Controlling the Law: Legal Pluralism in China's South-West Minority Regions

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Abstract

Millions of China's ethnic minority citizens remain subject to competing legal standards, even as state officials strive to strengthen a unified notion of state law. Minority customary law continues to bind many minority citizens in both civil and criminal arenas and often conflicts directly with state law. What happens when these laws conflict? Based on fieldwork in Yunnan, this article shows how local officials and communities navigate legal pluralism and what legal and policy provisions guide them. Granting local judges discretionary authority to set aside state law in favour of customary law, although seemingly undermining law enforcement, may in the long run be the best path to strengthening rule of law in China's minority regions.

Keywords: rule of law; ethnic minorities; customary law; legal pluralism; south-west China; Yunnan; law and society

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In Jinping Miao-Dai Autonomous County 金平苗傣自治县, in 2002 a ten-year-old Miao girl accused a Miao male worker of raping her. According to the young girl, the man forced her into his home, where he then raped her. After escaping from the man's house, she went to the local judicial office (*sifasuo* 司法所) to seek justice. Declaring the case a criminal matter outside of its jurisdiction, the office referred the case to the local public security bureau. The police declared the man's action a type of minority custom and therefore not a crime for which he could be charged.[1]

The case cited above illustrates the type of conflicts and problems of interpretation that arise when official state law and local minority customary laws collide in minority regions. The People's Republic of China (PRC) has nearly 150 million citizens who are officially classified as ethnic minorities. Vast differences exist among, and even within, the 55 officially recognized minority groups in terms of their languages, religious beliefs and social customs. Across the nation's vast territory, minority communities have developed often elaborate and sophisticated customary law practices, providing those within these territories with rules for the division of land and property, marriage and divorce, social interactions,

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1 Fang 2006, 322. Author's translation.

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utilization of natural resources, rights of citizenship in the local community, inheritance, trade practices, and more. Minority customary law also defines what actions constitute punishable crimes and details guidelines for punishments and fines. Minority customary laws explain who is empowered to interpret and enforce these binding rules of social interaction. Some of these laws are codified in written village regulations, while others are passed down and interpreted by popularly recognized village elders and social organizations.

Traditional minority customary law evolves with societal changes and in interaction with outside influences.[2] The customary legal norms binding minorities have gradually changed as they have come into increased contact with the Chinese state over the last several decades.[3] Despite the enormous changes minority regions have experienced since the establishment of the PRC, in many regions minority customary law continues to play an important role in shaping legal norms and expectations, particularly in regions less integrated economically and socially with the rest of the Chinese nation state.[4] With the Chinese government's active promotion of rule of law over the last 40 years, state law has begun to penetrate into even the most remote regions and to more regularly confront pre-existing minority customary law. Since the late 1990s, Chinese scholars have recognized that even in non-minority regions, local customary laws can challenge the promotion of state legal norms.[5] Scholars have focused particular attention on minority regions, however, owing to the pronounced cultural differences arising from ethnic distinctions and also to the fact that the Chinese Constitution and Party policy have explicitly allowed for the consideration of minority customs when crafting and enforcing state law in ways that are not offered to non-minority regions. The Constitution and the national Regional Ethnic Autonomy Law (*minzu quyu zizhi fa* 民族区域自治法, REAL hereafter) pledge to allow minorities to adapt state laws to "suit the conditions in a national autonomous area," but how, practically, can this be done? What happens when local minority customary law does not mesh with state law? Determining whether a crime has occurred at all, whether minority customs should affect the way a particular crime is interpreted, how to determine what the customary law stipulates about a particular situation, and whether local punishments trump those stipulated in written state laws and regulations or not vex local law enforcement and judicial workers throughout China's minority regions.

Tens of millions of Chinese citizens find themselves subject to multiple layers of laws, which often directly contradict one another. In the criminal law arena, for example, minority citizens may incur harsh local penalties not sanctioned by the state, or may find themselves punished for a single crime by both traditional non-state actors (such as the *zhailao* 寨老, or village head, in Hani 哈尼族 and

2 Erie 2016. Erie argues that international scholarship on legal pluralism tends to overemphasize the distinctions among legal traditions that operate within a single field.
3 Ou 2006.
4 Xue 2017.
5 Zou 2014.

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Zhuang 壮族 areas) and by the state. Some victims may see their violators escape the state sanctions that would have been imposed had the crimes occurred in predominately Han-majority populated areas. Yunnan police report that villagers are often reluctant to press formal criminal charges against their neighbours if they fear the offender will be incarcerated as required by the state's Criminal Law, but may report crimes when they know that customary law will be used to require the defendant to pay the victim material compensation for the crime.[6] As China moves towards building rule of law across the country, how should the government advise its minority citizens and local officials? When should state law apply and when should minority customary law be observed and enforced? In areas where minority legal consciousness has not yet shifted to accept national legal norms and state law, can use of customary law in lieu of state law contribute to the development of a unified rule of law system, or will the allowance of legal pluralism actually undermine the rule of law? In order for customary law to aid in rule of law promotion, the state needs to acknowledge the issues surrounding legal pluralism more openly and provide clearer guidelines to courts on how to balance competing sources of law.

