Law in the Mongol and Post-Mongol World: The Case of Yuan China

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Bettine Birge. *Marriage and the Law in the Age of Khubilai Khan: Cases from the Yuan Dianzhang*. Cambridge, MA: Harvard University Press, 2017. xii, 324 pp. Hardcover $27.95, ISBN 978-0-674-97551-4.

The historical impact of Mongols and their empires of the thirteenth and fourteenth centuries has long been dismissed. Conventional perceptions portray the Mongols as destroyers and plunderers, and until recently, scholars were usually content to pass off the Mongol conquest of Eurasia as a phenomenal aberration in history: the Islamic world was quickly re-established, Russia beat back the Golden Horde, the Ming dynasty quickly resumed China's late imperial trends, and despite the physical and cultural destruction, Korea threw off Mongol domination and adopted Confucianism. Research over the past few decades, however, has given a more balanced picture and made strong claims for the Mongol conquests and empire as a world changing event.[2] Whereas less than a decade and a half prior, historians still had to ask, "did the Mongols matter?" they can now more affirmatively divulge "how Mongolia matters."[3]

Law is one area that has received less attention, however. This is due largely to sources; the early Mongol empire followed an unrecorded customary law asserted by Genghis Khan—the *jasaq* or *yasa*—and the later empires often failed to codify or promulgate. Recent work on individual Eurasian empires and regions, however, has begun to show the specific developments of law and society within the various empires in the thirteenth through seventeenth centuries. Viewed comprehensively, these individual studies demonstrate a trend of legal and social change throughout Eurasia in the wake of the Mongol invasions. Broadly speaking, domestic legal codes and practices were supplanted by a newly imposed dynastic law. This development often shook local society, resulting in confusion, challenge, and tension, and leading to the elevation of a particular school of thought to mediate conflict and reinterpret tradition and social ideals in accordance with the new political order. While the particulars of each society generated individual dynamics, a general repositioning of law took place throughout the post-Mongol Eurasian world.

This essay takes up the case of one Mongol empire, Yuan China (1271–1368), and in doing so moves to highlight broader Eurasian trends. It looks at the specifics of a long-standing problem in Chinese history on women and law in China's middle period, and Bettine Birge's contribution to addressing this problem, especially in her new book on marriage and property law in the Yuan, *Marriage and the Law in the Age of Khubilai Khan*. The problem goes something like this: from approximately the twelfth to the fifteenth centuries, existing laws and practices in China were challenged and revised, old codes were abrogated, and new understandings of social and political order were imposed. One of the most reverberating changes was in gender and property relations, where wives and daughters, who had steadily gained more access to property and unilateral divorce in the Song dynasty (960–1279), were subjected to new legal restrictions in the Ming (1368–1644) and Qing dynasties (1636–1912) that gave primacy to the agnate. One of the key questions is what happened and why. Birge's research shows that the Mongol conquest and subsequent political developments in the Yuan dynasty were instrumental in this transformation.

The rest of this review is divided into four sections. The first section examines historiographical debates and summarizes the conclusions of Birge's arguments; it also looks at the importance of the legal text she has translated, the *Yuan dianzhang* 元典章, or Statutes and precedents of the Yuan dynasty (complete title, *Dayuan shengzheng guochao dianzhang* 大元聖政國朝典章). The second section considers the text of the *Yuan dianzhang* itself as a legal and social document, and questions its historical production. Section three draws on the *Yuan dianzhang* to explore a case of uxorilocal marriage in the early Yuan, noting the dilemma faced by jurists and illustrating interventions by the school of thought that would rise to prominence in the Yuan and Ming, the Neo-Confucians. The last section returns to the broader argument of this essay and situates the Yuan within the context of the Mongol empires and post-Mongol Eurasia.

Marriage and the Law in Medieval China

Historians have long been interested in marriage practice and law. Old debates on the nature of marriage and its relation to everything from philosophy to social order continue to animate the field. This is not only because historical actors wrote prolifically and acted legally on the matter, but also because marriage in imperial China implicated property and who had rights to it.[4] Did women have rights to property and could they maintain claim to it even in the case of divorce or widowhood? More specifically, were daughters included in the division of property; could they inherit property? If a husband moved into the wife's families' home, what were his responsibilities and did he have claim

to the wife's family's property? Were marriage practices and claims developed from custom, or were they imposed by the state in an attempt to impart certain values and principles in the regulation of society?

Historians' early explorations into these inquiries sought an all-encompassing analysis and essential explanation of the undergirding principles of marriage practice and property law. Niida Noboru argued as early as the 1950s that Chinese customary practice designated the entire family unit as joint owners of property. Because this included wives and daughters, by definition, he held, it gave women equal share to division and inheritance. Although this practice was later curtailed through state involvement in the Ming and Qing periods, it was legally sanctioned in the Southern Song after the Jin conquest of 1127, and a "half-share law" was enforced, whereby daughters received half of the division of property. Rejecting the idea of evolution from social practice to state law, Shiga Shūzō argued to the contrary, that marriage and property rights were well grounded in Confucian thought and practice. Property ownership, Shiga said, was structured on the father–son relationship, where property was passed down along the male line, restricting the access and rights of daughters and wives. Due to the nature of the ritual obligation, where only a male from the agnate can offer sacrifice to ancestors, property would not be given to women. In Shiga's explanation, the Southern Song, where women did hold property, was an anomaly.[5]

