

Regulatory Interaction in Court-
based Dispute Resolution of
Inheritance Disputes –
A Research Story

Overview

- A story about my research journey
 - Its context
 - Its design and implementation
 - Its findings
- Observation about foreign/international research and comparison with Vietnam

My background

- Domestic trained, brief foreign exposure
- Law lecturer: Hanoi Law University (10 years)
- Legal practitioner: B&M, VILAF (6 years)
- Legal development worker: INGO, foreign governments (6 years)
 - Law and governance reform programs
 - Judicial reform/Alternative Dispute Resolution (ADR)

The Research - in a Nutshell

- A qualitative research
- A socio-legal study
- The requirements:
 - Innovative
 - Original contribution to knowledge
- A learned and unlearned process
- Outsider/insider perspective



Framing the Inquiry

- A *social construction* view of disputes (i.e. disputes are socially constructed)
- A *processing* view of disputes: naming, blaming, claiming
- A snapshot of civil dispute resolution in Vietnam

Framing the Inquiry

- Dispute resolution in East and Southeast Asia
 - Japan, China, Taiwan, Thailand, Indonesia
 - Cultural explanation
 - Structural explanation
 - Socio-legal: structure and culture combined

The Vietnamese Situation

- The paradox: Increased number of disputes vs. Prolonged/Unresolved disputes
- <http://toaan.gov.vn/portal/page/portal/tandtc/5901712>
- Choice of inheritance disputes

The Vietnamese Situation

- Very limited research on Vietnamese dispute resolution
- Cultural explanation
- State-centered structural explanation
 - Policy research funded by donors (e.g. UNDP)
- Socio-legal approach: clash of regulatory conceptions

The Research Hypothesis

- Multiple regulatory systems (both state and non-state) compete and sometimes collaborate to steer the judicial resolution of inheritance disputes in Vietnam
- *State law and legal processes* have not claimed a dominant role in this contest.

The Research Questions

- Which actors are involved in the resolution of inheritance disputes?
- How do the actors perceive inheritance rights?
- What are the main motives for inheritance disputes?
- How do disputants assess the validity of state and customary rules, dispute resolution processes and dispute outcomes?
- What are the key differences in the criteria used to assess validity?
- How are disputes resolved?
- What role do structural factors play in shaping dispute resolution?

Analytical Framework

- Choosing a Theory
 - Judicialization
 - Procedural Justice (justice of the procedure)
 - Alternative Dispute Resolution
 - *Systems Theory*
 - Social sub-systems: law, economics, politics
 - Legal communication

Challenge: Theoretical Understanding

Post-modernism



Quasi-modernism



Methodology

- Discourse Analysis
 - Semi-autonomous discourse mode (mode of thinking)
 - Interpretive community
 - Discursive strategy

Data Collection

- Semi-structured Interviews
 - Judges
 - Lawyers
 - Disputants
- Documentary Research
 - Court cases
 - Reports: GoV, foreign project documents
 - Secondary materials

History of Inheritance Regulations

- Pre-colonial Period (Hồng Đức and Gia Long Codes)
 - Neo-Confucian moral instructions
 - Hierarchical and male-centred social order
 - Filial piety
 - Relational harmony
 - State-village enforcement mechanism
- French Colonialisation
 - Introduction of modern legal institutions
- Post-1945 Socialism
 - Legal institutions present Party-state's Policies

History of Inheritance Regulations

- Constant process of foreign borrowings and local adaptation
- Contemporary inheritance regulations are highly complex and fragmented
- Entanglement of Vietnamese kinship, the family, the individual and their relationships with property
- Fundamental discrepancy between state and societal approaches to inheritance rights

Epistemic Communities in Inheritance Disputes

- Three communities: judges, lawyers, disputants
- Legitimacy Concept
 - Pragmatic legitimacy: material benefits
 - Normative legitimacy: social understanding of what is right/wrong
 - Cognitive legitimacy: beliefs, ideology

The Judicial Community

- Court structure: 2 key sets of narratives
 - Soviet political-legal ideology
 - *Tập trung dân chủ, pháp chế XHCN, nhà nước pháp quyền*
 - Revolutionary morality
 - *Phụng công thủ pháp, chí công vô tư*
 - *Hợp tình hợp lý, tâm phục khẩu phục*
- Court organisation: administrative agent

The Judicial Community

- Pragmatic Legitimacy
 - Office reappointment
 - Relational governance
- Normative Legitimacy
 - Judicial deference/higher court instructions
 - Procedural law vs. substantive law
 - Customary norms
- Cognitive Legitimacy
 - *Niềm tin nội tâm*
 - *Hợp tình hợp lý/Thoả đáng*

