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## Should China Adopt Taiwan's Mandatory Share Doctrine?

Ya-Hui Hsu

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# Should China Adopt Taiwan's Mandatory Share Doctrine?

Ya-Hui Hsu\*

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## I. INTRODUCTION

In 2000, a millionaire, Ye Ruiding, died in Hangzhou and left his entire estate, including his real property, paintings, and personal property, to the nurse who had taken care of him for eight years before his death.<sup>1</sup> Mr. Ye had two adult daughters but left nothing to them.<sup>2</sup> The daughters took two of their father’s paintings and alleged that his will was invalid.<sup>3</sup> The nurse, Wu Juying, filed a suit against the two daughters, claiming that the will was valid and that the paintings belonged to Ms. Wu.<sup>4</sup> In July 2000, a trial court found that the will was properly executed because Mr. Ye was mentally competent and was not under undue influence when he executed the will.<sup>5</sup> Therefore, the court held that the will was valid and the daughters should return the paintings

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1. See *Xiao Baomu Jue Yizeng Jiufen An* [Case of Huge Legacy to a Young Nurse, LAW580.NET] (Jan. 5, 2009), available at <http://www.law580.net/article/sort120/11979.htm>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

to Ms. Wu.<sup>6</sup> After the daughters appealed, the Court of Appeals in Hangzhou affirmed the trial court's decision, and stated that because the will was properly executed and there was no evidence of mental incapacity or undue influence, Mr. Ye had the testamentary freedom to dispose of his estate under the Inheritance Law of the People's Republic of China ("P.R.C. Inheritance Law").<sup>7</sup>

Mr. Ye's case shocked Hangzhou in 2000 and was heavily criticized.<sup>8</sup> Chinese scholars claimed that the holding of this case was contrary to the public policy of the P.R.C. Inheritance Law and Marriage Law to protect the family relationship and prevent people from committing adultery (*bao ernai*).<sup>9</sup> Moreover, critics argued that the holding of Mr. Ye's case, which allowed a testator to disinherit his heirs and leave his entire estate to a non-heir, exposed a problem in China's Inheritance Law. The problem is that China's current "necessary portion" doctrine does not sufficiently protect a testator's heirs' right to inherit and, therefore, is contrary to a fundamental purpose of the Chinese Inheritance Law, support of a decedent's family survivors.<sup>10</sup> Chinese scholars concluded that China's current necessary portion doctrine should be replaced by the mandatory share doctrine of civil-law countries, such as Taiwan.<sup>11</sup> In response, they have recently proposed a new draft inheritance law, which includes a mandatory share provision.<sup>12</sup>

The necessary portion doctrine is stipulated by Article 19 of the P.R.C. Inheritance Law.<sup>13</sup> Article 19 provides a so-called "necessary portion" of a testator's estate to his heirs "who are unable to work and

6. See *Xiao Baomu Jue Yizeng Jiufen An* [Case of Huge Legacy to a Young Nurse, LAW580.NET] (Jan. 5, 2009), available at <http://www.law580.net/article/sort120/11979.htm>.

7. *Baiwan Yichan Zeng Xiao Baomu An Houxu: Ershen Caiding Laoren Yizhu Youxiao* [Appellate Court Affirmed the Young Nurse Legacy Case, SINA] (Jan. 20, 2001), available at <http://news.sina.com.cn/s/173085.html>.

8. See Shu Guang, *Hangzhou Baiwan Yizeng An Falu Pingxi—Jianlun Woguo Jianli Te Liu Fe Zhidu Tanxi* [Case Study of the Million Dollar Legacy in Hangzhou], 2 FAXUE 73, 73 (2001), available at CHINALAWINFO (last visited Nov. 20, 2009) (P.R.C.).

9. See Zhang Liqiang, *Dui Zhongguo Xianxing Jicheng Fa Yizhu Ziyou Guodu De Fansi* [Retrospection of Excessive Freedom of Testation in the Current Inheritance Law of China], 26 MOD. L. SCI. 66, 66-67 (2004), available at CHINALAWINFO (last visited Nov. 20, 2009) (P.R.C.).

10. See *id.* at 66.

11. See *id.* at 68-69; see also Shu, *supra* note 8, at 74-75.

12. See JICHENG FA YANJIU [CIVIL LAW] 253-58 (Guo Mingrui et al. eds., 2003) [hereinafter CIVIL LAW].

13. *Zhonghua Renmin Gongheguo Jicheng Fa* [Inheritance Law of the People's Republic of China] (promulgated Apr. 10, 1985, effective Oct. 1, 1985) FAGUI HUIBIAN I, art. 19 (China) [hereinafter P.R.C. Inheritance Law] (providing that "[r]eservation of a necessary portion of an estate shall be made in a will for an heir who neither can work nor has a source of income").

have no source of income.”<sup>14</sup> Although Article 19 requires a statutory forced share to protect an heir’s right of inheritance, heirs who are entitled to the necessary portion must meet two requirements: they must be “unable to work” *and* “have no source of income.” In other words, under China’s necessary portion doctrine, as long as a testator’s heirs are either able to work or have a source of income, the testator is free to dispose of the estate as desired. Therefore, because adult children, like Mr. Ye’s daughters, are usually able to work or have a source of income, rarely can adult children in China qualify for a necessary portion.

In contrast, the mandatory share doctrine in Taiwan, provided in Articles 1187 and 1223-25 of the Civil Code of the Republic of China (“Taiwan’s Civil Code”),<sup>15</sup> requires a testator to reserve either one-half or one-third of the intestate share for his heirs regardless of the need of the heirs.<sup>16</sup> Under this doctrine, generally a testator cannot intentionally and freely dispose of his estate as he desires. If a testator fails to leave the mandatory share to his heirs, the heirs can claim their shares under Articles 1187 and 1223 before probating the will.<sup>17</sup> If a testator disposed of his estate to legatees other than his intestate heirs who are entitled to the mandatory share, his heirs can claim their mandatory share against the legatees.<sup>18</sup> Because children, whether minor or adult, are intestate heirs under Taiwan’s Civil Code, a testator in Taiwan is not free to disinherit his or her adult children without legal justification.<sup>19</sup>

This Article argues that China should adopt the mandatory share doctrine because the necessary portion doctrine is outdated and does not fit China’s current societal needs. It recommends one specific model—Taiwan’s distinctive approach to the mandatory share doctrine. Based on a study of inheritance law in Chinese history and Confucian theory, this Article demonstrates that Taiwan’s mandatory share doctrine is the product of Chinese culture and tradition. Because China has the same history and culture as Taiwan, Taiwan’s version of the mandatory share doctrine best fits China’s cultural and societal needs.

Part II examines China’s necessary portion doctrine and how Chinese courts apply the doctrine in individual cases. It also discusses the proposed draft inheritance-law provisions to show that Chinese

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14. *Id.*

15. See *Zhonghua Minguo Xianxing Minfa* [Civil Code of the Republic of China] (promulgated Dec. 26, 1930, effective May 5, 1931) FAIGUI HUIBIAN, arts. 1187, 1223-25 (China) [hereinafter TAIWAN’S CIVIL CODE].

16. *Id.* at arts. 1187 & 1223.

17. *Id.* at arts. 1224-25.

18. *Id.* at art. 1225.

19. *Id.* at art. 1138 (providing that the lineal descendants of a decedent are heirs first in order to inherit the decedent’s estate under intestacy).

scholars are considering an amendment to the necessary-portion provision. Part III examines Taiwan's mandatory-share provisions and several cases to illustrate how Taiwanese courts are enforcing the mandatory share. It focuses particularly on one of the legal justifications provided in Article 1145 of Taiwan's Civil Code, which allows parents to disinherit their children.<sup>20</sup> The legal justification appears in Article 1145(5), which provides that if a child committed a seriously abusive or humiliating act against his parent, the parent can legally disinherit the child by mentioning the act in his will and demonstrating his intent to exclude the child from inheritance.<sup>21</sup> Part III illustrates that, in interpreting Article 1145(5), Taiwan's courts are applying the Confucian principle of "Xiao Dao." This judicial practice supports the argument that Taiwan's mandatory share doctrine is a product of Chinese culture. Part IV argues that China should abandon the necessary portion doctrine and adopt the mandatory share doctrine. It first explains why China's current necessary portion doctrine is outdated and why China needs the mandatory share doctrine. Part IV then demonstrates that Taiwan's version of the mandatory share doctrine provides the optimal model for China because it fits China's cultural and societal needs. Part V concludes that China should adopt Taiwan's mandatory share doctrine. By drawing on their shared Chinese history and culture, Taiwan's approach can address the major goals of P.R.C. inheritance law today—strengthening the family, encouraging support, and promoting predictable, fair distribution of estates.

