

The Choice of Norms in Courtroom Adjudication in Vietnam: In Search of Legitimacy in a Socialist Regulatory Context

Thi Quang Hong TRAN*

Institute of Legal Science, Hanoi, Vietnam

Abstract

Notwithstanding its defining feature of normative pluralism, the socialist state of Vietnam basically adopts a legal centralist approach to regulation. The judiciary is arguably the most illustrative of this approach, since it is the main forum where legal centralism encounters normative pluralism. Our research examines the choice of norms in judicial adjudication in Vietnam to check the effectiveness of its legal centralist approach. It finds that, despite lacking institutional support, judges managed to apply customary norms at their discretion against the state's emphasis on top-down legal rules. A legitimacy-based analysis explains this phenomenon. It points out that judges conceptualized their legitimacy under the influence of both legal and extra-legal rules, thus making it apart from the legality. Judges attempt to bridge the gap between legitimacy and legality enabled *de factor* normative pluralism. In looking at the influence of customary norms over judicial adjudication, the article aims to make both theoretical and practical contributions. Theoretically, it enriches the scholarship of normative pluralism by showing how legitimacy-building keeps normative pluralism effective, irrespective of the dominating legal centralism. Practically, it proffers insightful implications for the ongoing court reforms in Vietnam based upon the findings.

Keywords: choice of norms, normative pluralism, socialist regulation, judicial adjudication, legitimacy

1. INTRODUCTION

Notwithstanding its defining feature of normative pluralism,¹ the socialist state of Vietnam basically adopts a legal centralist approach to regulation.² The judiciary is arguably the most

* Dr Tran Thi Quang Hong, PhD (Monash), is a legal researcher at the Institute of Legal Science, Ministry of Justice of Vietnam. Her research interests focus on the process of legal reforms and judicial reforms in Vietnam. Hong has participated in many research projects in the field of Civil Law, Commercial Law, Environmental Law, Regulatory Theories, Legal Culture, Political Economy, and Legal Reforms. She also participates in law-making advisory and law review in co-operation with the Office of Vietnam National Assembly, the Vietnam Chamber of Commerce and Industry, and other ministerial agencies. The author would like to thank the judges from Lao Cai, Son La, and Lai Chau for sharing their experience and opinions and her colleagues at the Institute of Legal Science for their effective support in conducting the fieldwork in the above three provinces in late 2016 and early 2017. Gratefulness also goes to two Monash University lecturers: Professor John Gillespie for his valuable comments and suggestions on the early draft and to Dr Dinh Ngoc Thuy for her professional assistance. Correspondence to Dr Tran Thi Quang Hong, Institute of Legal Science, Hanoi, Vietnam. E-mail address: quanghonglc@gmail.com.

1. This article adopts the concept of normative pluralism defined by John Griffiths as “that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs.” It should be noted that Griffiths originally used the term “legal pluralism” but later replaced it with “normative pluralism.” See Griffiths (1986) p. 2; Griffiths (2006), pp. 63–4.

2. Legal centralism puts state laws at the supremacy and only accepts customary norms as a supplementary source of norms to the law of the state. See Galligan (2007), pp. 173–4.

illustrative of this approach, since it is the main forum where legal centralism encounters normative pluralism. Litigants bring to courts different arguments, informed by their own understandings of norms, which include not only legal, but also extra-legal, norms. However, the legal centralist approach adopted in the Vietnamese regulatory system does not support customary-norm application. It requires judges to adhere to the state law and develops necessary institutional constraints to ensure this requirement.³

In contrast to this supposition, there is evidence that judges in practice choose between norms rather than sticking to the state law.⁴ Two questions are posed regarding this *de facto* normative pluralism: (1) how do judges choose between norms brought to judicial jurisdiction and (2) what are the underlying forces driving this choice? To answer these questions, this research examines the practice of judicial adjudication in north-western Vietnam to find out how judges select norms from plural sources contrary to the government's attempts to instil a top-down rule by law. It also looks for the mechanisms influencing judges' choice of norms.

Prominent authors including Gillespie and Nicholson consider the mechanisms driving judicial adjudication in Vietnam by examining the external and internal factors influencing judicial power, focusing on the impact over judges' independence and impartiality.⁵ This article enriches the literature by pre-supposing a context in which political intervention and corruption are minimized to further highlight the internal forces influencing judicial discretion. As we shall see, the features of the case-studies support this presupposition.

Joining the normative pluralism camp, this article provides a counter-account to the legal centralist line to argue that judges in adjudication exercise some discretion to choose between social norms⁶ and state laws. It also points out how the desire to build legitimacy shapes the choice that judges made with respect to applicable norms.⁷

The article unfolds as follows. Section 1 draws on the methodological approach to the research. Section 2 introduces the legal centralist approach adopted by the socialist state of Vietnam against the background of normative pluralism. Section 3 describes the data to compare and contrast judges' choice of norms with the government's top-down approach. Section 4 conducts a legitimacy-based analysis to shed light on the mechanism influencing judges' choice of norms. The article concludes with its key findings and certain implications for the ongoing court reforms in Vietnam.

2. ANALYTICAL FRAMEWORK AND METHODOLOGY

This part draws on the analytical framework and the data-collection methods of this research.

3. How the socialist state embraces legal centralism will be further discussed in Section 2 of this article.

4. See e.g. Bui (2016), p. 235.

5. See e.g. Quinn (2003), p. 431; Gillespie (2007); Nicholson (2002), p. 215; Nicholson (2015); Nguyễn (2012); Thảo (2015); Tüông (2009).

6. Academically, social norms are defined as the "informal, decentralized systems of consensus and cooperation." This suggests that social norms encompass all kinds of norms other than the state laws. See Mahoney & Sanchirico (2001).

7. Arguably, one of the most intriguing issues of normative pluralism is how norms of different sources interact to order a society. See e.g. Tsuneki & Zasu (2010); Posner (2007); Lin (1999).

2.1 Legitimacy as an Analytical Approach

This research conducts a legitimacy-based analysis to shed light on the mechanism influencing judges' choice of norms.

As far as the issue of choice is concerned, some possible analytical frameworks have been put forth. For example, law and economic theories⁸ subject the choice of norms to cost-and-benefit considerations.⁹ This rational-choice perspective emphasizes the economic calculations in driving judges' decisions, and consequently downplays non-economic pursuits. This is an inadequate approach to understanding judges' thinking, for their job is generally admired in most societies as guarding the justice.¹⁰ As later pointed out, while pragmatic consideration significantly influenced judges' decisions, cognitive and normative values were equally important in this respect.

There are efforts to remedy this bias of the economic analysis of law. For example, in their work "A Behavioral Approach to Law and Economics," Christine Jolls, Cass R. Sunstein, and Richard Thaler suggest that, in order to develop a more accurate explanation of people's behaviours with respect to law, law and economics should take into consideration limits to people's rationality, willpower, and self-interest.¹¹ These limits, as suggested by the authors, include, for example, fairness behaviour, self-serving bias, over-optimism, loss aversion, etc.¹² They, unfortunately, fail to cover more varied non-economic factors affecting people's choice. The framework, as criticized by one of the key proponents of the rational-choice approach, should be better described as a "psychological analysis of law" that hardly advances the law and economic arguments.¹³

For the above reasons, a broader framework that allows considering different factors influencing judges' choice of norms is required. Such a framework should include both economic and non-economic factors to develop a comprehensive insight into the mechanism in which judges' choice of norms is driven. It also needs to allow weighing the influence of these factors over the actual choice. An analytical framework developed upon Weber's sociological concept of legitimacy accommodates this theoretical requirement.¹⁴

Legitimacy in Weber's theory is identified as the justification of authority,¹⁵ which ensures the rulers' influence over their subordinate without always resorting to costly coercion.¹⁶ This is echoed by Tom Tyler, who asserts that one of the elements securing people's obedience is the legitimacy of the authority.¹⁷ While Weber sees the typical expression of his

8. The theories that apply economic analysis to law. See Garner (2007), p. 901.

9. See e.g. Wendel (2002); Mahoney & Sanchirico, *supra* note 6; Posner, *supra* note 7.

10. See e.g. McLachlin (2001); Segall (2012).

11. Jolls, Sunstein, & Thaler (1998).

12. *Ibid.*, pp. 1548–9.

