able but unwilling to fulfill contractual obligations is not covered by Article 11; he may be imprisoned.

Security in a Regularized Legal Process

Over the centuries the history of individual freedom from insecurity and injustice has been the history of observing the procedural safeguards of the criminal process, which are sometimes technical in character.

The following international standards of human rights on personal security are found in equivalent national laws not only in the form of constitutional provisions but also in the form of criminal procedure articles (especially when the definition of their limitations is to be fixed).

Personal security includes the guarantees to be free from arbitrary interference with one’s privacy, home, or correspondence and not to be subject to attack on one’s honor and reputation.

But more fundamentally, personal security means the various guarantees or rules in the legal process, such as: no punishment unless for a crime defined by the law, nonarbitrary arrest and detention, no torture or inhuman

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treatment and punishment, presumption of innocence until conviction by a court, and therefore the accused is to be separated from the convicted and must have a fair, public trial by an independent court, in which he has the right to defend with the help of legal counsel if necessary, and the right to appeal; no double jeopardy or retrial for an act for which he has already been acquitted.

Freedom from Arbitrary Interference with Privacy and Unlawful Attack on Honor and Reputation. The international standards are:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference and attacks. (Article 12, UD; Article 17, CCPR)

The zone of privacy is an important element of human rights; only when this zone is protected against the encroachment by the public authorities can the common man escape a stifling situation caused by the state apparatus. The terms “arbitrary” and “unlawful” are both used because an action of interference may be arbitrary even when it is not a violation of positive law *if* the legislation itself is contrary to the principles of justice and human dignity.

The various possible violations of the rights to privacy beyond those enumerated in the above documents (home, correspondence, honor) have been mentioned by international conferences and scholars¹⁰: scrutiny and surveillance, unnecessary publication of the painful facts of one’s private life, and the like. But because of their importance, the articles grant a person’s home, correspondence, honor, and reputation explicit protection against interference or attacks. The “attacks” on honor and reputation must be a deliberate assault (connoting intentional violence) and not merely interference; also, not all attacks are unlawful because there can be no punishment for literary, artistic, or professional criticism expressed objectively in a search for the truth (otherwise, the restraints imposed would violate the freedom of expression).

No Punishment Unless for a Crime Defined by Law (Nulla Poena Sine Lege). This principle is embodied in both Article 11, par. 2 of the Universal Declaration and Article 15, par. 1, of the CCPR, which are identical:

No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed.

Article 15, par. 1, also incorporates the acceptable exception to this general principle of nonretroactivity of the law in case the new law is more indulgent in terms of punishment:

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If, subsequently to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

This exception to the general rule of *nulla poena sine lege*, or nonretroactivity of the law, would improve the protection of the human right to personal security.

There can be no derogation from this principle of *nulla poena* even in case of public emergency (Article 4, par. 2, CCPR). The principle of *nulla poena* admits one important extrapolation, however: the possibility of punishment of an act deemed criminal not by a specific provision of national or international law but by general principles of law recognized by humankind. According to Article 15, par. 2, of the CCPR:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This is the policy adopted to punish crimes against humanity by the Nuremberg International Tribunal as well as the Tokyo International Tribunal after World War II. The impact on personal security of this policy of punishment on the basis of the general principles of law recognized by the community of nations would depend on the extensive or restrictive interpretation given to those principles of law. A broad interpretation widening the scope of the punishment would add risk to personal security.

Security from Arbitrary Arrest and Detention. The most crucial element in an individual's right to security is the specific freedom from arbitrary arrest and detention, a right commonly ignored in today's criminal process. Article 9 of the Universal Declaration and Article 9, par. 1, of the CCPR state: "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention."

In more concrete terms, the following requirements must be met for a justifiable arrest or detention:

Grounds and procedures established by law. "No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law" (Article 9, par. 1, CCPR). The state cannot establish in positive law arbitrary grounds for making arrest or detention but must conform to some minimum standards of justice, one of which is that no special law should be enacted applicable solely to one case. The grounds for arrest should be major offenses and not mere misdemeanors.

Information on the charge. "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charge against him" (Article 9, par. 2, CCPR).

Authority to arrest. The authority to arrest varies with different legal systems. Generally, arrests can only be effected by the police with the prior

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authorization (warrant) or subsequent approval of the prosecutor or by judicial order. Detention is commonly authorized by judicial order only.

Right to a prompt hearing. Article 9, pars. 3 and 4, of the CCPR provides also for the right of the person arrested or detained to have a prompt judicial hearing and trial by the initiative of the authority or that of his own:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release . . .

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Thus, there are three parts to this right of the person detained: He must be brought promptly before a judge (promptly means hours or days, not months) for determining the charge against him; he must be brought to trial within a reasonable time (this reasonable time varies with the specific circumstances of each case, such as its complexity and the procedure followed by the applicant); he must be released if detention is unlawful. This right to release, however, is not absolute. There are acceptable grounds for continued detention, such as: danger of flight, suppression of evidence, repetition of the offense. Article 9, par. 3, continues: "Release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment." The guarantees required for release from custody may vary from one country to another, but generally bail is the most common guarantee. Bail should not be excessive (which would in fact deny the right to release) but should be based on the accused himself, his assets, or his relationship with any guarantors that he may have.

Compensation for unlawful arrest and detention. "Anyone who has been victim of unlawful arrest and detention shall have an enforceable right to compensation" (Article 9, par. 5). This is an important deterrent to the powers of the executive to keep a person in detention. Apparently the right to compensation lies only against the state, because a proposal to insert in the article the right of action against any individual who directly caused the unlawful arrest or detention was rejected by the drafters.¹¹ This principle of the state's sole liability is less advantageous to the individual than the principle of liability of both state and officials recognized by many contemporary legal systems—such as France's, for instance.

Presumption of Innocence. Separate Treatment of the Accused and the Convicted. No Torture and No Cruel Treatment or Punishment. Article 11, par. 1, of the Universal Declaration and Article 14, par. 2, of the CCPR set forth the

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principle of presumption of innocence: “Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”

The presumption of innocence has implications for both the pretrial stage and the trial itself. During the pretrial stage, the detainee should be treated as an innocent person who is only suspected of a crime and is not a convicted person. Consequently, the CCPR requires that “accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status of unconvicted persons” (Article 10, par. 2a).

Trial proceedings must be conducted on the presumption that the accused is innocent. The burden of proof falls on the government prosecutor and any doubt should benefit the accused, who may produce evidence in rebuttal. The judge can condemn the accused only if there is a sufficiently strong factual and legal basis to establish his guilt “beyond a reasonable doubt.”

The accused cannot be subject to torture and cruel or inhuman treatment or punishment. Article 5 of the Universal Declaration and Article 7 of the CCPR use identical language: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” Torture is the most aggravated form of cruel, inhuman, and degrading treatment or punishment. In the Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment (DPPT), torture is defined by the U.N. General Assembly as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.¹²

Besides torture, the question may arise about the point at which other treatment or punishment comes within the prohibition contemplated. The international documents leave up to the various states the definition of cruel, inhuman, or degrading treatment or punishment. There is no consensus as to what punishment can be deemed cruel, inhuman, or degrading. For example, some countries have abolished while others maintain the death penalty. The CCPR permits the death penalty (Article 6). One standard, however, is clear: If the death penalty involves torture or a lingering death, it is cruel and inhuman.

The prohibition of cruel, inhuman, or degrading treatment or punishment leads to the recognition of everyone everywhere as a person before the law (Article 6, UD; Article 16, CCPR). In jail, “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (Article 10, par. 1, CCPR).

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The prohibition against cruel, inhuman, or degrading treatment or punishment, and the recognition of everyone as a person before the law are rights of such importance that they cannot be derogated even in public emergency (Article 4, par. 2, CCPR).

The measures recommended by the United Nations for implementing the goal of abolishing cruel, inhuman, and degrading treatment or punishment are listed in the said DPPT. These include appropriate training of law enforcement personnel, especially in interrogation techniques; making criminal all acts of torture; and establishing complaint and disciplinary procedures.

Separate Treatment of Juveniles. The CCPR contains special provisions regarding juveniles. Article 10, par. 2b, provides that “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” During the trial, “in case of juveniles, the procedure shall be such as will take into account of their age and the desirability of promoting their rehabilitation” (Article 14, par. 4). In fact, the reformation and social rehabilitation of prisoners in general are the aims of the penitentiary system, according to Article 10, par. 3, of the CCPR.

Most countries make special provision for young people, although the minimum age may vary. Juvenile courts do not use adversary proceedings but rather a special procedure aimed at rehabilitating the offender.

A Fair and Public Trial by a Competent, Independent, and Impartial Court. To protect human rights during the court proceedings, the international standards require the following elements of a fair trial.

A competent, independent, and impartial court established by law. Article 14, par. 1, of the CCPR states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

A “competent” tribunal implies the accused is to be tried in a court whose jurisdiction was established by law, not before improvised bodies arbitrarily set up. An “independent” court means the judiciary should be separate from the executive or legislative and is subject only to law and not to the control or influence of the other branches of power, both in general and in relation to a given trial. If the selection and dismissal of the judges are too easily controlled by the executive, then the court cannot be deemed independent. An “impartial” court means the judges and the jury must adopt a detached attitude and not issue remarks adverse to the accused prior to ultimate decision. If the judges are politicized, they cannot be independent or impartial.

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A fair and public trial without undue delay. This is essential to the defense of the accused's rights. Such a trial must incorporate the following features.

(1) According to Article 14, par. 1, of the CCPR, the trial must be held in public. Publicity reduces the chance for abuse by the prosecution or an arbitrary decision by the judge. However, "the press and the public may be excluded from all or part of a trial for reasons of morals, public order ('ordre public') or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered... shall be made public." During this trial, the essential elements of a "fair trial" must exist. These are enumerated as "minimum guarantees" in Article 14, sec. 3, of the CCPR.

(2) The accused is to be tried without undue delay (Article 14, par. 3c). The term "to be tried" means to have the charge finally disposed of by the court. Thus, the shortest period of time possible must elapse from the arrest and detention of the accused until he is finally acquitted or convicted.

(3) The accused must be "informed promptly and in detail in a language which he understands of the nature and cause of the charge against him" (Article 14, par. 3a). "Nature" refers to the name of the alleged offense; "cause," to the facts upon which the allegation is made. Detailed information is necessary for the accused to prepare his defense adequately.

(4) The accused must be given "adequate time and facilities for the preparation of his defense" (Article 14, par. 3b). The length of time for adequate preparation depends on the facts of each case. The term "facilities" includes access to documents or other evidence for the accused's support, communication with counsel of his own choosing, and access to a legal library if the accused wants to defend himself in the case.

(5) The accused shall have the right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it" (Article 14, par. 3d). This right to counsel is also available to the accused on appeal, whether he was convicted or was acquitted and the government appealed.

(6) On the evidence in the trial, the CCPR (Article 14, par. 3e) gives the accused the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him." Thus, the accused shares equal powers with the prosecution for the examination and cross-

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examination of witnesses. The accused shall “not be compelled to testify against himself or to confess guilt” (Article 14, par. 3g).

(7) The accused is entitled “to have the free assistance of an interpreter if he cannot understand or speak the language used in court” (Article 14, par. 3f).

The Right to Appeal. Everyone convicted of a crime shall have “the right to his conviction or sentence being *reviewed by a higher tribunal according to law*” (emphasis added) (Article 14, par. 5, CCPR). After exhausting the appeal process and a final decision has been reached, the accused still has *the right to compensation for miscarriage of justice* if there is factual evidence to conclude such is the case. This right is stated in Article 14, par. 6, of the CCPR:

When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

This right to compensation for miscarriage of justice is a complement to the right of compensation for unlawful arrest or detention (Article 9, par. 5, CCPR).

No Double Jeopardy. Under the CCPR, no one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country (Article 14, par. 7). This is the guarantee against double jeopardy.

Standards: Equality or Nondiscrimination

Equality and nondiscrimination are positive and negative statements of the same principle. They constitute the dominant single theme pervading all the international structure of human rights. The Preamble of the Universal Declaration recognizes the inherent dignity and the “equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world.” The Universal Declaration and the international covenants refer constantly to the rights of “all persons,” “everyone,” “every human being.” For example, Article 1 of the Universal Declaration states that “all human beings are born free and equal in dignity and rights.” Equality is indeed the most fundamental of the rights of man.

Equality in the international documents has several meanings. Article 26 of the CCPR states:

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All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7 of the Universal Declaration also specifies that “all are equal before the law and are entitled without discrimination to equal protection of the law.”

Thus, two principles emanate from these articles: equality before the law (i.e., the courts) and equal protection of the law against discrimination anywhere else.

A third principle is: equal enjoyment of the enumerated rights without discrimination. This principle is derived from Article 2 of the Universal Declaration and the international covenants:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property or other status. (Article 2, UD)

Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Article 2, CCPR)

Article 2, par. 2, of the CESCPR requires the states Parties to the covenant to guarantee that the rights enunciated in that covenant “will be exercised without discrimination of any kind” (same enumeration of possible elements for discrimination).

Article 4, par. 1, of the CCPR permits the state, in time of public emergency that threatens the life of the nation, to take necessary measures revoking the standards of rights in that covenant. Such measures, however, must *not* involve discrimination solely on the ground of race, color, sex, language, religion, or social origin.

Although discrimination in purely private social relations does not come under the law of the articles, discrimination in housing, restaurants, transport, and access to public places such as beaches cannot be considered as falling solely within the realm of private relationships.

Finally, equality in the international documents refers to moral and juridical equality, formal equality of rights, and equality of opportunity. Thus, the principle of equality does not require identity of rights in result or

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in fact, but permits distinctions based on individual conduct (such as industriousness, carefulness, lawfulness, merit) or qualities (talent, mental capacities).

The international documents direct special attention to equality of men and women, or nondiscrimination on the basis of sex. Article 3 of both covenants (CCPR and CESCRR) proclaims the duty of the state Parties to the Covenants “to ensure the equal right of men and women to the enjoyment of all civil and political rights [or all economic, social, and cultural rights], set forth in the present Covenant.” Men and women also enjoy equality of rights as spouses for marriage, during marriage, and at its dissolution (Article 23, par. 4). The same idea of equality is expressed in the Universal Declaration (Article 16, par. 1).

On racial discrimination—defined as distinction, exclusion, or restriction based on race, color, national, or ethnic origin—Article 2 of the CERD provides that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and to this end:

- (a) Each State Party undertakes to engage in no action or practice of racial discrimination. . . .
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations. . . .
- (c) Each State Party shall . . . review . . . policies and . . . amend or nullify any laws which have the effect of creating or perpetuating racial discrimination.
- (d) Each State Party shall prohibit and bring to end by all appropriate means . . . racial discrimination by any persons, group, or organization.

More positively, the State Parties undertake (in Article 5, CERD) to guarantee, without distinction as to race, color, national, or ethnic origin, the equal enjoyment of various rights by all persons:

- (a) the right to equal treatment before the tribunals and all other organs administering justice;
- (b) the right to security of person and protection by the State against violence or bodily harm. . . .
- (c) political rights, in particular, the rights to participate in elections on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level, and to have equal access to public service;
- (d) other civil rights. . . .
- (e) economic, social and cultural rights. . . .
- (f) the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theaters and parks.

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The prohibition of discrimination, however, does not apply to distinctions, exclusions, or preferences made by the state between citizens and noncitizens (Article 1, par. 2, CERD). A nondiscrimination clause should not be interpreted as prohibiting measures to control aliens, but the measures of control are permissible only to the extent strictly necessary and they must be explicitly provided for. For example, foreigners can be denied the right to vote and take part in public affairs, the right to entry to one country, and the freedom from expulsion.

Also not to be considered racial discrimination are the special affirmative action measures designed to secure the advancement of certain racial or ethnic groups or individuals in order to ensure their equal enjoyment of human rights and fundamental freedoms. Such measures, however, must not lead to the maintenance of separate or unequal rights for different racial groups after the objectives for which they were taken have been achieved (Article 1, par. 4, of the CERD).

Besides equality of treatment, the ethnic, religious, and linguistic minorities might be given special rights, such as the right to enjoy their own culture, to profess or practice their own religion, or to use their own language (Article 7, CCPR). These are measures for positive cultural promotion and not measures of discrimination in violation of the international standard of equality. In practice, such positive cultural promotion measures take the form of the right of minorities to have their own schools and to use their own language in judicial and other proceedings. But the state has no obligation to finance or provide special institutions for minorities.

Standards: Civil and Political Rights

For our purposes of applying the international standards to the Vietnam case, civil and political rights can be classified into three main categories:

1. *Freedom of movement*: to move freely within one's country, to leave and return to one's country, to seek asylum in other countries to escape persecution.
2. *Freedom of thought*: to hold opinions without interference or to express them in media, especially in the press; to hold and practice religious beliefs.
3. *Freedom of collective action*: to assemble peaceably, to form associations, and to participate in the governance of one's country.

Freedom of Movement

Freedom of movement has two aspects. Freedom to move within one's own country consists of the right to move and relocate oneself and to choose

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one's place of residence. Freedom of movement between states encompasses the right to leave any country, including one's own, to travel abroad, and to return.

The Universal Declaration (Article 13, par. 1) and the CCPR (Article 12, par. 1) specify that all persons lawfully within the territory of a state shall have the right to liberty of movement and freedom to choose their residence within that territory. This further allows the individual to choose freely his occupation, his education, and his network of relationships with other people.

The Universal Declaration (Article 13, par. 2) and the CCPR (Article 12, par. 2) further provide for a person's freedom to leave any country, including his own. This would allow the person to choose the social system within which he lives.

According to the CCPR (Article 12, par. 3), these rights shall not be subject to any restrictions except those that are provided by law; are necessary to protect national security, public order, public health and morals, or the rights and freedoms of others; and are consistent with other rights recognized in the covenant. Thus, even under present international standards, freedom of movement is not absolute. Some limits are considered necessary to protect state interests without nullifying this right. Until the eighteenth century, for example, the passport was an obligatory document for internal as well as international travel in Europe. Only by the mid-nineteenth century was the individual's right to leave his country increasingly recognized. World War I saw a return to the restrictive policy, but with the end of World War II the right of freedom of movement was enshrined in the Universal Declaration. Still, limits are imposed on this freedom.

National security—protecting the state from political or military threats—is the first legitimate restriction on this right. The drafters of the CCPR articles, however, were concerned primarily with the state's control of military installations, military personnel, and persons not yet serving their draft duty and did not consider it legitimate for a state to curtail an individual's departure in an effort to maintain a country's manpower pool, or to forbid an individual's departure on the grounds that he had been involved with or exposed to "classified" information or that he held certain beliefs and would criticize the government once abroad.

Public order ("ordre public") is understood to be larger in meaning than the English expression "public safety" but not as broad as the term "public policy." Falling within this restriction of public order is the restriction of movement or internal exile of certain elements who could be otherwise subject to imprisonment terms. To use internal exile to exclude a political

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dissident from an area, however, is not in keeping with the spirit of the legitimate restriction.

Within the category of public health or morals are regulations that protect legally incompetent persons and minors, or measures to prevent the spread of contagious diseases.

The “rights and freedoms of others” mentioned in the CCPR (Article 12), facilitates the state’s action to protect family support obligations and private property interests.

Finally, any restriction on freedom of movement must be “provided by law”—that is, it must not result from a bureaucratic fiat against any particular subject but must be enacted by the legislature as a general measure. The restrictive law must also be “consistent with the other rights recognized by the Covenant,” so that the integrity of the international human rights system is preserved (for example, there must be no discrimination).

These mentioned restrictions do not apply to the right of a person to return to his own country specified both in the Universal Declaration (Article 13, par. 2) and the CCPR (Article 12, par. 2). Because the articles read, “No one shall be arbitrarily deprived of the right to enter his own country,” however, they imply that some exile, if not arbitrary—as, for example, exile as punishment for crime—is permissible under the international standard.

All rights of freedom of movement, however, are subject to derogation in national emergency under Article 4 of the CCPR. But this very special and limited exception will be discussed later under the heading of “securing government compliance” (with the international standards).

Under Article 13 of the CCPR, aliens are protected from arbitrary expulsion. First, the principle of national sovereignty still dictates that aliens have only a right to petition for asylum (for political crimes in his/her place of origin) and enjoy it if granted, but not the option to get permanent asylum as a matter of right. Indeed, Article 14 of the Universal Declaration reads:

Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecution genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations.

Because aliens have the right to seek only temporary admission, they may be expelled, and the only protection is the right to due process in the expulsion. Thus, the CCPR’s Article 13 states: “An alien lawfully in the territory of a state . . . may be expelled therefrom only in pursuance to a decision reached in accordance with law and shall, except where compelling

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reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed, and be represented for the purpose before the competent authority.”

Freedom of Thought

Under this heading we include both the freedom to hold any thought—whether religious or other—and the freedom to express or impart it in any way.

Freedom of Thought, Conscience, and Religion. Article 18, par. 1, of the CCPR, which is similar to Article 18 of the Universal Declaration, provides that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice [or “freedom to change religion or belief” in the UD wording] and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

“Thought” and “conscience,” taken together with “religion,” include all possible attitudes of a person toward the world, toward society, and toward the force—whether divinity or rationalism—that determines his fate and the destiny of his world. Thus the three terms, to the satisfaction of all ideological orientations, are rather all encompassing: “thought” includes social and political thought; “conscience” includes morality; “religion or belief” consists of both theistic and atheistic beliefs. The wording of the articles also emphasizes the absolute right to choose or change one’s religion or beliefs, which right is further confirmed by the express provision in Article 18, par. 2, of the CCPR: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Thus, in the realm of personal conscience or thought, absolute freedom prevails whether in the adoption or in the change of one’s conviction.

On the other hand, under Article 18, par. 3, of the CCPR, the freedom to manifest one’s religion or belief may be subject to limitations, although it is not subject to derogation in time of public emergency (see Article 4, par. 2, CCPR); it may, however, “be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Like other limitation clauses, the limitations permitted are only those prescribed by law and are necessary, but the special high value of the freedom to manifest one’s religion has induced the drafters of Article 18, par. 3, to circumscribe narrowly the conditions for limiting this freedom: The reasons are “public safety” (rather than “national security,” which could be broadly interpreted); “order,” that is, the prevention of public disorder (rather than

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“ordre public” with its general connotation of national public policy); the protection of “fundamental rights and freedoms of others” (rather than merely any rights and freedoms of others). Thus, for example, a state whose public policy is atheism or that favors one religion cannot invoke Article 18, par. 3, to suppress the practicing of religion or beliefs.

Freedom of Opinion and Expression. Given the divergence of ideological tendencies among the members of the United Nations, it is remarkable that Article 19 of the Universal Declaration has been accepted as a worldwide instrument:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This article forms the basis for Article 19 of the CCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order (“ordre public”), or of public health or morals.

Thus, a distinction must be made between, on one hand, freedom to hold opinions without interference—which is absolute, with no infringement allowed—and, on the other, freedom of expression—which may be subject to certain limitations described in Article 19, par. 3. One should note that the limitation clause in Article 19, par. 3, of the CCPR is the only one that is introduced by a kind of preamble explaining the rationale for the limitations: It points out that the right of expression carries with it special duties and responsibilities.

In practice, in their internal legal order, states have adopted many restrictions on the freedom of expression that are violations of Article 19 of the CCPR. In some countries, for example, freedom of expression is granted only “in order to strengthen and develop the socialist system,” not for other purposes; in other words, major limitations are thus built into the statement of the right, and the right of expression exists only so long as there is no conflict with the socialist doctrine or the one political party that

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upholds that sole ideology. If there is no choice between different political opinions, and citizens are compelled to adhere one political ideology, then their freedom to express political opinion is indeed curtailed.

Article 20 of the CCPR states another limitation on the freedom of expression and is practically a fourth paragraph to Article 19 on the subject:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In imposing the Article 20 restrictions on freedom of expression, a state would of course have to abide by the requirements of Article 19, par. 3 of the CCPR.

Freedom of Collective Action

This consists of the right to peaceful assembly, freedom of association, and the right to participate in the conduct of public affairs.

Right of Peaceful Assembly. The CCPR declares in its Article 21 that:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals, or the protection of the rights and freedoms of others.

Thus, some limitations are implied not only by reference to national security, public safety, public order, health, morals, and the rights of others but also in the term “freedom of peaceful assembly.” The assembly must be peaceful, without disturbance, uproar, or the use of arms. The right of assembly includes both the right to organize a meeting and an individual’s right to take part in it.

This article does not expressly state whether there is a negative right to abstain from participation—for example, the right to refuse a government’s request to participate in a political demonstration. But given Article 20, par. 2, of the Universal Declaration on freedom of assembly and association, which states, “No one may be compelled to belong to an association,” it can be deduced that if anyone has the right to decide freely to join an assembly, he should also enjoy the right to abstain from doing so.

Freedom of Association with Others. Article 22, par. 1, of the CCPR specifies that “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” As stated in Article 20 of the Universal Declaration, freedom of association includes the freedom not to associate because no one can be compelled to join an association.

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The right of association is the right to come together with other persons for social, cultural, economic, or political purposes. But special attention has been given to one kind of association, the right to form and join trade unions (Article 23, par. 4, UD; Article 22, par. 1, CCPR; Article 8, par. 1, CESCRC) and also the accompanying right to strike in conformity with the law of the land (Article 8, par. 1, CESCRC). Other forms of association—such as political parties—are not mentioned in the international documents. But the inclusion of the right to form and join trade unions as an example of the right of association would indicate that the right to form or join other organizations, including political parties, would be recognized; and the logical consequence is that, for example, the one-party system that forbids the formation of other political parties is contrary to this freedom of association.

The limitations to the general right of freedom of association are similar to those in other limitation clauses in the international instruments. Article 22, par. 2, of the CCPR states: “No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of health or morals or the protection of the rights and freedoms of others.” The specific limitations on the right to form and join trade unions and the right of trade unions to function freely are also similarly phrased: “No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedom of others” (Article 8, par. 1a,c, CCPR).

There is, however, one special limitation to the right of association of the armed forces and police personnel and the civil servants. Article 22, par. 2, of the CCPR just quoted continues in this way: “This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right.” Similarly, on the right to form and join trade unions and to operate them, Article 8, par. 2, of the CESCRC states: “This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police, or of the administration of the state.” It is understandable that, given the special position and relationship of these members to the state itself and the instruments of coercive power under their control, there must be different provisions for their right to form and join trade unions when compared to ordinary citizens.

The Right to Participate in Public Affairs. Article 25 of the CCPR provides:

Every citizen shall have the right and the opportunity without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

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- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 21 of the Universal Declaration also mentions these rights. The first notable feature about the three rights is that they are guaranteed only to the citizens of the country in question, not to every human being. There may be restrictions to these rights, but they must not be discriminatory or unreasonable. For example, a mentally incompetent person may be deprived the right to vote. What constitute reasonable restrictions, however, may not be easily agreed upon.

The right to vote and the right to be elected at genuine elections are special instances of the broader right to participate in the conduct of public affairs at all levels of government. But given their importance, these rights are singled out for more explicit treatment. When the Universal Declaration was drafted, there was a strong feeling that “genuine elections” included a genuine choice among parties and candidates and the right to vote against the government, free of any pressure. Later, during the drafting of the covenant, the discussion was less emphatic than before and “genuine” elections were simply understood as a guarantee that electors be protected against government pressure and fraud. Reference to the choice between at least two competitive parties or candidates was avoided so that single-party states could adhere to the covenant. In the last analysis, however, we can question whether noncompetitive elections without a meaningful choice between parties and candidates (and without fear or pressure) constitute genuine elections. One must suspect an electioneering process that lacks the meaningful competition of different candidates, parties, or groups, in which the result is 90 percent or more in favor of the government candidates or parties.

The elections must be by universal and equal suffrage: Everyone should have the right to vote without distinction as to property and the like. However, mental incapacity (minors or lunatics) may be a legitimate reason for disqualification from elections.

The right of access to public service may be restricted on reasonable and nondiscriminatory grounds—for example, soundness of mind, no record of serious offenses such as high treason, a certain level of education. In other words, “on general terms of equality” and in the interest of public service efficiency, certain requirements may be imposed on those wishing to join the public service.

In actual practice, with its general terms (such as elections), which are not clearly defined (what are “genuine” elections?) to fit a variety of

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political systems, Article 25 of the CCPR does not establish the clear requirements for democratic and representative government. Thus, universal and equal suffrage can be said to exist in almost all political systems, but as the term “genuine” election is not clearly defined, we must speculate that authentic popular representative government is rare even in the present world.

The political right to revolution is not part of the international system of human rights but rather an alternative to this human rights system understood as rights recognized in the regularized legal process. Indeed, the Preamble of the Universal Declaration states: “It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” Thus, we will not consider the right to revolution as a standard to describe the Vietnamese situation.

Standards: Economic, Social, and Cultural Rights

In the eighteenth and nineteenth centuries, constitutions and legislative acts mostly recognized civil and political rights. Only in the twentieth century have economic and social rights attracted the attention of states. In 1948, the Universal Declaration elaborated an extended list of economic, social, and cultural rights; since that time many states have recognized them as part of their constitutional frameworks. These rights are more fully detailed in the CESCRC.

The main difference between civil and political rights on one hand, and economic, social, and cultural rights on the other, is that the latter are *goals to be achieved gradually or progressively by the states in accordance with their resources* (Article 22, UD; Article 2, par. 1, CESCRC). In other words, if there is a general commitment to achieve economic, social, and cultural rights, then the goals can be said to have been met although the results from the policies adopted may vary from state to state precisely because no detailed international standard is specified. One point must be clarified, however: The developing countries hedge on economic and social rights because of their limited national resources, but they do *not* state that, since priority is given to these economic and social rights, there must be limitations on civil and political rights. As Henkin put it:

Perhaps in some circumstances, economic development requires some control, even some “regimentation” for some brief time. But how many hungry are fed, how much industry built, by massacre, torture, and detention, by unfair trials and other injustices, by abuse of minorities, by denials of freedom of conscience, by suppression of political association and expression? At the behest of the Third World, the U.N. General Assembly has declared itself profoundly convinced that all human rights and fundamental freedoms are interrelated and indivisible. To the Third World, this may imply that civil and

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political rights cannot flourish where economic-social rights lag. But it implies equally the reverse, that economic-social rights can be achieved only if basic political-civil rights are respected.¹³

Economic Rights

Adequate Standard of Living. The first group of economic rights can be summarized as rights to an adequate standard of living. Article 25, par. 1, of the Universal Declaration states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The basic economic rights to food, clothing, and housing are elaborated in Article 11 of the CESCR, which requires states to take appropriate steps to ensure the realization of these rights and—insofar as the fundamental right to be free from hunger is concerned—to enact measures and programs, which are needed to

improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

Thus, food distribution and other relief measures, tax or rent reduction in times of harvest loss, agricultural credit, land reform and redistribution, mechanization of agriculture, land development, and the like are all relevant to the promotion of the right to be free from hunger.

One basic means to sustain an adequate standard of living is the right of ownership of property because property is a means of production and livelihood. As a result of the controversy over nationalization, the international covenants do not provide for the protection of property rights. But Article 17 of the Universal Declaration states: “1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.” Most countries have recognized the right of ownership of private property (even the People’s Republic of China recognizes private ownership of income, house, and other means of livelihood) and have stipulated that property can only be taken away for public use with appropriate compensation.

An adequate standard of living also includes adequate medical care. Article 12 of the CESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health through

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steps taken by the state in the areas of medical service for the sick, prevention and control of diseases, reduction of infant mortality, promotion of healthy development of the child, and improvement of environmental and industrial hygiene.

Article 25, par. 1, of the Universal Declaration considers as part of an adequate standard of living the right of everyone to social services and security “in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond his control.” This right is reiterated in Article 9 of the CESCRC.

Work. The second group of economic rights are the rights relating to work. The most fundamental among this group is the right to work, which Article 6 of the CESCRC defines as “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” This right to free choice of work presupposes the prohibition of forced labor (as provided in Article 8, par. 3, of the CCPR) and the elimination of any discrimination in employment (non-discrimination in general as provided in Article 2 of the CESCRC). The right of everyone to work and protection against unemployment, which is also recognized in the Universal Declaration (Article 23) and is stressed again in the CERD (Article 5e), requires the states to take appropriate steps with a view toward its full realization: technical and vocational guidance and training programs to achieve economic, social, and cultural development and to ensure full and productive employment (Article 6, par. 2, CESCRC).

Supplementing the right to work is the right to just and favorable conditions of work, which includes, according to Article 7 of the CCPR and Articles 23 and 24 of the Universal Declaration:

- Fair wages and equal remuneration for work of equal value without distinction of any kind and a decent living.
- Safe and healthy working conditions.
- Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.
- Rest, leisure, and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Social Rights

There are two groups of social rights: family rights and educational rights.

The rights relating to protection of the family include the following (Article 10, CESCRC; Articles 23 and 24, CCPR; Articles 16 and 25, UD):

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- The right of men and women of full age to marry and found a family (which is protected by the state as the natural and fundamental unit of society) and to enter such marriage with free and full consent.
- The guarantee of equality of spouses during marriage and at its dissolution.
- The special protection accorded to mothers during a reasonable period before and after childbirth (paid leave or leave with adequate social benefits).
- The special protection and assistance accorded to children and young persons without discrimination as to parentage or other conditions. They should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development is punishable by law. Age limits should be set below which the paid employment of child labor is prohibited and punishable by law.

Educational rights can be classified into two groups: the right to education as a free or generally available benefit, and the freedom of choice of educational content and institution. The states recognize (Article 26, UD; Article 13, CESCR) that, with a view to achieving the realization of the right to education:

1. Primary education shall be compulsory and available free to all.
2. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by appropriate means, and in particular by the progressive introduction of free education.
3. Higher education shall be made equally accessible to all, on the basis of capacity, by appropriate means.
4. Fundamental education shall be encouraged for those persons who have not received the whole period of their primary education.

The freedom of choice of educational institutions and content is provided in the Universal Declaration (Article 26, par. 3) and reiterated in both the CESCR (Article 13, pars. 1, 3, 4) and the CCPR (Article 18, par. 4). Certain principles are to be respected, such as the full development of the human personality and the sense of its dignity; the respect of human rights; promotion of understanding, tolerance, and friendship among nations and all racial, ethnic, and religious groups; and the furtherance of peace. Certain minimum standards may be laid down by the states.

On the whole, however, the states undertake to have respect for the liberty of parents (and legal guardians) to choose for their children schools other than those established by the public authorities that conform to such

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minimum standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions. Not only so, individuals and organizations have the liberty to establish and direct educational institutions, provided they observe these principles and certain minimum standards laid down by the state. This means there should be pluralism in education and the state should not monopolize the control and direction of educational institutions.

Cultural Rights

The cultural rights of minorities have been mentioned in the discussion on equality.

Generally speaking, cultural rights include the following three categories (Article 15, CESC; Article 27, UD):

- The right of everyone to enjoy the benefits of scientific progress and the participation in cultural life.
- Freedom of scientific research and creative activity.
- The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is author.

Standards: Securing Government Compliance

If a state promulgates these international standards of human rights, there could be a presumption that the state has tried to meet its obligation of commitment. Under a standard of evaluation that has been adopted by the U.S. State Department and that we can also apply, if a government makes a commitment to respect human rights while there are some violations by subordinate personnel, that government's records may still be positive—provided that not too many violations are tolerated in practice, because sanctions are provided for the violations. In any case, accurate and full information on the true extent of human rights violations in any society, even in a democracy, can never be obtained because those who have been trampled upon may have fallen into the great silence and those who have violated these rights would never reveal them unless unmasked. Thus, in order to arrive at any judgment on the degree of a government's compliance with human rights norms, the crucial test is the government's positive measures for giving effects to the rights and the sanctions on violations of them.

Sanctions on Violation of Rights. Because economic, social, and cultural rights are goals to be achieved gradually in accordance with each state's resources and are not really norms that are enforceable in a court of law, the sanctions on

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violations of rights apply mainly to civil and political rights along with rights pertaining to the integrity of person and equality.

Article 2, par. 3, of the CCPR provides that each state undertakes:

- (a) to ensure that any person whose rights or freedoms... are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state and to develop the possibilities of judicial remedy;
- (c) to ensure that the competent authorities shall enforce such remedies when granted.

In the practice of various states, the competent administrative authorities may be the censorate, or procuracy (in communist countries), or the ombudsman (in Scandinavian countries). The legislative authorities in many countries exercise some oversight over the executive, including such powers as the legislative annulment of executive decrees (China's 1954 Constitution, for example).

Article 2, par. 3, of the CCPR mentioned above particularly emphasizes judicial remedy. The drafters of this covenant expressed a strong sentiment in favor of judicial remedy as the most effective means of protecting human rights within a national system. As independent judicial systems do not exist in many countries, there must be means of administrative and legislative recourse as well. The legal commitment of judicial remedy, however, has been accepted by states from all areas of the world, for it is mentioned not only in Article 2, par. 3, of the CCPR but also in Article 8 of the Universal Declaration: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The fact that Article 8 refers to a "constitution" raises the possibility that judicial remedy as understood in the Universal Declaration may go beyond the protection of human rights against illegal acts by the executive to the level of judicial review of unconstitutional acts by legislative and other political bodies.

The important condition for the ability of these administrative, legislative, and judicial authorities to protect human rights is their objectivity and independent status, free from subordination to political power: If there is political subordination, the sanctioning and protective role of these authorities in the area of human rights is put in doubt.

Whether the remedy comes through legislative, administrative, or judicial authorities, the next question is: Is the victim of human rights violations entitled to compensation? Article 2, par. 3c, of the CCPR requires the authorities to "enforce remedies when granted." The remedies should

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mean more than an injunctive relief or an order to cease and desist from violation because in some particular violations compensation is mentioned. For example, in case of unlawful arrest and detention, the victim shall have an enforceable right to compensation (Art. 9, par. 5, CCPR); in case of miscarriage of justice, the person who has suffered punishment shall be compensated according to law when the conviction is reversed because of newly discovered facts (Article 14, par. 6, CCPR).

The Government's Positive Measures for Giving Effects to Rights. Even in the area of the integrity of the person and civil and political rights, the international standard requires a state to take more positive measures than ex post facto remedies for violation of rights. According to Article 2, par. 2, of the CCPR, "where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The other measures are understood to be educational and information activities.

In the area of equality, the state will assure protection against racial discrimination. Article 6 of CERD provides that:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms... as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

It is in the area of economic, social, and cultural rights that the positive role of the government's measures takes on a particular importance. These rights are not enforceable in a court of law and, although the language of rights is used in the preambles of both covenants ("rights recognized in the present Covenant"; "obligations of state"), the states undertake only to achieve these rights gradually. Indeed, Article 2 of the CESCRC qualifies the obligation of states in this way: "Each state... undertakes to take steps, individually and through international assistance and cooperation, *to the maximum of its available resources*, with a view to *achieving progressively* [emphasis added] the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Article 22 of the Universal Declaration also states that "Everyone ... is entitled to realization, through national effort and international cooperation and *in accordance with the organization and resources of each State* [emphasis added], of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Consequently, individuals can only hope that the government will carry out the

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positive measures to promote their economic, social, and cultural rights but cannot expect judicial or administrative enforcement of these rights.

Limitations and Derogations of Rights. The protection of human rights by sanctioning violations and their promotion through positive measures are two ways to secure government's compliance with the international human rights norms. The government, however, is not always compelled to respect human rights—because of derogations and limitations mentioned in the international documents. Derogations and limitations are different in character and scope and in the circumstances in which they may be imposed. Derogations “in time of public emergency” (Article 4, par. 1, CCPR) are permitted only temporarily and to the extent strictly required by the exigencies of the situation; limitations can be permanent. Certain rights are not subject to derogations—for example, freedom of thought, conscience, and religion (Article 4, CCPR), and yet they may be subject to limitations in their expression (Article 18, CCPR). According to Henkin, “limitations and derogations permitted by the Conventions are largely those that are inevitable and that modify even the most libertarian national constitutions and law; they are not intrinsically destructive of human rights.”¹⁴

Derogations. The possibility of derogation is spelled out in Article 4 of the CCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states . . . may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

Thus, a government's exercise of the option of derogation under Article 4 is strictly limited. First, derogation from human rights is permitted only “in time of public emergency which threatens the life of the nation” and must be only “to the extent strictly required by the exigencies of the situation” and be nondiscriminatory. Second, there can be no derogation whatsoever from the rights mentioned in Articles 6 (no arbitrary deprivation of life), 7 (freedom from torture), 8 (no slavery or forced labor), 11 (no imprisonment for civil debt), 15 (no ex post facto law), 16 (everyone to be treated as a person before the law), and 18 (freedom of thought, conscience, and religion). Thus, even in a proclaimed emergency and even if measures derogating from these rights might be deemed strictly required by the exigencies of the situation, such derogations from those rights are not

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permissible. Note, however, that limitations to the nonderogable rights may be permitted by law, as will be discussed later.

Another safeguard against the government's option of derogating from human rights is contained in Article 5, par. 1, of the CCPR, which provides that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." This article ensures that the government does not use the provisions on derogations and limitations to destroy these rights altogether and impose unwarranted limitations on their exercise. In other words, one may inquire about a government's "aim": If the aim or motive is to destroy human rights, then the derogation (or limitation) would be impermissible even if it is otherwise in conformity with Article 4—for example, when a national emergency is created by a group that seizes power with the purpose of destroying human rights.

Limitations. Article 29, par. 2, of the Universal Declaration states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." This is the only international instrument that contains a single general clause pertaining to limitations on rights and freedoms.

On the other hand, the CESCR contains two articles on limitations, one general and one specific. Article 4 is a general limitation clause that governs the covenant as a whole: "In the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

Article 8, par. 1, however, which specifies the right to form or join trade unions and the right of trade unions to function freely, includes its own limitation clause in narrow and specific terms ("necessary in the interests of national security or public order or for the protection of the rights and freedoms of others").

There is no general limitation clause in the CCPR and other human rights conventions. The change from the general, single clause to specific limitation clauses for various rights and freedoms seems to aim at adapting the limitation clause to each particular right in order to make it more narrow and pointed, therefore safeguarding against the expansion of the state's power of limitation.

In describing the various reasons for limitations of rights, however, it is striking that the limitation clauses of the CCPR use almost the same terms. The

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reasons for limiting rights are: national security (Articles 12, par. 3, 14, par. 1, 19, par. 3, 21, 22, par. 2), public safety (Articles 18, par. 3, 21, 22, par. 2), public order (sometimes supplemented by “*ordre public*” in parentheses: Articles 12, par. 3, 14, par. 1, 18, par. 3, 19, par. 3, 21, and 22, par. 2), public health (12, par. 3, 18, par. 3, 19, par. 3, 21, 22, par. 2), public morals (12, par. 3, 14, par. 1, 18, par. 3, 19, par. 3, 21, 22, par. 2), the rights and freedoms of others (12, par. 3, 18, par. 3, 19, par. 3, 21, 22, par. 2). The procedural condition for imposing limitations is that they must be “provided by law,” “prescribed by law,” or “in conformity with the law.”

The meanings of these terms describing the reasons for limiting human rights are understood differently in different countries, at different times, and in different circumstances. Therefore, even if we have clear criteria on what types of grounds may justify limitations of human rights, there can never be a complete agreement on the final evaluation of a government’s human rights performance, because the actual reason a government uses for limiting human rights may not be deemed by others as legitimately belonging to one of the foregoing grounds.

National security is a permissible ground for limiting the freedom of movement and residence (Article 12, par. 3); for excluding the press and the public from a trial (Article 14, par. 1); for restricting freedom of expression (Article 19, par. 3), the right of peaceful assembly (Article 21), and the right of freedom of association with others, including the right to join and form trade unions (Article 22). Under Article 18, par. 3, however, national security is not a reason for limiting the “freedom to manifest one’s religion,” which may be subject to limitations only if the limitations are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others. Also, the word “national” means human rights may be limited only in the interest of the whole nation’s security, not in the sole interest of a government or ruling group—for example, riots or revolutionary movements that do not threaten the life of the whole nation do not constitute a risk to national security. As “national security” is used concurrently with public “safety” or “order” in these restrictive clauses, one may deduce that “national security” means the protection of territorial integrity and political and economic independence.

Public safety is not to be identified with public order (see later) but means the protection of the safety of persons, their bodily integrity or health. This is grounds for limiting the expression of thought, conscience, and religion (Article 18, par. 3), the right of peaceful assembly (Article 21), and the right of freedom of association (Article 22, par. 2)—especially by means of police rules and security regulations.

Public order is an important concept found in all the limitation clauses in the CCPR. In the text of this covenant, the term “public order” is followed in parentheses by the French word *ordre public* in the cases of Articles 12, par. 3,

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14, par. 1, 19, par. 3, 21, and 22, par. 2, but only the term “order” without the addition of the French term is used in Article 18, par. 3 (on limitations placed on the expression of freedom of thought, conscience, and religion). Public order is an ambiguous term, having different meanings in different legal systems. The addition in the English text of the French term *ordre public* indicates the importance of the French concept and French jurisprudence in determining the meaning and scope of this limitation. *Ordre public* as used in French private law entails the meaning of the term “public policy” in Anglo-American law. But, more relevant to our discussion of human rights, *ordre public* as used in French public law refers to the broad “police power” of the state. The purpose of *ordre public* is the maintenance of good order, safety, public health (*le bon ordre, la sûreté, la salubrité publique*). Later, the concept is expanded to include public morals, an economic *ordre public*, and a political *ordre public* (respect for the constitutional political system, the existence and functioning of the state organization). The police power that maintains these elements must be exercised in a legal framework that includes fundamental human rights (*libertés publiques*).¹⁵ In other words, the elements of *ordre public* may itself demand respect for human rights as part of the civilized order. The result is a concept of public order that is not precise and cannot be reduced to a rigid formula but must remain a function of time, place, and circumstances.

Public health is one of the grounds for restricting the rights and freedoms guaranteed. It is mentioned in all but one of the limitation clauses of the CCPR (Article 14, par. 1, on exclusion of the press and public from trial does not mention this ground for exception). This ground for limitation of rights does not raise any controversy.

Public morals is another term used in all limitation clauses of the CCPR. The moral ground for excluding the press and public from a trial may be even private, because Article 14, par. 1, omits the word “public.” Since it is impossible to adopt a uniform moral code for all countries, appreciation of what constitutes a violation of public morals must be left to the state. Also, these moral principles are guidelines accepted by the majority of the citizens and are not always enforceable under law.

Finally, what is *the procedural condition for limitations*? Restrictions on rights must be “provided by law” or “prescribed by law,” “in conformity with law” or “in accordance with law.” The first two terms mean that any restrictions on recognized rights and freedoms must be imposed by the legislature in duly enacted law. The third and fourth terms mean that if the measures of restrictions are taken by the executive authority, such as the police or local administration, they must not be arbitrary restrictions but must be authorized by general legislation. In every case, the purpose is to avoid arbitrary restrictions by requiring that limitations be established by general rules, that is, rules that are subject-general and occasion-general (not aiming at any particular person or

event). Also in the spirit of Article 5, par. 1, of the CCPR, which prohibits any act aiming at destroying any of the rights and freedoms recognized, the law restricting these rights and freedoms must be just and consistent with all the articles on human rights in the U.N. Charter, the Universal Declaration, and the international covenants.

The derogations and limitations clauses of the international documents use the words “strictly required” or “necessary.” This indicates that derogations and limitations of rights are permissible only when they are inevitable. These exceptions to rights must be interpreted restrictively, and such strict interpretation means that a state is limited in its authority and that for each invasion of individual right or freedom a legal justification is required.

Context: The Political-Legal System of Traditional Vietnam

Of course, traditional Vietnam was not bound to interpret its law in a manner consistent with today’s international human rights standards. But as we have decided that it is sound, legitimate, and practical to use these contemporary international standards as research guidelines for measurement of traditional Vietnam’s human rights performance, then the questions to be answered are: What was the extent of the commitment to human rights in traditional Vietnam? Did traditional Vietnam represent another case of “Oriental despotism” or did it measure up, to a certain extent, to modern human right standards?

Before we can subject traditional Vietnam to a rigorous scrutiny under international standards, we should briefly survey old Vietnam’s political-legal system. Because the international standards are essentially a legal framework, and because it is not feasible to summarize in a few words the total intellectual, social, economic, political, and legal history of Vietnam, we would describe briefly the political-legal system of old Vietnam as the context in which its human rights practices evolved.¹⁶

Traditional Vietnam denotes the period from the beginning of the country’s recorded history to the end of the nineteenth century, when the French came. For the greater part of this period, especially beginning in the fifteenth century, the Vietnamese state was modeled on the Confucian Chinese state, with an emperor holding supreme political power and a mandarin bureaucracy administering the state with a system of law very much similar to traditional Chinese law. The resilient Vietnamese people, however, while absorbing Chinese culture, never gave up their indigenous ways of thinking and doing things.

Recent archaeological excavations, especially relating to Đông Sơn Bronze Culture of North Vietnam that dates to 2000 B.C., provide general validation for the traditional Vietnamese claim to a history of four thousand

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years' duration, beginning with the country of Văn Lang and the legendary Hồng Bàng Dynasty (2879 B.C.–258 B.C.). This period was followed by the historical kingdom of Âu Lạc (257–208 B.C.). Âu Lạc was then absorbed into Nam Việt, a secessionist state known to Chinese as Nan Yüeh (207–111 B.C.), which was established by the Ch'in general Triệu Đà (Ch'ao T'o) and which included not only North Vietnam but also what is now Kwangtung and part of Kwang-hsi provinces. In 113 B.C., Triệu Đà's successor agreed to become an internal vassal of Han China, to abandon Viet laws, and to adopt Han laws; then, in 111 B.C., Nam Việt was fully incorporated into the Han Empire. In A.D. 40, a revolt led by the two sisters Trưng broke out in Han China's Giao Chỉ (Chiao-chih) Province, that is, the former Nam Việt. General Ma Yüan, who suppressed the revolt, memorialized the Han Emperor that Viet laws, compared to Han laws, were different in more than ten items.

From these pieces of evidence we can conclude that: (1) in Nam Việt the official legal system adopted was Ch'in law, and then, after 111 B.C., Han law; (2) but there were indications that in the former Âu Lạc territory taken over by Nam Việt the ancient indigenous laws continued in force. Triệu Đà ruled indirectly from his capital near Canton, while the old local nobility of Âu Lạc still held the power to rule the Lạc Việt people. In all probability, then, the Lạc Việt people still lived with their old customs and laws dating back to the period of the independent Âu Lạc kingdom. There was evidence that these laws and customs (on marriage, for example) even survived centuries after Vietnam's absorption into Han China. During the brief revolt of the Trưng sisters, the old indigenous laws, always alive among the Viet people, were officially revived and implemented. No details of these laws survive, however.

During the ten centuries of Chinese domination (111 B.C.–A.D. 939), China intensified its efforts at cultural assimilation of the Việt people after the suppression of the Trưng revolt. The position of hereditary rulers was abolished in districts and Chinese officials were appointed in their place. T'ang law was in force during the last three centuries of Chinese domination and retained its influence on Vietnamese law even down through the fifteenth-century Lê Code. Vietnamese resistance to assimilation remained strong, however. The Chinese adopted, in addition, the policy of carrying out the cultural assimilation of the masses while at the same time blocking advanced learning from Chinese books that might provide a channel for upward social mobility. This practice resulted indirectly in the importance of Buddhist monks, who were the most learned in Chinese (to study the Script) and the influence of Buddhism in Vietnam from very early times.

After Vietnam regained its independence from China, three dynasties—the Ngô (939–967), the Đinh (968–980), and the Former Lê (980–1009)—

followed in rapid succession. Because the dynastic rulers were military men busy consolidating their shaky power vis-à-vis the Chinese and internal rebels, however, none of the dynasties had the time and the technical expertise to produce law codes. We only know that they used a number of severe penalties.

Beginning with the Lý Dynasty (1010–1225), the monarchy was institutionalized and central power in Vietnam became stabilized, permitting successive rulers to ascend the throne at very young ages and govern for a long time without being overthrown by military officers, as in the previous dynasties. The Lý emperors ruled through their relatively well-organized (compared with the previous dynasties) military and civil bureaucracies. Political stability and administrative consolidation brought the opportunity of promulgating law codes. A *Book of Punishments (Hình Thư)* was promulgated in 1042 after Emperor Lý Thái Tông ordered that the laws be revised, written into articles, and classified into categories to make them more suitable for the time and to prevent the judges from sticking too much to the letter of the law to the extent of being harsh and condemning innocent people. Unfortunately, this book is no longer extant. It is only possible to reconstruct Lý laws on the basis of references in the historical records to relevant events, edicts, regulations, and policies under the Lý. In the remnants of Lý laws, we see the influence of Chinese law (in such areas as the five-penalty system, the ten heinous crimes, redemption of penalties, amnesty) and also indigenous Vietnamese legal concepts and practices (for example, treatment of prisoners, appeal, punitive damages, the principle of *res judicata* or “a litigated case is considered as truth”). Moreover, the trends in thought that influenced Lý laws were the “three religions” of Confucianism, Taoism, and Buddhism, but Buddhism was the most influential, shaping as it did legal philosophy and practice, especially in criminal law: The Lý emperors showed an extremely humanitarian policy in the administration of justice—to the extent that Vietnamese scholars and historians of the later Lê Dynasty, more Confucian, criticized the Lý laws as being influenced by Buddhism and overly lenient.

The Trần Dynasty (1225–1400), in an effort to maintain cohesion within the clan, gave imperial clan members a more important role in ruling the country than their counterparts in the Lý Dynasty. Clan members were given a sense of partnership in the governance of the country: they occupied important civilian and military posts, were given territories to tax and levy corvée on, and princes had separate military forces. But professional bureaucrats recruited through civil service examinations (more developed under the Trần than the Lý) filled the appointive positions down to the village level. Among the “three religions,” Buddhism remained influential; most of the emperors were devout Buddhists and went into temples upon retirement as “supreme emperors.” (This retired “supreme emperor” still held the reins of power until the time

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when the new emperor's apprenticeship was concluded, thus adding a stabilizing influence to the system.)

At least two codes were promulgated during the Trần Dynasty: *Quốc Triều Thông Chế* (General Statutes of the Dynasty) in 1230 and *Hình Thư* (Book of Punishments) in 1341. They do not survive, however, and we can only reconstruct the lost Trần laws on the basis of fragmentary references in the historical record. As under the Lý, we also detect in these laws both a Chinese influence and indigenous Vietnamese features (in the rules and practices relating to the political and social organization of the country as well in criminal and civil law). One aspect that distinguished Trần from Lý laws, however, was the Trần's severe criminal penalties that were applied very consistently, in conformity with the principle of legality, even against imperial clan members.

During the Hồ Dynasty (1400–1407) and China's Ming domination period (1407–1427), Confucianism gained considerable headway by the introduction of neo-Confucian social practices. But we find only fragments of the laws from the Hồ Dynasty in the historical records. Probably the main reason for the loss of all legal documents pertaining to the legal systems prior to the Hồ was the Ming general Chang Fu's policy of confiscating all books and bringing them to China.

A detailed study of the legal norms and practices relating to human rights in traditional Vietnam must thus rely mainly on the documents of the later dynasties of the Lê (1428–1788) and the Nguyễn (1802–1945). We can only make occasional references to the laws of the Lý and the Trần—let alone the earliest dynasties—when we can find in the historical records the relevant edicts, regulations, policies, and facts.¹⁷

The Lê Dynasty's rule of nearly 360 years (1428–1788, with several years' disruption after 1527) may be divided into two main periods: the unified Lê government of one hundred years (1428–1527) and the North-South division (1533–1788). During the first period, the Lê Emperor was the true supreme ruler. Imperial power was consolidated by depriving the nobility of their large landed estates and the private armies that had thrived under the Trần and building up an elaborate bureaucratic machinery, organized broadly along Ming lines and tightly controlled by the sovereign, which extended to the village level the uniform system of population control, tax, and corvée levies. However, there were political conflicts, often bloody, within the imperial household and the suspicious Lê emperors were not reluctant to kill high officials. Competition was also keen among the rival groups of officials: Power first resided with the generals of the liberation war and only gradually did the Confucian bureaucrats gain ascendancy. Buddhism with its compassionate philosophy lost influence in the political process as Sung neo-Confucianism gradually emerged as the predominant ideology.

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The central political power of the Lê began to weaken in the early sixteenth century and remained weak to the dynasty's end in 1788, not only because of the North-South division of the country but also because the Lê Emperor's power was curtailed in the North by the Trịnh family, who occupied a position similar to that of the shogunate in Japan. To the south, the Nguyễn family, true to their claim that they resisted only the Trịnh family and not the Lê emperors, apparently continued to apply the Lê system of law.

There are still extant a few primary source materials on the Lê system of law. The most important is *Quốc Triều Hình Luật* (Penal Code of the Lê Dynasty). This basic code was supplemented by a number of other documents on substantive laws, such as *Thiên Nam Dư Hạ Tập* (Collection of the Leisures of the South Heaven), an encyclopedic work on literature, political events, institutions, laws, and regulations; *Quốc Triều Thư Khế* (Legal Forms in Use under the Lê); *Hồng Đức Thiện Chính Thư* (Book of Good Government of the Hồng Đức Period), consisting of laws and decrees and summaries of cases; *Quốc Triều Chiếu Lệnh Thiện Chính* (The Dynasty's Edicts and Decrees Promulgated for Good Government); as well as procedural laws, such as *Quốc Triều Khâm Tụng Điều Lệ* (Procedural Code of the Lê Dynasty), consisting of important procedural rules classified in thirty-one chapters.

The Nguyễn lords in the South and the Lê-Trịnh court in the North were overthrown by the Nguyễn Tây Sơn, a short dynasty (1788–1802). No legal document from this dynasty has survived, however.

In 1802, Nguyễn Ánh, the nephew of the last Nguyễn Lord killed by Tây Sơn, recovered power after long and arduous years of struggle; as the Gia Long Emperor, he started the Nguyễn Dynasty (1802–1945). Although this last dynasty of traditional Vietnam only ended officially with the abdication of the Bảo Đại Emperor in 1945, it had already, after 1874, completely lost power in South Vietnam (which became a French colony that year) and ruled only nominally in North and Central Vietnam after 1884, when the latter two regions became French protectorates.

In 1811, the Gia Long Emperor appointed a commission that drafted the Nguyễn Dynasty code, the *Hoàng Việt Luật Lệ* (Laws and Decrees of Imperial Vietnam), commonly also known as the Gia Long Code. It incorporated 398 of the Ch'ing Code's 436 articles and also the thirty articles on analogy at the end of the Ch'ing Code. Almost all the Nguyễn Code articles were identical to those in the Ch'ing Code; only a few differed in minor details. Gia Long also imitated China on the organization of the court, a tendency pushed even much further by his successor, Minh Mạng. Unlike the Lê Code, the Gia Long Code did not include detailed provisions on a number of private interests, such as inheritance or matrimonial estate. Later the Nguyễn emperors promulgated a number of edicts to supplement the code, but the changes brought about by these edicts were minimal.

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On the basis of this brief survey of the political-legal systems of traditional Vietnam, we may point out the following essential features that we consider relevant to—because they are a context for—the state of human rights in traditional Vietnam. These features can be classified, as mentioned earlier, into two broad categories: Chinese influence and Vietnamese peculiarities.

Chinese Influence

The major traits of the traditional political-legal systems of China and Vietnam can be subsumed under three headings.

Paramount Position of the Sovereign. Numerous norms, both Confucian moral principles and legal provisions, were concerned with the consolidation of the power, prestige, and security of the emperor. The heaviest penalties were reserved for those guilty of high treason (attempt on the emperor's life), grave insubordination (destruction of the imperial mausoleums and palaces), and treason (following the enemy and betraying one's country). Additionally, the key procedural law guarantees were modified or dropped in such cases of political offenses, with a tremendous impact on the human rights issue.

Influence of the Legalist School of Chinese Thought. This influence was prevalent in Chinese law and administration from the Han onward, leading to the overwhelmingly penal orientation of the law and the principle of group responsibility (criminal liability imposed on household members for crimes, especially serious ones, committed by one of them). This had a bearing on the human rights of each individual. Another principle adopted by the legalist school and known in Western law as *nulla poena sine lege* (no penalty without a law), combined with the concern “to make the punishment fit the offense,” resulted in the proliferation of too many specific decrees on subcategories of specific offenses, thus making the law too complicated for ordinary citizens to understand.

Confucianization of the Law. Infractions of the Confucian moral codes were treated as criminal violations, and there was an element of unpredictability in the number of norms an individual had to abide by. Further, the particularistic considerations in Confucian ethics resulted in unequal treatment under the law of different categories of persons, depending on their class or family status. Privileges were granted imperial clan members or officials, whereas some social groups, such as serfs and entertainers, were legally disadvantaged.

Vietnamese Peculiarities

Several distinctive features of Vietnamese laws, especially those under the Lê Dynasty, provided the context within which human rights norms were implemented in traditional Vietnam. We classify them into three areas.

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Impact of Buddhist thought as a humanizing influence in law. As stated earlier, the humanitarian concern of Buddhism heavily influenced the laws of at least the two dynasties of the Lý and the Trần. Although under the Lê and the Nguyễn the ascendancy of Confucianism led to restrictive regulations on Buddhism, Taoism, and the popular cults, the humanitarianism and tolerant philosophy of Buddhism had contributed to a high degree of freedom of thought and religion in traditional Vietnam. On the other hand, religious persecution—especially of the Catholics in the nineteenth century—can be traced to the emperors' and their Confucianist advisers' intolerance of dissent from Confucian norms.

Public law's role in regulating the conduct of officials. In traditional Vietnam, especially in Lê Dynasty laws, we find detailed attention paid to the possibility of misconduct and oppression by officials and, by implication, a deep concern for the protection of ordinary citizens against government violation of human rights.

The Lê Code, for example, contained a series of articles, not existing in the Chinese codes, that imposed a strict standard for, and restrictions on, the behavior of officials and other members of the ruling class. Even Vietnamese Marxist writers, while considering these measures as designed primarily to preserve the class of commoners as the tax and manpower base for the ruling monarch, have been obliged to recognize that these very measures produced indirect beneficial effects for commoners.

The Lê Code differed from its traditional Chinese counterparts in a number of unique provisions on criminal law and criminal procedure that could be considered functional equivalents of modern legal concepts and penalties. There was, for example, less emphasis on corporal punishment and more on monetary and moral sanctions (fine and demotion); more latitude was given to the judge to mete out appropriate sentences for each individual case; a distinction was made in the judicial structure between the role of the trial judge and the prosecutor, thus guaranteeing to a certain degree the checks and balances between the trial and prosecution functions; there were meticulous procedural rules on arrests, summons, detention, investigation, legal aid, presentation of evidence and testimony of witnesses, trial, judgment, and execution of sentences—all with the aim of attaining fairness for the accused.

Private law's role in promoting the individual's interest. In contrast to the traditional Chinese state, the traditional Vietnamese state, especially under the Lê, was keenly interested in the regulation and protection of private interests, whether in the area of contracts, torts, property, inheritance, or equal rights between men and women. Examples of unique Vietnamese private law regulations abound. To cite a few: To promote fairness for all individuals, the interest of the economically weak was protected by imposing a maximum interest rate in loan contracts; an individual's moral right to reputation was upheld by the

provision on reparation for moral damage; to enhance the citizen's livelihood as well as equality between men and women, Vietnamese law paid more attention than Chinese law to the issues of land ownership rights, and unique Vietnamese legal provisions protected the equal property rights of men and women, in inheritance as well as in matrimonial estate.

Methodology and Purposes of This Study

We will discuss traditional Vietnam's performance in the various categories of human rights with the documentary evidence we have on the dynasties ruling the country during the long period of independence prior to contact with the West through French colonization at the end of the nineteenth century.

Methodology

In measuring the human rights performance of the Vietnamese dynasties against present-day international human rights standards, we intend to stick point by point to a rigorous analytical program derived from the international law instruments and set forth in this chapter.

At the outset, we should also make clear, as parameters for subsequent discussion, our approach to and interpretation of the various types of documentary evidence. Our legal-historical study will rely heavily and first of all on statutory laws, especially the dynastic law codes, and then—when available—on the historical facts, as evidence of the dynasties' commitment or lack of commitment to human rights values. The historical facts will be adduced to support the actual scope of application of, or resistance to, these statutory laws.

On these statutory laws, we have a two-pronged hypothesis that will be confirmed in Chapter 5 after we have provided a total picture of the human rights performance of traditional Vietnam:

1. Statutory laws inimical to human rights (for example, many edicts persecuting the Christians) or contrary to popular customs (for example, on marriage) were mostly not enforced or were watered down in practice. The Vietnamese dynastic state was a relatively weak polity without the ability to reach deeply into all spheres of life because it did not have at its disposal mass communications means and a large police force or prison system.

2. On the other hand, as many laws protecting legal rights were legally enforceable (for example, the guarantees of the integrity of the person in the legal process; also, economic and social rights) and, moreover, any violation by officials or courts of law would be criminally punished, these laws were, in all probability, respected in practice. Officials had no choice but to adhere to the statutory laws in order to stay clear of the statutory sanctions. At the lowest level of government—the district—officials were required to

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have at their residence two volumes of the laws of the country and a compendium of edicts, decrees, and orders.¹⁸ This was indicative of the extent to which statutory laws were operative in daily life.

Scholarly objectivity, however, does not permit the researcher to flinch from historical events and controversies in traditional Vietnam that might seem to threaten his conclusions. Therefore, he never takes statutes at face value but tries to substantiate his findings, whenever possible, with the recorded observations of eyewitnesses, including Europeans in Vietnam at the time.

Purposes

We may say, hopefully without prejudicing the issue at the outset, that we have been surprised during our research to discover that our Vietnamese ancestors approximated present-day international human rights standards. The knowledge of this human rights tradition of old Vietnam will permit the Western world to appreciate our ancient humane civilization and to help all of us to evaluate whether contemporary regimes ruling Vietnam during the last hundred years—whether French colonial or Vietnamese—have abandoned or have preserved our nation's respectable tradition of human rights.

In carrying out this research, we have sought to attain the following two scholarly purposes.

1. *A legal, political, economic, social and cultural history of traditional Vietnam.* The study is primarily a legal history of traditional Vietnam. But it goes beyond the realm of law and becomes a treatise on the history of Vietnam from the standpoint of the social sciences: political science, economics, sociology, and cultural anthropology. The study presents details on important aspects of life in traditional Vietnamese society and state that are rarely available in a general history book. It points out the interaction between law and politics (Introduction), the political facts of life in the discussion on the lack of executive-legislative separation of powers (Chapter 1), the overriding principle of state security exception to the guarantees of the integrity of the person (Chapter 1), and the relatively restricted political liberties (Chapter 3). It points out the economic and social rights (minimum standard of living, such as freedom from hunger, medical care, and property ownership) that were, surprisingly, enforceable even in a country with a primarily agricultural economy, long before the Western concept of the welfare state (Chapter 4). It utilizes the perspective of sociology to analyze issues of social classes, family status, sex discrimination or equality, and racial discrimination or equal protection (Chapter 2). Finally, it discusses in detail such cultural topics as religious and belief systems, customary laws on the role of women, and the like (Chapters 3 and 2).

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2. *A traditional East Asian case study that vindicates the universality and timelessness of modern international human rights standards.* Using the framework and terminology of today's international human rights standards as instruments for data compilation about, and legal analysis of, a traditional East Asian polity, this study presents systematically organized arguments on human rights, substantiated by historical facts, thus contributing to the validation of the universality of today's international law of human rights—a research need for scholars as well as practitioners. It is hoped that comparable studies will be carried out on other traditional East Asian countries such as China, Japan, and Korea, or, for that matter, on any non-Western country.

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Could an individual in traditional Vietnam expect that life, liberty, and security be respected by the government, along with a corresponding commitment to conform to certain requirements when there was a necessity to infringe upon such rights?

We will not discuss deprivation of life, liberty, and security (physical and moral) *by another individual*, because if we have to provide details on homicide, illegal detention, assault and battery, libel and slander, and similar topics of criminal law, the discussion will be too long. For our purposes, we will focus more narrowly on the government's encroachment on—or, alternatively, its warranted deprivation of—life, liberty, and security. Because protection against private interference has been cited by the international documents, however, we shall also refer to private interference when discussing the crucial issue of compensation for violation of the above rights.¹

No Arbitrary Deprivation of Life?

It should be recalled that the universal and contemporary standard with which we judge a regime's commitment to respect for life is not the ban on all governmental right to put to death certain harmful social elements in society but only the requirement that there should be no arbitrary deprivation of life—that is, the death penalty, if it is imposed, should be imposed by a competent court only for serious crimes and in accordance with the law in force at the time of the commission of such crimes.

Under the Lê, for crimes punishable with the serious penalties of penal servitude with tattooing, exile, and death, the courts had to transmit the case to the emperor for final decision via the Criminal Review Agency (*Thẩm Hình Viện*), the role of which was to review the judgment of the lower courts to enforce “uniform norms of law.”² Thus the death penalty was reviewed carefully by an agency at the highest level of the judiciary before a final decision by the emperor.

In Sung China, the Criminal Review Agency (*Shen hsing yüan* or *Thẩm Hình Viện*) was one of three courts of review at the highest level of government, the other two being the Board of Punishments (*Hsing pu*, or *Hình bộ* in Sino-Vietnamese) and the Court of Revision (*ta li ssu*, or *Đại Lý Tự* in Sino-

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Vietnamese). Later, under the Sung, the Criminal Review Agency was absorbed into the Board of Punishments. Under the Ch'ing, the highest level of the judiciary were the Three High Courts: the Board of Punishments, the Court of Revision, and the Censorate, which, together, reviewed the capital penalty cases sent up by the lower courts before final approval by the emperor. We do not know for a certainty whether judicial organs other than the Criminal Review Agency were also involved in the elaborate review of the death penalty under the Lê as they were in China, but we know that the Court of Revision (*Đai Lý Tự*) also existed from 1466 on and was also involved in judicial review.³

Under the Nguyễn, which borrowed not only the Ch'ing Code nearly in toto⁴ but also the Ch'ing institutions at the central and local levels of government,⁵ the death penalty was reviewed through the same elaborate procedure as in Ch'ing China: The lower courts had to forward it to the Board of Punishments, then to the Three High Courts—consisting also of the Board, the Court of Revision, and the Censorate—for their review. If injustice were found, the case would be remanded to the lower courts for retrial. If execution were approved, the case still had to be submitted to the emperor three times for final decision and execution. Execution could be carried out only three days after the emperor had repeatedly approved three times the three memorials asking for execution; the delay was designed to give the condemned the largest chance for imperial sympathy and pardon or commutation. Any official who violated this rule was to be punished.⁶ The Minh Mạng Emperor described how he scrupulously reviewed the proposed death sentences sent to him:

Night and day I have worried about how to save the life of the people. I have compassion for the unenlightened masses who do not know how to save themselves and who violate the law, and I fear that the judges would not examine cases properly. Therefore, any time a verdict is sent to me, I calmly hold my breath to scrutinize it. If any doubt lingers on, I would not condemn the accused. Even if there are solid grounds for condemnation, I would also review the case five or six times to make sure there is no shred of doubt remaining.⁷

Elsewhere this emperor ordered that because a man's life was extremely precious, even after he had approved a death sentence the officials should memorialize for his further review of the case if the situation justified it.⁸

All the death penalties imposed on Catholic priests under the Minh Mạng, Thiệu Trị, and Tự Đức Emperors of the Nguyễn Dynasty, even during the most atrocious period of religious persecution, were sent by the provincial courts to the capital of Huế for final approval.⁹

In short, the death penalty under the Lê and Nguyễn had to be imposed by a competent court and then reviewed at the highest levels of the judicial system. And in so reviewing the cases, the highest courts' duty was to see to it that uniform norms of law were applied. One such norm was that the

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penalty—or for that matter, any penalty—could not be imposed unless it was stipulated in the law in force at the time of the commission of the crime because, as will be discussed later, the judge had to adduce and quote verbatim a provision of law specifically applicable to the facts of the case. The law also stipulated a procedure that gave the condemned a chance to obtain imperial pardon.

That Lê and Nguyễn law that required the taking of a person's life should always adhere strictly to these procedural steps was further illustrated by the punishment imposed on those whose job was to arrest a person punishable by death but who, by their own authority, killed that person, even if the latter was in flight. The only cause that would exempt the arresting officer from liability was resistance by the criminal.¹⁰

A court's wrongful imposition of the death penalty also gave rise to criminal liability on the part of the judge. This aspect of the issue will be discussed in Chapter 5 on enforcement of human rights.

There was an important exception to the procedural step just described for imposition of the death penalty in the Nguyễn Code: In the event military personnel at a frontier post plotted treason, the head of the post was authorized to arrest them and bring them before the competent higher authorities, who, after reviewing all the obvious evidence and securing the confession of the accused, might execute them immediately according to the law, but then “had to report to the emperor.” The official commentary states that treason in the frontier areas could gravely jeopardize public peace; if one had to wait for the emperor's approval of the sentence, the enemy would have already come to the traitors' assistance.¹¹ Philastre theorized that this was a delegation of imperial power to the authorities on the scene, but then he also saw in the expression “report to the emperor” a deliberately obscure term that could mean either “report to the emperor for clemency” or “report to the emperor for execution,” in which ambiguous case the local authorities would be in danger of violating the usual procedural requirement of prior approval of death sentences by the emperor.¹² We do not think the meaning of the expression is to require still prior imperial approval, as such a meaning would nullify the military emergency aspect of the law.

In a similar article on treason in military posts, the Lê provided that troops had to be dispatched by officers in the area concerned or in the neighboring territories, in accordance with the needs of the situation; if they did not dispatch troops, they would be punished as severely as for unauthorized dispatching of troops; after sending out the troops, however, they had to report to higher authorities immediately.¹³ Given the urgency of the situation and the rigorous obligation of the officers, we may assume that they were allowed to execute traitorous elements in the military posts immediately. Some other provisions of the Lê also seemed to permit immediate

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execution in the case of military necessity, such as the provision for decapitation of a soldier who resisted his commander's order while facing the enemy.¹⁴

Did these exceptions violate the current standard for imposing the death penalty? Article 4, par. 2, of the CCPR stipulates that even in a public emergency there may be no derogation from the right to life. But this ban on derogation from the right to life seems to apply generally to the imposition of the death penalty within the entire national territory of a country during a public emergency rather than to situations of military urgency on the frontiers. If this is the right reading of Article 4, par. 2, then the Lê and Nguyễn exceptions were no more threatening to the right to life, as presently understood, than the present-day provisions in various countries on the authority of military courts at the fronts to execute deserters immediately without appeal.

Both the Lê and Nguyễn dynasties also adhered to the universal present-day rule of not imposing the death penalty on a pregnant woman. Such a woman would not have to undergo her penalty until a hundred days after childbirth. Judicial officers who imposed such a penalty during a woman's pregnancy would be punished.¹⁵ The rationale for this policy was to permit the child to be born and nurtured for at least one hundred days, for, in official conception, "this is the apex of humanity."¹⁶ Traditional Vietnam did not, however, fix the age of juveniles at eighteen for the purpose of exempting them from the death penalty: A juvenile under ten years of age would benefit from the procedure of a special petition for clemency addressed to the emperor, who would ultimately make the decision on his case. Juveniles under seven years were exempted from the penalty, and in such a case even the petition to the emperor was not necessary.¹⁷

In summary, the Lê and the Nguyễn codes seemed to measure quite well up to the present-day standard of "no arbitrary deprivation of life." The only black spot marring their record in this area was the fact that they provided for more cases of death penalty than would be warranted today, in light of the modern standard of imposing the death penalty only for serious crimes. Granted that most of the death penalties imposed were for crimes that could threaten the security of the emperor (such as shooting arrows toward the imperial palace when the emperor was in residence or thrusting oneself into the imperial procession¹⁸), many other cases of death penalty would not be normally conceivable in a modern secular state: counterfeiting the seals or written orders of the emperor or imperial family members; fornicating with one's father's concubine or one's aunt;¹⁹ merely being a relative of a person guilty of high treason or grave insubordination (plotting to destroy imperial palaces and mausoleums);²⁰ adopting the Catholic faith.²¹ In this respect, with the exception of religious persecution, we find

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the Nguyễn laws were often more lenient than the Lê, and in many instances where the latter provided for the death penalty the former only stipulated the heavy stick penalty, or penal servitude.²² One lenient aspect of the laws of the Nguyễn, Lê, and earlier dynasties, however, was the opportunity for those condemned to death to redeem their penalty, a humanitarian feature not easily found in modern criminal law.²³

Freedom from Bondage?

Under this heading we will discuss whether the state in traditional Vietnam imposed compulsory labor upon the people or sanctioned any system of slavery or servitude. We shall also examine the related issue of whether that state permitted imprisonment on the ground of inability to fulfill contract obligations.

Compulsory Service

In traditional Vietnam, there were two kinds of compulsory service: military service (*quân dịch*) and general corvée (*quan dịch*). The Lê Code contained several provisions establishing a system of universal military service: All able-bodied men had to serve in the national army by rotation; draft evasion and protection of draft dodgers were punished; reasonableness and fairness were the criteria for implementing the draft—it was to be carried out only within the period specified by an imperial edict, and responsible authorities who exempted the able-bodied men but drafted the unfit would be subject to severe penalties, including death.²⁴

The draft system already existed under previous dynasties: The Đinh and the Former Lê reportedly recruited civilian commoners into their armies. The Lý and the Trần adopted this policy, often levying soldiers among the people and also implementing the rotation of military personnel.²⁵ It was under the Lê, however, that a systematic draft system was charted out. Under Emperors Thái Tổ and Nhân Tông, the rotation policy continued to be pursued in order to permit soldiers to go home for land cultivation.

Beginning with the Hồng Đức reign (1470–1497) of Emperor Thái Tông, the military service system became somewhat less universal and egalitarian. Even though the draft system was more elaborate, relying on a population census every three years, male commoners were classified into six categories (active servicemen, reservists, [landowning] civilians, the elderly, the hired labor, and the poor); the hired labor and the poor were exempted (probably for their lack of means for self-support while serving), and only some among the male commoners of a family were drafted (a family of five males, for example, would have two recruited as active servicemen, one as reservists, and two as civilians).

