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BOOK REVIEW

LEGAL ORDER WITHOUT WRITTEN TEXT IN THE SOUTHEAST OF GUIZHOU PROVINCE, CHINA: BOOK REVIEW ON THE PRIMARY LAW (IN CHINESE)

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Xiaoguang Xu 徐晓光, 原生的法：黔东南苗族侗族地区的法人类学调查 (The Primary Law—Investigation of Legal Anthropology in the Districts of Miao and Dong Minorities in the Southeast of Guizhou Province, China). Beijing: China University of Political Science and Law Press, 2010. ISBN: 9787562035916. 348 pp. ¥28.00 (paperback, in Chinese).

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INTRODUCTION

This book was published originally in Chinese language in January 2010 (1st edition). It reveals the characteristic life in the Qian 黔 (Guizhou Province), the minorities' habitation. There exists a poetic social order (with no written law), and the peoples there make norms in a symbolic way, handing down in a mouth-ear way, and enforcing it in an artistic way. This order is filled with aesthetic experiences, also showing a unique way of justifying a positive law.

Prof. Xu has done research for years on the legal culture of minorities, such as Mongolian, Tibetan, *Qiang* 羌, etc. This paper opens up a vivid feature of the legal culture there.

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By the legal-anthropological approach, Xu has carefully examined the legal system (with no written text) among *Miao* and *Dong* peoples, as well as their rules and regulations. This is an attempt to give voice to their past and present lives, showing their cultural inheritance handed down generation by generation. In this book review, I comment most on its legal orders and life styles.

I. STONE LAW: CREATED BY MIAO AND DONG ANCESTORS

For a long period of time, *Miao* and *Dong* minorities had no written language. Despite the lack of written text, their ancestors made "stone law" by way of *maiyan* 埋岩 (bury a stone). They did so by putting into the earth one half of a rectangular stone with no carved text. The stone was just a symbol, serving as a means of making social order effectively. *Dong*'s *Leix Kuant* 款词 (*Kuant* agreement)[1] was made at *Kuant* meeting held at *Kuant* park 款坪. There were three types of maiyan as below.

First, the precedent *maiyan* was served as legislation and precedents. In general, the primary purpose of a *maiyan* was to seek a solution to a vital problem that faced by the society, and the same solution would apply to those similar cases after the date of the *maiyan* as a norm. Similarly, every stone erected by *Dong* people also became a piece of legislation or a precedent, being followed when a "*Kuant* gathering" was held.

Second, the execution/reaffirmation *maiyan* was usually erected when local headmen needed to convey a resolution by an important *maiyan* meeting, covering a range of subjects, to their own villagers. Unlike the above approaches, *Miao* people in the county of *Cong* river 从江 reaffirmed the rules and regulations by holding a *zaoyan* 凿岩 (chisel a stone) meeting. In the meeting, with the headmen serving as the chairmen, the local people killed cattle and ate the meat, and sometimes shared kebobs (i.e., distributing small pieces of meat on bamboo sticks to each family). During the ritual, people went to the stone that was buried by their ancestors especially for the making and execution of the *lang* rules 榔规. Then, the headmen chiseled the stone with a drill rod and simultaneously recited the rules that had been made. Then, the rules must be obeyed by all the villagers.

Third, the amendment *maiyan* prevailed among *Miao* people living in the boundary between Guizhou and Guangxi provinces in southeastern China. When

[1] *Kuant* was a kind of *Dong* local alliance between clans within a stockaded village, which were linked by geographic factors, or between villages or strongholds. Small, medium, big or united *Kuants* were forged in taking an oath, which played a role in dealing with community affairs and served as legal and military federations. *Leix Kuant*, a form of oral literature, was originally promulgated by *Kuants* and became an important carrier of *Dong* oral culture.

people considered it necessary to amend a *maiyan* rule, they met in a previously selected place to bury the stone. One half of the stone was buried in the earth, while the other half would be erected outside. Then people reaffirmed the ancient rules through some rituals and revised them. New *lang* rules formed in this way would regulate people's behavior thereafter.[2] In contrast, due to limited conditions and the difficulty to organize a *maiyan* meeting, *Dong* people seldom adopted the form of *maiyan* to reform outmoded rules that no longer had actual effect, or to make new ones; instead, they gathered where their ancestors had buried the *maiyan* and established new rules through certain rituals.[3]

