

**Governing Imperial Borders:
Insights from the Study of the Implementation of Law
in Qing Xinjiang**

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ABSTRACT

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This research examines, through a detailed analysis of the way in which laws were implemented, the changing strategies that the Qing Empire employed to govern Xinjiang from 1759, when this area was annexed into the empire, to 1911, when the Qing dynasty collapsed. Focusing on the changes in the applicability of the two legal systems—Qing state law and indigenous Islamic law—in the criminal and the civil domains respectively, as well as the dynamic of the Qing legal policies, the dissertation studies the Qing's state building project in a multi-ethnic context from the legal perspective.

Different from many historians studying European expansion, who argue that law was an important tool of forced acculturation, my research on Xinjiang shows that the Qing rulers managed to integrate this area without full acculturation. The story this dissertation is telling is one of the creation of Xinjiang as a province over time, though one that still holds an ambiguous status as an autonomous region even to today. It is against this background that the dissertation looks at how the two vast legal systems collided in China's northwestern frontier, and how the area's indigenous inhabitants and immigrants used the law to advance and defend their own interests.

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INTRODUCTION

Recent scholarship has demonstrated the fundamental role of law in structuring Western colonial expansion and governance from the sixteenth century onwards. However, little attention has been drawn to its role in the process of state building in the East. As many historians have illustrated, from the sixteenth to the eighteenth centuries, China shared the same expansion project as its European counterparts.¹ Research on the development of the legal system of Qing Xinjiang will certainly shed light on our understanding of how the Qing carried out state building in its newly acquired frontier. Mostly due to the lack of materials, little research has been done on this topic, especially on the legal arrangement in Xinjiang. In this dissertation, I investigate how the Qing authorities established and modified the legal system in Xinjiang in order to integrate this northwestern ethnic frontier as well as the influence of legal pluralism on the lives of local people, both indigenous inhabitants and immigrants.

1 Scholars have long been locating Qing expansion within early modern world history as a form of colonialism. As early as 1947, Qing rule over the Mongols was compared with British colonial rule by Luo Yingrong. See Luo Yingrong “*Zhong e meng de jiechu yu Qingdai de lifan zhengce*”, *Lishi zhengzhi xuebao*, vol.1, 1947, p. 32. For recent research, see Nicola Di Cosmo, “Qing Colonial Administration in Inner Asia.” *The International History Review* 20.2 (1998), pp. 287-309; Peter Perdue, “Comparing Empires: Manchu colonialism”, *The International History Review*, vol. 2, June 1998, pp. 23-504, and Laura Hostetler, “Qing Connections to the Early Modern World: Ethnography and Cartography in Eighteenth-Century China.” *Modern Asian Studies* 34, No. 3 (2000): 623-662.

Based on historical, political and topographic differences, during the Qing dynasty, the new frontier, Xinjiang,² as a whole could be divided into three parts: North Xinjiang (Zungharia), East Xinjiang, and South Xinjiang (the latter two parts were also called as Altishahr, Eastern Turkestan, Chinese Turkestan, or Huijiang). The entire region totaled some 650,000 square miles.

After Qing troops defeated the Zunghar Khanate in the late 1760s, almost all the Mongolian tribal people, who constituted the majority of the population in North Xinjiang, were killed in the purge after the war or were forced to leave their homeland. As a result, the dwellers of North Xinjiang were mainly the Qing stationed troops (Eight Banner and Green Standard troops) as well as Han or Uyghur agrarian immigrants from other Chinese regions and Altishahr. Chinese civilian administrative structures were taking shape and three prefecture-level units were established under the control of Manchu officials. East Xinjiang had a close relationship with China proper due to its geographic proximity and their early submission to the Qing. In East Xinjiang, mainly covering Hami and Turfan, local Muslims were organized under the banner system. The chieftains were designated as *jasaks* to rule over their people. In South Xinjiang where the indigenous Uyghurs constituted the majority of the population, Muslim officials—*begs*—were appointed to administer the Uyghurs and

² The Chinese term “Xinjiang” came into use soon after the conquest as a general appellation for the region that is almost coterminous with the present Xinjiang Uyghur Autonomous Region of China, although it did not indicate an official administrative area until the region became a province in 1884.

other Turkish-speaking natives under the supervision of imperial agents stationed there by the Qing.

Due to the diversity of the population and modes of administrative, legislation, judicature, and law enforcement differed in these three parts of Xinjiang. Generally speaking, Qing law prevailed in most parts of North Xinjiang. Nonetheless, an increase in both Chinese and Uyghur immigrants from within or outside Xinjiang made the situation more complex, since the number of disputes occurring between different ethnic groups increased accordingly and the implementation of Qing law became progressively challenging. The Huijiang area presented an even more complex picture. There, both Qing law and Islamic law were enforced to deal with criminal and civil cases. After several decades under Qing rule, the conflicts among various groups in Xinjiang became intensified due to ethnic conflicts, local bureaucratic corruption and legal abuse, foreign intervention, and an increasing diminution of the Manchu emperors' authority. The Muslim Rebellion, which broke out in 1864, can be regarded as an outgrowth of over one hundred years of accumulating social dissatisfaction toward Qing rule in the area. Finally, by the end of 1881, the Qing Empire regained and consolidated its sovereignty over the entire Xinjiang area after a thirteen-year loss of control. The designation of Xinjiang as a province in 1884 marked a turning point in Qing governance over Xinjiang.

By then, Xinjiang was administratively incorporated into the imperial prefecture system, which can be regarded as the final step of the long process that saw the balance of Qing administration shift from military to civil authority. *Begs* were placed

under greater official supervision and renamed *xiangyue* 鄉約(village compact head). As in the inland provinces after the Taiping Rebellion, ethnic Han officials replaced Mongol and Manchu officials in many of the high administrative positions of Xinjiang. The political thought of these officials was influenced by a group of 1820s and 1830s statecraft scholars, such as Gong Zizhen and Wei Yuan. Facing increasing fiscal and social troubles domestically and growing commercial and military pressure along the maritime and land frontiers, this new generation of officials was eager to carry out stronger national defense by turning Xinjiang into a fully-fledged Chinese “colony”.

Broadly speaking, there was a historical shift over the one and half centuries of Qing governance in Xinjiang, evolving from flexible, indirect rule which gave ethnic chieftains considerable administrative autonomy to an unmediated frontier administration which was said to be “unified” with China proper. The development of legal policies in Xinjiang followed the political and social changes of the frontier. Gradually the realms in which Qing codified law applied were enlarged and the realms in which Islamic law applied shrank. But for most of the era, the civil domain of indigenous people was largely left untouched by the state. My study examines these shifts and trends in detail and discusses their internal logic.

Qing Imperialism

The past two decades have witnessed a growing body of research focusing on frontier management and the foreign relations of the Manchu-ruled Qing dynasty,

much of it stimulated by the opening of the Qing archives in Beijing. The so-called “tribute system” paradigm raised by John King Fairbank and Teng Tsu-yu³ was gradually brought into question, because more and more scholars realized that the Sino-centric ideology implied by the tribute system did not fully serve the Manchu rulers, and the *hua-yi* 華夷 (Sino-barbarian/foreign) dichotomy became increasingly problematic as the expansion of the empire incorporated many groups of peoples who had previously belonged to the *yi* category in the Middle Kingdom.

The “Altaic school”, represented by David Farquhar, Pamela Crossley, Evelyn Rawski, Mark Elliott, and Edward Rhoads, has focused on how the Qing rulers ideologically envisioned and governed their multiethnic empire.⁴ According to them, the ability to maintain a separate Manchu identity and to adopt a multiethnic cultural policy, rather than a sinicization strategy, was the key factor of the Qing’s success in ruling their diverse subjects.

³ John K. Fairbank and S. Y. Teng, “On the Ch’ing Tributary System”, *Harvard Journal of Asiatic Studies* 6, no. 2 (1941), pp. 135-246.

⁴ See, David M. Farquhar, “The Emperor as Bodhisattva in the Governance of the Ch’ing Empire.” *Harvard Journal of Asian Studies*, Vol.38, No.1 (1978): 5-34; Pamela Kyle Crossley, *A Translucent Mirror: History and Identity in Qing Imperial Ideology* (University of California Press, 1999); Evelyn S. Rawski, *The Last Emperors: A Social History of Qing Imperial Institutions* (University of California Press, 1998) and “Presidential Address: Reenvisioning the Qing; The Significance of the Qing Period in Chinese History,” *Journal of Asian Studies* 55 (November 1996): 829–50; Mark Elliot, *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China*. (Stanford: Stanford University Press, 2001); and Edward J. M. Rhoads, *Ethnic Relations and Political Power in Late Qing and Early Republican China, 1861-1928* (University of Washington Press, 2000).

Following Pamela Crossley's idea that the Qing was an Inner Asian empire rather than a Chinese dynasty, James Millward's book, *Beyond the Pass*, tries to generate a rethinking of China's relations with Inner Asia based on the Qing conquest and administration of Xinjiang before the eve of the Muslim Rebellion.⁵ In this sense, Millward's work can be regarded as a case study of the Qing's universal emperorship advocated by the Altaic school. Focusing on Qing fiscal and ethnic policy in Xinjiang, Millward argues that though economic motives could largely explain the European expansionism of the same period, the Qing rulers did not treat Xinjiang as a profit center. Based on detailed research on Qing economic policies, including the shipment of annual silver subsidy (*xiexiang* 協餉), governmental trade with Kazakhs, official commerce, commercial taxation and so on, Millward concludes that at least the extraction of natural resources or commercial wealth was not a goal of the Qing in occupying this area before the 1830s. The Qing's position in Xinjiang seems to have had more to do with an imperial ideology, which was represented by the Qianlong emperor's ideological vision of the empire as "five nations under Heaven."⁶

According to Millward, Qing rule over Xinjiang can be divided into two phases. Qing imperialism in the first phase (before the 1830s) demonstrates little missionary impulse.⁷ The Qing authorities did not greatly interfere with local religion or customs.

⁵ James A. Millward, *Beyond the Pass—Economy, Ethnicity, and Empire in Qing Central Asia, 1759-1864*, (California: Stanford University Press, 1988).

⁶ *Ibid*, pp.197-203.

⁷ *Ibid*, p.246.

The second Khoja invasion in 1830 marked the beginning of a shift in Qing policy. The Qing government began to display an implicit distrust of East Turkestanis and voted for intensified Chinese colonization.⁸ In the meantime, some Han statecraft thinkers, such as Gong Zizhen, Wei Yuan, and Xu Song, proposed transforming Xinjiang into a fully-fledged Chinese colony. This blueprint was finally realized by Han general Zuo Zongtang and his colleagues who re-conquered Xinjiang in the 1880s and established it as a province. Millward defines their policies as “Hanization” instead of sinicization.

Millward’s work, however, covers only the period before 1864 and emphasized the economic aspect of empire building in Xinjiang; he does not go further to evaluate the role of frontier policies in the late Qing period. Therefore his thought-provoking research leaves some important questions unanswered. For instances, to what extent can we say Qing policies after the 1880s had missionary impulse? Should we regard the establishment of Xinjiang province in the 1880s and the more direct state control thereafter as a break with the Qianlong strategic mode? Can we divide the Manchu ruling elites and Han officials into two distinct camps and treat Xinjiang and even Qing history after the mid-nineteenth century as an incomplete process of “Hanization”?

Peter Perdue is another scholar who specializes in the Qing expansion northwestward. His article “Culture, history, and imperial Chinese strategy: legacies

⁸ Ibid, p.234.

of the Qing conquests” argues that the Qing strategy was radically different from the Ming, even though both faced a similar situation on the Northwest frontier.⁹ Perdue criticizes the cultural realism thesis, represented by Alastair Iain Johnson’s work¹⁰, and claims that the Qing strategy by no means can be characterized as merely “realism.” According to him, the fact that the Qing conquered and protected the Central Asian frontiers was mainly the result of the personalities of Kangxi, Yongzheng and Qianlong as well as the strong economy at that time. Moreover, Perdue suggests that the Qing conquest of Xinjiang was precarious. Their policies became more coherent only as time went on and as the international relations and domestic situation did not offer them more choices.

It is very illuminating for Perdue to mention the influence of the emperors’ personalities upon state policies. Many of the Qing emperors, especially the earlier ones, had very strong personalities and were usually eager to engage themselves in day to day state affairs. On the one hand, different emperors would frequently deal

⁹ Peter C. Perdue, “Culture, History, and Imperial Chinese Strategy: Legacies of the Qing Conquests,” in *Warfare in Chinese History*, ed. Hans van de Ven. E. J. (Leiden: Brill, 2000), pp. 252-287.

¹⁰ Johnson argues that there are two Chinese strategic cultures: (i) symbolic culture (Confucian, Mencian paradigm) that generally downplays violence as an instrument of state policy, instead stressing the power of moral virtue to bring peace; and (ii) the operational culture (*parabellum*) which means “if you want peace, prepare for war”. Johnson demonstrates that the Confucian-Mencian strategy was largely symbolic and often had little impact on actual behavior, while the decision-makers’ actual decisions corresponded much more closely to the *parabellum* paradigm and was realist. Johnson mainly based his arguments on the “Seven Military Classics” and the Ming dynasty’s grand strategy against the Mongols. See Alastair Ian Johnson, *Cultural Realism: Strategic Culture and Grand Strategy in Chinese History*, (Princeton: Princeton University Press, 1995).

with similar cases in different ways; on the other hand, the frontier situation was itself ever-changing, so the Qing's frontier governance was actually a long process of constant initiation, testing, and adjustment. Practical policies were formulated in an *ad hoc* manner in line with changing situations.

Perdue does not totally agree with the postmodernist approach to Chinese strategy either.¹¹ He argues that both the postmodernists and the "Altaic school" totally disregard coercion. They all notice correctly that Qing rulers adopted a multiethnic cultural policy to deal with different groups of subjects, but they ignore the employment and threat of military force as an important backup when ritual was violated.

Perdue concentrates more on the role played by the interaction of security concerns and commercial interests in shaping "nomadic state building," based on a comparative approach dealing with "state building in Europe and Asia." In *China Marches West* he suggests that we should regard the Qing expansion as a state doing state-building—a dramatic challenge to the "modern" concept that Asian state-building was merely a response to the West.¹² Perdue suggests that from the

¹¹ For instance, James Hevia criticizes Fairbank for endorsing an Orientalist view of China as practicing an archaic, traditional style of foreign relations; instead he proposes to view Macartney's mission to the Qianlong emperor's court as an encounter between two imperial formations, each with universalistic pretensions and complex metaphysical systems that buttressed them. See James L. Hevia, *Cherishing Men from Afar: Qing Guest Ritual and the Macartney Embassy of 1793*, (Durham and London: Duke University Press, 1995).

¹² Peter Perdue, *China Marches West: The Qing Conquest of Central Eurasia*, (Cambridge and London: Harvard University Press, 2005).

sixteenth to the eighteenth centuries China shared the same expansionist project as the European states and imperial China's security concerns were also not so much different from its European counterparts. Perdue agrees with Eric Hobsbawm, David Landes, Andre Gunder Frank, and other scholars who argue that there has long been only one global economy in which China played an important role. Perdue rejects the notion that China was isolated from the "European system" before the mid-eighteenth century and thus finds similar themes in Qing state-building. To him the early Qing empire was an "evolving state structure engaged in mobilization for expansionist warfare." When talking about the process of Qing state-building, Perdue borrows Charles Tilly's model of the formation of the European state system: the constant interaction of trade flows and security demands. He does this by arguing that imperial China's security and commercial concerns were not so much different from those of European states.

According to Perdue, the high Qing¹³ conquests and frontier strategy had a dramatic and long lasting influence on Chinese history. The Qing expansion changed the definition of the boundaries of state and society. More importantly, in the late Qing period, Chinese nationalists inherited this expansive strategic tradition. In his words, "imperialists and nationalists were secret sharers, especially in their analysis of the future of the Qing frontiers."¹⁴ It is particularly important that Perdue argues that

¹³ By "High Qing", I mean the "Kang-Qian Golden Age," which is the era when the Kangxi, Yongzheng, and Qianlong emperors ruled (1662-1795).

¹⁴ Peter Perdue, *China Marches West*, p. 498.

Zuo Zongtang's determination to re-conquer Xinjiang, the financial support provided by the Zongli Yamen for this campaign, and finally the establishment of Xinjiang as a province, all were legacies of the earlier Qing expansive strategy. However, Perdue does not go further on this topic. Like Millward, his research does not quite extend beyond the 1880s.

In his article "Qing colonial administration in Inner Asia," Nicola Di Cosmo analyzes the administrative system through which the Qing ruled the "outer provinces" that included Tibet, Xinjiang, and Mongolia, and argues that efficient administration played a more crucial role than military power in control over a colony. Di Cosmo notes that with new systems of administration the Manchu elite accomplished much more effective governance of frontiers than did previous dynasties when the tributary relationship dominated.¹⁵ Di Cosmo further reminds us that "while in the beginning the military posts were the more important, by the late Qianlong and Jiaqing periods the balance had shifted to civil administration." By then, the Qing eventually transformed the traditional Chinese system of tributary relations and "loose rein" policies into a new system in which the newly incorporated areas were under military occupation together with a more direct administrative structure.¹⁶ In particular Di Cosmo notes that the Qing's Northwest colonies were ruled via a separate ministry,

¹⁵ Nicola Di Cosmo, "Qing Colonial Administration in Inner Asia." *The International History Review* 20.2 (1998), pp. 287-309.

¹⁶ *Ibid.*, p. 290.

the Lifanyuan, and administered differently in different regions. The central government effectively established different systems which were largely run by local elites.

Di Cosmo seems to share a similar opinion with Perdue when arguing that the Qing expedition in Xinjiang was comparable to the territorial expansion of European empires and their establishment of colonial rule over weaker nations and peoples in eighteenth-century world history. He makes this argument in order to illustrate that the construction of the Qing empire was comparable to Western colonial empire-building.

The research of the aforementioned three scholars all focuses mainly on the high Qing expansion and the Qing state building process in the newly incorporated Inner Asian frontiers. They all notice that the Qing frontier strategy was dynamic and the rulers adjusted their frontier policies constantly as time went on. Particularly, Millward mentions that an ideological shift in strategic thinking began to occur after the second Khoja invasion in 1830. However, none of them extend their research beyond the re-conquest of Xinjiang, when a group of Han “nationalist” officials really began to administrate this frontier.

L. J. Newby’s book, *The Empire and the Khanate*, focuses on the political history of the Qing administration of Altishahr (South Xinjiang) and its relations with Khoqand from 1760 to 1860. Newby links the two angles by reminding us that policy towards Khoqand was bound both to the security of the empire’s frontier and the

domestic administration of Altishahr.¹⁷ Moreover, the distinctiveness of Newby's research lies in the fact that she makes a better effort to locate this frontier story in the background of the transformation of China from an expansive empire to a proto nation state. "The [Qing] empire's interaction with peoples outside its territorial jurisdiction contributed towards the move from an open, fluid frontier to a non-negotiable, closed concept of border, thus presaging the shift from a Qing empire to nation-state."¹⁸

The 100-odd years of diplomatic contact between Khoqand and the Qing empire from 1760 to 1864, indicates a shift from the old order to a new one. After the conquest of this northwest frontier area, the Qing soon found that their adjacent neighbor, the Khoqand state, was becoming a more and more powerful regional player and was in all likelihood capable of conquering Altishahr. This threat made the Qing finally choose to further consolidate their control by transforming Xinjiang into a non-negotiable part of the empire. As the Chinese scholar Pan Zhiping has also argued, Khoqand's relationship with Qing China shifted from that of a dependent state (*shuguo*) between 1759 and 1820 to that of a neighboring state (*linguo*) and therefore one that was equal and independent after 1820.¹⁹

¹⁷ L. J. Newby, *The Empire and the Khanate: A Political History of Qing Relations with Khoqand. 1760-1860*, (Leiden ; Boston : Brill, 2005), p. 10.

¹⁸ Ibid, p. 11.

¹⁹ Pan Zhiping, "Lun haohan hanguo de fuwang"(Studies on the collapse of Khoqand Empire), *Xinjiang shehui kexue*, 1988, no. 5, pp. 81-90.

In the same vein, Qing policy toward Altishahr experienced a general shift as well, further demonstrating the transition of a newly incorporated area from a fluid frontier for the empire into a closed border of a would-be nation state. As the conflict with Khoqand and the Khojas persisted, as early as the late eighteenth and early nineteenth centuries, these frontier frictions, together with internal uprisings in Altishahr, enabled the gradual hardening of the concept of border and the development of a border consciousness. Both Manchu (Mongol) officials (e.g. Nayancheng) and Han officials and statecraft scholars (e.g. Feng Guifen and Wei Yuan) came together to argue for Xinjiang as a non-negotiable part of a Chinese empire and voiced support for redefining the relationship with Altishahr and Khoqand. An inclusive border consciousness finally gave way to an exclusive concept of boundary.

This argument can very well supplement Perdue's view on the Qing's re-conquest of Xinjiang. Thus we can see that out of both a nascent nationalism and the legacy of high-Qing expansionism, the late Qing policymakers decided to consolidate their rule in Xinjiang. Moreover, Newby and Perdue's findings lend alert us to the importance of linking the changes of the Qing legal policies with the shift of the two inherent ideologies.

Legal pluralism

Qing Xinjiang society was legally plural, in the sense that two or more legal systems coexisted in this social field.²⁰ Among recent English-language scholarship on legal pluralism, Lauren Benton's work deserves particularly careful reading. Based on the profound observation that "the colonial order was by its very nature a plural legal order," Benton traces a historical global movement between 1400 and 1900, from those "truly plural" legal regimes of the early modern period to the "state-dominated" legal regimes of the modern period.²¹ Benton does not limit her research to one or two regions, but tries instead to identify a common dynamic to all empires and states.

Benton's work can particularly provide guidance for legal research on Qing Xinjiang. Firstly, the shift from truly plural legal orders to state-dominated legal orders is very similar to the process by which state-imposed law became more and more influential in Xinjiang over time, though the two legal systems never had a clear-cut demarcation when applied to Xinjiang legal cases. By "truly plural legal order" Benton refers to the relatively fluid legal pluralism in which semi-autonomous legal authorities operated alongside state law, which appeared in European expansion. The "state-dominated legal order" was described by Benton as hierarchical, in which state law subsumed in one way or another all jurisdictions, including "traditional"

²⁰ John Griffiths defines legal pluralism as "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs". See John Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism*, 24 (1), pp. 1-55.

²¹ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, (New York: Cambridge University, 2002.)

forums given special status by the state.²² Benton's finding lends us a luminous perspective, that is, the extent to which we can define legal pluralism in Xinjiang as "fluid" or "hierarchical." The answer to this question is crucial for us to understand the development of the relationship between the metropolitan conqueror and the conquered frontier.

Secondly, Benton argues in her book that cultural practice and legal institutions, and not just the global economy, shaped colonial rule and the world order. Colonial and post-colonial states developed in part as a response to conflicts over legal ordering. Similarly, when explaining the development of Qing rule in Xinjiang, current scholarship concentrates mainly on economic and military factors. Few scholars have ever explored how frontier legal order and metropolitan strategies interacted with each other in Xinjiang. My research, however, emphasizes that law played a crucial role in shaping the Qing rule over Xinjiang. The jurisdictional flexibility that the High Qing emperors willingly offered enabled local officials to abuse the law and generated severe social conflicts which finally drove the Qing policymakers to consolidate their legal sovereignty there.

Recently scholars have paid more attention to imperial legislation in relation to social change but most of these studies are about the inner provinces.²³ Joanna

²² Lauren Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State", *Comparative Studies in Society and History*. 41, 3 (2000), pp.563-588.

²³ See, Joanna Waley-Cohen, *Exile in Mid-Qing China: Banishment to Xinjiang 1758-1820*, (New Haven: Yale University Press, 1991); and Matthew H. Sommer, *Sex, Law and Society in Late Imperial China*, (Stanford: Stanford University Press, 2000).

Waley-Cohen's book does examine the development and actual implementation of banishment in Xinjiang during 1758-1820. However, what most concerns her is the lives of exile convicts, most of whom came from China proper, as well as the penalty of banishment in Chinese law, rather than the local legal system.

A few studies about the legislation and legal practice in other frontier regions of the Qing empire are particularly helpful for us to discuss the legal situation in Qing Xinjiang. Dorothea Heuschert discusses the development of Qing legislation for the Mongols in a brief but informative essay that shows some inspiring insights.²⁴ Firstly, she argues that the gradual blurring of Mongol and Chinese law does not seem to have been intentional, but a result of the wish to clarify and formalize Mongolian law. Moreover, the validity of the Manchu-made Mongolian statute-book for the whole Qing era indicates that Qing emperors had not intended to impose Chinese law on the Mongols. Secondly, when studying the coexistence of the Qing code and the Mongolian statute-book as well as the applicability of the two laws, Heuschert notices the Qing ruler's ambivalence in deciding between a principle of territoriality and of the ethnicity of the criminal. Thirdly, she reminds us that as the local judicial authority, Mongolian noblemen (*jasaks*) held a recognized position in the official hierarchy of Qing administration in Mongolia. They were not like indigenous litigants in most Western colonies, such as British Africa, who were answerable to the authorities of an alien imperial legal system.

²⁴ Dorothea Heuschert, "Legal Pluralism in the Qing Empire: Manchu Legislation for the Mongols", *The International History Review*, vol. 2, June 1998, pp. 310-324.

It seems to me that all the three phenomena can find parallels in Qing Xinjiang. However I argue that some fundamental differences existed between the two regions. In Xinjiang, there was nothing corresponding to a Mongolian statute-book, which embodies “customary law” in comparison to the Qing state law Qing rulers left much room for indigenous Islamic law to settle civil disputes and minor criminal offenses. Though Muslim *begs* held a position in the state official hierarchy analogous to that of Mongolian *jasaks*, Uyghur religious leaders had long been working independently of the state in the legal realm.

Among scholars who are interested in the experience of the Qing empire in its Southwestern frontier,²⁵ Donald Sutton is the only one who has dedicated research to the dual-law system in this area.²⁶ Utilizing both historical and anthropological methods, Sutton locates legal culture in its bureaucratic context and uncovers the process of legislation in the eighteenth-century Miao frontier. According to him, the Qing legal policy in this region shifted between a firmly integrative approach, which often brought on military conflicts, and a more tolerant, relaxed one. Sutton argues

²⁵ On research on this topic, see for instances, John E. Herman, *Amid the clouds and mist : China's colonization of Guizhou, 1200-1700*, (Cambridge, Mass. : Harvard University Asia Center, 2007); John Herman, “Cant of Conquest: Tsui Offices and China’s Political Incorporation of the Southwestern Frontier”, David Faure, “The Yao wars in the mid-Ming and their impact on Yao ethnicity”, and Donald S. Sutton “Ethnicity and the Miao frontier in the eighteenth century”, in *Empire at the Margins: Culture, Ethnicity, and Frontier in Early Modern China*, edited by Pamela Kyle Crossley, Helen F. Siu, and Donald S. Sutton. (Berkeley: University of California Press, 2005), pp.135-170; pp. 171-189; 190-228.

²⁶ Donald S. Sutton, “Violence and Ethnicity on a Qing Colonial Frontier: Customary and Statutory Law in the Eighteenth-Century Miao Pale”, *Modern Asian Studies*, vol. 37, No. 1 (Feb., 2003), pp. 41-80.

that the reason for the shift lies in bureaucratic splits aligned vertically and horizontally. By the former he refers to the conflicts between Manchu or Han bannermen who favored a quarantine policy to protect the Miao people in contrast to Han Chinese officials advocating the assimilation of the frontier dwellers. More importantly, Sutton stresses the horizontal division separating “ambitious” provincial level officials from the more pragmatic grassroots officials, who had to deal with the frontier reality and often allowed arbitration of Miao cases outside the court.

Sutton’s bureaucratic perspective reminds us that the imperial officials who were sent to rule the frontier were not a monolithic group. The local-level officials, who were implementing the legal policies, often had different agendas from those who made the policies. In the Southwest, these grassroots officials were more eager to diminish violence than to promote assimilation. In Xinjiang, as my research shows, many imperial officials collaborated up with indigenous leaders to abuse the law and gain personal profit.

As for the bureaucratic conflicts Sutton discerns between Manchu and Han officials on quarantine or assimilation policies, in Xinjiang the difference of opinions also seemed to exist on the surface. We do see that the Qing adopted a largely quarantine-based policy in Xinjiang before the Daoguang reign (1821-1850) and after the 1880s the Han Chinese provincial officials promoted a series of culturally assimilating policies. Nonetheless, I argue that the change took place chronologically and not along the line of the policymakers’ ethnicities. The reason that we see the Manchu officials merely advocating a quarantine policy lies in that the empire did not

send Chinese officials to rule the Inner Asian frontier before the Taiping Rebellion. It seems to me that a better way to explore the fundamental reason for change in state legal policy in the frontier is to locate it against the backdrop of the transformation of the Qing from an empire to a state.

According to both Heuschert and Sutton, as well as Millward (in his 1998 book²⁷), the new colonial systems established by the Qing—be they in Mongolian territories, the southwestern Miao frontier, or Xinjiang—all more or less favored non-Han ethnic people over Han Chinese or aimed to protect non-Han from being exploited by Han immigrants or merchants. In Xinjiang, the situation only changed after the Qing experienced increasing border conflicts with the neighboring state, Khoqand, and internal uprisings by the Uyghurs. During the course of transforming itself into a nation-state, the Qing had to redefine its rulers' relationship with different ethnic groups and adjust frontier policies, including in the legal sphere.

Sally Engle Merry distinguishes the “new legal pluralism” from “classic legal pluralism.” The former was mainly about colonial or postcolonial societies, where more than one normative ordering coexisted within the same territory. The latter can be found in almost all societies and is about the relationship between the official legal system and various kinds of unofficial forms of ordering.²⁸ At first sight, the topic of legal pluralism in Xinjiang belongs to the “classic” category, as the two actors, the

²⁷ James A. Millward, *Beyond the Pass*, pp.195-231.

²⁸ Sally Engle Merry, “Legal pluralism”, *Law and Society Review*, vol. 22, No. 5 (1988), pp. 869-896.

Qing state law and the indigenous Islamic law, were easy to identify. However, as Ildiko Beller-Hann reminds us, besides the two codified normative systems there was a third player in the game, which was a set of unwritten rules that can be called “customary law” or “local law” functioning from before the Islamization of this region.²⁹

Contemporary Qing officials, however, did not seem to differentiate codified Islamic law from unwritten Uyghur customs. The two were treated as one set of rules, and called together “*chan su* 纏俗 (Uyghur customs)” or “*hui su* 回俗 (Muslim customs)” in official documents. Different from the Mongolian statute book or *miao li* (Miao statutes), which were both “historical constructs of the colonial periods,”³⁰ in Xinjiang the Uyghur customs and codified Islamic law had much more continuity with the pre-colonial past. More importantly, Chinese officials treated these customary rules in a similar way to local Han Chinese customs in the *neidi*. As Sutton also suggests in his article, the frontier grassroots officials were in a situation similar

²⁹ Ildiko Beller-Hann, “Law and Custom Among the Uyghur in Xinjiang”, in *Central Asian Law: An Historical Overview*, Wallace Johnson and Irina F. Popova, ed., Lawrence, Ks.: Society for Asian Legal History, Hall Center for the Humanities, University of Kansas, 2004, p. 173. This article currently is the only piece of English research concentrating on the law in Uyghur society during the Qing and Republican periods. However, this anthropological study focuses mainly on unwritten local customs, instead of the whole legal system including the two codified laws.

³⁰ Sally Engle Merry, “Law and Colonialism: Review Essay,” *Law and Society Review*, 25.4 (1991), pp. 889-922

to those who worked in the *neidi*, where “the role of custom, personal relations and out-of-court negotiation was probably always large in dealing with locals.”³¹

This issue is related to another big discipline about civil practices of early modern China to which I try to contribute a very tentative response in this dissertation, especially in the second part. In spite of the debate on whether or not custom and civil law existed in pre-modern China,³² the recent two decades have seen a growing literature discussing how ordinary Chinese exchanged and secured their property claims in local area, as well as the role played by the state in dealing with civil matters in the late Qing and early Republic.³³ Particularly, some scholars have noticed how

³¹ Donald Sutton, “Violence and Ethnicity on a Qing Colonial Frontier: Customary and Statutory Law in the Eighteenth-Century Miao Pale”, *Modern Asian Studies* 37,1 (Feb. 2003), pp. 41-80.

³² In 1993 William Jones has suggested that the Qing law paid little attention to “private matters” and civil law as the law dealing with “private concerns of citizens” did not exist in China based on his studies of the Great Qing Code. Philip Huang and some historians have argued that although “civil law” was absent from the Qing Code, it was present in local judicial procedures and custom. In contrast, French historian Jerome Bourgon has claimed, however, that custom and civil law are Western categories that did not exist in Qing China. According to Bourgon, the term “customary law” must be reversed for framing a kind of normative order distinct from official law, and not an undefined collection of practices and feelings. See William C. Jones, “Introduction”, *The Great Qing Code* translated by William C. Jones, (Oxford : Clarendon Press and New York : Oxford University Press, 1993), pp.1-10. Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford, Calif.: Stanford University Press, 1996, and Jerome Bourgon, “Uncivil Dialogue: Law and Custom did not Merge into Civil Law under the Qing”, *Late Imperial China* 23.1 (June 2002) pp. 50-90.

³³ See, for example, Mark Allee, *Law and Local Society in Late Imperial China: Northern Taiwan in the Nineteenth Century*, (Stanford: Stanford University Press, 1994); Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China, 1600-1900*, (Stanford: Stanford University Press, 1998); Anne Osborne, “Property, Taxes, and State Protection of Rights” and Thomas Buoye “Litigation, Legitimacy, and Lethal Violence: Why County Courts Failed to Prevent Violent Disputes over Property in Eighteenth-Century China”, in *Contract and Property in Early Modern*

contracts created property rights as a fundamental institution in China with or without the backing of the state.³⁴

In my dissertation, I observe from a frontier perspective how private economic disputes among ordinary people were settled and examine the role played by the state. I argue that the flexible approach that the Qing legal system adopted to deal with civil matters in the *neidi* was also applied to frontier dwellers. It was embodied in Xinjiang in a non-interventionist policy which tolerated to a great extent the legal power of customary law in the civil domain. Moreover, contracts were a fundamental source of property rights in this multiethnic region.

Significance of Research

The one and a half centuries covered in my dissertation were one of the key transitional periods in Chinese history. From the high point of territorial expansion and state-building carried out by a conquest dynasty at the beginning, the Qing of the later period went on to experience the agony that came from its struggle with other imperial regimes in order to maintain control over its frontiers. My study shows that

China, edited by Madeleine Zelin, Jonathan K. Ocko, and Robert Gardella Stanford, Calif. : Stanford University Press, 2004, pp.120-157; pp. 94-119.

³⁴ See, for examples, Madeleine Zelin, “A Critique of Rights of Property in Prewar China”, Myron L. Cohen “Writs of Passage in Late Imperial China: The Documentation of Practical Understandings in Minong, Taiwan”, Mark A. Allee “The Status of Contracts in Nineteenth-Century Chinese Courts”, and Jonathan Ocko “The Missing Metaphor: Applying Western Legal Scholarship to the Study of Contract and Property in Early Modern China”, in *Contract and Property in Early Modern China*, pp.1-16; pp.38-93; pp.159-177; pp. 178-208.

the Qing rulers managed to integrate this area into the empire without full acculturation. The story this dissertation is telling is one of the creation of Xinjiang as a province over time, though one that still holds an ambiguous status as an autonomous region. Part I of the dissertation is on the criminal cases, which focus on state policy and its impact on the relationship between state and frontier officials; in Part II I use civil cases to examine how people in Xinjiang negotiated legal regime(s) in Xinjiang under Qing rule. At both top and bottom levels there appeared to be integration but not full acculturation.

Moreover, my research will respond to and supplement current literature mainly in three ways. First of all, while most current research discusses the characteristics of the Qing governance of Xinjiang from economic, political, military or administrative perspectives, my research provides an answer, based on legal arrangements in Xinjiang, to the question of how the Qing engineered state building in a multiethnic context, a question few scholars have attempted to address.

Second, while most current studies discuss Qing rule in Xinjiang before the outbreak of the Muslim Rebellion (1864-1877), I extend my study into the period stretching a restoration of imperial rule down to the collapse of the dynasty. Research on a longer period will enable me to draw a more complete picture of how Qing strategy changed in response to various domestic and international crises.

Third, as some historians suggest that there was a trend of “Hanization” of Qing policies toward the end of the dynasty, by locating the change of Qing governance style in Xinjiang against the background of the transformation from an empire to a

proto-nation state, I argue that the changes took place gradually and not along lines of ethnicity. It is as difficult as it is meaningless to separate “Manchu strategy” from “Han strategy.”

Fourth, studies of Western colonialism show a historical shift over three centuries of European overseas expansion: from a relatively fluid legal pluralism in which semi-autonomous legal authorities operated alongside state law, to a hierarchical model of legal pluralism in which state law subsumed all jurisdictions. Inspired by this framework, my dissertation will discuss the extent to which the legal pluralism in Xinjiang can be considered “plural” or “hierarchical.” Through an analysis of cooperation and competition between local religious courts and those of the Qing state, this work leads to a better understanding of the characteristics and development of Qing colonialism.

Organization of Dissertation

Part One of this dissertation, comprising two chapters, focuses on the legislation in the newly conquered region and changes in the applicability of the two legal systems—Qing state law and indigenous Islamic law—in the criminal domain. The general trend was to leave much room for indigenous law to operate in this frontier region, while the Qing rulers gradually tightened their control over criminal cases.

Chapter 1 addresses early legislation for Xinjiang as well as the Qianlong emperor’s opinions on the rule and administration of the “New Territories.” Together these two factors laid the foundation for Qing policies implemented in Xinjiang. I

analyze how and why Qianlong set the pattern for a complex and not always consistent application of the law in Xinjiang. Specifically, the emperor's intentional neglect of institution building in Xinjiang and the ad hoc character of the Qing's Xinjiang policies will be discussed. In addition, a comparison will be drawn between Xinjiang legislation and that of the Mongolian frontier.

Chapter 2 examines more closely the legacy of the Qianlong emperor's approach to law and governing Xinjiang. During the first half of the nineteenth century, the loosely defined plural legal order led to serious corruption among imperial officials and indigenous chieftains, which in turn generated frequent uprisings by impoverished Muslims. These uprisings and the Qing's constant border conflicts with Khoqand made the court finally adopt a more aggressive rule in Xinjiang. Accordingly, there was a shift toward a hierarchical model of legal pluralism. After the Muslim Rebellion and the re-conquest of Xinjiang, Qing law was the only law applied in serious criminal cases, irrespective of the ethnicity of the offender, while the arbitative domain of Islamic law shrank. Moreover, I argue that the changes in how the Qing dealt with Xinjiang had a closer connection with the Qing's transformation from an empire to a state than with the policymakers' ethnicities.

Part Two of my dissertation, comprising three chapters, focuses on how the civil jurisdictional mechanism operated in Xinjiang, especially after the establishment of the province, as well as how indigenous Uyghurs and Chinese immigrants negotiated their economic transactions within the pluralistic legal system. In general, I argue that

the intervention of Qing state law in the everyday lives of indigenous people was always been very limited and hardly helped promote the acculturation of this conquered territory into the larger Qing empire.

Chapters 3 and 4 investigate how the Qing/state and Islamic/local legal authorities competed and cooperated in regulating indigenous Uyghurs' everyday lives, using two dimensions involved in disputes as my windows into this subject—the gendered world of family and marriage and the economic transactions reflected in contracts and property disputes.

In Chapter 3 I suggest that Turkic customs and Islamic law in some cases provided Uyghur women with more “rights” than both their co-religionists in the Middle East and Han Chinese women. After the 1880s the new provincial officials tried to impose greater supervision on the gender order and relations among Uyghurs but the practical results turned out to be insignificant. Nonetheless, the existence of a Han Chinese *yamen*³⁵ in every county did have some real impact on Uyghurs' marital lives. Furthermore, legal archives in both Chinese and Turkish languages show that indigenous litigants were fully aware of the even more patriarchal nature of the Qing legal system and soon learned to press individual claims by exploiting jurisdictional confusion.

Chapter 4 explores the operation of the pluralistic legal arrangement in adjusting Uyghurs' economic relations and protecting their property rights. The most distinct

³⁵ This Chinese word means government administrative office.

and effective cooperation between the two courts was exemplified in the recognition and protection by Chinese legal authorities of *maor*-sealed Chagatai contracts. Generally speaking, only a small minority of Uyghurs' economic disputes were brought to the magistrates' desk. I argue that after the re-conquest, the Qing intervention in Uyghurs' everyday life was still very limited but this non-interventionist policy became more extreme toward the end of the dynasty: Han prefects and magistrates left all Uyghur economic disputes to local *akhunds* to handle according to indigenous law. The state simply withdrew from this realm.

Chapter 5 discusses how Uyghur natives and Chinese immigrants handled their economic disputes and protected their property rights in a multiethnic and jurisdictionally plural society. It seems to me that an important feature of Chinese law, namely the tolerance of local customs, as well as the extensive use of written contracts in both Chinese and Islamic legal cultures, enabled ordinary people to undertake various types of transactions and protect their economic interests in Xinjiang. Moreover, I argue that the lack of any established social mechanisms to mediate between different ethnic groups in Xinjiang required the state to play an active role in regulating and enforcing property rights and the protection of indigenous inhabitants' interests. However, the weak dynasty in its last years hardly achieved this aim.

CHAPTER 1

LEGISLATION IN XINJIANG AND THE QIANLONG EMPEROR'S ATTITUDES

This chapter is mainly about frontier legislation, in which I will discuss the Qianlong emperor's opinions on how to rule and administer the "new territories," opinions that laid the foundation for the Qing policies implemented in Xinjiang. My discussion will especially focus on the emperor's opinion on the applicability and practice of law in this area, as well as how frontier legal policies changed over time. I argue that the Qianlong emperor set a pattern for complex and not always consistent application of the law in Xinjiang and I will analyze how and why he did this in this chapter.

During the Qing dynasty, the territory of China was greatly expanded and several frontiers were added to the map of the Manchu state. As the Qing was a conquest dynasty whose own people were outnumbered many times over by the indigenous Han Chinese, how the Manchu rulers consolidated their power and effectively controlled this vast territory has long intrigued both Western and Chinese scholars.

Among all the Qing Emperors, it was Qianlong who laid down a solid foundation for Qing frontier policies, especially those affecting Xinjiang. Calling himself the "old man of the ten completed great campaigns," the Qianlong emperor won the majority of important wars launched during his reign. From 1755 to 1759, he

fought against the Zunghar, one of the western Mongol groups in North Xinjiang (Zungharia), and the Turkic Muslim Khoja brothers in South Xinjiang (Altishahr), dramatically expanding the Empire into central Asia³⁶. Before and after the anti-Zungharia war, Qianlong also launched eight other wars to suppress Tibet, Taiwan and even invaded Vietnam. Under the Qianlong reign, the Qing as a multiethnic, multi-linguistic empire gradually took its final shape. Qianlong has been regarded as a Chinese state-builder, a Manchu ethnic chief, and also a colonizing ruler whose empire-making ambitions largely transcended ethnicity.³⁷

It is now well known that Qianlong projected different images of ethnic identity to the different groups of his subjects. To Han Chinese, Qianlong was a Confucianist, a Han-style literati, a collector of Chinese painting and calligraphy³⁸, and even a Taoist believer³⁹. To Manchu bannermen, Qianlong was a champion of Manchu language and values, who usually expressed his scorn for decadent Han elites and worried about the Manchus' degeneration.⁴⁰ To Tibetan and Mongolian subjects,

36 Peter Perdue, *China Marches West*, pp. 133-302.

37 See Nicola Di Cosmo, "Qing colonial administration in Inner Asia", pp. 287-309.

38 See Pemala Crossley, "Thinking about Ethnicity in Early Modern China.", *Late Imperial China* 11 (1990), pp.1-35; and Evelyn S. Rawski, *The Last Emperors—A Social History of Qing Imperial Institutions*, (Berkeley and Los Angeles: University of California Press, 1998), p. 51.

39 Harold L. Kahn, *Monarchy in the Emperor's Eyes—Image and Reality in the Ch'ien-lung Reign*, (Cambridge: Harvard University Press, 1971), p. 184.

40 See Philip A. Kuhn, *Soulstealers: The Chinese Sorcery Scare of 1768*, (Cambridge and London: Harvard University Press, 1990), pp. 68-70. Susan Naquin and Evelyn S. Rawski, *Chinese Society in the Eighteenth Century*. (New Haven: Yale University Press, 1987). p. 18.

Qianlong designed his most famous self-representation—as a reincarnation of the Manjusri bodhisattva.⁴¹ While there might not be any image of the Qianlong emperor designed for Uyghurs as enlightened as that of the bodhisattva, we do know that he acquainted himself with the Uyghurs and married the “fragrant concubine” (*xiang fei* 香妃) of the Khoja clan.⁴² These ecumenical claims of the Emperor, as well as the establishment of a series of imperial institutions and state rituals to enact them,⁴³ reflected a highly developed ruling, especially colonizing, technique. As Evelyn Rawski states, “the key to Qing achievement lay in its ability to implement flexible culturally specific policies aimed at the major non-Han peoples inhabiting the Inner Asian peripheries in the Empire.”⁴⁴

The fact that Qing territory was considerably expanded and consolidated during his reign, and that the Qianlong emperor was well received by different ethnic groups, can be taken as an indication that he had successfully implemented “culturally specific policies” to rule his frontiers. Therefore, Xinjiang serves as a good case study for research on the Qianlong emperor’s frontier policies. The central inquiry of this chapter can be sub-divided into several questions. What were Qianlong’s basic ideas

41 David M. Farquhar, “Emperor as bodhisattva in the governance of the Ch’ing empire”, *Harvard Journal of Asiatic Studies*, 38, No. 1 (June 1978), pp. 5-34.

42 James A. Millward, “A Uyghur Muslim in Qianlong's Court: The Meanings of the Fragrant Concubine.” *Journal of Asian Studies* 53:2 (May 1994), pp. 427-458.

43 See Evelyn S. Rawski, *The Last Emperors*, and Philippe Foret, *Mapping Chengde: The Qing Landscape Enterprise*, (Honolulu, University of Hawaii Press, 2000).

44 Evelyn S. Rawski, *The Last Emperors*, p. 7.

about ruling non-Han frontier areas? What were the features of Qianlong's Xinjiang policies, especially the legal ones? How does one evaluate the success and failure of these policies? How did the emperor guide his bureaucracy, especially provincial officials, to govern frontiers and non-Han people living there? This chapter tries to find some answers to these questions.

The Emperor's basic consideration on ruling Xinjiang

The Qing empire comprised five main parts: Manchuria, China proper, Mongolia, Tibet and Xinjiang.⁴⁵ For Qing rulers, the conquest of Xinjiang may have been the most controversial, both in terms of the necessity for conquest and the means of control to be employed. The controversy was the result of several factors: the repeated internecine strife among the Oirat tribes, the threat from Russia, which was always waiting to take advantage of instability on its eastern frontier, and the defiance of the Khoja brothers who filled the power vacuum in Altishahr left by the Zunghar khanate. Facing such challenges, Qianlong was forced to give up his original plan for Xinjiang—that is, to establish several power entities there to pin each other down, rather than to conquer and control Xinjiang directly. At the time that Qianlong ascended the throne, he made an effort at peaceful coexistence with the Zunghars. He

45 In Chinese, Xinjiang literally means “new territories.” Though the name only appeared after 1884 when the Qing established Xinjiang province, I use it in this dissertation for convenience to refer to the vast region comprising both Zungaria (area to the north of the Tian Shan) and the Tarim Basin (area to the South of the Tian Shan). Due to its complicated political history and the religious, linguistic and social diversity, many other names were given to this region, especially the southern part, such as Eastern Turkestan, Chinese Turkestan, Altishahr, Little Bukhara, Xiyu and so on.

allowed the Zunghars to maintain regular trading relations with China and they sent periodic tribute missions to Beijing for nearly a decade. Had the western frontier not been thrown into disarray after Galdan Tsering's death in 1745, this situation might have remained unchanged. Therefore it would not be inaccurate to characterize Qing policy as one of "defensive imperialism" in Xinjiang.

The Manchu elites were now presented with a brand new project, figuring out how to govern South Xinjiang. In contrast to their relatively rich knowledge about Tibetans and Mongols, Manchu elites knew little about the Turkic Muslims (Uyghurs) living in South Xinjiang. Furthermore, for Qing rulers the control of millions of Muslim subjects was an ideological challenge. They "could not become proper Islamic monarchs on a scale that gave them real leverage without the approval of Mecca, which could not be managed the way Lhasa was managed."⁴⁶ At the same time, there was little in Tibetan Buddhism or Manchu shamanism that could appeal to these Muslims.

It is worth noting that launching military attacks on Xinjiang, especially South Xinjiang, might not have been Qianlong's original intention, although it is also possible that he expressed such sentiments in order to deflect any accusation that he was a warmonger. The Emperor was still trying to justify his Inner Asian wars after the court had already begun to celebrate their big success in 1759. In the ninth month

46 Willard J. Peterson ed., *The Cambridge History of China*, vol. 9, Part one "The Qing Empire to 1800", (Cambridge: Cambridge University Press, 2002). Alexander Woodside, "The Ch'ien-Lung Reign", p. 237.

of that year, in an edict to those officials who insisted on completing the war as soon as possible, Qianlong stated,

You might not know that it was not my original intention to launch a war in the Uyghur region (*huibu* 回部)... Just because the evil (Khoja) brothers were devoid of gratitude and even pounced on us, (we) had to suppress them in order to punish their crimes...Please think about the Han, Tang, Song and Ming dynasties, respectively. They exhausted their financial resources but failed to seize even a small piece of land. How do they compare to our glorious Qing dynasty? Since it has been peaceful for a long time, the military skills of our bannermen have languished. War (serves to) train the troops and polishes their skills...I have thoroughly thought about the whole issue. How can you say that I have a fondness for the grandiose?”⁴⁷

One month later, in the “Pacifying the Muslim tribe” edict, Qianlong pointed out again, “...therefore we had no choice but to suppress (the Khojas), since originally we did not intend to wantonly engage in military aggression.”⁴⁸

Although nowadays historians still have the impression that Qianlong had a taste for political theatrics,⁴⁹ South Xinjiang was very possibly an unplanned byproduct of the Manchus overall expansion project. So it might be safe to assume that from the very beginning Qianlong did not have a detailed blueprint for the

47 *Daqing Lichao Shilu* (hereafter QSL), Qianlong reign, (Taipei: Hualian Chubanshe, 1964), 597: 34b.

48 QSL, Qianlong reign, 600: 3b-7b.

49 Philip A. Kuhn. *Soulstealers*, p.228.

establishment of the new territory. It is highly likely that Manchu rulers were not well prepared to directly rule over Xinjiang, especially South Xinjiang. The stance of the Qianlong court toward Xinjiang varied over time and should be seen as a process of constant experimentation, testing, and adjustment. As we can see in the following discussion, this was a possible reason why the emperor's opinions were self-contradictory or changed quickly on several occasions. However, it seems that there was a basic strategy in the emperor's mind with regard to the governance of Xinjiang, that is, to station large numbers of troops around the Ili region, to exert tight control over North Xinjiang, and to rely on local Muslim leaders who pledged allegiance to the Qing to rule over the South in a looser way.⁵⁰

The Xinjiang administrative system of Xinjiang

How did Qianlong plan to govern Xinjiang? What kind of administrative system did he have in mind for the territory? As Qianlong pointed out in the aforementioned edict, one function of the Inner Asia war was to drill banner soldiers. Banner troops consisted of the main body of Qianlong's westbound army. Following the conquest, basically a clique of Manchu military commanders was in charge of Xinjiang affairs. High-ranking generals such as Zhaohui and Shuhede were leaders of this conquest group. In addition to this military group, there was another administrative group shared power over Xinjiang. This group was led by the Governors-General of Shaanxi

50 QSL, Qianlong reign, 570: 26a-b.

and Gansu (*shan gan zongdu*), who had been in charge of all administrative affairs in Shaanxi, Gansu, and the Eastern Xinjiang area before 1759 when Xinjiang became an independent administrative unit. Two Han officials took up this position in succession from 1755 to 1766: Huang Tinggui (1755-1759) and Yang Yingju (1759-1766). Both of them were Han bannermen. As Han Chinese they were a minority in the uppermost layer of the “provincial bureaucracy”, in which Manchu officials dominated.⁵¹ Despite their Han lineage, they were seen, in Qianlong’s eyes, to be different from ordinary Han officials because of their bannerman identity. In fact, during the Qianlong reign, the share of Han officials in the “provincial bureaucracy” decreased by about a half.⁵²

In February 1759 Huang Tinggui died of illness. His successor, Yang Yingju, was quite active at the beginning of his appointment. Like the Qianlong emperor, Yang was considering issues of ruling the vast “New Territory” as the war approached its end. At the end of 1759 he sent a memorial to suggest combining the separate governorships of Shaanxi and Sichuan into one position of “Governor-General of Sichuan and Shaanxi.” His own title, as a consequence, would be changed to “Governor-General of Gansu” so that his responsibilities could be concentrated on the affairs of Gansu and Xinjiang. Qianlong accepted his suggestion at the outset and asked Yang as well as other Manchu generals to discuss how to

51 See Qian Shifu, *Qingdai zhiguan nianbiao*, (Beijing, Zhonghua shuju, 1980), vol. 2, pp. 1400-1437, and pp. 1590-1644.

52 Philip Khun, *Soulstealers*, pp. 120-121.

create an administrative structure for Xinjiang. At that time the Emperor seemed to be considering the incorporation of Xinjiang into the regular administrative “prefecture-county”⁵³ system.⁵⁴ However, several months later Qianlong changed his mind. He decided not to station massive forces in South Xinjiang, but thought that the Ili area “still needed top Manchu generals (*man zhou da yuan* 滿洲大員) to govern”. At that time Yang Yingju had already gone all the way from Suzhou (today’s Jiuquan city, Gansu Province) to Ili, where his *yamen* was located, in order to familiarize himself with the situation in Xinjiang. Yang had begun to prepare himself as governor of the New Territory (at least North Xinjiang). However, Qianlong clearly upset Yang’s aspirations by issuing an edict saying “the newly incorporated land, such as the Ili area, was far away from the *neidi*. Everything is difficult to control from a remote distance...So I sent Manchu generals to govern there exclusively. Neither were Green Standard troops able to suppress that region, nor was the Governor capable of managing it... It is not necessary for Yang Yingju to be there. As (you) are already on [your] way, you should return soon to the interior...In sum, the boundary

53 The administrative divisions of China have consisted of several levels since the Qin dynasty(221-206BC). A three-tier system based on the levels of *dao* (circuits), *zhou* (prefecture) and *xian* (county) came into being during the Sui (581-618) and Tang (618-907) dynasties. This system lasted through the Song dynasty (960-1279). The Yuan dynasty (1271-1368) introduced the modern precursors to provinces, bringing the number of levels to four. This system was then kept more or less intact until the Qing.

54 Guan Shouxin, *Qingdai Xinjiang junfu zhidu yanjiu* (Studies on the military administration in Qing Xinjiang), (Wulumuqi: Xinjiang daxue, 2002). p.52.

of your jurisdiction is only up to Urumchi.”⁵⁵ Further, in December 1760, one year after the establishment of the position of the Governor-General of Gansu, Qianlong abolished this office and restored the position of Governor-General of Shaanxi and Gansu.⁵⁶

Thus in 1760 the administrative structure of Xinjiang took shape. The headquarters of the military garrison in Ili became the administrative center for all of Xinjiang. Below the center, diverse arrangements were made. In northern and part of eastern Xinjiang, the Qing established what was basically the civil administrative system applied to the interior provinces, with the addition of one or two independent counties or prefectures *zhilizhou* or *zhiliting*.⁵⁷ The Muslims living in Hami and Turfan and other Mongolian tribes in this region were organized as banners with their chieftains designated as *jasaks* who ruled over their people autonomously. In South Xinjiang, Muslim officials—*begs*, whom the Qing appointed to administer the Turkic-speaking population—governed Uyghurs and other Turkic-speaking natives, under the supervision of military residents.

It is clear that in Qianlong’s appointments to the administrative positions in Xinjiang, military officials led by high-ranking Manchu generals were given priority.

55 QSL, Qianlong reign, 612: 4b-5a.

56 Wang Xianqian ed., *Donghua xu lu*, Qianlong reign, in the book series of “*Xu xiu si ku quan shu*”(vol. 373), (Shanghai: Shanghai guji chubanshe, 1995), 52: 8a-b

57 As for the detailed change of the institution establishment, see Peter Perdue, *China Marches West*, p. 339.

During the wars in Inner Asia, Qianlong always trusted and relied on his Manchu generals. With their aid, Qianlong had successfully conquered Xinjiang. Now he wanted to continue to rely on these generals to govern this frontier region. It is known that, in his territorial administration of China proper, Qianlong appointed Manchus to the highest positions (as provincial governors-general) and Han Chinese to the lowest (as prefects and county magistrates)⁵⁸. In the Xinjiang administration, the appointments were even more biased in favor of Manchu bannermen. Manchu top officials (and imperial kinsmen) constituted the main body of the upper ruling strata of Xinjiang. Even the ordinary civilian positions in Eastern Xinjiang were largely filled by Manchu officials.⁵⁹ A study of the official composition at various levels of administration in Xinjiang, including circuit, prefecture, district, and county in the Qianlong period, suggests that Manchu appointments outnumbered both Mongol and Han bannermen by roughly two to one.⁶⁰ This showed a dramatically different pattern from that in China proper.

This appointment policy, however, was not initiated by Qianlong. It can be traced back to policies established with the founding of the Lifanyuan, which was the preserve of Manchu and Mongol administrators, and the only body in which ethnic

58 Willard J. Peterson ed., *The Cambridge History of China*, vol. 9, p. 238.

59 Guan Shouxin, *Qingdai Xinjiang junfu zhidu yanjiu*, p. 149.

60 Luo Yunzhi, *Qinggaozong tongzhi xinjiang zhengce de tantao*, (Taipei: Li ren shuju, 1983). pp. 131-47.

Chinese were excluded from positions above the rank of clerk-translator.⁶¹ Han Chinese non-banner officials were excluded from the administration of Xinjiang. The preferential treatment of Manchu officials lasted through the later reigns of the dynasty until the suppression of the Taiping rebellion (1850-1864), when many Han commanders of the new “regional armies” were appointed as provincial rulers. However, no parallel shift from Manchus to Han took place at the metropolitan level.⁶²

Why did the Qing Emperors distrust their Han Chinese officials to deal with frontier affairs? The following case might provide a clue to understand Qianlong’s thinking. In January 1760, the Han bannermen⁶³ governor-general Yang Yingju suggested an official monopoly over saltpeter and sulphur (the ingredients for manufacturing gunpowder) mined around Kuche. The Qianlong emperor rejected his proposal with the following response:

This is really a bad characteristic (*louxi* 陋習) of you Han bannermen (*luqi* 綠旗)! You formulate these kinds of regulations in an over precise and minute manner. However, didn’t you know that it was

61 Nicola Di Cosmo, “Qing Colonial Administration in Inner Asia”, pp. 287-309.

62 Edward Rhoads, *Manchus & Han*, pp. 47-48.

63 Han bannermen were also called as Chinese-martial (*hanjun* 漢軍) bannermen. See Edward Rhoads, *Manchus & Han*, p. 23, Wang Zhonghan, “Qingdai baqi zhong de Man-Han minzu chengfen wenti”(The question of Manchu and Han ethnic elements in the Eight Banners of the Qing), *Minzu yanjiu*, no. 4, 1990, pp. 62-66, and Pemala Crossley, *The Manchus*, (Oxford : Blackwell, 2002), p. 7.

often the case for local people to claim local products or even to make a small profit by selling the products to the newly incorporated Muslim frontier? How could you completely prohibit them from doing so? If you argued that the purpose of prohibiting the private storage of (those chemicals) was to minimize troubles, (it would simply be narrow-minded and unnecessary) just like to confiscate all of the weapons from those who surrendered. In every battle at the Hui frontier, our troops always defeated the enemy (even though we never seized their weapons). Do you believe that no saltpeter was made there before? Could it be said that we used to ban them from extracting (such materials)?”⁶⁴

As Pamela Crossley argues, the Qianlong emperor, in contrast to the Yongzheng and Kangxi emperors, rejected the flexible “transformationalist” ideology of identity and asserted rigid cultural differences among Manchus, Mongols and Chinese. He was eager to define “who was who” in order to consolidate his control of the multi-ethnic empire and prevent the assimilation of Manchus.⁶⁵ Thus it is not strange for him to make the above generalization of the “narrow-minded” character of the Han bannermen. This quote indicates that, in Qianlong’s mind, Han officials tended to pay attention only to minor economic benefits for the state but overlooked significant objectives. From his point of view, such intrinsic “bad characteristics” of

64 QSL, Qianlong reign, 602:12b-13a.

65 Pamela Crossley, *A Translucent Mirror*, pp. 221-336.

Han officials constituted a weakness that made them unsuitable to take up important positions governing frontier areas. Specifically, he felt that Han officials lacked a tolerant mindset, or the capability to harmonize with other ethnic groups. More so, they were overly concerned with petty profits, often at the expense of real benefits. Generally speaking, to the Qianlong emperor, the seizure of material benefits was not the primary purpose of controlling ethnic frontiers. What mattered was to maintain the social stability of all occupied territories. Also, it was evident that Qing emperors were confident about their military power. Concern with social stability rather than economic benefits as well as strong confidence in their military power made Manchu emperors take a more tolerant approach toward the governance of Xinjiang.