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Under the Restoration of the Lê—that is, the North–South Division period (1533–1788)—the draft policy was even less universal, for after 1658 the government allocated to each administrative unit quotas of active servicemen and reservists based on actual population figures (for example, for each hundred citizens an administrative unit in the provinces had to provide ten servicemen and twenty reservists, whereas an administrative unit in the capital area had to give twenty reservists). It even assigned the number of recruits to each village based on outdated population figures.²⁶

The military service of the Nguyễn was also less than universal and egalitarian. Soldiers were recruited only among the registered population (not among the unregistered poor) and from families with three or more sons, according to the following formula: in Central Vietnam, one soldier to be recruited for each three registered persons; in South Vietnam, one soldier for each five registered persons; in North Vietnam, one soldier per seven registered persons, or per ten registered men for the China border provinces. The soldiers served in rotation, one group being always at home to till the land. The total service period was fifteen years for soldiers from Central Vietnam or ten years for those from other areas. After satisfactory fulfillment of military service, the men would be exempt from half the head tax.²⁷

Despite the less than universal character of the military service duty in Vietnam from 1470 on, it was still a service of a military character and thus would not be included in the definition of forced or compulsory labor banned by Article 8, par. 3, of the CCPR.

What about the system of *corvée* or personal obligations to do public construction works? Both the Lê and Nguyễn levied *corvée* obligations from all registered commoners. Officials who omitted any individual or household from the population register would be punished, and the omitted individuals, under the Lê, would be required to pay the charges for the missed *corvée*.²⁸ Any attempt to change the categories of an individual in the register to avoid *corvée* also subjected either the individual or the village official responsible to a penalty.²⁹ Any person who fled his place of registration to avoid *corvée* would be punished, together with those authorities who protected him.³⁰ *Corvée* obligations were supposed to be fairly imposed: The Lê Code stated *corvée* should fall first on the strong and then on the weak, first on households with many men and then on households with few men and should be on a rotation basis;³¹ the Nguyễn Code required *corvée* to be based on the number of males registered and to be equitably distributed.³² *Corvée* labor was exclusively dedicated to works of value to the general welfare of society, such as constructing and repairing dikes,³³ digging canals, and building frontier posts.³⁴ Consequently, any attempt by

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officials to use *corvée* laborers for private projects or as servants would be severely punished.³⁵

We think the system of population registration and *corvée* obligations described here, with its general applicability, minimal fairness, and public interest value, would fall within the definition of “work or service which forms part of normal civil obligations” or “service exacted in cases of emergency . . . threatening the well-being of the community” that Article 8, par. 3, of the CCPR excludes from the rejected category of forced labor.

Despite this evaluation in light of the modern legal conception of forced labor, the history of Vietnam’s traditional period suggested that many Vietnamese villagers never liked the central government to make thorough checks of the population figures for taxation, military service, or *corvée*. For example, on two occasions, in 1725 and 1773, the Lê court attempted to revise and update the population registers and pursue fugitive families. Many people opposed these measures and fled. During the 1773 census, so many people became agitated over this matter that one discontented man rebelled under the name of “the Great King of the Taxpayers”; anonymous letters were posted on the wall of Lord Trịnh’s palace demanding the dismissal of the officials responsible for carrying out the census. Lord Trịnh, estimating that a thorough recount of the population would be difficult, decided to return to the quota system, ordering the old registers to be used and allocating the increase in population figures among villages.³⁶ Thus, popular protest does not necessarily mean there was a violation of human rights even as defined according to the most recent international standard, because popular aspirations may be too unrealistic.

One aspect of the *corvée* system in old Vietnam, however, was not so satisfactory: the inequality implicit in some cases of exemption from *corvée*. Under the Lê, some social groups were not subject to *corvée*. These included village notables,³⁷ scholars who passed some examinations,³⁸ and officials.³⁹ Under the Nguyễn, although the law did not discriminate among the commoners for purposes of subjecting them to *corvée*, there was some discrimination in practice: Only people with resources to pay tax were registered, but the working class (*lao dân*) was not registered.⁴⁰ The issue of inequality will be discussed at length in Chapter 2.

Slavery or Servitude?

Were *nô tỳ* (serfs) in traditional Vietnam the victims of a slavery or servitude system? Under the Lê as well as the Nguyễn, *nô tỳ* originated from two sources: Private serfs (*từ nô tỳ*) were the outcome of private contracts of sale of persons,⁴¹ whereas public serfs (*quan nô tỳ*) were those officially granted or sold by the state to officials and other high dignitaries.⁴² As a matter of practice rather than law, under the Nguyễn the children of female serfs were also serfs.⁴³

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Endorsement of the private sale of serfs and government approval of the number of serfs owned by one person were also legal requirements under the Lê.⁴⁴

Vietnamese serfs were clearly in a condition of human bondage. They could not act as or pretend to be commoners; if they did, they would be punished with the stick penalty and returned to their masters.⁴⁵ The master would not be punished for striking them unless such battery resulted in death, and even in case of death he would be very lightly condemned.⁴⁶ Private serfs might buy their freedom but apparently only if the master agreed to it.⁴⁷ Public serfs could never redeem themselves.⁴⁸ Anyone who incited serfs to escape or concealed them would be penalized; this penalty was particularly severe if the serfs belonged to the category of wives or children of men guilty of high treason, grave insubordination, and treason.⁴⁹ Fugitive serfs were required to return to their old masters and to pay the charge for missed labor.⁵⁰ Under the Nguyễn, serfs who had sold themselves to powerful people and had asked them to use coercion to annul the original sale contract with their old master would be decapitated.⁵¹

The Lê and Nguyễn seemed to make an effort to limit the abuse of the *nô tỳ* system.⁵² The Lê in particular favored serfs with property rights (the Nguyễn was silent on this matter).⁵³ It is clear, however, that the system subjected the victims to a condition of bondage that amounted to slavery, although of a milder kind than that experienced by chattel slaves in the Western world.⁵⁴ (For this reason, we prefer to translate *nô tỳ* as “serfs,” not “slaves.”) Mitigating factors that might have made the system somewhat less distasteful under the Nguyễn were the facts that (1) the Nguyễn Code seemed to be less concerned with these serfs and had fewer articles on the topic compared to the Lê, and (2) the practice of the state’s sale of serfs had practically disappeared in the last quarter of the nineteenth century.⁵⁵

Imprisonment for Contract Liability?

Did Lê and Nguyễn laws permit imprisonment on the ground of inability to fulfill contract obligations? The answer is no. Lê law required creditors to file a suit with a yamen (mandarin’s office) to recover the debts and banned them from using physical coercion such as seizing the person of the debtor, putting him under the cangue (yoke), incarcerating him, or pressuring him into writing another loan agreement incorporating the interest into a new amount of principal. If the creditors did so, they would have to forfeit all money lent.⁵⁶ The Lê Code also prohibited the private seizure of the debtor’s property in excess amounts without going to court.⁵⁷ As a reasonable deduction, it probably did not tolerate the practice of seizure of the debtor’s wife and children, a practice also forbidden in Article 134 of the Nguyễn Code.

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Philastre, in his discussion of Article 134, observed that the law would not want the family members of the debtor to be turned over to the creditor because that would keep them from working to pay off the debt, and that if the debtor failed to pay the debt not because of his attempt to cheat his creditor but because he did not have means to pay off his debt, then he would not be subject to any coercive measures but would be permitted to work off the debt together with his family members. The intent was to prevent a form of slavery from developing, and public opinion among Vietnamese accepted this interpretation.⁵⁸ Philastre added, however, that if the debtor purposefully refused to pay the debt although he had some means, the creditor would have the right to enforce payment by detaining the debtor (*contrainte par corps*) in application of Decree 1 following Article 23 of the Nguyễn Code.

It seems to us, however, that Decree 1 discussed imprisonment as a way to compel a convicted criminal to turn the illicit object of the crime (*tang*) over to the state or the victim rather than as a way to compel the fulfillment of a civil debt. In any case, as Philastre noted, the Vietnamese population at the time of his writing did not seem to know about the spirit of the law, which favored the debtor, and seemed to take for granted the debtor's imprisonment.⁵⁹ The Saigon court under the French interpreted the Nguyễn Code provisions as accepting the detention of the debtor for enforcing debt payment.⁶⁰ It should be noted that the imprisonment of a debtor able but unwilling to pay is not banned by Article 11 of the CCPR.

Security of the Individual in a Regularized Legal Process?

Thus far we have seen that legal protection of the right to life and of freedom from bondage was adequate in traditional Vietnam, although in certain respects it did not measure up to the universal standards of the modern world. The next problem an individual in this traditional Vietnamese setting—as in all time periods—would be concerned about was his personal security, especially when he was implicated in the criminal process.

Did an individual in this society adequately receive the protections enumerated in the Introduction as standards that we now consider as essential to the security of the person?

Nulla Poena Sine Lege?

Fundamental to an individual's security when facing the state is the principle that he shall not be held guilty of an offense for any act that did not constitute a criminal offense under the law in force at the time of commission.

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This principle, usually summarized as *nulla poena sine lege* (no person shall be punished except for crimes defined in law), was embodied in the following important articles of the Lê and Nguyễn codes.

In determining whether a wrongful act constitutes an offense of a specific name governed by a provision of law, any trial judge who takes the liberty of going beyond, or failing to apply fully, a specifically applicable article of law, or who refers to peripheral articles in order to mitigate or aggravate the case in his hand shall receive a penalty one degree higher than imposed for mitigation or aggravation of a case. (Lê Code 722)

The original text of all relevant statutes, decrees, rulings and instructions must be quoted in the wording of a judgment. Violators of this provision shall be fined.⁶¹ (Lê Code 683)

In sentencing, judges must always explicitly cite a statute or decree. Violators of this provision (who, for example, do not use a verbatim quotation) shall be punished with thirty strokes of the light stick. (Nguyễn Code 380)

The judges were even forbidden to cite imperial decisions on particular cases that had not been promulgated as a permanent ruling or law; if they did so and consequently incriminated an accused, they would be charged with aggravation of a case—an act that was severely punished.⁶²

Did traditional Vietnam accept nonretroactivity of the law as the logical corollary of the principle of *nulla poena sine lege*? Article 42 of the Nguyễn Code had two portions. The first stated that “from the date of the promulgation of the laws, acts committed before the promulgation shall be adjudged according to these laws.” The second portion (the interlinear note) provided that in case the act was committed prior to a new decree, it would be adjudged under the old law or decrees, but if the new decree was less severe the later decree would be applied. Interpreting these seemingly contradictory portions of the article, Philastre suggested that no criticism should be leveled against the Nguyễn Code for the first part of the article that stipulated the retroactivity of the law, because such retroactivity applied only to one occasion, the promulgation of the Nguyễn Code in 1812, and was never meant or interpreted in any other way. Such retroactivity was somewhat tempered by the fact that the code, representing a return to normalcy, consisted of milder laws and was less threatening to the people than those of the preceding period of upheaval in Vietnam. As for the second portion of Article 42, also according to Philastre, it consecrated the general rule of nonretroactivity of law and provided for an exception to the rule only to give the offender the benefit of any new and more indulgent statute—all of which is in conformity with today’s standards. This was, in Philastre’s words, in accordance with “the real principles of law.”⁶³

The Lê Code did not have an article generally providing for nonretroactivity of the law. But in banning marriage between Vietnamese and ethnic

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minority tribes, the Lê (as well as the Nguyễn) did not punish “existing marriage” or marriages contracted prior to the law.⁶⁴ The Lê Code also treated as leniently as a child any person whose crime was committed during childhood but was discovered and punished after the person had reached maturity.⁶⁵ Thus, the Lê Code recognized implicitly the principle of non-retroactivity of the law.

But what about use of analogy by traditional Vietnamese courts in their sentencing? Was this a violation of *nulla poena sine lege*, in the sense that it seemed to permit the judge to impose a penalty on an act not specifically governed by a provision of law? The basis for this method of sentencing was located in the following articles:

Whenever no specific provision of law is directly in point, if the sentence is to be mitigated, [the judge] shall compare the case with a more serious act to emphasize the pettiness of the accused’s wrong, and if the sentence is to be made severer, [the judge] shall compare the case with a less serious act to illustrate the gravity of the accused’s wrong. (Lê Code 41)⁶⁶

Laws and decrees being unable to cover all acts, when [the judge] determines the penalty for a case not provided for in any specific provision of law, he shall cite (by analogy) another provision which governs cases most similar to the act under investigation, in order to arrive at the penalty and to ascertain whether there shall be an increase or decrease of penalty. After deliberation, a memorial shall be addressed to the Emperor. (Nguyễn Code 43)⁶⁷

One notes that the Lê Code implied, whereas the Nguyễn Code explicitly stated, the requirement that the judge, even in the use of analogy, adduce an article of law. In this sense, we must agree with Philastre that this method of sentencing in Vietnam was somewhat similar to the option given French judges to adjust the penalty in conformity with the special nature of the facts in a case.⁶⁸ Sentencing by analogy was not punishment without law but was only a way to search for the penalty deemed most appropriate for the circumstances of a case. Chen’s observation on analogy in Ch’ing law applies equally to traditional Vietnam:

An analysis of analogy cases . . . shows that most of them fall squarely under existing statutes or substatutes. There is usually no doubt about the criminality of the act; indeed, the act is in most instances covered by a statute or substatute governing a broad category of crime. The only question before the court concerns the appropriate degree of punishment in the light of the particular circumstances of the case and the relative social status of the parties.⁶⁹

The method of sentencing by analogy, understood in this manner, was also consistent with the official policy in traditional Vietnam of expanding knowledge of the law among the people. The Lê court required officials and other public servants to publicize, explain, and comment on the law to

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military personnel and the civilian population “so as to proclaim the imperial benevolent will.” The Nguyễn Dynasty insisted that public servants read and learn the laws so that they could pass an annual examination and further stipulated that craftsmen and others who knew the law would be exempt from punishment when committing involuntary offenses.⁷⁰ This positive approach to popularization of the law in order to warn the people of its prohibitions might have been a more realistic approach than the Western motto of *nemo censetur ignorare legem* (no one is assumed not to know the law).

Finally, in the application of the method of sentencing by analogy, any danger to the individual accused could also be alleviated by the requirement of imperial control over every judgment using this method.

Article 350 of the Nguyễn Code seemed to be a catchall statute that, because of its broad definition of the offense of “violating an imperial decree,” could apply to many acts, thus presenting an element of unpredictability for the individual. Article 350 states: “Whoever violates an imperial edict shall be punished with fifty strokes of the light stick [i.e., an edict prohibiting or prescribing something when the law does not specify any penalty for it].” Courts in China had extemporized and interpreted the corresponding article in the Ch’ing Code as authorizing punishment even though the wrongdoer had not violated any promulgated decree. Under this statute they sometimes punished an individual who committed an act that was not yet forbidden but would have been banned by the emperor had he thought of it.⁷¹ But this was a mistake of interpretation on the part of some Chinese courts that we do not believe to have similarly occurred in Vietnam. Moreover, in the last analysis, when an edict forbade something, the people were already warned and, strictly speaking, the situation would not be tantamount to punishment without law. Whether the content of the imperial edict was threatening is an issue still to be discussed below.

Despite the guarantee of *nulla poena sine lege*, an individual in traditional Vietnam still faced some dangers when judicial practice sidetracked the principle, and especially when the courts applied another principle that constituted a derogation from it: the “doing what ought not be done” provision (*phi vi* or *bất ứng vi*).

First, the Nguyễn emperors might not have created *ex post facto* law as some Chinese emperors did.⁷² But in the choice among many edicts providing different penalties for the same type of offense, the Tự Đức Emperor (1847–1883), for one, refused to grant the benefit of the new and more lenient decree to one Nguyễn Thị Dữ, an adulterous woman, and her lover, who was a village notable. He ordered the Board of Punishments to discard a decree in the tenth year of his own reign that punished an adulterous woman by changing her into a serf and her lover by exiling him to three thousand lý

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(after receiving one hundred strokes of the heavy stick). Instead he told the Board to use, as a moral lesson to the people, a decree of the preceding Minh Mạng Emperor (1820–1840) that punished an adulterous woman with strangulation after the assizes and her accomplice, if he had official title, with immediate strangulation.⁷³ Thus, although the principle of *nulla poena* was still respected, the Tự Đức Emperor rejected its exception that is normally accepted today and thus the benefit of the new and more lenient law was denied.

Second, the *phi vi* provision was indeed, as we shall see, a derogation from the principle of *nulla poena*. The real question is: Under what condition would the derogation be acceptable? The Lê and Nguyễn provided as follows:

Whoever commits an act that ought not be done shall be condemned to penal servitude or exiled for a major wrongdoing and demoted or fined for a minor one. (Lê Code 642)

Whoever commits an act that ought not be done shall be given forty strokes of the light stick; if the offense is serious, the penalty shall be eighty strokes of the heavy stick. (Nguyễn Code 351)

The rationale for this catchall statute was that, in view of the impossibility of providing enough provisions of law governing all the infinite variety of criminal acts, this article was promulgated to supplement other provisions to cover cases not provided for by them. In defense of the Nguyễn article at least, it could be argued that the penalty was light and that only minor offenses, of the type resembling police contraventions in modern legal systems, would be sanctioned under this *phi vi* provision. But the Lê article did not seem to restrict the application of the *phi vi* provision to minor crimes and, as it mentioned penal servitude and exile, could present a considerable danger to the individual. The individual could normally be expected to be at a loss on knowing what ought not be done without the benefit of some positive law provisions already promulgated. Although the content of “what ought not be done” might be partially made known to the individual citizen—for example, in the form of detailed codes of ethics promulgated under the Lê Dynasty⁷⁴—he would not know the boundary beyond which he should not step to avoid being punished for doing something that ought not be done. The crucial issue affecting human rights here is: Would a judge’s decision that an act “ought not be done” be consistently justified on some predictable and acceptable bases?

As the substance of “what ought not be done” was not defined in law, it had to be found elsewhere: An offender would be condemned for “doing what ought not be done” if he offended Confucian morality, violated the numerous rules of etiquette (*lễ*)⁷⁵ or inadvertently disobeyed the policies of the ruling dynasty, including those inherited from the preceding dynasties. If Article 15, par. 2, of the CCPR today sanctions the punishment of “acts that are criminal according

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to *general principles of law* [emphasis added] recognized by the community of nations,” then a traditional judge in Vietnam might also claim that the norms of morality, etiquette, and traditional government policies on which he based his judgment were indeed the “general principles of [moral, ritual, and positive] law recognized by the community of [East Asian] nations” or the standards that were expected by the “Great Tradition” of East Asia from what it would consider a benevolent regime.

But as many norms of morality, of etiquette, and especially of policy might be vague or changing, the application of the *phi vi* provision presented a constant threat of penalty without the commission of a specific crime the name of which should have been defined in law. For example, the penalty of the light stick (up to fifty strokes) might be imposed, under a Nguyễn Code article (not equivalent to any in the Ch’ing Code), by military commanders and civilian officials on their personnel or on the population under their jurisdiction “in order to punish and direct them.” Although the code required it be applied to the correct part of the body as prescribed by law and later decrees outside the code limited its use to certain conditions,⁷⁶ this constituted an option for officers or officials to punish “administratively” persons under their jurisdiction simply for disobeying their command without committing a specific crime explicitly provided for in the law. Thus, the *phi vi* provision led easily to a derogation from the principle of *nulla poena sine lege*.

Moreover, who could guarantee that the judge could always define the criminal act in an objective and therefore predictable manner on the basis of these norms? Given the limited institutional autonomy of the judicial power from the executive power, both of which were in the hands of administrators answering to a single sovereign emperor who might or might not be enlightened about the norms or consistently adhering to them, the judge might end up defining the offense of “doing what ought not be done” in a biased and unpredictable manner, swaying with administrative command, the whim of the emperor, or the expediency of the changing policy, which would then become the unreliable touchstones of legality.

Even when there was a procedural adherence to *nulla poena sine lege*—that is, even in case the norms had been explicitly written and regularly promulgated as laws (thus becoming more precise and predictable than morality, etiquette, or policies)—there would be a still bigger issue affecting the individual’s rights: Legislation originating exclusively from the sovereign, who held legislative as well as executive powers.⁷⁷ In other words, there was no substantive autonomy of law from the administrative command. This lack of separation of legislative from executive powers could easily lead to oppressive legal rules. For example, for acts that affected the security of the emperor, his dynasty, and even his palaces and mausoleums, or for an act of thinking such as adopting the Catholic faith, the executive, also vested with rule-making

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powers, decided on severe penalties, such as death, that would be deemed too severe by today's standards. In such situations, there was no government under law; on the contrary, the government was above the law, since the government leader might promulgate laws in conformity with procedural due process, which laws, however, violated basic human rights.

Given the subjugation of legislation to the will of the emperor, the only hope for the individual would be the restraints on the emperor in his policy- or law-making activities. These restraints might be the advice of court officials, especially the censors and the judicial review agencies (the Lê Criminal Review Agency, the Nguyễn Three High Courts), or the ideological constraints of both the official Confucian morality and the fundamental rules set down by the founder of the dynasty or the emperor's predecessors. To be sure, a skeptic would argue that these were only moral restraints. Still, moral restraints might be effective. Indeed, nothing but the unwritten moral restraint controls the British Parliament, which, as the saying goes, may do anything except change a man into a woman, and yet Parliament has not dared to violate the unwritten constitution of its country. Similarly, the history and the law of the Lê and Nguyễn showed that, as a rule, the Vietnamese emperors were generally restrained and scrupulous in their exercise of legislative powers. The Minh Mạng Emperor, for example, ordered in 1829 that in making rules, thorough research should first be carried out to collect good data, avoid errors, and gather opinions from many people. Then the laws should be checked again before they were drafted. "Even if this takes a long time, it does not matter," he said.⁷⁸ Together with this restraint and scrupulousness in the promulgation of new legislation, the great respect for the fundamental principles of laws bequeathed by preceding emperors in the codes (which did not change much from one generation to another, or even from one dynasty to another) served as effective checks against possible arbitrary legislation.

In the last analysis, however, there would always be some irreducible danger that a piece of legislation that did not originate from the people's representatives might violate human rights. The moral norms imposed by Confucianism promoted social inequalities, and along with confucianization of the law, the codes sanctioned legal inequalities.⁷⁹ Since it was the emperor who had the right to modify the laws by new edicts or to promulgate new edicts on subjects not regulated by antecedent laws—and he had the right to do so without being inhibited by the external checks common to representative governments, such as a constitution or judicial review by an independent judiciary—there would be no foolproof guarantee that legislation would always respect human rights, because no one could ensure that all emperors would exercise self-restraint and promulgate only fair and just laws.

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No Arbitrary Arrest or Detention?

Could an individual in traditional Vietnam be easily deprived of his liberty by arrest or detention because of a lack of clear substantive or procedural requirements established by law?

We must say that the *substantive requirements* for arrest and detention in Lê and Nguyễn law constituted the guarantees for the individual against arbitrariness. As has been suggested, a person could be charged with an offense and arrested only if such an offense had been stipulated in the law. Thus the grounds for arrest were legally established. In many cases the law and the special decrees specifically discarded the necessity for arrest but entrusted the accused to supervision by village notables or provided for his release on bail.⁸⁰

Even if a judge saw a legally determined ground for arresting an individual, in serious cases such as theft or robbery, Lê law required that arrest should be carried out only if he estimated that the facts could be ascertained much more clearly by such an arrest.⁸¹ In homicide cases, the law permitted the arrest of an accused only if his culpability were nearly established, stating that one could not indiscriminately arrest all persons accused. This was to prevent a person from being unjustly detained in jail.⁸² In general, if the proceedings started from an accuser's information, the latter had to specify the factual details of the crime, such as the date of commission and the facts constituting the crime; if he declared to have only suspected there was a crime, he as well as the authorities acting on this vague declaration would be punished.⁸³ In short, some probable cause was a requirement.

To check the possibility of unwarranted arrests, Lê and Nguyễn law cracked down very severely on anonymous and false accusations. Already forbidden under the Lý and the Trần, anonymous accusation was suppressed in both the Lê and Nguyễn codes: The accuser, if identified, would be demoted (Lê) or strangled (Nguyễn); the authorities who took action on such an anonymous letter instead of destroying it would be demoted (Lê) or given the stick penalty and dismissed (Nguyễn).⁸⁴ Interestingly, in Nguyễn law, the accused, subject of the anonymous letter, would not be prosecuted even if his offense were real.⁸⁵

The consequence of false accusation leading to an unjust arrest had caught the attention of the lawmakers. For example, the Lê legislators mentioned certain unruly people who were not only content with striking people first but also rent their own bodies to create wounds, then accused their victims before the authorities; or others who denounced the defendant's whole family, listing as aggressors even his relatives who were traveling elsewhere during the fight. The lawmakers then ordered the judges to urge the plaintiffs to eliminate from their complaints the names of people accused without foundation and forbade them to issue warrants solely on the basis of the original complaint.⁸⁶ In addition, if the plaintiff or accuser were

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a detainee, the Lê Code banned him from changing his original statement in order to add names to his list of accomplices, whereas the Nguyễn Code subjected to the stick penalty a judge and his subordinates for arresting people on the basis of a detainee's false accusation.⁸⁷ The drafters of these codes feared that accusation by a detainee might not be spontaneous. Therefore, even in case a detainee listed his accomplices for the first time, a judge under the Lê was permitted to make arrests only if he found that the accusation was spontaneous and well founded; in case a detainee lodged a vague accusation based seemingly on imagined facts, the judge had to abstain from arresting the accused.⁸⁸

Both the Lê and the Nguyễn made a distinction between false accusation by private persons and false accusation by government officials. In the former case, according to the Lê Code, the accuser would receive a penalty one degree higher than for the crime alleged;⁸⁹ in the Nguyễn Code, the accuser would be punished two or three degrees more severely, whereas the court had to release the victim of the false accusation.⁹⁰ Inciting others to accuse someone falsely was punished in the same manner as false accusation.⁹¹

If judicial officers carrying out arrests and judges or prosecutors incited an arrested person to falsely accuse others, they would be punished for false accusation or wrongful condemnation.⁹² And, of course, if arrests were made on the basis of such false accusations, the authorities would be punished. For example, an official who arrested a person whom he had suggested that someone falsely accuse as a thief or robber would be punished by strangulation if the accused died in jail;⁹³ a judicial officer also received a penalty if he arrested a person on a false charge or even on the basis of bad antecedents.⁹⁴

The individual in traditional Vietnam was protected from arbitrary arrest not only by the substantive conditions but also the *procedural requirements* for arrest. Procedural due process included: an arrest warrant issued by a competent judge (Lê, Nguyễn), carried out by a judicial officer (Lê), with the collaboration of the local administrative authorities (Lê, Nguyễn); the right of the arrested person to be promptly interrogated and brought to trial or released on bail in case of minor offenses (Lê, Nguyễn).

All arrests required a warrant, called *câu thiếp* (Lê) or *tín bài* (Nguyễn), issued by the head of the competent government service (Lê) or the district and prefecture (Nguyễn).⁹⁵ If an arresting officer carried out an arrest without a warrant and the prosecutor and the jail director condoned or did not discover it, all would be punished;⁹⁶ if the officer used a faked warrant, he would be exiled.⁹⁷ Besides these authorities who were competent in judicial matters, other officials, no matter how highly placed, could not take over litigation and

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make arrests, whether they were powerful generals or administrators/superintendents with jurisdiction over a large portion of the population. If these officials persisted in their illegal arrest of people after the victims had complained, they would be demoted and removed from offices.⁹⁸

Under the Lê, the arrest warrant would be carried out by a “prisoner escort officer” or a “public mission officer”⁹⁹ whose name had to be written on the warrant.¹⁰⁰ The warrant officer had to present the warrant to the prefectural or district official concerned (or the local administrator, in case of an ethnic minority area), who would perform the arrest and turn the accused over to the officer.¹⁰¹ The use of another type of officer would subject the judge to demotion or fine.¹⁰²

The Lê Procedural Code described in detail the procedure for making an arrest, which was applicable to all cases except in the arrest of robbers or powerful people.¹⁰³ The judicial officer would present the warrant to the district official—accompanied by other documents, if necessary—and stay at the district office, instead of going on his own initiative to the village of the accused (if he did, the district official would inform the officer’s superiors for punishment). The district official would endorse the back of the warrant. If the accused failed to present himself on the date fixed, the district official would note this fact at the bottom of the warrant and return it to the officer, asking him to leave the district immediately without coming to the villagers’ houses to cause trouble. The prosecuting agency or service would issue a second warrant, which would be executed in the same manner as the first. If the accused still refused to obey the warrant, the district official would write a report to the prosecuting agency. The law required the district official to see to it that this procedure was strictly adhered to: If he did not endorse or sign the warrant as described above or tolerated the judicial officer to go to the villagers’ homes, a protest might be made by the villagers and the district officer would be fined 5 *quán* for each irregular warrant.¹⁰⁴

The Nguyễn Code did not provide for the role of a judicial officer; on the other hand, it stated that except for arrests in case of serious crimes (such as high treason, grave insubordination, and treason), the province, prefectural, and district officials could not send an officer for the purpose of summoning a person but could only send a warrant.¹⁰⁵ The consequence was that the subdistrict (*tống*) or village official would be the one to serve the warrant.

Once arrested, the accused would be tried within the deadlines set by law—which will be discussed later—or released if an interrogation revealed that he seemed to be unjustly arrested or his offense were only minor.

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In the interrogation, the prosecutor or judge (and his clerk) had the duty to stick to the allegations in the accusation and to get accurate information on or from the accused. The requirements probably served to avoid wide-ranging “fishing expeditions” or error and, therefore, injustice.¹⁰⁶ For the serious crime of robbery, the authorities were required to interrogate the accused promptly and thoroughly on the very day they were arrested.¹⁰⁷ If among the many accused in a robbery case who had been arrested any innocent were found, he had to be released immediately.¹⁰⁸ On serious crimes generally, the Nguyễn Code further stated that if there were evidence of a malicious or false accusation the accused should be released without waiting for a finalized judgment.¹⁰⁹

The release on bail was an automatic right for minor offenders. Indeed, if their relatives or friends were not allowed to get them released on bail or to visit them, the jail superintendent, the jail director, and his subordinates (Nguyễn) or whoever was responsible for the refusal (Lê) would be punished.¹¹⁰ Furthermore, the Nguyễn Code seemed to imply that in minor offenses the provincial governor, while waiting for the higher authorities’ response to his report on the case, had to release the accused even without a relative’s or friend’s petition.¹¹¹

If the accused was to be detained, he would be kept in a detention house and not in another place. Violating this rule would subject judicial clerks and prosecutors to demotion or fine.¹¹² While in detention, detainees were entitled to humane treatment, which we will discuss later.

Unlawful arrest and detention gave rise to different penalties, depending on what kind of violation was involved. We have seen the severe penalties provided for arrest on the basis of false or anonymous accusation.

Arrests made on the basis of a vague accusation or by the wrong kind of officers resulted in criminal liability of the prosecutors, who would be fined.¹¹³ The Lê Procedural Code stated further that even if a judge, wishing to avoid the danger of delivering an unfounded verdict, merely issued an arrest warrant and then dismissed the case (probably to satisfy temporarily a plaintiff who had given a bribe), he would be fined if the victim complained to a superior court.¹¹⁴ The prosecutors and the jail directors were also liable for unauthorized illegal arrests made by warrant officers on their own initiative if they failed to discover such arrests or condoned them.¹¹⁵

Illegal detention was punished under both the Lê and Nguyễn codes. The latter code was more severe because it provided for strangulation of the responsible officials (jail superintendent, jail director, and subordinates) in case a person, not accused by anyone, was arrested, detained, and died in jail. Such officials would be punished with eighty strokes of the heavy stick if the person were indirectly implicated in a case, arrested by error, and then died in jail.¹¹⁶

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We have not found in traditional Vietnam any concept exactly equivalent to civil liability of the state for officials' mistakes.¹¹⁷ But according to Article 704 of the Lê Code, the arresting officer who misappropriated the property of the accused's village and ruined it would be subject to death or exile and be required to return the corpus delicti and pay punitive damages to the victims. And according to Article 461 of the Lê Code, the arresting official who falsely accused a person and detained him would, besides being penalized, have to pay a reparation; and, if the person died in jail, death compensation as well.

Thus, the legal guarantees for the accused during arrest and detention proceedings were more than adequate under the Lê and Nguyễn. Sometimes abuse in practice has been mentioned, but according to Philastre there was not as much abuse as has been represented.¹¹⁸

One violation of human rights affecting not the accused but the plaintiff, was provided for in Article 372 of the Nguyễn Code. The accuser was detained until the interrogation was completed, the facts clarified, and the accused submitted to the crime with no need for another confrontation, at which time the accuser would be released. Although the law might have been drafted to discourage false accusation and to facilitate confrontation of all parties, we cannot deny that it violated the right of an honest plaintiff. The only consolation for him was that if the judge still detained him three days after closing the hearing, the judge would be punished.

Security of Home and Correspondence?

The postal system in Lê and Nguyễn Vietnam served only the function of carrying official communications. It was expressly forbidden for anyone, especially government officials, to use this system to carry private messages.¹¹⁹ The statute punishing unauthorized opening or damaging of correspondence applied therefore only to official communications,¹²⁰ and we may assume that the issue of privacy of correspondence did not arise. We find only one oblique mention in the Lê and Nguyễn codes about the punishment imposed on a chief guardian in a jail who, for a bribe, communicated to a detainee what people on the outside said about the case so that the detainee could implicate more persons or diminish his own guilt.¹²¹ From this, it is not clear whether the government did or did not regularly censor the detainee's correspondence, but even if it did, this is a derogation from the secrecy of correspondence also accepted by modern democracies.¹²² In practice, the detainee's right to have correspondence with the outside world was not denied. Even the foreign missionaries who were detained during the most severe religious persecutions of the late 1850s were free to write to their Catholic followers.¹²³

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As for the commitment to avoid arbitrary interference with the individual's private residence, it seems to have been reflected in the arrest procedure that forbade the warrant officer to go directly to an accused's home (Lê) and required the delivery of the warrant through the assistance of local government authorities (Lê, Nguyễn). Also, both the Lê and the Nguyễn punished the concealment in private homes of astronomical objects, such as firmament models or maps, or prohibited books, such as books of prophecy to be used in predicting national peace or upheaval; the law rewarded the accuser who brought possessors of these items to the attention of the authorities.¹²⁴

From the perspective of the time, prophetic instruments affected national security. When national security is involved, the law in modern democracies permits search and seizure in the home of private citizens. On the other hand, even in the suppression of seditious objects the Lê and Nguyễn dynasties seemed to rely primarily on accusers for information. We may deduce that in normal circumstances the governments did not resort to unreasonable search and seizure in private homes.

The Lê Dynasty further provided positive protection of private citizens' homes against private interference by powerful persons. The Lê Procedural Code forbade persons representing imperial household members, nobles, high dignitaries, or close attendants of the emperor from coming to people's homes to carry out a private business mission (such as to demand payment of a debt). The representatives were required to be equipped with a letter clearly defining their mission and endorsed by the province chief and province judicial commissioner and then to present themselves to the district chief, who would assemble the people concerned to inform them of the identity of the representatives. If these envoys tried to come to people's homes without a paper or with a considerable number of followers, they would be considered false envoys, arrested, and sent back to the capital.¹²⁵ If the occasion were an attempted enforcement of debt payment, not only would the representatives be arrested, but the debt would be forfeited and the creditors fined.¹²⁶

Security from Unlawful Attack on Honor and Reputation?

In the criminal process as well as generally during the normal course of social relations, both the Lê and the Nguyễn protected the individual from unlawful attack on his honor or reputation. In the criminal process, protection was provided against damaging attack by government officials: Court clerks would be given the stick penalty if they reviled detainees;¹²⁷ judges and judicial officers would be severely punished if they encouraged those arrested to accuse others as thieves or robbers or did so themselves.¹²⁸

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Protection was also provided against private attack on honor or reputation. Although this topic falls into the general area of criminal law on libel and slander rather than into the specific human rights issue of protection against government encroachment, we think it is worth mentioning in passing because of a special feature of Lê and Nguyễn law: Because of a status-discriminating tendency in the law, there was inequality of protection against violation of honor and reputation. Although there was probably only one provision in Lê and Nguyễn law on the general case of revilement of a common person by another of the same status,¹²⁹ a number of articles in both codes specified separate penalties for reviling persons of different status. Thus, special protection of honor or reputation was provided in both for officials of different rank,¹³⁰ for masters against violation by their serfs.¹³¹ Furthermore, the Lê Code gave special protection to warrant officers and tax collectors,¹³² officials' wives and children,¹³³ and teachers.¹³⁴ Within the family, status considerations also led to the zealous protection of parents, grandparents, or other senior relatives against revilement by children, grandchildren, or junior relatives¹³⁵ as well as to the nonexistence of the crime of a senior relative reviling a junior relative.

Finally, the Lê distinguished itself among Vietnamese and Chinese traditional codes in that it alone provided for, in addition to the criminal penalty, a reparation payment for revilement, whether committed by private persons or by government officials.¹³⁶ Moreover, it also uniquely provided that reparation would have to be paid for any loss of honor and reputation resulting not only from revilement but also from other offenses, whether committed by officials—such as encouraging robbers and thieves to falsely accuse innocent people¹³⁷—or committed by any person—such as cohabiting with a woman without presenting wedding gifts to her parents for a ceremony;¹³⁸ fornicating with the wife or fiancée of another man, or even only flirting with the wife;¹³⁹ rape;¹⁴⁰ striking¹⁴¹ or destroying temples or shrines in honor of someone;¹⁴² or unjustifiably demanding a retrial.¹⁴³ For these offenses, besides the criminal penalties the Lê Code also provided for reparation payments—as if, besides the disturbance of law and order and the material or physical damage sustained by the victim, the law also wanted the offender to indemnify the victim for the concurrent moral damage or loss of honor and reputation.

Presumption of Innocence? No Cruel, Inhuman Treatment or Punishment?

Under modern universal standards, the principle of presumption of innocence until the accused is proven guilty according to law in a public trial would lead to these logical consequences: The accused must be segregated from convicted persons for separate treatment appropriate to his status as an

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unconvicted person; the burden of proof is on the government; in trying to prove the accused's guilt, no torture is to be used; finally, no accused should be subject to inhuman or cruel treatment. Even after conviction, a person is not to be punished cruelly and should be recognized by law as a person and be treated with humanity and dignity.

Separation of the Accused from the Convicted? The issue of separating the accused from the convicted, as a rule, did not arise in traditional Vietnam because the convicted condemned to the heavy or light stick penalty were immediately given the punishment and released home, whereas those condemned to penal servitude, exile, or death were sent away or executed. Only those detained pending a judicial trial remained in jail.

Under the Nguyễn, by law, some accused were released on bail or sent home to be supervised by village notables. Those condemned to death after the assizes (whose sentence would be reviewed at the autumn assizes in the capital) were the only ones held in jail. In all probability, they were incarcerated in an inner prison constructed with hard wood, where they were separated from the detainees or minor offenders, who were held in an open compound from which they could easily communicate with the outside world.¹⁴⁴ In the capital of Huế, two separate jails were established: *trần phủ* for the accused and *khám đường* for the convicts.¹⁴⁵ There are also reports, however, that detainees waiting for their trial and minor offenders were not separated.¹⁴⁶

Other aspects of Lê and Nguyễn law seemed to imply that no clear distinction was made between accused and convicted. Although the Lê required review of a doubtful case by the Criminal Review Agency, the highest judicial organ, which would jointly deliberate the matter in public and then permit the accused to plead his case,¹⁴⁷ the law also said that in case of doubt, the penalty would be lower than the one prescribed for the offense the accused was charged with.¹⁴⁸ In other words, even in doubtful cases the accused's culpability was presumed to a certain degree. For condemnation to penal servitude, exile, or death, the Nguyễn required the accused's admission of guilt after hearing the verdict,¹⁴⁹ but it waived this condition for the light and heavy stick penalties and seemed to presume his guilt also by the permission of judicial torture.

Torture? Under both the Lê and Nguyễn, if the accused confessed prior to the discovery of the crime by the government, he would be pardoned and not subjected to torture. But if he were adamant during the interrogation, he could be subjected to torture. Thus in this area the government obviously did not shoulder the burden of proof.

The use of torture, however, was tempered by the following regulations. First, it could not be applied maliciously to peaceful people not implicated in a case: Even if the innocent victims were not wounded, the authorities responsible would be punished; if they were wounded, the penalty would increase; and if

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they died, the torturers would be decapitated.¹⁵⁰ Second, for detainees who were implicated in a case, torture would be used only when “the facts were already clear” and “the evidence was already concrete” by a prior careful examination of factual circumstances and statements by the accused and when the only remaining obstacle to the complete certitude about his guilt was the accused’s refusal to confess.¹⁵¹ If the judges or the prosecutors forced the accused to admit his guilt when the facts were still not clear and the reasons for punishment were not decisive, they would be severely punished for the crime of aggravating a case.¹⁵² Third, the instrument for torture and the method of applying it were legally determined. For interrogation the Lê specified the use of a heavy stick made of rattan stalk, of a definite length and size, to be applied to the buttocks not more than a hundred strokes and not more than three times and only if the accused had no skin disease or other ailment.¹⁵³ If the accused died from torture imposed in violation of these rules, the penalty would be penal servitude. The Nguyễn Dynasty, like the Ch’ing, did not specify in its code the size of the heavy stick used in interrogation, but we know from another source that it was a rattan rod, 8 to 10 millimeters in diameter and about 1 meter long, that is, of the same material and about the same size as that of the Lê instrument.¹⁵⁴ As for the number of strokes to be inflicted, an 1870 decree limited the number to fifty strokes on the buttocks each time. (This decree also mentioned the possibility of using pliers on the buttocks, but only for important cases of robbery, high treason, or treason.)¹⁵⁵ Fourth, torture would not be applied to persons aged seventy or older, fifteen or younger, disabled, or (specific to the Lê Code) persons entitled to the eight special considerations or to a special petition for penalty reduction.¹⁵⁶ Officials who violated this restriction would be charged with the serious crime of aggravating the case.

Thus, torture could be considered as a last resort, closely regulated, to be used only when culpability was clear, the only means left in the judicial search for truth being a confession by the accused. Because the aim was truth, the law punished officials for inducing by torture an accused person to make a false accusation but it did not punish this accused.¹⁵⁷ And for the same reason, it was in the interest of a prosecutor to apply torture “without much violence to avoid false accusation or self-incrimination [by the accused],” as the Catholic missionary Alexandre de Rhodes observed in 1651.¹⁵⁸

Nevertheless, torture, whether mild or severe, is still torture. Even though well regulated and less cruel than the horrible torture of modern times,¹⁵⁹ the interrogation stick of the Lê and Nguyễn could peel off the skin and cause bloody bruises.¹⁶⁰ Torture was a test of endurance for the accused. It would “condemn the innocent whose complexion [was] delicate and save the criminal who [was] born robust,” as the French writer La Bruyère put it. The latter statement was especially true in regard to the Nguyễn Dynasty. A distorted consequence of the need for a confession before condemnation could take place

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was that the judge had an incentive to put the accused to torture to get such a confession: He feared no legal consequences as long as he correctly followed the rules for torture, whereas the accused, guilty or not, suffered the pains. In this regard, the Lê Code, which permitted a judge to condemn an accused person on the basis of evident and decisive facts (circumstantial evidence) rather than requiring “full” proof of guilt via a confession, provided better protection for the accused than the Nguyễn because there would be much less need for forced confession and judicially sanctioned torture.¹⁶¹

Moreover, judicial torture in practice might go beyond the legal limits. The Tự Đức Emperor himself realized this, stating in one of his decrees:

The laws and decrees describe in minute detail the length and width of the light stick as well as the limits within which it must be used. But as time passes, men’s hearts become loose and fall into cruelty. People have been beaten up in violation of the rules and some have been seriously injured. Therefore, it is necessary to reiterate the order that officials have to conform to the laws and decrees in this area.¹⁶²

Thus, as long as torture was legal and even necessary in getting a confession, there could be abuses. Fortunately, the central government was committed to adhering to the strict limits imposed on the method. Judicial torture was abandoned by the French after their conquest of Indochina.¹⁶³

Cruel or Inhuman Treatment and Punishment? Torture, well regulated and restrained, was probably not considered as cruel or inhuman treatment by the drafters of the traditional codes of Vietnam (or China). By today’s universal standards, it is one aspect of the larger issue of cruel or inhuman treatment and punishment.

Was there a policy of cruel or inhuman treatment and punishment in traditional Vietnam? We see a tradition of humanitarian treatment of detainees and lenient punishment of convicts during the Lý Dynasty, which was heavily influenced by Buddhism. Typical was Emperor Lý Thánh Tông’s humane treatment of those caught in the toils of law. During the severe winter of 1055, he told his court officials:

Living in the palaces heated up with coal stoves and wearing plenty of warm clothing, I still feel this cold. I am quite concerned about the detainees in jails who are miserably locked up in stocks and manacles, without enough food to eat and without clothes to warm their bodies, or some even undeservedly dying while their guilt or innocence has not been determined. I feel a deep compassion for them.¹⁶⁴

Consequently, he ordered blankets and mats to be distributed to the prisoners and two meals a day to be provided them. It seems that the emperor considered the detainees to be innocent until proved guilty and

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deserving of humane treatment. His statement was a rare, probably unique, reference in traditional Vietnam (and China) to the notion of presumption of innocence of the accused, a concept vital to human rights.¹⁶⁵

This same emperor, while presiding over a trial in Thiên Khánh Palace in 1064, pointed to Princess Động Thiên, who stood in attendance next to him, and told the judicial officers: "I love my people as much as I do my own daughter. They commit offenses because they do not know [the law] and I have much compassion for them. From now on, I want all offenses, grave or light, to be judged with indulgence."¹⁶⁶

In fact, a lenient criminal policy was also the policy under other Lý emperors. Not only were the Lý penalties for certain ordinary crimes light (homicide was punished with penal servitude and the heavy stick penalty), but also Emperors Lý Thái Tông and Lý Nhân Tông were extremely tolerant in the punishment of rebels, whether from within the imperial clan (the pardon for three princes who rebelled in 1028 to contest the throne) or without (the pardon granted in 1041 to Nuông Trí Cao; the mere exile imposed in 1096 on Lê Văn Thịnh, accused of high treason). Vietnamese scholars and historians of the later, more Confucian dynasties of Trần, Lê, and Nguyễn found the law of the Lý to be overly lenient. They blamed the lenient punishment of homicide or rebellion or even the Lý amnesty policy on the "petty humanitarianism of the Buddhists."¹⁶⁷

The Trần's criminal penalties, on the other hand, were quite severe. For example, a husband was allowed to kill his wife's lover and to treat his guilty wife as a serf whom he could indenture or sell. A thief was required to pay a ninefold damage or to surrender his wife and children in lieu thereof; if he committed a third theft, he would be put to death. Thieves and absconding serfs would have their toes cut off; they would also be treated in whatever manner desired by the victims of the theft or the masters of the serfs, or could be trampled to death by elephants.¹⁶⁸ The Trần, Lê, and Nguyễn critics of the Lý may have been right in comparing the lenient criminal policy of the Lý to the severe policy of the Trần.¹⁶⁹ But when they looked closer into Lê and Nguyễn laws, they might want to modify their criticisms somewhat: There was a clear policy of humane treatment of the accused in Lê and Nguyễn laws, although their policy for punishing the convicted criminal was a mixture of cruelty and humanity.

The Lê and Nguyễn guidelines for humane treatment of detainees were accompanied by sanctions for violation on the part of jailkeepers or judges. Normally detainees could not make an accusation; they could, however, file a complaint against unprovoked ill treatment by judges or jail officials.¹⁷⁰ Striking or mistreating detainees was severely punished in both codes (injuring was penalized the same as striking in a fight; death brought the penalty of strangulation).¹⁷¹

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But striking was only one of the many types of cruelties and ill treatment identified by law.¹⁷² If jail officials reduced the food or clothes allotted by the state to a poor detainee not cared for by his relatives (as was normally expected), they and the jail director or the supervising prosecutor who tolerated the reduction would be punished as if for committing theft; if the detainee died, with exile or strangulation. An 1849 decree provided the following monthly allowance for prisoners exiled or condemned to death after the assizes: 12 *thăng* of rice for those eighteen years old or older; 9 *thăng* for those between ten and seventeen; 7 *thăng* for those ten or younger.¹⁷³ Although tight government budgets did not allow the full implementation of this decree, the situation was improved in 1899.¹⁷⁴ If a detainee were ill and needed food, medicine, and medical care, these items had to be supplied to the detainee in jail if he were a major criminal;¹⁷⁵ if he were a minor offender, his friends or relatives should be allowed to bail him out;¹⁷⁶ if nobody bailed him out, he should be relieved from chains and stocks, detained outside the prison, and treated medically.¹⁷⁷ If the authorities failed to provide or allow for these rights, they would be punished up to penal servitude. Finally, in addition to the protection provided by the statutes banning illegal arrest and detention, a detainee, once arrested, would be put in stocks or manacles only when required by law and only in accordance with the rules (the prosecutor or judge and the chief jail official had to consult on this matter). If the stocks or manacles were illegally imposed, they would be punished with the heavy stick.¹⁷⁸ Under the Nguyễn, only a criminal punishable by death had to carry the cangue. If it were imposed on a person guilty of a minor offense and if he died, the judge would be subject to penal servitude; if the detainee were ill, he was allowed to put off the cangue temporarily.¹⁷⁹ Under the Lê, not only the manacles and fetters had to be cleaned, but also the detention rooms were to be ventilated, swept, and washed.¹⁸⁰

Nguyễn law even provided for automatic checks on the fulfillment of these requirements. When a detainee was released, the jail superintendent had to interview him and ask him whether he had experienced cruel treatment while incarcerated. If he had, a penalty would be imposed; if the superintendent did not perform this interview, he would be punished. If a detainee died, there was to be an investigation.¹⁸¹

But Lý, Trần, Lê, and Nguyễn criminal punishments—consisting of the classic five penalties (the light stick or rod, the heavy stick, penal servitude, exile, or death),¹⁸² along with some other supplementary penalties and the principles for their application—were a mixture of cruelty and humanity.

The death penalty consisted of strangulation, decapitation, decapitation with exposure of the head, and death by slicing. But strangely enough, while Article 1 of the Nguyễn Code on the five penalties enumerated only the first two types, its Articles 223, 253, 256, and 257 also mentioned death by slicing. On

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the other hand, the Lê Code listed death by slicing in its Article 1, but nowhere in this code can we find a crime punishable by slicing to death (even the most serious—plotting high treason, Article 411—was punished by decapitation with exposure of the head), although in another document reproducing Lê laws (*Hồng Đức Thiện Chính Thư*), the cruel penalty of death by slicing was stipulated for high treason, grave insubordination, killing one's father, and although we found one occasion in which death by slicing was used—namely, the 1652 punishment of the Trần Nhân Liễn group of rebels.¹⁸³ The Lý and Trần dynasties also used this punishment on rare occasions for high treason or for servants falsely accusing their masters of high treason.¹⁸⁴ We must conclude with Philastre that the death by slicing penalty was rarely used.¹⁸⁵ Equally cruel was the penalty of mutilation of the legs inflicted by the Lê on military officers who lost seventy to ninety-nine men in battle.¹⁸⁶

Death, exile, or serfdom imposed on the uninvolved family or clan or even household members of those guilty of the political crimes of high treason, grave insubordination, or treason would constitute just so many cruel punishments for the innocent by today's standards. However, for other crimes, persons in a family, clan, or household were especially (in derogation from normal rules) allowed to help and conceal the criminal member.¹⁸⁷ Thus, except for political crimes, humanity and morality prevailed in a punishment system based on group responsibility.

In penal servitude, the condemned criminal enjoyed—as Philastre put it—a quasiliberty, because he was in permanent contact with the population. The same was true of exile: The person so condemned was free to bring his family along to his new hometown. This person was even in a better situation than in penal servitude because, although he had to face the (dreadful, by traditional standards) prospect of living far from his hometown and relatives, he was not subject to any required service as in penal servitude and was even given land, buffalo, and agricultural implements for livelihood. Under the Minh Mạng Emperor, the exiled, his wife, and children were provided with clothing and money. Philastre said it was too sweet a penalty for many crimes.¹⁸⁸

Some criminals subject to exile or penal servitude, however, had to wear chains under the Lê,¹⁸⁹ or chains and the cangue (although lighter than the Chinese cangue) under the Nguyễn, or the stocks used in both Lê and Nguyễn periods to lock up detainees,¹⁹⁰ all of which were burdensome and inhuman punishments. A French doctor, observing Vietnamese jails at the end of the nineteenth century, saw inmates with purulent wounds or skin ulcerations at places where they wore cangues or stocks; he further remarked that when the stocks were abolished in the prisons of Hanoi and Haiphong, run by the French, the number of escapees diminished.¹⁹¹

The stick penalties were abolished and replaced by penal servitude or imprisonment by the French in South Vietnam around 1875; in North Vietnam,

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1901; and in Central Vietnam, 1911.¹⁹² Were they as horrible forms of corporal punishment as the French claimed? The use of the light stick would not cause long-lasting pain. But the heavy stick could cause serious wounds or even death if it was not employed with care. That was the reason why the Lê and the Nguyễn demanded that it be administered according to the rules (on the buttocks, with a pause after every ten strokes; the size of the stick was also legally determined).¹⁹³ Other restrictions on the use of this penalty made it generally less life-threatening. The Lê used it only on men because they were considered to have a constitution solid enough to sustain it; influenced by the Lê and deviating from the Chinese model, the Nguyễn Dynasty, after mentioning the heavy stick in Article 1 (the principal provision on the penalties), stipulated that where women were condemned to the heavy stick, it would be replaced by the light stick.¹⁹⁴ Under the Lê, children or grandchildren could volunteer to undergo the stick penalties for their parents or grandparents; this practice continued to be common custom under the Nguyễn, although it was not sanctioned by any legal provision.

Thus far, the enumeration and description of the various penalties in Lê and Nguyễn Vietnam has revealed that some were mild and more or less humane whereas others were harsh and cruel in the light of modern standards. What follows is a summary of the various modes by which the penalties of Lê and Nguyễn could be postponed, decreased in severity, waived or not applied, and substituted by monetary sanctions and status demotion, all with the end result of humanizing the punishments to different degrees.

First, all penalties for pregnant women were postponed until one hundred days after childbirth.¹⁹⁵

Second, in many cases the penalties might be reduced for many reasons: lack of criminal intent, mitigating circumstances, offender being a certain type of person (such as a relative of the victim, etc.).¹⁹⁶

Third, for equivalent reasons (lack of criminal intent, exonerating circumstances, offender being a certain type of person), and other factors (offender having undertaken an act of compensation), in hundreds of cases the penalties were not applied at all because the indictment was tabled.¹⁹⁷ Particularly noteworthy was the humanitarian consideration for youth, old age, and disability. Persons aged ninety or older and seven or younger were exempt from all punishments; persons aged eighty or older and ten or younger, or persons seriously disabled, were not punished for any crime less serious than theft or wounding people.¹⁹⁸ Most lenient was the favor of granting this benefit for crimes committed before, but discovered after a person became disabled or old and crimes committed during youth but discovered after maturity.¹⁹⁹

Besides these cases of nonapplication of penalty sanctioned by law, there was an important way for the criminal to take his own initiative to avoid receiving the penalty: voluntary surrender or confession prior to discovery of

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the crime. Such a confession had to be complete, not partial and half-hearted. The Nguyễn Code did not permit enjoyment of the benefit of this voluntary surrender in case the crime had caused irreparable bodily or property damage or was a sex crime, a frontier crossing, a prison escape, or a plot involving high treason, grave insubordination, and treason that had already been carried out. The Lê Code refused the benefit of voluntary surrender in cases of ten heinous crimes and murder.²⁰⁰ Despite these limitations on pardon as a result of voluntary confession, such benefit could not but mollify to a great extent and in a general way the severity of the traditional sanction system.

Under the Lê, redemption of penalties was an option available to the accused: (1) who was punishable with exile or less for committing crimes of error or negligence (except for the ten heinous crimes, corruption, deceit, and forgery); or (2) who was punishable with exile or less for crimes less serious than the ten heinous crimes and was aged seventy or older, fifteen or younger, or disabled; or (3) who was guilty of wounding or theft and was aged eighty or older, ten or younger, or seriously disabled.²⁰¹ The option of redemption was available even for a crime committed during the period before the accused grew old enough to be eligible for the benefit of old age or for a crime committed during his youth but discovered when he grew out of the eligible young age.²⁰² Moreover, Article 22 of the Lê Code on rate of redemption indicated even death could be redeemed and women were allowed to redeem their penalties without qualification. Under the Nguyễn, the option of redemption was available to an accused belonging to categories (2) and (3) just mentioned;²⁰³ furthermore, the Nguyễn Code granted the option of redemption to all officials guilty of a crime before they became officials,²⁰⁴ to all female offenders condemned to exile or penal servitude,²⁰⁵ and generally to all offenders whom the judge deemed deserving of this favor.²⁰⁶ Although redemption was already used under the Lý and Trần,²⁰⁷ these provisions give us a clearer idea of the humanizing tendency of the redemption option under the Lê and Nguyễn.

Fines were another monetary sanction particular to the Lê Code.²⁰⁸ The Nguyễn had redemption, which replaced corporal punishment, but did not provide for the fine proper. The Lê featured about 184 applications of this purely monetary penalty, illustrating the modern orientation of the Lê sanction system away from corporal punishment.²⁰⁹

The same tendency toward more humane penalties also explained the predominant role of demotion under the Lê. This penalty of humiliation was applied about 492 times in the Lê Code to all strata of people, not only to the official class, as in China, but even to the lowest social categories of commoners and serfs.²¹⁰

It seems fair to say that penalties in traditional Vietnam were a mixture of humane and cruel punishments, and their severity was much softened during application. Probably it is also fair to say that this system of punishments was

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less barbarian than European systems of the same era. A European eyewitness living in Hanoi until the 1680s compared the Lê system of punishments to those he knew in the West:

To nail malefactors on crosses, or to dismember them by four small gallies that row several ways are torments unheard of in this country. . . . Cruelty . . . was never found predominant in them.²¹¹

Separate Treatment of Juveniles?

Did traditional Vietnam take into account the age of juveniles in the criminal process and give them, whether accused or convicted, a special treatment separate from that reserved for adults?

Under both the Lê and Nguyễn, an accused juvenile who was under fifteen years of age could not be subject to judicial torture; to convict him, the court had to rely on testimony by three or more witnesses. Violators of this rule would be charged with the serious crime of wrongfully aggravating a case.²¹²

After conviction, a juvenile offender was given special treatment. We have broached this topic previously, but the full details follow: (1) If a juvenile were fifteen years old or less, he was allowed to redeem exile or lesser penalties, except for cases involving (under the Lê) the ten heinous crimes or (under the Nguyễn) the first, second, third, and fifth heinous crimes.²¹³ (2) If he were ten or younger, he was allowed to petition the emperor for reduction and exemption of penalties, even the death sentence, or to redeem the penalties for the less serious cases of theft or injuring, and to go unpunished for other crimes.²¹⁴ The Nguyễn did not allow the petition procedure for the political crimes of high treason, grave insubordination, and treason, but the Lê did. (3) If he were seven or younger, he was held completely not responsible in criminal law, although the Nguyễn had some reservation concerning the incitor's liability and restitution of the corpus delicti.²¹⁵ Article 21 of the Nguyễn Code stated that the seven year old or younger child "would not be punished (although this rule does not apply in the case of high treason, grave insubordination, and treason)." The official commentary, interpreting this exception, confirmed again that the child would not suffer any penalty because his judgment was incapable of plotting the crime, but he would be held responsible for returning any corpus delicti he held and the person inciting him would receive the penalty.

Thus, traditional law in Vietnam generally segregated the accused or convicted child from the adult in criminal justice administration. Except for children under seven, however, a complete exemption from liability, at least for serious crimes, was not given to those whose age ranged from eight to fifteen (the age of maturity in traditional Vietnam), although they were entitled to apply for redemption or reduction of penalty.

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Moreover, those children who were condemned might not be detained separately from adult convicts, as we read in one and the same decree in 1849 that children aged ten and less and those aged eleven to seventeen, whether condemned to death or exile or held pending trial, were to be given 7 *thăng* and 9 *thăng* of rice per month, respectively, and that prisoners aged eighteen or more would be given 12 *thăng* per month.²¹⁶ In other words, they might be all in the same jail. Finally, we find no evidence of the existence of separate juvenile courts in traditional Vietnam, although specificity of function among various courts (general criminal courts; Ministry of Finance for tax matters; Ministry of War for military matters, etc.) was already a feature of the Lê system of courts (see the following discussion of appellate jurisdiction or Article 672 of the Lê Code).

Fair Public Trials by Independent and Impartial Tribunals?

To safeguard human rights, modern standards require that all accused persons be entitled to a fair and public hearing by an independent and impartial tribunal established by law; that during the trial, which shall be held without undue delay, the accused be informed of the charge against him and be given enough time and help, including counsel, to prepare for his defense; and that he be permitted to examine witnesses against him and on his behalf, and to use the assistance of an interpreter if he cannot understand the language of the court.

In both Lê and Nguyễn law, we find guarantees of these safeguards, but more in the former than in the latter.

Independent Court. Under both dynasties everyone was clearly entitled to trial by a court presided over by a specific official acting as a judge. The adjudication function at the trial level belonged exclusively to the chief official of the administrative area in which the accused lived or committed the offense. This judge would be, under the Lê, the district official; the prefectural official; or the official heading one of the three provincial civil, military, and judicial offices; or an agency in the capital—depending on the nature and importance of the case.²¹⁷ No other official could unwarrantedly handle judicial cases, no matter how powerful he might be. Lê law punished with the stick penalty, demotion, or fine any administrators or superintendents with power over *corvée* men and minorities, and any generals in charge of military territories, who illegally took over the judicial function and arrested people.²¹⁸ The competent judge had to examine the cases himself and could not delegate power to any subordinate clerk.²¹⁹ Moreover, an official at the upper court level (such as a prefecture or the Criminal Review Agency in the capital) could not take cognizance of cases handled by the court at the lower level.²²⁰ This somewhat autonomous role of the trial judge under Lê law was further enhanced by the clear separation of

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powers, in the same manner as in modern legal systems, between the trial judge (*hình quan*) and the prosecutor (*ngục quan*): The prosecutor received complaints, investigated cases, made arrests, indicted the criminals, supervised the detention houses, and executed the judgments, whereas the trial judge tried cases and rendered verdicts.²²¹

In Nguyễn Vietnam, the judge of the court of first instance was, as in Ch'ing China, the district magistrate. Although there was no distinction between prosecution and trial functions in Nguyễn law, it also required the official to write out the judgment himself and not to delegate his judicial function to anybody else, including his employees. If the delegation of power to an employee resulted in the modification of the facts and the penalty for an accused, a complaint could be filed with the upper court and the guilty official would be severely condemned for aggravation (or mitigation) of an accused's case.²²²

Thus, at the trial level, judicial powers under both the Lê and the Nguyễn were reserved exclusively for a court presided over by an administrative official-cum-judge. There was, however, nothing like the modern-day institutional separation of the judiciary from the executive branch of government. The vertical control of the traditional Vietnamese court by the upper administrative authorities made the court less independent than modern standards require for the protecting of human rights.

Under the Lê, control of lower courts by their upper authorities was exercised automatically on two occasions, apart from the appeal, which was a process initiated by the accused (to be separately discussed later). First, during the trial, the judge or prosecutor had to memorialize the throne on important temporary measures such as, for example, a temporary injunction on who was to keep the harvest in a land dispute²²³ or the detention of a high-ranking offender.²²⁴ The judge also had to refer cases of doubtful culpability to the Criminal Review Agency, in front of which the accused might present arguments for his defense.²²⁵ In reaching his judgments, the judge again had to ask for the emperor's final decision on verdicts with penalties ranging from the heavy stick to penal servitude as well as for the Criminal Review Agency's approval and the emperor's final decision on verdicts imposing penalties of penal servitude with tattooing, exile, or death.²²⁶ Second, at the end of each year, each court had to prepare a verification register mentioning the details on the cases handled by it during the year (including penalties, dismissals, and reasons for the judgments) and then forward it to the immediate upper court for review. (The district court forwarded its register to the prefectural court; the prefectural court to the provincial administrative office; the provincial administrative office to the provincial judicial office; the provincial judicial or military office to the Censorate; and the Censorate to the emperor.) This automatic annual review dealt with the competence of the court, the meeting of the

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deadlines, and the appropriateness of the verdicts in terms of law and justice.²²⁷ The two automatic review processes, on a case-by-case basis and on an annual basis, might actually protect the rights of the individual accused if the upper courts exercised their functions with fairness; on the other hand, they might also diminish the independence of the lower courts, though not necessarily.

The Nguyễn also subjected the lower courts to vertical control by the upper courts. Cases arising in the capital districts would be reviewed by the Three High Courts.²²⁸ Cases arising in the provinces would be sent by the prefect or district chief to the province to be reviewed by the governor, who also decided, with the help of his judicial commissioner, where the penalty of the light or heavy stick, of penal servitude or military servitude, or exile was to be imposed. At the end of the year, the governor would send to the Board of Punishments a comprehensive report on all judgments during the year. For the death penalty, the prefect or district chief would forward the case to the governor, who, after consulting his judicial commissioner and reviewing it, would forward the case to the Three High Courts for further review before submitting it to the emperor for final decision.²²⁹ This automatic review process, again, might be a factor diminishing the independence of the lower courts, though not necessarily.

Although this control, in traditional belief, can benefit the accused with the supposedly clairvoyant benevolence of the higher judicial authorities, the modern conception may consider it a step backward in terms of the protection of human rights by an independent court subject only to law and not to administrative control from above. The reason was that in reviewing the lower courts' verdicts, the upper authorities not only had the duty to alleviate any unduly severe judgment—in which case the accused would benefit—but also had the option to impose a severe penalty and condemn the lower courts for unduly exonerating an offender or mitigating his case. Thus, the latter power of the upper authorities might create a tendency toward strictness among lower courts to protect themselves against the sanction of their superiors, thereby posing a danger to human rights. Such a danger, however, might not be a necessary result.

Fair and Public Trial Without Delay. If the courts in traditional Vietnam were not as independent as the modern concept of the judiciary would have them be, there was a clear commitment in both Lê and Nguyễn periods to making them as impartial as possible.

Under the Nguyễn, the judge and the court clerk had to disqualify themselves from a case for being a relative or a student of a party or for having some enmity against such a party. If they did not disqualify themselves, they would be subject to the light stick penalty.²³⁰ Lê law even went further, permitting the accused himself to disqualify a prosecutor or a clerk, and therefore provided for the punishment of the official who persisted in handling the case against the

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well-founded request by the accused for his disqualification.²³¹ Judges in both dynasties had to investigate only the charge in the complaint and could look into additional facts only if obtained by searches or arrest permitted by the rules.²³² Clerks had to record faithfully the accused's declarations, and any attempt at deletions or additions would be punished severely as aggravation or mitigation of case.²³³ The Nguyễn Code provided for a procedure to check this possible distortion of the facts by clerks: When the judgment was read to the accused, he would sign or press his fingerprint on it if he accepted it as accurately recording the facts.²³⁴ If an official falsified the facts, the punishment under the Lê law amounted to exile or death; Nguyễn law was less severe.²³⁵ In general, any partiality on the judge's part would be condemned as "aggravation of a case," which was punished severely. The penalty for willful aggravation of a case was the total penalty wrongly imposed (except that in the Lê Code, for death wrongly imposed the penalty for the judge was exile). The penalty for mistaken aggravation of a case was two or three degrees less, but still severe.²³⁶ Doubtful cases under the Lê were referred to the Criminal Review Agency for review; under the Nguyễn, if the accused did not accept the verdict read to him, he was entitled to reconsideration.²³⁷

There was also an effort to minimize the chance of bribery that would contribute to unfair adjudication: The Lê Code forbade visits to the homes of judges or clerks and punished bribery as misapplication of the law; the Nguyễn Code cracked down on the acceptance of bribes by prison officials.²³⁸ A French author observed that the supposed corruption of the Vietnamese judges under the Nguyễn had been exaggerated; indeed, (1) it was difficult to render a judgment contrary to the law; (2) any fee or gift received by a judge was very small (a chicken, some bananas) and was much less burdensome than French judicial fees; and (3) corruption was kept in check by the hierarchy of jurisdictions reaching the sovereign, to which an accused could appeal successively.²³⁹

The guarantees for a fair trial seemed to be more detailed and thorough under the Lê Code than under the Nguyễn because the Lê also specifically ordered judges to consider all relevant facts, to take into account the accused's intent as well as the mitigating and aggravating circumstances,²⁴⁰ to arrive at a judicious sentence with the concrete evidence, and not to make random inquiries.²⁴¹ Any judge who tried to mitigate or aggravate a case after a judicious decision had been made would be condemned; the other judges on the panel who did not oppose the one who proposed a judgment on the basis of his mood would also be penalized.²⁴² The existence of the panel of judges, at least at the central government level, was another guarantee of fairness, especially because the law itself stated that "the joint conduct of a public hearing should discern right and wrong in such a manner as to satisfy the people's sense of justice."²⁴³

The effort to attain fairness in adjudication was also enhanced by a public hearing, for which the Lê Dynasty had much more detailed regulations than the

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Nguyễn. Under the Lê, a court had to announce its sessions to the public in advance by posters. The judge had to investigate and try cases in the hall of the yamen "so that everyone [could] hear what [was] said or submitted."²⁴⁴ He could not receive the complaints in privacy or render justice without the participation of other members of the tribunal.²⁴⁵ After the verdict was reached, its content, including the reasoning, had to be posted for all parties to copy; if the judgment was obscure and the litigants were unable to copy it, an appeal might be lodged with the higher court.²⁴⁶

The Nguyễn Code seemed to restrict access of strangers to the Board of Punishments: Decree 1 following Article 365 forbade people without official business and without authorization to frequent the board to spy or to take information. But Philastre stated that this restriction on public access to the court's audience and judgments was nowhere else announced.²⁴⁷ Indeed, when the French came to Vietnam at the end of the nineteenth century, they saw that the examination, cross-examination, or confrontation of parties and witnesses, as well as the debate during the trial at the district level, were conducted with scrupulousness and recorded in the judgment along with the code article that provided for the penalty. They also observed that as the people saw that the punishment fitted the crime, public opinion was almost immediately satisfied.²⁴⁸ Thus, public trial at the local level was as much a practice in Nguyễn Vietnam as in Lê Vietnam or Ch'ing China.

Legislators in traditional Vietnam, well aware that justice delayed was justice denied, wanted to make sure that court cases were disposed of expeditiously. Thus, the Lê provided for deadlines within which judges had to make decisions on court cases: two months for cases involving battery, revilement, household and marriage or miscellaneous matters; three months for homicide cases. These deadlines started from the date of summoning the defendant to the court to present his pleadings. Judges who procrastinated beyond these deadlines would be punished with demotion for a one month's delay, dismissal for three months' delay, and penal servitude for five months' delay.²⁴⁹ The judges had to ensure that court clerks did not delay processing the complaints; if the latter did, they had to memorialize the throne for prosecuting them under the law on instigating litigation.²⁵⁰ If the chief official of a court were absent but a second official was available to settle cases, the adjudication work would be pursued within the prescribed deadline.²⁵¹ When a difficult case of, say, homicide required a postponement of the date of judgment, the courts had to report to the Censorate and ask for permission to grant an extension of deadline.²⁵² When the judgment had to be filed with the throne for final approval and a delay occurred, the punishment was demotion.²⁵³ Cases remanded to a court for retrial had to be brought by the prosecutor to the court in time (two months for important cases, one month for unimportant cases).²⁵⁴

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The Nguyễn Code, like the Ch'ing Code, did not specify the deadlines within which judges had to conclude court cases.²⁵⁵ But like the Ch'ing, the Nguyễn Dynasty found it advisable to determine the deadlines for disposing of legal cases. An 1802 decree fixed deadlines of five months for homicide, robbery, and theft cases; two months for cases involving household and marriage, land disputes, and fighting; and one month for revilement, debt, and miscellaneous cases. The deadline started from the date the defendant was summoned to the court. Another decree of 1826 reduced the five-month deadline to three months and the two-month deadline to one month.²⁵⁶ If a lower court was slow in handling cases, the upper court would have to write a report on the situation. If the latter court failed to do so, it would also be sanctioned.²⁵⁷ A province governor's report to the throne on a case always mentioned the deadlines that were met or not by the district, the prefecture, or the provincial judicial commissioner's office.²⁵⁸ Decree 1 following Article 370 of the Nguyễn Code specified, for courts in the capital, the deadline of one month after hearing the testimony of witnesses.²⁵⁹ Nguyễn officials were rated according to whether they observed the time limits or not. For a case solved within the deadline, they would be graded for superlative performance; for a case not settled within the deadline, they would be graded for inferior performance. The records of officials in a province would be combined into a "list of superlative and inferior legal actions." Officials with equal numbers of superior and inferior actions would be graded as ordinary (*biền*); those with four more inferior than superior actions would be graded substandard (*thứ*); those whose inferior actions exceeded superior ones by five or more would be classified as poor (*liệt*).²⁶⁰

Because of the obvious difficulty in documentation, we cannot tabulate, for the Lê or the Nguyễn, the number of cases of judicial procrastination (or "inferior legal actions," in Nguyễn terminology) as compared to the number of cases of timely decision. But it is clear that the legal requirements of both dynasties put heavy pressure on judges to dispose promptly of the cases on the court dockets. In 1827, when the Board of Punishments presented a list of 800 pending criminal cases involving the detention of more than 1,000 accused and witnesses, the Minh Mạng Emperor decreed that since so many people were detained some innocent would be necessarily implicated and he ordered the criminal judges to settle the cases quickly.²⁶¹ If the detention of only some 1,000 persons worried the emperor to such an extent that he demanded quick disposal of the cases, we must say that expeditious justice was indeed the aim of the state. Such a commitment to expeditious justice could not but benefit the individual involved in the legal process.

Rights of Information and Counsel. On the rights of the individual to be informed of the charge against him and to have enough time and help, including

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counsel, to prepare for his defense, we again find the Lê Dynasty more detailed and protective than the Nguyễn.

Under the Lê, the prosecutor and the trial judge had to inform the accused of the specific name of his offense and urge him to admit his guilt if the facts of the offense and the reason for punishing him for it were clear²⁶²—a clear implication that the accused had to be informed of the charge. He had thirty days after notification of the warrant (or, if the distance were great, thirty days after the return of the warrant officer who carried out the notification) to present himself and produce the arguments for his defense.²⁶³ The court had to post a list of the dates during the month on which the accused might provide his explanations or the documents in his support. When the accused came, he had to be received and given a hearing immediately.²⁶⁴ For legitimate reasons (such as being away on a public mission or in the middle of an important mourning), the accused might be entitled to a postponement of the case: If the judge went ahead to deliver a judgment by default without granting the necessary postponement, thus depriving the accused of his chance to produce the arguments in his defense, the accused would be entitled to a new trial.²⁶⁵

Sanctions were specified for the violation of this right of the accused. If, after a judge had failed to have the accused served with the warrant, or counted the thirty-day period from the date of service instead of from the date of the return of the warrant officer, or refused to receive arguments presented by the accused, he condemned the accused unjustly, the accused could denounce the judge to the province judicial commissioner (if he were a district or prefectural official), to the Censorate (if he were the province civil or judicial or military official), or to the government council (if he were the judge from the Censorate, the six ministries, or the six boards). “The guilty judge would be severely punished and the case tried again at the next higher level of jurisdiction.”²⁶⁶

If an accused was provided ample time for his defense, was he also given the right to have counsel of his own choosing or counsel assigned to him? On this matter, we must first look into the Lê and Nguyễn law on the “incitor of litigation.” Under Article 513 of the Lê Code, anyone who maliciously incited another to sue a third person or wrote a petition for him falsely accusing a third person of an offense would receive a penalty one degree lower than that imposed on the plaintiff who wrongly sued or the false accuser. Article 309 of the Nguyễn Code punished the offender with the same degree of penalty as it did the one who sued or made the false accusation. Further, in Chapter 30 of the Lê Procedural Code concerning the “ban on perverse incitement of litigation” (*Cấm chỉ điêu toa*), Article 1 classified as litigation tricksters those individuals who were *regularly* engaging in drafting complaints for others, who provoked lawsuits and accusations on futile grounds, or who, having seen the cases being shelved, continued attempting to reach amicable settlement with their adversaries. Article 1 also required district officials to report them to the province civil

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office upon discovery of their offenses or upon information from the local people. Article 2 of the same Chapter 30 mentioned the fact that a number of notables called themselves “district experts” (*thông huyện*) or “district masters” (*cai huyện*) and under these alleged (illegal) titles interfered into the litigants’ affairs, incited them and circulated in the yamen. Both articles of the Lê Procedural Code permitted victims of such persons to denounce them to the district chief, who would then report to the province judicial commissioner for the imposition of the penalty of penal servitude or exile.

Decree 1 following Article 309 of the Nguyễn Code punished persons who, for value paid by another, took a complaint to the capital for submission to the emperor. Decree 2 following the same article penalized officials who did not investigate and suppress the “masters of lawsuits” who incited people to sue. According to Philastre, the Vietnamese used the term “masters of lawsuits” to refer to troublemaking and crafty people who were astute in such affairs.²⁶⁷

Despite the suppression of incitement to false accusation or litigation as well as of regular engagement in lawsuits as “masters” or “experts,” both the Lê and the Nguyễn permitted an illiterate accused to receive help from a person not involved in his lawsuit. According to Article 706 of the Lê Code, he might ask for assistance on writing statements from a relative or anyone not involved in his case, including a clerk in the court who did not work on the case. Under the Nguyễn,²⁶⁸ he might receive advice, instruction, or assistance on drafting the complaint or the memorandum from another person provided there were no modifications to the facts of the offense and the scribe accompanied the plaintiff to court or wrote his name and address on the complaint. If need be, the court might even order a person outside its administration personnel to help the illiterate accused. Last but not least, the Nguyễn Code did not adopt the Sixth Decree following the Ch’ing Code article corresponding to Article 309 of the Nguyễn Code, which Chinese decree ordered the destruction of certain books on procedure and provided the penalties for printers, booksellers, and buyers. The Nguyễn Dynasty was not so hostile as the Ch’ing to knowledge about litigation among the general population.

Thus, we may say that although the Lê and the Nguyễn did not tolerate habitual litigation tricksters, they did not ban the role of counsel in the judicial process. There might not be a formally recognized legal profession in traditional Vietnam, but the role of ad hoc defenders was not restricted and, at least in the Nguyễn Dynasty, the court might even assign a scribe (who was not a member of the court’s personnel) to assist the illiterate accused.