Although the Chinese government has not yet provided such clear guidelines, an increasingly robust scholarly discussion has emerged within China in recent years over how best to reconcile local minority customs and state law. English-language material on legal pluralism in China, however, remains scant. There are a handful of excellent studies on law in China's minority regions, although they focus either on how the broad national REAL has been applied across the country[7] or on how the legislatures within autonomous regions have utilized their powers to write or adjust legislation to reflect local customs.[8] The few detailed studies of customary law that have been conducted by Western scholars focus on Tibetan and Muslim regions.[9] Given the tensions in these regions between the minorities and the state, the state represses local customs and laws more than in less politically contentious minority regions in the south-west. Legal pluralism is handled much differently in provinces such as Yunnan, Guizhou and Guangxi than in Tibet and Xinjiang. Within the latter regions, the state regularly conflates minorities' appeals to exercise their ethnic customs, including rights enshrined in the constitution and REAL, with the "three evils" of ethnic separatism, terrorism and religious fundamentalism. The state may be willing to consult imams outside of Xinjiang on how best to utilize customary law in judicial rulings in non-Uyghur Islamic communities, as Matthew Erie's recent study on the Hui reveals, but in Xinjiang, Party officials reject even formal state law when it conflicts with state efforts to clamp down on Uyghur ethnic cul-

6 Gu and Geng 2017.
7 Sautman 1999; Congressional-Executive Commission on China 2005.
8 Ghai and Woodman 2009.
9 Erie 2016; French 2002; Pirie 2006.

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tural activities.[10] By focusing on legal developments outside of Tibetan and Uyghur areas, this article explores an understudied aspect of ethnic–state relations in regions that are not under the type of military and state repression currently imposed on Xinjiang.[11] Only a very few anthropologists have written on the local customary law of specific minorities in the south-west.[12] None of the studies available in English, however, specifically addresses what happens when minority customary laws conflict with written state laws, or focuses on how the judicial administration and law enforcement bureaus have tried to balance discrepancies between local minority law and state law. Nor do English sources discuss contemporary views in Chinese scholarship on these questions.

Scholars and development practitioners have been studying conflicts between customary and state legal systems across the globe for decades, although they seem to have neglected categorically the Chinese case.[13] Until the last decade, the general consensus among legal analysts seemed to be that legal pluralism undermined efforts to promote the rule of law in developing countries.[14] More recent studies, however, acknowledge that appropriate incorporation of customary laws and traditional courts can contribute positively to rule of law promotion, and cite evidence from countries as diverse as Malawi, India, Sudan and Bolivia.[15] The Chinese case adds to this growing body of literature.

Within China, scholars and analysts are noting that not only are minorities underutilizing their autonomous powers to draft, amend or supplement laws to reflect minority customs and local circumstances, but that even if these powers *were* better utilized, there would still remain a set of complicated, poorly addressed issues centred around what to do in cases where no formal local legislation has been passed to reconcile the conflict. The vast majority of the customary practices that minority citizens perceive to be legally binding have not yet been legislated into formal state law even at the local level. Local citizens, local courts and local law enforcement in minority areas are thus regularly confronted with two challenges: determining in what cases minority norms provide different substantive norms than state law, and then determining what guidelines are in place to determine whether state law or minority law should be applied. The central government has given local authorities little guidance on either of these important issues. This leaves local authorities a great deal of flexibility, but provides local judicial and law enforcement officials little protection should their interpretations run afoul of policy shifts from higher-level authorities. Given the regular tensions between state law and local minority customary law, local officials report they often must either set aside state laws in favour

10 Erie 2016. See also Congressional-Executive Commission on China Annual Reports for the years 2005–2018.
11 Zenz 2018.
12 Qubi and Ma 2001.
13 For overviews of the literature, see Tamanaha, Sage and Woolcock 2012; Kötter et al. 2015.
14 Tamanaha, Sage and Woolcock 2012.
15 Kötter et al. 2015.

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of some type of mediation that takes into account minority laws, or else risk inciting minority resentment through strict imposition of state law.[16]

A general consensus is emerging among Chinese scholars and policymakers that local minority customary law needs to be better understood. Many argue that effective utilization of minority law, both in mediation and in the formal court system, will improve local governance and help to develop acceptance of state law in minority territories. Some scholars have begun to argue that failure to accord greater legitimacy to minority customary law and its place in judicial proceedings, however, may result in local judges and law enforcement officials being forced to utilize local norms "clandestinely" in ways that undermine the transparency required to legitimate rule of law.[17] The lack of clear government guidelines for handling conflicts in laws and the failure of the autonomous legislatures to pass formal laws reflecting customary legal norms, as they are empowered to do, are precisely what channel citizens towards resolution of conflicts outside of the formal court system. The existence of the informal system then obviates the urgency of articulating clear procedures for resolving conflicting legal norms.

Although Western scholars have expressed concern that a similar national tendency towards mediation and away from formal adjudication in recent years may indicate a "dangerous turn against law,"[18] my own fieldwork in Yunnan province, particularly in Honghe Hani and Yi Autonomous Prefecture 红河哈尼彝族自治州, suggests that mediation and informal incorporation of minority customary law may actually *strengthen* rule of law and acceptance of formal state law in these areas. Dozens of law enforcement and judicial authorities reported in extended interviews that recognizing minority legal norms was the only way to promote rule of law in those areas. Doing otherwise, they reported almost unanimously, would risk disturbing "social harmony" and could undermine the state's efforts to promote a "rule of law society" with a unified set of state laws and legal norms. As one Hani township judicial office director explained, when imposing penalties he sometimes used customary law guidelines even though the state's legislation law clearly outlaws using penalties not set by the legislature: "if I have to choose between using something that is reasonable but illegal, versus choosing something that is legal but unreasonable, I'll choose the former every time."[19] He and other interviewees justified their use of customary law in terms of promoting justice, rather than purely in terms of preventing social protests. In south-western minority regions, not only is mediation often the most viable approach currently available for resolving conflicts between official state law and minority customary law, it may be the most effective path for building acceptance of the state's legal codes and altering minority citizens' legal consciousness.

