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Louis B. Schwartz, Inheritance Law of the People's Republic of China, The , 28 HARV. INT'L. L. J. 433 (Spring 1987).

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Louis B. Schwartz, Inheritance Law of the People's Republic of China, The , 28 Harv. Int'l. L. J. 433 (1987).

APA 7th ed.

Schwartz, L. B. (1987). Inheritance law of the people's republic of china, the Harvard International Law Journal 28(2), 433-464.

Chicago 17th ed.

Louis B. Schwartz, "Inheritance Law of the People's Republic of China, The ," Harvard International Law Journal 28, no. 2 (Spring 1987): 433-464

McGill Guide 9th ed.

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AGLC 4th ed.

Louis B. Schwartz, 'Inheritance Law of the People's Republic of China, The ' (1987) 28(2) Harvard International Law Journal 433

MLA 9th ed.

Schwartz, Louis B. "Inheritance Law of the People's Republic of China, The ." Harvard International Law Journal , vol. 28, no. 2, Spring 1987, pp. 433-464. HeinOnline.

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The Inheritance Law of the People's Republic of China

Louis B. Schwartz*

INTRODUCTION

On April 10, 1985, the National People's Congress (NPC) promulgated the first inheritance law in the history of the People's Republic of China (PRC).¹ The structure and function of the Inheritance Law are a product of traditional and modern influences. The Inheritance Law also reflects political, economic, and legal developments in the PRC which have caused a resurgence of private enterprise in the years since the end of the Cultural Revolution.

The Inheritance Law further evidences a diminished state interference in matters concerning the ownership and disposition of property in China. Where the drafting of the Inheritance Law revealed conflict between the furtherance of important state policies and the encouragement of individual initiative, the resulting law emphasizes individual autonomy. Consequently, while the Inheritance Law consciously embodies certain traditional Chinese inheritance practices, other less benign traditions may reemerge as individuals exercise the autonomy the Inheritance Law permits.

I. A BRIEF HISTORY OF INHERITANCE LAW IN CHINA

A. Traditional Inheritance Practices

Property in traditional Chinese society was considered to be owned by the family, not the individual.² In accordance with the Confucian ideal, the clan lived together and pooled family property, whether

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1. Zhonghua Renmin Gongheguo Jicheng Fa (Inheritance Law of the People's Republic of China) [hereinafter Inheritance Law], Apr. 10, 1985, *reprinted in Renmin Ribao* (People's Daily), Apr. 14, 1985, at 3, col. 1. An English translation can be found in JOINT PUBLICATIONS RESEARCH SERVICE, CHINA REPORT [hereinafter JPRS]: POLITICAL, SOCIOLOGICAL, AND MILITARY AFFAIRS, May 9, 1985, at 14. The author's own translation appears as an appendix to this article.

2. Aronowitz, *Chinese Succession Law: An Historical Survey*, 2 PORTIA L.J. 265, 274 (1967).

inherited from ancestors or earned by family members.³ Following the death of the head of the clan, a successor took his place, but the family property remained undivided so long as relations were harmonious and the family's economic situation was stable.⁴

Only when the family itself was partitioned did patrimonial succession occur.⁵ Upon partition, all sons enjoyed the right of inheritance. Male heirs inherited whether they were born to the father's wife or to his concubine.⁶ Illegitimate sons (i.e., those not born to a wife or concubine) were entitled to a half share provided they had been acknowledged by the father. A family head who had no heirs by his wife or concubine was obligated to adopt a son to continue the male line.⁷ Typically, a close relative such as a nephew was adopted through a device known as an adopted heir agreement,⁸ though non-relatives could also serve if there were no relatives available.

Females, on the other hand, did not enjoy a right of inheritance to the patrimony of either the family to which they were born or the family into which they married.⁹ Females in traditional China joined the family of their husbands, and their male children were considered to be in the line of succession of the husband's family. What role a woman had in determining the disposition of family property stemmed from her influence within the family and not from any legal right.¹⁰

Although testamentary instruments, such as the will and the adopted heir agreement, were known in traditional China, testate succession was the exception to the intestate regime. Testate succession

3. A man who acquired property may have enjoyed somewhat greater freedom to dispose of it in a way that deviated from the general rule that all sons inherited equally. See A. WOLF & C. HUANG, MARRIAGE AND ADOPTION IN CHINA, 1845-1945 at 59-61 (1980).

4. Aronowitz, *supra* note 2, at 275.

5. *Id.*

6. A. WOLF & C. HUANG, *supra* note 3, at 94-107.

7. Aronowitz, *supra* note 2, at 276.

8. The heir was often selected among agnates and was usually a nephew. The "adoption of an heir" (*guo ji*) was designed to ensure the survival of the line of descent and to guarantee that ancestor worship would continue. Hence another name for this practice is *si zi*—"continue the succession." Some scholars estimate that five percent of Chinese households entered into adopted heir agreements. S. VAN DER SPENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 16 (1962).

The boy was often adopted as a child and came to live with his adoptive parents, assuming the role of a natural son and severing ties with his natural parents. There were also cases, however, of post-mortem adoption of a male successor by the clan of the decedent. The male successor usually did not assume responsibilities to that branch of the family until after the death of the adoptive parent. Whatever the manner in which the male successor became associated with the family, he was usually entitled to inherit the entire family patrimony. Aronowitz, *supra* note 2, at 270, 272, 277.

For a discussion of the treatment of adopted heir agreements under current Chinese law, see *infra* text accompanying notes 86-90.

9. Daughters could inherit the family property if there were no male successors, but the use of the adopted heir agreement made such occurrences rare. Aronowitz, *supra* note 2, at 276.

10. *Id.* at 278.

existed primarily to facilitate a more efficient allocation and distribution of assets among family members or, in the case of the adopted heir agreement, to approximate intestate succession for individuals who were not true heirs. Testate succession thus served to support intestate succession and not to circumvent customary succession practices. The individual had little power to disinherit an heir or make a disposition to a non-heir, since the individual was considered the custodian of family or "corporate" assets.¹¹

B. The Nationalist Inheritance Law

The Nationalist Government enacted an inheritance law in 1930,¹² but it was never fully implemented due to the Nationalists' inability to control areas outside of China's cities. Despite its limited efficacy, however, the Nationalist law broke new ground in seeking to combine elements of China's traditional inheritance practice with western civil law principles.¹³

By drawing a distinction between commencing succession and partitioning the estate, the Nationalist inheritance law retained the traditional practice of not automatically partitioning the estate upon the death of the head of the family. Under the Nationalist law, however, heirs were permitted to demand partition at any time after the commencement of succession (i.e., after the decedent's death), unless the will, a contract, or a law provided otherwise.¹⁴ The Nationalists also followed traditional practice in providing for the assignment of a portion of the estate, whether conveyed by will or by intestacy, to one who had been supported by the decedent.¹⁵ Although the Nationalist inheritance law abolished the compulsory adoption of male heirs,¹⁶ judicial practice permitted that tradition to continue as well.¹⁷

Although the Nationalist inheritance law retained key aspects of traditional inheritance practice, it also incorporated several innovations. Most significantly, the Nationalist law elevated the will to a position of greater prominence, reflecting a growing emphasis on freedom of disposition of property.¹⁸ The Nationalists also established

11. *Id.* at 280-83.

12. Civil Code of the Republic of China [hereinafter ROC Civil Code], bk. V (C. Hsia, J. Chow, L. Chieh, & Y. Chang trans. 1931).

13. Aronowitz, *supra* note 2, at 284.

14. ROC Civil Code, *supra* note 12, art. 1164.

15. ROC Civil Code, *supra* note 12, art. 1149.

16. Aronowitz, *supra* note 2, at 284.

17. Moreover, the Nationalist law placed adopted children and natural children in the same order of succession, though the amount which an adopted child could inherit was limited to one half that of a legitimate child, unless no legitimate children survived. See Aronowitz, *supra* note 2, at 284-85.

18. Aronowitz, *supra* note 2, at 285-86.

for the first time in China the principle of equal treatment of the sexes in inheritance.¹⁹ Finally, the Nationalist law departed from traditional practice in limiting an heir's liability for the debts of the decedent to the amount of his inheritance.²⁰

Many of the core principles that distinguish the Inheritance Law of the PRC have their antecedents in the Nationalist inheritance law. Like the Nationalist law, the Inheritance Law of the PRC seeks to promote equality of the sexes and a substantial degree of freedom of disposition of private property, while retaining certain traditional inheritance practices which are compatible with or conducive to the regime's policy goals.

C. Inheritance in the PRC: 1949-1979

The founding of the People's Republic in 1949 did not bring an end to inheritance in China. The Chinese Communists proceeded from the Marxist premise that the role of inheritance in a given society depends on the scope of property ownership.²¹ According to this view, the right of inheritance withers away when the socialist transformation of property has been completed and there is no longer an economic base upon which the right of inheritance of private property can rest.

In the years immediately after 1949, however, the new government acquiesced in the existence of a wide range of private property. Consequently, it created a legal framework for inheritance, elements of which are reflected in the new Inheritance Law. The right of inheritance was recognized both in the 1950 Marriage Law²² and in the 1954 Constitution.²³ Provisional regulations on inheritance were also issued though no formal law was ever enacted.²⁴

However, property relationships in the PRC soon changed dramatically, and the importance of inheritance decreased in proportion to the diminution of private property rights. By 1956, agriculture had

19. See ROC Civil Code, *supra* note 12, arts. 1138, 1144; Aronowitz, *supra* note 2, at 284-86.

20. ROC Civil Code, *supra* note 12, art. 1154. The traditional practice of "universal succession" made heirs liable for all of the debts of the deceased. Aronowitz, *supra* note 2, at 282.

