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## Exploring the Limits of the Judicialization of Urban Land Disputes in Vietnam

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Economic and legal reforms have triggered waves of conflict over property rights and access to urban land in Vietnam. In this article I develop four epistemic case studies to explore the main precepts and practices that courts must negotiate to extend their authority over land disputes. Courts face a dilemma: Do they apply state laws that disregard community regulatory practices and risk losing social relevance, or apply community notions of situational justice that undermine rule formalism? I conclude that reforms designed to increase rule formalism in the courts may have the unintended consequence of reducing the capacity for judges to find lasting solutions to land disputes.

Urban land disputes are among the most contentious issues in Vietnam today. Over the last two decades, economic and legal reforms have stimulated new sets of property relationships among state and social actors (Kim 2008:4–9). They have triggered the return of individual property and brought Vietnam into the globalized economy that is characterized by legally protected property rights. While reforms have been spectacularly successful in stimulating a vibrant residential land market, an urban construction boom, and an ascendant middle class (Leaf 2002), they have also unleashed waves of conflict over property rights and property use. “Hot spots” have erupted where people directly and sometimes violently challenged state land policies and officials. Thousands of urban land disputes are reported in Vietnam each year (Kim 2008:101–8). Together with bureaucratic corruption, a phenomenon that is often closely related to land administration, grievances

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about access to urban land pose a serious challenge to government legitimacy and social stability in Vietnam.

In response, the Vietnamese government has tried to clarify land rights and increase public accountability for land administration (Dang Hung Vo 2009:14–22). In addition, it has also enlisted courts and tribunals to resolve the most intractable cases (Ginsburg & Chen 2009). This policy of judicialization—the willingness of states to submit new social and economic arenas to regulation by courts—is slowly if unevenly taking hold in socialist transforming Asian countries (Fu 2010) such as Vietnam (Gillespie 2007). In this article, I explore the limits of judicialization in resolving urban land disputes in Vietnam. This investigation is particularly relevant to China, which is experiencing a similar wave of urban land disputes to Vietnam (Whiting 2011).

Research on compulsory pretrial mediation in Vietnam shows that most disputes concerning urban land do not settle amicably and eventually reach the courts for resolution. But there is ample evidence presented in this article that judicialization is faltering because courts struggle to use the law to find lasting solutions to grievances. Political intervention is the standard explanation for poorly performing courts in socialist Asia (Peerenboom 2002:298–309). I argue, on the contrary, that political intervention is relatively unimportant in the vast majority of land cases where state interests are not involved, and that the problems courts encounter are more deeply rooted; courts may not be the most appropriate forum for resolving these types of disputes.

Land laws in Vietnam are predicated on Western notions of exclusive property rights that were grafted onto management principles imported from the former Soviet Union (Sturgeon & Sikor 2004). They were not drafted to reflect the self-regulatory traditions that most urban residents turn to when deciding what they can and cannot do with land. As a consequence, courts face a dilemma in resolving land disputes: Do they uphold state laws that disregard local regulatory traditions and risk losing social relevance, or do they apply community notions of situational justice that undermine rights-based land laws? The central question then becomes whether courts can reconcile competing understandings about access to land and extend their authority over urban land disputes.

To answer this question I first complicate de Soto's (2000) claim that registered property rights minimize land disputes. Instead I suggest that the plurality of regulatory approaches to urban land in Vietnam is not easily reconciled with a uniform set of exclusive property rights. I then synthesize from social constructionism and systems theory a framework to identify and evaluate the interaction

among the different normative and epistemological approaches to land regulation.

Second, I provide a brief overview about the data and methods used to study land regimes and dispute resolution. Urban land disputes in Vietnam were selected for study because they bring into clear focus the challenges judges in socialist-transforming countries face in extending judicial power into complex social arenas that were previously regulated by government agencies and self-regulating communities.

Third, I describe in detail the four main epistemic communities that variously compete and collaborate to regulate access to urban land in Hanoi. They are Central Party policy makers, land management technocrats, judicial communities, and self-regulatory urban communities.

Fourth, I examine a series of case studies about dispute resolution to ascertain how judges draw on a complex repertoire of legal, socialist, and community traditions to resolve land disputes. This inquiry examines to what extent, and in what circumstances, courts look for guidance from sources outside the juridical framework. A key question is what rules and practices do different epistemic communities regard as fair and reasonable access to urban land. Findings suggest that judges quickly exhaust the possibilities of statutory land rights and either push back cases to state officials to resolve administratively or use “reason and sentiment in applying the law” (*ly va tinh trong viec chap hanh phap luat*), a form of distributive justice.

Fifth, I explore how judges socially construct solutions to urban land disputes and argue that courts are unlikely, in the near future, to develop legally recognized exceptions to exclusive property rights that reflect community expectations. Even if they could improve their capacity for legal reasoning, court-based dispute resolution is not well attuned to resolving disputes to the satisfaction of all concerned—conciliation and mediation are better suited to this task. Finally, I reach the counterintuitive conclusion that, at least in the short term, reforms designed to increase rule formalism in the courts may have the unintended consequence of reducing the capacity for judges to put an end to quarrels and find lasting solutions to land disputes.

## **Conceptualizing Land Disputes**

### **Plural Land Regimes**

One of the major trends in global development policy since the collapse of centrally planned economies is the neoclassical economic attack on collective and extralegal forms of property ownership, and the promotion of legal formalization and clarification of

property rights (Barros 2009). De Soto (2000:47–62), a leading exponent of this movement, invokes the metaphor of a bell jar to explain the difference between registered and unregistered property rights. Those within the bell jar enjoy state protection for their registered property rights, while those outside the bell jar must fend for themselves. The assumption underlying this metaphor is that state regulators and courts protect property rights more effectively than community-based, self-regulatory systems.

A number of anthropological and sociological studies of property rights in China (Sturgeon & Sikor 2004) and Vietnam (Sikor 2004:83–91) have questioned the effectiveness of formalizing property rights and critiqued its lack of regard for cultural and historical variations of place. They show that recent law reforms in these countries have introduced registered property rights that promote exclusiveness, in the sense that they bundle multiple land rights into the hands of single entities. But contrary to de Soto, they argue that exclusive property rights have tended to complicate land disputes by separating rights and duties associated with land from the political and social relationships of land regulators and holders.

More controversially, the studies further claim that officials in the pre-reform, socialist system could flexibly accommodate overlapping claims to the same property, because property relationships could be changed at policy and implementation levels with relative ease. This resulted in permeable land boundaries that shifted over time to reflect changing community views about just access to land.

Far from the unified and exclusive property rights promised by statutory reforms, the studies suggest that land regulation in Vietnam (and elsewhere in socialist Asia) is better conceptualized as a continuum, along which there are many points representing different degrees of state and self-regulation. For example, at one end registered property owners such as foreign investors rely on substantive law to define their entitlements to land. At the other end of the continuum, most urban residents rely on community constructed norms and precepts to guide their dealings with land (Kim 2008:31–51; Tenev et al. 2003:68; VNCI 2007:21).

Some theorists (e.g., Hancher & Moran 1989) use the notion of “regulatory space” to explain this kind of pluralism, in which states do not monopolize regulation but are only one of many regulators. They argue that regulators—state, nonstate, and hybrid—variously compete and cooperate to control specific types of behavior. Taking the urban space in Vietnam as an example, what are recognized as state land laws—sets of rules, norms, and practices—do not so much control behavior directly as they coordinate and interact with other regulatory orders. One implication is that courts must engage with other regulators such as Communist party and

government agencies, as well as self-regulatory urban communities, to govern land disputes. What researchers need is a framework for analyzing how these different regulators come together to shape the resolution of urban land disputes.

### **The Social Construction of Land Disputes**

Social constructionism—the notion that “background beliefs, practices, and goals is what makes the perception of anything possible and what gives that perception shape” (Robertson 1999: 417)—provides a effective way to understand how courts interact with other land regulators. Scholars in a wide range of fields including law and society (Silbey 2005), sociology (Berger & Luckman 1967), and neo-institutional theory (Frank & Meyer 2002) argue that the deep beliefs of regulatory traditions form a lattice or web that determines what ideas, arguments, and facts people find compelling. Diverse educational, economic, and social experiences generate differences in the distribution of knowledge, and, especially in rapidly transforming societies like Vietnam, discrete epistemic communities form that make sense of the world from different cognitive perspectives.