Judges Regulatory Preferences

1. Higher courts and management guidance
2. More attention to procedural law than substantive law
3. When pressed to produce socially accepted resolutions
 - Flexible application of inheritance law and customs under *'hợp tình hợp lý'* framework
 - Customary understanding of inheritance rights provides the broad conception
 - Legal norms set out basic rules for distribution of property

Legal Professional Community

- Pragmatic Legitimacy: Legal fees
- Normative Legitimacy
 - Law and customs combined
 - *Đông Tây y kết hợp với cúng*
 - Tactically use of procedural law
- Cognitive Legitimacy
 - Soviet idea: judicial support/Inferior position to judges
 - *Tâm*

Legal Professional Community

1. Lawyers submit legal analysis to judges' discretionary power
2. Lawyers use procedural law as negotiating tools with judges
3. Lawyers mediate inheritance law and customs to achieve the intended outcome for clients

Disputants Community

- Pragmatic legitimacy: a share in the family property
- Normative legitimacy: *biết điều*
- Cognitive legitimacy
 - Customary inheritance and community justice
 - Emotional intensity: *cay cú*
 - Outcome-oriented and belief in the power of bribes

Disputants Community

1. Disputants bestow legitimacy on customary inheritance
2. Disputants are outcome-oriented. They rely on a community justice framework to evaluate a just outcome
3. Disputants use inheritance law strategically to achieve intended outcomes

Legitimacy of 3 communities - compared

- None of the 3 communities bestows legitimacy upon inheritance law
- The underlying assumptions in each community qualify the validity and appropriateness of this law
- Legal and social thinking on inheritance are diverge rather than converge.

Case Studies: Inheritance Disputes in Polygamous Families

- 3 cases
- Polygamy is historical
- Analysis of narratives used by judges, lawyers, and disputants
- Findings: a contest between customs and law in influencing the actors' construction of disputes
- After lengthy struggle, customs prevailed

Case Studies: Inheritance Disputes in Polygamous Families

- The litigants
 - Motivated by a clash of the individual 'self' in the entanglement of family relations
 - Emphasis on the continuity of the family in the next generation
- The judges
 - Accepted polygamy as a source of inheritance
 - Reinterpreted legal text in community justice framework

Case Studies: Inheritance Disputes in Polygamous Families

- Claimants engaged with the court system because customary rules failed to offer them a resolution
- Judicial decisions failed to transmogrify conflicts and generate lasting solutions
- No unified understanding about gender-neutral inheritance rights was developed
- Absence of a legal concept on private property rights and legal reasoning

Case Studies: Inheritance Disputes on Ancestor Worship Property

- 3 case studies
- *Hương hoả* concept: lasted for centuries, but eliminated by socialist legislation
- Rejuvenation of kinship and ancestor worship
 - *Nhà thờ họ*
 - *Đất thổ mộ*