16 Field interviews, Honghe prefecture, March 2013; Gao 2017.
17 Li 2010.
18 Minzner 2011.
19 Interview with township judicial official, March 2013.

Before policies can be proposed to better reconcile tensions between minority customary law and state law, a brief overview of terms is first in order. How should minority customary law be defined and how is it different from state law at both the national and grassroots levels? By next examining the limited guidelines for handling minority customs and their corresponding legal norms put forth in the PRC Constitution, the REAL, the Criminal Law and the Administrative Law, the lack of clarity on how to resolve these conflicts becomes apparent. The urgency of providing greater guidance for resolving these conflicts can be demonstrated by briefly examining a few cases in which minority customary law conflicts with state law and impacts those caught between the two legal regimes. While acknowledging that issues of legal pluralism will not, and cannot, be resolved quickly, some general conclusions emerge from this brief overview of practices, drawn from fieldwork conducted in Honghe 红河 prefecture in southwest China. Mediation and flexible interpretations of when minority law should apply and when state law must apply may not be an ideal path to rule of law development, but for the near future, it may be a necessary one.

Honghe is an excellent location to observe both the persistence of legal pluralism and the dramatic shifts in legal consciousness over the last ten years. Ethnic minorities make up more than 57 per cent of the prefecture's 4.44 million people. In 2013, I spent a month conducting interviews in Yunnan's provincial capital, Kunming. I also conducted interviews with prefectural-level officials prior to and after interviewing residents in Jinping Miao, Yao, Dai Autonomous County 金平苗瑶傣族自治县, a region which sits on the border with Vietnam. Jinping is one of Honghe's poorest counties, with more than a third of its 366,300 citizens falling below the national poverty line of 2,736 yuan annual per capita income. The large majority of the population (86 per cent) comprises members of nine different ethnic groups: the Miao 苗族, Yao 瑶族, Dai 傣族, Hani, Yi 彝族, Han 汉族, Zhuang, Lahu 拉祜族 and Bulang 布朗族. During the course of my fieldwork, I interviewed scholars, officials and citizens at the provincial, prefectural, county and village levels. I met with judges, lawyers, police, village heads, officials from a variety of government offices and the heads of village Old Persons' Associations, among others. My fieldwork followed on from that conducted by a team of legal anthropologists from Yunnan University led by Professor Fang Hui 方慧 in 2000. I was able to compare my findings to theirs, and I interviewed several of the scholars and government officials who had participated in the initial fieldwork project. Follow-up interviews in Kunming in 2015 and 2016 added to the study.

What is Minority Law? Defining the Terms

So, what do we mean by "minority customary law"? The question is not just a matter of semantics but dramatically impacts how one perceives the sources of law and their relative weight in determining how to resolve cases. Should customary law be understood simply as general customs or must these be written or

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otherwise codified in traditional village regulations? Scholars use a variety of terms to refer to non-state, non-official written laws such as folk law, indigenous law, traditional law and unofficial law, among others.[20] Here, I use the term "minority customary law" to refer to a body of norms produced and enforced by non-state minority actors. Minority customary law thus differs from those written statutes, rules and regulations produced by autonomous bodies within minority regions, even though the latter are often drafted specifically to reflect and incorporate customary minority law. It also differs from pure customs and norms that may influence minority residents' behaviour but are not enforced or enforceable by any organization or person other than the individual's conscience.

Although minority law has evolved over the centuries in China, the term minority "customary law" first began to be used in China during the large scale state-sponsored ethnic research projects of the 1950s. Exactly how to utilize the term is still debated. In the 1980s, scholars did not view customary law as a binding legal code separate from state law, as can be seen in several dictionaries and encyclopedic entries on "customary law."[21] The 1984 *China Encyclopedia of Law*, for example, defined customary law as "Customs that the State has recognized and the practice of which are protected by the State … customs that evolved before the State was built do not have the quality of laws (不具有法的性质)."[22] It was not until the early 1990s that scholars began to emphasize the distinction between state law and minorities' customary law. Gao Qicai's 高其才 definition of minority customary law reflects this shift: "Customary law is independent of state-made law. Relying on the authority of society and social organizations, it has enforcement powers in overall rules of conduct."[23]

In seeking to define minority law, Liu Yigong 刘艺工 asserts that it differs from state law in six ways.[24] Whether or not his characterizations are accurate are of less interest here than is the example of published efforts to clarify the distinction. He argues that minority law tends to "maintain the traits of primitive democracy," and is grounded in traditional religious beliefs. According to Liu, the primary content of minority law centres on criminal law, marriage and property rights. The vast majority of conflicts in minority regions are traditionally handled through mediation, with village heads or chiefs ruling based on local minority customs and rarely appealing to higher-level government agencies. These mediators arbitrate cases though there is no clearly defined formal organization for enforcement and arbitration. Many minority communities use fines rather than corporal punishments, even for criminal acts.[25] Minorities, according to Liu, often base their criminal penalties on "repayment of the value of the life"

20 Zhang, Xiaohui, and Wang 2003.
21 Liu, Yigong 2004, 111.
22 *Zhongguo da baike quanshu: faxue* 1984, 87. Author's translation.
23 Gao 1996, 71. Author's translation.
24 Liu, Yigong 2004, 111–12.
25 I question Liu's argument but present it here to reflect a Chinese scholar's voice rather than an accurate depiction of minority customary law.