13. Posner (1997), p. 1558.

14. This article adopts the sociological view of legitimacy, which assesses the legitimacy of an institution through the attitudes and reaction of the relevant audience. It is to be distinguished from the normative view, judging the legitimacy of an institution by what it ought to do. On the distinction of sociological legitimacy and normative legitimacy, see Gibson & Nelson (2014), p. 1. For further discussion on sociological legitimacy, see Wells (2007); on normative legitimacy, see Fallon (2005).

15. Weber (1978), pp. 942–54; see also Gillespie (2011), p. 552. Weber's concept of legitimacy creates a starting point for an extensive literature that discusses the sources of legitimacy of the modern state. See e.g. Beetham (2016), pp. 34–45; Hechter (2009); Kane, Loy, & Patapan (2010).

16. Weber, *supra* note 15.

17. Tyler (1990), p. 4.

explication in the bureaucracy,¹⁸ his concept of legitimacy is particularly relevant to court.¹⁹ It gives rise to an extensive literature, which develops insights into court's basis of authority, including courts at national, supranational, and international levels.²⁰ Authors such as Tyler and Sevier focus on how courts gain legitimacy, seen especially through the public support and acceptance, coined as popular legitimacy.²¹

This article is based upon Weber's proposition that the one in power appeals to their audience for legitimation²² to understand how such legitimacy-building drives judges' decisions. Ascribing this legitimacy-building to judges' choice incorporates the pragmatic consideration devised by the rational-choice theories, because legitimacy in this way accommodates judges' practical needs for recognition and influence. At the same time, it allows evaluating the impact of non-economic factors such as normative and cognitive values, thus offering a more comprehensive view on the subject matter.

This article, however, departs from Weber's legal positivist thesis²³ to understand judges' context-based legitimacy-building in the socialist regulatory system. According to Weber, the audience evaluates the validity of a power upon three principles of rational norms, tradition and/or charisma, or the "combination, mixtures, adaptations, or modifications of these" from time to time.²⁴ This suggests that the one in power just needs to resort to the above for legitimation. With respect to courts, this positivist view fuels discussions on to what extent substantive justice and procedural justice act as criteria to assess judicial legitimacy.²⁵ This approach does not work well in a context of normative pluralism, where legitimacy is inevitably constructed through relevant agents' own reflection of conflicting norms.²⁶ Adopting the legal constructionism, this article acknowledges that people's interpretation of norms significantly informs their perception of judicial adjudication. This perception in turn informs judges' consideration in building their legitimacy.

The Vietnamese court organizational and operational features also determine the structure of its audience. In Vietnam, the courts are institutionally positioned between ordinary people who are subject to their judicial adjudication and the state who subjects the judiciary to its surveillance and administration, including judge appointment.²⁷ This creates two key groups of audience for the court, requiring them to appeal to both for legitimation. Investigating how judges seek legitimation from both groups is necessary to reveal the motivations driving judges' decisions, including their choice of norms.

18. Weber, *supra* note 15, p. 954.

19. Gibson & Nelson, *supra* note 14, pp. 201–19.

20. *Ibid.*; Lupu (2013); Tyler & Sevier (2014); Gribnau (2002); Yoo (2001). The extant literature somehow touches on the legitimacy of the court in Vietnam, including Nicholson & Minh Duong (2010).

21. Tyler & Sevier, *supra* note 20; Yoo, *supra* note 20.

22. Weber, *supra* note 15, pp. 952–3.

23. On Weber's legitimacy framework, Donald H. J. Hermann reckons that Weber attempted but failed to move beyond legal positivism. See Hermann (1983), p. 4.

24. Weber, *supra* note 15, p. 954.

25. See especially Tyler, *supra* note 17; Tyler & Sevier, *supra* note 20; Ruibal (2010); Bottoms & Tankebe (2012); Baird (2001).

26. For example, Sida Liu has explored how the lower court in China encounters conflicting legitimacy given the normative pluralism context. See Liu (2006).

27. See Section 2 of this article for further information.

2.2 *Methods to Collect Data*

In order to gain a profound understanding of how judges choose between norms and what drives their choice, this research relies upon the fieldwork conducted from October 2016 to July 2017 in the three provinces of Lai Chau, Lao Cai, and Son La in the north-western mountainous area of Vietnam. The north-western mountainous area is chosen because it is the home of numerous Vietnamese ethnic-minority groups who still live in their own communities and are separated by the remote and divided geographical condition.²⁸ This isolation keeps the customary norms of the ethnic minorities effective and thus provides an ideal context to investigate the interaction between the state laws and indigenous norms.

Most of the data for this research were collected from semi-structured interviews with judges.²⁹ As written judgments in the archives rarely state any customary norms,³⁰ our case-studies are basically based upon judges' restatements. We had support from the court administration to contact judges who were experienced in hearing cases involving ethnic-minority people. In practice, we conducted five individual interviews and three group interviews. The five individual interviews include three on 10 October 2016 with three judges from Lai Chau province, one on 13 December 2016 with a judge from Son La province, and one on 3 July 2017 with a judge from Lao Cai province.³¹ We also organized three group interviews with 30 judges from provincial and district courts in Lai Chau, Son La, and Lao Cai on 13 October 2016, 16 December 2016, and 4 July 2017, respectively.³² At the interviews, we asked judges whether they had adjudicated cases relating to customary norms; what the norms involved were; what their decisions were; and what their considerations with respect to norm application were.

These data are supplemented by interviews with provincial cadres whose jobs are related to ethnic-minority groups, cadres of the commune people's committees, legal officers, villagers, and two Supreme Court clerks.³³ These supplementary data provide further understanding of the types of court cases involving ethnic-minority people and also the background in which these cases were adjudicated. In all villages we visited, villagers reported no cases brought to the court. Most disputes were settled at the village level or, if more serious, could be escalated to the commune level for settlement and were settled there. The court cases regarding ethnic people shared by interviewed judges were basically those involving elements that made court procedure compulsory, such as divorce cases³⁴ or criminal-related cases.³⁵ It can be inferred that most ethnic-minority people did not initiate a

28. Ngô Đức Thịnh (2003).

29. Semi-structured interviews use prepared questions but with sufficient flexibility to allow adjustments, if necessary, during the interviews. See Wengraf (2001), p. 5.

30. Further explanation on this will be provided in Sections 4 and 5 of this article.

31. For confidentiality, all judges' names are kept anonymous and litigants' names in the cases shared by them are mostly coded as *A* and *B*.

32. The group interviews with judges were conducted in Lai Chau on 13 October 2016, in Son La on 16 December 2016, and in Lao Cai on 4 July 2017.

33. Interviewees included cadres from the Provincial Department of the Culture, Sports and Tourism, the Provincial Department of Justice, Provincial Department of Ethnic Minorities Affairs, Chairmen of the People's Committees of several communes.

34. In fact, not all divorces were brought to court. Some villagers confirmed with us that many couples just parted without the court trials.

35. Further details are to be mentioned in the case description in Section 3 of this article.

court case at will, suggesting the modest popularity of the court procedure within ethnic-minority groups.

I also conducted an archival search of relevant legal documents and government reports. This archival search provides more details about the context in which court adjudication took place, supporting the fieldwork data.

Focusing on court cases whose litigants were ethnic people living in the remote areas, the research pre-supposes special circumstances for adjudication practices. Those people largely maintained their traditional style of living, which was closer to nature and unlike many Kinh practices,³⁶ including the court system. They simply had no idea of bribery, which basically excluded the possibility of corruption. The examined cases related to small disputes arising from their daily activities. They neither connected to any kinds of group interests nor were politically sensitive, thus minimizing the influence of political intervention that might corrupt judges' impartiality.³⁷ This helped isolate the mechanism influencing judges' decisions in a condition almost free of corruption and political intervention.

3. THE SOCIALIST REGULATORY CONTEXT: LEGAL CENTRALISM VERSUS NORMATIVE PLURALISM

This section briefly introduces the state of normative pluralism in Vietnam to contrast it with the state's legal centralist approach. It sets the background for an inquiry into the actual impact of different sets of norms on judicial adjudication, which is considered in the following section.