Right to Examine and Disqualify Witnesses. The accused in traditional Vietnam also had the right to examine witnesses. Moreover, these witnesses might be disqualified on several grounds. The plaintiff, the first witness against the accused, had to appear in court. Under the Lê, if he failed to do so without good

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reason, he would be deemed guilty of false accusation.²⁶⁹ Under the Nguyễn, the plaintiff or accuser was held in court for all the necessary confrontations with the accused and witnesses; he would be released when there was no longer any need for more confrontation. If he fled or was absent for two months, he would be seized and punished for false accusation.²⁷⁰

As for the other witnesses, the right of the accused to examine them was explicitly recognized by Article 30, Chapter 1 of the Lê Procedural Code: “When the litigants challenged on ground of partiality the reports established by, or the testimonies produced in, the courts and yet the persons thus challenged did not present themselves at the inquiry held for this reason, a judgment shall be rendered against the writers of these reports or these witnesses.” The Nguyễn Code required the witnesses to declare to both the plaintiff and the accused that they could be held accountable for the real existence of the facts they alleged.²⁷¹ In 1835, when the judicial commissioner of Hải Dương Province memorialized proposing to render some judgment on the basis of reasoning, even in case the witnesses’ testimony and the material evidence did not conform to one another, the Minh Mạng Emperor rejected his proposal—stating that material evidence and witness testimony were important legal elements for reaching a verdict.²⁷² In deciding cases on the basis of the Nguyễn Code, the French courts in South Vietnam (called Cochinchina at the time) nullified investigations that were not performed in the presence of all parties and witnesses.²⁷³

Under the Lê Code, the judge who postponed beyond a reasonable period the confrontation of the parties and witnesses was subject to a fine.²⁷⁴ The right of the accused to examine witnesses against him or on his behalf had been frequently used, even abused, under the Lê. Lê legislators, after pointing out that people had usually cited as witnesses persons who were not present at the place of the offense or incident in question, reminded the courts that thenceforth only real eyewitnesses should be invited. Those who cited witnesses without foundation would have to pay a fine and to compensate for the expenses incurred by them in coming to the courts.²⁷⁵

In challenging witnesses, the accused or the litigant had to answer for his honesty or dishonesty: He had to promise to accept a severe penalty for an unjustifiable request for reconvening the witnesses.²⁷⁶ The witnesses themselves, however, would also incur serious penalties for perjury. And this was a safeguard for the right of the accused. The Lê Code punished a witness guilty of perjury with the same penalty as for the offense of aggravating a case, reduced by two degrees.²⁷⁷ The Nguyễn Code also severely penalized witnesses guilty of perjury as well as officials who knowingly let them go unpunished.²⁷⁸

Litigants’ relatives, friends, or enemies were disqualified to serve as witnesses. If they concealed these relationships in order to be admitted as witnesses, they would be punished for perjury. Judges and prosecutors who

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knowingly tolerated such witnesses would also be punished.²⁷⁹ Thus, in examining a witness, an accused might challenge him not only on the basis of the facts he presented but also on the ground of personal background.

Services of an Interpreter. Under both the Lê and Nguyễn an accused was entitled to the services of an interpreter if needed. This interpreter would be punished for the offense of aggravating or mitigating a case if he did not faithfully translate the words spoken in court.²⁸⁰

Mitigating Abuses of Power by Court Clerks. The Lê paid particular attention to the enforcement of an accused's right to a speedy and fair public trial in which he had a chance to prepare for his defense. Given the proneness of underlings in any court system to abuse power, it mandated the judges to issue warnings to their clerks about the necessity of respecting this right and to memorialize the throne on their punishment for any violation thereof. Chapter 31 of the Lê Procedural Code began with a factual observation that among the subaltern personnel in the courts, persons of integrity and probity were rare but those devoted to intrigue and cunning were numerous. It then enumerated the frequent abuses of the clerks: frightening the defendant, misleading him, delaying the procedure by failing to report to the judge on the facts or any investigations. If such abuses of power occurred, the case had to be withdrawn from the clerks or, if the matter were serious, the clerks would be dismissed from office. If the judges had issued no warning, thus letting the abuses occur, they would be also subject to disciplinary or penal sanctions.²⁸¹ The clerks had to permit the litigant, after paying a predetermined fee, to copy all pieces in the file to prepare for his defense. If the clerks refused this right to the litigant, the case would be taken from them. Clerks could not ask for more than a predetermined fee when the litigant deposited his brief with the court. Clerks of the Censorate, especially, were required to forward the briefs to the censors on the same day they received them; if the clerks refused to receive the briefs, litigants could complain to their supervisors for their punishment.²⁸²

Not only the defendant's but also the plaintiff's right to a speedy and fair trial was protected against the maneuvers of court clerks. The Lê Code mandated the judges to memorialize the throne for the punishment of the clerks who delayed processing the complaints, destroyed them, returned them to the litigants without reporting to their superiors, or made illegal decisions about them.²⁸³

Right to Appeal?

The right to appeal, an option open to a litigant or accused to request that his "conviction and sentence be reviewed by a higher tribunal,"²⁸⁴ should be distinguished from the automatic review, without initiation by a litigant, of lower court decisions by higher authorities, a review long characteristic of the traditional Vietnamese and Chinese legal systems.²⁸⁵ The right of

Trial Courts and Appellate Courts

Type of Cases	Court of First Instance	Appellate Courts
1. Marriage, land, striking, revilement, debt, tax, miscellaneous cases	district (for cases in the provinces) one of the two capital districts (for cases in the capital)	prefecture, province civil office, Censorate, Government Council capital governor, Censorate, Government Council
2. Homicide	prefecture and district together	province civil office, Censorate, Government Council
3. Disputes about land boundary and village chief nomination; dikes, roads, and irrigation	province civil office province civil and military offices	Censorate, Government Council Censorate, Government Council
4. Theft and robbery (including looting and illegal arrest committed by powerful people), gambling, Christianity, hoarding of weapons	province military chief (for cases in the provinces) capital police chief (for cases in the capital)	Censorate, Government Council Censorate, Government Council
5. Oppression by the powerful; extortion by tax collectors, government purchasers, extortion by arresting officers	province judicial office (cases in the provinces) Censorate (cases in the capital)	Censorate, Government Council Government Council
6. Extortion by officials, including on occasion of land distribution, excessive tax burden	Ministry of Finance	Board of Finance, Government Council
7. Draft dodging, military usurpation of state land, misappropriation of a soldier's land and salary	Board of War	Government Council
8. Misappropriation of state land or land of ambassadors and craftsmen; avoidance of <i>corvée</i>	Ministry of Public Works	Board of Public Works, Government Council
9. Suits among or against monks and priests, litigation on <i>hương hỏa</i> [incense and fire] property reserved for ancestor worship	Ministry of Rites	Board of Rites, Government Council
10. Suits involving imperial clan members	Imperial Clan Agency	Government Council

Note: Board is *Bộ* (*Pu* in Chinese), any of the six executive organs under the emperor. Ministry is *Phiên* (*Fan* in Chinese), any of the six parallel executive organs under the *Trịnh* Lords.

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appeal should also be distinguished from suits against judges for denial of justice (in French, *prise à partie*), which will be discussed in Chapter 5. The right to appeal, together with the automatic review process and the right to sue magistrates for denial of justice, constitute three incentives for the judge to render a fair verdict for an accused.

Again, as in other areas, we find the law of the Lê to be more thorough than that of the Nguyễn. As we shall see, all cases under the Nguyễn began—as in Ch'ing China—at the level of the district magistrate sitting as the court of first instance; the appellate courts were successively the next higher levels of administration (prefecture, province, etc.).

On the other hand, the Lê judicial system provided for a variety of specific courts of first instance (depending on the subject matter of the cases) and the corresponding sets of appellate jurisdictions. The initial court system was spelled out in Article 672 of the Lê Code: The court of first instance was the village if the matters were very minor; the district if they were minor; the prefecture if they were of intermediate importance; and an agency in the capital if they were important. From those levels of first-instance jurisdiction, cases might be brought on appeal to the next higher level, successively, up to the throne. Subsequent decrees of the Lê Dynasty on the judicial system promulgated in 1645, 1653, 1659, 1661, 1669, and 1676 gradually evolved from the four vague categories of very minor, minor, intermediate, and important matters to a classification of legal cases and their allocation to a specific court of first instance, on the basis of content: marriage and household, land, homicide, theft and robbery, and so on.²⁸⁶ The evolution culminated in Articles 1–17 of Chapter 1 of the Lê Procedural Code (which was reedited in 1778), which specified the courts of first instance and the corresponding levels of appellate jurisdictions to which a litigant could bring different types of cases.

We summarize in table form some features of these seventeen articles. Note that, like the 1676 decree, the Lê Procedural Code no longer mentioned the village as the court of first instance, although the village's authority in administration and mediation-conciliation was extended at the end of the eighteenth century. The Lê Procedural Code reduced to a reasonable figure the excessive number of levels of jurisdictions provided in earlier decrees (for example, for marriage, household, and land cases, the 1645 decree spelled out eight levels: village, district, prefecture, province civil office, province judicial office, the censor supervising the province in question, the Censorate, and the Trịnh Lord's office). This simplification of the appellate system very probably benefited the litigant: Without his right of appeal being sacrificed (because he still had the option to appeal two or three times), the inconvenience and cost of litigation or defense were much diminished.

On appeal, if the appellant were found to have suffered from an improper decision, the lower court judge who had erred from justice and the law (*thất*

đáng) would be, according to a 1665 decree, demoted one grade in important cases and fined in minor cases. The demotion might be redeemed by paying a sum of money.²⁸⁷ If a judgment had some good points and some bad points, and the good ones exceeded the bad ones, the appellant had to pay a reparation to the judge. Conversely, if the bad points exceeded the good ones, the judge had to pay the fine. But the amount of reparation or fine would be half in these cases.²⁸⁸

These penalties of demotion or fine applied to a simple improper decision (*thất đáng*), which was a professional mistake that should be distinguished from the more serious offense of denial of justice by violating the rules (*bất y lệ*) or abuse (*nhuông bĩ sự tình*), which will be discussed in Chapter 5.

The appellant who was vindicated by the higher court would be entitled to a retrial. When a case was to be remanded to another court for retrial, if the prosecutor and the clerk failed to bring it to the appropriate court for adjudication within the time limit (one month for unimportant cases, two months for important cases) they would be fined and demoted, respectively.²⁸⁹

Nguyễn law was less detailed than Lê law and more indirect in providing for the right to appeal. According to the article on the “violation of hierarchy of jurisdictions,”²⁹⁰ a complaint should be filed “according to hierarchy, from the bottom up.” If an accuser skipped the court to whose jurisdiction he naturally belonged—which court was, according to the commentary, the district—and filed his complaint with a superior court, he would be given fifty strokes of the light stick. Only when the court having jurisdiction over him did not rule on his case or forgot something or committed some irregularity could he submit his appeal to a higher court. Thus the right of appeal was recognized implicitly in the article on violating the hierarchy of jurisdictions.²⁹¹

As in the automatic review process, the appeal would go successively to the prefecture, the province, the Board of Punishments, and the other boards (depending on whether the cases concerned the offenses specified in the part of the code related to the Board of Punishments or to the other boards).²⁹² The Three High Courts (consisting, as we know, of the representatives of the Board of Punishments, the Censorate, and the Court of Revision) would consider the appeals on the capital penalty cases: On the sixth, sixteenth, and twenty-sixth days of each month, the Three High Courts would hold a session in the Public Hall (*Công Chiếu Đường*) to receive appeals lodged on the ground of innocence by the accused or family.²⁹³ According to the Nguyễn Code, in such cases all members of the lower courts, whether first instance or appellate, would have to appear to answer questions and their judgments would be rectified.²⁹⁴

Concerning the liability of the judge for a wrongful judicial decision, the Nguyễn Code did not seem to distinguish, as did the Lê Code, between the light penalties of demotion or fine for a simple improper decision (which was presumably only a professional mistake subject to appeal) and the more severe

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penalties for the offense of denial of justice (especially if it was an aggravation of a case). This was because, according to the Nguyễn Code, any time the revision of judgments revealed some injustice or wrongful condemnation (*oan uổng*), not only would the accuser be punished for false accusation, but the official who rendered the original judgment would also be condemned according to the provision on aggravation of a case (*nhập nhân tội*),²⁹⁵ which severely penalized the offender.²⁹⁶ In other words, Nguyễn law did not, but Lê law did, provide for a gradual increase in the liability of the judge from the professional mistake of an improper decision (*thất đáng*) to a wrongful condemnation and injustice (*oan uổng*) punishable as an offense under the article on aggravation of a case (*nhập nhân tội*).

Besides the successive appeals to higher levels of jurisdiction, there was a direct appeal to the emperor, the Supreme Judge of the land. The Lý, the Lê, and the Nguyễn provided for various methods to present this kind of appeal to the throne: by presenting a complaint to the emperor during his itinerary or by sounding the bell (under the Lê) or the drum (under the Nguyễn) in front of the imperial palaces. In 1052, Lý Thái Tông ordered that a bell be manufactured and placed in the courtyard of Thiên An Palace for the people to ring to claim their innocence.²⁹⁷

The Lê Procedural Code seemed to reserve this right of appeal to the victims of serious acts of oppression by powerful and high-ranking people against which there was no ordinary way to make appeal in the ordinary courts or against which a remedy had not yet been obtained through a judgment rendered on appeal by the higher courts. In such eventualities, the victims would be allowed to sound the bell at the left gate of the palace to make their claims heard by the Supreme Judge.²⁹⁸ The Lê Penal Code itself also provided for the punishment of the high-ranking or powerful people who tried to obstruct or detain plaintiffs who submitted complaints to the emperor: The offenders would be presumed guilty of the offenses of which they were accused. If the complaints concerned a secret matter, the penalty would be exile or death. Those who received orders to obstruct the plaintiffs and the palace guards who collaborated in the seizure of the complaints would receive the same penalty as the principals.²⁹⁹

The Nguyễn Dynasty also provided for this direct appeal to the emperor: the appellant might beat the drum or prostrate himself on the road on the occasion of the passage of the imperial procession.³⁰⁰

But this right to appeal, whether successively through the court system or directly to the emperor, was not without constraint or risk. As in modern days, one had to exercise one's right to appeal within the prescribed time period. According to the Lê Code, the time period for appealing to higher officials was five days; for appealing to the throne it was five days for cases in the capital and eight, ten, thirteen, fifteen, thirty, forty, or fifty days for cases outside the

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capital, depending on the distance to the capital. Anyone who filed a petition to the throne to claim his innocence after the time period already expired would be given the stick penalty, although his case might be reexamined.³⁰¹ Later the Lê seemed to extend the deadlines for appeal: A 1676 decree specified the period of one year for all types of cases.³⁰² Still another decree, in 1687, fixed the deadlines for appeal at four months for murder; three months for theft, robbery, and land disputes; two months for marriage and household disputes, striking and revilement, and miscellaneous wrongdoing.³⁰³

Constrained within a short time period, appeal was also a risky procedure for the appellant. He would be subject to punishment if his claim were found to be untrue. According to a decree in 1468 of the Lê, if an appeal were not well founded and the appellant did not suffer any injustice, he would be condemned to eighty strokes of the heavy stick and fined 5 *quán*.³⁰⁴ Another decree, in 1665, provided for reparation payment to the judges for unfounded appeal.³⁰⁵ Moreover, if after the Government Council had made the decision, the appellant still claimed innocence and asked for a retrial, he would have to accept a severe penalty (death for an important case; penal servitude for a minor case) if his request proved to be unfounded.³⁰⁶ Under the Nguyễn, as the judge's liability for wrongful condemnation was gravely penalized, so was the litigant's unfounded appeal: He would be condemned to a hundred strokes of the heavy stick and three years' penal servitude or a more severe penalty provided under the provision on aggravation of a case.³⁰⁷

In summary, the right to appeal was available to a litigant or an accused in traditional Vietnam, and the judge had all the incentive to render a fair verdict because he would be sanctioned on appeal for an improper or unjust decision. The appellant, however, had to be very careful in exercising his right to appeal because he himself would incur a penalty, sometimes very severe, for an unfounded appeal.

No Double Jeopardy?

The principle of “no double jeopardy” means that “no one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure” (Article 14, par. 7, of CCPR).

We find that Article 681 of the Lê Code contained the principle of *res judicata*³⁰⁸ and therefore most closely approximated this principle of no double jeopardy:

Whoever reopens a case already adjudged or changes a decision already entered during a previous reign [i. e., a reign of one of the emperor's ancestors] shall be demoted two grades. Any official who acts on a petition related to such a case shall be fined; in grave circumstances, such official shall be demoted.

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Article 19, Chapter 1, of the Lê Procedural Code repeated the same principle and added that the individual whose case was improperly reopened could denounce to a higher court the guilty judge, who would then be fined.

The Lê Code prohibited not only the judicial authority but also any litigant from attempting to change an outcome already decided by the courts. According to its Article 514, whenever a lawsuit had been terminated by a judgment and yet a litigant forcibly contested the outcome, he would be demoted three grades.

The principle of *res judicata* had long been in Vietnamese tradition. Indeed, it was already embodied in an 1128 edict by Emperor Trần Tông of the Lý Dynasty,³⁰⁹ and reasserted in 1463 by Emperor Thánh Tông of the Lê Dynasty.³¹⁰ This principle apparently continued to apply under Mạc³¹¹ and Nguyễn dynasties.

Exceptions to the Usual Guarantees on the Grounds of State Security?

We have seen that the legal system of traditional Vietnam offered many due process guarantees for the individual. The French commentator Luro had this to say on the Nguyễn Dynasty's criminal process which, as we have observed, provided less detailed protection for human rights than the Lê Dynasty's (but still adequately): "Bien que l'organisation de la justice chez les Annamites diffère beaucoup de ce qu'elle est en France, il faut reconnaître que la loi accorde à l'accusé de très sérieuses garanties."³¹²

There were, however, a few cases in which many of these guarantees were discarded. These cases involved the crimes against the security of the state, the most serious among the political offenses. Although in theory, traditional Vietnamese (and, of course, Chinese) scholars talked about the "right of revolution" mentioned in *Meng-tzu*, such a "right" was only moral and was never recognized as a legal right, even implicitly, in the principles of state organization. In fact, in surveying all types of political regimes, we can see that, with the exception of a few cases of explicit recognition (such as in the American Declaration of Independence), the right to overthrow the government is seldom, if ever, consecrated in the constitution of a country. Most modern constitutions explicitly uphold as unchallengeable the integrity and security of the state and the republican form of government. Any legal change of government must be accomplished through a peaceful process. Moreover, a "right" that must be exercised outside the regularized legal process is no longer within the scope of recognized human rights in the definition of the Universal Declaration. Thus, the duty to respect the integrity and security of the state is taken as a parameter of our discussion of human rights.

The remaining issue is: Did the Vietnamese tradition impose *acceptable derogations* from human rights in the name of respecting the integrity and

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security of the state? In other words, the issue is the *reasonableness* of the derogations on grounds of state security.

Although the idea of the nation-state was more developed in traditional Vietnam than elsewhere in East Asia during the same era,³¹³ the state was still largely represented by the emperor and the ruling dynasty. The integrity and security of the state was often equated with the security of the emperor or the integrity of the ruling dynasty. Therefore, officials had to take an oath of allegiance. Failure to attend an oath-taking ceremony would lead to the penalty of penal servitude or exile.³¹⁴ Moreover, any attempt on the integrity and security of the state was severely punished and the offender as well as his relatives would be deprived of many usual substantive and procedural due process guarantees.

High Treason, Grave Insubordination, and Treason. Under both the Lê and Nguyễn, whoever plotted high treason or grave insubordination would be condemned to decapitation (with exposure of the head in the Lê Code).³¹⁵ High treason was defined in the Lê Code as an attempt on the life of the emperor, including the intentional preparation for the emperor of some medicine not in conformity with formula or the inscription of a wrong label on any drug package addressed to him, or the intentional violation of the rules in the preparation of his meals.³¹⁶ Grave insubordination was defined as plotting to destroy imperial temples, mausoleums, and palaces,³¹⁷ thus endangering (in terms of geomancy) the security of the ruling dynasty. There was also a presumption of high treason or grave insubordination in cases of formation of cliques or unauthorized assembly of men into units.³¹⁸

Nguyễn law also very generally defined a high treason plot as a plot to endanger the emperor, and a grave insubordination plot as one for destroying imperial temples, mausoleums, and palaces.³¹⁹

The death penalty for the offender guilty of high treason would not be deemed extraordinary according to today's human rights standards, but the death penalty for grave insubordination would be too harsh. Moreover, the death penalty for the offender's relatives who were informed of the plot or the condemnation of his wife and children to the status of unredeemable public serfs (as provided in the Lê Code) would be, in the modern view, a severe violation of the human rights of innocent people.³²⁰ Even more blatantly in violation of the rights of innocent people was the Nguyễn Code provision that, on one hand, punished with death the offender's grandfather, father, sons, nephews, brothers, uncles, whether they were living with the offender or not (and aware or not of the offense) and all persons residing with him and, on the other hand, seized as public serfs or slaves the offender's male relatives aged sixteen or under, as well as the offender's mother, wife, daughters, daughters-in-

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law, and sisters. Whereas we would consider this harsh punishment of the offender's innocent relatives (or innocent outsiders living with the offender) a serious encroachment of human rights, the official commentary in the Nguyễn Code took the position that this wide-ranging punishment was a policy of humanity and indulgence because it would motivate a person to discourage any plot by a relative "even in its bud."³²¹

Under both the Lê and the Nguyễn, whoever plotted treason would be decapitated.³²² Treason was defined as turning against one's country and serving the enemy, or going into a mountainous or marshy area and ignoring government exhortations to surrender;³²³ the Lê Code also presumed as treason the act of fleeing one's own country.³²⁴

Again, the serious threat to human rights was, under the Lê, the condemnation of the offender's wife and children to the status of public serfs or slaves or, under the Nguyễn, the exile of the offender's father and mother, grandfather, grandsons, and brothers to a distance of three thousand miles, and the condemnation of his wife and children to the status of public slaves.³²⁵

Loss of Substantive Due Process Protections. The severity of the penalty was only one aspect of the traditional criminal policy toward the offenders against state security. In their suppression, most of the usual substantive due process protections were discarded.

First, in normal circumstances, a criminal enjoyed the usual benefit of authorized mutual concealment among relatives.³²⁶ The possibility of concealing a relative guilty of a crime, recognized primarily to preserve family cohesion, had an indirect but positive effect on the protection of an individual's human rights. There was a limitation to this protection: Concealment could take place only if the criminal had not been identified by the law; if he had been pursued by the law, the protection was no longer available.³²⁷ But what is more relevant and important for our discussion here is the exceptional provision that, when the crime in question was treason, grave insubordination, or high treason, this option of mutual concealment among relatives no longer existed.³²⁸ In fact, anyone who knew about such a crime had the obligation to denounce it; withholding the accusation would lead to punishment.³²⁹

Second, in normal circumstances, an offender was protected by the provisions banning detainees from accusing other people (for an act not related to their offenses), children or grandchildren from accusing their parents or grandparents, and serfs from denouncing their master (for any offense, whether true or not).³³⁰ Again, the rationale for these bans was social order (ban on detainees' accusation) or Confucian morality (ban on children's or serf's accusations of grandparents, parents, or master). But their indirect and positive effect was the added protection given to the rights of the guilty individual. However, this protection of the offender from accusation by certain persons or relatives

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would no longer be available where high treason, grave insubordination, or treason³³¹ was concerned. The Nguyễn Code commentary clearly stated that in these cases, “the crimes affected the security of the state.”³³²

Third, in normal circumstances, an offender who confessed or voluntarily surrendered before his offense was discovered would be pardoned.³³³ However, when the criminal act of high treason, grave insubordination, or treason had already taken place,³³⁴ the offender would not be exempted from punishment. In particular reference to such treasonable acts as fleeing into mountainous or marshy areas or deserting one’s country, the Nguyễn Code granted only a reduction of penalty for an offender who voluntarily surrendered.³³⁵

Fourth, disability and old or young age were normally grounds for lenient treatment of offenders: Offenders who were disabled, young, or old would be able to redeem their penalties or to have them reduced or waived. When high treason, grave insubordination, or treason was involved, however, the lenient policy no longer applied. In this respect, Lê law was a little more generous than Nguyễn law. Under the Lê, persons who were seventy years or older, fifteen years or younger, or disabled were permitted to redeem the penalty of exile or less; if the ten heinous crimes (among them high treason, grave insubordination, and treason) were concerned, however, this option would not be available. Persons eighty years or older, ten years or younger, or seriously disabled might redeem whatever penalty was imposed for theft or injury caused to others or might even be exempted from prosecution for lesser crimes. When their crime was high treason, grave insubordination, or homicide punishable by death, however, they would be entitled only to a special petition to the throne (for penalty reduction). Only persons aged ninety or older or seven or younger, would not be punished in every case.³³⁶

The Nguyễn was more severe than the Lê: It excluded high treason, grave insubordination, and treason from all cases of lenient treatment for old or young age, or disability. As under the Lê, persons aged seventy or older, fifteen or younger, or disabled who were guilty of such crimes against state security could not redeem their penalty. If they were eighty or older, ten or younger, or seriously disabled, as under the Lê, they would be entitled to a special petition in case of homicide punishable by death; but, in contrast to the Lê, they would not be so entitled if guilty of high treason, grave insubordination, or treason. Persons aged ninety or older or seven or younger would be, as under the Lê, exempted from all penalties, including death. In contrast to the Lê, however, they would still be punished if they were guilty of high treason, grave insubordination, or treason.³³⁷ The Nguyễn Code’s official commentary stated that only children aged seven or less would not be punished for these crimes against state security, but those who recruited them would be. The children, although not punished, were required to make restitution or pay damages, if any.³³⁸

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Fifth, under both the Lê and the Nguyễn, persons entitled to one of the eight special considerations (for being an imperial relative, for long service, for virtue, etc.) or to a special petition to the throne, were entitled to have their cases memorialized the throne for stay of prosecution or for approvals of indictment, deliberation, and verdict (which often resulted in penalty reduction), or to have their cases reconsidered by the court for reduction of one degree in the penalty. If, however, they were guilty of the ten heinous crimes, among them high treason, grave insubordination, and treason, they were no longer thus entitled.³³⁹

Sixth, the Lê Code in particular provided for the option of redeeming all penalties for offenses committed by error or negligence. However, when the offenses were the ten heinous crimes, which of course included high treason, grave insubordination, and treason, this option of redemption was no longer available.³⁴⁰

Loss of Procedural Due Process Protections. Not only the substantive but also many procedural due process protections disappeared when the offenses in question were violations against state security.

First, as mentioned earlier, false or vague accusation was severely punished.³⁴¹ According to Article 501 of the Lê Code, however, the false accusation of high treason, grave insubordination, or treason was eligible for a special petition to the throne for penalty reduction “if the accuser was unable to verify the truth and did not act maliciously.” The T’ang Code, from which this Lê Code provision was borrowed, gave in its commentary examples of the inability to verify the truth: the mistaken belief that a troop movement was the beginning of an act of high treason or that repair of an imperial temple was an act of grave insubordination when in fact the emperor had already issued a decree permitting a review of troops or the reconstruction of a temple.

We believe the interpretation of the Lê Code provision should take these examples into account. Thus, the Lê Code gave some leeway to any informer who denounced the crimes of high treason, grave insubordination, or treason and treated him leniently even if he wrongly accused someone in a bona fide manner in the interest of protecting the security of the state.³⁴² This concern for the overriding national security interest was also embodied in Article 505 of the Lê Code, which seemed to be designed to punish less severely than normally a false but bona fide accusation of grave insubordination committed by an official having jurisdiction over the informer: In other words, it was designed to encourage the accusation of any attempt at grave insubordination by an official.

Second, judges were normally required to restrict the scope of their investigation to the charges brought in the complaint; to do otherwise would be committing the offense of aggravating a case.³⁴³ When high treason or grave insubordination was involved, however, this restriction on the scope of the

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judges' investigation would not be applied. Again, the security of the state prevailed over the accused's interests during the prosecutor's investigation of offenses.

Third, in normal circumstances, whoever fraudulently claimed to have received an imperial order for the arrest of an individual would be exiled under the Lê (if he took the occasion to loot the individual's property) and decapitated under the Nguyễn.³⁴⁴ If he actually forged an imperial order, he would be, under both dynasties, decapitated.³⁴⁵ However, in case there were a plot of high treason, grave insubordination, or treason and the officials did not have enough time to memorialize the throne in advance, they might falsely adduce an imperial decree for the arrest of the offenders but thereafter had to report the situation to the emperor for his decision.³⁴⁶ Again, flexibility in the procedure of arrest was provided in the case of offenses endangering state security.

In summary, not only were offenses against state security severely punished but also the offenders and their family members or relatives were deprived of many of the usual substantive and procedural guarantees of due process. In many cases, when state security or the security of the ruler was simply thought to be in danger, death was imposed without even a semblance of a trial. Under the Trần, in 1232, Trần Thủ Độ buried alive the members of the Lý Imperial Clan whose power the Trần had just taken over; Hồ Quý Ly had his opponents put to death without trial. Under the Lê, many high officials were summarily killed for being suspected by the emperors (Trần Nguyên Hãn, Phạm Văn Xảo, Lê Sát, Lê Khả, Lê Khắc Phục); or for being implicated in a doubtful case of an emperor's death (Nguyễn Trãi). Later, they were given posthumous recovery of titles and their descendants were compensated with land. Under the Nguyễn, Nguyễn Văn Thành and Đặng Trần Thủởng also met death without the benefit of a trial.³⁴⁷

Despite these cases of summary liquidation, however, in order to have a balanced view of the traditional Vietnamese treatment of all political offenses and not only of the subcategory of offenses against state security, we need to review other political offenses, such as writing or uttering portentous prophecies about evil events or commenting on ill omens unfavorable to the emperor,³⁴⁸ or using anonymous letters to discuss national issues in an offensive manner.³⁴⁹ For these other political offenses, although the penalty was decapitation or strangulation under both the Lê and Nguyễn dynasties, the offenders still enjoyed the various guarantees of due process. In a modern regime, on the contrary, especially in an authoritarian or totalitarian one, persons guilty of such political offenses could be subject to unlimited administrative detention or a summary procedure without the normal guarantees of the judicial process. We should also remember the harsh "savagery with which religious and political nonconformity have been and often continue to be punished in the Christian West."³⁵⁰ Seen in such perspective, the deprivation of

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some due process protections imposed on offenders violating state security in traditional Vietnam was indeed a minor derogation of the rights of the accused. The death penalty for some of the political offenses in traditional Vietnam, however, even if imposed with all the procedural due process and not in an arbitrary manner, constituted deprivation of life beyond the proper standard of human punishment. This brings us back to the issues of inhuman punishment discussed in a preceding section.

In practice, when an emperor saw no danger to the security of his dynasty, he might become generous to his former enemy. For example, after unification of the country in 1802, the Gia Long Emperor of the Nguyễn ordered the search for the Lê descendants. Upon finding Lê Duy Hoán, who took refuge in the Thái Nguyễn ethnic minority region, the emperor gave him 10,000 *mẫu* of ricefield (1 *mẫu* = 733 sq. yards), 1,016 persons to tend the Lê temples, and assigned to Hoán the worship of the Lê ancestors. He also exempted Lê descendants from tax and corvée. In 1804, he ordered Lê Duy Hoán to go to the Nam Quan pass on the China border to receive the remains of Lê Duy Kí, who had fled to China in 1789 and died in Peking in 1793, and to bring the remains to the Lê mausoleum in Thanh Hóa. Although Lê Duy Hoán fomented a revolt in 1818 and the court officials proposed to Gia Long to abolish the cult of the Lê, the emperor refused to follow this advice and ordered the governor of North Vietnam to find another Lê descendant to continue the cult so that, he said, “all the dead and the living benefit from my favors.”

As early as 1802, the Gia Long Emperor also ordered the search for the descendants of the Trịnh family, his archenemies. He entrusted to one of them the Trịnh family cult, giving him 500 *mẫu* of ricefield. He also exempted 247 Trịnh clan members from corvée. This was, he said, “to remember the old alliance between this family and mine.”³⁵¹

In 1832, after the Lê Văn Khôi rebellion was suppressed and security had been restored, the wives and children of the soldiers who had joined the rebellion were released from detention.³⁵²

Thus, despite the exceptions to the usual protections of due process when offenses against state security were involved, the legal system in traditional Vietnam offered many guarantees for the life, liberty, and security of the individual. If these guarantees did not quite measure up to current international standards, we must say there is no basis to justify a theory of “Oriental despotism” in the case of Vietnam. On the contrary, the humane tradition of old Vietnam was very much in favor of the integrity of the person.

The next question to be answered is: Did this tradition also promote equality?

CHAPTER 2

Equality or Discrimination?

The ideal of equality is enshrined in the Universal Declaration in these terms:

All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration. (Article 7)

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Article 2)

The ideal of equality is considered so desirable that even in times of public emergency threatening the life of the nation, when modern governments are permitted by the CCPR to take measures derogating from their obligations to respect human rights, they are still obliged to avoid measures that involve “discrimination solely on the ground of race, color, sex, language, religion or social origin” (Article 4).

We find in traditional Vietnamese (and Chinese) law particularistic considerations of social status, family status, sex, national, or ethnic origin. On the other hand, ever since the policy of leveling all subjects before uniformly applied law was advocated by the legalist school of thought and applied since the Han in China, Vietnamese and Chinese dynasties adopted codes of law applicable to their whole population, and their court systems had jurisdiction over all people in the national territory. Can we say that both particularistic considerations and general and uniformly applied principles existed in Vietnamese and Chinese tradition, forming the warp and woof of the law?

Many cases brought before the magistrates might involve people not related to one another, and in these cases the particularistic considerations given to the family status of the offender and the victim did not apply. It is true that under the Lê even powerful people guilty of an offense could not escape the sanction of the laws and the prosecutors or the judges who protected them would be punished. It is also true that under the Nguyễn the Gia Long Emperor had his son flogged for forcing someone's child to be a

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singer, and the Minh Mạng Emperor chastised his brothers several times for beating people or forcing them to do *corvée*.¹

In the criminal process, however, as well as on the more general level of government policy, discrimination based on family status, social status, sex, and national or ethnic origin occurred on so many occasions that one wonders whether equality before the law was the exception rather than the rule in traditional Vietnam.

Inequality on the Basis of Family Status

Family and clan were and continue to be important units of Vietnamese society. In traditional times, under the influence of Confucianism, the different personal statuses assigned to different family and clan members had produced legal inequalities in criminal as well as in civil matters. Junior relatives were punished for denouncing, reviling, or striking senior relatives. But for the latter to commit any such acts against the former did not constitute an offense except when it led to the most serious consequences, such as striking resulting in injury or death. By law, junior relatives were obligated to carry out, *vis-à-vis* their seniors, certain responsibilities that modern law would not consider as their civil obligations. But senior relatives were not so obligated.

Consider, for example, the relationship between children/grandchildren and parents/grandparents. Children/grandchildren denouncing their parents/grandparents, even for genuine crimes, would be guilty of lack of filial piety, one of the ten heinous crimes, and would be punished with exile or penal servitude;² if the denunciation were false, the penalty would be much more severe.³ On the other hand, both the Lê and the Nguyễn were silent about any punishment for the accusation of children/grandchildren by their parents/grandparents;⁴ the Nguyễn even explicitly exempted false accusation of children/grandchildren by their parents/grandparents.⁵

This unequal relationship was also revealed in the offense of revilement. Children/grandchildren reviling their parents/grandparents (including parents/grandparents-in-law) would be guilty of lack of filial piety (again, a heinous crime) and would be exiled in the Lê and strangled in the Nguyễn Dynasty.⁶ On the other hand, the reverse did not constitute a crime, as both Lê and Nguyễn dynasties were silent on revilement of children/grandchildren by parents/grandparents.⁷

For striking their parents/grandparents, children/grandchildren (or daughters/granddaughters-in-law) would be condemned for wicked insubordination (one of the ten heinous crimes) and sentenced, under the Lê, to exile or strangulation depending on whether any injury (or death) was caused or not, and under the Nguyễn to decapitation in all cases of outcome.⁸ On the other hand, parents/grandparents would be found guilty only

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if they struck and killed their children/grandchildren, and even in this case they were condemned merely to penal servitude under the Lê and one hundred strokes of the heavy stick under the Nguyễn. Only in the case of striking daughters-in-law would they be punished (with demotion in the Lê and the stick penalty in the Nguyễn) for injuring the woman.⁹

Moreover, for unintentional homicide, parents/grandparents were not punished; on the other hand, their children/grandchildren would be penalized even if they unintentionally caused injury or death to their parents/grandparents.¹⁰ For murder, parents/grandparents would be punished only by penal servitude,¹¹ whereas children/grandchildren would be subject to death by slicing.¹²

Not only in criminal offenses but also in civil law matters, the relationship between parents/grandparents and children/grandchildren was sanctioned by law as hierarchical and unequal in nature. The children/grandchildren were punished for what we nowadays would consider as a mere moral violation *vis-à-vis* their parents/grandparents, or an act for which the law would not impose any penalty. Children/grandchildren were punished for disobeying their parents/grandparents,¹³ for discarding mourning clothes or marrying during mourning for their parents/grandparents,¹⁴ and for suing them in courts.¹⁵

The hierarchical family structure and the resulting legal inequalities were also apparent in the existence of criminal law penalties for the crimes committed by younger against elder siblings, by nephews/nieces against uncles/aunts¹⁶ or by other types of junior relatives against their senior relatives,¹⁷ and the lack of penalties for the reverse cases of offenses.

A junior relative accusing a senior relative of the second (one-year) degree of mourning would be condemned for discord (one of the ten heinous crimes) and punished with penal servitude in the Lê and the stick penalty in the Nguyễn. The Nguyễn Code also explicitly forbade the accusation of all senior relatives of the second, third, fourth, and fifth degrees of mourning. But the reverse accusation did not constitute an offense.¹⁸

For revilement, the junior relative would, if the victim were a senior relative of the second degree of mourning (such as an elder brother or sister, an uncle or aunt), be demoted in the Lê or receive the stick penalty or penal servitude in the Nguyễn.¹⁹ Whereas the Lê did not seem to regulate and punish revilement among relatives of the third, fourth, or fifth degree, the Nguyễn also punished the junior relative for reviling a senior relative of these degrees of mourning, but with decreasing severity in the penalty.²⁰ The same principle of punishment applied if the offender were the wife of a junior relative.²¹ On the other hand, for the equivalent act of reviling a junior relative, the senior relative was not punished. Thus, differences in family status resulted in corresponding inequalities in legal sanctions.

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For striking a senior relative of any degree of mourning, whether it was the second, third, fourth, or fifth, the junior relative or his wife guilty of the offense would be punished with demotion or the stick penalty, penal servitude, exile, strangulation, or decapitation, depending on whether the striking resulted in no injury, injury, disability, or death. Both the Lê and Nguyễn dynasties increased the penalty by one degree if the victimized senior relative were of a generation higher than the offending junior relative's. On the other hand, the senior relative striking a junior one would be punished, and punished lightly, only if the latter were seriously injured (i.e., sustained a fracture) or died. If the junior relative were not injured, the senior relative was not guilty of a crime.²²

For unintentional killing, the junior relative was still punished, although rather lightly (penal servitude), whereas the senior relative was exempted from any punishment.²³

In short, in both the Lê and the Nguyễn, differences in family status consistently resulted in inequalities under the law, in civil as well as in criminal matters.

Inequality on the Basis of Social Status

Apart from commoners, who formed the great majority of the population in traditional Vietnam, some social categories were privileged and some underprivileged. The privileged strata consisted of imperial relatives, officials, and those who could be called, for convenient classification, quasi-officials—such as people holding honorary titles, officials' children, local notables, and scholars who had passed some stages in the examination for recruitment into the officialdom. The underprivileged classes consisted of serfs (slaves) and entertainers (singers, actors, and actresses).

The Privileged Classes

Princes and Other Imperial Relatives. Under the Lý and Trần dynasties these persons were powerful: They had private armies and were given land to tax and levy corvée. Under the Lê they were deprived of these privileges, although they were still permitted, to a lesser degree, to own landed estates. The Nguyễn further reduced the role of the imperial clan: Imperial clan members who were granted noble titles could only rent state land; no longer did such land constitute a fief with separate power to tax and levy corvée, as under the Lý and Trần.²⁴ These politico-military facts related to the social organization of the times rather than to the issue of human rights, but we mention them briefly here in passing.

In terms of human rights protection, imperial relatives were, in the first place, granted some alleviation of criminal sanctions when they were caught up in the net of the law. Of course, they had to abide by the law.²⁵ But the emperor's

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or empress dowager's relatives of the three-month or closer degree of mourning and the empress's relatives of the five-month or closer degree of mourning who were guilty of crimes would benefit from "special consideration for being imperial relatives" and consequently would have the privilege of having their cases memorialized the throne or reported to the court for a decision on the penalty and, in the Lê Dynasty, would be exempted from, or permitted to redeem, the light and heavy stick penalties and tattooing.²⁶ Even the crown princess's relatives of the nine-month or closer degree of mourning were given the privilege of "special consideration for being imperial relatives" in the Nguyễn and the privilege of "special petition for penalty reduction" in the Lê.²⁷

The arrest of guilty imperial relatives required imperial approval.²⁸ When they were summoned to court, princes' daughters from the third rank upward would be permitted to send a representative, whereas those from the fourth to sixth ranks were allowed to stand while in court instead of sitting on the ground. Princes themselves were allowed to sit on a wooden bed while attending their trial, whereas ordinary men had to sit on the ground.²⁹

Second, criminal law also provided imperial relatives with special protection for their bodily and moral integrity against violation by others. If they were struck by a person, the latter would be punished more severely than for striking an ordinary citizen.³⁰ In the Lê, if a commoner reviled an imperial relative he would be demoted two degrees instead of receiving no punishment, as in the case of reviling another commoner.³¹

Officials. Compared with imperial relatives, officials had even more privileges under the Lê and Nguyễn dynasties, in terms of either alleviation of criminal sanctions or special protection of personal, social, political, and economic privileges. The preferential treatment officials received continued even after they had retired.³²

Alleviation of criminal sanctions. Prosecutors had to indict and judges had to try guilty officials and other powerful people; if they tried to protect the latter, they themselves would be punished.³³ But there was only that much about equality under the law.

In the Lê Dynasty, the arrest of officials of the fifth rank or higher (or persons holding an honorary title of the third rank or higher) required imperial approval. Even if only a minor wrongdoing had been committed by officials, if they were of the sixth rank or higher, local officials had to memorialize the throne.³⁴ When they were brought to court, officials were not required to sit on the floor, as was normally the rule, but were allowed to sit on a wooden bed or mat (if they were of the second rank or higher) or to stand (if they were of the third rank or if they attended trial only because of their public duties).³⁵ In these respects, as we have seen, they were given about the same privileges as imperial relatives. In

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the Nguyễn Dynasty, all officials guilty of criminal offenses (administrative mistakes were not included) could not be indicted without a report being first sent under seal to the emperor with a request for instruction; the judge also had to forward his proposed verdict to the throne for approval.³⁶

But the most important privileges granted to guilty officials were the lesser or milder penalties, which varied with their ranks and were regulated in more complicated details in the Lê than in the Nguyễn.

All guilty officials were granted a one-degree reduction in the penalty in the Lê.³⁷ The Nguyễn Dynasty was less generous toward them but still treated them in a favorable manner. Except for serious crimes such as fornication, theft and robbery, forgery, and bribery, or for crimes in which the penalty was penal servitude, exile, or death—in which cases officials would undergo the legally prescribed penalties like any commoner—officials had the option of redeeming all light and heavy stick penalties.³⁸ Even if they did not exercise that option, their stick penalties would not actually be administered but would be replaced by loss of salary or grade or dismissal from office.³⁹

The Lê permitted officials of the fifth rank or higher to have the number of tattooed characters reduced on their bodies after due consideration⁴⁰ and exempted the same category of officials from residence at the worksite in case of penal servitude or exile if they were meritorious subjects and had been in the imperial service for a long time.⁴¹

Under the Lê, officials of the third rank or higher, by definition, would be entitled to the special “consideration for high position” and would benefit from the prerequisite procedure of imperial (or court) approval for any indictment and condemnation that might be imposed on them.⁴² Through this procedure, the emperor might grant them a stay of prosecution or they might be given a lighter penalty than was ordinarily imposed.⁴³ Moreover, in both the Lê and the Nguyễn, officials enjoying “consideration for high position” were exempted from judicial torture during investigation and would be condemned only on the basis of witnesses’ testimony.⁴⁴

Under the Lê, for certain crimes officials of the second or higher rank would be required only to pay a fine instead of being demoted⁴⁵ or instead of being condemned to penal servitude.⁴⁶ Apparently they were also exempted from the heavy stick penalty or the tattooing penalty because the Lê Code articles on redemption of these penalties only mentioned the redemption by officials of the lower rank and the commoners.⁴⁷

Thus the higher the rank of an official, the more exemptions from the normal procedure and sanctions of criminal law he would get. This unequal treatment on the basis of rank was also true of other privileges.

Special protection of personal, social, political, and economic privileges. An official’s physical security was especially and preferentially protected by the

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provisions that imposed on a person who struck him a punishment that grew gradually more severe as the gap between their status increased. Thus, a commoner striking a second- or first-rank official would be punished more severely than a ninth- or eighth-rank official striking the same official, and this guilty ninth- or eighth-rank official would be punished more severely than a fifth- or sixth-rank official guilty of the same offense. Or, for instance, the penalty would be more severe when the victimized official was the head rather than the deputy head of the administrative areas or military unit of the offender.⁴⁸ Thus, the state provided for a greater deterrence against harming officials than against harming commoners; the higher the official's position, the greater the deterrence was. The Lê even protected head officials' parents, wives, and children by punishing their offenders more severely than for the ordinary crime of striking other people's parents, wives, and children.⁴⁹ The Nguyễn in particular provided that if officials were mistreated by their superiors, they could memorialize directly the emperor for protection.⁵⁰

In Lê law, the false accusation of officials was punished one degree more severely than the same violation against a person without official status.⁵¹

Also in Lê law, death caused to officials would lead to amounts of compensation that varied in direct proportion to their high or low status. For example, death compensation was 15,000 *qúan* for a first-rank official, only 300 *qúan* for an eighth- or ninth-rank official, and 150 *qúan* for a commoner.⁵² Thus, through this legally sanctioned graduated deterrence against violation, the physical security of an official was better ensured than that of a commoner or that of another official of lower rank.

An official's reputation and entitlement to social respect were better protected than a commoner's. For example, the Lê Dynasty punished the revilement of officials more severely as the difference in status between the offender and the victim widened.⁵³ In one legal document, revilement of officials was assimilated to a slave's revilement of his master.⁵⁴ Even criticism of officials in writing was not permitted.⁵⁵ In the Lê, officials' wives and children were also better protected than commoners' wives and children against revilement by commoners.⁵⁶

Under the Lê, vessels of second-rank or higher officials were exempted from inspection by river surveillance posts, but those of their retinue were not (a privilege unknown under the Nguyễn).⁵⁷ Even the shrines or tablets commemorating the memory of officials of the third rank or higher were better protected than those of commoners: Destroying them was punished one degree more severely.⁵⁸

Officials and their children, as well as scholars who had passed certain examinations (i.e., who might become officials) were granted specific politico-economic advantages. In the Lê Dynasty, bankrupt officials might petition the throne for an inventory of their property and a proportional reduction of debts to

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be paid to various creditors; in other words, unlike commoners, they were allowed the composition of debts to start a new life.⁵⁹ In both the Lê and the Nguyễn, officials' descendants enjoyed extendible privileges or "shades"—that is, the possibility of receiving some official titles or becoming local notables because of their forebears' position.⁶⁰ Officials' children and even scholars who passed a certain number of examinations were exempted from military duty and corvée service.⁶¹ Under Minh Mạng and Tự Đức, the parents of officials from the sixth rank up were exempt from corvée and military service and, at times, also from taxes and contributions, depending on the rank of the officials. They were treated as subsidiary officials (*quan viên phụ hạng*).⁶² Finally, in the area of sumptuary law, officials of different ranks and commoners were subject to different statutory restrictions (depending on their ranks) on their land, houses, clothing, personal effects, vessels and carriages, ceremonial objects, tombs, and the like.⁶³ The inequality in these consumption items was not the result of purely socioeconomic determinants but a legally enforced unequal distribution of material rights. The gap of inequality could become extremely wide among people of different ranks. For example, in the capital, the area of the garden and residence of officials of the first rank was fixed at 3 *mẫu* (each *mẫu* being about 733.5 square yards), whereas that of officials of the eighth and ninth ranks and of commoners was limited to 1 *cao* (.1 *mẫu*).⁶⁴

The Underprivileged Classes

While some social strata were treated better than commoners, others were relegated by law to a lower status than the latter.

Serfs. Most obviously underprivileged were the *serfs* or *slaves* (*nô tỳ*). Although the law (at least the Lê Code) implied that they were entitled to property rights,⁶⁵ serfs did not receive the same treatment as commoners under the law of the Lê and the Nguyễn.

According to the Nguyễn Code, when a commoner committed an offense against a slave or vice versa, the commoner was punished less severely than in ordinary cases between equals, whereas the serfs were punished more severely. (The Lê Code did not regulate this aspect of inequality between a commoner and another person's serf but, as pointed out subsequently, regulated the unequal relationship between a serf and his/her master.) For example, if a commoner had illicit intercourse with a female serf, he would receive a penalty one degree less severe than for the same offense committed with another commoner. On the other hand, if a male serf had illicit intercourse with the wife or daughter of a commoner, he would be punished one degree more severely than in ordinary cases among equals. The official commentary in the Nguyễn Code explicitly mentioned the difference in preeminence or inferiority that warranted the gradation of the penalty and stated that the commoner fornicating

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with a serf debased himself and the serf fornicating with a female commoner rose beyond his proper status.⁶⁶ For striking a serf not his own (which led or did not lead to injury or death), a commoner would be punished one degree less severely than in the ordinary case of striking another commoner. But for striking a commoner (which resulted in injury or death), a serf would be punished one degree more severely than in the ordinary case among equals.⁶⁷

When the commoner was the serf's master, the inequalities between them were still greater. In discussing the serfs' condition of bondage,⁶⁸ we have pointed out that serfs were not independent of their master, who commanded their service or might sell them to others; serfs could be emancipated or redeemed only upon the consent of their masters.⁶⁹ This constituted the fundamental inequality between serf and master. The other aspects of inequality were the differential penalties for offenses committed by the master and his serf against each other.

Serfs were banned from accusing their masters, even for genuine crime, because in so doing they would be punished with exile (Lê) or penal servitude (Nguyễn)—that is, as severely as children/grandchildren denouncing their parents/grandparents (the only exception to this ban was for high treason, grave insubordination, and treason). False accusation would give rise to more severe penalties. If the serfs accused the masters' relatives, they would be subject to penal servitude (Lê), or the stick penalty (Nguyễn)—that is, they were punished as if the victims were their own senior relatives. On the other hand, serfs did not benefit from the possibility of being concealed by household members, or being surrendered by them, and thereby being exempted from punishment.⁷⁰

Serfs reviling their masters or their masters' grandparents/parents would be punished with exile (Lê) or strangulation (Nguyễn), whereas the reverse did not constitute an offense. Serfs reviling their masters' relatives of the second, third, fourth, or fifth degree of mourning were also punished more severely than ordinary cases among equals.⁷¹

Masters could even go much further in violating the human rights of their serfs. They could beat and injure them with impunity because they were only punished—and punished lightly—if they killed their serfs: They would be only demoted (Lê) or given the stick penalty (Nguyễn) for killing a serf who had committed an offense; subject only to penal servitude for killing an innocent serf (Lê, Nguyễn); and punished lightly (Lê) or held not responsible (Nguyễn) for accidentally causing death to a serf while punishing him or her for disobedience.⁷² Even the master's relatives would go unpunished for beating serfs, provided no fracture was caused.⁷³ On the other hand, serfs would be severely punished for striking their masters. The mere act of striking the master or his grandparents and parents brought the penalty of strangulation (Lê) or decapitation (Nguyễn). If fracture (Lê) or the more serious outcome of death (Lê, Nguyễn) resulted, the penalty would be decapitation in the Lê and death by

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slicing in the Nguyễn.⁷⁴ The penalties for striking and killing the master's relatives of the second, third, fourth, or fifth degree of mourning were one or more degrees lower than for the same offense against the master but always more severe than for the ordinary cases among equals.

Serfs plotting the murder of their master would be subject to decapitation (Lê, Nguyễn) or, if death resulted, to death by slicing (Nguyễn). The Nguyễn assimilated serfs to the category of children/grandchildren plotting the murder of their parents/grandparents, thereby raising the seriousness of the penalty.⁷⁵ If the crime were aimed at the master's relatives, the serfs would be strangled (Lê) or punished with the same degree of penalty for various junior relatives plotting the murder of senior relatives (Nguyễn).⁷⁶

The unequal treatment of serfs and masters by the law was obvious in the penalty for illicit intercourse. A male serf who fornicated with the wife or daughter of his master or with the master's relative of the one-year degree of mourning would be decapitated or strangled.⁷⁷ On the other hand, it was not a crime when a master fornicated with his female serf, as society accepted the right of the master to demand sexual satisfaction from his female serfs.

Inequalities between masters and serfs persisted even after the serfs were emancipated, because the differential treatment of penal law still prevailed between former masters and former serfs. Under the Lê, a former serf would be subject to penal servitude if he reviled a former master, exile if he struck him, or decapitation if he killed him, whereas the former master was only punished—and punished four degrees lower than in ordinary cases—if he struck his former serf and caused a fracture. There was no penalty if the master killed his former serf by accident, but the latter would be punished for ordinary homicide if he accidentally killed his master.⁷⁸

The Nguyễn did not distinguish, for penalty purposes, former serfs from serfs if the former serfs redeemed their commoner's status—that is, they were still treated unequally by the criminal law provisions for crimes between them and their former masters. The Nguyễn, however, treated former serfs who were sold by their master—and who were therefore not bound by any obligation toward their master—on an equal footing with their former masters.⁷⁹

Indentured Laborers. The indentured laborers (*diễn công nhân*)—that is, those who engaged their labor for a period of time for salary or for paying off their debt—were another underprivileged class in traditional Vietnam, at least with regard to some aspects of criminal law. Their masters could scold and strike them with impunity provided that they did not cause fractures. Even if fractures were caused, the penalty for the master would be three degrees lower than for ordinary cases of striking among equals. If death resulted, the master would be subject only to penal servitude.⁸⁰ Even the master's relatives received no penalty when striking the indentured laborers, provided no fracture was caused.⁸¹

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On the other hand, indentured laborers who reviled their master or struck him (without resulting in any injury or resulting in injury or death) would receive penalties lighter than those imposed on serfs but more severe than those in ordinary cases of offenses among equals.⁸² But for plotting murder against the master or fornicating with his wife or daughter, indentured laborers were punished as severely as the lowly serfs: decapitation.⁸³

In the Nguyễn, some indentured laborers were even assimilated with serfs for purposes of judging the guilty master who injured or killed them: those who had lived for more than three years in the master's household or had been established in the master's household and given a wife and a house by him.⁸⁴ In other words, the master in these cases would go unpunished for injuring them or would be only lightly penalized for killing them.

Professional Entertainers. Professional singers, actors, and actresses were traditionally considered a despicable, "mean" group of people. Under the Lê, they and their descendants were not allowed to take part in civil service examinations nor to marry officials or their sons or grandsons. If officials or their descendants married singers and actresses, they themselves would be punished with the stick penalty and demotion and the marriages would then be dissolved.⁸⁵

The exclusion of singers, actors and actresses, and their descendants from civil service examinations and officialdom had a great impact on Vietnamese history during the Lê Dynasty and possibly led to their more equal treatment or social acceptance under the later Nguyễn Dynasty. Đào Duy Từ, born to a singers' family in Thanh Hóa Province and therefore banned from taking examinations, was so frustrated in his ambition that he went to the southern part of the country and married the daughter of Trần Đức Hòa, who introduced him to Lord Nguyễn Phúc Nguyên (1613–1635). Từ advised Lord Nguyễn to build a fortress and a long rampart in Quảng Bình Province along the Đồng Hới estuary. Once this defense line was consolidated, Lord Nguyễn began to refuse to submit to the authority of Lord Trịnh in the Lê capital. Thereupon began forty-five years of civil war and a century and a half of political struggle between the two parts of Vietnam until the end of the eighteenth century, when the Tây Sơn and then the Nguyễn Dynasty unified the country.

Probably because of this great man's contribution to the Nguyễn Dynasty, the Nguyễn Code did not incorporate an article in the Ch'ing Code that banned officials' and their offsprings' marriage with entertainers.⁸⁶ Article 340 of the Nguyễn Code only provided the penalty of sixty strokes of the heavy stick for officials who entertained in their households or frequented the public singers (understood as prostitutes, according to the interlineary commentary and the note in the code). In practice, Nguyễn officials often took singers as secondary wives (concubines) and the children born of their union were not subject to any ostracism.

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In summary, social status was a potent factor for legal inequality in traditional Vietnam. This system of social stratification, however, was not a rigid class system because there were ways for an individual to move upward socially or from one status to another. For example, indentured laborers could regain their status after the period of indenture; serfs or slaves might be emancipated or permitted to redeem their commoners' status. But most relevant to the possibility of enjoying social equality by the overwhelming majority of the population was their right to participate in the civil service examinations and thereby raise themselves to the level of officials.⁸⁷ Given this equal chance for upward social mobility and attaining official status on the basis of merit (with one exception, the exclusion of entertainers under the Lê) and the absence of any permanent hereditary right to nobility,⁸⁸ the impact of social inequality sanctioned by law in traditional Vietnam was greatly tempered.

Sex Discrimination or Equality?

Historically, the extent of men's control over women has varied from one society to another, but traditional China especially—from the Han period to the end of the imperial era in 1911—upheld the dominant male position and relegated women to a lesser status not only in morality but also in law. Traditional Vietnam was within the cultural realm of China and reflected this influence. The Nguyễn Code and even the Lê Code, in accordance with Confucian ethics, gave the Vietnamese wife, like her Chinese counterpart, a lower status in family and society, in some respects, than the husband.

The Lê Code, however, unlike the Nguyễn Code, which was a copy of the Ch'ing Code, represented genuine Vietnamese custom with its idiosyncracies and incorporated original provisions unknown in any Chinese code—including its model, the T'ang Code—that gave equal civil rights to Vietnamese women.

Thus, the issue of sex discrimination or equality in traditional Vietnam was rather complicated. On one hand, the status of the wife in both the Lê and Nguyễn was inferior to that of the husband in many respects. On the other hand, unlike the Nguyễn, the Lê provided for women, *vis-à-vis* men in general, substantial equality in civil rights.

Some brief observations will also be made on special protective measures for women.

The Lesser Status of the Wife

Although the Lê made some concession to Vietnamese custom by permitting junior family members to establish separate households or divide family properties,⁸⁹ the general organization of the Vietnamese family after the period of Chinese domination was patterned according to the Chinese

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model: Male members held a dominant role. Male heirs, even of a junior status, such as sons of secondary wives or female serfs (slaves), had priority over female heirs in the inheritance of the ancestor worship property; this was to avoid the extinction of the family's name for lack of male heirs to carry out worship.⁹⁰ The inferior position of Vietnamese women during the traditional period reveals itself even more clearly when their status as wives is considered.

The traditional Vietnamese family was monogamous in the legal sense: There was only one legal wife, the principal one; other women taken by the husband were either secondary wives or serfs (slaves). The fact that a man might have many wives, of different categories, however, constituted a *de facto* polygamy. This circumstance alone reveals the dominance of the husband. In addition, many provisions of Lê and Nguyễn law explicitly recognized the superior status of the husband, both within the family and in the society.

Within the Family. The wife's lower status compared to that of her husband was evident in criminal law as well as in certain areas of family law.

Criminal law sanctions. There were many inequalities between husband and wife in the area of criminal law sanctions. Many offenses committed by the wife against the husband were punished with the same severity as offenses committed by children or grandchildren against parents or grandparents or as offenses committed by slaves or serfs against masters.

For example, the wife's reaching a settlement with the murderer of her husband was punished as severely as a child's/grandchild's settlement with the murderer of his parents/grandparents (exile in the Lê, penal servitude in the Nguyễn). On the other hand, the husband's settlement with the murderer of his wife was not punished anywhere in the Lê Code and was punished by only eighty strokes of the heavy stick in the Nguyễn Code, in the same manner as the settlement by parents/grandparents with the murderer of their child/grandchild or the settlement by a master with the murderer of his serfs or servants.⁹¹

A wife who accused her husband, even though correctly, would be punished in the same manner as offspring accusing grandparents/parents or serfs accusing masters: they would be exiled (Lê) or subject to penal servitude (Nguyễn). False accusation of one's husband was punished in the Nguyễn Code as severely as the false accusation of one's maternal grandparents or parents (strangulation) and in the Lê Code as severely as false accusation of one's maternal grandparents (penalty one degree less than that for the alleged crime).⁹²

A wife who plotted the murder of her husband or former husband would be punished by decapitation, just as she would for plotting the murder of her

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grandparents or parents.⁹³ To kill one's husband was considered wicked insubordination (one of the ten heinous crimes) and was punishable by decapitation (Lê) or death by slicing (Nguyễn), in the same category of serious crimes as killing one's maternal grandparents or plotting the murder of one's grandparents or parents.⁹⁴ On the other hand, a husband who killed his wife would be punished more lightly, as if he had killed a nonrelated person.

A wife who killed her husband accidentally in a roughhouse would not benefit from the otherwise normally granted reduction of penalty because, according to the Lê Code, neither with the husband nor with the maternal grandparents was a wife permitted to jest.⁹⁵

The penalty for the same offense in many cases was more severe when committed by the wife against the husband than when committed by the husband against the wife.

Under the Lê, a wife who struck her husband would be exiled to an outlying region; if a fracture resulted, she would be exiled to a distant region; if death resulted, the penalty was strangulation. A secondary wife guilty of the same offense would be punished one degree more severely. Under the Nguyễn, the penalties were, respectively: for simple beating of the husband, one hundred strokes of the heavy stick; for wounding, three degrees more severe than wounding a nonrelated person; for (involuntary) killing, decapitation.⁹⁶ The wife's plotting to murder or actual murder of her husband has already been mentioned; and the penalties were decapitation or death by slicing.

The penalties for the same crimes committed by the husband against the wife were much lighter. Under the Lê, a husband who struck and injured his principal wife would receive a penalty three degrees lower than the penalty for injuring an unrelated person (which was eighty strokes of the heavy stick or demotion or, if a fracture resulted, penal servitude or exile). If the victim were a secondary wife, the penalty would be five degrees lower.⁹⁷ Under the Nguyễn, the husband who injured his wife would receive a penalty two degrees lower than for injuring an unrelated person.⁹⁸ The Lê Code implied, and the Nguyễn Code explicitly stated, that if the battered wife was not injured, the husband would not be punished. This was tantamount to legal sanction of the freedom to beat one's wife—provided no injury was inflicted. This stood in contrast to the penalty of exile or one hundred strokes of the heavy stick these codes imposed for a wife's simple beating of her husband. Under the Lê, a husband who struck and killed his wife would receive a penalty three degrees lower than for killing by striking an unrelated person (which was strangulation). Even in the case of intentional killing by striking, the husband was still entitled to a one degree reduction in the penalty; in unintentional killing, he was exonerated.⁹⁹ Under the

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Nguyễn, the guilty husband would be punished as if for killing an unrelated person, by strangulation.¹⁰⁰ But if the wife was at fault for reviling or beating his parents, he would be punished only by the heavy stick.¹⁰¹

For the same offense, the penalty was more severe when the crime was committed by the wife against the husband's relatives than when committed by the husband against the wife's relatives.

Under the Lê, a wife who reviled her husband's grandparents or parents would be exiled; if she struck them, she would be exiled to an outlying region; if injury resulted, she would be exiled to a distant region.¹⁰² But a husband would be simply demoted two grades if he reviled his wife's grandparents or parents; subject to penal servitude as a heavy work menial if he struck them; condemned to penal servitude as a soldier assigned to elephant stables if he injured them lightly, or as a paddy-farming soldier if he caused a fracture.¹⁰³ He would be punished as severely as his wife guilty of similar crimes only in the following cases: If the wife's parents or grandparents were wounded with a sharp weapon or lost an eye as a result, the husband would be exiled to a distant region; if his parents-in-law were killed by striking, he would be decapitated;¹⁰⁴ the wife would be punished by strangulation if she were guilty of killing her parents-in-law by striking (ordinary homicide) but she would be decapitated if it was a murder (premeditated killing).¹⁰⁵

The penalties under the Nguyễn denoted the same preferential treatment for the husband. For example, for reviling parents-in-law, the wife would be punished with strangulation, the husband with the heavy stick penalty; for striking them, the wife would be decapitated whereas the husband would be subject only to one-year penal servitude; for killing by striking, the wife would be put to death by slicing and the husband by decapitation. Furthermore, these codes provided for the wife's crimes against her husband's parents and grandparents, whereas in the husband's case they stipulated only for crimes against his wife's parents.¹⁰⁶

Many actions were considered criminal only when committed by the wife against the husband or his parents or grandparents, and not when committed by the husband against the wife or her relatives. Some offenses mentioned previously belonged to this category: accusation and, at least for the Lê, private settlement with the murderer of one's spouse. The Lê punished only the wife for bringing suit against her husband's parents or grandparents and was silent about the husband suing his parents or grandparents-in-law.¹⁰⁷

Both the Lê and the Nguyễn punished the wife's offense of striking or reviling her husband's senior relatives belonging to the categories between the one year or further degree of mourning and the fifth (three-month) or closer degree of mourning, but seemed to be silent about similar offenses

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committed by the husband against the wife's relatives of these degrees of mourning.¹⁰⁸

Both the Lê and the Nguyễn stipulated that during the spouse's detention for a crime punishable by death, only the wife, not the husband, would be punished for participating in musical or theatrical entertainments.¹⁰⁹ They also stipulated that the wife would be punished for leaving her husband's home without authorization and punished especially severely for remarrying while in flight, whereas the husband who abandoned his wife would only lose his right as a husband.¹¹⁰

An adulterous woman was punished with exile (Lê) or the heavy stick (Nguyễn). Moreover, in the Nguyễn Code the husband might sell his guilty wife or marry her off.¹¹¹ But a man would very probably be punished only as an accomplice in an adultery committed by a married woman because, conceivably, he would not be considered guilty if as a married man he had a relationship with an unattached woman—since he was entitled to secondary wives or female serfs. Moreover, in some cases, under the Lê, adulterous women were punished with strangulation—that is, more severely than the penalty of exile provided for in the Lê Code.¹¹²

Inequalities between husband and wife in family law matters. Inequalities in family law matters between wife and husband consisted in the husband's right to repudiate (or unilaterally divorce) his wife and the wife's obligations after the husband's death.

In both the Lê and the Nguyễn codes, the seven grounds on which the husband could repudiate his wife (*thất xuất*) were: barrenness, lasciviousness, refusal to serve and to obey parents-in-law, quarrelsomeness, thievery, jealousy, and incurable disease. The Lê also called these seven grounds the "cases of extinction of loyalty obligations" (*nghiã tuyệt*), whereas the Nguyễn made a distinction between seven grounds for repudiation and grounds for extinction of loyalty obligations, such as the wife's adultery or scheming to slay her husband: the husband was legally required to abandon his wife when a case of extinction of loyalty obligations was involved.¹¹³

In any case, repudiation and/or extinction of loyalty obligations constituted a great calamity for the wife: she would be denied any claim to dowry, alimony, or even her children. By contrast, it was inconceivable for the wife to take the initiative in divorce: Simply to leave home would be a crime for her.

The wife had obligations after her husband's death; the husband had no equivalent obligations. In the Lê and Nguyễn, during the three years' mourning for her husband (which was as long as the mourning for her own parents), a wife who wore clothes other than the mourning garb or participated in theatrical or musical entertainments would be demoted (Lê) or given the heavy stick penalty (Nguyễn); she would be considered as committing the ninth heinous crime, disloyalty.¹¹⁴ In contrast to its legal code, other legislation of the Lê Dynasty on

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mourning punished the wife's failure to observe mourning for her husband more heavily. According to one document, under Lê Thái Tông concealing the mourning of one's parents or husband would lead to penal servitude as a hard-labor menial or as a silkworm-breeding menial (similar to the code), but wearing ordinary rather than mourning clothes or participating in entertainment would lead to penal servitude as "a paddy-farming soldier" (or, if a woman, as a "paddy-husking serf"), that is, a penalty heavier than that prescribed by the code.¹¹⁵ In 1470, under Emperor Lê Thánh Tông the penalty for a mourning widow who abandoned the mourning garb was even death.¹¹⁶

If a widow engaged in fornication during the period of mourning for her husband, she would be decapitated (Lê) or punished two degrees more severely than for the general crime of fornication (Nguyễn).¹¹⁷ If a widow remarried during the mourning period for her husband, she would be subject to penal servitude (Lê) or the heavy stick penalty (Nguyễn), and the marriage would be dissolved.¹¹⁸

These stringent legal obligations for widows were rooted in Confucian morality: The seven grounds of repudiation were listed in the *Book of Rites*. There was also the Confucian moral expectation that the wife not only obey the husband during his lifetime but also remain faithful to him after his death. The husband had no such obligations.

In Society. A wife's status in society, compared to that of her husband, was also unequal and dependent. She might, however, benefit from her husband's power and position. Under the Lê, for example, if a commoner reviled or slandered the wife of an official, he would be punished more severely than if he reviled the wife of another commoner.¹¹⁹ Also, a wife who had an official position because of her husband's position qualified for special consideration and was entitled to a reduction of any penalty she might be subject to.¹²⁰

In criminal sanctions, however, a wife's destiny was inexorably bound to her husband's and she became a subordinate entity with no independent existence. According to a surprisingly stringent article in the Lê Code, military officers who lost a hundred or more men in battle would be punished by death; their wives, children, and property would be seized for the state.¹²¹ The Lê Code also unjustly punished the wife and children of those who fled the country; they, too, would be seized for the state.¹²²

In both the Lê and the Nguyễn, a wife was seized for the state if her husband was guilty of high treason, grave insubordination, or treason.¹²³ Particularly under the Lê, the wives or children of rebels (i.e., those guilty of high treason or grave insubordination) could not be concealed or protected by anyone; heavy penalties were imposed on those who showed them sympathy or offered them protection.¹²⁴ Moreover, these wives or children could not be redeemed from their status as public serfs:¹²⁵ this provision was particularly harsh, given the opportunities open to other kinds of serfs to redeem themselves.

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In summary, it is impossible to say that wife and husband fully enjoyed equal justice under the criminal law of traditional Vietnam. When we examine the area of civil rights, however, we find that the Lê Dynasty, in contrast to the Nguyễn, provided for equality between men and women.

Equality Between Men and Women in Civil Rights: Personal and Property Rights

The unusual protection of the private civil rights of women under the Lê Dynasty, no doubt originating in indigenous Vietnamese culture, was the most important idiosyncrasy of Lê law compared to the Nguyễn or, for that matter, Ming and Ch'ing law. For the sake of clear presentation, we classify these into personal and property rights.

Personal Rights. According to a decree issued in 1662 by Emperor Lê Huyền Tông, which promulgated forty-seven articles on moral education, “spouses must not leave each other upon being tired of their condition of poverty”; a wife was entitled to “love and respect” from the husband and vice versa.¹²⁶ Under the Lê Code, if a husband neglected or abandoned his wife out of passion for another female, he would be demoted if the wife filed a suit denouncing him.¹²⁷ Thus the law recognized with justice that the personal right to have her husband’s attention should not disappear with the decline of the wife’s youth and grace and the presence of a rival beauty; moreover, the wife could litigate to enforce this right.

The Lê Code granted the wife the right to take the initiative and ask for divorce on several grounds unknown to the Nguyễn or Chinese codes. First, according to Article 308 of the Lê Code:

A husband who neglects his principal wife and does not personally visit her for five months shall be deprived of his rights over his wife (she shall be allowed to report the case to competent officials of her locale, as well as to village officials in order to have the facts publicly recognized). If they have children in common, the above period shall be extended to one year. This provision shall not apply to persons who have to travel far away on a public mission. A husband who, after abandoning his wife, takes the liberty of arresting the man whom she remarries shall be demoted.

Thus there was a curious negative prescription for a husband’s rights over his wife. Unless traveling on a public mission, if he failed to visit her for five months (or one year, in case they had children) she could sue him for divorce and remarry. And if he took revenge by arresting her new husband, he would be punished.

The right of the wife to file for divorce on the basis of neglect was unknown in the Nguyễn Code. A decree in the Nguyễn Code¹²⁸ stated: “If a husband disappears or has fled without returning for three years, the wife

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shall be allowed to petition the officials for attestation and remarriage.” But this decree dealt with another issue, disappearance or absence, rather than neglect of one’s wife. Indeed, the commentary stated that the decree was applicable to a man who disappeared for having committed a mistake or because of upheavals related to rebellion or war. If he simply went on a business trip, on a search for a relative, or for equivalent reasons, he could not be said to have disappeared or fled and the decree would not apply, whatever the number of years elapsed since his departure. On the other hand, besides being on a public mission, a husband in the Lê Code could not resort to other reasons, such as business trips, to neglect his wife without incurring the risk of being sued by his wife for divorce. Moreover, the Lê Code used the terms *sơ thê* (in Chinese, *shu ch’i*), which meant neglecting the wife, and *bất vãng lai* (in Chinese, *pu wang lai*), which meant having no sexual relations. Thus, the ground for a wife’s divorce suit in the the Lê Code was clearly neglect, sexual or otherwise, which was unknown to the other codes.

Second, according to Article 333 of the Lê Code: “In case a son-in-law uses abusive language against his wife’s parents without reason, the fact may be reported to the authorities for dissolution of marriage.” We find a case in which a son-in-law was punished with eighty strokes of the heavy stick, the loss of his wife, and a reparation payment to his parents-in-law for lacking filial piety toward them.¹²⁹ The Nguyễn Code only punished the revilement of a senior relative but—unlike the Lê—did not provide for dissolution of marriage.¹³⁰

With these grounds for divorce, the wife in the Lê Code was on a footing of near-equality with her husband in the dissolution of marriage.

One of the important rights of a person is the right to sue to seek remedy for injustice suffered or to protect his or her interest. In an article barring people in confinement or aged eighty or more, ten or less, or seriously disabled, from bringing complaints before the authorities, the Nguyễn Code also *forbade women* to do so, except for high treason, grave insubordination, treason, impiety of children and grandchildren, or certain offenses (robbery, deceit, economic crime, murder, or injury) committed against themselves or persons living with them. Conversely, the Lê Code’s corresponding article on persons barred from bringing suits did not mention women among those thus barred.¹³¹ Thus the Nguyễn Code disapproved of females who stepped over the domestic threshold into the outside world, giving them the right to bring complaints only in a few serious circumstances. On the other hand, the Lê Code imposed no restriction on the women’s right to bring suit in courts.

The Lê Code also mentioned in passing the role of women in officialdom. Article 709 stipulated that the *nữ quan* (female official) was entitled to preferential treatment in court proceedings. We also know that Nguyễn Thị Lộ, the beautiful and literary secondary wife of Nguyễn Trai, was protocol official for Lê Thái Tông.

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Equal Property Rights for Women. In contrast to the Nguyễn, the Lê gave daughters inheritance rights equal to those of sons. As a consistent consequence, it also settled the issue of matrimonial property on the principle of equality between husband and wife in a way that was diametrically opposed to the complete incorporation of the wife's property into the husband's estate as prescribed under the Nguyễn.

Equal inheritance rights. The basis for equal inheritance rights for women under the Lê was not Article 42 of the Lê Code, which reads, in part: "The term 'children' refers at the same time to sons and daughters." This, as well as the equivalent article in the Nguyễn Code,¹³² referred to sons' and unmarried daughters' joint criminal liability with their father for certain crimes such as high treason and grave insubordination. Evidence of daughters' equal inheritance rights during the Lê must be found elsewhere, in other articles of the Lê Code and other documents.

Under the Lê, a woman had inheritance rights not only in the general estate of her parents but also in the special portion of the estate reserved for ancestor worship called "incense and fire" property (*hương hỏa*). In addition, if she married and her husband died, she had certain rights over her husband's estate.