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and determine fines based on the seriousness of the crime and the social status of the victim. Many ethnic communities labelled as Jingpo 景颇, for example, require a murderer to pay the victim's family up to ten head of cattle along with a set amount of clothes, knives, etc. And finally, minority law often appeals to divine intervention (*shen pan* 神判) to determine a person's guilt or degree of guilt. Minorities use a variety of methods, Liu notes, to determine divine judgments, including requiring the accused to grab a hot iron or pull an egg from boiling water and then measuring the severity of the burn to determine the degree of guilt. Although several cases from the 1990s report similar methods of determining guilt, interviews conducted in 2013 in southern Yunnan suggest that this practice is rarely used today. In some areas, villagers report that they have not used such methods since "before liberation" in 1949.

National Laws and Regulations Providing for Incorporation of Minority Customs in Laws

Long before it came to power, the Chinese Communist Party (CCP) recognized that unique challenges existed in governing ethnic groups that did not speak Chinese and were generally poorly integrated into the Chinese state. The Party proposed "regional autonomy" for the minority regions, stipulating that autonomous areas would be established in all areas with a concentration of minorities.[26] The actual implementation of the Party's regional autonomy policy has been highly problematic, particularly in Xinjiang and Tibet, as has been well documented.[27] Indeed, since the arrival of new Xinjiang Party secretary Chen Quanguo 陈全国 in 2016, the party-state has stamped out any hints of autonomy for the Uyghur population with a level of repression not seen since the Cultural Revolution.[28] Article 7 of the REAL clearly states that all autonomous areas must "place the interests of the state as a whole above all else."[29] Western focus on human rights violations and the harsh imposition of state controls in Xinjiang and Tibet has distracted scholarly attention away from the central government's willingness to allow minority customary law to continue in many other parts of China and particularly in south-west China. Even for minority legal norms that may not mesh with global human rights norms themselves, the state has generally not enforced state laws aggressively when it encounters conflicting minority legal norms among groups who do not seek secession or challenge the state's right to rule.

26 Kaup 2000.

27 See, e.g., reports by Human Rights Watch and Minority Rights Group International at https://www.hrw.org/world-report/2015/country-chapters/china-and-tibet. Accessed 15 June 2016; and http://minorityrights.org/country/china/. Accessed 15 June 2016. Also see Fischer 2014; Hillman and Tuttle 2016.

28 Human Rights Watch 2018; Niewenhuis 2018.

29 Regional Ethnic Autonomy Law (in English and Chinese text), translated by the Congressional-Executive Commission on China staff, at http://www.cecc.gov/resources/legal-provisions/regional-ethnic-autonomy-law-of-the-peoples-republic-of-china-amended.

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The Constitution outlines how autonomous governments are to be established for all areas where minorities are concentrated, and grants them a range of rights, including the right to alter national legislation that does not suit local minority conditions.[30] Article 116 of the Constitution states that "People's congresses of national autonomous areas have the power to enact autonomy regulations and specific regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned."

Together with the Constitution, the REAL, the Criminal Law and the Legislative Law grant minority regions the right to draft local autonomous legislation in the form of *zizhi tiaoli* 自治条例 (autonomous regulations), *danxing tiaoli* 单行条例 (specific regulations), *biantong guiding* 变通规定 (modifying regulations) and *buchong guiding* 补充规定 (supplemental regulations).[31] Minority legislatures, and the party-state authorities who guide their actions, have generally underutilized these autonomous powers, but even if they were more fully used, they would not be able to sufficiently anticipate and handle all conflicts between local minority customary law and state laws.[32]

Article 20 of the REAL grants legislatures in autonomous areas, with approval from above, authority to alter or cease entirely state directives that conflict with local conditions. The Legislation Law of 2000 clarifies that minority areas may also adjust national laws that conflict with the "special characteristics of the nationalities" as long as the revisions do not contravene the basic principles of the law or regulation, as determined by the Standing Committee of either the Autonomous People's Congress (for laws submitted by local legislatures) or the National People's Congress (for laws submitted by autonomous provincial-level legislatures). The autonomous areas are barred, however, from adjusting laws or administrative regulations that make specific provisions for the ethnic autonomous areas. Autonomous areas would not be allowed to adjust or amend the Legislation Law itself, for example, because it already contains specific language addressing minority issues in its Article 66.

According to Article 90 of the Criminal Procedure Law:

> Where the provisions of this Law cannot be completely applied in national autonomous areas, the people's congresses of the autonomous regions or the provinces concerned may formulate adaptive or supplementary provisions on the basis of the political, economic and cultural characteristics of the local ethnic groups and the basic principles stipulated in this Law, and these provisions shall go into effect after they have been submitted to and approved by the Standing Committee of the National People's Congress.

To date, not a single modification has been issued to address conflicts in criminal law, although local minority customs regularly conflict with state law and result in technically unlawful and unapproved modifications. Some scholars argue that the Criminal Law provides minority legislatures powers to prevent conflicting

30 Congressional-Executive Commission on China 2005.
31 For a thorough discussion of local legislative powers, see Ghai and Woodman 2009.
32 Ibid.; Zhang, Dianjun 2009. Ghai and Woodman describe autonomous legislation as "unused powers" in their excellently detailed analysis of the legislative powers in minority regions.

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laws, and that these powers need to be better used.[33] Others, however, argue that the Criminal Law actually attempts to grant minority regions powers beyond their constitutionally defined limits.[34] Furthermore, the 2000 Legislation Law clarifies in Articles 8 and 9 that only the National People's Congress can make laws "concerning criminal offences and their punishment, mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person, and the judicial system." Minority laws that penalize villagers with shunning (deprivation of their political rights) are thus technically against the law, although these cases continue.