During the activities, *maiyan* headmen played a vital role, whose prime mission was to announce rules set by such meetings to the villagers. Other less important missions were to organize people in their own villages to attend the meeting, to represent their neighbors to discuss with other headmen, to publicize the rules after the meeting and to oversee the execution of rules as well as the solutions to problems that occurred within their own villages.[4] The fact that leaders who were of virtues and authority served as the operators of the activities, and the promulgators, propagators and even supervisors of the rules would doubtlessly enhance the level of public participation, strengthen people's confidence in the *maiyan* rules and win their support, so that these rules would have greater legitimacy and validity. In this sense, as it were, "virtuous people themselves are the sources of order.[5]

An overview of the *maiyan* activities shows that there are two distinct features of this practice. The first is there was full discussion and consultation before a *maiyan* meeting. Thus, owe to full discussion and consultation beforehand, solutions to certain problems were sufficiently rational and were based on high public participation. In other words, people's opinions had been freely expressed and all the related elements had been repeatedly and carefully examined, and the headmen and their representatives' participation could ensure broad public participation of the consultation. These factors led to the fact that normative solutions which had been formed through discussion easily won general obedience from people, for one's allegiance to the rules derives from their capacity to give expression to the common purposes in which one participates rather than from the threats of harm with which their enforcement is guaranteed.[6]

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[2] Xu, fn. 2 at 28.

[3] See Xu, fn. 2 at 55.

[4] See Xu, fn. 2 at 26, 27.

[5] Henry W. Ehrmann, *Comparative Legal Cultures* (Chinese ed.), translated by Weifang He & Hongjun Gao, Tsinghua University Press (Beijing), at 71 (2002).

[6] R. M. Unger, *Law in Modern Society* (Chinese ed.), translated by Yuzhang Wu & Hanhua Zhou, Yilin Press (Beijing), at 29 (2001). The English version referred here is from R. M. Unger, *Law in Modern Society*, Free Press (New York), at 31 (1976).

Also, higher public participation in legal activities is the primary way to revive law. People do not respect law unless they consider it their own.[7]

The second is a unique way of recognition and acceptance of *maiyan* rules. Generally speaking, the procedure of a *maiyan* meeting was as follows: It is thus clear that people recognized and accepted such rules by having wine and meat. During the procedure of the meeting, the headmen accepted the rules by drinking wine and eating cooked meat, and the villagers showed their acceptance for the new rules by eating kebobs. While having these kebobs, the family heads announced the new rules so that the whole family could bear these rules in mind. If some family members had left home, they cured the meat and ate it together when these members returned. After eating kebobs, which indicated their recognition of the rules, people as well as their descendants should obey them. It is worth noting that the legitimacy of the rules not only came from the extensive participation and full discussion before the meeting, but also from the unique way of recognition and acceptance of the rules. That people accepted the rules by performing certain rituals had cultural significance of enhancing the authority and sacredness of the rules. As Harold J. Berman says:

By the ritual of eating kebobs, new *maiyan* rules were accepted in a way that enjoyed higher authority and legitimacy. Besides enhancing the authority and legitimacy of the *maiyan* rules, such a way also performed the function of publicizing the *maiyan* rules, which could be realized in the headmen's distributing kabobs and the villagers' eating the meat. Such a kind of multilayered publicity was doubtlessly a highly valid way to make law known, not only enabling the stone law to be remembered, but also making it possible for this law to be inherited as cultural genes by the offspring.

II. LI LYRICS, ANCIENT SONGS AND LEIX KUANT: TRANSFERRING ORAL LAW

Nations with no written text, generally speaking, have relatively developed oral law. In the past, *Miao* and *Dong* were illiterate, so they conveyed and recited their law by some artistic forms such as *li* lyrics 理词 (chanting at a *maiyan* meeting), ancient songs, *Leix Kuant*, etc. *Li* lyrics and ancient songs were *Miao* people's unique ways of passing on oral law, while *Leix Kuant* played an important part in carrying and broadcasting *Dong*'s legal culture.

There were two kinds of *li* lyrics: *maiyan li* lyrics and lawsuit *li* lyrics. *Maiyan li* lyrics were composed of two parts: general lyrics and special lyrics. The general *maiyan li* lyrics were used in every *maiyan* meeting; for example, by

[7] Harold J. Berman, *The Interaction of Law and Religion* (Chinese ed.), translated by Zhiping Liang, China University of Political Science and Law Press (Beijing), at 35 (2003).

chanting general *maiyan li* lyrics, the *maiyan* headman gave an account of the origin of *maiyan*, the role it had played in the past, etc., at the beginning of every *maiyan* meeting. In contrast, the special *maiyan li* lyrics were specially created for a *maiyan* meeting according to the social problems to be dealt with.[8] *Li* elderships were judges of cases to which *Miao* customary law was applied, most of whom were articulate and familiar to ancient *lang* rules. They were knowledgeable and virtuous elders in the village society, who not only mastered the knowledge of ancient rules and lyrics, but were also eloquent and bright enough to apply the ancient *li* and precedents flexibly.[9]

When disputes arose among *Miao* people in the Qian, they first turned to elders or great uncles of the clan, who would mediate between the two sides. When attempts at mediation failed, they went to the *li* elderships, who would serve as judges and set *li* stages 理场 for the parties to debate, following proceedings that were similar to those of the court debates in the formal litigation system.