Economic benefit, of course, had only been one of Qianlong's considerations in drawing up Xinjiang policies. While the emperor did not expect economic benefits from control of Xinjiang he did expect that Xinjiang at least could be self-sufficient without the center having to financially support the troops and bureaucracy there, though this goal was never reached.⁶⁶ It is very interesting that, two months after rejecting Yang's suggestion that the state establish a saltpeter and sulphur monopoly, Qianlong sanctioned the Manchu councilor Shuhede's proposal requesting that a certain number of Aksu Muslim households hand in saltpeter and sulfur they extracted. Qianlong also made a detailed plan for the production and transportation of

66 James A. Millward and Peter Perdue C. "Political and Cultural History of the Xinjiang Region through the Late Nineteenth Century", in S. Frederick Starr ed., *Xinjiang: China's Muslim Borderland*, (New York and London: M. E. Sharpe, 2004), p. 58.

saltpeter and sulphur for the entire southern Xinjiang area. As southern Xinjiang was quite rich in these two mineral resources, Qianlong ordered the cessation of (unnecessary) transportation of gunpowder from inland.⁶⁷ To the Qianlong emperor, economic benefit was surely attractive, but it could not be reaped at the expense of the social stability of a new frontier. In Qianlong's view, Manchu officials might be more capable than Han officials to balance the gain and loss between economic interest and social stability.

In addition to the central officials sent to Xinjiang, local ethnic agents, mainly *begs* and *jasaks*, were also an important component of administration. What was the emperor's attitude toward these local ethnic agents? Qianlong advocated a policy of tolerance and nonintervention. It is also worth noting that the emperor often behaved very cautiously when dealing with these native ethnic officials. At the end of 1761, a Manchu official, Kashgar Imperial Agent (*banshi dachen* 辦事大臣) Yonggui, sent a memorial suggesting that, since some Muslim *begs* often exploited their subjects and made trouble, the government should expand its regulations in such a way as to reduce the power of local authorities. One way would be to add the confiscation of livestock and other goods to the current range of judicial penalties that could be applied to local authorities who did not cooperate with the new regime. Qianlong refused his suggestion. He was concerned that "if (the confiscation) is not handled well and causes any corruption, it will give Uyghurs excuses (to criticize our rule), which

⁶⁷ QSL, Qianlong reign, 605:8b-9a.

will be extremely disgraceful.” “In addition,” he continued, “Do you really think people living in the *neidi* never cheat or disguise (*ji neidi ren deng, qi jing quanwu qishi ye* 即內地人等，豈竟全無欺飾耶)?”⁶⁸ Qianlong remained alert to his non-Manchu subjects, not only Muslim *begs* but also Han Chinese. His generosity and tolerance can be partly explained as taking precautions against potential troubles. At the same time he did not take it for granted that the Han Chinese or officials were more trustworthy than Muslims. Again we see that the Qianlong emperor regarded Uyghur subjects as equally important as, if not more than, the Han subjects in his multi-ethnic empire. This is a view that also appears to be embraced by an increasing number of contemporary historians. For example, James Millward suggests that within the ideological scope of Qianlong’s Empire, “neither Han Chinese nor Chinese culture was granted privileged position in the Inner Asian parts of the realm”.⁶⁹

The legislation

Before the advent of Qing governance, Islamic law (mixed with some traces of pre-Islamic native customs of this place)⁷⁰ regulated Uyghur behavior in Eastern Turkestan. It was recorded in a Chinese document that “the Uyghurs do have their criminal law, but they do not have their codes or statutes. (When they have disputes),

68 QSL, Qianlong reign, 648: 17b-18b

69 James Millward, *Beyond the Pass*, p. 234.

70 See Ildiko Beller-Hann, “Law and Custom Among the Uyghur in Xinjiang”, pp. 173-194.

they go to *akhunds*, who will look at the (Islamic) classics to make a decision. Both *begs* and common people will all believe and obey the arbitration.”⁷¹ Generally speaking, Islamic law pays more attention to private law.⁷² The judicial regulations of civil cases constituted the main body of Islamic law. This is in contrast to the Chinese traditional legal system, largely represented by the Great Qing Code, which had a strong penal emphasis. In the Great Qing Code, even matters of a civil nature were treated based on stipulations of penalties. Moreover, whereas Islamic law operated parallel to state authority, Chinese law was public law and “dealt with all matters from the point of view of the ruler”.⁷³

After 1759, the Qing rulers allowed the application of Islamic law in dealing with the civil disputes and the least serious criminal cases. When dealing with other criminal cases, especially severe ones, officials had to make reference to the Qing law (*an lu ni zui* 按律擬罪). It is widely agreed that the adjudication of civil and non-severe criminal disputes among Uyghurs during the Qing dynasty was largely carried out by *akhund*.

71 Su Erde, *Xinjiang Huibu zhi*, (Taipei: Cheng Wen chubanshe, 1968), cited in Wang Dongping, “Qingdai Huijiang diqu falv dianzhang de yanjiu yu zhushi (Legal classics of Qing Huijiang area)”, in *Xibei Minzu Yanjiu* (Studies on Northwest Peoples), 1998, no. 2. p. 103.

72 Although the categories of Western law might be meaningless within the non-western system of formal law, we use such terms as “private law” and “public law” in a relative sense in order to compare the Chinese and Islamic legal systems.

73 William C. Jones, transl., *The Great Qing Code* (Oxford: Clarendon Press, 1994), Introduction, p.7.

During the Qing dynasty, the central government continuously incorporated new sub-statutes and regulations into the Code to meet new exigencies, such as the incorporation of new frontier colonies. Legislation for ethnic areas was an important project of the Qing government. However, the legislation in Xinjiang, especially in terms of the legislation of criminal and civil laws, was different from that in other ethnic or frontier areas.

Qing rulers did not lack experience in the design of a legally pluralistic empire. As early as the Kangxi reign, they began to incorporate elements of Chinese law into Mongolian law. However, we will find that, when dealing with the legislative issues of Xinjiang, the Qianlong emperor did not duplicate the approach that his ancestors and he himself followed when dealing with Mongol tribes. Differences in legislation between Xinjiang and Mongol regions, as well as the rationale behind them, are worth detailed inspection.

In 1643 the Lifanyuan compiled the *Mongol Penal Code* (*Menggu liishu* 蒙古律書), which was a collection of all the precedents and rules concerning Mongolian affairs during Huang Taiji's reign.⁷⁴ The collection listed all entries without categorizing them. During the Shunzhi and Kangxi reigns it was revised several times and the earliest extant edition bears a 1667 date.⁷⁵ The compilation of this collection

74 Shimada Masao, *Minmatsu Shinsho Mongoru hō no kenkyū* (Studies on the Mongolian laws in force at late Ming dynasty toward early Qing dynasty), (Tōkyō : Sōbunsha, 1986), pp. 400-403.

75 This collection was written in Mongolian and is preserved in No. 1 Archives, Beijing. The archive number is "Meng 19," classified as "Mongolian archives of Inner Secretariat (*nei mishu yuan Menggu wendang bu*)".

indicates that the Manchu government had extended their legislative powers over Mongols and Mongol areas by this time.

The next Qing Mongolian legal code compiled after *Menggu liǐshu* was *Mongol Statutes and Precedents* (*Menggu Lili* 蒙古律例), which was promulgated for the first time in 1741. Generally speaking, the most significant legislative milestone for ethnic areas in the Qing Dynasty was the compilation and revision of *Menggu Lili* during the Qianlong reign (1741-1785).⁷⁶ This set of regulations was compiled based on *Menggu liǐshu* but with a large number of amendments. This set of regulations contained twelve categories, including “Official titles” (*guanxian* 官銜), “Registered population and taxes” (*huikou chaifu* 戶口差賦), “Tribute” (*chaogong* 朝貢), “Alliances and military affairs” (*huimeng xingjun* 會盟行軍), “Customs and passes” (*bianjing kashao* 邊境卡哨), “Theft” (*daoze* 盜賊), “Homicide” (*renming* 人命), “Litigation” (*shougao* 首告), “Arrests and escapes” (*buwang* 捕亡), “Other Offenses” (*za fan* 雜犯), “Lama regulations” (*lama li* 喇嘛例), and “Judgment and prisoners” (*duanyu* 斷獄). About half the regulations in *Menggu Lili* focused mainly on criminal matters, including both severe crimes, such as homicide and robbery, as well as non-severe crimes, such as stealing livestock and cursing a person of higher class. The punishments for these crimes were clearly specified in every sub-statute. In

76 As for the different editions of *Menggu luli* and the differences among them, see Shimada Masao *Shinchō mōkorei no kenkyū* (Study on the Mongol Regulation of the Qing Dynasty). (Tōkyō : Sōbunsha, 1982), pp.117-171; Dalizhabu, “*Menggu luli ji qi yu lifanyuan zeli de guanxi*”, *Qingshi yanjiu*, 2003, vol. 4, pp.1-10, and Zhao Yuntian, “*Menggu luli he lifanyuan zeli*”, *Qingshi yanjiu*, 1995, vol. 3. pp. 106-110.

addition, *Menggu Lili* regulated various civil matters, such as tax collection, marriage and divorce. It followed a similar format to that of the Great Qing Code and provided regulations for the same kinds of civil matters. In brief, the Qing government intentionally formulated a set of laws, particularly applicable to Mongol areas, which pertained to administrative, civil and criminal concerns. This code can be seen as parallel to the one Qing used to govern inland China.

In 1789, the Qing government issued *Rules and Precedents of Lifanyuan* (*Lifanyuan zeli*), which was based largely on the *Menggu Lili*.⁷⁷ From that time the regulations of the *Menggu Lili* formed the main body of law applied over Mongolia, Tibet and some other areas. Yet for a long time, the Qing rulers had been trying to combine two different legal systems (Chinese-styled Qing law and the autochthonous Mongolian law) organically into one legal code. *Menggu Lili* (together with *Menggu lushu* and *Lifanyuan zeli* 理藩院則例) is a good example of such a combination. To meet the special situation in ethnic areas, some unique regulations were issued and included in *Menggu Lili*. For instance, it is apparent that *Menggu Lili* widely preserved customary law's use of livestock fines as a penalty for criminals or civil offenses in the legislation of the Mongol area. (It is likely that Yonggui's aforementioned memorial was inspired by existing customs of livestock fines.) Mongolian legal tradition used fines levied in livestock to punish various crimes, including homicide, theft, rape, adultery and so forth.

77 Gong Yin, "Qingdai Minzu Fazhi Gai Shuo (Qing ethnical law system)", in *Xibei Minzu Xueyuan Xuebao*, 2002, no. 7, pp. 183-184.

Many regulations of the *Menggu Lili* combined the typical penalties found in Chinese law, such as strangulation and banishment, with livestock fines in a comprehensive way. For example, one of the sub-statutes in the statute on “homicide” of the *Menggu lili* stipulated that “either an official or an ordinary person, who intentionally kills his wife, would be punished by strangulation with delay. If there was a quarrel or a scuffle between the couple before the murder, the offender should compensate the wife’s family with “three nines” (one “nine” was a combination of nine different domestic animals) as atonement of his crime”.⁷⁸ This sub-statute indicates that in addition to livestock fines the Qing law makers also incorporated a Mongol tradition of compensating the victim of crime.

Another example relates to criminal motivation. In traditional Mongol criminal law, when determining punishment, whether an offender committed a crime on purpose or not was not considered. But in the Chinese legal system, the motivation was always an important factor in determining the penalty. For example, in *The Great Qing Code*, the penalties for killing a person on purpose and manslaughter are different. After the Qing conquest, motivation was taken into consideration when Manchu elites drew up Mongol law. In *Menggu Lushu*, killing a person on purpose was mentioned in Statutes no. 70, 75, and 89. The 90th entry was about how to punish manslaughter.⁷⁹

78 *Menggu Luli*, (Lanzhou: Quanguo tushuguan wenxian suowei zhongxin, 1998), 7: 4a.

79 Li Baowen, “Kangxi liu nian Menggu lushu”, *Lishi dang’an*, 2002, vol. 4, pp. 3-11.

Oaths played an important role in the traditional Mongol legal system. This practice was also preserved in the Mongol law drawn up by the Manchus. When there was insufficient evidence, the defendant could deny an accusation by swearing an oath. In *Lifanyuan Zeli*, a chapter entitled “*rushi* 入誓” collected all the detailed regulations about oath-taking. According to this code, when the remains of someone else’s missing livestock are found around one’s home, as long as the defendant swears an oath that he did not steal them, he is to be regarded as innocent.⁸⁰

More importantly, regulations in the *Menggu lili* try to clarify the applicability of Qing Mongol law and the Qing (general) law when people of different ethnicities were involved in one case.⁸¹ For instance, a regulation specifically stipulates that. “Mongols who commit crimes in inland China should be punished according to inland laws. Chinese civilians who commit crimes in Mongolia should be punished according to the Mongolian codes”.⁸² However, it is hard to say to what extent this principle was applied. We hardly find any cases that Chinese were judged on the basis

80 *Lifanyuan zeli (Qianlong chao nei fu chaoben)*, annotated by Zhao Yuntian, Beijing: Zhongguo Zang xue chubanshe, 2006, pp. 158-159.

81 Due to the influx of Chinese farmers and traders into Inner and Outer Mongolia, the Qing policy makers had long been confronting the problem that when a case involved both Chinese and Mongols, whether the punishment should be determined by the territoriality or the ethnicity of the criminal, or that of the victim. Policies issued by the Qing state were sometimes contradictory. See Dorothea Heuschert, “Legislation for the Mongols”, pp. 318-319.

82 *Menggu Luli*, category of litigation, volume 12, 7b.

of the Mongolian law as Chinese farmers and traders living in the Mongolian areas were placed under the jurisdiction of Chinese officials.⁸³

There existed no equivalent counterpart of *Menggu lili* enacted in Xinjiang from the Qianlong era to the end of the dynasty. The legislation in Xinjiang, especially in terms of the legislation of civil and criminal laws, was dramatically different from that in Mongol areas.

The whole Xinjiang area was finally incorporated into the Qing empire during the Qianlong reign. However, little systematic effort to establish a legislative framework for Xinjiang was carried out in this period. It was during the Jiaqing and Daoguang reigns that the Eastern Turkestan bureau (*laiyuan si* 徠遠司) of the *Lifanyuan* compiled and amended a set of regulations entitled *Rules and Precedents of South Xinjiang* (*Huijiang zeli* 回疆則例) to deal with Xinjiang affairs.⁸⁴

This set of regulations can be regarded as the working regulations of the *laiyuan si*. The *Laiyuan si* of the *Lifanyuan* was established in 1761 and was in charge of South Xinjiang (including Hami and Turfan) affairs. *Huijiang zeli*, revised and reissued in 1842, contained eight volumes. Each volume records ten to twenty regulations. The first five volumes are generally related to administrative matters, such as the titles, appointments and dismissals of *begs*. The last three volumes are

83 Dorothea Heuschert, "Legislation for the Mongols", pp. 318-319.

84 As for the different versions of *Huijiang Zeli*, see Wang Dongping, *Qingdai Huijiang falu zhidu yanjiu 1759-1884* (Studies on legal institutions of Qing dynasty South Xinjiang), (Ha'erbin: Heilongjiang jiaoyu press, 2003), pp. 29-31.

mainly about economic and financial regulations. Most of regulations contained in the *Huijiang zeli* concern Uyghur *begs*, Qing officials and soldiers stationed in the region. For example, the *begs* in *Huijiang* were prohibited from levying exorbitant taxes on Uyghurs. Qing officials were prohibited from selling houses through the *Hakim begs*. The Green Standard soldiers who were on short assignment to the region were prohibited from marrying local Uyghur women or accommodating Uyghur women in the Manchu garrison cities (*man cheng* 滿城). Also, there were one to two civil regulations to manage Tungan (Chinese Hui) persons and Chinese merchants who lived in Xinjiang. In the *Huijiang Zeli* there is only one regulation directly related to criminal offenses. It states that “*Hakim begs* themselves can handle those common crimes in which the penalty is limited to cangue-wearing, and report the results to stationed Qing ministers. When encountering a serious criminal offense, *Hakim begs* can only report the case to the stationed Qing ministers in charge and wait for them to deal with the case”.⁸⁵ Clearly this was not a criminal statute, but rather established judicatory authority in handling criminal cases. No guidance was provided as to what criminal statutes would apply in such cases.

Just as for the *Menggu Lili*, the source of the regulations of *Huijiang zeli* was largely decisions made in previous cases relating to Xinjiang and the Qing emperors edicts (especially Qianlong’s) issued concerning Xinjiang affairs. This is no accident. The compilation of *Huijiang Zeli* was strongly influenced by the ideas that governed

⁸⁵ *Huijiang Zeli*, (Lanzhou: Gansu wen hua chu ban she, 1999), 6: 18a-b.

the compilation of the *Menggu Lili*. Some regulation makers who were involved in writing the *Huijiang Zeli* were selected from the editorial department of *Menggu Lili*. Nevertheless, the main contents and formats of *Huijiang Zeli* and *Menggu Lili* were far from Identical.

The penal nature of *Menggu Lili*, in like fashion to the *Great Qing Code*, was evident. It provided specific penalties for legal elites to punish various acts of moral or ritual impropriety or of criminal violence. However, *Huijiang zeli* was merely an administrative law, as the category of “*zeli*” indicated. It followed not the format of the *luli*, but the format of the administrative regulations found in the *zeli*. This eight-volume collection contained regulations about administrative structure, taxes and the corvée system, the monetary system, judiciary, foreign commerce and so on, with more than half of its provisions devoted to the regulation of the official activities of Xinjiang officials, including Manchu and Mongol ruling elites, local *begs*, as well as sojourned troops.

As a result, when dealing with regular civil and criminal cases, it was impossible for an official in charge to make reference to *Huijiang zeli*, and nor was he able to ensure whether the Chinese law or the Islamic law should be applied to a specific case. The existence of a legal compendium for this particular territorial jurisdiction created ambiguities which do not seem to have been directly resolved. Given the existence of the *Huijiang zeli*, what was the authority of the other codified compendia that applied to both criminal and administrative matters throughout China?

There is some evidence that all the codes issued by the state were considered applicable or at least existed as a reference in dealing with official matters in Xinjiang. As early as 1764, the Qing court had already issued several sets of statutes to Xinjiang *yamen*, which included the *Great Qing Code, Regulations for the Eight Banners (Baqi zeli 八旗則例)* and *Menggu Lili*.⁸⁶ In 1816, Xuzhuang, a Kuche Imperial Agent, presented a request to the throne for the Board of Punishments to draft a proper penalty for a specific case. The Jiaqing emperor was irritated by this request, claiming that “the court has already issued the Great Qing Code and some supplementary regulations to Kuche. There is no question that this case should be judged according to the (Qing) statutes”.⁸⁷ Moreover, he demanded a demotion of Xuzhuang as his punishment.

In 1788 (Qianlong 52) a *yamen* secretary, named Wu Yixian, collected all the laws concerning Xinjiang convicts from the Great Qing Code and compiled *Statutes and Sub-statutes Concerning Xinjiang (Xinjiang zeli shuolue 新疆則例說略)*⁸⁸ However, in this collection, almost all statutes or sub-statutes targeted exiles in Xinjiang, not local convicts. In other words, there were no formal laws formulated particularly for the regulation of Uyghur people before the 1759 conquest. Moreover, this indicates that the state-compiled legal codes did not contain any laws or

86 QSL, Qianlong reign, 714: 16b-17b.

87 QSL, Jiaqing reign, 316: 17a-18a.

88 Wu Yixian, ed., *Xinjiang zeli shuo lue* (Beijing: Beijing chubanshe, 2000).

regulations on Xinjiang Uyghurs. This is in marked contrast to the promulgation of specific statutes and sub-statutes directed at civil or criminal acts committed by other minorities, such as the Hui or Miao people.⁸⁹

We can get a better sense of the legislative documents that guided officials in Xinjiang by looking at a hitherto neglected bibliography of works issued to the Kashigaer Councilor's *yamen*. Compiled in 1804 and recorded in the *Comprehensive Gazetteer of Huijiang (Huijiang Tongzhi 回疆通志)*⁹⁰, this bibliography shows that at least the following legal codes and regulations had been issued to the government offices in Xinjiang before 1804.

Chinese works in this bibliography included: the Great Qing Code, the New Edition of the Great Qing Code (Xin Zuan Daqing Lu 新纂大清律), Menggu Lüli , Table of destinations for exiles (San Liu Dao Li Biao 三流道里表), Regulations Concerning the Capture of Escaped Slaves of the Banner Troops (Du Bu Zeli 督補則例), Regulations of the Board of War (Zhongshu Zheng Kao 中樞政考), Menggu Lushu, Regulations for the Eight Banners, A bibliography of Official Banned Books (Cha Jiao Weijin Shumu 查繳違禁書目), Regulations of the Board of Civil Appointments (Libu Zeli 吏部則例), Regulations Concerning Water Transport of Military Supplies (Zhuanyun Junliang Tiaoli 轉運軍糧條例), Regulations

89 For example, see the sub-statutes of No. 824, 825, 829 and 844 in “Wrongful taking in the daytime” of “General Public Disorder and Theft” in the *Da Qing Lili* (The Great Qing Code and Statutes), (Tianjin: Tianjin Guji, 1995), pp.383-384, pp. 388-389.

90 *Huijiang Tong Zhi* (Comprehensive gazetteer of South Xinjiang), Compiled by Hening, ca. 1809. Reprint. (Taipei: Wenhai press, 1966). 7: 14a.

Concerning the Purchase of Official Titles (Juan Kuan Tiaoli 捐款條例), New Regulations (Xin Li 新例), Collected Cases of Injustice Rectified through Forensic Science (Xi Yuan Lu 洗冤錄), Xinjiang Wuliao Jiazhi Zeli (新疆物料價值則例 unavailable for detailed records, it is presumed to be related to official prices of materials in Xinjiang), Regulations Concerning the Purchase of Official Titles in Gansu Province (Gansu Juan Kuan Tiaoli 甘肅捐款條例), Supplemental regulations of the Great Qing Code (Daqing Lu Xu Zuan Tiaoli 大清律續纂條例), and new edition of Regulations for the Eight Banners (Xin Zuan Baqi Zeli 新纂八旗則例).

Law books written in Manchu language included: Regulations of the Board of War in Manchu language (Qingzi Zhongshu Zhengkao 清字中樞政考), Regulations for the Eight Banners in Manchu language (Qingwen Baqi Zeli 清文八旗則例) and Xin Zuan Qing Wen Zeli 新纂清文則例 presumably the Manchu edition of the Great Qing Code).

Among all these regulations and codes, those related to criminal laws included the *Great Qing Code* (all the editions), *San Dao Liu Li Biao*, *Du Bu Zeli*, and *Menggu Zeli*. As mentioned above, the *Great Qing Code* contained no specific regulations that applied directly to Uyghurs in Xinjiang, nor did the *San Dao Liu Li Biao* or *Du Bu Zeli*. It appears that they were largely used in relation to exiled criminals from the *neidi*. As for the *Menggu Zeli*, which was the draft edition of Regulations of the Board

of Dependencies⁹¹, it could be only applied to criminal cases that occurred among the Mongolian banner tribes (*jasak*) in Hami and Turfan.

The government had intentionally left room for Qing law to intervene in Xinjiang affairs. Unlike the situation in Mongol areas, the Qing government did not stipulate a whole series of independent and comprehensive criminal laws and regulations which would represent fixed criteria for the applicability of laws to Xinjiang. But this does not necessarily mean that the Qing government never formulated new regulations for criminal offenses to meet the requirement of new exigencies. Qing legislative policies in Xinjiang appeared more flexible.

The emperor's basic opinions toward law applicability and practice in Xinjiang

At the beginning of Qing rule in the new frontier, the Qianlong emperor had three basic views on the applicability and practice of law there.

First of all, when the Qing first conquered the “new frontier”, the Qianlong emperor tried to implement a non-intervention policy. He wanted to legitimize Manchu rule in Xinjiang by respecting and tolerating native customs, religion and culture. Therefore he was very cautious about imposing Chinese or Manchu or other customs on Uyghurs. One example of this approach can be seen in the emperor's reaction to an attempt to apply a Mongol tradition to Xinjiang in the years directly

91 The predecessor of Li Fan Yuan (Board of Dependencies) was “Menggu (Mongol) *yamen*.”

following annexation. In 1761, the third year after the Qing annexation of Altishahr, Kashgar Imperial Agent, Yonggui, suggested that the state punish some badly-behaved Uyghur *begs* and commoners by confiscating their livestock and using the livestock to honor those hardworking, obedient ones. The Qianlong emperor rejected his suggestion by stating "...If (the confiscation) was not handled well and caused any corruption, it will give Uyghurs excuses (to criticize our rule), which will be extremely disgraceful. In brief, to deal with Huijiang affairs (we) should take into consideration their temperament and customs and guide them to favorable direction (*yin qi xingqing fengsu er lidao zhi* 因其性情風俗而利導之). Not all inland laws or policies can be imposed on them... If a Uyghur could be confirmed guilty, he no doubt should be punished precisely based on law, instead of only by confiscation."⁹²

The Qianlong emperor's directive to respect Uyghur culture and tradition as expressed in this edict had a profound effect on the Qing court's Xinjiang policy. Even after the establishment of Xinjiang province in 1884, the first provincial governor, Liu Jintang reiterated a similar idea. In a memorial sent to the Guangxu emperor, Liu suggested that in order to control Xinjiang Uyghurs the Qing rulers should "educate them without changing their customs and polish the administration there without abolishing their (previous) effective policies."⁹³ Also, Qianlong's edict

92 QSL, QL, 648: 17b-18b.

93 This quote originally appeared in *Li Ji* (Classic of Rites), and then was quoted by Liu Jintang in his memorial. Liu Jintang, *Liuxiangqingong zougao* (Memorials of Liu Jintang), (Taipei : Cheng wen chu ban she, 1968), 2:33a.

showed that he had been trying to prevent any possible corruption perpetrated by his imperial representatives in this newly incorporated frontier, because he was fully aware that this would do great harm to the empire's rule.

In brief, in order to control this vast place as long as possible, the emperor wanted his Xinjiang policies and officials to be both culturally tolerant and economically non-exploitative. This fundamental idea was embraced by most of the successive Qing emperors and it became the core of the Qing government's Xinjiang policies at least until the 1880s.

Secondly, the Qianlong emperor held that more severe penalties should be applied to Xinjiang offenders in order to maintain social stability in this newly conquered area. Moreover, these criminals should be punished as soon as possible.

In June 1760, the Manchu general Shuhede captured a Uyghur horse thief who was a recidivist. He requested central government instruction with regard to punishment. The emperor ordered that the thief be decapitated and his body hung in public according to the traditional regulations of Muslims (*huiren jiuli* 回人舊例). Qianlong emphasized in his edict that because rebellions in this place had been put down not long ago, criminals should be punished by severe penalties in order to ensure social stability.⁹⁴

Theft, especially by recidivists, was strictly prohibited in both Islamic and Chinese law. According to the Great Qing Code, "if it is the first offense, tattoo on the

⁹⁴ QSL, Qianlong reign, 612: 31b-32a.

right forearm the words, ‘stole stealthily.’ The second time, tattoo on the left forearm. For the third offense, (the thief) will be strangled (with delay).”⁹⁵ The penalty of strangulation with delay was lighter than decapitation and exposing the body. So the emperor ordered the criminal to be punished according to Islamic law.

Another case, also from 1776, involved a Uyghur slave who killed his master with an ax and also injured the victim’s wife. The local authority sentenced him to immediate death in the presence of the public (*ji xing zhengfa shizhong* 即行正法示眾). However, in an edict the Qianlong emperor argued that this was a case in which a slave or a hired servant planned to kill the household head”(*nupu shasi jia zhu* 奴僕殺死家主). According to Qing statute, the convict should suffer a more severe penalty, the lingering death. “Even in the mainland those who commit this crime should be sentenced to lingering death. In *Huijiang* area, such kinds of crimes should be punished particularly severely.”⁹⁶

In 1771, Qianlong sent an edict again stating that in Xinjiang, those who acted violently and killed people must be punished severely, expressing that it was improper to (treat these cases) with delay, as were similar cases inland.⁹⁷ In 1778, a Uyghur brought a false charge against a *hakim beg*. The Qianlong emperor ordered him to be exiled and told his Xinjiang officials that, when dealing with future cases like such, as

95 William C. Jones (trans), *The Great Qing Code*, p. 251.

96 QSL, Qianlong reign, 1011:15b-16b.

97 QSL, Qianlong reign, 892: 13b-14b.

long as the crime was confirmed, local generals should sentence the guilty person to death immediately and request imperial sanction to execute him and expose his body in public.⁹⁸

Thirdly, it seems that in this period the Qianlong emperor took an expedient approach to decisions over the application of Chinese or Islamic law. Most important was that the case be handled quickly and effectively so that an example could be set to warn potential offenders. When responding to the above 1760 horse theft case, after confirming that the Uyghur thief should be punished severely, the emperor gave his frontier officials an additional instruction. “Nonetheless, there were also some shameless inland soldiers and servants who stole Uyghurs’ horses. It was unfair if they were punished according to the inland laws.” Qianlong then ordered that hereafter Uyghurs who stole horses from local Uyghurs or inland Chinese, as well as inland Chinese who stole Uyghurs’ horses, both should be dealt with based on the native Muslim law.⁹⁹ This instruction is significant in that in his edict the Qianlong emperor specifically stated that criminal acts of cattle-theft should be punished according to Islamic law, even when the criminals were inland Chinese.

The Qianlong emperor’s emphasis on flexibility extended beyond his choice of applicability of law. While he had no problem using Islamic law to punish Chinese criminals or Chinese law to punish Uyghurs he was also not averse to making

98 QSL, Qianlong reign, 1054: 15b-16a.

99 QSL, Qianlong reign, 612: 31b-32a.

adjustments to the Qing code itself when he felt it was appropriate to do so in order to cope with Xinjiang circumstances.

For example, in 1760 Yongning, a Manchu official, reported that a Hami Muslim called Lin Fu—the name indicated that he was a Chinese Muslim—killed a person when he was drunk. As a normal procedure, Yongning proposed to punish the killer by strangulation (according to the Qing law) and send him to the Governor-General's *yamen* to await the result of the annual Autumn Assizes. The Qianlong emperor rejected the proposal and thought it was unnecessary.

“(In this case) Hami is close to Suzhou. If the case takes place in a place as far as Yili or Yeerqiang, how can you send him all the way to Suzhou under guard? In these recently pacified regions, the legislation should be strict. In the future more and more people from inland provinces will live together with local Muslims. Anytime there is a homicide following fighting (*dou'ou sharen* 鬥毆殺人), it should be punished by immediate execution right on the spot (*benchu zhengfa* 本處正法). Only in this way can we intimidate ruffians. The inland laws (*neidi zhifa* 內地之法) need not always be consulted.”¹⁰⁰

As we know, Autumn Assizes was an important institution of the Qing judicial system. This institution was inherited from the Ming dynasty and became fully implemented during the Kangxi reign. According to it, following the initial investigation and conviction at the county level all capital cases had to be reviewed at

¹⁰⁰ QSL, Qianlong reign, 608: 16b-17a.

higher levels of government. All relevant documents as well as the accused suspects were to be sent in turn to the prefecture, the province, the Board of Punishment, and finally the throne (while the suspects were held in provincial prisons). Every year on one day of the eighth month (by lunar calendar) hundreds of high officials in the central government, including the directors of *lifanyuan*, would participate in the grand ceremony of Fall Assizes at Tiananmen Square to review these capital cases and receive the final sanction of the emperor.¹⁰¹ As a reviewing system, Fall Assizes had two important functions. On the one hand, through this ceremony the emperor was able to affirm in front of his subjects his noble virtue of “respecting lives” (*hao sheng zhi de* 好生之德), which was an important Confucian value. On the other hand, this institution helped the emperor control the right of adjudication both practically and formally.

Therefore, bypassing the procedures for sending criminals to the provincial capital (or Beijing) and waiting Fall Assizes constituted a “sacrifice” of the emperor’s normal prerogative in capital cases. In order to do so the emperor had to bestow more judicial power on his imperial provincial officials. In this case the Qianlong emperor deliberately changed the capital reviewing procedures and made it a precedent that officials should invoke thereafter. To the Qianlong emperor, to punish Xinjiang criminals as soon as possible and to warn Xinjiang dwellers who were potentially able

¹⁰¹ Song Beiping, *Qiushen tiaokuan yuanliu kao* (Studies on regulations of Fall Assizes), (Beijing: Shehui kexue wenxian chubanshe, 2009), p. 12.

to jeopardize the social stability of this frontier must have been important and urgent enough for him to make an exception from the regular legal procedures.

By saying that “inland laws need not always be consulted”, the Qianlong emperor was in effect creating a new regulation for Xinjiang: homicide after fighting should be punished by execution right on the spot. This regulation contains parallels to the sentence of “immediate execution on the spot” (*jiudi zhengfa* 就地正法), which was widely meted out through martial law by many field generals during the Taiping Rebellion (1850-1864)¹⁰². A similar policy was implemented in Xinjiang during and after the Muslim Rebellion. It is difficult to determine whether implementation of *jiudi zhengfa* at this time was part of the nation-wide martial policy during a period of extreme turmoil, or a continuation of Qianlong’s flexible frontier policy, or both. What we do know is, in the late Qing period, this “effective” policy became a challenge to the authority of the central government and the emperor’s judicial right over capital punishments which, respectively, would weaken the imperial power and symbolize the devolution of central power to local governments, the specifics of which I will return to discuss in the next chapter.

Undoubtedly, Qianlong himself regarded these exceptional precedents as effective in Xinjiang. He had no intention to carry out systematic legislation in Xinjiang; neither did he care about drawing clear borderlines between Chinese law and Islamic law. His preferred method was to give specific instructions whenever a

¹⁰² Wang Ruicheng, “Jiudi zhengfa yu Qingdai xingshi shenpan zhidu”, *Jindaishi yanjiu*, vol 2005, no. 2, pp. 212-244.

new case came up. By making exceptional and ever-changing regulations, he may have felt that he could control this frontier more directly and tightly, although this would have deprived him of a good opportunity to engage in institution building on the frontier. Without precise rules, local officials would have to constantly consult the emperor about penalties in certain cases.

Fourthly, since the penalties provided in Uyghur law and in Qing law for certain kinds of crimes were often different the emperor was at liberty to punish some criminals more severely or more leniently than others. The Qianlong emperor pardoned some convicts who themselves, or whose ancestors, made contribution to the establishment of the dynasty in the very early period of Qing's governance in order to show the benevolence and gratitude of the central government.

For instance, in 1761, a Uyghur, Yisilamu, who was in charge of some agricultural colonies, killed another Uyghur, and injured the latter's wife and brother in the course of several petty disputes. Yonggui presented to the court that this person should be punished with strangulation in accordance with the sub-statute on "engaging in an affray or intentionally killing another" under the Great Qing Code. But the Qianlong emperor decided that Yisilamu could be punished in accordance with Islamic law for two reasons. First, in the past Yisilamu had helped the Qing troops collect information before the conquest. Secondly, Muslim tradition allowed monetary redemption of death sentences (*chu cai dizui* 出財抵罪). The strong justification presented by the emperor was that "because of his previous contribution,

this case is treated as an exceptional one in favor of Yisilamu. Otherwise he (or any other criminal) should be punished in accordance with the Qing codes.”¹⁰³

From 1759 to his death, the Qianlong emperor ruled Xinjiang for 36 years. His attitude toward the applicability of law in Xinjiang changed as time went on. Gradually, the emperor began to impose the inland law (the Great Qing Code) on more kinds of frontier offenses.

In 1776, a Uyghur slave killed his master with an ax and injured the victim’s wife, too. Maxing’e, the local Qing official, sentenced him to immediate death in public (*ji xing zheng fa shi zhong*). When the Qianlong emperor was informed of the case, he felt that the existing criminal laws in force in Xinjiang were not a sufficient deterrent to criminal behavior. In an edict the emperor declared that “from now on, if the crimes would be severe enough to give a banishment sentence (based on Qing codes and statutes), officials in Huijiang should handle them in the same way as applicable in inland cases, in order to warn the Huijiang Uyghurs.” Moreover, the Emperor himself drafted a set of regulations with regard to the banishment of Xinjiang criminals in the same edict, instructing that the distance of banishments should correspond to the severity of the transgression.¹⁰⁴

By the end of his reign, Qianlong further emphasized the importance of the applicability of the Qing law to Xinjiang cases. In 1792 he issued an edict stating

103 QSL, Qianlong reign, 646: 12b-13a.

104 QSL, Qianlong reign, 1011: 15a-16b.

“Xinjiang has been under the central administrative system for years. The officials there should have a better understanding of the inland laws. Uyghurs are also my servants. There should be no difference between Uyghurs and Chinese. In the future, severe cases should be handled in accordance with inland laws.”¹⁰⁵ Later in the same year when a local Manchu official listed all the relevant statutes and regulations in both Chinese and Uyghur laws in his report of a case to ask for the Qianlong emperor’s final decision, the Emperor seems to have been irritated by the request. He criticized the multiple legal inclusions as unnecessary considerations that merely complicated the situation, and issued a clearer instruction as well: “in future all the officials stationed in Xinjiang should observe the following rules when dealing with criminal cases. A Uyghur who kills his uncle, or brother, or grandfather, or grandfather-in-law, should be punished in accordance with the inland codes or statutes. The homicide cases related to distant relatives should be dealt with based on Uyghur traditions. Such cases need not to be treated based on the inland institutions and laws.”¹⁰⁶

Qianlong’s ever-changing policy confused his field officials. Without clear stipulations they often could not make decisions on how to choose an appropriate law to judge cases by themselves. As a result, these officials usually listed all the possible precedents that could govern a judgment and let the emperor make a final decision.

105 QSL, Qianlong reign, 1413: 15a-b.

106 QSL, Qianlong reign, 1417: 23a-b.

This appears to have been what the emperor wanted from the beginning. In this way, he achieved closer control over his frontier bureaucrats and seized the discretionary power to choose which laws to apply. However, maintaining this closer control required a more patient and diligent sovereign. In his old age, the Qianlong emperor does not seem to have been energetic enough to deal with every single case, which accounts for the above two contradictory instructions appearing toward the end of the Qianlong reign. In the years following Qianlong's death, until the Muslim Rebellion, the two laws kept working together to deal with criminal offenses, especially severe ones, without a clear demarcation.

Qianlong's Xinjiang policies and bureaucratic monarchy

Up to this point I have been exploring the features of the Qianlong emperor's strategies and policies with regard to ruling Xinjiang. Although my analysis is far from comprehensive due to archival constraints, some interrelated issues revealed here can be raised for further research under the central theme of ruling Xinjiang under the Qianlong reign.

First of all, as mentioned above, the Qing Empire did not intend to conquer Xinjiang by military actions at the very beginning. Peter Perdue in his article "Culture, history, and imperial Chinese strategy: legacies of the Qing conquests"¹⁰⁷ criticizes

107 Peter Perdue, "Culture, history, and imperial Chinese strategy: legacies of the Qing conquests", in Hans van de Ven ed., *Warfare in Chinese History*, (Leiden; Boston: Brill, 2000). pp. 252-287.

the cultural realism thesis, represented by Alastair Lain Johnson's work.¹⁰⁸ Perdue claims that the Qing strategy by no means can be characterized as merely "realism." Despite the opposition of the Han literati and some Manchu ministers, the fact that the Qing conquered and protected the Central Asian frontiers was mainly the result of the personalities of Kangxi, Yongzheng and Qianlong, as well as the strong economy at that time. Moreover, Perdue suggests that the Qing conquest of Xinjiang was precarious. Facing such an unprecedented situation, Qing rulers themselves seemed to be uncertain about how to govern this newly incorporated area from the very beginning. Their policies became gradually coherent only as time went on and as international relations and the domestic situation began to limit their choices. When reviewing history surrounding the Qing's conquest of Xinjiang in 1759, we get the impression that Qianlong was not well prepared for ruling a frontier about which he and other Manchu elites knew little. When dealing with governance issues, he appears to be engaged in a process of trial and error as decisions were made on which policies to jettison and which to preserve. Practical policies were formulated in an *ad hoc* manner in line with changing situations.

108 In his book, *Cultural Realism: Strategic Culture and Grand Strategy in Chinese History* (Princeton: Princeton University Press, 1995), Johnson argues that there are two Chinese strategic cultures: symbolic culture (Confucian, Mencian paradigm) that generally downplays violence as an instrument of state policy, instead stressing the power of moral virtue to bring peace; and the operational culture: parabellum, which means "if you want peace, prepare for war." Johnson demonstrates that the Confucian-Mencian strategic was largely symbolic and often had little impact on actual behavior, while the decision-makers' actual decisions corresponded much more closely to the parabellum paradigm and was realist. Johnson mainly based his arguments on the "Seven Military Classics" and the Ming dynasty's grand strategy against the Mongols.

Second, the Qianlong emperor's governance in Xinjiang as a whole was influenced by his predecessors. He was not the first Qing emperor orchestrating empire building in Inner Asia. The three great rulers of the high Qing period (1681-1796), the Kangxi, Yongzheng, and Qianlong emperors, all invested considerable political energies and military resources into the expansion of boundaries and empire. The prolonged wars against the Zunghars began with the Kangxi emperor's campaigns of the 1690s; the Yongzheng emperor also launched important wars against Galdan; Qianlong concluded the conquest designs carried out under his grandfather and father. The administrative apparatus established by these earlier Qing rulers during the course of colonization had a great effect on Qianlong's later administrative arrangement, not only for the "outer provinces" (Xinjiang, Tibet, and Mongolia) but also the Chinese heartland. For instance, the Yongzheng emperor formed the Grand Council (*junjichu* 軍機處) to deal with military affairs during campaigns against the Zunghars and it later became one of the most important central government institutions of the Qing.

Another important institution was the court for the administration of outer provinces (*lifanyuan* 理藩院), which was established by Huang Taiji in 1636 (at that time it was called as "Mongol *yamen*") and consolidated by both the Kangxi and Yongzheng emperors. Qianlong made further revision of the inner organization of this department and had it supervise the affairs of the Northern and Western frontiers. Since the Kangxi reign, almost all of the high positions of Lifanyuan were occupied by Manchu or Mongol officials, with only several Han Chinese working in this

central institution as lower-ranked officers, such as Chinese translators (*jiaozheng hanwen guan* 校正漢文官) and scribes (*bitieshi* 筆帖式). The structure of this ethnic composition was continued by Qianlong in setting up the Xinjiang bureaucracy. Among the senior positions of the Xinjiang administration, Manchus greatly outnumbered Han Chinese. Moreover, the Qianlong emperor did not originate the practice of having both the native law and the Qing law operated in the frontier area. Early in the Kangxi reign, both Mongol law and the Qing law had been applied to punish the crimes committed in Mongol territories.

Nonetheless, as the designer of Xinjiang policies when the region was finally annexed to the empire, the Qianlong emperor had his own thoughts on how to rule this non-Han frontier area. It is also very illuminating for Perdue to mention the influence of the emperors' personalities upon state policies in the aforementioned article.¹⁰⁹ Many of the earlier Qing emperors, especially the Qianlong emperor, had very strong personalities and were usually eager to engage in numerous trivial state affairs.

First, the Qianlong emperor articulated a new paradigm of racial identity. His perception of cultural differences among Manchus, Mongols, and Han Chinese also affected his choices of Xinjiang's bureaucracy. He emphasized that, compared with Manchus, Han officials were "narrow-minded" and usually paid too much attention to

¹⁰⁹ Peter Perdue, "Culture, history, and imperial Chinese strategy: legacies of the Qing conquests", pp. 252-287.

short-term trivial benefits without a long-range perspective. Therefore, it was better not to place them in higher positions to govern the Inner Asian frontier.

As for the applicability of law, like the situation in other ethnic frontiers, both Qing law and Muslim law were simultaneously applied to Xinjiang. But unlike the situation in Mongolia, where there existed comprehensive laws made by the central government, Xinjiang did not have unambiguous and comprehensive laws formulated by the Emperor. Although native Islamic law as a pre-existing legal institution continued to be enforced during the Qianlong reign, the emperor made exceptions in severe criminal offenses and did not draw a clear line in defining the applicability of legal traditions for these cases. Local officials often had no clear guidance to deal with this type of cases, resulting in their need to consult the Emperor time and again. It appeared that the Qianlong emperor was in favor of flexible, sometimes temporary, policies for Xinjiang affairs. The flexible policies reflected a blending of Qianlong's different concerns on Xinjiang governance. On the one hand, Qianlong did not intend to deeply involve and interfere too much in Uyghur affairs. On the other hand, he sought to maintain his authoritarian grip on his empire, to which Xinjiang belonged. As a result, the laws in Xinjiang were neither comprehensive nor systematic.

Discussion of the above issues can be related to the question of bureaucratic monarchy. Prior studies indicate that over a long period of time arbitrary power interacted with bureaucratic routine within a single system in Imperial China. We can

follow Philip Khun to call this system a “bureaucratic monarchy”.¹¹⁰ There always existed a tension between the emperor’s autocratic power and the bureaucracy’s routine power over regulations and rules. Social analysis like that of Max Weber’s tends to support the view that in the long run autocrats will be replaced by bureaucrats. But according to Philip Khun, the Qianlong emperor found certain ways to resist the encroachment of bureaucracy’s routine power upon his autocratic power. By creating the category of “political crime,” for example, Qianlong was able to mobilize the bureaucracy around sedition crises or intimidate the literati by means of literary inquisition, and finally exert control over the bureaucratic elite.

It is helpful, at this point, to review Michel Crozier’s classic description of power relationships in bureaucracies: “To achieve his aims, the manager has two sets of conflicting weapons: rationalization and rule-making on one side; and the power to make exceptions and to ignore the rules on the other. His own strategy will be to find the best combination of both weapons...Proliferation of the rules curtails his own power. Too many exceptions to the rules reduce his ability to check other people’s power”.¹¹¹

Both the soulstealing cases studied by Philip Khun and the Xinjiang cases mentioned in this chapter illustrate that the Qianlong emperor relied more on the second set of weapons: to make exceptions and to ignore the rules intentionally. In

110 Philip Khun, *Soulstealers*, pp. 187-222.

111 Michel Crozier, *The Bureaucratic Phenomenon*, (Chicago: University of Chicago Press, 1964). pp. 163-64.

contrast to his father, the Yongzheng emperor, Qianlong did not pay much attention to institution building. As I mentioned earlier, in Xinjiang affairs, Qianlong grasped the discretionary power to deal with criminal cases by willfully promoting an inconsistent application of the regulations. His frontier officials would have to report every controversial case to him and wait for his intercession. Also, he gave himself wide latitude to punish certain criminals harshly or leniently. Moreover, in the very beginning of his reign, Qianlong was impatient with rules that were unworkable. He preferred to take a flexible approach to deal with criminal cases rather than to make rigid and non-negotiable stipulations which could restrict his discretionary power.

The Qianlong emperor resisted the encroachment of the bureaucracy's routine power upon his autocratic power by intentionally not making comprehensive and systematic laws. Without a clear legal framework and specific laws, local officials often could not decide on how to choose an appropriate law to certain cases. Only the Emperor could interpret laws. Local officials were able to do no more than list the judgments of cases that could serve as precedents and let the Emperor make a final decision. Local officials could not predict the Emperor's decision for a given case as there were no strict criteria governing the Emperor's considerations. By making the laws more flexible, Qianlong was able to deprive the local-level bureaucracy of decision-making power and then to maintain his autocratic monarchy. However, such maintenance of the Emperor's autocratic power came at the expense of institution building, and particularly at the expense of legislation.

Some scholars argue that the flexibility of Qianlong's frontier policy was key to Qing administrative success.¹¹² Certainly that is right. However, on the other hand, such flexibility was relied on the absence of strong local institutions and, in the long term, had a negative impact on Xinjiang governance. First of all, the absence of a clear legal framework provided a window for local officials to abuse their authority for their own benefit. Abuse of the law and corrupt practices commonly occurred at the local level. Such practices of course further intensified social instability. It was often found that by taking advantage of the legal loopholes, Qing officials could gang up with local Uyghurs to exploit the common people. They abused the law for their own benefit and willfully decapitated those they disliked. This resulted in the death of innocent people and resulted in many demonstrations and revolts by local civilians¹¹³. As more and more instances of conflict arose, the deteriorating social situation escalated, particularly during the Xianfeng reign, and led up to the Muslim Rebellion of 1864. On the other hand, a prerequisite of Qianlong's flexible frontier policies was a strong-minded, diligent emperor, or in other words, strong imperial power. The emperor had to be energetic and active enough to observe every important incident at the frontier and provide his opinions immediately. Otherwise, the flexibility would very likely lead to local official exploitation. For instance, the policy of immediate

¹¹² James Millward and Peter Perdue, "Political and Cultural History of the Xinjiang Region through the Late Nineteenth Century", in S. Frederick Starr ed., *Xinjiang: China's Muslim Borderland*, Armonk, N.Y. : M.E. Sharpe, c2004, p. 57.

¹¹³ Instances will be discussed in Chapter 2.

execution on the spot, as part of the Flexible Regulations of Xinjiang endorsed by Qianlong, was intended to simplify the lengthy procedures of inspection and central trial for severe criminal cases. But this policy also made room for local officials to deprive the center of its final judicial power. By bypassing the reviewing procedure of death sentences, local officials abused their power and killed people unjustly.

CHAPTER 2

LEGAL IMPLEMENTATION AND PERCEPTIONS ABOUT THE APPLICABILITY OF LAW BEFORE THE MUSLIM REBELLION

Historians have noted that the Qing tried to control Xinjiang without committing large numbers of troops or officials to the area or spending large sums of money there.¹¹⁴ Instead of sending imperial representatives to Eastern Turkestan, the Qing rulers incorporated the majority of Muslim Turkic native elites into their frontier bureaucracy and tolerated local traditions and institutions to a great extent. After the Qing conquest, most Xinjiang Uyghurs were still able to maintain their familiar religious and cultural traditions and lived under the control of familiar indigenous (religious) elites. Only a few imperial officials supervised these indigenous elites. This administrative mode was cost-effective for the empire. At the same time, these measures allowed the Manchu conquerors legitimized their rule by preserving local tradition and recognizing cultural differences.¹¹⁵ As an important part of local cultural tradition, Uyghur legal institutions continued to operate in Xinjiang. In the

114 See Nicola Di Cosmo, "Qing Colonial Administration in Inner Asia", pp. 287-309, and James Millward, *Beyond the Pass*, pp. 44-75.

115 L. J. Newby, "The Begs of Xinjiang: between Two Worlds", *Bulletin of the School of Oriental and African Studies*, vol. 61, no. 2, 1998, pp. 278-297.

following section, I will discuss the applicability of laws to criminal cases in the Huijiang area under the Qing before the establishment of Xinjiang province.

Due to the limitation of available materials, few Western scholars have carried out research specifically into the legal history of Xinjiang during the Qing dynasty. Several Chinese scholars have written articles on the applicability of laws in criminal cases in Huijiang under the Qing. However, their views differ greatly. Based on the current literature, limited as it is, four main perceptions can be identified. Here we should keep in mind that when elaborating their opinions, some scholars do not clearly differentiate the criminal law system from that dealing with civil administrative and other legal matters. The “legal system” in Qing Huijiang is used as a general term in their studies to refer to all forms of law.

First of all, since the *Huijiang Zeli* is the only systematic legal code related to Huijiang compiled during the period of Qing rule, some scholars have assumed that after it was published, all legal disputes involving Uyghurs were handled according to this set of new regulations.¹¹⁶ But the majority of the regulations in the *Huijiang Zeli* were intended to treat administrative issues. As I have discussed previously, there were only a few regulations related to civil or criminal offences in this collection, such as the regulation prohibiting *Hakim begs* from issuing judgements in cases of serious crimes. It was basically an administrative law, the main content of which was

116 See Liu Guang'an, *Qingdai Minzu Lifa Yanjiu* (Studies on ethnic legislation in the Qing dynasty), (Beijing : Zhongguo zheng fa da xue chu ban she, 1993), pp. 80-94; and Gong Yin, “Qingdai minzu fazhi gaishuo (Qing ethnical law system)”, in *Xibei minzu xueyuan xuebao*, 2002, no. 7, pp.183-186.

about administrative governance. The *Huijiang Zeli* could therefore not have been used widely to handle the majority of criminal matters in Eastern Turkestan.

Secondly, in *The Cambridge History of China*, Joseph Fletcher claims that the Qing maintained a non-interference policy in Huijiang, where the Qing government had set up a bureaucracy of *begs* and *akhunds*. From the time of the Qing conquest onwards, he argues judicial authority in this region was in the hands of this bureaucracy. Moreover, “foreigners were impressed by the fact that disputes arising between Muslims and ‘Chinese’ (namely Manchus, Green Standard soldiers, and other non-native Ch’ing subjects in Altishahr) were settled according to Muslim law”.¹¹⁷ However, Fletcher cites as evidence the first Chinese monograph on Xinjiang history under the Qing, the *Zhongguo jingying xiyu shi*, where the historian Zeng Wenwu wrote that “(before the establishment of Xinjiang province), the rights of judicature usually belonged to native administrative officials...Uyghurs living in the eight main cities of Huijiang were ruled by *Hakim begs*. Therefore *Hakim begs* also exercised the right to arbitrate disputes. All people abided by religious regulations and customs”.¹¹⁸ Some contemporary Chinese scholars still stick to this

117 John King Fairbank and Kwang Ching Liu: *The Cambridge History of China: Late Ch’ing, 1800-1911*(part 2, volume 11) (Cambridge: Cambridge University Press, 1978), p.76

118 Zeng Wenwu, *Zhongguo jingying xiyu shi* (A history of China’s management of its Western Regions). (Shanghai: Commercial Press, 1936), p. 603.

view.¹¹⁹ However, Zeng's assertion completely ignores the application of Qing law to criminal cases in Xinjiang. From the 1759 conquest to the establishment of Xinjiang province in 1884, there were a great number of criminal cases either among Uyghurs or between Uyghurs and Chinese which were judged and punished according to Qing law.

The third view concerning the applicability of law in criminal cases in Qing Huijiang, now held by many scholars, is that whether or not to apply Qing law was determined by the nature of the crime. If a crime was regarded as severe, Qing law was applied, whereas Muslim law was applied to lesser offences. According to these scholars, when handling criminal matters, Qing rulers made different judgments, depending on whether the cases were serious enough to endanger Qing governance and social stability violating the foundations of the state and Confucian ethics, or were regarded as common offences with no such importance. In the former cases, the Qing Code would be applied without question and in the latter, *begs* could judge the case based on Islamic law (*hui li* 回例).¹²⁰ Most of these scholars argue that these policies, which applied a different system of law according to the nature of the

119 Li Xinghua, "Qing zhengfu dui Yisilanjiao (Huijiao) de zhengce" (the policies of Qing government on Islam), in *Qingdai Zhongguo Yisilanjiao Lunji*, (Yinchuan: Ningxia Renmin Chubanshe, 1981), pp.1-46.

120 Wang Dongping, "Qingdai Huijiang falu wenhua chu lun (The legal culture of Qing Huijiang area)", *Minzu Yanjiu*, 1999, no. 3. p. 80-87..

offence, had produced a successful balance between the two legal systems.¹²¹ However, though this view is supported by many legal cases, it is not confirmed by all of them. The relevant historical documents and precedents show that actually there was no clear criterion by which one could distinguish severe crimes from commonplace ones, and from the cases presented below, one can see that sometimes the Qing rulers also punished common criminal offences according to Qing law.

The last view is that the application of the Qing code was determined by ethnicity and social class. If an offender was not a Uyghur, the Qing Code would be applied. In addition, local Uyghur nobles and officials who committed criminal offences were always punished according to Islamic law. In this way, Manchu rulers were able to show leniency to their subjects. Otherwise, the more severe Qing law would be applied.¹²² This view is too simple to encompass the principles of criminal law and its application in Xinjiang. In Chapter 1, my discussion of the applicability of law during the Qianlong reign showed that in Xinjiang it was possible for Chinese immigrants to be punished based on native Islamic law. In addition, Uyghurs could certainly be punished according to the Great Qing Code. Moreover, the penalty for a given crime was not always more severe if adjudicated according to the Qing law than if punished according to the requirements of Islamic law. For example, as mentioned previously, a habitual thief was punished more severely under the Islamic code.

121 See Yuan Ziyong and Gao Ting'ai, "Qingdai Huijiang de Falu Shiyong (The Choice of law in Qing Huijiang)", in *Kashi shifan xueyuan xuebao*, 2001, No. 9, p. 38-41.

122 Zhang Jinfan, *Qingchao Fazhi Shi* (Qing Legal History), (Beijing: Falv Chubanshe, 1994). p. 492.

In summary, legal practice and the applicability of laws to criminal cases in Qing Xinjiang have been poorly understood. Based on the legal cases recorded in Chinese documents, including the veritable records of the reigns of the dynasty and court memorials of the Grand Council, I will suggest some tentative conclusions on this topic. In general, it seems to me that there were no unequivocal criteria defining which of the two systems of law should actually be applied in a specific case. The criteria employed by Qing rulers were complex and flexible. Their considerations changed frequently in accordance with changes in the social situation in Xinjiang. Nonetheless, as time went on the Qing emperors did try to enlarge the field of applicable Qing law, but only to a very limited extent.

Punishment of serious criminal offences in Xinjiang

Study of Xinjiang legal cases suggests that in reality the applicability of laws to criminal cases was more complex and flexible than the existing studies have concluded. Specifically, I have the following findings.

1. In Xinjiang, the Great Qing Code could be imposed on Chinese and Uyghurs, as well as people of other ethnicities.

When we review criminal cases that were reported to the central government from Xinjiang as well as other relevant materials, it is clear that a significant feature of legal practice in this place was that when dealing with severe criminal cases, the selection of which laws to apply was not always determined by ethnicity of the criminal. Theoretically, the Qing law was applied to all Chinese immigrants in

Xinjiang. But the Great Qing Code could also be imposed on Uyghurs and people of other ethnicities.

As we know, Fairbank has suggested that there were disputes between Uyghurs and Chinese which were handled according to Islamic law.¹²³ But more often Uyghurs who committed certain crimes were sentenced according to Chinese law. From the reign of Qianlong onwards, every year there were capital cases that were reported to Beijing by Xinjiang officials for imperial sanction. Both Chinese and Uyghur criminals in these cases were tried and punished according to the Qing law.

For example, in 1836 a Han merchant called Lu Zilin, who owned a store in Kashgar, was killed. Two Uyghurs were suspected of having committed the crime. According to the Administrative Official (*zhangjing* 章京) of Kashgar, the two slipped into Lu's store to steal but were caught by Lu and deliberately killed him. When the decision in the case was reported to the higher authorities for approval, the Yarkand Councilor found that the details of the case were full of contradictions. He summoned all of the seventeen witnesses, who included both Uyghurs and Han, for interrogation. The investigation lasted more than two years and finally reached the Daoguang emperor. The Emperor announced that the Kashgar *zhangjing* had made a wrong judgment and his official title was to be removed as a punishment. But this *zhangjing* was allowed to remain in office and was ordered to find the real murderer within half a year. "The real murderer should be punished according to the (Qing)

123 John King Fairbank and Kwang Ching Liu: *The Cambridge History of China: Late Ch'ing, 1800-1911*(part 2, volume 11), p.76

law”, said the emperor.¹²⁴ In this case, since the real murderer was still at large, no one knew his (or her) ethnicity. Still, the emperor emphasized that the Qing law should be imposed on him (her).