In addition to the Constitution and REAL, dozens of other national laws make special provisions for minorities, ranging from very broad exhortations that the stated law be implemented according to local minority customs to more specific provisions listing tax breaks and preferential bank loans.[35] Zhang Xiaohui and Wang Qiliang note that minority villagers are subject to at least seven layers of regulation: state law, government regulations, township regulations, village committee regulations, village rules, customs, and taboos.[36] Conflicts can easily occur between the first three levels, which are state regulations, and the last four, which belong to minority customary law.[37] Despite some efforts to clarify jurisdiction, such as the Law of Administrative Penalties' stipulation that township governments and below cannot impose administrative penalties, numerous township regulations specifically include administrative penalties.

Provincial and county autonomous legislatures have passed over 400 specific regulations. Most of these regulations address issues of marriage and divorce, languages, compulsory education, management of natural resources, population control, economic development, and inheritance. However, none of the inheritance laws incorporate Islamic law on inheritance, which is a blatant omission given the clear discrepancies in Islamic and state inheritance law. Although Ghai and Woodman view these regulations as "largely analogous to general local legislation," they often do, in fact, include measures that address concerns specific to the minorities living in those regions.[38] Several of the regulations on marriage, for example, are much more detailed than the state law on marriage and are designed to reflect customary taboos on marrying within certain lineages.

Although legislatures in minority regions are granted limited autonomous powers, it is important to note that no such powers exist for the judiciary. Legislatures in the autonomous areas, prefectures and counties are authorized to make single autonomous regulations, as well as adjustment regulations or supplemental regulations to higher-level state laws. No similar authority or specific

33 Zhang, Xiaohui 1994, 175, 177, 226.
34 Wang 2001; Liu, Xi 2008a, 109
35 For a list of examples, including the Tobacco Monopoly Law and Law on Electric Power, see Sautman 1999, 289.
36 Zhang, Xiaohui, and Wang 2003, 63.
37 Ibid., 64.
38 Ghai and Woodman 2009, 43.

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interpretive authority is granted to the courts operating in minority areas by the Constitution or by the REAL. The State Council's "Provisions for implementing the Law on Regional National Autonomy" of 2005 never once mentions the need for considering local customary laws when applying state law, although the first action article of the provisions calls for strengthening "propaganda and education on the Law on Regional National Autonomy of the People's Republic of China and on the relevant laws, statutes, and national policies."[39] Moreover, all Chinese courts are expected to apply the laws, not make or interpret them, and courts in autonomous areas are no exception, at least according to the law.[40] Scholar Zhang Dianjun 张殿军 notes that local judges have no choice but to consider local customary laws when applying state laws, particularly when autonomous legislatures have not yet attempted to address the discrepancies between the laws.[41] Good rulings are clearly based on a thorough understanding of the local minority cultures, he argues avidly. Although there are ongoing national directives to recruit more minority personnel into the autonomous governments, the Judges Law (revised June 2001) does not require or recommend any specific training for judges to understand minority customary law or customs.

Some minority regions have recognized the crucial importance of training more minority judges and have adopted a number of special policies and directives to bolster the number of licensed minority judges. In an effort to improve the calibre of judges across the country, beginning in 2002 all judges had to pass a rigorous national judicial exam that tested competence in 17 subject areas. Special provisions were incorporated in the licensing law that allocated an additional five points on the exam to minority examinees. An unintended consequence of the new national standards, however, was a reduction in the number of minority students who were able to pass the exam. Nationally, an average of 7 per cent of those who sat the exam passed it, while only 4 per cent passed in Yunnan and Guangxi (where minorities account for nearly 40 per cent of the population) despite the extra allocation of points for minorities. By 2008, only 6 per cent of judges in Yunnan could even speak a minority language, and not all of these were themselves members of ethnic minorities or necessarily versed in local minority customs and legal norms.[42] In a province where ethnic minorities comprise more than 38 per cent of the total population, government officials worried that failure to understand minority customs could lead to clashes between those trying to impose state law and those whose legal consciousness was still shaped primarily by minority customary legal norms. Scholars across

39 Provisions of the State Council for Implementing the Law on Regional National Autonomy of the People's Republic of China (Art. 2), effective 31 May 2005.
40 Peerenboom 2002, 282.
41 Zhang, Dianjun 2009, 1–4.
42 "Yunnansheng pi 19 ming shuangyan beifaguan jiang shanggang" (Yunnan province approves 19 bilingual judge candidates for appointment), *Fazhi ribao*, 9 August 2012, http://legal.people.com.cn/n/2012/0809/c188502-18700547.html. Accessed 15 June 2016.

the country warned of the hazards of rushing the imposition of state law in minority areas without deep understanding of minority legal norms, how they evolved, and how they were often practised in such areas. One scholar noted, for example, that it is a "crucial question for the development of law how to discover, deepen, and put into detail and use laws and rules that the masses have in actuality developed. Ignoring the reality of customary law, striving [only] to perfect written legal codes, is not the path to rule of law development."[43] The deputy director of the Yunnan Provincial People's Court, Dr Tian Chengyou 田成有, used a vivid metaphor to warn against the promotion of state law without a comprehensive understanding of the reality of minority village needs and customs: "[Laws] must be built on the foundation of current practices to promote truly meaningful and progressive laws. Simply to rely on the views of so called 'progressive' people who come to 'improve' [customary] laws is as ridiculous as trying to fly by lifting yourself up by your hair."[44]

In 2009, several government departments in Yunnan joined together to create the "Yunnan province judicial system's programme for recruiting minority personnel," and established special classes for minorities training to be judges.[45] By 2012, 144 students were either currently enrolled in the programme or had recently graduated from it. In 2013, all 12 of the students I interviewed from the minority judges class at Yunnan Minzu University were confident that state law could not simply be imposed on minority regions without consideration for local minority customs. In their view, the ultimate goal was to work towards eventual acceptance of state law and to shift minorities' legal consciousness gradually without provoking a reactionary backlash by rushing the process.