## II. NECESSARY PORTION DOCTRINE IN CHINA

In China, adult children are rarely entitled to the necessary portion because China's necessary portion provision primarily focuses on the need of a testator's heirs, not on the status of the heirs, i.e., their relationship with the testator. The inheritance laws protect only heirs who are unable to work and have no source of income whether they are parents, siblings, spouses, minor or adult children. Part II.A summarizes the relevant legislative provisions of China's necessary portion doctrine. It also examines Chinese courts' interpretation and application of the necessary portion doctrine. Through analysis of the legislative provisions and courts' interpretations, Part II.A concludes that the necessary portion doctrine in China is based on the need, not the status of the heirs. Part II.B shows that Chinese reformers are currently considering adoption of the mandatory share doctrine used in the civil-

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20. TAIWAN'S CIVIL CODE, *supra* note 15, at art. 1145.

21. *Id.* at art. 1145(5).

law countries. In 2003, scholars and institutions proposed a draft of a new Chinese inheritance law. The draft adopts the civil-law countries' mandatory share doctrine, which gives a forced share to intestate heirs regardless of their needs.

#### A. *The 1985 P.R.C. Inheritance Law*

##### 1. Relevant Legislative Provisions of China's Necessary Portion Doctrine

Under the P.R.C. Inheritance Law, generally, a citizen may freely dispose of her property by will to one of her intestate heirs, any person other than the intestate heirs, or the state.<sup>22</sup> However, in Articles 19 and 28, the law also limits a testator's testamentary freedom by (1) giving a "necessary portion" to "heirs who are unable to work and have no source of income"<sup>23</sup> and (2) reserving a share for children born after the decedent's death.<sup>24</sup> The reservation for unborn children protects posthumous children, an issue outside the scope of this Article. Rather, this Article focuses on Article 19 of the P.R.C. Inheritance Law, which provides protection against purposeful or intentional disinheritance of children. In addition, this article considers the Supreme People's Court's guidelines for Chinese courts to apply Article 19.<sup>25</sup> The Supreme People's Court has issued three guidelines. First, if a testator failed to preserve in the will an intestate share for an heir who is unable to work and has no source of income, such heir should be given his intestate share before probating the will.<sup>26</sup> Second, after such heir has received an intestate share, the rest of the disposition of the will can be followed.<sup>27</sup> Finally, courts should determine whether the heir is actually unable to work and has no source of income at the time the will became effective.<sup>28</sup>

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22. P.R.C. Inheritance Law, *supra* note 13, at art. 16 (stating that "A citizen may, by making a will, designate one or more of the statutory successors to inherit his personal property. A citizen may, by making a will, donate his personal property to the state or a collective, or bequeath it to persons other than the statutory successors").

23. *Id.* at art. 19 (stating that "reservation of a necessary portion of an estate shall be made in a will for a successor who is unable to work and has no source of income").

24. *Id.* at art. 28 (stating that "at the time of the partitioning of the estate, reservation shall be made for the share of an unborn child").

25. See Zui Gao Fayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo Jicheng Fa" Ruogan Wenti De Yijian [Opinion of the Supreme People's Court on Certain Matters Concerning the Implementation of the "P.R.C. Inheritance Law"] art. 37 (Sept. 11, 1985) [hereinafter INHERITANCE LAW OPINION], in ZHONGHUA RENMIN GONGHEGUO JI CHENG FA QUANSHI [ANNOTATED P.R.C. INHERITANCE LAW] 134 (Zhou Xianqi ed., 1995) [hereinafter ANNOTATED INHERITANCE LAW].

26. See ANNOTATED INHERITANCE LAW, *supra* note 25, at 134.

27. See *id.*

28. See *id.* at 135.

According to Article 19 of the P.R.C. Inheritance Law and the Supreme People's Court's guidelines, China's necessary portion doctrine has three distinct characteristics.<sup>29</sup> First, to be entitled to the necessary portion under Article 19 of the P.R.C. Inheritance Law, a person must be an heir entitled to inherit under intestacy and must satisfy two statutory requirements: "unable to work" and "no source of income."<sup>30</sup> All heirs eligible to inherit under intestacy can qualify for a "necessary portion" as long as they meet both requirements of "unable to work" and "no source of income."<sup>31</sup> The right to claim a necessary portion is not limited to the decedent's lineal descendants, but applies to all of the decedent's intestate heirs.<sup>32</sup> However, in order to claim a necessary portion, such heir must satisfy both requirements of "unable to work" and "no source of income."<sup>33</sup> In other words, if the heir satisfies only one requirement, he or she is not entitled to the necessary portion.

Second, if a testator disinherits an heir who meets the requirements of "unable to work" and "no source of income," courts usually provide two kinds of remedies to the qualified heir.<sup>34</sup> On the one hand, if the testator's estate is so small that a court finds it necessary to give the entire estate to such heir, the testator's disposition of his property is void.<sup>35</sup> On the other hand, the heir who qualifies for the necessary portion must receive his necessary portion before the estate of the

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29. See Zhang Huagui, *Guanyu Sheli "Te Liu Fen" Zhidu De Lifa GouXiang* [Legislative Conception of Establishing the System of "Legal Portion"], 26 MOD. L. SCI. REV. 151, 153 (2004), available at CHINALAWINFO (last visited Nov. 20, 2009) (P.R.C.).

30. See ANNOTATED INHERITANCE LAW, *supra* note 25, at 132-33.

31. See Zhang, *supra* note 29, at 153.

32. See *id.*; see also Bian Xiangping & Wu Mou, *Lun Woguo Jicheng Fa Zhongde Te Liu Fen Zhidu* [On the System of the Portion Specially left in China's Inheritance Law], 6 FAXUE PINGLUN 33, 34-36 (1987), available at CHINALAWINFO (last visited Nov. 20, 2009) (P.R.C.) (stating that other countries, such as Japan and France, usually limit the eligibility of mandatory share to lineal descendants, while China's mandatory share doctrine gives the right to claim a mandatory share to all intestate heirs, but limits the eligibility to heirs who are unable to work and have no source of income); see also Zuo Hailin, *Jianlun Woguo Jicheng Fa Zhongde Te Liu Fen* [Necessary Portion Doctrine in China's Inheritance Law], 2 CHING NIAN LUENTAN 15, 15-16 (1990), available at CHINALAWINFO (last visited Nov. 20, 2009) (P.R.C.) (stating that the right of an heir to claim a mandatory share will not be limited to whether he is a lineal descendant or not, but applies to all intestate heirs and that the limitation is based on whether the heir is unable to work and has no source of income).

33. See Zhang, *supra* note 29, at 153; see also ANNOTATED INHERITANCE LAW, *supra* note 25, at 133 ("People who are unable to work include minors, disabled persons and those who have a serious illness, and elderly people who are unable to work. No source of income means the heir primarily depended on the decedent. Without the decedent's support, the heir could not have any source of income.")

34. See *id.* at 153.

35. See *id.* (stating that courts would give an heir who is unable to work and has no source of income his necessary portion even if the estate is smaller than the debts).



testator can be distributed to other legatees.<sup>36</sup> After giving the necessary portion to the qualified heir, the disposition of the rest of the estate under the will can be followed.<sup>37</sup>

Interestingly, in China, neither the legislation nor the courts define “necessary portion.”<sup>38</sup> This leaves courts broad discretion to determine what constitutes a “necessary portion” on a case-by-case basis. So, whether it should be the same as, more than, or less than the intestate share depends on the individual situation. Under China’s necessary portion doctrine, the “necessary portion” means an amount needed to meet a qualified heir’s “fundamental needs.”<sup>39</sup> “Fundamental needs” means reasonable living expenses to meet the average standard of living. Usually, Chinese courts determine the necessary portion based on (1) the size of the testator’s estate and (2) the qualified heir’s standard of living.<sup>40</sup> Thus, if the heir’s standard of living is lower than average or the testator leaves a large estate, the heir’s necessary portion can be more than his intestate share.<sup>41</sup> On the other hand, if the heir’s standard of living is similar to the average standard of living or the estate is small, the heir’s necessary portion can be less than his intestate share.<sup>42</sup>

Finally, the determination of whether an heir is entitled to the necessary portion occurs at the time the will becomes effective, not the date of execution.<sup>43</sup> If an heir is unable to work and has no source of

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36. *See id.*

37. *See id.*; *see also* Liu Yuxia, *Te Liu Fe Zhidu Tanxi [Probe into Legal Portion System]*, 4 J. OF SWUPL 95, 96-97 (2002), *available at* CHINALAWINFO (last visited Nov. 10, 2009) (P.R.C.) (stating that mandatory share does not refer to any designated property of testator’s estate, but a necessary portion of the entire estate for qualified heirs to claim); *see also* Zuo, *supra* note 32, at 16 (stating that a will that does not leave a mandatory share to qualified heirs is not always invalid). If the will does not provide the qualified heir his mandatory share, the estate should pay off the heir first and the rest of the estate can be disposed of under the will. *Id.* However, if the will does not provide a mandatory share to the qualified heir and the total estate cannot satisfy the “necessary portion” for the qualified heir, the disposition of the will is void and the entire estate should go to the qualified heir. *Id.*

38. *See* Zhang, *supra* note 29, at 153-54 (arguing that it is a significant problem in China to give courts such wide discretion in determining how much should be a “necessary portion” for heirs who are unable to work and have no source of income); *see also* Bian & Wu, *supra* note 32, at 37 (stating that China’s mandatory share doctrine is uncertain as to what percentage of the estate the qualified heir should take). Courts can determine what constitutes “necessary.” *Id.* The “necessary portion” can be larger than the intestate share, can be all of the testator’s estate, and can be smaller than the intestate share. *Id.*

39. *See* Bian & Wu, *supra* note 32, at 37.