3.1 *Legal Centralism versus Normative Pluralism in Vietnam: A General View*

Normative pluralism is a defining feature of Southeast Asia³⁸ and Vietnam is not an exception. Sharing the regional features of ethnic, religious and cultural diversity, a long history of colonialism, and constant reception of global commercial practices,³⁹ the country is home to multiple sources of co-existing norms intervening in its society in addition to the state law. Its 90 million population is composed of 54 ethnic groups,⁴⁰ each of which has long history of self-regulation.⁴¹ The moral values, imbedded with Confucian ideas, have had a long-lasting influence in the country over centuries.⁴² The closed organization of the Vietnamese old-village system cemented the role of village conventions (known as

36. The Kinh, also known as Viet, is the majority ethnic group of Vietnam. It accounts for 86.83% of the population according to the result of the National General Survey on Population and Housing in 2009. The Kinh also dominates the country's economic and political system.

37. The influence of corruption and political intervention over court adjudication in Vietnam is covered by a number of scholars. See e.g. Gillespie, *supra* note 5; Nicholson, *supra* note 5; Quinn, *supra* note 5.

38. Gillespie (2013), p. 67. The normative pluralism in Southeast Asia is extensively widely discussed in the literature. But see Scott (2009); Engel & Engel (2010).

39. Gillespie, *supra* note 38.

40. Information on the 54 ethnic groups of Vietnam can be seen in the official website of the Committee for Ethnic Minorities Affairs at Committee for Ethnic Minorities Affairs; see Cema (2016).

41. The Vietnamese literature has extensively drawn on the existence of tribal norms of the 54 ethnic communities of Vietnam. But see Ngô Đức Thịnh, *supra* note 28. For the norms emerging from the northern mountainous area, see Nguyễn Văn Trọng, et al. (2012).

42. Whitmore (1994).

“*Huong uoc*”) that co-existed and sometimes competed with the law of the royal court.⁴³ The colonial history put more layers on the already diverse system of norms and made it more complicated with the debated policies toward both the royal court law and customary rules.⁴⁴

Extant scholarship reveals the reluctant recognition of normative pluralism in Vietnam. Back to the fifteenth century, Emperor Le Thanh Tong (1460–97) issued an order discouraging the development of new rules at the village level. The order, however, still allowed villages with peculiar customs and tradition to establish their village convention subject to a mandarin’s approval.⁴⁵ The Le Code of 1483 stipulated that the rules of the highland areas should be applied to conflicts among highlanders.⁴⁶ This recognition continued until the French colonialism, which initially rejected the village’s self-regulatory system but later endorsed it.⁴⁷ Toward the end of their domination, the French even established the customary court to apply customary laws and settle disputes between highlanders.⁴⁸

The socialist state,⁴⁹ strongly influenced by Soviet legal thinking,⁵⁰ embarks on a legal centralist approach to its regulation. For decades from 1945 to 1993, it abandoned customary norms in social administration.⁵¹ Nevertheless, in the 1990s, it shifted its position by declaring to recognize customary norms.⁵² This, however, did not secure a better status for customary norms in practice, given the fact that this recognition was made through a legal centralist lens.⁵³ Customary norms were subordinated to state law and could only be accepted upon satisfying two requirements: (1) there is no legal rule to regulate the relevant undertaking and (2) the applicable customary norm must be consistent with the state law.⁵⁴

The above pre-conditions subordinate customary norms to the state law and simultaneously narrow their regulatory space. With the state’s attempt to develop a comprehensive legal system to cover loopholes in the state regulation,⁵⁵ there is little room left for customary norms. As remarked by some interviewed judges: “The system of state law has extensively covered social issues. We can hardly find an area without state regulation.”⁵⁶ Moreover, the other requirement that customary norms must comply with the basic principles of the Civil Code discourages judges to take up customary norms, given the likeliness of being involved in a controversy about whether a customary norm is legally compliant. As stated by a judge:

43. Village convention (or *Huong uoc*, as it is called in Vietnamese) is a set of customary rules compiled and approved by each village to be applied within that village. See Bùi Xuân Đĩnh (1985).

44. Baugher (1980); Jamieson (1995).

45. Đào Trí Úc (2003). The feudal states in fact failed to control village conventions. This practice was seen in the widely known proverb “*Phép vua thua lệ làng*” (“Inside the village, the king’s law bows to the village rules”).

46. Art. 40 of the Le Code of 1483.

47. Baugher, *supra* note 44, p. 8.

48. Ngô Đức Thịnh (2014), p. 267; Nguyễn Mạnh Thắng (2016).

49. The socialist state ascended to power in Vietnam after the August Revolution in 1945 and established its effective control all over the country after its victory over the Southern Republic State in 1975.

50. Bùi, *supra* note 4, p. 20.

51. Ministry of Justice of Vietnam (2017).

52. VII Central Committee of the Communist Party of Vietnam (1993).

53. Galligan, *supra* note 2.

54. See Art. 14 of the Civil Code 1995, Art. 3 of the Civil Code 2005, and Art. 5 of the Civil Code 2015. It should be noted that, until now, the Socialist Republic of Vietnam has promulgated three Civil Codes: the Civil Code 1995, the Civil Code 2005, and the Civil Code 2015. See The Government of Vietnam (2014).

55. Hà Hùng Cường (2009).

56. This remark was made by most of judges attending the group interviews in Lai Chau, Son La, and Lao Cai.

“There are no criteria on how a customary norm is compliant with the basic principles of the Civil Code, thus judges have difficulties in determining whether a customary norm is acceptable.”⁵⁷

The party-state’s promotion of customary norms did not achieve a better situation for them. In parallel with its recognition of customary norms, from the 1990s, the state launched a programme to resume the traditional *Huong uoc*.⁵⁸ For the new development, local authorities nationwide were instructed to support villagers to develop the modern *Huong uoc*.⁵⁹ Notably, they had to follow a strict screening process to ensure the *Huong uoc* complied with the state law.⁶⁰ Being under the pressure to ensure this compliance, the state cadres in charge of monitoring this process adopted a safe solution by putting only state and state-endorsed rules in the *Huong uoc* template. As a result, the *Huong uoc* is a set of state-designed rules rather than a collection of village norms,⁶¹ and many of them are almost identical.⁶² This situation is unfortunate for real customary norms because judges have now become even more reluctant to apply the norms not being stated in the *Huong uoc*.⁶³

The domination of legal centralism is consolidated by the legal education system that all judges have experienced. All legal textbooks teach that the principle of socialist legality is one of the tenets of the socialist legal system. To respect this principle, customary rules are accepted only when they are consistent with the state law.⁶⁴ This illustrates the official viewpoint that there are no extra-legal rules valid without state acceptance. The mainstream literature follows the same line. It puts the state law at the supreme position to decide which norms are to be accepted and which are to be declined. This approach is reflected in a general bifurcated view, which sees the diversity of norms in Vietnam as a collection of either good/suitable ones to be recognized by the state or bad/unsuitable ones to be abolished.⁶⁵

3.2 *The Court Institutional Design: Embracing Legal Centralism*

The court institutional design consistently adopts the legal centralist approach and puts more constraints on judges’ norm application. With respect to applicable rules, judges in theory can apply customary rules to supplement the state law, as stipulated by the Civil Code.⁶⁶ However, a decision to apply a customary norm is most likely to be questioned on its

57. This was stated by a judge attending our group interview in Son La.

58. Ministry of Justice of Vietnam, *supra* note 51. Also see Bùi (2013).

59. “Thông tư liên tịch số 03/2000/TTLT/BTP-BVHTT-BTTUBTUMTTQVN ngày 31/3/2000 về việc hướng dẫn việc xây dựng và thực hiện hương ước, quy ước của làng, bản, thôn, ấp, cụm dân cư [Inter-Agency Circular No 03/2000/TTLT/BTP-BVHTT-BTTUBTUMTTQVN dated 31 March 2000 on Guiding the Development and Implementation of Internal Conventions of Villages, Wards and Hamlets].” For a definition of *Huong uoc*, see the early discussion of this section.

60. “Thông tư liên tịch số 03/2000/TTLT/BTP-BVHTT-BTTUBTUMTTQVN ngày 31/3/2000 về việc hướng dẫn việc xây dựng và thực hiện hương ước, quy ước của làng, bản, thôn, ấp, cụm dân cư [Inter-Agency Circular No 03/2000/TTLT/BTP-BVHTT-BTTUBTUMTTQVN dated 31 March 2000 on Guiding the Development and Implementation of Internal Conventions of Villages, Wards and Hamlets].”

61. Interview with an official from the Ministry of Justice on 17 August 2017.

62. Some copies of *Huong uoc* of different villages collected during the field trips are now on file with the author.

63. A judge attending the individual interview in Lai Chau revealed that, if she could not apply a customary norm, she might explain that it was not stated in the *Huong uoc*.