21. Foster-Simons, *The Development of Inheritance in the Soviet Union and the People's Republic of China*, 33 AM. J. COMP. L. 33, 37 (1985).

22. The Marriage Law of the People's Republic of China, May 1, 1950, arts. 12, 14, *reprinted in* FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 266, 269 (A. Blaustein ed. 1962).

23. "The state protects the right of citizens to inherit private property according to law." CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Sept. 20, 1954, art. 12, *reprinted in* 1 THE PEOPLE'S REPUBLIC OF CHINA 1949-1979: A DOCUMENTARY SURVEY 99, 100 (H. Hinton ed. 1980).

24. M. MEIJER, MARRIAGE LAW AND POLICY IN THE CHINESE PEOPLE'S REPUBLIC 251 (1971).

been collectivized and the nationalization of industry completed.²⁵ The legal framework of inheritance atrophied as changing property relationships eroded its practical utility. In the wake of the Anti-Rightist Campaign of 1956, law-making and legal education and research were largely discredited. In the late 1960s, with the onset of the Cultural Revolution, the legal system as a whole came under violent attack²⁶ and the focus of analysis turned to reconciling "the dwindling importance of property with the need for a law of inheritance."²⁷ An estate now typically consisted of no more than personal belongings such as clothing, bedding, household utensils, bicycles, watches, and books.²⁸ When the leftist-dominated NPC promulgated a new constitution in 1975, all reference to the right of inheritance was omitted.²⁹

Since the fall of the Gang of Four in 1976, the influence of the leftists in China has waned. Property relationships have once again become more varied and the private property rights of Chinese citizens have expanded. The 1978 Constitution did not explicitly sanction inheritance of private property, but such a right came to be seen as implied by the protection granted to "the right of citizens to own lawfully earned income, savings, and other means of sustenance."³⁰ The Inheritance Law is further evidence of the growing importance of these rights in the PRC.

D. Inheritance in the PRC Today: The Ideological and Legal Background

Chinese commentators still offer obeisance to the Marxist premise that inheritance is not a cause but an effect of the existing economic structure.³¹ They stress that in the present socialist stage, the productive forces in the economy have not yet reached a high level of development. Therefore, not all of the means of production can be transformed into state property and inheritance must continue for the time being. At the same time, Chinese theorists hasten to add that unlike capitalist inheritance systems, which are designed to consolidate

25. Wu, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1, 8 (1983).

26. *Id.* at 11-13.

27. M. MEIJER, *supra* note 24, at 264.

28. *Id.* at 252.

29. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Jan. 17, 1975, reprinted in 5 THE PEOPLE'S REPUBLIC OF CHINA 1949-1979: A DOCUMENTARY SURVEY 2502 (H. Hinton ed. 1980).

30. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Mar. 5, 1978 [hereinafter 1978 CONSTITUTION], art. 9, reprinted in 5 THE PEOPLE'S REPUBLIC OF CHINA 1949-1979: A DOCUMENTARY SURVEY 2840, 2841 (H. Hinton ed. 1980). The translation in the Hinton collection uses the term "means of livelihood" rather than "means of sustenance." See also Liao, *Jichengfa Chutan (An Initial Exploration of the Law of Inheritance)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), May 1980, at 18.

31. Ren, *A Socialist Inheritance Law With Chinese Characteristics*, reprinted in JPRS: RED FLAG, July 11, 1985, at 44, 47.

and safeguard an exploitative private ownership system, China's socialist inheritance system reflects the inherently nonexploitative ownership of property by the Chinese masses.³²

The ideological justification for the right to inherit private property is closely linked to the policy—embraced by the Chinese Government since 1979—of encouraging individual initiative to spur economic growth. The Communist Party theoretical journal *Red Flag* has emphasized the benefits to economic development of permitting inheritance of property: "Practice has proven that [the Inheritance Law] is beneficial to the accumulation of social wealth, conforms with the demands of developing our nation's productive forces, accords with the nature and characteristics of our nation's productive relations and with popular will."³³ Focusing on the potentially stifling effect that the absence of a right of inheritance could have on the accumulation of capital, the *Red Flag* commentary continued, "If we only allow the peasants to have and use the means of production during their lifetime, allocating them elsewhere on their death, these people's enthusiasm will be dampened and there will be no way for the individual economy and individual operations to continue to exist."³⁴ The Chinese now accept that if individuals and families are to make more than token economic investments, they must be guaranteed the right to dispose of their property at their death.³⁵

The Inheritance Law must also be viewed in the context of the progressive development of the legal order in China. The bitter experience of the Cultural Revolution left many of today's leaders in China convinced of the need to manage society according to relatively fixed laws rather than the whims of policy.³⁶ At the same time, they have come to see law as an indispensable means of providing a predictable common ground among an increasingly diverse range of economic actors.³⁷

The constitutional foundation for the Inheritance Law is Article 13 of the 1982 Constitution of the PRC: "The state protects by law the

32. *Id.* at 47–48. The only arguably socialist aspect of the Inheritance Law itself is Article 29: "The division of an estate should be beneficial to production and the necessities of living [and] not harm the usefulness of the estate." Inheritance Law, *supra* note 1, art. 29. Yet the requirement that the division of an estate be advantageous to production does not permit the state to affect the interest of an heir or testamentary donee, only the form that the interest takes. An estate that is unsuitable for division may be settled by converting it into money for distribution, providing appropriate compensation, or requiring ownership in common. *Id.*

33. Ren, *supra* note 31, at 46.

34. *Id.* at 45–46.

35. NPC Peasant Deputies On Inheritance Law Draft, reprinted in JPRS: POLITICAL, SOCIOLOGICAL, AND MILITARY AFFAIRS, May 9, 1985, at 11, 11.

36. Wu, *supra* note 25, at 26–27, 29–30.

37. *Id.* at 30–31.

right of citizens to inherit private property."³⁸ This provision represents a significant change from the 1978 Constitution, which did not explicitly sanction the inheritance of private property.³⁹ Moreover, the right of ownership and, by extension, the right of inheritance of property are not limited in the 1982 Constitution to "means of sustenance" (i.e., consumer goods) as was the case in the 1978 Constitution.⁴⁰ The "means of production" have become legitimate property subject to private ownership and inheritance.⁴¹ The 1982 Constitution thus represents a significant departure from the Marxist orthodoxy that the means of production are not to be privately owned, and therefore it is no longer appropriate to classify inheritable property according to the Marxist means of production/means of sustenance dichotomy.

The evolution of the Inheritance Law is also intimately linked to China's efforts to codify its civil law.⁴² Work on a successor to the Nationalists' Civil Code began in the early 1950's, but fell victim to the political turmoil of the Anti-Rightist Campaign and later the Cultural Revolution.⁴³ In late 1979, the drafting process resumed once

38. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Dec. 4, 1982 [hereinafter 1982 CONSTITUTION], art. 13, reprinted in 1 THE PEOPLE'S REPUBLIC OF CHINA 1979-1984: A DOCUMENTARY SURVEY 278, 280 (H. Hinton ed. 1986).

39. See *supra* text accompanying note 30.

40. Compare Article 13 of the 1982 Constitution ("The state protects the right of citizens to own lawfully earned savings, houses, and other lawful property."), 1982 CONSTITUTION, *supra* note 38, at 280 (emphasis added) with Article 9 of the 1978 Constitution ("The state protects the right of citizens to own lawfully earned income, saving, and other means of sustenance."), 1978 CONSTITUTION, *supra* note 30, at 2841 (emphasis added).

41. Liao, *supra* note 30, at 18. The Inheritance Law explicitly authorizes the inheritance of "[t]he means of production which the law permits a citizen to own." Inheritance Law, *supra* note 1, art. 3(5). See *infra* notes 57-59 and accompanying text.

Attitudes towards ownership of the means of production in China have evolved rapidly over the last ten years. A 1980 commentary on inheritance stated that "our socialist country does not have a private ownership system of the means of production, but means of sustenance are owned by citizens." Liao, *supra* note 30, at 18. By the time the Inheritance Law was promulgated in April 1985, it was settled that "as a result of the progress in the reform of the urban and rural economic structures and the extensive application of the system of contracted responsibility for production, a considerable number of peasants have owned some lawful means of production." *Baobu Gongmin Hefa Caichan De Jicheng Quan* (Defending the Citizens' Right to Inherit Lawful Property) [hereinafter *Defending the Citizens' Right*], Renmin Ribao (People's Daily), Apr. 14, 1985, at 3, col. 6, reprinted in FOREIGN BROADCAST INFORMATION SERVICE, CHINA REPORT [hereinafter FBIS], Apr. 18, 1985, at K15, K15.

42. For a short but interesting discussion of the research and drafting process that culminated in the promulgation of the Inheritance Law, see Wang Hanbin Xiang Liuji Quanguo Renda Changweihui Dijici Huiyi Zuo Guanyu Zhonghua Renmin Gongheguo Jichengfa Cacao Shuoming (Wang Hanbin's Explanation of the Rough Draft of the Inheritance Law of the PRC to the Ninth Session of the Standing Committee of the Sixth National People's Congress) [hereinafter Wang Hanbin's Explanation], ZHONGGUO RENMIN DAXUE SHUBAO ZILIAOSHE, (CHINESE PEOPLE'S UNIVERSITY BOOKS AND PERIODICALS), 1985, No. 1, at 32. Wang Hanbin is Chairman of the NPC Legislative Affairs Committee and Secretary-General of the NPC Standing Committee.