40. *See id.*; *see also* Zhang, *supra* note 29, at 154; ANNOTATED INHERITANCE LAW, *supra* note 25, at 132.

41. *See* Bian & Wu, *supra* note 32, at 37.

42. *See id.*

43. *See* ANNOTATED INHERITANCE LAW, *supra* note 25, at 134.

income at the time of the will's execution, he is not automatically entitled to the necessary portion.<sup>44</sup> He must maintain these conditions at the time the will becomes effective. Therefore, a qualified heir is an heir who is unable to work and has no source of income at the time the testator's will becomes effective.<sup>45</sup> Similarly, even if an heir does not qualify for the necessary portion when the testator executed the will, he can still be entitled to the necessary portion if he meets the two requirements when the testator dies and the will becomes effective.<sup>46</sup> In sum, according to these three distinct characteristics, the necessary portion doctrine in China primarily focuses on the need of the testator's heir, not the heir's status. Therefore, because adult children are usually able to work or have a source of income, rarely can adult children in China qualify for a necessary portion.

## 2. Chinese Courts' Interpretation and Application of the Necessary Portion Doctrine

Chinese courts' interpretation and application of the necessary portion doctrine also primarily focuses on the needs of heirs, not their status. Chinese courts will give a necessary portion to heirs second in order even though heirs first in order exist. They will also award a necessary portion to children who disappointed the testator as long as the children meet the two statutory requirements.<sup>47</sup> However, Chinese courts usually allow disinheritance of adult children because, generally, adult children are able to work. The following are cases supporting the argument that the necessary portion doctrine in China focuses mainly on the need of the heirs.<sup>48</sup>

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44. *See id.*

45. *See id.*

46. *See* Bian & Wu, *supra* note 32, at 36.

47. *See* P.R.C. Inheritance Law, *supra* note 13, at art. 10 (regulating intestate heirs as follows: "the estate of the decedent shall be inherited in the following order: first in order: Spouse, children, parents; second in order: Brothers and sisters, paternal grandparents, maternal grandparents. When the succession opens, the heir(s) first in order shall inherit to the exclusion of the heir(s) second in order. The heir(s) second in order shall inherit in default of any heir first in order.").

48. Note that the cases examined in the text are "rewritten accounts of actual cases with extensive analytical and critical commentary by Chinese scholars and judges." *See* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 82-83 (1998) (stating that because China has no official court reporter and their cases usually are "neither binding legal precedents nor verbatim transcripts of Chinese court proceedings and ruling," cases in China are not 'official' cases in the American sense. However, they still respond to a "practical need for more predictability, certainty and consistency in judicial decision-making."). *Id.*

a. Promoting Need over Status: Applying the Necessary Portion to All Qualified Heirs

In 1994, an Intermediate People's Court (the "Intermediate Court") in Jinan overruled a lower court's decision that had validated a will disinheriting minors who were the testator's grandsons.<sup>49</sup> The Intermediate Court ruled that the necessary portion doctrine applied to all intestate heirs who are unable to work and have no source of income.<sup>50</sup> In Mr. Yang's case, Mr. Yang had two grandsons from his deceased sons; he also had three married daughters.<sup>51</sup> In March 1993, he executed a will leaving all his property to his three living daughters.<sup>52</sup> When Mr. Yang died in December 1993, his three daughters and two grandsons survived him.<sup>53</sup> The grandsons were ages sixteen and eleven at the time of Mr. Yang's death.<sup>54</sup>

Although the two grandsons were supported by their mother, the Intermediate Court still treated them as "heirs who are unable to work and have no source of income."<sup>55</sup> It did so on three grounds. First, minors are always assumed to be unable to work.<sup>56</sup> Second, minors who are taken care of by their parents do not count as people who have a source of income.<sup>57</sup> Third, the Intermediate Court stated that "all intestate heirs have the right to claim a necessary portion as long as they qualify as 'unable to work' and with 'no source of income.'"<sup>58</sup>

The Intermediate Court ruled that because the necessary portion doctrine also applies to intestacy, several rules regarding intestacy also apply to the necessary portion doctrine.<sup>59</sup> Article 11 of the P.R.C. Inheritance Law provides that "where a decedent survived his child, the direct lineal descendants of the predeceased child shall inherit in

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49. See *Yangmou Yizhu Quxiao Weichengnian Daiwei Jicheng Jiufen An* [Case of Mr. Yang's Disinheritance of His Minor Grandsons] (Wang Xuguang, ed.), available at CHINALAWINFO (last visited Nov. 20, 2009) [hereinafter Mr. Yang's Case].

50. *Id.* (holding that the necessary portion applies to a direct lineal descendant of the predeceased child who inherits in subrogation). The court held that as long as the descendant is unable to work and has no source of income at the time of the testator's death and, before the testator's death, the testator was the primary caretaker of the descendant, he is entitled to the necessary portion even if he is not the first order heir under intestacy. *Id.*

51. *Id.*

52. *Id.*

53. Mr. Yang's Case, *supra* note 49.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Mr. Yang's Case, *supra* note 49.

59. *Id.*

subrogation.”<sup>60</sup> Moreover, “descendants who inherit in subrogation generally shall take only the share of the estate to which their father or mother is entitled.”<sup>61</sup> Therefore, Mr. Yang’s grandsons were entitled to the necessary portion because they were the direct lineal descendants of Mr. Yang’s deceased sons and were unable to work and had no source of income when the testator died.<sup>62</sup>

The Intermediate Court emphasized that because the necessary portion applies to all intestate heirs, an heir second in order who is unable to work and has no source of income can also claim his necessary portion even if any heir first in order exists.<sup>63</sup> Under Article 10 of the P.R.C. Inheritance Law, an heir second in order is not allowed to inherit under intestacy if any heir first in order survives the decedent.<sup>64</sup> However, according to Article 14 of the P.R.C. Inheritance Law,

an appropriate share of the estate may be given to a person other than an heir, who depended on the support of the decedent and who neither can work nor has a source of income, or to a person other than an heir, who was largely responsible for supporting the decedent.<sup>65</sup>

In Mr. Yang’s case the Intermediate Court held that the necessary portion doctrine should apply to Article 14,<sup>66</sup> which allows an intestate heir second in order to take a necessary portion if she is unable to work, has no source of income at the time of the testator’s death, and the testator was her primary caretaker.<sup>67</sup> Even if such heir is not entitled to an intestate share as an heir first in order under intestacy, she still has a right to claim the necessary portion if she meets the two requirements under Article 19 of the P.R.C. Inheritance Law.<sup>68</sup> In sum, this case supports the argument that China’s necessary portion doctrine applies to all intestate heirs who are qualified as “unable to work” and with “no source of income.” It also confirms the argument that China’s necessary portion doctrine focuses on the need of the heirs, not the status of the heirs.

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60. See P.R.C. Inheritance Law, *supra* note 13, at art. 11.

61. See *id.*

62. Mr. Yang’s Case, *supra* note 49.

63. *Id.*

64. See P.R.C. Inheritance Law, *supra* note 13, at art. 10.

65. *Id.* at art. 14.

66. Mr. Yang’s Case, *supra* note 49.

67. *Id.*

68. *Id.*

b. Allowing Qualified Heirs to Claim the Necessary Portion Before the Decedent's Creditors

Because China's necessary portion doctrine focuses on the need of heirs, if a testator's debts are larger than his estate, an heir who is unable to work and has no source of income can still get paid his necessary portion from the testator's estate before creditors.<sup>69</sup> A 2006 Tianjin case is illustrative. The Tianjin People's Court held that because the decedent's estate was too small to cover her debts, her son who was unable to work and had no source of income at the time of her death should be granted his necessary portion before the decedent's creditors.<sup>70</sup> The decedent, Guan Suling, committed suicide after she killed her ex-husband, Mr. Li. Ms. Guan was divorced from Mr. Li and had a son with her ex-husband.<sup>71</sup> Her ex-husband had disappeared after they divorced, and her son lived with her.<sup>72</sup> After Ms. Guan died, Mr. Li's heirs filed personal-injury and wrongful-death cases against Ms. Guan's survivor, her son, asking the son to pay off their damages from Ms. Guan's estate.<sup>73</sup> Moreover, Ms. Guan had other creditors while she was alive. When Ms. Guan died, both her creditors and Mr. Li's heirs asked the estate executor to pay their damages from Ms. Guan's estate.<sup>74</sup> However, the Tianjin People's Court found that because Ms. Guan's ex-husband had disappeared after their divorce and Ms. Guan was the only caretaker of her son, her son had no source of income at the time of Ms. Guan's death.<sup>75</sup> Furthermore, her son was only ten years old at the time of Ms. Guan's death and, thus, was assumed to be unable to work.<sup>76</sup> Therefore, the Tianjin People's Court held that Ms. Guan's son would be granted a necessary portion for his living and educational expenses from Ms. Guan's estate before all of her creditors, including Mr. Li's heirs, could claim their damages.<sup>77</sup>

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69. See Li Jiyang, Li Zuozhou and Wang Xiuyun Su Feng Yiqiao, Guan Xuelian, and Li Xiuzhen Renshen Sunhai Peichang An [Li v. Guan] (Tianjin People's Ct., Aug. 15, 2006), available at CHINALAWINFO (last visited Nov. 20, 2009) [hereinafter Case of Ms. Guan].