More recently, scholars have historicized developments and noted the changing nature of marriage and property relations in imperial China. Patricia Ebrey identified the curious rise of dowry prices in the Song, and linked this to the move of attaching property with daughters in order to guarantee them a favorable marriage into a reputable family. This development was a result of the decline of the Tang aristocracy and the rise of a gentry elite, who sought to further their social standing and position through marriage networks. In order to build relations and either marry up or into a network, they would endow daughters with property that she would not relinquish to the husband but rather own herself.[6] Katherine Bernhardt pushed this narrative forward into the late imperial period, noting a transition after the Song, where women's inheritance claims were curtailed and access to property stripped. This was compounded by fewer chances, both socially and legally, and the emergence of the ideal of the chaste widow who continued to serve her in-laws after the death of her husband. Bernhardt's narrative is one of increasing Confucianization of law and practice in marriage and inheritance, where the male-dominated lineage takes precedence.[7]

Birge's previous work built upon this research.[8] She has shown that the incitement of the transformation from greater access to less was not Confucian principles underlying state and society, nor was it an ineluctable rise of Neo-Confucianism, but rather the Mongol Yuan dynasty and the

confrontation of cultures and practices. In her first book, *Women, Property, and Confucian Reaction in Song and Yuan China (960–1368),* she demonstrated first that women's rights were improving throughout the Song, and second that the Yuan reversed this trend. For the former proof, she illustrated that wives and daughters in the Song manipulated the law and won favorable judgment to obtain property rights, secure the ability to remarry, and to return to their natal family in the event of divorce or widowhood.

Having made this case, she then argued that these gains were overridden and annulled not by a Neo-Confucian opposition—although such detractors were certainly outspoken—but rather by a confluence of interests in the Yuan state. The Mongol invasion and the establishment of the Yuan dynasty in 1271, Birge says, created conditions to undermine the rights in marriage and property that women had won in the Song. These conditions included the use of a head tax rather than land tax, which called for labor service and the creation of military households that required each family to provide an able-bodied male. With this tax system, the state necessitated (and created law to uphold) the availability of a male in each family to fulfill the tax and service requirements. Culture and tradition further added to this trend, as the introduction of nomadic forms of marriage practice, such as the levirate marriage—where a widow marries her husband's brother—had binding effects on women's control of property and her ability to return to her natal family or remarry at her choosing. In short, for tax and military purposes, the Yuan favored a social system that upheld the male patriline.

These conditions created a space for Neo-Confucians to successfully argue for a particular vision of marriage and property that often aligned with Yuan state goals and sensibilities. Although active in the Song, when they railed against marriage and property practices that discounted the lineage, Neo-Confucian officials and thinkers failed to change laws or set precedent that could enforce the patriline at the expense of the woman's family. In the Yuan, they continued to challenge women's access to rights and property by calling for widow chastity, and for restrictions in women's autonomy in inheritance and marriage. Although this advocacy of the patriline was made as part of a program to promote proper ritual practice to create harmonious personal and social relations, it happened to correspond to the goals of the Yuan state in promoting tax collection and military service. By offering a program that favored an agnate system of sacrifice, the Neo-Confucians were able to achieve in the Yuan what they could only argue for in the Song: the legalization of patrilineal control of marriage and property. The Yuan favored such arguments not for the cosmological and ritual significance that the Neo-Confucians promulgated, but because patrilineal control served the Yuan state.

This coup in marriage and property law was made possible, Birge argued, due to the lack of a code or precedent in the Yuan. As legal cases over marriage and property flooded the courts, Yuan jurists found themselves at a loss over which regulations and practices to follow, and were thus unclear on how to adjudicate. Although rulings were made, they were often done without edict, precedent, or based on any clear standard, which led to frequent reversals. This created a general confusion among officials and the populace, and compounded the lack of consensus about what law to apply and how, and how it should relate to social order. Here a philosophical vacuum emerged into which the Neo-Confucians could step with a complete program to rethink social and personal relations. The repositioning of law advocated by the Neo-Confucians worked to give primacy to the patriline at the expense of the woman's family and her ability to hold property: it effectively attached property to the male line, broke the bond between the woman and her dowry, transferred control of a woman's personhood to her husband, and institutionalized widow chastity. This structural limitation of the rights and autonomy of wives and daughters would take full hold in the Ming and accelerate through the Qing.

The *Yuan dianzhang* is one of the key sources for understanding this transition. Birge has translated chapter 18 on marriage law, which consists of seventy-five cases. Rather than a code, or even edicts, the *Yuan dianzhang* is a series of cases, arguments, and judgments from the years 1268 to 1319 (although the content is mostly focused in the reign of Khubilai Khan [r. 1260–1294]). In the section under consideration, different cases related to marriage and property are tried and argued with commentary by different courts at different levels of government. These cases try everything from marital infidelity to divorce, wife-selling, runaway slaves, widow remarriage, absconding husbands, and household maintenance. Throughout, the cases show swings in the law as local customs are sometimes upheld then overturned, and new precedents are set then annulled. In addition to the confusion of jurists over how to judge, and the different attitudes and application of Yuan marriage law, the *Yuan dianzhang* also illustrates the rise of the Neo-Confucians. In numerous cases, arguments emerge from adherents of the Neo-Confucian program that push for a certain position that champions the patriline or promotes widow chastity. Birge's translation of the text adds to the picture she previously painted of the Yuan period as the key to understanding the transition of Chinese marriage and property law.[9]

In the book under review here, the translated section of the *Yuan dianzhang* comprises Part 2 and will be examined in more detail. Part 1 of the book consists of four chapters devoted to discussing and introducing the translated materials: chapter 1 explores the historical and social setting of the period within which the *Yuan dianzhang* was produced; chapter 2 examines the

structure of the Yuan government and legal system; chapter 3 takes up the origins, content, and circulation and use of the text; and chapter 4 offers a few notes on the translation.