Although detailed assessment of conflicting minority customary laws and state laws across issues is beyond the scope of this essay, the challenges of resolving these conflicts become apparent through a brief examination of one of the most contentious areas of conflict, criminal law.

Criminal Law – Addressing the Conflicts in Minority Customary Law and State Law

Neither the Constitution nor the REAL give minorities the right to contradict the spirit of national laws or to ignore them completely, but they do allow laws to be implemented "in the light of the existing local situation." But what exactly constitutes the "existing local situation"? And how should judicial authorities respond when local existing legal norms contradict state laws? There is also the

43 Qiu, Feng. 2004. "Gei tusheng zhangde 'xiguanfa' pei tu liushui" (Let indigenously born and raised "customary law" be cultivated), *Shenzhen shangbao*, 12 July.

44 "Guanyu minjianfa de xueli yu yunyong, zuozhe: shengfayuan fuyuanzhang Tian Chengyou" (About the study and use of folk law by Yunnan court deputy director Tian Chengyou,), Yunnan People's Court website, 19 October 2009, http://www.gy.yn.gov.cn/Article/spyf/lldy/fglt/200910/15920.html. Accessed 2015 May 21.

45 *Fazhi ribao*, 9 August 2012.

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question of what limits should be placed on the utilization of customary law, particularly in areas that may undermine citizen or basic human rights. Examining just a handful of actual cases will help to illustrate the challenges facing policymakers and citizens alike as they struggle to decide which legal practices should take precedence. These cases confirm what both field interviews and the near complete absence of open policy statements on the status of minority customary law suggest: no clear government guidelines exist on how to balance conflicts between customary and state law. Consequently, there is little consistency in how these issues are handled, even within a single county.

Some actions considered criminal by the state are viewed merely as standard customs and not as crimes by certain minorities. For example, although the Criminal Law specifies the punishments for statutory rape, judicial authorities in minority areas are generally instructed to "apply penalties more leniently" in cases that do not threaten society.[46] In a Dai minority region in 2002, a family planning official discovered that a 17-year-old Dai boy had fallen in love with a 13-year-old Dai girl and had sex with her.[47] He reported the case to the public security bureau, which investigated the case and pressed rape charges. The procuratorate was reportedly divided over whether the case should be considered to be a criminal case. The majority felt that the act was criminal but because it had occurred between a minority couple and because this type of relationship is quite common among minorities, the act should not be considered as a major crime. Furthermore, since the crime posed little threat to society, they were of the view that it should be considered a minor crime and exempt from punishment in accordance with Article 37 of the Criminal Procedure Law. In this case, state law was used to determine that a crime had been committed and to determine the sentence; however, local circumstances were considered when using state law to impose the penalty, so the young boy was not punished at all despite being convicted of statutory rape.

The Criminal Procedure Law specifically allows for lenient sentences in minority regions, but what should be done when local customary law demands a sentence that would be deemed too severe or unreasonable by state law? Officials are told to respect minority customs and apply laws leniently, but how should state authorities handle local punishments of rape in some Yi areas where the local population may still be influenced by traditional norms that call for both a raped woman and her attacker to be executed if the man is from a lower social rank than the woman he raped? There have also been cases in some Miao areas where arson has been punished by throwing the arsonist into fire. The law enforcement personnel I interviewed gave several examples of villagers imposing their own punishments for crimes, including mass beatings of those accused of theft and heavy fines imposed by non-state village elders. They also

46 The policy is known as "two smalls and one leniency" (*liang shao yi kuan*) and guides local judicial authorities in minority areas to make "a small number of arrests and small number of executions, and when enforcing punishments, apply them leniently."

47 Fang 2006, 323.

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reported that, when possible, the state intervenes to prevent such physical punishments as those mentioned above. And, despite the fact that village executions are not allowed by the state, one police officer recalled a case in which an entire village beat to death a suspected thief. The officer described how the villagers allowed this customary punishment by banding together and refusing to turn in those who had carried out the capital punishment. Because no witnesses would come forward, those responsible for the extra-legal death sentence were never punished. Fang Hui encountered several such cases during her fieldwork carried out in 2000. The judicial authorities I interviewed confirmed that there were few written guidelines on how to handle conflicts between state law and minority customary law, but they also reported that in "serious" cases, such as rape or homicide, the state had an obligation to step in, investigate and try the crimes even if minority norms differed from those of the state.

Although there are few domestic guidelines on exactly how conflicts of law should be resolved, Fang Hui points out that the International Labour Organization attempted to provide some guidance with the passage of the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries.[48] Articles 8 and 9 of the Convention note that minorities "have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights." Article 9 notes that "to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases."[49] Although no clear procedures have yet been established for resolving conflicting laws, these basic principles do seem to guide administration of justice in minority regions – as long as the crimes do not even hint at undermining state authority or threatening "harmonious relations among the nationalities."

The Criminal Code clearly states that only acts specified by the National People's Congress may be punished as crimes and that only the National People's Congress holds the right to impose penalties for crimes removing citizenship rights. During her fieldwork in Yunnan in the early 2000s, Fang Hui met an 80-year-old woman accused of being a *pipa jing* 琵琶精 (a type of demon or devil) She was forced to leave her home and village and fend for herself in the forest. Fang came across several other such cases, including ones in which whole families had been forced to leave their village because a member had been accused of being a demon.[50] This punishment not only violates the Criminal Law by allowing the village head to strip someone of the rights of community

48 Ibid., 312, 317.
49 International Labour Organization 1989.
50 Ibid., 306

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membership but also infringes the right to protection against being held accountable for family members' crimes. Fang does not report whether judicial authorities intervened or punished the village head for these clear violations of villagers' civil rights.