To understand the regulatory dynamics in urban Vietnam, one needs a theoretical framework that accounts for epistemic difference and change. Social constructionists posit that regulatory change occurs because people are influenced by multiple epistemic communities (Lessig 1995:958–61; Robertson 1999). For example, in this article I consider cases showing that Vietnamese judges are simultaneously members of local communities and court-based and party-government communities, and that each community formulates different sets of assumptions about what constitutes fair and reasonable access to land. Seen from this perspective, judges are not entirely creatures of habit, unthinkingly reproducing received norms and beliefs. Rather they reflectively apply ideas, arguments, and facts contained in one interpretive community to reinforce or discredit beliefs and practices privileged in another epistemic community. Over time the dominant ideas win out.

Systems theorists such as Teubner (1993) contribute the additional insight that effective communication between different epistemic communities requires a mutually compatible conceptual language. Each community has its own modes of thinking, comprising norms and epistemologies that prioritize the relevance and value of external information. For example, if courts and local communities share common or compatible modes of thinking, then they are likely to effectively communicate with each other and may eventually form common understandings about appropriate regulatory responses. Conversely, misunderstandings and

disagreements are likely to occur where courts apply norms and epistemological assumptions that did not coevolve with, and differ from, community traditions (Teubner 1998).

Systems theory usefully draws researchers' attention to the hegemony of the state and attempts by Vietnamese regulators to colonize and displace community storylines about land regulation. Central to such dialogical contests are issues of distributive justice versus procedural justice, localism versus centralism, and whether one set of intellectual and cultural traditions will engage with or subordinate another.

### Data and Methods

The fieldwork for this study includes my ethnographic studies in Hanoi and other large urban centers in Vietnam compiled over a 14-year period from 1997 to 2010. To construct the different epistemic communities that regulate urban land, I conducted a series of interviews with Nguyen Thuc Bao and Phung Minh Nguyen, retired state officials, and also with Tran Thi Hai, a judge, and Le Trong, a private land broker. Their accounts were cross-checked against written commentaries and additional interviews with government officials, judges, lawyers, and land brokers.

The discussion about mediation councils and court decisions relies heavily on interviews with judges, court personnel, and lawyers. Their cooperation was essential in gaining access to court judgments, which are rarely published in Vietnam. I reviewed 18 urban land and housing cases, and a further 23 cassation appeal cases decided by the Supreme Court from 2005 to 2006. General discussion about the role of judges in resolving land cases is based on more than 50 interviews with judges<sup>1</sup> and 24 interviews with Hanoi-based lawyers.<sup>2</sup> Finally, I used the Supreme Court's Bao Cao Tong Ket Cong Tac (Annual Report on Judicial Work) for

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<sup>1</sup> The phrase "interviews with judges" refers to the following interviews: Dang Quang Phung, director, Institute for Judicial Science, Supreme Court, Hanoi, March 1999, September 1999, February 2000, March 2002; Ngo Cuong, vice director, Institute of Judicial Science, Hanoi, February 2002, March 2004, January 2005; Nguyen Khac Cong, judge, Supreme Court, Hanoi, October 1997, March 1999, October 2002; Nguyen Van Dung, judge, Supreme Court, July 1998, March 1999; Nguyen Nien Bich, judge, Supreme People's Court, Hanoi, March 2004; Nguyen Thi Loi, deputy chief judge, Civil Division, Hanoi People's Court, Hanoi, July 1998, March 1999, June 2003, May 2010; Hoang Huu But, vice chief justice, Hanoi People's Court, Hanoi, September 2002, March 2004; Chung Lam, chief judge, Hoan Kiem District Court, Hanoi, March 2004; Nguyen Thi Tuyet Lan, judge, Hanoi City Court, Hanoi, January 2009; Nguyen Manh Cuong, judge, Hanoi City Court, Hanoi, July 2007; and Pham Tuan Anh, judge, Hanoi City Court, Hanoi, July 2007 (hereafter referred to as "judges interviewed").

<sup>2</sup> The phrase "interviews with Hanoi-based lawyers" refers to the following interviews: Nguyen Hoang Hai, Hai and Associates, Hanoi, November 2008, November 2009; Nguyen Quang Tuyen, land law lecturer, Law University, Hanoi, December 2008; and Nguyen Hung Quang, NH Quang and Associates, Hanoi, March 2008, November 2008,

statistical data about the number and type of court cases, and procedural instructions to judges.

## The Epistemic Communities Regulating Urban Land in Vietnam

A central claim in this article is that judges resolve urban land disputes by drawing on norms and beliefs from the different epistemic communities that regulate access to land. My research has revealed four main epistemic communities: Central Party policy makers, land management technocrats, judicial communities, and self-regulatory urban communities. I use narratives from key actors to describe the boundaries, core norms, and cognitive assumptions that animate these communities.

### Central Party Policy Makers

Nguyen Thuc Bao, a former legal adviser to the Minister of Agriculture, played a significant role in shaping land policy in Vietnam.<sup>3</sup> The story he recounted aimed to legitimize the socialist experiment and by implication the Communist party. Nguyen Thuc Bao worked as a party policy adviser on land regulation, first with the Hanoi Housing and Land Management Office (So Quan Ly Dien Tho Ha Noi) in 1958 and later as a senior policy adviser in the Ministry of Agriculture. He also actively collaborated in policy formulation with a loosely constituted group of about 10 senior party cadres located in the Central Party Committee and the key ministries that regulate land.

He remembered that after liberation in 1954 the new government, like the French colonial regime before it, developed separate policies for rural and urban land (Moise 1983; Nhan Dan 1954:25). To familiarize the French-trained officials with communist ideology and the new party line about urban land, Nguyen Thuc Bao formed a party affairs section (*ban can su dang*) within the Hanoi Land Office. He stressed the importance of creating a new morality based on class struggle (*dau tranh giai cap*) that would “sweep clean” (*quet sach*) attachments to the exclusive property rights introduced by colonial authorities. Class replaced land titles as the primary means of determining access to land in the new epistemic order. For example, Circular No. 713 TTg, Authorizing State Management Policies 1963 instructed officials to confiscate (*tich thu*) urban

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December 2008, December 2009, May 2010; and Nguyen Bao Huy, Leadco, Hanoi, June 2008, November 2009, May 2010 (hereafter referred to as “lawyers interviewed”).

<sup>3</sup> Personal interview, Nguyen Thuc Bao, former legal adviser to Ministry of Agriculture, Hanoi, September 2000.

land from party enemies and requisition (*trung thu*) or acquire (*trung mua*) land from those considered sympathetic to the party (Pham Thi Thu Thanh & Tran Ha 1971).

Nguyen Thuc Bao described how state officials were instructed to follow socialist legality (*phap che xa hoi chu nghia*), a doctrine imported from the Soviet Union. In contrast with the universal legality championed by the colonial administration, socialist legality permitted officials to use law as a “management tool” (*cong cu quan ly*) to balance (*dieu chinh*) social relationships—a practice permitting the substitution of party policy for law. Officials were also encouraged to get “in touch with the people” (*duong loi quan chung*) (Hoang Quoc Viet 1962:33–6) and flexibly apply the law. He attributed this regulatory approach to “situational validity” (*thoa dang*), a pre-modern dispute resolution practice that valued contextually relevant and enduring solutions more highly than procedural justice. Eventually this preference for distributive justice evolved into “reason and sentiment in applying the law”—an epistemological setting that favored contextual solutions over universal legality.

As Nguyen Thuc Bao recalled, by the early 1970s, senior party officials agreed to replace the chaotic Maoist land reforms with more sober Soviet regulation that emphasized a proprietorial approach to land management (Nguyen Nhu Phat 1979:14–16; Nguyen Thuc Bao 1986:7–15). It was not until the 1980 Constitution (Vien Luat Hoc 1980:155–65), however, that the Soviet notion of people’s ownership and state management formally abolished private land ownership.

Calls by leading party members for economic and political reform eventually culminated in the watershed 6th Party Congress in 1986, which, according to Nguyen Thuc Bao, “opened the door” to “renovation” (*doi moi*) reforms. During the Congress, Party Secretary Truong Chinh (1988:318) argued for “[t]he management of the country to be performed through laws rather than moral concepts.” In Nguyen Thuc Bao’s estimation, *doi moi* reforms had a galvanizing effect on Central Party policy makers. Although they still believed in socialism, they reluctantly concluded that to modernize and compete with neighboring countries, Vietnam needed more orderly land procedures.