Besides Chinese and Uyghurs, criminals of other ethnicities could also be punished based on the Chinese law. In 1789, three Turhut¹²⁵ horse thieves were captured. When the local official in charge reported to the Qianlong emperor and asked for his suggestion about the penalty, the emperor responded: “Those who stole more than ten horses should be put to death by strangulation according to the law. Now these criminals stole more than thirty horses from Uyghurs. Surely you should sentence them to death and report to me.”¹²⁶

2. Serious crimes that threatened social order and Qing rule were punished according to Qing law.

124 “The Collection of Entehenge’s Memorials”, in Ma Dazheng and Wu Fengpei ed. *Qingdai Xinjiang xi jian zoudu huibian* (collection of the rare memorials in Qing Xinjiang), (Wulumuqi: Xinjiang Renmin, 1996). pp.209-211.

¹²⁵ The Turhuts were a tribe of Western Mongols (Oirats), who in the late sixteenth and early seventeenth century were forced from Outer Mongolia into Zungaria by westward expansion of the Khalkha Mongols. In the first decades of the seventeenth century they finally settled along the Emba, Yayik, and Volga Rivers. By the latter half of the eighteenth century, the Volga Turhuts fell under increasing Russian Pressure and large numbers fled eastward in search of new lands. In 1770, under Khan Ubasi, the Turhuts began their epic return to Zungaria and sought asylum in Ili in 1771. They were resettled in Hobdo, Etsin Gol, and two sites in Xinjiang—east of Ili and north of Karashahr. See Michael Khodarkovsky, *Where Two Worlds Met: The Russian State and the Kalmyk Nomads, 1600-1771*. (Ithaca: Cornell University Press, 1992), and Ma Dazheng and Maruhe ng, *Piaoluo yiyu de minzu: 17 zhi 18 shiji de Tuerhute Menggu* (A nationality adrift in foreign lands: the Turhut Mongols in the seventeenth to eighteenth centuries), (Beijing: zhongguo shehui kexue chubanshe, 1991).

¹²⁶ QSL, Qianlong reign, 1324: 21b-22a.

First and foremost, those offenders whose actions endangered the rule of the empire in the frontier region were to be punished according to the state law. For instance, in 1764, the Qing sent an envoy to persuade Khoqand to withdraw from the Esi (Osh) area. Abdulayimu, the *ishikagha beg* (assistant to the *hakim*) of Kashgar, secretly sent a missive to tell Erdena, the ruler of Khoqand city, that the Qing envoy was not bringing troops and that there was no need for Erdena to travel a great distance from the city to welcome the delegation. Further, he suggested that there would be no harm in agreeing to the Qing's request.¹²⁷ Under interrogation Abudulayimu further admitted that he had appealed to Erdena saying that "If you lead your forces here now, I shall provide support from inside."¹²⁸

When the secret communication between Abudulayimu and Khoqand was confirmed, Nashitong, the councilor of Kashgar, reported this issue to the Qianlong emperor. The emperor responded: "According to the law of our great Qing, the crime of those who have told people of other countries about domestic affairs is equal to plotting rebellion and high treason (*fanpan* 反叛)."¹²⁹ *The Great Qing Code* included a regulation that "in the case of plotting rebellion and high treason, when there is joint plotting, do not distinguish between the principal and the accessory, all will be put to

¹²⁷ Fuheng, et al. (comp.), *Qinding Pingding Zhunga'er Fanglue* (Imperially commissioned history of the pacification of the Zunghars), 1768, Repr. 4 vols. Beijing: Quanguo tushuguan wenxian suowei fuzhi zhongxin, 1990, 24:25b-28b.

¹²⁸ *Ibid.*, 26:7a-b.

¹²⁹ QSL, Qianlong reign, 707:12b.

death by slicing. His paternal grandfather, father, sons, sons' sons, brothers, and those living in the same household, regardless of whether they are of the same surname, as well as his paternal uncles, and sons of his brothers...will all be beheaded. His mother, daughter, wife, concubines, (unmarried) sisters, and also the wives and concubines of his sons, will all be given into the households of the household of meritorious officials as slaves."¹³⁰ In this case, Abudulayimu was finally sentenced to death by slicing. His sons were executed and all the other female family members were sent to Beijing as servants.¹³¹ The penalty was precisely in accord with the regulation.

Uyghur criminals who committed various kinds of homicide were to be punished according to Qing law. As we have discussed in Chapter 1, in 1792, the Qianlong emperor stated that "in the future all the officials stationed in Xinjiang should observe the following rules when dealing with criminal cases: a Uyghur who kills his uncle, or brother, or grandfather, or grandfather-in-law, should be punished in accordance with the *neidi* codes or statutes. The homicide cases relating to distant relatives should be dealt with based on Uyghur traditions. No need to treat such cases on the basis of *neidi* institutions and laws."¹³²

According to the *Huijiang Tongzhi* (Comprehensive gazetteer of South Xinjiang), which was compiled in 1804, a Uyghur who has deliberately killed elders

¹³⁰ William Jones (trans.), *The Great Qing Code*, pp. 237-238.

¹³¹ QSL, Qianlong reign, 715:4b.

¹³² QSL, Qianlong reign, 1417: 23a-b.

or seniors should be punished according to *neidi* law. The sentence must be reported for review. Those intentionally killing someone or injuring someone with an instrument to an extent that leads to their death should be strangled in the bazaar. Those killing someone by mistake or beating someone to death without using any instrument could be dealt with in accordance with Muslim tradition, that is, they should “redeem the crime by giving money or livestock to the relatives of the dead.”¹³³

Some other crimes that were serious enough to be dealt with by the death penalty (based on the Qing law), such as stealing horses, would also be punished according to the Qing law.

Another type of crime that was always treated according to the Qing law was rape, including both the heterosexual and homosexual forms. According to Matthew Sommer, by the eighteenth century, China’s status society had been transformed into a society in which free peasants (bound only by contractual obligations) comprised the overwhelming majority of the population. The Qing government’s basic principle for governing them was to fix them into the institutions of family and marriage in order to maintain social stability. A uniform standard of sexual morality and criminal liability was extended to the entire population. In traditional China, sexual purity and loyalty to husband was the most important female virtue. The law against rape was made harsher towards those who “polluted” female purity and threatened family order.

¹³³ He Ning, ed., *Huijiang Tongzhi*, (Taibei : Wen hai chu ban she, 1966), 7: 24b.

Vulnerable adolescents from peasant households were also seen to be in need of protection, thus leading to the category of “illicit sexual intercourse” including homosexual sodomy.¹³⁴ In the same vein, in order to maintain social stability in the new frontier, the Qing court was eager to protect family order among Uyghur peasants and so made both heterosexual and homosexual rape serious crimes punishable under Qing law.

In 1799, a Khotan Uyghur raped a ten-year-old Uyghur girl. Enchang, a Manchu official, proposed that the offender should be punished by immediate death (*ji xing zhengfa* 即行正法). The Jiaqing emperor approved his proposal by saying that according to the Qing law, this crime should be dealt with by decapitation with delay. However, “the criminal was extremely execrable and the situation of Xinjiang was different from the *neidi* area,” he ruled, and therefore “it is right to inflict a heavier punishment in order to correct the licentious atmosphere (以懲淫風) there.”¹³⁵ Cultural, marital and gender relationships among Uyghurs differed from those of both the Manchus and the Han Chinese, and the Qing completely tolerated Uyghur marriage and sexual customs, such as *mutah* (temporary contractual marriages), a high divorce rate, and child marriage. Nevertheless, some of these customs and practices, together with the presence of professional Uyghur prostitutes in urban

¹³⁴ Matthew Sommer, *Sex, Law, and Society in Late Imperial China*, (Stanford University Press, 2000), pp.1-165.

¹³⁵ QSL, Jiaqing reign, 50: 3a.

areas,¹³⁶ very likely contributed to the imperial colonizers' bias against what they saw as the "licentious" sexual behavior of Uyghur Muslims. This attitude certainly contradicted the Qing rulers' ultimate ideal of an orderly society: every woman a wife, every man a husband. Clearly the emperor shared these views when he issued orders designed to clear the "licentious atmosphere" by punishing rape criminals in the severest way.¹³⁷ According to a sub-statute of the Great Qing Code, if someone rapes a girl younger than ten, the punishment is decapitation without delay; if the girl is ten or above, the punishment is decapitation with delay,¹³⁸ which supposed to be the proper punishment if this case happened in the interior.

While Uyghur society did not condone rape, the youth of the victim in the above case would not have been the deciding factor in popular reactions to the case. In Uyghur society to rape a ten year old girl would not be considered as a heinous crime because Uyghur girls were considered to be suitable for marriage and sexual relations at nine or ten. Most Uyghur people got married at a very young age. "According to (Uyghur) custom, women are to be married at around ten. If a woman

¹³⁶ See, for example, Carl G. Mannerheim, *Across Asia. From West to East in 1906-1908*. I.II. Anthropological publications. (Oosterhout N.B. –The Netherlands: Societe Finno-Ougrienne, 1969), p. 50.

¹³⁷ The Qing was particularly concerned about family and saw it as the foundation of social stability of the multi-ethnic empire. For a recent discussion on Qing attitudes toward female chastity, see Janet Theiss, *Disgraceful matters: the politics of chastity in eighteenth-century China*. (Berkeley : University of California Press, c2004), pp.1-56.

¹³⁸ *Daqing luli*, annotated by Tian Tao and Zheng Qin, (Beijing: Falu chubanshe, 1999), p. 522.

is still single at thirteen or fourteen, people will paint her home door with filth.”¹³⁹

An investigation conducted in the 1950s suggests that there were still at that time a significant number of Uyghur girls who had been married at 9 or 10 years of age.¹⁴⁰

But in this case, the ten-year old victim was regarded as a “child girl” (*younu* 幼女), implying that she was sexually immature, according to Chinese standards, and the rapist was punished accordingly.

The Qing also intervened in sodomy cases in Xinjiang. In 1853, a Turfan Uyghur sodomized a seven-year old boy, Liu Yinwazi (Liu is a Chinese surname and “wazi” means boy, so this seems to have been a Chinese name). The Xianfeng emperor commented on this case: According to the (Qing) statute, even if a villain (*e tu* 惡徒) has not gathered a gang, whoever lures away a young boy of ten *sui* or under and forcibly sodomizes him shall be immediately beheaded according to the subsidiary statute on rootless rascals (*guanggun li* 光棍例)”. In this case, an investigation had revealed that the anus of the victim had been ruptured (*gudao yi po* 穀道已破) and that the rape had been consummated. Therefore the offender was to be sentenced to death according to the subsidiary statute referred to by the emperor.¹⁴¹

¹³⁹ Pei Jingfu, *Hehai Kunlun lu* (A journey from South China to the Kunlun mountains), (Shanghai, Wenming shuju, 1906), vol. 4, p. 30.

¹⁴⁰ *Weiwuerzu shehui lishi diaocha* (Investigations on history and society of Uyghur people), Xinjiang Weiwuer Zizhiqu congkan bianjizu, "Zhongguo shaoshu minzu shehui lishi diaocha ziliao cong kan" xiuding bianji weiyuanhui ed., (Xinjiang renmin press, 1984), p.9.

¹⁴¹ *Junjichu lu fu zouzhe* (Reference copy of palace memorial stored in the Grand Council), the category of *minzu* (ethnicity), Number One Archives of China. Xianfeng 3(1853), the 10th month, the 6th day

From the Qing rulers' point of view, these rape cases, though not involving any act of homicide, still did harm to the social order of the frontier area, since the rapists polluted the chastity of adolescents from common peasant families (*liangjia* 良家) and thus jeopardized family order.

3. The Qing emperors often drew up new regulations to react to specific circumstances.

For a long time imperial edicts had been one of the primary sources of the Qing law. The Qianlong emperor had been especially active in drafting specific regulations to punish certain kinds of crimes committed in the new frontier, even in the late part of his reign. As we have seen, the emperor's strong opinions on sentencing made frontier law enforcement more flexible and unpredictable for local officials. Officials were not always sure which the emperor would think was applicable in a particular case.

For example, from 1785 to 1792, following border conflicts with the Russians, the Qing shut down the Kiakhta trade with Russia and placed an embargo on the export of rhubarb, which was in great demand by the Russians. Therefore, when more and more Eastern Turkestanis as well as Han and Tungan merchants were found smuggling rhubarb from the interior to the northwestern frontier, where the Andijani merchants traded with Russians so eagerly that the embargo became invalid, Qianlong emperor became very concerned and issued a number of edicts to Le Bao, the General Governor of Shaanxi and Gansu requesting that these smugglers, whether they were Altishahr Muslims or *neidi* Chinese, be delivered to the interior and be given severe

punishment within the prescribed limits.¹⁴² In one of these edicts, the emperor even ordered a particular *neidi* merchant, Li Guisheng, who played a leading role in smuggling rhubarb, to be sentenced to death.¹⁴³ When Le Bao reported in 1789 that a group of smugglers were to be sentenced to military exile for life or to penal servitude according to the regulations on “smuggling prohibited goods”, the emperor overruled his proposal, saying that it was not proper at all (for Le) to have mistakenly cited the statutes which were supposed to apply to ordinary ignorant *neidi* people. These smugglers, he ordered, should be charged as “managing to get profit and having illicit relations with a foreign country”, and to be sentenced according to the severest penalties.¹⁴⁴ By doing this, the emperor created a wholly exceptional rule for the punishment of a specific crime—too exceptional for the local administrator to draw up a “correct” penalty based on the legal code. Qianlong himself was aware of this, as in another edict he informed his frontier officials that this severe regulation was made especially for rhubarb smugglers and could not be imposed on merchants selling other goods.¹⁴⁵

Another intriguing situation arose when the Ili General Mingliang proposed to punish six Andijani Muslims who had smuggled rhubarb by having them wear the

¹⁴² QSL, Qianlong reign, 1323: 30a-32b, 1324: 19a-20b.

¹⁴³ QSL, Qianlong reign, 1325: 3a-4a.

¹⁴⁴ QSL, Qianlong reign, 1330: 5b-6a.

¹⁴⁵ QSL, Qianlong reign, 1323: 35a.

cangue for one month, while seven Kashgarians who had committed the same crime were to be made to wear it for two months. For this, he was sternly criticized by the emperor. According to Qianlong, Kashgarians had been living under his kindness for years and were no different from inland commoners. They were not at all comparable to Andijanians, who should be driven out of the locality after wearing the cangue for one month. As for the case of Kashgarian merchants, they had to be handled by Le Bao according to the special regulation.

The Qianlong emperor's attitude recalls Laura Newby's argument that the Qing's interaction with Koqand contributed to their increasing border consciousness.¹⁴⁶ This case indicates that by the late Qianlong period, the northwestern Qing border with Koqand was still blurred and Koqand could still be regarded as a dependent state under the Qing, because the Qing officials had a right to punish Koqandi merchants who had broken the imperial regulations. However, this right had already been circumscribed, since both Qianlong and Mingliang agreed that the punishment inflicted on Andijanians should be much lighter than on the Kashgarians.

From the Qianlong reign on, successive Qing rulers continued to formulate new regulations with regard to the assessment of penalties for certain specific criminal cases. For example, during the Daoguang reign, there were often cases involving people who sent out leaflets appealing for donations in support of the uprising of

¹⁴⁶ Laura Newby, *The Empire and the Khanate*, pp.11-13.

Jahangir. In 1825 the Daoguang emperor issued a decree of prohibition, stipulating that if such a practice were found out, the offenders should be sentenced to immediate death. The person who donated the money would be expatriated to the *yanzhang* area (remote and harsh frontiers, at that time meaning Guangdong and Guangxi provinces) to carry out military service. Such criminals would not be granted a remission of penalty under any circumstances and on any occasion. The beneficiary would be expatriated to the inland frontier to carry out military service.¹⁴⁷

According to the Chinese legal tradition, the emperor's edicts always had uncontested legal authority and the Manchu rulers were especially willing to issue these when a specific case had to be dealt with in Xinjiang. Legislation there had always been incomplete and not systematic, and the Qing rulers had a large degree of freedom within which they could amend their policies for Xinjiang from time to time.

4. As time went on, the Manchu emperors tried to enlarge the applicable field of state law and to make a clearer demarcation between the two legal systems.

In Chapter 1, I argued that the Qianlong emperor adopted a flexible and dynamic policy to deal with “severe” criminal cases in Xinjiang. During the earlier part of the Qianlong reign, the emperor punished Xinjiang crimes according to both Chinese and Islamic laws. There is no indication that he had any intention to draw a clear line between the fields within which the two laws could be applied. Without

¹⁴⁷ QSL, Daoguang, 82: 9a-10a.

clear stipulations Xinjiang officials often could not make decisions on how to choose an appropriate law to adjudicate and sentence in a specific case. They usually listed the judgments given in cases that were precedents and let the emperor make the final decision.

By the late Qianlong reign, the emperor appears to have shifted his approach to the authority of state law in handling serious criminal offences in the frontier area. In 1792, a Uyghur, Tuohuta, beat his elder brother to death. The Ush Imperial Agent, Funishan, listed all the relevant statutes and regulations in both Chinese and Uyghur law in his report to the Qianlong emperor and asked if it was proper for Tuohuta to “redeem” his crime as allowed for in Islamic law. The emperor was furious with his memorial and sent an edict stating:

Xinjiang Uyghurs have been assimilated (*guihua* 歸化) for years and they should be familiar with *neidi* law. Now Tuohuta beat his brother to death and so this case should be treated according to the *neidi* statutes and precedents. Funishan has already proposed immediate death for this criminal, why cite the Islamic regulation of “donating money to redeem the crime” as well? It is especially wrong for [Funishan] to refer to “our *neidi* law” and “the law of those Uyghurs” in his memorial. Uyghur [and other non-Manchu peoples] are all subjects, why differentiate between them as between those and these (or between ours and yours, *he fen bici* 何分彼此)? Funishan is very thoughtless and should be reproached strictly. From now on, all

serious cases of this kind should be dealt with according to *neidi* statutes and precedents.¹⁴⁸

A careful reading of this edict shows it to be quite revealing. Funishan and the Qianlong emperor, though both Manchus, had different attitudes toward not only the Uyghurs, but also toward their own identities. By referring to “our *neidi* law” (*wo neidi zhi fa* 我內地之法) and “the law of those Uyghurs”, Funishan’s memorial implies that he regarded himself as belonging to the “*neidi*” camp, while seeing the frontier Uyghurs as others. However, to the Qianlong emperor, “*neidi*” meant Han Chinese; both frontier Uyghurs and *neidi* Han Chinese were merely subjects of the Manchus (and there was therefore no need to differentiate between them). The Qianlong emperor, who had been promoting Manchu values for his whole life, was far more aware than Funishan of the unique and overarching status of their Manchu identity. So he could not stand that his high-ranking Manchu official treated himself as a “*neidi*” person when he referred to “our *neidi* law”. Although the Great Qing Code had been compiled largely based on the Great Ming Code¹⁴⁹, from Qianlong’s point of view, the “*neidi* law”, which was also the state law, was merely to be used by him to govern non-Manchu people, especially the Chinese. Even if the law was used

¹⁴⁸ QSL, Qianlong, 1413: 15a-b.

¹⁴⁹ See Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases* (Translated from the Hsing-an hui-lan) with Historical, Social, and Judicial Commentaries (Cambridge, Mass., 1967), p. 60.

to regulate other, non-Manchu ethnic groups, it should not be taken to mean that the Han Chinese enjoyed a higher or unique status in the Manchu empire.

This perhaps is one of the reasons why the emperor left a large space for his Inner Asian frontier ethnic subjects to have their legal affairs dealt with according to indigenous law. A unified Qing legal system, which was established largely based on the Chinese law of the previous Ming dynasty, would foreshadow the risk of assimilation of not only non-Manchu ethnic peoples, but also Manchus into the Chinese culture, a prospect which significantly worried the Qianlong emperor. Nonetheless, a more unified legal system was not only more efficient but also more effective in forging a close link between the frontier and the central empire. Therefore, after the new frontier had been incorporated for more than thirty years, the emperor decided to impose state law on the Xinjiang Uyghurs to a greater, but still limited extent. After sending the above edict, the Qianlong emperor soon added another decree to declare the new set of frontier legal rules that I have mentioned previously: “a Uyghur, who kills his uncle, or brother, or grandfather, or grandfather-in-law, should be punished in accordance with the *neidi* codes or statutes. Homicide cases related to distant relatives should be dealt with based on Uyghur traditions. No need to treat such cases based on the *neidi* institutions and laws.”¹⁵⁰

Serious criminal cases recorded in the *Secret Palace Memorials* indicate that this set of rules was valid to the end of the Muslim Rebellion. No case of killing

¹⁵⁰ QSL, Qianlong reign, 1417: 23a-b.

distant relatives can be found in the archives, which very likely means that this type of case was handled according to indigenous law. On the hand, for example, in 1811 an intoxicated Uyghur injured his wife and killed his own mother with a knife, and was sentenced to death by slicing according to the Qing code.¹⁵¹ It is also worth noting that in this case the Qing government ordered the wife, who was proven to be filial to the parents-in law and completely innocent in terms of Chinese law, to be dealt with by the *hakim beg* according to the Muslim statutes (*huizi li* 回子例); and the offender's friends, who had been drinking with him that night, were to be disciplined by the *hakim beg* as well. These legal arrangements attested that by this time not only minor criminal offenders but also victims were left to be dealt with by indigenous law or customs.

As I have just mentioned, more rules about punishing severe crimes by the Qing law were recorded in the *Huijiang Tongzhi*, including regulations ordering that “those who intentionally kill someone or injure someone to death with a metal instrument should be strangled in the bazaar. Those killing someone by mistake or beating someone to death without using any metal instrument could be dealt with in accordance with Muslim tradition, that is, they were allowed to redeem the crime by giving money or livestock to the relatives of the dead”.¹⁵² The *Huijiang Tongzhi* was

¹⁵¹ *Junjichu lu fu zouzhe* (Reference copy of palace memorial stored in the Grand Council), the category of *minzu* (ethnicity), a class of document held in the Number One Archives of China. Jiaqing 15(1810), the 6th month, the 22nd day.

¹⁵² He Ning, ed., *Huijiang Tongzhi*, (Taibei : Wen hai chu ban she, 1966), 7: 24b.

compiled in 1804. Some of the regulations recorded at that time seem no longer to have been applied by the 1840s. An 1842 case indicated that the regulation mentioned above regarding accidental killing was no longer being obeyed by that time. In that year, when urinating in a field at night, a Turfan Uyghur, Manlike, threw a stone at some dogs which were trying to attack him. Unfortunately the stone hit a neighbor's head and caused his death the next day. The case was reported by the Turfan Commandant to the central government. Finally Manlike was punished with strangulation and about 14 *taels* of silver was to be given to the family of the victim. The statute which was invoked stated that anyone who unintentionally kills or injures another will be sentenced as if it were an act of killing or injuring in an affray (*dou sha lu* 鬥殺律). Redemption will be carried out according to the law, and the money will be given to the family (of the person who was killed or injured). An accident means that which the ear or eye does not extend to, or that which was not contemplated, as, for example, when for some reason one is tossing bricks or tiles (and unexpectedly kills another).¹⁵³

Although the judgment in this case also involved redemption, this was stipulated by the Great Qing Code, instead of by Islamic law. More importantly, Manlike was sentenced to death as well according to the Qing statute of “killing or injuring in an affray”, while in Islamic tradition the crime could have been redeemed

¹⁵³ *Junjichu lu fu zouzhe*, the category of *minzu*, no. 596, the 20th day of the 5th month, Daoguang 22 (1842). The statute was translated by William Jones, see William Jones (trans.), *The Great Qing Code*, p. 278.

by giving money or livestock. Since this case was in the category of “mistaken killing and unintentional killing”, it indicates that by the 1840s, the offence of killing someone by mistake was also punishable according to the Great Qing Code.

In the meantime, the Manchu emperors repeatedly guided their frontier agents, who were hesitant about the applicability of law when adjudicating criminal cases, to refer to the Qing law when dealing with serious cases. For instance, in 1816 a Kucha yamen runner named Gao Erbing was asked to look for and capture a criminal. Fearing that the deadline was approaching, Gao lodged a false charge against a Chinese Muslim (Hui) named Ma Xiang and applied severe torture to induce him to confess.. In a moment of desperation Ma Xiang injured himself badly. Xuzhuang, the Kuche Imperial Agent (*banshi dachen* 辦事大臣), made presentation to the throne requesting that the Board of Punishments draft a proper penalty in Gao’s case. The Jiaqing emperor criticized Xuzhuang harshly, saying “the court has already issued the Great Qing Code and supplementary regulations to Kuche. Undoubtedly this case should be judged according to the (Qing) statutes. You (Xuzhuang) said that because the case did not fully match with the statutes or the subsidiary statutes, you could not decide the penalty. But how can the details of a real case tally with the law book word by word?”¹⁵⁴

Since there were no clear stipulations from the central government with regard to the applicability of law to criminal cases in Xinjiang, theoretically the emperor had

154 QSL, Jiaqing, 316:17a-18a. .

discretionary power to make the final decision. It seems that ever since the late Qianlong period, there had been a tendency for the Manchu emperors to try to impose state law on a greater number of criminal cases. As we shall see, by the reign of Tongzhi, the emperor even tried to terminate the applicability of Islamic law on any form of criminal case in Xinjiang.

5. Muslim law continued to play a strong role in the local area and many Qing imperial officials dealt with cases according to the Islamic scriptures. Since there were no clear guidelines from the central government with regard to the applicability of laws, many problems arose at local level.

Without clear central guidelines, Xinjiang officials were often confused by the two law systems that were implemented simultaneously in this frontier area. They also could not predict the emperor's decision for any given case as there were no strict criteria to constrain the emperor's considerations. The safest strategy for officials was therefore simply to leave the final decision-making to the higher authorities.

However, not all officials were cautious and correct. Since there existed large space for discretion in the selection of a specific law to deal with a given criminal case, some officials, both stationed Qing agents and local *begs*, perverted the practice of criminal law in Xinjiang by making decisions that were sometimes very arbitrary. The absence of any detailed stipulations with regard to the applicability of laws provided opportunities for local officials to abuse the law for their own benefit. This legal abuse was a leading factor giving rise to social instability.

In 1857, the Imperial Agent in Kuche, Wuerqinge, asked the local *begs* to arrest some Uyghurs who had refused to pay their taxes in kind. Those Uyghurs were charged with having formed a mob to make trouble. With the excuse that both Han and Uyghurs resided together in Kuche city and because there was no jail in the city, the Agent decided to “follow Islamic law” and ordered immediate decapitation with exposure of the head for fifteen Uyghurs who “had made confessions” (*qu gong zhi fan* 取供之犯) and another fifteen who had not. No effort was made to consult with the Ili Governor-General before carrying out these sentences. The Emperor suspected that the imperial official pressed local Uyghurs too severely for the tax leading to the upheaval. As a result, he required the Ili General to appoint some officials to investigate the case.¹⁵⁵

The above case is only one of many indicating that Xinjiang officials intentionally abused the law and caused popular discontent with Qing rule. A notorious case finally made the Tongzhi emperor order that criminal cases among Xinjiang Uyghurs could no longer be sentenced according to Muslim law, and in the next section of this chapter I discuss this case in detail.

To summarize, the co-existence of the two laws generated multiple effects. It provided both flexibility for the Qing rulers to deal with Xinjiang affairs and opportunities for local officials to abuse their powers and oppress ordinary people. The abuse of the laws surely caused and intensified social instability in Xinjiang, and

¹⁵⁵ QSL, Xianfeng reign, 228: 22b-23a.

this in turn forced the Qing rulers to amend their strategic decisions on the applicability of laws to criminal cases.

The Mianxing-Yingyun case

The primary source of revenue for the Xinjiang government was the silver subsidy (*xiexiang*) shipped from other provinces annually. The subsidy amounted to around one million *taels* by 1830 and rose quickly over the subsequent decades. However, because of the Taiping rebellion and foreign indemnities imposed on the Qing government in the mid-nineteenth century, the Qing state was no longer able to ship the silver subsidy to Xinjiang. This caused a fiscal crisis in Xinjiang as it had a very small tax base and its expenditures were highly reliant on the *xiexiang* shipment. Meanwhile, trade between Xinjiang and China proper had been decreasing for a decade. Chinese merchants had gradually withdrawn in response to growing political instability because they had frequently become the target of attacks by local Muslim rebels and robbers.

Given the non-availability of the silver subsidy from China proper and the declining number and wealth of Chinese merchants, Qing officials in Southern Xinjiang were forced to depend increasingly on the local Uyghurs to feed the garrison troops. This required Qing officials to allow the *begs* to levy new taxes and additional

levies on the native people. These changes in fiscal policy undermined the Qing policy of light imperial taxation that had been in effect in Xinjiang since 1759.¹⁵⁶

It is against this background that we can understand the actions of Manchu officials and Uyghur *begs* in the Mianxing-Yingyu case. Due to the suspension of the annual silver subsidy, the Aksu Councilor (*banshi dachen* 辦事大臣), Mianxing, levied a new salt tax without permission from the central government. *Beg* Akelayidu borrowed money from local Han merchants and Andijani merchants and imposed a *tanpai* or irregular levy on Uyghur commoners.¹⁵⁷ For reasons that are unknown, a cashiered *beg*, Apisi, donated 20,000 taels of silver to the Xinjiang government. What we do know is that the Qing authorities resorted to the sale of offices when stipends from China proper no longer available. Han and Muslim merchants made contributions and received brevet ranks. It was possible that Apisi got his *beg* title as a result of the donation but was soon removed from office. It is against this background that a prolonged, complicated case took place, the final result of which was the Tongzhi emperor's decision to amend the way in which serious offenses were handled in Xinjiang.

In the late Xianfeng reign (1850-1861), the Aksu Imperial Agent (*banshi dachen*) Mianxing, who was also a member of the Qing royal family, reported to the

¹⁵⁶ James Millward, *Beyond the Pass*, p. 239.

¹⁵⁷ *Tanpai* was by no means a frontier practice. By the late Qing it had become commonplace in the *neidi* as well. See Zheng Qidong, "Jindai Huabei de tanpai (1840-1937)", *Jindaishi yanjiu*, 1994, no. 2, pp. 81-94.

emperor that the Muslim *begs* in Southern Xinjiang had illegally levied taxes for a long time. As the central government did not benefit from such illegal taxation, Mianxing suggested that it would be better to legalize the practice and to use the money collected to subsidize the expenses that the central government incurred in administering Xinjiang.¹⁵⁸ To assist him in making this decision the emperor sent some officials to investigate the feasibility of this taxation reform. Shortly after this, the Yarkand Councilor, Yingyun, impeached Mianxing for corruption. The investigators found that Mianxing had already illegally levied a salt tax not only on the local residents but also on the Andijani aliens living and trading in Southern Xinjiang. In fact, Mianxing had openly imposed additional taxes on Uyghurs without the permission of the emperor, and Uyghurs had protested that this practice was unlawful.¹⁵⁹

Several higher-level officials, including the Ili General, Changqing, the Ili Councilor (*canzan dachen* 參贊大臣), Jinglian, and the Ili Commandant (*lingdui dachen* 領隊大臣), Guiwen, were sent to investigate Mianxing's case at different stages of the investigation process. When Guiwen was in charge of the investigation, Mianxing first designated someone to bribe Guiwen and then lodged a false accusation to the emperor to accuse Guiwen of having demanded a bribe.

¹⁵⁸ QSL, Xianfeng reign, 337: 18a-19b.

¹⁵⁹ QSL, Xianfeng reign, 342: 6a-7b; 346: 17a-b.

In 1862, the new emperor, Tongzhi, urged Changqing and Jinglian to clear up the case. During their intensive investigation, Changqing and Jinglian found that Yingyun had committed several offences, including levying an illegal exaction on Uyghurs, beheading those who were against this illegal exaction without making a request for an imperial judgment, and doing something which was not allowed in Xinjiang.¹⁶⁰ Yingyun's offences are detailed below.¹⁶¹

1. Levying an illegal exaction

In 1857, a Hakim *beg* called Akelayidu in Yarkand borrowed 20,000 *taels* of silver from Andijani merchants for the defense of the Muslim city during the *jihad* (holy war) led by Katta Khan and Wali Khan, which was recorded as “the Rebellion of the Seven Khojas” in Chinese documents. Akelayidu then made a loan from Han merchants who were carrying out trade in Yarkand to pay back the Andijani merchants. After two years, the cashiered *beg*, Apisi, donated a similar amount to the Xinjiang authorities.

Yurui, who was the Yarkand Councilor¹⁶² at that time, ordered the *beg* Akelayidu to lend this donation to local merchants to earn interest.¹⁶³ However,

¹⁶⁰ QSL, Tongzhi reign, 2: 8a-9b; 10: 9b-10a; 16: 16b-19b; 16: 26a-27b.

¹⁶¹ *Junjichu lu fu zouzhe*, No. 1 Archives, Beijing. Category of *minzu* (ethnicity), Chang Qing's memorials submitted on the 19th day, 4th month, and the 27th day, 5th month, Tongzhi 1 (1862). See also QSL, Tongzhi reign, 25: 45a-47b.

¹⁶² The Yarkand Councillor was in charge of all affairs of Southern Xinjiang. The official ranking of Yarkand placed him immediately under the Ili General.

¹⁶³ This practice was often used by garrison authorities to supplement their budgets. The monthly interest rate varied from 1% to 9%. See James A. Millward, *Beyond the Pass*, pp. 86-87. Again, this

Akelayidu was not satisfied with the low interest rate. He chose to repay all debts to his Chinese creditors from this donation, without consulting Yurui. Akelayidu paid an additional 6,000 *taels* of silver as interest. About one year later (in 1860), Yurui required Akelayidu to return the amount of silver which he had ordered to be lent to merchants for interest (*fa shang sheng xi* 發商生息) in order to pay soldiers' stipends. At that time Akelayidu could only borrow 7,000 *taels* at most from merchants, the amount that was equivalent to the interest earned if that money had been lent to merchants, but had no way to pay back the principle of 20,000 *taels*.

Therefore, Akelayidu discussed the matter with other *begs* and decided to levy a special exaction (*tanpai*) on local Uyghurs in order to collect 20,000 *taels* of silver. They asked the new Yarkand Councilor, Yingyun, for his permission. Yingyun replied: "This is an official debt (*ci shi gongzhang* 此是公帳). It is assumed that you should try to repay the debt in an official way. Do not trouble the Uyghur (commoners)."¹⁶⁴ Nevertheless, it appears that Yingyun did not strictly prohibit the

was practiced in the *neidi* too, by both central and local governments. It started under the Kangxi emperor and ended in Qianlong reign. During the Kangxi reign the emperor considered primarily for the Eight Banners' livelihood and lent the money to the merchants who were related to the Neiwufu and who engaged in salt business. During the Yongzheng reign the policy was used to support provincial troops as well. See Wei Qingyuan, *Ming Qing shi bianxi* (Questions of the Ming and the Qing), (Beijing: Zhongguo shehui kexue chubanshe, 1989), pp.113-127, pp. 166-256; Zhang Jianhui, "Guanyu Qianlong shouche "en shang yinliang" yu shengxi yinliang zhi de cunfei wenti"(On the withdrawing of the system of *shengxi* silver by Qianlong and some problems concerning it), *Xibei daxue xuebao*, no. 5, 2009, pp. 41-46, Zhang Xianwei, master thesis, "Qingdai shengxi yinliang zhidu tanjiu" (The exploration of the Interest bearing silver system in the Qing dynasty), (Northeast Normal University, 2010).

¹⁶⁴ *Junjichu lu fu zouzhe*, No. 1 Archives, Beijing. Category of minzu (ethnicity), Chang Qing's memorials submitted on the 27th day, 5th month, Tongzhi 1 (1862).

practice of exactions and these *begs* apportioned the burden of 20,000 *taels* of silver to all the Uyghur villagers and finally collected the total amount of 447 silver ingots (equivalent to 22354.1 *taels* of silver) between the 10th month of Xianfeng 10 (1860) and the 9th month of Xianfeng 11 (1861).

2. Beheading those who resisted this illegal exaction without authorization

When Akelayidu implemented the tax apportionment, local Uyghur imams (*akhunds*) filed a petition requesting that they be exempted from the exaction, as Muslim clerics were habitually exempt from the *alban* tax. With Yingyun's permission, Akelayidu ordered the eight *akhunds* to be placed in the cangue. The general public also resisted the exaction, but in a different way from the *akhunds*. In one case, it was reported, the heavy burden of the new tax forced a Uyghur named Tailai to attempt to commit suicide. According to Tailai, a *beg* called Nudun levied a share of 12 *taels* of silver on him, and as he could not afford to pay it, Nudun took away most of his property, including a piece of white felt, a piece of wood and a donkey. Out of despair, Tailai injured himself severely in his suicide attempt. Scared by the potential consequences of Tailai's behavior, Nudun eventually returned his goods and promised that he would be exempt from the apportionment.

The most severe resistance against this exaction occurred in the 10th month of 1860. Local *begs* in a village called Yinma refused to present Uyghur commoners with the account book for this *tanpai*. The *begs* also detained ten Uyghurs who did

not pay the tax in the form of Muslim cotton (*hui bu* 回布).¹⁶⁵ As a consequence, more than one hundred Muslims, holding knives and wooden sticks, went to protest at the front gate of the yamen. Only after the *begs* fired blanks did the crowd finally disperse. The new Yarkand Councilor Yingyun apprehended the mob leaders and strangled or beheaded more than ten of them according to the Islam classics, without first submitting a request for imperial approval.

3. Doing something which was prohibited in Xinjiang

During the course of investigation, Jinglian also found that Yingyun had celebrated his mother's birthday with an opera performance (*yan xi* 演戲). According to the emperor's edicts and Jinglian's memorials, drama performances were banned in Xinjiang. Yingyun defended himself with the justification that he had only asked some travelling artists to perform on that day. However, the Secondary Captain (*shoubei*) of the Councilor yamen, Tian Feng, confessed that he had painted costumes for the theatrical troupe and had them embroidered by Uyghurs. Moreover, later the investigators found the actor, who confessed that he had gone onto the stage on that day to play "peaceful songs" (*taiping ge* 太平歌). According to Jinglian, drama (*xi* 戲) was referred to as "peaceful song" in the region beyond the pass (*kou wai* 口外).

So far I cannot find any sources precisely recording a regulation banning drama performances, either in the law codes or in other Qing materials such as the *Qing*

¹⁶⁵ After 1762, the Qing authorities in Xinjiang began collecting cotton cloth woven in Southern Xinjiang in lieu of the grain tax, which was shipped annually to the north to supply troops and to supplement the silk for trade with the Kazakhs.

Huidian. Why did the Qing government prohibit the playing of dramas in Xinjiang? I can only try to guess some of the reasons. First, although Uyghurs have always loved song and dance, Islam is hostile to music and performance in principle. We have no record indicating that all kinds of secular music were banned in Qing Xinjiang, but according to some historians, the Islamic imams and mullahs monopolized secular culture among Uyghurs, and did what they could to prevent its spread among the people.¹⁶⁶ The second and probably the most important reason is that Chinese operas often used images of idols such as Buddha, the Monkey King, which would be offensive to Muslims. So it is highly likely that the ordinance indicated a way in which the Qing leaders showed their respect to the religious customs of Uyghurs, especially the upper class.

In 1861 the Ili General Changqing was appointed to investigate and handle Yingyun's case. In the investigation edict Changqing reported that what Yingyun had done was based on the consideration that "previously all cases in Yarkand were handled according to the Islamic codes",¹⁶⁷ from which it is clear that the Imperial Agents often applied the Islamic codes to cases in Xinjiang. In 1862, the Tongzhi Emperor circulated a decree about the Yingyun's case. The decree pointed out that in addition to Yingyun, other councilors such as Yurui, Deling and Changqing all took the same action against those who objected to the apportionment. It was ordered that

¹⁶⁶ Colin Mackerras, "Traditional Uyghur Performing Arts", in *Asian Music*, vol. 16, No. 1, (1985), p. 30.

¹⁶⁷ QSL, Tongzhi reign, 10:9b-10b.

all of them should be punished, and the emperor decided that “from now on cases should be sentenced according to the Qing codes. All penalties based on Islamic codes were no longer allowed.”¹⁶⁸

This edict, however, tells us little about which kinds of cases should be dealt with only by the Qing codes. In the *Collected Institutes and Precedents of the Qing* (*Qing huidian shili*), we can find only the instruction issued by Tongzhi¹⁶⁹ without any further explanation about which are the relevant cases to be sentenced under the Qing system. Shortly after the issuance of this edict, the Muslim Rebellion broke out in Southern Xinjiang. In no time the entire Xinjiang region was engulfed in enormous upheaval. During these chaotic times, the emperor’s priorities inevitably shifting to measures for suppressing the rebellion, and no explanations or clarifications by way of follow-up on the matter of law applicability have been found. No other evidence has been found so far with regard to the central decision on the applicability of laws to criminal cases in Qing Huijiang. The crisis lasted until the establishment of Xinjiang province and to date no other evidence has been revealed to clarify the central decision on the applicability of laws to criminal cases for the years 1862—1877, the period before Zuo Zongtang proposed the designation of Xinjiang as a province.

Sizable archives about the Mianxing-Yingyun case help us to understand more clearly Southern Xinjiang society on the eve of the Muslim Rebellion. Mianxing’s

¹⁶⁸ QSL, Tongzhi reign, 25:47a-b

¹⁶⁹ *Qing Huidian Shili* (Collected statutes of the Qing, with sub-statutes based on precedents), (Beijing : Zhonghua shu ju, 1991), volume 994, p. 1258.

original proposal of formalizing the extra tax illegally levied by indigenous officials (*biantong si zheng zhuanwei gongyong* 變通私徵轉為公用) indicates that Chinese officials were trying to seize illicit profits extracted from Uyghur commoners by indigenous *begs*. In his memorial, Mianxing was able to justify undertaking this policy by saying that he was planning to reduce this “private tax” by half and to formalize it and that therefore “local Muslims will suffer less and the (Chinese) government will get more funds.” The Xianfeng emperor, though fully aware of the illegality of this tax, could not resist any policy that could relieve the financial burden of the central government. According to him, Mianxing’s suggestion would probably “increase (Uyghur’s tax burden) on the surface but reduce it in reality”.¹⁷⁰ This proposed policy reminds us of Yongzheng reforms, which legalized the collection of meltage fee (*huohao* 火耗 or *haoxian* 耗羨) in order to increase the legal income of local government without increasing the tax burden on the people, although neither the officials nor the emperor mentioned that there were precedents.¹⁷¹

¹⁷⁰ QSL, Xianfeng reign, 337: 18a-19a.

¹⁷¹ Madeleine Zelin, *The Magistrate’s Tael: Rationalizing Fiscal Reform in Eighteenth-Century Ch’ing China*. (Berkeley, University of California Press, 1985), pp. 25-115. See also Dong Jianzhong, “Qingdai haoxian gui gong qishi kao” (Studies on the beginning of the policy of “haoxian gui gong”), *Qingshi yanjiu*, 1999, no. 1, pp.103-113; Dong Jianzhong, “haoxian gui gong de zhiduhua jincheng” (The institutionalization of the return of meltage fees to the public coffers), *Qingshi yanjiu*, 2000, no. 4 pp.50-58.

Actually Xinjiang residents had long been suffering from exploitation by both imperial and local officials.¹⁷² These officials managed to extract revenues by various means, including levying extra taxes, investing government funds for interest, selling official titles, and so forth. These practices, as we know, were also common in the *neidi*. With stipends from China proper no longer available the situation became even worse. Imperial and local officials were both partners and rivals in the search for funds. Usually Qing officials demanded more revenue from indigenous *begs*, who in turn made up for their own loss of revenue by levying more taxes from Uyghur commoners. In this case, people like Tailai were at the bottom of the pyramid. They had no way to meet these demands but to commit suicide or rebel.

It was hard to say how much of the revenue went to the government treasury and how much to the officials' own pockets. In this case, without resources from the state, the need to repress the rebellion of the Seven Khojas gave Qing officials an excuse to demand more local revenue and Uyghur *begs* to extract more from the populace. By so doing, popular discontent with Qing rule was further heightened contributing to increased popular unrest. This seems to be a vicious circle that foreshadowed the bankruptcy of Qing governance in Xinjiang.

This case also suggests that Islamic law was widely referred to in the punishment of Uyghur criminals by Chinese officials. Although, as I have discussed, the Qing emperors from Qianlong to Xianfeng had all reiterated that severe criminal

¹⁷² Ildiko Beller-Hann, *Community matters in Xinjiang, 1880-1949 : towards a historical anthropology of the Uyghur*, (Leiden ; Boston : Brill, 2008), pp.164-175.

cases were to be handled according to state law, in practice, many cases in Yarkand were handled based on the Islamic scriptures, which is why so many high-ranking Qing officials were condemned by the Xianfeng emperor.

Why did the Qing officials prefer to consult indigenous Islamic law, instead of the state law? This case proved particularly instructive for answering this question. It seems to me that what mattered here was not the system of law itself, but the jurisdictional procedures each one set in motion. When a capital sentence was issued according to the Qing law, it had to be reported and approved by the emperor. However, punishments based on Islamic law, including the death penalty, could be implemented quietly at the local level without the knowledge or acquiescence of higher-level authorities. In this case, if Yingyun was going to execute the Uyghur mob leaders based on Chinese law, the whole case had to be reported to Beijing and the emperor would have found out that he was carrying out illegal tax extractions in Yarkand. With the native law available to him, Yingyun was able to suppress the rebels crudely and secretly. In brief, the dual-law system, especially the validity of Islamic law in Xinjiang, helped to cover up the corruption of both imperial and indigenous officials.

In the previous chapter I have argued that the Qianlong emperor was able to deprive the local level of the bureaucracy of decision-making power and then maintain tighter control on the frontier by not drawing clear distinctions between Chinese law and Islamic law. Nonetheless, the Mianxing-Yingyun case during the Xianfeng reign indicates that having two laws operating side by side was a

double-edged sword. Whenever the central authority loosened its control, frontier officials manipulated the system to benefit themselves.

Rebellion and the state of Kashgaria: a chaotic period

Beginning in the 1820s the new frontier saw increasing popular discontent, more and more domestic rebellions and frequent Khoja jihad, as well as severe external pressures mainly from Russia and Khoqand. Shortly after the Mianxing-Yingyun case, the (Chinese) Muslim rebellion broke out in South Xinjiang. Soon all of Xinjiang was engulfed in upheaval. It has not been found that the emperor presented any follow-up explanations or clarification for policy to end any further reliance on Islamic law. The social crisis lasted until the establishment of Xinjiang province.

Encouraged by the Tungan (Chinese Muslim) rebellions in Yunnan (1855-1873) and Shaanxi (1855-1873), Kucha Uyghurs and Tungsans, who shared the same religion but spoke different languages, rose up in June 1864 and overthrew the local government. This revolt soon expanded to almost the entire area of South Xinjiang. Qing rule there was on the brink of collapse: the rebellion wiped out the last vestiges of Qing rule in Xinjiang. The power vacuum left in South Xinjiang was soon occupied by a Kokandi army led by Yaqub *Beg*, who set up the independent Islamic state of Kashgaria. Yaqub tried to maintain good relations with both Great Britain and Russia, in the hope that these two countries would protect him against military attack by the Qing. Taking the opportunity of the unstable situation in Xinjiang, the Russians

proceeded to annex the Ili Valley in 1870, in the name of maintaining stability in this area and in the territory in Russian Turkestan that they had recently conquered.

Depicting himself as a defender of religious values, Yaqub pursued a strict Islamic policy. Sources concerning the implementation of law in the state of Kashgharia are limited in number, what we do know is that East Turkestanis were required to adhere to Islamic law at that time. Of the two documents that are known to have survived, one was written by Kuropatkin, an officer of the Russian General Staff, who was dispatched to Kashghar in 1876; the other was written by Liu Jintang, the first governor of Xinjiang province.

Kuropatkin wrote the following in his report:

Severe punishments, often which by death, overtake those disobedient to the will of Yakoob Bek. Of late years, however, having succeeded in making his name terrible, this potentate has, in spite of the generally-received opinion to the contrary, very seldom resorted to capital punishment. Being in need of money, he has more frequently punished offenders and those in disgrace by declaring their possessions confiscated to the State.¹⁷³

Liu Jintang in his memorial to the Guangxu emperor told basically the same story as Kuropatkin:

¹⁷³ A. N. Kuropatkin, *Kashgaria, historical and geographical sketch of the country, its military strength, industries and trade*. Trans. Walter E. Gowan. (Calcutta: Thacker, Spink and Co., 1882), p. 39.

Yaqub had occupied Xinjiang for more than ten years. That was a really chaotic period. A Uyghur who killed others need only to pay some money to the relatives of the dead, which was called “buy-life money”, but never pay a life for a life (*chang ming* 償命), since to amass money is the only purpose of Yaqub’s regime. Therefore, the rich men there regarded murder as a children’s game.¹⁷⁴

Surely both the Russians and the Chinese had reasons to want to criticize Yaqub. But the above two observations, especially the latter one, obviously have their own biases. As “a life for a life” (*sharen changming* 殺人償命), which means the person guilty of murder should be executed seemed to be one of fundamental principles of Qing criminal law, it would be hard for the Chinese to accept the Islamic laws which allow a murderer to be punished financially instead of by death and money given to the family of the victim as compensation.

It is well-known that in 1875 a heated debate took place at the Qing court over the relative importance of “Coastal Defense (*haifang* 海防) of the Southeast” and “Overland Defense (*saiifang* 塞防) of the Northwest”. The Qing government finally decided to back the Han general, Zuo Zongtang, in his suggestion that it reconquer the northwest frontier. In 1877, the Qing army under the command of Zuo Zongtang and Liu Jintang defeated the Kashgarian troops. Yaqub *Beg* died in April of that year when the Qing army was approaching his state. The Qing military expedition was formally completed with the occupation of Khotan on the second day of January 1878.

¹⁷⁴ Liu Jintang, *Liuxiangqingong zougao* (Memorials of Liu Jintang), (Taipei: Chengwen press, 1968), 2: 32a.

However, "the Ili Crisis" continued until the signing of the St. Petersburg Treaty in 1881, which affirmed the return of most of the annexed areas of Ili to China. Thanks to the financial difficulties of Russia at that time as well as the great diplomatic skills of Chinese ambassador, Zeng Jize, a war was avoided and Russians finally gave back the territory to the Qing. Under the terms of this treaty, Russia kept part of the territory, China had to pay an indemnity, and had to allow Russia to open more consulates in this area.¹⁷⁵ By the end of 1881 the Qing Empire regained and consolidated its sovereignty over the entire Xinjiang area after a thirteen-year loss of control.

Cultural policies for the new province

The officials who led the reconquest and establishment of the province, namely Zuo Zongtang and his subordinates among the Hunan troops, showed more ambition for cultural expansion than the Qianlong emperor, who had always been extremely cautious about enlarging the influence of Han culture across his multi-ethnic empire. It was not the first time that China had implemented direct control over this area, but the control mechanisms in previous periods had been primarily military-style governance. From the 1880s on, Xinjiang was integrated into the regular civil administrative system of China. Civil bureaucracy, manned largely by Han Chinese

¹⁷⁵ The political changes in Ili between 1871 and 1881 have been discussed in length in Immanuel Hsu's works. See Immanuel Hsu Chung-yueh, *The Ili Crisis: A Study of Sino-Russian Diplomacy, 1871-1881* (Oxford: Clarendon Press, 1965). See also Sarah C. M. Paine, *Imperial Rivals: China, Russia, and Their Disputed Frontier*, (Armonk, NY: M.E. Sharpe, 1996).

officials governed these areas directly in place of members of the Manchu and Mongolian military elites. The tax system was restructured to be consistent with that of *neidi* provinces. Muslim *begs* were placed under greater imperial supervision and were renamed *xiangyue* (“village compact lecturers”). Meanwhile, immigration from the interior to Xinjiang continued to be encouraged.

Unlike the conquest of 1759, when the Qianlong emperor had designed most of the policies for the new frontier, this time it was a group of Han Chinese provincial officials who planned the new administrative model for Xinjiang. Among them, it was General Zuo Zongtang who had the greatest influence on this period of Xinjiang’s history. The successful repression of the Taiping Rebellion paved the way for a group of Han officials and the troops they led, most of whom were from Hunan province, to step to the center of the political stage during the last decades of the dynasty. These Han officials, such as Zeng Guofan, Zuo Zongtang, and Hu Linyi, were all faithful adherents of Confucianism and were deeply influenced by the statecraft school. Zuo Zongtang had been memorializing the Qing court in favor of the idea of province designation for Xinjiang long before he took over official responsibilities in the area. By the time Xinjiang was designated a province in 1884, Zuo had already taken up a position as Governor-General of Liangjiang. However, the first four Xinjiang provincial governors were all men recommended by him.

According to James Millward, during the high Qing period, the Qianlong mode of frontier governance barely had any missionary ambition.¹⁷⁶ As we too have demonstrated, within this scheme, native customs, law, and religion were highly respected and able to operate as before. The policies implemented after the establishment of Xinjiang province, however, reflected the cultural concerns of the new generation of Xinjiang rulers. From 1876 on, Zuo Zongtang, in four memorials he had submitted to Beijing, set out his blueprint for Xinjiang province. Among his suggestions were the abolition of rotation of the garrison troops, the construction of irrigation projects, the expansion of land reclamation, a survey of arable land, reconfiguration of the tax system, unification of bank currency, and the promotion of education.¹⁷⁷

In one of the memorials, called “Report on handling rehabilitation works in Xinjiang”, Zuo mentioned that Zhang Yao, who had participated in the Xinjiang reconquest campaign and had served as his adjutant, had edited *Sixteen Sacred Edicts with Simple Explanations of the Code* (*shengyu shiliu tiao fu lv li jie* 圣喻十六條附

¹⁷⁶ James Millward, *Beyond the Pass*, p. 246.

¹⁷⁷ Zuo Zongtang, *Zuo Zongtang quanji* (The collection of Zuo Zongtang), (Changsha: Yuelu Shushe, 1986-1996). vol.7, “Memorial about whether Xinjiang should be established as a province (1878)”, pp. 3-6; “Memorial of reporting the Xinjiang situation again (1878)”, pp. 190-198; “Memorial of again reporting the plan of Xinjiang province (1880)”, pp. 491-496; and “Memorial on handling rehabilitation works of Xinjiang (1880)”, pp. 517-521.

律例解).¹⁷⁸ The book was written in both Chinese and Uyghur and had been distributed among Uyghur *begs* for them to teach orally to Uyghur commoners. The *Sixteen Sacred Edicts* had first been produced by the Kangxi emperor in 1670. It announced sixteen fundamental principles about how to be a “good” imperial subject, one of which was “obeying the law”. Most of these principles were drawn up on the basis of Confucian values.¹⁷⁹ Moreover, some of the maxims were simply directed at reducing challenges to the state. Ever since its publication the *Sacred Edicts* was intended to be taught to common people by *xiangyue* or school teachers in every village across the empire. This was, however, the first time it was suggested that it be promoted in Xinjiang. This can be seen as a sign that the new policy-makers intended to extend imperial cultural influence into this frontier region.

A memorial submitted by Liu Jintang, the first governor of Xinjiang province, also mentioned the distribution of the *Sixteen Sacred Edicts with Simple Explanations of the Code*. Early on, during the time when the Qing troops were fighting with Yaqub, the book had been distributed and taught in the newly established Confucian

¹⁷⁸ We cannot find any version of this book now. However, the “*Sixteen Sacred Edicts*” was widely circulated during the Qing dynasty, and a later version of it was entitled as *Elaborations of Sacred Edicts* (*Sheng Yu Guang Xun* 圣喻廣訓).

¹⁷⁹ On the *Sacred Edicts*, see Victor H. Mair, “Language and Ideology in the Written Popularizations of the Sacred Edict,” in *Popular Culture in Late Imperial China*, ed. David Johnson, Andrew J. Nathan, and Evelyn S. Rawski (Berkeley: University of California Press, 1985), p. 326.

charitable schools (*yishu* 義塾) and among *begs* so that more native Uyghurs could learn it.¹⁸⁰

Before the territory had been completely reconquered, the Qing officials had begun to establish Confucian *yishu* in every place immediately when it had been recovered. The establishment of Confucian schools throughout Xinjiang later aimed to teach non-Han children Chinese language and Confucian classics.¹⁸¹ The government would pay for the students' tuition and various living expenses. At the same time, the Qing rulers used this channel to disseminate Chinese legal thought. The minorities from a young age were inculcated with Chinese legal principles, as part of an education in Chinese social norms. During the process of preparing the designation of Xinjiang as a province, careful attention was paid to the insertion of Chinese legal culture into the area.¹⁸²

Though the new policy makers did attempted to modify local customs and moral principles, in general, they paid more attention to economic and financial construction than cultural affairs, since the expense of governing this frontier had haunted the court ever since Qianlong's 1759 conquest. In terms of cultural policies, these provincial officials still largely inherited Qianlong's idea of non-intervention,

¹⁸⁰ Liu Jintang, *Liuxiangqin gong zougao*, 2: 32b

¹⁸¹ Kataoka Kazutada, *Shincho Shinkyoto chi kenkyo* (A Study on Qing Dynasty's Administration toward Hisn-Chiang), (Tokyo: Yozankaku, 1991) , pp.202-205.

¹⁸² Jiang Huchong and Tang Jianzhao, "Luelun Liu Jintang zhi minzu wenhua guan", *Wenjiao ziliao*, January, 2007, pp. 71-72.

which was reflected in Liu Jintang's famous memorial declaring the aim of the new policies as being to "educate [the Uyghurs] without changing their customs and polish the administration without abolishing its [previous] effective policies."¹⁸³ The *Xinjiang Tuzhi* further elaborated this idea: "[we] should raise up and teach [Uyghurs] as people do with their newborn infants, through the establishment of the province, the nomination of officials and the installation of administrative units. However, as for religion, customs, and moral principles, there is no need to impose uniformity, and neither for food, clothing, language, or writing."¹⁸⁴ Since newborns actually have no culture, this expression indicates an ambivalence of Qing officials' opinion toward Uyghur native culture and custom: on the one hand, they felt it was necessary to adopt a tolerant cultural policy; on the other hand, they thought Uyghurs were without civilization.

Dealing with criminal cases after the 1880s

Few studies exist on the administration of laws in Xinjiang province after the 1880s. Based on materials such as the *Secret Palace Memorials* and the *Veritable Records*, I will try to analyze the applicability of laws and how criminal cases were handled from the 1880s to the fall of the dynasty. Since the central archives only documented serious cases punishable by execution reported by provincial governors

¹⁸³ See footnote no. 93.

¹⁸⁴ Yuan Dahua and Wang Shunan etc., (*Xuantong*) *Xinjiang tuzhi* (Xinjiang Gazetteer), (Taipei: Wen hai chu ban she, 1965), 48: 1b.

to the emperor for his approval, my study of this period will still focus on these serious criminal cases. First, however, I look briefly at jurisdiction in cases of minor criminal offences in Xinjiang based on local archives, which are also limited in quantity.

1. Only Qing law was applied to serious criminal cases, irrespective of the ethnicity of the offender. Islamic law was no longer valid for dealing with cases of this type.

Before the Muslim Rebellion, more than one Qing emperor had emphasized that the imperial agents were prohibited from judging serious criminal cases according to the Islamic classics. The notorious Mianxing-Yingyun case indicated that this prohibition had never taken full effect in Xinjiang. But after the 1880s, all serious criminal sentences documented in the *Secret Palace Memorials* were strictly dealt with according to the Great Qing code, regardless of the ethnic identity of the offenders or the victims. No more discussion about “handling cases according to the Islamic classics (*cha jing ban an*)” has been found at the central level, which means that, at least among cases that were severe enough to be reported to the emperor, these were all dealt with according to Qing law.

On the other hand, there had been waves of in-migration by Han and Hui Chinese from the 1830s onwards. After Jahangir’s jihad and the invasion of Khoqand, the Qing had begun to encourage the migration and settlement of Han people in Xinjiang. In addition, more Chinese agricultural colonies had been established in the South. During the suppression of the Muslim Rebellion, many Chinese from Hunan

and Tianjin followed the Qing troops to Xinjiang. They opened businesses and gradually settled down. By the early years of the Guangxu reign, the trend of Chinese migration to Xinjiang was more prominent.¹⁸⁵ After the defeat of the Rebellion, a large number of Tungans moved into Xinjiang from Gansu and Shaanxi to escape persecution by the government.¹⁸⁶

With a huge number of Chinese migrants flooding into this frontier region, conflicts among various ethnic or religious groups inevitably increased. The situation pushed the imperial rulers to work out an appropriate policy to deal with these inter-ethnic tensions. More so, the Qing government had to determine whether or not to go on punishing perpetrators according to different laws, even when they committed the same crime and in the same place.