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Case of Ms. Guan, *supra* note 69.

75. *Id.*

76. *Id.*

77. *Id.*

c. Prohibiting a Testator from Disinheriting a Qualified Heir Even if the Heir Mistreated the Testator

Because China's necessary portion doctrine focuses on a qualified heir's needs, courts sometimes will not allow a testator to disinherit an heir who is unable to work and has no source of income even if such heir mistreated or abandoned the testator. Generally, under the P.R.C. Inheritance Law, an heir may be disinherited under several legal justifications.<sup>78</sup> Regarding the legal disinheritance of an heir, Chinese inheritance law adopts a behavior-based model, which "allows courts to respond to the full range of possible misconduct toward the decedent."<sup>79</sup> Professor Foster has argued that because Chinese inheritance law is behavior-based and focuses on support, courts usually have several remedies to penalize heirs who do not fulfill their duty of support or who mistreated the decedent. These remedies include reducing the wrongdoer's share of the decedent's estate.<sup>80</sup> Courts will also consider both status and circumstances of the claimant to determine whether to impose the punishment of disinheritance.<sup>81</sup> In addition, to totally disinherit an heir, the misconduct must meet the statutory "serious circumstances" standard.<sup>82</sup> Courts do, however, also allow the testator to forgive the wrongdoer.<sup>83</sup> Finally, China even allows courts to readjust inheritance shares to non-heirs who have supported or taken care of the decedent.<sup>84</sup> Accordingly, Chinese inheritance law not only gives courts discretion to determine whether there is justification for disinheritance, but encourages "support" in determining who can inherit.<sup>85</sup>

Similarly, when Chinese courts determine whether an heir who is unable to work and has no source of income can be legally and properly disinherited, they also give significant weight to whether such heir can be supported.<sup>86</sup> In general, Chinese inheritance law permits disinheritance

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78. See P.R.C. Inheritance Law, *supra* note 13, at art. 7: "An heir shall be disinherited upon his commission of any one of the following acts: (1) intentional killing of the decedent; (2) killing any other successor in fighting over the estate; (3) a serious act of abandoning or mistreating the decedent; or (4) a serious act of forging, tampering with or destroying the will."

79. Foster, *supra* note 48, at 95.

80. *Id.*

81. *Id.* at 97.

82. *Id.* at 98.

83. *Id.* at 101-02.

84. Foster, *supra* note 48, at 102-06.

85. *Id.* at 97-102. For an extended discussion of the role of support in Chinese inheritance law, see Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199 (1999).

86. See Inheritance Case No. 2, in ANLI XUANBIAN [COLLECTION OF CASES] 140 (1986) [hereinafter COLLECTION OF CASES] (stating that a principle of China's Inheritance

of an heir for intentional killing of a testator or the testator's other heirs and for the intentional act of destroying or changing the will.<sup>87</sup> China also allows disinheritance of an heir for "a serious act of abandoning or maltreating the decedent."<sup>88</sup> This provision gives courts broad discretion to determine what constitutes "abandoning or maltreating" and how much of such acts justify disinheritance.<sup>89</sup> Moreover, China's courts give "considerable weight to a wrongdoer's reform and repentance even in the most severe cases of family neglect and abuse—those cases falling within the ambit of article 7(3)'s provision for 'abandoning' and 'maltreating the decedent under serious circumstances.'"<sup>90</sup> These justifications for disinheritance can conflict with the necessary portion doctrine. Thus, China courts will also consider the disinherited heir's needs.

For example, a China court invalidated a will disinheriting a minor child who "was disobedient, fooling around, fighting with others all the time, and disappointing the testator by causing a lot of problems."<sup>91</sup> In this case, Mr. Song had three sons. Because the first and second sons usually took care of Mr. Song and the youngest one always got in trouble, he disinherited the youngest son in his will.<sup>92</sup> The court stated that Mr. Song's will violated the P.R.C. Inheritance Law and that the youngest son was entitled to his necessary portion to meet his fundamental needs.<sup>93</sup> In order to fulfill the legislative purpose of taking care of elders and minors, the court ruled that a testator's testamentary freedom would be limited if he had an heir who was unable to work and had no source of income at the time of his death.<sup>94</sup> The court stated that because China is a socialist country "it is necessary to take care of people

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Law in regulating the disposition of estates is to take care of an heir who is a minor or is unable to work and has no source of income); *see also* SHUO ANLI XUE FALU: ZHONGHUA RENMIN GONGHEGUO JICHENG FA BUFEN [USING CASES TO LEARN LAW: INHERITANCE] 25 (Ju Fu et al. eds., 1986) [hereinafter USING CASES TO LEARN LAW] (stating that the legislative purpose of the mandatory share doctrine is to protect heirs who are unable to work and have no source of income from being disinherited by testator).

87. *See* P.R.C. Inheritance Law, *supra* note 13, at art. 7.

88. *Id.*; *see Foster, supra* note 48, at 101.

89. *See Foster, supra* note 48, at 99-102.

90. *Id.*

91. Inheritance Case No. 25, *in* USING CASES TO LEARN LAW, *supra* note 86, at 62.

92. *Id.*

93. *Id.* at 63.

94. *Id.* at 62 (stating that, generally, a testator can leave his estate to heirs he likes or who have a close relationship with him and not consider the actual need of his heirs). This practice usually will result in heirs who can take care of themselves receiving the estate and leave heirs who are in need with nothing. *Id.* According to the court, this is not only unreasonable, but also violates the Inheritance Law. Inheritance Case No. 25, *in* USING CASES TO LEARN LAW, *supra* note 86, at 62.

who are unable to work and have no source of income.”<sup>95</sup> However, if the youngest son was a minor when the will was executed but became an adult at the time of the testator’s death, he could not claim his necessary portion against the will unless he could prove that he was unable to work and had no source of income.<sup>96</sup>

d. Allowing a Qualified Child to Inherit Even if that Child Failed to Fulfill His Duty to Support the Decedent

Because of their focus on support, Chinese courts may allow a child to get his necessary portion if he is unable to work and has no source of income even though he never performed his duty to support his parents. Under Article 13 of the P.R.C. Inheritance Law, Chinese courts can reduce an heir’s intestate share if such heir had the duty and ability to support the decedent but failed to “fulfill his or her duty of support.”<sup>97</sup> However, if a child was unable to fulfill his duty to support the decedent based on physical or mental incapability, Chinese courts would not only not reduce his share but require the decedent to provide a necessary portion from his estate if such heir qualified as “unable to work” and with “no source of income.”<sup>98</sup>

For example, in a case where a couple had a mentally disabled son, they often told their four other children that whoever took care of their brother would receive the money from the couple’s savings account.<sup>99</sup> In 1982, the couple died in a car accident without leaving a will.<sup>100</sup> The oldest daughter took the responsibility of taking care of her brother.<sup>101</sup> She collected the compensation fees and the couple’s personal property and divided the estate into five shares.<sup>102</sup> She took two shares and the couple’s savings account for the care of her disabled brother.<sup>103</sup> The other three shares were to go to her other siblings besides her disabled brother.<sup>104</sup> One of her siblings claimed that the oldest daughter could not take the savings because the disabled brother never took care of their parents.<sup>105</sup> She argued that those savings should be divided equally into

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95. *Id.* at 63.

96. *Id.*

97. P.R.C. Inheritance Law, *supra* note 13, at art. 13.

98. Inheritance Case No. 14, in *USING CASES TO LEARN LAW*, *supra* note 86, at 140-41.

99. *Id.* at 140.

100. *Id.* at 140.