43. Epstein, *The Evolution of China's General Principles of Civil Law*, 34 AM. J. COMP. L. 705, 705 (1986).

again, initially with the goal of promulgating a comprehensive civil code on the German model.⁴⁴ Ultimately, however, the Chinese Government decided to promulgate as separate laws the sections of its draft civil code dealing with specific areas of civil law.⁴⁵ The General Principles of Civil Law, which became effective January 1, 1987, contain rules broadly applicable to civil law in China. The only explicit reference to inheritance is in Article 76, which provides that "[a] citizen enjoys the right to inherit property according to law."⁴⁶ The Inheritance Law is thus now the main source of law in the field of succession.⁴⁷

II. AN OVERVIEW OF THE INHERITANCE LAW OF THE PRC

A. *The Scope of Inheritable Property*

Article 3 of the Inheritance Law governs the scope of property that may be passed from one generation to the next.

An estate is the lawful personal property left when a citizen dies, including:

- (1) A citizen's income;
- (2) A citizen's house, savings, and personal effects;
- (3) A citizen's trees, livestock, and domestic fowl;
- (4) A citizen's cultural relics, books, and reference materials;
- (5) The means of production which the law permits a citizen to own;
- (6) The property rights in a citizen's copyrights [and] patents;
- (7) A citizen's other lawful property.⁴⁸

The enumeration of such specific items as income, houses, savings, livestock, books, and reference materials reflects a broad consensus

44. *Id.* at 707.

45. See, e.g., Marriage Law of the People's Republic of China, Sept. 10, 1980 [hereinafter 1980 Marriage Law], reprinted in 2 PEOPLE'S REPUBLIC OF CHINA 1979-1984: A DOCUMENTARY SURVEY 553 (H. Hinton ed. 1986); Economic Contract Law of the People's Republic of China, Dec. 13, 1981, reprinted in COMMERCIAL LAWS AND BUSINESS REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1949-1983 at 300 (V. Sir ed. 1983); Trademark Law of the People's Republic of China, Aug. 23, 1982, reprinted in CHINA INVESTMENT GUIDE 1984/85 at 559 (1984); Patent Law of the People's Republic of China, Mar. 12, 1984, reprinted in CHINA INVESTMENT GUIDE 1984/85 at 567 (1984).

46. General Principles of Civil Law of the People's Republic of China, art. 76, reprinted in 34 AM. J. COMP. L. 715, 730 (W. Gray & H. Zheng trans. 1986).

47. Because the Chinese are following in the civil law tradition, a wide range of references are appropriate supplemental sources of law, including case precedents, lectures and essays, treatises, and the expert opinions of scholars and lawyers.

48. Inheritance Law, *supra* note 1, art. 3.

since the end of the Cultural Revolution regarding the right of ownership of these forms of property. Other types of property have only recently gained sufficient acceptance to warrant inclusion in Article 3. One example is "cultural relics" (antiques).⁴⁹ Even on the eve of the promulgation of the Inheritance Law, some deputies to the NPC complained that individuals should not be permitted to inherit certain "cultural relics."⁵⁰

The right of inheritance of copyrights gains specific recognition in Article 3, but such a right will not be afforded prior to the promulgation of a copyright law.⁵¹ Conversely, a trademark law is already in force and theoretically applicable to individuals,⁵² but trademarks are not specifically listed with the other Article 3(6) intellectual property rights.

The open-ended nature of Article 3(7) reflects both a lack of consensus regarding the ownership of other types of property and the recognition that in the future new categories of property may become protected.⁵³ For example, Chinese citizens are beginning to pool funds to establish schools, factories, shops, and scientific research institutes.⁵⁴ As the practice of pooling capital becomes more widespread, the issue of the right to inherit securities will become more pressing. But because the scope of the right to own securities has yet to be defined, securities were not included in the list of inheritable property in the Inheritance Law.⁵⁵ Chinese observers suggest that when securities become governed by Chinese law, they will be deemed inher-

49. Article 387 of the fourth draft Civil Code provided that "[i]f there are important historical, cultural or secret archives or articles in the estate which are not suitable to be retained by an individual, they must be returned to State ownership." Jones, *A Translation of the Fourth Draft Civil Code (June 1982) of the People's Republic of China*, 10 REV. OF SOCIALIST L. 193, 247 (1984).

50. "Some deputies [to the NPC] said precious cultural relics should belong to the State and cannot be inherited." *Zhang Youyu Explains Draft Inheritance Law*, reprinted in FBIS, Apr. 16, 1985, at K13, K13.

51. Conversation with Guo Shoukang, Legal Adviser to the Ministry of Foreign Economic Relations and Trade (MOFERT) and an expert on Chinese intellectual property law, in Cambridge, Massachusetts (Jan. 10, 1986).

52. *Id.* See also Trademark Law of the PRC, art. 4, *supra* note 45, at 559.

53. The vagueness of Article 3 did not go unnoticed by those who drafted the Inheritance Law. Bai Shouyi, a member of the NPC Standing Committee, stated: "There are now many different types of family property and the draft Inheritance Law lacks a clear conception of such types of property. Thus, the stipulations on the inheritance of such property do not seem explicit enough." *NPC Standing Committee Continues Discussion*, reprinted in FBIS, Mar. 20, 1985, at K7, K8.

54. *Id.* at K8.

55. There was some debate among the deputies to the NPC at the time of the passage of the Inheritance Law about whether negotiable securities should be listed in Article 3. In the words of Zhang Youyu, Vice-Chairman of the NPC Legislative Affairs Committee, securities were not listed because "negotiable securities cover a wide scope with some questions still being explored. . . ." *Zhang Youyu Explains Draft Inheritance Law*, *supra* note 50, at K13.

able under Article 3(7) as "other lawful property."⁵⁶ Unfortunately, when property becomes "other lawful property" is not determined by reference to the Inheritance Law itself but rather requires an analysis of the status of that property right generally in Chinese law.

Article 3(5) makes explicit the inference in Article 13 of the 1982 Constitution that the means of production may be privately owned and inherited. The means of production lawfully subject to inheritance under Article 3(5) are generally thought to include only minor pieces of equipment such as tractors or trucks.⁵⁷ However, one editorial in the Chinese Communist Party newspaper *People's Daily* has suggested that investments in China by Overseas Chinese may be inherited by Chinese citizens.⁵⁸

The one means of production that clearly may not be inherited is land.⁵⁹ But Article 4 of the Inheritance Law permits the inheritance of the right of possession and use of land pursuant to a land contract.⁶⁰ Inheritance of land contract rights flows from the constitutional right of citizens to enter into contracts to engage in private economic activity.⁶¹ The right to inherit land contract rights under Article 4 creates a strong incentive for peasants to make investments in the land they work.

B. Intestate and Testate Succession

The Inheritance Law provides for both intestate and testate succession. Intestate succession is accomplished through statutory inheritance.⁶² Testate succession encompasses inheritance by will and testamentary gifts.⁶³ Statutory inheritance and inheritance by will are similar in that both are confined to "heirs" as defined by Article 10

56. *Id.* at K13.

57. See *Defending the Citizens' Right*, *supra* note 41, at K15. See also *Zuguo Xinmao (The New Face of the Motherland)*, Renmin Ribao (People's Daily) (Overseas ed.), Oct. 22, 1985, at 1, col. 5 (photo depicting a long row of newly purchased tractors; caption states that in this particular village an average of every third household owns a motor vehicle).

58. *Defending the Citizens' Right*, *supra* note 41, at K15. If means of production in China owned by Overseas Chinese may be inherited, then it is possible to imagine individual Chinese owning factories and hotels!

59. 1982 CONSTITUTION, art. 10, *supra* note 38, at 280 ("No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways."). See also *Journal Carries Article on Inheritance Law*, reprinted in FBIS, Oct. 6, 1983, at K11, K11 ("Land, which is an essential means of agricultural production, cannot be rented, sold, nor passed on as an estate; it belongs to the collective.").

60. Inheritance Law, *supra* note 1, art. 4.

61. Article 8 of the 1982 Constitution states that "[w]orking people who are members of rural economic collectives have the right, within the limits prescribed by law, to farm private plots of cropland and hilly land, engage in household sideline production and raise privately owned livestock." 1982 CONSTITUTION, *supra* note 38, at 280.

62. Inheritance Law, *supra* note 1, ch. 2.

63. *Id.* ch. 3.

of the Inheritance Law.⁶⁴ Under statutory inheritance, the heirs and the amount they receive are determined by law based on sequence, need, and whether the heirs have fulfilled their obligation to provide for the decedent. Under inheritance by will, on the other hand, the decedent chooses among the heirs and decides how much each is to receive, constrained only by the requirement that he or she provide for heirs who are elderly, infirm, or under age. A testamentary gift is the means by which a testator makes a bequest to a non-heir.