Thus we can see that the lawsuit *li* lyrics were impromptu works created by *li* elderships while they were settling disputes among *Miao* people. During the ruling process, *li* elderships pronounced the judgments by stating/chanting the *li* lyrics, which were composed by adding new lyrics to old melodies according to the current cases. For instance, a piece of vivid divorce *li* lyrics was used to declare the final judgment.

For another example, a piece of cooking *li* lyrics[10] 烧汤理词 expressed *Miao* people's view of legal culture that encouraged the pursuit of harmony and tolerance in a vivid, descriptive language style.

The *li* debate always attracted the public to watch. For the audience, *li* debate was like an excellent artistic performance, of which *li* masters were definitely the protagonists. By singing *li* lyrics in an appeal, *li* masters announced the results of the cases, disclosed the processes of resolution to disputes as well as the meaning of the rules, and proclaimed the legal value and sense deeply rooted in the rules. Meanwhile, *li* lyrics, which were displayed in the form of songs, were easy for people to learn by heart and spread around. Thus, the people could be familiar with these rules. It was significant to establish an order in a given society, especially a small-scale society. As Xiaotong Fei's saying, "The credit of the village does not mean that they focus on the social contract, it just means that all people are so familiar with the rules that they follow them subconsciously."[11] Thereby people could "act without transgressing."

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[8] See Xu, fn. 2 at 66–67.

[9] See Xu, fn. 2 at 105–06.

[10] "Cooking rice dumpling" was a kind of ordeal used by the *Miao* people.

[11] Xiaotong Fei, 乡土中国 (China's Rural Area), SDX Joint Publishing Company (Hong Kong), at 6 (1985).

Singing ancient songs was another way to display and spread the customary law of *Miao*. *Miao* people were skilled in singing and dancing. The main function of the ancient songs was to record the history of *Miao* and express their perception of the universe and human beings. An ancient song could have different kinds of content: genesis, production, migration, litigation and so on. It was ancient songs of litigation that served as the primary carrier and the main mode of propagation of *Miao* legal culture.

Based on *li* lyrics, *Miao* picked out some representative and influential cases, and finally composed ancient songs of litigation. From this standpoint of view, ancient songs of litigation were *li* songs 理歌 in fact. Furthermore, ancient songs had more plots, and were more artistic than *li* lyrics, which made them a special form of displaying and spreading the customary law. In addition, because of the artistic way in performance, ancient songs were spread more widely and were more long-lived, while *li* lyrics were monopolized by li masters who adjudicated disputes.

Besides, there was another kind of ancient songs, songs that described the *maiyan* activities, called *maiyan* songs.

Thus we can see that *maiyan* songs were primarily about the *maiyan* activities, and aimed at spreading and disseminating *maiyan* rules. Through singing *maiyan* songs, people acquainted themselves with all the *maiyan* rules that had been proclaimed in the previous *maiyan* meetings. In virtue of their vividness, those songs were more convenient for people to remember and master; as a result, the *maiyan* rules profoundly influenced people, as this poem says: Spring rain sneaked into the night with the wind and moistened things silently.

Unlike *Miao* people, *Dong* developed a different form of songs, called *nianci* 念词, to fulfill the function of *Miao* ancient songs. The ancestors of *Dong* compiled meaningful historical events, immigration, social rules and habits into *nianci* which would be bequeathed to descendants. They also preached these songs at the tribal meeting. *Leix Kuant* was the most significant part of *nianci*.

In content, there were different types of *Leix Kuant*: *Kuant* parks, *Kuant* agreement, and *Leix Kuant* of expeditions, of heroes, of the origin of *Dong*, of the creation of world, of habits, of toasts, of seeking divine help, and of sacrifices. Among them, *Kuant* agreement was considered to be the primary way to spread the legal culture of *Dong*.

After the enactment of the *Kuant* rules, in order to urge people to remember and abide by the rules, *Kuant* regions of *Dong* always held tribal meetings to read and explain these rules in certain time of each year, which were called "green agreement in March" and "yellow agreement in September" — to restate the rules at the very time when people were busy preparing for cultivating in March and harvesting in September.