101. *Id.*

102. *Id.*

103. Inheritance Case No. 14, in *USING CASES TO LEARN LAW*, *supra* note 86, at 140.

104. *Id.*

105. *Id.* at 141.



five shares and each child should take one share.<sup>106</sup> However, the court stated that when disposing of a decedent's estate, the most important consideration should be whether there are heirs who are unable to work and have no source of income, rather than whether the heirs fulfilled the duty to support the decedent.<sup>107</sup> Therefore, the court held that because the disabled brother qualified as an heir who is unable to work and has no source of income, he could get a larger share than the other siblings even though he never performed his duty to support his parents.<sup>108</sup>

e. Permitting a Testator to Disinherit Without Any Legal Justification an Adult Child Who is Able to Work or Has a Source of Income

If there is no heir qualified as "unable to work" and with "no source of income," a testator can freely disinherit his adult children. For example, in the 2000 Hangzhou case discussed above, the court held that a will that disinherited the testator's three adult daughters and left his entire estate to his young nurse was valid.<sup>109</sup> The court held that because the testator's daughters were adults at the testator's death, the disinheritance of his children was valid.<sup>110</sup> The court also mentioned the fact that the testator's three daughters never visited him during the eight years before his death.<sup>111</sup> However, the court did not determine whether the failure to visit the testator constituted a legal justification for disinheritance under Article 7 of the P.R.C. Inheritance Law.<sup>112</sup> The main reason for the court to validate the will was that the testator's three daughters were adults and had a source of income at the time the will became effective.<sup>113</sup> Accordingly, Chinese courts will validate a will disinheriting without any legal justification an adult child who does not qualify as "unable to work" and with "no source of income." On the other hand, courts may invalidate a will even if the testator suffered mistreatment, but not seriously, by the heir as long as the heir qualified as "unable to work" and with "no source of income."

In sum, China's necessary portion doctrine protects an intestate heir from disinheritance if such heir is in need at the time of the testator's death. This applies even if the heir mistreated the testator or did not fulfill his duty to support the testator. On the other hand, an adult child,

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106. *Id.*

107. *Id.*

108. *Id.*

109. *See Shu, supra* note 8, at 73.

110. *Id.*

111. *See Appellate Court Affirmed the Young Nurse Legacy Case, SINA, supra* note 7.

112. *Id.*

113. *Id.*

who is able to work or has a source of income at the time of the testator's death, can be disinherited for any reason whatsoever.

*B. Proposed Drafts of the P.R.C. Inheritance Law*

Since 2000, Chinese inheritance-law scholars and commentators have called for a change in the necessary portion doctrine. They have argued that this doctrine does not fit China's culture and current societal needs. They concluded that the necessary portion doctrine has three problems. First, the current necessary-portion provision is contrary to the support purpose of the P.R.C. Inheritance Law.<sup>114</sup> Because a testator can disinherit an adult child who is able to work or has a source of income regardless of whether the adult child fulfills his duty to support the testator, the necessary portion doctrine discourages children from supporting their parents.<sup>115</sup> Moreover, since the necessary portion doctrine does not sufficiently protect an heir who is in need, it imposes the burden of taking care of those heirs on society.<sup>116</sup> In China, an adult child who is physically and mentally healthy and capable of working is presumed to be "able to work." However, this presumption does not consider the reality that China has a large population and even though a person is able to work, he may not be able to take care of himself due to poverty.<sup>117</sup> Also, the qualified heir must meet both requirements of "unable to work" and with "no source of income." However, in fact, rarely can heirs meet both requirements, and those heirs who meet only one of the requirements usually cannot support themselves after the testator's death.<sup>118</sup> Therefore, if a testator is allowed to disinherit those heirs who cannot take care of themselves and were dependent on the testator's support, but not qualified as "unable to work" and with "no source of income" at the time of the testator's death, society bears the burden of supporting those heirs.<sup>119</sup>

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114. See Foster, *supra* note 48, at 96-117 (stating that China's Inheritance Law and courts would punish family members who have a duty to support the decedent but not perform their duty by reducing the inheritance share and allow non-heirs to inherit if they took care of the decedent).

115. See Zhang, *supra* note 9, at 66 (stating that allowing disinheritance of heirs who have a duty to support the testator is inconsistent with the Marriage Law and weakens the foundation of the family relationship); see also Zhang, *supra* note 29, at 154.

116. See Zhang, *supra* note 9, at 66-67; see also Liu, *supra* note 37, at 97; Shu, *supra* note 8, at 75; Zhang, *supra* note 29, at 154.

117. Zhang, *supra* note 9, at 68.

118. See *id.* See also Cao Hairong, *Woguo Te Liu Fen Zhidu Rougan Wenti Tantaoy* [Problems of Our Mandatory Share Doctrine], 8 *FALU SHIYONG* 79, 79 (2008), available at CHINALAWINFO (last visited Nov. 20, 2009) (P.R.C.); Shu, *supra* note 8, at 75.

119. See Zhang, *supra* note 29, at 154; see also Liu, *supra* note 37, at 97.

The second problem is that allowing a testator to leave his entire estate to his extramarital lover as long as his spouse and children are able to work or have a source of income may encourage immorality and adultery and undermine the family.<sup>120</sup> Third, because the current necessary portion doctrine leaves large discretion to courts, it may lead to unfair results.<sup>121</sup> Because the definitions of “necessary portion,” “unable to work,” and “no source of income” are unclear, judges may decide individual cases based on their personal experiences and perspectives, and their rulings may not address the heir’s actual needs.<sup>122</sup> Therefore, the current necessary portion doctrine, which creates inconsistency in individual cases, will not sufficiently protect heirs who really need the necessary portion.<sup>123</sup>

In order to meet societal needs and resolve problems in the current necessary portion doctrine, Chinese scholars have recommended adopting the mandatory share doctrine used in some civil-law countries, such as Taiwan.<sup>124</sup> In 2003, scholars proposed a Draft of Inheritance Law Proposal in the Civil Code of the People’s Republic of China (the “Draft”).<sup>125</sup> The Draft adopts civil-law countries’ mandatory share doctrine by designating particular types of intestate heirs as “mandatory share heirs” and the specific portions of the intestate shares to which the mandatory-share heirs are entitled.<sup>126</sup> The mandatory-share provisions are stipulated in Articles 29 and 30 of the Draft.<sup>127</sup> Article 29 requires a testator to leave a portion of his estate as the mandatory share to “mandatory share heirs” and invalidates dispositions against the legal portion.<sup>128</sup> Moreover, it designates the intestate heirs first and second in order as “mandatory share heirs.”<sup>129</sup> It also prevents the mandatory-share heirs from giving up their legal share before the testator’s death.<sup>130</sup> Article 30 gives one-half of the intestate share to the intestate heirs first in order as their mandatory share; it gives the intestate heirs second in

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120. See Zhang, *supra* note 9, at 66; see also Liu, *supra* note 37, at 97.

121. See Cao, *supra* note 118, at 80.

122. See *id.*

123. See *id.*

124. See CIVIL LAW, *supra* note 12, at 224-25.

125. *Id.* at Preface II.

126. *Id.* at 253-55. For extended discussion of civil law schemes, see MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 246-49 (1989); EUROPEAN SUCCESSION LAWS (Dayton Hayton ed., 1998); Michael McAuley, *Forced Heirship Redux: A Review of Common Approaches and Values in Civil Law Jurisdictions*, 43 LOY. L. REV. 53 (1997).

127. CIVIL LAW, *supra* note 12, at 253-58.

128. *Id.* at 253.

129. *Id.*

130. *Id.*

order one-third of the intestate share as their mandatory share.<sup>131</sup> Article 14 of the Draft defines the intestate heirs first in order as the decedent's spouse, children, and parents and the intestate heirs second in order as the decedent's siblings, paternal grandparents, and maternal grandparents.<sup>132</sup> Moreover, Article 14 also considers "widowed daughters-in-law or sons-in-law who have made the predominant contributions in maintaining their parents-in-law" as intestate heirs first in order.<sup>133</sup> Therefore, under the Draft, heirs who are entitled to mandatory shares are family members with the duty to support or the right to be supported.<sup>134</sup>

Most importantly, Article 30 of the Draft states that the right to claim the mandatory share should be the same as the right to inherit.<sup>135</sup> Article 21 of the Draft provides that "the intestate heirs in the superior order have the right to inherit against the intestate heirs in the inferior order."<sup>136</sup> This means that an intestate heir in the inferior order can inherit only if there is no intestate heir in the superior order surviving the decedent.<sup>137</sup> Accordingly, under the Draft, not all intestate heirs are entitled to the mandatory share. This changes the current necessary portion doctrine, which allows all intestate heirs, regardless of whether they can inherit under intestacy, to claim the necessary portion if they qualify as "unable to work" and with "no source of income." Thus, the Draft's mandatory-share provisions no longer focus on the need of heirs, but on heirs' status.

Besides the proposed provisions, the Draft also includes reasons for recommending Articles 29 and 30 of the Draft. It states that these provisions are designed to resolve problems of China's current necessary portion doctrine. First, the provision to change the vague "legal portion" to "1/2 or 1/3 of intestate share" gives both testators and courts clear guidelines to provide accurate mandatory shares to the qualified heirs in each case.<sup>138</sup> Second, changing the definition of the "mandatory share heir" from "heirs who are unable to work and have no source of income" to the "intestate successors first and second in order" protects the testator's closest family members and is more consistent with the Inheritance Law's legislative purpose of providing support to family

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131. *Id.* at 256.

132. CIVIL LAW, *supra* note 12, at 256.

133. *Id.* at 223-27.

134. *Id.*; *see also* Foster, *supra* note 48, at 97.

135. CIVIL LAW, *supra* note 12, at 256.

136. *Id.* at 240.