Statutory heirs are organized into two sequences.⁶⁵ The first sequence heirs—the spouse, children,⁶⁶ and parents of the decedent—have the first right to inherit all of the intestate decedent's property. In general, statutory heirs inherit the decedent's estate in equal shares, though this rule is subject to important exceptions based upon the relative financial needs of the heirs, the extent to which the heirs have fulfilled their obligation to provide for the decedent, and any agreements the heirs have concluded among themselves and with the decedent.⁶⁷ Should no member of the first sequence survive the decedent, the second sequence heirs—the siblings and grandparents of the decedent—share the decedent's estate.⁶⁸ If no first or second sequence heirs survive an intestate decedent, the estate escheats to the state or the decedent's collective.⁶⁹

Following traditional practice and the precedent of the 1980 Marriage Law,⁷⁰ the Inheritance Law broadly defines the persons who qualify as statutory heirs. Legitimate, illegitimate, adopted, and "step-children who have a foster relationship with their parents" are all entitled to inherit as first sequence heirs.⁷¹ A widowed son-in-law or daughter-in-law is also deemed a first sequence statutory heir if he or she has "fulfilled the principle obligation to support a father-in-law or mother-in-law."⁷² Siblings with one parent in common, adopted siblings, and "step-brothers and -sisters who have a foster relationship" are all within the scope of the second sequence.⁷³

Chinese legal scholars who analyze the history of inheritance law and practice in the West often cite the advent of disposition by will as the definitive challenge to the hereditary system of the patriarchal

64. *Id.* art. 10.

65. *Id.*

66. If the decedent's children predecease the decedent, their direct lineal descendants take their parent's place in the first sequence. *Id.* art. 11.

67. *Id.* art. 13.

68. *Id.* art. 10.

69. *Id.* art. 32.

70. 1980 Marriage Law, arts. 19–21, *supra* note 45, at 554.

71. Inheritance Law, *supra* note 1, art. 10.

72. *Id.* art. 12.

73. *Id.* art. 10.

clan.⁷⁴ Analogizing traditional Chinese and Roman inheritance practices, Chinese commentators express the belief that by promoting disposition by will, China can break down "decadent" inheritance practices characterized as the product of "feudal thinking."⁷⁵ That "decadent" inheritance customs may be overcome by the use of wills is a view premised on faith in the ability of the legal propaganda machinery to educate Chinese citizens in the proper use of their power of disposition.⁷⁶ By promoting the use of wills, however, the Chinese expose the tension and conflict between individual autonomy and state policies. Freedom of disposition may undermine the state's goal of promoting equality of the sexes and, conversely, the state's policy of promoting sexual equality may inhibit the individual initiative necessary to bring about economic development in China.

The Inheritance Law recognizes the validity of a number of different types of wills.⁷⁷ A notarized will is obviously preferred, as it provides evidence of the circumstances of the making of the will and the state of mind of the testator. The testator may submit to the notary a will that he has previously written or a will written by another for him.⁷⁸ The testator may also make an oral will before the notary, who then creates a record.⁷⁹ This latter technique is important in that it provides an opportunity for those who are illiterate to leave clear directions as to the disposition of their property.

Citizens may also use wills to make testamentary gifts to persons who are not heirs, to the state, or to the collective.⁸⁰ One practical distinction between inheritance and testamentary gifts lies in the satisfaction of the tax and debt obligations of the decedent. Article 33 of the Inheritance Law requires heirs to pay taxes and debts up to the value of the estate.⁸¹ Article 34, however, requires the estate to clear up the tax and debt obligations of the decedent prior to distributing any testamentary gifts.⁸² In addition, only heirs are given the

74. Zhu, *Lun Yizhu Jicheng (On Inheritance By Will)*, FAXUE YANJIU (JURISPRUDENCE RESEARCH), June 1986, at 38, 39.

75. *Id.*

76. See *infra* notes 152-54 and accompanying text.

77. Inheritance Law, *supra* note 1, art. 17. A "testamentary note" (*yi shu*) can also serve as a will if it satisfies the requirements of the law governing formation of wills. *Feibunshengnu Ke Jicheng Wo Baoxiong De Yichan Ma? (May an Illegitimate Daughter Inherit Her Brother's Estate?)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), July 1983, at 46 ("Legal Adviser" column).

78. Inheritance Law, *supra* note 1, art. 17. See also *Zenyang Shenqing Banli Yizhu Gongzheng (How to Apply for Notarization of A Will)*, Zhongguo Fazhi Bao (China Legal System News), July 15, 1985, at 3, col. 5.

79. *Id.*

80. Inheritance Law, *supra* note 1, art. 16.

81. *Id.* art. 33.

82. *Id.* art. 34.

opportunity to voluntarily pay debts and taxes of the decedent that exceed the value of the estate.⁸³

A second practical distinction between inheritance and testamentary gift lies in the presumption the Inheritance Law creates as to the acceptance or renunciation of inheritances and gifts. Heirs are presumed to accept an inheritance in the absence of a renunciation before the estate is distributed. Conversely, testamentary donees are presumed to renounce a testamentary gift unless they accept it within two months of becoming aware of it.⁸⁴

The Inheritance Law contemplates at least one other type of testamentary writing. In an "agreement of support and testamentary gift" (*yi zeng fu yang*), an individual or a collective can undertake to provide for the donor and to bury him or her in exchange for receiving a testamentary gift when the donor dies.⁸⁵

The practice of adopting a male heir has survived in China despite official hostility to customs designed to preserve property within patriarchal lineages. Many adopted heir agreements have been reported, one as recently as 1976.⁸⁶ However, the legality of these agreements is unclear.

There are three possible approaches to the question of the legal effect of adopted heir agreements. The first is simply to regard such agreements as invalid. The failure of the Inheritance Law to mention adopted heir agreements lends some credence to this view. The second approach is to ignore the agreement and evaluate the actual relationship between the adopted son and the adopting parent.⁸⁷ This analysis

83. *Id.* art. 33. See *supra* note 20. The reservation of an opportunity for an heir to assume the debts and taxes of a deceased family member is a twist on a traditional Chinese attitude toward the law by which one who owes a legal obligation will voluntarily acknowledge and assume that obligation once he realizes his legal responsibilities. Cf. Regulations of the People's Republic of China on Economic Contract Arbitration, Aug. 22, 1983, art. 6, reprinted in 3 CHINA L. REP. 219, 220 (L. Schwartz trans. 1986): "The party who petitions for arbitration before the arbitration organ must do so within one year of the date when the party knew or should have known that its rights were infringed[;] however, there is no period of limitation when the infringer is willing to assume the liability."

84. Inheritance Law, *supra* note 1, art. 25.

85. *Id.* art. 31.

An "agreement of inheritance and support" (*shanyang yu jicheng caichan xieyi shu*), which is not mentioned in the Inheritance Law but which is used in practice, is similar to the "agreement of support and testamentary gift" except that it is concluded among the testator and the heirs. FALU WENSHU XUANPING (SELECTED LEGAL DOCUMENTS) 563 (1984). In it, the testator and the heirs often agree that the sibling who takes care of the testator will receive a larger share of the future estate. *Id.*

86. "Guojiyue" Kefou Zuowei Yizhu? (May an "Adopted Heir Agreement" Serve As a Will?), MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), May 1983, at 46 ("Legal Adviser" column).

87. One scholar takes the position that since the adopted heir agreement is not recognized by PRC law, only if there is an actual adoptive relationship will the law enforce the mutual obligations and benefits of the adoptive parent and child. Liao, *supra* note 30, at 20. See also May an "Adopted Heir Agreement" Serve As a Will?, *supra* note 86, at 46.

focuses on whether the beneficiary of the adopted heir agreement has fulfilled his obligation to support the decedent or has lived with the decedent, as required of other heirs.⁸⁸ The third approach requires both that the adopted heir agreement be performed according to its terms and that a relationship-in-fact exist.⁸⁹ Only under the last of these three approaches would the adopted heir inherit according to the terms of the writing. Otherwise he would either share in the intestate estate (assuming no other testamentary writing existed) or receive an "appropriate amount" as a non-heir entitled to a share of the estate under certain circumstances.⁹⁰

C. Administration of Estates

The Inheritance Law seems to make a distinction between the administration of intestate and of testate estates. Chapter Two, on statutory inheritance, does not provide for the appointment of an administrator of the estate. Instead, intestate succession is to be handled by the family "through consultation" in a "spirit of mutual accommodation and understanding."⁹¹ On the other hand, Chapter Three, on inheritance by will and testamentary gift, permits and contemplates the designation by the testator of an executor to administer the estate.⁹²

Leaving the administration of succession to the family has antecedents in the traditional Chinese custom of ceding jurisdiction over most family matters to the clan. The Nationalist inheritance law similarly assigned some functions of intestate administration to the Family Council rather than the courts.⁹³ No on-going supervision of either intestate or testate administration by a Chinese court or legal agency is contemplated by the Inheritance Law. The Law allows for mediation of statutory inheritance disputes before a People's Mediation Committee, or litigation of such disputes before a People's Court, should the family fail to handle inheritance problems through "consultation."⁹⁴ Whether the executor of a testate estate will be subject to judicial oversight is not clear from the law itself and shall await further regulations.

88. Inheritance Law, *supra* note 1, art. 10. See also *Guo Mou De Yichan Yingfou You Sizi Jicheng?* (Should the Estate of a Certain Mr. Guo Be Inherited By an Adopted Heir?), MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Mar. 1983, at 45 ("Legal Adviser" column).