Mai Xuan Yen,<sup>4</sup> a member of the same dialogical circle as Nguyen Thuc Bao, went on to explain that the 1988 Land Law recognized private land-use rights, but it was not until the 1992 Constitution formally recognized a mixed market economy and private ownership that lawmakers took the next step and granted

<sup>4</sup> Personal interview, Mai Xuan Yen, chief inspector, Land Administration Department, Hanoi, October 1997 and June 1998.

urban residents rights to transfer land. This epistemological shift opened the way for a series of incremental changes that culminated a decade later in the formation of real estate markets. The 2003 Land Law now gives urban residents indefinite tenure, as well as rights to transfer, lease, bequest, and mortgage land-use rights.

Both Nguyen Thuc Bao and Mai Xuan Yen stressed, however, that senior party leaders remain ideologically opposed to private land ownership. Party leaders expect state officials (including judges) to subordinate substantive private rights to the socialist project and protect the “state benefit” (Le Hong Hanh 1998:291–326).

During the interviews, Mai Xuan Yen and especially Nguyen Thuc Bao frequently used the term *dong ta* (our party) to identify themselves with an elite circle of senior party policy makers. In defining the epistemological boundaries of their community, they carefully distanced themselves from land management technocrats who increasingly call for strict adherence to law-based property rights and tight legal controls over discretionary “land management” powers. For Mai Xuan Yen and Nguyen Thuc Bao, “protecting the results of the land revolution” (*thanh qua cach mang ve dat dai*) and the party’s moral mission to manage land remained the paramount objectives.

### **Land Management Technocrats**

Presenting more heterodox views, Phung Minh (1998) reflected on 40 years working as a land management technocrat in the Hanoi Housing and Land Management Office. He trained under the French as a land surveyor and worked in the Hanoi Cadastral Department before 1954. Although generally sympathetic to the revolutionary cause, he distanced himself from elite party policy makers such as Nguyen Thuc Bao.

Phung Minh complained that revolutionary policies eroded professional skills and competencies. The politicization of land administration replaced French trained officials with party cadres who had migrated to Hanoi from rural areas. The cadres were unfamiliar with, and even contemptuous of, the title-by-registration system operating in former colonial centers.

Phung Minh gave some examples of the regulatory confusion caused by the retreat from colonial property rights and procedures. Party orders to subdivide and reallocate large villas seized from the French and class enemies in 1954 were poorly documented because discretionary powers, rather than personal property rights, determined boundary dimensions and entitlements to property. He dryly noted that senior party cadres reinterpreted

egalitarian socialist principles such as distribution according to personal need to benefit themselves.

In Phung Minh's view, a new class emerged during this period that comprised the high-level party cadres responsible for administering state- and collectively owned property. Although under socialist legality property belonged to the people and was managed by the state, he thought that members of this new class instinctively felt that state property was their property. He noted that they benefited in myriad ways from their control over state property, such as living in superior housing and enjoying preferential access to travel, food, and other consumer items. It was members of this new class, he opined, that vigorously opposed deviations from state land management to retain preferential access to state property.

Phung Minh identified with a group of technocrats working in land management who valued procedural certainties over short-term political expediency and self-interest. He recalled that land officials were encouraged to believe that party ideology expressed reality, at the same time they lived in a world where high-ranking officials, family, and friends profited from private land markets. In his view this contradiction between ideology and reality eroded the legitimacy of state revolutionary objectives and also led to a decline in professional competencies.

He believed that most land disputes in contemporary Vietnam were caused by arbitrary socialist land management practices and that land management technocrats played a major role in convincing Central Party policy makers to adopt rights-based land laws. These calls for strict compliance with land procedures resonated with reform-minded party leaders who, in the early 1990s, championed the introduction of *Nha nuoc phap quyen* (literally, law-based state), a type of rule formalism (Le Hong Hanh 1998:318–19). These reforms were vigorously opposed by some members of the new class.

More recently, Dang Hung Vo, another land management technocrat, unsuccessfully tested the limits of epistemological change by advocating private land ownership.<sup>5</sup> Despite movement toward property rights and procedural justice in Central Party thinking, epistemological tensions remain between Central Party policy makers and many land management technocrats over the core socialist tenet that the “state benefit” should prevail over private property rights.

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<sup>5</sup> Personal interview, Dang Hung Vo, former vice minister for Land Administration, Ministry of Natural Resources and Environment, Hanoi, March 2006.

## Judicial Communities

Tran Thi Hai, formerly the Chief Judge of the Dong Da District Court in Hanoi, described the community of judges in Hanoi.<sup>6</sup> There are approximately 25 judges who regularly work on land cases in Hanoi's 10 urban district courts. Most were recruited from Hanoi, trained together at university and judicial training school, and maintain contact through workshops and frequent social events. In addition to face-to-face discussions, their views about the appropriate ways to resolve land disputes are shaped by party policies, government directives, and internal directives from the Supreme Court. Professional journals and the Supreme Court's Bao Cao Tong Ket Cong Tac (Annual Report on Judicial Work) primarily discuss procedural rather than substantive interpretations of land laws.

Tran Thi Hai thought that judges working in the same court develop the closest personal relationships. She gave some examples where judges have come together to discuss land cases. District courts use a collegial decision making system in which judges meet regularly in judicial committees (*Uy Ban Tham Phan*) to review cases before decisions are announced. A recent survey (UNDP 2007: 250–2) reported that 68 percent of district-level judges in Vietnam “request case outcomes” (*think thi an*) from judicial committees.

She also noted that judges are required to attend regular “party group” meetings to discuss party resolutions pertaining to court work. Senior party cadres lead discussions by repeatedly sensitizing judges to the political and social implications of their decisions. Common epistemic approaches to party policy are further entrenched during monthly self-criticism (*phe binh tu phe binh*) meetings (Nicholson & Nguyen Hung Quang 2005). All party cadres take part in self-criticism sessions where, despite the session's name, they are criticized by senior party members for misinterpreting the party line. Judges and court personnel also socialize together, participating in signing competitions and other solidarity-building activities.

Judges interviewed were refreshingly direct in describing a five-tiered epistemological hierarchy that orders their thinking about land disputes.

1. As Tran Thi Hai put it, “Judges are instructed that the primary purpose of law is to protect the interests of the ruling party.” Because party guidelines are generally vague (except in politically sensitive cases), judges search for other regulatory narratives to decide cases.

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<sup>6</sup> Personal interview, Hanoi, September 1999, March 2007, May 2010. Tran Thi Hai was recently promoted to the Hanoi City Court. She is now a judge in the civil division of the Hanoi City Court.

2. In many cases judges turn to local government for solutions. Until recently, district courts functioned like branches of local government. Organizational reforms have loosened government control by placing court administration under the central authority of the Supreme Court,<sup>7</sup> but Tran Thi Hai and other judges interviewed were adamant that judges still defer to party and government sub-regulations and directives.
3. The Supreme Court requires inferior-level judges to passively and mechanically apply the law to resolve cases. In socialist legal theory, judges have no powers to interpret the law, and they are expected to assume that legislation is comprehensive and internally consistent, and that for every housing and land issue there is a governing rule (Bui Ngoc Son 2003). To paraphrase, the law is supposed to have already judged, and judges merely mechanically fit facts into the matrix of law. The judges interviewed thought that Central Party policy makers were revisiting long-standing socialist land management policies that gave judges the flexibility to adjust the law to community expectation, and were more inclined than in the past to insist upon the strict enforcement of exclusive property rights. They noted that local party and government communities were more ambivalent about rule formalism and exclusive property rights.
4. Judges interviewed also complained that land laws are hortative and lack prescriptive detail. To resolve a novel or sensitive case they often request “professional guidance” (*chi dao chuyen mon*) from the Supreme Court. This takes the form of prescriptive rulings about the application of law to specific cases, rather than broadly applicable principles or doctrines that would assist judges to analogize the law to fit the facts of cases.
5. In most cases, the judges interviewed could not rely on party, government, or court guidance and were compelled to reconcile land law with community norms and precepts. In these circumstances the judges used “reason and sentiment in applying the law,” the situational decision making technique developed by government land officials to generate socially acceptable outcomes.

Judges interviewed thought that the importance attached to Central Party and state narratives seems to depend on where judges are positioned within the court structure. They were of the view that Supreme Court judges are in closer dialogical contact with Central Party and state organs and more strictly follow central dictates than inferior court judges. District and city court judges were

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<sup>7</sup> Law on the Organization of People's Courts 2002, Articles 45, 46.

considered more in tune to precepts circulating with in local government agencies and community networks.