137. *Id.*

138. *Id.*

members.<sup>139</sup> Because heirs in the same intestate order can have equal mandatory shares and will not be disinherited without legal justification, this can establish good family relationships and encourage people to support their family members.<sup>140</sup> Accordingly, the proponents of the Draft concluded that the proposed mandatory-share provisions can resolve problems in the current necessary portion doctrine.

Interestingly, there is another proposed draft called Proposal with Legislative Reasons for Inheritance Law of China (the “Proposal with Legislative Reasons”) published in 2006, which has a different suggestion for the new Chinese Inheritance Law.<sup>141</sup> It recommends abolishing the necessary portion doctrine but limits testamentary freedom by providing “necessary living expenses” to heirs who are unable to work and have no source of income.<sup>142</sup> The rationale for providing “necessary living expenses” under the Proposal with Legislative Reasons is to give more freedom to a testator in disposing of his property and still protect the heirs of the testator who are unable to work and have no source of income.<sup>143</sup> The proponents of the Proposal with Legislative Reasons consider the mandatory share doctrine in civil-law countries as “overly limiting testamentary freedom.”<sup>144</sup> Therefore, they recommend that China abolish the necessary portion doctrine in the new Inheritance Law but not adopt the mandatory share doctrine used in civil-law countries. However, they still recommend that the new Inheritance Law provide heirs who are unable to work and have no source of income a portion of a testator’s estate as “living expenses” to meet the heirs’ fundamental needs.<sup>145</sup>

In conclusion, under current inheritance law, a parent in China can disinherit his adult children as long as those children do not meet the statutory requirement that they are unable to work and have no source of income. However, because the current necessary portion doctrine has many problems and does not fit China’s current societal needs, scholars

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139. *Id.* at 254-55.

140. CIVIL LAW, *supra* note 12, at 255.

141. See ZHONGGUO JICHENG FA LIFA JIANYIGAO JI LIFA LIYOU [PROPOSAL WITH LEGISLATIVE REASONS FOR THE INHERITANCE LAW OF CHINA] 109-11 (Zhang Yumin et al. eds., 2006) [hereinafter PROPOSAL WITH LEGISLATIVE REASONS].

142. *Id.* at 109 (“Article 38 of Proposal with Legislative Reasons states that ‘a will must provide necessary living expenses to heirs who are unable to work and have no source of income. If a will does not provide shares for heirs who are unable to work and have no source of income, a necessary portion must be left to such heirs when disposing of the estate and the rest of the estate can be followed by the will. Moreover, whether an heir is unable to work and has no source of income should be determined at the time of the probate of the will.’”).

143. *Id.* at 109-10.

144. *Id.* at 110.

145. *Id.* at 111.

in China are considering adoption of civil-law countries' mandatory share doctrine. If they do adopt it, a parent will not be able to disinherit his adult children without legal justification. As the next Section will show, this is the very approach that Taiwan's inheritance law follows.

### III. MANDATORY SHARE DOCTRINE IN TAIWAN

The mandatory-share provisions in Taiwan are very similar to the mandatory-share legislation in other civil-law countries.<sup>146</sup> They provide particular heirs a statutorily required portion, which is called the "mandatory share."<sup>147</sup> When the Republican government enacted the Civil Code of the Republic of China in 1930, it included the mandatory-share provisions in the Civil Code.<sup>148</sup> In Taiwan, there is no separate "inheritance law." All civil laws, such as torts, contracts, property, inheritance law, and family law are included in Taiwan's Civil Code. Taiwan's Civil Code contains eighty-eight provisions regarding rules of inheritance, starting at Part V. Succession, Article 1138. Articles 1187 and 1223-25 are the provisions regarding the mandatory share doctrine. These four provisions have never been amended or repealed and are still effective today.<sup>149</sup>

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146. PROPOSAL WITH LEGISLATIVE REASONS, *supra* note 141, at 111-12 (providing several mandatory share provisions in France, Germany, Switzerland, and Japan). In France, Civil Code Articles 913-916 prevent a testator from disposing of his entire estate to people other than his children or his lineal descendants if he has any lineal descendants or children who survive him. *Id.* In Germany, Civil Code Article 2303 provides a testator's lineal descendants, parents, and spouse the right to claim one-half of their intestate share if they are disinherited by the testator. *Id.* Switzerland's Civil Code Article 470 provides that a testator's lineal descendants can get 3/4 of their intestate share as their mandatory share and the testator's parents and spouse can get 1/2 of their intestate share as their mandatory share. *Id.* The testator can freely dispose of his estate to people other than his lineal descendants, spouse, and parents only when none of them survives the testator. *Id.* Finally, Japan's Civil Code Article 964 provides that a testator cannot violate the mandatory share provision when he disposes of his estate. *Id.* Moreover, under Article 1028 of Japan's Civil Code, heirs who are entitled to the mandatory share are intestate successors other than siblings. *Id.* Lineal descendants can get 1/3 of their intestate share as their mandatory share. *Id.* Others are entitled to 1/2 of their intestate shares. *Id.*

147. See Taiwan's Civil Code, *supra* note 15, at art. 1223 ("The mandatory share of an heir is determined as follows: (1) For a lineal descendant by blood, the mandatory share is one half of his intestate portion; (2) For a parent, the mandatory share is one half of his intestate portion; (3) For a spouse, the mandatory share is one half of his intestate portion; (4) For a brother or a sister, the mandatory share is one-third of his or her intestate portion; (5) For a grandparent, the mandatory share is one-third of his intestate portion.").

148. *Id.* at arts. 1187, 1223-25.

149. *Id.*

### A. *Taiwan's Mandatory Share Statutory Provisions*

According to Article 1187 of Taiwan's Civil Code, a testator may freely dispose of his property by a will as long as the disposition does not contravene the provisions with regard to the mandatory share.<sup>150</sup> This is a general provision to show that a testator's power of disposing his property by will is limited by the mandatory-share provisions. Those provisions are Articles 1223-25. Article 1223 designates who can take the mandatory share and how much of it.<sup>151</sup> Article 1224 states that the mandatory share is calculated after the creditors of the testator have been paid.<sup>152</sup> Article 1225 provides that an heir who is entitled to the mandatory share can claim his right from all legatees if the testator failed to leave the mandatory share to him and disposed his estate through legacy.<sup>153</sup>

Most importantly, because the mandatory share is based on the intestate share, only heirs of the testator who can inherit under intestacy are entitled to the mandatory share.<sup>154</sup> This means that an intestate heir second in order cannot claim the mandatory share if there are intestate heirs first in order who survived the testator.<sup>155</sup> Moreover, if lineal descendants in different generations survive the decedent, lineal descendants in the closer generation to the decedent can inherit, and others cannot. Under Article 1138, the decedent's spouse and lineal descendants by blood are heirs first in order.<sup>156</sup> Under Article 1139, if both children and grandchildren survive the decedent, only children can be the heirs first in order.<sup>157</sup> However, Article 1140 states that "Where

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150. *Id.* at art. 1187.

151. Taiwan's Civil Code, *supra* note 15, at art. 1123.

152. *Id.* at art. 1224 ("A mandatory share is determined by deducting the amount of debts from the property of the succession as reckoned according to Article 1173.").

153. *Id.* at art. 1125 ("A person entitled to a mandatory share may have the amount of the deficit deducted from the property of a legacy, if the amount of his mandatory share becomes deficient on account of the legacy made by the testator. If there are several legatees, deductions must be made in proportion to the value of the legacies they severally receive.").

154. See MINFA QINSHU YU JICHENG [FAMILY LAW AND INHERITANCE LAW OF THE CIVIL CODE] 338 (Lin Jidong et al. eds., 1994) [hereinafter FAMILY LAW AND INHERITANCE LAW OF THE CIVIL CODE] (stating that the right to claim a mandatory share is a right after an heir has the right to inherit a decedent's estate, and therefore, it should apply to regulations regarding intestacy).

155. *Id.* at 304 (stating that according to Article 1138, one who has right to inherit at the time of opening of succession is in the following order: (1) spouse and lineal descendants, (2) parents, (3) siblings and (4) grandparents). Therefore, if the intestate heirs are first in order survive the decedent, the second, third, and fourth in order do not have the right to inherit. *Id.*

156. Taiwan's Civil Code, *supra* note 15, at art. 1138.

157. *Id.* at art. 1139.

an heir first in order provided in Article 1138 has died or lost the right to inheritance before the opening of the succession, his lineal descendants shall inherit his entitled portion in his place."<sup>158</sup> Therefore, a grandchild's right to claim his mandatory share is greater than the rights of the testator's parents, siblings, and grandparents if the grandchild's parents predeceased the decedent. Under these provisions, a child, even if he is an adult, is able to work, and is rich, can claim half of his intestate share as his mandatory share from the decedent's estate. In other words, a parent in Taiwan cannot disinherit his children by will without any legal justification. Even if the child predeceased the parent, the lineal descendant of the child can take the mandatory share of the decedent's estate. On the other hand, as long as there is a child or lineal descendant, other intestate heirs second or third in order are not entitled to the mandatory share even if they are disabled or have no source of income. Therefore, Taiwan's mandatory share doctrine focuses on the heir's status at the time of the decedent's death.