III. PARA GRASS AND GRASS SUPERSCRIPT: CULTURAL AND LEGAL SYMBOL

Para grass is an evergreen herb which can be found in southwest of China and has long leaves like sharp-edged swords. Being considered as their divine grass by the locals of *Miao* and *Dong*, Para grass was worshipped and endowed with rich connotations, as being a particular sign of legal culture, which stood for diverse meanings. Meanwhile, straw superscripts — knots or bunches tied with Para grasses — had different symbolic meanings and functions in different situations. As a sort of cultural symbol in the legal culture of *Miao* and *Dong*, Para grass and grass superscript functioned as the symbol of power, taboo, ownership and counting.

During the process of *yi lang* 议榔 (making regulations), the grass superscript was the symbol of power and authority of *lou fang* 娄方.

In the legislation, Para grass was a kind of power which symbolized the authority of legislation and the power of the leaders. The function of the grass superscript, as a taboo symbol, could be seen in many activities. Door superscript and agreement superscript made with Para grass had the same taboo attribution as well.

In addition, through the forms of "prohibition superscript" and "mountain superscript," the grass superscript was endowed with a symbolic function of confirming the rights of ownership. In the Qian, when there was a grass superscript beside something, no matter what it was (a piece of wasteland on the mountain, a few sundries, firewood, or something else in there temporarily), people would realize that the very thing had belonged to its owner and nobody had the right to possess it or move it. The one who broke the rule would be punished by the customary law. To keep a wasteland, you could set grass superscripts around the land in advance, which meant that this land was waiting to be exploited by its owner, and others who saw the superscripts would look for other places. As for trees that needed protection for a long time or would be used for building, you could tie grass superscripts around them, then others who saw these superscripts would not cut them down. When the floating plants in paddy fields got ripe, the owner could put grass superscripts around to show his ownership in case the plants were taken by other people.[12] Likewise, *Miao* people who lived in Fenghuang county of Hunan province, were accustomed to sealing a mountain pass with grass superscripts. They would put a grass superscript, called "mountain superscript," every 20 steps on the roads leading to the mountain to warn people not to chop firewood or cut grass.[13]

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[12] See Xu, fn. 2 at 136.

[13] See 凤凰县民族志 (Ethnography of Phoenix County), China City Press (Beijing), in Appendix (1997); see also Xu, fn. 2 at 137.

Besides its symbolic meanings and functions, Para grass also served as a tool of calculating, which was used by the *li* elderships when they needed to calculate the parties' faults in the arbitration of disputes. Before the arbitration, the *li* eldership would prepare many pieces of Para grass and place in front of both parties a dustpan as the container of Para grass that they would get. Then they began to deal with the controversial issues one by one. For each issue, based on the careful investigation of the details, the *li* master decided which party should take the responsibility and put a piece of Para grass into the other party's dustpan. Finally, the one who had more pieces of Para grass would be the winner.[14]

It is clear that the Para grass (with multiple cultural meanings and symbolic functions) played a great role in the legal order of *Dong* and *Miao* in the Qian. (a) Grass superscripts, which symbolized power and authority, endowed the *Yi lang* rules with some kind of divinity and legitimacy. (b) Owe to their functions as taboos and symbols of ownership, the grass superscripts served as institutional supplement beyond the formal *lang* rules (or *maiyan* Rules) and *Kuant* rules. (c) Being as the tool of calculating during the *li* debate, the grass superscripts made the whole debate logical and the parties' responsibility clear, so that the results of disputes were fair enough to be trusted and accepted. All the above consequently promoted the conscience of the public to abide by the rule, for "trust, justice, faithfulness or commitment plays a more important role than coercion does in ensuring the obedience of the rules."[15]

CONCLUSION

With unique practical wisdom, the ancestors of *Miao* and *Dong* living in the Qian created an orderly kingdom. The kingdom, where no words existed or were needed, did operate in an orderly manner. With *maiyan* activities as the rites and stones as the symbols, it made rules in its own way; with songs as the carriers and art as the driving force, it deeply embedded the rules in the minds of people; with Para grasses as the symbols, it achieved legitimacy by endowing some divinity to the rules; with grass superscripts as the signs, it enforced the rules effectively, and supplemented rules flexibly.

Such an order seems not only nice but also autonomous. Weber distinguishes autonomy from heteronomy as follows: "The legitimate order of an autonomous region is established by its own members on authority, no matter how the order comes up in other ways. However, the order of a heteronymous region is imposed by external forces."[16] According to this approach, the traditional order of *Miao*

[14] See Xu, fn. 2 at 95.