As I presently discuss, there is tension within this epistemological hierarchy between central pressure for rule formalism and strict adherence to property rights, and the desire by local judges and urban residents for socially relevant outcomes that recognize multiple community claims to property.

### Self-Regulatory Communities

Le Trong told a different story about land regulation in Hanoi.<sup>8</sup> As the son of a prominent *avocat* (lawyer) in the French colonial system, the state denied him a formal education and employment. During the high-socialist period (1954–1986), he earned a precarious living as a land broker, bringing private buyers and sellers together for a commission.

From the early 1960s until the enactment of the Ordinance on Residential Houses in 1991, only the state was supposed to allocate and transfer land and housing. Le Trong remembered that during this time people were afraid to openly advertise private sales and attract unwelcome state intervention. Despite official suppression, a covert self-regulating housing market slowly developed. Initially most transactions involved the small residential apartments allocated to families in collective housing (*nha chung*).

Le Trong thought that the demand for housing generated by soldiers returning to Hanoi in 1975 after the war led to a partial relaxation of market controls. There were simply too many private land transactions for land officials to suppress. In this more liberal regulatory environment, self-regulating markets rapidly expanded (Evertsz 2000:147–51) to include people from every social stratum.

Contrasting with the views expressed by the party and state officials, Le Trong maintained that socialist land laws and policies only marginally influenced self-regulatory land markets. He and other land brokers interviewed<sup>9</sup> invoked the adage “what my grandfather owned, I own” to explain the tacit assumption circulating among urban residents that long-term occupation confers full ownership of land. In their view, land is not merely owned in the abstract legal sense of title by registration, but in the richer *gia tri chung* (community knowledge) sense of collective ownership by the different generations living under the same roof. Land is

<sup>8</sup> Personal interview, Le Trong, land broker, Hanoi, March 2001 and November 2008.

<sup>9</sup> Pham Hong Hoa, director, Cong Ty Trung Tam Nha Dat, and land broker, Hanoi, November 2008 and May 2010; Nguyen Van Bao, Land Broker, Hanoi, November 2008, December 2008, May 2010.

more than an economic commodity; it forms a mythical and legitimizing basis for family and community ties.

Le Trong surmised that colonial notions of property rights conflated in the popular imagination with local normative practices to form new regulatory traditions. For example, self-regulatory communities used handwritten documents to sell land, and traced ownership through a chain of transfers back to colonial land titles. Rather than demonstrating rights to title, their function under the colonial land system, the transfer documents now recorded chains of relationships. Neighbors were encouraged to sign the transfer documents not only to signify that there were no outstanding boundary claims—a practice introduced by the French—but also to place community pressure on the parties to honor their personal undertakings. Local officials at the ward (Phuong) level of government performed a similar function by placing their *chop* (seal) on what were technically illegal transfer documents. In short, local communities used personal connections within the community rather than legal entitlements to validate claims to land.

Le Trong believed that the loosely structured and interrelated self-regulatory communities that clustered around particular land brokers and Phuong-level officials constituted the dominant regulatory force in Hanoi's housing and land markets.<sup>10</sup> There is solid empirical evidence for his claim. The Vietnamese Ministry of Natural Resources and Environment estimated that 40 percent of houses in Hanoi lack registered land titles, and even houses with titles are routinely traded outside the state system.<sup>11</sup> An International Finance Corporation survey (Tenev et al. 2003:68) puts the level of land transactions taking place outside the state land tenure system at 75 percent (VNCI 2007:21).

Le Trong depicted land brokers and Phuong officials as functioning like nodes in a regulatory network. They critically discuss and shape the norms and precepts that order land transactions and disputes. The brokers in particular devote considerable effort to informing buyers and sellers about local regulatory traditions and repeat stories that reinforce the importance of honoring personal undertakings. Le Trong observed that a common theme in these stories is the need for local communities to rely on personal relationships to avoid the chaotic and impersonal state land system. He described the communities as functioning like urban villages, because many people in Hanoi emigrated from surrounding rural districts and brought with them the tight corporate organization of

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<sup>10</sup> There are more than 85 Phuongs in Hanoi, each with approximately 30,000 people (Koh 2004:197–204).

<sup>11</sup> Personal interviews, officials from the Ministry of Natural Resources and Environment, Hanoi, March–May 2006.

rural villages. This well-documented phenomenon is called *sieu lang* (super village) in Vietnam.<sup>12</sup>

Le Trong and other land brokers believed it was too early to predict how expanding urban land markets might change self-regulating communities. However, they thought that urban residents were open to new ideas in the state land regime, such as registered land titles. Although residents closely identified with the moral and sentimental community principles that had proven useful in regulating land, they were prepared to find novel ways to apply these principles to new situations. For example, the brokers noted that many residents had received land use rights certificates from the government but still used unregistered relational agreements to transfer ownership to purchasers. Overall, the land brokers agreed that most urban residents still preferred community norms and precepts to deal with land.

To summarize, four loosely structured epistemic communities variously collaborate and compete to regulate access to land in Hanoi (see Table 1). Because members in each community live significant parts of their lives together, they influence each other to act for collective interests. Although they sometimes pursue their own political, economic, and moral objectives, in general they work toward common objectives. Members repeated particular stories that stressed the need for collaboration to promote particular regulatory traditions. Over time, particular storylines about just access to land and appropriate methods of resolving disputes gathered authority and formed a closed circuitry of ideas. Each community acted like a constitutive forum in which appropriate regulatory practices were constantly defined and redefined.

The storylines told and retold by Central Party policy makers sought to legitimize and project party and state control over land. They first discredited the Western capitalist idea that land ownership exists as a private individualistic “moment.” The socialist revolution aimed to sweep away all traces of colonialism and create a new epistemological structure that was unwilling to accommodate the past. In practice, however, socialist land management permitted a flexible, though officially unacknowledged, accommodation with private ownership and land markets. Following *doi moi* reforms, party policy makers incrementally gave official recognition to private land markets and substantive property rights. Despite this epistemological shift, Central Party policy makers still attach considerable symbolic importance to “state land management” because this signals party and state hegemony over private property rights and land markets.

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<sup>12</sup> Personal interview, Hoang Ngoc Hien, sociologist, Nguyen Du School of Creative Writing, Hanoi, October 1997 and August 2000.

**Table 1.** Summary of the Main Epistemic Communities That Regulate Land in Hanoi

Name	Membership	Cohesiveness	Epistemic Settings
General Party policy makers	High-ranking party officials in party and state organisations	Policy makers are bound together by membership of the new class and promote a cohesive set of ideas.	Support exclusive property rights except where there is a conflict with the “state benefit.”
Land management technocrats	Middle-level professionally trained land officials	Technocrats are loosely grouped and heterogeneous in their use of language and ideas.	Support exclusive property rights and due process through high professional standards, while some argue against privileging the “state benefit.”
Judicial communities	Judges in district and city courts	Judges in the same court are tightly coupled and deploy homogeneous language and ideas but are subordinate members of party and local government communities.	Support a flexible application of property rights to enable creative outcomes that reconcile competing community interests to land. But if directed, judges apply the epistemic preferences of superior party and government agencies.
Self-regulatory urban communities	Land brokers, local-level officials, and residents in urban wards (Phuong)	Self-regulatory communities are bound together by land brokers and local officials and vary in their degree of cohesion.	Support a flexible application of property rights that reflects complex community claims to land.

Professionally trained land officials promoted a technocratic narrative that stressed efficiency, professional competencies, predictability, and coherence—in short, a proceduralization of land regulation. To some extent this narrative developed in opposition to the personal appropriation of land by the new class. Eventually the technocratic vision for a legally ordered world gained qualified support from Central Party policy makers. Divisions remain among the technocrats about whether to push Central Party policy makers to entirely abandon the Soviet proprietorial approach to land management and fully embrace a rights-based tenure system. Evidence that this epistemological shift is incomplete can be seen in the cases discussed below, in which land officials privileged the “state benefit” over private rights.

Judges in Hanoi differ from the other state-based epistemic communities in that they depict themselves as passive implementers of external (to the courts) rules and norms. But is this portrayal accurate? Interviews suggest that judges have developed their own epistemological hierarchy that orders the relative importance of norms and precepts emanating from other epistemic communities. For example, judges claimed they follow the norms and precepts circulating within party and local government communities but then routinely use “reason and sentiment in applying the law” to bring community norms and precepts into the courtroom. Judges are nevertheless careful not to overstep their epistemological autonomy and clearly regard themselves as the junior partners in party and government communities.