#### *B. Courts' Interpretation and Application of the Mandatory Share Doctrine*

##### *1. Preventing a Parent from Depriving His Children of Their Mandatory Share*

Taiwan's courts strictly follow these mandatory-share provisions in each case. Generally, courts will enforce the mandatory-share provisions to prevent disinheritance of a child unless proponents of the will can prove one of the following: (1) the contestant is not the testator's heir;<sup>159</sup> (2) there is legal justification under Article 1145 of Taiwan's Civil Code for the testator to disinherit the heir;<sup>160</sup> or (3) the estate was disposed of

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158. *Id.* at art. 1140.

159. 96 JIA-SHANG-ZI 191 [No.191, Family Decision 2007], 2007, The Judicial Yuan of the Republic of China Law & Regulation Retrieving System [hereinafter JUDICIAL CASE SYSTEM OF R.O.C.] (Taiwan High Ct., Nov. 7, 2007), available at <http://jirs.judicial.gov.tw> (holding that a child who is not born after the marriage of his father and his stepmother and has not been adopted by the stepmother cannot claim a "compulsory portion" from his stepmother's estate since he is not an heir of his stepmother).

160. Taiwan's Civil Code, *supra* note 15, at art. 1145 ("A person shall forfeit his right to inherit in any of the following events: (1) Where he has been sentenced to criminal penalty for having intentionally caused or attempted the death of the deceased or of a person entitled to inherit; (2) Where he has, by fraud or by duress, induced the deceased to make, revoke or alter a will relating to inheritance; (3) Where he has, by fraud or by duress, prevented the deceased from making, revoking or altering a will relating to inheritance; (4) Where he has forged, altered, concealed or destroyed the deceased's will relating to inheritance; (5) Where he seriously abused or humiliated the deceased and has been forbidden to inherit by the deceased.").



while the testator was living.<sup>161</sup> In other words, if an heir has a right to inherit at the time of the testator's death and the testator does not leave the heir the mandatory share without any legal justification, courts in Taiwan usually will hold that the heir has the right to claim against the legatees for the amount of the deficit deducted from the property the testator devised in his will.

## 2. Applying the Chinese Tradition of "Xiao Dao" to Allow a Parent to Disinherit His Children Who Seriously Abused, Humiliated, or Abandoned Him

Notably, the mandatory share doctrine in Taiwan not only focuses on the status of the entitled heir but also on the behavior of the heir. In the majority of will-contest cases, the most important factor for a Taiwanese court in determining whether a parent can legitimately disinherit a child is section 5 of Article 1145 of Taiwan's Civil Code.<sup>162</sup> This provision uses a concept from Chinese culture and tradition, "Xiao Dao" (a child must obey, serve, and take care of his parents),<sup>163</sup> to allow disinheritance of children. Thus, it is important for the purposes of this Article to examine how Taiwan's courts have interpreted Article 1145(5).

Article 1145 lists five situations where a person shall forfeit his right to inherit:

- (1) Where he has been sentenced to criminal penalty for having intentionally caused or attempted the death of the deceased or of a person entitled to inherit;
- (2) Where he has, by fraud or by duress, induced the deceased to make, revoke, or alter a will relating to inheritance;
- (3) Where he has, by fraud or by duress, prevented the deceased from making, revoking, or altering a will relating to inheritance;
- (4) Where he has forged, altered, concealed, or destroyed the deceased's will relating to inheritance;
- (5) Where he seriously

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161. See 98 CHONG-SHEN-ZI 250 [No. 250, Remend 2009], 2009, JUDICIAL CASE SYSTEM OF R.O.C. (Taiwan High Ct., Oct. 28, 2009), available at <http://jirs.judicial.gov.tw> (holding that a testator's right to dispose of his property during his life will not be limited by the mandatory-share provisions and that therefore, an heir who is entitled to his mandatory share cannot use Article 1225 of the Civil Code to claim the amount of the deficit deducted from the property disposed by the testator during life).

162. Taiwan's Civil Code, *supra* note 15, at art. 1145(5) ("A person shall forfeit his right to inherit in any of the following events: . . . Where he seriously abused or humiliated the deceased and has been forbidden to inherit by the deceased.").

163. See CHENG WEIRONG, ZHONGGUO JICHENG ZHIDU SHI [HISTORY OF CHINESE INHERITANCE LAW] 109 (2006) [hereinafter HISTORY OF CHINESE INHERITANCE LAW] (stating that "Xiao" requires a child to take care of her parents and that it requires a child to take care of her parents with "obedience, submission, and service").

abused or humiliated the deceased and has been forbidden to inherit by the deceased.<sup>164</sup>

Therefore, under Article 1145(5), there are two requirements for a deceased parent to disinherit his child: (1) the child seriously abused or humiliated him and (2) the child had been forbidden to inherit by the decedent.<sup>165</sup> The proponent of the will or other intestate heirs (if the decedent died intestate) should prove that both requirements were met. Most importantly, an heir who committed an Article 1145(5) offense cannot regain his right to inherit even if he had been subsequently forgiven by the testator.<sup>166</sup> The following are cases of how Taiwanese courts have applied Article 1145(5) to allow a parent to disinherit his child.

First of all, courts have usually interpreted the “seriously abused or humiliated the deceased” language of Article 1145(5) to mean serious physical or mental abuse of the decedent.<sup>167</sup> In Taiwan, purposefully not supporting a parent to whom the child owes a duty to support constitutes mental abuse.<sup>168</sup> For example, in a 1985 case, the Supreme Court held that if a parent was sick for a long time and, before his death, his child never visited him without any legitimate reason, such as long distance, disability, or illness, the child could be disinherited because he seriously abused or humiliated the decedent.<sup>169</sup> As a result, such child could not claim his mandatory share because his conduct caused serious mental abuse to the deceased.<sup>170</sup> In the 1985 case, the decedent suffered a stroke in the 1960s due to a business failure.<sup>171</sup> In 1966, his four children left him and, up to his death in 1978, did not visit their father.<sup>172</sup> During these eleven years, the decedent’s four children lived less than half a mile away.<sup>173</sup> They were also adults and were able to work during this period. Therefore, the Supreme Court stated that the language “seriously abused or humiliated the deceased” not only meant physical

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164. Taiwan’s Civil Code, *supra* note 15, at art. 1145.

165. *Id.* at art. 1145(5).

166. *Id.* at art. 1145. In contrast, if an heir commits one of the offenses specified in sections 2-4, he can regain his right to inherit if he is subsequently forgiven by the testator. *Id.*

167. See 74 TAI-SHANG-ZI 1870 [No. 1870 Appellate 1985], 1985, JUDICIAL CASE SYSTEM OF R.O.C. (Sup. Ct., Aug. 26, 1985), available at <http://jirs.judicial.gov.tw>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. See 74 TAI-SHANG-ZI 1870 [No. 1870 Appellate 1985], 1985, JUDICIAL CASE SYSTEM OF R.O.C. (Sup. Ct., Aug. 26, 1985), available at <http://jirs.judicial.gov.tw>.

173. *Id.*

abuse or not taking care of the decedent whose heirs owe responsibility to take care of him, but also meant not visiting an ill parent for a long time without legitimate reason.”<sup>174</sup>

The Supreme Court’s rationale was that because Chinese tradition focuses on “Xiao Dao,” a child who does not visit his parent for a long time, especially when the parent is ill, is assumed to have purposefully abused his parent mentally.<sup>175</sup> “Xiao Dao” is one of the Confucian teachings. It states that children must respect, obey, and take care of their parents.<sup>176</sup> Therefore, a child has a duty to support his parents; abandoning parents violates the duty to support.<sup>177</sup> Thus, the Supreme Court concluded that when an heir purposefully abandons his parents, whom he has duty to support, the heir’s actions constitute a seriously abusive or humiliating act under Article 1145(5).<sup>178</sup> This rationale for disinheritance applies not only to testamentary succession, but also to intestate succession. If the decedent died intestate but had mentioned that his children abused him and should not be entitled to his estate, courts will allow extrinsic evidence to prevent such children from inheriting the decedent’s estate.<sup>179</sup>

Lower courts in Taiwan all have followed the Supreme Court’s 1985 precedent and allowed a parent to disinherit an adult child if such child was able to visit but did not visit the ill parent for a long time before his death. For example, in 2004, a Taizhong trial court held that a child’s failure to visit his blind parent for three years qualified as a seriously abusive or humiliating act.<sup>180</sup> In this case, the testator was sick for over three years, and his child never visited him.<sup>181</sup> In December 1999, the testator became blind because of his illness, but the contestant, one of the testator’s children, still did not visit him.<sup>182</sup> As a result, the testator executed a will leaving his entire estate to his two other children.<sup>183</sup> After the decedent’s death, the contestant asked for his compulsory portion under the mandatory-share provisions.<sup>184</sup> The court

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174. *Id.*

175. *Id.*

176. *Id.*

177. *See* 74 TAI-SHANG-ZI 1870 [No. 1870 Appellate 1985], 1985, JUDICIAL CASE SYSTEM OF R.O.C. (Sup. Ct., Aug. 26, 1985), *available at* <http://jirs.judicial.gov.tw>.