89. May an "Adopted Heir Agreement" Serve As a Will?, *supra* note 86, at 45.

90. Inheritance Law, *supra* note 1, art. 14.

91. *Id.* art. 15.

92. *Id.* art. 16.

93. Aronowitz, *supra* note 2, at 269, 285.

94. Inheritance Law, *supra* note 1, art. 15.

III. ANALYSIS

In drafting the Inheritance Law, the Chinese have attempted to retain certain positive features of traditional family relations in China while implementing several important social policies. Where the state attempts to write traditional Chinese practices into the law, tradition and law are mutually reinforcing. In other cases, the Chinese Government has endeavored to promote social policies, such as freedom of disposition and equality of the sexes, that conflict with tradition or with each other. The discussion below focuses on the extent to which the Chinese Government will be successful in encouraging some traditional customs but not others and in promoting new rights while discouraging the use of such rights to revive "decadent" traditions.

A. *Mutuality of Obligations and Benefits*

One important characteristic of the Inheritance Law is its insistence on "mutuality of obligations and benefits."⁹⁵ Article 13 provides that an intestate heir may completely forfeit his right of inheritance or receive only a reduced portion if he fails to fulfill his duty to support the decedent. Likewise, an heir who has fulfilled the duty of support may receive a larger share of the estate.⁹⁶ Arranging the decedent's burial is the minimum obligation which an heir must fulfill to qualify for an intestate share.⁹⁷ Because Article 13 applies only to intestate succession, an individual testator may choose to ignore the principle of mutuality of obligations and benefits in his will, though as a matter of human nature he is likely to write a will favoring those who have supported him. In cases of intestate succession, however, Article 13 provides an additional economic incentive for heirs to continue the "fine tradition of the Chinese people"⁹⁸ of mutual support within the family.

The principle of mutual familial responsibilities is also found in the 1982 Constitution and the 1980 Marriage Law. Parents are required to "rear and educate" their minor children⁹⁹ and children who have come of age must "support and assist" their parents.¹⁰⁰ Correspond-

95. See Guanyu "Zhonghua Renmin Gongheguo Jichengfa (Caoan)" De Shuoming (An Explanation of the Draft Inheritance Law of the PRC), Renmin Ribao (People's Daily), Apr. 14, 1985, at 4, col. 1 (remarks of Wang Hanbin at the Third Session of the Sixth National People's Congress on April 3, 1985).

96. Inheritance Law, *supra* note 1, art. 13.

97. May an "Adopted Heir Agreement" Serve As a Will?, *supra* note 86, at 46.

98. CPPCC Members Discuss Draft Inheritance Law, JPRS: POLITICAL, SOCIOLOGICAL AND MILITARY AFFAIRS, May 9, 1985, at 13, 13.

99. The Chinese laws on civil capacity are contained in Articles 11 and 12 of the General Principles of Civil Law of the PRC, *supra* note 46, at 717.

100. 1982 CONSTITUTION, art. 49, *supra* note 38, at 283.

ingly, parents have a "right to demand the means of living from their children" and minor children the "right to demand support and assistance from their parents."¹⁰¹ The mutual rights and responsibilities defined in the Marriage Law apply over three generations, so that grandparents and grandchildren are also subject to these duties.¹⁰² Furthermore, family members who fail to support and care for each other may be subject to administrative disciplinary measures¹⁰³ or more severe criminal penalties.¹⁰⁴

The expansive concept of familial duties enunciated in the Constitution and the Marriage Law is reflected in the Inheritance Law in several respects. As noted above, the Inheritance Law requires that all heirs, including spouses, fulfill their duty of support to the decedent as a condition of inheritance.¹⁰⁵ In addition, the Inheritance Law defines statutory heirs for intestate succession to include not only legitimate children, but also grandparents, grandchildren, adopted and illegitimate children.¹⁰⁶ Furthermore, heirs may forfeit the right to inheritance by committing acts other than non-support of the decedent which are flagrant violations of the principle of mutuality of obligations and benefits. Such acts include murdering the decedent, killing an heir while contending for a part of the estate, forsaking the decedent or mistreating him with serious consequences, and forging, tampering with, or destroying the will.¹⁰⁷

The case of Li Youcheng illustrates both behavior that constitutes a failure to fulfill one's obligation of support and the fact that the

101. 1980 Marriage Law, art. 15, *supra* note 45, at 553.

Divorce does not release a parent from the duty to nurture and educate a child. See *Shonma Shi Shanyang, Fuyang, Fuyang He Shouyang? (What are "Supporting", "Providing For", "Raising", and "Adopting"?)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Jan. 1980, at 44 ("Legal Adviser" column).

102. 1980 Marriage Law, art. 25, *supra* note 45, at 554.

103. See 1980 Marriage Law, art. 34, *supra* note 45, at 554 ("Persons violating this law shall be subject to administrative disciplinary action or legal sanction."). See also *Zinu Dui Fumu Bujin Shanyang Yiwu Fanfa Ma? (Do Children Who Do Not Fulfill Their Obligation to Support Their Parents Violate the Law?)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), May 1979, at 43 ("Legal Adviser" column).

104. See Criminal Law of the People's Republic of China, July 1, 1979, art. 183, reprinted in *THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA* 5, 61 (J. Cohen and T. Gelatt trans. 1984) ("Whoever has a duty to support aged persons, children, sick persons or others lacking the ability to live independently, but refuses to provide such support, when the circumstances are odious, is to be sentenced to not more than five years of fixed-term imprisonment, criminal detention or control.").

105. See *supra* note 96 and accompanying text. See also *Jiejie De Yichan Ying You Shui Jicheng? (Who Should Inherit My Older Sister's Estate?)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Sept. 1981, at 45 ("Legal Adviser" column).

106. See *supra* text accompanying notes 65-69.

107. Inheritance Law, *supra* note 1, art. 7. One cannot, however, be denied an inheritance because one is serving a prison sentence. *Fuxing De Ren Shifou You Jicheng Yichan De Quanli? (Does a Person Serving a Prison Sentence Have a Right of Inheritance?)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Sept. 1983, at 46 ("Legal Adviser" column).

mutuality of obligations and benefits applies to adopted as well as natural children. Li Youcheng was brought into his adoptive household at an early age. After his adoptive father died, he refused to provide any monetary support for his adoptive mother. She was forced to sell household articles in order to live until an organization in her neighborhood helped her apply for state assistance. When Li Youcheng's adoptive mother died in 1981, he wanted to inherit her three-room house. When the situation was presented to a legal adviser,¹⁰⁸ Li Youcheng's behavior was characterized as forsaking his adoptive mother and he was not permitted to inherit his mother's house.¹⁰⁹

By conditioning the right to intestate inheritance on the fulfillment of support duties, mutuality of obligations and benefits may work to the benefit of sons and to the disadvantage of daughters. Some legal scholars have suggested that the relative shares of heirs in the same sequence should depend on their contribution to the economic livelihood of the family.¹¹⁰ Because the vast majority of women "marry out" and do not contribute to the accumulation of property in their parents' household, these scholars argue that daughters should not request a share of the estate of their parents.¹¹¹ In one reported case, a legal adviser noted that the daughter's receipt of a dowry did not preclude her from participating in the distribution of her parents' estate. But because she lived away from her parents and visited only on holidays and the New Year, the legal adviser suggested that she was entitled to a smaller share than her brothers, who lived with the parents and presumably cared for them on a regular basis.¹¹² The principle of mutuality of obligations and benefits therefore may conflict with the policy of promoting equality of the sexes.¹¹³

Chinese legal scholars emphasize that the failure of family members to support one another is both immoral and illegal.¹¹⁴ Article 13 continues "with the force of law" the traditional Chinese practice of providing for one another within the family. In this sense, mutuality

108. Chinese law journals print columns by lawyers who offer advice based upon actual legal disputes. These "Legal Adviser" columns, as they are known, are important secondary sources of law because they are intended to educate Chinese citizens about their legal rights and duties.

109. *Yangzi Yiqi Yangmu, Nengfou Jicheng Yangmu De Yichan?* (May an Adoptive Son Who Forsakes His Adoptive Mother Inherit Her Estate?), MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Feb. 1984, at 48 ("Legal Adviser" column).

110. Liao, *supra* note 30, at 19.

111. *Id.*

112. *Wo Nale Peijiaquan; Hai Neng Jicheng Fumu Yichan Ma?* (I Received a Dowry; Am I Still Allowed to Inherit My Parents' Estate?), MINZHU YU FAZHI, (DEMOCRACY AND THE LEGAL SYSTEM), May 1985, at 47-48 ("Legal Adviser" column).

113. See *infra* notes 132-54 and accompanying text.

114. *Yichan Bu Gei Erzi, Geidao Nu Hefu Ma?* (Is a Will that Fails to Make a Bequest to a Son, but Makes a Bequest to a Niece Valid?), FAXUE ZAZHI (JURISPRUDENCE MAGAZINE), Jan. 1980, at 79-80 ("Legal Adviser" column).

of obligations and benefits may be analogized to the traditional practice of enforcing Confucian ethical principles (*li*) with law (*fa*).¹¹⁵

B. *The Reserved Requisite Share*

A second Chinese tradition enshrined in the Inheritance Law is that of reserving a portion of the estate for certain dependents. The sections of the Inheritance Law dealing with testate and intestate succession both provide that a share of the estate must be reserved for those who are dependent on the deceased or cannot support themselves because they are elderly, infirm, or under age. The scope of the beneficiaries of the reserved requisite share requirement is, however, narrower in the context of testate succession. Article 14, which applies to intestate succession, provides that a share of the estate may be distributed to "persons other than heirs who lack the ability to work and depend on the decedent."¹¹⁶ By contrast, Article 19, on disposition by will, only refers to heirs; a will must "reserve a requisite share of the estate for heirs who lack the ability to work or a source of income."¹¹⁷

The reserved share requirement embodies the "tradition of the Chinese peoples"¹¹⁸ of "supporting the aged and providing for the young."¹¹⁹ The reserved requisite share may be viewed as one instance where the mutuality of obligations and benefits transcends the boundary between the living and the dead. Supporting one's minor children and providing for one's aged parents or other dependents are obligations that must be performed even after death.