64. See e.g. Hanoi Law University (2013); Hochiminh Academy of Politics and Public Administration (2008), pp. 196–06.

65. See e.g. Ngô Huy Cường (2010); Bùi, *supra* note 58; Đỗ Quang Hưng (2008); Lê Minh Thông (2008).

66. See Section 2 of this article.

identification. This happens even before the above-mentioned requirements of legal loopholes and legal compliance can be considered.⁶⁷ Such a question operates as a real deterrence of customary-norm application, since its answer is indeterminate and depends largely on the appellate/cassation court judges' personal opinions. The fact that nearly all judgments recognizing customary norms have been corrected or cancelled by appellate or cassation courts, mostly in terms of the identification of the applied customary norms,⁶⁸ confirms this obstacle. A case told by a Supreme Court clerk further illustrates this problem. The case involved an unregistered adoption. This adoption was not compliant with the Law on Marriage and Family of Vietnam, which requires all adoptions to be registered with the authority to be valid.⁶⁹ However, the judge still recognized it "according to the local custom."⁷⁰ The judgment was brought to the Supreme Court. The clerk, in her capacity as an assistant to the justice in charge, proposed accepting the local custom. The justice, in response, questioned her: "Ai bảo?" (which means "Who told that it was a local custom?").⁷¹ This suspicion prompted his decision to fail the local judgment.

Judges' limited competence also bars them from adopting customary norms. In adjudication, judges are supposed to apply the law mechanically.⁷² The power to interpret laws is exclusively delegated to the National Assembly's Standing Committee.⁷³ Being deprived of the power to interpret laws, judges cannot give meaning to legal provisions. Their adjudicating work, thus, basically means applying the right provisions to particular situations. Certain authors assert that judges in Vietnam exercise some degree of legal interpretation. However, what they contend to be judges' interpretation is simply syllogism-based inference,⁷⁴ not that of explaining the meaning of the legal provisions or developing legal reasoning.⁷⁵ Without the power to interpret laws, judges have little authority to justify their position in the controversy of whether a customary-norm application is valid. This makes their decision more vulnerable to the higher courts' discretion.

67. The two interviewed clerks working for the People's Supreme Court confirmed these challenges.

68. The most prominent case is possibly the one heard at the court of the first instance of Long Dat District, Ba Ria-Vung Tau province. In this case, Ms Chiem Thi My Loan sued Mr La Van Thanh to reclaim her priority over a fishing area 19 hours off the Vung Tau shore of Ba Ria-Vung Tau province. The first-instance court found that, according to the local custom, one deserting the fishing area for three months or longer will lose the priority to fish there. The court relied on this custom to reject the plaintiff's reclaim. The appellate court did not accept the custom. It overturned the decision by the court of first instance and asked Mr Thanh to return the fishing area to Ms Loan. Then, at the cassation session, the Supreme Court held that the custom was valid. It abolished the decision of the appellate court to uphold the judgment of the court of first instance. The fact that the case had to undergo many levels of trial indicates the complexity of applying customary norms in the court. See the Cassation Decision No. 93/GDDT-DS by the Civil Tribunal of the Supreme Court dated 27 May 2002. In addition, this case also attracts the most earnest scholarly debate. See a brief of different views on this case in Ngô Huy Cường, *supra* note 65.

69. The Law on Marriage and Family of 1986 of Vietnam replaced the Law on Marriage and Family of 1959 and started to outlaw unregistered marriages by its Art. 11. This is reasserted in the subsequent Laws on Marriage and Family of 2000 and 2014.

70. This is the translation of the words that the judge used in his judgment, as restated by the interviewee.

71. The interview was conducted on the 15 November 2016.

72. Authors also argue that, in practice, some formalism of legal interpretation by the court is accepted. This is done through the Supreme Court promulgating resolutions of the committee of Supreme Court Justices and issuing official letters to local courts. It is by no means the interpretation of law made by judges in particular circumstances. See more in Võ Trí Hào (2003).

73. Art. 85 of the Law on Developing Normative Documents of Vietnam (2008), replaced by Arts 159 and 160 of the Law on Developing Normative Documents of Vietnam (2015).

74. Trương Hoà Bình & Ngô Cường (2014), pp. 372–3.

75. For the lack of legal reasoning in Vietnamese court, see Gillespie, *supra* note 5; Bùi, *supra* note 4, p. 116.

The judge-appointment system and their limited tenure further prevent judges from embracing customary norms. In Vietnam, judges' careers are developed within a virtually closed system. Most judges in Vietnam are chosen from the court's employees. A typical path to becoming a judge is to start as a court clerk. After at least four years' working under a judge's supervision and completing some designed training courses, a clerk would be eligible for judge selection.⁷⁶ The judge-selection council would select a list of candidates and submit it to the President of State for appointment.⁷⁷ In practice, it takes much longer than four years for court clerks to become judges.⁷⁸ This career path does not bring judges diversified working experience, and thus offers them little chance of changing to another career. This makes remaining in office even more vital for a judge.

The judicial system also adopts the limited tenure as an instrument to check judges' performance. In Vietnam, judges' terms of office are set for five years.⁷⁹ They have to keep the rate of abolished judgment low to be reappointed. The court's internal regulation stipulates that a judge having 1.5% of their judgments abolished will not be considered for any praise of the year. If the abolishment rate reaches 3% during a term, the judge will be postponed for reappointment.⁸⁰

Being subject to limited tenure and a strict appointment and reappointment system further stresses the importance of the safety of judges' careers. This discourages them from adopting a customary norm, given the high risk mentioned above.

In brief, while Vietnam features normative pluralism, the socialist regulatory system of Vietnam strictly binds judges with the state law. In the following section, we consider how judges actually chose between norms out of this context.

4. JUDGES' CHOICE OF NORMS IN THE COURTROOM: MOVING BEYOND THE INSTITUTIONAL CONSTRAINTS

Our examination of court practice in Lai Chau, Lao Cai, and Son La provinces shows that judges in practice exercised discretion in selecting norms. This part presents the selected case-studies to illustrate how this happened.

In their official words, judges unanimously claimed their strict adherence to state law. Most interviewed judges asserted that they had never applied customary norms in their judgments. Many said that they preferred applying the legal rules in fear of the obvious risks associated with upholding customary norms. However, in contrast to this representation, interviews with judges revealed both cases of customary-norm endorsement and customary-norm rejection. This section provides examples of both types of treatments, which later facilitate the analysis on the mechanism influencing the judicial process.

76. The new law that took effect on 1 June 2015 increases it to five years and adds a qualifying examination as a prerequisite for judge selection. See Arts 67, 71, and 74 of the Law on the People's Court Organisation 2014.

77. Arts 20–31 of the Ordinance on Judges and People's Assessors 2002.

78. The time for a clerk to become a judge varies in particular cases. According to some judges, it takes from seven years to 15 years or even more. Many work as court clerks until retirement.

79. From 2015, the first term of office remains five years, while the subsequent terms (if reappointed) have been increased to ten years. See Arts 67, 71, and 74 of the Law on the People's Court Organisation 2014.

80. Interviews with two clerks from the People's Supreme Court on 15 November 2016, 17 July 2017, and second interviews on 14 July 2018.

4.1 Customary Norms Were Accepted in the Courtroom

4.1.1 Case 1: Relying on a Customary Norm to Identify the Nature of a Transaction⁸¹

This case relates to a customary norm followed by H'mong people in the Tao Nung Commune of Lai Chau province. For the H'mong people living in this area, water buffalos are important production means. Thus, when one agrees to lend a buffalo to another, the borrower has to bring a chicken and spirit to the lender to express gratefulness.

A and B were living next door in the above commune. A sued B in court to reclaim the buffalo that B was keeping. A asserted that the buffalo belonged to A and that B had borrowed it from A one year before. B rejected this, asserting that B had bought the buffalo from A. The two disputants had no evidence to prove their own cases.

The judge, through investigation, learned about the custom applied to buffalo-borrowing in Tao Nung Commune. He then checked whether there had been such practice exercised between A and B and found that there was none. The judge relied on this finding to challenge A at an informal session, which led to A's withdrawal of his request.