Land brokers, *Phuong*-level officials, and urban residents form distinctive epistemic communities. Through constant repetition and practice, a set of norms, procedures, and tacit assumptions about the proper way to control and transfer land has slowly crystallized and gained authority in self-regulatory communities. As messy as they are, community-based regulatory traditions prove to be rich, gripping, and remarkably durable. State laws tried to displace them, officials tried to suppress them, yet they remain the dominant regulatory force in the residential land market in Hanoi.

I have briefly described the origin, membership, boundaries, and key epistemological positions of the main epistemic communities that regulate land in Hanoi (see Table 1). The storylines circulating within the communities did not just passively reflect what people think about land, they also actively shaped behavior—they performed a regulatory function. In the next section I examine, in a series of case studies, how these communities come together to influence land disputes, and how judges navigate this asymmetric power structure.

## Local Government Conciliation Councils

Before considering how courts resolve land grievances it is instructive to first analyze dispute resolution by local government conciliation councils (*ban hoa giai*). Article 134 of the 2003 Land Law requires complainants to refer disputes in the first instance to conciliation councils. Unlike community mediation (*hoa giai so*), which is conducted by respected local entities selected by the complainants (Investconsult 2008:13–17), conciliation councils are appointed by the state. They are chaired by the head of Phuong-level people's committees and comprise local-level officials from land and construction departments and party mass organizations, such as the Women's Union and Veterans Association.

Surveys report modest success rates in resolving residential land disputes.<sup>13</sup> Take, for example, a conciliation in peri-urban Hanoi. In 2001, the Coy Giay District People's Committee granted land to Mr. Think in compensation for acquiring his house for a road-widening project. Soon afterward Mr. Think sold the land to Mrs. Hao for 105 million *dong* (approximately USD 5,500). The agreement was handwritten and did not conform to the formal requirements stipulated in the 2003 Land Law. The transfer could not take place until the District People's Committee allotted a new title.

During the intervening years the value of the land increased and Mr. Think demanded an additional 200 million *dong* (approximately USD 10,500), but Mrs. Hao refused to pay. When the People's Committee eventually allotted the land title in 2004, Mr. Think repudiated the sales agreement. Mrs. Hao then lodged a petition with the Mai Dich Phuong Conciliation Council to recover the land.

During the initial hearing the vice chairman of the Phuong instructed both parties to respect each other's interests but did not order Mr. Think to return the deposit or transfer the land. Some months later Mr. Think began to build a house on the land. At this point, Mrs. Hao's daughter used personal connections with the chairman of the Phuong to secure a rehearing. This time the vice chairman pressured Mr. Think to transfer the land. He accused Mr. Think of jeopardizing his good reputation in the community by refusing to stand by the agreement and disrupting harmony (*di hoa*) and promoting "conflict in the community." Stung by this public criticism, Mr. Think agreed to stop building the house and to transfer the land to Mrs. Hao. The vice chairman then urged Mrs. Hao to follow *loc* (literally, benefit from ancestors) and share

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<sup>13</sup> Approximately 23 percent of residential and a mere 4.7 percent of commercial land disputes are settled by conciliation councils (Investconsult 2008:33).

some of the inflated value with Mr. Think. She deferred to this community norm and agreed to pay Mr. Think an extra 50 million dong (approximately USD 2,600).

This case demonstrates negotiation and compromise rather than competition between different epistemic understandings about land. The disputants transferred the house using norms and precepts derived from the self-regulating community, but they relied on the state system for a land title. Similarly, the council accepted Mr. Think's legal title to the land but then relied on community norms about honoring personal agreements when ordering him to transfer his interest to Mrs. Hao. It drew again on community norms to urge Mrs. Hao to share her windfall gains with Mr. Think.

The Phuong officials aimed for distributive justice and gave little thought to consistently applying the same categories of norms and epistemic assumptions. They negotiated with the litigants in a personal and highly contextual language that balanced community interests against central laws and policies. To remain socially relevant, officials were expected to show good neighborliness or sentiment among neighbors (*tinh cam lang gieng*) and intervene on behalf of family and friends.

Lawyers interviewed during my research reported low levels of success in conciliations involving commercial land because businesses lack physical and sentimental attachment to local communities. Local residents, on the contrary, are connected to each other and conciliators through a web of personal relationships that holds them accountable to the regulatory traditions of the Phuong community. Without this relational commitment, conciliators struggle to find solutions to land grievances.

Courts differ from conciliators because they are constitutionally required by Article 130 of the 1992 Constitution to decide cases at arm's length from litigants and according to the law. The following discussion examines a series of case studies to ascertain how courts reconcile the land law with the often contradictory norms and assumptions that inform land disputes.

## Court-Based Dispute Resolution

Judges interviewed reported that the number and complexity of urban land cases is increasing (Toa An Nhan Dan Toi Cao 2007:2–4). In 2005, approximately 30 percent of the 50,000 civil law cases concerned urban land.<sup>14</sup> Increasing litigation rates seem

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<sup>14</sup> Approximately 70 percent of housing and land cases related to compensation claims for site clearance, 10 percent involved administrative abuses by state officials, 8 percent concerned boundary disputes, 8 percent were claims to recover possession, and 4 percent were listed as other issues ("Firm Foundation Laid to Build Land Laws," *Vietnam*

to imply that judges can put an end to quarrels so that past disputes no longer burden the present.

Some commentators (Jensen 2003:345–9) argue, on the contrary, that litigation rates are a poor measure of judicial effectiveness. The case studies I consider next support this view. They show that court hearings (as distinct from pretrial mediation) rarely find lasting solutions to land disputes, and approximately 60 percent of cases are referred by unsuccessful litigants to party and state agencies for resolution.<sup>15</sup>

### **Jurisdiction Over Land Cases**

Civil courts in Vietnam have extensive powers over housing disputes. However, their jurisdiction over land cases is limited to “lawful” ownership claims, a classification that automatically excludes land owners without legally recognized titles to land.<sup>16</sup> Because courts lack the power to define their own jurisdiction, what constitutes “lawful” in politically sensitive areas, such as reclaiming land that is managed by the state, remains the exclusive provenance of the government. Where the law does not provide clear guidance, judges are instructed to base their jurisdiction on directives issued by government officials (Toa An Nhan Dan Toi Cao 2007:12).

### **Compulsory Pretrial Mediation**

Judges and lawyers interviewed agreed that compulsory pretrial mediation is the most effective dispute resolution procedure in Vietnam (Do Xuan Loi 2005:44–5). Judges are required, before proceedings commence, to encourage litigants to settle amicably through mediation. There are no reliable statistics, but judges and lawyers interviewed estimated that approximately 30 percent of housing and land disputes are successfully resolved in mediation, a much higher level than the 10 percent resolution rate in formal court hearings.

In November 2008, the author observed a mediation session in the Hoan Kiem District Court between a petitioner claiming ownership of a villa in the old quarter of Hanoi and the long-term occupants.<sup>17</sup> The petitioner wanted to regain possession without paying compensation to the occupants. The judge first invited lawyers representing the litigants to summarize their positions and

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*Investment Review*, Vietnamnet, 10 Sept. 2006, p. 10, [http://vietnamnet.vn/service/printverion.vnn?article\\_id839356](http://vietnamnet.vn/service/printverion.vnn?article_id839356) (accessed 29 Oct. 2008).

<sup>15</sup> Personal interviews, Nguyen Thi Tuyet Lan, judge, Hanoi City Court, Hanoi, January 2009; Tran Van Son, deputy director, Claims Settlement Department, Office of Government, Hanoi, March 2007.

<sup>16</sup> Civil Procedure Code 2005, article 25; 2003 Land Law, Articles 50, 138.

<sup>17</sup> The litigants did not want their names disclosed.

submit corroborating documentation. He next encouraged the litigants to make concessions and compromise.

A sticking point in this case was the occupants' claim for relocation expenses as well as a rent subsidy for the new premises. Although the 2003 Land Law extinguished a pre-existing legal obligation to pay this kind of compensation, the mediating judge emphasized that *gia tri chung* (community knowledge) still recognized this duty. The judge next presented the disputants with a proposal that appeared to accommodate their claims but was somewhat different from their original intentions and interests. He suggested that the petitioner should cover relocation expenses and rent for six months but was not obliged to find the occupants alternative accommodation. This proposal ranged well beyond the compensation required under the law. When the litigants pulled back, they did not return to their starting points but rather adopted new positions. The petitioner, for example, contemplated paying relocation expenses, while the occupants acknowledged the petitioner's exclusive rights over the land. After some weeks of negotiations the litigants agreed on relocation compensation, and the case settled without proceeding to a formal trial.