Archives dating after the 1880s indicated that the Qing government exclusively imposed Chinese law on severe criminal offences committed in Xinjiang, irrespective of the perpetrators' ethnicities. In 1886, for example, a Kucha Uyghur called Tudi beat his cousin's wife to death when she vigorously resisted his efforts to rape her. The case was reported to the *xiangyue* and investigated and reviewed in turn by the county magistrate, the prefectural magistrate, and finally reported by the provincial

¹⁸⁵ As depicted in *Hami zhiliting Xiantuzhi*: "Native Uyghurs knew little about commerce. It was the immigrants from within the pass, either from Shaanxi or Gansu, that did business here following the troops. Goods were abundant and commerce was prosperous in the early years of the Guangxu reign." Ma Dazheng, Huang Guozheng and Su Fenglan, *Xinjiang Xiangtuzhigao* (Beijing: Quanguo tushuguan wenxian suowei fuzhi zhongxin, 1990). *Hami zhiliting xiangtuzhi*: volume of *shangwu*, p.271.

¹⁸⁶ Yuan Dahua and Wang Shunan etc., *(Xuanton) Xinjiang Tuzhi (160 volumes)* (Taipei: Wenhai chubanshe, 1965), volume 104. *Zouyi*. p. 3901

governor, Liu Jintang, to the emperor. The criminal was punished by decapitation and his head was exposed to the public, according to the statute on attempting to rape the wife of a relative of morning degrees above *sima* (總麻)¹⁸⁷ and killing her. The victim was honored as a chaste woman for having given up her life to resist pollution according to the Qing policy.

In the same year, a Kotan Uyghur boy, Wushou, at the instigation of his mother, Lidipi, stole 250 cash coins from a female neighbor and was found out immediately. When the neighbor reported this to Lidipi's husband, Lidipi was shamed, agitated and worried that she might reveal this to other villagers. So she induced the woman to enter her house and there killed her with the help of her son. Eventually Lidipi was sentenced to decapitation with delay according to the statute on intentional murder. According to the Great Qing Code, those who stole money of less than one *tael* of silver should be beaten by 60 blows of a heavy stick and the penalty for the subordinate criminal should be reduced by one degree or level. So Wushou was to be punished by 50 blows with a light sticks. However, there was another statute in the Code providing that if a child younger than ten years old steals or injures others, his crime should be redeemed (by money) and no other penalty should be imposed on him. Therefore, Wushou's father was asked to pay a ransom as well as to return the money that Wushou had stolen. The father himself was punished by eighty blows

¹⁸⁷ *Sima* was the fifth degree of morning.

with the heavy stick- according to the penalties of minor offences(*bu ying zhong lu* 不應重律) because he had failed to discipline his wife.¹⁸⁸

The above two cases indicate that by the 1880s the assessment of punishment in severe criminal cases was strictly based on the Great Qing Code. In the first case, although the criminals were Uyghurs, Chinese mourning degrees were used to weigh the relation between the criminal and the victim and then to assess the degree of seriousness of their crimes. In addition, the murdered woman received the honor of a chaste woman, a gesture that was never found in Xinjiang before the 1860s.

The second case is even more instructive, since the boy, as the accessory to the crime, was also strictly punished according to the Great Qing Code. But as I have discussed previously in this chapter, at the latest by the early nineteenth century, the accessories to serious crimes were left to be punished or “disciplined” according to Islamic law. Thus we can say with certainty that the Chinese legal system did expand in Xinjiang, although largely with regard to the most serious crimes.

2. The Flexible Regulations of Xinjiang

When Zuo Zongtang was called back to Beijing in 1880, he recommended his fellow countryman, Liu Jintang, a 30-year old Hunan Chinese, to be the Imperial Agent in charge of Xinjiang affairs. It was Liu who finalized the grand project of province designation and took the position of the first Xinjiang Provincial Governor.

¹⁸⁸ *Guangxu chao zhupi zouzhe* (Rescripted palace memorial of the Guangxu reign), Number One Archives ed., (Beijing: zhonghua shuju), vol. 106, p. 655

In 1881, Liu Jintang drafted the *Flexible Regulations of Xinjiang* (*Xinjiang biantong zhangcheng*) and submitted them to the Qing court. The *Regulations* were the first and most important set of principles in the shaping of the rule of law in Xinjiang province. Although the word “*biantong*” in Chinese means not only flexible, but also temporary and subject to change, this legal framework actually defined the implementation of criminal law in Xinjiang for the next twenty odd years. In this document the Qing laws, especially Qing legal procedures, were amended for implementation in Xinjiang.

When submitting the *Regulations* to the court for the final amendment, Liu explained the purposes and necessity of drawing up these regulations in his memorial, which he called “Proposing to handle *ming* [homicide] and *dao* [general disorder and theft, including rebellion, robbery, and theft] cases flexibly”.¹⁸⁹

According to Liu Jintang, Xinjiang inhabitants of various ethnicities had been away from orthodoxical (Confucian) education (*jiu wei sheng jiao* 久違聲教) for a long time. They were like pastured horses, whose wild nature could not be tamed although they were temporarily under restriction. In previous dynasties, systems of law operating in the frontier areas had been designed to be simple and easy to apply. Ferocious crimes had been punished severely to warn others while minor faults had usually been forgiven. The Qing government, he wrote, should follow this tradition. Particularly, Liu Jintang cited the Qianlong emperor’s legal policies in the Miao

¹⁸⁹ Liu Jintang, *Liuxiangqingong zougao*, 2: 32a-34b.

frontier as a good example. After the Miao frontier was annexed to the regular civil administrative system of the empire in the early Qianlong reign, Miao people were allowed to resolve their disputes according to the native law. This policy could now be extended to Xinjiang, he proposed, because it would not be easy to achieve perfect governance immediately by imposing Chinese policies on frontier barbarians (*yong xia manyi, ju zhen shangzhi, shi wei yi yan* 用夏蛮夷，遽臻上治，实未易言).

The legal flexibility proposed by Liu Jintang mainly consisted of two elements. One was the toleration of minor offences (*kuan xiaoguo* 宽小过), which meant leaving those cases to be handled by native laws and customs. The other was to hold to great principles (*zong dagang* 总大纲), which meant harshly and quickly punishing serious crimes. According to Liu, trials for these cases should be carried out immediately and the sentence should be imposed as soon as possible. If the offender was punished long after the crime was committed, the warning and intimidatory effect of the punishment would be weakened. On the other hand, since Xinjiang was large and logistics inconvenient, the cost of sending criminals to the upper level court to wait for their cases to be reviewed and the cost of exiling criminals would be unaffordable. Therefore, for the time being the criminal cases of *ming* and *dao* should be tried and punished immediately on the spot and a list of summaries of these cases would be submitted to the emperor every three months.

The *Flexible Regulations of Xinjiang* contains a number of detailed provisions to “simplify legal procedures”. These can be summarized into two aspects: those who should be sentenced to death without delay according to the Great Qing Code should

all be executed immediately on the spot; those who should be sentenced to death with delay or to personal military exile, should all be punished by imprisonment (*gugin* 錮禁) of various lengths. In other words, the complex assessment of penalties was now “simplified” into two extremes: either the most severe penalty or more or less the lightest one. In this way, it was argued, provincial officials would be able to implement the criminal law in a very easy, prompt and perhaps more effective way. They need not wait for Beijing’s sanction to punish serious criminal offenders, and instead they merely had to submit a report to the emperor every three months, briefly summarizing all the cases that had been handled according to the *Flexible Regulations*.

The earliest report that I have found written by Liu Jiantang is about the cases “flexibly” handled in the autumn and the winter of 1882. There were seven criminals, shown here with the punishment each received.

A Turfan Tungan who intentionally killed his brother (who were a young child) and tried to impute the crime to others (*tu lai taren* 圖賴他人): execute on the spot (*jiu di zheng fa* 就地正法). The standard sentence for a superior or elder relative to plots to kill someone who is an inferior or younger relative was strangulation (with delay) according to the Great Qing Law.¹⁹⁰ However, usually in the Fall Assizes if a person willfully killed his younger brother or neiphew and tried to impute the crime to others, he would be classified into the category of “confirmed (*qingshi* 情實) and

¹⁹⁰ William Jones (trans.), *The Great Qing Code*. Article 284, p. 270.

sentenced to death.¹⁹¹ A Koqandi Uyghur who injured another Uyghur to death in a fight: wearing cangue for three months. If he was an inland Chinese, the standard sentence was strangulation (with delay) according to the Great Qing Law.¹⁹²

An Aksu Uyghur who killed a person because the latter beat his mother: imprisonment (*gu jin* 錮禁) of two years. The standard sentence was strangulation with delay according to the Great Qing Law.¹⁹³

A Shayar Uyghur who murdered a Chinese merchant and his wife for their money: death on the spot (*jiu di zheng fa*), head being cut off and hanged up as a warning to all. The standard sentence was decapitation (without delay) according to the Great Qing Law.¹⁹⁴

An Aksu Chinese with mental disease (*fengbing* 瘋病) who injured a Uyghur and caused his death: sending back to his native place to be locked up (*suo gu* 鎖錮) for at least two years by the local magistrate. The standard sentence was to be locked up forever or to be punished according to the Regulations of Affrays and Blows (if the offender had recovered from the mental disease).¹⁹⁵

¹⁹¹ Song Beiping, *Qiushen tiaokuan yuanliu kao*, pp. 178-185.

¹⁹² Ibid, Article 290, p.276.

¹⁹³ Ibid. Article 323, p.309.

¹⁹⁴ Ibid, Article 282, p. 268.

¹⁹⁵ *Qinding Daqing huidian shili* (Collected statutes of the Qing, with sub-statutes based on precedents), (Shanghai: Shanghai guji, 1995), vol. 805, p. 796.

A Uyghur living in Qitai county who murdered another two Uyghurs (father and son): *jiu di zheng fa*, head being cut off and hanged up as a warning to all. If the standard sentence for killing two persons of one family was decapitation without delay.¹⁹⁶

A Yarkand Uyghur who beat his sister-in-law's adulterer to death when catching them in the act of having sex: imprisonment for half a year. The standard sentence was strangulation (with delay) according to the Great Qing Code.¹⁹⁷

Basically these cases attest the above mentioned principles of flexible regulations. Those who might be punished by death without delay were all executed on the spot and those who might be punished by death with delay or lighter all receive sentence of imprisonment. In the light of the policy being put forth at this time the punishment of Criminal 2 is astoundingly light. We can only assume that this was politically motivated by the Qing desire to maintain peaceful relations with the leadership of the man's homeplace, Koqand.

The *Flexible Regulations* were imposed not only on primary criminals but also on accessories. For instance, there were twelve cases in total which were handled flexibly according to the *Regulations* in the spring (from the first to the third month of the lunar calendar) of 1885. Among the twelve cases, primary criminals in seven cases and accessories in two received sentences of imprisonment ranging from two to

¹⁹⁶ *Daqing luli*, annotated by Tian Tao and Zheng Qin, p.428.

¹⁹⁷ William Jones (trans.), *The Great Qing Code*. Article 290, p.276.

five years. Imprisonment is not a punishment in China. Here in Xinjiang it seems to be a substitute for exile, since it was too difficult to transport exiled criminals in Xinjiang, especially South Xinjiang.¹⁹⁸

3. Immediate execution on the spot

After the establishment of Xinjiang province, at the level of legislation, the most controversial issue was whether or not to continue “*jiu di zheng fa*”, which was supposed to be a temporary legal practice. However, Xinjiang was not the only province that generated this debate between the central and the provincial officials – the debate was nation-wide and prolonged.

The institution of death penalty review became problematic during the Taiping Rebellion, when many more local bandits, who had taken advantage of the social instability at that time and carried out various crimes, were to be sentenced to death than during any preceding peaceful period. To wait for final approval of a death penalty was not always feasible for local officials during this time of war or rebellion. To minimize the delay in carrying out a capital sentence, Chinese military officials who were fighting on the front, represented by Zeng Guofan, proposed that *jiu di zheng fa* should be institutionalized in times of chaos. In 1853, the Qing court approved this proposal and issued the Regulation concerning *jiu di zheng fa (jiu di zheng fa zhangcheng)*.¹⁹⁹ According to this ordinance, whenever a group of bandits

¹⁹⁸ Yuan Dahua and Wang Shunan etc., (*Xuantong*) *Xinjiang tuzhi*, 101: 16b-18b.

¹⁹⁹ Zhao Erxun, *Qing Shi Gao* (History of the Qing Dynasty), (Beijing: Zhonghua shuju, 1976), *Xingfa zhi* 2, pp. 4202-4203. But this is not the only statement, refer to Qiu Yuanyou, “Taipingtianguo yu wan

gathered and pillaged commoners, the local officials were allowed to execute them immediately after investigation, but all other regular crimes of the *dao* and *ming* categories were to be punished according to the normal procedures.²⁰⁰

The Regulation concerning *jiu di zheng fa* remained valid after the Taiping Rebellion was put down. Beginning in the 1870s, central officials of the Board of Punishment had begun to challenge the normalization of *jiu di zheng fa*. In 1874, an imperial censor, Deng Qinglin had proposed to abolish *jiu di zheng fa* in provinces that had recovered from warfare, but this had been rejected. In 1882, Chen Qitai and Xie Qianheng, both of whom were censors of Board of Punishment, submitted memorials to the court to suggest the cancellation and amendment of *jiu di zheng fa* respectively. This time, the emperor asked for more opinions from both sides— the legal elite on the Board of Punishment and the provincial officials as legal executors. According to the former, *jiu di zheng fa* was a simplified, *ad hoc* policy that was only suitable during wartime. The dynasty had been at peace now for twenty years, and *jiu di zheng fa* had been abused by local officials. It was often difficult to catch a criminal offender immediately. When the tenure of a county or prefecture magistrate was up, in order to clear his caseload, he often wrongfully procesuted those who committed minor crimes as serious offenders and sentenced them to death peremptorily

qing jiu di zheng fa zhi zhi” (Taiping Rebellion and the institution of the immediate execution in the late Qing dynasty), *Jindai shi yanjiu*, no. 2, 1998, pp. 31-50.

²⁰⁰ Zhao Erxun et al., eds, *Qingshi gao* (Draft official history of the Qing Dynasty), (Beijing : Zhonghua shu ju : Xin hua shu dian Beijing fa xing suo fa xing, 1977), vol. 143, pp. 4202-4203.

according to the *jiu di zheng fa* regulation. Therefore, lack of the review mechanism severely damaged the fundamental principle of “cautious punishment (*shen xing* 慎刑)” in the Chinese legal tradition and caused resentment among the common people.²⁰¹

According to the provincial officials, however, chaos had not completely ended and it was also a tradition to impose serious punishments during periods of chaos (*luanshi xu yong zhongdian* 乱世需用重典). Liu Jintang’s explanation of the situation in Xinjiang was a typical of the opinion coming from the provincial level. According to him, the delay in implementing criminal sentences would produce challenges for the detainment of offenders. Xinjiang had a large territory with low population density, and it would be hard to prevent criminals in jail from escape if they were detained for a long time, he argued. Moreover, the cost of imprisoning them and sending them to the upper-level court could be huge. On the other hand, if a capital criminal were not executed because of a long string of judicial procedures, capital sentence would hardly produce enough effect in terms of warning others.²⁰²

In the fourth month of 1882, an emended regulation concerning the implementation of *jiu di zheng fa*, drafted by the Board of Punishment, was supposed to end the debate. It provided that from then on, within one year the “old institution” should be restored to deal with all regular cases in the *dao* category, with exceptions

201 Zhu Shoupeng, *Guangxu chao dong hua lu*, (Beijing : Zhonghua shu ju, 1958 (1984 printing)), pp. 1316-1317.

²⁰² Liu Jintang, *Liu Xiangqin Gong Zougao*, vol. 8, 38a

including cases arising in Gansu and Guangxi, where there were still wars and uprisings, as well as cases of bandits, horse thieves, secret society bandits (*huifei* 会匪), escaping soldiers (*游勇*) and rebels. Provincial governors were prohibited from executing other criminals before receiving sanction from the capital.²⁰³

But the story of Xinjiang indicates that this amendment to the regulations by no means terminated the local officials' arbitrary rights to execute criminals on the spot. The "old institution" had not been restored in Xinjiang by 1885. Officials of the Board of Punishments suggested that the emperor reconsider how to deal with cases of general disorder and cases of homicide occurring in Xinjiang. According to them, all Xinjiang criminals in *ming* and *dao* cases should be charged according to the Great Qing Code and their penalties should only be implemented after receiving the approval of the Board. All offenders subject to "death penalties without delay" should be executed only after receiving approval and other criminals sentenced to death should wait for the Autumn Assizes.²⁰⁴ In the memorial that contained his immediate response, Liu argued that the legislation of criminal cases of *ming* and *dao* in Xinjiang had been different from the *neidi* areas as early as the period before the Muslim Rebellion, and in any case *jiu di zheng fa* was still valid in many interior provinces. Therefore, he wrote, it was really difficult to apply strictly the regular legal

²⁰³ Zhu Shoupeng, *Guangxu chao dong hua lu*, Beijing: zhonghua shuju, 1958, pp. 1318-9.

²⁰⁴ *Guangxu chao zhu pi zouzhe*, vol. 106, pp.83-84.

institutions in Xinjiang at the present time.²⁰⁵ Finally, a compromise was reached between the two sides: the offenders sentenced to (military) personal exile, or to strangulation or decapitation with delay, or assigned to the category of “capital sentences with delay” in the Autumn Assizes (*qiushen ru huan* 秋审入缓) should not be handled in any exceptional way, but according to the regular legal procedures. Those offenders sentenced to strangulation or decapitation without delay, or assigned to the category of capital sentences without delay in the Autumn Assizes (*qiushen ru jue* 秋审入决) according to the regular legal procedures, should be executed immediately on the spot according to the *Flexible Regulations*.²⁰⁶

A year later, the imperial court tried again to restore the normal reviewing system for capital sentences with another edict. Liu reiterated the special situation in Xinjiang. At the end of his memorial, Liu requested that the *Flexible Regulations of Xinjiang* continue in effect for at least another three years. The memorial was finally endorsed by the emperor.²⁰⁷

Nothing significantly changed three years later when Liu Jintang retired in 1888. Another Hunanese who had served in the Hunan troop, Wei Guangtao, succeeded Liu as the acting governor of Xinjiang province. In around 1899, the *Amendment to the Flexible Regulations of Xinjiang* (*Xinjiang zouding biantong zhangcheng* 新疆奏定

²⁰⁵ Ibid.

²⁰⁶ *Guangxu chao zhu pi zouzhe*, v106, p.505.

²⁰⁷ Liu Jintang, *Liuxiangqingong zougao*, 11:48a

變通章程) was issued, according to which severe cases in the *dao* category were still subject to *jiu di zheng fa*, but the final judicial right to issue capital sentences of the *ming* type went back to the Board of Punishment and the emperor.²⁰⁸ This change helps to explain why two of Wei Guangtao's reports to the emperor about flexibly handled cases, one dating from the fourth month of 1889, the other from the second month of 1890, differed dramatically when describing the content of the *Flexible Regulations*. In the first report, Wei wrote: "According to the (Flexible) Regulations, severe cases of the *ming* and *dao* should be punished by *jiu di zheng fa*."²⁰⁹ After the statement, Wei listed six cases under the *ming* and *dao* categories, for example, the case of a son killing his father and the case of a wife killing her husband. Both were no doubt homicide (*ming*) cases. Regarding the second one, Wei wrote: "According to the [Amendment to the Flexible) Regulations, severe cases of "theft" (*dao*) should be punished by *jiu di zheng fa*."²¹⁰ The two statements, though they looked alike, had significantly different implications for the kinds of cases that would be subjected to *jiu di zheng fa*. Ten cases of *jiu di zheng fa* listed in the second summary were all about *dao*, such as killing people willfully during a robbery, or killing people while plundering a house, or raping women during a robbery.

²⁰⁸ Yuan Dahua and Wang Shunan etc., (*Xuantong*) *Xinjiang tuzhi*, 101:19a.

²⁰⁹ *Gongzhong dang* (Secret Palace Memorials, hereafter GZD), (Taipei: National Palace Museum, 1973-1975), Guangxu reign, vol. 4, pp 394-395.

²¹⁰ GZD, Guangxu reign, vol. 5, pp. 148-149

Much as with the practice of *jiu di zheng fa* in the *neidi* China, the *Amendment to the Flexible Regulations* remained valid in Xinjiang until very late, when the Qing rulers tried to modernize the Chinese legal system during the reforms of the New Policies movement in the 1900s.

It is worth noting that the practice of *jiu di zheng fa* did not start at the time of the Taiping Rebellion, as some Chinese historians suggest.²¹¹ Instead, from the early Qianlong reign emperors had, from time to time allowed capital offenders to be executed immediately.²¹² As I have discussed in the previous chapter, as soon as Xinjiang was conquered, Qianlong had issued an edict bestowing on sojourning officials the right to punish criminals guilty of homicide by immediate execution on the spot in order to intimidate local ruffians. Post-Rebellion Xinjiang officials were fully aware of the legal history of this place. So when the legal elites of the Censorate and the Board of Punishment tried to abolish the policy of *jiu di zheng fa* by defining it as merely a temporary military law implemented during the Taiping Rebellion, Liu Jintang meaningfully pointed out that this policy had been in place in Xinjiang during the “peaceful period.”

²¹¹ For instances, see Li Guilian, “Wan Qing jiu di zheng fa kao”(Studies on *jiu di zheng fa* in the late Qing), *Zhong nan zhengfa xueyuan xuebao*, no.1,1994, pp. 81-87; Qiu Yuanyou, “Taiping tianguo yu wan Qing jiudi zhengfa zhi zhi”(Taiping Rebellion and the institution of *jiu di zheng fa* of the late Qing), *Jindaishi yanjiu*, vol. 2, 1998, pp. 34-38; Qiu Yuanyou, “Wanqing zhengfu heshi hedi kaishi shixing jiudi zhengfa zhi zhi”(When the late Qing government launched the policy of *jiu di zheng fa*), *Lishi dang'an*, vol. 3 2002, pp.93-96; Zheng Qin, *Qingdai falu zhidu yanjiu* (Studies on legal institutions of the Qing dynasty), (Beijing: Zhongguo zhengfa daxue press, 2000), p. 197.

²¹² Wang Ruicheng, “Jiu di zheng fa yu Qingdai xingshi shenpan zhidu”(Jiu di zheng fa and the criminal jurisdiction of the Qing dynasty), *Jindaishi yanjiu*, no. 2, 2005, pp.213-214.

Though applied in both the early and later parts of Qing's rule in Xinjiang, the policy of *jiu di zheng fa* implied a different status for the imperial power. The debate over *jiu di zheng fa* in the late Qing period has long been interpreted as a competition for arbitrary power between the emperor and the provincial officials, and the result of this debate has been seen as the downward transfer of power from the center to the province.

It seems to me, the contention on *jiu di zheng fa* indicates more acutely the aloofness of the late Qing rulers from local affairs, especially from legal enforcement in the localities. In Qianlong's reign, this policy was drawn up by the emperor himself and could actually be regarded as a direct collaboration between the emperor and his Xinjiang imperial agents, bypassing the officials of the central legal and censorate institutions. Local officials had to report their decisions on immediate execution to the emperor, but did not need to receive sanction from the central judicial institutions. The Qianlong emperor strengthened his rule by making this kind of exception.²¹³

However, during the late Qing period, the Guangxu emperor (and the Empress Dowager) no longer played the role of policy maker for Xinjiang. They had withdrawn from day to day governance, or at least from consultation about the governance, of frontier administrative affairs some time earlier. As we have noted, it

²¹³ In doing this Qianlong was actually following a technique utilized by his father to carry out fiscal reform. Yongzheng bypassed the Board of Revenue and had officials report *huohao* funds directly to him. He also bypassed the Grand Secretariat, an outer court institution, when he set up the Grand Council to handle military affairs on the Western frontier. Madeleine Zelin, "The Yongzheng Reign" In *Cambridge History of China*, v. 9, Willard Peterson, ed., (Cambridge: Cambridge University Press, 2003), pp. 203-220.

was not even the imperial court, but the central legal institutions, that had been eagerly promoting the abolition of *jiu di zheng fa* and the restoration of the regular reviewing procedures for capital cases. The court became much more passive than during the high Qing period, when the emperors' opinions were quite unpredictable regarding each capital case. The late Qing rulers' lack of commitment and ability to become involved in frontier governance made it easy for the frontier officials to ignore imperial opinions and acquire more power.

It does not seem to me, however, that the motive of these local Han Chinese officials to try so hard to maintain the policy of *jiu di zheng fa* was simply to grasp more power and to contend with the center. The purpose of implementing a simplified legal policy could also be to warn the potential perpetrators and to maintain stability, as the provincial officials claimed themselves. In traditional China, judicial and administrative were always intertwined. From the emperor to the county magistrate, all were judges as well as administrators. Therefore, both the Qianlong emperor and the Xinjiang provincial governors, such as Liu Jintang and Wei Guangtao, tended to put social stability above the authority and stability of law. After all, in the short run, to quickly and cruelly punish criminals could be effective as a means to end turmoil. As an exception to normative legal institutions, *jiu di zheng fa* was advocated by legal executors but opposed by imperial censors. Therefore, when the late Qing monarchs were too weak to become involved in detailed local governance, it is not surprising that the officials, who had to deal with local order on a daily basis found it easier just

to execute criminals than to go through all the procedures necessary to make sure that justice is carried out.

Flexibility and the culturally tolerant policy

It was not just a coincidence that both the Qianlong and the Guangxu emperors had approved a set of *Flexible Regulations for Xinjiang*. Rather, flexibility (*biantong* 變通) was a constant theme of the Qing's Xinjiang policies, not only in the realm of legal practice. The Qianlong emperor employed a flexible approach to frontiers in general. The Han officials in the post-Muslim Rebellion period failed to transform it into a regular administrative unit, although they intended to do so through the establishment of Xinjiang as a province. When Liu Jintang tried to persuade the emperor to stick to the special legal policies in Xinjiang, he described eagerly how the situation there differed from the *neidi* provinces. Although according to the new generation of Xinjiang policy makers, the setting up of the province of Xinjiang implied carrying out comprehensive, *neidi*-style governance there, in practice, to incorporate the administration of justice of Xinjiang into the *neidi* legal system was not within their repertoire.

Therefore, in this sense, it is not correct to conclude that the Qing way of dealing with Xinjiang criminal cases became increasingly unified with the *neidi*. What we have seen is a rather contradictory picture: on the one hand, after the province was established, criminal cases subject to verification by the Board of Punishment were handled strictly according to the Great Qing Code. On the other

hand, the Flexible Regulations of Xinjiang was used to handle other criminal cases in an astoundingly “simplified” or arbitrary way.

However, materials dating from after the establishment of the province indicate a clearer trend: Islamic law was no longer valid to adjudicate severe criminal cases. This practice, which was so common before the 1860s that even the imperial officials often judged a case based on the Islamic classics, disappeared completely from the legal documents beyond the provincial level. This trend can easily be understood as one of the results of the “Hanization” policies promoted by the Han officials after the 1880s. However, this change had actually started much earlier than that. As I have argued, early in the reign of Qianlong, the emperor had stated that the Xinjiang Uyghurs had been assimilated to Qing culture for years and that the state law should therefore be imposed on them in a more intensive way. Since the reign of Xianfeng, the Qing emperors had issued several edicts to prohibit reference to Islamic law in the handling of serious criminal cases. In non-Han frontier areas, Manchu ruling elites always faced two main missions: one was to maintain the significant ruling status of the Manchus in the “great unity” of the five peoples that composed the Qing empire; the other was to strengthen a close connection between the frontier and the central empire. In the first mission, the Han Chinese were regarded by the Manchu elites as their competitors, while in the second one, the Koqand gradually became a potential enemy.

The 1759 conquest by the Qing of Xinjiang represented a great success for the central-frontier relations mission. As a consequence, during the earlier period of Qing

rule in Xinjiang, the Qianlong emperor devoted most of his attention to promoting Manchu values and to limiting interaction between Uyghurs and Han Chinese. This also explains why the *Huijiang zeli* devoted much space to prohibiting exploitative conduct of Xinjiang military personnel and Chinese merchants, as well as why Islamic law had been valid up until the mid-nineteenth century to punish Muslims and even Chinese criminals in some extreme cases.

However, as the conflict with Khoqand and the Khojas persisted, as early as the late eighteenth and early nineteenth centuries, these frontier frictions together with internal uprisings in Altishahr made it necessary for the Qing rulers to redefine their relationship with Khoqand and Altishahr. As the Chinese scholar, Pan Zhiping has argued, Khoqand's relationship with Qing China shifted from that of a dependent state (*shuguo* 屬國) between 1759 and 1820 to that of a neighboring state (*linguo* 鄰國) and therefore one that was equal and independent after 1820. A parallel process was the transformation of Eastern Turkestan from an open, fluid frontier to a non-negotiable, closed border.²¹⁴ This transformation in turn enabled Qing rulers to carry out a series of state-oriented policies beginning in the 1830s, including encouraging immigration and settlement of Han Chinese, as well as a frontier legal system that no longer targeted the Han Chinese, but the local Uyghurs. Finally, the indirect rule of the Qing in Xinjiang during the High Qing period was replaced by the

²¹⁴ Pan Zhiping, *Zhongya Haohanguo yu Qingdai Xinjiang* (the central Asias state of Khoqand and Qing dynasty Xinjiang), (Beijing: Zhongguo shehui kexueyuan, 1991), p. 24.

idea of establishing a province under the more direct control from Han officials, advocated first by the statecraft scholars.

But can we divide the Manchu ruling elites and Han officials into two distinct camps and treat Xinjiang and even Qing history after the mid-nineteenth century as an incomplete process of “Hanization”? Shall we regard the establishment of Xinjiang province in the 1880s and the more direct state control thereafter as a sharp break with the previous Manchu strategy?

It seems to me there was no clear-cut dividing line between Han and Manchu views concerning the frontier issue; neither was there an specific point in time that marked a sharp change in Xinjiang policies. The Qing frontier policies were largely the product of international and domestic conflicts. Although Qianlong’s indirect Xinjiang policy was finally replaced by a more direct form of control, his northwest expansion and his Xinjiang administrative policies were to a great extent inherited by successive Xinjiang policy-makers, no matter whether they were Manchu, or Han.

In this sense, I fully agree with Peter Perdue’s argument that “imperialists and nationalists were secret sharers, especially in their analysis of the future of the Qing frontiers.”²¹⁵ Although statecraft thinkers criticized Qing policies for having failed to achieve enough assimilation of Xinjiang, their statement about “fighting war is superior to worshipping at ancestral temples (*zhan shengyu miaotang* 戰勝於廟堂)” expressed an approach to the frontier similar to the expansionist ideology of

²¹⁵ Peter Perdue, *China Marches West*, p.498

Qianlong. Moreover, in his *Shengwuji* the nineteenth century foreign expert Wei Yuan took Qianlong's military conquests as a model for securing the imperial borders. It is therefore impossible to divide "Manchu strategy" from "Han strategy": the changes took place gradually, and not along the line of ethnicity.

When statecraft scholars were promoting their ideas about the establishment of the province and the demographic remaking of the Western Region in the 1830s and 1840s, the Daoguang emperor had already begun to encourage Chinese colonization in Xinjiang. After the Koqand invasion, Zuo Zongtang, a loyal student and friend of Wei Yuan, reconquered Xinjiang based on Qianlong's map as well as realizing the blueprint of a Xinjiang province, which had been passionately advocated by the statecraft thinkers. His administrative policies had a missionary character, since he was eager to promote the Sacred Edicts and the establishment of Chinese elementary schooling. However, this was more likely a reflection of his own zeal for Confucian teaching than a characteristic shared by all his Chinese colleagues in the Xinjiang project.

Liu Jintang, who was recommended by Zuo as the first governor of Xinjiang province, had a more tolerant attitude toward Muslim culture. Liu's statement - "to educate them without changing their customs and to polish the administration there without abolishing their [previous] effective policies" - echoed Qianlong's cultural policy of "taking into consideration their personalities and norms and instructing them in a natural way".

In practice, Qianlong's culturally tolerant policy in Xinjiang was largely followed by Han nationalist officials. In terms of legislation and law enforcement, the late nineteenth century saw only limited changes. Uyghurs were still allowed to resolve their civil and non-severe criminal disputes within the sphere of Shari'a. When dealing with severe criminal cases, Islamic law had long been prohibited. However, the provincial officials showed little intention to uphold in Xinjiang the authority and stability of the Great Qing Code and especially the complex Chinese legal procedures. Instead, they were more interested in the flexible style of dealing with frontier legal affairs which had been initiated by the Qianlong emperor.

CHAPTER 3

UYGHURS' CIVIL MATTERS (I): THE GENDERED WORLD OF FAMILY AND MARRIAGE

After the Manchu conquest in Eastern Turkestan, there existed both religious courts (Shari'a) and secular legal authority (the *begs*) to deal with Uyghurs' civil disputes. After the establishment of Xinjiang province in the 1880s, Uyghurs were allowed to bring their civil lawsuits to Chinese magistrates' yamen. How did the jurisdictional mechanism operate in this area? How did the new situation after the 1880s affect the resolution of day-to-day conflicts within the province of Xinjiang? I examine these questions by looking at two important realms of human activity: the gendered world of family and marriage, and the local-level economic transactions reflected in contracts and in property disputes. I focus in particular in this chapter on the gender issue. A large proportion of criminal and civil cases among Uyghurs that I collected are related to gender, such as adultery, rape, divorce, marriage and so on. This chapter will show how indigenous ethnic dwellers reacted to the new change of jurisdictional system after the establishment of Xinjiang province, as well as what legal cases, especially those recorded in Chinese materials, tell us about Uyghur society.

Multiple legal authorities and changes after the 1880s

Before the Muslim rebellion, a relatively clear demarcation along ethnic lines existed in the civil judicature in Xinjiang. The civil disputes of Han, Manchu and Tungan commoners who were foreign to this region were taken to the Chinese yamen, while local Xinjiang Muslims continued to comply with normative Islamic law as well as with their local customs.

It is conventional wisdom that Islamic law retained its salience in local society after the Qing conquest. However, a question that remains disputed is to what extent the local secular officials, the *begs*, retained the monopoly of power, including judicial power. One can even ask if a religious court really existed in Qing Xinjiang after 1759.²¹⁶

The Altishahr nobility who held secular authority were engaged in a power struggle with local religious leaders (*akhunds*) long before the Qing conquest. This is demonstrated in one instance in which the *akhunds* were given the authority to decide if a Hakim *beg* should continue to hold their positions or to be executed after an incident in which he was seen as having behaved incorrectly on the Roza (fast) festival.²¹⁷ After 1759, however, as Laura Newby has shown, the Qing “dealt a significant blow to religious powers and enhanced the status of the *begs*” by

²¹⁶ For instance, Chinese scholar, Pan Xiangming, suggests that there existed no religious court in South Xinjiang at that time because. See Pan Xiangming, “Luelun Qing zhengfu zai nanjiang diqu de zongjiao zhengce”(Studies on the Qing’s ethnic policies in South Xinjiang) , *Xibei Shidi*, vol. 2, 1998, pp. 93-102.

²¹⁷ Qishiyei, *Xiyu wenjian lu* (Record of things heard and seen in the Western Regions), 1777, (Taipei: Wenhai, 1966), 3:3a.

subordinating the religious functionaries to the high-ranking *begs*.²¹⁸ According to official Chinese gazetteers such as the *Qinding Huangyu Xiyu tuzhi*, the administrative system under the charge of the Hakim *beg* and his subordinates included several legal functionaries: the *qadi beg* (responsible for interpreting Shari'a law); the *sipah qadi beg* (in charge of lawsuits brought by Uyghur chieftains); the *ra'ya qadi beg* (in charge of lawsuits brought by Uyghur commoners); the *padishab beg* (in charge of hunting down criminals, carrying out arrests, night patrols, and prison security), and so on.²¹⁹ The fact that it was secular officials who carried out these legal functions is the main reason that some scholars suggest no religious court existed in Qing Xinjiang before the Muslim Rebellion. In other words, the yamen of the *begs* appeared to cover all the functions of a religious court.²²⁰

However, there are more sources that seem to suggest the opposite. Nayancheng, one of the most famous Manchu ambans sent to Xinjiang, reported in one of his memorials that “according to Muslim customs, *akhunds* are in charge of religion. Uyghurs’ domestic disputes or small lawsuits are all judged by them, and no one

²¹⁸ L. J. Newby, “The Begs of Xinjiang”, p. 284.

²¹⁹ Fuheng, comp. *Qinding Huangyu Xiyu tuzhi* (Imperial authorized illustrated gazetteer of the imperial dominions in the Western Regions), 1782. (Reprint. Taipei: Wenhai, 1966), 30: 28a-30b. See also Wang Dongping, *Qingdai Huijiang falu zhidu yanjiu*, pp. 126-128, Toru Saguchi, *Shiba Dao Shijiu Shiji Xinjiang Shehuishi Yanjiu* (Study on Xinjiang society during 18th-19th century), (Urumqi: Xinjiang Renmin, 1984), vol. 1, p. 134.

²²⁰ For instance, see Pan Xiangming, “Luelun Qingzhengfu zai nanjiang diqu de zongjiao zhengce”, *Xibei Shidi*, 1988, vol 2, pp. 93-102.

disobeys.”²²¹ *Xinjiang tuzhi* also mentioned that “the one [who is in charge of] a mosque is called an *imam*. It is he who teaches classics and deals with disputes.”²²²

When the Russian military official Kuropatkin traveled to Kashgar in 1876, he came away with a similar impression on this issue:

On the question of religious tolerance the Chinese proved themselves to be very humane. In the towns which they occupied mosques might be seen to exist side by side with Buddhist pagodas.... In like manner the Chinese abstained from interfering with the manner and customs of the people. They left to the Kashgarians their Mahommedan tribunals and took no part in the choice of Kazis [qadis] and Mooftis.²²³

Since both religious and secular systems for administering legal authority existed in Xinjiang, what was the relationship between the two? The Qur’an and other religious written traditions such as hadith and *ijma*, were the exclusive source of law in mosques, but they were just one kind of the sources used for the dispensing of law in the *beg yamen*. As discussed in Chapter 2, both Chinese and Islamic juridical works were stored in *beg’s yamen*, and the *begs* judged the cases according to either Islamic classics or the Great Qing Code. There seemed to be a rough division of labor

²²¹ Nayancheng, *Na wenyigong zouyi* (Memorials of Nayancheng), (Taipei: Wenhai press, 1968), 77: 37b.

²²² Yuan Dahua and Wang Shunan etc., (*Xuantong*) *Xinjiang tuzhi*, 48: 7b.

²²³ A. H. Kuropatkin, *Kashgaria: Historical and Geographical Sketch of the Country; Its Military Strength, Industries and Trade*, Trans., Walter E. Gowan, (Calcutta: Thacker, Spink and Co., 1882), pp. 127-128.

between the two legal institutions, the details of which require further study. Based on currently available materials from the 1760s to the 1860s, local Uyghurs usually went to *akhunds* to resolve civil disputes over issues such as marriage, inheritance, the endowment of *waqf* properties, transactions involving land or other commodities, while the *beg* officials handled most local criminal cases, especially those severe criminal cases that had to be reported to the provincial and state authorities.

Did some of the functions of the two legal institutions overlap? Can we detect a hierarchy of jurisdiction in some cases? My tentative answer to both questions is yes. Some statements by Uyghurs accepting the judgments given in property disputes are addressed to “Master *beg*” even though they were actually judged or mediated by the Shari’a religious court.²²⁴ We do not know whether these documents, dating from the Daoguang reign (1821-1850), indicate that the Uyghurs appealed to the *beg* court when they were dissatisfied with *akhund*’s decision or show that the *begs* asked the religious courts to resolve some of the civil lawsuits that they had received, not all that different from the practice among Han officials in the *neidi* who sent certain civil cases back to local lineages or other social groupings for mediation. But we do know that it is hard to completely separate the secular and religious systems administrations in Xinjiang, especially during the earlier period of Qing domination. In 1760 many who had served as religious and legal authorities (such as the *qadi akhund*) under the

²²⁴ Wang Shouli and Li Jinxin, eds., *Xinjiang Weiwu’erzu qiyue wenshu ziliao xuanbian* (A selection of Uyghur contracts and historical documents in Xinjiang, hereafter *ziliao xuanbian*), (Wulumuqi. The Xinjiang Academy of Social Science, internal circulation, 1994). cases 007, 012, and 015, p.5, p.8, and pp. 10-11.

Khwajas and the Zunghars were now given the title of *beg*, and we know that *hakim-begs* were eager to appoint their personal favorites as *akhunds*.²²⁵ Therefore, people might well go to the same person to deal with their civil issues after the Qing conquest because they were aware that although he was now the “*qadi beg*”, he had previously been the *qadi akhund*.²²⁶ It is thus important not to confuse the position of the *qadi akhund* in a mosque, the judge in the Islamic religious courts, with the *qadi beg*, a secular position in the *beg* bureaucracy.

Information about the administrative structure of the local religious courts in the Uyghur communities in Xinjiang at this time is limited. Basically, the clergy of a local religious court included the *ailanmu akhund*, who was the highest judge, referred to by the Chinese as the *da-a-hong* or “the first *akhund*”; the *qazi kalan*, who worked as a legal scholar and consultant and was referred to as the second *akhund*; the *qazi rais*, who was the third *akhund* and worked as a religious judge to deal with day-to-day civil disputes; and the *mufti akhund* (the fourth *akhund*), whose function was said to be equivalent to that of a modern lawyer.²²⁷ Every Shari’a *akhund* held a seal called a *maor* (or *mo* in Chinese documents) which was used to authenticate or certify a legal document such as a judgment, contract, or will. The title of *qadi* was engraved on it. All of the Chagatai contractual documents signed by Uyghurs during

²²⁵ L. J. Newby, “The Begs of Xinjiang”, p.284.

²²⁶ Qing rulers always tried to separate the secular and spiritual powers and an 1829 edict clearly prohibited *akhunds* and their sons from serving as *begs*. See QSL, Daoguang reign, 151: 2a-b.

²²⁷ See Wang Dongping, *Qingdai Huijiang falu zhidu yanjiu*, pp.213-214.

the Qing dynasty bore the *maor* seals, and without these a document would be regarded as fake or illegal.²²⁸ The *maor* can therefore be regarded as a symbol of the authority of both Shari'a and the *akhunds*.

After the 1880s, when Xinjiang was established as a province, every *beg yamen*, as the lowest level of local government, was replaced by a county *yamen* in the charge of a Chinese magistrate. The *begs*' judicial function was now taken over by these magistrates as well, under whom all disputes were dealt with according to Qing law. From then on, as we have seen, native Muslims in Xinjiang had to deal with two normative legal systems between which the boundaries were much clearer than in the previous system: the Shari'a court based on Islamic religious law and the Chinese court based on secular Chinese law. The two legal systems existed side by side and were often in competition with each other. Besides these, a set of local customs continued to regulate social relations through informal mechanisms, such as communal mediation and public reconciliation.²²⁹

How did Eastern Turkestanis deal with their civil disputes and affairs within a legal framework constituted by Islamic law, Chinese law, and local customs, especially after the 1880s? The lack of sources has meant that until now little research has been undertaken on this topic. For the same reason it has been unclear until now

²²⁸ Xinjiang Zizhiqu Archives (hereafter XJA), 003312.

²²⁹ Ildiko Beller-Hann, "Law and custom among the Uyghur in Xinjiang", pp. 173-194.

how ordinary Xinjiang Turkestanis²³⁰ during the last decades of the Qing negotiated their personal and property rights, as well as marriage and family relations. But now, thanks to the Chinese legal archives of the Qing dynasty preserved in the local Archives in Xinjiang, private documents written in Chagatai²³¹ collected by both Chinese and Japanese scholars, and Chinese records of Xinjiang homicide cases kept in Qing central archives, I can offer a preliminary assessment of the operation of the civil legal system of the Uyghurs in Xinjiang and of its place in the everyday life of native dwellers after the Qing conquest, particularly after the 1880s. Several dozen cases provide abundant information about how Xinjiang Uyghurs practiced marriage, divorce, family division, inheritance, and economic transactions.

Generally speaking, after the 1880s the *yamen* of the Chinese magistrates and the Islamic religious courts operated in parallel as they dealt with civil matters among non-native commoners and native Muslims respectively. Uyghurs were still allowed to settle their civil disputes within the realm of Shari'a. Nevertheless, they did face some inconspicuous but crucial institutional and substantial changes in civil practices.

²³⁰ The term "Turkestani" is used here to refer to Uyghur, Uzbek, Kirghiz and Kazakh people living in Xinjiang. In Chinese materials they were called "Chanhui" or "Chanmin", in order to make distinctions from "Hanhui" (Muslim Chinese, called as Tungan in Western literature). In modern Chinese historical studies, scholars usually avoid to use the term of "Turkestan" or "Turkestani" for political reasons. Instead, they often translate "Chanhui" into Uyghur alone and use Uyghur as a general name for all the Turkic Muslims living in Xinjiang, since Uyghur population exceeded the population of other peoples by a great margin. In this dissertation, I also use Uyghur in this broader sense time to time.

²³¹ It is also called "old Uyghur language" in Xinjiang, which is an extinct Turkic language belonging to the Uyghur branch of the Turkic language family. The language was once widely spoken in Central Asia and remained the shared literary language there until the early twentieth century.

For example, the secular Chinese *yamen* was now open to them too, and if they chose to go there they would be judged based on a group of new laws and regulations which were different from the standards applied by the *akhunds* and *begs* in the past. Moreover, from as early as the late 1820s, more and more Han and Muslim (Tungan) farmers from China proper had come to Xinjiang and were living side by side with the Uyghurs. After the 1880s, when disputes between local Uyghurs and these civilian immigrants arose, they had to go to the Chinese *yamen* to ask for resolution. More importantly, although the religious judges, the *akhunds*, preserved their legal authority among Uyghur commoners, they were subject to greater control by Chinese secular officials sent by Beijing. The Xinjiang archives show that during the late Qing period although the *akhunds* who held *maor* seals in each community were recommended (公舉 *gong ju*) by local eminent Uyghurs, the recommendations and the request of resignation *akhunds* to resign from their positions had to be proposed and endorsed by Chinese magistrates.²³²

Marriage and divorce in Eastern Turkestan

Marriage and family stood at the very center of Uyghur society and culture. Although written records from this area in the 19th and 20th centuries that focus on the role of women and gender relations are scattered and very limited in number, they do provide some crucial information on this topic and several historians have already

²³² XJA, 15-2-994.

managed to carry out pathbreaking research based on this material. Linda Benson, in a 1993 article, examined Western, Chinese, and even local Uyghur literature about the image of Chinese Turkestani women in the period 1850-1950. Unfortunately she had access only to a limited number of Chinese sources—a 1930s record and two history books published after the 1980s—and had to rely mainly on folk tales to get a sense of local perceptions.²³³ But still she was able to show that Chinese and English sources concur very closely in their accounts of the relatively high status of women in Xinjiang. Divorce and remarriage were prevalent and in terms of status did not represent an obstacle for women within the local society. Indeed, some women even gained a considerable degree of control over their sexual behavior and over possession of property through divorce and remarriage.²³⁴ Local Uyghur sources, which offer an image of strong and independent women and of equal welcome being given to baby girls, also support the perception of women's high social status in Xinjiang. Based on these findings, Benson suggested that Turkestani culture seemed to be less orthodox than some other Islamic societies in its observance of Islamic law in terms of marriage and family issues, and called for further study of the role of Islam within Xinjiang society in the recent past.²³⁵

²³³ Linda Benton, "A Much Married Woman: Marriage and Divorce in Xinjiang, 1850-1950", *The Muslim World*, vol. no. 3-4, 1993. pp. 237-240.

²³⁴ *Ibid*, p 238

²³⁵ *Ibid*, p 246

Ildiko Beller-Hann's paper, "Law and Custom among the Uyghur in Xinjiang", suggests an answer to Benson's question about why local marriage and divorce practices in Xinjiang Uyghur society deviated considerably from those in other Islamic societies. Beller-Hann regards the standard binary description of Xinjiang's jurisdiction system as insufficient because, she argues, it does not take account of the set of unwritten rules (basically Uyghur customary or local law) that operated in addition to state law (imperial Qing law and, later, Republican law) and Islamic law in the local community, managing everyday social relations both in the Qing dynasty and even today. Family disputes were one of the main areas in which both Islamic law and customary law had regulatory power, and some aspects of gender relations were in practical terms under the exclusive authority of customary law.²³⁶ Beller-Hann's main purpose is not to compare the social status of Uyghur women with those living in other Muslim communities, but we do find that, to a certain extent, Uyghur customs (most of which were Turkic customs from pre-Islamic times) bestowed some unique conjugal rights on women as well as the right to possession of family property.²³⁷ The existence and effectiveness of customary law thus might be a significant factor in the relatively high social status of Uyghur women.

Both of these studies, although heavily reliant on sources in Western languages, offer us valuable insights into gender relations in Xinjiang, and the questions they

²³⁶ Ildiko Beller-Hann, "Law and custom among the Uyghur in Xinjiang", p. 185.

²³⁷ *Ibid*, p. 182-185.

raise about the conjugal rights and social status of Uyghur women shed great light on the topic that I am researching here. To these we can now add the materials available in the Chinese archives, especially the local Xinjiang legal archives, which provide important pieces of the larger picture of Uyghur gender relations. Although Uyghurs were not forced to go to a Chinese court when no Chinese or any other non-Uyghur ethnicity was involved in a case, the existence of a new legal system, that of Qing state law, after the establishment of Xinjiang province in the 1880s also had a significant impact on the lives of local Uyghurs and has to be added to the picture created in the earlier studies, which paid more attention to the role of Islamic civil law and Uyghur customary norms on everyday life among Uyghurs. Therefore, this part of my dissertation is an attempt to examine gender relations and women's social status in Xinjiang as depicted by Chinese records of criminal and civil cases, and to discuss how the situation was influenced by the emergence of the third realm--the Qing state law.

In general, it seems that the presence of this third realm of law provided additional ground for some Uyghurs to negotiate their personal interests at the same time as introducing new threats to some of their existing rights. It seems to me local Uyghur custom gave women considerable rights even though they did not exist in Sharia courts and that the possibility of going to a Qing court gave Uyghur husbands a way to exert greater control over their wives. Most prominent was the introduction by the Qing local courts of patriarchal Chinese social norms that enabled Uyghur husbands to deprive their wives of certain rights and freedom that they had previously

possessed. But in addition, I want to ask how people made their legal choices when confronted by more than one court system and how the power-holders in the Qing court dealt with local customs which were distinct from their own cultural beliefs.

Most of the Uyghurs in Xinjiang were Sunni Muslims of the Hanafi School, who practiced *nikah* marriage according to Shari'a. According to both Chinese and Western records, a valid marriage in this tradition had to involve the attendance of one or several Islamic *akhunds*, who would read the classic text known as the *nikah* (*he hao jing* 和好經) for the new couple in the wedding ceremony in order to legalize the marriage.²³⁸ In 1873, when the area was under the rule of Yaqub *beg*, the price of this service was “one to two or more *tanga* according to the rank and means of the parties”.²³⁹ T. D. Forsyth noted in 1873 that when the marriage terms were agreed to, the girls' parents would receive a letter of permission from the governor of the city, whose fee was one *tanga*. But no record of this certificate letter has been found in Chinese materials, and this policy might have been peculiar to Yaqub's rule.

Besides the comparatively stable system of marriage by *nikah*, there existed another kind of marriage—the temporary marriage (*mutah*). Both the Russian scholar Valikhanov and the Russian military official Kuropatkin, who went to Xinjiang in

²³⁸ Qishiye, *Xiyu wenjian lu*, 7:4b; Qi Yunshi and Wang Tingkai, comp. *Xichui zongtong shi lue* (General affairs of the Western borders). Song Yun, general ed. 1809. 12: 20a, and Thomas Douglas Forsyth, *Report of a mission to Yarkund in 1873, under command of Sir T.D. Forsyth, with historical and geographical information regarding the possessions of the ameer of Yarkund*. (Calcutta, Printed at the Foreign Dept. Press, 1875), p.84.

²³⁹ T. D. Forsyth, *Report of a mission to Yarkund in 1873*, p84.

1858 and 1878 respectively, claimed to have witnessed the practice of temporary marriage in Southwest Xinjiang, especially in cities to the west of Kucha.²⁴⁰ This type of marriage had to last at least one week, provided that the man had agreed to support the woman and buy new clothing for her. According to both these observers, this marriage system was only popular among the foreign merchants sojourning in Kashgar and other southern cities. Since *mutah* was not permitted among Sunni Muslims, Valikhanov regards it as a remnant of pantheist traditions.²⁴¹ Two Chinese scholars, Chen Guoguang and Wang Dongping, suggest that this practice indicated the impact at Xinjiang of the Shi'a Islam tradition from Central Asia, which considered *mutah* as legal, since the Central Asian Islamic merchants played a very active role in Southwest Xinjiang during that period.²⁴² Forsyth believed that the *mutah* (*mata'*), which had been “of universal prevalence” under Chinese rule, was entirely suppressed by the Yaqub regime when it reestablished pure Islamic rule in South Xinjiang in 1870s.

Compared to the steps associated with marriage, divorce procedures were much easier in Xinjiang. According to the Hanafi School, if a husband wished to divorce his

²⁴⁰ Chokan Valikhanov, *Qiaohan Walihannuofu Zhuzuo Xuanji* (Selected works of Chokan Valikannov), Xinjiang weiwuer zizhiqu minzu yanjiusuo trans. and ed., 1975, p. 118; A. H. Kuropatkin, *Kashgaria: Historical and Geographical Sketch of the Country; Its Military Strength, Industries and Trade*, Trans., Walter E. Gowan, Calcutta: Thacker, Spink and Co., 1882. p. 38.

²⁴¹ Chokan Valikhanov, *Qiaohan Walihannuofu Zhuzuo Xuanji*, p. 113.

²⁴² Chen Guoguang, “Qingchao tongzhi shiqi Xinjiang weiwuer diqu yisilan jiaofa wenti”, *Shijie Zongjiao Yanjiu*, vol. 2, 1990, pp. 56-66. Wang Dongping, *Qingdai Huijiang Falu Zhidu Yanjiu*, p235

wife, all he needed to do was to pronounce the word *talaq* (divorce) once (for reversible divorce) or three times (for irreversible divorce). The wife could also propose a divorce, which was known as *khul*. The prevalence of divorce in Xinjiang impressed both Chinese and Western observers. The *Xinjiang tuzhi* suggests that among Uyghurs “couples divorce at any time when they do not get along well with each other.”²⁴³ Qishiye, a Manchu scholar, records in his travel notes, the *Xiyu wenjian lu* (*Xiyu zongzhi*), that

A couple can divorce whenever they do not get along well; this is called *yandur* in the Uyghur language. If a husband divorces his wife, she can take anything of the home away with her; if a wife divorces her husband, she is allowed to take away nothing. The custody rights of their children are split between them, and sons go to the husband, while daughters belong to the wife. Within one year after their divorce, if the woman bares any child the man would need to acknowledge him (her) as his child. After one year, (the child) would not be his responsibility. In some cases, after several years during which the woman has married several husbands, her ex-husband is still willing to remarry her. Some people continue with their relationship secretly (*si xiang wang lai* 私相往來) after divorce.²⁴⁴

²⁴³ Yuan Dahua and Wang Shunan ed., (*Xuantong*) *Xinjiang Tuzhi*, 48: 6b.

²⁴⁴ Qishiye, *Xiyu zongzhi*, (Taipei: Wenhai press, 1966), 18a..

According to an investigation by PRC researchers in 1953, few Uyghur women had not divorced at least once in their lives.²⁴⁵ These Chinese depictions of the prevalence of divorce and of the ease with which divorce could be arranged in the 19th and 20th centuries concur with European sources. Forsyth suggests that divorce was “extremely prevalent” among Uyghur women and “systematically worked as a means of securing independence and provision for old age”.²⁴⁶ He gave examples that were intended to show that local women were capable of gaining both independence and property from men by means of multiple marriages and divorces.²⁴⁷ Kuropatkin, noted that “[in the time of the Chinese dominion], the people were left free to follow their own faith... Marriage, which can, by the law of Mahomet, be so easily dissolved in Kashigaria, was set aside with even fewer formalities.”²⁴⁸ C. P. Skrine observed that in Xinjiang a woman above average in looks or wit could “exchange an uncongenial husband for a better one with very little difficulty”, and usually older women or those who have been married and divorced more than once were worth more on the marriage market.²⁴⁹ In brief, divorce was observed as very much tolerated among Xinjiang Uyghurs and no particular reasons were required to justify

²⁴⁵ *Nanjiang nongcun shehui* (Agricultural Society of South Xinjiang), Xinjiang weiwuer zizhiqu bianjizu, ed., (Wulumuqi: Xinjiang renmin, 1980), p. 332.

²⁴⁶ T. D. Forsyth, *Report of a mission to Yarkund in 1873*, pp. 84-85.

²⁴⁷ *Ibid*, pp. 84-85.

²⁴⁸ A. H. Kuropatkin, *Kashgaria: Historical and Geographical Sketch of the Country*, p. 38.

²⁴⁹ Skrine, C. P., *Chinese Central Asia*, (New York: Barnes & Noble, 1971). pp. 202-203.

such a common and unremarkable practice. It was said that divorce even tended to heighten a woman's value on the marriage market rather than to diminish it.²⁵⁰

Modern Chinese scholars also noticed the high divorce rate among Xinjiang Uyghurs during the socialist period. According to them, the causes of this phenomenon include the simplicity of the divorce procedure, the tolerance of divorce by Uyghur culture, which is regarded as a remnant of matriarchal period, and Uyghur families' close relationship with and support of their daughter (which I will discuss later in this chapter).²⁵¹ Particularly, Uyghur daughters had inheritance rights and many Uyghur parents allocated at least a house to their daughters. By doing this, they could better shelter their daughter in circumstances such as when she argued with her husband and came back home, or divorced. This also contributes to the ease with which one could get divorce.²⁵²

Moreover, Uyghur women were often awarded the custody of their children after divorce. Fieldwork done by a Chinese scholar in a South Xinjiang town, Aksu, in the 1990s concurs with the observations noted above. After a Uyghur couple divorced, usually the daughter(s) lived with their mother and son(s) father. If the

²⁵⁰ Linda Benton, "A Much Married Woman", p. 225.

²⁵¹ See Li Xiaoxia, "Shixi Weiwuerzu lihun xianxiang xingcheng de yuanyin" (A tentative analysis on the reasons of divorce among Uyghurs), *Xibei minzu yanjiu*, no. 19, vol 2 1996, pp. 66-72; Xu Anqi, "Xinjiang weiwuerzu de hunyin zhidu yu funv fuli" (Marriage institutions and women's benefits of Xinjiang Uyghurs), *Funu yanju luncong*, vol 5, 2005, pp. 10-15; Yuan Zhiguang, "Weiwuer hunsu zhong de lihun xianxiang jiqi chengyin tanxi" (A study on Uyghur's divorce and marriage customs), *Xibei minzu yanjiu*, vol. 1, 1999, pp. 124-136.

²⁵² Li Xiaoxia, "Shixi weiwuerzu lihun xianxiang xingcheng de yuanyin", pp. 66-72.

children were younger than one year, they stayed with mother regardless of gender. So Uyghur women were allowed to bring children with her after her husband had died, whether she decided to go back to live with her natal family or to get remarried.²⁵³ This is different from Han Chinese women, who were actually married more to the husband's family than the husband himself and whose son(s) had to stay at their father's home even when the father had died.

In the high Qing period, the Qing officials who sojourned there generally maintained a laissez-faire attitude toward marriage and divorce issues among Uyghurs, although from time to time they discussed the sexual order among Uyghurs and what they saw as their exotic tastes in their memoir or travel notes.²⁵⁴ After the Muslim Rebellion, the Qing officials seem to have succeeded in imposing stricter limits on marriage and divorce among Xinjiang Uyghurs. Just after the Qing rulers regained sovereignty over Xinjiang, they began to install village compact head (*xiangyue* 鄉約) in every county of the Islamic area to handle the civil affairs of Uyghurs commoners. In Shengjin county, Turfan prefecture, a Uyghur was appointed to be the “*haidipu*”

²⁵³ Ibid, pp. 66-72.