4.1.2 Case 2: Accepting the Plaintiff's Request for "Khoan" Service Following a Customary Norm⁸²

Ethnic-minority groups such as Dao, H'mong, and Thai from north-western Vietnam have a common belief that a human-being's soul (which they call "*khoan*," with a slight modification in pronunciation from group to group) co-exists but can be separated from the physical body. This belief underpins certain kinds of long-lasting spiritual services in their communities, including the "*khe khoan*" (meaning: recalling soul) to restore the lost souls for those killed by accidents and the "*panh khoan*" (meaning: repairing soul) to repair the damaged souls for those being injured. In common language, these services are called "*khoan*."⁸³ Requiring the culprit in a relevant incident to do the *khoan* service for the victim has long been a norm in the north-western mountainous area. This influences the claim the ethnic people brought to the state court, as demonstrated in this case.

A hit B in a traffic accident. B was injured and had to seek hospital treatment. The court had to decide on A's civil liability in addition to criminal liability. At the court, B insisted that A had to pay him some extra money to do the *khoan* service apart from the hospital expenses. However, the tort law of the Civil Code, which only asked the culprit to compensate for the physical damages, did not support this requirement.⁸⁴

The judge ruled by splitting B's requirements. He applied the Civil Code to order A to compensate for B's hospital expenses in the official judgment. With respect to the claim for *khoan* service, at the closing of the hearing session, the judge orally required A to fulfil the *khoan* obligation to B. The parties later took action accordingly and there was no appeal to the higher court.

81. Following the recount by a judge attending the group interview in Lai Chau province headquarters on 13 October 2016.

82. Following the recount by a judge from a district court in Son La province attending the group interview on 16 December 2016.

83. We had shaman Lo Van Nenh from Son La province explain this belief and relating spiritual services to us in the interview on 14 December 2016. This account was confirmed by interviewed judges and villagers.

84. Chapter XXII on the Tort Law of the Civil Code of Vietnam (2005).

4.1.3 Case 3: *Facilitating the Parties' Negotiation on Returning a Wedding Gift*⁸⁵

Many women from Thai ethnic families in north-western Vietnam still maintain the tradition of preparing a gift for their sons' brides. The typical gift is a hair-bun holder that was prepared for years from the mothers' own hair. It is believed that, if the bride later abandons the son, she will have to return the gift. This is inconsistent with the Civil Code, deeming such gift-giving a kind of gratuitous contract under which the ownership of the gift is transferred to the bride without any reservation. Judges at times encounter such inconsistency, as in the following case.

A young Thai couple divorced. At the court, the man's family insisted on taking back the gift (the hair-bun holder) that they gave the bride at the wedding. They asserted that the gift was the treasure of the family. It was given to the bride following their ethnic custom, which also required that she return it to the husband's family if she later abandoned her husband. The judge rendered this requirement reasonable but found no basis in the Civil Code to ratify the reclaim. He thus organized a mediation session and guided the two parties toward the outcome expected by the husband's family. Later, the judge delivered a judgment to declare the divorce and recognized the wedding-gift return in his decision as resulting from the parties' negotiation.

4.1.4 Case 4: *A Customary Norm Served as an Excuse for a Minor Crime*⁸⁶

One of the customs exercised in many villages in north-western Vietnam is that garden-owners can kill livestock damaging their garden.

Following this custom, a man shot dead a buffalo that was penetrating his vegetable beds. However, according to the Criminal Code, the act of destroying an asset valued at 2 million Vietnamese dong (which was this case) constitutes the crime of destroying other people's assets provided in Article 143 of the Criminal Code of Vietnam.⁸⁷ The man was prosecuted under this article. The judge adjudicating this case understood that the garden-owner was guided by his village rule without being aware that it was forbidden under the state law. Following this reason, the judge was not persuaded that the garden-owner deserved a criminal charge. However, the state law did not accept local customs as mitigation for a crime. To exempt the defendant from a criminal charge, the judge cited the fact that the defendant was the chairman of the people's committee of his commune. On the basis that charging him criminally could influence the politics of the locality, the judge decided to terminate the prosecution.

4.2 Customary Norms Were Rejected at the Court

This section describes two cases in which judges refused to apply customary norms. Besides illustrating how judges' choice of norms can vary in practice, these examples also provide the counterparts to enable a comparison with the cases in which customary norms were accepted. This supports our latter analysis on judges' considerations upon making their choice.

85. Following the recount of a judge working in a district court in Son La province attending the group interview on 16 December 2016.

86. Following the recount by a judge from Lai Chau Provincial Court attending the group interview on 13 October 2016.

87. As amended in 2009.

4.2.1 Case 5: *Giving a Baby Boy to the Mother against the Ethnic Custom that Boys Go with Fathers and Girls Go with Mothers*⁸⁸

The H'mong people in north-western Vietnam has the custom that, if parents divorce, all girls would go with mothers and all boys with fathers, irrespective of their age or economic condition. This conflicts with the state law, which provides that children under three years old shall stay under the mother's care upon divorce.⁸⁹

An ethnic couple filed to divorce at the court. They had two children: a five-year-old daughter and a one-and-a-half-year-old son. At the court, the father asked to take his son and leave the daughter with the mother. The mother respected it following the custom of their ethnic group.

The judge believed that the custom reflected a kind of backward perception and did not suit young babies' interests.⁹⁰ At the hearing, he opined that it was in the best interest of the baby son to be looked after by his mother. He cited Article 92 of the Law on Marriage and Family 2000 to rule that the son had to stay with the mother. The father broke out crying at this decision. Witnessing the father's reaction, the judge comforted him by explaining that the baby was still his son and persuaded him to agree to the judgment for his son's best interests.

4.2.2 Case 6: *Rejecting the Custom-Based Claim of Ownership over Deserted Land*⁹¹

A number of tribes in north-western Vietnam, including the Red Dao, used to exercise shifting cultivation. By this production mode, they slashed and burned vegetation and cultivated the land until the soil turned barren. They then moved to another place and would return to re-cultivate their deserted land when it became vegetated again. This practice generated a custom that recognizes the ownership of the first cultivators, no matter how long they have abandoned the land for.

In this case, a man deserted a land plot after a few years of cultivation. Another person occupied the land afterward and was cultivating on it when the local authority inspected the land. He was then issued the land-use right certificate.⁹² After several years, the previous cultivator returned and cited the Red Dao rule of first cultivators to sue to court to claim his ownership over that land.

The judge rejected the plaintiff's claim on the ground that the land plot was lawfully allocated to another person. To raise the plaintiff's awareness, the judge explained how differently the state law regulated the issue compared to the customary norm and also explained that they had to obey the state law.

The above cases prove that norms adopted by judges were case-dependent. Such a variety of choice indicates that judges in practice moved beyond the institutional constraints to

88. Following a recount by a judge from a district court in Lai Chau province attending the group interview on 13 October 2016.

89. Art. 92(2) of the Law on Marriage and Family of 2000. This law has now been replaced by the Law on Marriage and Family of 2014.

90. As shared by the judge ruling this case in the interview on 13 October 2016.

91. Following the recount of a judge from provincial court in Lai Chau province attending the group interview on 13 October 2016.

92. According to Vietnamese Constitution, all land belongs to the ownership of the entire people. Thus, individuals can only have the land-use rights.

secure their discretion in adjudication. In the following section, we look into the forces driving this varied treatment.

5. UNDERSTANDING JUDGES' CHOICE OF NORMS: SEARCHING FOR LEGITIMACY IN A SOCIALIST REGULATORY CONTEXT

This section conducts a legitimacy-based analysis to understand the forces driving judges' choice of norms. Starting from Weber's concept of legitimacy, it points out that judges shaped their legitimation upon the state's recognition and people's expectations. Pursuing the two-aspect legitimacy motivated judges to move beyond the institutional constraints to embrace customary norms.

Seeking recognition from the state constitutes the first aspect of the court legitimacy. In the socialist system, it is essential for judges first and foremost because judges are not judges without the state's recognition. The state not only appoints judges, but also assesses their performance and decides their reappointment after a limited tenure.⁹³ The judges in our survey were keenly aware of this. Many of them expressed the concern that, if they had their decisions abolished, they might not be considered for reappointment.

The awareness of the significance of state recognition makes it compelling for judges to relate their norm choice to how the state would perceive such a choice. Under the impact of legal centralism, this aspect of legitimacy also means the legality in a narrow sense, which requires a strict adherence to legal rules. The desire to pursue this first aspect of legitimacy explains judges' representation that they must stick to the state law. Through interviews, judges reiterated that they had to adhere to the state law to secure state recognition, in addition to mentioning that they must protect the principle of socialist legality. Many of them asserted that applying state law minimized the risk of having their decisions abolished. They also expressed their concern about how endorsing customary norms might adversely affect the safety of their career. In brief, the first aspect of legitimacy required judges to strictly obey the state law and at the same time discouraged them from embarking on customary norms. This handicapped their pursuit of the second aspect of legitimacy, as will be discussed below.