A clear tension existed in this case between applying the law and finding solutions based on community norms and practices. To explain this problem, some judges interviewed referred to the well-known proverb "*mot núi cái lý không bằng một tí cái tình*" (a mountain of reason cannot equal a little sentiment) to underscore their conviction that land laws play a marginal role in the lives of most urban litigants. In their opinion, judges must arrogate discretionary power to find contextually relevant solutions, but they acknowledged limits to this approach. For example, if by following local practices decisions openly challenge state law, then judges answer for their indiscretion professionally. As a consequence, judges are careful, especially in their written judgments, to avoid giving the appearance of subverting legality (*duy lý*) with sentiment (*duy tình*).

### Protecting the State Benefit

In cases involving claims against state interests, judges often push the decision back to government officials. Consider Le Van Dinh's action in the Hanoi People's Court to reclaim land from the Hai Ba Trung District People's Committee.<sup>18</sup> Shortly before moving to Saigon in 1954, Mr. Dinh's parents leased land in Hanoi to the Tan Viet Cooperative. Over the intervening years, a series of cooperatives and companies leased the land.

<sup>18</sup> Ban An Hanh Chinh So Tham So: 1/HSST Toa An Nha Dan Hanoi (Judgment No 1-HSST Hanoi People's Court), December 21, 1996.

Decades later in 1991, the director of Cong Ty Dong A, a company owned by the Hanoi People's Committee, decided to buy the land from Mr. Dinh. When Mr. Dinh refused, the People's Committee issued Official Letter No. 568, declaring that his family's title was extinguished when the land came under "state management" on June 27, 1963. The director then sold the land to the Hanoi Housing Renovation and Development Company.

Nguyen The Hung, the lawyer acting for Mr. Dinh, argued in court that Official Letter No. 568 failed to reflect land policy during the 1960s.<sup>19</sup> According to Circular No. 713 TTg, Authorizing State Management Policies 1963, only the act of confiscating (*tich thu*) land from party enemies could extinguish private property rights. He produced evidence that Mr. Dinh's parents participated in the anticolonial resistance and were not party enemies. He also showed that state agencies paid rent for more than 30 years, contradicting the claim the land had been confiscated. In a bold move, he accused state authorities of deliberately misinterpreting land policy to seize valuable real estate.

The presiding judge ordered in favor of the Hanoi People's Committee. He did not look beyond Official Letter No. 568 to answer the arguments raised by Nguyen The Hung. His decision was consistent with the requirement that judges should "protect the results of the land revolution" (*thanh qua cach mang ve dat dai*) and give preference to the "state benefit" (Tran Quang Huy 2001:231–2). Mr. Dinh did not bother appealing the decision.

This case shows that even where a private party is clearly entitled under the land law to legal title, judges defer to local government directives. Although the Official Letter issued by the People's Committee had no formal legal validity, in the mind of the judge it supplanted statutory rights. This case sits comfortably with the proposition that judges are junior members of party-government epistemic communities and quietly acquiesce to the most powerfully articulated version of the state benefit. It also shows that members of the previously discussed new class can still invoke the "state benefit" to camouflage their appropriation of state or private property.

### **Reason and Sentiment in Applying the Law**

In politically and commercially sensitive cases, judges turn to party and state officials for guidance. But what happens in the overwhelming majority of cases where the law provides no clear solution and the "state benefit" is not an issue? Judges interviewed said that a tacit understanding has evolved to deal with this type of

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<sup>19</sup> Personal interview, Nguyen The Hung, lawyer, Hanoi, September 2000.

“hard” case: Senior judges publicly stress strict compliance with statutory law, while in practice they allow inferior-level judges to smuggle “community knowledge” and other extra-judicial narratives into the courtroom. Inferior-level judges then use “reason and sentiment in applying the law” to blur the legal boundaries circumscribing property rights and make their decisions more socially relevant.

Consider the petition lodged by the Nguyen clan in the Tu Liem District Court to recover possession of their ancestral clan house in Dong Ngac Village (in peri-urban Hanoi) during 1995.<sup>20</sup> The five-room clan house was constructed in 1770, and one branch of the clan had lived rent-free in the premises for almost 100 years. During the mid-1990s, clan leaders began to complain that the occupants were failing in their duty to maintain the building and tend the fruit trees. Finally the clan leaders lost patience and demanded the return of the building and land.

The occupants claimed that continuous occupation since 1907 gave them a right to possession. The clan counterclaimed that although village traditions entitled occupants to compensation for improvements made to buildings, clan leaders enjoyed exclusive rights to control the land.

Nguyen Van Thuy, the presiding judge, ordered the clan to subdivide the land and give one-third to the occupants. He argued that the clan’s assertion of unencumbered ownership contravened a “constitutional right to housing.” The legal basis for this assertion is unclear. Article 62 of the 1980 Constitution required the state to provide housing for citizens, but this socialist principle was quietly dropped from the 1992 Constitution and, in any event, it only applied to state-owned housing. Le Kim Que, the clan’s lawyer, later speculated that the judge manufactured the constitutional principle to conceal his reliance on the socialist principle that land should be distributed according to need.<sup>21</sup>

The clan leaders appealed the decision to the Hanoi People’s Court.<sup>22</sup> Once assured that the “state benefit” was not an issue, the judges proceeded to explain why the district court judgment was “unsatisfactory to the litigants’ demands and aspirations.” They attached considerable importance to the years of service provided by the occupants and inferred a moral and social responsibility for the clan to look after its members. Clan leaders were ordered to

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<sup>20</sup> An So 52/DSST, October 2, 1995, People’s District Court Tu Liem; An So 20 PTDS, January 31, 1996, People’s Court, January 1, 1996.

<sup>21</sup> Personal interview, Le Kim Que, president of the Hanoi Bar Association, Hanoi, July 1998.

<sup>22</sup> Judgment No. 20 PTDS, Hanoi People’s Court, January 31, 1996.

“assist and stabilize the occupants’ lives” by providing alternative accommodation.

To compromise, the clan leaders offered to rehouse the occupants in a smaller area attached to the clan house. The appeal court regarded this arrangement as reasonable (*hop ly*) under the circumstances, because it provided adequate accommodation without compromising the clan’s right to worship in the clan house. The court wound back the generous compensation ordered in the first hearing and instructed the clan leaders to give the occupants a small parcel of land suitable for a modest house.

Once again the law was clear; the clan leaders held an exclusive right to the land. The judges, on the other hand, were persuaded that all clan members possessed rights to the land according to their status within the clan and the familial obligations they owed each other. Using “reason and sentiment in applying the law,” they adjusted the clan leaders’ exclusive property rights to accommodate their social duty to provide for relatives. This ruling emphasized community morality and the “public good” over the exclusive individual rights demanded by the land law.

Although the 2003 Land Law significantly strengthened the legal presumption of title by registration, recent cases show that judges continue to reconcile exclusive property rights with the epistemological assumptions animating self-regulatory communities. One case is sufficient to illustrate this point. In 2004, Nguyen Thi Nhu petitioned the Thanh Tri District Court in Hanoi to reclaim land occupied by Nguyen Van Han.<sup>23</sup> Thanh Tri District was originally a rural area that became incorporated into the fabric of Hanoi during the construction boom in the early 1990s. Mrs. Nhu’s parents, the owners of the land, died intestate in 1946, and as the only surviving child Mrs. Nhu inherited the house and land. Soon afterward Mrs. Nhu left the family home and went to live with her husband. In 1953, Mr. Han, a distant and homeless relative of Mrs. Nhu, asked for permission to temporarily reside in the house. He had recently been released from Son La jail after serving five years’ imprisonment for fighting the French colonial government.

Mr. Han and his family lived in the house rent-free. When Mrs. Nhu attempted to reclaim the house in 1981, an argument erupted and Mr. Han forced buffalo dung into her mouth, causing injuries that required hospitalization. She then sought the support of the local Phuong authorities to recover the land. Her petition was badly timed because the 1980 Constitution had just nationalized land ownership, and the principle of private ownership of residential houses had not yet been enacted into law. Adding to her problems,

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<sup>23</sup> Decision No. 19/2004/DSST, Thanh Tri District Court, Hanoi, June 24, 2004.

as an anticolonial resistance hero, Mr. Han commanded considerable prestige and persuaded local authorities not to intervene.