²⁵⁴ For instance, Qishiyi in his *Xiyu wenjian lu* suggested that the Uyghur male and female could marry anyone except their own parents or children. Moreover, “when Uyghur boys are fourteen or fifteen or sixteen years old and possess some primary knowledge about sex, they are gathered in the forests and made to copulate with mares.” Qishiyi, *Xiyu wenjian lu*, 7: 4b and 5b. As for Chinese tendency to sexualize and exoticize non Han peoples, see Dru C. Gladney's discussion of their treatment of Southwest Chinese minorities in “Representing Nationality in China: Refiguring Majority/Minority Identities”, *The Journal of Asian Studies*, vol. 53, No. 1 (Feb., 1994), pp. 92-123

xiangyue, with responsibility for marriage of Uyghurs there. He received an edict from the prefecture which read as follows:

The marriage traditions of the Uyghurs are outside [the realm of] proper moral relations (*chu yu lunchang zhiwai* 出於倫常之外). They get married hastily and privately, and they frequently divorce and remarry, which is degenerate and loathsome... The *xiangyue* are in charge of marriage issues. From now on, when proposing a marriage, people must make sure that both parties know each other's age and are willing. They must engage and marry each other openly and officially, [the marriage ceremony] should be ceremonious enough [to make it known to others]. They must not marry secretly or divorce for trivial reasons.²⁵⁵

This regulation was first announced in the Turfan area, perhaps because this region was subjected to Qing rule very early during the war of conquest in the 18th century, and because the Uyghur *Jasaks* there had always been loyal to the Manchu emperors.²⁵⁶ However, the newly posted officials after the re-conquest were not pleased with putting only part of the Uyghur population under the sovereignty of Confucian social norms. Two years later, in 1882, Liu Jintang, the first governor of Xinjiang province, sent two edicts requiring that not only the Uyghurs in Turfan prefecture but also those living in the eight cities of South Xinjiang (*nan ba cheng* 南

²⁵⁵ XJA, 15-1-127.

²⁵⁶ Shen Suli, "Qingdai tulufan zhasake qi zhi yanjiu", *Qinghai shifan daxue minzu shifan xueyuan xuebao*, vol. 16, no. 1, 2005, p. 1

八城) should eliminate their “bad norms and habits” (*qu exi*)祛惡習: “Once married, a couple is not allowed to divorce except for the seven reasons (*qichu* 七出)²⁵⁷,” he ordered.²⁵⁸ In these edicts Liu Jintang implied that this regulating policy had already taken effect in some places in Turfan and Yangi Hisar.

These regulations and edicts are very interesting particular because the state did not certify marriages among Han Chinese and did not interfere in marriages unless there was a lawsuit. Were Liu’s edicts treated as law and obeyed by the Uyghurs in Xinjiang, at least in principle? According to the materials and legal cases collected so far, it seems that the answer is no to both questions. Liu’s edicts appear to have represented only an ambitious and idealistic blueprint for legal consolidation in the minds of those Qing generals who first re-conquered this area. At that time, they expected to establish a new province that was economically low-maintenance or even profitable, as well as institutionally and culturally in line with the inland provinces.²⁵⁹ However, in due course, as the Qing encountered problems elsewhere, most of their time and energy were spent on practical and routine issues and the missionary impulse

²⁵⁷ The Qing law recognized seven conditions allowing him to divorce his wife, which included disobedience to the husband’s parents, infertility, adultery, loquacity, jealousy, incurable disease, and theft.

²⁵⁸ XJA, 15-1-195.

²⁵⁹ See, for examples, Chen Li, “Zuozongtang yu Xinjiang jiansheng”, *Zhongyang minzu daxue xuebao*, vol. 28, no. 3, 2001, pp. 23-30, and Liang Jiagui, “Zuozongtang yu Liujiang zai Xinjiang jiansheng fang’an shang de fenqi”, *Xinjiang daxue xuebao*, vol. 29, no. 4, 2001, p. 53.

was gradually forgotten. In the case of marriage reform, no follow-up edict has been found to indicate any Qing efforts to consolidate Liu's initial demands.

Western travelers and scholars paid much attention to the social status of Eastern Turkestan women. According to Forsyth, before the 1860s, ethnic custom prevailed because the Qing was initially inclined to allow self government in areas of family and civil law. Even during the strict enforcement of Shari'a during the rule of Yaqub, "ethnic custom" still played an important role in the everyday life of Xinjiang Uyghurs.²⁶⁰ Valikhanov expressed a similar opinion regarding the social status of Xinjiang women before the 1860s. In his expedition to Kashgaria from 1858 to 1859 he observes that:

Women in Kashgaria have superior status in social and domestic life...Women support their husbands' careers, and whenever there is a meeting, women have to be present. Polygamy is not common in Xinjiang. This is because wives are able to abandon their husbands as they wish... their faces were always bare (and without a veil).²⁶¹

When Linda Benson suggests that Turkestani women generally enjoyed higher status than "either their Han Chinese neighbors or their co-religionists of the Middle East",²⁶² she refers mainly to the freedom Uyghur women enjoyed to divorce and

²⁶⁰ T. D. Forsyth, Report of a mission to Yarkund in 1873, pp. 84-85.

²⁶¹ Chokan Valikhanov, *Qiaohan Walihannuofu Zhuzuo Xuanji*, pp. 112-116.

²⁶² Linda Benton, "A Much Married Woman", pp. 236-237.

remarry, as well as to the image of women as strong and independent individuals that is found in Uyghur love stories. Regrettably, the Chinese legal archives in which I conducted research included hardly any cases of divorce or remarriage, perhaps simply because a Uyghur person would never choose a Chinese court to propose a divorce (I discuss below the types of domestic cases that were brought before a Chinese judge). Nonetheless, the records of criminal cases found in the legal archives of the central government in Beijing and the records of various civil disputes in the local archives do give us some clues about gender relations and the family lives of ordinary women in Xinjiang. All of this information can help us to reflect further on the social and domestic status of Uyghur women at this time.

Social status of Uyghur women: showed by legal cases

In Xinjiang, “adultery” was frequently cited as a motive or factor in homicide cases. Cases of this type from Xinjiang involving female criminals or victims in the legal archives of the central government have storylines that look very similar to those from China proper. There are a number of scenarios or plots that were relatively common in the Xinjiang caseload. The first scenario, the the most violent and tragic, describes a woman caught in bed with her lover and killed immediately on the spot (alone or together with the *jianfu*) by her angry husband. Three cases of this type are

found from 1886-1898 in Xinjiang.²⁶³ Since by then all Xinjiang homicide cases were under the penalty of the Qing law, these husbands were exempted from any legal punishment – this was a privilege bestowed by the patriarchal Great Qing Code on all married males: if a husband caught his wife and her paramour in the act of adultery, he could kill both on the spot with impunity.²⁶⁴ In a second type of case, the husband killed either his wife or the *jianfu* (or in one case was killed by him in the ensuing fight) after coming to know of their misconduct, or after just becoming suspicious of their behavior. In these cases the murderers were sentenced to death. Four cases of this type occurred in 1889²⁶⁵ and 1890.²⁶⁶ A third and quite frequent scenario consisted of a husband who, upon discovery of his wife’s infidelity, beat her severely and prohibited her from associating with her lover; the wife, unable to bear this any longer, then murdered her husband by herself or with the aid of her partner, the adulterer. Three cases of this type occurred in 1887, 1889 and 1892. In these cases, the female criminals, although also abused by their husbands, were all described as “really lascivious and villainous” (*shi shu yin e* 實屬淫惡) by Chinese magistrates and sentenced to the most cruel punishment—death by slicing, according to the Great

²⁶³ *Guangxu chao zhu pi zouzhe*, vol. 106, p532; GZD, Guangxu reign, vol. 7, p402; and XJA, 002512

²⁶⁴ William C. Jones, trans. *The Great Qing Code*, Article 285, p. 271.

²⁶⁵ GZD, Guangxu reign, vol. 5, p208.

²⁶⁶ GZD, Guangxu reign, vol. 5, p902, p276 and p238.

Qing Code.²⁶⁷ There are also cases where a woman killed her husband simply because his existence hindered her association with her paramour²⁶⁸ and cases caused by the jealousy between the two adulterous lovers of a married woman.²⁶⁹

Similar accounts to these can easily be found in legal records in inland courts, even for the last and rarest scenario. Nonetheless, the social systems of the two places differed so much that this resulted in different players in legal cases. In Han Chinese cases, when marital transgressions were found, the unfaithful wives usually suffered pressure or abuse not only from their husbands but also from his parents or other immediate kin. These persons were hence likely to become victims of the wife's desperate crime.²⁷⁰

In cases from Xinjiang involving Uyghurs, on the other hand, almost no relatives of the husband appear in the records. There is only one case in which we do see mention of a mother-in-law of the female murderer: In 1892 a woman living in Kalasha'er *ting* (sub-prefecture) suspected that her husband was having an affair with their neighbor, which was denied by him. They argued and fought with each other, leading to the wife unintentionally fatally wounding her husband. Probably because

²⁶⁷ William Jones (trans.), *The Great Qing Code*, Article 285, "If the wife or concubine, because of adultery, plots to kill her own husband, she will be condemned to death by slicing", p. 271.

²⁶⁸ For example, see GZD, Guangxu reign, vol. 5, p. 484.

²⁶⁹ For example, see GZD, Guangxu reign, vol. 7, p747.

²⁷⁰ Ai Jing and Huang Xiaotong, "Qing mo nuxing jianqing sharen'an yanjiu (1901-1911)", *Ningxia daxue xuebao*, vol. 29, no. 2, 2007, pp. 88-93.

the wife was pregnant, her mother-in-law did not report her son's death (and the woman's crime) to the authorities and instead helped to bury him secretly. The death was not discovered until 16 months later—"the *ting* magistrate carried out a visit round and about and came to know about it (*fang wen* 訪聞)".²⁷¹ In Uyghur cases involving a dispute between a couple, we seldom find that the family of the husband played an important role. Even in the Kalasha'er case, the mother-in-law is very different from in-laws in Chinese cases, who often made the situation for wives more difficult. By contrast in the Uyghur cases a wife's relatives, whether by blood or marriage, appeared far more frequently and always took her side when there was a dispute between a Uyghur couple. In brief, Chinese archives about criminal cases indicate that in Eastern Turkestan, a man's family members rarely intervened in his conjugal life or put a lot of pressure on the wife.

Besides enjoying marriage without abuse or intervention from her husband's family, a Uyghur woman also seemed to suffer less scrutiny from the community.

Whether a woman was married or divorced could never be a secret in a Han Chinese community, but in Uyghur community women seem to have been able to invent or fabricate their marital status, at least for some time, when they wanted to move in with their new lovers. In 1887, for example, a Yutian villager named Shawei planned to relocate along with his wife, Hailijie, to an area near a gold mine, leading Hailijie to ask her lover, Yueyinmuxia, to beat him to death so that the two of them

²⁷¹ GZD, Guangxu reign, vol. 7, p613.

could be a “lasting couple” (*changjiu fuqi* 長久夫妻). Later, when asked by her husband’s friend, Hailijie told him that Shawei had divorced her and had gone to the gold mine by himself three months earlier, so that she had married Yueyinmuxia. The man accepted the story as true (*xin yi wei shi* 信以為實). This case too was finally revealed and became known (*fang wen*) to the county authorities.²⁷² Clearly the local people (including family) did not treat marriage and divorce the same way that Han did.

Another case of status deception took place in Ningyuanin in 1892, when a Uyghur woman named Aizihan had an affair with her husband’s friend, Zelepu, while her husband was away on business outside the county. Afterwards she became sexually involved with another man called Tuolai. She decided to escape with him to Shamar after she heard that her husband was about to return. With fatal na ʻvet ʻ she hired her ex-adulterer, Zelepu, as the coachman to take the two of them and her little daughter to Shamar. She told him that her husband had abandoned her and she had to make a living with Tuolai in another place. Feeling extremely jealous and humiliated, Zelepu killed her and her daughter on the way.²⁷³

Both cases were about women who boldly changed their marital or sexual partners in an illicit way, making their decisions before their husbands became aware of the affair. The reasons why they were able to dissemble their marital status perhaps

²⁷² *Guangxu chao zhu pi zouzhe*, vol. 106, pp. 649-650.

²⁷³ GZD, Guangxu reign, vol. 7, pp. 747-748.

lie in the prevalence of divorce in Uyghur society or in the simple procedure which it required. Moreover, the relatively mobile life-style of Uyghur men (many were engaged in trade or mining work) and the widely dispersed residential practices of Xinjiang Uyghurs, based as they were on a single household,²⁷⁴ also seem to have provided women with more opportunities to evade public attention and develop an extramarital relationship.

While a husband's relatives did not play an important role in his conjugal life, a Uyghur wife usually maintained very close relationship with her natal family. According to Forsyth, in the wedding ceremony the groom had to make several promises to the bride or her family in addition to promising to obtain their permission before taking a concubine. These included a pledge not to take his wife to another place without her consent as well as to allow his wife free contact with her parents and near relations.²⁷⁵ To be sure, the latter was crucial for Uyghur women, who usually remained very close with their natal family after they got married. A Uyghur custom was that a woman would usually go back to her parents' home to give birth to her first and second children, and her husband was not allowed to take her and the baby back to their own home until after 40 days.²⁷⁶ In the socialist period, a Uyghur

²⁷⁴ Hu Xinxia, "Yingxiang Xinjiang Kashi diqu nongcun weiwuerzu hunyin jiating xingtai de yinsu fenxi" (Analyses on influencing factors of Uyghur marriage and family), *Xinjiang sheke luntan*, no. 5, 2006, pp. 62-65.

²⁷⁵ T. D. Forsyth, *Report of a mission to Yarkund in 1873*, p. 85.

²⁷⁶ Xu Anqi, "Xinjiang weiwuerzu de hunyin zhidu yu funu fuli", *Funu yanjiu luncong*, no. 5, 2000, pp. 10-15; see also Ildiko Beller-Hann, "Law and custom among the Uyghur in Xinjiang", p.191.

wife still has the customary right to visit her natal home “once every eight days”, provided it is located reasonably close to her husband’s residence.²⁷⁷

In nineteenth and early twentieth century Xinjiang, Uyghur women usually made frequent use of this customary right. They seem even sometimes to have taken advantage of it in terms of relations with their spouse – whenever wives were dissatisfied with their husbands for economic or other reasons, they frequently went home and stayed for a long time, until the husbands came to take them back. When this right was jeopardized, many women would immediately fight with their husbands and take various measures to protect their freedom. They either went back to their natal home in spite of the husband’s objections, or sought help from family members, or threatened the husband with divorce. In Xinjiang quite a few domestic conflicts, ranging from severe homicide cases to minor civil disputes, arose from cases where wives “returned to the natal home”.

For example, two homicide cases of this kind were reported in 1889. The wives in both cases returned to their natal home frequently because of the “poverty of the home of the young couple”. The first case involved a Yangi Hisar husband who suspected that his wife was committing adultery at her parents’ home with a man who was often called to help weave cloth there. Finally the husband stabbed the latter to death.²⁷⁸ In this case the son-in-law obviously did not believe that his parents-in-law

²⁷⁷ Ildiko Beller-Hann, “Law and custom among the Uyghur in Xinjiang”, p.191.

²⁷⁸ GZD, Guangxu reign, vol. 5, p. 208.

were on his side in helping to protect his wife's fidelity. In the second case, in Turfan, a husband who had been rejected and threatened with divorce by his wife killed her in a rage while trying to persuade her to come back from her natal home.²⁷⁹ The man was sentenced to strangulation according to the Great Qing Code for "willfully killing one's wife". The magistrate commented on the actions of the wife, noting that

She went back to her natal home frequently and when her husband went to bring her home, she rejected him and claimed that she was going to [divorce him] and get remarried, and although she was being dragged on the ground [by her husband when she said this], the words, though shouted out with anger, were still inappropriate (sui shu fuqi zhiyan, jiu shu buhe 雖屬負氣之言, 究屬不合). However, since she has been killed, there is no need to punish her.

This comment, which was to be reviewed by the emperor, clearly indicates that the right of Uyghur women to propose divorce bestowed by Shari'a was considered "inappropriate" within the framework of the Chinese sexual orthodoxy.

As we have seen, unlike many Chinese parents, Uyghur parents almost always stood on their daughter's side and showed no disapproval of her return to their home. Not only parents, but also the girl's other close kin were eager to protect her right to return home. In 1895 when a husband living in Karashahr went to his mother-in-law's house to bring his wife back home to help collecting the harvest, both her

²⁷⁹ GZD, Guangxu reign, vol. 5, p. 733.

father-in-law and brother-in-law would not let her go. They soon began to fight and the father-in-law was fatally wounded.²⁸⁰

In some cases, the natal home even became a refuge for Uyghur women in which they could develop a sexual relationship with other men. In Wensu prefecture a married woman named Gusongbibi had an affair with their neighbor, Aisha. When this affair was discovered by her husband, Wushour, Gusongbibi went back to her natal home. There she continued to engage in sexual intercourse with Aisha. When the suspicious husband finally seized them in the act of adultery one day in 1891, he used a hoe prepared in advance to kill not only the two but also Gusongbibi's mother, who he blamed for having connived at her daughter's misconduct (*zong jian zhi xian* 縱姦之嫌) and who was at that moment trying to stop him from completing his violent act. As we have seen, according to the Great Qing Code states, a husband who catches his wife and her paramour in adultery can kill them on the spot without risk of punishment. But this did not apply to the killing of the mother-in-law, who had committed *yijue*—which means that she had broken the bond between the two families—by conniving at her daughter's adultery. The Qing law dictated that a person who killed a parent who had committed *yijue* should be punished in the same

²⁸⁰ GZD, Guangxu reign, vol. 9, p. 951.

way as a person who has killed a non-relative. As a result, Wushour received the penalty of suspended decapitation for having willfully killed his mother-in-law.²⁸¹

Sometimes the relations between a married daughter and her parents could be even closer than described above. In a criminal case that took place in 1886, a Uyghur mother had been living together with her daughter and son-in-law since the young couple had married three years before.²⁸² The records of this case do not tell us why the mother decided to live with her daughter instead of with her husband or her own natal family. In another case of domestic homicide, in Shule prefecture in 1889, a Uyghur named Simayi who had married a girl named Hailijie the previous year had made a marital agreement that the man would not be obliged to hand over any betrothal gifts (*cai li* 彩禮), but in return for this the young couple would have to live with Hailijie's mother, Jimilihan, and support her throughout her life (*shan yang qi mu, tong ju gong du* 贍養其母, 同居共度). Again, whether or not this mother was widowed is not mentioned. However, we do know that one day in that same year, after an argument with her son-in-law, Jimilihan went to her natal nephew (*nei zhi* 內侄) 's home together with Hailijie (this implies that the mother was probably either widowed or divorced, as she would not otherwise have preferred to live with her daughter than with her husband). Some days later, Simayi went to the nephew's home

²⁸¹ According to the *Great Qing Code*, if someone kills a person in the fifth degree of mourning (such as a man's parents in law) or above, he will be beheaded without delay. See William C. Jones, trans. *The Great Qing Code*, "Article 284, pp.269-270.

²⁸² *Guangxu chao zhu pi zouzhe*, vol. 106, p523

and declared that he was going to bring his wife home and leave his mother-in-law with the nephew, which further angered both Hailijie and Jimilihan. In the ensuing conflict Simayi beat both of the two women to death with a stick.

This example takes us to the question of marriage payment in Xinjiang. There existed two forms of it in the Xinjiang Uyghur community, one is *toyluq*, a Uyghur custom; the other is the Islamic practice known as *mahr*. *Toyluq* usually refers to the wedding presents received by the bride and her family from the groom's family. After the wedding, the *toyluq* typically stayed with the bride.²⁸³ According to Islamic marriage customs, *mahr* refers to a bridal gift offered by the groom's side to guarantee the bride's financial independence, which is usually decided by the girl's father before the marriage. This property belongs to the wife exclusively. According to Beller-Hann, *mahr* did exist in the Uyghur context during the Qing period, but as a kind of provisional agreement rather than an actual payment. In the Republican period, *mahr* have persisted only in name, and it seems to have become inextricably intertwined with the practice of *toyluq*.²⁸⁴ My study also suggests that the two institutions were quite similar and intertwined during the Qing. Later in this chapter I will discuss this issue again in some details.

As far as I can tell, neither term appeared in the case records held in the local or central legal archives written in Chinese, where we can only find marriage payments

²⁸³ Ildiko Beller-Hann, "Law and Custom among the Uyghur in Xinjiang", p. 186.

²⁸⁴ Ibid, p. 188.

referred to according to Han Chinese usages, such as *cai li*, *pin wu* or *pin li*, meaning betrothal gifts or bride price – agreements over marriage payments between Uyghurs were thus recorded in Chinese documents without mentioning whether they related to *toyluq* or *mahr*. Xinjiang cases involving betrothal gifts show that when processing cases, Qing officials, Chinese scribes or translators (who wrote legal complaints or confessions for Uyghurs) usually treated Uyghur norms of marriage payment as consistent with Chinese tradition and the details of each premarital agreement was recorded without reference to their specific ethnic or religious nature. This leaves it unclear as to whether Uyghur norms of marriage payment had become mixed with Chinese ones by the late Qing period, or whether Chinese scribes just avoided using local terminology. It seems likely that, as long as it was not critical to adjudication of the case, local officials were not willing to consider local customs where these differed strikingly from Chinese ethical conventions and from the Qing code.

While Uyghur women might have enjoyed more freedom in their choice of marriage or sexual partner and suffered less scrutiny from their in-laws and the community, their financial rights within the household remained limited as long as the marriage continued. Generally speaking, Uyghur husbands held the purse strings of the family. But traditionally they needed regularly to give items of clothing to their wives, at least twice a year at the time of the major Islamic holidays.²⁸⁵ Sometimes women had to fight for this. An 1890 case from Wushi *ting* (sub-prefecture) illustrates

²⁸⁵ Ibid, p. 185.

that ignorance of such a requirement could even lead to tragedy. When a woman called Xialihan asked her husband for new clothes and was rejected, she cried and returned to her natal home. After about ten days, his husband went there in hope of bringing her home. But Xialihan's brother would not let her go and scolded him for "treating his sister too stingily". In the fight that followed, Xialihan and her brother both suffered mortal injuries at the hand of the angry husband.²⁸⁶

Besides controlling the purse strings, Uyghur men had exclusive power to make domestic financial decisions, even when the bulk of a family's property had been brought into the marriage or subsequently acquired by the wife. A Shufu woman named Saigenaibibi brought rather large assets from her natal home when she married Keqike. The fortune, however, was dissipated by him and the conditions of the family declined day by day. In 1892 Keqike secretly married another woman and arranged for her to live in another village. When Saigenaibibi learned this, she asked Keqike to divorce her but was rejected by him. From then on she held a grudge against him and frequently argued with him. One day she gave some cotton yarn she had spun to Keqike and asked him to sell it. In the evening when she questioned him about the proceeds of the sale, Keqike said he had already spent it. Irritated, Saigenaibibi scolded him for no longer caring for the family or her after marrying the second wife. During the quarrel, Keqike declared that he would definitely divorce her. Saigenaibibi was still very upset after they both went to bed. The fact that Keqike had

²⁸⁶ GZD, Guangxu reign, vol. 7, pp. 234-236.

impoverished the family by using up the property she had brought into the marriage and that he was going to divorce her because of the other wife made her so desperate that she killed him in his sleep. She then tried to get Keqike's body to sink in a nearby pond, but was seen by a Uyghur *akhund* who then reported this to the *xiangyue*. Saigenaibibi was finally sentenced to death by slicing for murdering her husband.

This is one of the very few cases I found in Xinjiang that involved “the other wife”. Polygamy was allowed among Xinjiang Uyghurs as in many other Muslim societies. Forsyth records that in a Uyghur wedding ceremony the groom promised to his wife that he would not take another wife without her consent,²⁸⁷ which is also evidence that polygamy was permitted. However, the practice was by no means prevalent and men, like Keqike, often secretly took second wives. Valikhanov noted in his travel notes that “polygamy is not common in Xinjiang”²⁸⁸ and Kuropatkin stated more explicitly that “the plurality of wives in Kashgaria, as in other Mussulman countries, is open to all, and yet in practice it is a custom that is within the reach of the opulent alone.”²⁸⁹ In other words, having a plurality of wives could often be an economic issue as well as a gender issue.

In the case of Saigenaibibi, it was largely her financial contribution to the family that made it possible for Keqike to marry his concubine, but nonetheless it

²⁸⁷ T. D. Forsyth, *Report of a mission to Yarkund in 1873*, p. 85.

²⁸⁸ Chokan Valikhanov, *Qiaohan Walihannuofu Zhuzuo Xuanji*, p. 112.

²⁸⁹ A. H. Kuropatkin, *Kashgaria, eastern or Chinese Turkistan*, p. 39.

seems that once Saigenaibibi married him, she lost any control over their domestic property, not only what she had brought from her natal home but also the income she earned every day. Shari'a provided Uyghur women the right to inherit property from their natal family. However, when they entered into marriage, it was the husband who held the purse strings, which meant that if the wife brought some asset into the marriage, she might lose control over it.

In this case, both marrying and settling a concubine and spending the proceeds of the sale of the yarn were economic actions, but neither of them was made known to Saigenaibibi. Saigenaibibi's case illustrates the lack of institutional protection for the rights of an existing wife to influence or interfere in her husband's decision to marry a second time, suggesting that a Uyghur husband at that time had exclusive control on domestic finances.

Though material conflicts could lead to serious crimes between a husband and his wife, I have not been able to find even one civil case in the Chinese archives that is about an economic dispute between a Uyghur couple. But they did go to religious courts to resolve such problems. Beller-Hann cites two such cases in her article to show that "neither Islamic nor customary law considered husband and wife as a legal unit whose interests always coincided".²⁹⁰ One of the cases she describes is about a husband accusing his wife of stealing his money; the other is a legal agreement in which a husband made some promises including giving his wife a regular allowance

²⁹⁰ Ildiko Beller-Hann, "Law and Custom among the Uyghur in Xinjiang", pp. 184-185.

to run the household. The two cases suggest that Uyghur women were not completely passive in the face of their husbands' domination over family property and income. However, Chinese courts seemed not to have been the recourse they chose to exercise what legal rights they had in the fight for their interests.

Chinese court as an option for the resolution of domestic disputes

Throughout the years of Qing rule in Xinjiang, the influence of the state on the civil affairs of local Muslims was very limited. However, after the establishment of Xinjiang province, the state did try to impose more of its authority over the everyday lives of Uyghur people, and to encourage them to go to the Chinese magistrate's *yamen* to resolve their civil disputes. Therefore, there was one more alternative way in which a Uyghur might solve a marital dispute; and this became a realm in which the Chinese state interacted with Uyghur commoners, although to a very limited extent. Under these circumstances, the secular *yamen* and the religious court found themselves in an undeclared relationship of competition.

Because they would have existed outside the official bureaucratic structure cases that were mediated have not survived as part of the documentary record. We therefore cannot say how many cases were mediated or how many Uyghurs brought their cases directly to the magistrate's court or how many cases arrived on the magistrate's desk because the native mediators failed to settle disputes. A similar problem faces scholars attempting to analyze the role of the magistrate's court in

solving civil disputes in the *neidi*. However, the existing sources do suggest that indigenous Uyghurs were fully aware of the different natures of the two different legal systems and they were able to choose different strategies and discourse to serve for their interests.

The large difference in family and marital norms between Uyghur and Han communities made it possible for a Chinese magistrate to issue a judgement different from the Shari'a court. For instance, the distaste Chinese officials harbored for the Uyghur practice of wives' "returning to the natal home" may have provided Uyghur husbands with additional grounds for enhancing their own interests in a marriage and keeping their wives with them. It may explain why in some cases Uyghur husbands went directly to the Chinese magistrate instead of consulting the local Uyghur village heads or religious leader in order to resolve minor domestic disputes and to retrieve their wives from their natal homes.

For example, in 1898, a Turfan man named Ruohemang charged that his mother-in-law had frequently asked his wife to return to live with her after the mother-in-law's remarriage to another man. When he went to look for his wife, he saw her surrounded by several single young men at his mother-in-law's home. His outrage led to a fight with his mother-in-law, who insisted that he had already divorced her daughter, a claim that the man denied. Ruohemang finally brought a case before the Chinese magistrate, who sent the case for settlement to the *xiangyue* of this county with the instruction, "if what the man said is true, bring his wife back to

him”.²⁹¹ Here the magistrate either did not know about the Uyghur custom or did not acknowledge it: he, and the Chinese civil law system he represented, were on the side of the husband, even though if Ruohemang’s own account was true, according to Uyghur custom, he had no right to prohibit his wife from staying frequently with her mother.

But not every Uyghur man was as lucky as Ruohemang. Not all the magistrates sent wives back to their husbands. In 1898 a Uyghur man was sued by his father-in-law for beating and wounding him. He defended himself by telling the Chinese magistrate that since he had no family members of his own, he had made an agreement with the bride’s family in front of the matchmaker and witnesses stating that she was not allowed to stay at her natal home for too long after getting married (娶過不准久住娘家 *qu guo bu zhun jiu zhu niang jia*); in return for this concession he had paid twenty taels of silver more than the usual bride price as a betrothal gift (*cai li* 彩禮). However, after their marriage, his father-in-law’s mother visited their home every six or seven days and lured his wife back to her natal home and would not let her return, despite the husband repeated requests. Muslim marriage is a legal agreement to which either partner is allowed to attach conditions, such as the condition in this case that “the wife must not stay at her own home for long”. In addition, he noted that the marriage contract had not included any undertaking that he was obliged to support his father-in-law’s mother (并未提說養伊母到老 *bing wei ti*

²⁹¹ XJA, 002541

shuo yang yi mu dao lao), and it was this that had led to the conflict. Hearing this case, the Chinese magistrate, Master Shen, did not punish any party but simply asked them to “resume proper relations” between relatives.²⁹²

This case shows that the husband could make an exception to the custom that allowed one’s wife to pay frequent visit to her natal home only by increasing the marriage payment. This suggests that this custom remained salient within the local Uyghur community after the establishment of Xinjiang as a province, and even in eastern Xinjiang, where the Chinese rule had deeper roots. More importantly, the magistrate in this case did not try to challenge the Uyghur custom protecting women’s right to visit their natal home. Actually, later I will talk about that the magistrate’s court had a very flexible attitude toward Uyghurs’ ethnic customs and in many cases the state was willing to enforce them.

Although few in number, these cases suggest that Uyghurs would bring their ethnic marriage and divorce customs to the Chinese court as a way of asserted contested rights. Next I am going to discuss an interesting case in some detail to show the extent to which Uyghurs saw the Chinese courts as willing to be used to enforce their customary rights. Also, this case offers us a good chance to observe various Uyghur marital customs and the complex relationship that could exist between a Uyghur couple.

²⁹² XJA, 002422

In 1903 a Uyghur man from Turfan named Bazier sued his mother-in-law, sisters-in-law and a man called Shali for having prevented his wife, Manlikesi, and their son from staying with him when he was planning to bring the whole family to another place. He explained that the reason for his move was that he found that his wife had committed adultery with Shali, a coal miner, and that the move was necessary in order to “avoid any possible big disaster in the future” (*mian zhi jianglai niang chu dahuo* 免致將來釀出大禍). However, he declared, “my mother-in-law, sisters-in-law and Shali ganged up and kept my wife and son from staying with me. What a villainous thing they have done...seizing my wife and taking my son...” The prefect of the Turfan *zhiliting* (independent sub-prefecture), Master Liu,²⁹³ then summoned the wife, Manlikesi, to a hearing, where she responded:

In the sixth month of Guangxu 28 my husband divorced me for no reason at all [after more than 15 years of peaceful marriage]. According to Uyghur customs (*yi chantou jingli* 依纏頭經理), if a man divorces his wife he should return money to her and send her back to her natal home (*tui yin gui niang* 退銀歸娘), while if a woman divorces her husband, she can only go out of the door without taking anything with her. However, I left home without one penny but with a debt (*dai zhang chumen* 帶賬出門). Life in my natal home was really hard but still I have been raising our son and

²⁹³ Master Liu was Liu Chengqing, whose reign was from the 25th day of the 4th month of Guangxu 28 to the 6th day of the 5th month of Guangxu 30. See Cao Shangting and Zha Xiangjun, “Tulufan zhiliting yunzuo shi goulue”, *Xinjiang daxue xuebao*, vol. 33, no. 5, 2005, pp. 45-51.

daughter for one year [under these conditions]. Now he suddenly came and attempted to take our son back without mentioning one word about how to compensate me for my suffering and hard work and expenses, and in any case, it is too hard for a mother to separate from her son. Since during the past year he did not get remarried and neither did I, if he did want our son back, isn't it better for us to go back with him together? If he does not agree, he may take our son back after he marries a new wife. Our son is too young now to be raised [by him alone]. Moreover, since he divorced me for no good reason, it's hard for me to marry again to a good husband because of my damaged reputation I would rather remarry my original husband (*xu pei yuan fu* 續配原夫) than marry another person only because it's unbearable to separate from my son. If he does not agree, he should return me the children's maintenance payment (*jiang zinv fuyang xinku bugei xiaonu* 將子女撫養辛苦補給小女). As long as he does this, our future life will be none of his concern even if I am out begging for food and tea.²⁹⁴

Obviously two different stories were told to Magistrate Liu by the husband and the wife. To Bazier, the husband, their marriage was ongoing although he had discovered that his wife had committed adultery with another person, and he was now taking measures to protect his family by moving to another place. But as a Uyghur, he

²⁹⁴ XJA, 003034

must have known that besides the right to return to the natal home, a wife has the customary right, as mentioned previously, not to be taken from one city to another without her consent.²⁹⁵ When he decided to move, according to these customs, his wife had a valid reason to reject his proposal. However, perhaps believing that the Chinese magistrate would not support or even know about this custom, the man did not hesitate to tell the story in a way that emphasized the accusation that his wife had committed adultery, which according to Chinese sexual orthodoxy can deprive a woman of almost any moral standing. For Manlikesi, the marriage had already finished when her husband had divorced her one year earlier, and so when forced to attend the Chinese court, she did not respond at all to the accusation of “adultery”, but instead tried to protect her economic interests by telling the Chinese magistrate about Uyghur customs concerning property distribution upon divorce. The custom she referred to – “if a man divorces his wife he should return money to her and send her back to her natal home, while if a woman divorces her husband, she can only go out of the door without anything taken with her” – could be found in both Chinese and Western sources at the time. We have already noted that the Manchu civil officer, Qishiyi, had written in his travel notes, *Xiyu Wenjianlu*, that “if a wife divorces her husband, she is not allowed to take even a piece of grass away from their home; if a husband divorces his wife, the wife is allowed to take anything she want with her,”²⁹⁶

²⁹⁵ T. D. Forsyth, *Report of a mission to Yarkund in 1873*, p. 85; and Xu Anqi, “Xinjiang weiwuerzu de hunyin zhidu yu funu fuli”, pp. 10-15.

²⁹⁶ Qishiyi, *Xiyu wenjian lu*, 7: 8b.

and Valikhanov had made a similar observation in his report.²⁹⁷ These descriptions are in accordance with Islamic law, which requires that a divorced wife receive a payment (*mata*) from her husband if he instigates the termination of their marriage.²⁹⁸

But why does Manlikesi describe Uyghur custom as requiring that a husband should *return* money (*tui yin* 退銀) instead of *giving* money or compensation in some form to his divorced wife? And in her case, why does she say that she left home “with a debt”? This appears to recall the *mahr* practice. As Beller-Hann has suggested, in early 20th century Xinjiang, *mahr* was not an actual payment and was regarded only as a debt that could theoretically be claimed by the wife following divorce. However, upon divorce, husbands were usually able to waive their obligation by various methods. Beller-Han quotes an account of a marriage arrangement in 1935:

With *nika* is meant that on the side of the girl three or four of the very important people and on the boy’s side three or four people act as witnesses and having fixed the marriage portion (*mahr*) of the girl at four or five hundred sar he gives clothes to the amount of two or three hundred sar.²⁹⁹

²⁹⁷ “If a wife wants a divorce, she cannot take anything away from home, if a husband wants a divorce, he has to support his wife’s life.” See Chokan Valikhanov, *Qiaohan Walihannuofu zhuzuo xuanji*, p. 113.

²⁹⁸ The Quranic text cited is verse 241 of Surah 2. “For divorced women (a one time provision should be paid) on a reasonable (scale). This is a duty on the righteous.” See Abdullah Yusuf Ali trans., *The meaning of the Holy Qu’rān*, (Beltsville, Md. : Amana Publications, 2008), p. 98.

²⁹⁹ This quotation originally appeared in G. Jarring, *Materials to the Knowledge of Eastern Turki, Tales, Poetry, Proverbs, Riddles, Ethnological and Historical Texts from the Southern Parts of Eastern*

The gifts of clothes given by the man's side to the woman immediately after the fixing of *mahr* in this reference, according to Beller-Hann, "raise the possibility that the notions of *mahr* and *toyluq* were inextricably intertwined." However, as we know, in many Islamic communities, the amount of *mahr* is usually divided into two parts: immediate payment (given upon marriage) and deferred payment (given upon divorce, death of either party, or other specified events).³⁰⁰ Thus the gifts of clothes in this account could also refer to the immediate part of *mahr*. It seems to me that this reference could raise another possibility as well: that in the Xinjiang Uyghur community in the 19th and early 20th centuries, the practice of *mahr* was prevalent and that, as in other Muslim communities, it was divided into two payments or potential payments. The immediate payment might have become intertwined with the Turkic tradition of *toyluq*, or even with the Chinese practice of *caili* in some cases, while the deferred part was deemed to be a "debt" that a wife had a right at least theoretically to claim upon divorce. In the case of Manlikesi, it is highly possible that her description of Uyghur custom as ordaining that the husband "should return money to her" referred to the deferred element of *mahr*, and that the "debt" to which she referred upon divorce was this element of *mahr* that he owed her, not a debt that she owed him.

Turkestan (With translation and notes). IV. 1951. (Ethnological and Historical texts from Guma, in Lunds Universitets Arsskrift N. F. Avd. 1, Bd 47. Nr 4, 1946-1951), p. 11. I quote it from Ildiko Beller-Hann, "Law and Custom among the Uyghur in Xinjiang", p. 189.

³⁰⁰ Ghada G. Qaisi, "A Student Note: Religious Marriage Contracts: Judicial Enforcement of "Mahr" Agreements in American Courts", *Journal of Law and Religion*, Vol 15, (2000-2002), p. 71.

Manlikesi made another point in her response to the Chinese court: she complained that the divorce had damaged her reputation as a good woman and thus hindered her chances of remarriage. As we know, this was an accusation that was likely to resonate with a Chinese judge, since Confucian orthodoxy required a woman to be absolutely sexually loyal to her husband and a chaste woman had to remain true to her first husband until the end of her life (*cong yi er zhong* 從一而終); it was said that “a good woman does not marry again (*hao nv bu jia er fu* 好女不嫁貳夫)”. In the imperial Chinese context, a wife was allowed to propose a divorce only if her husband had disappeared or mistreated her severely and even in that case the husband’s consent was needed. In almost all cases the initiative for a divorce came from the husband, in which case the law recognized seven conditions (*qichu* 七出) allowing him to divorce his wife (these were disobedience to the husband’s parents, infertility, adultery, loquacity, jealousy, incurable disease, and theft), but imposed three limits (*san bu qu* 三不去) that could trump any of the seven reasons: if the wife had nowhere to return to, if she had completed a three-year-mourning for her deceased parents-in-law, or if the husband’s family had been poor at the beginning of their marriage but had since become wealthy.³⁰¹ These regulations alone indicate that divorced status for a woman in Chinese society would necessarily indicate a physically or moral flawed and thus dramatically damage her reputation.

³⁰¹ About *Qi chu* and *san buqu*, see Dai De ed., *Da dai li ji*, (Beijing : Zhonghua shu ju, 1985), 13:14a; See also ZhangsunWuji, ed., *Tang lu shu yi*, (Beijing : Zhonghua shu ju, 1985), 14:8a-9a.

Would a divorce “with no good reason”—although to her husband, the reason would certainly have been adultery—have really reduced the chances of a Xinjiang Uyghur woman marrying again? As shown earlier, both Chinese scholars and officials noticed the frequency of divorce and remarriage among Uyghurs and considered that divorce even tended to heighten a woman’s value on the marriage market. Manlikesi’s complaint thus seems somewhat suspicious. It is unlikely that she could have been referring to her chances of finding a Han husband, because Muslim women in Xinjiang were strictly prohibited from marrying with the Han and there are hardly any accounts of such marriages. There were more Chinese living in Turfan and in Hami than in south Xinjiang, but as we discussed previously, the everyday life and civil practices of Uyghurs in all parts of Xinjiang at that time largely followed their customary laws and social norms. So we can speculate that in this part of her statement Manlikesi was trying to use Chinese moral standards to empower herself in the Chinese court.

Therefore we see that even by the 1880s local Uyghurs, not necessarily literate, much less scholars, were already able to deploy different legal norms within the same argument to a court in order to get the best chance of persuading a Chinese magistrate, clearly recognizing his likely prejudices and assumptions, or his possible respect for local norms, in order to support different aspects of their cases.

Unfortunately, the archives do not contain the record of Master Liu’s judgment after that hearing: the relevant document has been lost. But we do have another indictment submitted by Bazier one year later (1904). In this statement, we learn that

Master Liu had judged, right there in the court (*dang tang xun duan* 當堂訊斷), that Bazier could bring Manlikesi “back to discipline” (*ling hui guan jiao* 領回管教) as long as he repaid his mother-in-law 20 taels of silver as compensation”. This shows that Master Liu ruled nominally in part according to Chinese norms, according to which the wife could not disobey the husband, but still respected local norms which required a payment of the *mahr* debt alluded to by Manlikesi in her statement.

But in a subsequent indictment, Bazier accused his mother-in-law and Shali yet again, saying that when he had gone to reclaim his wife and make the payment, his mother-in-law had refused to take his money or return his wife to him. When the magistrate, Master Fang (Master Liu had left this position by then) received the suit, he summoned all the relevant parties to the case to make an appearance before him. This is the last information we have about this case.

We can see here that as in previous cases from the Turfan archives, again it was the husband who chose to go to the Chinese court to resolve the family’s domestic disputes, and that he accused his wife of committing adultery, not with the aim of punishing her infidelity but in order to bring her and their son back to live with him. In this situation, the wife mobilized both Uyghur customs and the Chinese discourse of female virtue in order to show that she was the person who had been treated unjustly, in order to gain the magistrate’s sympathy. Her ultimate goal is more likely to have been to get sufficient compensation for her and her parents. The subsequent record suggests either she was not really willing to go back with her husband or

changed her mind, or that she or her family considered the compensation awarded by the court to be insufficient.

The magistrate's attitude here seems to have been largely the same as that of magistrates in *neidi*, for whom the prevention of the collapse of a marriage was the primary aim.³⁰² Master Liu seems not to have taken any action to clarify whether or not the husband had divorced her wife, or if she had committed adultery, since he made his decision right in the court. His decision included a main part and an additional condition: firstly, that Manlikesi should be sent back to her husband, a standard solution employed by Chinese magistrates to protect the husband's interests in cases of "back-home-wives," and additionally, that the husband should pay his mother-in-law a sum of money based on Uyghur customs. While trying to protect a stable patriarchal social order, the additional condition of his decision shows a respect for local custom (in this case, a non-Han ethnic custom), as sometimes happened in late imperial China when law officers had to deal with civil disputes in areas with non-Han populations.

The case shows another way in which Chinese officials adjusted local norms in the direction of Confucian principles, even when showing respect for those local practices. In the first round of this case, the plaintiff was Bazier, the husband, and the accused were his in-laws and the alleged adulterer. The person who presented an elaborate defense to the court was his wife Manlikesi, in which she argued that

³⁰² Wu Xin, *Qingdai minshi susong yu shehui zhixu* (Civil disputes and social order of the Qing dynasty), (Beijing: Zhonghua shuju, 2007), p38-39

compensation should be paid to her for her maintenance. Compensation was indeed awarded by Master Liu – but it went to Manlikesi’s mother rather than to the supplicant. So why didn’t Master Liu instruct that the payment be made to Manlikesi? In Qing legal culture, marriage was considered more as a union between two families than between two people. Likewise, conflicts between a young couple were usually treated as between two families. That may have been why whenever there was a case of wife who had taken flight, the husband (or his family) usually sued her family instead of her alone, even in cases where her natal family had not sheltered the woman at all.³⁰³ In such a dispute, the husband and the wife were merely regarded as representatives of their natal families’ interests. Thus in Bazier’s case, whether the compensation was awarded to Manlikesi or to her mother was probably much the same in Master Liu’s eyes. At the same time, Qing legal culture usually treated a couple as a community of interests dominated by the husband. Thus it would look strange if a man was judged to pay a sum of money to his wife to whom he remained married; this would have upset the perceived natural hierarchy of the relationship as seen in Chinese terms. This might be another reason why Master Liu awarded the compensation to the mother-in-law, and why he instructed Manlikesi’s family to return her to Bazier as his wife.

In short, in this case both the Uyghur husband and wife were able to mobilize Chinese discourse in order to win the magistrate’s sympathy. More importantly,

³⁰³ Ibid, pp. 36-37.

facing the Chinese magistrate, they did not hesitate to refer to Uyghur customs to protect their interests. The Chinese magistrates, though eager to uphold Confucian principles, did show respect for local custom and enforced it in practice.

Western travelers who went to Xinjiang in the middle of the nineteenth century, such as Skrine, Forsyth and Valikhanov, had similar observations about the high social status enjoyed by the local Turkestani women compared to their co-religionists in the Middle East, particularly because they could divorce and remarry with ease. As for Uyghur women's status, Chinese legal archives do not contribute much more information about divorce and marriage institutions in Xinjiang, but they do provide us with more knowledge of gender relations in other respects. On the one hand, these case records show that while suffering less scrutiny from in-laws and the community, ordinary Uyghur women were able to maintain a very close relationship with their natal family after marriage, much more so than their Han Chinese neighbors. This provided Uyghur women with stronger grounds on which to fight for a better domestic status and more freedom of emotional and sexual life. On the other hand, 19th century Uyghur women also suffered frequent domestic violence and extremely limited economic rights in their marital life, like many women in China proper and other places at that time. These "rights" enjoyed by Uyghur women flowed from Turkic customs or in some cases from Islamic law, not from Qing law.

In the early period of Qing rule over Xinjiang, the everyday life of Uyghur people was seldom touched by Qing law or Chinese culture. But after Xinjiang was

made a province in the 1880s, a group of new provincial officials began to implement a Chinese-style administration there, including an effort to impose greater supervision over the gender order and relations among Uyghurs. The practical results of their original efforts turned out to be insignificant: We have every reason to believe that most of Uyghurs continued to deal with their marriages and divorces within the framework of their religion and their customs. Nonetheless, the existence of a Han Chinese *yamen* in every county did have a real impact on Uyghurs' marital lives, and the records show that many Uyghurs were fully aware of the more patriarchal nature of the Qing legal system and its norms, and that Uyghur men soon learned of ways in which this system could be handled to some extent to their advantage. In at least some cases, a husband whose wife was flouting his wishes in a way that he had no grounds to counter according to customary law, such as returning to her natal home, would go to the Qing court to seek a judgment in his favor by appealing to Chinese norms. However, no Uyghur, whether a husband or a wife, would go to the Qing court to settle a dispute, such as a divorce, which could be resolved with more ease and efficiency by religious or customary law. In our case records we do not find even one Uyghur woman who went to the Qing court voluntarily to fight for more conjugal rights, because, as the women must have known, the Qing code and the Chinese customary system offered no advantage to them in this respect.

Certainly Qing and Uyghur legal norms and systems were based on different beliefs and principles, and the gender issue was one of their most prominent battlefields. But in Xinjiang as in the *neidi*, it was a time-honored tradition for

Chinese magistrates to respect local customs when dealing with civil disputes. Aware of this, Uyghurs were good at mobilizing both Chinese discourse as well as Uyghur customs to defend their interests in the magistrate's court.

CHAPTER 4

UYGHURS' CIVIL MATTERS (II): CONTRACTS AND PROPERTY RIGHTS

After the Qing conquest, Islamic law, local customs, and Qing state law worked together in establishing, protecting and adjusting Xinjiang Uyghurs' property rights. For a long time, the Qing central government maintained an indirect system of rule in which native inhabitants were largely governed by local elites. In such circumstances, Uyghurs continued to observe their existing civil law system when establishing property rights and undertaking private transactions. Generally speaking, the religious court in Xinjiang played a dominant role in adjusting the inheritances, transactions and transfer of property rights of native Muslims. This was a result of both the Qing rulers' indifference to the regulation of Uyghurs' civil matters, as well as the flexible and customary features of Qing civil legal tradition. Nevertheless, after the establishment of Xinjiang as a province in the 1880s, the Qing state did try to play a more active role in intervening in Xinjiang Uyghurs' economic life. This was mainly manifested in the state registration of Uyghur contracts as well as its cooperation with local Uyghur religious and secular authorities to protect people's property rights. In this chapter, I will discuss how Uyghurs used written contracts to establish and protect their property rights as well as the actual effect of the new policies after the 1880s.

A group of written agreements drawn up originally in Chagatai language are the primary materials studied in this section. They mainly come from two different sources. One of them – *Xinjiang Weiwu'erzu qiyue wenshu ziliao xuanbian* (Collection of Contractual Documents of Xinjiang Uyghurs) – a precious collection comprising 314 documents dated from 1773 to 1949, that was compiled in the South and East Xinjiang countryside and translated into Chinese by scholars at the Xinjiang Academy of Social Science from the 1950s to the 1980s. Among them, 66 documents date to the Qing dynasty. The other material source is presented in a master's thesis written by Erkenjiang · Yidelisi, a young Uyghur scholar. He collected 62 Chagatai documents, among which 30 were provided by Japanese scholar Jun Sugawara. In his thesis, Yidelisi classified all of them into seven groups by content and translated into Chinese sixteen documents which were complete and in the best condition. The Chagatai documents include but are hardly limited to contracts. Basically, all of them are signed and witnessed statements confirming ownership of certain properties or securing certain transactions. Beside these Chagatai materials, Uyghur civil matters that related to some Chinese contracts, petitions, and agreements written after disputes were settled by court (*jujie* 具結) constitute another important part of the “database” of this study. They will help us understand the influence of the Chinese judicial system on Xinjiang Uyghurs' economic behaviors during the late Qing period.

How Xinjiang Uyghurs negotiated their property rights

Property transactions contracts

The Muslim community has a long tradition of respect for private property. Many verses in the Qur'an give a clear indication that everything is owned by Allah and that property in the absolute sense belongs to Him. But God's ultimate ownership of the universe does not conflict with every individual's private ownership. Private ownership and individual rights are gifts from God. Private property in Islam was protected so well that until the present day some traditionalist countries would not interfere with private property and rights.³⁰⁴ A contract received just as much protection as property did from the Shari'a. The concept of a contract in Islam does not exist merely as a legal institution. A contract means much more in Islamic law than in other legal systems. For many scholars, the Shari'a itself is regarded as a system of law based on a pact between God and man and "the entire fabric of the Divine law is contractual in its concept and content."³⁰⁵ Shari'a does not present a formal definition of the term of contract (*'aqd*), nor does it develop an explicit general theory of contract. Nonetheless, Islamic law recognizes the principle of freedom of contract, though this freedom is not unlimited. "It established the rule that in matters of civil and commercial dealing (Mu'amalat) any agreement not specifically prohibited by the Divine Law was valid and binding on the parties and could be

304 Saba Habachy, "Property, Right, and Contract in Muslim law", *Columbia Law Review*, vol. 62, No. 3, p. 456-457.

305 Ibid, p. 460.

enforced by the courts.”³⁰⁶ People’s agreements could not violate Islamic prohibitions, such as those on usury (*riba*), uncertainty (*gharar*), and gambling (*maysir*).³⁰⁷ Besides the principle of freedom, there were some other basic ideas that directed and stabilized commercial and other transactions in the Islamic world, such as justice (*adala*), faithfulness (*amana*), equality and liberality.³⁰⁸

Although the resources of this specific study all come from written documents, it is misleading to think that there were no property transactions before the time of the earliest known written contract in Xinjiang. For Xinjiang Uyghurs, as long as there were witnesses, an oral agreement had legal power as well. The situation was largely the same in other Islamic societies, such as Sudan, where “in Islamic law the role and function of witnesses is quite crucial in many connections and their testimonies regarded as more valid than written evidence”.³⁰⁹ Nevertheless, in Xinjiang, people might share the belief that tangible evidence would provide a greater chance of success in the event of future possible disputes. This appears to have been the reason

306 Ibid, p. 459.

307 Hussein Hassan, “Contracts in Islamic Law: the Principles of Commutative Justice and Liberality”, *Journal of Islamic Studies*, 13:3 (2002), p. 261.

308 See both Saba Habachy “Property, Right, and Contract in Muslim law”, pp. 450-473; and Hussein Hassan, “Contracts in Islamic Law”, pp. 258-297.

309 Anders Bjorkelo, “Islamic contracts in economic transactions in the Sudan”, presented in the fourth Nordic conference on Middle Eastern Studies: the Middle East in globalizing world, Oslo, Aug, 13-16th, 1998.

for the following document, which recorded a written contract that re-established a contract based on an oral agreement.

(Islamic Calendar) 1303rd year, 2nd month, 7th day (Nov 15, 1885)

Bayi³¹⁰ Saipaier, in his lifetime donated 2 arver³¹¹ of land located along Hejie Canal Rebaqi, as waqf³¹² land. This was not written down when the agreement was made and only orally told to people such as Bayi Kasimu and Bayi Minhan living in the village. They all provide testimonies. This evidence is valid in the presence of Shari'a. Now I establish a (written) contract again for this matter.

The boundaries of this land extend eastward to the wasteland; southward to Maimaiti Yousufu's land, divided by the bush; westward to the Canal of the village; northward to Bayi Kasimu's land, divided by the apricot tree. ³¹³

310 Bayi means people who controlled large amount of wealth and vast area of land.

311 Arver was originally a Uyghur unit of weight. One arver roughly equals to 191 kilogram. In Xinjiang and some other northwestern places of China, people used to use unit of weight to describe size of arable land in which the same amount of grain seeds can be sown. For instance, an arver of land indicated a land where an arver of seeds can be sown. See *Xinjiang Weiwu'erzu qiyue wenshu ziliao xuanbian*, pp. 10-11. Wang Dongping, "Qingdai Huijiang liangfu zhidu yanjiu (Study on the grain tax of Qing dynasty Xinjiang)", *Zhongguo bianjiang shidi yanjiu*, Sep 2007, vol. 17, no. 3, pp.32-47.

³¹² Uyghur charitable trust, later I will talk more about it.

³¹³ The contract is converted from Chagatai language into Latin letter and translated into Chinese by Yu Hongmei, The English translation is based on her Chinese translation. Yu Hongmei, "Qing dai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu (A study on Chagatai contractual documents of Qing Southern Xinjiang)", master thesis, 2003, p. 31.

The documents studied in this chapter range in date from 1773 to 1911, and were written for various purposes. Generally, these documents include contracts for sale of land, real estate, gardens, water mills, underground canals (*karyz*)³¹⁴ and so on; written agreements about the transfer, endowment, tenancy, partnership of arable land; endowment statements regarding *waqf* properties; documents concerning inheritance and distribution of property during family division, and agreements of all parties of a civil dispute which was settled by Shari'a court.

Sale contracts, especially of land, were among the most important written documents for Uyghurs who had a long history of agriculture. The following is an example of a land sale contract:

Islamic calendar: 1195th year, 1st month, 11th day, Saturday

The executor of this contract, Maredilisufei³¹⁵, voluntarily sells 50 *mou* of farmland and 10 houses located at Rebaqi Street, which were left by my parents, to Yakufubayi, for a fair price of 100 silver dollars. Now I've received the money in full. This land is not a land for pledge sale, or a gift, or a *waqf* land. No one is allowed to muscle in on the land or the house. Henceforth, if my descendants or I cause any trouble by disavowing or damaging this contract, it is invalid in the presence of religious law.

Boundaries in four directions: eastward it extends to the graveyard,

314 For a brief description of the *karyz* system used in the Turfan Basin, see L. Wawrzyn Golab, S. V. D., "A Study of Irrigation in East Turkestan", *Anthropos*, no. 46(1-2), 1951, pp.187-99.

315 All the Uyghur names were transliteration based on the original Chinese translation.

southward to the main road, westward to the seller's left houses, with the wall as a dividing line, northward is Yakufubayi's previous *** (damaged part of the document), with the wall as a dividing line.

Witnesses: Mullah Aibaidula, Imam Dulaiti, Sufi³¹⁶ Tuoheti.³¹⁷

This document, written in 1801, exemplifies the standard format of land sale contracts: first, the contract is dated and the executor is named. The land to be sold is identified in terms of location and its four boundaries (which is very similar to Chinese land contracts), with the purchaser and price indicated. The voluntary and justice principles for settling the transaction price were usually emphasized in the contract. “*Qurur Qäbn Qururini ötüp biqimmät ädil rastgä ulväkit* „ (voluntary and fair) is a standard phrase that is frequently encountered in Chagatai sale contracts.³¹⁸ In Xinjiang as in other societies, fields and real estates inherited from the parents often became one's main property. In these Chagatai documents, if the land or other property in question was inherited by one of the trading parties, it was often indicated in the contract. The boilerplate of “this land is not a land for pledge sale, or a gift, or a *waqf* land” was also widely used for irrevocably selling land, in order to avoid possible disputes.

316 Here Sufi means people practicing Sufism.

317 The contract is converted from Chagatai language into Latin letter and translated into Chinese by Yu Hongmei, The English translation is based on her Chinese translation. Yu Hongmei, master thesis, “Qing dai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu”(A study of Chahetai language documents in the south of Tianshan mountain in Qing dynasty), (Xinjiang University 2003), pp. 19-20.

318 Yu Hongmei, “Qing dai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu”, p. 33.

Completion of the payment had to be recorded. In the end, all the witnesses had to sign the contract. Witnesses were usually of some standing in the local community, and could include one who was a Mullah (people having abundant religious knowledge), *Imam* (religious scholar, or person in charge of worship in a Xinjiang Mosque), *Sheikh* (person in charge of a *mazar* for Muslim sages, elderly people, or religious leaders in a community), *Bayi* (a rich person) and so on. The executor(s) did not sign their names in these Chagatai documents.

A crucial expression shared in common by a majority of these Uyghur contracts, which is also a significant difference from traditional Chinese contracts in terms of both formality and substance, lies in the sentence of this contract which states: “if my descendants or I cause any trouble by disavowing or damaging this contract, it is invalid in the presence of religious law (Shari’a).” This standard expression shows that in Xinjiang, local Muslims were fully aware that they were signing these agreements within the framework of Shari’a. They believed that the religious court would enforce their private agreements, though in many cases simultaneous performance had alleviated the need for outside enforcement. For these people, whose everyday lives were comprehensively regulated by a sacred civil law system, a contract seemed to be more of a legal and religious document than a self-enforcing mechanism. This is in contrast to Chinese practice where, although in property-related

lawsuits contracts were routinely upheld by court, “there is a strong tendency toward self-enforcement in late imperial and early Republican contracts”.³¹⁹

This 1801 contract, concluded more than 40 years after the Qing conquered this area, is the earliest contract of sale found so far from Xinjiang. During that period, the Qing rulers maintained a non-intervention policy toward the civil matters of local ethnic people. The above standard usages and phrases appeared frequently in documents of the same type from various counties of South and East Xinjiang till the end of the Qing dynasty. Generally speaking, Xinjiang Uyghurs, speaking the same language, shared a unified contractual vocabulary.

The following is another contract of land sale, whose format and usages were largely the same:

(Islamic calendar) , 1266th year, 2nd month, 17th day (Jan, 1st, 1850)

I, Yousufuhejia, hereby sell one carak of land located in Mogala area and irrigated by Kaluke Canal to Mullah Xiahejia, at the price of 30 tunga³²⁰. I’ve received the money in full, the buyer does not owe me any more. This land is not a waqf land, nor does it belong to any other partner. About this land, if my descendants or myself or anyone else initiate a lawsuit for whatever reason, the lawsuit will be groundless and rejected

319 Madeleine Zelin, “A Critique of Rights of Property in Prewar China”, *Contract and Property in Early Modern China*, p. 28 and p. 25.

320 *Tunga* was a money unit in Eastern Turkestan, one *tunga* of silver equaled to one *tael* of standard silver.

according to religious law. Therefore, we conclude the contract by ourselves. The land's boundaries extend eastward to the buyer's land, divided by the ridge; northward to the buyer's land as well, divided by the ridge; westward to a waqf land, divided by the pit. These are the boundaries.