While at times local customary law imposes severe penalties such as those listed above, at other times the penalties fall far short of what is required by state law. In such cases, courts sometimes impose state penalties and yet sometimes accept the local rulings. In Jinping 金平 in 2002, an 18-year-old man was accused of raping a three-year-old girl and sodomizing a five-year-old boy in a single day. Although the matter should have been referred to the local judicial authorities, the local mediator instead fined the offender 160 yuan. The local judicial authorities reversed the local mediator's ruling and held the offender responsible for his crimes.[51]

At other times, both state penalties and minority customary penalties are imposed for the same crime. This may be a result of the local court refusing to accept the ruling of local customary law authorities or of disputants using both systems until they get the ruling they desire. Community members not satisfied with state punishments often demand the imposition of local customary penalties. Conflicts that threaten to explode into cross-village conflicts are often dealt with quite pragmatically by local authorities, using whatever methods seem most likely to quell social unrest. As one director of an administrative village police station explained, "sometimes we just have no alternative. If we insisted on enforcing state law, we'd have a riot on our hands in certain situations."[52] An example from Qinghai province reinforces this point. A fight between boys from two different counties resulted in the stabbing to death of one of the boys. To avoid escalation, a workgroup was formed that consisted of prefecture, county and township leaders, judicial leaders and several monks. After confirming that a murder had occurred, the work team ordered that compensation of 25,000 yuan and three horses be paid to the victim's family. Afterwards, the case was tried by the courts and the accused was sentenced to 12 years for murder and an additional two years for subverting the state. Only after the imposition of both penalties did all parties seem satisfied with the outcome.[53]

Owing to the lack of government clarification on how local courts should integrate minority customary law and state law, the utilization of customary law varies greatly across localities and various ethnic communities. Scholar Gao Qicai reports, based on more than a decade of fieldwork in Jinxiu Yao Autonomous County 金秀瑶族自治县 in Guangxi province, that the use of customary law has expanded over the last 20 years.[54] Jinxiu judges explicitly acknowledge the benefits of using customary law and consulting with the "Yao elder" to rule

51 Ibid., 324. The precise penalty was not given in Fang's field notes.
52 Interview with official, Jinping county, March 2013.
53 Fang 2006, 314–15.
54 Gao 2017.

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on a variety of cases, including criminal cases. According to Gao, more than 80 per cent of the commercial disputes in the county over the last decade have been handled outside of the formal courts using customary law.

These cases and field reports illustrate a number of problems that arise from conflicting laws. First, it is clear that citizens are attempting to exploit both systems for their own benefit. Rulings based on customary law may well be rejected by those involved in a particular case and tried again in the formal state court. Second, while the Constitution and a host of national laws grant autonomous governments the right to foster and maintain their traditional minority cultures, in actuality there are numerous examples of how doing so would clearly violate internationally accepted human rights norms. Greater guidance needs to be given to local judicial authorities on how to handle these types of situations. Western scholarship tends to focus on the flagrant Chinese government oppression of minority cultures in Tibet and Xinjiang, which may lead to the false assumption that the Chinese state refuses to recognize minority customs as a source of law across the country. In reality, the state has an interest in protecting those minority customs that do not challenge state authority, both for practical reasons and to prove that it is upholding promises made in the REAL.

As government officials seek to resolve these conflicts, they are in many senses faced with an untenable situation. If they force state law on to a reluctant minority population that prefers the customary code, they risk increasing popular resentment of state laws. If, however, they allow both codes to coexist, at times using one while at other times using the other, or as many scholars recommend, "accepting the rational minority customs while rejecting the useless ones," they risk undermining the credibility of a fragile and yet incomplete formal legal system.[55] This latter risk is heightened by the lack of guidance given to local state authorities on how best to resolve these conflicts.

Proposals for Resolving Conflicts of Law

A clear consensus has emerged among scholars over the last decade that minority customary laws need to be better understood, and that when integrated with state law, these laws can provide an important "supplement" to formal legal statutes. Several government offices in Yunnan have similarly begun to recognize the need to work with minorities on gradually reconciling minority legal norms with state laws.

As noted by Zhang Dianjun, effectively utilizing legislative powers to ensure laws are suited to local minority conditions is crucial but insufficient to resolve the tensions between customary minority law and state law. To deal with the tensions, it is necessary to reconceptualize the justification for accommodating

55 Liu, Xi 2008b.

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minority customs, he argues.[56] Article 3 of the Criminal Procedure Law stipulates that an action cannot be considered a punishable offence if it is not explicitly prohibited by law. The Criminal Code, Zhang points out, was thus designed to protect citizens' human rights by protecting them from being punished for actions they did not know were crimes. He urges, however, that it is important not to narrowly conceive of how actions are explicitly prohibited. If minority customary practices and norms in fact clearly indicate a particular action is an offence, it should be considered as such in the local courts. The Criminal Procedure Law is designed to protect citizens from being charged with crimes for actions that are not prohibited; it is not designed to force judges to throw out cases against actions that *are* viewed as crimes by local minority customs simply because they have not been legislated as crimes in the local state laws. Although Zhang makes an important contribution by urging greater understanding and utilization of minority customary law, he does not clarify who should decide exactly which customary laws should be recognized and which should be dismissed. He does suggest that courts should be allowed to interpret the formal laws within the context of local customs, and he rejects calls to apply the letter of the law in all cases.[57]