Decades later, when Mrs. Nhu detected a shift in government land policy, she tried again to recover the house and land. Once more the Phuong authorities rejected her claim. Eventually she brought the action to the Thanh Tri District Court in 2004.

Mrs. Nhu asked the court to decide between two competing stories. Her claim relied on Article 24 of the 1990 Ordinance on Inheritance, which gives property in intestacies to the surviving children. Mr. Han, on the other hand, based his case entirely on community norms and practices. He produced a deed written in *Nom* (Vietnamese-Chinese characters) purporting to show that the *chu ho* (clan head) had assigned the house and land to him.

In the first instance hearing, Judge Do Thi Luyen handed Mrs. Nhu a Pyrrhic victory. She regained possession of the family house and land, but at the cost of compensating Mr. Han for improvements to the land and the inflated land value. The judge accepted evidence that the local community expected relatives to support each other. She also thought that the document in *Nom* characters might be genuine, because at the relevant time in the 1950s, village scholars routinely prepared land transfers for illiterate farmers. Relying on Mr. Han's moral claim to the land, she then ordered Mrs. Nhu to pay compensation that went well beyond the legal requirements of the 2003 Land Law.

On appeal, the Hanoi City Court quashed the decision of the court of first instance on the grounds that there was insufficient evidence to support Mrs. Nhu's inheritance claim. The Supreme People's Procuracy protested this surprising decision to the Supreme Court—an intervention that usually signals bribery. The Supreme Court cancelled the Hanoi City Court decision on the grounds of error of law and transferred the case back to the Thanh Tri District Court for a rehearing.<sup>24</sup>

The retrial took place in 2007 before Judge Nguyen Tri Tuyen.<sup>25</sup> He found insufficient evidence to support Mr. Han's claim and preferred Mrs. Nhu's account that she lent the house temporarily. Nevertheless, he awarded compensation that far exceeded Mr. Han's lawful entitlement and acknowledged that in some circumstances long-term use can generate moral interests in land. He also invoked the utilitarian argument that social welfare is served by sharing property with those in greatest need.

What is instructive about this case is that even the Supreme Court treated Mr. Han's claim, which was based entirely on traditional norms and practices, seriously and did not strictly apply the

<sup>24</sup> Cassation Review Decision No. 62/2007/DS-GDT, March 7, 2007.

<sup>25</sup> Case No. 14/2007/DSST, Thanh Tri People's Court, October 16, 2007.

inheritance law and award Mrs. Nhu exclusive legal rights to the land. The generous compensation awarded to Mr. Han reflects the ambiguous status of legal rights in this case. Land law lacked the authority to give exclusive rights where litigants demonstrated community-based claims to land. Finding enduring solutions to housing and land disputes is widely considered by judges and litigants more important than strictly following statutory formulations.

### **Judicial Construction of Land Disputes**

The case studies show that judges applied an epistemic hierarchy to resolve land disputes. During pretrial mediation they drew on solutions from outside the law to find common ground between the parties. These norms and precepts reappeared in court cases, sometimes disguised as vague constitutional or legal principles. Judges perform a filtering function when mediation fails to resolve disputes. They apply the law where there are clear legal violations, but push back “hard” cases involving the “state benefit” to local government officials to determine.

Judges resolve “hard” cases that do not involve the “state benefit” by reference to what is reasonable in the circumstances. In most cases judges thought it reasonable to support the party in the inferior economic position. For example, some judges found a community obligation for family members to support each other, to recognize long-term occupation of land, and to share the windfall inflationary gains in land value with relatives. In each case the community norms and epistemic assumptions recognized a broader range of interests in land than statutory property rights countenanced.

Other judges found support for the economically disadvantaged party in the norms and assumptions circulating in party and government epistemic communities. While only one judge explicitly invoked the socialist principle that land should be distributed according to need, others reached a similar conclusion, applying the utilitarian logic that the redistribution of property maximizes social welfare. What these cases share in common is the epistemic position that it is reasonable to expand the range of claims to property in order to reach socially acceptable outcomes.

These cases further suggest that judges straddle several epistemic communities. Judges create their own epistemic communities that coalesce around particular courts. Here they draw on party policies, state laws, and self-regulatory norms and precepts to produce contextually relevant judgments. Judges are also junior partners in the party-government epistemic communities. They defer to ideas generated within these communities and then passively apply them in the courtroom. Some sense of this asymmetrical relationship was conveyed by Nguyen Van Thuan,

Vice President of the Law Committee of the National Assembly, when he declared, “[i]t would be an honor for the president of a provincial people’s court to be invited to work with the chairman of a people’s committee at the same level, so how dare an ordinary judge quash the chairman’s decision in a land dispute case?” (Phap Luat 2003).

Despite their evident sympathy for local community ideas, judges are not as directly involved in self-regulatory communities as local government officials. The land brokers interviewed considered judges more law-bound and detached than local government officials and, as a consequence, less capable of shaping the narratives that influenced community attitudes to land. In short, the requirement that judges decide cases in courts, follow abstract procedures, and locate their rulings within a legal rubric isolates them from self-regulatory communities.

Nevertheless, judges contribute to a creative synthesis of laws, extralegal norms, and epistemic assumptions. It did not seem to matter which regulatory tradition dominated the deliberations; state and community regulatory traditions interacted in complex articulations with each other. Depending on the nature of the dispute and status of the parties, judges combined and intertwined different layers of legal formalism and community regulatory traditions.

### **Assessing the Potential for Law-Based Solutions to Land Disputes**

To remain politically accountable and socially relevant, judges blur statutory property rights with the norms and precepts circulating within party, government, and self-regulatory community groups. What is largely missing from their epistemic repertoire is the use of legal reasoning to formulate doctrines that provide legally recognized exceptions to property rights. For example, the law might suspend exclusive ownership rights where owners owe a duty to care and provide for dependents. To push the analysis further, one must ask in what circumstances judges might develop their own law-based principles for dealing with the complex claims to urban land?

For decades, socialist legal thinking discouraged judges from bringing legal discourse into conversation with community norms and epistemological assumptions. As a holistic ideology, socialist legality only permitted analysis from its own self-referential perspectives and did not recognize customary rules and practices as sources of law (Le Hong Hanh 1998:291–326). Because judges were prevented from integrating legal and community knowledge into a coherent system of legal reasoning, a bifurcated dispute-resolution system developed. Judges strictly enforced socialist legality where the state benefit applied and applied reason and sentiment” in other cases.

Following doi moi reforms, the state has increasingly required courts to apply the *Nha nuoc phap quyen* (law-based state) doctrine (Gillespie 2007), which expects judges to regulate social behavior through the strict enforcement of centrally created and controlled rules (Khanh Van 2003). It also insists that judges should remain normatively and epistemologically detached from society. As this centralizing narrative gains momentum, pressure is mounting for judges to further insulate themselves from self-regulatory communities and uniformly apply standardized and exclusive property rights. At the same time, judges are expected to remain engaged with party-government epistemic communities and blur property rights to protect the “state benefit.”

Reforms promoting rule formalism present a conundrum. Most judges interviewed seemed to genuinely want their judgments to reflect self-regulatory approaches to land. Some even regarded statutory property rights as alien and inappropriate to community beliefs. To engage with the community and put an end to quarrels, they felt the need to reconcile property rights with community claims to property. Exclusive property rights and winner-takes-all outcomes did not settle the underlying disputes, and the losing parties then petitioned government and party authorities.

Another difficulty is that rule formalism expects judges, as third-party decision makers, to follow legal rather than community logic. Judges interviewed believe that this refocusing on abstract rights will prevent them from considering the distributive intentions of litigants and give dispute resolution a distinctly anti-cooperative character. They fear that this emphasis on procedural and substantive justice will disrupt the long tradition in socialist land management of promoting distributive justice.

Despite their sympathy for local communities, judges are more strategically aligned to party-government epistemic communities than to self-regulatory communities. Judges interviewed understood that their tenure depends as much on their loyalty to the party line as their judgment record. Judges are appointed on five-year contracts and are subjected to close scrutiny by review committees comprising senior judges and party officials before their positions are renewed (Nicholson & Nguyen Hung Quang 2005). Judges thought that expressing a preference for self-regulatory norms over clearly articulated property rights would not automatically constitute disloyalty to the party but might lead to the reversal of their judgments on appeal. Employment contracts are not renewed where numerous judgments have been overturned on appeal for misapplication of the law. They knew where their primary allegiance lay and readily admitted that they would strictly implement property rights if the local party leaders gave them clear and consistent instructions to this effect. Meanwhile, judges

continued to use “reason and sentiment in applying the law” while carefully preserving the appearance of legal compliance.