The Nguyễn Code as well as the Ch'ing Code, its model, mentioned nothing about daughters' *succession rights to the general estate*. As a rule, in the Chinese family system daughters were excluded from the division of properties. They were to be married; in other words, they were to go into another family. Were they allowed to bring properties with them, they would only be enriching the husband's family. In case the father divided his estate during his lifetime, if some daughters preferred to remain unmarried, by amicable arrangement they would be given a small portion or one of the brothers would offer them accommodation. But they had to be content with what was offered them and could not demand a portion equal to those of their brothers.¹³³ A decree in the Nguyễn Code (as well as in the Ming or Ch'ing Code) explicitly included only the sons and omitted the daughters in the inheritance of the family estate.¹³⁴

On the contrary, the code and other legal documents of the Lê Dynasty contained specific articles explicitly stating that brothers and sisters would share equally in the succession of their parents' general estate. Moreover, the eldest son, except for his special role in keeping the will and other documents related to the estate and the ancestor worship property, would receive a portion equal to those of his male or female siblings.¹³⁵

Under the Lê the parents' oral will or testament was to be respected provided that the distribution of their estate among the male and female children was not groundlessly unjust. A child who was victimized by an unjust distribution could file a complaint for repartition unless he or she had been disowned by the parents on good grounds, such as lack of filial piety. *Hồng Đức Thiện Chính Thư*, elaborating on this point of equal distribution of the inheritance, did not

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make a distinction between sons and daughters and apparently treated them equally. Even more explicitly, section 269 of this document, dealing with the parents' right to disown a child who repeatedly misbehaved, clearly mentioned "the partition of the estate among sons and daughters."¹³⁶

As the natural corollary of recognizing land ownership by daughters or by female members of a family, generally, the Lê Code explicitly singled them out for separate punishment (which was less severe than that imposed on males) in case they claimed ownership in violation of other people's ownership rights: for example, in case they falsely claimed ownership of their parents' property and sold it surreptitiously,¹³⁷ or in case they forcibly claimed ownership of land already passed to another person by a period of adverse possession or negative prescription.¹³⁸

In the Lê and Nguyễn (and Chinese) codes, the "*incense and fire*" or *ancestor worship property* was devolved in priority to male heirs and only in the last resort to female heirs. But whereas the Nguyễn (and Chinese) Code relegated the daughters to the third position in order of priority—after not only the various sons but also the adoptive son—the Lê Code assigned the daughters to the second position, before the adoptive son or the brothers or sisters of the deceased and directly after the various sons or grandsons.¹³⁹

Moreover, the Lê had some special rules that constituted a derogation from male heirs' priority right to the ancestor worship property. When there were only daughters in the family, they would be allowed to inherit the ancestor worship property. This contrasted to the rule in the Nguyễn (and the Chinese) Code that required first the adoption of a male heir originating from the same clan as that of the deceased to carry out the worship of the latter, and then allowed the succession of the daughters to the worship property only if there were no such male relative in the deceased's clan.¹⁴⁰ In addition, even when there was a son or grandson, under the Lê, a female heir might be given priority right to the ancestor worship property under certain conditions. For example, because of the principle that a remarried widow became, upon joining her second husband, a stranger to her late husband's family, when she died the property dedicated to worshipping her would go to her daughter by the second husband and not her son by the first husband. A maternal grandson, with a different family name from that of the deceased, yielded to an aunt in the inheritance of the worship property.¹⁴¹

As for a widow's succession to her husband's estate under the Lê, when a couple was childless and the husband died, the wife would not only take back her part in the division of the matrimonial estate but enjoyed certain usufruct on a major percentage of the portion that would belong to the late husband's parents or paternal relatives to be used as worship property. This survivor's benefit, reserved even for a childless widow, will be mentioned subsequently in the

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discussion of the provisions on matrimonial estate, such as Lê Code Articles 374, 375, and 376, which settled at the same time the question of inheritance.

The Lê allowed the childless wife to inherit land awarded to her late husband by the state for denouncing clandestine occupation of land. The Nguyễn gave the widow of an official the emoluments attached to her husband's transmissible title only if there were no male heir in the clan to inherit them. Among these male heirs, not only the couple's children but also the husband's younger brothers or nephews had to be included.¹⁴² Thus, under the Nguyễn the surviving spouse's benefit went to a much narrower circle of women—the wives of officials with transmissible titles, not any wife—and also, these women would receive this benefit only if the lineage became extinct—that is, there was no male heir even in the category of brothers or nephews of the late husband.

Equal rights in the management and settlement of the matrimonial estate. The Nguyễn (as well as the Chinese) Code had no explicit set of rules on property relations between spouses except for one decree on the remarrying widow's obligation to leave all properties of her late husband's family as well as the wedding gifts within the ownership of that family (see later). The absence of regulation arose from the concept that a woman did not inherit from her own family and in general did not bring into her husband's family estate assets of any importance. Her personality was absorbed by that of her husband; she did not possess any separate property and was not coowner of the family estate with her husband during his lifetime. Therefore, at the death of the husband, the issue of settlement of the matrimonial property did not even arise although she might replace her husband in the role of family head as long as she did not remarry.

On the other hand, under the Lê the woman was entitled to inherit property from her own family. Therefore, if these inherited properties were absorbed into her husband's family estate, the latter would benefit from an "enrichment without good cause."¹⁴³ Consequently, the Lê had a set of rules on the management of the matrimonial estate during the lifetime of the spouses and its settlement at the death of one of them. These rules sanctioned *equal property rights for women*.

The Lê Code. The Lê Code and its related legal document, *Hồng Đức Thiệu Chính Thư*, contained a number of provisions on *the settlement of the matrimonial estate at the death of one spouse*. Each of these provisions regulated one hypothetical case (for example: A couple had no child and the husband died; the deceased husband had children from a previous marriage but none from the surviving spouse; a couple had a child but first one spouse and then the child died; a remarried widow had children but sold the property inherited by them). Also, to different degrees, these provisions dealt with different types of properties such as movable property or chattels (*phù vật*), and real property (*điền sản*), which in turn was classified into real property originating from the

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husband's clan or wife's clan (*phu tôn điền sản* or *thê tôn điền sản*) and real property newly acquired during marriage (*tân tạo điền sản*).

Therefore it is necessary to read these provisions in combination and systematize them into a coherent regime of the matrimonial estate. According to these provisions on the surviving spouse's benefits, the *husband and the wife had exactly the same rights*. We will consider the issue from the standpoint of the widow's rights. These rights varied depending on whether the marriage produced children or was childless.

The complicated rules on the *childless widow's property rights* in the settlement of the matrimonial estate could be summarized in simplified language as follows, dealing first with her assets and then her liabilities.

First, assets. The widow would have full ownership right on all real property originating from her clan, on half of the real property jointly acquired during marriage, and on half of the movable property that remained after servicing the various debts mentioned later.

The widow would also have usufruct during her whole lifetime or until remarriage over the following portions of properties belonging to her late husband (or his children, or parents, or paternal relatives):

- One-third of the real property originating from her husband's clan, if there were a child from the husband's previous marriage and no child in the current marriage; or one-half of such property if there were no child at all and the husband's parents were not living; or two-thirds of such property if there were a child who subsequently died and the husband's parents were not living either.
- One-third of the half of the property jointly acquired during the marriage that was to belong to the late husband, if there were a child from the husband's previous marriage and none in the current marriage; or two-thirds of such half if there were no child at all.
- One-third of the half of the movable property remaining after servicing debts that was to belong to the late husband if there were a child from the husband's previous marriage and none in the current marriage.

In terms of these assets,¹⁴⁴ the wife enjoyed exactly the same rights as the husband would have if he became a widower. There was only one slight difference, because of custom: The usufruct of the widow ceased upon her remarriage, whereas the same right of the widower on his late wife's property expired only with his death. Thus, in a marriage without children the property originating from a spouse's clan never lost its original nature. The property originating from the surviving spouse's clan would always return to the survivor (in our discussion, the widow); and the property

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originating from the deceased's clan would be owned by that deceased's children from a previous marriage, if any; if there were no child, the property would go to the parents (if living), or (if the parents were not living) to the paternal relatives for worship purposes. The portion over which the surviving spouse had usufruct would eventually have to return to the deceased spouse's clan. This meant that under the Lê the woman always had her own property and there was no absorption of a wife's or her clan's property into her husband's estate—in contrast to the situation of women under the Nguyễn (or Ming or Ch'ing).

That the wife had separate property was evidenced in other provisions of Lê law. According to Article 401, she would have to forfeit her property to her husband if she committed adultery.¹⁴⁵ If the wife struck and caused a fracture to her husband or killed him, her property was also forfeit.¹⁴⁶ Such a provision did not exist in the Nguyễn (or any Chinese) Dynasty.

Second, liabilities. Equality of husband and wife in property rights was also evident in the way in which joint matrimonial debts contracted during marriage were to be settled. In terms of payment obligation, there was no distinction as to whether the husband or wife originated the debt. Joint debts incurred during the spouses' lifetimes would first be paid with movable properties. Then, if these were insufficient, the debts would be divided into two parts: half to be paid with the husband's share in the estate, half with the wife's share. Finally, in case there was riceland to service the debts, the creditors would be allowed to pursue the surviving spouse for repayment: the wife, if the husband died; the husband, if the wife died. In no case, however, could they sue the deceased's parents, brothers, or cousins.¹⁴⁷ Thus, debts contracted by the wife constituted a liability to the family estate in the same way as debts incurred by the husband. The wife, in other words, had full legal capacity to make valid acts.

Thus, from both standpoints—taking over the assets and paying for the liabilities in settling the matrimonial estate of a childless marriage—the Lê gave the Vietnamese wife, vis-à-vis her husband, an equality in property rights unknown in the Nguyễn (or any Chinese) Dynasty.

As for *widows with children*, under the Lê, in a marriage with offspring, when one spouse died, there would be no settlement of the matrimonial estate because the administration of the family estate would remain in the hands of the surviving spouse, either husband or wife, until death, no matter whether the surviving wife remarried or not.

The possibility for a widow with children to preserve her powers over the family estate even after remarriage was an important difference between Lê law and Nguyễn (or Chinese) law. Whereas the Nguyễn Code, as will be seen, deprived such a remarrying widow of all property rights, the Lê Code allowed her to continue, after remarriage, to administer minor children's property

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(bequeathed by the late husband) and even to sell such property, provided good reasons for such sale had been given to the representative of the late husband's paternal relatives and the expenses necessitating the sale had been verified by the authorities.¹⁴⁸

If the widow wished to remain a widow, she would naturally have at least as much administering power over the family estate as the widow who decided to remarry. This last eventuality was not specifically provided for by the Lê Code, but it can be deduced from the principle that "he who can do more can do less" and from another article of the code that banned any attempt by the children to sell the parents' property during their lifetime.¹⁴⁹ The widow's administering powers over the family estate was a counterpart of her financial obligations (to pay the husband's debts, as noted, and to provide for the other members of the family, such as children, secondary wives, *nô tỳ*—slaves or serfs—and the husband's parents if they were still living). Such powers were considered so justified that they have remained customary in Vietnam even to the present time. Vietnamese custom permits a widow with children to have the right, in case of the intestate death of her husband, to dispose of the properties in the matrimonial estate deemed to have become her children's permanent properties even without asking permission from her late husband's family. In addition, the widow might even deprive her children of their inherited property through the procedure of disowning them on grounds of their being worthless scoundrels.¹⁵⁰

In short, under the Lê widows enjoyed equal property rights compared to widowers.¹⁵¹ But what about the property rights of the wife when both spouses were living?

The Lê Code had no explicit rule directly concerning the *management of the matrimonial estate during the lifetime of both spouses*. But we can deduce some general principles from the legal provisions already known and from other documentary evidence.

Even at the death of one spouse, real property originating from his or her clan would not become the property of the surviving spouse. Therefore during the lifetime of both spouses, the husband, for example, could not sell real property originating from the wife's clan without her consent.

As for real property newly acquired during marriage, any transaction regarding such property required the signature of both spouses. In *Quốc Triều Thư Khế* (Legal Forms in Use under the National Dynasty [of the Lê]),¹⁵² we find a number of sample forms concerning the sale, mortgage, and exchange of real property in which the opening sentence always stated: "I ——— of ——— prefecture, ——— district, ——— village, ——— hamlet, ——— official title (or social status) *together with my principal wife* (or *secondary wife*) *named* ———" [emphasis added]. At the bottom there was always a place for the signatures or fingerprints of the parties, witnesses, and scribe. The sample

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forms for the sale or emancipation of serfs also required the wife's participation.¹⁵³

The sample form for testament started with the sentence: "In _____ prefecture, _____ district, _____ village, _____ hamlet, we, the father, named _____, official title _____ (or social status) *and the mother* [emphasis added], named _____ (official function, if any), having felt that our health has deteriorated...do hereby establish this testament..." The Lê Code articles and other Lê legal documents on wills referred constantly to both the father and the mother (*phụ mẫu*).¹⁵⁴

As has been stated, the payment of the liabilities of the matrimonial estate did not distinguish between wife and husband.

The Lê Code did not explicitly specify the position of the *secondary wife*. But present-day Vietnamese custom, no doubt dating back to the Lê Dynasty, continues to recognize their separate property¹⁵⁵ and, as evidenced in the Lê Dynasty's sample forms on sale or mortgage of real property just mentioned, they participated along with the head of the household in the management of jointly acquired property.

In summary, we quote French scholar Camille Briffaut's comment on the matrimonial regime of the Lê:

C'est un régime profondément égalitaire, basé sur le principe de l'égalité des clans et de l'égalité des époux, en personnes et en biens: apports égaux; fruits communes; solidarité; charges communes; dettes communes; volontés directives égales, partage égale; retrait des propres.¹⁵⁶

Nguyễn Code. By contrast, the Nguyễn Code, by virtue of the rigidly patriarchal family system it promoted in accordance with its model the Ch'ing Code, narrowly circumscribed the property rights of married women. We find in the Nguyễn Code (and, for that matter, in the Ch'ing or Ming Code) only two provisions, one indirectly and one directly related to the question of matrimonial estates. One article stated that during the parents' lifetime, children could not divide the family estate and register in separate households except when allowed to do so by the parents.¹⁵⁷

A decree required a childless widow who did not wish to remarry to appoint, on behalf of her deceased husband and with the assistance of the clan members, a person serving as worshipping heir. The decree also stipulated that if she remarried, the property of her husband's family and the wedding gifts would remain in the ownership of the husband's family.¹⁵⁸

In the Nguyễn Code (and the Chinese family system it officially copied), although the principal wife would be treated respectfully by the junior members of the family, who had to obey both the father and the mother, she was, during the lifetime of her husband, an *alieni juris*, similar in status to inferior family members in her relationship to the family head (*gia trưởng*; in Chinese, *chia*

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chang): She had no personal property and did not join her husband in the administration of the family estate; in a divorce by mutual consent she could take only her clothes and trousseau.¹⁵⁹

In widowhood, the principal wife only had powers over the family estate if she remained a widow and thereby in a way took her husband's place as family head. She would have managerial powers over the family estate until the appointed worship heir reached the age to manage it, or, if she had children, up to the time when she consented to divide the estate among them. She might otherwise oppose such division of property.¹⁶⁰

These powers were not merely normal usufruct. If necessary, the widow was entitled to sell some property with the assistance of her mature sons or the clan head. The rationale for this special usufruct of the widow was her obligation to support the children, the secondary wives, and the husband's parents.

Unlike the Lê, however, the Nguyễn (or the Ch'ing or Ming) stipulated that the widow who remarried would have to leave her late husband's household almost empty handed: She was not entitled to withdraw any assets from the matrimonial estate; she could not take even the trousseau unless authorized by her husband's family; moreover, she had to get permission from her husband's family for remarriage.¹⁶¹

For *secondary wives* also, the Nguyễn (or the Ch'ing or Ming) Code did not recognize any meaningful status or property rights. Whereas the principal wife called her husband "husband," secondary wives called him "family head" and were inferior to the principal wife. If they committed crimes against her husband, they would be punished more severely than the principal wife guilty of the same crime; if their husband committed crimes against them, his punishment would be less severe than if he had committed the same crime against his principal wife.¹⁶² Sons of secondary wives might inherit the family estate, but these women had to relinquish all authority over their children to the principal wife. Secondary wives had separate properties but could not take over the management of the husband's family estate even if the husband and the principal wife had died: In such a case, they were simply to be supported by their husband's family.¹⁶³

Armed with equal property rights, women played an *important economic role* in Lê Vietnam society, to such an extent that Charles Chapman, sent to Vietnam in 1778 by the Governor General of British India, described them in these terms: "The ladies are by far the most active sex; they usually manage all the business concerns."¹⁶⁴ Another Western observer, John Barrow, who traveled in China and Vietnam in the 1790s, pointed out the difference between the economic roles of women in these two societies: "A Chinese would consider it disgraceful to commit any affair of importance to a woman. Women, in the estimation of the Cochinchinese, are best suited for, and are accordingly entrusted with, the chief concerns of the family."¹⁶⁵

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The Lasting Influence of the Lê Code Provisions on Equality Between Men and Women. Thus, while the Lê Dynasty pursued a genuinely Vietnamese tradition by placing women's civil rights on an equal footing with those of men, the Nguyễn Dynasty, copying the Ch'ing Code, paid as little attention to the interests of women as did China's traditional codes.

In this area of equal rights for women, the Lê Code compared favorably even with nineteenth-century Anglo-American law as described by Tapping Reeve. In the *Law of Baron and Femme* (1816), he wrote about the legal position of wives and husbands under English common law and those statutes generally adopted by the American states:

The husband, by marriage, acquires an absolute title to all the personal property of the wife, which she had in possession at the time of marriage. . . . These, by marriage, become his property . . . and such property can never again belong to his wife. . . unless it be given to her by his will; and in case of the death of the husband, this property does not return to the wife, but vests in his executor.¹⁶⁶

Because the Lê prescriptions on equality of rights between men and women fit so well the cultural patterns of Vietnamese society, nineteenth- and twentieth-century Vietnamese remained faithful to the tradition embodied in Lê law. As many French scholars have demonstrated, by the time of the French arrival in Vietnam in the last quarter of the nineteenth century, living traces of the Lê Code's legal concepts and principles on women's equal civil rights existed in custom; such legal concepts continued through the 1950s. Some authors found out that the Vietnamese people resisted and never applied a number of provisions in the Nguyễn Code, continuing to adhere to those in the Lê Code. Camille Briffaut wrote:

Le Code de Gia Long est un anachronisme et une erreur de législation; il n'a jamais été appliqué dans ses prescriptions civiles par le peuple annamite. . . . J'affirme même que la plupart des coutumes actuelles de droit sont conformes à la loi des Lê et lui obéissent encore fidèlement.¹⁶⁷

In fact, we find evidence that the Nguyễn Dynasty, in its regulations posterior to the code, had to make some concessions to the traditionally important role of the principal and secondary wives. In a curious combination of the Nguyễn Code's principle of the children's respect for the parents' power to manage the family property and the common practice of letting the principal and secondary wives participate in property management, a 1860 decree required the verso of the sale deed to show the signatures or fingerprints of the seller's parents and principal and secondary wives.¹⁶⁸

Robert Lingat has pointed out that during the 1950s the Vietnamese continued to use legal forms dating back to the Lê Dynasty in which a distinction was made between "the part of the property inherited from

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parents or grandparents” and the “part of the property newly acquired,” a distinction important under the *Lê* for property settlement between husband and wife but no longer so in mid-twentieth century. He concluded that “le régime matrimonial coutumier ait finalement triomphé du nouvel effort de sinisation marqué par la promulgation du Code Gia Long.”¹⁶⁹

Popular custom varied from South Vietnam (known under the French as Cochinchina) to the North (known as Tonkin). But it generally conformed to the *Lê* tradition of requiring the wife’s signature or consent in property disposal and of permitting her, upon divorce or the death of her husband, to withdraw her separate property which had originated from her own family.

According to custom in South Vietnam, the husband always asked for his wife’s consent when disposing of her property; people would not buy this property if it were not sold by both spouses. Thus, the property originating from the wife’s clan was still recognized by custom. Moreover, in legal forms (sales, mortgages, loans, gifts), the wife’s name always figured next to the husband’s.¹⁷⁰ Lasserre, an author whose “Proposed Civil Code for the Vietnamese” was partly incorporated in the Short Civil Code for Cochinchina in 1883, reported that the matrimonial regime in South Vietnam gave even more status to the wife than the French community property law: The husband was not the master and lord, as in French law, for he had to obtain his wife’s consent in any act of importance such as a loan or acquisition or disposal of property.¹⁷¹

Custom in North Vietnam also sanctioned the *Lê* principles of equality in property rights and collaboration in property management between husband and wife. In 1927, a Consultative Commission on Customary Law conducted an inquiry and reported that during the lifetime of both spouses, the regime was one of community property in which both the husband and the wife signed on any sale of real property; that at the death of one spouse, the community property regime continued with the surviving spouse, whether wife or husband; and that in the countryside, the wife’s parents used to give the couple, for ultimate bequeathment to the children, some real property which would, however, revert back to the said parents in case the couple was childless or the wife died or was repudiated or divorced: In other words, the withdrawal of the wife’s separate property, provided for by the *Lê*, was still a practice.¹⁷²

The French court system in Indochina was forced to recognize popular custom as embodied in the *Lê* Code. Established during the colonial rule, this court system consisted of jurists trained in the Civil Law system (as contrasted to Common Law system). Therefore, they considered the statutory law in force as the most important source of law. The French promulgated the 1883 Short Civil Code (*Précis de Législation Civile*) for Cochinchina. This code, however, had only a number of provisions on

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personal status (birth, death, marriage, domicile) and family relationship (filiation, adoption, minority) and contained no stipulations on such subjects as inheritance, matrimonial estate, contracts, and the like. In Central and North Vietnam, the Civil Codes were promulgated only at a much later time, in the 1930s. In other words, the Nguyễn Code was the code officially in force for much of the French colonial period. Moreover, in Cochinchina, for subjects which were not regulated by the 1883 Short Civil Code, the French courts still applied the Nguyễn Code. But although they applied this code as a statutory law in force in Cochinchina, they had to make concessions to the influence of customary law as embodied in the Lê Code.

On the question of inheritance, the courts were firm on one important point: the right of women to inherit property (which was not recognized in the Nguyễn Code).¹⁷³

On the question of matrimonial estate, there was what a French law professor in Hanoi called a “struggle during eighty years, within the French judicial system, between the Chinese conception of the family and the genuinely Vietnamese conception.”¹⁷⁴ During this “struggle,” the courts sometimes recognized property acquired during marriage as the community property of husband and wife in conformity with the Lê principle of equality; for most of the time, however, they denied the existence of such community property on the basis of the Nguyễn Code’s principle that the husband’s estate absorbed all property acquired during marriage. On the other issue, the courts changed position many times between denial and recognition of the wife’s ownership rights over the separate property she received through inheritance or donation. Moreover, even after the Second Chamber of the Saigon Court of Appeals had definitively opted for refusal to recognize the wife’s separate property, the First Chamber of the same court continued to grant such a right. Thus, the Lê influence on the French courts on this issue of the wife’s separate property was stronger and more long-lasting, although not undisputed, than its impact on the issue of community property.¹⁷⁵

Codification efforts in Vietnam since the 1930s have incorporated many features of Lê law. In 1931, the Civil Code for North Vietnam (Tonkin) was promulgated, and its drafters reported that popular customs identified by the Consultative Commission on Customary Law had been taken into account and incorporated in the code, especially those touching distinctive Vietnamese institutions such as family relationships, inheritance of the general estate, *hương hỏa* (ancestor worship property), composition of the matrimonial estate, role of the spouses in property relations, and the widow’s legal status.¹⁷⁶ The Civil Code for Central Vietnam (Annam), promulgated between 1936 and 1939, reproduced most of the Civil Code for North Vietnam, with some revisions and improvements.

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These codes adopted, in the area of women's property rights, many features of customary law dating back to the Lê. According to one author, they constituted a break with the Chinese-inspired Nguyễn Code and a return to the institutions of custom; they did not create any trouble but were welcomed by the population of North and Central Vietnam for having deep roots in the popular conscience.¹⁷⁷ These codes, however, followed the French Civil Code's stipulation that the wife had no legal capacity and her husband was the administrator of the matrimonial estate during his lifetime.

This legal incapacity was abolished by the 1959 Family Law of the Republic of Vietnam (South Vietnam), which upheld community property and equality of powers between husband and wife. This equality continued to be recognized in South Vietnam by the succeeding statutes, the 1964 Family Law and also the Civil Code of 1972. Much like the Lê Code, the latter two statutes also clearly defined the separate property of each spouse as distinguished from community property acquired during marriage.¹⁷⁸ In the Democratic Republic of Vietnam, the Hanoi government promulgated on December 19, 1959, the Law on Marriage and Family, which gave the woman full legal capacity and equality (in entering into contracts, in using and disposing of property) and sanctioned the community property regime.¹⁷⁹ This law continued in full force in the unified Socialist Republic of Vietnam until the promulgation in 1987 of a new law on marriage and the family which adopted the same principles of full legal capacity and equality of women.

Special Protective Measures for Women

As we have seen, the issue of sex discrimination or equality in traditional Vietnam cannot be described in black or white terms: For the Lê Dynasty at least, the lesser status of the wife in criminal law sanctions and in some civil law aspects of marital relationships (having to do with Confucian morality) was counterbalanced by equality between men and women or husband and wife in property rights and certain personal rights.

A discussion of the issue of sex discrimination or equality would not be complete if we did not mention another dimension that existed in both Lê and Nguyễn law, special protective measures for women. At the outset, it is worthwhile to say that inasmuch as special measures adopted to advance certain ethnic groups did not constitute racial discrimination as defined by the CERD,¹⁸⁰ the special protective measures for women incorporated in traditional Vietnamese law also did not constitute sexual discrimination. In the last analysis, they worked to the women's advantage. These protective measures in areas of criminal and family law should be briefly mentioned precisely because they were capable of softening the impact of any discrimination the women were subject to.

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Criminal Law. First, in criminal law, women in traditional Vietnam enjoyed special protections against criminal violations committed by other people and benefited from some alleviation of criminal sanctions imposed on them. In both Lê and Nguyễn law, statutory rape of young women was severely punished;¹⁸¹ in this respect, Vietnamese women were as well protected then as they are now. Powerful families' abduction of female commoners (with or without the intent of marrying them), as well as officials' fornication with women under their jurisdiction, was strictly penalized in special provisions to discourage these acts and give more protection to common women.¹⁸² To prevent lonely young women from being seduced and sold by unscrupulous people, the Lê Code specified that when an orphan girl under fifteen (the age of maturity) sold herself without the assistance of a guarantor, the sale contract would be annulled and the purchaser, scribe, and witnesses punished with the stick penalty.¹⁸³ Not only did the law punish the greedy parties involved but it also gave the young woman the benefit of nullifying her contract. Under both the Lê and the Nguyễn, probably to avoid forced marriage, officials were forbidden even to marry women under their jurisdiction. If the women were the wives or daughters of persons implicated in legal proceedings before the officials, the penalties would be increased.¹⁸⁴ The Lê in particular punished the serfs of princes or princesses who took advantage of their master's power and forced common women to marry them; their master would be fined or demoted if he tolerated their wrongdoings.¹⁸⁵

Women who committed offenses were treated more leniently in many respects than men. If several persons of the same family jointly committed an offense, only the most senior member, defined as son or husband, would be prosecuted; even if a senior female member of the family were the initiator of the crime, only the husband or son would be prosecuted.¹⁸⁶ The Nguyễn Code stated that "a female accused shall not be jailed except for a crime punishable with death and for adultery; in all other cases, she shall, if married, remain in the charge of her husband, and if single, in that of her relatives or neighbors, who shall be held responsible for her appearance in the court."¹⁸⁷ In the Lê, an accused female of high social standing was permitted to send a proxy to the court or to stand in court instead of sitting on the floor, whereas males accused were all required to appear in court in person.¹⁸⁸ In Lê and Nguyễn law pregnant women guilty of offenses would not have to undergo penalties until a hundred days after childbirth.¹⁸⁹ The Nguyễn Code permitted all female offenders to redeem penalties of exile and penal servitude—considering the penalties not befitting women.¹⁹⁰ In the Lê Code a female offender, even if convicted, would be exempt from certain kinds of penalties or would receive a lighter penalty than a man for the same offense. The heavy stick penalty was not applied to her (the Nguyễn Code, in principle also punishing women with the heavy stick like the Ch'ing Code, incorporated this special feature of the Lê

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Code by stating that when the heavy stick was specified for a woman, it should be replaced by the light stick).¹⁹¹

Three degrees of penal servitude for women (menials, serfs assigned to kitchens, paddy-husking serfs) were less burdensome than the three corresponding degrees for men.¹⁹² Women were not required to wear chains like men when they were exiled.¹⁹³ For many offenses provided for only in the Lê Code, a lighter penalty was imposed on women than on men—for example, the offense of children selling property belonging to parents while the latter were still alive, or the offense of arson.¹⁹⁴ For many offenses also listed in the Nguyễn Code, the Lê Code punished women less severely than men (whereas the Nguyễn Code subjected them to the same penalty)—for example, fornication,¹⁹⁵ theft,¹⁹⁶ trespassing at night.¹⁹⁷

Family Relationships. In some aspects of family relationships, women in Lê and Nguyễn Vietnam were given special protection despite their otherwise inferior personal status. A woman was not inexorably bound by betrothal to marry her fiancé: She might cancel the engagement if the man committed a crime (Lê, Nguyễn) or dissipated his fortune or caught leprosy (Lê).¹⁹⁸ Once married, a woman could not be demoted from the position of principal wife to that of a secondary wife or concubine.¹⁹⁹ Her repudiation could take place only if one of the seven specific reasons existed (Lê, Nguyễn) or if there were a case of extinction of loyalty obligations (Nguyễn). In other words, the husband was narrowly restricted by law to a definite number of grounds in his power to repudiate his wife and could not act arbitrarily.²⁰⁰ Also, both the Lê and the Nguyễn recognized three impediments to repudiation: if the wife had mourned for the husband's parents; if the couple, previously poor, had become rich after marriage; if the wife had her parents when marrying but was now without any relative to return to if repudiated—in these cases, the husband could not abandon her even if she fell into one of the seven cases of repudiation. Additionally, Lê law forbade the repudiation of the wife when either of the spouses was in mourning for his or her father or mother (except when the wife was extremely lascivious and noisy).²⁰¹

As for a woman's wish to be released from an intolerable matrimonial bond, both the Lê and the Nguyễn provided the possibility for her to persuade her husband to accept a divorce by mutual consent,²⁰² and the Nguyễn Code gave her the option to seek unilaterally a divorce in case her husband struck her or committed serious crimes (such as selling her or forcing her to fornicate with another person) and the dissolution of the marriage was necessary for her protection.²⁰³

When a woman wished to remain a widow, any relatives, including her parents or grandparents, who forced her to remarry would be punished.²⁰⁴ This was to encourage chastity on the part of the widow, but it also had the effect of

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protecting her from an attempt by her late husband's family to deprive her of her role as administrator of the family estate.

All these protective measures for women in Lê and Nguyễn law could be considered as positive discrimination in their favor.

Racial Discrimination or Equality?

In our discussion here, we use the definitions and standards of the CERD. Therefore, the term "racial discrimination" means any distinction, exclusion, restriction, or preference based on race, national, or ethnic origin.²⁰⁵

Did traditional Vietnam "undertake to prohibit and to eliminate racial discrimination . . . and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law?"²⁰⁶ We will examine the issue under three headings: the legal process, the enjoyment of economic and cultural rights, and the enjoyment of civil and political rights.

A preliminary question needs clarification. Even according to modern universal standards, the term "racial discrimination" does not apply to distinctions, exclusions, restrictions, or preferences made by a government between citizens and noncitizens.²⁰⁷ If we look into the law of the Lê and the Nguyễn, we find that the Lê Dynasty made, among peoples of alien culture (*hóa ngoại nhân*; in Chinese, *hua wai jen*), a distinction between ethnic minorities (*man liêu*; in Chinese, *man liao*) and foreign nationals (*ngoại quốc nhân*; in Chinese, *wai kuo jen*) and applied a different set of legal rules to the foreign nationals. These rules will be briefly discussed at the end of this discussion to ascertain whether they discriminated against the foreigners and subjected them to exclusions or restrictions. The Nguyễn Dynasty, copying the Ch'ing Code, did not make such a distinction between ethnic minorities and foreign nationals, designating them all peoples of alien culture. As we shall see, the Nguyễn policy toward foreigners did not discriminate against them but, especially vis-à-vis the permanent resident Chinese, actually treated them well.

For the bulk of this discussion of racial discrimination, however, we will concentrate on the ethnic minorities.

Equal Treatment by the Tribunal in the Legal Process

When brought before tribunals in Lê or Nguyễn Vietnam, members of ethnic minorities were governed by their own customary law if their case involved only the people of one ethnic group, and by national law if the parties belonged to different ethnic groups (a case involving an ethnic minority person and a lowland Vietnamese would fall into the latter category). This rule for settling conflicts of laws was quite modern and substantially gave ethnic minorities equal protection under the law.

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The Lê Dynasty clearly provided for this principle in its code:

Whenever persons of alien cultures belonging to the same ethnic group commit an offense one against another, justice shall be dispensed in accordance with their customs. If they come from different groups, the national law shall apply.²⁰⁸

In the Lê application of this principle, when members of an ethnic minority committed robbery or homicide against each other, they could receive a penalty one degree lower than would normally be the case and were permitted to reach an amicable settlement;²⁰⁹ when they robbed ethnic Vietnamese, they would be sentenced under the national law on robbery like any other citizen.²¹⁰

The Nguyễn Code, adopting the principle contained in its Chinese model, the Ch'ing Code, provided simply that "All people of alien culture who were guilty shall be adjudged under the national laws."²¹¹ In practice, besides this leveling of all persons (national or alien, Vietnamese or ethnic minority) before the law, the Nguyễn Dynasty also made concessions to the ethnic minorities' customary law. In civil disputes involving only people from these groups, it permitted them to apply their customary law. In criminal cases (even homicide), if their customary law led to a more indulgent penalty, they were allowed to benefit from the lighter penalty.²¹² The Minh Mạng Emperor ordered that when the death penalty was imposed, even the newly incorporated minorities in freshly assimilated territories were entitled to the review process at the Imperial Court level.²¹³ He also rejected as genocide a proposal by the Quảng Ngãi Province governor to assassinate the Mỡ and Mọi minorities to prevent them from making trouble in the border areas.²¹⁴

In summary, with respect to the criminal process, ethnic minorities in traditional Vietnam were treated equally under the national law or more leniently under their customary law. In no case would they be discriminated against by the tribunals and subjected to a more oppressive penal policy compared to citizens from the lowlands.

In the area of procedural law, the same principle of equality applied. Ethnic minorities benefited from all the procedural guarantees of the criminal process. For example, in making arrests among the ethnic minorities, the jail officers also had to go through the local administrative authorities as in the arrests of other citizens in the lowland area. The only difference was, under the Lê, the local authorities in these cases of arrest were the "administrators of the ethnic minorities" instead of the prefectural or district chiefs, as in lowland areas.²¹⁵ Presumably these ethnic minority administrators knew the minority people's language, customs, and culture and would help carry out the arrests in an effective way. If the warrant officers

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went directly to the accused ethnic minority people's houses to make arrests and were reviled or struck by them, the latter would not be charged with any offense.²¹⁶

In addition to the usual procedural due process guarantees, members of ethnic minorities were entitled to an honest interpreter in the court proceedings. If the interpreter for the ethnic minority group deceitfully made a wrong translation, thereby aggravating or mitigating the criminal case in question, he would be punished for the (serious) offense of aggravating or mitigating the case.²¹⁷

Thus, ethnic minorities had the same rights as, if not more than, Vietnamese lowlanders in criminal proceedings before a Lê or Nguyễn court of law.

Administrative Autonomy and Economic-Cultural Rights

As we have seen, the Lê Dynasty permitted ethnic minorities to reach an amicable settlement out of court when they committed robbery or homicide against one another. This concession to the minorities' customs and culture expanded beyond the fields of law and social relations. In fact, in an apparent effort to maintain the minorities' way of life, the Lê established ethnic minorities' districts (*châu*) in which the administrators at different levels were members of ethnic minorities: in hamlets, the hereditary tribal chief-clan heads (*phụ đạo*); in districts, the ethnic minority district chiefs (*tri châu*).²¹⁸ The Nguyễn Dynasty's approach seemed less clear. One policy was consistent, though: The local administrative authorities in ethnic minority areas were always their own people. At first, in 1822, the Minh Mạng Emperor ordered that highland tribes might follow their customs in matters of marriage, family ceremonies, and funerals and might be governed by their own leaders appointed by province governors, but in litigation they should follow national law.²¹⁹ Later the same emperor looked for a way to Vietnamize these people. He said of the highlanders and Cambodian minorities in the southern provinces: "We must hope that their barbarian habits will be subconsciously dissipated, and they will daily become more infected by Han [that is, Sino-Vietnamese] customs."²²⁰ Still later, in 1836, when two lower officials proposed that the northern highlanders be ruled directly by the Vietnamese, that their own chiefs be transferred to remote provinces, that roads be built into their mountains and that their communities be organized into Vietnam-style villages with village chiefs, this proposal was not received with enthusiasm.²²¹ Thus, in the final analysis the Nguyễn Dynasty was obliged to recognize the coexistence of minority cultures; any attempt to imbue the minorities with Sino-Vietnamese cultural mores was only through persuasion (*hiển dụ*) and education (*giáo hóa*), such as teaching them Vietnamese customs and language in a gradual, not hurried, assimilation process.²²² The Minh Mạng Emperor even established

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four translation offices to which were appointed people who knew foreign and minority languages—so that people were encouraged to learn these languages. Specifically he ordered officials in Bình Thuận, Nghệ An, and Hà Nội to select two persons in each province for the study of Chăm and Thô' languages under a state scholarship. Later he ordered Vĩnh Long, An Giang, and Hà Tiên officials to select intelligent and learned Vietnamese to learn the Khmer language so that they could understand minority customs that, though different, “belonged to the same culture [as Vietnamese].”²²³

The policy of “live and let live” was applied to the ethnic minorities not only in the administrative and cultural but also in the economic area. The most important economic resources of the ethnic minorities were agricultural products from virgin land along with forest and mountain products. The Lê Dynasty placed restrictions on public landholding but did not impose any limit on the clearance of virgin land.²²⁴ As for forest and mountain products, it stipulated that no one could monopolize them, because—as the T'ang Code, its model, stated—they were considered as belonging to the people at large except when labor had been performed to obtain those products.²²⁵ The Nguyễn permitted the excavation of virgin land. The highlanders were relegated to the plateaus, but they were free to cultivate land, to burn successively different parts of the forest to change them into dry ricefields and, after each use, to move from one area to the other—which was not at all an efficient way to manage forest resources. The point here is the Nguyễn also let ethnic minorities enjoy their economic rights on wilderness land without restriction.²²⁶

The Lê specifically protected ethnic minorities against possible economic deprivation by government officials in their area. Any frontier guard who exacted “greeting gratuities” would be punished and required to pay punitive damages.²²⁷ Even generals governing the frontier territories who exacted these “greeting gratuities” were demoted and required to pay punitive damages; if they looted the ethnic minorities, they would be subject to penal servitude and also required to pay punitive damages.²²⁸ We shall discuss this in more detail later, but it should be noted here that the punitive damages payable by government officials to private citizens were particular to the Lê Dynasty law and constituted an important protection of human rights. Even ethnic minorities enjoyed this protection: tax collectors would be demoted if they collected tax directly from ethnic minorities and did not act through their administrators. This rule was intended to protect minorities from possible pressure and economic exploitation by tax collectors.²²⁹

In one sphere of economic activity, the Lê and Nguyễn at first sight did seem to discriminate against ethnic minorities. The Lê Code did not allow lowlanders and ethnic minorities to borrow money from one another; offenders would be demoted and the loan confiscated.²³⁰ The Nguyễn Code also stated:

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Whoever frequents the savage tribes, does business with them, loans money to or borrows it from them, cheats them of their properties and causes hate, acts of reprisal, or crimes among these people on the frontiers and therefore brings calamity to the nation, shall be condemned to military servitude at a distant frontier, or to death if their offense is more serious (such as crossing a frontier post, bringing out people, weapons and military equipment).²³¹

But a close and careful reading of these provisions shows that there was no discrimination against ethnic minorities, as the ban on borrowing and lending between them and the Vietnamese lowlanders applied to both categories of people. Moreover, the main purpose was to prevent possible exploitation of the naive minorities by the more astute Vietnamese in business deals and thereby to preserve peace in the frontier regions.

In other words, these provisions did not promote inequality of treatment but, at worst, aimed at a “separate but equal” treatment based on public order and national security considerations. That national security considerations were the prime reasons for economic separation of the minorities can be proven by an opposite decision in 1825 by the Minh Mạng Emperor who wanted the 400 or so tribesmen newly rallied to the government by two minority women to live scattered among Vietnamese so that the government could subject them to control and avoid their assembling together and causing trouble.²³² But when no such special considerations existed, minorities enjoyed equal economic privileges, if they did not in fact receive greater solicitude from the government in the form of lighter taxes and the like. The Minh Mạng Emperor often told his officials that these minorities were also “the children of the Court” and once said in connection with his order to send relief rice to two starving minority prefectures: “Although these two prefectures were in distant barbarian areas, they are also my children. The Court’s benevolence is uniformly applied to the whole people. How can we place them outside its scope?”²³³ Finally, in practice, trade between Vietnamese and highlanders was not banned and was only subject to a garrison tax (*thuế cữu đôn*).²³⁴

On the other hand, national security reasons also prompted some discrimination against minorities in the area of civil and political rights.

Some Discrimination in the Enjoyment of Civil and Political Rights

National security considerations were the source of the Lê Dynasty requirement that the position of a tribal chief–clan head of an ethnic minority group (*phụ đạo*), which was hereditary, could not be assumed without prior petition to the throne for official appointment.²³⁵ The head of a Vietnamese family in the lowland area was not required by law to report to the throne before assuming his powers. Tribal chiefs also had to come to the capital to pay homage to the emperor twice a year, in the first and the seventh months;

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according to a 1478 decree, if they failed to do so twice, they would be brought to the capital for punishment.²³⁶ These politico-civil control devices served to secure the allegiance of the ethnic minority tribes to the national government. On the other hand, the Nguyễn's later policy of diminishing the administrative autonomy of minorities by appointing Vietnamese to minority areas was not motivated by discrimination. Indeed, after the court had appointed Vietnamese administrators to newly established administrative units in the northern provinces of Lạng Sơn, Cao Bằng, Hưng Hóa, Tuyên Quang, and Thái Nguyên, in 1836 the Minh Mạng Emperor instructed province officials to inform the minorities that "the recent policy of appointing Vietnamese administrators did not mean discrimination against them and they would be welcome to an audience with the Emperor and employment in the central government if they so desired, in accordance with the policy of 'one people enjoying the same benevolence' [*nhất thị đồng nhân*]." ²³⁷

Both the Lê and the Nguyễn dynasties, to different degrees, frowned upon marriages between Vietnamese and ethnic minorities, the Lê being less restrictive in this respect. The Lê forbade officials to contract marriages with the families of tribal chiefs in the frontier territories; if they did, they would be condemned to penal servitude or exile and the marriages would be dissolved.²³⁸ Since the ban did not apply to the common people, and since another Lê provision punished with exile any member of an ethnic minority who secretly exchanged blood oaths with officials or military men (and Vietnamese commoners), it can be safely deduced that the ban on marriage between officials' and tribal chiefs' families was aimed chiefly at preventing a possible collusion between officials and tribal chiefs for rebellious purposes. Thus, the Lê restriction on interracial marriage was based on national security reasons. If a 1499 imperial edict expanded the group subject to the restriction and forbade everyone, "from princes down to the common people," from marrying women of the Chăm race,²³⁹ it was also based on national security considerations: The only minority group specified was the Chăm, whose matriarchal society occupied the territory south of Vietnam and who often attacked Vietnam and were the target of the Vietnamese expansionist drive. Ironically, a missionary, Ordoñez de Cevallos, reported that because of the necessity to rely on the Chăm to struggle against the Mạc Dynasty, this edict became inoperative after a few years and Emperor Lê Anh Tông himself married a Chăm princess.²⁴⁰

The Nguyễn Code generalized the ban on marriage with minorities to the common people and enlarged the list of minorities to include those from South Vietnam such as the Cambodians and the Thuận Thanh (probably the highlanders in the southern plateaus) and the Nùng and Mán of the mountainous region of North Vietnam.²⁴¹ The Nguyễn Code's decree was patterned according to a Ch'ing decree that was aimed against the people of

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Formosa. Therefore, it smacked of racial discrimination rather than being based on national security considerations.

Under the Nguyễn as well as the Lê, however, the people's acquired rights were respected in this matter of interracial marriage. The Lê Code ban on officials' marriage into tribal chiefs' families did not affect then-existing marriages, and the Nguyễn Code restriction on interracial marriage also had no impact on long-contracted unions that had produced children.²⁴²

Conclusion

To conclude, we can safely say that there was no racial discrimination against *minorities* in traditional Vietnam, insofar as equal treatment under the law and equal enjoyment of economic and cultural rights were concerned. Some restrictions were imposed on the political and civil rights of the ethnic minorities. In the Lê these were based on national security considerations, whereas the ban on interracial marriage in the Nguyễn Code had some connotations of discrimination that originated with the Ch'ing Code decree it adopted.

On the other hand, the Lê Dynasty adopted stringent regulations against *foreign nationals*, whereas the Nguyễn was somewhat more generous. Strictly speaking, the following brief discussion of foreign nationals' rights under the Lê and Nguyễn touches only tangentially on the topic of racial discrimination or equality because, as stated previously, even if the foreigners were subject to restrictions and exclusions, this would not constitute "racial discrimination" as defined by modern universal standards, which permit distinctions, exclusions, restrictions, or preferences made by a state between citizens and noncitizens. Even modern democratic states have imposed many restrictions on foreigners (especially in freedom of movement) for national security reasons. Foreigners' rights, however, always feature some interest when the issue of discrimination on the basis of national origin is considered, and it is therefore worthwhile to discuss briefly their rights or the restrictions on these rights without implying that any substandard performance on the part of the dynasties in the area of human rights standards.

Under both the Lê and the Nguyễn, foreigners were subject to, and received all the protections of, the regular legal process,²⁴³ both in substantive and procedural law. We will see that even in the sensitive area of punishing foreign missionaries who, while spreading the Christian religion, were suspected of endangering national security, the governments of the Lê and the Nguyễn brought these missionaries to trial in a careful manner; the Nguyễn government even provided protection of the Catholics against the spontaneous but illegal violence from segments of the population, especially the Confucian scholars.²⁴⁴

If we go beyond the minimum due process protections that guaranteed the integrity of the person, however, the picture was different. Foreigners were restricted or excluded by law from a number of activities under the Lê

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because of this dynasty's concern for national security. In the Lê, whoever married a foreign national would be exiled and the marriage dissolved.²⁴⁵ An edict in 1662, however, permitted foreigners who had married Vietnamese and given birth to children to enter their names in the population registers.²⁴⁶ The ban had been either lifted or not enforced. Those who sold to foreigners land bordering on the frontier,²⁴⁷ or who sold serfs, elephants and horses, military weapons,²⁴⁸ or who divulged military secrets to foreigners²⁴⁹ would be subject to decapitation. Those who sold to aliens any salt, cinnamon, pearl, elephant tusks, iron, copper, cattle skin, and the like would be punished with exile.²⁵⁰ In cases where trade and relations with foreigners were permitted, they had to follow detailed rules on stopovers by foreign trading vessels, and they were restricted in their residence, movement, activities, and contracts with Vietnamese. These regulations applied to Westerners as well as Chinese.²⁵¹ Long-time resident Chinese were compelled to use Vietnamese national dress and language; Westerners, to desist from spreading Christianity.²⁵² That national security was the primary reason for the careful control of foreigners could be seen in the fact that they were restricted to the trading centers (*bạc dịch trường*) so that they would not be able to spy for their countries. Under the Lê, these trading centers were: Vân Đồn and Phố Hiến in North Vietnam, Hội An (or Faifo) and Tourane in South Vietnam under the Nguyễn Lords' control.²⁵³ When the foreigners were believed to be simply engaging in trade, they were treated well by both the government and the people. In South Vietnam, for example, all Nguyễn Lords from Hy Tông on encouraged foreign trade.²⁵⁴ The missionary Christopher Borri, who was in South Vietnam (Cochinchina) in 1618, reported that the policy of the "Cochinchinois" was "to give all strangers free access into their ports and take traffique in their Countrey. . . . The maxime of the Cochinchinois being, not to acknowledge ever any the least apprehension of any Nation in the World. Cleane contrary to the king of China, who fearing all, shutteth the Gate against strangers, permitting no traffique in his Kingdome."²⁵⁵ Borri considered the Vietnamese open minded and hospitable in their contact with foreigners:

Of this gentle and agreeable humour of the Cochinchinois commeth the account they make of strangers, giving them liberty to live according to their owne law, and to apparrell themselves as they thinke good. . . . Whereas all the other Easterne nations hold the Europeans for profane people, and have them naturally in horror; in such sort that when wee land in any of their countreys, they betake themselves to flight. In Cochinchina on the contrary, they contend who shall converse with us most; they ask us many questions, they invite us to eate with them, using all kind of courtesie, civility and familiarity.²⁵⁶

When a foreigner complained about nonpayment in a credit sale, the Nguyễn Lord always ordered an expeditious payment.²⁵⁷ On the other hand,

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when foreigners were suspected of threatening the security of the state, they were harshly dealt with. For example, although the Nguyễn Lord already expressed a strong desire to have trading relations with the Dutch in Djakarta, he stiffened his position when he was informed by spies in North Vietnam that the Dutch East India Company had sent the vessel *Grol* to North Vietnam in 1637 and was given trading privileges by the Trịnh Lord who, however, requested the Dutch to help him in his war with the Nguyễn Lord. Beginning in 1641, a series of incidents led to actual naval fighting between the company's vessels and the Nguyễn navy ships. The strained relations improved in 1650 with the new Nguyễn Lord but worsened again in 1654. In the eighteenth century, the Europeans' trading relations with North as well as South Vietnam further deteriorated to the point of near-extinction because of the Vietnamese suspicion that foreigners came with a political design and were also creating public disorder in their dealings with one another and with Vietnamese.²⁵⁸

The same dichotomous attitude toward foreigners (stringency toward suspected national security violators but condescension for bona fide traders) continued under the Tây Sơn Dynasty and the Nguyễn Emperors (who were the descendants of the Nguyễn Lords). Barrow reported that Emperor Quang Toản of the Tây Sơn Dynasty and the local authorities welcomed the *McCartney's* mission when he and the mission visited Tourane Bay in 1793. But when the vessel's crew attempted to measure the baseline on the beach and an officer explored the river leading up to Faifo, he was arrested.²⁵⁹

The Nguyễn Code provisions on contact and trade with foreigners, copied from the Ch'ing Code, were also restrictive when national security was thought to be at stake. The code punished with strangulation whoever brought persons, weapons, or military equipment to foreign countries; with the heavy stick, whoever brought to foreign countries for purposes of sale the following items: horses, cattle, iron goods usable for military purposes, copper coins, and silk. In such cases the goods and the vessels or carriages used in transporting them would be confiscated.²⁶⁰

Foreign vessels coming into Vietnamese ports, however, were permitted to trade provided they notified the authorities for a customs inspection.²⁶¹ Even at a time (1834–35) when the Minh Mạng Emperor already worried about the Chinese merchant vessels bringing thousands of poor and worthless people to Vietnam, these vessels were permitted to dock at Vietnamese ports for four or five months to trade.²⁶²

Especially with regard to the Chinese, the Nguyễn Dynasty was generous. The Nguyễn did not exclude the latter from the equal enjoyment of civil, economic, and even political rights. The entry of new immigrant Chinese into Vietnam was regulated, but in a very simple manner: In order to establish residence they needed only to procure the guarantees of a Vietnamese of

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Chinese descent (*Minh Hường*) and of the head of their *bang* (dialect-based association) and to register their names on the tax roll.²⁶³ Prior to the Nguyễn Dynasty, up to the end of the eighteenth century, Chinese in South Vietnam were not organized among themselves and were administered by the head of each province. But between 1802 and 1807, the government permitted the Chinese to organize in each province different associations called *bang*, based on their dialects. The heads of these associations were elected by the Chinese but confirmed in their position by the province chiefs. The role of the *bang* heads was to collect the head tax for the government.

Thus, the Chinese enjoyed a certain administrative autonomy in Vietnam. Moreover, the Chinese enjoyed all human rights on an equal footing with the Vietnamese. They might purchase movable or real property and marry Vietnamese. As for economic activities, the Chinese became dominant in trade and even in mining.²⁶⁴ Later, to pursue a policy of assimilation, the Nguyễn government permitted half Chinese–half Vietnamese offspring to form *Minh Hường* villages, that is, villages of Vietnamese of Chinese descent organized according to the typical Vietnamese village and independent of the dialect associations. These *Minh Hường* people were allowed also to participate in civil service examinations and to become officials (typical cases were Lê Quang Định and Trịnh Hoài Đức, who were well esteemed by the Gia Long and Minh Mạng emperors). From 1842 on, the policy of assimilation extended even to pure Chinese in the various dialect associations who were henceforward required to list their names in the *Minh Hường* population registers to pay tax accordingly and to abandon their hair style (shaven head with a pigtail).²⁶⁵

Thus, while increasingly suspecting the Westerners, especially because of their religious proselytizing efforts, the Nguyễn Dynasty was generally well disposed toward the Chinese and their descendants to the extent of permitting—or requiring—them to assimilate with Vietnamese. All this might be because of the help the Nguyễn emperors' ancestors obtained from the Chinese immigrants in South Vietnam during the period of the nominal Lê government.²⁶⁶

Civil and Political Rights

To facilitate our search in traditional Vietnam for the functional equivalents of the various civil and political rights mentioned in the Universal Declaration and the CCPR (and also in the CESCRC), we classify these rights into three broad categories: (1) freedom of movement (to move within one's country, to leave and return to one's country, and to enjoy asylum); (2) freedom of thought (to hold opinions, to express them, to have and practice religious beliefs); and (3) freedom of collective action (to assemble peaceably, to form associations and to participate in the governance of one's country). This broader classification scheme, by providing flexibility to our searching and analyzing efforts, will enable us to identify more easily the existence or absence in traditional Vietnam of the civil and political rights in question or their equivalents.

Freedom of Movement?

Freedom to Choose Residence and to Move Within One's Country?

Did traditional Vietnam permit its citizens the freedom of choosing their residence and moving within the national territory, such freedoms to be limited only by law when it was necessary to protect national security, public order, public health or morals, or the rights of others?¹

Did the system of population registration constitute an unwarranted restriction on the freedom to choose one's residence? Every person had to be listed as a member of a household in the population register of his or her village. Omission of an individual on the register would subject both the derelict officials and the omitted individual to punishment and, under the Lê, also to the payment of the charge for missed corvée.² Individuals who fled to another area to evade corvée obligations would be punished more severely. Under the Nguyễn, they would be sent back to their old place of registration; under the Lê, they would be compelled to pay the charge for missed corvée.³ Under the Lê, vagrants were considered as worthless, unregistered individuals; any powerful person who harbored them or village official who tolerated the act would be punished, and the vagrants had to return to their native place to pay the charge for missed corvée.⁴ Did all this

mean that the population of old Vietnam was bound to its native places? As the principal purposes of population registration were to collect taxes and levy *corvée* (public work as well as military service),⁵ traditional Vietnamese law did not restrict an individual's freedom to choose his residence: Both the Lê and the Nguyễn codes allowed the individual to enter his name in the population register of a new locality and do *corvée* there.⁶ The Nguyễn Dynasty specifically permitted individuals dispersed by war or calamity to establish themselves and register in the population register of their new locality.⁷ In practice, the Nguyễn Dynasty was rather loose in its control of the population and its registration: Only persons with resources were registered; persons without resources, called *lao dân* (working people), were not.⁸ Thus, both the Lê and Nguyễn dynasties were more liberal than many modern states that, for regional economic planning purposes, have severely restricted population movement within the national territory.

If freedom to choose one's residence was not restricted in traditional Vietnam, did this mean that the state permitted freedom of movement within the national territory? Obviously, old Vietnam was not an entirely sedentary society: The existence of tradesmen and population migration was evidence of the physical movement of persons.⁹ The legal issue, then, boils down to the following: granted there were movements of persons within the national territory, were individuals restricted by oppressive regulations beyond the justification of national security or public order? In the Lê Dynasty, any visit by a person from another village that extended beyond five days had to be reported to village authorities. If the visitor stayed beyond twenty days after the completion of his business, he would be considered as overstaying without authorization. In such a case, village officials had to report to district officials within three months so that the latter could take appropriate action, arresting the individual in his illegal residence and sending him back to his original area (or military unit) to be listed as a man subject to *corvée*.¹⁰

Under the Nguyễn, an official or a commoner circulating from one province to another had to apply through the local authorities for a written permit from the province governor, who would also notify the governor of the province where he wanted to go. After the completion of his business, the individual was under deadline to return to his own province, and another notification would go from the governor of the province of his visit to the one of his native province. If the individual privately went out of his province without authorization, he would be demoted, if an official, or be subject to the heavy stick penalty, if a commoner.¹¹ According to a decree in 1839, officials or subordinate public employees (clerks) and soldiers were also required to have letters of introduction (*dân văn*) to move from one place to another. Only civil officials of the third or higher rank or military officers of the second or higher rank in the capital who sent their relatives and household members to the frontier passes or seaports

could themselves issue letters of introduction for them.¹² Thus, a traveler in traditional Vietnam was permitted to go from one place to another within the national territory, but a permit was required to avoid the charge of evading *corvée* if he overstayed his time in a place other than his place of registration.

Even if we suppose, however, that this permit was somewhat similar to the internal passport and worker's booklet of nineteenth-century France, we find no evidence that it unduly restricted freedom of movement. First, the travel permit system was established mainly to control evasion of *corvée*, a restriction accepted by today's international standards as being justified by public order. Second, both Lê and Nguyễn law punished any government officials who attempted to delay travelers at river checkpoints.¹³ Rather than restricting him, the Lê Dynasty even provided for the traveler's protection by requiring that the host where he stayed had to notify his neighbor so that together they took the necessary information about the traveler's name and baggage and its content and then witnessed the traveler's departure.¹⁴ This was to prevent dishonest hosts from robbing or murdering travelers, as had happened in a famous case under the Lê.¹⁵ The Nguyễn's meticulous requirements for the internal travel permit and other police measures were not enforced in practice; they were, as Philastre put it, "certainly a dead letter" ("à coup sûr, lettre morte").¹⁶ Moreover, the Nguyễn also conceded freedom of movement to "riverboat people" (*giang lộ nhân*) in newly settled areas of Vietnam. These were not mere travelers, but permanent nomads who, although registered in a village, changed their place of residence by moving their sampans and vessels around to avoid *corvée* and taxation to such an extent that desperate officials proposed engraving the vessel registration licenses (*bài chỉ*) with the names of their villages on the bows of their boats and establishing river posts to check them.¹⁷

Any Freedom to Leave One's Country?

The Lê Code punished with decapitation persons who, without authorization, passed through a frontier surveillance post and crossed the frontier into a foreign territory or boarded a merchant vessel to go abroad.¹⁸ Persons who fled the country—that is, left without authorization—were considered to have committed treason, a crime punishable by decapitation.¹⁹ Article 201 of the Nguyễn Code stated that whoever sneaked through a frontier post without a *laissez-passer* would be condemned to one hundred strokes of the heavy stick and three years of penal servitude; if he crossed over the frontier and had relations with people outside it, he would be condemned to strangulation. The commentary in this Nguyễn Code article specified that the crime punished here was frontier crossing for any given reason without premeditation for the purpose of entering into relations with foreigners. If, however, the crime was to have prior relations with foreigners and then cross the frontier to contact them, it would be punished as treason under Article 224, that is, with decapitation.

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Thus, in both the Lê and Nguyễn dynasties, to travel abroad without authorization was a crime punishable by death. The reason for this severe penalty was undoubtedly national security considerations, as evidenced by the language on the presumption of treason in both dynastic codes. It was also for national security considerations that the Lê punished with penal servitude or exile even those officials who, without good reason, visited a frontier post.²⁰

On the other hand, in ordinary circumstances—such as going abroad or outside the country for trading or fishing—when the state under both dynasties deemed itself not threatened in its security, authorization for foreign travel would be given, as implied by the terms “authorization” or *laissez-passer* and by the punishment meted out by the Lê Code to frontier guards who exacted money from legitimate merchants²¹ as well as by the *limited* list of items of trade that the Nguyễn Code excluded from bringing “privately” to foreign countries for trade.²² A contemporary Western observer, while remarking that foreign voyages were rare under the Lê, stated that poor people did go abroad for purposes of livelihood or for attending foreigners.²³

If we are to compare traditional Vietnam law to the international human rights standard on foreign travel (which also permits restriction thereof on the basis of national security or public order), as well as the present-day practice of such countries as France (according to which foreign travel is a matter of “high-level police power,” subject to discretionary prior authorization by the government of a passport), we must conclude that traditional Vietnam did not violate modern standards. The only reservation to be made is that the death penalty for unauthorized foreign travel was probably too severe. But this question is related to the issue of deprivation of life discussed in Chapter 1.

Right of Asylum?

The concept of right of asylum from persecution for political offenses did not exist in traditional Vietnamese law, probably because most of the provisions on aliens were copied from China, which did not accept asylum from governmental pursuit in the context of the tribute system wherein the Chinese emperor ruled over the countries of his vassals.²⁴ But we found evidence that this right of asylum was recognized in practice for foreigners who fled to Vietnam for political reasons and was denied to those who were nonpolitical offenders.²⁵ For example, the Nguyễn Lords in South Vietnam did many things in their attempt to court the Ch’ing for support and possible investiture as a Chinese vassal independent from the Lê. They tried to cement good relations with the Chinese authorities in Kuang-Tung, Fukien, or Chekiang and to give aid to Chinese vessels shipwrecked on Vietnamese shores. When a Chinese committed a crime and was arrested in Vietnam, he was extradited back to China, as, for example, in a case in 1756.²⁶ But the policy toward political refugees was different when the Ch’ing took over

China from the Ming in the mid-seventeenth century. At this time, many Chinese fled to Faifo and were given permission to stay and establish Ming villages (*Minh Hường*).²⁷ Later, in 1679, when the Ch'ing were about to take over Taiwan, the last Ming resistance center, many more Chinese came to Vietnam and were given asylum. They were led by Yang An Ti and Ch'en Shang Ch'uan (Dương Ngạn Địch and Trần Thượng Xuyên), two Ming military commanders from Kuangtung who had fled to Taiwan. They brought 3,000 persons (soldiers and relatives) in fifty war vessels to the Tourane shore and pleaded with the Nguyễn Lord to accept them as servants, since they did not want to be subjects of the Ch'ing. The Nguyễn Court did not want to abandon the loyalists but on the other hand was afraid to antagonize the Ch'ing for accommodating these refugees near the capital area. Consequently, the latter were accepted as subjects, granted permission to stay in Vietnam, but were told to establish themselves in the present-day Mỹ Tho and Biên Hoà provinces (which at that time were in Cambodian territory under Vietnamese protectorate). The two resettlement communities became thriving commercial centers that were frequented by Europeans, Chinese, Japanese, and Malaysians.²⁸

The relationship in the eighteenth and nineteenth century between Cambodia and South Vietnam as ruled by the Nguyễn Lords under the Lê Dynasty, as well as Vietnam under the Nguyễn Dynasty, was rife with incidents in which the Vietnamese rulers gave political asylum to those Cambodian contenders for power they supported who had temporarily lost to their opponents (usually supported by Thailand) and fled to Vietnam. These political refugees were: the royal clansmen opposed to King Chant (Nặc Ông Chân), 1658; Prince Ang Tan, 1672; King Ang Non II (Nặc Ông Nộn), 1674, 1679, 1684; King Satha II (Nặc Ông Tha), 1736–1748, 1749; King Ang Snguôn (Nặc Ông Nguyên), 1755; Nặc Ông Tôn, 1769–1772; Nặc Ông Chân, 1807–1813.²⁹ All these cases of asylum, however, were granted not on human rights grounds, but on the basis of political calculation with the Vietnamese ultimate aim of imposing a protectorate and ultimately direct rule (1835–1841) on Cambodia.³⁰ Thus, we may even say that these cases of Vietnamese support for and provision of sanctuary to the Cambodians were more examples of foreign intervention than of asylum granted for human rights consideration.

Freedom of Thought?

Although Vietnam was traditionally not an *état engagé* (committed state) with one ideology upheld as the only truth—as in, say, an Islamic state, imperial Vietnam was heavily influenced by orthodox Confucianism, which in turn was reinforced by the authoritarianism of a monarchical form of government. For these reasons, it can be anticipated that there would be limitations to freedom of thought, whether it was freedom of expression or of religion. The question is: Were these limitations equivalent to the acceptable restrictions of

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the modern world, that is, were they justified by reasons of public security, order, public health, or morals?³¹

A general issue should be raised here: Did the dominant Confucian doctrine in traditional Vietnam lead to restrictions or violations of freedom of thought?

After a period of “upholding equally the three religions” of Buddhism, Confucianism, and Taoism under the Lý and the Trần,³² under the Lê and the Nguyễn the state gave ascendancy to Confucianism. Confucian moral and political precepts were officially promoted as the organizing principles of family, social, and political life. Not only did we witness the confucianization of the law but also codes of ethics were officially promulgated by dedicated Confucianist emperors that imposed basic moral norms upon all Vietnamese.³³ Even the system of education and examination became a means of indoctrination in Confucianism. Although free choice of educational institutions was always the rule (parents were free to choose public or private teachers for their children),³⁴ the content of education remained the orthodox classics and histories. At the age of seven, male students began to learn Chinese characters with their teachers; at eleven, they studied the four books: *Analects*, *Mencius*, the *Doctrine of the Mean*, and *Great Learning*; at fourteen, they began the five classics: the *Book of Odes*, the *Book of History*, the *Book of Changes*, the *Record of Rituals*, the *Spring and Autumn Annals*, and the earlier Chinese dynastic histories.³⁵ The orthodox ideas and philosophical orientation derived from these classics and histories were reinforced by the examination system. In Woodside’s description of the Nguyễn period, this system “imposed Chinese-style topics and conventions upon Vietnamese minds...[and required] exegetical elaborations of aspects of the Four Books and Five Classics, based upon their Sung Neo-Confucian commentaries.... The ghosts of the twelfth-century Chinese Sung neo-Confucian philosopher Chu Hsi and his followers hovered over Nguyễn Examination sites.”³⁶ In this process, “individual discretion and originality were reduced”³⁷ because students were learning by rote from the same old books and dared not deviate from the neo-Confucian viewpoint in taking examinations, afraid as they were of flunking for propagating “maverick” doctrines.

Can we say that this orthodox Confucianism constituted an ideological straitjacket that suppressed freedom of thought? To be sure, the influence of Confucianism had the effect of conditioning the thoughts of traditional Vietnamese. The Confucian education and examination constituted the means of ideological training in a social philosophy that favored absolute loyalty to the emperor (absolutist statecraft).

But this ideological conditioning might also have had a positive effect on human rights in the sense that Confucianism, especially the Mencian version,

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emphasized humanism in the rulers' behavior toward the people. This Confucian humanism no doubt motivated the benevolent social policies of the dynasties to be discussed in Chapter 4.

Thus Confucian humanism, plus the theoretical Mencian right (which was moral if not legal) for the people to revolt against tyrants, might have been an ideological impetus for the respect of human rights.

The critical test of whether this moral and social philosophy unwarrantedly violated freedom of thought would then become: (1) whether the philosophy claimed for itself a pervasive and monopolistic position in society, and (2) whether any deviant would be subject to criminal penalty.

A moral or social philosophy must be all pervasive and monopolistic to constitute a restriction on freedom of thought and opinion. This is because a minimum number of norms is normal and necessary for social life and social organization in any country and, as such, would not violate any freedom of opinion: Even in the most liberal democracies, in which no official ideology is promoted, and the state is morally neutral and secular, there must still exist some norms for social life (for example, no advocacy of war and anarchism, racial discrimination, and violent overthrow of government).³⁸

Throughout the greater part of the traditional period, Confucianism did not attain a completely monopolistic position in Vietnam. In fact, during the Lý and the Trần dynasties, Confucianism was on an equal footing with Buddhism and Taoism. Under the Lê and Nguyễn, the Confucian ascendancy in the power struggle between them and the Buddhists did not result in completely setting aside Confucianism's coexistence with, or tolerance of, the other religions. Also, the Confucian state gave concessions to other and less sophisticated cultures, those of the ethnic minorities: As we have seen, any attempt to change thought and social norms among the minorities was allowable only through the education system. Finally, not all deviations from Confucian norms were subject to criminal penalty. Besides the important precepts governing fundamental interpersonal relationships and state organization that were already embodied in the law codes with accompanying criminal sanctions, the moral principles of the codes of ethics just mentioned were seldom, if ever, accompanied by penalties.³⁹ It is conceivable that the sanction for moral violations would have been the *phi vi* provision ("doing what ought not be done"). But as we have seen previously,⁴⁰ the application of this provision was narrowly circumscribed and would be applied only to *acts* instead of to *thoughts*.

Thus, we may say that, in general, orthodox Confucianism did restrict freedom of thought in traditional Vietnam, although its restrictions were not so unduly serious as to constitute unwarranted violations of this freedom under contemporary international human rights standards.

One reservation to this statement must be made, however: The persecution of Catholics, especially under the Nguyễn, constituted one violation of freedom

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of thought. Although a number of cases of Catholic repression were prompted by considerations of state security and public order, many arose at least in part, if not totally, from the Vietnamese rulers' wish to adhere strictly to certain Confucian norms (especially ancestor worship) that the Catholics disdainfully forsook.⁴¹ Many Catholics were requested to deny their belief in Christ by stepping over the cross; if they did so, they would be released. Thus, in many cases, suppression was not justified by the need to protect state security or public order but seemed to be a pure denial of freedom of thought, thereby constituting the elaboration and punishment of thought crimes. This issue will be discussed fully later; here we will merely say that the causal link between orthodox Confucianism and repression of the Catholic population's freedom of thought and religion was clear. This was mentioned by the historian Trần Trọng Kim in his explanation of the Minh Mạng Emperor's anti-Catholicism:

Our nation from ancient to modern times followed the Confucian norms of three bonds and five virtues in the relationship between emperor and subject, father and child, and husband and wife. Whoever violated these key moral principles would not be considered worthy of a human being. A son would obey his father, a subject his emperor, and anyone who deviated from this way would have committed a serious offense and deserved the death penalty.

While in all the country, from officials to commoners, everybody held the above ideals as the best, there were, however, some who followed another religion and talked about things very few people of the time understood: they would necessarily be considered heretics who corrupted the best tradition in the country. Therefore, the emperor forbade the people to adopt the new religion.

For an emperor as stern as Minh Mạng, if his restriction was not respected, the consequent penalty should be death. When he banned Catholicism and killed the Catholics in such a manner, he thought he was doing his duty as emperor and did not think he was harming the people and the nation.⁴²

We should not overlook the fact that the defiant and provocative language with which the Catholics attacked Confucianism might have prompted their repression.⁴³ We should equally not forget, however, that the Confucianist frame of mind was conducive to denial of freedom of thought and expression for believers in the new Catholic creed.

After this discussion of traditional Vietnam's general orientation toward freedom of thought, let us examine the details of legal principles and practice regarding the component freedoms of religion and expression.

Freedom of Religion?

The history of freedom of religion in traditional Vietnam was closely connected with the rise and fall of orthodox Confucianism. It may be said that the more complete control over human thought and its manifestations

the Confucians wanted their doctrine to exercise, the less freedom of religion the people possessed.

Buddhism was introduced into Vietnam by the second century A.D. or probably even earlier,⁴⁴ whereas Confucianism and Taoism arrived during the Chinese colonial period ending in A.D. 939. During the Đinh (968–980) and Former Lê (980–1009) dynasties, the Buddhists were dominant in the courts over the Confucians. During the Lý (1010–1225) and Trần (1225–1400) dynasties, the courts and the bureaucracies were organized according to the Confucian model imported from China. Buddhist political and religious influence remained very strong, however, and despite occasional attempts by some Confucians to have the government crush the Buddhists, the latter generally enjoyed great freedom and support from the emperors in the exercise of their religion until the end of the Trần Dynasty. This may be deemed the period of coexistence and freedom of religions in Vietnam.

The Confucians' renewed attempt to monopolize power began at the end of the Trần, and they gained permanent ascendancy in the courts under the Lê (1428–1788) and the Nguyễn until the French conquest (1802–1862). During these five centuries, a number of restrictions were imposed on Buddhism, Taoism, and even popular religious cults such as village spirit worship.

It was, however, toward an alien religion from the West, Roman Catholicism, that the orthodox Confucian rulers displayed their intolerance, first mildly under the Lê and then so oppressively for a short period under the Nguyễn as to constitute severe religious persecution. Of course, state security considerations might have been the grounds for many cases of persecution, but it was also the emperors' anger with the defiant manner in which the Catholics rejected certain fundamental Confucian precepts (such as ancestor worship) that led to their determined suppression of the Catholics. The vicious circle of suppression/resistance/foreign intervention only ended when the Tự Đức Emperor changed his policy in the face of the conquering French, who specified freedom of religion for the Catholics in the 1862 and 1874 peace treaties they signed with Vietnam.

Full Freedom of Religion under the Đinh, Former Lê, Lý, and Trần Dynasties (968–1400). Although there was no evidence that the emperors of the Đinh and Former Lê dynasties were devout Buddhists (in fact, as mentioned in Chapter 1, they used cruel forms of the death penalty that were contrary to the tenets of Buddhism), they held the Buddhist monks in esteem probably for political reasons.⁴⁵ In a nation where Buddhist influence among the people was most likely widespread, the founders of these dynasties—who were military, not learned, men—found it expedient to rely on the monks, who were best

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equipped with knowledge of the Chinese language and learning for handling state affairs and who, moreover, were undeterred by the Confucian doctrine of loyalty to one ruler when serving a new dynasty that had just seized power from another. The first Buddhist monk to participate in political affairs was Ngô Chân Lưu or Khuông Việt. A descendant of the former Ngô Dynasty, he served Emperor Đinh Tiên Hoàng, who appointed him chief monk of the Buddhist church and gave him the title Khuông Việt (the Great Monk, who helped administer the Việt country). During his reign, Đinh Tiên Hoàng also determined the hierarchy of grades for the monks, who were considered public officials. After Lê Hoàn assumed power from Đinh Tiên Hoàng's successor and became Emperor Lê Đại Hành, all state affairs were handled by the monk Khuông Việt. He and the monk Lạc Thuận assisted the emperor in receiving the Chinese ambassador.⁴⁶ Monk Vạn Hạnh was consulted on state affairs by Emperor Lê Đại Hành during his campaign against the Sung and the Cham Kingdom. This monk saw portents in a tree struck by thunder, then predicted that the cruel Lê Ngọa Triều would be the last emperor of the Former Lê Dynasty and advised Lý Công Uẩn to take the throne.⁴⁷

Lý Công Uẩn, or Emperor Thái Tổ (the first), of the Lý Dynasty was an illegitimate child and was adopted by monk Khánh Vân. Thus the Lý Dynasty (1010–1225) was closely connected with Buddhism from the beginning. Although the political role of the monks was not dominant as before, their influence was still very strong, and Buddhism was given the widest freedom and support ever known in traditional Vietnam.

More learned than their predecessors, the Lý emperors appreciated Buddhism in a more spiritual way. There were also more Confucians in the court, which was organized according to the Chinese model. In 1070, Lý Thánh Tông built the Literature Temple (*Văn Miếu*) where he sent the crown prince for study and where Confucian classics were stored. He also had statues of Chou Kung, Confucius, and the seventy-two saints fashioned. In 1075, Lý Nhân Tông organized the three-stage examination to recruit Confucian scholars into officialdom, thus beginning the Confucian examination system in Vietnam. In 1076, he established the National College (*Quốc Tử Giám*).⁴⁸ Because of the Confucians' increasing role, the monks did not have as dominating a role in political affairs as previously.

The famous monks, however, retained their overall influence in three ways. First, many were sons or nephews of the emperors, the empresses, or the great officials and therefore still exercised an indirect, though personal, influence on emperors and officials.⁴⁹ Second, they were always highly respected as religious leaders by the emperors and the queen mothers (the supreme empresses) who often invited them to manage the temples in the capital and lecture on Buddhism in the imperial palaces. The monks Huệ Sinh and Viên Chiếu were invited by Lý Thái Tổ to the palaces. Emperor Lý Nhân Tông and

his mother, Supreme Empress Linh Nhân, were devout Buddhists and often summoned well-known monks to discuss religious issues. Many monks were well esteemed by Nhân Tông and other Lý emperors, among them Thông Biện, Mañ Giác, Chân Không, Giác Hải, and Không Lộ.⁵⁰ Third, many emperors became monks themselves upon retirement: Thánh Tông (founder of the *Thảo Đường* sect), Anh Tông, Cao Tông, and Huệ Tông.

During their reign, many emperors followed what Confucians called the “humanitarianism of Buddhism”⁵¹ in their criminal policy. Also, because of the influential position of the monks as religious leaders along with the embrace of Buddhism by emperors, their relatives, and officials, the Buddhist church received generous aid from the government.

Hoàng Xuân Hãn listed in *Lý Thường Kiệt* (a biography of the famous Lý Dynasty general) the Lý Dynasty’s government measures that actively supported Buddhism.⁵² The Lý emperors built and repaired hundreds of Buddhist temples, many of which are still standing today in North Vietnam (Chùa Một Cột 1049, Đền Quan Thánh 1102, Đền Hai Bà 1160, Đền Voi Phục). The process of construction began as soon as Lý Thái Tổ ascended the throne and continued throughout the dynasty. Supreme Empress Linh Nhân (formerly Ý Lan) alone built more than a hundred temples. Money and land as well as corvée men were provided to establish and maintain these temples. The Đinh Dynasty’s hierarchy of grades for monks continued to be adopted. Certificates of monkhood were given to thousands; in 1016 alone, more than a thousand individuals were chosen for monkhood in the capital. Exempt from corvée and military service, the monks were aided materially by the people and the emperors. The government also ordered the procurement, editing, and storage of Buddhist scriptures in depositories and organized many Buddhist festivals or ceremonies. In 1179 and 1195, near the end of Lý Cao Tông’s reign, examinations on three religions were held.

In short, Lý government leaders’ respect for Buddhist monks and the Buddhist creeds, the measures of material assistance they granted to the Buddhist church and monks, and the privileges granted the latter for their religious practice all added up to the highest degree of religious freedom and development for Buddhism in the history of Vietnam.