In the first part, rather than rehash her previous research or the scholarship of others, Birge draws on the cases to outline the period and its developments. Her framework is the Yuan as a multiethnic empire, where state-makers grappled with the assertion of rule over different groups with different customs and practices, and administrators struggled with the issue of how to apply law to diverse subjects of different traditions. People living under Yuan rule spoke a myriad of languages, including Chinese, Mongolian, Jurchen, Khitan, Turkish, Persian, Arabic, Korean, Tibetan, and probably even Italian and French; and they practiced different religions from Islam to Judaism, Christianity, Manichaeism, Buddhism, and Confucianism. Such diversity infected social values and practices, and many had their own legal and customary traditions. As Birge writes, "The Yuan government faced the challenge of devising a legal and administrative system that could accommodate this multicultural mix" (p. 28).

Such a challenge vexed Yuan rulers and state-makers. They entertained the problem of "whether to apply different laws to different ethnic groups or to try to impose unified laws on everyone within Yuan territory," and vacillated back and forth on the matter as different arguments were made one way or the other. At times, jurists allowed local custom to set precedent, and at other times they made all subjects conform to uniform rules with no account for cultural or ethnic difference and background. There is no pattern in the application; rather, administrators were guided by the desire to keep order but confused how to mediate between different interests and traditions. Should levirate marriage be legally permissible for all or just Mongols, for example. In the course of such indeterminacy, Yuan jurists constructed "hybrid laws and new legislation unprecedented in Chinese history that exerted much influence on later Chinese law" (p. 28). Even though the Yuan never got it right and suffered contradictions and protest over the matter, they did impact the course of Chinese legal history.

The example of levirate marriage illustrates the point. In Chinese practice, sexual relations between a widow and her husband's relatives was deemed incest, and Tang and Song law outlawed levirate marriage with harsh punishment for infraction. If a Chinese woman widowed, she usually returned home to her natal family and, if still of marriageable age, could remarry. Mongols and other steppe people, by contrast, practiced levirate, where a widow would often be "inherited" by a younger male relative of her husband. In 1271, Khubilai Khan universalized all law and made levirate legal for all Yuan subjects. This conflict between custom and non-codified dynastic law sparked a rash of lawsuits, leading to a number of state-issued restrictions on

the operation of the levirate, including a ruling in 1276 that allowed a widow to escape levirate marriage if she remained chaste and did not remarry. Continued tension and mounting lawsuits over the matter led to a reversal in 1330, when the emperor outlawed the levirate "among those for whom it is not their original custom" (p. 8).

In addition to the problem of ruling a multiethnic population, this case also illuminates the indeterminacy of law in the Yuan. Part of the problem, generally, was the lack of standardization in administrative and legal systems. In both organization and application, the Yuan government and its operations were "ad hoc, redundant, and fluid" (p. 36). This allowed flexibility in dealing with different groups of subjects and their diversity of issues, to be sure; but in a centralized, hierarchical ruling structure, it also led to confusion, hesitation, and inefficiency. In fact, as Birge notes, a clear hierarchy existed only in ideal, for the "[administrative] units were set up at various times for various reasons in an ad hoc manner" (p. 41). The ambiguity of authority bred uncertainty and administrative paralysis, which led to the frequent passing upwards of responsibility and legal decision. Minor cases that should have been handled at the local level were sent to higher courts. As the *Yuan dianzhang* shows, cases in marriage contracts or property dispute could travel all the way up to the secretariat, or even the emperor.

The picture Birge here paints on the canvas of middle period China with the colors of the *Yuan dianzhang* is one of tension between existing practice and a newly imposed dynastic authority. This context not only precipitated legal confusion among jurists, leading to contradictions among courts and frequent reversals, sometimes in the same decision, but also exposed the paucity of social vision for ruling a multiethnic empire. The Neo-Confucians exploited this gap, using it to push their agenda to institutionalize in practice and law the primacy of the patriline in marriage and property rights.

The Yuan Dianzhang

Confusion in the legal climate was precipitated by the fact that the Yuan never promulgated a formal legal code. For the better part of the first half of the thirteenth century, administrators in northern China relied on the Jin Dynasty code to adjudicate cases and set precedent. Known as the *Taihe code* 泰和律, it combined customary Jurchen law with the Tang code and provided a standard for jurists, even after the Mongols toppled the Jin in 1234. But with the announcement of the establishment of the Yuan dynasty in 1271, Khubilai Khan ordered the abrogation of the code and commanded officials to cease using it. He aspired to create a new code based on the will of the sovereign that would organize all of life in the empire: In 1273 a new code, the *Da Yuan xinlü* 大元新律, or New laws of the great Yuan, was drafted but never

promulgated, and in 1291 ordinances (*Zhiyuan xinge* 至元新格, or New statues of the Zhiyuan period) were drawn up but again never published and circulated. After Khubilai's death in 1294, initiatives were taken to draft another code, the *Dade lüling* 大德律令, or Laws and statutes of the Dade period, which was presented to the emperor in 1305. But his death curtailed revision and promulgation, thus ending court attempts to produce a comprehensive legal code.

In subsequent decades, the court turned its efforts to compiling collections of imperial edicts and judicial decisions. In doing so it aimed to provide a guide for adjudication, and to address the problem of judges abdicating their judicial responsibility out of fear of reprisal. As imperial advisor to Khubilai Khan, He Zhiyu (1227–1295), wrote, "If they do not assume this responsibility and push off their work, things get messy and out of hand; cases drag on and cannot be settled" (p. 49). In 1323, the court issued the *Da Yuan tongzhi* 大元通制, or Comprehensive regulations of the great Yuan, only portions of which are today extant. A decade later, in 1332, Emperor Wenzong's court published the *Jingshi dadian* 經世大典, or Great compendium for administering the world, which collected administrative and legal documents that had been produced over the course of the dynasty.