The reserved requisite share requirement is perceived by the Chinese as not only a legal and moral responsibility but also as a practical necessity. The state simply cannot afford to provide relief to all those who are unable to live independently¹²⁰ and families cannot be permitted to "push off on society" those who cannot care for themselves.¹²¹ The reserved requisite share requirement thus reinforces the role of the family as the basic welfare unit in Chinese society. The renewed emphasis on this role parallels the reemergence of the family as the basic production unit in China (at least in the countryside), a trend which is itself reinforced by the protection which the Inheritance Law

115. See generally Schwartz, *On Attitudes Toward Law in China*, reprinted in J. COHEN, *THE CRIMINAL PROCESS IN THE PRC 1949-1963* at 62 (1968).

116. Inheritance Law, *supra* note 1, art. 14.

117. *Id.* art. 19.

118. *Chuli Jicheng Anjian De Jiben Yuanze* (Basic Principles in the Disposition of Inheritance Cases) [hereinafter *Basic Principles*], *Zhongguo Fazhi Bao* (China Legal System News), July 19, 1985, at 19, col. 1.

119. Li, *Luelun Yizhu Jicheng* (Notions of Inheritance by Will), *MINZHU YU FAZHI* (DEMOCRACY AND THE LEGAL SYSTEM), Aug. 1982, at 12, 12.

120. *Basic Principles*, *supra* note 118, at 19.

121. Li, *supra* note 119, at 12.

provides for the right to own and inherit an increasingly broad array of property.

C. The Practice of *Fen Jia* (Division of Household Property)

The Inheritance Law encourages heirs to keep an estate intact until the death of the surviving spouse by making a distinction between when the right of inheritance accrues and when the estate is split.¹²² Article 15 allows the heirs to handle through "consultation"¹²³ the time, method, and shares of the distribution of the estate.¹²⁴

The practice of family members deciding through consultation matters relating to the distribution of an estate is related to the traditional Chinese practice of treating property as that of the whole family, rather than the individual, and maintaining it as a unit until the sons formed separate households.¹²⁵ This practice, known as *fen jia*—division of household property—often occurred at a time unrelated to the death of a parent.¹²⁶ Brothers would frequently continue to use the "common budget" after the death of the family head,¹²⁷ but only rarely would cousins share the household property after the death of all the brothers.¹²⁸ Division of household property was a legal act in traditional China whereby the wealth of the household was calculated and distributed among the sons.¹²⁹ The effect of division of household property was to break up the larger family unit into smaller property-holding units consisting of a brother and his wife and children.¹³⁰

Fen jia is still practiced in China,¹³¹ but unlike in traditional times, when the "common budget" was not viewed as owned by any one individual, the property interests of individual family members in an estate are now clearly defined by the Inheritance Law. When a Chinese citizen dies intestate, the interests of the heirs and others are deter-

122. Zhang Youyu Explains Draft Inheritance Law, *supra* note 50, at K15. Although some deputies to the NPC argued that permitting the whole estate to remain in the possession of the surviving spouse would accord with Chinese tradition, make it easier for the children to support their parents, and avoid unnecessary disputes, the Inheritance Law does not make it mandatory for an estate to be kept intact during the life of the surviving spouse. *Deputies Differ On Law*, reprinted in FBIS, Apr. 8, 1985, at K8, K8-K9.

123. Wang Hanbin's Explanation, *supra* note 42, at 33-34.

124. Inheritance Law, *supra* note 1, art. 15.

125. See *supra* text accompanying notes 2-5.

126. Aronowitz, *supra* note 2, at 274.

127. Shiga, *Family Property and the Law of Inheritance in Traditional China*, in CHINESE FAMILY LAW AND SOCIAL CHANGE IN HISTORICAL AND COMPARATIVE PERSPECTIVE 109, 111 (D. Buxbaum ed. 1978).

128. *Id.* at 116.

129. *Id.*

130. *Id.* at 117.

131. See *Women You Jicheng Quan Ma?* (Do We Have a Right of Inheritance?), FAXUE ZAZHI (JURISPRUDENCE MAGAZINE), Mar. 1981, at 49-50 ("Legal Adviser" column).

mined by Chapter Two of the Inheritance Law, and the legal right to their respective shares should not be affected by a decision to delay splitting up the estate. In fact, however, a daughter who has "married out" may prefer immediate distribution while the sons and the spouse may favor delaying distribution so that they can continue to jointly use the property.

D. Equality of the Sexes

The principle of equality of the sexes is embodied in the 1982 Constitution¹³² and much of the contemporary legislation of the PRC.¹³³ The Inheritance Law likewise incorporates many specific measures designed to further the state's policy of sexual equality. For instance, the Inheritance Law provides that all decedents, without regard to sex, have the same right to dispose of their property by will.¹³⁴ The interests of wives are protected by Article 26 of the Inheritance Law, which mandates separating out the surviving spouse's share of the marital property prior to the distribution of the decedent's estate.¹³⁵ The Inheritance Law also provides that a widow who remarries retains both her marital property and her share of her deceased husband's estate.¹³⁶ Finally, the Inheritance Law gives a widowed daughter-in-law an equal intestate share of the estate of her parents-in-law.¹³⁷

Chinese legal commentators claim that the guarantee of equal rights for women in inheritance "expresses the socialist character" of China's

132. "Women in the People's Republic of China enjoy equal rights with men in all spheres of life, political, economic, cultural and social, including family life." 1982 CONSTITUTION, art. 48, *supra* note 38, at 283.

133. See, e.g., 1980 Marriage Law, art. 9 ("Husband and wife shall enjoy equal status in the home."); art. 13 ("Both husband and wife enjoy equal rights in the management of their community property."); art. 14 ("Husband and wife are in duty bound to support and assist each other.") *supra* note 45, at 553.

134. *Basic Principles*, *supra* note 118, at 19.

135. Article 26 provides that the property accumulated during a marriage is deemed to be the common property of the husband and wife. There is no right of survivorship to the deceased spouse's interest, but one-half of the marital property is considered the property of the surviving spouse. The estate of the decedent is therefore confined to one-half of the marital property and any other property that the deceased spouse owned separately. Inheritance Law, *supra* note 1, art. 26.

136. *Id.* See also *Basic Principles*, *supra* note 118, at 19.

137. Inheritance Law, *supra* note 1, art. 12. The right of a widowed daughter-in-law to be included in the first sequence of intestate heirs is conditioned on the requirement that she have lived with the decedent for a long time or that they have mutually supported and provided for one another. See *Zhe Sange Erzi, Yige Guaxi, Shui Dui Sizhe You Jicheng Quan?* (These Three Sons, This Daughter-in-Law, Who Has a Right of Inheritance with Respect to the Decedent?), MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Jan. 1981, at 45 ("Legal Adviser" column). See also *Sangshi Peiou De Nuxu Kefou Jicheng Yuefumu De Yichan?* (May a Son-in-Law Who Has Lost His Spouse Inherit the Estate of His Parent-in-Law?), MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Dec. 1982, at 41-42 ("Legal Adviser" column).

Inheritance Law and thereby distinguishes it from "the inheritance system of all exploiting classes."¹³⁸ Yet the Inheritance Law prohibits sex discrimination only in statutory inheritance and not in testate succession. In contrast to the general principles of succession in the fourth draft Civil Code, which stated, as to both testate and intestate succession, that "[p]roperty succession carries out the principle of the equality of the sexes . . . ,"¹³⁹ the policy in the Inheritance Law that "[t]here is equality of the sexes in the right of inheritance" is confined to the chapter on statutory inheritance.¹⁴⁰

It is widely acknowledged that discrimination against women remains widespread in China.¹⁴¹ This is usually attributed to the "long-term effects of feudal thought," especially in rural areas.¹⁴² In 1979 a legal adviser was presented with the case of a father who made a will dividing all of his property between two sons and disinheriting a daughter who had cared for him. Emphasizing that disinheriting a daughter because of "feudal thinking" was unreasonable and was likely to cause the estrangement of the siblings, the legal adviser admonished the parties that the right to devise property was not without limits. At the same time, the legal adviser could only suggest that the siblings redistribute the father's property voluntarily, for he could not say that disinheriting a grown daughter with independent means of support was cause to void the will.¹⁴³ The case of the disinherited daughter exemplifies the conflict between the equally important policies of freedom of alienation and sexual equality that faced Chinese legal scholars during the formulation of the Inheritance Law.