Toward the end of the Lý Dynasty there were indications that the Confucians, who had been growing impatient with the free rein given the Buddhists, succeeded temporarily in oppressing them. In 1179, Emperor Lý Cao Tông (1176–1210) ordered apprentice monks to sit through a test on Buddhist scriptures. In 1198, the Confucian official Đàm Dĩ Mông memorialized the emperor:

At the present time, the number of monks nearly equals that of corvée men. They form cliques, select their masters, and commit many dirty acts, such as eating meat and drinking wine in places of abstinence or having secret sex in

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temples. They hide during daytime and go out at night, in the same manner as the mice and the foxes. They corrupt the custom and ruin the culture. If we do not crack down on them, they will become exceedingly odious.⁵³

The emperor agreed with Đàm Dĩ Mông and had him order the monks in the country to assemble in various temples. About ten well-known monks were permitted to remain as monks, but the rest were forced to have their arms tattooed and to unfrock.⁵⁴

Despite this attack by the Confucians, however, the influence of Buddhism did not decline. Lý Cao Tông and his successor Lý Huệ Tông remained pious Buddhists and entered temples upon retirement. Later on, under the Trần, Buddhism was still so popular among the people that the Confucian Lê Quát, a doctoral degree holder, complained in a stele set up in Thiệu Phúc temple during the Trần: “Buddhist temples exist in all villages but nowhere does one find the worship of Confucius.”⁵⁵

Even among the rulers of the Trần, Buddhist influence remained very strong. Most of the Trần emperors were devout Buddhists, enjoyed conversing with monks, and entered temples themselves upon retiring and becoming supreme emperors: Thái Tông, Thánh Tông, Nhân Tông, Anh Tông, and Minh Tông. A situation could develop in which an emperor supported Buddhism while his retired father, the supreme emperor, traveled as a monk among the people to promote Buddhism. Such a situation could only lead to the maintenance of a strong Buddhist presence. When Supreme Emperor Nhân Tông entered the capital in 1304 as head of the Trúc Lâm Buddhist sect, Emperor Anh Tông and all his court went to meet him; the emperor asked to become a Buddhist disciple and all his court followed suit.⁵⁶

The Trần emperors apparently continued what we have witnessed under the Lý: the coexistence of Confucianism, a social philosophy that governed state organization and social relations, and Buddhism, recognized as the religion of all, rulers and people. Indeed the, Trần continued the examination on three religions begun under the Lý.⁵⁷ Emperor Trần Thái Tông wrote the treatises *Thiền Tông Chỉ Nam* (Guide to Zen) and *Khóa Hư* (Lessons on the Empty Life) in which he made reference to Buddhism, Confucianism, and Taoism on every topic discussed.⁵⁸ Given this eclecticism, Buddhism was, in the Trần as under the Lý, actively supported by the government in terms of material assistance and exercise of religious freedom. In 1231, Emperor Thái Tông ordered the people to install Buddhist statues in every public office and place of meeting.⁵⁹ In 1248, he invited the monk Trúc Lâm to review the Buddhist scriptures before printing.⁶⁰ New Buddhist temples were built and new Buddhist schools were opened during the reign of Trần Thánh Tông.⁶¹ After Trần Nhân Tông retired and went into a Buddhist temple, he became the head of the Trúc Lâm Buddhist sect, preached throughout the country, and attracted many disciples.⁶² During Trần Anh Tông’s reign, Buddhist scriptures

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brought back from China by Ambassador Trần Khắc Dụng were printed and distributed among the people.⁶³

Confucian officials, however, never ceased their efforts to attempt to undermine Buddhism. For example, Trương Hán Siêu wrote the text of a stele in a Buddhist temple in Bắc Giang Province: “The ruined temple has been reconstructed, but that was not on my initiative. As a scholar-official, I would not talk about anything but Yao and Shun, I would not write about anything but Confucianism. And yet I have to discuss Buddhism; can I mislead anybody?”⁶⁴ Toward the end of the Trần Dynasty, in the period 1358–1369, during the reign of Emperor Dụ Tông (1341–1369), the Confucians consolidated their position briefly by again putting forward a proposal already rejected once by Emperor Minh Tông (1314–1329) and having Sung law and institutions adopted on a large scale by the government. Although Emperor Nghệ Tông (1370–1372) later repealed these changes and returned to the old system of Vietnamese law and institutions,⁶⁵ the underlying intellectual impetus of neo-Confucianism was to persist and become influential in later development, affecting the religious freedom of the Buddhists. In 1381, Emperor Trần Phế Đế decreed that Buddhist monks be drafted into the expeditionary force to fight in the campaign against the Cham Kingdom.⁶⁶ In 1396, Emperor Trần Thuận Tông issued an edict unfrocking a number of Buddhist and Taoist monks who had not reached fifty years of age.⁶⁷ The policy was launched by the determined Confucian Hồ Quý Li, the all-powerful Court Adviser of the time. This measure, to be continued by the later Lê Dynasty, was to mark the beginning of the decline of religious freedom that accompanied the ascendancy of Confucianism in traditional Vietnam.

Limited Religious Freedom for Buddhism, Taoism, and the Popular Cults Under Lê and Nguyễn. Confucianism gained considerable headway under the Hồ Dynasty (1400–1407) and during the Ming domination (1407–1427). It was to triumph eventually under the Lê, especially with the dedicated Confucian Emperor Lê Thánh Tông (1460–1497). Law and policy under Lê and Nguyễn still granted a degree of religious freedom to Buddhism, Taoism, and other cults among the people, but it was a closely regulated freedom.

Control over the clergy. In their physical movement, Buddhist monks and Taoist priests were subject to the same reporting duty as the people in general.⁶⁸ The government had a monopoly over the issuance of ordainment certificates to Buddhist monks or Taoist priests, and only persons fifty years or older were eligible to receive such certificates.⁶⁹ Any attempt to obtain private ordainment certificates or to enter monkhood or priesthood without a certificate would lead to the punishment of penal servitude (Lê) or the stick penalty (Nguyễn).⁷⁰ In order to identify the monks or priests clearly, those who were not monks were not allowed to shave their heads or wear the clothes of priests.⁷¹ Apparently

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monks and priests were examined on their morality and knowledge of scriptures before the ordainment certificates were issued to them.⁷² The policy of controlling the number of the clergy was officially explained by the economic concern over the depletion of *corvée* laborers caused by their induction into the clergy ranks. According to the official commentary on Article 75 of the Nguyễn Code and Decree 3 following that article, the government believed that if no limit were imposed on the numbers of Buddhist monks and Taoist priests, who were not listed in their family households and were thus exempted from *corvée*, the population would decrease; also, since the clergy did not till land or exercise any trade and depended on the people for their food and clothing, national resources would be wasted. Therefore any attempt to put young men sixteen years old or older outside the family (i.e., into the clergy) would lead to punishment.⁷³ Despite this official justification, however, the indirect effects of the limitation on the number of clergymen were a restriction upon the free exercise of religion and the limited development of the Buddhist, Taoist, and other religions. John Crawford, reporting on a trip in Southeast Asia in 1821–1822, described the condition of the clergy in Vietnam in these terms:

Coming from countries like Hindostan and Siam, where systematic and national forms of worship are established and where religion exerts so powerful a sway over society, we were surprised at the contrast which Cochinchina presented in this respect. The ministers of religion, instead of being honored, revered, and powerful, as in Buddhist and Brahminical countries, are few in number and the meanest orders and little respected.⁷⁴

The Minh Mạng Emperor even interfered in the internal organization of the churches. He decided to give the title of *Hoà Thượng* to Buddhist monk Giác Ngộ alone and ordered all the *Hoà Thượng* in the country to be dubbed *Tăng Cang* (monk-controller), implying clearly that they were government-appointed supervisors of the Buddhist church.⁷⁵

The increasing tendency of the government to regulate religion was also evident in the attempt to impose legal sanctions over violations of purely religious rules: Monks and priests who consumed meat and alcoholic beverages would be unfrocked and drafted into the army; those who indulged in fornication would be condemned to penal servitude;⁷⁶ those who married would be subject to the stick penalty and expelled from the clergy.⁷⁷

Despite these efforts to control them, members of the clergy still enjoyed enough religious freedom and at times even the good will of high-level officials in the government. The career of Monk Hường Hải under the Lê was a case in point. He had been well treated by Lord Nguyễn Phúc Chu (1691–1725) of South Vietnam, who invited him to serve as Resident Master in the palaces and built a temple for him. But when someone spread an outrageous rumor reflecting on his reputation, Hường Hải went to North Vietnam and was warmly

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received and honored by Lord Trịnh Cương (1709–1729) and Emperor Lê Du Tông (1705–1729). Lord Trịnh asked him to take care of the government temple and Monk Hưởng Hải became a frequent visitor to the palaces.⁷⁸

Control over temple building and statue casting. Under the Lê, Buddhist and Taoist temples could be built and statues could be cast only with official permits.⁷⁹ Under the Nguyễn, besides those monasteries or convents already registered, no new ones could be constructed; only with imperial authorization (obtained by filing an application with the province governor) could a new monastery or convent or temple be established.⁸⁰

Control over printing of religious books. Under the Lê, Buddhist and Taoist books could be printed only with government permission. Violation of this rule led to penal servitude. The ban was supposedly based on the desire to avoid the possibility of monks and priests preying upon the people and “worming” away their money. This ban was considered so important that officials had the duty to arrest the offenders and memorialize the throne; if they failed to do so, they would be demoted.⁸¹

Control over the popular cults. The Vietnamese people also adopted other forms of religion, such as worship of animist spirits, gods, or human figures. In this connection, we clearly see attempts by the Confucians to exercise control over popular religions. To worship their guardian spirits in the communal temples, the villages had to obtain a patent from the emperor. Under the Lê, whoever took the liberty of fashioning and installing statues of deities in temples without memorializing the throne would be subject to penal servitude.⁸² Control over religious practices began to take on the characteristics of religious oppression when the death penalty was imposed on “perverse religions” in some provisions of the Nguyễn Code, which were, of course, adopted from the Ch’ing Code. The Nguyễn Code punished with strangulation those religious masters or sorcerers who evoked “diabolical spirits,” “saints,” and all other “faked religious doctrines,” or who formed unauthorized religious societies, thereby sowing confusion among the population. Neighbors who did not denounce and officials who failed to suppress these offenders would be punished themselves.⁸³

On the other hand, the practice of ancestor worship, which was promoted by Confucianism, received obvious preferential treatment. It was a legal obligation under both the Lê and Nguyễn to reserve part of the inheritance property for the ancestor cult. Whoever sold this portion of ancestor worship property would be severely punished for lack of filial piety, a very important Confucian virtue.⁸⁴

Thus, the more powerful the Confucians became, the more slavishly Vietnamese lawmakers imitated Chinese law (as under the Nguyễn) and the less religious freedom the people had for forms of cults other than Confucian-

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sanctioned ones. This fact will become more obvious as we examine the history of Catholicism in traditional Vietnam.

Catholicism: From Tolerance to Persecution to Freedom of Religion. The history of the Catholic religion in traditional Vietnam spans four hundred years.

The first missionaries in the sixteenth century. In 1533, during the Lê-Mạc division period, Father Ignaca was the first Catholic missionary to arrive in Vietnam; he came to Nam Định in Lê-occupied territory.⁸⁵ Another missionary, Father Cevallos, reported that he came to the Lê territory in 1591 and converted Princess Mai Hoa, who liked him so much that she proposed marriage to him and later established a convent in An Trường, Thanh Hóa.⁸⁶

In Mạc-occupied territory, government authorities even took the initiative in inviting Catholic missionaries to Vietnam. In 1578, a Vietnamese delegation came to Macao to ask Bishop Carneiro to send missionaries to preach in their country, but no one was able to come. In 1581, Mạc Mậu Hợp received a letter from Father Pesaro in Macao requesting a permit for him and a few other missionaries to enter Vietnam for the purpose of carrying out evangelical work. Mạc Mậu Hợp responded favorably. When Pesaro did not show up, he sent several other letters to the Bishop of Macao, who sent a delegation of missionaries from the Philippines to Quảng Yên in 1583. When the missionary Bartholomeo Ruiz came in 1585, he was well received by Mạc Mậu Hợp, who provided him with a house in which a room was reserved for worship. Ruiz preached in the market, advising the people not to worship Buddha and the spirits, an action the monks vehemently protested. Although Emperor Mạc Mậu Hợp enjoyed listening to Ruiz, no one dared convert to Catholicism because the emperor himself did not want to do so. In 1586, Ruiz went to Japan, from which he was later expelled.⁸⁷

The Catholics in the seventeenth century. The history of Catholicism in seventeenth-century Vietnam was complicated by many different factors. Missionaries consisted of two groups: the Jesuits, who first came to Cochinchina (South Vietnam) in 1616 and were active in all Vietnam for the remainder of the seventeenth century as well as the eighteenth; and the Society of Foreign Missions based in Paris (France), which sent its first mission to Vietnam in 1664. In Tonkin (North Vietnam), the Trịnh Lords' policy toward Catholicism was generally more intolerant than that of the Nguyễn Lords in Cochinchina. Within both parts of Vietnam, this policy eventually changed with time. To clarify our presentation, we shall discuss the Nguyễn Lords' policy in Cochinchina separately from the Trịnh Lords' in Tonkin.

Cochinchina. The Jesuits had been active in Japan during the sixteenth century. In the first years of the seventeenth century, however, the climate in Japan grew intolerant and they founded a new mission for Cochinchina in 1615.

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For the following two hundred years they preached in both Cochinchina and Tonkin, even after a policy of suppression had been pursued by the authorities.

From 1616 to 1639, Busomi, the founder of the Jesuit mission, lived in Cochinchina. In the first ten years of this period, he brought twenty-one Jesuits (seventeen fathers and four sisters), mainly Portuguese, into Cochinchina. By 1625, their evangelical work had been successful; they were preaching in all the main areas of Cochinchina.⁸⁸

Among these Jesuits was Christoforo Borri, author of the first account of the Cochinchina mission. Borri described the welcome he received from the provincial governors of Bình Định and Quảng Ngãi, who provided the missionaries with means of transportation (vessels, elephants), feasted them, gave them housing, servants, interpreters, and even constructed a church for them. Some officials and their families converted to Catholicism.⁸⁹ The people treated the missionaries as princes because they saw that the governors always received them at their tables.⁹⁰

Despite this welcome, three times during this twenty-three-year period, when the Nguyễn Lords heard that the Catholic missionaries ridiculed ancestor worship as a barbarian custom, they asked them to leave Cochinchina. Each time, however, the priests used the pretext of honoring the Vietnamese tradition of the one-hundred-day mourning period for their dead to stay on and thus gave the lords sufficient time to change their minds.⁹¹ But in 1639, when Busomi went to Macao on a mission for Lord Nguyễn Phúc Loan, the governor of Quảng Nam Province asked the Nguyễn Lord to expel the missionaries to Macao.⁹²

In 1640, Alexandre de Rhodes, who had been active in Tonkin during the period 1627–1630, was sent to Cochinchina to replace Busomi. He brought gifts to the Nguyễn Lord, who let him preach and stay at the home of Minh Đức, secondary wife of the First Lord Nguyễn Hoàng and the ruling lord's aunt. The priest converted the lady (who later had a church constructed) and ninety-four other persons, including a monk and three other relatives of the lord.⁹³ De Rhodes was forced by the Quảng Nam governor to leave for Macao, presumably on the basis of the old edict of 1636, but the missionary went back and forth to Cochinchina during the next four and a half years.⁹⁴ In 1642 and 1644, he visited and brought gifts to the Nguyễn Lord, who retained the Jesuit in his court to teach him mathematics. De Rhodes continued secretly or openly to convert many to Catholicism in different provinces. In 1641, one of his disciples, whose Christian name was André, was put to death by the governor of Quảng Nam; André was arrested only because the wife of the Nguyễn Lord and some officials were looking for another disciple who had humiliated them in a debate.⁹⁵ In 1645, on their way from Huế to Quảng Bình in Tonkin, de Rhodes, together with nine accompanying Vietnamese, was arrested on the high seas by one of the Nguyễn Lord's war vessels. Although the Nguyễn Lord had thought

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of condemning him to death, the Jesuit priest was only expelled from Cochinchina on June 3, 1645. The authorities cut off the fingers of seven of his assistants and executed two others who answered the lord in a defiant manner during interrogation.⁹⁶ These were the first Catholics condemned to death in the history of Catholicism in Vietnam. But one case resulted more from personal vendetta, and the other two from state security considerations, than from religious intolerance.

Alexandre de Rhodes was expelled only because he was suspected of trying to resume his connection with the Trịnh Court in Tonkin (where he resided during the years 1627–1630).⁹⁷ Lord Nguyễn Phúc Loan continued to accept the other missionaries who came to replace de Rhodes: Fathers Saccano, an Italian, and Caldeira, a Portuguese. Later the Nguyễn Lord came to distrust all Portuguese after having some troubles with the Macao merchants; he ordered the priests to leave the capital to go back to Faifo on the coast (today Hội An, near Đà Nẵng) after he saw them arrive with the Portuguese officers.⁹⁸ Caldeira was expelled, but Carlo de Rocca replaced him. Thereafter, Lord Nguyễn Phúc Loan modified his stand and Saccano was able to contact the Vietnamese Christians formerly converted by de Rhodes and to continue de Rhodes's effort.⁹⁹

The next lord, Nguyễn Phúc Tần or Hiền Vương (1648–1687), initially refused to let the missionaries continue their work. The reason for this change of policy was, according to Maybon, that the Nguyễn Lord did not get the help he had hoped for from the missionaries during his campaign against Tonkin (1655–1661); additionally, he was acting on the advice given by certain mandarins.¹⁰⁰ But in 1659, when Father Marquez brought back the weapons he bought in Macao for this Nguyễn Lord, Hiền Vương returned to the Catholics all confiscated churches and permitted the Jesuits to preach freely as before.¹⁰¹

By this time, the Society of Foreign Missions, newly formed in France mainly through the effort of Alexandre de Rhodes, began to send missionaries to Vietnam. De Rhodes left Vietnam in 1645, arrived in Rome in 1649, secured the support of the Pope, and, after much struggle, succeeded in 1652, with the help of other Catholic priests, in establishing the Society of Foreign Missions based in Paris. Rivalry, however, developed between this society and the kingdom of Portugal, which the sixteenth-century Popes had granted the authority to nominate bishops in its overseas sphere of influence. Fearing that France would come to the Far East behind the missionaries, the Portuguese king protested when the Pope wished to send three French priests to Cochinchina and Tonkin and issued an order in 1661 to arrest French bishops when they reached the Indies and send them back to Portugal.¹⁰²

Despite this rivalry, the Society of Foreign Missions sent two bishops, Pallu and La Motte, to Siam; in 1664, they sent Chevreuil to Faifo. The Jesuits in Vietnam received Chevreuil well, but the Portuguese tradesmen tried to harm

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him by spreading false reports about him.¹⁰³ The Jesuits themselves were in difficulties; three were expelled in 1665.¹⁰⁴ In 1666, Antoine Hainques, another Society missionary, went to Bà Rịa but he was denounced by the Portuguese to the converts as an impostor and also to the Nguyễn Lord as a troublemaker and a foreign spy. By this time, however, Hiền Vương had returned to a policy of tolerance and Hainques was left alone. In 1671, Hainques died from poison and the Portuguese were accused of the crime.¹⁰⁵

In 1672, Bishop Pallu sent gifts to Hiền Vương, who was satisfied and permitted the missionaries to continue their work of converting new followers and building churches.¹⁰⁶ In 1676, La Motte went to Cochinchina and was cordially received by Hiền Vương, who promised to allow freedom of religion in the country. He kept this promise; there was to be no more persecution under his reign.¹⁰⁷ During the period of 1680–1682, Cochinchina counted 600,000 Catholics (in Tonkin the number was about 200,000).¹⁰⁸

Thus, through much of the seventeenth century, religious tolerance and even freedom for the Catholics were more the rule than the exception in Cochinchina. The few cases of death penalties might have been prompted by personal vendetta and suspicion of violating state security more than by religious intolerance.

Tonkin. In Tonkin, the Trịnh Lords were initially also very open and granted freedom to Catholicism, which had been brought in by the Jesuits during the first part of the seventeenth century. After they were successful in Cochinchina, the Jesuits sent Father G. Baldinotti to Tonkin in 1626. He was well received by Trịnh Tráng, who sent four vessels to welcome the priest and gave him the most beautiful house in the capital.¹⁰⁹ When Baldinotti told the Trịnh Lord that he came to spread Christianity, the latter sent a monk from the most important temple to assist him. Baldinotti left Tonkin only because he did not know the Vietnamese language and he was on his way to Macao.¹¹⁰ The mission in Tonkin was created with Alexandre de Rhodes as its first chief.

According to the historian Maybon, de Rhodes gave the most exact description of the situation in Vietnam after he lived in Tonkin from 1627 to 1630. According to his own account, immediately after arriving and before he was received by Lord Trịnh, de Rhodes began preaching and converting. Later, accompanying the lord in the campaign against Cochinchina, he preached freely among the army. He even converted the lord's sister, giving her the Christian name "Monique;" her mother-in-law, who was baptized "Anne;" and a famous bonze accompanying the lord during the campaign to say the prayers adopted the Christian name of "Jean."¹¹¹

A group of monks challenged de Rhodes to a debate. He read Genesis from the Bible and explained it to the meeting, while the monks read a paper which he described as "full of atrocious defamations." De Rhodes thought that, thanks to the presence of a eunuch, the bonzes did not dare to resort to violence

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in their wrath and he was “in full liberty” to interpret the Bible while the bonzes (de Rhodes’ term for monks in his book) retired, grumbling and making threats against whoever would embrace the Christian doctrine.¹¹²

After Lord Trịnh Tráng returned from the war, de Rhodes lectured him for two hours on the movement of the celestial bodies and, according to de Rhodes, when he mentioned God, the lord “was not angry at me at all.” Lord Trịnh invited him to remain in the country so that they could talk “on many things.”¹¹³ Seeing the welcome the lord granted de Rhodes, the new Christians were encouraged. The priest converted another of the lord’s sisters, giving her the Christian name “Catherine,” her mother, another famous bonze at Vũ Xa, as well as many other people.¹¹⁴ Lord Trịnh Tráng sent a letter to Father Palmier to thank him for having sent de Rhodes and another letter as well to Pope Urbain VIII.¹¹⁵ The lord offered the priest a place to live within the Imperial City but the latter, thinking it more convenient for his followers’ visits if he lived somewhere other than the palace grounds, chose a residence outside the Imperial City, which was approved by the lord. Many people, including those from the lord’s clan, visited de Rhodes here.¹¹⁶

After this initial period of total freedom of religion, de Rhodes ran into his first difficulties when he preached against polygamy. The Trịnh Lord sent him a note: “What is this law which you publish in my country? You order my subjects to have only one wife, and I want them to have many so that they would have many offspring who are loyal to me. Desist from publishing this law.”¹¹⁷ Believing, however, that the letter was not from the lord himself, but the eunuchs—who would lose favor if the lord abandoned his own concubines through which the eunuchs gained influence—de Rhodes continued to preach against polygamy.¹¹⁸ A rumor arose in the court that de Rhodes was a witch who could kill a person by blowing on his face, and so the Trịnh Lord no longer invited the priest to sit next to him or squeezed his hand affectionately, as before: He talked to the priest from a distance when receiving him.¹¹⁹ Later, de Rhodes would regain the lord’s confidence by accurately predicting a moon eclipse.

Then Alexandre de Rhodes fell victim to what he described as a calumny. Some bonzes accused him of breaking the statues in one of their temples and urged the lord to consider whether he should tolerate a religion that encouraged the destruction of the “cult of spirits” and their statues. The lord issued an edict forbidding the people to embrace this Christianity that destroyed the “idols” and had the edict posted on the gate of de Rhodes’s house. The priest rushed to the palace to ask for an audience. Upon asserting he never advocated the breaking of the statues, the lord was glad, gave him meat, and agreed to revoke the edict and to grant him “ample power to preach, provided that no statue would be broken.”¹²⁰ On the occasion of the lunar New Year Day (Tết), de Rhodes ordered each Christian family to attach a cross to the top of the pole

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planted in front of their houses. When the Trịnh Lord was paraded through the streets on the New Year Day, he saw them and said: “That is the sign of the Christians.”¹²¹

De Rhodes, however, continued to vilify Confucianism as “falsehood” and Buddha as “this black liar.”¹²² And then he fell victim to another calumny. According to the priest’s own account, a former bonze rebelled under the banner of *Chúa Canh* (Lord Canh), was arrested and, wishing to delay his death, offered to reveal a secret conspiracy against the government involving the Lord of Cochinchina and the European priest in the capital. This time, after so many accusations old and new, Trịnh Tráng issued an Edict of Prohibition carved on a wooden board and planted in front of the priest’s house: “We, the King of Tunquin, although being informed that the European preachers in our Court up to now had taught the people no bad and pernicious doctrines, never know what they may do in the future. Therefore, we prohibit our subjects, under sanction of the death penalty, to seek them out or embrace this Law which they preach.”¹²³ De Rhodes, however, continued to hold secret gatherings of Christians and his house was not touched by the government.

When Trịnh Tráng suggested to de Rhodes that he take the Chinese vessels to leave for Macao, the priest asked for permission to stay in Vietnam to wait for a Portuguese vessel. By this means, he was able to stay in the country during 1629. When Trịnh Tráng saw that no Portuguese vessel was coming, he gave de Rhodes twenty taels of gold and precious silk and asked him to go on a government vessel to Bồ Chiñh, in the southern part of Tonkin. A group of 1,500 Christians, including a palace censor who had converted and adopted the name of “Joachim,” saw him off at the boat, where de Rhodes was free to talk to them and bless them.¹²⁴ On his journey, the priest converted the captain of the vessel and, in Nghệ An, another 112 persons.¹²⁵ From Bồ Chiñh, he went to Nghệ An. The governor of the province, impressed by the priest’s prediction of a solar eclipse, permitted him to gather people to hear the preachings of Catholicism. In eight months of exile, de Rhodes converted more than six hundred persons without counting those converted by his followers.¹²⁶

Returning to the Tonkin capital on a Portuguese vessel, de Rhodes resumed preaching, baptizing, saying masses, and administering confessions to the Catholics; despite the fact that the Edict of Prohibition had not been revoked.¹²⁷ When he finally left for Macao in 1630, he was able to carry a letter to Pope Urbain VIII from the Vietnamese Catholics expressing their joy in having adopted the Catholic faith.¹²⁸

Thus, if de Rhodes’s experience in 1627 to 1630 revealed anything, it was an indulgent policy of the Trịnh Lord toward Catholicism. The prohibition of Catholicism was promulgated only as a preventive measure against the priests’ possible collusion with the enemy of the state, yet it was not enforced.¹²⁹

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In 1631, other Jesuit missionaries came to Tonkin. According to de Rhodes's account, they observed that the Vietnamese Catholics themselves had instructed and baptized 3,340 more converts and built twenty-four churches, even though the Edict of Prohibition had not been revoked.¹³⁰ The missionaries were allowed to preach freely throughout the country.¹³¹ According to one, Bonifacy, the Lê Emperor even told them missionaries had been ordered to leave in the past only because of the advice of some officials; this time, however, they would be allowed to convert anyone and the government would also give them housing accommodations.¹³² A few incidents involving Catholics were mentioned in de Rhodes's account, but they did not reveal any policy of religious persecution. One palanquin carrier for Trịnh Tráng's brother was expelled from the palace for adopting Catholicism. When he continued to preach the new faith, he was arrested and ordered to forsake Catholicism. Stubbornly refusing to renounce his faith, he was ordered to be executed for disobedience by the prince.¹³³ Some Chinese residents in Nghệ An Province attacked the Christians in a church and then accused the missionary there of homicide for the death of one of the attackers. But the priest was acquitted by the governor, who gave him complete freedom to preach and even ordered the rebuilding of the church destroyed by the mob. By 1639, there were 2,472 new converts in this province.¹³⁴

In the whole of Tonkin, Catholics numbered 82,500 in 1639; 140,000 in 1640; and 200,000 in 1651.¹³⁵ Two hundred great churches and an inestimable number of small churches, as well as six residences for the Jesuit missionaries, were built. This expansion of Catholicism was possible because the authorities never seriously enforced the official ban on Catholicism. According to de Rhodes, when Trịnh Tráng saw that the Portuguese priests refused to sever their ancient alliance with the king of Cochinchina, he asked them to leave with the Portuguese ships but still permitted two to remain provided that they instruct no one in their religion.¹³⁶ The two remaining priests, plus two Italian priests, secretly engaged in proselytizing and converted more Christians.¹³⁷

In 1643, there was a brief period of uncertainty with another Edict of Prohibition: A notice on a pole was posted in front of the missionaries' house prohibiting Christians to frequent it and profess their religion. If they did, the priests would be taxed; Christian images and books would be burnt. But a few weeks later, Trịnh Tráng summoned Father Majorica and explained that he regretted the severity with which he treated the Christians in the edict—a thing he did only because he had heard accusations that the Christians broke the statues. Trịnh Tráng then granted the missionaries permission to stay in the country enjoying the same security as before. And later, at the request of Father Majorica, the edict itself was repealed.¹³⁸ In the years following, through the 1650s, the missionaries were free to preach their religion, especially given the

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sympathy of Emperors Lê Thần Tông (1619–1643, 1649–1662) and Lê Chân Tông (1643–1649).¹³⁹ In 1658, Fathers Manoel Ferreira and Joseph Tissanier arrived in Tonkin.

On the Lê-Trịnh government's policy toward Catholicism during this early period through the 1650s, the conclusion of Alexandre de Rhodes was the most appropriate: "The Tonkinese nation is more tractable for, and more susceptible to, our religion than any other Oriental countries."¹⁴⁰

In 1659, under Trịnh Tạc (successor to Trịnh Tráng), a rebellion by an official named Phấn changed the government's policy toward the Catholics. One of Phấn's followers was Catholic. Another Catholic was accused of manufacturing gunpowder and selling to the rebels. Many of the priests' servants were denounced as spies. Trịnh Tạc first ordered Father O. Borgès to reassemble all missionaries in the capital to proceed to Macao; subsequently he agreed to let Father Borgès and his colleague Father Tissanier to remain, preaching and holding masses as before.¹⁴¹ In 1660 alone, they converted 8,000 persons. Catholics from distant provinces such as Hưng Hóa and Tuyên Quang were able to come to the capital to attend masses. In 1663, Trịnh Tạc asked all Jesuit priests, including Tissanier, to leave and issued a new edict banning Catholicism. But then he withdrew the edict and also ordered a halt to the demolition of churches.¹⁴²

By this time, as stated previously, the Society of Foreign Missions began to send their priests to Cochinchina. To Tonkin, in 1666, they sent Father Deydier, who was received "as an angel" by the Catholics who had been converted by the Jesuit missionaries but had not seen a priest since they had left some years before. With the help of two Vietnamese priests who returned from the seminary in Thailand, by 1668 Deydier converted 10,000 people, including a secondary wife of the late Lord Trịnh Tráng.¹⁴³

In 1669, a Portuguese vessel came to Phố Hiến with some Catholic priests aboard who brought a letter requesting permission to preach Catholicism along with some gifts to Lord Trịnh Tạc. According to Deydier, the lord was offended by the mediocre value of the gifts. Ordering all of them burned along with all Catholic books and images, he issued a new edict prohibiting Catholicism and mandating the destruction of churches, the stick penalty of fifty strokes on converts, and the restriction of foreigners to Phố Hiến.¹⁴⁴

Despite this sanction and the imprisonment of Deydier and some Vietnamese assistants for two years, the foreign priests were able to convert more than 6,069 persons in 1671–1672, 5,386 in 1673, and 6,690 in 1674. The Vietnamese priests converted about 73,000 people.¹⁴⁵ In 1677, Tonkin counted two bishops (Deydier and de Bourges), seven French missionaries, eleven Vietnamese fathers, and 200,000 Catholic followers. In 1685, the two bishops left Phố Hiến to live in the capital itself without being bothered by Lord Trịnh Căn.¹⁴⁶

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In 1696, however, this lord issued another edict that prohibited Catholicism as a doctrine capable of troubling the people's minds. He mandated the heavy stick penalty for missionaries and converts and the destruction of Catholic churches and books.

Thus, from 1659, when some Catholics had allegedly been involved in a rebellion, until the end of the seventeenth century, the ban on Catholicism grew more and more intense. Despite the intensity of the language of the edicts of prohibition (which, in any case, only imposed the stick penalty on the Catholics), however, these edicts were either repealed or not fully enforced.

The Catholics in the Eighteenth Century. The eighteenth century brought mixed fortune for Catholics in Vietnam.

Cochinchina. With the exception of some brief periods of persecution from 1700 to 1704, Catholics in Cochinchina continued to enjoy until 1750 the "profound peace" they had experienced since the sixteenth century.¹⁴⁷ In 1700, Lord Nguyễn Phúc Chu (Minh Vương) issued an edict banning Catholicism and taxing Catholics three times more heavily than non-Catholics. The chief missionary, Langlois, was arrested along with three other fathers; three of them died in jail. In 1704, however, Catholicism was no longer banned, thanks to the Nguyễn Lord's respect for his physician, Father Jean de Arnedo.¹⁴⁸ In 1724, Nguyễn Phúc Chu again issued an edict expelling missionaries and forbidding Vietnamese to convert. Never applied with any severity, the edict was revoked the next year by Nguyễn Phúc Trú (Ninh Vương), the succeeding lord.¹⁴⁹ In 1738, Lord Nguyễn Phúc Khoát (Võ Vương) came to power and was even more tolerant than his predecessors. By 1743, Cochinchina had 300 churches (five in the capital) and 70,000 Catholics, among them 200 assistant preachers. In the capital, there were twenty-nine fathers.¹⁵⁰

In 1750, a change of policy from tolerance to persecution was suddenly adopted at the instigation of officials who warned Võ Vương of the danger of missionaries bringing invading armies behind them (as had happened in Siam in 1687) and of the advisability of imitating the Ch'ien-lung Emperor who, in 1746, expelled all Catholic priests from China.¹⁵¹ The mandarins also invented the story that European vessels were in Tonkin to help the Trịnh and concluded that the missionaries were the most dangerous Europeans.¹⁵² Twenty-eight priests were arrested. One, Michel de Salamanque, died in prison and the rest were sent by force to Macao. Only Father Koeffler, Võ Vương's physician, was allowed to remain. A number of churches were destroyed; Vietnamese Christians were fined, flogged, or subjected to penal servitude.¹⁵³ Fifteen years later, in 1765, Lord Nguyễn Phúc Thuần (Huệ Vương) acceded to power and was more indulgent toward the Catholics and permitted those who were previously condemned to come home or to redeem their penalty. Bishop Piguel was able to come from Cambodia to visit Catholic followers and convert more people.¹⁵⁴

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Thus, a serious policy of repression began in Cochinchina in 1750 when political and security considerations were involved: Court advisors alarmed the Nguyễn Lord with the prospect of Western armies following on the footsteps of the Catholic missionaries, alleging they were already in Tonkin to help the Trịnh.

Interestingly enough, rival missionaries used this specter of foreign invasion themselves to undermine their competitors. For example, Bishop Piguel noted in 1770 that the Spanish Franciscans tried to chase away the French missionaries from Cochinchina by accusing them of plotting war against Cochinchina with Cambodia and Siam.¹⁵⁵

Similarly, state security considerations lay behind the later maltreatment of the Catholics by the Tây Sơn (1788–1802) in South Vietnam. Although this dynasty treated all religions with a heavy hand (drafting Buddhist monks and destroying statues and temples), its repression of the Catholics occurred only when the suspicion arose that they collaborated with Nguyễn Ánh, the future first emperor of the Nguyễn Dynasty. In one brief episode two powerful officials of this dynasty, Bùi Đắc Tuyên and Ngô Văn Sở, embarked upon the policy of repression when they heard Pigneau de Béhaine, the French bishop, was helping Nguyễn Ánh. After the two officials were liquidated in a power struggle with the Tây Sơn general, Vũ Văn Dũng, however, the new policy was to stop repressing the Catholics and to return to them their churches and property. The Catholics sent a delegation to thank Prince Nguyễn Quang Thùy, brother of Emperor Cảnh Thịnh.¹⁵⁶ But later, in 1798, when a letter from Nguyễn Ánh to Bishop Labartette in Huế was seized, the Tây Sơn Emperor again adopted the policy of repression. Thirty-two Vietnamese, including two priests, were killed. Others went into hiding.¹⁵⁷

Tonkin. Let us now turn to the situation in Tonkin. In the eighteenth century, the Trịnh government in Tonkin was generally harsher toward the Catholics than the Nguyễn in Cochinchina. Intermittently it issued edicts prohibiting Catholicism and executed foreign missionaries as well as Vietnamese Catholics.

As early as 1712, Lord Trịnh Cương ordered the expulsion of foreign missionaries (among them, Bishops de Bourges and Bélot), the tattooing of characters *Hoa Lang Đạo* (Catholic religion) on the forehead of those Vietnamese who refused to sign a statement relinquishing this religion, the destruction of churches, and the confiscation of Catholic property. Later, however, as bad harvests occurred after the persecution, Trịnh Cương changed his policy and issued an edict permitting the people to follow twelve religions, among them Catholicism.¹⁵⁸ Because of this, the Catholics prospered for a number of years.

In 1721, however, after some accusations against Catholics by a Catholic woman who had been excommunicated as well as by two other persons, Trịnh Cương again issued a new edict prohibiting Catholicism. Two Jesuits were

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arrested: Fr. Messari, who died in jail, and Fr. Buccharelli, who was condemned to death together with a number of Vietnamese Catholics.¹⁵⁹

Despite the prohibition, the Jesuits continued to arrive in Tonkin. In 1736–1737, four of them were arrested, condemned, and executed.¹⁶⁰ In 1745, two Dominicans (Gil and Liciniani) were decapitated.¹⁶¹

In 1748, after getting some help from the missionary Paleceuk in interpreting French for him, Lord Trịnh Doanh ordered the release of those Catholics currently under detention and granted them freedom of religion. Many converts were made. Trịnh Doanh even condemned some monks for falsely accusing the priests, but Fr. Paleceuk intervened to save them. Thereupon the lord warned that any future false accusation of the Catholic priests would be severely punished.¹⁶²

During the reign of Lord Trịnh Sâm (1767–1782), a monk was condemned to decapitation. Because the lord had issued an edict against certain Buddhist practices, he reportedly wanted to avoid the appearance of favoritism for the Catholics, so he issued a new edict prohibiting Catholicism once more. In 1773, the Dominican missionary Castanheda and the Vietnamese priest Vinh Sơn were condemned to death. They had been asked by Trịnh Sâm's mother, a devout Buddhist, "Where do non-Catholics go after death?" Upon answering, "to Hell," they were arrested and imprisoned on her orders. Trịnh Sâm reportedly had them executed to please his mother.¹⁶³

From this evidence, it seems fair to say that persecution of the Catholics by the Lê-Trịnh government in the eighteenth century was harsh on a number of occasions but persecution was only intermittent. Between these fits of repression came periods when that government returned to a policy of tolerance. This atmosphere of tolerance and some degree of freedom of religion and expression was a prerequisite for an event such as the "Four Religion Conference" to occur. A booklet reprinted many times in Vietnam reported that this three-day seminar debated the three topics of "man's origin," "the purpose of human life," and "life after death." It was attended by Fr. Castanheda and Vinh Sơn as well as the representatives of Confucianism, Buddhism, and Taoism and was organized by one of Lord Trịnh Sâm's uncles, whose mother was a Catholic.¹⁶⁴

The Catholics Under the Nguyễn in the Nineteenth Century. The Catholics enjoyed some thirty years of peace from 1800 to 1833, when the first major persecution began under the Minh Mạng Emperor.

During his long struggle against the Tây Sơn, Nguyễn Ánh, who was to become the Gia Long Emperor (1802–1819), asked Bishop Pigneau de Béhaine to help obtain the promise of military assistance from France in the Versailles Treaty of 1787. Because of a disagreement between the bishop and Count Conway, who had the duty to implement the treaty, France never carried it out. The bishop, however, privately recruited soldiers and bought warships and

weapons for Nguyễn Ánh.¹⁶⁵ Thus, Nguyễn Ánh treated the Catholics very well, permitting the bishop to move the seminary from abroad to Lái Thiêu near Saigon and to tour every parish in the territory under his control. He considered Catholicism a good religion although he did not like its ban of polygamy and ancestor worship. Once he severely scolded a defiant official who refused to kow-tow before the altar of his ancestors, stating that the bishop did not deem this tradition a superstition and the official was ungrateful to him and his ancestors.¹⁶⁶ After ascending the throne in 1802, the Gia Long Emperor paid warm visits to Bishop Labartette in Huế and the other bishops and the missionaries in Nghệ An and Hà Nội. The same year, he issued an edict advising the villages not to compel the Catholics to contribute to the worship of spirits they did not believe in.¹⁶⁷ Although in 1804 he ordered that all constructions and repairs of Buddhist temples or Catholic churches needed government authorization, he told his successor in his testament to refrain from prohibiting any of the major religions (Confucianism, Buddhism, and Catholicism) because they were all good.¹⁶⁸ In the first two decades of the nineteenth century, therefore, Catholics were free to practice their religion and to build or repair churches.¹⁶⁹

Freedom of religion, however, was soon to be cut short under the Minh Mạng Emperor (1820–1840), when this fervent Confucian emperor began to be swayed by the allegations of his Confucian court officials against the Catholics.¹⁷⁰ Phan Bá Đật, Deputy Censor of the Left, memorialized the emperor that the Western priests would take the eyes from the dying¹⁷¹ to manufacture medicine; that they would permit a man and a woman to live in adjacent houses separated by a wall,¹⁷² and, when caught in a sex act, would be crushed dead, with the water from their bodies used to impregnate the bread distributed to the faithful in masses to put them under the spell of the religion; and that when a man and a woman married, the priest would bring the woman into a secluded place on the pretext of preaching to her but, in fact, in order to have intercourse; and that all these acts should be firmly suppressed and severely punished.¹⁷³ Besides these kinds of fantastic allegations by his advisors, the emperor was also worried about the Catholics' refusal to carry out ancestor worship and probable failure to honor the other obligations in a Confucian society, such as the loyalty to the emperor.

The first Edict Prohibiting Catholicism was promulgated in 1825. It stated: "The heretic Western religion bewitches the people. . . . The missionaries confuse them, corrupt the good tradition, causing great damage to the nation. . . . I must, therefore, eliminate this bad situation to prevent the people from straying from the correct Path."¹⁷⁴ The emperor ordered the closing of churches, banned missionaries from entering the country, and summoned all Western priests to Huế in 1826 to translate Western books. The priests in North Vietnam, however, succeeded in hiding among the people, protected to some extent by the Catholic officials. In the south, Governor Lê Văn Duyệt arrested and sent the

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missionaries Gagelin, Taberd, and Odoorco to the capital; in 1828, however, he intervened with the emperor to obtain their release back to their respective areas.¹⁷⁵ In 1831, a dispute between two villages where Fr. Jaccard served as a priest, *Cổ Lão* and *Dương Sơn*, led to the accusation that the priest was inciting the Catholics to loot. Acquitted on that charge, he was still condemned to death but was then reprieved by the emperor, who summoned him to Huế for translation work. Fr. Jaccard daringly gave *Minh Mạng* a Bible and several times adamantly refused to burn Catholic books and articles of worship. *Minh Mạng* gave up his attempt to cow the priest and merely posted guards around his house.¹⁷⁶

In 1832, *Minh Mạng* once more noted that the Catholics would not obey his command to relinquish their faith. The commander of the imperial guards ordered his subordinates to sign a pledge abandoning their faith. Twelve soldiers and Captain *Tống Viết Bường* refused and were beaten. Six gave up their religion, but six others and *Bường* refused to. Bitter that whereas all subjects obeyed him the Catholics did not, the emperor issued an edict in 1833 that was much more sweeping than the previous one, ordering the Catholics to relinquish their religion by stepping over the cross and rewarding the arrest of foreign missionaries. This edict disapproved of the Catholics' refusal to worship ancestors¹⁷⁷ and their alleged practice of snatching the eyes of the dying and permitting males and females to mix freely in churches. Fr. Gagelin was arrested and condemned to strangulation, *Bường* to decapitation. Many other Catholics were killed, jailed, or exiled.¹⁷⁸

The *Lê Văn Khôi* rebellion in *Gia Định* from 1833 to 1835 made the emperor even more suspicious of the Catholics. *Lê Văn Khôi* rebelled for being arrested by officials handling the posthumous trial of his adoptive father, the late Governor *Lê Văn Duyệt*. *Khôi* reportedly wanted to obtain assistance from Western powers by using the missionaries as intermediaries. For their part, the missionaries or at least their Catholic following might have wished that the successful revolt would lead to a government favorable to their religion. A group of Catholics on a vessel were arrested in *Hà Tiên* with a letter addressed to Bishop Taberd requesting him to leave Siam for Saigon, where *Lê Văn Khôi* would welcome him. These Catholics were all killed.¹⁷⁹ In 1835, the imperial army retook the *Phiên An* citadel, where the rebels were entrenched and killed thousands of them. Among those arrested was the French missionary Marchand. (As for *Khôi*, he had already died from illness in 1833.) During the interrogation, *Lê Văn Khôi's* generals declared that *Khôi* rebelled at the suggestion of Bishop Taberd and the missionaries in order to put the son of Prince *Cảnh* (the *Minh Mạng* Emperor's late elder brother) on the throne; that Marchand was proselytizing the people on *Khôi's* behalf while the missionaries abroad were requesting military assistance from Siam and possibly also from the European powers.¹⁸⁰ Fr. Marchand was condemned to death by slicing; his

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verdict recorded that he admitted to have written to the Western powers and Siam to request help for the rebels.¹⁸¹

From then on, Minh Mạng embarked on a much more severe persecution of the Catholics. In 1836 and 1838, he issued two edicts reiterating the prohibition of Catholicism. Western missionaries who hid on foreign vessels entering Vietnamese ports or inside the country, those who concealed them, and officials who did not make an effort to arrest the hiding missionaries would be all condemned to death. As for the people, they had to contribute their efforts in constructing temples and shrines and, on specified religious days, had to come to burn incense and kow-tow at these places; those Catholics who refused to participate would be arrested and condemned.¹⁸² The emperor stated that the Western missionaries bewitched the people and plotted high treason; his main purpose was to eliminate them and prevent them from harming the people. As for the people, he said they did not, after all, belong to the same category as the missionaries and if they really repented and walked over the cross, they would be released back to normal life;¹⁸³ on the other hand, if they persisted in worshipping a Western religion and forsaking the cult of ancestors, they would be lacking in filial piety, doubly so when an only son in the family was condemned to death under the law, thus depriving his ancestors of all worship.¹⁸⁴

Thus, on both grounds—state security and preservation of Confucian values that were rejected by the Catholics—the Nguyễn government under Minh Mạng arrested and executed the missionaries Delgado, Henarès, Cornay, Fernandez, and Jaccard as well as Bishop Borie. Many Vietnamese priests and Catholic followers were also put to death in 1837 and 1838.¹⁸⁵

In the minds of the Vietnamese authorities at the time, the connection between the Catholics and the threat of French intervention was always prominent. In 1838, the same year he promulgated the new Edict of Prohibition, Minh Mạng sent the Phan Thanh Giản delegation to France to negotiate. They were to deliver the message that the missionaries would be welcome in Vietnam and the people allowed the freedom to keep their Catholic faith. The Society of Foreign Missions, however, asked the French King Louis Philippe not to receive the Vietnamese delegation. When the delegation returned to Vietnam with no results, Minh Mạng was already dead.

The Thiệu Trị Emperor (1841–1847) initially stopped the policy of religious persecution. Five missionaries (Miche, Duclos, Galy, Berneux, and Charrier) were arrested, but they were released in 1843 along with Bishop Lefebvre when Captain Lévêque brought a vessel to Tourane (Đà Nẵng) and requested (with no instruction to that effect by the French government) that the Vietnamese authorities free them.¹⁸⁶ After that, the Catholics enjoyed freedom of religion: They openly conducted ceremonies with only a notification of the village chiefs.¹⁸⁷

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In 1847, the Vietnamese government saw the first concrete evidence that substantiated their suspicion of the connection between the Catholics and the foreign imperialist forces when Lapierre and Rigault de Genouilly brought two warships to Tourane. Lapierre sent a letter protesting the maltreatment of the missionaries and requesting Vietnam to follow China in letting people be free to adopt Catholicism. Thiệu Trị sent a letter inviting the French officers to a banquet. But a Catholic wrote a note in Latin to the French, warning them of the possibility of assassination during the banquet, so they did not come. When the Vietnamese vessels approached the French, there was an exchange of fire. The French vessels inflicted serious damage on the Vietnamese navy and withdrew.¹⁸⁸ Thiệu Trị issued an order to arrest and kill all Western priests and to reward those who killed them. But lower officials did not enforce this order and the Catholic people bribed the officials so they could continue the exercise of their religion.¹⁸⁹

In 1848, the Tự Đức Emperor (1847–1883) promulgated another edict prohibiting Catholicism as a heretic doctrine that advocated the abandonment of ancestor worship and the snatching of eyes from the dying for manufacturing drugs. The edict would subject foreign missionaries to the death penalty and would force Vietnamese priests to give up their religion or, if not, be exiled. As for their followers, they would be, thanks to imperial compassion, merely given the stick penalty and sent home instead of being exiled or put to death.¹⁹⁰

Then came Prince Hồng Bảo's abortive plot. According to the accounts given by Bishop Pellerin and the missionary Galy-Carles, this prince, Thiệu Trị's eldest son, was passed over for the throne in favor of Tự Đức, the second son. Hồng Bảo tried to recover the throne a number of times and promised freedom of religion to the Catholics, from whom he hoped to get support for his attempt. The Catholics often asked advice from Bishop Pellerin, who always told them to stay away from politics. Hồng Bảo looked elsewhere for support: In January 1851, he was captured while preparing for a secret trip to Singapore with a view toward getting help from the British.¹⁹¹ The Tự Đức Emperor suspected that the Catholics once more plotted high treason. He issued a new Edict of Prohibition in 1851 that would put to death all priests, foreign or Vietnamese, as well as those who harbored them.¹⁹²

A Vietnamese priest, Phan Văn Minh, was condemned to death. Not all officials, however, enforced the prohibition; Nguyễn Đăng Giai and Nguyễn Tri Phương, government envoys in North and South Vietnam, respectively, failed to publicize the edict.¹⁹³

In 1855, another edict repeated that Western missionaries and their disciples would be decapitated; it ordered the Catholic followers to forsake their religion in one to six months and forbade them to participate in civil examination and officialdom; it provided for the destruction of churches and the filling up of all caves used for hiding.¹⁹⁴

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The vicious circle of government repression of the Catholics and foreign intervention on the latter's behalf escalated. In 1857, after several French vessels came without being received, Charles de Montigny brought a war vessel to Tourane. Upon seeing that he too was unwelcome, he sent a letter to the Vietnamese authorities warning that France would intervene militarily if more persecution of the Catholics occurred.¹⁹⁵ Tự Đức became alarmed at the spreading of Catholicism to what he estimated as four-tenths of his people,¹⁹⁶ among them many officials and soldiers, and he thought it necessary to "prevent the epidemic from spreading all over the country." The emperor consequently issued another edict ordering the Catholic population to abandon their religion in one year and to follow traditional ceremonies, including the worship of ancestors and village spirits. Those who failed to do so would have their faces tattooed; after one more year, obstinate elements would be condemned to death.¹⁹⁷ Nothing more was said about the priests.

In 1858, Bishop Pellerin reported to Emperor Napoléon III: "If France comes to conquer Vietnam, the Catholic elements in the population would welcome her as the savior. They would collaborate with the French so the conquest would be quickly completed."¹⁹⁸ Pellerin was present on one of the fourteen French and Spanish warships that came to shell Tourane in July 1858 under the command of Major General Rigault de Genouilly and Colonel Lazarote. Pellerin urged R. de Genouilly to advance toward the capital of Huế, but the latter, seeing that no Catholic armed rebels rushed to his help, accused Pellerin of duping him and brought his armada off the coast of South Vietnam to attack Saigon in 1859. After the French occupied Saigon, the Vietnamese general Tôn Thất Hiệp forbade the civilian population to frequent the French-occupied area so that the foreign troops would be deprived of a food supply. But Bishop Lefebvre mobilized the Catholic population to give the foreigners supplies on the grounds that they had come to liberate the Catholics.¹⁹⁹

Subsequently, in 1859, the emperor issued a communiqué arresting all Catholic priests and forcing the Catholic population to abandon their religion and to cut off all supply sources from the "barbarians."²⁰⁰ In this same year, he issued an edict stating: "The heretic religion of the Catholics brought much harm. We cannot classify them among the other superstitions which we tolerate in our country. We have to ban this heresy especially. The Catholics form a separate society. Although they do not openly oppose the government, secretly they support the foreigners."²⁰¹

In 1860, the emperor issued two more edicts. The first indicated the government would not repeal the ordinances banning Catholicism although the "barbarian" warships had come and created trouble in Quảng Nam and Gia Định.²⁰² The second, promulgated at year's end, provided for drastic measures against the Catholics in five articles:

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1. All Catholics, male or female, old or young, shall be dispersed into the villages of honest commoners.
2. The honest commoners shall have the responsibility of watching over these Catholics.
3. All Catholic villages shall be destroyed.
4. Catholic men shall be separated from Catholic women in different provinces; their children entrusted to non-Catholic families.
5. Before being dispersed, the Catholics shall have the character “heretic” tattooed on their face so that none of them can flee.

As a result, many Catholics fled into the jungles or onto floating boats. Many were scattered or arrested and condemned to a life of bondage; their properties were confiscated.²⁰³

In all, under Tự Đức, from 1848 to 1860, ten European missionaries, 100 Vietnamese priests, and about 20,000 of their followers were put to death in North Vietnam. In South Vietnam, the number of deaths was: fifteen missionaries, 200 Vietnamese priests, and 10,000 followers.²⁰⁴

The French invasion continued. In 1861, Charner and Bonard were sent to conquer South Vietnam. Probably this defeat in the face of a foreign invading force and a message from Đặng Đức Tuấn, a Vietnamese priest, prompted Tự Đức to reconsider his policy toward the Catholics.²⁰⁵ He had this priest join Phan Thanh Giản and Lâm Duy Hiệp in the negotiation that led to the 1862 peace treaty with France.²⁰⁶ The treaty gave France three provinces in South Vietnam (Biên Hoà, Gia Định, and Định Tường), and recognized freedom of religion. After the signing of the treaty, it was said, Tự Đức never smiled again. In the same year, he granted an amnesty to older people, women, children, and those men who agreed to forsake the Catholic religion. Their property was restored to them. Those men who refused to abandon their faith would still be held in restraint. The villages, however, uniformly tired of watching over the Catholics, released all Catholics without distinction. But the amnesty benefited only practicing Catholics. Restrictions were still imposed on non-Catholics and those Catholics who had fled or declared their abandonment of their faith: They could not readopt Catholicism. Moreover, any assembly of more than a hundred persons required authorization. Missionaries had to live in a house within the compound of the province governor and had to carry a passport whenever they traveled.²⁰⁷

In 1864, a plot by the Confucians who formed the Văn Thân Movement was uncovered and Tự Đức completely changed his policy toward the Catholics. More enlightened than the Confucian scholar-official class of that time, the emperor was, as we have seen, already awakened to the reality of the international balance of forces that had to be taken into account in

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pondering the issue of the Catholics. He also awakened to the reasonable arguments of a Vietnamese priest on tolerance. But the Văn Thân Confucianists dogmatically wanted to liquidate all Vietnamese Catholics for allegedly collaborating with the French without making a distinction between the foreign priests, a number of whom really hoped for and acted to bring in foreign intervention, and the ordinary Catholic people, who generally “lived in peace,” were good taxpayers, and “seldom were robbers and rebels,” as Nguyễn Đăng Giai, a high official reported to Tự Đức.²⁰⁸ On the occasion of the provincial examinations in 1864, about 5,000 Confucian scholars assembled in Nam Định from various provinces and demanded the high officials to wipe out the Catholic population. When this request was denied, they refused to take the examination and ran about the city shouting slogans of vengeance.²⁰⁹ In Central Vietnam, the Văn Thân Movement also plotted to kill all Catholics and to rebel against the emperor himself if he did not follow their plan. They accused the Catholics of storing weapons in their houses and alleged that Bishop Sohier was not returning to France but was actually in the mountains training his Catholic following in warfare. The emperor ordered a search for the weapons but nothing was found. Some Văn Thân elements burned Fr. Bernard’s house and a church and were arrested. During interrogation, they revealed the Văn Thân plot. The emperor had them put to death and issued an edict that revealed a great deal about the emperor’s new attitude toward the Catholics and the influence of his Confucian advisors on his past repressive policy:

All people in the country are my children. When the children do not behave, they are penalized by their parents, but after this punishment the parents love them as before.

A few years ago, France and Spain came to conquer part of our territory. Officials reported to me that the Catholics had summoned these countries to come because they were not allowed to keep their religion and suggested that I scatter the Catholic population. Because of this false report and because of the emergency of the moment, I did not know where to find the truth and whom to consult, and therefore I and the Court used a stern measure. While some officials proposed that all Catholics be killed, how could I, as a parent of the people, adopt such a course of action? Therefore, I chose the moderately severe policy of scattering the Catholics.

But among those who had the duty to carry out this order, some took advantage of this measure to make the people miserable. I suffered knowing of such actions. When peace was restored, I ordered that the Catholics be permitted to return home and to practice their religion.

The Catholics have gone through great pains and I respect their loyalty to their religion and their adherence to the national law. I do not discriminate between Catholics and non-Catholics. If the Catholics still hold a vengeful

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attitude, they will be deemed as not following my order; they will be considered rebels. Please cultivate yourself, so you, Catholics, will reach perfection.

As for you, Văn Thân, what kind of scholars are you to violate national law by gathering in villages to murder Catholics? The ancient philosophers condemned violence; you are not allowed to use it. You have accused the Catholics of rebellion but without evidence.²¹⁰

When Bishop Sohier returned from France, the emperor sent a delegation to welcome him. In 1869, the emperor issued two other edicts to protect the Catholics: permitting them to assemble in separate villages headed by Catholic village chiefs; and forbidding non-Catholics to slander Catholics and disturb them during religious ceremonies.²¹¹ In 1874, after France captured Tonkin, Article 9 of the 1874 peace treaty provided details for freedom of religion for the Catholics:

The Emperor of Vietnam repeals all Edicts which prohibited Catholicism and grants to all citizens the freedom of religion.

Therefore, Vietnamese Catholics may gather in churches to worship. They shall not be forced to do anything contrary to their belief.

The Emperor shall order the abolishment of all identification papers which have the purpose of controlling the Catholics.

Foreign bishops and missionaries have the right to circulate within the country.

Vietnamese priests are as free to preach as the missionaries. If they violate national law, the penalty of the stick would be replaced by an equivalent one.

Bishops and priests have the right to rent and buy land, build churches, hospitals, schools, and orphanages. . . .

All properties confiscated from Catholics shall be returned to them.²¹²

At a time when the Nguyễn government had already completely changed its policy from persecution to tolerance of the Catholics, the Văn Thân Movement still continued to attack them: in North Vietnam provinces as well as Nghệ An in Central Vietnam in 1868 and 1874; in Central Vietnam provinces such as Hà Tĩnh, Thừa Thiên, Quảng Ngãi, and Qui Nhơn in 1886–1888. The number of dead Catholics rose to the thousands in each province, and the government had to send troops to suppress the Văn Thân.²¹³ After the Hàm Nghi Emperor was arrested in 1888, the Văn Thân Movement gradually died down. The Văn Thân attack on the Catholics was not a negative indicator of the Nguyễn human rights policy; on the contrary, it provided a proof of the Nguyễn government's effort to defend the rights of the Catholics against encroachment by another segment of the population.

The history of Catholicism in Vietnam leads us to these concluding remarks:

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1. Religious tolerance was more the rule than the exception for Catholics in sixteenth- through nineteenth-century Vietnam. During the greater part of these four centuries, either the people enjoyed freedom in adopting the Catholic faith and practicing this religion in ceremonies or church building, or the edicts of prohibition were either not enforced or were repeatedly withdrawn.

2. The initial prohibition was accompanied by mild penalties. Although the killing of foreign missionaries was already carried out by the eighteenth-century Lê-Trịnh governments, the bloody repression of Vietnamese Catholics began only with the Minh Mạng Edict of 1833 and ended in 1862 under Tự Đức.

3. The defiant way in which the missionaries and their Vietnamese followers rejected traditional Vietnamese values, such as the ancestor cult, was the initial cause of the escalating ill will between the Catholic population and the Confucian scholar-official class who ruled the country and who at the beginning demanded only that the missionaries leave. But the emperors' and their Confucian officials' intolerance of any dissent from Confucian norms (refusal to adhere to the cult of ancestors or spirits, or to submit completely to imperial will even in the spiritual realm), and their demand that the Catholics, who committed no crime, step over the cross to forsake their faith and thus escape penalty, were clear evidence of the violation of religious freedom.

4. In many cases, suppression of the Catholics was motivated and might even be justified by security considerations for the dynasty or the state, especially when action was taken against foreign priests who might allegedly or truly collaborate with foreign powers. (For example: the actions taken by Lord Trịnh Tạc in 1659; by Lord Nguyễn Phúc Khóat in 1750; by Minh Mạng in 1838 after the Lê Văn Khôi–Marchand affair; by Thiệu Trị after de Genouilly's shelling of Đả Nẵng in 1847, which was provoked by the information given by some Catholics, or by Tự Đức after the 1858–59 French and Spanish attack in Đả Nẵng and Saigon at the suggestion of Bishop Pellerin.) However, to subject indiscriminately to dispersal or the death penalty those ordinary Vietnamese Catholics who were not involved with foreign intervention and whose only crime was refusing to abandon their faith was a violation of the basic human rights of religious freedom and freedom from cruel punishment. Moreover, such overreactions led to a vicious circle of repression—resistance or an appeal for foreign help followed by more repression, and so on.

Freedom of Expression?

Freedom of expression is the ability to impart ideas or information without interference, either orally or in printed form as well as in other mass

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media. Although the terms may be used interchangeably, “freedom of opinion” (or of speech) is usually regarded as oral “freedom of expression.” On the other hand, “freedom of the press” is one form of written “freedom of expression.”

Whatever statutory law provisions or cases in traditional Vietnam relating to the issue of freedom of expression we may come across, we find them to be restrictive with regards to an individual’s ability to express opinions freely.

Freedom of Speech or Oral Expression. The most rigorous abridgement of free speech or expression was imposed when the sovereign, his legitimacy, and his policies were involved. Under the Lê, whoever willfully criticized the emperor in terms harmful to his prestige would have committed a heinous crime, punishable by decapitation; even if the criticism was not harmful, the penalty would still be penal servitude; if the criticism of the emperor occurred incidentally during a discussion of state affairs, the culprit would still be punished but a special petition would be addressed to the emperor for possible reduction of penalty.²¹⁴ Writing or speaking anything that raised the slightest doubt about the legitimacy or stability of the ruler’s reign was severely punished. Under the Lê, whoever “formulated portentous writings or words”—that is, wrote or uttered prophecies or commented on bad omens in a manner unfavorable to the sovereign—would be strangled to death.²¹⁵ The Nguyễn similarly provided that the author of prophecies, magic spells, or any writings that created confusion in the people’s minds (that is, according to the official commentary, the author of predictions of ascension to, or loss of, power and discussion of good or bad omens for the state) would be decapitated.²¹⁶ In this connection, even making a divination about a man’s destiny would lead to exile if such divination was deemed by the government to imply a rebellious purpose—for example, predicting a man would become a ruler someday.²¹⁷ Anyone informed about criticisms directed at the emperor or discussion of portents who failed to report them to the authorities would receive a penalty two degrees lower than the authors of such criticisms or talk.²¹⁸

Criticizing government policies in an offensive or unfavorable manner was also severely punished. Under the Lê, whoever criticized government policies in an unfavorable manner or spread rumors alarming the people while commenting on state affairs in stories, songs, or poems would be exiled. Whoever concealed or used such compositions (stories, songs, or poems) or spread such rumors would receive a penalty one degree lower.²¹⁹ Whoever used anonymous letters for offensive discussion of important national issues would be decapitated; if the issue were unimportant, the penalty would be exile. Whoever used such anonymous letters to slander current government policies would also be exiled in aggravating circumstances or condemned to penal servitude in mitigating circumstances.²²⁰ Similarly, under the Nguyễn, dangerous malefactors

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who composed anonymous letters discussing state affairs and created trouble for the public order would be strangled; persons who knew about these letters had to denounce them, if not, they would be punished.²²¹ Under the Lê, whoever slandered a public servant or official in writings or in lawsuit documents would be demoted.²²² Finally, whoever created confusion or panic among the people by making prophecies as a fortune-teller during a military campaign, or by spreading rumors about bandits' and rebels' attacks on the frontier, would be decapitated.²²³

Were these restrictions on freedom of speech justified on the basis of national security or public order? Probably the ban on making prophecies or rumors that could sow panic among the people was a legitimate abridgement of free speech, given their impact on state security and public order. Probably the punishment for slandering government officials was a normal criminal sanction even by today's standards. Probably willful criticism of the emperor in terms harmful to his prestige, along with prophecies or comments on omens relating to the downfall of the state or the loss of imperial power that caused confusion among people, were the equivalents of the seditious talk that present-day democracies also ban from free speech.

But to punish criticism that was not harmful to the emperor or unfavorable comments on governmental policies or state affairs (including anonymous letters) was indeed a curtailment of free speech that could not be easily justified. Such a conception of criticism actually led to the suppression of legitimate speech. The institution of the Censorate might have encouraged officials to speak out on government policies; the Lê Code even had one article that specifically required officials, in their memorials to the throne, to discuss fully matters harmful to the public or the army and even punished those who did not do so but simply flattered the emperor while voicing a contrary opinion behind his back.²²⁴ The Nguyễn Dynasty might have permitted the people to speak out and established the memorializing officials (*ngôn quan*) with the function of reporting all wrongdoing and injustice.²²⁵ But the punishment of even harmless criticism of the ruler and the absence of clear criteria on what constituted "harmful" speech²²⁶ brought about the suppression of legitimate speech in a number of cases.

For example, in 1402, when Nguyễn Bảm proposed to Hồ Quý Ly that this Supreme Emperor retreat to Thanh Hóa so that his son Hồ Hán Thương, then emperor, could be promoted to be Supreme Emperor, and Crown Prince Nhuế could be inaugurated as emperor, Bảm was decapitated for "harmful criticism."²²⁷ In 1467, under Lê Thánh Tông, Investigating Censor Lê Bá Tu was banished to a district on the China border for criticizing the "wrong policies" of the time.²²⁸ In 1731, Bùi Sĩ Tiêm was dismissed by Lord Trịnh Giang for pointing out frankly what was wrong with government policies.²²⁹ In 1833, Thân Văn Quyèn, a secretary in the Imperial Cabinet, requested pardon for

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Nguyễn Trữ, a doctoral degree holder, who was banished as a soldier. Instead of listening to this good advice and retrieving wasted talent, the Minh Mạng Emperor suspected Quyèn of trying to protect his clique and ordered the Three High Courts to rule on his “fault,” for which Quyèn was condemned to decapitation after the assizes. On this occasion, Minh Mạng stated that he always received his subjects with a mild face and courteous language since ascending the throne, so that the people could be frank and free in giving him their opinion and he had not condemned anyone; it was, however, “inevitable that dishonest people would try to mislead the emperor” and form cliques secretly: Văn Quyèn was one of these when he petitioned for a favor for Trữ in order to use it to create obligations toward him.²³⁰

Freedom of the Press. This freedom was extended to the people in varying degrees during the different historical periods in traditional Vietnam. Although printing of Buddhist scriptures under Emperors Thái Tông and Anh Tông of the Trần Dynasty was mentioned in the Lê historical record and by the Buddhist writers of today, another theory holds that printing was brought into Vietnam by Lương Nhữ Hộc, who, during his two embassies to China in 1443 and 1459, stealthily learned it from the Chinese, who wanted to keep it a secret. He then taught printing to the inhabitants of his village Hồng Liễu and the neighboring village Liễu Tràng in Hải Dương Province.²³¹ Imported late into Vietnam, the art of printing stayed in its infancy until recent times; the majority of Vietnamese documents before the Nguyễn Dynasty were handwritten.²³²

The Lê policy on freedom of the press seemed to be one of benign tolerance, except for two types of books: Buddhist and Taoist scriptures. Those who wanted to carve woodprints and print these religious works had to ask for authorization.²³³ There was also no fixed policy on distribution and storage of printed books. Lê Quý Đôn reported that no office was designated for library services or for gathering and keeping books and that no rule was established for copying and storing them.²³⁴ The only exception to this unregulated distribution of printed materials was the forbidden books, defined as books of prophecy, books on the Great Monad or “Thunder God” methods of prophecy, and astrological calendars.²³⁵ Thus, in the eighteenth century, stories were told of books freely copied by hand and then passed informally from family to family from Hà Nội to Hà Tiên.²³⁶

Under the Nguyễn, the Lê policy of tolerating freedom of the press was also adopted during the Gia Long era. People might manufacture their own printing blocks.²³⁷ The Nguyễn Code did not reproduce the Ch’ing Code decree that punished printers and sellers of immoral books. Also, it only forbade the concealment in private houses of prohibited books (i.e., books or maps serving to predict the fortune of the country); the penalty of a hundred strokes of the heavy stick was specified for those who failed to declare them to the authorities.²³⁸

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After 1820, the Minh Mạng Emperor pursued a policy of centralization of printing facilities. He ordered those officials in the provinces who had their own printing blocks to send them to Huế. Scholars who wished to print their own private texts had to take their own paper and ink and report to officials at the National Historical Institute (*Quốc Sử Quán*) where their wishes might or might not be granted. All the printing blocks for the Chinese classics that had previously been stored at the Lê Temple of Literature (*Văn Miếu*) in Hanoi were brought by junk to Huế and deposited at the National College.²³⁹ Although the Minh Mạng Emperor might have rewarded the writing of new books,²⁴⁰ the centralization of the printing facilities, the prohibition of some books,²⁴¹ and the restricted access to government school libraries²⁴² constituted important limitations on freedom of the press. The suppression of the Catholics and their religious books under the Minh Mạng, Thiệu Trị, and Tự Đức emperors was another example of curtailment of freedom of speech and press; this area pertains to the issue of freedom of religion, which we have studied in the previous section. It is noteworthy that the general tendency toward restriction on the various freedoms of thought (religion and expression) was typical of the Minh Mạng, Thiệu Trị, and Tự Đức eras, when the Vietnamese court was dominated by the Confucian emperors and their Confucian officials.

Freedom of Collective Action?

These freedoms include peaceful assembly, association, and the right to participate in the governance of one's country.

Freedom of Assembly and Association?

As the two freedoms of assembly and association were not always separated in traditional Vietnam, we treat them together here.

Freedom of Assembly. Because religious services and ceremonies were the most common form of assembly of people in traditional societies, freedom of assembly in old Vietnam was first and foremost associated with freedom of religion. As we have seen, the Lý and Trần governments were very much in favor of, and actually helped organize, Buddhist religious gatherings. When Catholicism came to Vietnam in the sixteenth century, it was fully tolerated at first and was persecuted only later and in intermittent periods. During those years when Catholicism was tolerated, missionaries were free to hold gatherings of followers, as evidenced by writings left by such missionaries as A. de Rhodes, for example. Probably this freedom of religious assembly was only slightly limited in the sense that big gatherings that might jeopardize public order needed governmental authorization. One piece of evidence was that in 1862, after the bloody repression of the Catholics under the Nguyễn Emperor Tự Đức, the emperor revised his policy to a tolerant treatment and ordered that

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only assemblages of more than a hundred persons needed government authorization. As for Buddhist gatherings, they formed such a firmly rooted tradition that the *hội chùa* (Buddhist gatherings) were an integral part of village life under all dynasties—authorized, sponsored, and even financed in part by the village councils.²⁴³

As for freedom of assembly in general, Article 464 of the Lê Code provided for the principle of prior notification to the authorities, very much like the rule of the *déclaration préalable* in the 1881 French law on freedom of assembly. Under the Lê, those persons who pretended to be “retired scholars” and gathered people for unlawful acts would be punished. Those who met for benevolent purposes, on the other hand, were free to do so provided that, for important matters, they had memorialized the throne or high officials, or, for petty matters, they had notified the prefectural, district or village officials. There were, however, indications that under the Lê the regulated freedom of assembly was also predicated upon a legitimate reason for gathering. In 1429, Emperor Lê Thái Tổ ordered officials in the capital and in provinces or districts to punish with a hundred strokes of the heavy stick those who, without business, including official business, gathered to drink wine.²⁴⁴ In 1484, Emperor Lê Thánh Tông also forbade any gathering for feasting that had no legitimate reason such as an anniversary, a wedding, a funeral, or a celebration.²⁴⁵

Under the Nguyễn, if there were no suspicion of a plot (in suspect cases there would be restrictions on the freedoms of assembly and association, as will be discussed), the people seemed to enjoy even more freedom of assembly, as evidenced by the religious gatherings already mentioned and the following description of the capital of Huế:

Nguyễn Court records document episodes in which the people of Huế interfered with imperial processions through the streets, offered little respect to officials in sedan chairs and indulged in hooliganism. Huế in the early 1800s was renowned for its discordantly noisy food peddlers, whom a desperate Minh Mạng tried to license.²⁴⁶

Freedom of Association. As for freedom of association, both the Lê and Nguyễn dynasties adopted the same kind of relatively liberal policy when people gathered for trade, professional, or social purposes. (Again, freedom of association would be restricted only if a plot was suspected.)

Trade associations. Under the Lê, the development in handicrafts led not only to the emergence of villages specialized in different crafts²⁴⁷ but also to the formation of trade associations or guilds (*hội bách nghệ*, *hộ*, or *phường*). Initially, these were less professional associations and more mutual aid societies in which members were on an equal footing with one another although supervised by a person elected for one year from among the elder and more respectable members. Customary rules governing these associations developed, and they became trade guilds headed by a master artisan (*thợ cá*) and an

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assistant master artisan (*thợ phó*) who taught, guided, and directed other members.

The government encouraged these guilds because they helped control the quality of products, ensured that they conformed to sumptuary laws of the court, collected the taxes owed the government by members, and recruited elite craftsmen for imperial factories and warehouses. The government gave the master artisans legal recognition and the guilds autonomy of management. Thus, a rule mentioned in *Hồng Đức Thiệu Chính Thư*²⁴⁸ barred from any trade a person who tried to set himself up in the trade without apprenticeship with a master artisan and suspended any member who, while a disciple, failed in his obligations toward the master artisan. In the capital of Thăng Long (Hanoi), separate wards were reserved for different trade guilds. Certain trades, especially in the Nguyễn Lord's area, were organized according to a military pattern—such as, for example, gold prospectors, blacksmiths, welders, and hunters of swallow nests.²⁴⁹ The Lê government even agreed to deal with the artisans through a contractor who received the total fee for a certain project and then organized his own group of workers, allocated tasks, fixed individual salaries, and carried out the project.²⁵⁰ Thus, the Lê government, for its own interest, let the people assemble freely into trade guilds with a minimum of interference.

The Nguyễn Dynasty's policy toward trade guilds—which it called *hộ*, *phường*, or *ty*—was similarly liberal. Guilds were also recognized for the government's own interest (tax collection, production for official procurement orders, and the like). The government regulated only very generally the setting up and the tax-paying obligations of these trade guilds. To establish one trade guild, a group of artisans assembled, selected one leader, and filed an application with the finance commissioner in their province. Each year, a list of members with birthdates and residences would be filed with the provinces so that special taxes could be collected from these members—who, however, were exempted from head taxes and *corvée*. Precisely because of the government's limited objective in regulating these guilds, they became autonomous administrative, social, and trade organizations. The head of a guild was assimilated with a subaltern ninth-rank official, at the same level as a village chief; he served as an intermediary between the government and the artisans and was responsible for tax collection as well as for the filling of government orders. The internal management of the guilds was left entirely to their leaders: worshipping their own trade ancestor, helping one another in social events such as marriages or funerals, and bidding for work that was then distributed to members.²⁵¹

Thus, the guilds in both the Lê and Nguyễn were somewhat like modern-day trade unions, and even more than that: They were also administrative units and social organizations with a minimum of governmental control. Some features of

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these organizations, however, made them less free “trade unions” than they otherwise would be.

First, as Lê law stated explicitly, a person could not hope to join a craft without apprenticeship with the master artisan of a guild. In other words, there was no freedom *not* to join a trade guild.

Second, precisely because the government’s own interest motivated the granting of autonomy to the guilds, at times the government might interfere into the function of these associations when its interests so dictated. The government might want to eliminate from the guilds those artisans who, in the government’s view, were not skilled but joined the guilds merely to avoid head taxes and corvée. This kind of interference happened in 1835–1840 under Minh Mạng, for example: Of 997 artisans in the coal industry in Gia Định in 1835, only 100 were permitted to remain in the trade; the rest were sent back to their regular status in the population registers. In 1840, artisans in unimportant fields in North Vietnam were reclassified in the population registers subject to military service and corvée. Also, even among those artisans left in guilds, only those who worked for the government were exempt from head taxes; others had to pay the required assessment. In big cities, the office of the guilds (*chính ty sự, chủ cục trưởng*) supervised the trade guilds and issued them procurement orders at low prices.²⁵²

Social organization. The relative freedom of association also applied to social organizations. An association might be set up to obtain monthly contributions from members so that each month a pig might be bought and allocated to the use of one member. A credit union (*hụi*) might be formed to permit each member to borrow a sum of money for consumption or production purposes. In associations for joyful celebrations (*hội hỷ*), members regularly contributed money to a common fund from which they would take a lump sum to celebrate a wedding, a successful examination, joining the officialdom, or receiving a title. In associations for filial piety (*hội hiếu*), members similarly made contributions into a common fund from which expenses for funerals would be disbursed. Other associations were associations of lettered men (*hội tư văn*), associations of disciples (*hội đồng môn*), and the like.²⁵³

Restrictions on Freedom of Assembly and Association. The freedoms of assembly and association were subject to restrictions under Lê and Nguyễn law in many cases because of state security considerations, and sometimes for reasons of public morals. No one could participate in, or organize, musical or theatrical entertainment shows while the sovereign was ill or when the country was in national mourning or was honoring the anniversary of an imperial ancestor.²⁵⁴ Thus public morals put a limit on freedom of assembly. But it was mainly state security considerations that restricted freedom of assembly and association under Lê and Nguyễn law.

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According to the Lê Code, officials were obliged to keep track of, and take action against, those military officers who befriended soldiers, commoners, and public servants “with a view toward plotting rebellion.”²⁵⁵ Besides this type of assembly, which was obviously threatening to national security, the law presumed a plot of high treason or grave insubordination existed when persons in command of military men or civilians assembled them in units without imperial authorization. In such a case, all officials and especially their colleagues were permitted to report directly to the emperor for an order.²⁵⁶

The Lê Dynasty also frowned upon any secret assembly for exchange of blood oaths between officials, military men, or commoners and “barbarians” in military territories. The mere act of assembly in these circumstances would bring the penalty of exile; if a serious crime were committed, the penalty would be decapitation.²⁵⁷

Even more restrictive to the freedoms of assembly and association were those Lê statutes that imposed rather general limitations on the right of assembly of civil officials or military men. According to Article 204 of the Lê Code, those civil and military officials who, without reason, frequented the homes of those who were not their subordinates, relatives, or brothers in order to form cliques and who, during these gatherings, offered money or presents in order to create friendly relations and obligations, chased away other household members, and conversed furtively in low voices would be charged with plotting high treason or grave insubordination. A decree of 1477 also forbade those who were not relatives of the imperial guards to befriend the latter by giving them gifts or feasting them; those court and provincial officials who befriended one another were subject to decapitation.²⁵⁸

These restrictions on freedom of assembly and association in Lê law clearly arose from concern for state security because they aimed at obviously suspicious gatherings such as assembly into military units or secret meetings accompanied by blood oaths or applied exclusively to those persons in a position to threaten state security: officials and military men. Thus, there was still room for some freedom of assembly and association in the Lê, as we have earlier described. We find no across-the-board restriction on all kinds of gatherings by all kinds of people, but we find some limits on freedom of assembly and association for benevolent, social, and trade purposes.