The *Yuan dianzhang* was produced in this environment that lacked codified law or established precedents. The text available to scholars today is an edition published in 1322, most likely unofficially by literati or officials in southern China in order to provide judges with a reliable collection of cases, judgments, administrative notes, and edicts. This much we know, but the lack of further publication details, circulation records, or the existence of more than one extant copy hinders understanding and has led to competing theories about the production of the text. For a long time, historians held that the *Yuan dianzhang* was an official text produced by the court.[10] Given the nature of the text consisting of cases, edicts, and judgments, this is a reasonable assumption. Birge disagrees with this interpretation, however, arguing that it was a joint production among southern literati and officials, published locally in southern China for unofficial circulation among magistrates and local elite. Most of Birge's evidence and argument is convincing; parts are not.

Part of the problem is that there is only one extant copy of the original text—now held in the National Palace Museum, Taipei—and it contains very few clues on the origins of its conception. Birge begins with the physical copy itself, noting that a number of characteristics indicate that it was printed in Jianyang in northern Fujian. Foremost, the copy is printed with small characters tightly placed and crammed onto the page, which was the nature of the cheap Jianyang imprints. If it were imperially commissioned and produced by the court, the characters would be larger, more evenly spaced, and with fewer characters on the page, eliminating the clutter. Furthermore, the text

lacks the front matter common in imperially-commissioned texts: usually the emperor's preface, the edict commissioning the text, and the editor's introduction. This edition contains only a fake notarization certificate from the Central Secretariat dated to 1303. Such anomalies are compounded by the absence of the names of the editors or compilers, and the omission of key stock phrases in the edicts, such as "by the authority of the emperor." Adding up this physical evidence, Birge concludes that the text is clearly an unofficial production from a Jianyang publishing house.

Her archeology is commendable, leaving little doubt that the physical copy under observation is a Jianyang offprint. But this does not necessarily mean that the *Yuan dianzhang* itself was an unofficial production. The copy that we have now could very well have been a pirated edition of the preexisting, officially commissioned text. Consider the publication life of the *Da Qing huidian* 大清會典, or Statutes and precedents of the Great Qing, for comparison. The *Da Qing huidian* was an official text commissioned by the Qing dynasty (1636–1912) and published by the imperial press. Numerous extant copies attest to this fact, as well as published and archival evidence discussing the Huidian in such terms.[11] In addition to the imperially commissioned copies, however, countless unofficial editions were published in the eighteenth and nineteenth centuries by private publication houses, mainly in southern China. Libraries and archives in China and Taiwan today hold many of these unofficial copies that bear the same characteristics as the single extant copy of the *Yuan dianzhang*, including crammed layout, small characters, lacking prefaces, page irregularities, miswritten characters, and so on and so forth. The existence of these unofficial editions of the Qing *Huidian* does not lead scholars to conclude that the text was unofficial, rather that there were many pirated editions for private consumption. The difference is that in case of the Yuan text, it is the only existing edition—but it could very well be that there were official editions, and that they have been lost, not that they never existed.

Birge's argument is on much firmer ground when considering the textual evidence. Foremost, the official history of the Yuan, the *Yuanshi* 元史, does not list the *Yuan dianzhang* among the official publications of the dynasty. Other Yuan legal texts, such as those mentioned above, are all discussed, but not the *Yuan dianzhang,* indicating that it was indeed most likely a private enterprise.[12] Moreover, eighteenth century textual scholars cast doubt on the officiality of the Yuan text: they found the organization of the book "confused and unsystematic," and the case records to have been transcribed by clerks and minor officials, not esteemed scholars or officials commissioned by the emperor to produce an official legal text (p. 70). On these grounds, Qing Dynasty editors decided not to include it in the *Siku quanshi* 四庫全書, or the Four treasuries collection, and instead placed it among the excess books unworthy of inclusion in the grand

encyclopedic book project (but not among the banned books).[13] Such evidence does point to the fact that the *Yuan dianzhang* was not an official legal text, and most likely, as Birge argues, a private production.

If this argument is correct and it was indeed a local production, who consumed it? Birge deduces that it was "designed as a handy legal reference work" for use by officials, judges, and local elite needing legal knowledge (p. 65). Given the absence of an official code in the Yuan, along with the legal climate lacking precedents leading to a hesitation to adjudicate, it would have been most useful to magistrates and local officials, who had to hear cases and pass judgments. But it was also probably of interest to any official in the bureaucratic hierarchy, for, as Birge notes, "In addition to providing a quasi law code containing precedents to use in deciding legal cases and administering state affairs, the work is filled with practical information that any official would want at his fingertips" (p. 66). It contained guidelines on administrative standards and practices, such as which titles were attached to which ranks, as well as the mourning grades and requirements for different ranks and their relatives; it further discussed the types of documents to send to certain offices and how to address different senders and receivers. This information would also have been useful to the local gentry and elite who required legal knowledge for personal and communal affairs.

A Case of Uxorilocal Marriage Contracts and the Neo-Confucian Influence

That being the content of the first part of the book under review, a closer look at some of the translated material of the *Yuan dianzhang* itself is now in order. The following discussion turns to two interrelated judgments on uxorilocal marriages—that is, marriages where the husband moves in with the wife's family. Not only does this case illustrate the problem of code and case adjudication in the Yuan, it further shows how Neo-Confucians intervened and began to command influence.

The case begins with a plaint filed with the Taiyuan Circuit in Shanxi Province in northern China in 1273 by the Song family. Five years earlier they entered into an agreement with the Shi family to invite a husband into their household, which was presumably without a son. A marriage contract was drawn up between the daughter Xiaomei and Shi Huhu, with conditions that stipulated an annulment of the marriage if Shi ran away. In 1270, Shi absconded but was discovered by a relative and brought back. A few days later he bolted again, and had not been seen since. The plaint asked the circuit court to uphold the contract and annul the marriage (pp. 111–112).