Law professor Liu Xi 刘希 from Yunnan University argues that although the Constitution, the REAL and the Criminal Procedure Law all stipulate that minority customs should be protected, to date minority customary law has not been factored into the discussions of "minority customs."[58] He cites numerous examples from national laws and provincial court decisions to show that although the term "customs" frequently appears in rulings, it is used either in a manner that does not specifically acknowledge customary law, or used "as an adverb to mean 'generally' rather than 'by custom'."[59] He, like Zhang and others, believes that greater study of customary minority law is required and calls for the acknowledgement of the important role that customary law can play in strengthening rule of law and local good governance, particularly in an incompletely established rule of law system. In Gao Qicai's fieldwork, Jinxiu judges did explicitly acknowledge the value of minority customary law, and not just minority customs, in determining their rulings.[60]

Liu Xi argues that minority customary law can serve as an important tool for effectively enforcing the Constitution, the REAL and the Criminal Code, even though at times minority law may conflict with state law.[61] Minority law, he notes, has evolved from the people themselves rather than being imposed from outside by the state; in addition to the enforcement power of the state, minority law is powerfully enforced by members of the minority society itself. He offers

56 Zhang, Dianjun 2009, 1–4.
57 Ibid.
58 Liu, Xi 2008a, 110.
59 Ibid.
60 Gao 2017.
61 Liu, Xi 2008a.

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three main recommendations to utilize minority law more effectively to achieve state goals. First, he suggests that more extensive fieldwork be done to understand the intricacies of minority customary law. He advocates the study of local laws to determine which are "rational" but makes no attempt to clarify on what grounds, or by whom, a law can be so deemed. He also argues that minorities should be better included in the drafting and approval process when crafting state laws. Finally, he urges that modern standards be used to "utilize the best and cast aside the dregs" of minority customary law.[62] Liu, like most other scholars addressing this issue, recommends better education for minorities to increase their understanding of state law as well as the conception of individual and collective rights enshrined within them.

Concluding Reflections

There is growing recognition within Chinese scholarly circles and among some provincial and local-level judicial authorities that minority customary law has an important role to play in the development of rule of law throughout China. The Supreme People's Court jointly hosted a major national conference on minority legal culture with the Central Ethnic Affairs Commission in August 2016. Over the last 20 years, there has been a clear shift from discounting the influence of minority customary law to recognizing the power and influence of the traditional authority figures and institutions that continue to exert an influence over minority understandings of justice. Local authorities are gaining some confidence in their right to utilize minority customary laws that do not threaten social stability or the authority of the state, as reported in field interviews. Although a resurgence of mediation over adjudication may indicate a problematic trend in some regions of China as Carl Minzner suggests,[63] mediation remains the most appropriate tool in minority areas that have yet to accept state law as legitimate and binding. Cao Wenwu 曹文武, vice-director of the Honghe Prefecture Judicial Office, notes that mediation is still very important both to avoid aggressively forcing state law on populations that are still not prepared to accept it and for handling issues which simply cannot be resolved through state law.[64] He notes major shifts away from minority customary law and towards greater acceptance of state law among the minority population in Honghe prefecture over the last ten years. He does, however, predict that significant conflicts will continue for at least another ten to twenty years as acceptance of state law builds. He attributes changes in Honghe minorities' legal consciousness to both explicit state policies and demographic shifts. Every elementary and middle school in the prefecture now has a "legal vice-principal" and all students are required to attend mandatory legal education classes that teach state law at

62 Ibid., 111.
63 Minzner 2011.
64 Interview with Cao Wenwu, Honghe prefecture, March 2013.

least once a month and often once a week. In Yunnan province, more judges and legal personnel are being recruited from among minority populations. Building a judicial work force that is familiar enough with local minority customary law to understand when best to utilize it and when to persuade villagers to set it aside may lead towards a gradual reduction in the prevalence of customary laws and greater acceptance of the state's legal dissemination campaign.

Although Chinese scholarship on minority customary law has grown dramatically over the last two decades, few studies have explored comparative customary law or closely examined how international law might influence legal pluralism issues within China. Scholars regularly call for greater recognition of minority customary law that is "reasonable." They would benefit by appealing to the UN Declaration of Human Rights to set the limits on what should be considered reasonable, and from studying how other countries have handled these issues. Accepting legal pluralism within the bounds of international human rights standards is the most effective path towards building a more unified rule of law in China under a single national legal regime.

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Biographical note

Katherine P. Kaup is James B. Duke professor of Asian studies and political science at Furman University in Greenville, South Carolina, US. She is the author of *Creating the Zhuang: Ethnic Politics in China*, several articles and chapters on ethnic minorities, and editor and contributor to the textbook *Understanding Contemporary Asia*. Kaup has served as a visiting scholar at Guangxi Ethnic Affairs Commission and a special adviser for minority nationalities affairs at the Congressional-Executive Commission on China. She has also been a distinguished visiting fellow at Yunnan Nationalities University, a National Committee on US–China Relations public intellectuals fellow, and a PI/programme director for the Luce Initiative on Asian Studies and the Environment.

摘要: 近年来，虽然中国政府致力于树立统一法制观念，但众多少数民族群众仍受限于多重法律标准。在刑事和民事领域，少数民族习惯法对少数民族具有法定约束力，且不少条例直接和国家规定的法律法规相互冲突。通过实地考察云南地区的相关情况，本文解答了少数民族习惯法和国家法相互冲突时产生的一系列问题，介绍了当地政府官员和社会群体是如何对待法律多元主义，以及改善这一现状的政治条例和法律方针。从长期角度考虑，笔者认为虽然赋予地方法官更多的自由裁决权，允许其采用习惯法

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而非国家法可能削弱法律执行力，但从长远看来却是加强少数民族地区法治稳定的最佳方案。

关键词: 法治; 少数民族; 习惯法; 法律多元主义; 中国西南地区; 法与社会

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