Witnesses: Sheikh Tuohutihejia, Mullah Samusake, Mullah Tuohuti, Sheikh Abudula.³²¹

In contrast to contract vocabulary in China proper, Chagatai documents did not indicate that a transaction was a “permanent sale.” Without specific notification, all the sale transactions were final, in which the seller lost all rights to make further claims. As yet not even one Chagatai source has been found recording that a seller asked for additional payments for land or other property already sold by him at a settled price. This probably can be explained in part by the more absolute and complete character of Islamic rights of ownership than in Western or Chinese contexts.

Besides the land sale contracts and transfer agreements, there are two other main groups of surviving documents: one involved *waqf* endowments, and the other the succession of family property.

***Waqf* documents**

321 Converted into Latin letter and translated into Chinese by Erkenjiang Yidelisi, master thesis, “Qingdai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu” (A study on Chagatai contractual documents of Qing Southern Xinjiang), (Xinjiang University 2006), p. 31

An important institutional economic practice of Uyghurs in Xinjiang was that of *waqf*, which means charitable trust. This institution was introduced to and developed in Xinjiang during the 10th -14th century with the spread of Islam. Two types of *waqf* existed in Xinjiang as well as in other Islamic societies: the *waqf khairi* (a public or charitable endowment), and the *waqf ahli* or *dhurri* (a family endowment). This dissertation is primarily concerned with the former.

Originally *waqf* means “to detain” in Arab language. According to the Hanafi school of Islamic law, a *waqf* was “the detention of the corpus from the ownership of any person and the gift of its income or usufruct either presently or in the future, to some charitable purpose.”³²² While ownership of the *waqf* property was relinquished by the founder, it was not acquired by any other person; rather, it was “arrested” or “detained.”³²³ In other words, as long as a property became a *waqf*, the ownership of it was detained, while its usufruct was donated to the beneficiaries of the trust. In Xinjiang, the three main *waqf* types were Mosque *waqf*, *mazar* (tomb) *waqf*, and *madressehs* (religious school) *waqf*; while the property most commonly made *waqf* was land and real estate.

Before the Qing conquest, *waqf* lands were awarded by secular rulers or donated by commoners. During the Qing ruling period, most of *waqf* lands came from

322 H. Cattan, “The Law of Waqf”, *Law in the Middle East*, edited by M. Khaddouri and H. J. Liebeseney. Washington: The Middle East Institute, 1955, pp. 212-218 and p. 203

323 Monica Gaudiosi, “The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College”, *University of Pennsylvania Law Review*, vol. 136, No. 4, pp. 1231-1261. p. 1234.

endowments created by common Muslims. But the Qing emperor left the majority of *waqf* lands and properties untouched when they started their domination over Xinjiang from 1759. For instance, one memorial presented by Amban Aliyan to Emperor Qianlong states that “the tomb of the old Khoja in Islamic Kashgaria owned 30 *patman*³²⁴ of land which was taken care of by 12 Muslim households. They are allowed to manage the land as before in order to meet expenditures for sacrifice and repairs, as well as their own living.”³²⁵ Actually there were surprisingly few records of Xinjiang *waqf* that can be found in Chinese sources. All transactions involving *waqf* properties were handled within the sphere of Islamic law. Though *waqf* endowment was widely and frequently practiced among Uyghurs during the Qing dynasty, this fact is almost impossible to sense by reading both central and local Chinese materials. The Qing’s attitude toward Xinjiang *waqf* was in line with their general “non-interference” policy on Uyghur internal affairs. What we do know is that the state did not levy tax on *waqf* lands.³²⁶ Moreover, I found no restrictions imposed on *waqf* endowment by the state in practice.

The reason for a Muslim to make public *waqf* endowment was complex. Generally and nominally every public *waqf* was made in order to perform good works

324 The *patman* was an East Turkestani unit of measure, originally fixed in the Qianlong reign at 4 *shi* 5 *dou*, later changed to 5 *shi* 3 *dou*, in fact there was considerable variation from this nominal value. According to *Xinjiang Weiwu’erzu qiyue wenshu ziliao xuanbian*, one *patman* equals to 64 *carak* or 573.44 kilogram.

325 QSL, Qianlong reign, 614: 2a-b.

³²⁶ Li Jinxin, “Xinjiang nanbu Weiwu’erzu diqu de wahefu zhifu wenti”, pp. 18-27,

and to please God. This motive was often declared in the written agreements. However, founders used the law of *waqf* for a variety of undeclared, personal reasons. For instance some impoverished people donated their lands to avoid paying the land tax; some old people *waqfed* their land because they were childless; some poor people created a *waqf* because they were not able to make a pilgrimage to Mecca while some rich ones created it to seek atonement.³²⁷

Islamic law did not mandate a particular form to create a *waqf*. As previously shown, it is valid for the *waqif* (founder) to indicate his intention to create a *waqf* orally. However, it is much more common for Xinjiang Uyghurs to make this declaration in writing. The following is a typical *waqf* endowment document:

(Islamic calendar) 1244th year, 2nd month, 4th day (Aug 16, 1828)

The executor of this document is Teacher Tuerdi. I hereby donate my land at Hejie Canal, Rebaqi, which can grow 100 jin of seeds as well as trees and houses on it, to the local Mosque as *waqf*. From now on, I, as well as others have no right to interfere. These properties are not for redeemable sale or deposited. There is no turning back.

The land's boundaries extend eastward to the donor's land, with the village canal as the dividing line, southward and westward to Supi³²⁸ Niyazi and Wuresi's lands, with the field ridge as the dividing line;

327 Erkenjiang Yidelisi, "Qingdai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu", p. 56.

328 *Supi* is a title for a male Sufism practitioner.

northward to Yisimayier's land, with the lake as the dividing line.

Witnesses: Bakeniyazi, Yibulayimu.

Islamic law allowed the founder of a waqf (waqif) the right to designate a mutawalli (trustee) for the trust or he could also appoint himself to be the mutawalli. Though ordinarily the founder would appoint a mutawalli in the waqf document,³²⁹ it seems Xinjiang waqifs usually did not write about this in their contracts. As in the above example, the majority of the present Xinjiang waqf documents³³⁰ show that the donor chose to give up all of his rights on the waqfed property as soon as he concluded the document of endowment. In the meantime, they did not mention the mutawalli. Only one late Qing contract differs from this pattern:

(Islamic Calendar) 1323rd year, 3rd month (May 1905)

The executor of this document, Hadj³³¹ Yisilan, with the conscience bestowed by Allah, following the proverb that “the best donation is the donation that never dries up,” now endows 5 mu of land irrigated by Oleaster Canal as well as trees grown on it which is located at Bazaar Village, to Yishan³³² Nuer Maimaiti's Hedumu Mosque as permanent

329 Monica Gaudiosi, “The Influence of the Islamic Law of Waqf on the Development of the Trust in England”, p. 1237.

330 *Ziliao xuanbian*, cases 001, 004, 006, 008, 013, 022, 045, and 046. See p.1, p.3, p.4-5, p.6, p. 9, p. 15-16, p.34, and p. 35.

331 *Hadj* is a title for the person who made a pilgrimage to Mecca.

332 *Yishan* is a title for the leader and teacher of Sufi (*Yishan* school) community in South Xinjiang.

waqf. The conditions include: no selling, no transfer, no conditional sale, and no privatization. When I'm alive, the landlord is me. When I'm dead, all the income of the land is to be managed by the one who teaches in the Mosque; my son or nephew shall not intervene.

Witnesses: akhund Muming, akhund Wumai'er³³³

In this case, Yisilanaji clearly appointed himself as the *mutawalli* of the trust in his lifetime and the Mosque leader upon his death. Also, the conditions of his endowment were underlined in a stricter way than is found in other such documents.

The main duties of the *mutawalli* were preservation of the *waqf*, collection of *waqf* income, distribution of that income to the appropriate beneficiaries, and so forth. According to Shari'a, a *mutawalli* was also a beneficiary of the *waqf*.³³⁴ It is hard to know exactly why in some cases the *waqifs* made themselves the *mutawalli* and in others they relinquished the right of management to the *mutawalli* (usually the power holder of the beneficial religious or charitable institutions). *A Brief History of Xinjiang* lends an insight to the identity of *mutawalli* by stating that "a mosque or religious school, as the legal owner of *waqf* land, only received part of the rent income, while the majority of it went to the *mutawalli*, who was very likely to be the donor's relative."³³⁵ This, however, could just be a hypothesis, since insufficient

333 *Ziliao xuanbian*, case 055, p. 40.

334 Li Jinxin, "Xinjiang nanbu Weiwu'erzu diqu de wahefu zhifu wenti"(Questions on waqf institutions in South Xinjiang Uyghur region), *Xiyu yanjiu*, no. 2, 1994, pp. 18-27.

335 *Xinjiang Jianshi*, vol 1, p. 300.

sources were found to support it and there is an obvious weakness in this statement. Firstly, as mentioned previously, mosques or schools did not “own” the *waqf* properties. Secondly, a religious leader of the mosque or school often acted as *mutawalli*; in this case, their interests and that of the institutions’ were not always in conflict.

The three basic principles that governed *waqf* institutions were: the trust had to be irrevocable, perpetual (which means if a person *waqfed* a property, he should make it a perpetual *waqf* from the day he declared the *waqf*) and inalienable (which means a *waqf* could not be sold, mortgaged, inherited, or alienated by any other means).³³⁶ Theoretically, the principle of perpetuity implied that once a *waqf* was created with a written agreement, no other contract was needed to secure this endowment. Nevertheless, there are several documents which were written to reiterate the *waqf* status of a plot of land or a real estate after tens of years either by the founder himself³³⁷ or by his descendants. The following is an example:

Give thanks to Allah...(a prayer) After the praise and prayer, it’s noted that,

(Islamic calendar) 1260th year, 2nd month, 20th day (Aug 31, 1850)

The executors of this document are successors of Mullah Abulahailpai: his wife, Rugeiyebaba, and son, Aibudujelali.

336 H. Cattan, “The Law of Waqf”, p. 206.

337 *Ziliao xuanbian*, case 027, p. 20.

When my father was alive, he donated 9 chengzi³³⁸ of land located along Hejie Canal, Rebaqi, to the Mosque as waqf.

The executor (of this agreement) has passed away. We, his successors, also admit that this is a waqf land. The land has no connection with us.

From now on, whether we or our descendants, if trying to raise an objection or to change this agreement, or to damage the land, or to appropriate the income of it, will be punished severely.

So we generate this agreement.

(Boundaries of the land)

Witnesses: Maimaiti Sailimu, Tuerdi, Maimaiti Yiming, Yousufu

The existence of this type of document indicates that the *waqf* properties could be misappropriated after a while. The above case represents one typical situation that could occur when the founder of a *waqf* land had died. His descendants might till the land and possess the harvest as an inheritance, especially when the founder was the *mutawalli* (trustee) himself before he died. Perhaps that is why the beneficiary institution (mosque, *mazar*, *madresseh* and so on) asked the descendants of a *waqif* to sign a second agreement. Another document illustrates this more clearly:³³⁹

(Islamic calendar) 1267th year, the 10th day of Eid al Fitr (Aug 8, 1851)

338 Same as *carak*.

339 *Ziliao xuanbian*, case 024, p. 17-18.

(A prayer)

My name is Buweixike. The madresseh owns 2 carak of land in Kuerma Village, which has been a waqf for 30 years. However, it had always been in control of the waqif Bayi Husaiyin's successors Bibi³⁴⁰ Ayishe, Bibi Tuohetaxi, and Bibi Tuohaxi, as their father's inheritance land, since the contract could not be found. Now knowledgeable elders certify that the 2 carak of land is waqf of the madresseh, and they admitted this. So we conclude this contract again to show the truth. From now on, whoever upholds this waqf will be happy forever, while whoever defies or changes it or makes a dispute will be punished in this life and the next.

(Boundaries of the land)

Witnesses: Maimaiti Yousufu, Mullah Niyazi, Mullah Kanji, Supi

Dulaiti

Unlike most of the previous documents of *waqf* endowment, the first person of this document was Buweixike, who represented the beneficiary and is highly likely to be the *mutawalli*. It seems that the children of the *waqif* had occupied this land for quite a long time after their father died. Without the original document, the school had no grounds to get the land back until they found attesters who appeared to have legal

340 *Bibi* is a title for female Sufism practitioner.

validity as well. But still, a written and stamped affidavit was needed to maintain the clarified “truth.”

Besides the *waqif*'s relatives or descendants, the clergy of the beneficiary institutions and their descendants constituted another group who were able to usurp *waqf* properties without much difficulty. Both Chinese scholars' investigations³⁴¹ and the Chagatai documents at my disposal suggest that on occasion this actually happened. The following document records such a dispute:³⁴²

(Shache³⁴³ Calendar) 1215th year, 7th month, 3rd day (1800)

The executor of the document, Bayi Silamu, comes from Rebaqi. I hereby donate one year's harvest of my 20 carak of land located along Hejie Canal to the local Mosque as waqf. Meanwhile, I accuse Imam Mullah Yakufu of the mosque of not returning my land. Mullah Yakufu said: “The land was donated to the Mosque as waqf by my father when he was alive. I became the Imam after my father died. I make a living by tilling one part of the land. The rest is dry land and reclaimed by me. Bayi Silamu does not concede it.” But the villagers all confirmed that the 20 carak of land were donated by Bayi Silamu

341 See Li Jinxin, “Xinjiang nanbu weiwu'erzu diqu de wahefu zhifu wenti”, pp.23-24; Zhou Yun, “Qingdai Xinjiang de wahefu tudi zhidu”(Waqf institutions in Qing Xinjiang), *Xibei shidi*, no. 3, 1995, pp. 50-52, and Erkenjiang Yidelisi, “Qingdai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu”, pp. 57-58.

342 *Ziliao xuanbian*, case 002, pp.1-2.

343 Shache is a prefecture in South Xinjiang.

as waqf, and persuaded Mullah Yakufu to make an apology to me. So Mullah Yakufu gave me 10 carak of wheat. I'm satisfied with this. Now I declare the land is waqf. From now on, if my descendants or myself make any dispute, it will be null and void.

In this case, Bayi Silamu donated much more grain as *waqf* than he received from Mullah Yakufu as compensation. This might be regarded as a moral gesture showing that he was not lodging the lawsuit for profit. The case faintly implies that if *waqf* land was donated by a high level clergyman himself or his elders, he could have more (or almost all) rights on it than simply receiving a share of its income. Otherwise it is hard to explain why Iman Mullah Yakufu fabricated the fact that his father *waqfed* the land.

Another more common method was to usurp *waqf* property by targeting its usufruct rights, instead of actual ownership. In Xinjiang, *waqf* lands were usually rented out for cultivation in order to make profit. In practice, the tenancy relationships seem to have been flexible. The land rent required by *muttawalli* or the charitable institution depended on the particular facts of each case. A Chagatai document shows that when previously arable land became a "dry land" (*han tian*) on which crops could no longer grow, the tenant was allowed to build houses and plant trees on it (in order to use the land). "The houses were owned by the tenant; while the field was not."

Also, the *waqf* landlord consented to the tenant's request to reduce the land rent.³⁴⁴

Moreover, a tenant was allowed to transfer the tenancy to another person.³⁴⁵

A *waqif* had considerable latitude in setting up the terms and conditions of the operation of the *waqf*.³⁴⁶ Besides designating a *mutawalli* of the trust, he was also allowed to make a decision on how to distribute the income of the *waqf*. However, in the majority of Xinjiang *waqf* documents people did not mention the distribution of *waqf* income. The information they always specified was only the nature of the property to be *waqf*ed and the charitable purpose, for instance, for the good of certain mosques or *madresseh*.

According to Chinese modern historians, there existed some established regulations about the distribution of the *waqf* income of a certain institution in the Xinjiang Islamic community before 1949. Perhaps that is why in most cases the founders did not need to make their own arrangements. In Shufu county's Qiapan Mosque, before 1949 the total annual of *waqf* lands was distributed in accordance with the rules stipulating that those in general charge of the Mosque received one-tenth (of the total income); those in charge of Mosque properties received one-tenth; missionaries and classics researchers received four-tenths; those in charge

344 See *Ziliao xuanbian*, case 47, p. 35-26.

345 See *Ziliao xuanbian*, case 41, p. 29. This document records that a person called Rouzi Halike transferred the management right and rent payment obligation of a mosque *waqf* land to his uncle.

346 Monica Gaudiosi, "The Influence of the Islamic Law of Waqf on the Development of the Trust in England", p. 1236.

of public worship on the Day of Assembly (Friday) received one-tenth; those guarding the Mosque received one-tenth.³⁴⁷ According to an earlier written record, in Imam Kazimu's *Mazar* at Hetian county, South Xinjiang, ten-sixtieth of the total income was used for renovation of the grave; eight-sixtieth went to the two Sheikhs who were governing the *Mazar*.³⁴⁸

As for *madressehs*, according to a Western observer, "every year the *mutawalli* collects the total income of *waqf* lands and hands it over to the *akhund*, who will divide it into ten shares and distribute it in accordance with the following rules: four shares belong to the *akhund* and the *mudarrs* (teachers); one share goes to the *mutawalli*, one share is to be used for the renovation; four shares go to the *jarubkas* (sextons) and sometimes the students as well."³⁴⁹

Certainly, these rules could not completely prevent disputes from arising. In practice, the actual distribution of *waqf* incomes of a mosque, a *madresseh* or a *mazar* was controlled by several of the highest *akhunds*. It is hard to say to what extent these rules were followed by them.³⁵⁰ Several Chagatai documents recorded disputes on the

347 Deng Liqun and Gu Bao, "Nanjiang de wahefu wenti"(Questions on *waqf* of South Xinjiang), in *Nanjiang shehui diaocha*, pp. 102-103. Also see Zhou Yun, "Qingdai Xinjiang de wahefu tudi zhidu", *Xibei shidi*, no. 3, 1995, pp. 50-52.

348 Deng Liqun and Gu Bao, "Nanjiang de wahefu wenti", p. 99.

349 Shaw Robert B., "The History of the Khojas of Eastern Turkestan", summarized from the *Tazikira-i-khwajagan* of Muhammad Sadiq Kashgari, introduction by Ney Elias, *Journal of the Asiatic Society of Bengal* 66, part I (supplement 1897), appendix, p. 67.

350 Deng Liqun and Gu Bao, "Nanjiang de wahefu wenti", pp. 102-103.

distribution of *waqf* income. For instance, in 1901, two *madresseh* students accused the school teachers of withholding one share of *waqf* land income due to them. The Shari'a authority had the two sides confront each other face to face while they mediated. Finally they reached an agreement in which the students received their portion of 200 *carak* of wheat and 200 *carak* of maize every year, while the rest of the income was at the teachers' disposal.³⁵¹

Documents about inheritance of household property

Among the Chagatai written agreements at my disposal, a large part can be classified as inheritance-related documents. In Eastern Turkestan, the inheritance of family property took place either when the parents were alive or after their death. In the latter situation, whenever a father or a mother died, his (or her) property would be divided and inherited immediately. In the absence of any will-like document, the successors would have to invite *qadi akhund* and village elders come to determine the distribution of property. They would serve as mediators and even more forceful participants in the process whereby family holdings are identified, divided into shares, and then distributed among the parties holding rights to them. Based on their decisions, all parties would sign an agreement with stamped with a *maor* seal to represent the authority of the religious court.

As in any other Muslim society, among Uyghurs inheritance of family property was regulated by Shari'a law. Among the numerous and detailed inheritance rules laid

351 *Ziliao xuanbian*, case 050, pp. 37-38.

down by the Qur'an, the two most important ones were that all sons inherit equally; and that where the deceased has both male and female children, a male child receives a share equal to that of two females.³⁵² The Islamic inheritance rules presuppose a patriarchal organization of the family, as well as providing females one half of the rights of males. *Xinjiang Tuzhi* records the basic rules of Uyghur inheritance as such: “if the person (whose property is to be inherited) has son(s), the property goes to him (them); his daughter(s) and son(s) of an ex-wife (and himself) receive half of the son’s share. If the person only has daughter(s), the property goes to her (them). A childless person does not have an heir. The foster son does not get his inheritance. Instead, his brother(s) and relatives get it. If the person’s wife does not bear a son, she gets half of the daughter’s share. If a son dies before his parents, their property cannot be inherited by their grandchildren.”³⁵³ These rules were largely in accordance with the general Islamic inheritance law. However, the two differ in that the “classic” Islamic law would not bestow all legacies to the daughter who has no brother or half-brother. She can only get one-half. Regretably, I failed to find such a Uyghur case that can provide us more illustrations about this kind of situation.

Among ten surviving Xinjiang inheritance cases written in Chagatai language, two were handled by *qadi* and *akhund* after a father’s death. In both of the two cases,

352 Quran: verse 11 of Surah 4. See Abdullah Yusuf Ali trans., *The meaning of the Holy Qu'rān*, p. 186.

353 Yuan Dahua and Wang Shunan etc., (*Xuantong*) *Xinjiang tuzhi*, 48: 6a.

the rule of “daughter gets half of son’s share” was strictly respected. The following is the first case taking place in the Daoguang reign.³⁵⁴

(Islamic Calendar) 1253rd year, 3rd month, 27th day (July 1st, 1837)

Respected Mullah County head and Master Beg:

We are successors of Mullah Abula Hailipai.

We are his wife Rukeya Ayila, daughter Bibi Hailimaixi, Bibi Haibibai, Bibi Hailiqi, son Aibudu Jilili and Aibudu Heilili. When our father was alive, he bestowed the lands in Hejie Canal to us through Shari’a. It has been 7 years. Part of the estates that was not bestowed to us at that time was spent on the costs of his funeral. Some discord arose over the distribution of the rest, so we asked for a religious settlement. When the Shari’a was dealing with this, we all showed our bestowing documents. During the course of trial, father’s debt of 189 silver coins was found out. The legacies given to us by father were not enough to pay the debt. So it has been decided that each of us men should pay 10 silver dollars, and each woman pay 5 dollars. In this way we paid father’s debt and the dispute was resolved. We sisters and brothers do not owe each other. From now on, in the presence of Shari’a it will be useless for any of us to make trouble again over father’s legacy.

354 *Ziliao xuanbian*, case 15, pp. 10-11.

Witnesses: Hadj Tuerdi, Hadi Maimaiti Sailimu, Maimaiti Yiminghailipai, Hadj Yibula Heimu, Hadj Tuoheti, Supi, and so on.

The other late Qing case reads as:³⁵⁵

(Islamic Calendar) 1314th year, 10th month, 15th day (Mar. 19 1897)

The executors of this agreement were Naelaqi Street's dweller, Akhund Yaqufu's successors, including his wife Bibi Maizure, daughter Bibi Tajiye, Son Yusufu, Yibulayin, Aiyoufu, and Akhund Yisihage, that's all.

After Yakufu passed away, before the distribution of his estate, Yisihage died also. His mother Bibi Maizure, younger sister Bibi Tajiye, older brothers Yousufu, Yibulayin, and Aiyoufu were left by him.

Now successor Maizure invites Akhund Nuer and Qadi Silamu to help us to value and distribute the deceased's properties. The total estimated value is 1450 silver coins, which is divided into 216 shares according to Allah's willing. The distribution should be: 36 shares to go to his wife; Yousufu, Yibulayin and Aiyoufu each receive 52 shares; 26 shares go to Bibi Tajiye. Based on the cash value, each of them will receive some properties as listed below:

355 *Ziliao xuanbian*, case 43, pp. 30-33.

His wife should receive: a felt blanket, worth 8 silver coins; a red blanket for worship, 8 silver coins; a carpet, 8 silver coins; a old blanket for worship, 6 silver coins; five big bowls, 15 silver coins; a big jar, 26 silver coins, a Russian pot, 10 silver coins; ...³⁵⁶ The sum is 228 silver coins and 6.5 pennies.

Yousufu should receive: a felt blanket, 6 silver coins; a white blanket for worship, 5 silver coins; a trowel, 6 silver coins; a teapot, 3 silver coins; an Islamic classic, 30 silver coins; an Islamic classic, 2 silver coins, a Qur'an, 8 silver coins; a pair of leather shoes, 1 silver coin; an Islamic classic, 30 silver coins; a big oval bowl, 3 silver coins; a Beijing-style saddle, 2 silver coins; a tray, 80 copper coins; a iron hammer, 1 silver coin; a pair of copper shoes, 12 silver coins; a jar, 28 silver coins; a scythe, 1 silver coin; a door, 2 silver coins; 8 houses in the village, 143 silver coins; 7 carak of land in the garden, 105 silver coins. The sum is 349 silver coins.

Yibulayin should receive: a felt blanket, 4 silver coins; a blanket for worship, 2 silver coins; an ax, 5 silver coins; a pair of bowls, 3 silver coins; a teapot, 1 silver coin; a poem collection, 5 silver coins; a Qur'an, 10 silver coins; an Islamic classic, 5 silver coins; an Islamic classic, 1 coin; a leather shoes, 1 coin; a iron lamp, 1 silver coin; a pot,

356 A "*Hadj Yousufu*" was mentioned as a successor here and received legacies worth more than 1100 silver coins, which appears to be a mistake or messed up translation, so I omit this part.

8 silver coins; a copper bowl, 12 silver coins; a jar and a basin, 18 silver coins; a teapot, 6 silver coins; 3 wood boards, 2 silver coins; an Islamic classic, 5 silver coins; houses in the village, 143 silver coins; 7 caraks of land, 106 silver coins. The sum is 346 silver coins.

Aiyoufu should receive: a white felt, 2 silver coins; a book, 5 silver coins; a black blanket for worship, 2 silver coins; an Islamic classic, 6 silver coins; an Islamic classic, 5 silver coins; a tray, 3 silver coins; a wood box, 8 silver coins; a jar, 12 silver coins; a teapot, 10 silver coins; a plate, 14 silver coins; a tall pot, 40 silver coins; houses in the village, 140 silver coins, land in the garden, 102 silver coins. The sum is 349 silver coins.

Bibi Tajiye should receive: a white felt, 6 silver coins; a thread blanket for worship, 2 silver coins; 2 dishes, 80 copper coins; a earthen jar, 1 silver coin; a tray, 1 silver coin; an iron hammer, 2 silver coins; a amphora, 10 silver coins; a pair of copper shoes, 10 silver coins; two iron plates, 1 silver coin; a iron *, 30 copper coins; a bag, 80 silver coins; houses and land, 54.5 silver coins. The sum is 174 silver coins.

We are all pleased with the above arrangements and received the stuff distributed to us. From now on, if whoever raises more requirement, it will be invalid in the presence of Shari'a.

(Boundaries of the field and guest house received by Bibi Maizure,

omitted)

(Boundaries of kitchen, living room, front corridor, front arbor, toolhouse, barn, and randa received by Yousufu, Yibulayin, Aiyofu and Tajiye, omitted)

(Boundaries of the 8 carak of land that tilled jointly by Maizure, Yousufu, Yibulayin, Aiyofu, and Bibi Tajiye, omitted)

The road to the farmland and guesthouse given to Bibi Maizure, keep unchanged.

Half carak of land in the garden should go to Akhund Aiyofu's daughter, Bibi Reyisi.

The contract is written based on truth.

Witness, Akhund Mudelisi Aizezi

Both of the two inheritance disputes were resolved by the religious legal authority. The daughter received half of the son's share, not only of the father's estate, but also the debt. This principle was respected by both judges of the two cases. The first case also shows another important principle of Islamic succession: debts and claims have precedence over obligations and rights. The exact sequence should be: first, the costs of the funeral; second, the debts; and then the distribution of the rest of legacies among successors.³⁵⁷ As we have seen in this case, this sequence was strictly followed. In both of the cases, the widow was one of the successors waiting for the

357 Joseph Schacht, *Introduction to Islamic Law*, (Oxford : Clarendon Press, 1964) , p. 169

qadi's arrangement. As for a widow's fixed share of inheritance, typical Islamic regulation laid down in the Qu'ran is "the wife receives one-quarter if there are no children or son's children, receives one-eighth in the contrary case".³⁵⁸ In the first case, all the debt paid by the wife, three daughters and two sons were 40 silver dollars. The wife did pay one eighth; while in the second case, the wife's share was one sixth, the rest was distributed among the four children. Moreover, in both of the cases, all sons/daughters inherited equally.

Although both of the agreements were signed based on *qadi*'s verdict, the situations differed slightly. In the first case, the deceased father had made his own arrangements about the succession before he died. But the rest of his estate (as well as his debts) still stirred up controversies, which made it necessary to bring the case to Shari'a court. The previous dispute among the successors can presumably explain why there were at least six witnesses signing this fairly lengthy agreement. In the second case, all of the estates were not pre-arranged by the deceased person; under these circumstances his wife invited an *akhund* and a *qadi* to make a decision on the inheritance according to the custom. So it is not surprising that the number of witnesses is far smaller than in the other document. The job the religious power holders did at least seemed to be impartial. Every family belonging, ranging from a house to a tray, was valued precisely. All successors received house and land. Among

358 Joseph Schacht, *Introduction to Islamic Law*, p. 171

all the Chagatai documents at my disposal, this was one of the most detailed and meticulous.

In traditional China, family division usually included two simultaneous processes: the physical division of the household (symbolized by the establishment of independent stoves) and the division of family property, with the “division sheet (*fendan* 分單)” type of division taking place immediately, while the “will (*yizhu* 遺囑)” type which only took place after the death of the parents.³⁵⁹ But in Xinjiang, things were different. On the one hand, as shown earlier in this dissertation and confirmed by other scholars, generally speaking, Uyghurs’ basic family unit was a nuclear family. It was not common for married sons to live with their parents under one roof. Obviously this custom implied an early physical dispersal of the household. On the other hand, however, an independent son could not ask to inherit the family property until his father had died. Unless the father was willing to bestow some properties on his children during his lifetime, all other properties were to be inherited after his death. Therefore, Uyghurs’ household division often did not take place simultaneously with the inheritance of family properties. One result of this situation was that in Eastern Turkestan, many Uyghur fathers rented their lands out, while their sons had to be the tenants of other people.³⁶⁰ In our second case, although not stated explicitly, the appearance of the daughter of Aiyoufu (the third brother) at the end of the document

359 David Wakefield, *Fenja: household division and Inheritance in Qing and Republican China*, (Honolulu: University of Hawai’i Press, c1998). p. 58.

360 Chen Gonghong, “Weiwuerzu de yichan zhidu”, *Nanjiang nongcun diaocha*, p. 203.

suggests that these children were all married and perhaps had their own children. They were very likely to finally inherit the father's estates (especially lands) after living on their own for years.

This Uyghur custom seems to reflect a strong paternal authority. Uyghur fathers continued to be the controller of the family properties throughout their lives, while among Han Chinese, at the time of family division when the parents were alive, most of the properties were divided among the brothers, with only a small portion set aside for elderly parents. In order to avoid a one-off division of all family properties, but to support their children well, a Uyghur man often gave them some properties as presents during his lifetime, as mentioned in the first agreement. The bestowal can also be regarded as a form of "partial" inheritance. Moreover, in the first case all the successors showed their "bestowing documents" to the *qadi* when there were disputes. This suggests that the drawing up of a written document was essential for legalizing the bestowal. The following are two more examples:

(Islamic Calendar) 1320th year, 10th month, 23rd day (Jan 23 1903)

I am Muhammad Xielifu's son, Yibulayin Hailipai, living in Huzer village. I admit that I bestow a mule and a big ingot to my son Batisi. I admit that I bestow a small milk cow, two oxen, a house worth 10 taels of silver, and a kettle worth 2 taels of silver to my daughter, Haifuzihan. Since they are both too young, the properties were collected by others on behalf of them. From now on, I have no right to these properties.

Witness: another son of the bestower.

In Uyghur society, when properties were given to children by a father, the transfer of ownership usually went into effect immediately. This case is even more extreme. The two children were not old enough to collect and make use of these properties but the father still settled part of his estate on them. The daughter seemed to receive a larger gift than her brother, though we do not know exactly the value of “a big ingot”. Most importantly, the daughter received a house from her father when she was still young. As I have mentioned in previous chapter, this actually reflects a Uyghur custom that parents usually granted their daughter a house from the family properties so that whenever she got divorced, she had her own place to live. This was certainly related with the frequency of divorce among Uyghurs. Moreover, it is worth noting that the witness of this agreement is another son of the father. It is not necessary for Uyghur parents to bestow their estates to all the children at the same time or at one time. Also, the family members that appeared in this document—the father, the daughter, the son receiving gifts and the son acting as a witness—were all acting as independent agents of their own interests.

Another gift document reads as:

(Islamic Calendar) 1327th year, 7th month, 22nd day (Aug, 9, 1909)

The executor of the agreement is Ubulihaishan.

I give two mu of the five-mu land irrigated by Sugatai Canal that I bought using gold to my elder daughter, Amina; one and a half mu of land to my elder son, Daiwulaitihan, one and a half mu to my younger

son, Aibudu Laihaiyi. They all receive the lands and will farm them themselves. From now on, the lands have no connection with me.

(Boundaries of the lands, omitted)

The land tax will be paid in their own names.

Witness: Saidihan, Hadj Tuoheti Maimaiti, Hadj Wusiman and so on.

In this document the father divided land among his three children. We have no further clues about how he divided his other estates among the children. But for this particular portion of his land, he did not obey the rule that a daughter receives half of a son's share. Land tax was mentioned in this late Qing document, which implies a general understanding by Uyghurs of the day that payment of taxes would help to establish property rights. As in the previous case, the father relinquished all the rights as well as obligations relating to the properties to his children as soon as the document was drawn up.

A Uyghur man would grant not only his children, but also his wife certain properties during his lifetime, as showed in the following document:³⁶¹

(Islamic Calendar) 1315th year, 7th month, 6th day (Dec 1, 1897)

I am Hadj Aisha, a cordwainer, coming from Hetian County. I have been married with Rebiya for 42 years. She is a good wife and keeps the house very well. In order to support her life after my death, and to please the God and the Prophet, I bestow her the south living room,

361 Yu Hongmei, "Qing dai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu", p.32.

half of the courtyard, and the cowshed. In case the sons will encroach, I hereby draw up this agreement. Besides, I give her a good iron pot, a kettle and two felt blankets.

Witness: Akhund Abulasilimu

Executor: Haji Aisha

In general, all the inheritance-related Qing Chagatai documents at my disposal can be classified into two types: one is about distribution of a person's property after his death; the other is about a person's bestowal of certain estates to his successor during his lifetime. However, the above agreement is a bit unique. It seems to stand somewhere between a bestowal agreement and a will. Although the husband stated clearly that the purpose for giving these properties to his wife was "to support her life after my death", we do not know whether or not the bestowal took effect immediately or after his death. In other words, it is not clear whether the wife had received these properties or she could only receive (inherit) them after her husband's death. In practice, these properties, including the living room, courtyard, and housewares, were very likely to be used together by the couple before and after drawing up of the document. Moreover, this document implied that disputes over person's estate could often take place between his widow and his children (since the couple in question had been married for 42 years, the children might well be the wife's own children, too).

One question that remains is why drawing up a typical will did not seem to be a preferred choice for Xinjiang Uyghurs dealing with succession of their properties? This can be explained by Islamic regulations on wills. As we know, a *wasiyyat*

(Islamic last will) can apply to no more than one third of the net estate of a testator; there are precise rules for the amount of the other 2/3 that goes to people in particular relationships to the testator. More importantly, for a Sunni Muslim, a will cannot be made for *fard* (Islamic legal heirs) who are allowed to inherit automatically in the estate of the deceased.³⁶² These heirs include parents, grandparents, children, grandchildren, brothers, sisters, some other agnates such as uncles and nephews. The fundamental reason of these regulations is to prevent the lawful heirs from developing conflicts over potential inheritance while still protecting their inheritance rights. Nevertheless, these rules also limit the testator's right to distribute his own estate. As for Qing Uyghurs, when they did not want to bequeath estates to the successors according to the fixed share, they chose to bestow certain properties to them (usually children and wife) when they were alive, since otherwise, no matter by writing a will or letting a *qadi* to distribute their estates after their death, their particular purpose could not be accomplished. This could also explain why, in one of the previous cases, the father would rather find an agent for his very young children to receive his gift properties than to write a will for them.

The Uyghur community was not the only one that saw a tension between the orthodox Islamic rules on succession and their original customs. For instance, the Bedouins living in the Jerusalem-Bethlehem region also invented various ways to circumvent the Shari'a rules of succession, particularly by distributing their land to

362 Joseph Schacht, *Introduction to Islamic Law*, p. 174.

their children during their lifetimes. However, their main purpose was to leave their property to male agnates only.³⁶³

In all, the Qing Uyghur practices of inheritance were a combination of both Islamic law and native customs. On the one hand, many basic Islamic inheritance rules were strictly obeyed, especially by the legal and religious power holders. These included equal distribution among sons (daughters), the daughter's receipt of half of the son's share, the provision that debts and claims came before obligations and rights, and so on. On the other hand, common Uyghurs tried to stick to their customary lifestyle and had their own ways to protect and even improve their rights on distribution and succession to family properties. For instances, Uyghur fathers were not willing to divide all the family properties at once when married sons started their own independent households. Also, they might have different plans of their properties from the fixed share. Due to the tension between personal calculations and religious and legal rules, most Uyghur fathers chose to bestow certain properties on their heirs whenever they felt necessary. Judged by the Chagatai documents, to leave an *ahkund* the right to distribute their estates after their death seemed not to be their first choice. Finally, we can detect little Chinese on the practices of Uyghur inheritance. The state seems to show its face only when "land tax" was mentioned in

³⁶³ Aharon Layish and Avshalom Shmuely, "Custom and "Sharī'a" in the Bedouin family according to legal documents from the Judaeen desert custom", *Bulletin of the School of Oriental and African Studies*, University of London, Vol. 42, No. 1 (1979), pp. 29-45

one of the bestowal documents. Uyghurs handled their inheritance issues mainly within the framework of Islamic law and local customs.

The role played by Chinese courts

Cooperation of the two courts

After the 1880s, when Xinjiang was established as a province, every *beg yamen*, as the lowest level of local government, was replaced by a county *yamen* in the charge of a Chinese magistrate. Previous *begs* were now given the new title of “village compact head” (*xiangyue*). As we have already discussed in chapter 4, from that time Shari’a courts and the magistrate’s courts both worked to deal with local Uyghurs’ civil disputes. However, this does not mean that the two courts existed side by side and were always in competition. Nominally, the two shared a hierarchical relationship with the Chinese court on the top, since the appointment of *akhunds* had to be sanctioned by the magistrates. An 1897 petition from thirty-two (eminent) Uyghur villagers to the Turfan *ting* magistrate attested to this. In this petition these people reported that following the order of Master Zhu (the magistrate), they had already recommended three *akhunds* to handle local villagers’ “red and white affairs”³⁶⁴ (*hong bai shijian* 紅白事件) as well as the writing of contracts (*xie li ziju* 寫立字據), with each of them holding a *maor* seal respectively. This appointment awaited Master Zhu’s endorsement.

³⁶⁴ This usually means affairs related to marriage (red) and funeral (white).

Nonetheless, this procedure of resignation does not mean that Uyghur religious elites' legal decisions were also to be sanctioned by the magistrates sent from Beijing. As long as local Uyghurs went to the *akhunds* directly, the latter were free to judge the case on their own. From this point of view, the Qing was still by and large adhered to a *laissez faire* attitude toward Xinjiang Uyghurs' civil and economic life. The only difference from the past lies in the fact that after the 1880s the existence of the Qing court provided an alternative to Uyghurs to resolve their civil disputes. When the Chinese magistrate received a Uyghur's suit, it was possible for the plaintiff to get a different result than he would get by bringing the case to the religious court directly. In Chapter 4, I have discussed the influence of the existence of two courts on Uyghur couples' marital disputes. Here I will continue to discuss the two courts' cooperation and competition in adjusting Uyghurs' economic relations and protecting their property rights. Generally speaking, in the economic field, the two legal systems worked in a closer cooperative relationship, although they did encounter conflicts when judging certain cases.

The most distinct and effective cooperation between the two courts was exemplified in the fact that the legal power of *maor*-sealed Chagatai contracts and other agreements were recognized and protected by Chinese authority after the 1880s. Materials show that Xinjiang magistrates were very familiar with this Uyghur legal tradition. In contrast to the case of the Uyghur term "*waqf*", which never appeared in Chinese documents as far as I know, the term of "*maor*" can be frequently found in

legal archives and magistrates' edicts. It was usually written as “*mo* 摹”, “*mao'er* 毛爾”, “*mao'er tuji* 毛爾圖記 (*maor* seal)” or “*mao'er chuoji* 毛爾戳記 (*maor* seal)”.

As we know, all of the Chagatai documents studied so far were stamped with one or more *maor* seal. These legal documents were extremely valuable to their owners. The documents could be mainly divided into three groups in terms of the role the religious court played in their enforcement. The first group includes those contracts recording transactions or transfer or bestowal of certain important properties, such as land or real estate, drawn up by private individuals voluntarily. The fact that so many people had these documents of private transaction stamped by *maor* seal points to the legal power of the religious court in establishing property rights, and its power to even enforce those rights in the future when disputes arose. As in other Muslim communities, these land contracts and transfer documents also functioned as legal deeds of ownership.³⁶⁵ Turfan archives show that Uyghurs had to pay a certain fee to *akhunds* of the religious court for stamping the *maor* seal on their contracts or purchasing an official form of contract with the *maor* seal.³⁶⁶

The second group includes those agreements written by the parties to a dispute about certain properties which were settled by Shari'a authority. Shari'a solved the disputes by either holding a trial or offering mediation. In most cases, all parties to the

365 Anders Bjørkelo, “Land sale Contracts as Historical Sources: Methodology and analysis”, in Donald Crummey (ed.), *Land, Literacy and the State in Sudanic Africa*, (Red Sea Press, Trenton, 2005), pp. 213-224.

366 XJA, 15-1-1163.

civil disputes would have to reach a written agreement and have it endorsed by the court. Most agreements for the distribution of an estate also belong to this group. The third group is the records of endowment of public *waqf* properties. People were inclined to have these properties registered with the Shari'a court, although it is also valid for the founder to indicate his intention to create a *waqf* orally.

In brief, all of these documents with *maor* stamps, although often quite brief, had eminent legal power, as did the Shari'a court's function of regulating social, economic, and religious affairs before and after the establishment of Xinjiang province.

What was the attitude of the Chinese court's toward *maor* contracts? Turfan *ting* archives indicate that Uyghur contracts with proper *maor* seals were regarded as a valid proof of ownership or possession of rights of property. For example, in 1906 a Uyghur woman went to redeem a plot of land that her father sold when he was alive. But the buyer insisted that it was an outright sale, instead of a conditional one and he had a contract with an *akhund's* *maor* mark as proof. The Uyghur woman then went to the magistrate's court and accused the land buyer of bribing the *akhund* and faking a *maor* contract. However, the Chinese magistrate did not believe that the *akhund* was bribed and accepted the *maor* contract as a valid proof of the legitimate land sale.³⁶⁷

367 XJA, 15-8-2831

On the other hand, a Uyghur contract without a *maor* mark would be regarded as fake or invalid. For instance, in 1905 a Uyghur called Shawuti sued another Uyghur, Semaiti, for secretly and illicitly selling a plot of land purchased by Shawuti from Semaiti 25 years ago to a Chinese Muslim called Ma Shuangqing. But the Chinese magistrate found that the land sale contract between Semaiti and Shawuti submitted by the latter did not have a *maor* stamp (*akhund maor chuoji*) on it, nor did the neighbors know about this transaction. Therefore, the contract was judged to be forged by Shawuti, and Semaiti was deemed innocent.³⁶⁸ Cases like this prove that the Shari'a's legal authority as well as some judicial customs of Uyghurs, such as both *maor* stamp and witness's oral testimony, had legal power, and continued to be respected by the central authority.

Another important form of cooperation between the two courts can be found in their legalization of Uyghurs' real estate transactions. It is worth noting that when two or more Uyghurs made a deal concerning land properties, besides signing a contract in Chagatai language, some of them also chose to sign a Chinese contract or had their transaction registered with the magistrate's office. We find such examples in both Turfan *ting* archives and Chagatai documents, both before and after the Muslim rebellion.

Among all the Chagatai documents I examined, several land sales were recorded as "reported to *yamen*". The following are some examples:

368 XJA, 15-9-3312

(Islamic calendar) 1302nd year, 4th month, 4th day (Jan 21, 1885)

Akhund Zunun's son, Akhund Zohuridin, the agent of Salihkar's daughter Turdihan, is the executor of this document. I sold my client's approximately 10 carak of land located at Uzun Saqualdaki Village, Tagongmu (area), as well as the certificate (of the land) to Mullah Gayasi's son, Akhund Amin, at a price of 100 tanga. This has been reported to yamen. The money has been received in full. My client has no right on this plot of land any more. (The boundaries of this land, omitted)

Witnesses: Akhund Karim, Akhund Osur. The people who reported (to yamen) were *Beg* Mohammed Yar and Bayi Koruq.³⁶⁹

(Islamic calendar) 1314th year, 2nd month, 24th day (Aug 4, 1896)

I, Khoja Hasan's son, Akhund Isma'il, am the executor of this contract. In the past I inherited from my mother a store (and two living rooms within it) which was located at Guzar Street, near Tosuk Gate, Kashgar City. Today I sold the store, the rooms, all the furniture in it, as well as its pathway and empty space to Akhund Faxriddin, son of Mullah Islam, the *nan*³⁷⁰ maker, at a price of 1100 tanga. This has

369 Erkenjiang Yidelisi, "Qingdai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu", p. 32.

370 *Nan* is a kind of crisp baked pie, which is Xinjiang Uyghurs' staple food.

been reported to yamen. I've received the money in full. From now on, I have no right to do anything about these properties for whatever reason. (The boundaries of this real estate, omitted)

Witnesses: Imam Sahabiddin, Imam Yusuf, Akhund Muniriddin Sabir, Khoja Salih, Khoja Yusuf, Akhund Mohammed, Khoja Talib, Akhund Isma'il. Akhund Hafiz went together to affix the maor seal.

(Islamic calendar) 1317th year, 5th month, 15th day (Sep 21, 1899)

The executor of this document is Mullah Haji Muniyazi Bayi's son, Mullah Hudabaier. I sold my garden at Aisikewole, Dawulaitebage,³⁷¹ as well as the trees, the path and the canal (in it) to Mullah Yisilamu's son, Akhund Faheerding at a price of 90 tanga and reported this to yamen. I've received the money in full. The land will have no connection with me hereafter. (The boundaries of the garden, omitted)

I hereby draw up this document as a credential.

Witnesses: Imam Ahkund Amin, Akhund Yisilamu, Akhund Ousiman went in together to affix the maor seal. ³⁷²

(Islamic calendar) 1324th year, **month, 15th day, (1906)

371 Place name, in present Kashi city, noted by Erkenjiang Yidelisi.

372 Erkenjiang Yidelisi, "Qingdai Tianshan nanlu Chahetaiwen qiyue wenshu yanjiu", p. 35-36

My name is Akhund Hawazi. I admit that I have sold three houses I inherited in the town as well as furniture in it to Mullah Mijiti Maihemu for 25 taels of silver. I've received the money in full. This is reported to yamen.

(The boundaries of the houses, omitted)

I hereby draw up this document as a credential.

Witnesses: Wuzhake Reyimu, Habibula Xielipu, Niyazi, Mijitiaili,
etc.³⁷³

All of the four late Qing private transactions were reported to local Qing government. In the original text, this was usually written as “**yamunvā ištürüp**” (reported to *yamen*). Here “*yamun*” is a transliteration of Chinese word “*yamen*”, which means the magistrate’s court, rather than Shari’a or any other Uyghur authority. After the establishment of Xinjiang province, the Qing state tried to enlarge the state’s governance sphere. A policy required that besides drawing up a contract with a *maor seal*, Uyghurs carrying out private transactions involving land and houses had to pay tax to the prefecture or county government and obtain the official contract tag. As for the tax rate, in 1901 it was 9% for irrevocable sale and 6% for conditional sale.³⁷⁴ This policy had been reiterated by many Chinese magistrates who were sent to work

373 *Ziliao xuanbian*, case 061, pp.43-44.

374 Chen Guoguang, “Guanyu qingdai Xinjiang Yisilanjiao minfa wenti”(Questions on Islamic civil law in Qing Xinjiang), in *Xiyu yanjiu*, no. 2, 1992, pp.83-101.

in Xinjiang. For instance, an 1891 edict sent by the magistrate of Turfan prefecture announced that “all civilian transactions of lands and houses are subject to tax... I have been working here for several months, but nothing about the tax collection situation has been reported yet...From now on, whenever Han, Hui, or Uyghur people purchase lands or houses, they must submit their contracts (*qizhi* 契紙) to the government and have it examined and registered. Then the contract shall be stamped by the (official) seal and attached with an official contract tag (*qiwei* 契尾) after the tax is paid according to the regulation.”³⁷⁵ This is not the last official edict to urge Xinjiang dwellers to pay tax for their real estates transaction—government documents of the same content were also found in the Xuantong reign,³⁷⁶ which suggests that this tax policy did not become compulsory or universally implemented in the province until the end of the dynasty. Actually this is not so much different from cases in *neidi*, where the practice of “white contracts” commonly existed in local society.

So now many Uyghurs living in South Xinjiang went to register their real estate transactions with the Chinese authority as well as following Shari’a procedures to sign a contract. Moreover, they did this openly and did not seem to need to conceal the fact that they had registered their transactions with one court from the other court.

The above 1885 contract mentioned two “reporters” together with the witnesses who seemed to have relatively high social status (one’s title was *beg*, the other’s *bayi*).

375 XJA, 15-1-1091.

376 XJA, 15-3-1511.

This implies that there might be certain professionals working as agents whose main duty was to help Uyghur commoners to register their transaction with the magistrate's *yamen*. Moreover, the full procedures of registration were known and accepted by Shari'a, otherwise it would not have appeared on the *maor* sealed contract. The 1908 document mentioned the transaction tax levied by Chinese government explicitly, and there were both a *maor* seal and a Chinese tax seal affixed to it. On the one hand, private parties managed to establish relationships with both the state and the religious authority to gain dual protection for their arrangements. On the other hand, the two authorities both received information and revenue along with the convenience of regularization and control through this process.

By the very end of the dynasty, some Uyghurs even mentioned in their Uyghur contract obtaining a red contract by paying a transaction tax to the Chinese *yamen* for example:

(Islamic calendar) 1325th year, 12th month, 22nd day (Jan 16 1908)

I am Hadj Razi's son Akhund Metnijaz, living in the town. I sold 3.5 mu of land irrigated by Canal Oq aral as well as the trees growing on it to Khoja Yehja at a price of 50 taels of silver. The money has been received in full. Tax has been paid to *yamen* and a tax seal has been affixed. (The boundaries of this plot of land, omitted)³⁷⁷

377 Adalaiti Tayier, thesis, "Cong defang wenxian kan qingdai nanjiang weiwu'er shangye jingji zhuangkuang"(Economy and commerce of South Xinjiang Uyghurs in Qing dynasty – reflected by local documents) , (Xinjiang University, 2007), p. 24.

Clearly, Akhund Metnijaz now had both a Uyghur contract and a Chinese red contract to endorse his property transaction. As we saw in the above contracts, among the Chagatai documents at my proposal, a lot of late Qing ones were indeed registered with both Shari'a court and the magistrate's *yamen*.

Chinese legal archives stored in Turfan *ting* provide more information about how Qing Uyghurs legitimized their transactions by following Chinese rules. In disputes recorded in Turfan *ting* documents, some Uyghurs claimed to the Chinese magistrate that they had a "red contract" to prove their ownership of properties purchased from other Uyghurs, which could be either a written understanding in Chagatai language with a seal of the Chinese *yamen* and/or an official contract tag or a red contract written in Chinese. I found among archives from the same place a land certificate written by both Chinese and Chagatai (Uyghur) language with a red *yamen* seal on it.³⁷⁸

The earliest reference to a red contract signed between two Uyghur parties was in an 1890 complaint submitted by a Uyghur widow Gunisha, who told the magistrate that she owned a grape garden purchased by her husband from her father and two brothers before the Rebellion and that for this property she "had a red contract as evidence."³⁷⁹ In another case, a Uyghur plaintiff claimed that he had three papers including a Chinese contract, a Uyghur contract, and a red contract (*han chan wenyue, hongqi san*

378 XJA 15-4-107 and 15-4-507.

379 XJA 15-5-993

zhang 漢纏文約，紅契三種) to prove his rights on a plot of land purchased by his father from one of their relatives in the early Guangxu reign.³⁸⁰ Another 1905 petition submitted by a 74-year-old Meilike, is as follows:

A Uyghur woman named Guluqu had a grape garden left by her former husband, within which there are 32 *dun*³⁸¹ of grapes, a plot of empty area (about 2 *mu*), a small vegetable field, two huts and a drying room (for making raisins). In July last year, she sold (the usufruct right of) this garden to me for a period of 19 years at a price of 275 teals of silver, with Hadj Aijiang, Akhund Yiming, Mirab Huerban, Xiangyue Aji as witnesses. We have drawn up a maor-sealed contract (*mao' er ziju* 毛爾字據) and a red contract (*hong qi yi zhang* 紅契一張) that are to be submitted and examined. Guluqu then made a pilgrimage to the West on the income. After coming back this June, she bought a hut from me to live in and prevented me from tending this garden. On the 22nd of this month, when going to the garden to pick some vegetables, I did not expect that she would suddenly appear on the way with a knife in her hand and threaten that “if you dare to enter the garden today, I will either kill you or myself!” I dared not to argue with her there and had no

380 XJA 15-6-1716

381 One *dun* includes about 10 grape plants.

choice but to come to the court to bring this complaint...³⁸²

It seems that by the very end of the Qing dynasty, more and more Uyghurs were used to obtaining both Uyghur and Chinese (red) contracts for their purchased properties. Therefore, when disputes occurred, they would be able to go to any court to protect their property rights. Uyghurs were willing to fulfill the procedural and documentary requirement of the Chinese legal system by various methods including paying a transaction tax, obtaining the *yamen* seal, and drawing up a contract in Chinese. Upon doing this, they believed the contract would be enforced by Chinese court as well whenever there was a dispute.

A Uyghur's petition to the Chinese court found in the Turfan *ting* archives suggests that people living in the Eastern part of Xinjiang were fully aware of the regulation that transactions of real estate had to be taxed by the government. In this case, two Uyghur brothers inherited their father's *karyz* and a plot of *karyz* land after his death. After several years they received a notification from the county magistrate asking them to pay taxes for the properties. Feeling that this was unfair; the brothers appealed against the command by stating that they acquired the properties as inheritance, and not through sale, so they need not pay the tax. Moreover, they asserted that the original contracts of both the land and the *karyz* were red contracts and the properties had real estate certificates (*zhi zhao* 執照).³⁸³ The two Uyghurs in

382 XJA 15-7-2405

383 XJA 15-3-1511

this case showed a comprehensive knowledge of the state's policies on real estate, that they knew that land and house transactions rather than inherited real estate were to be taxed by the government, and that the red contract (contract with a red tax stamp of local government) as well as a certificate bestowed by the *yamen* could strongly legitimize property rights.

One of the Turfan *ting* archives I collected was a list of contract taxes paid by Turfan *ting* residents for their real estate transactions from the first month to the tenth month of Guangxu 15 (1889).³⁸⁴ There was a total of 139 taxed transactions and among them about 60 were conducted between two Uyghur parties.³⁸⁵ That is to say, about 43% of the total taxed real estate transactions were conducted between Uyghurs. If we include those transactions engaged in by a Uyghur and a person of another ethnicity, calculations show that around 87% of the total taxed real estate transactions were conducted by at least one Uyghur (party). While in a late-Qing population survey, the total Muslim population of Turfan *ting* (including a very small number of Hui immigrants) was 29726, the total population was 41704.³⁸⁶ The ratio of Uyghur population to total population was less than 71.2%. Surprisingly, these data show that compared to Chinese dwellers, Uyghurs were not any less, if not even more eager, to register their real estate transactions with the Chinese government. Why was this?

384 XJA 15-5-908

385 Since I can only speculate the ethnicity of every transactor by his name, I may confuse a Uyghur's name with a Mongolian's or a Chinese Muslim (Hui)'s.

386 Yuan Dahua and Wang Shunan etc., (*Xuantong Xinjiang tuzhi*, 43: 5b-6a.

Firstly, in terms of the contract registration and legalization, the two courts might appear identical in these Uyghurs' eyes. Our previous discussion shows that Uyghurs were fully aware of the rule that a potential future legal sanction in protecting one's property rights depended on satisfying procedural and documentary requirements of the legal (religious) authority. That is why all the Chagatai contracts were witnessed by Shari'a *akhunds* and affixed with one or more *maor* seals. Presumably, the practice of affixing *maor* marks to contracts made the procedure of buying contract tags and registering real estate transactions familiar and more acceptable to Uyghur people. Unlike the Chinese who signed a lot of "white contracts [that is, untagged and untaxed contracts]" Uyghurs had to have their property transactions written and endorsed by the religious/legal authority, otherwise they would not gain their protection once there was a dispute. Therefore, the endorsement from another authority—the Chinese government—could be as necessary and effective for Uyghurs. Chinese officials' repeated promotion of this policy in Xinjiang after the 1880s was certainly another reason that prompted these Uyghurs to register their transactions with the government. After all, in an unstable society like late Qing Xinjiang, it was understandable for people to take advantage of all methods that could protect their property rights.

Nonetheless, it is noteworthy that the legitimizing power of the Chinese court on Uyghurs' economic transaction was still limited. As far as the existing documents indicate, no Uyghur signed only Chinese contract. In other words, no Uyghur dared to relinquish the protection of their property rights from the Islamic court by not

acquiring a *maor* contract. Obviously, the Qing rule in Xinjiang had never been strong enough to defeat local religious authority in the civil realm.

Moreover, though the Chinese government kept working on becoming another authority to legalize people's property transactions, they did not seem to attempt to limit the Islamic court's legal power in the same field, or at least they did not achieve this result. This can be illustrated by the Chinese magistrates' continuous acknowledgement of the legal power of the Islamic judge's *maor* marks.

In general, the two authorities were working in peace with each other in the same judicial sphere. Their operating mechanisms were similar, too. Uyghurs were permitted and willing to acquire protection from both of the courts.

Competition of the two courts

The extent to which the two courts cooperated or were in competition was a crucial factor for a Uyghur as he determined where he would lodge his case. As one can imagine, if a Uyghur knew that the village *akhund*'s comments would become an important reference for the Chinese magistrate to make a decision on his case, or that his case would ultimately be sent to the *akhund* whom he might want to avoid at the very beginning, it would be meaningless for him to bring it to the Chinese magistrate. In Chapter 3, I argued that some Uyghur men went to the magistrate's court to resolve their domestic disputes. That is because they knew that it was likely that the magistrate would rule differently from the religious judge and the magistrate's decision would be more favorable to men. Therefore, in what circumstances did Uyghurs go to the Chinese magistrate's court to settle their disputes concerning

property rights? In other words, in which realms was it more likely that the Chinese court would handle an economic dispute differently from the Shari'a court?

In total, I collected 19 archived cases about Uyghur-Uyghur economic disputes all of which were stored in the Financial Department (*hu fang* 戶房) of Turfan *ting*. I have classified them into five groups based on their content.

1. The first group includes of those cases that had initially been handled by *xiangyues* or *akhunds*. However, their judgments or mediations failed resolve the disputes or could not be enforced. The plaintiff himself or local leaders then submitted the cases to the magistrate.³⁸⁷ For instance, in 1892 a Turfan Uyghur went to the South to make a living after renting his house to another Uyghur. Five years later, when he came back to collect the rest of the total rent the tenant owed him, he surprisingly found that the tenant himself had applied for a red contract on the house (*si che hongqi* 私扯紅契). Local *akhunds* judged that it was incorrect for the tenant to do that and ordered him to continue to pay the rent (minus the money he spent on applying for the red contract). However, the tenant did not obey this judgment and continued to occupy the original owner's house. The original owner had no choice but to bring the case to the magistrate.³⁸⁸ Since only this petition was left regarding this case, we do not know how the magistrate dealt with it in the end. In this case, the religious judges provided a clear judgment which was nevertheless simply ignored by

387 See XJA 15-4-480, 15-6-1988, 15-8-2717 and 15-9-3062.

388 XJA 15-7-1988.

the wrongdoer. One of the things that enabled him to act so boldly was perhaps the fact that the red contract was issued by another authority: the Chinese *yamen*. We do not know the details of how a tenant was able to get a red contract only by paying some money (the property tax, I assume), but this case does indicate that there were some loopholes in the whole mechanism relating to real estate property registration and red contract issuance when it was operating in Xinjiang. This can also explain why some Uyghurs were willing to register their real property with Chinese *yamen*.