Uxorilocal marriages were not uncommon in middle period China. Families without a son needed a male in the household to work, uphold ritual obligations, and take care of family affairs. Instead of marrying the daughter out, as was commonly expected in the patrimonial Confucian society, a family

might prepare a betrothal gift and agree to have a male marry into the family, either in perpetuity or for a fixed term, say fifteen years. In order to guarantee the interests of the marriage, parties began signing elaborate prenuptial contracts outlining the terms of the agreement, which usually protected the wife's family should the male not fulfill his obligations. Early Yuan jurists observed that parties "write such lines as, 'If our son-in-law does not maintain the family enterprise and runs away, etc., [this contract] will stand as a letter of divorce.'" They went on to note that parties do this in order "to control their uxorilocal sons-in-law and make them willing to work for the wife's family according to the law, and [prevent them from] unlawfully getting drunk, being lazy and indolent, being wasteful and profligate, not maintaining the family enterprise, and not obeying the orders of their father- and mother-in-law" (p. 117). Such contracts became so common that, by the thirteenth century, Yuan administrators in northern China declared that all uxorilocal marriages should be confirmed with a written contract (pp. 116–117).

Despite the contract between Xiaomei and the Shis, the Circuit was still hesitant to act on the case. "We could adjudicate this on the basis of the contract that was originally established," he wrote, "but we have not seen a ruling in a case like this to use as a precedent" (p. 112). The problem he confronted was the lack of any guidance on how to handle such a case, either in code or in previous judgments. Whereas Yuan judges once looked to the *Taihe code,* and leaned on local precedent, they were now forced to rely on imperial command, which was made all the more difficult considering that Khubilai neither issued a new code, nor circulated a collection of edicts to serve as a basis for legal order. Judges such as the Taiyuan Circuit were thus at a loss on how to judge cases.

Unable or unwilling to adjudicate, the Circuit passed it up to the central ministry in charge of marriage cases, the Ministry of Revenue (Hubu). The Ministry looked into the matter and found four similar cases over the past ten years where uxorilocal husbands ran away multiple times, stole jewelry and other valuables, and even beat their mothers-in-law. In each case, the parties had prenuptial agreements that called for divorce, punishments, and even death for such acts. Citing a 1269 ruling by the Ministry of Revenue, and a 1271 decision by the Secretariat for State Affairs requiring parties to have a formal marriage contract, officials decided that "these cases should be adjudicated according to the privately negotiated marriage contract, which was willingly established by the two parties themselves, and divorce should be allowed" (pp. 112–119). The Secretariat approved this decision, enabling the annulment of the marriage between Xiaomei and Shi Huhu, and setting a precedent for such cases. "In this way," the Ministry wrote in conclusion, "there is a basis for adjudication, and this should prevent lawsuits so that they do not disrupt government offices" (ibid).

This ruling was a triumph for the families of wives throughout the realm, giving them legal and social leverage. Continuing the legal and customary practices of the past few hundred years, the Yuan state here sided on the behalf of wives and their natal families, circumventing Confucian social practices that otherwise privileged the male side. Rather than locking women into a patriarchal social structure where they had to adhere to the law of their husband and in-laws, they were now given enhanced legal privileges that effectively granted them the same right of unilateral divorce that the husband would have in a patrilocal marriage (pp. 110–111). Furthermore, the ruling meant that the Yuan was tacking towards an adherence to local precedent. Rather than imposing a new dynastic law, or forcing Mongol practice on different ethnic groups now under their control, or even enforcing a centrally imposed, universal vision of marriage, jurists chose to acknowledge existing legal and cultural norms, and to guarantee them as legally binding.

Yet, less than sixteen months later, the ruling was overturned.

In the spring of 1275, the Ministry of Revenue received a dispatch from the Dongping Circuit in Shandong Province asking that the central government reconsider rulings on upholding divorce stipulations in local marriage contracts. Citing a brief from a local official on the increasing number of lawsuits and the demise of civic life, the Circuit emphasized the social assault on the sanctity of marriage, where daughters "deceitfully hatch crafty plans and seek to remarry over and over." The Secretariat quickly approved the request and prohibited marriage contracts from including divorce triggers. The office further ordered local officials to "instruct and exhort" parties on the propriety of marriage, and to especially ensure that the uxorilocal sons-in-law behave in accordance with their legal and social duties (p. 123).

At the root of this reversal was a memo from the Wenshang County Magistrate, Du Run. Ostensibly concerned with the number of lawsuits brought on by the 1273 ruling upholding divorce stipulations in local marriage contracts, Du argued that this offended the institution of marriage and disrupted social and cosmological order. Noting that Heaven and Earth are the foundation of all things, he went on to link this to marriage: "Husband and wife are the basis of human moral relations . . . Enduring permanence is their constant principle," he said, which cannot include divorce. Bringing to bear many of the moral arguments of Neo-Confucian thought, he claimed that the meaning of the marriage contract is not to set conditions of permanency or the terms of matrimony, but rather to bind people in a particular kind of relationship and guarantee the honest nature of that relationship. "Why not therefore restrain it [by law]?" Doing so, Du claimed, "can eradicate debauched traditions and turn them into virtuous customs" (pp. 122–123). For Du, the role of government was not to uphold existing practices and amicably mediate conflicts among parties; rather, it was to change local customs and provide

moral instruction in the enforcement of a coherent vision of ethical behavior. As Birge puts it in her annotations on the case, these Neo-Confucian thinkers saw that "It was the job of the government to intervene in local society and impose a universal moral vision on the community" (p. 119). This is precisely what the state then did, reversing the previous judgment and annulling all preemptive divorce contracts.

The new ruling based on Du's arguments points to the beginning of a trend in the Yuan government's ruling practice and legal strategy that only intensified over the next century. In constructing a multiethnic empire, where the sovereign would project universal rule over numerous ethnic groups that previously maintained self-rule and employed traditional customs, practices, and laws in the maintenance of their own social order, the Yuan initially moved to uphold each groups' existing customs. In the case discussed above, Yuan jurists in the 1260s and early 1270s not only sided with the existing customs and laws of the Chinese, but also took steps to formalize it (as noted, the Ministry of Revenue decreed that all uxorilocal marriages needed to have a written contract). Mongol subjects, by contrast, did not practice uxorilocal marriage and thus would not be subjected to the same law—not only would the courts not have such cases from Mongols, but the law itself would be so foreign to Mongol marriage practices that it would be applicable only to Chinese. This development indicates legal pluralism.