Unlike the first aspect of legitimacy, which coincides with legality, the second one does not. The reason is that the latter is context-based, which contrasts with the universality of the former. Our survey shows that, in order to seek acceptance from litigants and the community, judges had to consider their expectations, which were significantly custom-led. As generalized by a judge: "The ethnic people are accustomed to their ethnic norms and this makes it difficult for them to accept otherwise."⁹⁴ Other admitted: "In certain situations, the state law is not as persuasive to people as their customary norms."⁹⁵ Pursuing the second aspect of legitimacy thus required customary-norm application in certain circumstances. This, as already pointed out, could not secure the legality in its narrow sense.

There is evidence showing that certain judges even discredited their own adjudication upon being handicapped from choosing between norms. A judge attending our group interview in Son La province told of an inheritance case in which he was privately consulted

93. See the discussion on this in Section 2 of this article.

94. This was asserted by a judge attending our group interview in Son La on 16 December 2017.

95. Interviews in Lai Chau, Son La, and Lao Cai.

by a H'mong family about how the court would settle their case. In response, the judge had advised that family to negotiate for a mutual agreement themselves rather than bringing the case to court. He had explained to them that the court would have to apply the state law, not their customary norms, which neither of them wanted. The judge's advice indicates his dissatisfaction toward the institutional setting that did not allow him to choose the norms that were deemed suitable. It also proves that he was completely aware of the risks associated with customary-norm application.

Judges, however, strongly desired to achieve this second aspect of legitimacy. The reason is that it granted them the feelings of fulfilment and of seeing the social value in their jobs, which at the same time secured public support. One of the interviewed judges shared with pride her experience that "as soon as I finished declaring the judgment, the audience burst into applause."⁹⁶ Another judge opined that a good decision must be the one supported by the public.⁹⁷ The fact that the state court remained an exotic forum to ethnic people⁹⁸ strengthened their desire to expand its social basis.

The enforceability of judicial decisions put more weight on this second aspect of legitimacy. One of the judges' concerns when passing judgments disagreeable to the ethnic people was the possibility that they might refuse to implement them. The judge hearing Case 5 said that judges could not simply reject customary norms because the parties might ignore those decisions. In his particular case, not only the father wanted the son, but the mother also believed that the son should be given to the father. In order to make sure that the divorced couple obeyed his decision, the judge said that he had felt compelled to persuade them, especially the father, that, no matter whom the boy lived with, he would remain the son of both father and mother. The judge had even sought the village head's support to have him further console and convince the couple.⁹⁹ In Case 6, the judge similarly attempted to explain the state law to the plaintiff in an effort to seek his obedience to prevent him from appealing the judgment. It can be seen that seeking litigants' and the community's acceptance is among judges' top concerns, which further motivates their endorsement of customary norms if possible.

The second aspect of legitimacy comes to terms with judges' common way of justifying their judgments, which is normally shaped around a Vietnamese famous adage of "*hợp tình hợp lý*" ("sentimentally reasonable and legally sound"). This concept, which requires judges to achieve a balance between legally based arguments and a sympathetic understanding of people's particular contexts, is widely recognized in Vietnam and generally used to evaluate judicial adjudication.¹⁰⁰ This significantly influences judges. Many of the interviewed judges stated that their judgments needed to be not only "legally sound," but also "sentimentally

96. Interview with judge Tran Thi Hoa from Lai Chau Provincial Court on 10 October 2016.

97. This was expressed by a judge attending our group interview in Lai Chau on 13 October 2016.

98. As already mentioned, it is not common for ethnic-minority people to take an action before the court. Interviews with villagers show that they are more familiar with the village dispute-resolution system than courts, which may be regarded as the Kinh's courts.

99. The recount was by a judge attending the group interview at Lai Chau Provincial Court head quarter on 13 October 2016.

100. "*Hợp tình hợp lý*" is generally accepted in Vietnam and in many cases has been used to evaluate the legitimacy of the regulator's decisions. It is also asserted by Vietnamese high-ranking legal leaders. For a detailed discussion, see Bùì, *supra* note 4, pp. 80, 112, 140, 157.

reasonable.”¹⁰¹ Every other judge supported this opinion. This proves that this kind of perception further consolidates judges’ wish to pursue popular legitimacy.

Judges’ representations demonstrate how the second aspect of legitimacy played a key role in motivating their customary-norm embracement. In Case 1, the involving judge explained his endorsement of the customary norm on the basis that it decided the correct owner of the cattle. In Case 2, the judge upheld the request for the *khoan* ritual in sympathy with the ethnic people who regarded it as vital to their life. As he explicated, ethnic people regarded repairing the wounded soul as an integral part of living. Without doing it, their lives could not come back to a normal state. In Case 3, the judge reasoned that the husband’s family had reasonably expected that they had been entitled to having their treasure back if their daughter-in-law had abandoned the family. They had given it to the bride based upon this expectation, thus it would not be fair if their reclaim over the gift was refused. In Case 4, the judge did not simply see the defendant’s action from the criminal law’s perspective, but took up a more sympathetic view to treat him as a victim of conflicting norms. This understanding underlay his effort to release the defendant from the criminal charge.

As the two bases for their legitimacy were not always consistent, judges were found in a self-contradictory situation. On one side, they asserted that they had to stick to the state law with a view to protecting the socialist legality. On the other side, they said that they needed to uphold customary norms to produce *hợp tình hợp lý* decisions. Interviews with judges showed their effort to seek an official solution to address this self-contradiction. At all our group interviews, judges petitioned that the state promulgates a list of recognized customary norms so that judges could confidently apply them. This impractical petition proves judges’ urging desire to be able to apply customary norms in a formal manner without compromising the legality.

The unavailability of a practical solution explicates a common practice that judges embraced to negotiate between the two aspects of legitimacy. That is adopting customary norms to obtain the second aspect of legitimacy and recognizing them in an implicit manner to satisfy the first aspect. This, as we can realize, is evident in Cases 1 to 4, mentioned above.

Negotiating the two aspects of legitimacy was not always possible, which was seen in judges’ refusals to accept customary norms in other cases. These cases then show how judges prioritized the first aspect of legitimacy, which satisfied the legality and thus did not harm their career safety. For example, in Case 6, the judge could not apply the customary norm implicitly, as this application would inevitably lead to the abolition of a certificate granted by another state agency. Thus, the safest solution was to recognize the status quo at the expense of the customary norm involved. This case demonstrates that, when judges failed to negotiate between state recognition and social acceptance, they would opt for the former and sacrifice the latter. This means that, of the two aspects of legitimacy, the one supported by the legality held a higher position in the hierarchy. This fact also illustrates that judges were just removed half-way from the institutional bindings.

To sum up, the search for legitimacy explains the way judges choose between norms in Vietnam’s socialist regulatory context. It demonstrates that, in a context of normative pluralism but dominated by legal centralism, the consistency between legitimacy and legality is seriously challenged. Judges’ wish to build legitimacy in this context triggers their effort to

101. Interviews with judges and the two Supreme Court clerks.

bridge the gap between the two. In doing so, they have to move beyond the institutional constraints to embrace customary norms and, in securing the legality, they have to hide this embracement by applying customary norms in an implicit manner. In the conclusion section of this article, we discuss the implications of these findings for the literature of normative pluralism and for the ongoing court reforms in Vietnam.

6. CONCLUSION

By drawing on the judges' choice of norms in the north-western mountainous area of Vietnam, the research has provided a picture of how state law interacts with social norms in a socialist regulatory context. Against the background of socialist regulation, which adopted the legal centralism and relies on institutional restraints to control judicial adjudication, customary norms still influenced the courtroom. Judges, being the key agents of judicial adjudication, managed to have their choice of norms and thus allowed the effects of customary norms rather than rigidly sticking to the state law. Their appeal for legitimation from both the state and the people accounted for the attempt to exercise this discretion.

The finding of this research has transcended conventional research in normative pluralism that often sees the role of extra-legal norms in their respective fora¹⁰² or sees how the extra-legal norms take effect through the state recognition.¹⁰³ Here, through the action of judges as state agents, customary norms effectively influenced the judicial adjudication without the state's acknowledgement.