Prior to the promulgation of the Inheritance Law, Chinese legal scholars vigorously debated whether the prohibition against sex discrimination should apply to disposition by will. The minority took the position that both testate and intestate succession should be subject to the prohibition against sexual discrimination.¹⁴⁴ If a testator disinherits a daughter and "from between the lines" it is clear that such behavior is a result of "feudal thinking," then the People's Court should void the will upon the request of the disinherited daughter.¹⁴⁵ To do otherwise, according to this view, would be a capitulation to "feudal thinking."

138. *Basic Principles*, *supra* note 118, at 19.

139. Jones, *supra* note 49, at 247 (art. 385).

140. Inheritance Law, *supra* note 1, art. 9.

141. Liao, *supra* note 30, at 19.

142. *Basic Principles*, *supra* note 118, at 19.

143. *Boduole Nuer Jichengquan De Yizhu Shifou Rengran Juyou Falu Xiaoli? (Is a Will that Strips a Daughter of Her Right of Inheritance Still Valid?)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Apr. 1979, at 41-42 ("Legal Adviser" column).

144. Wu, *Ye Tan Yizhu Jicheng (Another Discussion of Testate Succession)*, MINZHU YU FAZHI (DEMOCRACY AND THE LEGAL SYSTEM), Nov. 1981, at 16.

145. *Id.* See also Liao, *supra* note 30, at 18.

Even as it acknowledged the continuing influence of the traditional patriarchal inheritance system, the majority refused to concede that the failure to make a disposition to one's daughter could be motivated by "feudal thinking,"¹⁴⁶ arguing instead that the abuse of the right to dispose of one's property is a malady only in the inheritance systems of capitalist societies.¹⁴⁷ Although the majority attempted to suggest that the disinheritance of a daughter was usually due to a testator's decision to make a bequest to the state or a collective to further "socialist construction,"¹⁴⁸ it argued that disinheriting a daughter is lawful even if due to "feudal thinking."¹⁴⁹ These scholars characterize disposition by will as the "full embodiment" of the protection of a citizen's lawful ownership rights in property.¹⁵⁰ By refusing to condition a testator's right to dispose of his property on the absence of discriminatory intent, the Inheritance Law expresses a clear preference for freedom of alienation over the state policy of preventing sexual discrimination.¹⁵¹

According to the majority view, the way to eradicate the "contradiction between law and morality or reason"¹⁵² that arises when a testator exercises his right to dispose of his property in a socially repugnant manner is education through propaganda.¹⁵³ Shortly after the Inheritance Law was promulgated, the Chinese press began to publish articles which made examples of peasant farmers such as Yang Ruxian, who "shamefacedly" admitted that he had originally intended to act in a sexually discriminatory manner but had changed his mind upon realizing the error of his thinking.¹⁵⁴ Thus the legal propaganda machinery is entrusted with the often contradictory task of inculcating a particular morality to guide the exercise of one's rights under the Inheritance Law while simultaneously promoting the free exercise of those rights in ways that may be abhorrent to that morality. Propaganda, however, may be too weak a dam to hold back the flood of undesirable traditional practices let loose by the relative freedom of testate disposition.

146. Li, *supra* note 119, at 12.

147. *Id.* at 13.

148. *Id.* at 12.

149. *Id.* at 13.

150. *Id.* at 12.

151. *Id.* See also Wu, *supra* note 144, at 16; Liao, *supra* note 30, at 18; *Is a Will that Strips a Daughter of Her Rights of Inheritance Still Valid?*, *supra* note 143, at 41-42.

152. Li, *supra* note 119, at 13.

153. *Id.*

154. NPC Peasant Deputies On Inheritance Law Draft, *supra* note 35, at 11.

E. National Minorities and Regional Practices

The Inheritance Law, as a national law, applies to all Chinese citizens, whether they are of the majority Han nationality or of a minority nationality. Yet the Inheritance Law follows a familiar pattern in recent Chinese legislation¹⁵⁵ by providing some leeway for minority groups to formulate legislation that accommodates ethnic differences in inheritance practices. Article 35 permits the People's Congresses of autonomous areas¹⁵⁶ to formulate "modifying or supplementary regulations in light of the specific circumstances of property inheritance among local nationalities."¹⁵⁷ The supplementary or accommodating regulations must be "based on the principles" of the Inheritance Law.¹⁵⁸

The central government's grant of limited freedom to autonomous areas to formulate inheritance rules raises a dilemma: how can the state encourage cooperation with its national policies by granting a degree of autonomy to minority nationalities and still ensure that its policies take effect throughout the country? The central government believes that free expression of ethnic diversity will ultimately promote trust in national policies by weakening local political loyalties nurtured by a wariness of Beijing and creating conditions for a more homogeneous national culture.¹⁵⁹ It is unclear, however, whether the Chinese Government will succeed in its paradoxical quest to eliminate ethnic diversity by ensuring that minority nationalities may engage in inheritance practices that are repugnant to the central authorities.

To encourage conformity with the Inheritance Law without alienating national minorities, the Chinese Government has again entrusted its propaganda machinery with the task of inculcating a particular morality by which people can "freely" exercise their rights under the Inheritance Law.¹⁶⁰ The potential conflict between the policy of mi-

155. See, e.g., 1982 CONSTITUTION, art. 116, *supra* note 38, at 289; 1980 Marriage Law, art. 36, *supra* note 45, at 555.

156. Areas of China that are heavily populated by non-Han nationalities are organized into autonomous counties, prefectures, and regions. The authorities in these areas enjoy a degree of flexibility in adapting laws and policies to fit local customs and needs. For a general discussion of China's minority nationalities, see L. MOSER, *THE CHINESE MOSAIC: THE PEOPLES AND PROVINCES OF CHINA* (1985).

157. Inheritance Law, *supra* note 1, art. 35.

158. *Id.* Regulations drawn up by autonomous prefectures and autonomous counties must be approved by the provincial or regional People's Congress and reported to the Standing Committee of the National People's Congress for the record. The regulations of autonomous regions need only be reported to the National People's Congress for the record. *Id.*

159. J. DREYER, *CHINA'S FORTY MILLIONS* 262 (1976).

160. *Falu Zhishi Puji Bianyuan Ailao Shanqu Shenshan Laolin Chuxian Shoufa Wenming Xincun* (Disseminating Legal Knowledge in the Remote Ailao Mountain Region Gives Rise to a New Village with a Law Abiding Civilization in the Thickly Forested Mountains), *Renmin Ribao* (People's Daily) (Overseas ed.), March 1, 1986, p. 4, col. 3. See also *supra* text accompanying notes 152-54.

notity autonomy and other policies, such as the promotion of sexual equality, represents a microcosm of the contradiction between conformity and autonomy that generally permeates the Inheritance Law.

IV. CONCLUSION

The Inheritance Law of the PRC both reflects and gives further impetus to the important social and economic changes that have occurred in the lives of Chinese citizens since the end of the Cultural Revolution. The Inheritance Law helps reestablish the Chinese family as the basic economic and social welfare unit in Chinese society. In the process, it also reinforces the government's current emphasis on economic development through individual initiative.

The Inheritance Law is an eclectic law, shaped by many disparate influences. It attempts to separate out "fine traditions" from "feudal thinking" and to encourage the former while suppressing the latter. Enshrining freedom of disposition as a prime objective of the Inheritance Law, however, diminishes the government's control over the reemergence of "decadent traditions" that have survived communist rule. In this way, the Inheritance Law suggests a small yet significant shift in the Chinese Government's attitude toward law as a device that purposefully and actively impinges on the personal realm in order to achieve certain social goals. While the state's presence in the distribution of a decedent's assets remains pervasive, especially in intestate succession, its interference is restrained by a clear preference for permitting freedom of disposition even at the expense of important policy goals. As a result, the Inheritance Law evidences a diminished presence of the state with respect to individual transactions and a corresponding expansion of individual rights.

Appendix: The Inheritance Law of the People's Republic of China*

CHAPTER ONE: GENERAL PROVISIONS

Article 1

This law is formulated in accordance with the stipulations of The Constitution of the People's Republic of China for the purpose of protecting citizens' right of inheritance of private property.

Article 2

Inheritance begins upon the death of the decedent.

Article 3

An estate is the lawful personal property left when a citizen dies, including:

- (1) A citizen's income;
- (2) A citizen's houses, savings, and personal effects;
- (3) A citizen's trees, livestock, and domestic fowl;
- (4) A citizen's cultural relics, books, and reference materials;
- (5) The means of production which the law permits a citizen to own;
- (6) The property rights in a citizen's copyrights [and] patents;
- (7) A citizen's other lawful property.

Article 4

The income of individuals which should be earned from personal contracts is to be inherited in accordance with the stipulations of this law. Personal contracts which heirs continue in accordance with what the law permits are handled in accordance with the contract.

Article 5

After [it] begins, inheritance is handled according to statutory inheritance; if there is a will, [succession] is handled according to inheritance by will or testamentary gift; if there is an agreement of

* Promulgated at the Third Session of the Sixth National People's Congress on April 10, 1985.

support and testamentary gift, [succession] is handled in accordance with the agreement.

Article 6

The right of inheritance [and] the right to receive a testamentary gift, of a person without capacity to act is to be exercised by his legal representative.

The right of inheritance [and] the right to receive a testamentary gift, of a person with restricted capacity to act is to be exercised by his legal representative, or exercised [by him] after soliciting and receiving the approval of the legal representative.

Article 7

Heirs who behave in one or the following ways forfeit [their] right of inheritance:

- (1) Intentionally killing the decedent;
- (2) Killing another heir while vying for the estate;
- (3) Abandoning the decedent or maltreating the decedent where the circumstances are serious;
- (4) Forging, falsifying, or destroying a will, where the circumstances are serious.