Yuan state-makers' lack of a clear commitment to a vision of social order backed by a coherent legal regime enabled the rise and influence of Neo-Confucian thinkers and officials like Du Run. The case above shows how easily the court succumbed to arguments that mapped out a social program and made arguments for particular rulings. Where some Yuan jurists floundered on judicial opinion and lacked programmatic means to mediate social conflict, Neo-Confucian thinkers approached cases with conviction, and built their arguments grounded in a comprehensive vision not just of society and social relations but of the universe as a whole. Perhaps lacking in specifics of the cases at hand, and ignoring the intricacies of the conflict under consideration, these jurists made up for it with the moral attitude of the self-righteous, demanding that the power of the state be used not to confirm and concede to existing custom so as to preserve social harmony but rather to impose judgment and law as a moral force to transform local society. In the case above, it meant the imposition of patriarchal authority to uphold the dominance of the male line in marriage, and stripping the wife of the means of unilateral divorce.

More research still needs to be done on the rise of the Neo-Confucians in Yuan China.[14] How a particular vision of state and society influenced policy and law in the Mongol Yuan court and shaped late imperial society and social practice up to the present day remains an enduring question. Although

political and social networks in the Yuan still need to be mapped, and the factors enabling the growth of political influence analyzed, it is clear that by the early decades of the fourteenth century, the Neo-Confucians were on the rise and their program began to solidify through state action. An issue like widow chastity, for example, which the Neo-Confucians began to advocate in early years of the Southern Song—where they called on widows to reject Song laws and social practices and to remain chaste in their husbands' home serving his parents—was gradually worked into Yuan law: Neo-Confucian influence in the Yuan court led to a measure in 1299 promoting widow chastity and restricting their ability to remarry and forcing them to return home without their dowry if they chose to leave their dead husband's household. In 1304, the Yuan state began rewarding widows for their chastity and remaining with their in-laws; and in 1309, law was promulgated stipulating that widows had to stay in their late husband's home. An even greater sign of the influence of the Neo-Confucian school was not merely the reinstatement of the civil service examination system in 1313 but that the basis of the exam would be Zhu Xi's interpretation of the Confucian classics.

By the mid-fourteenth century, the Neo-Confucian program was in place. Despite the mounting political tensions and social problems that would end Yuan rule, a fundamental social shift had occurred, whereby the authority of the agnate was strengthened at the expense of the woman's family. As Birge aptly notes, "This shift included limits on married women's property rights, a favoring of the groom's family over the bride's, and laws to encourage widow chastity and penalize widow remarriage" (p. 35). Her research and translation of the *Yuan dianzhang* marriage chapter is a great contribution to understanding this development.

Epilogue: Law in the Post-Mongol World

The general picture outlined here is one of gradual social and legal change precipitated by the imposition of rule by a group originating outside of established society. New sovereigns in the Mongol and post-Mongol world brought with them their own forms of social, political, and economic life, which were instituted and upheld by already existing laws and customs. These laws and customs were attached to the new dynasty and imposed or integrated in the conquered society, whose practices were upended. In the course of the establishment of the new order, old codes were abrogated or subjugated, and local customary practices either challenged in the attempt to standardize or reorganize society, or mediated by the new rulers in the interest of mitigating conflict and maintaining social order. At some point, the tension between the existing legal and social practices of the conquered and the imposed law and order of the conquerors created the space for a third program or interpretation to emerge and push a social and legal agenda. While the particular program of

the emergent school was rarely implemented in full, it shaped social and political practices, and remade the legal foundation of early modern Eurasian empires.[15]

The China case is one such manifestation of this more general development in the Mongol world. In the conquest of China, the Mongols abrogated existing codes and overrode customary practices, such as the taboo on levirate marriage. They initially tried to standardize law to apply equally to all groups under Yuan rule but faced opposition, conflict, and local social tension. Judgments were made based on existing practice, then reversed due to imperial perception and consideration, facilitating further lawsuits as people challenged each other and called into question social practices, values, and ideals. This ambiguity drove conflict and created an opening for a coherent program to emerge that would articulate a vision of social order and provide legislation on how it would be upheld. As the Neo-Confucians rose and became more prominent, their agenda set precedent for judgment in legal cases. This influence was possible not just because of the force of argument and coherency of vision but also because their position corresponded to the aims of the Yuan state in imposing and upholding order over a multiethnic empire.

Similar developments can be observed across Eurasia. In the wake of the thirteenth-century Mongol invasions, old political orders fell and new ones emerged based on new forms of political and legal legitimacy. From Kamakura Japan to Mamluk Egypt, medieval patterns of dualistic culture and political authority were destroyed, and secular government and law emerged, often directly sourced to Genghis Khan and Mongol dynastic authority. This facilitated domestic social and political reorganization, which can be recognized broadly throughout Eurasia in four forms: the replacement of traditional elites in government and education coupled with an increasing challenge by rising merchant and military classes; written vernaculars; the deterioration of a single orthodoxy and the spread of populist beliefs; and universal rulership.[16] In law, newly emergent dynasties imposed their own rules and practices, which they legitimized not through scripture but genealogically, often as a descendant of Genghis Khan. Resultant tension between dynastic law and the existing domestic law enabled the rise of a third party to theorize and shape legal developments and social and political order in the emergent empires.