Investigation of the mechanism that impacts judges' choice of norms indicates their effective discretion to a large extent rather than simply adhering to the regulatory system. Judges did not passively follow what the state law supposed. Rather, they developed their justification based upon their own evaluation of both legal and extra-legal norms, and pursued a result that fit this justification, even with the lack of institutional support.

The article also illustrates a context-based conceptualization of court legitimacy that challenges any effort to reach a universal pattern for court-legitimacy building. Even when the socialist state supported a universality of court legitimacy by ascribing it to legality, judges themselves adjusted it to fit the normative pluralism context. This adjustment drove their moving beyond the institutional constraints to choose the applicable norms at their discretion.

Investigating judges' choice of norms in Vietnam's socialist regulatory context thus has more to tell us than the kind of norms that judges choose in their adjudication. What we have seen through this choice is how judges' pursuit of legitimacy overtakes the institutional constraints. This problematizes the legal centralist approach that currently informs court reforms in Vietnam. From this research, it is evident that the state should be more compromising in claiming the supremacy of its laws to acknowledge the role of extra-legal norms in the judicial system. A more practical scheme to utilize customary norms should be in place to promote more effective judicial reforms.

Also, as we have lifted other interfering factors (such as corruption and political interests) out of context, we see how judges' own evaluation of norms facilitated the pursuit of better justice by customizing the concept of justice to a specific situation. Giving judges more

102. See e.g. Ellickson (1991); Engel & Engel, *supra* note 38.

103. Some examples are Crouch (2012); Steiner (2015).

power—especially the power to interpret law—should be regarded as an important direction for judicial reforms in Vietnam.

And, as we have tried to work in a corruption-free environment, it is practical to bring it back into consideration for more practical solutions to judicial reforms. As long as judges can get around the institutional restraints to pursue their self-legitimacy, they can similarly do it to pursue their self-interests through, for example, taking bribery. Eradicating judges' motivation for corruption thus should be put equally, if not more emphasized, compared to structural bounds. This is an issue that invites further initiatives.

REFERENCES

- Baird, Vanessa A. (2001) "Building Institutional Legitimacy: The Role of Procedural Justice." 54 *Political Research Quarterly* 333–54.
- Baughner, P. Frederic (1980) "The Contradiction of Colonialism: The French Experience in Indochina, 1860–1940." PhD diss., University of Wisconsin-Madison.
- Beetham, David (2016) "Max Weber and the Legitimacy of the Modern State." 13 *Analyse & Kritik* 34–45.
- Bộ Tư pháp [Ministry of Justice of Vietnam] (2017) *Báo cáo số 109/BC-BTP ngày 17/4/2017 Đánh giá thực trạng pháp luật về xây dựng và thực hiện hương ước, quy ước và đề xuất chính sách, định hướng trong dự thảo Quyết định của Thủ tướng Chính phủ về xây dựng, thực hiện hương ước, quy ước* [Report 109/BC-BTP dated 17 April 2017 Evaluating the Situation of Law on Developing and Implementing Village Conventions and Proposing the Policy and Direction for Drafting the Prime Minister's Decision on Developing and Implementing Village Conventions], Hanoi.
- Bottoms, Anthony, & Justice Tankebe (2012) "Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice." 102 *The Journal of Criminal Law and Criminology* 119–70.
- Bùi, Quang Dũng (2013) "Hương ước và mấy vấn đề quản lý nông thôn hiện nay [Village Convention and Some Current Issues of Rural Governance]." 1 *Xã hội học [Sociology]* 9–17.
- Bùi, Thị Bích Liên (2016) "Regulatory Interaction in Court-based Resolution of Inheritance Disputes in Vietnam." PhD diss., Monash University.
- Bùi Xuân Đỉnh (1985) *Lệ làng phép nước [Village Rules and State Law]*, Hanoi: Nhà xuất bản pháp lý [Law Publishing House].
- Cema (2016) "The Community of All Ethnic Groups in Vietnam," <http://cema.gov.vn/gioi-thieu/cong-dong-54-dan-toc.htm> (accessed 2 December 2016).
- Chính phủ [The Government of Vietnam] (2014) "Tờ trình số 287 /TTr-CP ngày 15/8/2014 về dự án Bộ luật dân sự (sửa đổi)" [Notes No. 287 /TT 2014 on the Project of the Civil Code (amended)].
- Crouch, Melissa (2012) "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law." 7 *Asian Journal of Comparative Law* 5–48.
- Đại học Luật Hà Nội [Hanoi Law University] (2013) *Lý luận nhà nước và pháp luật [Theories of State and Law]*, Hanoi: Nhà xuất bản công an nhân dân [The People's Police Publishing House].
- Đào Trí Úc (2003) *Hương ước trong quá trình thực hiện dân chủ ở nông thôn hiện nay [Village Convention in the Current Process of Implementing Democracy in Vietnam's Rural Area]*, Hanoi: Nhà xuất bản chính trị quốc gia [National Political Publishing House].
- Đỗ Quang Hùng (2008) "Building a Secular State Model in the Diversified Religious Environment: The Invariable and the Variable—the Case of Vietnam" Paper VN3.TB3.585 presented at the 3rd International Conference on Vietnam, Hanoi, 5–7 December 2008.
- Ellickson, Robert C. (1991) *Order Without Law: How Neighbors Settle Disputes*, Cambridge, MA: Harvard University Press.
- Engel, David M., & Jaruvan S. Engel (2010) *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand*, Stanford, CA: Stanford Law Books
- Fallon, R. H. Jr. (2005) "Legitimacy and the Constitution." 118 *Harvard Law Review* 1789–853.
- Galligan, D. J. (2007) *Law in Modern Society*, New York: Oxford University Press.

- Garner, Brian A. (2007) *Black's Law Dictionary*, 7th edn, Eagan: West Publishing Co.
- Gibson, James L., & Michael J. Nelson (2014) "The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto." 10 *Annual Review of Law and Social Science* 201–19.
- Gillespie, John (2007) "Rethinking the Role of Judicial Independence in Socialist-Transforming East Asia." 56 *International and Comparative Law Quarterly* 837–70.
- Gillespie, John (2011) "Exploring the Role of Legitimacy and Identity in Framing Responses to Global Legal Reforms in Socialist Transforming Asia." 29 *Wisconsin International Law Journal* 534–79.
- Gillespie, John (2013) "New Transnational Governance and the Changing Composition of Regulatory Pluralism in Southeast Asia." 9 *The Asian Journal of Comparative Law* 65–95.
- Gribnau, J. L. M. (2002) "Legitimacy of the Judiciary." 6 *Electronic Journal of Comparative Law* 25–46.
- Griffiths, John (1986) "What Is Legal Pluralism?" 24 *Journal of Legal Pluralism and Unofficial Law* 1–55.
- Griffiths, John (2006) "The Idea of Sociology of Law and Its Relation to Law and Sociology," in M. Freeman, ed., *Law and Sociology: Current Legal Issues*, New York: Oxford University Press, 49–68.
- Hà Hùng Cường (2009) "Hoàn thiện hệ thống pháp luật đáp ứng yêu cầu xây dựng nhà nước pháp quyền XHCN [Improving the Legal System to Meet the Requirements of the Socialist Rule of Law]," *Nghiên cứu lập pháp điện tử [Legislative Studies Online]*, <http://tcdcp.l.moj.gov.vn/qt/tintuc/Pages/70-nam-nganh-tu-phap-viet-nam.aspx?ItemID=15> (accessed 30 November 2018).
- Hechter, Michael (2009) "Introduction: Legitimacy in the Modern World." 53 *American Economic Review* 279–88.
- Hermann, Donald H. J. (1983) "Max Weber and the Concept of Legitimacy in Contemporary Jurisprudence." 33 *DePaul Law Review* 1–29.
- Học viện chính trị-hành chính quốc gia Hồ Chí Minh [Hochiminh Academy of Politics and Public Administration] (2008) *Lý luận nhà nước và pháp luật [Theories of State and Law]*, Hanoi: Nhà xuất bản lý luận chính trị [The Political Theories Publishing House].
- Jamieson, Neil L. (1995) *Understanding Vietnam*, Berkeley, CA: University of California Press.
- Jolls, Christine, Cass R. Sunstein, & Richard Thaler (1998) "A Behavioral Approach to Law and Economics." 50 *Stanford Law Review* 1471–550.
- Kane, John, Hui-Chieh Loy, & Haig Patapan (2010) "Introduction to the Special Issue: The Search for Legitimacy in Asia: Legitimacy in the Contemporary Global Order." 38 *Politics & Policy* 381–94.
- Lê Minh Thông (2008) *Luật nước và hương ước, lệ làng trong đời sống pháp lý của các cộng đồng làng xã Việt Nam [State Law and Village Convention in the Legal Life of Village Communities in Vietnam]*, Paper VNH3.TB7.851 at the 3rd International Conference on Vietnam, Hanoi, 5–7 December 2008.
- Lin, Timothy E. (1999) "Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption of Cases." 3 *Columbia Law Review* 739–94.
- Liu, Sida (2006) "Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court." 31 *Law & Social Inquiry* 75–106.
- Lupu, Yonatan (2013) "International Judicial Legitimacy: Lessons from National Courts." 14 *Theoretical Inquiries in Law* 437–54.
- Mahoney, Paul G., & Chris William Sanchirico (2001) "Competing Norms and Social Evolution: Is the Fittest Norm Efficient?" 149 *University of Pennsylvania Law Review* 2067–62.
- McLachlin, P. C. (2001) "The Role of Judges in Modern Society—Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada," Speech delivered at the The Fourth Worldwide Common Law Judiciary Conference, Vancouver, British Columbia, 5 May.
- Ngô Đức Thịnh (2003) *Tìm hiểu luật tục các tộc người ở Việt Nam [An Inquiry of the Tribal Laws of Vietnamese Ethnic Groups]*, Hanoi: Nhà xuất bản khoa học xã hội [Social Science Publishing House].
- Ngô Đức Thịnh (2014) *Luật tục trong đời sống các tộc người ở Việt Nam [Customary Laws in the Life of Different Tribes in Vietnam]*, Hanoi: Nhà xuất bản Tư pháp [Judicial Publishing House].