2. The second group of cases was also initially handled by local *akhunds*. But one of the parties at odds claimed that the *akhunds* had been bribed and made unfair decisions, so they brought the cases to the magistrate's court. Also, this group includes those cases that came to the magistrate's desk because one of the parties had tried to challenge the authenticity of the contract held by the other party or the justness of the *akhunds* who endorsed the suspicious contract.³⁸⁹ For instance, in 1882 Yunusi pledged a plot of land to Shada Haji for 25 years. The land was originally set aside for his daughter, Agesi, as her dowry. Several years later, Yunusi died and Shada Haji went to Mecca to make a pilgrimage. When the time was due, Agesi found Shada Haji's son, Zibaihawei, to claim her land. But Zibaihawei "fabricated a fake agreement of outright sale and bribed the second *akhund* to get his *maor* mark." When Agesi went to the first *akhund* and argued about this issue, the *akhund* "was also bribed and dismissed my case", as Agesi told the magistrate.

389 See XJA 15-6-1404, 15-6-1542, 15-6-1988, 15-7-2388, 15-6-1716, 15-8-2831, 15-9-3095, and 15-9-3335.

However, the magistrate was suspicious about the truth of Agesi's account. He remarked that "her accusation that the *akhunds* had been bribed were particularly unbelievable."³⁹⁰ At last, the magistrate supported the authenticity of Agesi's father's *maor* contract of land sale with Zibaihawei, which means he believed that the land was first pledged and then sold to Zibaihawei. However, like many other Chinese magistrates, he asked Zibaihawei to give Agesi 25 *taels* of silver, as a supplement to the previous land price in order to show some mercy to the weaker members of society. Among Xinjiang archives, this is not the only case in which the plaintiff reported to the magistrate that one or more local *akhunds* were bribed and fabricated *maor* contracts. However, so far I have not found any *akhund* who was found guilty by the magistrate's court of accepting bribes and abusing their rights to use *maor* seals.

3. The third group includes those disputes that involved an *akhund* or a *xiangyue* himself.³⁹¹

4. This group of cases consists of property disputes among family members, including those that took place between a mother-in-law and her son-in-law, a father-in-law and his son-in-law, a woman and her brother-in-law, sisters and brothers, sisters having different mothers, two brothers, an uncle and his nephews, and so on.³⁹²

390 XJA 15-8-2831

391 See XJA 15-4-480, 15-7-1895 and 15-8-2717.

392 See XJA 15-4-546, 15-6-1542, 15-6-1599, 15-7-1895, 15-7-2173, 15-8-2670, 15-8-2759 and 15-9-3095.

Among all the eight cases, three of them were brought to the court by women plaintiffs through the unique Chinese legal procedure of proxy litigation (*baogao* 抱告).³⁹³ It seems that compared to disputes with other persons, Uyghurs brought more financial disputes with their family members to the Chinese court. This is not very different from the situation in the *neidi*, where a large percentage of Chinese litigation also involved family members. One reason might be that at that time people tended to transact more with family and people they knew well.

A Uyghur woman called Bibiyasi had three married daughters and a son. Her late husband had bequeathed a plot of land to their son when he was alive. But still, the son was now in bad financial condition and owed a debt of more than one hundred *taels*. Now Bibiyasi's three sons-in-law "conspired" together and kept asking her to divide her (and her late husband's) *karyz* land property (among all the family members). The old woman insisted that she would not divide the property unless she died and the debt of her son was settled. In 1895 her oldest son-in-law brought the case to the first *sumu*.³⁹⁴ The *sumu* ordered that the property to be divided only after the widow's death. The son-in-law then brought the case to the first *akhund* (*ailanmu akhund*), who was "bribed (by him) and told me that if I don't want to divide the land,

393 In Qing dynasty, women were allowed to bring a case to the magistrate's court, but only through one of her male relatives, such as her brother or nephew, acting on behalf of her. This male representative was called *baogao*.

394 *Sumu* is the Mongolian word for "*xiangyue*". Since Turfan was under *jasak* system, village compact heads there was often called as "*sumu*", instead of "*xiangyue*".

I have to give twelve *taels* of silver to each of my daughters”, according to the mother.

Not willing to divide the family property or give cash to her daughters, the old woman finally went to the magistrate’s court and accused her daughters of “fighting for the natal family’s property by force” (*qiang bi niangjia zhi chan* 強逼娘家之產), although they had the husband’s family to rely on.³⁹⁵

At the end of the petition, the magistrate wrote his this remark:

It has been investigated that Uyghurs do have the rule that the son-in-law is allowed to acquire a share of his parents-in-law’s property. However, it is improper for him to force (his mother-in-law).

If what Bibiyasi said was true, Daguti and the other two sons-in-law were really outrageous and the *akhund* should not have accepted his bribes and taken sides with him...Now the first *sumu* should stop Daguti and other sons-in-law from forcing the old woman to divide the family property. If they dare to disobey, they shall be brought here and receive severe punishments.

On another instruction attached to this petition, the magistrate again asked the local *sumu* to hold a hearing and settle this dispute as soon as possible and that if the *akhund* was really bribed, he should be reprimanded (*shenchi* 申斥).

395 XJA 15-6-1542

Though at the beginning of her lawsuit, Bibiyasi summarized the reason of her accusation as “sons-in-law seizing family property and threatening my life,” the dispute actually took place between two parties: the mother (allying with her only son who had already received his share of the father’s legacy), and the three daughters (allying with their husbands, who had not received their share of the family property due to them). In this case, both Bibiyasi and her sons-in-law were doing court shopping and trying to find the court that could protect their interest best. When Bibiyasi approached the Chinese magistrate, she was careful to make sure her accusation resonated well with a Chinese judge. For instance, she emphasized that she was old and weak and bullied by her sons-in-law. More importantly, she managed to use Chinese civil rules and discourse to win the magistrate’s sympathy by saying “the daughters have their husband’s family (to rely on), how could they still fight for their natal family’s property by force?” (*nü you xu jia, he de qiang bi niangjia zhi chan?* 女有婿家, 何得強逼娘家之產). It seems that she was perfectly aware that her female Chinese contemporaries received only a dowry from their natal family and nothing after the wedding.³⁹⁶

But actually the Chinese magistrate was not confused by the Uyghur mother and knew the Uyghur (Islamic) rule regarding this issue clearly. As we have discussed earlier, according to the Islamic law of inheritance, a daughter receives half of a son’s share. That is why the local *akhund* asked Bibiyasi to give a part of her husband’s

396 Kathryn Bernhardt, *Women and Property in China: 960-1949*, (Stanford, Calif.: Stanford University Press, c1999), pp. 9-46.

legacy to the daughters, whether or not he was really bribed. I believe that the view that “a son-in-law was allowed to acquire a share of his parents-in-law’s property” (*nixu de fen yue jia zhi chan* 女婿得分岳家之產), which was quoted by the Chinese magistrate as a “Uyghur custom” (*chan su* 纏俗), was his interpretation of the Islamic legal protection of a daughter’s inheritance right to her natal family’s property, since Chinese did not recognize that a married woman had an independent economic right. This clearly indicated the Chinese magistrates were aware of Uyghur customs and had no intention to defy them.

However, by ordering that the daughters should not “force” their mother to divide the property, on the ground of a Chinese ethical formula: people should be filial to their parents and parents-in-law and not force them to do anything against their wishes, the magistrate’s decision actually implied that the mother could pay off the son’s debt before dividing the property among all the children. The daughters’ inheritance right was actually jeopardized.

It is also worth noting that the magistrate told the county authority that if the *akhund* was really bribed, he should be reprimanded. I have mentioned above that I have found few legal materials confirming that a Uyghur *akhund* had accepted bribes and, as a result, was punished severely by a Chinese magistrate. This case showed that even if an *akhund* was really bribed, a magistrate might be able or willing to do no more than simply reprimand him.

Another case occurred in 1884. A Uyghur, Aihaiti, together with his son, Tiemuer, who was disabled and living in a charitable home (*yangji yuan*), sued

Aihaiti's son-in-law, Wushouer, for agreeing to purchase land (through *zumai*) but failing to pay. The magistrate asked their village authority (the second *sumu*) to verify that their contract of sale was valid and that Wushouer had made the payment. After an investigation, the second *sumu* reported that the purchase was real but whether Wushouer had paid Aihaiti was difficult to confirm. The magistrate then judged that since Aihaiti changed his stories frequently and had waited five years to sue he must have made a false accusation. However, besides rejecting this false accusation, the magistrate still ordered that Wushouer give Aihaiti 10 *taels* of silver to help him since Aihaiti was very old and was his father-in-law.³⁹⁷

In this case, although the magistrate already discerned that Aihaiti's narrative of the story was logically flawed and concluded that he was making a false accusation against Wushouer, he still asked Wushouer to help him financially simply because he was his father-in-law. In fact it is not rare for a Chinese magistrate to force the winning party to make a compromise with the losing party for certain moral reasons, such as "to promote harmony of family members."³⁹⁸

5. The plaintiffs of these cases voluntarily brought their regular financial disputes to the magistrate's court.³⁹⁹ For instance, in 1884 a man called Yusufu told

³⁹⁷ XJA 15-4-546

³⁹⁸ Shuzo Shiga, "Shidai soshou seido ni okeru minnji hogen no gaikatu kentou"(A General survey of the sources of law concerning civil cases in the judicial system of Qing China) , *Tōyō shi kenkyū*, no. 1, 1981, pp.74-102.

³⁹⁹ See XJA 15-4-546 and 15-4-575.

the magistrate that he had bought a plot of land and paid the transaction tax. However, the original owner sold the land to others so he lost both money and the land. The magistrate's comment was: "since you have both witness and contract, how could he sell the land to others?" No other record about this case was found.

In general, the 19 cases give me the following impressions:

1. At least some Uyghurs believed that the magistrate's court had more power to enforce their judgments than local *akhunds*, otherwise they would not have gone to the magistrate's court to try to resolve the disputes that the *akhunds* failed to resolve.

2. Some Uyghurs tried to challenge the authenticity of a *maor* contract and the impartiality of local *akhunds* at the magistrate's court, but this was rarely successful. The Chinese magistrates might declare that a Uyghur contract without a *maor* mark as fake. However, they never discredited a contract with a valid *akhund's maor* mark, even if it was possible that the *akhund* was bribed to affix his *maor* seal.

Chinese magistrates rarely overthrew a Uyghur *akhund's* judgment, nor did they really want to know if an *akhund* was bribed or had faked a contract by using his *maor* seal. It seems that the two legal authorities had an unspoken understanding that they did not intervene in each other's affairs when dealing with civil cases. They were aware that respecting each other's power and authority among their subjects was beneficial to both sides.

Particularly, it seems to me that Chinese magistrates were not willing to become enemies with Uyghur religious authorities (at least openly); they would rather keep aloof from the conflicts between local Uyghurs and their religious authority. They

might be secretly aware that they were actually not powerful enough to really punish Uyghur *akhunds*. Therefore they were trying to avoid getting overly involved in the cases of alleged bribery or challenging the *akhunds*' innocence.

3. Chinese magistrates usually respected Islamic civil rules and did not try to challenge them openly, even in the realm of family inheritance, in which Uyghur legal regulations differed dramatically from those of the Chinese. However, if a Uyghur plaintiff was able to describe his (or her) situation by using proper Chinese discourse and made the magistrate feel that his (or her) suffering showed a violation of any basic Chinese ethical standards, such as filial piety, it was possible for the magistrate to issue a judgment to his (or her) advantage which was to a limited degree in opposition to Uyghur civil law.

4. In some cases in which the plaintiff had no grounds to win the case in either court, if he (or she) was the weaker or poorer party, the Chinese magistrate might still ask the winning party to compromise with him (or her) for moral or compassionate reasons. This happened more frequently in financial disputes between relatives, whereas in the Islamic court, the *akhunds*' judgments were usually black and white. This was another important reason for a Uyghur to bring his case to the magistrate's court.

5. Generally speaking, not many Uyghurs went to the Chinese court to settle their economic disputes. Two reasons can mainly explain this situation. One is the close cooperating relationship between the two courts, which created a high probability that Uyghur commoners would obtain identical judgments from the

magistrate's yamen and the indigenous religious authority. The other is the official tolerance of ethnic law and customs. This was manifested particularly in Chinese courts' acknowledgement of contracts signed according to Uyghur tradition. As we have discussed, contracts were widely used in the Uyghur community and the written document was the main source of property rights. As long as a person had a valid contract, the result of his case could largely be predicted no matter which court he went to. At the same time, it was natural to find more people brought their cases to the court they were more familiar with.

Late Qing changes

Xinjiang legal archives show that, during the very end of the Qing dynasty, some new phenomena appeared. It seems that Chinese officials worked more closely with local Islamic religious authorities to deal with civil disputes among Uyghurs.

First of all, cooperation between the two legal authorities, which was tighter than the mutual recognition of contract registration, came into being at least in some parts of Xinjiang. This can be sensed in the following case:

(Islamic calendar) 1321st year, 1st month, 23rd day (Jan 25, 1904)

The executor of this document, akhund Maimaiti Niyazi, is teaching in the religious school established by Khoja Muhammad Xielifu Younusi.

My partner Haji Rouzi Hailipai and I had a disagreement on the distribution of (school) income. So I brought a lawsuit against him to Magistrate Chen. The inhabitants living around the school and

students of the school also sued him. Akhund Ailanmu also made comments on the two indictments, which were regarded as reasonable by him. Right before the trial, many good persons came to mediate between us. Finally we reached an agreement that from now on, after the maintenance cost and students' expenses were deducted from the total income, Rouzi Hailipai and I will share the rest equally.⁴⁰⁰

The “income” discussed in the document was very likely *waqf* income since the income of Xinjiang *madresseh* schools mainly came from rent of *waqf* lands, and the whole dispute was about two *madresseh* teachers and their students' disagreement on the distribution of *waqf* income. As mentioned previously, Chinese materials give one a vague impression that the Qing officials had a distaste toward the idea of *waqf* property, perhaps this distaste could explain why this document used the term “income,” instead of “*waqf* income”.

Cooperation between the Chinese secular court and the Shari'a authority happened more than once in the course of settling this case. Before the teacher and students submitted their petitions to Magistrate Chen, they had them assessed by Ailanmu *akhund*, who was the highest judge of the local Shari'a court. This action suggests that the local religious court's opinions on a dispute may have had great influence on the Chinese magistrate's decision, and the local natives were fully aware of this. The second instance of cooperation took place when the magistrate withdrew

400 See *ziliao xuanbian*, case 054, also see Yu Hongmei's thesis,

the trial and sent the case for local level (and religious level) mediation. That is why the final agreement of this dispute was written in Chagatai language and attached with a *maor* stamp.

As indicated by the above example, Chinese magistrates' handling of Uyghur-Uyghur cases often relied heavily on the local religious court. On the one hand, they need to consult local religious professionals about Uyghur legal customs. On the other hand, as they did in the Chinese *neidi* too, Chinese magistrates often sent cases back for local mediation, which is to say, these cases would return to the desks of *akhunds* and other religious professionals'.

Another dramatic late Qing change can be seen in some records of civil disputes which happened in the very last several years of the Qing dynasty. The following are some examples of these case archives:

Case 1: In 1907, a Uyghur woman named Niurehan sued five other Uyghurs for selling a plot of land, which was her late grandfather's property, without her permission. The magistrate remarked that "the *akhunds* in charge of that area shall call all the parties together to investigate the case carefully and judge it fairly according to (Islamic) classics and Uyghur norms" (*zhaoyi chansu yi jingdian bingong lichu* 照依纏俗以經典秉公論處). Local *akhunds* soon reported to the magistrate that the plot of land had been sold by Niurehan's father, and according to Uyghur norms and the Islamic classics, the property transactions performed by a father when he is alive have nothing to do with his sons or daughters. The magistrate endorsed this report and remarked again: "It is really wicked for Niurehan to bring a

lawsuit over a plot of land that has nothing to do with her. I was originally going to punish her according to the regulation on false accusation, but since the *akhunds* have mediated between the two parties, I finally decided not to take any action against her.”⁴⁰¹

Case 2: In 1907, a Uyghur woman sued her brother at the magistrate’s court for illegally occupying her land. The magistrate remarked that “the two parties were actually blood relatives...the *akhunds* of her village shall go to investigate this case carefully and then deal with it fairly according to (Islamic) classics and Uyghur norms (*zhaoyi chansu yi jingdian binggong lichu* 照依纏俗以經典秉公理處), in order to sustain the blood relations.”⁴⁰²

Case 3: In 1905 a Uyghur called Mayiti told the magistrate in his lawsuit that he had bought a plot of land more than 10 years ago and had a valid contract. However, a man called Maimaiteli who had been renting and living in an old house on the land for many years was now trying to occupy the house and part of the land. In the end of the petition Mayiti asked the magistrate to ask the first *akhund* of his village to resolve the dispute according to the Islamic classics (*anzhao jingdian banli* 按照經典辦理) and prevent the illegal occupation.⁴⁰³

⁴⁰¹ XJA 15-8-2667

⁴⁰² XJA 15-8-2670

⁴⁰³ XJA 15-7-2388

It is quite interesting that among the Chinese case archives dating to the last decade of the Qing dynasty, I have surprisingly found that phrases such as “according to Islamic classics and Uyghur norms to deal with (the case)” and “to resolve the dispute according to Islamic classics” appear frequently in the remarks of Chinese magistrates acting on Uyghur-Uyghur cases. Above I only list 3 examples but there are easily more than twenty cases like these that can be found.

Before 1900, when a civil dispute among Uyghurs was brought to the Chinese magistrate’s desk, he either tried the case himself, or turned the case over to local secular authorities, such as *xiangyue*, or *sumu*, to investigate or mediate. As to whether or not these secular local level authorities would ask local religious judges to help or take over the investigation, they seemed to not care. Particularly, they never told local leaders to handle the cases according to Islamic classics or Uyghur norms.

It was only after the 1900s that the magistrates began to pass this type of cases directly to local *akhunds* and clearly asked them to deal with the cases according to Islamic classics and Uyghur norms. The above Case Three shows that Uyghur commoners were even able to go to the magistrate and ask him to send the case to local *akhunds* and let them deal with it according to Islamic classics. It indicates that by that time, it had been well known that an *akhund*’s handling of civil cases according to Islamic classics was accepted and supported by Chinese magistrates.

Why did the attitude of the Chinese magistrate toward local *akhunds* and their way of handling civil cases experience such a transition? As I have discussed in the previous chapter, after the Muslim Rebellion, the Qing sojourning officials seemed to

have tried to intervene in the civil lives of Xinjiang Uyghurs more, and Governor Liu Jintang once said the Uyghurs should “eliminate their bad norms”. Although this goal soon turned out to be too ambitious, Chinese officials were still reluctant to openly express their opinions on Uyghur norms or Islamic classics. The two legal realms had been operating in parallel and not meddling in each other’s affairs for a long time, though the Chinese secular authority theoretically acted as superior. But as time went on, the interests of the two ruling authorities might have become more and more identical. Moreover, all of the local *akhunds* were nominally designated by Chinese officials after the establishment of Xinjiang province, so it is natural for the two to experience closer cooperation than before. By the 1900s, the vertical relationship of the superior and the subordinate had become very obvious, that is why in Case Three, a Uyghur commoner went to the Chinese *yamen* and asked the magistrate to arrange his case to be handled by village *akhunds*.

However, it is wrong to conclude that by the very end of the Qing dynasty, Chinese officials in Xinjiang controlled local religious authority more tightly than before. To the contrary, the above cases show that by that time, the magistrates had completely given up trying to deal with Uyghur’s civil disputes. Their remarks to on Uyghur petitions were a clear declaration to all Xinjiang Uyghurs that from then on, their civil cases were all to be judged by religious leaders and according to Islamic classics and Uyghur norms. Toward the end of the dynasty Chinese magistrates withdrew from this realm.

CHAPTER 5

TRANSACTIONS BETWEEN UYGHURS AND CHINESE

This chapter, based mainly on Turfan *ting* legal archives, focuses on how Chinese immigrants and native Uyghurs traded with each other and settled their economic disputes, especially those involving land-related transactions. It also discusses the role played by Chinese and Islamic courts in handling this type of dispute. The practice of land transactions between Chinese and Uyghurs indicates a very cautious relationship between the two ethnic groups, both of which were eager to reduce risk in their economic transaction.

In addition to such inter-ethnic relations, it appears that in this frontier region, where social connections among different ethnic groups were very weak, different from in inland China, there was hardly a so-called “self-regulating community” to enforce their agreements in Xinjiang. Therefore, the existence of state adjudication and its enforcement were crucial for both Chinese and Uyghur dwellers interacting through economic transactions. Many sources show that they developed useful strategies for adjusting their relations with each other and protecting their own interests whenever necessary by means of the law.

Transactions between Chinese and Uyghurs

Property conflicts, especially those concerning land, between Uyghurs and Chinese⁴⁰⁴ were frequently recorded in Turfan *ting* archives. Though most of these legal archives date from after the 1860s, property transactions that happened well before that time are mentioned and owners even brought forth old contracts in order to protect their properties. The civil conflicts presented in this chapter mainly range in date from the 1860s to 1911. As we know, during this half century-long period, the Turfan dwellers, both Uyghurs and Chinese immigrants, experienced the Muslim Rebellion, the establishment of a Muslim state led by *Yaqub beg*, and the restoration of the Qing regime, as well as the final collapse of the last imperial dynasty. People's everyday lives were dramatically influenced by these political and military events.

Before the establishment of Xinjiang province, Eastern Turkestanis living in Turfan were organized under the *jasak* banner system, which was a gesture of appreciation the Qing showed to local Uyghur chieftain, Emin Khoja, for his cooperation and contribution in their expansion project in this place. As *jasaks*, Emin Khoja and his offspring enjoyed hereditary authority over their subordinates. However, fearing that *jasak* chieftain might monopolize rule in Turfan, in 1761 and 1778, the Qing adjusted the boundary of *jasak* land and population twice and put several hundreds of Uyghur households into direct rule of the state.⁴⁰⁵

404 The term "Chinese" is here taken to include Han and Hui peoples, the majority of which came from the inland provinces after the Qing conquest of 1759.

405 Shen Suli, "Qingdai tuerfan zhasake qizhi yanjiu (A study on the *jasak* system of Qing Turfan)", *Qinghai shifan daxue minzu shifan xueyuan xuebao*, Vol. 16, no. 1, 1995, pp. 1-5.

Obtaining land from the state

Manchu rulers since the Qianlong emperor encouraged migration to northern and eastern Xinjiang in order to impose better political control, promote agricultural production and relieve population pressure in China proper. During the Jiaqing and Daoguang reigns, many Han and Hui peasants and merchants migrated to Urumchi, Hami, Turfan and nearby places. This influx of immigrants, mostly from the provinces of Gansu and Shaanxi, was only temporarily interrupted by the Muslim Rebellion of 1864-1877.

At the very beginning, this immigration was state-sponsored and each settler received a travel allowance, animals, agricultural tools, and seed as well as land. They were arranged into different places and organized as colony farmers. Land reclamation in the Xinjiang oasis turned out to be difficult and needed specific skills such as those for digging the *karyz* for irrigation. In Xinjiang most new lands were opened up by state-organized programs that encompassed various types of frontier settlements, such as military settlement (*juntun* 軍屯), criminal settlement (*fantun* 犯屯), civilian settlement (*mintun* 民屯), and even Manchu bannermen settlement (*qitun* 旗屯)⁴⁰⁶. As we know, *tuntian* was a time-honored frontier strategy practiced by various dynasties.

406 As for the history, allocation, and change of various Xinjiang tuntian settlements, see Wang Xilong, *Qingdai xibei tuntian yanjiu*, (Lanzhou: Lanzhou University, 1990), pp 1-230; Feng Xishi, "Qingdai Xinjiang de tuntian", in Ma Ruyan and Ma Dazheng ed., *Qingdai bianjiang kaifa yanjiu*, (Zhongguo shehui kexue, 1990), pp. 244-274, and Wang Jianmin "Qing qianjia shiqi Xinjiang tuntian fenbu zhuangkuang chutan" A brief study on the distribution of Xinjiang agricultural colonies in the Qianlong and the Jiaqing reigns of the Qing dynasty), *Xibei shidi*, no. 1, 1984, pp. 4-12. As for

After the establishment of Xinjiang province in 1884, various kinds of state sponsored settlements were all “upgraded into taxed land” (*sheng ke* 升科). The state gave title of the land to their cultivators and required that the new owner pay tax on the land.⁴⁰⁷ Meanwhile, Chinese policy makers, such as Zuo Zongtang and Liu Jintang, launched land reforms and a series of “*gaitu guiliu*” (改土歸流) policies in Xinjiang, to limit the independent authority of native chieftains and to control over the frontier in a tighter way.⁴⁰⁸

In Southern Xinjiang, the *beg* system was abolished, their dependent peasants (*talanqi*) freed, and emolument land (*yanglian dimu* 養廉地畝), which were previously granted to them according to their rank, confiscated. In former *jasak* areas, the Qing stripped the native Uyghur nobles (*jasak*) of their privileged rule and incorporated the whole area into the regular provincial administrative system. Their enfeoffed land was given to the Uyghurs who had farmed their land previously. In Turfan, Emin Khoja family’s was largely deprived of control over *jasak*. The Khoja

the criminal settlements, see also Joanna Waley-Cohen, *Exile in Mid-Qing China*. (New Haven and London: Yale University Press, 1991).

407 Yuan Dahua and Wang Shunan, (*Xuantong*) *Xinjiang tuzhi*, 30:3a-4b.

408 The Qing’s “*gaitu guiliu*” (administrative incorporation of native chiefdoms) policy was first launched in the Southwest during the Yongzhen reign (1723-1735), as a response to the increasing in inter- and intrachieftainship violence. By abolishing the native chieftainships and extending direct bureaucratic control over the former autonomous frontier area, the state managed to promote assimilation of frontier (ethnic) people into the empire. See Madeleine Zelin, “The Yongzheng Reign” in *Cambridge History of China*, v. 9, Willard Peterson, ed., Cambridge: Cambridge University Press, 2003, pp. See also John Herman, “Empire in the Southwest: Early Qing Reforms to the Native Chieftain System”, *The Journal of Asian Studies*, vol.56, no. 1, 1997, pp. 47-74.

family was allowed to retain their title but no longer levy tax or corvee from Uyghur commoners. All the original *jasak* Uyghurs who had been subordinate to Emin Khoja now became subjects of the State.

Together with the unification of Xinjiang's administrative institutions, a new system of land rights also came into being. From that time onwards, the majority of Xinjiang's arable land became privatized, with official land in a subordinate position.⁴⁰⁹ Most native Uyghur commoners became self-cultivating peasants and had to pay a land tax to the state. In Turfan, they all received an official land certificate (*zhizhao wenyue* 執照文約) indicating the size, quality and boundary of their land. Four characters were printed on this certificate: now responsible for regular land tax (*gai gui ezheng* 改歸額征⁴¹⁰).

Both before and after the official organization of civilian settlement ceased after 1781, individual Chinese peasants continued to arrive in Turfan. Some Chinese immigrants purchased *guandi* (official land 官地) from the state and became private landowners immediately. But local records do not show many cases of this kind. The small number of cases was usually dated around the 1880s, when much land was designated as "waste land" or "unclaimed land" and controlled by the state. New immigrants were allowed to purchase this *guandi* and pay a fixed tax annually. When

409 Li Lei and Tian Hua, "Xinjiang jiansheng hou de tianfu zhidu" (The institutions of land tax after the establishment of Xinjiang province), *Xinjiang Daxue Xuebao*, Sep 2000, pp. 76-81.

410 *Ezheng* means the tax quota of a place assigned by the state. See Wang Dongping and Guo Hongxia, "Qingdai huijiang liangfu zhidu yanjiu", *Zhongguo Bianjiang Shidi Yanjiu*, Sep 2007, pp.32-47.

doing this, they could obtain an official land certificate (*zhizhao* 執照) from the Turfan Reconstruction Bureau (*Shanhouju* 善後局)⁴¹¹ to support their property rights. For instance, an 1879 *zhizhao* shows that a Han merchant named Yang Zhankui purchased for 310.815 taels of standard silver (*kuping yin* 庫平銀) from the Turfan *Shanhouju* 518.25 *mu* of third-class *guandi* that was irrigated by a government-built irrigation system. This land was considered his property in perpetuity (*yongyuan guanye* 永遠管業) and he was also liable for the regular land tax (*ezheng* 額征).⁴¹² Compared to the interior provinces, the price (0.6 tael/*mu*) was exceptionally low.⁴¹³ The low price was one of the most important reasons inland peasants or merchants invested in Xinjiang land. Like Yang Zhankui, many Han immigrants brought large sums of capital to Xinjiang and were able to purchase large plots of land. This appears to account for the change of state policy away from official reclamation programs and toward private development during this transitional period.

Archives show that local Turfan Uyghurs, most of whom were dependent peasants of former *jasak* nobles, enjoyed both a priority and a lower price in their

411 After suppressing the Muslim rebellion and before the establishment of Xinjiang province, Zuo Zongtang set up a *Shanhouju* (rehabilitation bureau) in each big city including Turfan, which was actually a provisional government in charge of various kinds of reconstruction matters. See Liu Min, "Lun Qingmo *Shanhouju*" (*Shanhouju* in the late Qing), *Anyang Shifan Xueyuan Xuebao*, no. 4, 2007, pp. 69-71.

412 XJA 15-4-178

413 See Kang Chao, *Man and land in Chinese history: An Economic Analysis*, (Stanford, Calif. : Stanford University Press, 1986), p 130. The table shows that the average land price in the *neidi* from 1871-1880 was 10.63 *taels* per *mu*.

purchase of newly confiscated *guandi* from the *Shanhouju*. In 1879 a Uyghur named Hailier was allowed to pay 36 taels of silver to the *Shanhouju* to purchase 60 *mu* of *guandi*, which he might have been cultivating for a *jasak* before it was confiscated.⁴¹⁴ The land sold here was first-class, but the price was 0.6 tael/*mu*, which was the same as the rate Merchant Yang had paid for his third-class land (0.6 tael/*mu*).

This fact shows that when the state was privatizing land that had formerly belonged to native elites and agents of the Qing state, they sought to privatize quickly and discounted the land. The state appears to have considered it desirable that local Uyghurs be able to own the land they had farmed. However, the Qing did not just give the land to the former dependent Uyghur peasants and because of this, many Uyghurs were unable to buy the land they had farmed. This explains how some of this land came into the hands of wealthier Chinese immigrants. An example of this can be seen in the case of Hailier.

Although the “favorable” land price offered to him was quite low, it was still too high for a Uyghur peasant who had been living in a slave-like condition under the *jasak* system. Not willing to lose this preferential treatment, through a middleman, Hailier mortgaged this plot of land to a Turfan Chinese called Ma Wenchang for 70 taels of silver, although he did not yet legally own the land. Receiving the money from Ma, Hailier only paid 25 taels to the *Shanhouju* and seems to have spent all of the remaining 45 taels he received from Ma. When the magistrate demanded the

414 XJA 15-4-452

arrearage (11 taels), Ma was also summoned to court. Finally, the magistrate decided that the land should go to Ma, as long as he paid the 11 taels. Also, Hailier was asked to return 45 taels to Ma by the end of the year. Ma paid the money at once and acquired the land as well as the official certificate. By the next year, Hailier returned only 25 taels in kind and still owed him 20 taels.

Again this case shows that the official land price (*guanjia* 官價) offered by the *Shanhouju* was lower than the market price. The official price *Shanhouju* charged Hailier was 36 taels, while the price offered by him in the mortgage sale was 70 taels. It is easy to understand that indigenous Uyghur chieftains usually owned the most fertile land. Local Uyghurs who had been farming *jasak* land before the confiscation, such as Hailier, had priority access to this rare source. However, it is noteworthy that in this case, when the Uyghur peasant had no enough money to purchase the official land, the magistrate simply gave this priority to the Chinese who he owed a debt to and could afford the favorable price, instead of reserving the priority for another Uyghur.

Rental sale (*zumai*) practiced in Turfan

Because of the limited amount of *guandi*, a large number of individual immigrants were unable to purchase land from the government. Based on the archives under study, there were mainly two ways for these immigrants to get land in Turfan: one was through the Uyghurs' pledge sale (*dang* 當), the other by "rent-purchase" (*zumai* 租賣). Conversely, these constituted two ways by which local Uyghurs could obtain a large sum of cash at the expense of the land they had once cultivated. As I

will explain below, it seems that Uyghurs seldom transacted their land to Chinese immigrants through direct sales. The Turfan archives show that since the Xianfeng reign (1851-1861), many immigrants arriving from the interior chose to rent a plot of land from native dwellers. People there invented a unique term for land transaction combining purchase and tenancy — *zumai*, which literally means rent-purchase — and used it for the majority of Chinese-Uyghur private land trades. Closer inspection reveals that *zumai* was actually a long-term rental arrangement. Due to the time limit and the regulations of the Xinjiang Archives, I was able to copy only 30 pieces of *zumai* cases. However, the total number of this type of archives was much larger, at least several hundreds. The following 1861 contract is the earliest complete *zumai* contract I have found in Turfan *ting* archives, but several more cases mention earlier land transactions of this kind.

Ailihezhe, Hasenmu, Shayitihezhe, Manlahezhe, and Bilaerhezhe, the executors of this contract for the *chuzumai* (sale and renting out) of a grape garden together with the trees growing on it, are brothers. Owing to financial difficulties, after discussing [the decision] with our mother, we are willing to sell (*chumai* 出賣) the grape garden located in front of our home and east to the Big Canal as well as some unused areas whose boundaries are the garden wall to the Yongshengxing Shop. [The garden is] for them to cultivate for five years. The period starts from the spring of Xianfeng 10 (1860) and extends to the autumn of Xianfeng 15 (1865). Through a middleman, the two parties

have agreed that the total rental price (*zujia*) is 3500 taels of silver. The money has been paid in full immediately. After signing the contract, the money-owner (*qianzhu* 錢主), [which means the tenant here] has the freedom to pledge or sublet the land to others. The landowners shall not disagree. Should there be any relatives of the landowners making trouble in the future, it will be the responsibility of the landowners that is the five brothers, to deal with that. This transaction is made by the two parties voluntarily and without any coercion. Because we fear that verbal agreement is not reliable, we have drawn up this contract as evidence.

Also, through the middlemen, the two parties have agreed that every year the landowners are allowed to eat or use 1500 *jin* of fresh grapes and 200 *jin* of raisins for free.

Executors of the contract: Ailihezhe, Hasenmu, Shayitihezhe, Manlahezhe, Bilaerhezhe

Mediators/witnesses: Molla Selinmu, Yang Jucai, Fu Dengke,

Translator (*tongshi* 通事) Bahai

Xianfeng eleventh year (1861), first month, twenty-sixth day

(The contract is bilingual and the Uyghur language version is written on the same piece of paper, to the left of the Chinese version.)

This contract is similar in format to a typical Chinese land lease or sales contract,⁴¹⁵ except that the Uyghur executors mentioned they had “discussed [the decision] with their mother” before signing this contract. A mother’s opinion, would never be seen in a Chinese contract.

This contract contains basic elements of the *zumai* transaction which was practiced most frequently in Turfan. Through *zumai*, the party who paid a lump-sum cash payment acquired the rights to work on a plot of land. The land was for him/them to cultivate or otherwise put to use for a specified period. When the term of the contract ended, the land had to be turned back to the landowner unconditionally.

Like in Chinese contracts found in the *neidi*, it is also emphasized that this transaction was made voluntarily by the two parties and the possible interference of the sellers’ relatives was considered in advance. Whether or not the money had been paid was always mentioned. As in most of the other Uyghur-Han land transactions I have seen, the one above involved both Han and Uyghur middlemen, as well as a translator. Another feature of these contracts is that a description of the boundaries of the land was always included, while the size of the plots of land transacted was not necessary. (This, as well as the ever-changing currency exchange rate in Xinjiang, made it impossible to do any quantitative analysis of changing rent rates or the size of

415 For instance, see Madeleine Zelin, “Rights of tenants in mid-Qing Sichuan”, *The Journal of Asian Studies*, Vol. 45, No. 3 (May, 1986), pp.499-525; and Myron L. Cohen “Writs of Passage in Late Imperial China”, pp. 38-93.

plots involved in transactions, a problem faced by scholars working on many parts of inland China as well).

Turfan people treated *zumai* as a temporary sale of land rights sale rather than as a long-term rental arrangement. In contracts written in Chagatai, Uyghurs usually used the verb “*sut-*”, which means “to sell”, to refer to this type of transaction.⁴¹⁶ In Chinese contracts, *zumai* was referred to in different ways even in a single contract, such as the one above. The executors also used terms like *chuzumai* (出租賣, to rent and sell out) or *chumai* (出賣, to sell out) to describe this transaction, and *zujia* (rent price) for the payment involved. In other contracts, people also call it “*mai nianxian* 買 (賣) 年限”, which means to sell/purchase (cultivation) rights for a period. Due to the highly developed agricultural economy and the long history of immigrants investing in land there, apparently tenancy rights had become independent of land ownership and been highly commodified in Turfan. Moreover, unlike most rentals, the *zumai* was a sale of rights also in the sense that all of the cost of the rights was paid up front.

Why was the practice of *zumai* so popular in Turfan? First of all, the reason might lie in that *zumai* was an important way for poor Uyghurs to get money, since Islam prohibits usury and *neidi* Chinese were prohibited to lend money to the frontier

416 Jin Yuping, “Qingji Tulufan diqu de zudian qiyue guanxi” (tenant-landlordism and contractual relationship in late Qing Turfan), *Xiyu yanjiu*, 2001, No. 3, pp. 46-52.

ethnic peoples by the Great Qing Code.⁴¹⁷ Thus *zumai* became a legitimate way to borrow money. Secondly, the practice of selling use rights for a period of time was probably the result of the *jasak* system whereby all Turfan Uyghur commoners were tenants of their *jasak* chieftain before the 1880s—it was the Emin Khoja family who in theory owned the land. Having no freedom to sell their land or the right to rent it directly, instead they sold use rights for a limited period. Moreover, it seems that Uyghur Muslims were not willing to lose their land permanently, especially to non-Muslims outsiders.

As a commodity, tenancy rights could be transferred freely. In this particular contract, the owner of the Yongshengxing shop was allowed by the landowners to sublet or pledge the grape garden to another party within the contracted period of five years.

Though the period of tenancy recorded in Turfan *zumai* contracts varied from several to several tens of years, it was an indispensable element that must be explicitly indicated in this type of written agreements. Before the Muslim Rebellion, the data deriving from the contracts and lawsuits at my disposal show that in more than half of the *zumai* agreements, people signed tenancy leases of 30 or 40 years and even longer (see Table 1).

Table 1. Duration of *zumai* Relationship Recorded in Contracts or Mentioned in Lawsuits before the Muslim Rebellion

417 *The Great Qing Code*, Article 149, substitute 06. Quran, verses 275, 276, 278, 279, 280 of Surah 2. See Abdullah Yusuf Ali trans., *The meaning of the Holy Qu'rān*, pp. 115-116.

Date	Length of Tenancy	SourSource (Archive Number)
1848	18	15-4-101
1850	30	15-4-101
1851	32	15-4-101
1851	32	15-4-101
1853	48	15-4-14
1857	42	15-4-14
1857	10	15-4-101
1860	30	15-4-101
1861	5	15-4-176
1862	32	15-4-88
1862	14	15-4-125
1862	107	15-4-235
1866	30	15-4-40

As indicated in the above data, it was not uncommon for people to sign long-term agreements. On the eve of Muslim Rebellion, some Han Chinese still signed long-term *zumai* contracts with Turfan Uyghurs. For instance, an 1862 contract shows Yang Shuyan paid a Uyghur named Shawuti 4000 taels of cash⁴¹⁸ to rent

418 4000 taels of cash here means they weighed 4000 *taels* of copper coins. As recorded in the Turfan archives the *tael* (*liang*) was used as a measuring unit for not only silver (*yin*), but also copper coin (*qian*), which differed dramatically from inland provinces. In Chinese contracts I found that whenever people talked about certain amount of *taels* of cash, the amount was always big. Chagatai contracts stored in the archives attest to this finding, which show that people paid hundreds of *taels* of “yarmak” (copper coin in Chagatai) to purchase properties. Jin Yuping also noticed this when translating

(*zumai*) a vineyard for 107 years, and another in 1866 indicates Ma Gong rented three plots of dry land from Shayiti for 30 years. Both of them paid off the total rent at the beginning of the transaction and both Uyghurs threw their tenants off the land when warfare broke out. Chinese who survived the Rebellion had to escape and Muslim landlords took back their lands without returning any money to the tenants.

Chinese commoners realized that in this remote frontier area, imperial authority could easily be too weak to guarantee their long-term investments. Probably this explains why after the Qing reconquest of Xinjiang, few *zumai* leases dating around the early Guangxu reign were longer than 15 years, while most of the leases were no more than 10 years. When the tenancy went well, the two parties would renew their lease once or even several more times.⁴¹⁹ But to sign a one-time long-term *zumai* contract was not much less common than before the Muslim Rebellion.

Nevertheless, given no external risks, long-term tenancy was usually welcomed by Chinese tenants with enough capital because it gave them more freedom to determine how to best use the land. Particularly for those who grew cash crops, such as grapes, the dynamic market situation needed flexible management and long-term skillful cultivation; besides, long-term tenancy would reduce tenants' annual cost. On the one hand, it is worth noting that the longer a *zumai* agreement was, the cheaper annual rent the tenant could get. Although in *zumai* contracts, the rental price was

Chagatai written agreements into Chinese. See Jin Yuping, "Qingji tulufan diqu de zudian qiyue guanxi", *Xiyu Yanjiu*, 2001, No. 3, pp. 46-52.

419 XJA 15-4-107 and 15-4-355.

always calculated for the rental period as a whole and the annual rent was never specified. For example, in 1896 two Uyghur brothers, Maimaitasheng and Hailier, leased (*zumai* 租賣) a piece of dry land to Wang Zhaoqi for 16 years. The price was said to be 116 taels of silver. Soon, due to financial difficulties they asked a middleman to extend the tenancy on the same land with Wang for another 14 years. The total rental price for 14 years was another 32 taels of silver. Therefore, “(the usage right of) the land was sold twice...the total price was 148 *taels* of silver.”⁴²⁰ In this case, when the land was to be rented for 16 years, the annual rent averaged 7.25 taels; but when considering the extension, for a mere additional 32 taels, that brought the rental period to 30 years, the average annual rent was reduced sharply to 4.93 taels.

Similarly, when a landowner tried to extend or renew his *zumai* tenancy with the same tenant, the rental price would always become cheaper. For instance, in the Uyghur language archives in 1889, 1893, and 1894, a Uyghur landowner leased (*zumai*) his vineyard composed of 430 grape vines, to the same tenant three times, with total rent listed as 110 taels for 10 years (averaging 11 taels/year), 60 taels for 8 years (7.5 taels/year), and 30 taels for 6 years (5 taels/year), respectively.⁴²¹

How the land tax and labor responsibilities were arranged was another important issue mentioned in *zumai* contracts. Before the Muslim Rebellion, Turfan

⁴²⁰ XJA 15-6-1499

⁴²¹ Jin Yuping, “Qingji tulufan diqu de zudian qiye guanxi”, translated case 6,7 and 8.

had two administrative systems. One was the *jasak* system, under which the Uyghur Turfan commoners paid land tax and corvees to their *jasak* chieftain, instead of the state. The other was the regular Qing civil administrative system, under which the peasants of other nationalities were all under the direct charge of the Turfan independent prefecture and were responsible for the state land tax.⁴²² After the Qing reconquest of Turfan, the state privatized most of the *jasaks*' effeoped land and various kinds of official land settlements and also began to levy regular land tax on these lands. At the beginning, Zuo Zongtang levied a tithe on private land modeled after the old Turkestani tax tradition.⁴²³ The first Xinjiang provincial governor, Liu Jintang, regarded this tax rate as too high for peasants to afford. In 1887 he had all private land surveyed and classified into three groups according to quality. In Dihua (Urumchi), Turfan and other parts of Northern and Eastern Xinjiang, tax was levied differently in each category:

⁴²² See Saguchi Toru, "Shinchō shihai-ka no Torufan" (Turfan under Qing rule), Kanazawa daigaku Hobungakubu ronshu, shigakuka (Kanazawa University, Studies and essays. History) no.26, 1978, pp. 25-50; and Shen Suli, "Qingdai Tulufan shehui jingji xingtai yanjiu"(Studies on social-economic situation of Qing Turfan), *Qinghai minzu yanjiu*, Vol. 15, No. 4, Sep 2004, pp. 67-71.

⁴²³ Tithe levied on private land was regulated by the Islamic law and this institution was valid in both Northern (under the Zunghar rule) and Southern Xinjiang (Yarkand Khanate) before the Qing conquest. The tithe had been long borrowed by the Qing to impose on Uyghurs' private land. Early before 1759, the Qianlong emperor had asked his imperial officials to investigate the taxes levied by Zunghar on Uyghurs and made it the model of the tax system of Qing regime. See Saguchi Toru, *Shiba dao shijiu shiji Xinjiang shehuishi yanjiu* (Study on Xinjiang society during 18th-19th century), (Uluquqi: Xinjiang Renmin, 1984), pp. 224-226.

First Class: seven *sheng*⁴²⁴ of cereal per *mu*

Second Class: four *sheng* of cereal per *mu*

Third Class: three *sheng* of cereal per *mu*⁴²⁵

Those cultivating vegetables or fruits, such as grape, were responsible for a “garden tax” (*yuan shui* 園稅), which was usually paid in cash. This kind of tax was also called as “land duty” (*di ke* 地課).

Land taxation was a strong impetus for Turfan Uyghurs to sell or rent out their land. After the establishment of the province, the tax levied by the Qing in Southern Xinjiang was significantly less than that extracted by *begs* before the Muslim Rebellion.⁴²⁶ In Northern and Eastern Xinjiang, the land tax had also been decreased, but it was still higher than in the South.⁴²⁷ Moreover, due to the severity of damage from the war, land tax turned out to be a much heavier burden on the peasants in Northern and Eastern Xinjiang, in which tax arrears were universal and where some peasants even chose to give up their land and escape. By contrast, in the South, tax

⁴²⁴ *Sheng* was a traditional Chinese unit of volume, which equaled to 1035.4688 cm³ in the Qing dynasty. See Qiu Guangming, Qiu Long, and Yang Ping, *Zhongguo kexue jishu shi –du liang heng juan* (Chinese history of technology, volume of weights and measures), (Beijing: Kexue press, 2003), p. 427.

⁴²⁵ Liu Jintang, *Liuxiangqingong zougao*, 12: 36a-b.

⁴²⁶ For land tax levied before the Muslim Rebellion in Southern Xinjiang, see Saguchi Toru, *Shiba dao shijiu shiji Xinjiang shehuishi yanjiu*, pp. 244-245.

⁴²⁷ See Li Lei and Tian Hua, “Xinjiang jiansheng hou de tianfu zhidu” (The institutions of land tax after the establishment of Xinjiang province), *Xinjiang Daxue Xuebao*, Sep 2000, pp. 76-81.

arrears were uncommon.⁴²⁸ Moreover, labor corvée was another heavy burden of Turfan Uyghurs. Under the circumstances, looking for a tenant became a crucial way to relieve one's tax responsibility in Turfan. There were landlords who, in the tenancy agreement, explicitly attributed their decision to enter into a tenancy relationships to the heavy tax burden. For instance, a *zumai* renewal contract signed in 1881 recorded that because the Uyghur landowners were “not able to afford the land tax money (*di ke yinliang* 地課銀兩), they are willing to renew the *zumai* tenancy for five more years. (During this term) the land tax is to be paid by Cao (the Chinese tenant) and has nothing to do with the landowners.”⁴²⁹

Among all the *zumai* written agreements we have been considering, the majority of them mentioned how to deal with the land tax and labor services. There were mainly three ways to arrange the tax payment in *zumai* transactions: to be paid by landowners themselves; to be paid by tenants; or to put aside a plot of land from which the harvest would be submitted as land tax. The most common practice was tenants paying the land tax. The following contract is an example:

The executors of this vineyard sale renewal (*xu mai* 續賣) contract are Shawuti, Maimaitieling and Ailibahai. Owing to financial difficulties, we are now willing to renew our sale agreement of a vineyard, which

⁴²⁸ *Lu fu zouzhe* (Reference copy of palace memorial), No. 1 Archives, classified as “Guangxu chao caizheng lei”(finance, Guangxu reign), Rao Yingqi's memorial submitted on the 29th day, third month, Guangxu 22(1896).

⁴²⁹ XJA 15-4-355

was our inherited property and is located to the east of the river in Shahezi, with Yang Shuji for 8 years. There are about 430 grape vines (growing in this garden). Through a middleman, the total price of 60 taels of silver has been agreed upon. Today the money has been paid in full. The period will start from the spring of Guangxu 46 and extends to the autumn of Guangxu 53... The boundary (of the garden) is clear. Land tax follows the land (*liang sui di xing* 糧隨地行) and labor service has nothing to do with the buyer. Because we fear that verbal agreement is not reliable, we have drawn up this contract as certification.

Witnesses: Shadilang, Tayiermila, Sun Qinglian, Zhao Wande, and Mullah Heshenmaiti

Scribe: Li Guilin

Executors: Shawuti, Maimaitieling and Ailibahai

Guangxu 15 (1889), tenth month, twenty-second day. ⁴³⁰

(The contract is bilingual and the Uyghur language version is written in the same piece of paper, left of the Chinese version. There are 6 big characters written in the middle of the paper, stating “each party keeps one copy of the contract.” Three Chinese official seals were stamped on it, which indicates that this is a red (official) contract upon which there is a deed tax being collected by the state.

⁴³⁰ XJA 15-4-107

Although the two parties called this contract a sales renewal contract, the content of this document shows that it is actually a *zumai* contract, through which the buyer (tenant) received the usage rights to the land for a certain period (8 years). As we know, the Guangxu reign lasted 34 years, so the three Uyghur landowners (who could be brothers) were contracting out the cultivation rights of their land for 30 more years, which shows that their family condition may have been worsening. Apparently the cultivation rights from Guangxu 15 (1889) to Guangxu 45 (1919⁴³¹) for this vineyard had already been leased, very likely to the same Mr. Yang. (The Yang brothers, Shuji and Shuyan had been renting land from the same three Uyghurs since 1862, with their long tenancy relationship only temporarily interrupted by the Muslim Rebellion.⁴³²)

When talking about the tax burden associated with the land in question, the term “land tax follows land” (*liang sui di xing* 糧隨地行) was often used. This means that it was the tenant’s responsibility to pay the regular land tax, which was usually called “*eliang* 額糧”, “*zhenggong* 正貢”, “*zhengfu* 正賦”, or “*dike* 地課” in Xinjiang. In all the contracts I have been considering, most Uyghur landowners made their tenants pay the land tax. For instance, besides the above tenancy agreement, five years after Guangxu 15 (1889), Shawuti, Maimaitiling and Ailibahai leased another piece of their land to a man called Wang Shouren for 8 years. The contract also made it Yang’s

⁴³¹ Actually there is no Guangxu 45, since the Qing dynasty collapsed in 1911.

⁴³² XJA 15-4-235

responsibility to pay “official cereal” (*guanliang* 官糧) every year, while the landowners (*yezhu* 業主) were to perform labor service (*chaishi* 差事).⁴³³ Many more contracts were found designating the tenant responsible for the land tax.⁴³⁴

Compared to “land tax follows land”, the landlords-paying-land-tax cases are much fewer. Among all the written agreements dating after the establishment of Xinjiang province I collected there is no such case. However, the Chinese scholar Jin Yuping did find such a case in the Turfan *ting* archives, which was written in Chagatai language. The case shows that in 1883 a Uyghur sold (*zumai* 租賣) the usage right of half of his *karyz* to a Chinese for 23 years. He himself was responsible for paying land tax and labor service.⁴³⁵ Besides this case, I found another court archive which suggests that the pattern of landlords paying land tax once existed widely. In 1880 a Uyghur *xiangyue* went to the magistrate’s court and sued about 20 Han and Hui Chinese (Tungan) under his jurisdiction because they resisted paying the land tax. These Chinese appellees soon filed a defense to argue for themselves:

...It is right and proper for a person cultivating land to pay land tax. However, in the peaceful years, when Uyghurs sold land to tenants, they only sold tenure, instead of conditional sale (*zhi mai nianxian, bing bu dianmai* 只賣年限, 并不典賣). When the agreed

⁴³³ XJA 15-4-107

⁴³⁴ See, for example, XJA, 15-4-119, 15-4-231, 15-4-328, 15-4-353, 15-4-355 and 15-5-949.

⁴³⁵ Jin Yuping, “Qingji Tulufan diqu de zudian qiye guanxi”, pp. 46-52.

upon period was over, (the tenants) lost both money and vineyards. As for the land tax and labor service, (the landlords) raised the price when selling land, so they were willing to take care of them. (These tax responsibilities) had nothing to do with we tenants, we have contracts to prove this. (This format) has not changed much since the Rebellion. Now the Uyghur *xiangyue* made a false accusation against us saying that we resisted paying land tax. Actually he is conspiring with the landowners (*yu yezhu chuantong yiqi* 與業主串通一氣) and trying to impose their tax burden on us, which is favoritism and intolerable by Heaven (*tianli bu rong* 天理不容). We simply refuse to accept such treatment. Moreover, nowadays when the Shanhouju sells former official vineyards (*guanyuan* 官園), the unconditional sale (*du mai* 杜賣) price of each grapevine is 6 *qian*⁴³⁶ of silver, while the price those landowners offered us was 4-5 *qian* for only one year. The additional price they charged us was just meant for (them) to pay land tax and labor services. And now the landowners are actually willing to pay land tax. However, the Uyghur *xiangyue* did not urge them to do that, but only accused us of tax resistance (*kang liang bu na* 抗糧不納), which is really unfair. So we would also like to elect other Han and Hui *xiangyues* and let them be in charge of our public affairs.

⁴³⁶ *Qian* was Chinese copper coin.

Now Han and Hui Chinese are in the charge of Uyghur *xiangyues*, which is not bearable at all. After serious consideration, we have no choice but to beg your eminence to make decisions for us.⁴³⁷

“Peaceful years” in this document refers to the period before the Muslim Rebellion. According to this document, before the Rebellion when Chinese immigrants moved into Turfan villages where the landowners were Uyghurs the most frequent type of land transactions between Uyghur land owners and Chinese tenants was *zumai* (selling tenure, *mai nianxian* 賣年限), which was not really different from the situation after the establishment of the province.

According to these Chinese tenants, in *zumai* transactions Uyghur landowners undertook the tax responsibility themselves before the Muslim Rebellion. But in return, these Chinese tenants had to pay a higher rent. The fixed sale price charged by the *Shanhouju* was 0.6 taels of silver per grape plant, while by private landowners it was 0.4-0.5 taels per plant annually. It means that a two-year *zumai* tenancy would cost more than a permanent sale. If what these Chinese farmers said was true, then either the amount of the purchasable land offered by the *Shanhouju* was really limited, or the tax and corvée responsibilities associated with the land were very heavy. Otherwise the Chinese immigrants would have directly purchased vineyards from the *Shanhouju*, instead of leasing from Uyghurs at such a high price.

⁴³⁷ XJA 15-4-313

It is interesting to see the economics laid out. If the tenant pays the tax, the *zujia* is lower. If the owner pays the tax, the *zujia* is higher. But materials are not enough for us to answer the question: what were the benefits of each to the respective parties? We can only guess that the reason for the Uyghur landowners to be willing to undertake the tax responsibilities perhaps lies in that when they raised up the land price, they could raised an amount that was higher than the tax and thus make more profit. But if they chose to let the tenants pay the land tax, they were able to avoid the risk of tax increases.

The magistrate's final comment on this report ordered that the Uyghur landowners pay the land and corvee tax: "it is alright to pay land tax and corvée according to the original contracts." This archive also shows that the practice of land transactions often contradicted the interests of native Uyghurs and Chinese immigrants and, at the local level, Uyghur *xiangyue* could not represent the interests of both his fellow Uyghurs and Chinese immigrants. That is why these Han and Hui Chinese asked the magistrate to install Han and Hui *xiangyue* for them. Actually most of the archives show that in Xinjiang *xiangyue* of different ethnicities were indeed appointed to serve different ethnic groups.

An 1878 *zumai* case shows us another way to deal with land tax. Among the 160 grapevines in the transacted vineyard, 120 plants were given to the lessee to manage; the other 40 plants were still managed by the landowners and the harvest was

to be used to pay land tax and labor service (*chai liang shiwu* 差糧事務).⁴³⁸ However, this seems to be an exceptional practice since only one example was found.

Besides land tax and labor service, another responsibility often came with the transaction of *karyz*, which was the maintenance of the *karyz* irrigation system. Every *karyz* required constant maintenance, which included clearing the canal runway, reinforcing the vertical shafts, and so on. The contractual documents under study suggested that these tasks were usually undertaken by Uyghur landowners, because they were more experienced and familiar with the professional skills required.⁴³⁹ Moreover, ultimately this infrastructure was a valuable commodity of their land. They could not afford to let these infrastructures be damaged or neglected.

In all, these contracts give a rough impression that prior to the Muslim Rebellion Turfan Uyghur landlords usually assumed the land tax and labor responsibilities themselves, while after the Muslim Rebellion the most commonly practiced pattern of *zumai* transactions put the lessees in charge of land tax, and landowners in charge of labor service. Why was there this change? It probably can be linked to the detrimental effect of war on people's confidence in their transaction with others from a different ethnicity. On the one hand, before the Rebellion, Chinese tenants paid higher prices to rent cultivation rights from Uyghurs in order to have the land tax paid by landowners. But during the Rebellion, all of a sudden land was taken

438 XJA 15-4-161

439 For instances, see XJA 15-4-231 and 15-4-353.

back by landowners and tenants were driven away. These Chinese immigrants immediately lost their cultivating rights on the land for which they had already paid a lump-sum rental price in advance, which included, moreover, the additional tax charge for the whole agreed upon lease period. It is highly likely that this experience taught the Chinese immigrants a lesson so after the Rebellion, they only signed short-term *zumai* lease and they took the responsibility for paying land tax themselves and paid it to the government on a year to year basis. In this way, had there been another rebellion and the *zumai* contract broken again by the Uyghur landowners, their lost would be reduced effectively. On the other hand, when Chinese tenants took on the responsibility of paying land tax, the Uyghur landlords also avoided the risk of tax increases.

Regular tenancy was widely practiced in Qing Xinjiang, not only between Uyghur tenants and Chinese “landlords”, but more often between Uyghur landlords and Uyghur tenants. Unlike regular tenancy, rental sale (*zumai*) only occurred between Uyghur landlords and Chinese tenants. As far as I know, *zumai* was not found practiced in other parts of China. In Turfan, no *zumai* contract was signed by two parties of the same ethnicity. The most remarkable difference between *zumai* and regular tenancy was that in *zumai* transactions the rent price of the whole leasing period was paid full in advance, and in cash, while a regular tenant only paid rent on an annual basis, in kind or in cash. Not even one *zumai* contract ever mentioned an annual rent.

Zumai transaction indicated a cautious relationship between the two trading parties. First of all, with the duration period specified and all rent pre-paid, the two parties did not have much space to change the terms and generate disputes. This is different from pledge sale, in which disputes often arose when the pledge holder tried to get the redemption earlier. On the other hand, *zumai* effectively prevented original landowners from evicting their lessees arbitrarily except when war broke out. Among Turfan archives concerning *zumai*, I find no case recording that a Uyghur landlord evicted his Chinese lessee before the agreed-upon rental period was over, except during the Muslim Rebellion when many Uyghur landlords simply seized the land after their Chinese lessees fled or died. Since all rent was pre-paid, this transaction was more like an outright sale; both parties were not able to terminate it arbitrarily.

Secondly, through *zumai* Uyghur landowners were able to acquire a sum of money and, in the meantime, reserved ownership of their properties. The use of rent deposits in the inland provinces was similar to this practice. In Sichuan, people used large rent deposits as a way to get capital out of the land to use for other purposes, while rents came in small amounts every year.⁴⁴⁰ The wide practice of *zumai* in Xinjiang indicates that most Xinjiang Uyghurs, even those badly in need of money, were not willing to lose their land permanently to Chinese immigrants. In the previous chapter, I have discussed that straight land sale was commonly practiced among Uyghurs. But Turfan archives show that Uyghur peasants seldom sold their land

⁴⁴⁰ Madeleine Zelin, “The Rights of Tenants in Mid-Qing Sichuan”, p. 523,

unconditionally to Chinese. Even when the family was in really bad shape, they only renewed their *zumai* contracts with Chinese lessees. While some of such contracts exceeded 100 years, the land was in theory to be returned to their descendants. Moreover, the land was to be returned automatically when the *zumai* agreement was over, no matter how bad the landowner's financial situation was. This dramatically differed from the practice of conditional sales.