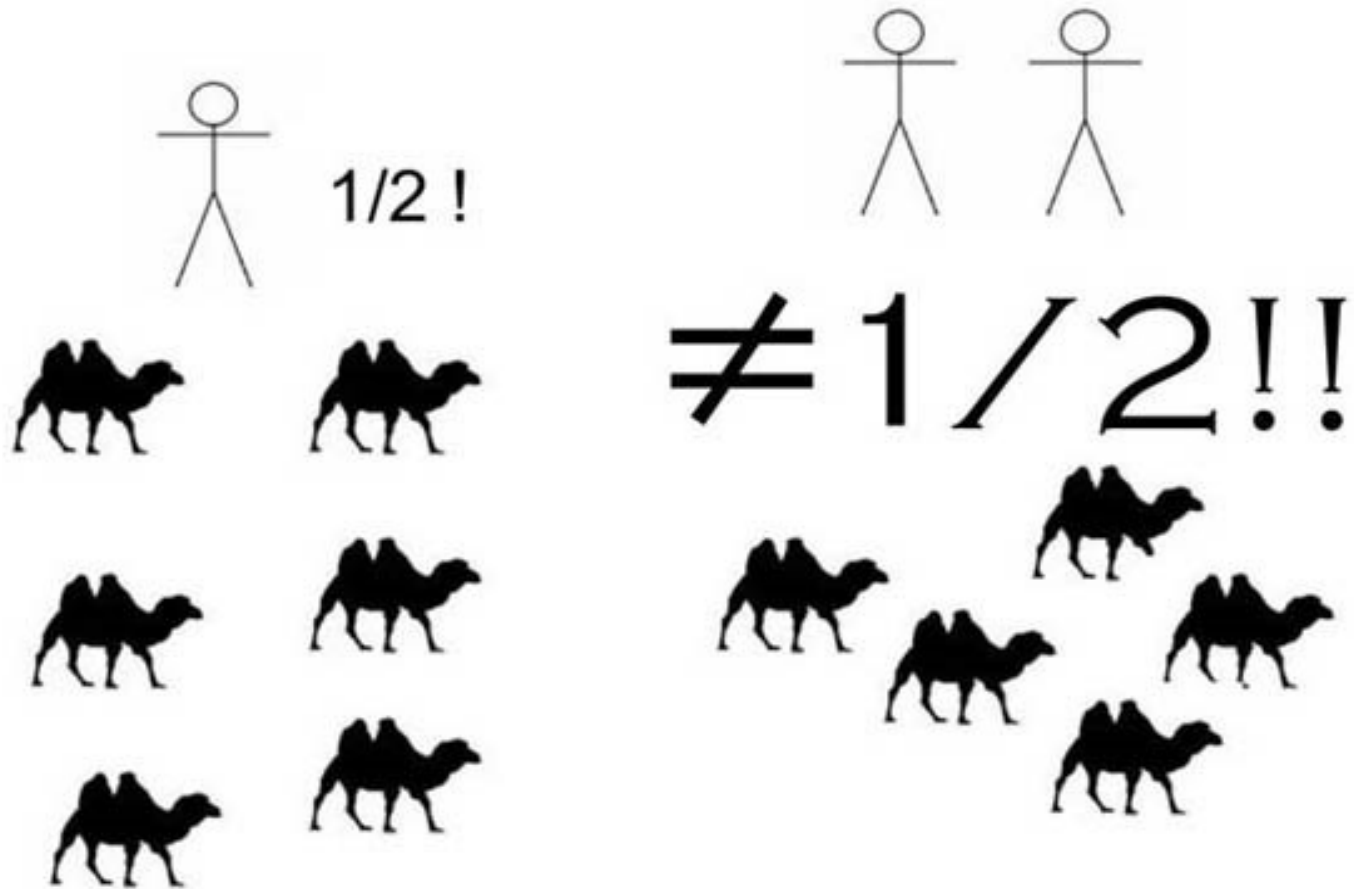
Case Studies: Inheritance Disputes on Ancestor Worship Property

- The meaning of inheritance rights is contested and negotiated in the courtroom
- Customary concept of *hương hoả* animated and informed litigants actions
- Soviet legal ideas prevented judges to develop law-based decisions
- Judicial discourse responded to rituals and symbolism

Analyzing the interaction between law and customs

- Questions:
 - Why law does not gain the upper hand over customs in the courtroom?
 - What drives and shapes the interaction between law and customs?
- The legal lenses:
 - The social-plus value of law: alienating conflicts

The symbolic value of law



Analyzing the interaction between law and customs

- Two analytical concepts
 - Legal fictions
 - Judicial power
 - Jurisdictional power
 - Discretionary power
 - Authoritative power
- Two components of the legal system
 - Procedural law
 - Substantive law

Analyzing the interaction between law and customs

- Procedural Law: Structural Constraints and the Lack of Uniformity
 - Judicial controlling mechanism
 - Ideological constraints
 - The state uses its absolute authority to filter customs that it deems appropriate
 - Social customs applied by judges are regarded as evidence, but not law

Analyzing the interaction between law and customs

- Substantive Law: Absence of Legal Fictions
 - Law and customs intertwined
 - Blurred boundary
 - Lack of normative uniformity

Analyzing the interaction between law and customs

- Limited co-evolution between inheritance law and customs
 - Incompatible conceptualizations
 - Civil law serves the dual role of guarding 'state interests' and protecting individual 'legitimate rights and benefits'
 - The primary 'state interest' is social stability, which is prioritised over individual civil rights

Analyzing the interaction between law and customs

- Weak institutional linkages
 - Limited role of lawyers in promoting legal reasoning
 - Poor legal education
- Courtroom corruption
- Language deficiency
 - *Quyền lợi vs. quyền*
 - *Hợp tình hợp lý*

Some conclusions

- Affirmation of research hypothesis
- Limited judicial power
- Cognitive-closed and fragmented political-legal ideology
- Little attention to conceptual gap between law and customs

Some conclusions

- Priority: crafting judgements that have social relevance, NOT creating legal fictions that balance the litigants' legal rights
- Unintended consequence: subconscious denial of law

Some conclusions

- Development of judicial precedents
 - The Supreme Court does not perform the role of coupling law and customs
 - The so-called '*án lệ*' are not systemized or codified normative solutions
- Expansion of regulatory vacuum
 - Syncretic combination of law and customs/
Normative syncretism