- Ngô Huy Cường (2010) “Cụ thể hóa quan điểm về tập quán pháp theo Nghị quyết số 48 – NQ/TW của Bộ Chính trị, Tập chí nghiên cứu lập pháp điện tử [Specifying the Viewpoints on Customary Laws in the Resolution No 48-NQ/TW of the Politburo].” *Nghiên cứu lập pháp điện tử [Legislative Studies online]*, http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap_luat/cu-the-hoa-quan-11-liem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri (accessed 18 December 2018).
- Nguyễn, Đăng Dung (2012) “Các yêu cầu của tư pháp trong nhà nước pháp quyền [Judicial Requirements in the Rule of Law],” in Nguyễn Đăng Dung, ed., *Toà án Việt Nam trong bối cảnh xây dựng nhà nước pháp quyền [Vietnamese Court in the Context of Developing the Rule of Law]*, Hanoi: Nhà xuất bản Đại học quốc gia Hà Nội [Hanoi National University Press].
- Nguyễn Mạnh Thắng (2016) *Áp dụng tập quán trong các tranh chấp thương mại [Applying Customary Law to Commercial Disputes]*, Hanoi: Nhà Xuất bản chính trị quốc gia [The National Politic Publishing House].
- Nguyễn Văn Trọng, et al. (2012) *Nghiên cứu đánh giá những tập quán của đồng bào dân tộc miền núi khu vực phía Bắc ảnh hưởng xấu đến đời sống kinh tế – xã hội- Một số giải pháp và kiến nghị [Customary Norms of the Ethnic Minority Groups in the Northern Vietnam that Adversely Affect the Socio-Economic Life – Some Solutions and Measures]*, Hanoi: Ủy ban Dân tộc [The Committee of Ethnic Minorities Affairs].
- Nicholson, Penelope (2002) “The Vietnamese Courts and Corruption,” in T. Lindsey & H. Dick, eds., *Corruption in Asia: Rethinking the Governance Paradigm*, Sydney: The Federation Press, 201–18.
- Nicholson, Pip (2015) “Renovating Courts: The Role of Courts in Contemporary Vietnam,” in J. Yeh & W. Chang, eds., *Asian Courts in Context*, Cambridge: Cambridge University Press, 528–65.
- Nicholson, Pip, & Minh Duong (2010) “Legitimacy and the Vietnamese Economic Court,” in A. Harding & P. Nicholson, eds., *New Courts in Asia*, London: Routledge, 31–55.
- Posner, Richard A. (1997) “Rational Choice, Behavioral Economics, and the Law.” 50 *Stanford Law Review* 1551–75.
- Posner, Richard A. (2007) *Social Norms, Nonlegal Sanctions, and the Law*, Cheltenham: Edward Elgar.
- Quinn, Brian J. M. (2003) “Vietnam’s Continuing Legal Reform: Gaining Control Over the Courts.” 4 *Asian-Pacific Law and Policy Journal* 431–68.
- Ruibal, Alba (2010) “The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts.” 3 *Mexican Law Review* 343–56.
- Scott, James (2009) *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, New Haven, CT: Yale University Press.
- Segall, Eric J. (2012) *Supreme Myths: Why the Supreme Court Is Not a Court and Its Justices Are Not Judges*, Santa Barbara, CA: Praeger.
- Steiner, Kerstin (2015) “Governing Islam: The State, the Administration of Muslim Law Act (AMLA) and Islam in Singapore.” 16 *Australian Journal of Asian Law* 1–16.
- Thảo, Nguyễn “Doanh nghiệp Việt đang đi trên cầu khỉ [Vietnamese Business Are Walking on a Single-Wood Bridge],” *VnEconomy* (Online), 27 August 2015, <http://vneconomy.vn/thoi-su/doanh-nghiep-viet-dang-di-tren-cau-khi-20150827112922865.htm> (accessed 18 December 2018).
- Trường Hoà Bình & Ngô Cường (2014) *Hệ thống toà án của một số nước trên thế giới (kinh nghiệm cho Việt Nam) [Court Systems in Some Countries in the World (the Lessons for Vietnam)]*, Hanoi: Supreme Court of Vietnam and Japan International Cooperation Agency.
- Tsuneki, Atsushi, & Yoshinobu Zasu (2010) “On the Complementarity between Law and Social Norm: A Model Analysis with Special Reference to the Liability Rule for Tort.” 765 *The Institute of Social and Economic Research*, 1–17.
- Tưởng, D. Lượng (2009) *Pháp luật dân sự và thực tiễn xét xử [Civil Law and Judicial Practices]*, Hanoi: Nhà xuất bản chính trị quốc gia [Political Publishing House].
- Tyler, Tom R. (1990) *Why People Obey the Law*, New Haven: Yale University Press.
- Tyler, Tom R., & Justin Sevier (2014) “How Do the Courts Create Popular Legitimacy? The Role of Establishing the Truth, Punishing Justly, and/or Acting through Just Procedure.” Yale Law School,

- Faculty Scholarship Series Paper 4991, http://digitalcommons.law.yale.edu/fss_papers/4991 (accessed 30 November 2018).
- VII Central Committee of the Communist Party of Vietnam (1993) Nghng through Just Procedure.to the Liability Rule for Tort. Lessons for Vietnam)]3về tiếp tục đổi mới và phát triển kinh tếsterhủ về xây dựng, thực hiện hương ước, quy ước [the interpretation tinuing to Renovate and Develop the Socio-economic Situation in the Rural].
- Võ Trí Hào (2003) “Vai trò giải thích pháp luật của Tòa án [On the Court’s Role in Legal Interpretation].” 3 *Tạp chí Khoa học pháp lý [Legal Science Journal]*, http://101.53.8.174/hcmulaw/index.php?option=com_content&view=article&id=237:tc2003so3vttagt&catid=93:ctc20033&Itemid=106 (accessed 30 November 2018).
- Weber, Max (1978) *Economy and Society*, Berkeley, CA: University of California Press.
- Wells, Michael L. (2007) “Sociological Legitimacy in Supreme Court Opinions.” 64 *Washington & Lee Law Review* 1011–70.
- Wendel, W. B. (2002) “Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation.” 77 *Indiana Law Journal* 1–62.
- Wengraf, Tom (2001) *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods*, London: SAGE Publications Ltd.
- Whitmore, John K. (1994) “Social Organization and Confucian Thought in Vietnam.” 15 *Journal of Southeast Asia Studies* 296–306.
- Yoo, John C. (2001) “In Defense of the Court’s Legitimacy.” 68 *The University of Chicago Law Review* 774–91.