The Nguyễn Code provisions restricting the right of association were more ominous. These laws applied to all assemblies of people who bore different family names. First, if persons of different family names assembled, took blood oaths, burned a statement related to this oath and addressed Heaven in order to invite Heaven’s witnessing, and call each other brothers, they would be condemned for treason, punishable by strangulation after the assizes. Even if there were no blood oath and no statement burned for Heaven but an association was formed with forty members who called one another brothers, the principal

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offender would be condemned to strangulation after the assizes and his accomplices to a penalty one degree lesser. If the association had less than forty members, the penalty would be exile to 3,000 *li*; if the members counted less than twenty, the penalty would be a hundred strokes of the heavy stick and two months of the cangue.²⁵⁹ Officials would have to arrest them before any trouble arose, and neighbors to denounce them.²⁶⁰ Thus under the Nguyễn Code, the criterion was not very clear when an assembly or association of men would be deemed threatening to the security of the state: The mere act of forming an association of less than twenty persons²⁶¹ and addressing one another as brothers would be punished.

Compared to the Nguyễn Code's provisions, the restrictions on the rights of assembly and association under the Lê Code were somewhat more in tune with modern-day international standards that accept as restrictions on these rights the justifiable considerations of national security, public order, and public morals.²⁶²

The Right to Take Part in Government and to Have Equal Access to Public Offices?

The nature of the imperial system in traditional Vietnam barred any full participation by the people in general in the management of public affairs either directly or through freely chosen representatives. They had no right to vote or to be elected at genuine periodic elections that were held by universal and equal suffrage and by secret ballot or equivalent free voting procedures.²⁶³ Loyalty to the ruling monarch and dynasty was absolutely required. Therefore, at the central government level, political competition with the rulers in free elections was unthinkable; on the other hand, the oath of allegiance proved that highest value was ascribed to loyalty to the rulers.²⁶⁴ By the same token, all the offices at the intermediate levels of government were also appointive positions.

There has been much scholarly discussion about popular elections at the village or lowest level in traditional Vietnam. But the historical record proved that many village leaders were not elected at all, and during periods when the positions of village chiefs were allegedly elective offices, the people actually had only the power to nominate them for ultimate appointment by the central government. Traditional village government consisted of two organs: the village chief, who, while serving as the intermediary between the central government and the villagers, collected taxes and carried out court decrees; and the council of notables (*hội đồng kỳ mục* or *hội đồng hào mục*), who dealt with village business of less interest to the central government, such as night patrols, property management, and the like. The council of notables, the real power holders in villages, were not elected by the people but consisted of persons who satisfied the conditions specified in the

village charter (such as being retired officials, degree holders, former village chiefs, true elders). Led by a *tiên chỉ*, the elder with the highest status, they constituted a permanent village elite; they did not serve any specific term.²⁶⁵ Thus, the council of notables formed an oligarchy of influential people rather than an elected leadership.²⁶⁶

The village chiefs²⁶⁷ were appointed officials under the Lý, Trần, and early Lê: They were known as *xã quan* or village officials.²⁶⁸ In 1466, Lê Thánh Tông changed the title of *xã quan* to *xã trưởng*²⁶⁹ or village chiefs. Apparently, these were still officials appointed by the central government representatives: In 1488 and 1496, decrees were issued forbidding the prefectural and district officials to establish two relatives as village chiefs in the same village.²⁷⁰ In 1669, a detailed imperial order by Lê Huyền Tông provided for the popular nomination of village chiefs, but it clearly implied that their appointment and promotion were in the hands of the central government representatives. An order was issued to district chiefs to instruct the people to nominate and guarantee (*bảo vệ*) as village chiefs or officials (*xã quan*) individuals chosen from among honest, uncorrupt, just, diligent, and learned persons; or Confucian students; or those who had passed three of four parts in the provincial examinations; or those who were exempt from corvée for being sons of officials or honest families. The village chiefs would represent their villages to the central government, handle judicial cases, and explain to the people the court's moral precepts two times a year. Every three years, district officials would examine village chiefs, clerks, and runners to see which were honest and had succeeded in educating the people to follow pure customs and desist from legal wrangles. The examination results would then be presented to the administrative office of the province (*thừa ty*), which, after further checks, would forward the files to the Board of Public Office. Thereupon, a meritorious village head might be selected to become a district official, and a village clerk or a village chief runner promoted to the position of village chief.²⁷¹

Clearly, the people nominated the candidates for village chiefs, but the central government appointed and promoted them to the higher position of district chiefs. The term of office for the village chief and his deputy might be fixed for, say, three years, as under Minh Mạng. It did not, however, mean they were elected by the people for a term because officials, under the Lê as well as the Nguyễn, though nominated by the people, were officially appointed only by a certificate from the court.²⁷² Moreover, the central government might even reproach or recall the village chiefs,²⁷³ or, conversely, promote worthy ones to the rank of chiefs of cantons, as was stipulated under Minh Mạng.²⁷⁴ Although the historian Phan Huy Chú stated that from the period of 1732–1740 on, examination of village officials was dropped as unimportant and the filling of their positions was left to the people,²⁷⁵ it was not clear whether, after being

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nominated by the people, they were appointed without the court's final approval.

The theory of village elections put forward by some Vietnamese scholars, may have arisen from their misunderstanding of the term *bảo cử* (in Chinese, *pao chu*) or "guarantee and nominate," which was already a mechanism for choosing officials under the Han Dynasty in China. *Bảo cử*, has been misunderstood as *bầu cử*, "to elect."

In conclusion, traditional Vietnam had no genuine periodic elections, even at the village level. The people were asked only to nominate candidates for the position of village chiefs. Even this ability to nominate, however, could be considered a precious mechanism for some popular participation in the management of public affairs in the villages. The right of the people to take part in village government was satisfied at least to a certain degree through the control exercised by the notables, who were the elite, and through the process of nominating the village chiefs. The monarchy became less autocratic because of the presence of those elements that to some extent represented the people in the village government. District, prefectural, province, and even central officials would likewise not act in too arbitrary a way, in part because the village council of notables had among its members some retired officials.²⁷⁶ According to Alexander Woodside, the provincial, prefectural, and district officials in Vietnam were in a stronger position in their supervision of the Vietnamese villages than their counterparts in Ch'ing China with respect to Chinese villages, because they supervised smaller jurisdictions, but that fact, however, did not lead to more authoritarianism because the Vietnamese administrators did not exploit their position of strength and simply restricted their role to tax collection and preservation of public order.²⁷⁷ As a result, we have the saying, "The laws of the emperor give way to the customs of the village" (*phép vua thua lệ làng*), which "exalted the supposed inability of the centralized political power to dominate the villagers' lives."²⁷⁸

If there was only limited popular participation in government through the nominating process at the village level, was there equality of access to public offices through the appointment and other processes? The answer is a qualified yes. Through the examination system, which was designed to identify the best scholars for officialdom, access to public offices and opportunity for upward social mobility were available to almost anyone with a talent for classical studies.

Examinations were first organized in Vietnam in 1075 under the Lý Dynasty.²⁷⁹ Under the Trần Dynasty, there was a doctoral examination (*thái học sinh* examination) in 1232 with successful candidates listed on three tables.²⁸⁰ During the Lê Dynasty, examinations were held more regularly; generally speaking, there were two principal examinations: provincial examinations in

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which the successful candidates were selected as *cử nhân* (in Chinese, *chū jen*, meaning “recommended men”), and a central examination, given in two stages at a central government agency in the capital and then in the imperial palaces, out of which emerged the *tiến sĩ* (in Chinese, *chin-shih*, or “presented scholars”). Besides these two examinations there was also a preliminary examination to select candidates for the provincial examinations. Those candidates who succeeded in it would be exempt from military service and corvée.

The first edict providing for examinations under the Lê Dynasty was issued in 1434 by Lê Thái Tông, who decreed that after 1438 there would be provincial examinations in the provinces and after 1439 a doctoral examination in a central government agency in the capital. From that time on, provincial and central examinations were to be held every three years.²⁸¹ In 1462, Emperor Lê Thánh Tông issued a decree on guaranteeing the identity and morality of candidates at the provincial examinations: Candidates had to declare their identity (native village and so on); village officials or commanders (if they were military) had to guarantee in writing that they were persons of good morality. Those guilty of lack of filial piety, discord, disloyalty, incest, or perversity would not be permitted to register for the examinations.²⁸² Thus everyone, whether his background was civilian or military, was entitled to an opportunity to take the examinations and enter the officialdom, provided he was of good moral character.

The examination system, which “attained a definitive maturity under the Lê Dynasty,” was inherited in the 1800s by the Nguyễn,²⁸³ who began to hold the provincial examinations in 1807 at six provincial sites. During the Gia Long era, only these examinations took place and at six-year rather than three-year intervals—in 1807, 1813, and 1819—because drought and famine in North Vietnam had postponed the 1810 examination, thus setting a precedent for a six-year interval. From the 1820s on, the provincial examinations began to be held every three years, producing the *cử nhân*. The central examinations in the capital and in the imperial palaces began to be offered from 1822 and 1829, respectively, out of which emerged the *tiến sĩ*. A third group of scholars, the *tú tài* or licentiates, were candidates who had passed all but one of the three or four stages of the provincial examinations; in other words, they differed from the *cử nhân* in only one stage of the provincial examinations.²⁸⁴

Persons who were successful at examinations and held any of the above titles would be included in the ruling political élite. Thus, according to a formula in the 1830s, the *chức sắc hạng* or “men of the governmental background category” consisted of officials from the first to ninth ranks, doctoral degree holders, the *cử nhân*, the “shade” students or sons of illustrious fathers (*âm sinh*) and the *tú tài*.²⁸⁵

Moreover, as Woodside has pointed out, while a commoner in China could enter the higher examination system, which promised political and social

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advancement only if he had passed three sets of school examinations (*t'ung shih*) in his district and prefecture (district examination, *hsien shih*; prefectural examination, *fu-shih*; and academy examination, *yüan shih*), in Vietnam there were no such three-tiered preparatory qualifying examinations.²⁸⁶ In other words, upward social and political mobility through the examination system in Vietnam did not require overcoming as many obstacles as in China. Both the Lê and Nguyễn dynasties made efforts to give an equally fair chance to all scholars at examinations and therefore to guarantee their equal access to public offices.

The Lê Dynasty required officials who had relatives among the candidates selected or recommended for the central examination, which was held in the imperial palace, to disqualify themselves.²⁸⁷ The Nguyễn also had laws of avoidance or disqualification for cases in which examiners had among candidates at their site such relatives as children, brothers, patrilineal uncles, and nephews. Subordinate officials had to supply certificates stating that they had no relatives among the candidates at their site.²⁸⁸ The Nguyễn sought to impose restrictions on the behavior of examination site censors, prohibiting them from freely going in and out of the site, grasping and examining papers, and having foreknowledge of the names and native place records of the candidates.²⁸⁹ The identities of candidates were disguised by the Lê procedure of copying the candidates' papers before sealing them off and delivering the copies to the examiners,²⁹⁰ and by the Nguyễn method of assigning a series of designations to the different papers of a candidate.²⁹¹

Severe punishments were meted out for those officials who favored one candidate over others or who tolerated any fraud. For example, penal servitude was imposed in 1673 on a provincial official who accepted bribes to favor certain candidates and another who hid documents in the examination sites and substituted examination papers; another examination official was dismissed from service.²⁹² In 1696, the head of an examination site was condemned to strangulation, a censor to demotion, and other officials to fines for passing a candidate whose paper had already been graded as failing.²⁹³ In 1768, a reexamination of candidates was imposed in Nghệ An as rumors spread that unqualified candidates were passed; later, two officials were demoted when the alleged fraud was substantiated.²⁹⁴ In 1775, Lê Quý Kiệt, son of the famous scholar-official Lê Quý Đôn, exchanged examination papers with Đinh Trung, Đôn's student, on the suggestion of Đôn, who wanted Kiệt to become the most outstanding candidate. Đôn was exempted from punishment by Lord Trịnh Sâm only because he was a high dignitary, but his son was jailed and Đinh Trung exiled.²⁹⁵

Thus the examination system, which the Lê and Nguyễn governments tried to run fairly, served the purpose of recruiting into the political and social elite individuals with academic merit drawn from practically all social classes.

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There were, however, some limitations upon this opportunity for equal access to public offices. Woodside has suggested that “it was unlikely that the fish vendor’s son could very easily become a mandarin. He lacked property, and he lacked personal contacts with bureaucrats and scholars. But above all, he lacked a family tradition of Sino-Vietnamese classical education and the leisure to set about continuing such a tradition himself.”²⁹⁶ Did this social constraint (which has been summarized in the popular saying, “The son of the emperor will become emperor, the son of the pagoda watchman will sweep the leaves of the *bồ* tree”) constitute a denial of equal access to public offices? We must answer in the negative, because such inequality of opportunity did *not* result from the government’s *deliberate* policy of unequal treatment.

Government-imposed restrictions on equal access to public offices were to be found elsewhere, in laws and regulations. Under the Lê, descendants of the principal offenders in the crime of surrendering to enemies could not be appointed as officials unless they had atoned for their ancestors’ guilt with great achievements or showed talent;²⁹⁷ nor could they take examinations.²⁹⁸ More unjust, from the human rights standpoint, was the ban on singers and actors as well as their descendants from taking civil service examinations.²⁹⁹

As we have pointed out earlier,³⁰⁰ Nguyễn law did not discriminate against actors, actresses, singers, and their descendants who desired to take examinations and join public offices, probably out of respect for Đào Duy Từ, son of a singer’s family who had migrated from North to South Vietnam to help the Nguyễn Lords consolidate their power.

Under the Nguyễn Dynasty, however, there was another type of inequality of opportunity for entrance into the civil service system. We have mentioned earlier the “extendable privileges” or “shades” that permitted sons of officials to receive appointments in officialdom.³⁰¹ Within the National College, which prepared scholars for the examinations, sons of high officials could also receive shade appointments. As of 1844, all the sons of first-, second-, third-, and fourth-rank civil officials serving in Huế, and one of the sons of a fifth-rank official, could receive admission, with stipends but without having to pass examinations, into the National College. All the sons of first- to third-rank civil officials serving in the provinces, and one of the sons of a fourth-rank official, were similarly favored.³⁰² Thus, at the National College, there were many types of students: “assembled regular students” (*giám sinh*); “tribute students” (*công sinh*) chosen annually by the prefectures; “shade students” (*âm sinh*), who were sons enjoying the “shade” or sponsorship of their civil or military fathers; and “students from the imperial house” (*tôn sinh*).³⁰³ Only in 1848 did the preferential treatment for “imperial household students” and “shade students” greatly diminish. Before that date, from 1827 to 1848, they were given superficial tests on the Chinese classics and Vietnamese legal texts and then

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were awarded offices; after 1848, they were required to pass stiff, three-stage eligibility examinations before they could be employed.³⁰⁴

In conclusion, the examination system of traditional Vietnam provided almost full equality of access to public offices for all social classes, the only reservation to this observation being some discrimination in favor of officials' sons and against the families of singers and actors.

Economic, Social, and Cultural Rights

As we saw in the Introduction, the Universal Declaration of Human Rights in its Article 22 provides that all members of society are entitled to the “realization, through national effort and international cooperation and *in accordance with the organization and resources of each State* [emphasis added], of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” Article 2 of the CESCR states:

1. Each state... undertakes to *take steps*, individually and through international assistance and cooperation especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures. (Emphasis added.)

Thus, even in the context of today’s international human rights standards, the state’s commitment to implementing the economic, social, and cultural rights of its citizens is limited by each country’s resources. These rights are *goals* to be defined flexibly and to be realized gradually with due regard to the availability of resources. The state is not legally bound to realize these rights up to any predetermined level; the state is only required to pursue them as ideals. In other words, even in the modern conception there would be no way to enforce these rights in a court of law or through other binding proceedings, the only exception being the right of property ownership.

With that in mind, we examine the historical records to see how much commitment to the economic, social, and cultural rights of the individual the Lê and Nguyễn governments displayed. And if they also provided for a way to enforce some of these rights, the record could be hailed as quite positive.

Economic Rights?

As has been noted, the Universal Declaration lists a number of important economic rights in its Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the

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event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Did Lê and Nguyễn Vietnam provide such economic benefits as social security for the old or the disabled, medical care for the sick, and food, clothing and housing for the people at large?

Social Security?

The idea of social insurance against unemployment did not exist in traditional Vietnam. The governments of the Lê and the Nguyễn, however, felt the state had an obligation to provide food, shelter, and medical care for the sick or disabled who were indigent, and for the widows or widowers and the orphans who did not have any kin to take care of them.

According to Article 294 of the Lê Code:

Whenever there is a disabled or sick person in the wards and lanes of the capital or in the villages who is not cared for by anyone and who is staying temporarily on roads or bridges, in inns or Buddhist or Taoist temples, the officials of the ward or village concerned must proceed to those places and build a shelter to protect and help such a person. They must also provide him with food and drugs and endeavor to save his life, instead of watching with indifference his sufferings and progressive deterioration. If death unfortunately ensues, these officials must report the fact to higher authorities and carry out a burial with available means so that the remains shall not be exposed. Ward or village officials who violate these provisions shall be demoted or dismissed.

Article 295 states further:

Whenever widowers, widows, orphans, solitary persons, or people afflicted with slight or serious disability are living in a destitute condition, lacking relatives to care for them and unable to live by themselves, the authorities of the administrative areas concerned must take them in and support them. Failure to do so shall subject said authorities to a punishment of fifty strokes of the light stick and a one-grade demotion. Should those poor people be provided with clothes or food, officials or clerks who reduce the number or quantity of the allotted items shall be punished as if they were superintendents and chief guardians guilty of stealing things in their custody, with some reduction in the penalty.

Whereas the Lê Code thus recognized the obligation of the state to give assistance to the sick, the disabled, the widowed and the orphaned—and even subjected to sanction those state officials who failed to provide such assistance—the Nguyễn Code did not incorporate the Ch'ing Code article equivalent to Article 295 of the Lê Code. The Nguyễn, however, made it a practice, whenever rice shortage and starvation threatened, to distribute free rice to the old, the disabled, the orphaned and children. The Minh

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Mạng Emperor encouraged local officials to do so without any obligation to report to him.¹ Besides this emergency measure, the Minh Mạng Emperor also established “Offices of Nurturing and Assistance” (*Sở Dưỡng Tế*) in the provinces to provide housing, food, and pocket money for the sick, the disabled, the widowed, and the orphaned; when these people died, means were provided for their decent burial.² The Tự Đức Emperor also approved the policy of distributing money and rice to the parents or orphans of civil servants or military personnel who died in service or in battle.³ Thus, although the Nguyễn Dynasty did not provide for social security for the sick, the disabled, the old, and the orphaned in its legal code, it adopted in practice and also in separate regulations the same kinds of measures of assistance.

Medical Care?

In an underdeveloped country during a period of rudimentary medical science such as traditional Vietnam, one would not expect the state to provide a high level of medical services and an efficient program of disease prevention and control.⁴

In 1907, for the first time a rather comprehensive program of public health measures was provided for in a royal decree dated December 6, which called for: vaccination; protection of water streams, roads, gardens, and public markets against pollution by human excrement or animal bodies; quarantine of persons with contagious diseases; controlled inhumation and disposal of corpses.⁵ These measures, however, were adopted when Vietnam was already a French protectorate and could not be counted exclusively as part of the traditional Vietnamese state’s concern for medical care of the people.

For earlier periods, however, we also find in Lê and Nguyễn legislation and practice some evidence of the state’s concern for the health of different strata of the population.

First, army personnel who became ill would receive medical attention as a matter of right. Any commander who failed to provide or request such medical care for his sick men would be punished with the stick penalty (Nguyễn) or penal servitude (Lê).⁶ A 1666 Lê edict made it clear that the government provided medical care for soldiers so that they could preserve peace of mind as well as their strength and élan in national defense. The edict stated:

Up to now, foodstuffs have been distributed, but regulations on medicines have not been fixed. Now that the army in the capital has been divided into the right, left, front, and rear units with right, left, front, and rear dispensaries and with government medicines stocked in the care of supervisory officials, henceforth when a military man from company commander to simple soldier falls sick, he should be provided with medicine and taken care of by his

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commander in case of minor illness, so that all soldiers can have peace of mind. In serious cases, the sick man should be sent to his unit's dispensary to be treated with appropriate medicines by the competent physicians . . . so that efficient cures can preserve the strength and élan of all soldiers.⁷

The Nguyễn Code official commentary on Article 342 also specified that officials should have compassion for soldiers and civilians when they were ill, more so if the soldiers were in garrison in a military post or if the civilians were craftsmen on a public work project.

Both the Lê and the Nguyễn recognized the state's obligation to provide medical care for *corvée* men working for the government. Heads of the public agencies using *corvée* laborers or craftsmen in government service had the duty to request or provide medical care and drugs to these men.⁸

As for the sick among the accused detained in jails pending trial, they were entitled to medical examinations and medicines if they were to be kept in the detention houses for major offenses or released on bail to the care of their relatives and friends if only minor offenses were involved. Failure to respect this right of the accused would lead to the stick penalty, demotion, or penal servitude for the responsible prison officials. In the Nguyễn Code, even the higher officials supervising the prison system would be punished as well.⁹

As for medical care for the population at large, we found no evidence of a widespread network of health care centers in traditional Vietnam. As mentioned, however, local officials had the duty to provide medical assistance (in addition to food and shelter) to those solitary persons who had no relative or friend to take care of them when they fell sick. Thus medical care for these poor people was a matter of right. The government also stepped in whenever there was an epidemic. In the twentieth year of the Minh Mạng reign (1840), for example, there was a great epidemic in North Vietnam; the emperor issued an edict ordering the establishment of altars to pray for the people's recovery and the dispatch of physicians to affected areas. When the epidemic subsided, officials memorialized proposing that the delivery of medicines to the people be ended; but the emperor retorted: "I would not hesitate to spend all my gems and treasures to cure the epidemic. The medicine being distributed does not cost much. Why are you so stingy? You should order physicians to come to wherever necessary to cure the epidemic among the people to make it ten times lesser."¹⁰ Finally, the government also protected the health of the population in general by punishing medical malpractice, such as prolonging the patient's illness for gain or mistakenly or intentionally deviating from established medical methods.¹¹

Freedom from Hunger?

The most crucial test of a government's concern for the people's right to a decent standard of living is the measures it adopts to feed, clothe, and house

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its citizenry.¹² Most important for livelihood is, of course, the right to have adequate food or to be free from hunger, which a government may satisfy through improving methods of production and distribution of food with technical and scientific advances or the reform of the agrarian system.¹³ How did traditional Vietnam fare in this area?

Construction and Maintenance of Dike and Irrigation Systems. Maintenance of agricultural systems was a recurrent worry for all the dynasties in traditional Vietnam. Because of cultural conformity, lack of scientific knowledge and even lack of capital for innovation, the dynasties did not improve the perennially old agriculture techniques. The huge efforts put into the construction and management of the dike and canal systems were, however, evidence of governmental effort to improve agricultural production.¹⁴

Land Distribution and Land Development Programs. Most interesting from the human rights standpoint, these programs jointly constituted the continuing reforms of the agrarian system for better utilization of land resources.

Land distribution. This category includes programs of public land distribution and measures affecting privately owned land.

Public land distribution was a continuing policy under the Lê. Immediately after Emperor Lê Thái Tổ ascended the throne in 1429, he showed intense interest in distributing public land to benefit every citizen in the country. The emperor told his assembled civil and military officials of the great national task awaiting implementation and of his concern that those soldiers who had fought the Chinese during the war of liberation had little land to live on whereas scoundrels who contributed nothing of value to the nation had too much land. Consequently he ordered his high officials to discuss and determine the land portions to be distributed to “officials, military men, and commoners, whether they were high dignitaries, the old, the weak, the widowed or the orphaned.”¹⁵

Lê Thái Tổ promulgated thirty-two articles on land that were incorporated in the original chapter of the Lê Code on real estate.¹⁶ Public land, if not cultivated in state farms run by soldiers or various government agencies, would be granted, temporarily and without full ownership right, to the civilian population of all categories (commoners as well as officials) and to the military men, as a basis for their livelihood and for raising the grain tax. Out of this distribution emerged the “officially granted land” (*quan thụ điền thổ*) for officials and commoners, and the “allotment land” (*khẩu phân điền thổ*) for military men. Both these types of land could not be sold.¹⁷ As the main purposes were to promote production for the people’s livelihood and for tax revenue, officials had to see that all land was distributed and not left uncultivated.¹⁸ People were permitted to reclaim wilderness land with no limit on the maximum area. For registered public land, however, limitations were imposed on the extent of area each person might occupy.¹⁹

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The land distribution policy was continued by succeeding emperors. Lê Thánh Tông issued decrees in 1477 laying out details on public land distributed every six years to officials, commoners, and soldiers.²⁰ During the Restored Lê period, the government adopted further measures to limit the area of public land each person might receive in the distribution in order to maintain an equitable distribution of land. In 1659, a decree warned soldiers against occupying public land beyond the portions already allotted to them in their village of origin. Anyone who had been given “officially granted land” such as “land for meritorious subjects,” “land for ambassador,” “worship property,” and the like would have to deduct this area from their portion of the distribution.²¹ A 1670 edict limited to 10 *mẫu* per individual the total amount of land received as perquisite for officials, for meritorious subjects, or allotment land.²² In 1711, another decree, repeating the six-year periodical distribution, specified that anyone with officially granted land or private land belonging to him or his wife that was equivalent to the amount he would be entitled to in the public land distribution program would not be given any of this distribution land.²³

The Nguyễn Dynasty continued the policy of public land distribution. At the beginning of the dynasty, the area of public land shrank to a small percentage of the total acreage because of the privatization of land during the civil war years at the end of the eighteenth century. After observing that land had been taken over by the local tyrants, a reformer, Phan Huy Chú, proposed that the inequality in ownership patterns should be abolished by a land redistribution program in which each person was to hold about 5 *mẫu* so that everyone would have land to till and no one would go hungry.²⁴

In 1803, the Gia Long Emperor reissued the ancient prohibition on the sale of public land²⁵ and then embarked in 1804 on a program of distributing public land that was allotted to each individual in proportion to his or her rank or social category.²⁶

Again, under succeeding emperors, the government sought to expand the area of public land by repeating the ban on selling public land and by ordering wealthy owners to volunteer to donate one-third of their land to the government for distribution to the people.²⁷ In 1840, a revised and more egalitarian program of public land distribution was adopted. Public land distributed in this manner was called allotment land (*khẩu phần điền thổ*). Each person in the categories of officials, soldiers, craftsmen, and tax-paying commoners would receive one allotment part, without any reference to rank or grade; the old and disabled would receive half the part; the orphaned and the widowed would receive a third of the part. Anyone who established residence on public land would have to deduct the occupied area from the allotted portion; if the occupied area exceeded the allotted portion, a tax at twice the regular rate would be collected on the excess area.²⁸

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The result was apparently an equalization of public land holding under the Nguyễn. The majority of the holdings measured 5 *mẫu*. In each province, only scores of persons held up to 100 *mẫu*; those who held above 100 *mẫu* numbered only three or five.²⁹

To support the livelihood of the people, the Vietnamese dynasties also adopted agrarian reform measures that *modified or conditioned private land ownership patterns*.

Lê Thái Tổ's land distribution policy did not seem to jeopardize private land ownership. If anything, it actually laid down the legal framework that facilitated the acquisition of land ownership rights. According to the Lê Code articles promulgated under his reign, the long-term occupation of wilderness and unregistered land gave rise to a protectable ownership right against the claims of all, including those who produced ancient contracts or deeds to stake a claim on the land. Under this doctrine of adverse possession or positive prescription by occupation—also used in modern Western law—the Lê Code recognized the right of ownership for such an occupier of unregistered land and punished anyone who denounced him.³⁰ Even for registered land unclaimed and abandoned by its owner, if the period of positive prescription of twenty or thirty years had run its full course, the occupier-tiller of the land would also acquire title against the owner. The only defense for the owner would be to cite war or population migration as an explanation of his absence.³¹

According to Philastre, the Nguyễn followed the same principle of land acquisition by occupation and tax payment. Any person could, at no cost, acquire private ownership of public land by filing an application to put the land in question into cultivation and pay tax on it.³² The newly excavated land would be measured for tax purposes by the government. Anyone who failed to pay tax would find his land reverted back to the public domain,³³ and another person who was willing to till it and pay tax on it would be in a position to take over the ownership.

The Lê and Nguyễn policy of facilitating private ownership of land served the purpose of providing a means of livelihood for the people. But a complete laissez-faire policy might lead to the other extreme, undue concentration of land ownership, which would reduce many people to the status of landless poor with no economic means to free themselves from the threat of hunger. Did the governments of traditional Vietnam try to eliminate such an outcome? Because large land estates had been increasing under the feudal Trần Dynasty in 1397, Hồ Quý Li ordered that except for princes and the eldest princess, whose land area was not restricted, each person could own only 10 *mẫu*; the excess was to be surrendered to the state.³⁴ Besides this early land reform measure, we witness another crackdown on big land estates in eighteenth-century Lê Vietnam. A 1711 statute³⁵ abolished these farming

estates. After expounding on the abuses and inequities caused by the big landowners, the statute declared:

From now on, officials and rich people are forbidden from taking advantage of the poverty and dispersion of the villagers to usurp through purchase their land and to create farming estates where registered people in flight can take refuge and are used as farm labor. The owners of these estates shall have three months to abolish them themselves. If they delay or refuse to carry out this order, they shall be prosecuted.

The Nguyễn Dynasty also opposed the concentration of land ownership. Even meritorious subjects of the Gia Long period were granted only small areas of land from 3 to 15 *mẫu* in size. Under the Tự Đức Emperor the areas were further reduced to 2 to 10 *mẫu*.³⁶ Many edicts were issued to remind officials and the rich to refrain from taking advantage of the poverty or dispersal of the villagers to take over land. Dispersed people who returned home could always take back their land. In 1839, the Minh Mạng Emperor ordered that any mortgage-sale of land had to specify a redemption period so that the mortgagor-sellers could redeem their land at the end of the period without difficulty.³⁷

New land development. In their effort to keep the people free from hunger, the Lê and Nguyễn governments knew that the better solution, in the face of an expanding population, was not the redistribution of a cake but its enlargement. They sought to increase the area under cultivation with new land development programs. This policy also went hand in hand with the southward advance of the Vietnamese frontier.

Military farms run by farming soldiers (*chúng điền binh*) and state farms operated by government agencies already existed at the beginning of the Lê Dynasty.³⁸ In the fifteenth century there were, in addition to fifty-three agricultural extension offices, forty-two farms, eighteen animal husbandry centers and thirty-one silkworm-breeding farms in all the national territory.³⁹

During the Restored Lê period, the policy continued in the northern part of the country, with the soldiers back from their campaign being permitted to establish military farms in the southern provinces such as Nghệ An and Hà Tĩnh. These farms were later carved up and distributed to the people.⁴⁰

In South Vietnam under the Nguyễn Lords, where more new land was available with the southward expansion of the territory into the Châm and Cambodian kingdoms, the program of new land development was more extensive. The Nguyễn followed basically the rules of the Lê-Trịnh court in this respect but encouraged private land development more than the latter. First, the Nguyễn Lords developed public land through establishing military farms with soldiers and other state farms with vagrants, convicts, or war prisoners. These farms constituted public land (*quan điền thổ*). But the state did not keep it that way: Aside from some parcels rewarded to officials and

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sometimes to the developers themselves if land abounded, most new land was assigned to newly created villages, which was then distributed periodically among the people according to established rules.⁴¹

Second, the state also gave new land concessions to private interests. Members of the reigning family, high dignitaries, and entrepreneurs excavated new land with hired labor while enjoying the government tax holiday of three years. According to the nineteenth-century official Trịnh Hoài Đức, people were completely free to exploit new land and establish new villages; the individual needed only to inform the government of his plan. The government did not even measure or classify the land transferred in concession to private persons; each paid tax with a small or a big picul (weight unit of 133.33 pounds) at his own choice: "Old rules were followed but without much attention to details."⁴² As a result, small landholdings were combined with big landholdings, which were operated directly by owners with the help of their serfs or rented out to tenants.⁴³

The combination of public and private efforts in new land development programs continued under the Nguyễn Dynasty in the nineteenth century. The Nguyễn emperors continued granting wilderness land concessions to private developers; such land would become privately owned ricefields.⁴⁴ The government gave even more concrete assistance to this private land development effort: providing initial capital; carrying out public work projects in the development areas, such as canal digging and housing construction; granting a tax holiday of three to ten years; and rewarding the principal developers.⁴⁵ Participants in the private land development projects were able to keep the land they developed for their lifetime, having to return it to the government only upon their death. In 1864, the Tự Đức Emperor decided that where government support had been provided, one-third of the developed land could become private land but two-thirds was to become public land. After 1882, the government no longer gave capital assistance to private land development, but the people could keep half of the newly developed land as private land.⁴⁶

A shining example of these publicly funded private land development projects was the development of accretion land in Ninh Bình and Nam Định provinces supervised by Nguyễn Công Trứ in 1827–1832. Private land developers recruited workers, but the government gave to each group of sixty persons a sum of 100 *quần* for housing construction, 300 *quần* for buying buffalo, and 40 *quần* for buying agricultural implements; as a consequence, 33,570 *mẫu* of new land were developed. In 1832, another similar program was run by Nguyễn Công Trứ in Quảng Yên Province, increasing the acreage by 3,500 *mẫu*.⁴⁷ The government also pursued this kind of private land development in South Vietnam. Under the Tự Đức Emperor, participants were organized into companies of fifty men and brigades of 500; recruiters were rewarded with ranks.⁴⁸

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As the Vietnamese villages became increasingly autonomous administrative entities under the Nguyễn, they were also encouraged to engage in land development by the government's policy of granting rewards to village and provincial officials for excavating new land and imposing penalties on them for leaving land uncultivated. The land developed by the administrative units would become communal land, thus ultimately distributed to the people in the public land distribution process. Most of the new land developed by the administrative units was in South Vietnam, where wilderness land abounded.⁴⁹

Finally, the Nguyễn central government itself engaged in new land development. As early as 1790, Nguyễn Ánh, the future Gia Long Emperor, resumed the policy of establishing state farms with soldiers and convicts. The government provided all the material support (agricultural implements, draft animals, seeds, money for housing and food). Besides those advantages and their salaries, soldiers were allowed to keep all proceeds from the farms during the first two or three years, and beyond that time, still to keep these proceeds after deducting an amount to pay the grain tax. The land would be allocated to neighboring villages as communal land when the soldiers moved away. As for the convicts, they were also allowed to keep all the proceeds during the first two years and had only to pay the grain tax from the third year on; after the expiration of their term, they were given a share of the land to keep as private property.⁵⁰

As a result of these programs, cultivated acreage increased under the Nguyễn. In the eleven-year period from 1836 to 1847, the figure zoomed from 4,063,892 *mẫu* to 4,278,013 *mẫu*.⁵¹

Food Distribution and Other Relief Measures in Times of Trouble. Land distribution and development are measures that help the people fend for themselves in their struggle for adequate food and shelter as well as other means of livelihood. But a government that pays attention to the people's right of freedom from hunger should also try to help them when the harvest is lost and malnutrition and starvation threaten. Did the Lê and Nguyễn dynasties adopt relief measures for the population in times of trouble?

The minimum, required by justice and equity, a government can do in case of crop failure is to waive the agricultural tax and see to it that landlords decrease their rent proportionate to harvest loss. Such had been the dynastic policy since the Trần waived the agricultural tax on the poor.⁵² Upon ascending the throne in 1428, Lê Thái Tổ forgave all land taxes for two years.⁵³ The reduction or exemption of land taxes in case of calamity resulting from drought, flood, rain, hail, pests, or locusts had been incorporated as a right in the Lê Code: If officials failed to report the calamity or did not do so faithfully, with the result that taxes were wrongfully collected,

they would be punished with the heavy stick or a fine and required to pay not only the taxes wrongfully collected but also punitive damages equal to twice the value of the taxes. Even for late reports beyond the specified time limits that led to a loss of verifiable vestige of the damage to the crop, officials had to pay back the taxes wrongfully collected.⁵⁴ As for the rent, the landlord, whether a private person or the state itself, had to reduce it in case of a poor harvest.⁵⁵

The Nguyễn Dynasty adopted the same policy of requiring officials to verify damage to crops caused by natural calamity and granting tax reduction to the people.⁵⁶ According to a decree in the seventh year of Gia Long (1808), the rate of tax reduction would be two-tenths for a loss of four-tenths of the harvest; three-tenths for a loss of five-tenths; four-tenths for a loss of six-tenths; five-tenths for a loss of seven-tenths; six-tenths for a loss of eight-tenths; seven-tenths for a loss of nine-tenths and total exemption in case of total loss.⁵⁷ Later, the rate of tax reduction was fixed as three-tenths for a harvest loss of five-tenths, five-tenths for a loss of seven-tenths, or total exemption for a harvest loss of over eight-tenths.⁵⁸ As for rent reduction in time of poor harvest, it was a customary practice in Nguyễn Vietnam, although we do not find a legal requirement in the Nguyễn Code to that effect.⁵⁹ Under Minh Mạng, taxes and corvée were waived many times for poor people or people afflicted by natural calamities,⁶⁰ and the emperor also praised those wealthy persons who canceled debts owed by poor people.⁶¹

More direct and positive relief action was also taken by the Vietnamese dynasties when crop failure and rice shortage brought about the threat of famine. Price-stabilizing stocks of grain already existed under the Lê Dynasty.⁶² Under the Nguyễn, although at first the Gia Long Emperor ordered government paddy to be sold at a low price to the starving people,⁶³ the Minh Mạng Emperor rejected a proposal in 1821 by provincial officials to accumulate such stocks in the provinces. He retorted: “[This] belonged to an excellent law of the past. But to practice it now would be most difficult.”⁶⁴ In 1834, Nguyễn Đăng Giai suggested that a communal granary be established in each village to give relief to those villagers afflicted by famine. But again, Minh Mạng rejected this proposal brusquely: “Ages are different and customs are dissimilar.”⁶⁵ In 1835, however, he argued to establish such an emergency stabilization granary (*sở bình thiếu*) in the capital to sell rice to poor people at a low price.⁶⁶ Under Tự Đức, such stabilization granaries (called *bình chuẩn thương* and *xã thương*) were set up on a larger scale in the villages, with rice crops obtained from communal land or bought during glut and then sold at cost to the people in time of famine.⁶⁷ Another method the Gia Long Emperor used to preserve the people from hunger was outright granting of government rice.⁶⁸

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His successor, the Minh Mạng Emperor, considered it wise in time of rice shortage or natural calamity to combine these methods of relief assistance (sale or donation of rice) with loans (especially of seed paddy) to all persons. He ordered paddy to be donated to the poor, but all people would be allowed to borrow paddy from the government.⁶⁹ Under his reign and those of the succeeding Nguyễn emperors, these measures of relief were used to respond to many famines.⁷⁰ Relief granaries (*nghiã thương*) were established in the province, prefecture, and district towns with government tax grain and privately contributed paddy.⁷¹ Since the Tự Đức reign, relief granaries were established even in the villages with paddy from communal land or private contribution. The rice in these granaries would be sold or loaned to those people who needed it or given away to the hungry from the same village.⁷² The government rewarded wealthy people who donated relief rice with titles and exemption from tax and corvée.⁷³ People in all provinces, including those hungry ethnic minorities in the Cambodian territory (who “although barbarian also belonged to the population registers of the Court”) received relief rice from these granaries.⁷⁴ The Minh Mạng Emperor imposed sanctions on some province governors as well as financial and judicial commissioners whose slow implementation of the relief program resulted in the starvation death of a number of people and even reprimanded others whose reports on the hunger condition were merely late. He said: “As caretakers of the people you must roll up your sleeves and rush to the rescue of the people in trouble.”⁷⁵ On the other hand, he congratulated those who knew how to use expedient measures, such as spending the reserve fund, to bring food to the hungry masses.⁷⁶

A Keynesian measure also used under the Nguyễn was to employ people threatened by starvation in public works and pay for their labor in rice.⁷⁷

These relief measures caused the government considerable expense including loss due to graft and corruption or mismanagement.⁷⁸ The Nguyễn government’s commitment to the humanitarian effort of feeding the hungry people, however, was evident in Minh Mạng’s statement that he would not spare any fund outlay “even if the expenses were in tens of thousands.”⁷⁹

Protection of Property Rights?

On a more general level, the economic right to an adequate standard of living should include the protection of property rights because property is a means to sustain such a standard of living. Although there is no provision on property rights protection in the two international covenants—a situation that reflected the controversy between developed and developing countries

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on nationalization and compensation—Article 17 of the Universal Declaration states: “Everyone has the right to own property. No one shall be arbitrarily deprived of his property.” This provision means that the individual must be protected against any arbitrary deprivation of his property; if his property rights must be taken away, it should be by the orderly procedure of nationalization or confiscation with fair compensation.

We have seen that both the Lê and Nguyễn governments legally sanctioned the acquisition of property by private citizens. Not only that, the right of property ownership was recognized by the state as inheritable.⁸⁰ The next question is: Did these governments take away with one hand what they gave with the other? In other words, did they protect their citizens from arbitrary deprivation of property?

Protection from Encroachment by Government Officials. First, it is clear that both dynasties sought to protect property owners against encroachments by government officials, although the Lê Code provided for more detailed regulations than the Nguyễn.

Baron made the following observation on the situation in North Vietnam in the 1680s: “[The officials] permit the men of their train (a rude brutish gang) to enter with them into the most private apartments of other people’s houses, especially Europeans, where they behave themselves very apishly . . . ; moreover often steal whatever they can lay hold on.”⁸¹ As for foreign traders, Baron continued,

a new-comer suffers a thousand inconveniences; and no certain rates on merchandizes imported or exported being imposed, the insatiable mandareens cause the ships to be rummaged and take what commodities may likely yield a price at their own rates, using the King’s name to cloak their griping and villainous extortions; and for all this there is no remedy but patience. . . . The Tonqueen trade is at present the most fastidious in all India. . . . This defect and disorder in trade proceeds more from their indigency and poverty than from anything else. . . . The Tonqueenese are not all together so fraudulent, and of that deceitful disposition as the Chinese.⁸²

We do not know how much exaggeration might have entered into Baron’s remark, but from his description we may adduce that under the Restored Lê the rich Europeans, compared to the ordinary Vietnamese, fell prey more easily to rapacious mandarins.

From the human rights standpoint, the critical test is whether the Lê government made a commitment to suppress any violation of property rights by officials. The answer is yes: If we compare Lê and Nguyễn legislation, the Lê provided in more detail for penalties against official encroachment of property rights, uniquely stipulated the payment of punitive damages in addition to the return of the property taken (and the

criminal sanction), and specified in its Procedural Code some steps to be taken by the citizens to enforce their property rights vis-à-vis the officials.

An official or his subordinate clerks or officers might violate private citizens' ownership rights in three ways: by outright misappropriation; by using public business as an occasion or pretext to violate property rights; or by taking advantage of his position of power to exert coercion and exact unfair economic deals from common citizens. The Lê and Nguyễn codes cracked down on all three types of violations.

As we have seen, under the Lê, officials and rich people had been taking advantage of population dispersal to usurp the common people's land and create vast estates. Besides the administrative measure of abolishing these large estates, the Lê Code would subject to fine or demotion those high-ranking or powerful families who took by force landed property from commoners and require them to return the seized property and pay punitive damages.⁸³ The Lê government was also well aware of the tendency of serfs or servants of the powerful to rely on their master's power to deprive the common people of their property. If the princes' or princesses' serfs occupied the common people's land illegally, the masters who tolerated such acts would be punished with a fine or demotion and local officials would have to report these acts or suffer a penalty.⁸⁴ If cooks from imperial kitchens or powerful families' households misappropriated items in the market or bought them at low prices, they would be punished with penal servitude and the heads of the households would be fined. The market supervisors who failed to arrest the offending cooks would also be punished; on the other hand, any outsider was allowed to arrest such offenders.⁸⁵ Generals in military territories who exacted greeting gratuities (*xướng dạ tiền*) in the districts under their jurisdiction would be demoted and required to pay back the amount exacted plus punitive damages.⁸⁶ In both the Lê and the Nguyễn codes, officials or subordinates who illegally collected money or goods from soldiers or commoners, whether for a private purpose or a public need, would be punished for bribe taking and, in the Lê Code, required to return the illegal contributions plus punitive damages.⁸⁷ The Lê Code drafters were particularly averse to these illegal collections; thus they specifically singled out and punished officials' collections for the New Year Festival, sacrificial ceremonies, or presents for the emperors.⁸⁸ The Nguyễn legislators provided severe penalties (up to strangulation if the amount was important) for illegal collection to buy presents for anyone (not just the emperor).⁸⁹

Officials and their subordinates often took advantage of their public business to extort money or goods. In both the Lê and the Nguyễn codes, officials who, while arresting offenders, looted or exacted money from them, or who falsely accused people in order to extort money, would be severely punished (from penal servitude to exile); in the Lê Code, they were

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required to pay back the amounts plus punitive damages.⁹⁰ Under the Nguyễn, if the arresting officers, on the pretext of carrying out the arrest warrant, looted the property of innocent people, they would be put to death or exiled. Neighbors of the victims were obliged to denounce the crime and officials had to pursue the offenders; if not, all were punished.⁹¹ Again under the Nguyễn, after the case of one Nguyễn Văn Tuấn (who misappropriated property while on an inspection tour) was examined by the Minh Mạng Emperor who had his penalty increased from dismissal for misapplication of the law to decapitation after the assizes, the emperor issued an edict imposing decapitation with exposure to the public on whoever misappropriated the people's property when making an arrest.⁹² Under the Lê, if a person were not in a position to make an arrest yet fraudulently claimed to have an imperial order to do so and then looted people, he would be exiled and required to pay back the property looted plus punitive damages.⁹³

Officials or subordinate officers were allowed certain perquisites during the exercise of their public functions, but if they exceeded the statutory amount or limit of perquisites and violated the common people's property rights, they would be penalized. The Lê Code would demote or dismiss them, subject them to the stick penalty or penal servitude, and require them to pay punitive damages.⁹⁴ Public officials on missions who required inordinate numbers of escorts or food allotments exceeding the legal quotas were to be punished with the stick penalty and demotion and were further required to pay punitive damages.⁹⁵ Members of the judiciary or clerks could not exact fees beyond the official rates; if they did, they would suffer from the criminal sanctions and punitive damages just mentioned.⁹⁶

In tax collection, if the collectors increased the taxes and misappropriated the excess amounts, or assessed what was not due, they would be, under the Lê, punished for concealing state property, demoted or fined, and required to pay back the excess amounts and punitive damages to the victims.⁹⁷ The Nguyễn Code did not mention the punitive damages and only punished such officials for unjustly imposing the undue tax.⁹⁸ In carrying out public works, if the officials requisitioned excess labor or expenses, under the Lê Code they would have to return the balance to the people (or the state, as the case might be);⁹⁹ under the Nguyễn Code, they were merely punished but were not required to reimburse the state because, as the interlinear commentary of the relevant Nguyễn article made clear, they did not benefit personally from the excess labor and monetary outlay; according to the article footnote, however, the ultimate purpose of this regulation was to prevent any unnecessary harm to the people.¹⁰⁰

Both the Lê and Nguyễn shared a concern that the common people might be coerced into unfair economic deals by officials and thus, indirectly, be deprived of their property rights. The Lê generally punished all persons who

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used coercion to purchase land.¹⁰¹ Similarly, to avoid undue influence in business transactions, the Nguyễn specifically forbade officials to buy land within their jurisdiction under the sanction of dismissal from office and confiscation of the property.¹⁰² If a high dignitary or an imperial household member appropriated a good piece of land, mistreated the merchants, or suppressed free trade, he would be punished by decapitation after the assizes.¹⁰³

The Lê and Nguyễn also generally banned unfair economic deals involving other types of property transactions than land purchase. The Lê Code stated that persons having command over soldiers and commoners would be punished if they exacted or borrowed money or property from people under their jurisdiction or sold them goods or loaned them money at excessive cost or interest; this property would be returned to the victimized legal owner or confiscated, as the case might be.¹⁰⁴ These officials or military officers would also be punished if they took gifts from the soldiers and commoners.¹⁰⁵ The Nguyễn Code also punished the officials or their relatives for using coercion to extort loans of goods or money or gifts from, or make unfair economic deals with, people under their power.¹⁰⁶

The principle of fairness in all economic transactions, including those involving state officials, was upheld explicitly by the Lê and the Nguyễn. A Lê decree of 1669 stated that those in charge of buying [for the state] had to pay the prevailing fair market prices in full to the consenting sellers, to ensure that merchants would be satisfied and willing to sell; in any violation of this provision, the owners who suffered losses could file complaints.¹⁰⁷ Decree 5 following Article 137 of the Nguyễn Code also required that items bought for the government be always acquired at fair market price. A decree of the fourth year of the Thiệu Trị reign (1844) even suggested government purchases be made at higher prices than that usually agreed upon among merchants and craftsmen.¹⁰⁸

In summary, both the Lê and the Nguyễn provided for the protection of private property rights against officials' outright misappropriation, or interference on the pretext of public business, or unfair economic deals imposed with undue influence. Moreover, the Lê in particular established the general principle of punitive damages payable by officials for their violation of private property rights—a provision that was quite unusual in East Asian traditional law.¹⁰⁹ The Lê Dynasty even provided steps in its Procedural Code for enforcing this restraint on possible official violation of property rights: Injured parties might file complaints against tax collectors' exorbitant exactions of various fees and perquisites at the Board of Civil Affairs and complaints against supervisory officials' abusive assessment of taxes at the province Judicial Office or the Censorate. The guilty officials would be fined and lose the power to collect taxes and the amounts collected in excess

would be restituted to the victims. If the supervisory officials, knowing that persons were about to file suit, arrested them and beat them, these persons might bring the matter to the competent local courts; the officials would lose their titles and grades and have to pay compensation for injury or death to the victims. Military personnel to whom tax payments had been assigned as remuneration would also suffer penalties if they exacted tax beyond the authorized assessments. The military commander of the unit was required by law to check constantly whether there was any exaction; if he did not make this check and the people complained, he would be demoted and fined and his subordinates would lose their titles and grades.¹¹⁰

Compensation for Confiscated or Nationalized Property. The second question on ownership rights is: If a state must confiscate or nationalize property, does it provide for adequate compensation or does it at least avoid arbitrary acts of deprivation and provide for a regularized process?

Most of the Lê and Nguyễn provisions on state confiscation of private property related to officials appropriating convicted criminals' property. We are not discussing here the confiscation of objects or property involved in the wrongdoing, or *corpus delicti*, such as bribe money, gambling stakes, smuggled goods or hoarded merchandise, because these illegal items belong properly to the general area of criminal law and their confiscation would be considered normal even in modern criminal law.¹¹¹ We are mainly concerned with the human rights question of whether the property rights of the offenders were duly taken into account when the related issue of the confiscation of their property came up.

Criminals' property could be confiscated only in the limited circumstances enumerated in Lê law; such circumstances occurred primarily when the offenders were punished with exile or death, in which eventuality they could no longer use their property. Thus, under the Lê, only offenders guilty of the following crimes had their property confiscated: discussing governmental affairs in anonymous letters; losing a hundred soldiers or more under one's command; deserting; high treason; grave insubordination; treason; robbery; stealing imperial property or objects in imperial mausoleums or temples; and fleeing the country.¹¹²

We find only three articles in the Nguyễn Code that explicitly mention confiscation of the offenders' property.¹¹³ Article 23 of the Nguyễn Code made reference, in passing, to "the offenses which call for the confiscation of the offenders' property," but it did not list the specific cases in which confiscation was provided. In annotating this article, Philastre hypothesized that "the very rare crimes which lead to the general confiscation of property are those to which a general amnesty does not apply (i.e., those mentioned in Article 15 [of the Nguyễn Code])."¹¹⁴ Reviewing all articles related to the crimes mentioned in

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Article 15, however, we find that only in the four crimes of high treason, grave insubordination, treason, and illicit association mentioned in the three Articles 57, 223, and 224 did the Nguyễn Code explicitly call for confiscation of the offenders' property. Furthermore, Article 131 of the Nguyễn Code specified that besides the four crimes of high treason, grave insubordination, treason, and illicit association, which called for confiscation of the offenders' property, other articles governing criminal offenses that did not provide for confiscation of property did not allow the judge to order confiscation.

Thus, confiscation of property in criminal cases was even rarer in Nguyễn law than in Lê law. At first, during the early years of the dynasty, Article 84 of the Nguyễn Code provided for confiscation of land that had been fraudulently hidden to avoid the land tax. According to Philastre, however, this provision was abrogated by a decree of 1810, which was reinforced by another decree, in 1827, both of which simply required payment of the tax from the year of the discovery of the tax evasion or from the year preceding that discovery. Another decree, in 1834, stated that the hidden land (not declared for registration and tax payment) would be allocated to whoever offered first to pay the tax; thus, the person who had excavated the land and failed to pay the tax could avoid confiscation by acting quickly and paying the tax.¹¹⁵ The risk of confiscation for failure to pay the land tax had practically disappeared.

If the Lê and Nguyễn provided for only a few cases in which an offender's property would be confiscated, they also regulated carefully the process of confiscation. Both punished a judge who ordered an improper confiscation.¹¹⁶ The Nguyễn Code specified that if an amnesty was granted during the period in which the state had not yet seized an offender's property, then he would be exempted from confiscation even if he had already suffered other (corporal) penalties relating to his crime.¹¹⁷ The Lê Code required the confiscated property to be inventoried and deposited with the Treasury and Warehouse Service within the specified time limit; the judge would be fined for any violation of this regulation.¹¹⁸ In the same kind of effort toward a judicious confiscation, the Nguyễn Code tried to differentiate and isolate an offender's property from those of other people. It required the prior division of an estate in which the offender had an undivided interest before the confiscation of the offender's part could take place¹¹⁹ and threatened to punish severely any judge who, without express legal stipulation, held an offender's relatives jointly liable for his crime and confiscated the property of these relatives.¹²⁰ The Lê Dynasty also specifically provided for a minimum amount of property necessary for livelihood that could not be confiscated by the tax collectors or the courts in the process of confiscation: instruments of trade, cattle for agricultural work, personal effects for daily use.¹²¹ This is equivalent to the nonconfiscable reserve portion of property in modern law.¹²²

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Besides these regulations on confiscation in criminal law, did traditional Vietnam provide compensation for nationalization of property initiated by the state? The Lê Code stipulated that the fair value of an article confiscated for the emperor's use would be paid to the owner.¹²³ We do not find in the Nguyễn Code any specific regulation on nationalization, but as Pierre Pasquier noted, "in practice, the Vietnamese government always gave compensation in cash or in kind to the property owner."¹²⁴ In 1809, the Gia Long Emperor fixed the compensation for confiscated property at half the price mentioned in the deed or at 50 *quán* per *mẫu* (a *mẫu* equals 733.5 square yards) if no deed was available. In 1827, the Minh Mạng Emperor stipulated a more adequate compensation for nationalized property: The indemnity would be equivalent to the full price.¹²⁵

Thus we find no evidence of arbitrary deprivation of private property by the state in old Vietnam. Only in one case was there a deviation from this general trend: Under Minh Mạng, after much reluctance, the government confiscated without compensation half of the private riceland in those villages of Bình Định Province in which private landholdings exceeded public lands. Public land area in the province had been reduced to about 500 *mẫu* while the powerful local tyrants grabbed most of the land and owned up to more than 17,000 *mẫu*.¹²⁶ Given the fact that this province was the home of the Tây Sơn emperors, archenemies of the Nguyễn Dynasty, the Nguyễn government probably did not hesitate to resort to unusually strong measures for land redistribution.

Protection of Ownership Rights Against Private Interference. Did traditional Vietnam also provide for protection of ownership rights against private interference? The main focus of our study of human rights has been on the protection of these rights against governmental interference. In some areas of human rights such as racial discrimination, however, state intervention against private encroachment of rights might be a necessary condition for the enjoyment of these rights.¹²⁷ Moreover, Article 30 of the Universal Declaration as well as Article 5 of the two covenants bar, by implication, any violation of human rights by a state or a private group or *person*. Therefore, we think it is proper to enumerate some legal provisions of traditional Vietnam that defended property owners against private interference. To avoid extending this study into a general treatise on civil or criminal law, however, we deem it necessary to be as concise as possible.

Any private encroachment of property rights would result not only in criminal liability of the party at fault but also in his obligation to return the property in question or compensatory damages and, particularly in the Lê Code, his obligation to pay punitive damages. For example, under both the Lê and the Nguyễn, a robber or a thief would be required to return the property in question and, in the Lê Code, to pay punitive damages as well.¹²⁸ Whoever fraudulently sold another person's land or encroached on the boundary of such

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land by removing or setting up boundary posts would be forced under both the Lê and the Nguyễn to return the land or the monetary equivalent thereof, plus the fruit from such land; in the Lê Code, he also had to pay punitive damages.¹²⁹ Under both codes, whoever wounded, killed, or misappropriated buffalo and cattle belonging to another person would have to pay the price of the animals or the equivalent of the loss of their value; in the Lê Code, he also had to pay punitive damages.¹³⁰ Whoever destroyed or cut down trees or crops or had his animals damage crops belonging to another would have, under both codes, to pay for the loss and, in the Lê Code, to pay an additional sum of punitive damages.¹³¹ The Lê further specified other specific cases of violation of property rights: refusing to let mortgagors to redeem their ownership of land upon repayment of debts; falsely claiming to be the tiller of land to exclude the legitimate tiller from taking the harvest; damming up water canals to make one's own pond and thus causing a flood on other people's land; relatives fraudulently selling minor children's or orphans' property. In these cases, the property had to be returned or compensatory damages and punitive damages had to be paid.¹³² One should note that the important notion of punitive damages for property loss was emphasized in the Lê Code but was almost nonexistent in the Chinese and Nguyễn codes.¹³³

The state's providing of protection for private property against private interference also took the form of prohibition of unfair business transactions. No duress or fraud could be used to violate the property right of a private party in a contract—a land purchase contract, for example.¹³⁴ Usury was banned in both codes: no creditor could accrue interest to more than one time the principal.¹³⁵ It is notable that the Nguyễn Dynasty decreased the Ch'ing interest rate of 36 percent per annum to the 30 percent rate in force in Vietnam since the Lê Dynasty. The Lê Code forbade seizure, without court proceedings, of the debtor's property to a value exceeding the amount of the loan.¹³⁶ The Nguyễn Code simply banned any appropriation of the debtor's property without petition to the court.¹³⁷ In 1838, the Minh Mạng Emperor even went so far as to repeal all private debts in Quảng Trị Province dating back to before 1830.¹³⁸

Disparity in Ownership Rights for Craftsmen. Despite their good record in the defense of property rights, the Lê and Nguyễn governments adopted a policy that, although not amounting to arbitrary deprivation of property, made it difficult for craftsmen to accumulate wealth. Either because of their traditional belief in the advisability of favoring agriculture (the “root” of the economy) and discouraging handicrafts (the “top” of the economy) or because of officials' tendency to grab the best handicraft products in the country for their own use, artisans were forced to work for the Lê government for subsistence salaries to supply handicraft items for the emperor and his officials. Many craftsmen tried to avoid this indentured laborer's status by secretly producing and selling their

products as Chinese imports.¹³⁹ Baron described the situation in the 1680s as even bleaker than that. He wrote: “Handicrafts-men are abound to this *vecquan* [official *corvée* or *việc quan*] six moons in a year and receive nothing.”¹⁴⁰ Phan Huy Chú dramatized the impact of the confiscatory policy under Lê Dụ Tông (1705–1729) in these terms: “If the state required paint, people cut the trees; if the state required silk, people destroyed the weaving frame; if the state required wood, the people threw away their axes.”¹⁴¹

The Nguyễn Dynasty adopted the same policy of drafting handicraftsmen into government factories. The artisans did not want to work for the government because they had to work for meager salaries under deplorable conditions.¹⁴² Many of the artisans fled and the government had to resort to punishment.¹⁴³ As under the Lê, the result, again, was negative: The skillful craftsmen had to hide their talent in order to avoid being relegated to the status of indentured laborers for the government. Thus, indirectly, the Lê and Nguyễn governments discouraged craftsmen from working and producing to their fullest potential and made it difficult for them to accumulate wealth for further development. This was a black spot in the otherwise good record of both Lê and Nguyễn on protection of property rights.

Social and Cultural Rights?

For the purposes of our study, we group the galaxy of social and cultural rights into two categories: family rights and educational rights.

Family Rights

Included in this group of rights would be (1) the right to marry and found a family and to enter into marriage with free consent, (2) the right of spouses to equality during marriage or at its dissolution, (3) the right of mothers to special care before and after childbirth, (4) the right of all children to equal protection as required by their status as minors, without discrimination as to parentage, and (5) the right of parents to ensure the moral and religious education of their children in conformity with their own convictions. Spouses’ rights to equality have already been discussed in Chapter 2. What was the record of the Lê and the Nguyễn in the other four areas?

The Rights to Marry, Found a Family, Enter into Marriage with Free Consent. As much as or even more than in other societies, traditional Vietnam (and China) considered the family the natural and fundamental group unit of society. Both law and morality, impregnated with Confucian principles of filial piety, family hierarchy, and solidarity, worked to consolidate the family. As we have seen, the law confirmed the hierarchical system of family status to the extent of providing differently for the obligations and sanctions of different family members.¹⁴⁴ The law emphasized family solidarity to the extent of permitting

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mutual concealment of guilty family members.¹⁴⁵ In custom, morally as well as under law, the duty of filial piety required children to respect, and provide for, their parents or grandparents in their lifetime, to perpetuate the lineage to ensure their cult after death, and to ensure that this ancestor cult be properly maintained with adequate ancestor worship property.¹⁴⁶ Aging parents were favored with such unusual state protection as the opportunity to have their only child stay home to take care of them even if that child had already been condemned to penal servitude, exile, or death.¹⁴⁷

The natural corollary of state protection of the family and promotion of its perpetuation was the right of everyone to marry, found a family, and give birth to children. Marriage was declared the basis of social relations in a 1663 decree on moral education.¹⁴⁸

There was no legal restriction on a person's general right to marry just because of his or her personal qualifications. Traditional Vietnam knew no such prohibition against marriage as the ban imposed on the idiot or the insane.¹⁴⁹ The law gave preferential treatment in criminal sanction to persons with a disability (defined, among other things, as idiocy) or a serious disability (defined, among other things, as insanity or leprosy).¹⁵⁰ But nowhere do we find a provision restricting the right to marriage for these persons. The law only gave the option to one party in a betrothal to cancel the engagement if the other party was afflicted with leprosy or an infirmity.¹⁵¹ But this was not a state restriction on the right of the leprous or otherwise disabled or sick person to get married if the other party consented to the marriage. Article 94 of the Nguyễn Code even clearly stated that if the disabled person had been accepted by the other family, the marriage had to be consummated; any party who attempted to cancel it would be punished. The Nguyễn Code even granted the daughters of female slaves the right to get married in stipulating that a master who did not make an effort to marry them off would be punished.¹⁵²

Restrictions on marriage were only narrowly circumscribed restrictions on marriage of specific categories of person with certain other definable categories, these marriages being considered immoral, contrary to social order, or inimical to the security of the state. Moreover, many of these limited restrictions were not enforced or were watered down in practice. Both the Lê and Nguyễn codes banned marriages between close relatives,¹⁵³ considering them incestuous. Article 100 of the Nguyễn Code adopted the Chinese prohibition of marriage among persons of the same family name. But because there were only a few family names in Vietnam and the Nguyễn family name was quite common, the Vietnamese code drafter added this provision to the article: "The restriction does not apply to persons of the same family name but of different origins." This addition virtually nullified the effect of the article.¹⁵⁴

The Nguyễn Code banned marriage between commoners and serfs,¹⁵⁵ but this did not prohibit these two social categories from marrying among their

equals. The Lê Code did not seem to have banned such marriages between free commoners and serfs because it stipulated that children of the serfs were also entitled to inheritance.¹⁵⁶ The Lê Dynasty forbade officials to marry into the family of tribal chiefs, probably for security reasons, but the ban did not apply to the common people.¹⁵⁷ The Nguyễn prohibited Vietnamese marriages with Cambodians and members of ethnic minorities in South and North Vietnam.¹⁵⁸ The Lê Dynasty prohibited officials from marrying singers and actresses,¹⁵⁹ but the Nguyễn Dynasty dropped this ban.¹⁶⁰ Article 71 of the Lê Code punished with exile anyone who married foreigners, but an edict of 1662 implied that this ban was either lifted or never enforced because it permitted foreigners to enter their names in the population registers if they had married and given birth to children.¹⁶¹ The Nguyễn had no provision in its code on this matter; on the other hand, it permitted Chinese to marry Vietnamese. In short, none of the foregoing specific restrictions abolished a person's general right to get married, especially to one of his or her own social status or category. Furthermore, many of the restrictions were dropped, watered down, or simply not enforced.

The Lê and Nguyễn codes contained a number of provisions that indicated that the law provided for free consent in marriage and did not tolerate coerced marriages. Under both codes, officials who married women under their jurisdiction would be subject to the stick penalty (Nguyễn) or demotion and dismissal (Lê) and the marriage would be nullified; thus the law implied that undue influence or coercion to obtain consent from the woman would be punished.¹⁶² Moreover, under the Nguyễn, if force were actually used, the penalty would be increased by two degrees; if the women were implicated in the cases the guilty officials were themselves handling, the punishment would be a little heavier.¹⁶³ Under the Lê, serfs of princes or princesses who relied on their master's power to marry common women by force would be condemned to penal servitude.¹⁶⁴ A widow who decided to remain faithful to the memory of her late husband could not be forced into remarriage by any of her relatives; the Lê Code, however, excluded the widow's parents and grandparents from this ban: In other words, they could force her to remarry.¹⁶⁵

It was this right of parents/grandparents and other close relatives to force consent of a would-be bride or bridegroom, a direct result of Confucian morality, that prevented marriage in traditional Vietnam from being always in conformity with today's human rights standard of free consent in marriage. Marriage was as much a union of two persons as it was a bond between two families. The Lê Code implied, and the Nguyễn Code explicitly stated, that the family would decide the marriage, that the member(s) of the family who presided over the marriage (*chủ hôn*) would be responsible for any illegality in the marriage and that the bride and bridegroom might be forced to follow the decision of the one who presided over the marriage. Indeed, Article

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315 of the Lê Code stipulated that after the acceptance of the betrothal gifts, if the girl's family married her to another man or if the bridegroom's family (*nam gia*) did not proceed with the marriage, they would be punished.¹⁶⁶ Article 109 of the Nguyễn Code was very explicit in this matter of consent to marriage: In the case of illegal marriage, it punished only the grandfather, grandmother, father, mother, uncle, aunt, elder brother, or elder sister who presided over the marriage and exempted the bride or bridegroom; it indicated that the bride or bridegroom, even if older than twenty-one, could be forced into the marriage by the person presiding over the marriage. The official commentary on the article further elaborated that the bride and bridegroom could not fail to obey the decision of the person presiding, and if they were under twenty-one, they could not be the arbiters of their own marriage.

The law made only two small concessions to the free will of the marrying person. First, when a man was away from home in a public position or on private business and entered into a marriage prior to another arranged by his parents at home during his absence, his free will would prevail. If his self-determined marriage dated after the parent-arranged one, however, the latter would be upheld.¹⁶⁷ Second and more important, in case the person presiding over the marriage was a relative other than grandparent, parent, uncle or aunt, elder brother or sister, this relative did not have the right to impose his or her will on the person marrying.¹⁶⁸

In practice, Vietnamese young men and young women in traditional times had more freedom in deciding their own marriage than was warranted by the law. Abbé Richard observed that Vietnamese boys and girls during the Lê period used to sing together at festivities and were free to choose their marriage partners. He said the girls "always choose their husband according to their liking, which the Chinese are not allowed to do."¹⁶⁹ In all probability, this Lê custom of tolerating some free choice in marriage among the population continued under the Nguyễn despite the state's official policy of adhering to Confucian morality in its borrowed code. We have ample evidence in folklore and popular sayings about love, courtship, and marriage indicating that the circumstances of social life and agricultural production work resulted in boys and girls freely meeting and choosing one another as marriage partners.¹⁷⁰ The right of self-determination in marriage when the presiding person was a relative who had no veto power was expressed in this poem:

Một cành tre, năm bảy cành tre,
Lấy ai thì lấy chớ nghe họ hàng.

(A bamboo branch, several bamboo branches,
Marry the one you choose and don't listen to relatives.)

As for parental approval of the marriage, it was always a treasured occurrence. But at times the young people did rebel to assert their wish to choose their marriage partner freely, as the following poem shows:

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Xưa kia ai cấm duyên bà?
Bây giờ bà già bà cấm duyên tôi?

(Formerly, who kept you from choosing your life-mate?
Now that you are getting old, you keep me from choosing my beloved man.)

The very fact that the girl was presenting her mother (or aunt) with a *fait accompli* about her already chosen man proved that she initiated the marriage and was struggling to hold on to her choice.

Freedom for Vietnamese youth to choose marriage partners might antedate the arrival of Confucian cultural values in Vietnam. The daughter of the legendary King Hũng the Third (third millennium B.C.), who refused all princely suitors, suddenly decided on her own and against her father's will to marry Chử Đôn Tữ after a chance encounter with him. On that fateful day, the princess was on a cruise in her barque when she decided to have a tent erected on the beach so she could enjoy sea bathing in privacy. In the middle of her bath, the waves washed some sand away, revealing a handsome man buried to his waist. Highly embarrassed, the young man explained that he was so poor that he had no clothes; he would go out fishing at night and stand up to his waist in water during daytime to sell his catch or beg alms from passing vessels. At the approach of the royal barque, he had hurriedly buried himself under the sand. Thereupon the princess told him: "I have not wanted to get married. But in this situation we must obey the dictates of destiny."

Special Care and Protection for Mother and Children. Traditional Vietnam had not developed a system of special care, such as social benefits or paid leave, for mothers before and after childbirth. But under criminal law the punishment of pregnant women was to be postponed until one hundred days after childbirth so that they could nurture their fetus and child.¹⁷¹ As we have mentioned,¹⁷² from the official viewpoint this policy was considered to be the "apex of humanity."

Although old Vietnam did not have legislation equivalent to a child labor law to prevent the economic and social exploitation of children, the Lê and Nguyễn dynasties expressed concern for the security and welfare of children in their criminal and civil law regulations. Of course, no government in traditional China and Vietnam tolerated the killing of children by parents or grandparents.¹⁷³ But Abbé Richard observed that "the Tonquinese [Vietnamese in the Lê-Trịnh part of Vietnam] have not the barbarous custom that the Chinese have of drowning the children they cannot support."¹⁷⁴ Thus Vietnamese children, compared to those in China, were given better protection, not only by law but also by custom, against the murderous tendency of parents who were desperate enough to eliminate them to avoid the burden of supporting them.

Moreover, in the law of the Lê and Nguyễn we find evidence of the state's commitment to the special protection of children's personal security against lesser crimes than homicide. Statutory rape, defined as intercourse with a girl

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aged twelve or less even with her consent, was punished with death.¹⁷⁵ The official commentary on this provision stated that even with the girl's agreement, because she was young the law presumed some fraud on the part of the male offender. The special protection of children also extended to other aspects of their personal security. Whoever found a lost child had the obligation to report the fact to the authorities; if he failed to do so and kept the child, or sold him/her as a child or as a serf, he would be subject to penal servitude. Individuals were encouraged by law to support lost children with food or lodging because they were entitled to reimbursement of expenses incurred¹⁷⁶ and, under the Nguyễn, to a reward and an exemption from *corvée* for six to twelve years or even forever. Under the Lê, there were many more measures protecting children. If a minor (aged less than fifteen) orphan girl sold herself without being assisted by a guarantor, the contract would be voided and although the sale price was returned to the purchaser, he as well as the scribe and witnesses would be punished.¹⁷⁷ This was to protect lonely young girls from being seduced and sold by unscrupulous adults.

Also, to protect usually defenseless children from being arbitrarily deprived of their property, Lê law stipulated that whoever took children's clothes or property would be condemned to penal servitude and required to return the property and pay punitive damages.¹⁷⁸ The civil law provisions of the Lê also extended special protection to children's property rights. Minor or orphan children's property could not be sold without good reason by their relatives, stepfathers, or even remarried mothers. The property would have to be returned to the children, and damages would also have to be paid if the offenders were relatives.¹⁷⁹ These were important protections for minor or orphaned children, who often fell victim to relatives who were their property managers.

Although special measures existed in traditional Vietnam for the protection of minors, Lê and Nguyễn law discriminated against specific groups of children or, more accurately, the descendants—whether minor or already mature—of certain categories of people. Thus, specifically defined parentage was the basis of a discrimination that somewhat overlapped, but was not exactly the same as, the type of discrimination against minors rejected by today's international human rights standards.¹⁸⁰ As we have noted, the Lê Dynasty forbade the descendants of singers and actors to participate in examinations, thus depriving them of an equal chance to enter public service.¹⁸¹ On the other hand, in a reverse discrimination that resulted in special protection, sons of officials were given privileges for entrance into the civil service and exemption from military duty and *corvée* service.¹⁸² Thus, the nature of the discrimination might be negative or positive, depending on the social status of the child's parents.

More directly in violation of modern principles of nondiscrimination against children because of parentage and individual responsibility in criminal matters was the persecution of children—minor or adult—for their parents' crimes. In

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the Lê Code, the children of offenders condemned of high treason, grave insubordination, or treason would be seized for the state as public serfs. Under the Nguyễn, sons and grandsons more than fifteen years old of those guilty of high treason and grave insubordination would be decapitated, whereas those fifteen years or younger along with daughters and granddaughters would be given to families of high dignitaries as serfs. In cases of treason, the Nguyễn Code punished the offspring of offenders a little more lightly: Offenders' sons and daughters would be given to the families of high dignitaries as serfs and the grandsons would be exiled. In the case of all three crimes, only the children or grandchildren already adopted by another family or females already given away in betrothal or marriage would escape the punishment.¹⁸³ Under the Lê, anyone who concealed those rebels' children who had been seized for the state would be punished more severely than if they had concealed an ordinary public serf.¹⁸⁴ Thus, the law was particularly harsh toward the offspring of rebels—that is, those guilty of high treason and grave insubordination. Under the Lê, even the children of those condemned to decapitation for fleeing the country and of generals who had lost one hundred or more men in battle and were condemned to death were seized for the state.¹⁸⁵

In all these cases, the innocent children were discriminated against and punished harshly because of their parents' crimes. Such discrimination and punishment would be in clear violation of their human rights, if we ignore the traditional principle of joint liability in old Vietnam and China and judge this matter according to today's international standards.

However, in practice, under the Nguyễn there was some relaxation in this discrimination against children and grandchildren of former enemies of the Nguyễn Dynasty. The Minh Mạng Emperor ordered that the children and grandchildren of former collaborators of the Tây Sơn Dynasty be released because they were innocent, their fathers and grandfathers having already been punished.¹⁸⁶

Parents' Right to Ensure the Moral and Religious Education of Their Children in Conformity with Their Own Convictions. Parents in traditional Vietnam had enormous moral authority over their children and the law supported this authority by punishing those who refused to abide by moral teachings and children who lacked filial piety—that is, were guilty of disobeying their parents, among other things.¹⁸⁷ The Lê Dynasty permitted parents of a misbehaving child to disinherit him or her if they did not succeed in their attempt to educate him or her.¹⁸⁸

Parents, however, were somewhat and, at times, severely restricted in their option to teach their children their moral or religious convictions, because, as we have seen in the discussion of freedom of thought, in a Confucian state parents were not free to teach their children any religious or

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moral doctrine. They were allowed to teach their children only an approved moral code—which was Confucian—and accepted religions.¹⁸⁹

Thus, there remained, for parents, merely some freedom of choice between public and private schools where they could send their children, which is the topic of the next section.

Educational Rights

Education Generally Available and Equally Accessible. In traditional Vietnam, education was not clearly divided into primary, secondary, and higher levels. Nor were there concomitant stipulations on the right of everyone to “free education at the elementary stage” level, or the “compulsory character” of such elementary education.¹⁹⁰ However, as pointed out earlier and as will be described below, the traditional government did make education and the examination system “generally available” and somewhat “equally accessible” to the population.¹⁹¹ As we have seen in Chapter 3, the only exception to the “equal access” principle was the Lê Dynasty’s discrimination against families of singers and actresses in participating in the civil service examination and the Nguyễn Dynasty’s discrimination in favor of officials’ sons in their entrance into the National College.

Liberty to Choose and Establish Schools. Even if the governments of traditional Vietnam made education generally available to the population, did they restrict parents’ freedom to choose between public and private schools on their children’s behalf or was the liberty of individuals to establish educational institutions curtailed?¹⁹² A general review of the dynasties’ educational policies is necessary to answer these questions.

The Lý Dynasty (1010–1225) established the National College or *Quốc Tử Giám* in 1076.¹⁹³ The Trần Dynasty (1225–1400) continued this National College and named it *Quốc Học Viện* (National Institute) in 1253.¹⁹⁴ In 1398, educational officials in the provinces (*đốc học*) and the prefectures and districts (*giáo thụ*) were granted land to perform their educational work.¹⁹⁵ In this way, the Trần Dynasty in its later years began to lay the groundwork for a nationwide public school system. We do not know how well organized and developed this educational system was or whether a private school system was simultaneously developing.