The case of the Ottoman empire and the rise of the Hanafi school complements the Yuan case in illustrating such developments. Prior to the thirteenth century, the Islamic world was dominated by the theory and rule of the Caliphate, which monopolized political and religious authority. All law was bound up in Islamic law, with religious judges deciding cases based foremost on the word of the prophet supplemented with local custom and tradition. The Mongol conquest in 1258 ended this Islamic order, and the Caliphate was

replaced with a right of dynastic rule, where all political, legal, and administrative practices were legitimized by the lineage traced back to the founder, Genghis Khan.[17] Rather than abrogating existing legal practice, as did Khubilai Khan, Ottoman rulers superimposed dynastic law on top of Islamic law, giving primacy to the secular law, but utilizing both to maintain social order and rule over a heterogeneous society.[18] Much like the Yuan, however, disparity between existing law and imposed dynastic law led to legal confusion and social tension, most notably because dynastic law distinguished between tax paying subjects and servants of the sultan, whereas Islamic law distinguished according to gender, religion, and slave or free.[19] In the midst of this tension one school of interpretation of Islamic law rose to prominence, the Hanafi school, which became sanctioned by the state. State schools were opened offering a general humanistic education and Hanafi legal interpretation. Graduates were often directed towards a legal profession, while others became officials; furthermore, religious judges were told to adhere to the Hanafi school and base adjudication on its interpretations. This had the effect of standardizing legal norms and procedures, but more so, of the state maintaining control of legal interpretation by subjecting the school to dynastic authority. If a question of primacy was raised, Islamic law was often subordinated to dynastic law.[20]

Throughout the post-Mongol Islamic world, similar patterns can be seen. The Timurids, Uzbeks, and Mughals took up the practice of appointing judges, and the Mughals came to regulate law and codify doctrine through the Hanafi school, albeit not until the seventeenth century. Furthermore, the Crimean Khanate nearly mirrored the Ottoman practice by instituting a dual legal structure that navigated between Islamic law and dynastic law. Like the Ottomans and Mughals, the Khanate elevated the Hanafi school, largely because they recognized custom where religious law failed, and the school's interpretation deferred to the judge and ruler.[21] A variation on this development is found in the Mamluk sultans, who appointed four chief religious judges in Cairo, one from each school. This was done to stabilize the legal system in the wake the Mongol invasions in 1265, and to impose predictable rules and practices; in less than a century, this quadruple judicial system was in place in surrounding areas.[22] Broadly speaking, by the sixteenth century, the four major imperial polities of the Islamic world—Ottomans, Safavids, Uzbeks, and Mughals—all had developed institutions that followed political, legal, and administrative norms and practices drawn from, and imagined with reference to, the Mongol tradition[23]: they all had dynastic law that stood above but in tension with sacred law, but which opened a space for a particular school to establish dominance.

These parallels across space are not just interesting convergences—they are not just the recognition of trends within documents and historical writings—

they are much more: they help explain the trajectory of empire, and to understand the basis of legal and social developments that create a legacy of culture informing social and political practices from the early modern period to the present day. Chinese societies today, for example, are still burdened by the problem of unequal inheritance. Although guaranteed equality in law, families operating under ritual and patriarchal tradition either divide inheritance before the death of the patriarch, which serves to empower sons and deprive daughters, or force daughters to legally sign away their inheritance rights.[24] Tradition and customary practice still takes primacy over modern legal practice.[25] As Birge aptly details in this book, however, such practice was not always the case, nor did it even have to end up that way—there was no necessary path that Chinese societies would trod in an ineluctable embrace of a particular form of Confucianism that would inform what some social groups could and could not do. Tradition has a history, and Birge shows that it has no necessary form; rather, a series of historical contingencies point in a direction that actors may or may not actualize.

Such analysis reminds us that society is not a determinate truth, but rather an artifact. Society was made through human activity, and it can be remade.

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NOTES

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2. Historians of the broader Mongol empire have been more likely to emphasize its importance than historians of a particular place or region. For example see J. J. Saunders, *The History of the Mongol Conquests* (Philadelphia: University of Pennsylvania Press, 2001 [1971]).

3. John W. Dardess, "Did the Mongols Matter?" in *The Song-Yuan-Ming Transition in Chinese History*, ed. Paul J. Smith and Richard Von Glahn (Cambridge, MA: Harvard University Asia Center, 2003); Morris Rossabi, *How Mongolia Matters: War, Law, and Society* (Leiden: Brill, 2017).

4. The use of rights in China's imperial period should not be understood as a bundle of indivisible protections upheld by law and independent of the will of the ruler, as developed in the West. Rather, it was more a practical claim that imperial judges upheld to legitimize property and contractual claims. For a full discussion of this distinction see Philip C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford, CA: Stanford University Press, 1996), chap. 4.

5. An overview of this debate can be found in Kathryn Bernhardt, *Women and Property in China: 960–1949* (Stanford, CA: Stanford University Press, 1999), pp. 9–11.

6. Patricia Buckley Ebrey, "Shifts in Marriage Finance," in *Marriage and Inequality in Chinese Society*, ed. Rubie Sharon Watson and Patricia Buckley Ebrey (Berkeley: University of California Press, 1991), pp. 97–132.

7. Bernhardt, *Women and Property in China*.

8. The following discussion is drawn from the corpus of Birge's scholarship, including, Bettine Birge, "Levirate Marriage and the Revival of Widow Chastity in Yüan China," *Asia Major* 8, no. 2 (1995): 107–146; Bettine Birge, "Gender, Property, and Law in China," ed. Kathryn Bernhardt, *Journal of the Economic and Social History of the Orient* 44, no. 4 (2001): 575–599; Bettine Birge, *Women, Property, and Confucian Reaction in Sung and Yüan China (960–1368)* (Cambridge, UK; New York, NY: Cambridge University Press, 2002); Bettine Birge, "Women and Confucianism from Song to Ming: The Institutionalization of Patrilineality," in *The Song-Yuan-Ming Transition in Chinese History*, ed. Paul J. Smith and Richard Von Glahn (Cambridge, MA: Harvard University Asia Center, 2003); Bettine Birge, "How the Mongols Mattered: A Perspective from Law," in *How Mongolia Matters: War, Law, and Society*, ed. Morris Rossabi (Leiden: Brill, 2017), pp. 87–104.