Thirdly, the existence of so many *zumai* transactions also indicates the ambivalence of Chinese immigrants toward their life in this frontier area. On the one hand, they needed more autonomy in managing land and making a profit. On the other, they were not willing to invest in immovable assets, since most of them had no plan to spend the rest of their lives in Xinjiang. As *Xinjiang Zhi Gao* commented, “those coming from within the Pass (*guan nei* 關內) travel a long way (to Xinjiang), and mainly focus on making profit. They do not want to give up their asset in their hometown. They will go back to their hometown as soon as they save enough money (in Xinjiang). To purchase land or to bring up offspring here was beyond their consideration.”⁴⁴¹ Therefore, *zumai* was more suitable for them than regular purchase or tenancy.

Pledge sale practiced in Turfan

The Chinese farmers told the magistrate in the aforementioned 1880 court document that Uyghur landowners did not sell their land by conditional sale to

⁴⁴¹ Zhong Guangsheng, *Xinjiang zhi gao*, (Taipei: Cheng wen chu ban she, 1968), 2:21b.

Chinese immigrants. However, I found that the term *dian* 典, or *dianmai* 典賣 was frequently used in Turfan contracts and court archives, both before and after the Rebellion. So, did the Chinese farmers tell the truth?

The answer is yes. After scrutinizing all the Chinese legal archives, I found that in Turfan, *dian* or *dianmai* was actually used interchangeably with *diandang* 典當 or *dang* 當, which means simply “to pledge”. As we know, in *neidi*, conditional sale (*dianmai*) was a very important and widely practiced form of land sale. Contrary to the irrevocable sale (*juemai* 絕賣), the seller of the land reserved the right to redeem his land and/or ask for supplemental payment from the buyer when the land price increased (*zhaotie* 找帖). The original owners tried to make more profit from the sold land even after a very long time, which generated a lot of disputes. This was the reason that the Qing tried to limit the time during which land could be redeemed. In 1753, a substitute was issued providing that if a contract was made more than 30 years ago and did not specify redemption, even without including the words “irrevocable sale,” the property would be treated as irrevocable property and may not be redeemed.⁴⁴²

As a unique Chinese practice, conditional sale was seldom established between a Uyghur party and a Chinese party in Xinjiang, although the term *dianmai* was

⁴⁴² Kun Gang, Liu Qiduan etc, ed., *Qinding Daqing huidian shili*, (Shanghai : Shanghai guji 1995), vol. 755, p. 331

frequently used to indicate a pledge sale of land.⁴⁴³ I never found a case in which the pledgor tried to ask for a supplemental payment for the land he pledged out. When doing *dianmai* in the *neidi*, many Chinese sellers had no real intention to buy back the land, the reason for them to sign a contract of redeemable sale could simply be to reserve the right to make more profit when the land price increased. In Turfan, the Uyghurs who pledged their land really did not want to lose their land, especially to non-Muslims. When they claimed that they were going to redeem the land, they meant it. More so, they did not have the expectation of making more money from the land by threatening to redeem it.

Pledge sale (*diandang* or *dang*) was widely practiced between Uyghurs and Chinese in Turfan. It was a transaction whereby land or another commodity was turned over to the party advancing funds, with the understanding that the original owner was allowed to buy back the property. In Xinjiang, *dang* bears some similarities to *zumai*. In both practices land was turned over to the party advancing funds, for that party to cultivate or put to other use, while *zumai* was for a specified period of time and *dang* not necessary. The most prominent difference between *zumai* and *dang* were as follows. In the former money was paid as rent and was not refundable. In the latter, money was given to the landlords as a loan and was refundable. Therefore, a typical *dang* agreement usually contained this phrase— “the

⁴⁴³ In *neidi*, *dianmai* and *dang* were also often used interchangeably. In the Republican period, people used “*dian*” to refer to pledge sale because immovable property was not allowed to be pledged by the law. See Huang Zongzhi (Philip Huang), “Zhongguo lishi shang de dian quan”(Redeemable rights in Chinese history), *Qinhua Falu Pinglun*, 2006, vol.1, pp. 1-21.

land or other commodity would be redeemed upon the money's return (*yin dao hui shu* 銀到回贖)".⁴⁴⁴ Usually Turfan pledge sales did not have an agreed-upon time limit. Many transactions provided that as long as the original owner had enough money, he could redeem the land; if not, the party holding the land would maintain long-term control (*you yin shu qu, wu yin chang zhong* 有銀贖去，無銀常種).⁴⁴⁵

Whenever their financial situation allowed, Uyghur pledgors tried to redeem their land immediately and court archives show that the duration period of this type of land sales in Turfan could be very short.

In the spring of 1890, a Uyghur named Ruoziyasi pledged a vineyard to a Hui Chinese, Youbuer at a price of 700 *hu*⁴⁴⁶ of grape, which was 4.5 taels of silver. In the presence of a middleman, the two parties agreed that the land would be redeemed upon return of the price; otherwise Youbuer would manage the land continually. After only one year, Ruoziyasi had already saved enough money and returned to redeem the land.⁴⁴⁷ The market price of grapes that year had increased to 2 taels per 100 *hu*. So besides returning the 4.5 taels of redeemable price to Youbuer, Ruoziyasi gave him 9.5 more taels to redeem the vineyard. However, the pledge holder seemed to be unsatisfied with this profit, so he refused to return the land. In a separate case in 1886,

⁴⁴⁴ See, for instance, XJA 15-4- 843 and 15-5-537.

⁴⁴⁵ See XJA 15-4-843, 15-5-1181, and 15-5-1143.

⁴⁴⁶ *Hu* was a traditional unit of volume, one *hu* equals to 100 *sheng*.

⁴⁴⁷ XJA 15-5-1181.

Uyghur Bayisi pledged his land to Wang Junqing for 15 taels of silver.⁴⁴⁸ The deal had no redemption deadline and the land was to be redeemed upon the money's return. The next year Bayisi began to redeem his land. He paid Wang a total amount of more than 30 taels but still could not redeem the land.

It is regretful that no further documents about the above two cases were found. So we cannot know what happened next or if the magistrates intervened to make the holders of the pledge allow the redemption. What we do know is that both pledgors tried to redeem their land according to the current market price, instead of the original price. Even so, the Chinese pledge holders refused the immediate redemption. In both cases the original owners paid much more than the original price, but still failed to redeem the land successfully. It seems that these Chinese pledge holders either expected a more lucrative profit, or they regarded the pledge sale as a way to acquire manageable land, so that an immediate redemption was not welcomed.

Another case was about a more complex situation, in which the pledgor asked the pledgee to reduce the interest of the loan (to return part of the usage right of the property). In 1887 a Uyghur, Akenmu, pledged his water (irrigation) right by *karyz* of 4 days in summer and 6 days in autumn as well as a plot of land to a Chinese immigrant, Ma Huakui, for 150 taels of silver. They signed an agreement and promised that the land and water could be redeemed upon the return of money; otherwise the pledge holder would maintain long-term control (*yin dao hui shu, wu*

⁴⁴⁸ XJA 15-5-898

yin chang zhong 銀到回贖，無銀長種). Meanwhile, Akenmu worked on this land as Ma's tenant. After two years, through several middlemen, Akenmu asked Ma to return part of the usage rights for the irrigation water to him because he was desperately poor. At first Ma rejected this idea, but faced with the middlemen's repeated persuasion (*zaisan wanyan shuohe* 再三婉言說和), he finally conceded. In 1890, Ma gave "summer (irrigation) water" of one and a half days and "autumn (irrigation) water" of two days back to Akenmu. Meanwhile, the remaining water rights and land was again sold to Ma to manage for a total of 18 years (*mai nianxian shiba nian* 賣年限十八年) at the price of 250 taels. Since 150 taels had already been paid, Ma paid Akenmu 100 more taels.

Just as "*yin dao hui shu* 銀到回贖" indicates a pledge sale, the phrase "*nian man jia xiao* 年滿價銷", which means the payment would not be returned when the period is due, stood for *zumai* transactions. After the Muslim Rebellion, most *zumai* contracts used the latter phrase to assert that the rent paid by the lessee was not refundable.⁴⁴⁹ In the above case, Ma Huakui first purchased the land and water through a pledge sale, but after two years this transaction was changed into a *zumai* tenancy. Theoretically, since Akenmu was not able to redeem the property, Ma had the right to go on managing it. But in practice Ma paid 100 more taels to obtain the usage rights for a fixed period, which was 18 years.

⁴⁴⁹ See XJA 15-6-1499, and 15-6-1404.

In this pledge sale, the pledgee, Ma Huakui's right to manage the land and to have it irrigated by karyz for 4 or 6 days was actually the interest he acquired by lending the loan. When the pledgor, Akenmu asked him to "return part of the usage rights of the irrigation water", he was actually asked for a reduction of interest. Akenmu was not able to redeem the property. He actually had no ground to make such a request. The only reason is that he was too impoverished and badly in need of more irrigation water. Although Ma Huakui said that he "had no choice but to agree to return the irrigation rights", in fact he did not accept the reduction of the interest of the loan. In the end, the pledge sale was actually abolished and the two parties signed a new *zumai* contract. After paying 100 more taels, Ma Huakui gained a fixed time period to manage the land.

The above three cases give us an impression that in Turfan a pledge sale without a time limit on redemption was less reliable to guarantee long-term tenure than *zumai*. Some Uyghur pledgors tried to redeem the land very soon. Meanwhile, In Turfan Chinese immigrants were usually living among a large number of Uyghur neighbors and they might feel a lot of pressure from the neighborhood, especially from local Uyghur elites. For example, in this case, Akenmu asked several Uyghur "middlemen" to persuade Wang to "return" some water to him.

Some Chinese who purchased land from Uyghurs through *zumai* or *dang* did not cultivate the land themselves. The land (or vineyard) was cultivated by tenants (or sub-tenants), who were very likely to be local Uyghur peasants. This type of tenancy relationship, usually called *zudian* 租佃, or *dian* 佃, was very similar to that

practiced in the *neidi*. The tenant was required to pay rent annually to the landowner, which was dramatically different from in the *zumai* transactions. It is common in Turfan for Chinese to acquire land through *zumai* or pledge sale and then lease the land to Uyghur peasants to actually farm. This annual rent could be paid either in cash or in kind.

Actually to rent out the property one purchased by *zumai* could be quite lucrative. For instance, Wu Decai purchased through *zumai* a vineyard from a Uyghur at a price of 100 taels of silver for a period of 18 years. Meanwhile, the original Uyghur owner continued to manage this vineyard as his tenant. The annual rent Wu charged him was 30 taels, which means Wu could earn back his full investment within 4 years given no rent arrears. And the purchase price he paid in advance was still refundable.⁴⁵⁰ However, a Chinese “newcomer” had to take risks to rent out his land to local Uyghurs, especially the original owner of the property, since a below-average harvest would easily cause a poor Uyghur peasant to fall into arrears, and leasing land to Uyghur tenants made the Chinese land renter subject to pressure from the Uyghur community.

Turfan archives show that the original landowner had priority to cultivate the land he had pledged or leased out. For instance, in 1879 Hasenmu pledged his land to the Wan brothers. The property was said to be redeemable upon the return of money. For the first 6 to 7 years, the Wan brothers sub-leased the land to some unknown

⁴⁵⁰ XJA 15-5-934

tenants. Then in the eighth year, they leased it to a Uyghur tenant called Shawuti. The annual rent was 110 *jin* of cotton. Half a year later, the original owner, Hasenmu began to make trouble physically on the land and finally forced Shawuti to cease the tenancy with the Wans. Wanting to rent the land himself, Hasenmu promised to pay the same rent as Shawuti did. Finally the Wan brothers “had no choice but to lease the land to him since he is the landowner”. However, Hasenmu failed to pay the rent by the end of the first year and even brought a false claim against Wu brothers for seizing his land illegally (according to the archives). The magistrate later judged that the pledge sale was valid and Hasenmu should pay the rent.⁴⁵¹

This case shows that in Turfan the original landowner enjoyed a priority to be a tenant of the land he rented or pledged, although it is not a written rule. The priority does not seem to be absolute, since Hasenmu had to promise to pay an equal rent, but he did successfully forced the current owners into a new tenancy relationship with him, when they already had another tenant. Again, we saw a community pressure felt by Chinese immigrant here, local Uyghurs had their own way to make resistance and fight for their interests. By making trouble physically, Uyghur tenants (original landowners) were able to obstruct the arrangements of Chinese (conditional) landowners.

The Wans paid Hasenmu a lump sum to *zumai* his land. Then they let Hasenmu farm it and pay them rent. This was not the only case in which the land’s original

⁴⁵¹ XJA 15-5-537

owner cultivated it as tenants.⁴⁵² In these cases, Chinese immigrants did not cultivate the land themselves. They simply invested their capital in the land and received interest every year (Uyghur tenants' annual rent).

In all, both *zumai* and *dang* transactions between Uyghurs and Chinese involved a large amount of money, which shows that Chinese immigrants often came with capital. In Turfan, they played a role similar to moneylenders. Through both kinds of transactions they acquired arable land from Uyghur peasants. By managing the land themselves or by leasing the land out (often to the original owner), they were able to gain annual income.

To Chinese investors, *dang* was both more lucrative and unstable than *zumai*. *Zumai* could better guarantee Chinese purchasers' use right of land for a longer time. On the other side, to Uyghur "land providers", *dang* seems to imply a worse financial situation than *zumai*, since they might lose their land if they were not able to buy back it. This could explain why in Akenmu's case, when he was not able to redeem his land, he managed to replace the original pledge sale by a new rental sale.

To Uyghurs, both *zumai* and *dang* were means by which they could acquire a large source of cash immediately. But why were they so badly in need of money? Turfan ting documents show no clues indicating that Uyghurs invested the money they made from *zumai* or *dang* in any type of business. They either put the money into some nonliquid forms of wealth, or were really impoverished.

⁴⁵² See also XJA 15-5-934

After the establishment of Xinjiang province, the state tried to ease Uyghur peasants' tax burden by reforming the tax system. It was said that from then on tax was calculated in Xinjiang based on the acreage of the land and no meltage fee (*hao* 耗 or *huohao* 火耗 or *haoxian* 耗羨) was levied.⁴⁵³ However, due to the corruption of local level officials (both Chinese and Uyghur) as well as the deteriorating fiscal situation of the government (both central and local), Xinjiang Uyghurs actually still suffered from various kinds of regional taxes, corvees, and other illegal charges besides the “regular taxes” (*zhengxiang* 正項) levied by the state.⁴⁵⁴ Many Uyghur smallholders were vulnerable. In the spring they were already in need of money to pay the land tax and by the autumn they were again left without resources after repaying their debts.⁴⁵⁵ As we have noticed in some Turfan cases, entangled in a web of debts, some Uyghur peasants had to renew their *zumai* contract with the Chinese tenant repeatedly through the help of middlemen. Moreover, as I have already mentioned, the reason some Uyghurs sold their land to a Chinese through *zumai* or *dang* was because they were in debt to him. Therefore, in Turfan *zumai* and *dang* displays a relationship of dependency based on economic inequality.

⁴⁵³ Liu Jintang, *Liu xiangqin gong zou gao*, vol. 12, p. 36. About the meltage fee, see Madeleine Zelin, *The Magistrate's Tael: Rationalizing Fiscal Reform in Eighteenth Century Ch'ing China*, (University of California, 1984), pp. 72-115.

⁴⁵⁴ Xinjiang Jianshi, vol 2, pp. 258-261.

⁴⁵⁵ Beller-Hann, *Community Matters in Xinjiang, 1880-1949*. p. 131

Economic Conflicts between Uyghurs and Chinese

Lawsuits about *zumai* after the establishment of province

Several Western observers noticed that in late Qing Xinjiang the ethno-religious boundaries between Chinese (both Han and Hui) and Uyghurs were carefully maintained and, in bazaars and other public places, the two groups of people had only very limited superficial contact and deep distrust toward each other at the bottom of their hearts.⁴⁵⁶ Local Chinese archives also show that except for necessary economic transactions, Chinese immigrants and Xinjiang Uyghurs had their separate social spheres. Very few examples of intermarriage between Han and Uyghur (or Hui and Uyghur) have been found. Among criminal cases, I did find one or two concerning sexual relations between a Uyghur and a Chinese, but even those entailed economic transactions — the purchase of sex.

Despite the clearly maintained ethno-religious boundaries and an underlying feeling of “distrust,” Chinese and Uyghurs were engaged in various economic transactions with each other, such as the trade of land and real estate, as well as money lending.

Although both Chinese and Uyghurs tried their best to avoid disputes when trading with each other, a dramatic historical break – during the Muslim Rebellion and the Emirate established by Yaqub *Beg* from 1864 to 1877 – caused many land disputes once the Qing reconquered this area. Among the Turfan *ting* archives, a large

⁴⁵⁶ See Mildred Cable and Francesca French, *The Gobi Desert*, (London: Hodder and Stoughton Limited, 1942), pp.190-191, and Ildiko Beller-Hann, *Community Matters in Xinjiang*, pp 70-71.

number of civil disputes from the early Guangxu reign were about the seizure of Han or Hui lands by Uyghur inhabitants during the Rebellion and Yaqub's reign. During the Rebellion and Eastern Turkestan's decade of independence from the Qing, most Chinese living in Turfan were ousted or killed. Their lands, which were usually acquired through *zumai*, were repossessed by the original Uyghur landlords, but it was also possible they were occupied by Uyghur sub-tenants⁴⁵⁷. After the turmoil and the reconquest, Chinese survivors came back and the first thing they did was to reclaim their land rights. Aggrieved parties had to bring their case to the magistrate's court. That is why we see in Turfan *ting* archives that the court handled large numbers of civil disputes of this type around the 1880s.

Due to the regulation of Xinjiang Archives, I was only able to read and copy forty seven cases of type (which were randomly chosen). Unfortunately, among them many were only petitions or did not mention the result of the dispute. Cases in Table 2 were those with the result recorded.

Table 2 Results of *zumai* disputes after the Muslim Rebellion

Archive	Original <i>zumai</i> period (in years)	Actual managing time (in years)	Compensation to be paid by Uyghur landlord	Land went to	Dispute resolved by
15-4-14	42	7	60 taels of silver	Uyghur landlord	Court mediation
15-4-14	48	10	70 taels of silver	Uyghur landlord	Court mediation
15-4-40	30	4	10 taels of silver	Uyghur landlord	Court mediation

⁴⁵⁷ XJA, 15-8-2505

15-4-69	Unknown	6	None	Confiscated by the government (because neither party had enough evidence)	Court decision
15-4-88	32	4	None	Chinese lessee (for him to cultivate until the period is due)	Court decision
15-4-19 2	40	8	150 taels of silver	Uyghur landlord	Court mediation
15-4-23 5	107	2	250 taels of silver	Uyghur landlord	Private negotiation
15-4-32 8	Unknown	Unknown	None	Chinese lessee (for him to cultivate until the period is due)	Private negotiation
15-4-32 8	Unknown	Unknown	None	Chinese lessee (for him to cultivate until the period is due)	Private negotiation
15-8-25 05	Unknown	Unknown	None	Chinese lessee (for him to cultivate until the period is due)	Private negotiation

Of the above 9 cases for which we have a clear magistrate's decision or result, it seems that the usually ruling was that the land be returned to the original landlords, as long as they paid monetary compensation to the lessees. The only exceptional case was recorded in Archive 15-4-88 but this case is somewhat complicated and unique.

In 1862 a Chinese tenant, He Quan, rented a vineyard from a Uyghur, Shawuti, through *zumai*. After one year He sublet the garden to two other Chinese, Zhang and Wu, and then left for another place to make further investments. In the course of this time, the Rebellion took place and He was killed in the chaos. After the Rebellion, before He Quan's younger brother He Yuan went to the magistrate to seek justice on behalf of his widowed sister-in-law, one of the subtenants, the late Mr. Wu's widow, Wu Shi, had already gone to Shawuti and privately negotiated eight more years to

cultivate the garden. When He Yuan brought this case to the court, the magistrate decided that He Quan's wife could cultivate the land for a certain period after Wu Shi's tenure of cultivation was over (document is in very bad shape and the characters are hard to see). Interestingly, the magistrate stated that he had originally meant to award the garden to its original owner (Shawuti) and let him pay compensation to the lessee. However, since Shawuti had already made an arrangement with Wu Shi, which indicates that "Shawuti may have purposes (other than keeping the vineyard under his own management) (*huo lingyou ta tu* 或另有他圖)," he made this very decision to let Mrs. He manage the garden.

Therefore, all these cases, including the above one indicate that to uphold the landlord's ownership of the property was an underlying principle for Chinese magistrates to resolve this type of land disputes. If Chinese tenants who had lost their tenure during the Rebellion went to the magistrate's court, they could most likely only get part of the rent price back. They stood a better chance to regain their cultivation rights through private negotiation with the Uyghur landowners.

Why did the magistrates not follow the contracts and order that the land be managed by Chinese *zumai* tenants until the original agreed-upon *zumai* period was over? It seems to me the fundamental reason lies in the state's overriding policy decision to make sure that indigenous landowners still got land to cultivate during the process of *gaitu guiliu* so that the frontier society could continue to be stable. In addition, since Han/Hui—Uyghur relations had been badly jeopardized during the chaos, to restore a tenancy relationship in which the two parties had already ended up

at the court might cause more troubles. Moreover, it was probably easier to enforce the judgment of monetary compensation than to force the unwilling Uyghur landlords to leave the land.

At the same time, a bias inherent in the Chinese land tenure system can also explain the decisions of Xinjiang magistrates. As Madeleine Zelin noted in her study of Baxian land tenure disputes, a tenancy contract in itself did not offer security of tenure.⁴⁵⁸ As long as the property owners paid taxes to the state, their claim to ownership was always recognized and protected. That is probably because ownership right represented a relationship between an individual and the state, while tenure rights existed between two private parties. As we know in other parts of China, a landlord could relet his land to another party whenever the current tenant was in arrears.⁴⁵⁹ A landlord could easily evict the current tenant as long as he returned the rent deposit.⁴⁶⁰ In Baxian, it is infrequent that tenants attempted to have evictions overturned and it is even more infrequent that such a claim was upheld by the magistrate. The Xinjiang magistrate's judgment on disputed land of *zumai* tenancy also followed the principle of giving priority to ownership rights. As the tenancy contracts promised the tenant the refund of his deposit but did not guarantee security

⁴⁵⁸ Madeleine Zelin, "The Rights of Tenants in Mid-Qing Sichuan", p. 523,

⁴⁵⁹ Wang Fuchang and Luo Li, "Ming Qing yilai Min Yue Gan bian zudian zhidu de jibian jiqi shengtai genyuan", *Nongye kaogu*, no. 1, 2009, pp. 74-94. .

⁴⁶⁰ Madeleine Zelin, "The Rights of Tenants in Mid-Qing Sichuan", pp. 510-514.

of tenure in inland China,⁴⁶¹ Xinjiang magistrates simply ordered a proper amount of rent price be returned to the Chinese *zumai* tenants.

Legal cases show that Chinese magistrates followed the same rule when dealing with cases of pledge sale. In Turfan, a Uyghur, Shawuer pledged his land to Wu Decai at a price of 100 taels of silver. After two years, Shawuer sued Wu at the magistrate's court saying that he only paid him 38 *taels*. Wu explained that this was because Shawuer's younger brother owed him a debt. Finally the magistrate ruled that Wu should return the land to Shawuer, Shawuer should return the price he had already received and his brother had to pay his debt immediately.⁴⁶² Again, in this case the magistrate was eager to protect the original owner's land rights first.

In general, Chinese magistrates' decisions on economic disputes between Han/Hui and Uyghurs seem to be practical and impartial. Their attitudes were not influenced by the two parties' ethnicities. To restore the normal social order and resume economic production in Xinjiang were their ultimate goals. The late Qing central government, standing behind these magistrates, does not appear to have had any intention to take "revenge" against indigenous Uyghurs who were once subject to another regime. Moreover, although following the Manchu restoration in the wake of the Yaqub episode, Han officials replaced Mongol and Manchu officials in most of the administrative positions of Xinjiang, local official materials do not give us the

⁴⁶¹ Ibid, pp. 510-514.

⁴⁶² XJA, 15-5-934.

impression that Chinese magistrates showed partiality toward Han immigrants when handling their economic disputes with native groups. The attitudes of these new Han *ambans* toward disputes between Han and non-Han commoners were not very different from their Manchu or Mongol predecessors.

After the Qing restoration, the region continued to retain a relatively large degree of autonomy. A more extreme case shows that even some of those who had served the Yaqub regime as lower-ranking officials were not punished and by and large kept their privileges and positions.

In 1875 a Han Chinese widow, Qizhang Shi, filed a petition in order to get back a *karyz* her late husband had built. She told the magistrate that in 1847 her husband and Sun Zhong together built the *karyz* and had been paying land tax on it ever since. During the Rebellion, both her family and Sun's were persecuted by two "evil Uyghurs," Luozi bahai, a *yuziboshi* 魚子伯什⁴⁶³ at that time, and Adier, who was known by Uyghurs as "*asibangban* 阿斯幫辦"⁴⁶⁴. The two were alleged to have killed more than ten persons of Qi's and Sun's households, seized all their wealth as well as the *karyz*, and shared them between themselves. "This was known by every Han and Uyghur living in Turfan, and the record that many people sued them could be found in government archives." However, since Adier was now the *xiangyue* of the

⁴⁶³ The Chinese *Yuziboshi* is very likely to be *yuzbasi* in Chagatai language, which is a Turkic term meaning the head of a hundred, whose job was to collect taxes from all landowners and maintain social order in his administrative district. See Ildiko Beller-Hann, *Community Matters in Xinjiang*, p. 121.

⁴⁶⁴ Here the Chinese "*asibangban*" probably means *onbasi*, which is a Turkic term meaning the head of ten. *Ibid*, p. 121.

county and Luozibahai the *yuzbasi*, “their money can get round all obstacles (*qian tong ge lu* 錢通各路)”, she had no alternative but to seek help from the magistrate.⁴⁶⁵

At the end of Qizhang Shi’s petition, the magistrate wrote his decision in red ink: “It has been found out that the *karyz* had been sold by the *Shanhouju* as property left without an inheritor (*juechan* 絕產).” If this is true, meaning that the *karyz* had been confiscated by the *Shanhouju*, then why did the old woman have no idea of this? Why did she not go to the *Shanhouju* to claim her property before it was sold to others? No more materials exist to answer this question. The only thing we know is that she lost the *karyz* during the Yaqub period and was unable to take it back after the Qing restoration. Moreover, in his comments the magistrate did not say a word about Luozibahai and Adier’s criminal offences accused by Qizhang Shi. He did not promise to punish them, neither did he declared this was false accusation.

If what Qizhang Shi said was true, the two lower-ranking indigenous Uyghur were hardly influenced by the alteration of regimes. Through the Yaqub reign to the Qing reconquest, despite slight changes to their official titles, the actual power and privileges they held in local society largely remained the same. Although they killed many Chinese during the Yaqub period and were sued after the restoration by many people (*zhong kong yi deng* 眾控伊等), the Qing rulers chose to let bygones be bygones and they had no intention to thoroughly investigated what happened during the chaos. It seems that these new Chinese magistrates only did the minimum they

⁴⁶⁵ XJA 15-4-227

had to do to restore local order and the economy. They had to start the agricultural production in this area as soon as possible, so they carefully handled civil cases related to the local economy, especially those relevant to land rights. More so, the indigenous administrative hierarchy was still useful for Qing governance in Xinjiang since the principle of non-interference of local practices still by and large persisted. Therefore, Luozibahai and Adier did not need to pay the price for what they had done during the period of turmoil.

Cases about moneylending

When discussing the land transactions between Uyghur indigenes and Chinese immigrants, I have mentioned that both *zumai* and *dang* indicate that the Chinese immigrants often came to Turfan with capital. The role they played in these transactions was very much like moneylender. In addition to their participation in land transactions Chinese also lent money to Uyghurs directly and extracted very high interest. Since the lending of money for interests (*riba*) was prohibited by Qur'an, Chinese were able to fill a large gap in the economic landscape that was barred to indigenous Muslims.

James Millward suggests that during the first century of Qing rule in Xinjiang, Chinese merchants had been active in the business of moneylending and this could be a source of ethnic conflict.⁴⁶⁶ Chinese materials dating after the 1880s indicate that

⁴⁶⁶ James Millward, *Beyond the Pass*, pp. 208-211.

this situation continued after the re-conquest, although the Chinese held no monopoly over this trade.⁴⁶⁷ It was very common for Xinjiang Uyghurs to use the services of Chinese moneylenders. I found several civil disputes submitted to Chinese magistrates concerning Chinese who loaned money to Uyghurs at high interest rates.⁴⁶⁸ Two cases record specifically that the Chinese moneylenders charged Uyghurs an interest rate of 6 percent per year, rates which according to the magistrate, even violated Chinese law. As he noted “there is a rule that the interest on private loans cannot surpass 3 percent and the total interest can never surpass the principal.” Here he was citing Article 149 in the “Laws relating to the Board of Revenue” (*hulu* 戶律) of the *Great Qing Code*.⁴⁶⁹

However, in practice few usurious moneylenders were reported and punished. According to a memorial submitted to the Guangxu Emperor in 1892 by Xinjiang governor, Tao Mo, there existed a lot of Chinese usurious moneylenders in Southern Xinjiang and this caused serious inter-ethnic conflicts.

Please allow us to punish those Chinese who exploit Uyghurs by lending money to them at heavy interest according to the regulation of inland civilian offenses of transacting with and lending money to

⁴⁶⁷ Ildiko Beller-Hann notes that in the first half of the twentieth century, besides Chinese, pawnshops were also run by Turkic and Indian owners. See Ildiko Beller-Hann, *Community Matters in Xinjiang*, p. 99.

⁴⁶⁸ XJA, 15-4-698, 15-5-949 and 15-6-1638.

⁴⁶⁹ William C. Jones (trans.), *The Great Qing Code*, (New York, 1994), p. 161.

ethnic people...Uyghurs are too stupid (*yu 愚*) to calculate (interest)...Those moneylenders are all outrageous ruffians. They are retired soldiers or former *yamen* scribes (*ding shu 丁書*), who bully the poor and the fool deliberately. In the meanwhile, the runners (*dingyi 丁役*) and translators (*tongshi 通事*) of each *yamen* also make profits out of this and cover for one another. In 1890 a group of Turfan Uyghurs led by Abudu Reyimu attacked Chinese exclusively and burned their houses and caused 36 deaths. This incident was also caused by the long accumulated rancor between moneylenders and borrowers...According to the legal code, inland civilian were prohibited to communicate with or lend money to ethnic people (*neidi minren gai buxu yu tusi deng jiaowang jiezhai 內地民人概不許與土司等交往借債*), The offenders should be punished as those who secretly cross the national border (*touyue fanjing 偷越番境*), and the native Miao people who borrowed money (from Chinese) should be punished in the same way.⁴⁷⁰

The emperor replied to this memorial: “the situation of Southern Xinjiang Uyghurs is similar to that of the native Miao (*tumiao 土苗*). It is reasonable to handle (them) in a similar way.”⁴⁷¹

⁴⁷⁰ XJA 15-4-698 and GZD, Guangxu reign, vol. 7, p35.

⁴⁷¹ GZD, Guangxu reign, vol. 7, p35

The incident mentioned by Governor Tao Mo was also called the Yanghai Incident (named after the village where it took place) in Chinese archives. In the Turfan area it was the most elaborate and tragic inter-ethnic conflict that happened after the Qing reconquest. The story was told in several other documents, according to which the two leaders of the armed attack, Abudu Reyimu and Maimaiti Reyimu, were both “notorious bandits” (*zhuming guan zei* 著名慣賊). In 1889 a Chinese *xiangyue* named Xu and a merchant named Zhao had asked the Turfan *ting* to oust them, after which Abudu and Maimaiti rioted and killed many Chinese including the Xu family out of revenge.⁴⁷² The 26 Uyghur “bandits” were finally caught by Qing troops and Uyghur *Jasak* Mamute. They were sentenced to death by slow slicing in public, charged with the crime of treason (*panni* 叛逆).⁴⁷³

Tao Mo’s memorial to the emperor, however, seems to be the only material that associates this inter-group violence with Chinese moneylenders. Apparently Tao did not want to conceal the sharp inter-ethnic hostility from the emperor. He especially condemned the retired soldiers, *yamen* runners, scribes as well as translators (including both Chinese and Uyghurs), who were notorious for abusing their power and bullying the poor locals for profit. It is widely known that many Chinese merchants who were doing retail commerce also engaged in money lending, but Tao did not explain how these minor officials and retired soldiers who did not hold high

⁴⁷² See GZD, Guangxu, vol. 6, p227, XJA 001385, 001473, and 001506.

⁴⁷³ XJA, 001473. The slow slicing (*lingchi*) was the most severe punishment in Qing law.

positions with good salaries were able to loan out large amounts of money to the poor Uyghurs. James Millward's finding might help us to understand this situation. According to him, local bureaucrats in Xinjiang became involved in usury by loaning money from the public money bureaus at a relatively low interest to rich merchants, who re-loaned this money to pawnbrokers or to the poor directly at very high interest rates.⁴⁷⁴ The people who were involved in usury and "bullied the poor and the foolish" might have been a far larger group of bureaucrats or semi-bureaucrats than those condemned by Tao Mo before the emperor.

Contracts and the role played by the state

The Yanghai Incident indicates the severity of inter-ethnic conflicts in Xinjiang that could be the result of economic disputes in activities such as money lending. However, the hostility and distrust between Chinese and Uyghurs did not prevent the two groups from entering into various forms of contractual relations.

In *Kinship, Contract, Community, and State*, Myron Cohen introduces the "overwhelming" use of "white contracts" (contracts not registered with the county government) in contrast to a small minority of "red contracts" (contracts registered with the county government) in Minong, Taiwan, whose residents also rarely turned to the court of law to resolve their economic disputes. These facts indicate that "recourse to the state in the protection of contractual agreements was powerfully

⁴⁷⁴ James Millward, *Beyond the Pass*, pp. 210-211

subordinate to reliance on social ties” and the contractual documents of Minong were “far more social than legal”.⁴⁷⁵

At variance with Cohen’s observation in Minong, I found that red contracts played an important role in Xinjiang dwellers’ economic transactions. In Xinjiang, the red contracts kept in the Turfan *ting* archives or mentioned in other legal documents seem to be more than “a small minority” compared to the number of white contracts. In the previous chapter, I discussed Uyghurs who were willing to have their contracts registered by the Chinese county government. As for the contracts signed between a Uyghur party and a Chinese party, red contracts also existed widely.

Among my findings at the Turfan *ting* archives was a list of all contracts of land-related transactions which were taxed and registered by the Turfan *ting* government office in the first ten months of Guangxu 15 (1889). As in the *neidi*, after collecting the tax, the government would affix a tag, called a “contract tail” (*qiwei* 契尾), to each contract in order to show official recognition and protection of the property transaction.. There were a total of 139 entries in this list, among which about 60 contracts were signed between two Uyghur parties; about 47 between a Uyghur party and a Chinese party; and the rest were mostly signed by two Chinese parties.⁴⁷⁶ All contracts recorded in this list were on their face red contracts. Another archive

⁴⁷⁵ Myron Cohen, *Kinship, Contract, Community, and State, Anthropological Perspectives on China*, (Stanford: Stanford University Press, 2005.) pp. 133-134, and Myron Cohen, “Writs of Passage in Late Imperial China”, p. 48

⁴⁷⁶ XJA, 15-5-908.

entry recorded that the outgoing Turfan *ting* magistrate, Master Zhang, passed on 299 contract tags to his successor, Master Fu. It was said that when Zhang assumed his new position, he accepted 439 tags from his predecessor, and issued 140 tags during his whole tenure.⁴⁷⁷ The Master Zhang mentioned in this archive refers to Zhang Qiyu, who had been a Turfan *ting* magistrate for about 14 months, from the tenth month of Guangxu 14 (1888) to the first month of Guangxu 16 (1890).⁴⁷⁸

When Xinjiang first became a province, the Qing central government required the registration of all irrevocable sales of land or other real estate with the local government office and the payment of tax within one year. Conditional sales longer than 10 years were also to be registered and taxed. In 1735, this policy was adjusted such that conditional sales no longer needed to be registered.⁴⁷⁹ As discussed above, when Chinese immigrants arrived in Xinjiang to make a living, a large percentage of them would choose to rent (*zumai*) land from Uyghurs for a specified period. Although we do not have precise data quantifying the annual influx of Chinese immigrants in Turfan, the area of land they purchased from local Uyghurs, or the number of Uyghurs who bought land from Chinese owners, the above two archives about contract tags do give us a sense that when Chinese and Uyghurs made

⁴⁷⁷ XJA, 15-5-977

⁴⁷⁸ Cao Shangting and Zha Xiangjun, “Tulufan zhiliting yunzuo shi goulue” (Studies on the operation of Turfan prefecture), *Xinjiang daxue xuebao*, vol. 33, no. 5, 2005, pp. 45-51.

⁴⁷⁹ *Qingchao wenxian tongkao* (Qing dynasty general history of institutions), (Taipei: Xin xing shuju, 1965), vol. 31, *zhengque* (taxation) 6, p. 5136.

unconditional land sales with each other, many of them were willing to pay the transaction tax and officially register their contracts in order to receive state protection over their property rights.

In the aforementioned “taxed contracts list” (*qishui hao bu* 契稅號簿) which was apparently drawn up annually by the local government, a brief note was taken for every single registered transaction, including the name of the transacting parties, the place and type of land or real estate in question, the agreed rent/ price, as well as the name of the guarantor, which was usually the *xiangyue*. This record, though very brief, contained the most important information about the sale and thus was a powerful proof of one’s property rights. It could be useful for replacing lost contracts, clarifying ambiguities, or identifying a forged contract. This might partly explain the low frequency of disputed irrevocable land sales found in the Turfan *ting* court archives.

Besides irrevocable sales, many more land-related transactions between a Uyghur party and a Chinese party were pledge sales or *zumai* tenancy. Also, disputes about the latter two types constituted the majority of the Turfan *ting* magistrate’s civil caseload. As we have seen, in order to protect their property rights when making these kinds of transactions, Chinese and Uyghurs often wrote and signed a bilingual contract with each other. Among these contracts signed by parties of different ethnicities, more than half are bilingual, typically with the agreement (between Uigher-Chinese parties) rendered in Chagatai on the left side of the document and in Chinese on the right. Sometimes the two contracts would be first written in Chinese

and Chagatai on separate slips of paper by local legal professionals, then pasted side-by-side onto a single bilingual contract.⁴⁸⁰ In some cases when the two parts would be written on one piece of paper and there was no space for the signatories to sign their names in Chinese on the Chinese side, they often signed on the left side beneath the Uyghur contract.⁴⁸¹ Signatories usually wrote and signed two copies of a bilingual contract and each would be kept by one party to the transaction. This rule of “each carries one copy of the contract” (*ge zhi hetong yizhang* 各執合同一張) would even be written clearly in the middle of the bilingual contract.⁴⁸² As with regular Chinese contracts, the middlemen and amanuensis all needed to sign the contract and the executors had to put their fingerprints on it. The Uyghur part of a bilingual contract would sometimes be affixed with *akhunds’ maor* seals,⁴⁸³ but for the most part these were not included.

Certainly when describing the same transaction, the content of the two parts written in different languages in a bilingual contract should be the same. But on occasions one or two details were recorded differently, which could lead to serious disputes. When there was such a mistake, the executors would have to go to the magistrate’s court to seek for arbitration.

⁴⁸⁰ For examples, see XJA 15-4-161, 15-5-949, and 15-8-2505.

⁴⁸¹ For examples, see XJA 15-4-231 and 15-4-355.

⁴⁸² For example, see XJA 15-4-335.

⁴⁸³ For examples, see XJA 15-8-2505 and 15-7-2361.

Before the Muslim Rebellion, four Uyghur brothers – Maimaitieling, Maimaiyasi, Shawuti, and Ailibahai – sold (*zumai*) a garden containing 430 grapevines to a Chinese man, Yang Shuji, for an unmentioned period. When the Rebellion broke out, Yang escaped to the South. In 1878 Yang returned to reclaim his property. The four Uyghurs restored Yang's cultivation rights on the garden for a period of 30 years. Subsequently, Yang and his son, Shouren, bought additional cultivation rights in three contracts totaling 25 years from Maimaitieling, Shawuti and Aiyibahai. In this way Yang and his son were allowed to manage the garden from 1878 to 1933 (a total of 55 years). In 1903, Maimaiyasi brought a lawsuit to the Turfan *ting* magistrate, Master Liu, because he thought the 30-year contract had some problems and it was unfair for him to be excluded from the additional 25-year transaction. When Master Liu investigated the old contracts, he found that in the first 30-year *zumai* transaction, the Chinese contract differed from the Uyghur one. The former contract stipulated that the buyers and the sellers agreed to collectively cultivate (*huozhong* 夥種) the vineyard in the first year but responsibility for the remaining 29 years fell solely on the buyers, while the latter contract provided that both parties should collectively cultivate the grapes for the entire 30 years. The magistrate then ordered that the 30-year *zumai* contract be reduced to 15 years and cultivation rights given to the Yangs. As a consequence, the total period that the Yangs could manage the garden shrank to 40 years.

However, Maimaiyasi was not satisfied with the judgment. The following year he brought the lawsuit to the provincial government, but it was sent back to the *ting*

court. The new magistrate, Master Fang, checked the brothers' family division document and found that Maimaiyasi acquired 87 grapevines from the garden concerned. He then ordered Yang Shouren to set aside 87 grapevines from the vineyard for Maimaiyasi to cultivate and, as compensation for Yang, the three Uyghur brothers were to extend 5 more years of cultivation rights to Yang for free.

Again, Maimaiyasi did not accept the judgment. He sued Yang Shouren for occupying one of his houses built in the vineyard in question. Master Fang then asked Yang to return the house to Maimaiyasi. But Yang refused because "(if we) live together in one garden, there will surely be conflicts". So the magistrate ordered that Yang should pay Maimaiyasi 60 *taels* of silver as rent for the house for 20 years. Additionally, the three Uyghur brothers should give Yang one more year to manage the vineyard as compensation.

For the third time, Maimaiyasi rejected the magistrate's judgment and sued again because he thought the 87 grapevines Yang returned to him were not good enough. This time, the magistrate scolded Maimaiyasi for being "a vexatious litigant and extremely greedy" (*diao jiao chan song, tan de wu yan* 刁狡纏訟, 貪得無厭). But after the mediation and persuasion of two Chinese neighbors and two *akhunds*, Yang agreed to return 4 more grapevines to Maimaiyasi, who finally accepted this arrangement. New Chinese and Uyghur *maor* contracts were signed under the supervision of these neighbors and *akhunds*. Each party would keep one copy of the final (bilingual) contract, and one more copy was to be saved by the court as a permanent, official record.

It is worth noting that the complex story recounted above was all based on the content of the aforementioned final contract. It was common practice in Qing China for the whole process of a prolonged civil case and the magistrates' decisions to be memorialized in a contract.

At first sight, it seems to be quite understandable for Maimaiyasi to bring the case to court because the difference in the terms of the bilingual contracts did exist. However, after a close reading of the documents, we discover that Maimaiyasi filed his petition quite late — after the contract had been in effect for 22 years. Why did he not raise an objection at the beginning of the second year of the *zumai* tenancy, when the Yang family began to cultivate the garden by themselves? Moreover, why did the other three Uyghur brothers not try to correct the possibly “false” arrangement in order to manage the garden together with the Yangs?

Unfortunately from the data now available it is impossible to figure out which contract recorded the “true” agreement made by the two parties in 1878. All previous outdated contracts were destroyed as was customary upon the conclusion of the case and the new, final contract was signed in 1904. Since all four Uyghurs did not object to the actual arrangement until 22 years later, it seems to be more possible that the two sides did agree to cultivate together for only the first year when they made the deal. Few *zumai* contracts stipulated co-cultivation by buyers and sellers, and the Uyghur contract might be wrong but had gone unnoticed by the executors. Certainly there could be more complex possibilities and explanations. Nonetheless, what we do know for sure was that crucial differences could appear when people drew up

bilingual contracts, resulting in executors turning to the court of law in an attempt to overthrow the current arrangement even if it was in accordance with what they had agreed upon at the very beginning. As long as inconsistencies existed in authentic signed and witnessed contracts, the magistrate had to take action. In this case, the Chinese magistrate certified the authenticity of the original contracts and made sure the differences did exist, after which he simply altered the *zumai* arrangement, from what the Chinese contract suggested into that of the Uyghur one. It seems that for both Chinese magistrates Liu and Fang, a contract drawn up properly naturally became a valid proof of property rights, regardless of whether it expressed the original agreement made by every party before it was written on paper.

Maimaiyasi was obviously good at using every kind of written understanding to protect his interests. Besides the Uyghur contract of *zumai* arrangement signed with Yang Shuji, the family division contract signed by the four Uyghur brothers was also used by Maimaiyasi twice to claim his property rights over the vineyard. By using the *fendan* 分單 the first time he successfully acquired his cultivation rights of 87 grapevines from the magistrate; the second time he confirmed his ownership of that old house and managed to receive rent from Yang. All the three times, the Chinese magistrates tried to enforce the authentic Uyghur contracts unreservedly.

The court did not reject Maimaiyasi's lawsuit until the fourth time, when his appeal had no support from any written agreement and Master Fang finally berated him for being a "vexatious litigant". This time, the local authorities, such as Uyghur *akhunds* and Chinese county elders, showed their mediation power and helped to

finalize the dispute with a new bilingual contract. The *akhunds* affixed more than five *maor* marks on the contract. Again, this case shows not only the close cooperation between Chinese *yamen* and Uyghur religious courts but also the important role the latter played in mediating inter-ethnic civil disputes during the last several years of the Qing dynasty.

Also, in this case as in many others, Xinjiang commoners, such as Maimaiyasi, showed a dramatic proficiency in making use of official legal services to fight for their own interests. Every time Maimaiyasi felt he was wronged, he went directly to court, first to the prefecture court, then the Qing provincial government.

In sum, besides revealing a lot of other meaningful information, this case eloquently shows how useful a valid contract could be to protect one's property rights. It confirms Madeleine Zelin's argument that in prewar China the written contract was the main source of property rights.⁴⁸⁴

I have discussed the important roles played by contracts in both Uyghur and Chinese legal contexts in previous parts of this dissertation. Now we noticed that besides drawing contracts in their mother language, many Xinjiang dwellers also managed to draw contracts in foreign languages when dealing with people from different ethnicities.

⁴⁸⁴ Madeleine Zelin, "A Critique of Rights of Property in Prewar China," in Madeleine Zelin, Jonathan Ocko and Robert Gardella, eds. *Contract and Property Rights in Early Modern China*, (Stanford: Stanford University Press, 2004), pp. 17-36.

Ever since the 1759 conquest, the Qing's imperial control in Eastern Turkestan was hardly steady. Lots of uprisings, crises, and invasions happened in this place. The 1860 Muslim Rebellion finally led to the establishment of an Islamic regime and the Qing had to reconquer this area in the 1880s. Due to this political instability, for Xinjiang dwellers the safer way to play the game was to make their written documents of transactions acceptable by both Qing and Islamic authorities, so that no matter which side ruled the area, their transactions could always be protected. This can explain why many Chinese immigrants were willing to have their economic transactions endorsed by Uyghur religious authority by signing and keeping Chagatai contracts, though they did not pay any attention to the Uyghur legal system or social customs in other aspects of their social life. In extreme cases, they even signed only Chagatai contracts. For instance, during the Muslim Rebellion, a Hui Chinese, Jin Nongguan, sold his land to a Uyghur and signed only a Uyghur contract (*chanyue* 纏約) with him before escaping.⁴⁸⁵

When talking about the use of written contractual documents in Minong, Taiwan, Myron Cohen suggests that contracts in Minong were more social than legal in nature, as their legitimacy was established first and foremost through the participation of social intimates, and protected by social connections.⁴⁸⁶ Jonathan Ocko discusses further that there could be two types of contracts practiced in two

485 XJA 15-7-2499

486 Myron Cohen, "Writs of passage in late imperial China", p. 88

types of societies — those contracts guaranteed by state adjudication and enforcement as well as those signed in a self-regulating community. The examples of the latter include a guild or a native place association that generated mutually beneficial trust over time. Moreover, the transaction cost of this society could also be high, because people had to make investments to maintain the trusted relationship through the exchange of gifts, information, meals, and perhaps marriages.⁴⁸⁷

These two historians' findings provide us a meaningful perspective to observe the economic exchanges carried out by Chinese and Uyghurs in late Qing Xinjiang. My previous discussions show that there were some dramatic differences between the practice of land-related transactions in Xinjiang and that of many other places in China. These differences include very frequent usage of red contracts, widely practiced bilingual contracts, and the Xinjiang dweller's proficiency in protecting their property rights by seeking justice from official (legal) institutions. These give us an impression that the contracts found in Xinjiang were more legal-oriented. In my opinion, it is precisely because people of different ethnic communities could not rely on the social mechanism to enforce their agreements

In most places in Qing China, lineages and guilds existed widely and they had a long history of providing the “matrix and infrastructure” for economic exchange and generating mutually beneficial trust. Therefore it was usually enough for people within such a community to simply sign a contract to protect their interest, as long as

487 Jonathan Ocko, “The missing metaphor”, p. 184

it was according to the customs of the area and witnessed by proper individuals, such as lineage heads or guild leaders. However, in the young multi-ethnic Xinjiang society, most Chinese immigrants (including merchants and peasants) came and made a living by themselves; there were no such things as guilds, or lineage or other native-place associations. Furthermore, distrust and even hostility between Uyghurs and Chinese was prominent in this area. As an aforementioned case in this chapter shows, Han and Hui Chinese immigrants did not believe that they would be treated fairly by the Uyghur *xiangyue*.⁴⁸⁸

In such circumstances, being under the protection of the state became crucial for contractual agreements between people of different ethnicities. Xinjiang residents were aware that their disputes over contracts were highly likely to be brought to trial and resolved in court. They had to make all kinds of preparations in advance, especially to have their contracts officially registered and endorsed. Certainly they could go for local mediation first, but since Chinese and Uyghur communities operate in separate spheres, it was hard to find a neutral authority to handle their cases. So it is understandable that there were so many commoners bringing their disputes directly to court. Things would become much easier if the magistrate sent the case back for local mediation, because in that case, both Chinese and Uyghur village authorities would have to sit together to resolve the dispute on behalf of the magistrate. In this situation, a bilingual contract that could be understood and accepted by local legal elites as valid

488 XJA 15-4-313

proof was necessary. Moreover, the fact that red contracts and bilingual contracts were widely signed in Turfan indicates that people living there had strong expectations for enforcement of the contract by the state.

In all, in the frontier society of Xinjiang, where the social links between different ethnicities were extremely weak, the state played a very important role in making and enforcing the economic rules of property rights. Lack of mutual trust among people made the state adjudication and enforcement of contracts more necessary for inter-ethnic property transactions.

CONCLUSION

Many scholars have drawn attention to the inheritance by the modern Chinese state of its vast frontier territories from the Manchu Qing empire. The role of the Qing in the history of China's northern and western frontiers is of unique significance and importance not only because the CCP has built on the imperial acquisitions of the Manchus, but also because it was the Qing who initiated civil administration in these frontiers. With these initiatives, the Qing endeavored to transform the traditional Chinese system of tributary relations and "loose rein" policies into a new system of administrative governance. It is these major changes that occurred in the second half of the Qing dynasty that are the subject of this study, covering the period when Xinjiang was lost and recovered. It is a period that includes both the end of a "glorious" imperial history and the start of a "nationalist" era, and that also saw the start of the central regime's formal governance of the vast northwestern frontier. Ever since the 1830s, the scholars of statecraft in China had been promoting the idea of turning Xinjiang into a province. The province was indeed established in 1884; however, by the end of the dynasty it was still quite different from a regular *neidi* province.

In terms of administrative institutions, it has been the Communist party which has largely accomplished this "unifying" mission. Intriguingly, today's Xinjiang is still not called a "province" and the government shows no intention of doing so. As the Xinjiang Uyghur Autonomous Region, it is currently the largest of the ethnic

autonomous regions and indeed of all administrative divisions of China. It has been granted autonomy, presumably an acknowledgement to its relatively recent incorporation into the Chinese administrative system as well as to the ethnicity of its population – but this autonomy remains more nominal than actual. Besides having an ethnic regional governor who is “shadowed” by the Party secretary, Xinjiang Uyghurs enjoy few extra legislative rights compared to people living in other Chinese provinces.

What does this study tell us about the history of administration in such cases? By documenting the role the law played in the Qing empire's state building project on its north-western frontier, it shows how law is used in conquered territories as an important tool of administration, but not as of forced acculturation. My observation thus differs from what is attested to in the history of European expansion.⁴⁸⁹

If we make an overall evaluation of Qing governance in Xinjiang, it is fair to say that by the end of the dynasty Xinjiang was integrated, but it was far from acculturated into the empire. Why was that? My dissertation provides some explanations from a legal perspective. First of all, the early Manchu rulers, especially the Qianlong emperor, had an ambivalent attitude about fully applying state law to the ethnic frontier and his early mode of legal administration in Xinjiang was largely

⁴⁸⁹ For instances, Sally Engle Merry in her book, *Colonizing Hawai'i*, discusses the role of law in the so-called civilizing process of nineteenth-century Hawaii. Sally Engle Merry, *Colonizing Hawai'i: the Cultural Power of Law*, (Princeton, N.J.: Princeton University Press, c2000). As for a story of early colonial period, see Susan Kellogg, *Law and the transformation of Aztec culture, 1500-1700*, (Norman: University of Oklahoma Press; 1995).

inherited by most of the policy makers who succeeded him. Secondly, the nature of the Chinese law, which tolerated native customs to a great extent, created a technical obstacle for state law to intervene in civil cases among Uyghurs even when the late Qing governors in Xinjiang had the intention to do so. Thirdly, the deteriorating political and economic situation from the second half of the nineteenth century onward did not allow the new policy makers to carry out more institutional reforms.

It is likely that Qianlong determined his legal policy in Xinjiang on the basis of both ideological and practical considerations. Ideologically, as the ruler of a multi-ethnic empire, Qianlong did not want to see the assimilation of non-Manchu peoples into Chinese culture. So he was reluctant to fully impose the Great Qing Code, which was compiled based on the Ming state law and thus served as an agent of Chinese culture, on Xinjiang Uyghurs. Practically, by adopting a flexible legal policy (or not drawing clear distinctions between Chinese law and Islamic law), the emperor was able to deprive the local level of the bureaucracy of decision-making power and so was able to maintain tighter control over the frontier areas. Therefore, Qianlong embraced a group of policies that were culturally tolerant and economically non-exploitive. In the legal domain, local dwellers were allowed to resolve most of their civil disputes and the majority of criminal ones within the sphere of the Islamic legal system.

But Qianlong failed to foresee that having two laws operating side by side was a double-edged sword. Whenever the central authority loosened its control, frontier officials manipulated the system to benefit themselves. Then the legal practice in

Xinjiang influenced the Qing's frontier rule in the opposite direction. As local rebellions and conflicts broke out frequently on this frontier, the Qing elites began to display an implicit distrust of East Turkestanis and as a result they began to modify their frontier policies. Consequently, the Manchu rulers' concern about the assimilation into Chinese culture eased and they tended to apply Qing law, especially the criminal law, to the frontier in a stricter way.

Nonetheless, the actual policies in Xinjiang did not always shift in one direction only. As nationalism became more and more important as a theme in Chinese history and history-writing from the time of the late Qing onwards, as a glorification of the imperial past, so the high Qing frontier strategies never completely faded away. For instance, late Qing Xinjiang Governor Liu Jintang's statement about "educating without changing their customs" actually reiterated Qianlong's idea of non-intervention. The practice of "*jiu di zheng fa*" which prevailed in post-Rebellion Xinjiang also originated in the Qianlong period, when the laws were adjusted "flexibly" to intimidate local criminals and to consolidate the emperor's control over the frontier. On the other hand, from the second half of the nineteenth century onward, facing various crises from inside and outside, the Qing rulers were not able to carry out more "formalizing" institutional reforms to make the frontier legal system more unified with that of the *neidi*. At the central level, the emperor was too preoccupied to involve himself with frontier administrative affairs; in the localities, toward the end of the dynasty Chinese magistrates explicitly left Uyghurs' civil disputes to be dealt with by the religious authorities.

Besides the change and development of the Qing's frontier ruling strategies, my dissertation also discusses from a legal perspective the effect of the annexation and the establishment of provincial rule on the everyday lives of frontier dwellers, by showing the effectiveness in practice of Qing rule. In the early period of Qing rule over Xinjiang, the daily life of Uyghurs was seldom touched by Qing law or Chinese culture. Once provincial rule was established Xinjiang in 1884, bringing it into the regular administrative system in China, the magistrate's court in each county provided local Uyghurs with one more choice of a method to resolve their disputes. However, my study suggests that few Uyghurs actually litigated against Uyghurs in the Qing courts – instead most of them continued to deal with their civil affairs within the framework of their religion and their customs. Actually even if a Uyghur did go to the *yamen*, with only a few exceptions, he was not likely to receive from the magistrate a judgment different from the one he would have obtained at the religious court. Moreover, religious courts and local institutions applying customary law tended to resolve a case with more ease and efficiency than state courts. Thanks to the sustained policy of non-intervention, the Islamic legal system and the Uyghurs' community-based system of self-regulation continued to operate as usual in Xinjiang.

Even when some Chinese provincial officials tried to impose greater supervision over the native social and gender order after the re-conquest, the flexible and customary features of Qing civil law did not make it easy for them to do so. In Xinjiang, as in the *neidi*, it was a time-honored tradition for Chinese magistrates to respect local customs when dealing with civil disputes. On the other hand, weak as a

source of criminal law, Shari'a contains a large group of regulations on economic and personal matters such as marriage and divorce. Archives show that Chinese magistrates were aware of native regulations and norms and usually set out to enforce them since this was the most efficient and familiar way to deal with local cases. Moreover, although their position theoretically endowed them with higher status than the local religious elites, the magistrates appointed by Beijing did not really want (or dare) to challenge Uyghur religious authority and preferred to remain aloof from conflicts between local Uyghurs and their native leaders. In most cases the two courts therefore remained in a relationship of cooperation. This was particularly manifested in the acknowledgement by Chinese courts of contracts signed according to Uyghur tradition.

Though few disputes among Uyghurs were brought to the magistrate's court, my study of transactions between local dwellers and Chinese immigrants suggests that the state did play a crucial and active role in the enforcement of rights and transactions in the multi-ethnic world of Xinjiang. Actually, the state appears to have been surprisingly powerful in this field. My study shows that, people of different ethnicities were extremely cautious in their dealings with each other and so often made unique arrangements for their land transactions (such as *zumai*) to protect their respective interests. Moreover, unlike in the *neidi* or Taiwan, where the majority of people signed white contracts instead of red ones, in Xinjiang red contracts were widely used and both Chinese and Uyghurs were eager to have their land transactions registered with both the state government and the religious authorities. Ordinary

people had strong expectations for the enforcement of contracts by the state and Xinjiang magistrates did show great respect for authentic contracts. All these situations indicate that in a multi-ethnic area where there was no established social mechanism to mediate between people of different ethnicities, formal state institutions were particularly important in upholding economic rights. While the contracts seem to be “more social than legal” in the *neidi*, the northwestern frontier stories suggest that with the backing of the state, contracts turned property rights into a fundamental social institution.

In general, the study of Qing policies of criminal jurisdiction indicates that legal pluralism in Xinjiang became more hierarchical and that its territory was gradually integrated within the state. But if we observe this development from the perspective of civilian life, the impression is clear that to a large extent ordinary Uyghur people still lived their familiar lives and followed their traditional religious and customary regulations. There seems to be a paradox that, while the Qing rulers carried out a series of culturally tolerant policies in order to better rule the ethnic frontier, their policies of this type constituted a barrier to acculturation and, more importantly, did not prevent riots and rebellions from frequently breaking out.

How do the legal policies of the PRC compare with that of the Qing in Xinjiang. Such a comparison would be an interesting project. Was “modernized” Chinese law a prerequisite for the Communist Party to fully impose state law on ethnic peoples? Did this policy help cultural assimilation? These are questions that await further study.

For the moment, we can conclude from this current study that Qing frontier legal policy led the area to become more “unified” and better “integrated” within the *neidi* toward the end of the dynasty, but that this trend was interrupted by the collapse of the Qing and so was never completed at that time. We may ask whether the transformation of the frontier policy of the central regime from an “imperial mode” to a “nationalist mode” was actually finalized in the PRC era. This will be the subject of my future study.

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