More evidence is available about the public and private school systems under the Lê.¹⁹⁶ At the top of the public educational network was the National College (*Quốc Tử Giám* or *Quốc Học Viện*) that had already existed under the previous two dynasties. Under the Lê, the National College was connected physically and intellectually to the Temple of Literature (*Văn Miếu*) and was reorganized and reformed several times—in 1483 (buildings enlarged, recruitment expanded), 1662, and 1693—with the result that the National

College under the Lê was no longer exclusively for officials' sons. The capital was also the site of the *Hàn Lâm* Academy with three dependent institutions: (1) the Exaltation of Literature Institute (*Sùng Văn Quán*), which provided students with books and taught the eldest sons of first- to third-rank officials and first- and second-rank military officials, as well as the younger sons of first- to third-rank officials; (2) the Luxuriant Forest Institute (*Tĩ Lâm Cục*), which educated the younger sons of the fourth- to eighth-rank officials; and (3) the Glorification of Literature Institute (*Chiêu Văn Quán*), which had the tasks of copying classical books for students and teaching the eldest sons and grandsons of dukes, marquises, counts, and eldest sons of second- to eighth-rank officials. Inequality of access to these institutes was somewhat tempered by the requirements that once accepted, especially into the Luxuriant Forest and the Glorification of Literature Institutes, students were required to pass rigorous examinations and only then would be appointed on the basis of achievement.

Much more than these educational institutions in the capital, provincial public schools under the Lê were equally accessible for, and generally available to, all strata of the population. Under the first emperor, Lê Thái Tổ, the government immediately "opened schools and appointed teachers in the various prefectures."¹⁹⁷ According to such Europeans as Father de Marini, in the seventeenth century, schools in the four provinces and the metropolitan prefectures were attended by anyone who wished to study; the number of students sometimes reached 30,000. According to the historical sources, the public schools existed not only at the province level but also at the prefecture and district levels.¹⁹⁸

Even more important from the human rights standpoint was the freedom reserved for students or their parents to choose between such public educational institutions and the numerous private schools that were opened by individuals of all categories ranging from scholars who failed to pass some or all of the examination stages to officials who had been dismissed by the government. Thus, in both selection and establishment of schools, the pluralistic principle of freedom of education was recognized implicitly by the Lê.

Freedom of educational choice as a sociocultural right for Vietnamese continued under the Nguyễn Dynasty, which perpetuated the parallel role of public and private schools. The system of public education was organized by the Gia Long Emperor at the beginning of the dynasty and then expanded by the Minh Mạng Emperor.¹⁹⁹ At the central level was the inevitable National College (*Quốc Tử Giám*) which included in its student body the sons of imperial relatives and high officials, provincial graduates, and also, after 1844, when the son of a middle-ranked soldier from Cao Bằng Province successfully appealed to be admitted,²⁰⁰ the descendants of lesser military officials. These students were encouraged to study with stipends and rations that

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were granted depending on the results of their tests.²⁰¹ The state also appointed teachers in the provinces to provide free education to whoever wished to study: provincial educational commissioners (*đốc học*), prefectural educational officials (*giáo thụ*), and district educational officials (*huấn đạo*). Although these officials were not present in all districts or prefectures, the system of public schools was extensive thanks to the population's devotion to study and the effort of a government that was convinced that education would help carry out the ideological molding of the population and preserve public order.²⁰² The provincial educational commissioners attracted to them "vast throngs of bright students." Lectures were given "at every official school... from the National College in Huế to the district 'palm leaf' school, if one existed."²⁰³ Pasquier noted that lectures were "gratuitous."²⁰⁴

Students, however, were not compelled to attend public schools. One reason was, as just mentioned, state educational institutions did not exist in every district or prefecture. But a more important reason was the concept that private schools with their independent-minded teachers were free to compete as "rivals" with the provincial educational commissioner and to woo students away from him.²⁰⁵ Particularly noteworthy was private education at the village level; one source said each village might have several private schools.²⁰⁶ Village private school teachers seemed to have performed their job well; French observers like Pasquier recalled encountering five-year-old children who could recite without a flaw the elementary texts they had memorized.²⁰⁷ But most interesting for our purpose was the fact that village private school teachers were acknowledged to be "an almost invulnerable sovereignty... unassociated in any way with the bureaucracy."²⁰⁸ The villages chose freely their own teachers.²⁰⁹ Among them, one should mention especially scholars who had no desire to be officials; for example, Lê Dynasty loyalists in the north were tolerated as private teachers after 1802. The Minh Mạng Emperor himself explicitly ordered that in North Vietnam and Thanh Hóa and Nghệ An provinces, graduates of the Lê Dynasty period be used as teachers.²¹⁰ The teachers might open schools in their own homes or could ask rich men to build partitions in their homes to create classrooms. If a teacher became famous, many people would enroll their children under him. The teacher would ask his host, if he opened a school at another person's home, for approval of increased enrollment—which would usually be granted.²¹¹

Private teachers' independence from government regulations also derived from the fact that they were paid from gifts given by students' parents or from contributions solicited from villagers by student-formed class associations (*hội đồng môn*),²¹² that there was no minimum qualifying requirement for private educators (a requirement that is common practice in the modern world), and that no official standards were laid down for programs and

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methods—except the self-enforcing standards voluntarily followed by teachers and students who wished to succeed in the civil service examinations.

To conclude, we may say with Alexander Woodside that “the significance of all this was that Vietnamese scholars could rise more easily to the top of their examination system without ever having set foot in a government school than Chinese scholars could. . . . The education which aspiring Vietnamese scholars received was perhaps less standardized and repetitive.”²¹³ As the French writer J. Silvestre observed in other terms, “freedom of education [in traditional Vietnam] was the most complete that could be seen.”²¹⁴

The only difference in this area of freedom of education between traditional Vietnam and a modern-day democracy would be the contemporary requirement of doctrinal neutrality or the secular character of the public school system as contrasted to the unwillingness of the Confucian state to tolerate the teaching of maverick, or anti-Confucian, doctrines.²¹⁵ But as long as Sino-Vietnamese literature and culture were taught, the schools enjoyed freedom in their educational work. For example, under Minh Mạng, Cambodian minorities in Vĩnh Long, An Giang, and Hà Tiên were told that they could not restrict themselves only to study in the Cambodian Buddhist temples but could pursue learning in the temples as long as they also attended the schools of the prefectural and district educational officials to study Sino-Vietnamese characters and that if they learned how to write these Sino-Vietnamese characters, they could become village or canton chiefs.²¹⁶ Again, we see that if there was any limit to human rights in the area of freedom of thought, it arose from the Confucian orientation of the old Vietnamese rulers.

Degree of Government Commitment and the Problem of Enforcing Government Compliance

Summary of the Degree of Government Commitment to Human Rights

As an overall generalization on the degree of the traditional Vietnamese governments' commitment to human rights, we might say that their record, although checkered, was surprisingly good—if we remember the stereotyped images of “Oriental despotism” that have often arisen whenever reference is to Asian regimes of any time, let alone those of the traditional period.

The integrity of the person received adequate protection in old Vietnam. Indeed, the right to life was deprived not arbitrarily but only after a careful judicial procedure reviewed at the highest level of the state. The military and corvée systems constituted the normal obligations of citizens. An elaborate criminal process served to ensure the security of the person. A man's home and honor were protected. He could not be arrested arbitrarily for a crime not yet defined in law. Prosecuted by the state, he would be entitled to a fair and public trial at an early date, during which trial he might be assisted by ad hoc counsel and had the right to examine witnesses. He was entitled to appeal the verdict condemning him and could not be subject to double jeopardy. The penalty system was not as cruel as systems in European societies of the same period.

There were, however, some dark spots on this performance record: The death penalty for some crimes could not be justified on grounds of national security and public order (and therefore would be unacceptable today); the serfdom system was a violation of the freedom from bondage and, by today's standards, is not an acceptable derogation from an individual's right to personal integrity; legal rules defining crimes were subjugated to the will or administrative command of a sovereign who might also control the behavior of the judiciary; torture, although carefully regulated, still hurt and, though not mandatory to obtain full proof in the Lê period, was nevertheless judicially sanctioned.

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In the area of promoting equality, the record was also mixed. One cannot say that traditional Vietnam was committed to the ideal of equal justice under law. The law sanctioned inequalities on the basis of family status and social status and, to a certain extent, sex discrimination. These limitations on equality were presumably justified on the basis of Confucian morality; but this justification would not be held valid within today's standards of public morality. On the other hand, however, there were some positive tendencies: the opportunity for upward social mobility to the higher status of official, that is, the existence of equality of opportunity to attain higher status; the equality between men and women in civil rights under the Lê Code and in custom; and the general lack of racial discrimination against ethnic minorities.

In the area of civil and political rights, the record of traditional Vietnamese governments was again checkered. An individual was free to choose his residence and to move within the national territory provided he got a permit; he might leave his country on business with government authorization; foreigners were also given asylum in Vietnam. However, the death penalty for unauthorized foreign travel was too severe. Freedom of religion for Buddhism, Taoism, and the popular cults was granted most extensively under the early dynasties through the beginning of the fifteenth century and was only regulated and somewhat controlled during the Lê and Nguyễn dynasties. But, the history of Catholicism from the sixteenth to the nineteenth centuries showed an intermittent pattern of tolerance and persecution until 1874, when the French imposed on Vietnam the definitive obligation to recognize freedom for the Catholics after the paroxysm of persecution in the mid-nineteenth century. Many of the violations of the Catholics' freedom of religion that occurred could not be justified as derogations warranted by the necessity of national security or public order. Free speech was abridged but freedom of the press was tolerated, at least until the middle of the nineteenth century. Freedoms of assembly and association were predicated upon government authorization and were subject to restrictions. Citizens had no right to participate in the government through genuine elections, but they might nominate local leaders for appointment by the central government, and almost all of them had equal access to public offices through an egalitarian examination system.

Most unexpectedly, not only did the traditional Vietnamese governments promote as goals the economic, social, and cultural rights of the people, but some of these rights—such as social security for the disabled, elderly and orphans; medical care for soldiers, *corvée* laborers, and detainees; the people's property rights; and children's personal security and property rights—they raised to the level of enforceable claims, and the law punished officials for not respecting them. This exceeds even today's international

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standards, which regard such rights only as goals for governments' efforts and not binding on them. Other economic and sociocultural rights also promoted by traditional Vietnam were: freedom from hunger through various government measures such as land distribution and development, or relief actions; the right to marry and found a family, to educate one's children in public or private institutions, depending on one's choice, and to establish schools and to teach. There were, however, some minor limitations in the area of social and cultural rights: The right to enter into marriage with free consent was limited by the decision-making power of parents and other close senior relatives; the right to choose schools did not entail the right to choose any other ideological content than orthodox Confucianism.

This brings us to another generalization: Most negative features of the human rights performance record of traditional Vietnam were caused by one or both of these influences: (1) Orthodox Confucianism, which imposed family and social inequalities and repression of "maverick" doctrines or religions; and (2) the paramount position of the monarch, which minimized the chance to achieve independent judicial protections or other kinds of checks against possible anti-rights rules originating with the sovereign, and which frowned upon the complete recognition of those freedoms of a political nature: free speech, assembly, association, and participation in genuine elections.

In the eyes of some Europeans, however, the limitations arising from these influences, which were characteristic of the Sino-Vietnamese traditional state, did not in practice lead to a heavy-handed rule inimical to human rights in Vietnam. John Barrow, for example, observed that

whether the execution of laws are here less rigidly attended to, or the morals of the people less corrupt, than in China, I will not pretend to say: it may be observed, however, that not a single punishment of any description occurred to our notice, whereas in China we scarcely ever passed a town or a village in which our eyes were not offended at the sight of the cangue, or the ears assailed with the cries of persons suffering under the stroke of the bamboo. . . . The spirit of the people of Turon [Đà Nẵng] did not appear to suffer any depression from a too severe exercise of the hand of power.¹

Milton Osborne, in his 1974 introduction to Barrow's book, also said:

The picture provided is of adequate sufficiency, if not prosperity, and of a society that operated with little evidence of excessive regulation, whether in the case of the freedom accorded women or the extent of governmental control over the population as a whole.²

Enforcing Government Compliance: Judicial and Administrative Remedies

Human rights norms may be recorded in the law and yet violated in practice. In other words, despite a central government's commitment to

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human rights embodied in the provisions of law, people may still suffer in their daily life from violations of these legal rules by subordinate officials. Given this reality, even though one cannot justifiably use every such violation by subordinates as a proof to reject the central government's claim to a commitment to human rights, one still needs to be assured by some indicators that the claim of serious commitment does not amount to an empty declaration. The best indicators of such a commitment should be the existence of methods of enforcing these rights by securing officials' (and also private persons') compliance through the sanctioning of any violations and the readiness to apply such methods of enforcement to prevent the violations, inevitable in all regimes, from exceeding a tolerable limit.

Many Lê and Nguyễn provisions for the integrity of the person, equality, freedom of movement, equal access to the examination system, social security and medical care, property rights, and children's rights also included methods of enforcement—that is, the sanctions to be imposed on those officials or private persons who did not respect them. These methods of enforcing the laws on human rights or sanctioning violations of them have been listed in previous chapters; here we will systematize them. Before doing so, however, we should mention a contemporaneous European's observations on the Lê-Trịnh government's readiness to enforce respect for their laws. Baron wrote that the Vietnamese “had their laws and old customs in great veneration and comported their actions agreeable thereto.”³

As mentioned in the Introduction, there are three methods of sanctioning violations of human rights: legislative remedy, judicial remedy, and administrative remedy by an agency of the executive—in the category of the inspectorate or procuratorate in the modern world. For traditional Vietnam, the issue of whether or not legislation promulgated by the sovereign provided protection for human rights has been discussed in Chapter 1. Here we focus mainly on the other two methods, judicial and administrative remedy.

Judicial Remedy Against Violations of Rights

An individual in old Vietnam had judicial remedy against human rights violations by government officials. The provisions on the various human rights that carried a sanction against officials' violations would belong to this category—for example, penalties for failure to provide social security assistance or medical care; or to respect property rights, including those of children and women (especially the punitive damages of the Lê Dynasty).⁴ Generally speaking, the avenues of judicial remedy against government violation of rights, both at the court of first instance level and at the appellate level, have been indirectly discussed under the topic of the right of appeal.⁵ We have pointed out that judicial powers in Lê and Nguyễn Vietnam were reserved exclusively to a court presided over by an official (who might be assigned, as

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under the Lê, the separate role of trial judge as distinct from government prosecutor) and could not be handled by other persons; and that the vertical control exerted by higher authorities on lower courts might benefit the people if the higher authorities were clairvoyant and benevolent.⁶ Thus, the individual stood a good chance of being able to vindicate his rights in a court against encroachment by government officials.

Judicial remedy was also available against *private persons' interference with an individual's rights*. Again, the avenues of judicial action against private encroachment have also been implied in our discussion of the right of appeal. It should be emphasized that the Lê Dynasty paid particular attention to the defense of the individual's rights against oppression by the powerful. This dynasty's Procedural Code⁷ permitted ordinary people to file complaints with the province judicial commissioners (if they resided in the provinces) or with the Censorate (if they resided in the capital) when powerful families (including imperial relatives) misappropriated their properties or detained them and beat them. The plaintiffs would lead the authorities to the persons thus accused, who would then be arrested and interrogated. If the crimes were substantiated, not only the offenders but also those who assisted them in their oppressive acts would be arrested and punished according to the regular judicial proceedings. Judges who rejected the well-founded complaints inconsiderately would be fined.⁸ Of course, it would be necessary for the plaintiffs to provide proof of the oppressive acts, such as illegal detention, in order to force a recognition of debt or a sale of property.⁹ Once the offenses were proven, however, the misappropriated properties had to be returned to the legitimate owner, the offenders would be fined and demoted, and their servants or those who carried out their order would be subject to the heavy stick penalty or penal servitude. Moreover, a report on the case to the Government Council would be drafted so that proper instructions be given out to all, using the case as an illustration.¹⁰

Similar acts of oppression by village notables (forcible sale of property or recognition of debt, looting of draft animals and other properties, forced marriages) would be brought to the attention of the district officials sitting as courts of first instance.¹¹

Judicial remedy was also available against *violations of rights by the courts themselves*. First were the sanctions specified for irregularities or mistakes in the various stages of the judicial process (such as illegal arrests and detention). These sanctions would be presumably applied by the higher court automatically when the cases were appealed; we will not repeat them here.¹² Second, persons victimized by the judicial process could take the initiative to launch the sanctioning process against the judges and other court officials; this was the special procedure of suing the judges for denial of justice. We will briefly describe first the procedure and then the sanctions imposed on judges and court clerks for some of the offenses constituting denial of justice.

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Chapter 2 of the L^ê Procedural Code, “suing the Judges,”¹³ permitted the victim of a violation of rules or an abuse¹⁴ by a judge to file a complaint with the next higher level of jurisdiction. If the trial court was the district or prefectural court, the victimized party would sue at the province civil office (or judicial office, if the trial court’s verdict were a judgment by default);¹⁵ if the decision at this higher level of jurisdiction to annul the lower court’s verdict or, alternatively, to reject the victim’s claim did not satisfy the latter, he might press his case further at the next level: the Censorate.¹⁶ If the trial court guilty of denial of justice was the office of the capital governor, or a province’s civil or judicial office, the victim would sue at the Censorate.¹⁷ In all cases where an annulment of the trial court’s (wrongful) decision was called for, the trial court judge would be fined (on the other hand, if the trial court were held correct, a reparation had to be paid to its judge).¹⁸ If the Censorate acted as the reviewing court and failed to fine the lower court judge after annulment of his decision, the censors themselves would also be punished.¹⁹ This procedure of suing the judge for denial of justice, similar to what is known as *prise à partie* in French law, was different from the ordinary process of appeal since the Procedural Code required separate listing in the courts’ registers of ordinary appeal cases and denial of justice cases and would punish any attempt to conceal these denial of justice cases by not placing them on the registers.²⁰

L^ê legislators, after making the factual observation that it took sometimes six to seven months for a case of denial of justice to be returned to another trial court for retrial, imposed a stringent deadline for retrial and elaborate procedures to ensure that this deadline be met. The trial court had to establish a table recording the dates of receiving the requests for transmittal of the cases to the higher court, the dates of transmittal, and the date of receiving the returned cases.²¹ The higher court reviewing the cases had to decide on annulment of the lower court’s verdict or rejection of the petitioner’s claim within thirty days; in order to help it proceed quickly, the law did not permit another call for witnesses but required the higher court to rule on the basis of the facts in the file.²² The tables of dates of transmittal and dates of request for transmittal would be examined every four months by the Censorate, in the case of tables established by districts and prefectures, or the Government Council, in the case of tables established by the province civil and judicial offices. The Censorate or the Government Council would fine the higher courts for any late return of files to the trial courts for retrial and even the trial courts themselves, if they concealed the late return out of fear of reprisal by the superior courts.²³

That the L^ê legislators were eager to prevent denial of justice can also be seen in the opportunity a prejudiced party had to ask the higher court to proceed with the retrial if he feared the trial court judge who had issued the annulled verdict would resent him.²⁴

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The Nguyễn Code also provided judicial remedy for denial of justice cases. Article 375 on “disputing a miscarriage of justice”²⁵ required that any time a court entrusted with the revision of a verdict identified some wrongful condemnation or decision, not only would the initial accuser be punished, but the judge of the first trial court, as author of the wrongful verdict, and his subordinates would also be condemned for mistaken or willful aggravation of a case.²⁶ It seems that unlike the Lê Code, the Nguyễn Code did not distinguish between the professional mistake of a judge who rendered an improper decision that—as the Lê Code provided—might be appealed and the offense of denial of justice that would be severely punished as a crime under the article on aggravation of a case.²⁷ The distinction between ordinary appeal cases and denial of justice cases made by Lê legislators was significant in that appeal was subject to deadline,²⁸ whereas the suit against a judge for denial of justice was presumably not subject to any statute of limitations as far as the victim was concerned. At the highest level, the Three High Courts of the Nguyễn period also had a role in punishing denial of justice. In reviewing cases, if the Three High Courts saw that the accused recanted in his statement or his family filed a complaint of injustice and oppression, they would summon the first trial judge as well as the reviewing court judge for confrontation and rectification of the wrongful verdict if necessary. The lower courts would be punished for aggravation of a case, and rectification would be carried out immediately after memorializing the throne. If the Three High Courts did not act in time, they themselves would be punished for aggravation of a case.²⁹

The sanctions imposed on judges and court clerks for denial of justice were severe in some cases. The most serious offense among crimes of denial of justice was aggravation of a case (or wrongful condemnation of a person).³⁰ Under the Lê, a prosecutor or judge who willfully condemned an innocent person (total aggravation of a case) would receive the same penalty unjustly inflicted on the innocent victim; if he willfully condemned a guilty offender more severely than warranted by law (partial aggravation of a case into a more serious one), he would be punished with the increase in the penalty; if he committed these offenses only by mistake, his penalty would be two degrees lower than in willful aggravation of a case; also, if death for the judge or prosecutor would result from applying these principles, he would only be exiled.³¹ Under the Nguyễn, the same penalties applied to the guilty judge, with only two differences: First, the judge would be subject to the death penalty if the victim were executed; and second, for mistaken aggravation of a case the penalty for the judge would be three degrees lower than for willful aggravation of a case.³² In the Lê Code, court clerks who committed mistakes in the examination and collation of documents and litigation supervision officials who failed in their

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duty to supervise the judges—thus, all contributing to the aggravation of a case—would also be punished for their respective responsibility.

Other acts in judicial proceedings were assimilated to the offense of willful aggravation of a case. Acts by the judges or prosecutors included: seeking out offenses not mentioned in the original complaint (except where these offenses were high treason and grave insubordination);³³ torturing people entitled to exemption therefrom (such as the elderly, young, disabled, etc.);³⁴ forcing admission of guilt in doubtful cases;³⁵ distortion of facts;³⁶ failure to quote the legal text in a verdict or going beyond the letter of the law;³⁷ inconsistently citing one provision and then condemning the accused on the basis of a more severe provision;³⁸ citing a court case not yet promulgated as a binding precedent or a permanent ruling to condemn the accused in the case at bar;³⁹ or wrongfully ordering a person to be seized for the state as a public serf.⁴⁰ Acts by court clerks included modifying the litigants' statements.⁴¹ Acts by witnesses and interpreters included perjury and wrong translation.⁴²

Even persons entrusted with quasijudicial functions, such as village councils and village chiefs under the Nguyễn in their conciliation and arbitration⁴³ of cases involving encroachment on honor (revilement), property (debt), personal integrity (fighting and causing mild injury), would be reprimanded and punished with the stick by the higher authorities—that is, the prefectures and the districts—if these persons unjustly decided cases brought to their attention.⁴⁴

To add to the severity of the punishments imposed on officials for wrongful judicial decisions, the Lê and the Nguyễn codes stipulated that these officials would not benefit from the usual exemption from penalty, even if they confessed their wrongful judgments, if such judgments had been carried out, and therefore they would still be punished under the provision covering mistaken aggravation of a case or mistaken condemnation of a person.⁴⁵

This procedure for suing judges, court clerks, and other quasijudicial parties for denial of justice and the heavy penalties imposed on them, if such injustice was substantiated, constituted a great deterrence to judicial abuse. The Vietnamese traditional courts were very scrupulous in adjudication and would weigh their judgments carefully. In fact, we find cases in which the judge went through a rigorous reasoning process before reaching his decision. For example, in 1662, Trương Văn Liễn, aged more than seventy, was punished with death for a bribe previously received when he had been deputy head of Quốc Oai Prefecture.⁴⁶ Although historians commented that the punishment was too severe, it was actually in conformity with Articles 138, 14, 17, and 16 of the Lê Code. Indeed, Article 138 punished the bribery of 20 *quân* or more with decapitation. Liễn's bribery, occurring during his term of office, was discovered only after his retirement. According to Article 14, Liễn's penalty could have been reduced one degree provided that his crime was not corruption, but unfortunately his bribery did fall into this category. On the other hand, because

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his crime was discovered only after he had reached the age of seventy, he could be treated, according to Article 17, as having committed it as an older person over seventy and could have benefitted, according to Article 16, from the option of redeeming his penalty provided it was not more severe than exile; but again, unfortunately for Liñh, the penalty was decapitation. His death sentence was reached presumably after a close reasoning by the judge, who had no choice but to abide by the codified law. Criticism, if warranted, should be leveled against the law itself, not against the judicial decision.

This brings us to the ultimate question: *What if the law itself were a violation of, or at least a threat to, human rights?* The issue should be understood in its proper perspective: instances of antihuman rights legislation were probably rare, as evidenced by the surprisingly good records of the Lê and Nguyễn and the well-known stability of the Vietnamese (and Chinese) legal tradition, at least as embodied in the basic provisions of the legal codes that were handed down from one dynasty to another. These basic principles of law would be equivalent to constitutional principles in today's world and served in practice as a check on the emperor's powers. Thus, the issue seldom came up. There would still, however, be an irreducible danger to human rights from the theoretically unrestrained legislative powers of the emperor because he could always promulgate new decrees modifying the previous legal rules or regulating new subject matters in an oppressive manner; in so doing, he was held back only by moral constraints in the form of advice from censors or other officials, ideological tenets such as Confucian doctrines, or practices adopted by his predecessors.⁴⁷ Consequently, in the event of an antihuman rights piece of legislation—rare but always possible—there was no hope for an individual to defend his rights in a test case before a court of law by the process of judicial review of this legislation in the light of a higher law, simply because there were no constitutional checks on the legislative powers of the emperor that the judiciary could rely on to review or nullify such legislation. The Supreme Court, moreover, was the emperor himself.

Thus the methods available to an individual in traditional Vietnam for enforcing human rights through judicial remedy provided a real and adequate protection against violation by officials, judges, and private individuals. Protection against violation by the supreme political power, however, rested on the fragile basis of moral restraints on the emperor.

A final word on the victim's effort to seek legal remedy against violation of his rights should be mentioned: his or his relatives' right to ask for compensation or compensation plus punitive damages under the Lý, Trần and Lê in addition to the proceedings just mentioned to force the violators to cease and desist.⁴⁸ This compensation applied not only to property loss but to loss of life.⁴⁹ Reparation was another type of indemnity provided by Lê law for the victim of a loss of honor or reputation.⁵⁰ Still another kind of monetary

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indemnity in Lê law was the “reparation for taking a person into serfdom” (*bồi mạng tiền*) payable to the master (if that person were a serf), to the husband or father (if the person were a woman or a child), or half to that person himself and half to the state (if the person were a commoner).⁵¹

Administrative Remedy Against Violation of Rights

We are not discussing here the ways and means for a private individual to seek remedies through agencies equivalent to administrative commissions or administrative appeal boards or administrative courts in modern times, because traditional Vietnam did not separate the general court system from the system of administrative appeal boards or courts. A private citizen could protect his rights by resorting to the only court system available—officials who were concurrently judges—and this course of action has been discussed under the rubric of “judicial remedy.”

The administrative remedy referred to here is the internal administrative check on officials’ abuse of functions and possible violations of rights by a watchdog apparatus: the Censorate. Besides its judicial appeal function already discussed,⁵² the Censorate in both Lê and Nguyễn Vietnam played the role of the administrative inspectorate in modern Western countries or the procuratorate in communist regimes—that is, an institution whose function is to see to it that the law is faithfully applied to avoid abuse or violation of rights.

The Censorate was supposed to raise its voice against abuse of powers by the emperor. Under the Nguyễn, for example, the *khởi cư chú viên* were the censors who noted the emperor’s risings and reclinings and every word he spoke while transacting business. We doubt whether these censors could exercise an effective check on imperial misbehavior. If the emperor wanted to listen to good advice, the censors would be at best as effective as the other court officials; if the emperor were not reasonable, the censors could not deter him and might even become victims of the emperor’s reaction, such as in the case of the investigating censor Lê Bá Tu in 1467.⁵³ Thus, although they might be “as courageous as their Chinese counterparts in rebuking individual emperors,”⁵⁴ the censors could not really serve as a definitive administrative remedy against abuse by the emperor, who, as the highest political power, stood outside and above the bureaucracy.

But against violations of law and rights by officials the censors’ role was more significant. Both the Lê and the Nguyễn Censorates consisted of: (1) a Chief Censor (*Đô Ngự Sứ* of the Lê) or Censor-in-Chief of the Left (*Tả Đô Ngự Sứ* of the Nguyễn); (2) a Deputy Chief Censor (*Phó Đô Ngự Sứ* of the Lê) or Censor-in-Chief of the Right (*Hữu Đô Ngự Sứ* of the Nguyễn); (3) six offices of scrutiny (*lục khoa*) that supervised the six boards; and (4) a number of “investigating censors” (*giám sát ngự sử*), each of whom traveled the country and

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supervised one of the circuits (six under the Lê and sixteen under the Nguyễn) comprising several provinces, and also collaborated with the censors at the Offices of Scrutiny in watching over specific central government agencies. The most active censors in the scrutiny and impeachment of officials were the “investigating censors,” who memorialized the throne on the judgments they passed on their fellow officials. The censors had an obligation to take action against any violation of law; their failure to do so would bring punishment on themselves.⁵⁵ Consequently, they attempted to carry out their impeachment function with diligence. According to the “testimony of numerous writers, the Nguyễn censors unmasked without pity” many officials, especially judges.⁵⁶

Conclusion

On the whole, one can say that the legal norms and practices of traditional Vietnam, even centuries ago, adhered to many of today’s international human rights standards. Any failure to measure up to these standards is almost always attributable to orthodox Confucianism and the monarchical form of government. Furthermore, in many respects, traditional Vietnam’s standards exceeded modern ones (for example, by raising many economic and social rights to the level of enforceable claims) and were likely to be better enforced than now in many countries in the contemporary world (for example, by providing for decisive judicial remedy). One must conclude that old Vietnam under the emperors fostered a strong tradition of respect for human rights.

Notes

Introduction

¹See Louis Henkin, *The Rights of Man Today* (Boulder, Colo.: Westview Press, 1978), chs. 1 and 2, esp. the statement, “In a substantial number of countries, human rights are constitutional rights” (p. 21); or his article, “Constitutional Rights and Human Rights,” *Harvard Civil Rights—Civil Liberties Law Review* 13 (3) (Summer 1978): 593–632, esp. his conclusion, “Human rights began as constitutional rights” (p. 631); and Ivo D. Duchacek, *Rights and Liberties in the World Today* (Santa Barbara, Calif.: Clio Press, 1973).

²Duchacek, *Rights*, pp. 4, 11, 16–17, 21.

³See Henkin, “Constitutional Rights,” p. 596.

⁴A comprehensive statement on this “despotic power—total and not benevolent” can be found in Karl Wittfogel, *Oriental Despotism* (New Haven: Yale University Press, 1957).

⁵To illustrate the universal concern for human rights in all societies, including non-Western ones, and throughout all periods, including those preceding Western constitutionalism, and to point out at the same time the scattered and unsystematic treatment of the various human rights themes in different countries, we list here abstracts from documents on *non-Western* and *ancient* societies that have been incorporated in the UNESCO book *Le droit d’être un homme* (1968). (The number following the quotations is the item number in that book.)

Government under law: “Ne modifiez jamais une loi pour satisfaire les caprices d’un prince, la loi est au-dessus du prince,” 249 (Chuang-tzu, fourth to third century B.C.).

Presumptions of innocence: “Traiter comme légers les crimes dont la gravité est douteux . . . Il vaut mieux négliger une irrégularité que de tuer un innocent,” 203 (Shu ching, 551–479 B.C.).

Impartial judges subject only to law: “Le roi doit nommer aux fonctions de juge des personnes qui ont étudié à fond les écritures, qui connaissent bien le Dharma, qui s’attachent à la vérité et feront preuve d’impartialité à l’égard du demandeur ou du défendeur. Les juges qui s’écarteront du droit . . . doivent être frappés d’une peine double,” 362 (Yājñavalkyasmṛiti, II A.D. third to fourth century).

Equality under law: “Puisqu’il est désirable qu’il y ait uniformité dans la procédure et les peines, j’ordonne qu’il en soit désormais ainsi,” 356 (edict of Asoka Pilier IV of India, third to first century B.C.).

No class distinction: “Il n’ya pas de distinction entre les classes de la société . . . I’l n’existe qu’une seule classe, celle des êtres humains,” 520 (Asvaghosa Vajrasūci, first century B.C. to A.D. first century).

Freedom of religion: “Ne pense pas et ne dis jamais que ta propre religion est supérieure aux autres. Ne dénigre jamais la religion d’autrui,” 474 (edict of Asoka, third to first century B.C.). “Le roi, ayant assimilé les plus hautes vérités de toutes les religions, a dit aux adeptes de diverses religions: ‘Allez, maintenant, et accomplissez vos différents rites et devoirs selon vos religions respectives,’” 479 (Uddyotanasūri Kūvalayamālā, A.D. 779).

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Social security and a decent standard of living: “Le roi doit assurer la subsistance des mineurs, des vieillards, indigents lorsqu’ils sont abandonnés, et aussi celle des femmes qui n’ont pas eu d’enfant,” 175 (Kautīliya Arthasāstra, II, fourth century B.C.).

“Dans son royaume, nul ne devrait souffrir de la faim, de la maladie, du froid et de la chaleur, que ce soit à cause de la pauvreté ou d’une action délibérée d’autrui,” 178 (Apastamba-Dharmasūtra, II, 450–350 B.C.).

From the very ancient non-Western law code of *Hammurabi* (eighteenth century B.C.), we also find evidence of the concern for impartial justice (e.g., Arts. 1–5 punished with death anyone guilty of falsely accusing another of homicide or sorcery and removed from office a judge who modified his judgment in violation of *res judicata*) and the protection of property and contractual rights.

⁶C. Clyde Ferguson, “Global Human Rights: Challenges and Prospects,” *Denver Journal of International Law and Policy* (Spring 1979): 368.

⁷The charter was signed at the United Nations Conference in 1945. The Universal Declaration was proclaimed by the General Assembly in 1948 and has now been accepted by virtually all of today’s 150 states. The Covenants of Civil and Political Rights and Economic, Social, and Cultural Rights were both adopted by the General Assembly in 1966 and have been accepted at the present time by more than one-third of the world states. The articles of the Convention on Racial Discrimination were adopted by the General Assembly in 1965, and the one on genocide in 1948. All these documents were reprinted in 1977 in one convenient *Selected Documents*, no. 5, put out by the U.S. State Department (Washington, D.C.: U.S. Government Printing Office, 1977).

⁸See Henkin, “Constitutional Rights,” p. 596.

⁹But, of course, despite the universal acceptance of the ideology of human rights there are many countries where governments merely pay lip service to these rights. As Henkin put it, “The condition of human rights in most parts of the world remains less than happy” (*Rights*, p. 113).

¹⁰See F. Volio, “Legal Personality, Privacy and the Family,” in Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp. 193–94.

¹¹*Ibid.*, p. 135.

¹²Quoted in Haji Noor Muhammad, “Due Process of Law for Persons Accused of Crime,” in Henkin, ed., *International Bill of Rights*, p. 161.

¹³Henkin, *Rights of Man*, pp. 130–31.

¹⁴*Ibid.*, pp. 105–6.

¹⁵See Alexandre C. Kiss, “Permissible Limitation on Rights,” in Henkin, ed., *International Bill of Rights*, pp. 300–1.

¹⁶See a fuller treatment of this topic in Nguyễn Ngọc Huy and Ta Văn Tãi’s introduction, *The Lê Code: Law in Traditional Vietnam* (Athens: Ohio University Press, 1987); hereafter *Lê Code* or *LC*.

¹⁷For a survey of the extant sources on traditional Vietnamese law and the reasons for the disappearance of other legal documents, see *Lê Code* or *LC*, pts. 1 and 2 of the Introduction. When we refer to an article in the *Lê Code*, we will use the abbreviation *LC*; thus, *LC* 1 would be Art. 1 of the *Lê Code*. When we refer to our annotation of an article, we will use the abbreviation *LC An*; thus *LC An* 2 means annotation of Art. 2. When we refer to other parts of this work, we will use the appropriate word, e.g., “See

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Introduction (or Index) of Lê Code.” Other abbreviations often used: LPC is the Procedural Code of the Lê Dynasty, translated by Raymond Deloustal in *Bulletin de l'école française d'Extrême-Orient* 19 (1919). Reference to the Nguyễn Dynasty Code will be to Philastre's 1909 translation of the Nguyễn Code., *Le code annamite* (Paris, 1909). NC 2, e.g., is a reference to Art. 2 in the translated version of the code; NC 1.1 is a reference to Decree 1 under Art. 1 of the translated version; but when we want to refer to a commentary by Philastre, we shall use the abbreviation: “Philastre, 1:560,” e.g., for the commentary in vol. 1 on p. 560.

¹⁸See a document entitled “Tu Tri Bộ” in the library of the Ecole Française d'Extrême-Orient, cited by Raymond Deloustal, in “La justice dans l'ancien Annam: Traduction et commentaire du code des Lê,” *Bulletin de l'école française d'Extrême-Orient* 10 (1910), note to Art. 222.

Chapter 1

¹See Introduction and ch. 5 on judicial remedy.

²LC 675. This rule was reiterated in the official history of the Lê drafted by its own officials, the *Đại Việt Sử Ký Toàn Thư* (Complete History of Đại Việt); this translation was completed in Hanoi, 1967, 1968, in 4 vols.; hereafter TT, 4:305–6.

³LC An 675.

⁴See LC, Introduction, pt. 1.

⁵See Alexander Woodside, *Vietnam and the Chinese Model* (Cambridge: Harvard University Press, 1967).

⁶NC 386. Also Vũ văn Mẫu, *Cổ Luật Việt Nam Lược Khảo* (Survey of Traditional Vietnamese Law) (Saigon, 1970), 2:522–23.

⁷*Minh Mạng Chính Yếu* (Ming Mạng Records) (Saigon, 1974), 4:68; hereafter MMCY.

⁸*Ibid.*, p. 97.

⁹Phan Phát Huồn, *Việt nam Giáo Sử* (History of the [Catholic] Church in Vietnam) (Saigon, 1965), 1:318–493.

¹⁰LC 425, 646; NC 353. If the criminal punishable by death was under control (e.g., already seized or in jail), or did not resist the arrest, the penalty for the arresting officer was severe enough. If the criminal was not condemnable to death, the punishment for privately taking his life was even much more severe and came under the normal criminal sanction for homicide, a subject within the general topic of criminal law. As for the Trần Dynasty's allowing a husband to kill the man who fornicated with his wife upon capturing him (Lê Tắc, *An Nam Chí Lược* [Brief History of An-Nam], translated by Huế University [1961], p. 222), it could be considered either as a delegation of state authority to carry out a death sentence or, alternatively, as a continuance of the prior Lý law of 1042 exonerating a jealous husband who killed in hot temper the adulterer who fornicated with his wife (TT, 1:218). Later under the Trần, in any case, the swift execution of the adulterer was replaced by another regulation providing for the adulterer's option to redeem his death with 300 *quán* (Lê Tắc, p. 222).

¹¹NC 32.

¹²Philastre, 1:252–53.

¹³LC 254.

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¹⁴LC 252.

¹⁵LC 680; NC 385.

¹⁶Official commentary under NC 385.

¹⁷LC 16; NC 21. However, the difference between Lê and Nguyễn law was that for political offenses of high treason and treason, the Nguyễn Code did not give the ten year old or seven year old this benefit.

¹⁸LC 64, 65; NC 174, 177.

¹⁹LC 515, 550, 406, respectively; NC 321, 334, respectively.

²⁰LC 411; NC 223.

²¹See ch. 3, section on freedom of religion. Only in a certain number of instances was the condemnation of the Catholics also prompted by considerations of state security; in ordinary cases, they were condemned for the very creed they professed—because they were told that if they denied it and agreed to step over a cross, they would be acquitted.

²²E.g., the crimes of borrowing imperial carriages or personal effects (LC 114; NC 146), of using an imperial taboo name (LC 125; NC 62), of climbing over the walls or passing through the gates to get into imperial palaces (LC 51, 52; NC 166).

²³LC 22; Philastre, 1:35–57. Redemption of penalty had been justified on both grounds—of humanity and pecuniary return for the government. But the practical impact was the softening of the death penalty. There are indications that the option of redeeming the death penalty dated back to the Lý and Trần dynasties (LC An 6).

²⁴LC 170, 525, 619.

²⁵LC An 23.

²⁶LC An 23.

²⁷*Đại-Nam Điển-Lê* (Institutions and Regulations of Đại Nam), translated by N. S. Giác (Saigon, 1962), p. 445. Also Pierre Pasquier, *L'Annam d'autrefois* (Paris, 1907), pp. 129–30.

²⁸LC 285; NC 74. See LC An 285 for a description of the evolution of the system of population registers through the dynasties of the Lý, Trần, Hồ, and Lê.

²⁹LC 285 specified the change “from resident to absentee, from healthy to infirm, from able-bodied to disabled.” NC 73 mentioned, as did the corresponding article in the Ch'ing Code, the change between several categories of population: civil, military, artisan, etc. Philastre noted that at the time of his translation of the code (1875), the Vietnamese population registers did not use these categories. Philastre, however, thought that Art. NC 73 could be, as a practical matter, applied to the change from the able-bodied to the infirm, to avoid *corvée* (Philastre, 1:360).

³⁰LC 184, 207, 286, 299, 655; NC 80. The Lý and Trần already set forth punishment for the authorities who hid the commoners on flight (see LC An 299) as well as for the commoners and soldiers who avoided *corvée* and their leaders (TT, 2:194).

³¹LC 325. On the rotation of *corvée*, see LC An 23, 619.

³²NC 78, 79.

³³LC 181; NC 396, 396.2.

³⁴LC 184.

³⁵LC 150, 207, 257, 571; NC 81. See LC An 257 for a 1467 case in which even the official who failed to report misuse of manpower was punished.

³⁶LC An 285.

³⁷LC 311, 552.

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³⁸TT, 3:81–82.

³⁹LC An 150.

⁴⁰Philastre, 1, 364.

⁴¹LC 363. The Nguyễn Code referred to serfs bought with “white contracts” (drafted on white paper), i.e., contracts between private individuals (Philastre, 2:325).

⁴²The state seized the enemies defeated in battle (LC 244); or the wives, mothers, children, daughters-in-law, and sisters of the criminals guilty of high treason, grave insubordination, and treason (LC 341, 411, 412; NC 223, 224); or of those who fled the country (LC 653); and then granted them to the high officials or dignitaries as serfs. The state also sold them with the “red contracts,” i.e., drafted on red paper (Philastre, 2:325, 327). Serfdom already existed under the Lý and Trần (LC An 23).

⁴³Philastre, 2:326.

⁴⁴LC 363, 372. The Hồ Dynasty (1400–1407) also put a limit on the number of serfs owned by private persons. See LC An 238.

⁴⁵LC 364.

⁴⁶LC 490; NC 283.

⁴⁷LC 291. Serfs’ option for self-redemption dated back to the Trần Dynasty (TT 2:68, 79).

⁴⁸LC 341 clearly stated that the wife and children of those guilty of high treason, grave insubordination, and treason could not be redeemed from their status; but another legal document, *Hồng Đức Thiệu Chính Thư* (Book of Good Government of the Hồng Đức Period), translated into Vietnamese by Nguyễn Sĩ Giác (Saigon, 1950); hereafter HDTCT; par. 234 seemed to give them an exceptional exit: If they made great achievements, they could redeem their ascendants’ or spouses’ guilt. See LC An 341.

⁴⁹LC 306, 307, 335.

⁵⁰LC 23, 306.

⁵¹NC 283.3 If they simply hid themselves without relying on the coercion of powerful people, they were punished only with the heavy stick and returned to their master.

⁵²By punishing people who seized for the state persons who should not be captured as public serfs (LC 693; NC 387); or who abducted commoners or relatives and then sold them as serfs (LC 365, 453; NC 77, 244); or who tattooed commoners to change them into serfs (LC 165, 168). Note that the Nguyễn did not adopt a Ch’ing decree permitting poor parents to sell their children, but preserved the main article banning the above unauthorized selling people as serfs (Philastre, 2:122). Lý laws also punished those who sold commoners as serfs (TT, 1:220).

⁵³The Lê Code provided for the serfs’ forfeiture of property in case they committed a crime punishable with death (LC 407), whereas Art. 306 of the Nguyễn Code did not say anything about it. See also LC 386 for the serfs’ capacity to sell property and LC 388 for their sons’ inheritance rights.

⁵⁴In Vietnam a master could not kill a serf with impunity. There were also cases of liberation: A male serf was promoted to be commander of a naval fleet and a female serf married Emperor Lê Hiền Tông and became empress (LC An 23).

⁵⁵Philastre, 2:327.

⁵⁶LPC, Ch. 26, Art. 1. Also *Quốc Triều Chiếu lệnh Thiệu Chính* (Dynasty’s Edicts and Decrees Promulgated for Good Government), translated into Vietnamese by Nguyễn Sĩ Giác (Saigon, 1961), p. 750; hereafter CLTC. The preceding Trần Dynasty, however,

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permitted a creditor to detain a debtor until full payment of principal and interest (Lê Tấn, p. 223).

⁵⁷LC 591.

⁵⁸Philastre, 2:606–7.

⁵⁹Ibid.

⁶⁰A. Miraben, *Précis de droit annamite et de jurisprudence en matière indigène* (Paris: Plon, 1968), pp. 150–52.

⁶¹This article was reiterated in LPC, Ch. 1, Art. 31.

⁶²LC 685; NC 380, 380.3.

⁶³Philastre, 1:275–76.

⁶⁴LC 334; Decree 2 following NC 109.

⁶⁵LC 17.

⁶⁶This was reiterated in LPC, Ch. 1, Art. 31.

⁶⁷The decree following this article gave more details of the procedure, specifying that the judge had to wait for the imperial edict that would prescribe the penalty.

⁶⁸Philastre, 1:278.

⁶⁹Fu-mei Chang Chen, “On Analogy in Ch’ing Law,” *Harvard Journal of Asiatic Studies* 30 (1970): 216.

⁷⁰LC 220; NC 59.

⁷¹D. Bodde and C. Morris, *Law in Imperial China* (Cambridge: Harvard University Press, 1967), p. 532.

⁷²The strong-willed Ch’ien-lung Emperor decreed the following verdict: “Let this rescript be transmitted to the Board of Punishments for inclusion in the register of new sub-statutes, and let Mrs. Ch’en be sentenced in accordance with it” (Ibid., p. 362).

⁷³*Đại Nam Thực Lục* (Historical Records of Đại Nam, Official History of the Nguyễn), translated into Vietnamese by the Historical Institute (Hanoi, 1975), 33:248–49.

⁷⁴See the two codes of ethics of twenty-four articles (1471) and forty-seven articles (1663) in LC An 136.

⁷⁵LC 136 was dangerously close to this: It punished with exile or death any “unruly rowdy who refuses to abide by moral teachings and who does not behave as a respectful subject.”

⁷⁶NC 1.1, 378; also Philastre, 1:116. NC 1.1 clearly distinguished this administrative penalty from the light stick resulting from a judicial decision.

⁷⁷E.g., according to LC 219, an edict might come into existence simply by the emperor’s ordering someone to write it.

⁷⁸MMCY, 4:92.

⁷⁹See ch. 2

⁸⁰Philastre, 2:630.

⁸¹LPC, Ch. 16, Art. 1.

⁸²LPC, Ch. 15, Art. 3.

⁸³LC 508; this was reiterated in another document, CLTC, p. 459.

⁸⁴LC 133; NC 302; see LC An 133 for Lý and Trần practices.

⁸⁵NC 302.

⁸⁶LPC, Ch. 22, Arts. 6–7.

⁸⁷LC 666; NC 373.

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⁸⁸LPC, Ch. 16, Art. 1.

⁸⁹LC 502; see, e.g., LC An 501 for a case in which a false accuser of high treason was decapitated.

⁹⁰NC 305, 373. According to NC 305.2, if the accuser fled, there would be a presumption of false accusation and the court had to release the accused.

⁹¹LC 513; NC 309.

⁹²LC 715; NC 373.

⁹³LC 461.

⁹⁴NC 305.6, 305.7.

⁹⁵LC 699, 704; NC 50.

⁹⁶LC 704.

⁹⁷LC 531; NC 321; the Lê, however, permitted the pretense of having an imperial edict to make arrests in case of high treason, grave insubordination, or treason, if there was not enough time to memorialize the throne in advance (LC 519). See the later discussion of political offenses.

⁹⁸LC 162, 164. According to a Lê decree of 1659, judicial affairs were the venue of judges; military officers were permitted to arrest only thieves and robbers (LC An 162).

⁹⁹LC 673.

¹⁰⁰LC 701.

¹⁰¹LC 702, 703.

¹⁰²LC 673. For crimes such as serious injury, theft, robbery, rape, and murder, bystanders were allowed to arrest the offender and hand him over to the authorities. For other offenses, they had to report the crimes and could not make the arrest (LC 649).

¹⁰³LPC, Ch. 5, Art. 3.

¹⁰⁴The Lê also attempted to limit the expenses that the role of the warrant officer caused the accused or litigant. Generally, the warrant officer could not demand perquisites or fees beyond the official rates (LC 197, 717). Details of these perquisites were given in LPC, Ch. 5, Art. 1: There could be two officers at most for each case. Each was entitled to (1) two meals a day (one tray each meal), or an equivalent amount of 1 *tiền* and one bowl of rice for each meal; (2) a fee for transmittal of warrant (3 *tiền* for provincial warrant, 2 *tiền* for prefectural warrant, and 1 *tiền* for district warrant); (3) a travel per diem of 1 *tiền*. If there were many accused or litigants in one village, only one warrant was to be executed. According to LPC, Ch. 9, these amounts were to be recovered by the winning party and paid in full by the losing party. In the modern context, these statutory limits may not look like an important check on the violation of the accused's right. But it is only so because modern legal systems do not allow a warrant officer's collection of fees and expenses from the accused or litigants. These limits were practical measures to keep under control abuses that had been described by the LPC as follows: During medico-legal examinations in connection with homicide, theft, robbery, battery, and injury, judicial officers had exacted considerable amounts of money, goods, and animals from defendant families on the pretext that they had to make an investigation, to report, to appear in court, and to drink and eat during a judicial mission (LPC, Ch. 9).

¹⁰⁵NC 50.1.

¹⁰⁶LC 667, 712, 716; NC 371.

¹⁰⁷LPC, Ch. 16.1.

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¹⁰⁸NC 371.1. Given the popular stories and theatrical pieces in Vietnam in his time, Philastre was a little skeptical whether this rule was always followed religiously (Philastre, 2:663). In our opinion, however, stories and theaters always dramatized cases of injustice that might be the exception rather than the rule.

¹⁰⁹NC 372.1

¹¹⁰LC 663; NC 366.

¹¹¹NC 372.1.

¹¹²LC 659. This requirement was already a practice under the Lý (LC An 659).

¹¹³LC 508, 673.

¹¹⁴LPC, Ch. 1, Art. 18.

¹¹⁵LC 704.

¹¹⁶LC 658; NC 361. According to the Nguyễn Code, if the arrested person were beaten while in detention, the officials responsible would also be flogged in cases of simple beating, or decapitated if the beating led to death.

¹¹⁷Such a concept, however, is relatively modern even in the West. E.g., only in 1972 did France abolish the principle of nonliability of the state; where state liability is now accepted, it is only for a serious fault of civil servants.

¹¹⁸Philastre, 2:631.

¹¹⁹LC 225; NC 211, 214; also note by Philastre, 1:776. This system was apparently developed merely to a minimum extent; e.g., under the Lê there were only fifty-four stations (see LC An 225).

¹²⁰NC 211.

¹²¹LC 664. NC 365 seemed to restrict sweepingly official approval of any kind of communication between detainees and the outside world, but in practice one could communicate easily with detainees and might bring them food (Philastre, 2:630).

¹²²Art. 187 of the French Penal Code stipulates three exceptions to privacy of correspondence: seizure ordered by an investigating judge or a prefect; censor during wartime, and correspondence of detainees.

¹²³See, e.g., the cases of Bishop José Diaz and priest Venard Ven (Phan Phát Huôn, 1:430, 482).

¹²⁴LC 117; NC 147.

¹²⁵LPC, Ch. 21.

¹²⁶LPC, Ch. 26, Art. 5.

¹²⁷LC 492.

¹²⁸LC 461; NC 305.6, 7.

¹²⁹NC 293 (penalty: the light stick); LC 336 only punished the revilement of commoners by serfs—and not commoners—but HDTCT 323 mentioned reparation for reviling a commoner without specifying the author of the revilement.

¹³⁰The higher the rank of officials, the heavier the punishment for reviling them (LC 473; LC An 31); imperial relatives, imperial envoys, officials heading an area or service, and military commanders were esp. protected (LC 474; NC 294.1; LC 487; NC 294), as were prosecutors and judges (LC 492; NC 294.2). Under the Trần, revilement was punished with the heavy stick penalty and monetary reparation (Lê Tắc, p. 222).

¹³¹LC 336 and NC 296 (heavy penalties: exile and strangulation, respectively).

¹³²LC 493.

¹³³LC 496.

Notes

¹³⁴LC 489.

¹³⁵LC 475, 477, 483; NC 298, 299, 297.

¹³⁶See all articles of the Lê Code listed in the preceding notes. Reparation for revilement already existed under the Trần (LC An 473).

¹³⁷LC 461.

¹³⁸LC 314.

¹³⁹LC 401, 405.

¹⁴⁰LC 403.

¹⁴¹LC 465, 466, 472, 474, 487, 491, 492, 493, 496.

¹⁴²LC 599.

¹⁴³LC 686.

¹⁴⁴Philastre, 2:630.

¹⁴⁵See Phan Phát Huân, 2:288.

¹⁴⁶For a description of prisons in Central Vietnam in 1899, see E. Jeanselme, *Prisons et châtiments corporels en Indochine* (Paris, 1913), esp. pp. 3, 4.

¹⁴⁷LC 691, 720.

¹⁴⁸LC 708.

¹⁴⁹NC 381.

¹⁵⁰NC 361.

¹⁵¹LC 667, 668. In this eventuality, the Lê Code permitted, but also required a joint decision by judges for, judicial torture. NC 361 exempted the judge from any penalty if such legal conditions were fulfilled even if torture, applied in conformity with the rules, resulted in accidental death.

¹⁵²LC 721.

¹⁵³The interrogation stick was about 105 cm long, 1.8 cm in diameter at the big end and 1 cm in diameter at its small end. See the Table of Penal Instruments at the beginning of LC; also LC 669 and 679.

¹⁵⁴Jeanselme, *Prisons et châtiments corporels*, p. 9.

¹⁵⁵Vũ Văn Mẫu, 2:537. The Nguyễn Code also stated that the person who correctly applied the instrument of torture according to the rules would not be punished when it resulted in death or injury if he were simply obeying the order given even maliciously by a higher authority (NC 361).

¹⁵⁶LC 665; NC 369. The eight special considerations were being an imperial relative, long service, virtue, ability, achievement, high rank, zealous service, and being guests of state.

¹⁵⁷LC 715; NC 373.

¹⁵⁸Alexandre de Rhodes, *Histoire du royaume du Tunquin et des grands progrès de la prédication de l'évangile depuis l'année 1627 jusqu'à l'année 1646* (Lyon, 1651), p. 45.

¹⁵⁹To say nothing of totalitarian regimes. Even France during the Algerian War resorted to this measure.

¹⁶⁰Jeanselme, *Prisons et châtiments corporels*, pp. 9–10.

¹⁶¹LC 668, 710, 721. The Lê Dynasty was thus ahead of continental European countries which, until the mid-eighteenth century, still required “full” proof (confession secured by torture) rather than giving the judges discretionary power to punish on the basis of circumstantial evidence.

¹⁶²Pasquier, *L'Annam d'autrefois*, p. 12.

Notes

¹⁶³Jeanselme, *Prisons et châtiments corporels*, p. 12.

¹⁶⁴TT, 1:229–30.

¹⁶⁵Humanitarian treatment of detainees was not unknown in China. See Ch'en Ku-yüan, *Chung Kuo Fa Chih Shih* (History of Chinese Legal Institutions) (Shanghai, 1934), pp. 251–52. But the reference to the probable innocence of the detainees in Lý Thánh Tông's statement was unusual.

¹⁶⁶TT 1:242.

¹⁶⁷For more details on humanitarianism in Lý law and its Confucian critics such as Lê Văn Hữu (1231–?), Ngô Sĩ Liên (14?–14?), Ngô Thời Sĩ (1725–1780), and Phan Huy Chú (1782–1840), see LC, Introduction, pt. 1.

¹⁶⁸Lê Tắc, pp. 222–23; also Phan Huy Chú, *Lịch Triều Hiến Chương Loại Chí-Hình Luật Chí* (Annals of the Laws and Institutions of Successive Dynasties—Legal Section), translated into Vietnamese by Cao Nãi Quang (Saigon, 1957), p. 526–27.

¹⁶⁹The Trần Dynasty, although harsh in criminal policy, was consistent in adhering to the law it had promulgated (see LC, Introduction, pt. 1).

¹⁷⁰LC 507; NC 308.

¹⁷¹LC 492, 707; NC 363.

¹⁷²NC 363.

¹⁷³LC 707; NC 363; Philastre, 2:650; 1 *thăng* was about 2.67 kg. The 1849 decree was an improvement on an earlier decree in 1818 that specified 9, 7, and 5 *thăng* for the same age groups, respectively (*Đại-Nam Điển-Lê*, p. 293).

¹⁷⁴Jeanselme, *Prisons et châtiments corporels*, p. 4.

¹⁷⁵LC 663, 692.

¹⁷⁶LC 692; NC 363.4.

¹⁷⁷NC 363.4, 366.

¹⁷⁸LC 658, 660; NC 360.

¹⁷⁹NC 360.1

¹⁸⁰CLTC, p. 425.

¹⁸¹NC 363.3, 363.4.

¹⁸²For a detailed discussion of these penalties—and some others used for a short period under the Lê (cutting off fingers and hands)—see LC An I.

¹⁸³TT, 4:270.

¹⁸⁴TT, 1:212; 2:49, 119.

¹⁸⁵Philastre, 1:67. Earlier dynasties, less well entrenched, resorted to other types of horrible deaths to consolidate their power. The Đinh Dynasty (969–980) boiled criminals in oil cauldrons, threw them to tigers, or cut them to pieces (TT, 1:154, 157). The last emperor of the Former Lê Dynasty (980–1009) had them sliced with blunt knives or drowned them slowly in the rising tide (TT, 1:184).

¹⁸⁶LC 244.

¹⁸⁷On political crimes, see LC 411, 412; NC 223, 224. On mutual concealment, see LC 39; NC 31.

¹⁸⁸Pasquier, *L'Annam d'autrefois*, p. 198; MMCY, 4:59; Philastre, 1:66–67.

¹⁸⁹LC 1, 695. The chain had from one to three loops.

¹⁹⁰NC 356; also Jeanselme, *Prisons et châtiments corporels*, p. 4.

¹⁹¹*Ibid.*, pp. 11, 12, 31.

Notes

¹⁹²Philastre, 1:66; Jeanselme, *Prisons et châtiments corporels*, pp. 8, 9. *Đại-Nam Điển-Lê*, pp. 497, 527, mentioned the earlier dates of 1898 and 1901 for the change of the stick penalties into imprisonment of two days to eighteen months (if the offenders did not have money to redeem them).

¹⁹³LC 679. See also the Table of Penal Instruments at the beginning of the Lê Code. NC 378 mainly dealt with using the heavy stick where the light stick should have been used or beating on the wrong part of the body.

¹⁹⁴NC 1.1.

¹⁹⁵LC 680; NC 385.

¹⁹⁶See “Reduction of penalty” item in the index of the Lê Code. The list of the corresponding cases in Nguyễn law could be compiled with the additional help of Appendix A1 in that volume.

¹⁹⁷See “Nonprosecution” item in the index of the Lê Code.

¹⁹⁸LC 16; NC 21. The Nguyễn Code was less generous: for the political offenses of high treason, grave insubordination, and treason, no exemption was granted.

¹⁹⁹LC 17; NC 22.

²⁰⁰LC 18, 19, 20. The ten heinous crimes were plotting high treason, plotting grave insubordination, plotting treason, wicked insubordination (beating or plotting to kill parents or other relatives), inhumanity (killing three persons in a family, dismembering a person, breeding venomous insects), *lèse-majesté*, lack of filial piety, discord (plotting to kill or sell a distant relative, beating a husband), disloyalty (killing official, superior officer, or one’s master), and incest. Details in LC 2; NC 24, 24.1, 24.2, 28.

²⁰¹LC 16; LC 14. Redemption was already adopted under the Lý and Trần, esp. for the young, old, and disabled. LC An 6, 16.

²⁰²LC 17.

²⁰³NC 21, 22.

²⁰⁴NC 12.

²⁰⁵NC 19.

²⁰⁶NC 1.7.

²⁰⁷See TT, 1:219; LC An 6.

²⁰⁸LC 26.

²⁰⁹See “Monetary sanctions: fine” item in the index of the Lê Code.

²¹⁰See “Demotion” item in the index of the Lê Code. Demotion already existed under the Lý, Trần, and Hồ dynasties (LC An 22).

²¹¹Samuel Baron, *A Description of the Kingdom of Tonqueen* (London, 1732), pp. 14, 23. Baron was half-European, half-Vietnamese; he served as trade representative for the Dutch and the English.

²¹²LC 665; NC 369.

²¹³LC 16; NC 21. The ten heinous crimes are listed in note 200.

²¹⁴LC 16; NC 21.

²¹⁵LC 16; NC 21.

²¹⁶Philastre, 2:650.

²¹⁷See the later discussion of the appellate system; also LC An 672.

Notes

²¹⁸LC 162, 164. Military officers could arrest and investigate only robbers and thieves. The Lý Dynasty also forbade people to rely on powerful people to settle land disputes (TT, 1:279).

²¹⁹LC 673.

²²⁰LC 698.

²²¹See LC 674, An 674.

²²²NC 388.1. The Minh Mạng Emperor once reminded judges in provinces to take upon themselves the task of judicial investigation; if they delegated such tasks to clerks, they would be punished (MMCY, 4:137).

²²³LC 362.

²²⁴LC 692.

²²⁵LC 691.

²²⁶LC 675, 719. The penalty for failing to report to higher authorities in rendering justice was demotion: LC 684.

²²⁷LPC, Ch. 14, Art. 1.

²²⁸NC 362.

²²⁹This automatic review process was governed by so many varying decrees for different offenses that Philastre suggested that only a thorough study of the whole code could produce an accurate summary of the situation. The foregoing general description, derived from NC 362 and 376 and official commentary, was only a summary of the main features of the review process. See also Đỗ Xuân Sảng, *Les juridictions mandarinales* (Paris, 1938), pp. 67–71; Vũ Văn Mẫu, pp. 522–23. See esp. the discussion on no arbitrary deprivation of life in a previous section.

²³⁰NC 304.

²³¹LC 689.

²³²LC 670; NC 371.

²³³LC 700, 706, 716; NC 388.

²³⁴NC 308.1

²³⁵LC 197; NC 374.2.

²³⁶LC 720, 686; NC 374. For a number of cases of aggravation of the verdict during the Trần and Lê dynasties, see LC An 686.

²³⁷LC 691; NC 381.

²³⁸LC 664, 711; NC 365.

²³⁹Pasquier, *L'Annam d'autrefois*, pp. 191–92.

²⁴⁰LC 47, 48.

²⁴¹LC 667, 668.

²⁴²LC 713.

²⁴³LC 720; see also the 1437 decree aiming at the same effect of a joint and public hearing in TT, 3:121.

²⁴⁴LPC, Ch. 1, Art. 29. LC 709 even specified the manner in which the litigants and accused had to stand or sit in the court. At the central government level, a public hearing was also required to satisfy the people's sense of justice, as stated.

²⁴⁵LPC, Ch. 1, Art. 29.

²⁴⁶LPC, Ch. 11, Art. 2.

²⁴⁷Philastre, 2:647.

Notes

²⁴⁸Pasquier, *L'Annam d'autrefois*, p. 218. See Jean-Baptiste E. Luro, *Le pays d'Annam* (Paris, 1897), pp 126–34 for a report by the Viñh Long Province judicial commissioner on a case during the Thiệu Trị reign (1841–1847), in which the district chief conducted the interrogation of offenders and witnesses with the utmost care.

²⁴⁹LPC, Ch. 1, Art. 22; LC 671. See also CLTC 395 and 469 for two decrees in 1645 and 1687 reiterating the same deadlines. See TT, 3:139–40, for cases under the Lê in which judges were given the light stick for delay in rendering justice.

²⁵⁰LC 673.

²⁵¹LPC, Ch. 15, Art. 1.

²⁵²LPC, Ch. 6, Art. 4.

²⁵³LC 719.

²⁵⁴LC 688.

²⁵⁵NC 65 only mentioned the delay in presenting an official report to the upper authorities (*trình*) and Decree 1 following it fixed the deadline for presenting official reports to the upper authorities as follows: five days for petty matters, ten days for intermediate matters, twenty days for important matters.

²⁵⁶Vũ Văn Mẫu, 2:540. Although the Ch'ing Code did not specify the deadlines for handling civil and criminal cases, the *Ch'ing hui-tien* and *Liu pu ch'u fen tse-li* specified in detail the time period for rendering judgments and for apprehending killers, robbers, or thieves. See T'ung-tsu Ch'ü, *Local Government in China Under the Ch'ing* (Cambridge: Harvard University Press, 1962), pp. 116–29.

²⁵⁷NC 303.1

²⁵⁸Luro, *Le pays d'Annam*, p. 132.

²⁵⁹NC 370.1

²⁶⁰Woodside, *Vietnam and the Chinese Model*, p. 108.

²⁶¹MMCY, 4:75.

²⁶²LC 721.

²⁶³LPC, Ch. 7, Art. 1. For homicide cases, the time period for the defendant to present his defense was two months from the date of the accusation. LPC, Ch. 15, Art. 4.

²⁶⁴LPC, Ch. 7, Art. 3.

²⁶⁵Of course, the judge could refuse postponement if he were faced by an obstinate accused who purposefully absented himself from the court to prolong his case. LPC, Ch. 7, Art. 4.

²⁶⁶LPC, Ch. 7, Art. 1.

²⁶⁷Philastre, 2:450.

²⁶⁸NC 309, 388; MMCY, 4:86.

²⁶⁹LC 671.

²⁷⁰NC 372, 305.2.

²⁷¹NC 305.5.

²⁷²MMCY, 4:136.

²⁷³Miraben, *Droit annamite et de jurisprudence*, p. 207.

²⁷⁴LC 677. We find in Art. 370 of the Nguyễn Code, on confrontation of an offender and the accomplices he denounced, that the official having jurisdiction over the persons thus denounced had to deliver them to the court within three days of receiving the subpoena.

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²⁷⁵LPC, Ch. 23.

²⁷⁶LPC, Ch. 5, Art. 2, stated that after the testimonies by officials and witnesses had been inserted in the file, if the litigants demanded that they be convened again, their request would be honored provided the litigants promised in writing to accept a severe penalty if the reexamination of the subpoenaed persons revealed no new fact.

²⁷⁷LC 546.

²⁷⁸NC 305.5. See also NC 373 for the penalty imposed on the witness who supported the false accusation of a detainee.

²⁷⁹LC 714.

²⁸⁰LC 546; NC 373.

²⁸¹LPC, Ch. 31, Art. 1.

²⁸²LPC, Ch. 31, Arts. 2, 3, 4.

²⁸³LC 673.

²⁸⁴In the words of Art. 14, par. 5, of the CCPR.

²⁸⁵See the preceding section.

²⁸⁶See LC An 672 for the details of these decrees.

²⁸⁷The redemption of the demotion was 100 *quán* (for a first-rank official); 75 *quán* (second rank); 50 *quán* (third rank); 30 *quán* (fourth rank); 25 *quán* (fifth rank); 20 *quán* (sixth or seventh rank); 10 *quán* (eighth or ninth rank). The fine would be: 5 *quán* for village chiefs; 10 *quán* for district or prefectural officials; 15 *quán* for province officials, the capital governor or police chief, the censor supervising an area where the case arose; and 20 *quán* for officials of the Censorate (CLTC 440–441). We find in the historical records that some judges under the Lê lost more than one grade for improper adjudication: Deputy Chief Censor Đỗ Thiệu Chính lost four grades in 1675 (TT, 4:336); Chief Censor Nguyễn Quý Đức lost one in 1696 while president of the Board of Punishments; and Trương Công Giai lost two in 1724 (CM, Book 34, pp. 36b–37a, and Book 36, p. 16ab).

²⁸⁸LPC, Ch. 1, Arts. 32–33.

²⁸⁹LC 688.

²⁹⁰NC 301.

²⁹¹Prior to, and after, the promulgation of the Nguyễn Code, a number of decrees on violating the hierarchy of courts were issued in the years 1802, 1829, and 1852 (see Philastre, 2:394–95).

²⁹²Vũ Văn Mẫu, pp. 522–23.

²⁹³Vũ Quốc Thông, *Pháp Chế Sử Việt Nam* (Vietnamese Legal History) (Saigon, 1971), p. 384.

²⁹⁴NC 376.

²⁹⁵NC 375.

²⁹⁶NC 374.

²⁹⁷TT, 1:226.

²⁹⁸LPC, Ch. 1, Art. 27.

²⁹⁹LC 230.

³⁰⁰NC 301; also two decrees of the Minh Mạng Emperor in 1829 (Philastre, 2:394).

³⁰¹LC 34, 687.

³⁰²CLTC 465.

³⁰³CLTC 469.

Notes

³⁰⁴TT, 3:222.

³⁰⁵The rate of reparation payment varied with the rank of the judge: The amounts were the same amounts of redemption that officials challenged on appeal would have to pay if they did not adjudicate properly: 100 *quán* for a first-rank official, 75 *quán* for a second-rank official, and so on (see note 287).

³⁰⁶LPC, Ch. 1, Art. 26.

³⁰⁷NC 375.

³⁰⁸*Res judicata pro veritate habetur*. A case adjudged is considered as the truth.

³⁰⁹TT, 1:263.

³¹⁰TT, 3:186.

³¹¹In a memorandum in 1543, Nguyễn Như Cương, judicial commissioner of Kinh Bắc Province during the Mạc Dynasty, repeated exactly the terms of this Art. 514. HCTCT, par. 7.

³¹²Luro, *Le pays d'Annam*, p. 134.

³¹³See LC, Introduction, pt. 1.

³¹⁴LC 107. The first oath-taking ceremony took place in the year 1028 during the reign of Lý Thái Tông, who survived the plot of three princes. The Trần and Lê dynasties continued this practice. See LC An 107.

³¹⁵LC 411; NC 223. See LC An 411 for cases in Vietnamese history, including those under the Lý and Trần dynasties. The Lý, Trần and Hồ also punished traitors with slicing and bone crushing (TT, 1:212; 2:49, 119, 213, 214, 223).

³¹⁶LC 2, 110, 111.

³¹⁷LC 2.

³¹⁸LC 204, 275.

³¹⁹NC 223.

³²⁰LC 411, 341.

³²¹NC 223. The harsh and swift punishment for relatives of those guilty of “high treason” can be seen in the contrasting attitudes of the Minh Mạng Emperor. On one hand, he was so scrupulous in reviewing the death penalty in ordinary criminal cases that he was ready to review once again a final decision of his when officials pointed out to him reason for doubt (see the discussion of deprivation of life in this chapter). On the other hand, he immediately ordered an emergency search for, and arrest and killing of, Nguyễn Văn Lương, son of the Nguyễn Nhạc Emperor of the previous hostile Tây Sơn Dynasty (MMCY, 4:97, 98); in another case, he let a seven-year-old son of rebel Lê Văn Khôi be put to death by slicing (Trần Trọng Kim, *Việt Nam Sử Lược*, p. 447).

³²²LC 412; NC 224. See LC An 412 for cases in Vietnamese history: In 1124, under the Lý, Mạc Hiền, who fled to China and was returned by the Sung, was only exiled.

³²³LC 2, 412; NC 224.

³²⁴LC 653.

³²⁵LC 412; NC 224.

³²⁶LC 39; NC 31.

³²⁷Philastre, 1:251.

³²⁸LC 39; NC 31.

³²⁹LC 411, 412, 500; NC 223, 224.

³³⁰LC 507, 504; NC 308, 306.

Notes

³³¹As well as some other serious crimes such as cases where the accuser was victim of murder attempt, injury, robbery, or deceit or was denouncing a spy, or where the accuser's father or natural parents were murdered by his stepmother or adoptive parents, or he was oppressed and sought redress (LC 507, 504; NC 308, 306).

³³²Philastre, 2:433.

³³³LC 18; NC 24.

³³⁴Or, under the Nguyễn, when some other types of criminal acts had already been carried out and had produced their harmful effects: irreparable bodily injury, noncompensable damage to property, fleeing from jail, sexual offense (NC 24, 24.1); or, under the Lê, when one of the ten heinous crimes or murder was involved (LC 18).

³³⁵NC 24. In 1309, however, Emperor Thánh Tông of the Trần Dynasty pardoned one Ma for grave insubordination after he asked his wife to confess for him (TT, 2:97).

³³⁶LC 16. The possibility of redemption for persons aged seventy to eighty, ten to fifteen, or for disabled people, and the exception from such a possibility in a case of the ten heinous crimes, had already existed from the time of the Lý Dynasty (TT, 1:219).

³³⁷NC 21.

³³⁸Philastre, 1:186. However, the seven-year-old son of the rebel Lê Văn Khôi was put to death by slicing in 1835 (Trần Trọng Kim, p. 447).

³³⁹LC 4, 5; NC 4; also LC An 4.

³⁴⁰LC 14. As error or negligence was the foundation for redemption, the option of redemption also disappeared for intentional crimes such as corruption, deceit or forgery.

³⁴¹See the discussion of "no arbitrary arrest."

³⁴²Under the preceding Trần Dynasty, Marquis Văn Hiến was also exempted from death for his false accusation of Quốc Chấn (the empress's father) for high treason (TT, 2:119).

³⁴³LC 670; NC 371. In its second paragraph, Art. 371 of the Nguyễn Code clarified that in making arrests or searches in pursuance of the original charges, if additional facts were uncovered, they would be taken into account in judgment.

³⁴⁴LC 531; NC 322.

³⁴⁵LC 519; NC 321.

³⁴⁶LC 519.

³⁴⁷Trần Trọng Kim, pp. 120, 180–81, 237, 238, 239, 240, 424.

³⁴⁸LC 413; NC 225.

³⁴⁹LC 133; NC 302.3. The Minh Mạng Emperor confirmed the death penalty for Hồ Công Quang, a first academic degree holder (*tú tài*) in Quảng Bình who improperly (but not anonymously) memorialized that the emperor should reassess the overlord of North Vietnam to the capital (MMCY, 4:70–71).

³⁵⁰Bodde and Morris, *Law in Imperial China*, p. 43.

³⁵¹Charles Maybon, *Histoire moderne du pays d'Annam* (Paris, 1920), pp. 400–1.

³⁵²MMCY, 4:118.

Chapter 2

¹LC 674; MMCY, 1:80; 4:67.

²LC 2, 504; NC 2, 306, 335.

³LC 502 (penalty one degree less than for the crime falsely denounced); NC 306 (strangulation).

Notes

⁴This accusation would be considered as tantamount to the children/grandchildren's surrendering themselves to the authorities (NC 24).

⁵NC 306.

⁶LC 2, 475, 476; NC 2, 298, 300. HDTCT, par. 145, provided for the same penalty as in the Nguyễn Code (strangulation), probably because of Emperor Lê Thánh Tông's adoption of a Ming provision, later incorporated in the Ch'ing and Nguyễn codes.

⁷According to Philastre, it is legitimate to infer from Art. 298 of the Nguyễn Code (which required the reviled parents/grandparents to file the suit personally) and Art. 306 of the same code (which forbade any suit by junior relatives against senior relatives except for some cases, such as high treason and the like, but not including revilement) that revilement of junior relatives by senior relatives was not punished because the junior relatives would not be able to file any suit.

⁸LC 2, 475; NC 2, 288, 291, 300.

⁹LC 475, 476; NC 288.

¹⁰LC 475; NC 288. It is noteworthy that the Nguyễn Code, in addition, mentioned the killing of children/grandchildren by the parents/grandparents for disobeying their orders in the same paragraph as the unintentional killing of the children/grandchildren and did not punish the act.

¹¹LC 475; NC 288.

¹²HDTCT, par. 299; NC 288.

¹³LC 506; NC 307.

¹⁴LC 2, 130, 317; NC 98, 160. In 1676, a censor who concealed his obligation of mourning for his parents was dismissed from service (see LC An 130).

¹⁵LC 511; NC 306.

¹⁶Who stood in the second (one-year) degree of mourning in relation to one another.

¹⁷I.e., those who stood in the third (nine-month), fourth (five-month), and fifth (three-month) degrees of mourning in relation to one another. E.g., those in the third degree of mourning were: sisters-in-law, married sisters, first cousins, nephews' wives, etc.; in the fourth degree, granduncles and their children, grandaunts, first cousins once removed, etc; in the fifth degree, greatgranduncles and their children, married grandaunts; first cousins' wives, etc. (For more details, see the Table of Five Degrees of Mourning in the Lê Code.)

¹⁸LC 2, 504; NC 306.

¹⁹LC 477; NC 297.

²⁰NC 297. It is noteworthy that the Nguyễn Code made a further distinction in family status for different degrees of penalty: If the senior relative was of a higher generation than the offender's, the penalty would be increased one degree.

²¹LC 483 granted the wife one degree reduction in the penalty, whereas NC 299 punished her with the same penalty as would be imposed on the husband guilty of the same offense.

²²LC 477 (second-degree relatives), 478 (third-, fourth-, and fifth-degree relatives), 483 (wife of the junior relative). NC 286 (third-, fourth-, and fifth-degree relatives), 287 (second-degree relatives), 289 (wife of the junior relative). It is noteworthy that, according to NC 287.2, a senior relative of the second degree of mourning or of a generation higher than the junior would not be punished if he struck

Notes

the junior and caused some disability after the junior had offended him or if they were in a fight.

²³LC 477; NC 287.

²⁴Nguyễn Thế Anh, *Kinh Tế và Xã Hội Việt-Nam Dưới các Vua Triều Nguyễn* (Economy and Society in Nguyễn Vietnam), (Saigon, 1971), p. 64.