There is another difficulty with developing law-based solutions. Judges in Vietnam lack the cognitive traditions to resolve disputes using legal reasoning. Judicial epistemic communities are highly porous to external ideas and have not developed jurisprudence and a system of legal reasoning that might enable judges to develop doctrines that reconcile statutory property rights with community norms and precepts. In practice, other modes of thought—such as party and government political imperatives and community sentiment and morality—clamor for attention and displace legal thinking. Compounding the problem, judges (especially at the district level) cannot hide behind legal procedures and substantive laws; they need to engage with community regulatory traditions to remain socially relevant. Surveys (Investconsult 2008; UNDP 2004) consistently show that most urban residents are skeptical about whether courts can find legal solutions to social problems. They expect judges to bargain and compromise with them in the courtroom.

In addition, court procedures in Vietnam are not geared to formulate universal legal solutions. In pretrial mediation, for example, judges reflect on the situational appropriateness of statutory property rights and community norms and precepts. Although mediation settlements are sometimes ratified in court hearings, as the case studies show, the carefully constructed accommodations between law and community practices are buried under layers of legal rhetoric and are not intended to form discrete legal doctrines. Judges treat mediation as a socially effective mode of dispute resolution, rather than an experimental site to learn about community regulatory preferences. There is little evidence that judges have the capacity or desire to engage in the judicial “experimentalism” described by Dorf and Sabel (1998), in which courts use their powers of information-gathering to formulate flexible and adaptive legal doctrines.

Court hearings are even less promising arenas for the production of legal doctrines. Judges first search for legislative authority to extend judicial power to specific disputes. This practice excludes many of the most socially important land cases from court review. Next, judges use analogy to extend legal principles or doctrines to case facts. As I have remarked the law is expected to have already judged the case, and senior judges view displays of judicial creativity as deviations from the law. Judges synthesize contextual solutions in preference to formulating legally recognized exceptions to exclusive property rights that reflect community traditions.

Compounding the problem, judges search for redundancies, or reasons why certain contextual elements that do not fit with legal

patterns of thought are irrelevant. This cognitive practice disinclines them from converting community norms and precepts into legal exceptions to property rights. Legal argument also selectively establishes connections with past legal findings to determine whether it is appropriate to extend state recognition to new norms and practices. Although senior judges have some scope to creatively use law, without a useable legal history, such as academic commentaries and reported cases, they passively rely on party and government authorities to formally expand legal categories (JICA 2007).

All this suggests that judges are constrained by their political and epistemological entanglements from developing legal doctrinal responses to land disputes. Even if local party leaders unequivocally ordered the strict enforcement of statutory property rights, judges would struggle to find meaningful legal solutions. If judges are currently unable to originate legal solutions, are other state agencies capable of bringing land law into conversation with community regulatory traditions?

### **Judicialization Through Quasi-Judicial Agencies?**

In tandem with the courts, a hybrid party and government agency also resolves land disputes. The Office to Receive Citizens' Complaints of the Central Committee of the Party and the State (Van Phong Tiep Dan Cua Trung Uong Dang va Nha Nuoc) comprises personnel co-opted from central government and party agencies.<sup>26</sup> It accepts land disputes that have passed through either the courts' or the Ministry of Natural Resources and Environment's review processes without resolution. In 2006, the agency received more than 30,000 land petitions; about 70 percent concerned compensation for site clearance, while around 20 percent involved boundary disputes or claims to recover land.

The agency differs from courts in some significant respects. It can draw on party and state officials who are active participants in self-regulatory communities for detailed information about particular disputes. If Phuong-level conciliation fails, then the agency can move up the political and administrative hierarchy to enlist officials with more political authority to make policy decisions about land. Unlike judges, the agency's officials are dominant rather than subordinate members of party-government epistemic communities. They are not expected to find legal solutions to social problems and have the discretionary power to creatively experiment with different normative and procedural approaches to dispute resolution. Agency officials do not have the power to override court

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<sup>26</sup> Personal interviews, Nguyen Van Kim, deputy director, Legal Department, Government Inspectorate, Hanoi, October 2006; Tran Van Son, deputy director, Claims Settlement Department, Office of Government, Hanoi, March 2007.

decisions, but they can apply considerable pressure to convince aggrieved parties to compromise and accept mediated versions of judgments.

Despite amassing considerable knowledge about community regulatory preferences, it is unclear whether agency officials are prepared to take the next step and engage in judicial “experimentalism” to craft a universal set of legal principles. They are well placed to assume this function. As members of the same dialogical circle as law makers, senior agency officials could redraft land legislation that more closely reflects community norms and epistemic expectations.

## Conclusion

The judicialization of land disputes is proceeding in Vietnam, although not in the way de Soto might have imagined—with statutory property rights leading the way. After two decades of land reforms, judges still struggle to resolve land disputes using the land law. A profound disjunction remains between universal, abstract, and exclusive property rights, and the self-regulatory traditions that recognize contingent, sentimental, and personal claims to land. Because these regulatory subsystems have not coevolved and converged, courts find statutory property rights no more reliable than the rules governing self-regulatory systems in resolving disputes. This finding resonates with research in China (Whiting 2011).

For decades Vietnamese courts have bridged this epistemic divide by using “reason and sentiment in applying the law” to synthesize legal and community solutions to land disputes. However, rule formalism is gradually limiting the ability of judges to construct highly contextual outcomes. The first problem is that the statutory law does not address the communities’ understandings about just access to land. Self-regulatory communities have constructed a system of justice that is based on small contingent commonalities between members, without a grand abstracted idea about rights to land. As a consequence, just access to land is not understood by ascertaining predetermined legal rights, but rather by engaging sentiments of sympathy and solidarity with family and community.

This is not to suggest that self-regulatory communities are static and impervious to external ideas. Some weakening of the personal ties that cement self-regulatory communities seems unavoidable as globalization and market forces broaden land markets beyond the boundaries of Phuong-centered communities. Foreign investors and large Vietnamese firms already prefer exclusive property rights to the networks of personal relationships that bind self-reg-

ulatory communities. But, for the present, most urban residents find more that is familiar and secure in the “thick” norms and personal networks in which they are embedded, than in “thin” and unfamiliar statutory rules and procedures.

The second problem with rule formalism is that even if self-regulatory communities were prepared to accept some synthetic legal idea of justice, courts are unprepared to develop the legal doctrines required to reconcile exclusive statutory rights with highly variegated and situationally contingent community norms and precepts. This failing is not confined to district-level courts. The Supreme Court confines itself to narrow procedural issues and avoids making doctrinal rulings on the substantive meanings of land laws.

The third problem is that legal reasoning is not particularly attuned to resolving disputes to the satisfaction of all concerned—conciliation and mediation are better able to deliver the distributive justice expected by urban residents in Vietnam. This is because the role of law in judicial rulings is not to produce socially grounded decisions (Teubner 2001), but rather to create legal fictions that provide solutions to otherwise socially intractable problems. As I have discussed, most urban residents distrust legal solutions to land disputes.

Looking ahead, the centralizing forces of rule formalism are unlikely to annihilate community property norms and practices. Despite the central state’s strong opposition to regulatory pluralism, self-regulatory traditions have proved remarkably resilient and adaptable. What is more probable than displacement is an accommodation between statutory and self-regulatory understandings about just access to land. In the short term, the dialogical exchanges that might encourage the state to learn from self-regulatory communities are most likely to occur in quasi-judicial forums, such as the Citizens’ Complaint Committees, where officials are in regular communication with urban residents. If Western experience is any guide, this process is likely to take decades, as it was not until industrialization and marketization harmonized and standardized markets that central authorities could develop uniformly applicable laws and regulations (Jessop 2001).

In the meantime, rule formalism creates a dilemma for courts: The strict application of land law to all cases risks alienating urban residents from the judicial system, while contextual outcomes undermine the validity of land laws. A crucial finding in this study is that no matter what the courts do, most urban residents are likely to continue using community-based regulatory systems that reflect their understandings about just access to land, and lasting resolutions to urban land disputes must take these multiple claims to property into account.

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