Article 8

The time limit for commencing litigation over a dispute concerning the right of inheritance is two years, calculated from the day the heir knew or should have known his rights were infringed. However, if more than twenty years have passed from the day inheritance began, litigation may no longer be commenced.

CHAPTER TWO: STATUTORY INHERITANCE

Article 9

There is equality of the sexes in the right of inheritance.

Article 10

An estate is inherited according to the following sequences:

The first sequence: spouse, children, parents.

The second sequence: siblings, paternal grandparents, maternal grandparents.

After inheritance begins, the first sequence heirs inherit[;] the second sequence heirs do not inherit. Where there are no first sequence heirs which inherit, the second sequence heirs inherit.

The children referred to in this law include legitimate children, illegitimate children, adopted children, and step-children who have had a foster relationship [with the decedent].

The siblings referred to in this law include siblings who have the same father and mother, siblings who have the same father and different mothers or the same mother and different fathers, adopted siblings, and step-brothers and step-sisters who have a foster relationship [with their siblings].

Article 11

Where the decedent's children predecease the decedent, the consanguineous decedents of the decedent's children inherit by representation. An heir taking by representation generally can only inherit the share of the estate which his father or mother had a right to inherit.

Article 12

A widowed son-in-law [or] a widowed daughter-in-law who has fulfilled the principal obligation to support a father-in-law [or] mother-in-law is regarded as a first sequence heir.

Article 13

The shares of an estate inherited by heirs of the same sequence generally should be equal.

When the estate is allocated, an allowance should be made for heirs lacking the ability to work who have special difficulties living.

When the estate is allocated, a larger share may be allocated to heirs who either have fulfilled the principal obligation to support the decedent or have lived with the decedent.

When the estate is allocated, either no share or a smaller share should be allocated to heirs who had the ability and means to provide support [but] did not fulfill the obligation to provide support.

When heirs consult [and] agree, [the estate] also may not be [inherited] equally.

Article 14

An appropriate inheritance may be allocated to persons other than heirs who, lacking the ability to work and without a source of income, depend on the decedent for support, or persons other than heirs who have provided a relatively large amount of support to the decedent.

Article 15

Heirs, in a spirit of mutual accommodation, understanding, harmony, and unity, should handle inheritance problems through consultation. When consultation is unsuccessful, mediation may be conducted by a People's Mediation Committee or a lawsuit may be initiated in a People's Court.

CHAPTER THREE: INHERITANCE BY WILL AND TESTAMENTARY GIFT

Article 16

A citizen may, in accordance with the stipulations of this law, make a will disposing of personal property and may appoint an executor.

A citizen may make a will designating that personal property be inherited by one person or several persons among the statutory heirs.

A citizen may make a will giving personal property as a gift to the state, a collective, or a person other than a statutory heir.

Article 17

A notarized will is handled by the testator through the notarial organ.

A holographic will is written in the testator's own handwriting, signed, [and] clearly indicates the year, month, [and] day.

A will written on behalf of another should be made in the presence of two or more witnesses, be written by one person among them who indicates the year, month, and day, and be signed by the person writing on behalf of another, the other witnesses, and the testator.

A will made using a sound recording should be made in the presence of two or more witnesses.

When in a situation of imminent danger, a testator may make an oral will. An oral will should be made in the presence of two or more witnesses. After the imminent danger has passed, if the testator is able to make a written or sound-recorded will, the oral will is invalid.

Article 18

The following persons cannot serve as a witness to a will:

- (1) A person without capacity to act[;] a person with restricted capacity to act.
- (2) An heir, a testamentary donee.
- (3) A person who shares an interest with an heir [or] with a testamentary donee.

Article 19

A will should reserve a requisite share of the estate for an heir who both lacks the ability to work and is without a source of income.

Article 20

A testator may revoke [or] alter his own wills. When several wills have been made with contradictory content, the last will is regarded as the standard to be followed.

Holographic wills, wills written on behalf of another, sound-recorded wills, [and] oral wills may not revoke [or] alter a notarized will.

Article 21

Where there is an obligation attached to inheritance by will or a testamentary gift, the heirs or the testamentary donee should carry out the obligation. Where there is no legitimate reason not to carry out the obligation, upon the request of a relevant unit or individual, the People's Court may deprive [the heirs or testamentary donee] of the right to receive the inheritance [or testamentary gift].

Article 22

Wills made by persons without capacity to act or by persons with restricted capacity to act are invalid.

A will must manifest the testator's genuine desires[;] wills made under coercion [or] misrepresentation are invalid. Forged wills are invalid.

When a will has been falsified, the falsified part is invalid.

CHAPTER FOUR: THE ADMINISTRATION OF THE ESTATE

Article 23

After inheritance begins, heirs who know that the decedent has died should promptly notify the other heirs and the executor. When there is no one among the heirs who knows that the decedent has died or though [they] know [they] cannot make notification, the unit of the place where the decedent lived before [his] death or the residential committee [or] villager's committee at the [decedent's] place of residence is responsible for notification.

Article 24

Persons holding the estate corpus should take proper care of [it][;] no one may misappropriate or fight over [the estate].

Article 25

After inheritance begins, if an inheritance is to be renounced, an heir should make an expression renouncing the inheritance before the estate is administered. The inheritance is regarded as accepted where there is no [such] expression.

A testamentary donee should make an expression either accepting or renouncing the receipt of the testamentary gift within two months after becoming aware of the receipt of the testamentary gift. Where there is no [such] expression by when [it] is due, the receipt of a testamentary gift is regarded as renounced.

Article 26

Except where there is another arrangement, if an estate is split up, one half of the property owned in common by husband and wife, accumulated [by them] during the period that the marriage relationship existed, should be separated out as that which is owned by the spouse [and] the remainder is property of the estate of the decedent.

If estate property is among property held in common by a family, then when the estate is split up the property of others should first be separated out.

Article 27

Under the following circumstances, the relevant share of the estate is to be handled according to statutory inheritance.

- (1) Either an heir renounces an inheritance or a testamentary donee renounces a testamentary gift;
- (2) An heir is deprived of the right of inheritance;
- (3) An heir [or] a testamentary donee predeceases the testator;
- (4) That estate property which is related to the invalid part of a will.
- (5) That estate property not disposed of by the will.

Article 28

When the estate is split up, a share of the inheritance should be reserved for a fetus. If the fetus is stillborn at birth, the reserved share is to be handled in accordance with statutory inheritance.

Article 29

The division of the estate should be advantageous to production and the necessities of living [and] not harm the usefulness of the estate property.

An estate that is not suited to being split up may be handled by adopting the method of converting [it] into money, appropriate compensation, or co-ownership.

Article 30

When, after the death of one of the married couple, the other remarries, [the surviving spouse] has the right to dispose of the property that was inherited without interference from anyone.

Article 31

A citizen may conclude an Agreement of Support and Testamentary Gift with a person who supports [him]. In accordance with the agreement, the person who provides support assumes the obligation to provide the citizen support during life and burial at death, [and] enjoys the right to receive a testamentary gift.

A citizen may conclude an Agreement of Support and Testamentary Gift with an organization of collective ownership. In accordance with the agreement, the organization of collective ownership assumes the obligation to provide the citizen support during life and burial at death, [and] enjoys the right to receive a testamentary gift.

Article 32

An estate for which there is no one to inherit and for which there is no one to receive a testamentary gift, escheats to the state. If the deceased was a member of an organization of collective ownership during [his] lifetime [the estate] escheats to the organization of collective ownership of the [decendent's] residence.

Article 33

When the estate is inherited, the taxes and debts which the decedent should have paid according to law should be paid, [but] the actual value of his estate is regarded as the limit of the obligation to pay taxes and satisfy debts. If the heirs voluntarily make repayment, the portion that exceeds the actual value of the estate is not within this limit.

If an inheritance is renounced, an heir is permitted to not assume the obligation to repay the taxes and debts which the decedent should have paid according to law.

Article 34

Executing a testamentary gift must not impede repayment of the taxes and debts which the testamentary donor should have paid according to law.

CHAPTER FIVE: SUPPLEMENTARY PROVISIONS

Article 35

People's Congresses of national autonomous areas may formulate modifying or supplementary regulations in accordance with the principles of this law, in light of the specific circumstances of property inheritance of local nationalities. The regulations of autonomous regions are to be reported to the Standing Committee of the National People's Congress for the record. The regulations of autonomous prefectures [and] autonomous counties are to be submitted to the Standing Committee of the People's Congress of the province or autonomous region, taking effect upon approval, and in addition are to be reported to the Standing Committee of the National People's Congress for the record.

Article 36

The inheritance by a Chinese citizen of an estate outside the territory of the People's Republic of China or the inheritance of an estate of a foreigner within the territory of the People's Republic of China is governed by the law of the residence of the decedent as to movable property [and] by the law of the situs as to real property.

The inheritance by a foreigner of an estate within the territory of the People's Republic of China or the inheritance of an estate of a Chinese citizen outside the territory of the People's Republic of China is governed by the law of the residence of the decedent as to movable property [and] by the law of the situs as to real property.

Where the People's Republic of China has concluded a treaty [or] an agreement with a foreign country, [succession] is to be handled in accordance with the treaty [or] agreement.

Article 37

This law comes into force as of October 1, 1985.