²⁵E.g., they could not illegally arrest people or take litigation into their own hands (LC 162, 164); they would be punished if they allowed their slaves to bully the common people (LC 336) or to harbor thieves or robbers on their estates (LC 455; NC 247). The Minh Mạng Emperor told the princes in 1831: “Prince Diên Khánh was exempted from punishment because he surrendered and confessed his guilt in a memorial, not because he is a relative of mine and I have distorted the law to protect him. As head of state, if I do not apply the law to my relatives, how can I give example to the people?” (MMCY, 4:103.)

²⁶LC 3, 6; NC 3. Under the Trần, imperial relatives were not punished severely even for high treason, whereas their accomplices suffered harsh penalties. Trần Liễu, e.g., was pardoned but his followers were put to death.

²⁷LC 5; NC 3. In the Lê, however, the privilege was no longer available if the ten heinous crimes, illicit sexual relations or theft in the imperial palaces, abduction, or bribe were involved.

²⁸LC 692.

²⁹LC 709.

³⁰LC 474; NC 274: If striking led to injury, the penalty would be penal servitude instead of the ordinary penalty of the heavy or light stick (LC 465; NC 271).

³¹LC 474.

³²LC 13; NC 11.

³³LC 674.

³⁴LC 692, 217.

³⁵LC 709.

³⁶NC 6.

³⁷LC 14 (even for crimes committed before becoming an official).

³⁸NC 8.1; 1, par. 2.

³⁹For public offenses (committed while exercising a public function and with no private motive), they would lose one year’s salary or less for the penalty of sixty strokes of the heavy stick or less, be demoted in grades for the penalties of seventy, eighty, and ninety strokes, and lose grade as well as being transferred for the penalty of one hundred strokes (NC 7). For private offenses (committed for a private motive) they would lose salary for the light stick penalty, be demoted in grade for the heavy stick penalty of sixty to ninety strokes, and be dismissed for the hundred strokes penalty (NC 8).

⁴⁰LC 9.

⁴¹LC 10.

⁴²See our discussion of the procedure of the eight special considerations in the section on offenses against state security.

⁴³They were given at least one degree reduction in the penalty (LC 3). The Lê Code explicitly mentioned a number of offenses for which officials of the third or higher rank would be given a lighter penalty than normally the case: taking a bribe for misapplication of the law (LC 138), concealing public property (LC 594), concealing rebels’ families

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(LC 307), beating up people (LC 472). For cases in which officials were spared the death penalty or simply dismissed, see LC An 3.

⁴⁴LC 665; NC 369.

⁴⁵E.g., for illegal arrest of people (LC 162); or exacting “greeting gratuities” when they served as generals administering the military territories (LC 163); or taking litigation into their own hands while serving as superintendents or administrators (LC 164); or tattooing people and transforming them into serfs (LC 168).

⁴⁶E.g., for harassing the people (LC 304); or fraudulently claiming to be superintendent in the military territories (LC 529); or beating up officials or reviling them (LC 472, 473).

⁴⁷LC 21, 24; also LC 9.

⁴⁸LC 472, 487 (commoners or officials striking officials); NC 275 (commoners and clerks striking officials); NC 278, 276 (officials striking officials). The only exception of the unequal treatment was, according to NC 275.3, when the official provoked the commoners by disorderly conduct, the case would be treated as the ordinary case of fighting between persons of unspecified status.

⁴⁹LC 487.

⁵⁰NC 6. Mistreatment could be both physical and moral.

⁵¹LC 502, 505.

⁵²LC 29.

⁵³LC 473, 487.

⁵⁴HDTCT, par. 147.

⁵⁵LC 509.

⁵⁶LC 496. Also, a 1487 decree listed a schedule of reparation payments that increases with the rank of the victims’ husbands’ official positions but did not provide for any reparation for reviling a commoner’s wife (HDTCT, par. 323).

⁵⁷LC 78; NC 203.

⁵⁸LC 599. NC 91 did not make any distinction between officials and commoners in this respect.

⁵⁹LC 592.

⁶⁰LC 22, 290. Under the Nguyễn, two decrees during the Gia Long and Minh Mạng reigns were repeated in 1865 specifying that one son of a principal (official) might be appointed as: (1) a principal ninth-rank official if his late father was a subaltern third-rank official; (2) a subaltern eighth-rank official if his late father was a principal; (3) a subaltern seventh-rank official if his late father was a subaltern second-rank official; (4) a principal seventh-rank official if his late father was a principal second-rank official; (5) a subaltern sixth-rank official if his late father was a subaltern first-rank official; (6) a principal sixth-rank official if his late father was a principal first-rank official. See Nguyễn Thế Anh, *Kinh Tế và Xã Hội Việt-Nam Dưới các Vua Triều Nguyễn* (Economy and Society in Nguyễn Vietnam) (Saigon, 1971), p. 61. See also *Đại Nam Điển Lệ*, p. 83.

⁶¹For the Lê, see LC 311 and LC An 23; CLTC 349, 109; TT, 3:301–2. For the Nguyễn, see Pasquier, *L’Annam d’autrefois*, p. 158 (officials, sons) and Luro, *Le pays d’Annam*, p. 149 (scholars who passed the bachelor, *tú tài*, and licentiate, *cử nhân*, examinations). See also Woodside, *Vietnam and the Chinese Model*, p. 78.

⁶²*Đại-Nam Điển-Lê*, p. 347.

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⁶³LC 142, 143, 226; NC 156; also see Woodside, *Vietnam and the Chinese Model*, p. 78, on the Nguyễn's unequal distribution of allotment land based on official rank. Details of the rigid differentiation in dress and personal effects between officials and commoners can be found for the Lê in CLTC, 199–269; for the Nguyễn, in *Đại-Nam Điển-Lê*, pp. 319–31.

⁶⁴LC 226.

⁶⁵LC 407, 386; the sons of a slave and her master also had inheritance rights for the master's estate (LC 388).

⁶⁶NC 339.

⁶⁷NC 282.

⁶⁸See the section on freedom from bondage in ch. 1 for more details.

⁶⁹LC 291, 417.

⁷⁰LC 503, 504; NC 306.

⁷¹LC 480; NC 296. See also Philastre, 2:753 for the crime of criticizing the household head, punishable by strangulation.

⁷²LC 490; NC 283.

⁷³NC 282.

⁷⁴LC 480; NC 283. But involuntary injury (not caused by striking) was punished with exile in both codes, whereas involuntary homicide was punished with exile in the Lê Code and strangulation in the Nguyễn Code.

⁷⁵LC 417; NC 253.

⁷⁶LC 417; NC 253.

⁷⁷LC 407; NC 336.

⁷⁸LC 486.

⁷⁹NC 291, 300.

⁸⁰LC 490; NC 283.

⁸¹NC 282.

⁸²LC 480; NC 296, 283.

⁸³LC 417, 407; NC 253, 336.

⁸⁴NC 283.1.

⁸⁵LC 629, 323. See also TT, 3:182–83 about a 1462 regulation requiring an affidavit of moral character that candidates had to get from local officials to register for examinations. This affidavit was to prove, among other things, that they did not come from a family of singers or actors.

⁸⁶Article 113 in George T. Staunton's translation of *Ta Tsing Leu Lee* (London, 1810; reprinted Taiwan: Ch'ing Wen Publishing Co., 1966).

⁸⁷See ch. 3.

⁸⁸E.g., under the Nguyễn, when the imperial relatives bequeathed their titles of nobility (Vương, Công, Hầu, Bá, Tử, Nam, or Prince, Duke, Marquis, Count, Viscount, Baron) to their descendants, their titles would be diminished one grade each time they were transferred. Titles could be transferred only if the recipients were deserving and received an imperial edict granting the new titles. The sixth-generation descendant of a duke would no longer have a title; the fifth-generation descendant of a marquis would not have a title, and so on. The only descendants of a baron entitled to any grade were his sons (*Đại-Nam Điển-Lê*, pp. 79–81; see also Nguyễn Thế Anh, pp. 62–63).

⁸⁹LC 2 and annotation.

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- ⁹⁰LC 393.
- ⁹¹LC 419; NC 269.
- ⁹²LC 504, 502, 503; NC 306.
- ⁹³LC 416; NC 253.
- ⁹⁴LC 2, 416; NC 2, 253.
- ⁹⁵LC 498.
- ⁹⁶LC 481. The distant region was Tân Bình, the furthestmost southern frontier area of Vietnam; the outlying region was Bồ Chính, the next furthest area (NC 284).
- ⁹⁷LC 482, 465, 466.
- ⁹⁸NC 284.
- ⁹⁹LC 482, 467.
- ¹⁰⁰NC 284.
- ¹⁰¹NC 262.
- ¹⁰²LC 476.
- ¹⁰³LC 477. See LC An 1 about these different degrees of servitude.
- ¹⁰⁴LC 477.
- ¹⁰⁵LC 476, 415.
- ¹⁰⁶NC 284, 288, 297, 298, 299.
- ¹⁰⁷LC 26.
- ¹⁰⁸LC 483; NC 289, 299.
- ¹⁰⁹LC 131; NC 161.
- ¹¹⁰LC 321; NC 108. In the Nguyễn Code, the husband was allowed to marry the wife off or sell her to another; if the wife remarried while attempting to escape, she would be strangled.
- ¹¹¹LC 401; NC 332.
- ¹¹²See TT, 3:107; HDTCT, par. 291.
- ¹¹³LC 310; NC 108.
- ¹¹⁴LC 2, 130; NC 2, 160.
- ¹¹⁵HDTCT, par. 128.
- ¹¹⁶TT, 3:226–27.
- ¹¹⁷LC 408; NC 338.
- ¹¹⁸LC 317; NC 98. TT, 3: 226–27, even mentioned a decree that punished with death any widow who remarried while mourning for her husband.
- ¹¹⁹LC 496; HDTCT, par. 323.
- ¹²⁰LC 7.
- ¹²¹LC 244.
- ¹²²LC 653.
- ¹²³LC 411, 412; NC 223, 224.
- ¹²⁴LC 307.
- ¹²⁵LC 341.
- ¹²⁶See CLTC, Art. 4, pp. 278–99.
- ¹²⁷LC 309.
- ¹²⁸NC 108.2.
- ¹²⁹HDTCT, par. 294.
- ¹³⁰NC 297.
- ¹³¹NC 308; the corresponding article in the Lê Code was 507.

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¹³²NC 37.

¹³³Le P. Guy Boulais, *Manuel du code chinois* (Shanghai, 1924), no. 417. Also cited in Robert Lingat, *Les régimes matrimoniaux du sud-est de l'Asie: Essai de droit comparé indochinois* (Paris, 1952), 1:17.

¹³⁴NC 83.1

¹³⁵LC 388; HDTCT, pars. 3, 84.

¹³⁶See HDTCT, pars. 85, 90, 102, 269.

¹³⁷LC 378.

¹³⁸LC 387 and annotation.

¹³⁹Staunton, *Tà Tsing Leu Lee*, 78; NC 76, 83.2; LC 389, 391, 392, 393, 395, 396, 398. Also HDTCT, pars. 256, 270.

¹⁴⁰LC 397, 395; NC 832.

¹⁴¹HDTCT, pars. 320, 126, 127.

¹⁴²LC 25; NC 46.

¹⁴³Camille Briffaut, "De la liquidation de l'association conjugale dans le droit de l'empire des Lê," *Pénant: recueil général de jurisprudence, de doctrine et de législation coloniales et maritimes* (1922), pt. 2, p. 7.

¹⁴⁴LC 374, 375, 376; HDTCT, pars. 258, 259.

¹⁴⁵HDTCT, par. 291, reported the case of an adulterous woman who was given eighty strokes of the light stick and then strangled; her property was turned over to the husband. See also HDTCT, par. 285, for another case in which an adulterous wife also lost her property to her husband.

¹⁴⁶LC 481.

¹⁴⁷HDTCT, par. 258.

¹⁴⁸LC 377.

¹⁴⁹LC 378.

¹⁵⁰HDTCT, par. 268. To avoid having the children's property dissipated, the young widow only needed to make a joint statement with any of the children's uncles or the family head and file it with the local yamen. If the widow was old and did not plan to remarry, she might make the statement alone.

¹⁵¹The settlement of the matrimonial estate in case of divorce probably followed the rule of LC 375 (childless widow or widower).

¹⁵²A document probably promulgated or reprinted during Thống Nguyễn's reign (1522–1527) as its model used that reign's title.

¹⁵³Only the sample form on selling a chattel—a vessel in this case—did not include the wife's name.

¹⁵⁴LC 388, 390; HDTCT 85, 90, 102.

¹⁵⁵Lingat, *Régimes matrimoniaux*, 1:104.

¹⁵⁶Briffaut, *Droit civil sino-annamite* (Hanoi, 1921), pp. 231–32.

¹⁵⁷NC 82.

¹⁵⁸NC 76.2.

¹⁵⁹Lingat, *Régimes matrimoniaux*, 1:21.

¹⁶⁰*Ibid.*, pp. 22, 59.

¹⁶¹*Ibid.*, p. 2. Probably because the remarried widow was deprived of all independent means of support, the law forbade her parents-in-law to force her into remarriage.

¹⁶²NC 284.

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- ¹⁶³Lingat, *Régimes matrimoniaux*, 1:24–25.
- ¹⁶⁴Alastair Lamb, *The Mandarin Road to Old Hué* (Hamden, 1970), pp. 130, 131.
- ¹⁶⁵John Barrow, *A Voyage to Cochinchina in the Years of 1792 and 1793* (London, 1806), p. 302.
- ¹⁶⁶Tapping Reeve, *The Law of Baron and Femme* (New Haven, 1816), ch. 1.
- ¹⁶⁷Briffaut, “La vieille loi annamite à travers la jurisprudence,” *Pénant*, 2:28.
- ¹⁶⁸*Đại-Nam Điển-Lệ*, p. 163.
- ¹⁶⁹Lingat, *Régimes matrimoniaux*, 1:92.
- ¹⁷⁰Jean-Baptiste E. Luro, *Cours d’administration annamite* (1875), pp. 51, 487ff.
- ¹⁷¹Firmin Lasserre, *Projet de code civil à l’usage des annamites* (Saigon, 1884), p. 235.
- ¹⁷²*Recueil des avis du comité consultatif de jurisprudence annamite sur les coutumes des annamites du Tonkin en matière de droit de famille, de succession et de biens culturels*, summarized in Lingat, *Régimes matrimoniaux*, 1:97–105.
- ¹⁷³Lingat, *Régimes matrimoniaux*, 1:39.
- ¹⁷⁴*Ibid.*, pp. 40–41.
- ¹⁷⁵*Ibid.*, pp. 41–53.
- ¹⁷⁶Trịnh Đình Tiêu, *La femme mariée en droit vietnamien* (Toulouse, 1958), p. 7.
- ¹⁷⁷Lingat, *Régimes matrimoniaux*, 2:19.
- ¹⁷⁸See Vũ Văn Mẫu, pp. 40–41; Nguyễn Quang Quýh, *Dân Luật* (Civil Law) (Saigon, 1972), p. 535; *Công Báo Việt Nam Cộng Hòa* (Official Gazette of the Republic of Vietnam) (February 28, 1973), p. 760/13–15.
- ¹⁷⁹George Ginsburgs, “The Role of Law in the Emancipation of Women in the Democratic Republic of Vietnam,” *American Journal of Comparative Law* 4 (Fall 1975): 613ff.
- ¹⁸⁰Art. 1, par. 4, of the Convention.
- ¹⁸¹LC 404; NC 332.
- ¹⁸²LC 338, 409; NC 105, 337.
- ¹⁸³LC 313.
- ¹⁸⁴LC 316; NC 103. See also TT, 3:38 on Emperor Lê Thái Tổ’s ban on these marriages of officials during the war against the Ming.
- ¹⁸⁵LC 336.
- ¹⁸⁶LC 35; NC 29.
- ¹⁸⁷NC 385.
- ¹⁸⁸LC 709.
- ¹⁸⁹LC 680; NC 385.
- ¹⁹⁰NC 19. The code drafters might have based their decision not to let women go alone to places of exile or penal servitude on considerations of decorum and morality.
- ¹⁹¹LC 1. See Philastre, 1:71, 111.
- ¹⁹²LC 1.
- ¹⁹³LC 1.
- ¹⁹⁴LC 378, 617.
- ¹⁹⁵LC 401; NC 332; LC 406; NC 334; LC 407; NC 336.
- ¹⁹⁶LC 429; NC 238; LC 441; NC 241; LC 446; NC 239, 240.
- ¹⁹⁷LC 450; NC 246.
- ¹⁹⁸LC 322; NC 94.

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- ¹⁹⁹LC 309; NC 96.
- ²⁰⁰HCTCT, par. 163, punished the violation of this restriction with eighty strokes of the heavy stick.
- ²⁰¹HDTCT, par. 165; NC 108; HDTCT, pars. 106, 107.
- ²⁰²LC 416; HDTCT, par. 167; NC 108.
- ²⁰³NC 284, 95, 333.
- ²⁰⁴LC 320; NC 98. The Lê Code, however, excluded the woman's grandparents or parents from this punishment.
- ²⁰⁵This derived from Art. 1, par. 1, CERD.
- ²⁰⁶Art. 5, CERD.
- ²⁰⁷Art. 1, par. 2, CERD.
- ²⁰⁸LC 40.
- ²⁰⁹LC 451.
- ²¹⁰LC 452.
- ²¹¹NC 33.
- ²¹²See Pierre Huard and Maurice Durand, *Connaissance du Vietnam* (Hanoi, 1954), p. 110. The Minh Mạng Emperor, ruling on a case involving a Montagnard (highland) criminal guilty of killing the local official, permitted him the option of redemption provided by his customary law instead of the penalty in the national law (MMCY, 6:180–81).
- ²¹³MMCY, 6:136.
- ²¹⁴*Ibid.*, p. 152.
- ²¹⁵LC 703.
- ²¹⁶LC 703.
- ²¹⁷LC 546; NC 373. The Nguyễn Code penalty for aggravating a case was decreased one degree if this penalty were death.
- ²¹⁸LC 298. See also Phillippe Langlet, "La tradition vietnamienne: Un état national au sein de la civilisation chinoise," *Bulletin de la société des études indochinoises* 45 (2–3) (1970): 37. The policy of cultural laissez-faire was also adopted by the Nguyễn Lords in South Vietnam. See Phan Khoang, *Việt Sử Xứ Đàng Trong* (History of the Southern Part of Vietnam) (Saigon, 1969), p. 511.
- ²¹⁹MMCY, 6:111–12.
- ²²⁰*Đại Nam Thực Lục*, 2:182; 2–2b, quoted in Woodside, *Vietnam and the Chinese Model*, p. 167.
- ²²¹*Ibid.*, p. 244.
- ²²²See MMCY, 6:128, 130; 3:291.
- ²²³*Ibid.*, 3:276, 278, 291.
- ²²⁴LC 343.
- ²²⁵LC 574 and annotation.
- ²²⁶The nomad minorities such as the Nuông, who constantly moved from one burned forest to another, were even given the favor of paying only half the tax rate (MMCY, 6:137).
- ²²⁷LC 72.
- ²²⁸LC 163. See TT, 3:211 for the case of General Lê Thiết, who was demoted for letting his men extort money from the ethnic minorities.
- ²²⁹LC 595.

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- ²³⁰LC 593.
- ²³¹NC 204.1
- ²³²MMCY, 6:161.
- ²³³Ibid., 2:102, 6:145.
- ²³⁴Ibid., 2:70.
- ²³⁵LC 340.
- ²³⁶TT, 3:262, 305.
- ²³⁷MMCY, 6:167. See also p. 182 where the policy of nondiscrimination is repeated and it is indicated that the Thổ tribal leaders were still kept in their positions to administer jointly with Vietnamese officials.
- ²³⁸LC 334.
- ²³⁹TT, 4:17.
- ²⁴⁰Phan Phát Huân, 1:40.
- ²⁴¹NC 109.2.
- ²⁴²LC 334; NC 109.2.
- ²⁴³LC 40; NC 33.
- ²⁴⁴See ch. 3.
- ²⁴⁵LC 71.
- ²⁴⁶CLTC, p. 126.
- ²⁴⁷LC 74.
- ²⁴⁸LC 75, 76.
- ²⁴⁹LC 76.
- ²⁵⁰LC 76, 77.
- ²⁵¹See LC An 612, 613; LC 613, 614, 615, 616.
- ²⁵²See LC An 613.
- ²⁵³Phan Khoang, *Việt Sử Xứ Đàng Trong*, pp. 528–30. As early as 1149, the Lý permitted foreign trade in Vân Đồn (TT, 1:281). This trade continued under the Trần (TT, 2:137).
- ²⁵⁴Phan Khoang, p. 528.
- ²⁵⁵Christopher Borri, “An Account of Cochinchina,” in *A Collection of Voyages and Travels*, compiled by Awnsham Churchill (London, 1704–1732), 1:1a, 3a.
- ²⁵⁶Ibid., Fla–b, E3b–E4.
- ²⁵⁷Phan Khoang, p. 573.
- ²⁵⁸Ibid., pp. 546–55.
- ²⁵⁹Barrow, *Voyage to Cochincina*, pp. xii–xiii, 291.
- ²⁶⁰NC 205.
- ²⁶¹NC 205.1
- ²⁶²Nguyễn Thế Anh, pp. 52–53.
- ²⁶³As an encouragement to immigration, very poor Chinese were even exempted from taxes for three years; see *ibid.*, pp. 41, 43–44.
- ²⁶⁴Ibid., pp. 242–45. See also Woodside, *Vietnam and the Chinese Model*, pp. 31–34, 140, 270–73, 227.
- ²⁶⁵Nguyễn Thế Anh, pp. 39–46.
- ²⁶⁶Chinese served as interpreters and helped the Nguyễn Lords develop the local economy, make Hội An a prosperous trade center, control foreign trade, evaluate goods

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on merchant vessels, and collect custom duties. See Phan Khoang, pp. 537–38. See also Nguyễn Thế Anh, pp. 48–51.

Chapter 3

¹To borrow the language of Art. 13, par. 1, of the Universal Declaration and Art. 12, pars. 1 and 3, of the CCPR.

²LC 285; NC 73. Population registers were already established under the Lý, Trần, and Hồ dynasties (LC An 285).

³LC 286; NC 80.

⁴LC 337, 657.

⁵As the official commentary in NC 80 put it, commoners had to live on a piece of land and cultivate it to acquit their corvée obligations and other charges.

⁶LC 286; commentary in NC 73.

⁷NC 80.1.

⁸Philastre, 1:364. Under the Trần, the same laxity occurred during the reign of Emperor Ming Tông (1313–1329): He refused to punish the vagrants who avoided tax and corvée on the ground that how could the time be called a period of peace without those vagrants (TT, 2:145)?

⁹See also NC 108.2 on, e.g., the impossibility for the wife to complain about the husband's business trips which extended beyond three years.

¹⁰LC 298, 301.

¹¹NC 201.1.

¹²*Đại-Nam Điển-Lê*, p. 461.

¹³LC 78; NC 203.

¹⁴LC 293.

¹⁵The people in Đa Giá Thượng Village, Gia Viễn District, Trường Yên Prefecture, agreed secretly among themselves to set up a guest house in their village and kill travelers who stayed in the guest house, dump their corpses in nearby caves, and steal their belongings. They carried out this plan for twenty years before the government discovered their crime in 1694, arrested 290 persons, decapitated the fifty-two principal offenders, exiled the rest, and wiped out the name of the village (LC An 426). On the other hand, it was for reasons of state security that a similar control on traveling was imposed under the Trần: In 1399, after an attempt by Trần Khát Chân's group to assassinate the powerful Hồ Quý Li (who was going to usurp the Trần throne) failed, it was ordered that no household could accommodate a stranger overnight; in the case of an overnight guest, the host had to notify his neighbors, who would serve as witnesses as together they checked the guest's papers and bags and determined his reasons for passing through. Villages also established checkpoints to inspect travelers (TT, 2:205–6).

¹⁶Philastre, 1:758.

¹⁷Woodside, *Vietnam and the Chinese Model*, p. 141.

¹⁸LC 71.

¹⁹LC 653, 411.

²⁰LC 612.

²¹LC 72.

²²NC 205.

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²³Baron, *Kingdom of Tonqueen*, p. 1.

²⁴Between the years 1801 and 1812, the Ch'ing Emperor issued five edicts to the kings of Korea, Burma, and Vietnam to ask them to extradite criminals to China. China also agreed to send criminals back to them. This policy apparently applied even to political refugees. Thus, with the exception of asylum given to 400 Vietnamese in 1772, leaders of defeated political factions were sent back to Vietnam in 1779–80 and 1812. See R. Randle Edwards, "Imperial China's Border Control Law," *Journal of Chinese Law* 1(1) (Spring 1987): 38, 40.

²⁵For the other rights of aliens, see ch. 2.

²⁶Phan Khoang, p. 524.

²⁷*Ibid.*, pp. 532–35.

²⁸*Ibid.*, pp. 407–10.

²⁹*Ibid.*, pp. 403–7, 410–11, 435–38, 443, 448; and Trần Trọng Kim, pp. 419, 420.

³⁰Trần Trọng Kim, pp. 461, 466–67.

³¹Arts. 18 and 19 of the Universal Declaration and Arts. 18, 19, and 20 of the CPCPR consecrated freedoms of opinion, expression, and religion that are restricted only by reasons of public safety, order, public health, or morals and the rights of others, including a ban on propaganda for war, hatred, and violence.

³²See the later discussion of freedom of religion.

³³E.g., the twenty-four moral precepts of Emperor Lê Thánh Tông published during his son Hiến Tông's reign in 1499. *Việt Sử Thông Giám Cương Mục Chính Biên* (History of Vietnam, Compiled Under the Nguyễn Dynasty), vol. 12, translated by the Historical Institute (Hanoi, 1959), pp. 63ff.; the forty-seven articles on moral education promulgated by Emperor Lê Huyền Tông in 1663 (CLTC, 278–99), both translated into English in LC An 136; and the ten moral maxims of the Minh Mạng Emperor of the Nguyễn (MMCY, 3:264).

³⁴See the section on educational rights in ch. 4.

³⁵The girls stayed at home and generally studied special primers written for them (such as those by Nguyễn Trãi, Lê Quý Đôn) in which they were taught the four virtues of how to stand and sit properly (*dung*), how to speak respectfully (*ngôn*), how to sew and cook (*công*), and how to be virtuous and gentle (*hạnh*).

³⁶Woodside, *Vietnam and the Chinese Model*, pp. 207, 208.

³⁷*Ibid.*, p. 215.

³⁸These norms are accepted by Art. 20 of the CCPR and by the law of such Western countries as France.

³⁹E.g., penalties were specified only for Arts. 22, 23, 32, 33 in the code of ethics promulgated in 1663.

⁴⁰See the section on *nulla poena sine lege* in ch. 1.

⁴¹See the later discussion of freedom of religion.

⁴²Trần Trọng Kim, p. 426

⁴³Alexandre de Rhodes told of the way he dismissed Confucius as a saint in front of some Vietnamese in 1627: "Ce Confucius est appelé des Tunquinois par excellence et sans queu*e* *le Saint* . . . [Mai dans ses livres] il n'y fait nulle part mention de Dieu, souverain principe de tout, it ne peut point être appelé Saint. Quant je tenois ce discours dans nôtre Église en présence d'une quarantaine de spectateurs et de disciples de ce Confucius, remonstrant aux nouveaux Chrestiens qu'ils ne pouvaient point

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l'appeller de ce nom, je fus écouté d'eux avec grande satisfaction, non des Confuciens qui se trouvoient alors dans l'Église, qui se retirèrent fort tristes et confus" (*Histoire du royaume du Tonkin et des grands progrès que la prédication de l'évangile y a faits en la conversion de infidèles* (Lyon, 1651), pp. 61–62.

⁴⁴LC, Introduction, pt. 1.

⁴⁵We owe this realistic assessment to the scholar Hoàng Xuân Hãn; see his *Lý Thường Kiệt* (Hanoi, 1949 [I], 1950 [II]), pp. 402ff. As will be seen, we shall try to be objective in our appraisal of the religious policy of various dynasties. Although we use the facts the commentators presented in their books, we shall endeavor to avoid the tendency of some Buddhist monks for idealized description of the Lý and Trần dynasties as the golden age of Buddhism, unstained by any challenge from Confucianism—or the opposite bias in some Catholic priests' presentation of the suppression of the Catholics as purely religious persecution never justified by state security considerations.

⁴⁶Hoàng Xuân Hãn, pp. 400, 403; Đào Duy Anh, *Việt Nam Văn Hóa Sử Cương* (Short Cultural History of Vietnam) (Saigon, 1951), p. 234.

⁴⁷Hoàng Xuân Hãn, pp. 403–4; TT, 1:185.

⁴⁸Đào Duy Anh, p. 235.

⁴⁹Hoàng Xuân Hãn, pp. 401, 404–5. E.g., the monk Mãn Giác was Lý Hoài Tố's son, Nun Diệu Nhân was Emperor Lý Thánh Tông's adopted daughter, the monk Viên Chiếu was Empress Linh Nhân's nephew.

⁵⁰*Ibid.*, p. 404.

⁵¹See the discussion on no inhuman treatment or punishment in ch. 1.

⁵²Hoàng Xuân Hãn, pp. 423–30, 399–402.

⁵³*Ibid.* p. 402.

⁵⁴*Ibid.*

⁵⁵*Ibid.*

⁵⁶Nguyễn Lang, *Việt Nam Phật Giáo Sử Luận* (History of Buddhism in Vietnam) (Saigon, 1974), pp. 307–8.

⁵⁷Đào Duy Anh, p. 255.

⁵⁸*Ibid.*, pp. 235, 236; TT, 2:20. See also Thích Nhất Hạnh, *Việt Nam: Lotus in a Sea of Fire* (New York, 1967), pp. 8–10.

⁵⁹TT, 2:11; Thích Mật Thể, *Việt Nam Phật Giáo Sử Luận* (Short History of Buddhism in Vietnam) (Saigon and Hue, 1960), p. 145.

⁶⁰Nguyễn Lang, p. 228.

⁶¹Thích Mật Thể, pp. 149–50.

⁶²*Ibid.*, p. 151.

⁶³*Ibid.*, p. 162

⁶⁴TT, 2:141.

⁶⁵See LC, Introduction, p. 1.

⁶⁶TT, 2:176.

⁶⁷TT, 2:198.

⁶⁸LC 301; NC 201.1

⁶⁹LC 288. It must be pointed out that the minimum age of fifty for ordainment was already specified under the Trần (TT, 2:198).

⁷⁰LC 288; NC 75.

⁷¹TT, 3:227; NC 75.

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⁷²Lê Thái Tổ ordered such examinations to be held as early as 1429. Those who failed were unfrocked (TT, 3:70).

⁷³See Philastre, 1:366.

⁷⁴John Crawford, *Journal of an Embassy to the Courts of Siam and Cochinchina* (1828) (London: Oxford University Press, 1967), p. 499.

⁷⁵*Hoà thượng and tăng cang*. See Thích Thiện Ân, *Buddhism and Zen in Vietnam* (Vermont, 1975), p. 171.

⁷⁶LC 288.

⁷⁷A 1474 statute. See LC An 288.

⁷⁸Thích Thiện Ân, pp. 159–60.

⁷⁹LC 289; TT, 3:180; Raymond Deloustal, “La justice dans l’ancien Annam,” *Bulletin de l’école française de Extrême-Orient* 11 (1911):354.

⁸⁰NC 75.2. The penalty for monks and priests would be exile; for nuns and priestesses, condemnation to the status of public serfs (NC 75).

⁸¹LC 215.

⁸²LC 600.

⁸³NC 144. Decree NC 144.1 also mentioned the Buddhist monks and Taoist priests guilty of these acts.

⁸⁴LC 388, 400; NC 87.1.

⁸⁵Phan Phát Huồn, 1:35; Đào Duy Anh, p. 223.

⁸⁶Phan Phát Huồn, 1:40.

⁸⁷*Ibid.*, 1:31, 34.

⁸⁸Charles Maybon, *Histoire moderne du pays d’Annam (1592–1820)* (Paris: Librairie Plon, 1920), pp. 29–31.

⁸⁹Phan Phát Huồn, 1:50, 51, 52.

⁹⁰Christoforo Borri, *Cochinchina* (London, 1633), p. f1.

⁹¹Phan Phát Huồn, 1:58.

⁹²*Ibid.*

⁹³*Ibid.*, 1:59.

⁹⁴Maybon, *Histoire moderne*, p. 32; Phan Phát Huồn, 1:60ff.

⁹⁵Phan Phát Huồn, 1:74, 81.

⁹⁶*Ibid.*, 1:78, 79.

⁹⁷See later.

⁹⁸Phan Phát Huồn, 1:71.

⁹⁹Maybon, *Histoire moderne*, p. 38.

¹⁰⁰*Ibid.*, p. 40

¹⁰¹Phan Phát Huồn, 1:165–66.

¹⁰²Maybon, *Histoire moderne*, pp. 42–44.

¹⁰³*Ibid.*, p. 45.

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.*, p. 46.

¹⁰⁶*Ibid.*, p. 47, although the missionaries had been caught committing some illegal acts such as unauthorizingly bringing Vietnamese to Siam to attend the seminary (Phan Phát Huồn, 1:149).

¹⁰⁷Maybon, *Histoire moderne*, p. 49.

¹⁰⁸Đào Duy Anh, p. 223. We do not know whether these figures are reliable or not.

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- ¹⁰⁹Maybon, *Histoire moderne*, p. 31; Phan Phát Huồn, 1:84ff.
- ¹¹⁰Phan Phát Huồn, 1:85.
- ¹¹¹De Rhodes, *Tunquin*, pp. 133, 136, 142, 144.
- ¹¹²*Ibid.*, pp. 147–48.
- ¹¹³*Ibid.*, pp. 152–57.
- ¹¹⁴*Ibid.*, pp. 164–71. That monk abandoned the care of a temple entrusted to him by a secondary wife of the lord and therefore was given the stick penalty at the order of this lady, but he persisted in his new faith and in his effort at converting others. Exiled later at the lady's request, he continued to convert more people.
- ¹¹⁵*Ibid.*, p. 173; Phan Phát Huồn, 1:94.
- ¹¹⁶De Rhodes, *Tunquin*, pp. 173, 174.
- ¹¹⁷*Ibid.*, p. 192.
- ¹¹⁸*Ibid.*, p. 193.
- ¹¹⁹*Ibid.*, p. 194.
- ¹²⁰*Ibid.*, p. 199.
- ¹²¹*Ibid.*, p. 201.
- ¹²²In his *Catechism in Eight Days*. See Thích Nhất Hạnh, pp. 18, 19.
- ¹²³De Rhodes, *Tunquin*, pp. 210–12.
- ¹²⁴*Ibid.*, pp. 223–25.
- ¹²⁵*Ibid.*, p. 236.
- ¹²⁶*Ibid.*, p. 238.
- ¹²⁷*Ibid.*, pp. 246–47.
- ¹²⁸*Ibid.*, p. 260.
- ¹²⁹Compare the Trịnh tolerance for de Rhodes with his suffering in Batavia from a two-month imprisonment in 1646 and the fine of 400 taels of gold imposed by the Dutch for his conducting a mass in his stopover there; and also the complete liquidation of the Catholic Church in Japan at this time (Phan Phát Huồn, 1:126–27, 128).
- ¹³⁰De Rhodes, *Tunquin*, p. 264.
- ¹³¹*Ibid.*, p. 272.
- ¹³²Phan Phát Huồn, 1:111.
- ¹³³De Rhodes, *Tunquin*, p. 266.
- ¹³⁴*Ibid.*, pp. 289–90.
- ¹³⁵*Ibid.*, pp. 292, 303.
- ¹³⁶*Ibid.*, pp. 272–73.
- ¹³⁷*Ibid.*, p. 274.
- ¹³⁸*Ibid.*, pp. 304–406.
- ¹³⁹Phan Phát Huồn, 1:116.
- ¹⁴⁰De Rhodes, *Tunquin*, p. 320.
- ¹⁴¹Raugel, Agnese, Marini de Rocca, d'Oliveira, and Albier were expelled (Maybon, *Histoire moderne*, p. 39; Phan Phát Huồn, 1:120–24).
- ¹⁴²Phan Phát Huồn, 1:124.
- ¹⁴³*Ibid.*, pp. 175–77.
- ¹⁴⁴*Ibid.*, pp. 177–79.
- ¹⁴⁵*Ibid.*, pp. 182–83.
- ¹⁴⁶*Ibid.*, p. 184.
- ¹⁴⁷The term “profound peace” was from Maybon, *Histoire moderne*, p. 138.

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¹⁴⁸Phan Phát Huồn, 1:156–59.

¹⁴⁹Maybon, *Histoire moderne*, pp. 138, 139.

¹⁵⁰Phan Phát Huồn, 1:160.

¹⁵¹*Ibid.*, p.163.

¹⁵²Maybon, *Histoire moderne*, p. 139.

¹⁵³*Ibid.*, pp. 139–40.

¹⁵⁴Phan Phát Huồn, 1:167.

¹⁵⁵Maybon, *Histoire moderne*, p. 146.

¹⁵⁶Phan Phát Huồn, 1:250–51.

¹⁵⁷*Ibid.*, pp. 248, 252, 253.

¹⁵⁸*Ibid.*, pp. 207–8.

¹⁵⁹*Ibid.*, pp. 209–10.

¹⁶⁰*Ibid.*, pp. 210–11.

¹⁶¹*Ibid.*, pp. 212, 220.

¹⁶²*Ibid.*, p. 220.

¹⁶³*Ibid.*, pp. 220–23.

¹⁶⁴*Ibid.*, pp. 222–23.

¹⁶⁵*Ibid.*, pp. 234–35.

¹⁶⁶*Ibid.*, pp. 241–44.

¹⁶⁷*Ibid.*, pp. 264–66.

¹⁶⁸*Ibid.*, pp. 267–68, 368.

¹⁶⁹*Ibid.*, p. 269.

¹⁷⁰Minh Mạng was such a dedicated admirer of Chinese culture and norms that he used the term “Hán” when talking about Vietnamization of ethnic minorities, and he was greatly annoyed by the stubbornness of the Vietnamese women in North Vietnam who resisted his order of ten years and stuck to their traditional skirts rather than changing to pants such as were used by Hán and Ming people (MMCY, 3:283).

¹⁷¹This might be a reference to the priest’s making the gesture of blessing before the eyes of the dying.

¹⁷²This might be a reference to the confession by the faithful to a priest through a partition wall.

¹⁷³*Đại Nam Thực Lục Chính Biên*, Book 164, quoted in Nguyễn Thế Anh, pp. 296–97.

¹⁷⁴Nguyễn Thế Anh, p. 297.

¹⁷⁵*Ibid.*, p. 298.

¹⁷⁶Phan Phát Huồn, 1:323, 327.

¹⁷⁷Ancestor worship was tolerated by the Jesuits but criticized by the French Society of Foreign Missions (Maybon, *Histoire moderne*, p. 136). In China, Catholicism initially made great progress with the Jesuits, but after the Pope condemned the Jesuits’ tolerance of ancestor worship and approved their rivals’ (the Dominicans’) ideas, Christianity made very little headway in China (Luro, *Le pays d’Annam*, p. 137).

¹⁷⁸Nguyễn Thế Anh, p. 298; Phan Phát Huồn, 1:327, 328–31.

¹⁷⁹Nguyễn Thế Anh, p. 298; Phan Phát Huồn, 1:303–4.

¹⁸⁰Phan Phát Huồn, 1:309.

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¹⁸¹Ibid., p. 310. Five other persons, including a seven-year-old son of Khôi, were similarly executed. It was also reported in non-Vietnamese documents that Prince Cảnh's wife and his son were liquidated, but Vietnamese official records never mentioned this.

¹⁸²Phan Phát Huôn, 1:336, 353.

¹⁸³*Đại Nam Thực Lục Chính Biên*, Book 192, quoted in Nguyễn Thế Anh, pp. 299–300.

¹⁸⁴Ibid., pp. 300–1.

¹⁸⁵Nguyễn Thế Anh, p. 300.

¹⁸⁶Phan Phát Huôn, 1:384–85.

¹⁸⁷Ibid., pp. 390–93.

¹⁸⁸Ibid., pp. 388–89.

¹⁸⁹Ibid., pp. 390, 392, 394, 395.

¹⁹⁰Ibid., p. 399.

¹⁹¹Nguyễn Thế Anh, pp. 301–2.

¹⁹²Phan Phát Huôn, 1:404–8.

¹⁹³Ibid., p. 415.

¹⁹⁴Ibid., pp. 418–20.

¹⁹⁵Ibid., p. 437.

¹⁹⁶Actually the Catholic population at that time was about one-fiftieth of the total population of Vietnam.

¹⁹⁷Phan Phát Huôn, 1:424–26.

¹⁹⁸Ibid., p. 438.

¹⁹⁹Ibid., pp. 440–43.

²⁰⁰Ibid., pp. 443–44.

²⁰¹Ibid., pp. 449–50.

²⁰²Ibid., p. 450.

²⁰³Ibid., pp. 452–53.

²⁰⁴Nguyễn Thế Anh, p. 303.

²⁰⁵Phan Phát Huôn, 1:466–67.

²⁰⁶Ibid.

²⁰⁷Ibid., pp. 494–97.

²⁰⁸Ibid., p. 417.

²⁰⁹Nguyễn Thế Anh, p. 304.

²¹⁰Phan Phát Huôn, 1:507–14.

²¹¹Ibid.

²¹²Ibid., pp. 523–24.

²¹³Ibid., pp. 514–40; Nguyễn Thế Anh, pp. 305–6.

²¹⁴LC 2, 132. The criticism of preceding emperors was punished with penal servitude (LC 127).

²¹⁵LC 413.

²¹⁶NC 225. In 1827, Nguyễn Đình Chương, a scholar, went to meet the imperial carriage to discuss natural calamities (flood and drought) and other “wild” topics; he was condemned to decapitation after the assizes for portentous words (MMCY, 4:78).

²¹⁷LC 414. In 1517, a soldier, Cồ Khắc Xương, was beaten to death for claiming to be a messenger from heaven sent to cure people. The court punished him for committing odd acts to dupe the people (TT, 4:89).

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²¹⁸LC 500.

²¹⁹LC 413.

²²⁰LC 133. Whoever used petitions to slander government policies would be similarly punished (LC 509). In 1645 Emperor Lê Chân Tông forbade anonymous letters tending to spread unfounded stories which troubled the people's mind (TT, 4:226). Previously, under the Trần, in 1283, one Mãnh, a serf of Prince Trần Lão's family, was condemned to death by slicing for slandering the state in an anonymous letter (TT, 2:49).

²²¹NC 302.3.

²²²LC 509.

²²³LC 250, 537.

²²⁴LC 625.

²²⁵In 1821 the Minh Mạng Emperor ordered the release of a scholar who was arrested for presenting fifteen items of reform to him when he inspected an examination site (MMCY, 6:15; see also 6:30 on the role of *ngôn quan*).

²²⁶Some of the criteria for types of harmful speech that are banned even in modern democracies are: attacking the ideological basis of the state (advocacy of war, violence, anarchism, racial discrimination), slandering public organs or officials, "clear and present danger" speech that jeopardizes public order (seditious talk) or national security (undermining army morale or spreading false rumors about monetary policy).

²²⁷TT, 2:213.

²²⁸TT, 3:220

²²⁹*Khâm Định Việt Sử Thông Giám Cương Mục*, Book 37, pp. 17b–18a.

²³⁰MMCY, 4:123–26.

²³¹From *Hải Dương Phong Vật* (Customs and Products of Hải Dương), preface of 1811, quoted in E. Gaspardone, "Bibliographie annamite," *Bulletin de l'école française d'Extrême-Orient* 34 (1934):101.

²³²There were many more manuscripts than woodprints in the two major collections at the Ecole Française d'Extrême-Orient and at the Imperial Palace in the Capital of Hue (Gaspardone, "Bibliographie annamite," p. 5).

²³³LC 215.

²³⁴See his preface to "Treatise on Literature" (*Nghệ Văn Chí*), in his "General History of Đại Việt" (*Đại Việt Thông Sử*), quoted in Gaspardone, "Bibliographie annamite," pp. 7–10.

²³⁵LC 117.

²³⁶Woodside, *Vietnam and the Chinese Model*, p. 186.

²³⁷*Ibid.*, p. 187.

²³⁸NC 147.

²³⁹Woodside, *Vietnam and the Chinese Model*, p. 187.

²⁴⁰And therefore encouraged presentation to him of works by Trịnh Hoài Đức, Hoàng Công Tài, Cung Văn Hi, Nguyễn Đình Chính, and Vũ Văn Tiêu (Trần Trọng Kim, pp. 435–36).

²⁴¹E.g., *Lê Sử Tục Biên* (Continued History of the Lê) was banned and burned for upholding the Trịnh who "oppressed" the Lê (MMCY, 3:290).

²⁴²This restriction was not Minh Mạng's policy but a factual situation resulting from the educational officials' treatment of the books as precious artifacts (Woodside, *Vietnam and the Chinese Model*, p. 187).

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²⁴³See Toán Ánh, *Laàng Xóm Việt Nam* (Villages in Vietnam) (Saigon, 1968), pp. 325–26.

²⁴⁴TT, 3:66.

²⁴⁵TT, 3:283.

²⁴⁶Woodside, *Vietnam and the Chinese Model*, p. 127.

²⁴⁷See Nguyễn Thanh Nhã, *Tableau économique du Vietnam aux XVII^e et XVIII^e siècles* (Paris, 1970), pp. 102–3.

²⁴⁸Par. 124.

²⁴⁹Nguyễn Thanh Nhã, p. 105.

²⁵⁰Ibid., p. 106.

²⁵¹Nguyễn Thế Anh, pp. 177–80.

²⁵²Ibid., pp. 180–82.

²⁵³Nguyễn Thanh Nhã, pp. 175–76; Toán Ánh, pp. 270–72.

²⁵⁴LC 144.

²⁵⁵LC 234.

²⁵⁶LC 275.

²⁵⁷LC 103.

²⁵⁸TT, 3:260. Under the Lý, some similar precaution was already taken against possible collusion between officials and princes (TT, 1:284).

²⁵⁹NC 224.2.

²⁶⁰NC 224.3.

²⁶¹It is interesting to note that Art. 291 of the French Penal Code (included in the Modified Penal Code in French Cochinchina until its repeal in 1933) provided that an association of more than twenty persons would require a permit.

²⁶²Art. 20 of the Universal Declaration; Arts. 21 and 22 of the CCPR.

²⁶³Requirements of Arts. 25a and 25b of the CCPR; Art. 21, pars. 1 and 3 of the Universal Declaration.

²⁶⁴LC 107. See also ch. 1.

²⁶⁵Vũ Quốc Thông, *Pháp Chế Sử Việt Nam* (Vietnamese Legal History) (Saigon, 1970), pp. 164, 166; Woodside, *Vietnam and the Chinese Model*, p. 154.

²⁶⁶Woodside pointed out that in 1921 the French *résident supérieur* in North Vietnam improvidently tampered with this oligarchic system by democratizing the village councils and encouraging young men without the traditionally recognized status to join them. The natural leaders felt themselves losing “face” and “prestige,” and so they withdrew. In 1927, the French were forced to abandon many of these changes (*Vietnam and the Chinese Model*, p. 155).

²⁶⁷See LC An 75.

²⁶⁸TT, 2:17; 3:66.

²⁶⁹TT, 3:198.

²⁷⁰TT, 3:301, 316.

²⁷¹CLTC, pp. 140–41.

²⁷²Vũ Quốc Thông, pp. 167, 169, 178.

²⁷³Ibid., p. 179.

²⁷⁴*Đại-Nam Điển-Lê*, p. 45.

²⁷⁵Phan Huy Chú (1782–1840), *Lịch Triều Hiến Chương Loại Chí, Quan Chức Chí* (Annals of the Laws and Institutions of Dynasties-Bureaucratic Section), translated into

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Vietnamese by Cao Nãi Quang (Saigon, 1957), p. 98. These are two of ten sections of an encyclopedia of Vietnamese laws and institutions up to the Lê Dynasty (1428–1788) written by a prolific nineteenth-century scholar.

²⁷⁶Vũ Quốc Thông, p. 185.

²⁷⁷Woodside, *Vietnam and the Chinese Model*, p. 157.

²⁷⁸*Ibid.*, p. 154.

²⁷⁹TT, 1:236.

²⁸⁰TT, 2:12.

²⁸¹TT, 3:91.

²⁸²TT, 3:182–83.

²⁸³Woodside, *Vietnam and the Chinese Model*, p. 169.

²⁸⁴*Ibid.*, pp. 170–72.

²⁸⁵*Đại Nam Thực Lục* (Records of Đại Nam), 2:199:6b, quoted in Woodside, *Vietnam and the Chinese Model*, p. 175.

²⁸⁶Woodside, *Vietnam and the Chinese Model*, pp. 176–77.

²⁸⁷LC 98. See also TT, 4:13 for a 1499 decree to the same effect.

²⁸⁸Woodside, *Vietnam and the Chinese Model*, p. 203.

²⁸⁹*Ibid.*, pp. 206–7.

²⁹⁰LC 98.

²⁹¹Woodside, *Vietnam and the Chinese Model*, p. 204.

²⁹²TT, 4:328.

²⁹³*Việt Sử Thông Giám Cương Mục*, Book 34, p. 39a–b; hereafter CM.

²⁹⁴*Ibid.*, Book 43, p. 20a.

²⁹⁵CM, Book 44, pp. 27b–28a. For more details on these measures against officials' biased treatment of candidates and security measures against violations by the candidates themselves, see LC An 101.

²⁹⁶Woodside, *Vietnam and the Chinese Model*, p. 216. In China, Wittfogel also found that the majority of officials recruited through examinations came from families of officials and only a small percentage came from commoners' families (*Oriental Despotism*, p. 354).

²⁹⁷LC 628.

²⁹⁸TT, 3:183.

²⁹⁹LC 629; also TT, 3:183; 4:17.

³⁰⁰See ch. 2.

³⁰¹See ch. 2 for both the Nguyễn and the Lê.

³⁰²Woodside, *Vietnam and the Chinese Model*, p. 219.

³⁰³*Ibid.*, p. 172.

³⁰⁴*Ibid.*, p. 181.

Chapter 4

¹*Minh Mệnh Chính Yếu*, 2:98.

²*Ibid.*, 2:72; or *Đại-Nam Điển-Lệ*, p. 291. See also Trần Trọng Kim.

³*Đại-Nam Điển-Lệ*, p. 277.

⁴Requirement of Art. 12 of the CESCR.

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⁵Gouvernement Général de l'Indochine, *Recueil général de législation et de réglementation de l'Indochine. III^e partie: Ordonnances des souverains de l'Annam, du Cambodge et de Luang Prabang 1803–1925* (Hanoi, 1928), p. 56.

⁶NC 342; LC 272, 572; the Lê Code even punished the commander with exile or death if the sick men were abandoned to the enemy (LC 272).

⁷CLTC, pp. 356–57.

⁸LC 572; NC 342.

⁹LC 663, 692; NC 366.

¹⁰MMCY, 2:136; also see p. 146.

¹¹LC 542; NC 266.

¹²Requirement of Art. 11, par. 1 of the CESCR.

¹³Art. 11, par. 2 of the CESCR.

¹⁴See, e.g., the regulations and sanctions on this effort in LC 181 and 184; NC 396 and 396.2. See also *Đại-Nam Điển-Lê*, pp. 545–63; and Nguyễn Thế Anh, pp. 120–28 on the efforts under the Nguyễn.

¹⁵TT, 3:67, 68.

¹⁶LC 342–73; LC An 342.

¹⁷LC 342, 343, 346, 347, 372.

¹⁸Officials would be demoted or fined if public land were left uncultivated (LC 350).

¹⁹LC 343.

²⁰As was true with the other aspects of society, however, this land distribution program also gave unequal treatment to different strata of people. High officials of the second or higher rank and imperial clansmen were given special categories of public land (hereditary riceland and residential land, riceland granted especially by the emperor, mulberry land, worship property). All persons from the third rank down would be granted a number of parts of land, each part being measured in terms of a *mẫu* or a *cao* (units of superfices). The number of parts given were: to a third-rank official, 11; to a fourth-rank official, 10; to a fifth-rank official, 9.5; to a sixth-rank official, 9; to a seventh-rank official, 8.5; to an eighth-rank official, 8; to a ninth-rank official, 7.5; to officials of the ninth rank whose position was probationary, students, clerks, soldiers, artisans, commoners, the elderly, the sick, the orphaned and the widowed, 3 to 7 (LC An 342, 343).

²¹CLTC, pp. 113–15.

²²CLTC, pp. 141–43.

²³CM, Book 35, pp. 8b–9a.

²⁴Nguyễn Thế Anh, pp. 108–10.

²⁵*Ibid.*, p. 110.

²⁶From three parts for the orphaned and the widowed to eighteen parts for officials above the first rank. See *Đại Nam Thực Lục Chính Biên* (Records of Đại Nam, 1: Book 24) for details that are summarized in Nguyễn Thế Anh, pp. 96–97.

²⁷Nguyễn Thế Anh, pp. 110–11. In the capital province of Thừa Thiên, some public land was sold before the ban and people then built houses on it or tilled it. In such cases, they were permitted by an 1854 decree of Tự Đức to retain their acquired rights, with only an obligation to pay taxes (the regular rate if houses were built on it; twice the regular rate if it were used for cultivation). See *Đại-Nam Điển-Lê*, p. 153.

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²⁸*Đại-Nam Điển-Lê*, p. 151. Also Nguyễn Thế Anh, p. 98. Besides the allotment land distributed for the people's livelihood, rich villages also owned "tax-burden land," to help the poor pay part of their tax; "education land," the proceeds of which were used to pay the teacher and to buy school supplies for poor students; "widow and orphan land," to support widows and orphans, and so on (*ibid.*, p. 99).

²⁹Nguyễn Thế Anh, pp. 106–7.

³⁰LC 353.

³¹LC 387.

³²Philastre, 1:407, 409. See a decree in the fifteenth year of Minh Mạng (1834) with a similar provision in *Đại-Nam Điển-Lê*, p. 161.

³³Philastre 1:409; see also Nguyễn Thế Anh, p. 100

³⁴TT, 2:202.

³⁵CM, Book 35, p. 9a. According to Raymond Deloustal, "La justice dans l'ancien Annam," *Bulletin de l'école française d'Extrême-Orient* 11 (1911):381–82, the statute's date was 1708.

³⁶There were only two exceptions under Gia Long: Võ Tấn and Nguyễn Phúc Trinh were granted 300 and 100 *mẫu*, respectively, but under Minh Mạng, Nguyễn Phúc Trinh was deprived of land and was paid in money instead (Nguyễn Thế Anh, pp. 64–66).

³⁷Nguyễn Thế Anh, pp. 106–7.

³⁸LC 1, 373.

³⁹Nguyễn Thanh Nhã, p. 61

⁴⁰Đào Duy Anh, p. 52.

⁴¹Nguyễn Thanh Nhã, p. 69.

⁴²*Ibid.*, pp. 70–71.

⁴³*Ibid.*, p. 71.

⁴⁴Nguyễn Thế Anh, p. 147, quoting *Quốc Triều Chính Biên Toát Yếu* (Official Record of the Dynasty), Book 3 (1831).

⁴⁵*Ibid.*, pp. 147, 149, 150, 151.

⁴⁶*Ibid.*, p. 149.

⁴⁷*Ibid.*, pp. 147–48.

⁴⁸*Ibid.*, pp. 160–61.

⁴⁹*Ibid.*, pp. 151–54.

⁵⁰*Ibid.*, pp. 155–59.

⁵¹*Ibid.*, p. 162.

⁵²Phan Huy Chú, p. 395.

⁵³*Ibid.*, p. 397.

⁵⁴LC 349.

⁵⁵LC 361.

⁵⁶NC 85.

⁵⁷*Đại-Nam Điển-Lê*, p. 281.

⁵⁸See Nguyễn Thế Anh, "Quelques aspects économiques et sociaux du problème du riz au Vietnam dans la première moitié du XIX^e siècle," *Bulletin de la société des études indochinoises* 42(1–2) (1967):19.

⁵⁹Philastre, 1:430.

Notes

⁶⁰*Minh Mạng Chính Yếu*, 2:35, 41, 42, 43, 44, 48, 56, 58–59, 63, 72, 78, 94, 105, 111, 139. Books 6 and 7 of this official history were collectively titled: “Compassion for the People” (*Ái Dân*).

⁶¹MMCY, 2:133.

⁶²LC 176.

⁶³See *Đại-Nam Điển-Lê*, p. 275.

⁶⁴*Đại Nam Thực Lục*, 2:12:7, quoted in Woodside, *Vietnam and the Chinese Model*, pp. 162–63.

⁶⁵*Đại Nam Thực Lục*, 2:121:8, quoted in Woodside, *Vietnam and the Chinese Model*, p. 162.

⁶⁶*Đại Nam Thực Lục*, 2:160; cited in Nguyễn Thế Anh, pp. 139–40.

⁶⁷Nguyễn Thế Anh, pp. 139, 140–41.

⁶⁸That was the method used in 1809 (Gia Long’s eighth year) to help the hungry in North Vietnam (*Đại-Nam Điển-Lê*, p. 275).

⁶⁹MMCY, 2:74, 95; Nguyễn Thế Anh, p. 141.

⁷⁰From 1819 to 1865 there were nineteen famines, in small localities or in the country at large (Nguyễn Thế Anh, pp. 134–35).

⁷¹Nguyễn Thế Anh, p. 140.

⁷²*Đại-Nam Điển-Lê*, pp. 213ff. Nguyễn Thế Anh, pp. 140–41.

⁷³MMCY, 2:106–7; see also Nguyễn Thế Anh, pp. 141–43.

⁷⁴See, e.g., the numerous occasions on which such rice was distributed under Minh Mạng (MMCY, 2:36, 53, 74, 80–82, 86, 94, 97–101, 104–5, 108–9, 116, 118, 122–25, 131–32, 134, 137, 139, 145).

⁷⁵*Ibid.*, pp. 81–82, 102, 112.

⁷⁶*Ibid.*, p. 125.

⁷⁷Nguyễn Thế Anh, p. 143.

⁷⁸*Ibid.*, pp. 144–45.

⁷⁹MMCY, 2:80.

⁸⁰See the numerous Lê provisions on inheritance bequeathed by parents to offspring and by children to parents under the item “inheritance” in the index to the Lê Code. See the annotations of these provisions for the corresponding Nguyễn articles.

⁸¹Baron, *Tonquin*, p. 12.

⁸²*Ibid.*, pp. 6–7

⁸³LC 370. Under the Lý, a 1143 edict forbade powerful families from interfering with the productive use of ponds and marshlands (TT, 1:278).

⁸⁴LC 296, 336.

⁸⁵LC 577. See also CLTC, p. 75, for a 1634 decree on the subject matter; and TT, 3:91, for a case involving a cook of the Great Imperial Temple.

⁸⁶LC 163.

⁸⁷LC 639; NC 319.

⁸⁸LC 186, 273, 300, 530.

⁸⁹NC 319.

⁹⁰LC 173, 461, 704; NC 305.8.

⁹¹NC 237.1.

⁹²MMCY, 4:72–73.

⁹³LC 531.

Notes

- ⁹⁴LC 193, 531; LC An 193 summarizes the detailed regulations or perquisites.
- ⁹⁵LC 185; see also LC An 185 for details.
- ⁹⁶LC 717. Also see the earlier section in ch. 1 on arrest and detention and LC An 193 for details on limits to judicial fees and fines.
- ⁹⁷LC 186, 206, 325.
- ⁹⁸NC 78.
- ⁹⁹LC 567.
- ¹⁰⁰NC 389.
- ¹⁰¹LC 355.
- ¹⁰²NC 88.
- ¹⁰³NC 137.4.
- ¹⁰⁴LC 638.
- ¹⁰⁵LC 632.
- ¹⁰⁶NC 317, 318.
- ¹⁰⁷CLTC, p. 139.
- ¹⁰⁸*Đại-Nam Điển-Lệ*, p. 301.
- ¹⁰⁹See LC, Introduction, pt. 3B.
- ¹¹⁰LPC, Ch. 19, Arts. 1–3.
- ¹¹¹See, e.g., confiscation of bribery money (LC 138, 140; NC 312, 316); of gambling stakes (LC 188; NC 343); of smuggled goods (LC 614); of hoarded merchandise (LC 198; NC 137).
- ¹¹²LC 133, 244, 264, 411, 412, 426, 430, 431, 653.
- ¹¹³NC 223, 224 on high treason, grave insubordination, and treason; NC 57 on illicit associations to create trouble in the governmental institutions.
- ¹¹⁴Philastre, 1:201.
- ¹¹⁵NC 84; see esp. Philastre, 1:399, 401–2.
- ¹¹⁶LC 694; NC 129, 131.
- ¹¹⁷NC 23.
- ¹¹⁸LC 327, 462, 694, 697.
- ¹¹⁹NC 23.6.
- ¹²⁰NC 374.3.
- ¹²¹Two edicts of the second year of the Cảnh Hưng reign (1741) (see Deloustal, “La justice dans l’ancien Annam,” *Bulletin de l’école française d’Extrême-Orient* 19 (1919): 35.
- ¹²²Or to use an analogy, the nonconfiscable dowry in case of bankruptcy.
- ¹²³LC 221.
- ¹²⁴Pasquier, *L’Annam d’autrefois*, p. 233.
- ¹²⁵*Đại-Nam Điển-Lệ*, p. 173; see also Nguyễn Thế Anh, p. 100.
- ¹²⁶*Ibid.*, pp. 112–13.
- ¹²⁷See Art. 2(d) of the CERD.
- ¹²⁸LC 426, 429; NC 235.4 and official commentary in NC 238.
- ¹²⁹LC 382, 344, 357, 533; NC 87.
- ¹³⁰LC 584; NC 207.
- ¹³¹LC 601, 581; NC 91, 207.
- ¹³²LC 384, 362, 635, 377, 379.

Notes

¹³³See the item “Restitution of the object involved in a wrongdoing with payment of punitive damages” in the index of the Lê Code.

¹³⁴LC 355; NC 137.

¹³⁵LC 587; NC 134.

¹³⁶LC 591.

¹³⁷NC 134.

¹³⁸Nguyễn Thế Anh, p. 133.

¹³⁹Đào Duy Anh, 63.

¹⁴⁰Baron, *Tonqueen*, p. 9.

¹⁴¹Quoted in Đào Duy Anh, p. 63.

¹⁴²See Nguyễn Thế Anh, pp. 190–91.

¹⁴³NC 80; Nguyễn Thế Anh, p. 191.

¹⁴⁴See ch. 2.

¹⁴⁵See ch. 1.

¹⁴⁶See the items under “filial piety” and “inheritance of the ancestor worship property” in the index of the Lê Code for Lê Code provisions, corresponding Nguyễn Code articles, and commentaries on the subject.

¹⁴⁷This option was copied by the Vietnamese from Chinese legal practice (Pasquier, *L’Annam de autrefois*, p. 207).

¹⁴⁸CLTC, p. 297.

¹⁴⁹Compare this with the involuntary sterilization of the incompetent imposed by some legal systems; e.g., many states in the U.S. (more than twenty) still sanctioned it (*New York Times*, December 30, 1980).

¹⁵⁰LC 16.

¹⁵¹LC 322; NC 94.

¹⁵²NC 109.1.

¹⁵³LC 319, 324; NC 102.

¹⁵⁴See Philastre, 1:515.

¹⁵⁵NC 107.

¹⁵⁶LC 388.

¹⁵⁷LC 334. See ch. 2.

¹⁵⁸See ch. 2.

¹⁵⁹LC 323.

¹⁶⁰See ch. 2.

¹⁶¹See CLTC, p. 126.

¹⁶²LC 316; NC 103.

¹⁶³NC 103.

¹⁶⁴LC 336.

¹⁶⁵LC 320; NC 98.

¹⁶⁶The only case in which a marriage could be cancelled was when one party was afflicted with leprosy or committed a crime (LC 322).

¹⁶⁷NC 94.

¹⁶⁸NC 109 and official commentary.

¹⁶⁹Abbé Richard, *Histoire naturelle, civile, et politique du Tonkin* (Paris, 1778), 2:116.

Notes

¹⁷⁰For a good collection of popular poems on courtship, love, marriage, divorce, and the like interpreted in French, see Nguyễn Hữu Tấn, “La femme vietnamienne d’autrefois à travers les chansons populaires,” *Bulletin de la société des études indochinoises* 45(1) (1970):1–113. In Vietnamese, see part 3 in Vũ Ngọc Phan, *Tục Ngữ, Ca Dao, Dân Ca Việt-Nam* (Proverbs, Folk Poems, and Folk Songs of Vietnam) (Hanoi: Nhà Xuất Bản Khoa Học Xã Hội, 1978).

¹⁷¹LC 680; NC 385.

¹⁷²See ch. 1.

¹⁷³LC 475; NC 288 and the corresponding article in the T’ang, Ming, Ch’ing codes (see LC An 475) punished it with penal servitude.

¹⁷⁴Richard, *Histoire naturelle*, 1:110. The Chinese practice of infanticide was described as approved by the traditional Chinese community by C. K. Yang (a firsthand observer of modern family life in China) in *The Chinese Family in the Communist Revolution* (Cambridge: MIT Press, 1972), p. 93.

¹⁷⁵LC 404; NC 332.

¹⁷⁶LC 604; NC 77; *Đại-Nam Điển-Lê*, p. 293. These articles constituted indirect measures against exploitation of child labor.

¹⁷⁷LC 313.

¹⁷⁸LC 435.

¹⁷⁹LC 377, 379.

¹⁸⁰Art. 10, par. 3, of the CESC.R.

¹⁸¹See chs. 2 and 3.

¹⁸²See chs. 2 and 3.

¹⁸³LC 411, 412; NC 223–24.

¹⁸⁴LC 48, 307.

¹⁸⁵LC 653, 244.

¹⁸⁶MMCY, 1:147.

¹⁸⁷LC 136, 2, 506; NC 2, 307.

¹⁸⁸HDTCT, par. 269. Even a widowed mother could disinherit her scoundrel child if she followed proper procedure (HDTCT, par. 268).

¹⁸⁹See the discussion of freedom of thought in ch. 3; we have indicated that moral codes were even promulgated by the government of the Lê and Nguyễn for people to follow (see esp. LC An 136).

¹⁹⁰As would be required according to Art. 26, par. 1 of the Universal Declaration and Art. 13, pars. 1 and 2a of the CESC.R. Regulations on “childhood education” (in villages whenever there was a group of sixty children aged six to twelve years), “elementary education” (in districts and prefectures), and “secondary education” (in province capitals) were promulgated in 1906 during the Thanh Thái Emperor’s reign, *under the French influence*. (The students could study Sino-Vietnamese or Vietnamese written in the Roman alphabet or take French as elective; they were also required to learn about Indochina; see *Đại-Nam Điển-Lê*, pp. 375–99). Thus, we consider these government efforts in education as belonging to the posttraditional, colonial period.

¹⁹¹As would be required for the secondary and higher education levels by Art. 26, par. 1, of the Universal Declaration and Art. 13, par. 2bc, of the CESC.R.

Notes

¹⁹²And thus violating the standards of Art. 26, par. 3, of the Universal Declaration and Art. 13, pars. 3 and 4, of the CESC?

¹⁹³Đào Duy Anh, p. 235.

¹⁹⁴Ibid., p. 255.

¹⁹⁵Trần Trọng Kim, p. 179.

¹⁹⁶Details from official historical sources were summarized in Philippe Langlet, "La tradition vietnamienne: Un état national au sein de la civilisation chinoise," *Bulletin de la société des études indo-chinoises* 45(2-3) (1970):44-45.

¹⁹⁷Trần Trọng Kim, p. 235.

¹⁹⁸See Langlet, "Tradition vietnamienne," p. 45.

¹⁹⁹MMCY, 3:230.

²⁰⁰Woodside, *Vietnam and the Chinese Model*, p. 182.

²⁰¹MMCY, 3:234.

²⁰²See Luro, *Le pays d'Annam*, p. 138. Woodside, *Vietnam and the Chinese Model*, p. 183, adduced *Khâm Định Đại Nam Hội Điển Sự Lệ* and stated that in 1840s Vietnam there were twenty-one provincial educational commissioners, sixty-three prefectural educational officials, and ninety-four district educational officials. Even in the newly conquered Cambodian territory, the government also appointed prefectural and district educational officials (MMCY, 6:158).

²⁰³Woodside, *Vietnam and the Chinese Model*, p. 184.

²⁰⁴Pasquier, *L'Annam d'autrefois*, p. 170.

²⁰⁵Woodside, *Vietnam and the Chinese Model*, p. 184; Pasquier, *L'Annam d'autrefois*, p. 170.

²⁰⁶Trần Trọng Kim, p. 483.

²⁰⁷Woodside, *Vietnam and the Chinese Model*, p. 188; Pasquier, *L'Annam d'autrefois*, p. 168.

²⁰⁸Woodside, *Vietnam and the Chinese Model*, p. 188.

²⁰⁹Ibid., p. 190.

²¹⁰MMCY, 3:244.

²¹¹Woodside, *Vietnam and the Chinese Model*, p. 191.

²¹²Ibid., pp. 191, 192; see also Luro, *Le pays d'Annam*, p. 142.

²¹³Woodside, *Vietnam and the Chinese Model*, p. 186.

²¹⁴J. Silvestre, *L'empire d'Annam et le peuple annamite* (Paris, 1889), p. 133.

²¹⁵NC 223.2 considered the institutions that taught "immoral or false doctrines" as violating the law on high treason and grave insubordination.

²¹⁶MMCY, 3:290-91. Minh Mạng favored any measure that promoted the expansion of official doctrines. In an 1837 edict he reprimanded educational officials for not making official books more widely accessible: "Previously, I have heard that educational officials, because they considered that government books were to be heavily respected, merely cherished them and stored them. None of the scholars under their jurisdiction were able to read them or to transcribe materials from them. Surely this was not the purpose of the court's distributing the books. . . . [Educational officials] must allow the scholars under them to come by themselves and copy materials and study, in order to broaden their experience. If the books that were originally supplied become worn out and cracked, it does not matter" (*Khâm Định Đại Nam Hội Điển Sự Lệ*, 102:12b, quoted in Woodside, *Vietnam and the Chinese Model*, p. 187).

Chapter 5

¹Barrow, *Cochinchina*, pp. 332–33.

²*Ibid.*, Introduction to 1974 edition, p. xiii.

³Baron, *Tonqueen*, p. 23.

⁴See ch. 4.

⁵See ch. 1, esp. the table summarizing the types of cases at various levels of jurisdiction.

⁶See ch. 1.

⁷LPC, Ch. 18.

⁸LPC, Ch. 18, Art. 1.

⁹LPC, Ch. 18, Art. 3.

¹⁰LPC, Ch. 18, Art. 2.

¹¹LPC, Ch. 18, Art. 4.

¹²See ch. 1.

¹³*Minh phán quan*.

¹⁴*Bất y lệ* or *những bị sự tình*.

¹⁵LPC, Ch. 2, Art. 1.

¹⁶LPC, Ch. 2, Art. 2.

¹⁷LPC, Ch. 2, Art. 1.

¹⁸LPC, Ch. 2, Arts. 2 and 3. The fine imposed on the judge for the wrongful decision was probably provided here for minor cases. If the wrongful decision amounted to a willful aggravation of a case, the penalty was more severe. See later discussion.

¹⁹LPC, Ch. 2, Art. 3.

²⁰Appeal cases, *phúc tụng*, were distinguished from denial of justice cases, *minh phán quan*.

²¹LPC, Ch. 2, Art. 6.

²²LPC, Ch 2, Arts. 1, 2, 3.

²³LPC, Ch. 2, Art. 6.

²⁴LPC, Ch. 2., Art 4.

²⁵Philastre translated *biện minh oan uổng* as “revision of illegality and injustice.”

²⁶See NC 374 and *infra* for a discussion of the severe sanctions imposed for aggravation of a case.

²⁷See ch. 1.

²⁸See ch. 1.

²⁹NC 376, 375.1

³⁰*Nhập nhân tội*.

³¹LC 686.

³²NC 374. The offense of aggravating (or mitigating) a case was already punished under the Trần, with, however, only dismissal—as evidenced in the penalty imposed on Eunuch Trần Huỳnh Thao (TT, 2: 79).

³³LC 670; NC 371.

³⁴LC 665; NC 369.

³⁵LC 721.

³⁶LC 720.

³⁷LC 683, 722.

Notes

³⁸ NC 380.2

³⁹LC 685; NC 380.

⁴⁰LC 693; NC 387.

⁴¹LC 706; NC 388.

⁴²LC 546; NC 373.

⁴³*Khẩu phân khẩu xử*.

⁴⁴MMCY, 4: 117.

⁴⁵LC 20; NC 28.

⁴⁶TT, 4:292.

⁴⁷See ch. 1.

⁴⁸See ch. 4 on damages for official and private encroachment of rights. On punitive damages under the Lý and the Trần, see LC An 28.

⁴⁹For example, death compensation to be paid by an arresting official who falsely accused a person and caused him to die in detention (LC 461), or by corvée supervisors who negligently killed their men (LC 494).

⁵⁰See ch. 1.

⁵¹LC 365. This reparation seemed to be justified not on the grounds of loss of liberty per se (the serf did not lose any more liberty than whatever he had left) but rather on the basis of loss of companionship (wife, child) or labor value (which, in the case of a commoner, belonged half to himself, half to the state).

⁵²On the right to appeal, see ch. 1.

⁵³See the discussion of freedom of expression in ch. 3.

⁵⁴Woodside, *Vietnam and the Chinese Model*, p. 73.

⁵⁵LC 157.

⁵⁶Đỗ Xuân Sảng, *Les juridictions mandarinales* (Paris, 1938), pp. 44–45.

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Abbreviations

ANCL	Lê Tắc, <i>An Nam Chí Lược</i>
CLTC	<i>Quốc Triều Chiếu Lệnh Thiện Chính</i>
CM	<i>Việt Sử Thông Giám Cương Mục Chính Biên</i>
Huấn	Phan Phát Huấn, <i>Việt Nam Giáo Sử</i>
HDTCT	<i>Hồng Đức Thiện Chính Thư</i>
LC or Lê Code	Nguyễn Ngọc Huy and Tạ Văn Tãi, <i>The Lê Code</i>
LPC	Lê Procedural Code or <i>Quốc Triều Khâm Tụng Điều Lệ</i>
MMCY	<i>Minh Mạng (or Minh Mệnh) Chính Yếu</i>
NC	Philastre, <i>Lê code annamite</i>
TT	<i>Đại Việt Sử Ký Toàn Thư</i>

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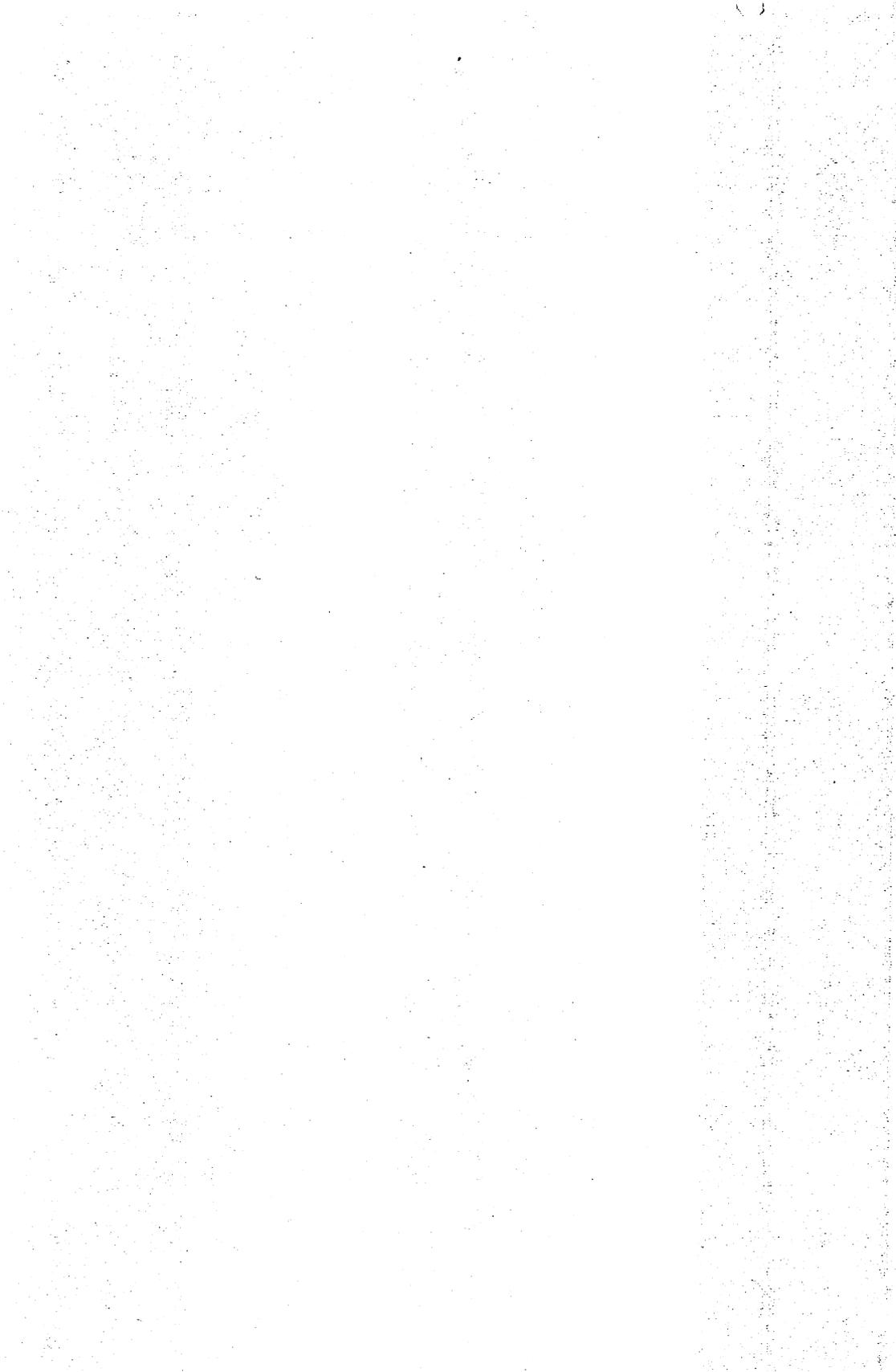
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