[15] See Berman, fn. 7 at 17.

[16] Max Weber, *The Methodology of The Social Sciences* (Chinese ed.), translated by Fubin Yang, Huaxia Publishing House (Beijing), at 91 (1999).

and *Dong* in the Qian was doubtlessly autonomous, for it was not imposed by external forces, but was entirely established by people with internal factors. From the origin of the rules, we can see clearly both the unparalleled creativity by people and the consistent promotion of internal factors. Beyond the rules, there existed a system of signs and symbols, performing the function of mediation.

Such a kingdom of order brings us not only admiration and satisfaction, but also rational evaluations and introspections. This is a beautiful picture painted by the kingdom which had no written text: Law and order prevailed, and people lived in peace and harmony. Even modern states that have a large number of legislations, professional judiciaries and powerful police agencies cannot achieve such a glamorous life. It is noteworthy that Henry W. Ehrmann said: "It is incorrect to explain the validity of law based on a central government, courts and policemen."[17] It is in this sense that the assertion from Roscoe Pound seems so constructive: "We must find a better basis for law, and must find out what is behind the coercion. Coercion cannot be the ultimate actuality of social control."[18] Again, this brings us to the perennial question of legitimacy. Instead of discussing this question in general terms, I just try to briefly comment on how *Miao* and *Dong* people interpreted the legitimacy of law.

For *Miao* and *Dong* people, legitimacy was understood in three ways: authority, ritual and participation. The authority of *maiyan* rules and *Kuant* agreements came from the charismatic authority of the headmen or *li* elderships, and the divine authority of the Para grasses as symbols. The ritual of drinking and eating during the process of *maiyan* activities externalized the people's recognition and acceptance of *maiyan* rules. And the ritual of *li* elderships' chanting *li* lyrics was a unique way of achieving legitimacy. On the one hand, it most sufficiently demonstrated the resolutions to disputes; on the other hand, it formally displayed and interpreted the basis of *maiyan* rules and customs and the premise of the culture of *Miao* and *Dong*. Through such a ritual, "the ideal of judicial justice is not mainly considered as something utilitarian, but something sacred, and is not achieved as an abstract concept, but as a common sentiment."[19] In the process of making "stone laws," the village leader and their representatives effectively conveyed people's consensus, which were profoundly important to construct legitimacy.[20] In the manner of watching the arguments in the *li* debates,

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[17] See Ehrmann, fn.5 at 3 (2002).

[18] Roscoe Pound, *Social Control through Law, the Task of Law* (Chinese ed.), translated by Zongling Shen, The Commercial Press (Beijing), at 15 (1984).

[19] See Berman, fn. 7 at 22.

[20] An American scholar R. M. Unger pointed out that "legal order must formulate consensus and sense of responsibility that surpass any calculation of costs and profits." See Unger, fn. 6 at 127.

people repeatedly participated in the enforcement of rules and accepted the civilizing influence exercised by *li* masters. And it is right to say that civilization is an optimal path to legitimacy, especially in an ancient society. All the above facts vividly show us the especial thoughts and practice of legitimacy of *Miao* and *Dong*.

Such thoughts and practices, which encourage rational reflection, are worth paying close attention to. For one thing, we should treat cultural diversity with understanding and tolerance according to the aesthetic dogma: Diversity is essential to beauty. In another aspect, "the unique feature of a culture is how to solve its own problems,"[21] and "as different institutions bring about different institutional benefits and costs, so a market of institutions, in which there are more institutional choices, could be established"[22] — a market that stimulates competition and innovation between institutions. In addition, I agree with Su li's saying, "We should not rashly put the order of the Chinese rural community (still needed) at the mercy of modernization."[23]

Emile Durkheim set an explicit principle for sociological researchers by saying, "Instead of contenting himself with metaphysical reflection on social themes, a sociologist must take groups of circumscribed facts as the object of his research."[24] In other words, a sociologist should dedicate himself to his research in a describable and analytical manner. Admittedly, *The Primary Law* is well committed to such a principle. It is thus possible for this book to show a picture of law without written text.

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[21] Claude Levi-Strauss, *Race and History, Race and Culture* (Chinese ed.), translated by Xiuying Yu, China Renmin University Press (Beijing), at 36 (2006).

[22] Su Li, 道路通向城市：转型中国的法治 (All Roads Lead to Cities: Rule of Law in a Transforming China), Law Press (Beijing), at 48 (2004).

[23] Id. at 37.

[24] Emile Durkheim, *On Suicide* (Chinese ed.), translated by Yunwen Feng, The Commercial Press (Beijing), at 2 (1996).