9. The case of the significance of the Yuan period was made most forcefully in her two essays, "Women and Confucianism from Song to Ming," and "How the Mongols Mattered."

10. See Paul Heng-Chao Ch'en, *Chinese Legal Tradition under the Mongols: The Code of 1291 as Reconstructed* (Princeton, NJ: Princeton University Press, 1979); Christian De Pee, *The Writing of Weddings in Middle-Period China: Text and Ritual Practice in the Eighth through Fourteenth Centuries* (Albany: State University of New York Press, 2007), p. 201.

11. For a discussion of the origins of the Qing *Huidian* see Macabe Keliher, "Administrative Law and the Making of the First *Da Qing Huidian*," *Late Imperial China* 37, no. 1 (June 2016): 55–107.

12. Although, it should be noted that in lamenting the lack of surviving Yuan legal materials, Qing scholars complained that the *Yuanshi* was "hastily compiled" and of "sketchy quality" (p. 70).

13. Birge does note that there is evidence that the text Qing editors consulted was similar to the extant copy today, enabling the counter argument that perhaps the official copy of the *Yuan dianzhang*, if there was one, was not available to these Qing scholars either. It seems that further work is necessary to conclusively prove the nature of the *Yuan dianzhang* as official or not.

14. Some of the existing research on the matter includes Wing-tsit Chan, "Chu Hsi and Yuan Confucianism," in *Yüan Thought: Chinese Thought and Religion Under the Mongols*, ed. Hok-lam Chan and William Theodore De Bary (New York: Columbia University Press, 1982), pp. 197–232; John W. Dardess, *Conquerors and Confucians: Aspects of Political Change in Late Yüan China* (New York: Columbia University Press, 1973); William Theodore De Bary, *Neo-Confucian Orthodoxy and the Learning of the Mind-and-Heart* (New York: Columbia University Press, 1981); Miura Shu'ichi 三浦秀一, *Chūgoku shingaku no ryōsen* 中国心学の稜線 (Tokyo: Kenbun shuppan, 2003); Linda Walton, "The Institutional Context of Neo-Confucianism: Scholars, Schools, and Shu-Yuan in Song-Yuan China," in *Neo-Confucian Education: The Formative Stage*, ed. William Theodore De Bary and John W Chaffee (Berkeley: University of California Press, 1989), pp. 457–492.

15. Among other political, social, and economic developments, the early modern period is characterized by an increasing rationalization of law and promulgation of codes. For an overview see Macabe Keliher, "The Problem of Imperial Relatives in Early Modern Empires and the Making of Qing China," *American Historical Review* 122, no. 4 (October 2017): 1006–1010.

16. These trends are discussed in detail in Pamela Kyle Crossley and Gene R. Garthwaite, "Post-Mongol States and Early Modern Chronology in Iran and China," *Journal of the Royal Asiatic Society* 26, no. 1–2 (January 2016): 293–307.

17. See Cornell H. Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Ali (1541–1600)* (Princeton, NJ: Princeton University Press, 1986), chap. 11.

18. In many ways, the Ottomans made secular law complementary to sacred law, for Sharia law had very little or nothing to say about land tenure, tax administration, and criminal law. Colin Imber, *The Ottoman Empire, 1300–1650: The Structure of Power* (New York: Palgrave Macmillan, 2002), p. 223.

19. This is reflected in Mehmed II's fifteenth century code, where the two kinds of law are interwoven. For an English translation see Uriel Heyd and V. L. Ménage, *Studies in Old Ottoman Criminal Law* (Oxford: Clarendon Press, 1973), pp. 93–131.

20. See Engin Deniz Akarh, "The Ruler and Law Making in the Ottoman Empire," in *Law and Empire: Ideas, Practices, Actors*, ed. Jeroen Duindam et al. (Leiden; Boston: Brill, 2013), pp. 87–109; Guy Burak, *The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire* (Cambridge Studies in Islamic Civilization) (New York, NY: Cambridge University Press, 2015).

21. Natalia Krolikowska, "The Law Factor in Ottoman-Crimean Tatar Relations in the Early Modern Period," in *Law and Empire: Ideas, Practices, Actors*, ed. Jeroen Duindam et al. (Leiden; Boston: Brill, 2013), pp. 177–195.

22. Yossef Rapoport, "Legal Diversity in the Age of Taqlīd: The Four Chief Qāḍīs under the Mamluks," *Islamic Law and Society* 10, no. 2 (2003): 210–228.

23. Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire*, p. 290.

24. Taiwan government tax records show that on average, annually from 2010 to 2015, only 40 percent of daughters received pre-death inheritance, while 60 percent of sons did. Similarly, over that same period, just under 60 percent of daughters signed away their rights for postmortem inheritance. Lin Jieling 林潔玲, "Yican paoqi jicheng: Nüxing zhang bi gaoyu nanxing" 遺產拋棄繼承 女性占比高於男性, *United Daily News*, April 9, 2017, https://udn.com/news/story/7243/2392677.

25. Note the recent case heard in Taiwanese courts on a mother illegally signing away her daughter's inheritance. Lin Duan 林端, "Taiwan de falü yu shehui" 台湾的法律与社会, in *Qinghua fazhi lunheng: Fazhi yu faxue hechu qu* 清华法治论衡: 法治与法学何处去, ed. Gao Hongjun 高鸿鈞, 5 (Beijing: Qingha daxue chubanshe, 2005), pp. 107–144.