178. *Id.*

179. *Id.*

180. *See* 92 CHONG JIA SU GENG 1 [No. 1 Amended Family Case 2003], 2004, JUDICIAL CASE SYSTEM OF R.O.C. (Taizhong District Ct., Oct. 7, 2004), *available at* <http://jirs.judicial.gov.tw>.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

said that, according to the Supreme Court's 1985 precedent, because the contestant did not visit the testator over the three years while the testator was ill, he committed serious mistreatment of the testator and forfeited his mandatory share.<sup>185</sup>

Similarly, in 2006, a Taipei trial court held that an adopted child's failure to visit the decedent for almost thirty years constituted serious ill-treatment of the decedent.<sup>186</sup> In this case the testator adopted the contestant in 1968; however, after the contestant got married, she never visited the decedent up to his death in 1999.<sup>187</sup> In 1996, the testator executed a will leaving his entire estate to his other children and expressing his intent to disinherit the contestant.<sup>188</sup> The court found that the contestant was adopted and supported by the testator while she was young.<sup>189</sup> Moreover, she had failed to visit or contact the testator for thirty years without a legitimate reason, even after the testator was bedridden.<sup>190</sup> Therefore, she could be disinherited by the testator under Article 1145(5) and could not ask for her mandatory share.<sup>191</sup>

The second way Taiwan's courts allow a testator to disinherit a child by will based on Article 1145(5) of Taiwan's Civil Code is that the testator must state in his will the facts of how his child seriously abused or humiliated him and demonstrate that his child indeed abused or humiliated him.<sup>192</sup> The allegation of serious abuse or humiliation must be based on objective evidence, not on the testator's dislike for or disappointment in the disinherited child.<sup>193</sup> In the 2006 Taipei case discussed above, the testator disinherited not only his adopted daughter who never visited him over thirty years, but also one of his daughters who usually had disputes with the testator.<sup>194</sup> In the will, the testator disinherited her because she "did not appreciate that I raised her, eavesdropped on my wife on several occasions."<sup>195</sup> The testator further said in the will that "[the daughter] even hired people to follow my wife and scared my wife causing a miscarriage of our baby; [the daughter] did

185. See 92 CHONG JIA SU GENG 1 [No. 1 Amended Family Case 2003], 2004, JUDICIAL CASE SYSTEM OF R.O.C. (Taizhong District Ct., Oct. 7, 2004), available at <http://jirs.judicial.gov.tw>.

186. 90 JIA-SU 106 [No. 106 Family 2001], 2002, JUDICIAL CASE SYSTEM OF R.O.C. (Taipei District Ct., Dec. 11, 2002), available at <http://jirs.judicial.gov.tw>.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. 90 JIA-SU 106 [No. 106 Family 2001], 2002, JUDICIAL CASE SYSTEM OF R.O.C. (Taipei District Ct., Dec. 11, 2002), available at <http://jirs.judicial.gov.tw>.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

these things because she wanted my entire estate.”<sup>196</sup> That daughter was a child from the testator’s previous marriage, and the testator gave his entire estate to his second wife and his second wife’s child.<sup>197</sup> The court found that there was no convincing evidence showing that the testator’s daughter actually did the things claimed by the testator in the will.<sup>198</sup> There were also disputes as to whether the will was fraudulent.<sup>199</sup> Furthermore, evidence also showed that the disinherited daughter visited the testator very often before the testator’s death.<sup>200</sup> The court stated that because the evidence the testator stated in the will could not be proved as true, it might have come from the testator’s subjective thoughts. Moreover, whether the daughter committed an act of serious abuse or humiliation was not proved.<sup>201</sup> Therefore, in this case, even if the will was genuine and valid, because the reasons for the disinheritance were the testator’s personal animosity toward his daughter, those reasons were invalid, and the daughter could still take her mandatory share.<sup>202</sup>

If it is proved that the testator’s reasons for disinheriting his child were based on specific abusive acts, the court will allow the disinheritance of the child after finding that those specific acts constituted serious abuse or humiliation.<sup>203</sup> For example, in another 2006 Taipei case, the testator left his house in his will to his wife and four daughters.<sup>204</sup> He neither expressly disinherited his son, nor did he leave any estate to his son. However, at the end of his will, he expressly said “please follow my will.”<sup>205</sup> Proponents of the will provided two kinds of evidence showing the testator’s intent to disinherit his son.<sup>206</sup> The first evidence was a tape containing a conversation between the testator and his son. In the tape, the son asked the testator to sell the house and give him “his portion” of the sale of the house. After the testator refused to do so, the son said to the testator that “if you were not my parent, I would hit you as if you were a dog,” “I would not hit you, but someone would,” and “I would set fireworks to celebrate your death after you died.”<sup>207</sup>

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196. 90 JIA-SU 106 [No. 106 Family 2001], 2002, JUDICIAL CASE SYSTEM OF R.O.C. (Taipei District Ct., Dec. 11, 2002), available at <http://jirs.judicial.gov.tw>.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. 90 JIA-SU 106 [No. 106 Family 2001], 2002, JUDICIAL CASE SYSTEM OF R.O.C. (Taipei District Ct., Dec. 11, 2002), available at <http://jirs.judicial.gov.tw>.

202. *Id.*

203. See 93 CHI-SU 57 [No. 57 Family 2004] 2006 JUDICIAL CASE SYSTEM OF R.O.C. (Taipei District Ct., Apr. 11, 2006), available at <http://jirs.judicial.gov.tw>.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

After the son insulted him, the testator responded "I would not even give you a cent," "you are so 'Bu Xiao'" (in Chinese, Bu means 'not'; so Bu Xiao means a child not obeying or treating his parents well.); and "a 'Bu Xiao' child like you would not even be forgiven in hell."<sup>208</sup> The second evidence was testimony from the testator's nurse who was taking care of him before he died. The nurse was a third-party witness and testified that the testator was upset and heart-broken by his son's insulting language and threats and stated many times to her that he would not give his son anything after he died.<sup>209</sup> Based on the tape and the nurse's testimony, the court first found the son's language and threats were seriously abusive or humiliating acts.<sup>210</sup> Also, the court stated that the proponents sufficiently proved that the testator had expressed his intent to disinherit the son.<sup>211</sup> Therefore, as this case shows, courts in Taiwan will allow disinheritance of a child if such child physically or mentally abused the testator, and the proponent of the will can prove that the testator had expressed his intent to disinherit the child based on objective, legitimate proof that the child abused or humiliated him.

To conclude, in Taiwan, it is very clear that, under mandatory-share provisions, a parent cannot disinherit his children by will without legal justification. Taiwanese courts strictly follow these provisions. If the testator fails to leave the mandatory share his heir deserved under Article 1223 of Taiwan's Civil Code, courts will give the heir his mandatory share before other legatees can claim their legacies under the will. However, if the heir commits one of acts that lead to forfeiture of inheritance provided in Article 1145, courts will not allow him to claim his mandatory share. Moreover, Article 1145(5) and Taiwanese courts adopt the Chinese tradition of "Xiao Dao" to allow disinheritance of children based on "Bu-Xiao." First, Article 1145 allows an heir who committed one of the offenses listed in sections 2-4 to regain her right to inherit if the testator subsequently forgave her. An act that falls under section 5, however, is considered so serious that the wrongdoer cannot inherit even if the testator later forgave him. Second, courts define "seriously abused or humiliated the deceased" as physical or mental abuse of the decedent, including failure to visit the decedent for a continuous period of time up to the decedent's death. Third, if the decedent has a will and expressly states that the reason for disinheritance was abuse or humiliation by the unworthy child, the court will give more

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208. See 93 CHI-SU 57 [No. 57 Family 2004] 2006 JUDICIAL CASE SYSTEM OF R.O.C. (Taipei District Ct., Apr. 11, 2006), available at <http://jirs.judicial.gov.tw>.

209. *Id.*

210. *Id.*

211. *Id.*

weight to the testator's will than to the heir's right of inheritance. According to the cases, the disinherited children were usually adults, able to work or financially independent; the testators were usually very ill or disabled even though they were still taken care of by other family members.

These cases demonstrate that Taiwanese courts usually require a child to take care of his elderly or ill parents. Moreover, these cases show that courts apply the Chinese tradition of "Xiao Dao" to show why a child should take care of his elderly or ill parents. However, Taiwanese courts also limit excessive use of Article 1145(5) to disinherit heirs by holding that a testator must provide objective evidence of the disinherited child's serious abusive or humiliating acts against him, rather than disinheritance based solely on the testator's subjective feelings. Thus, in determining whether a parent can disinherit an adult child, courts will balance the child's inheritance right and the testator's desires with Chinese tradition.

#### IV. CHINA SHOULD ADOPT TAIWAN'S MANDATORY SHARE DOCTRINE

The purpose of the mandatory share doctrine is to protect the inheritance rights of a testator's family members.<sup>212</sup> It limits a testator's testamentary freedom by preserving a portion of the testator's estate for his family members.<sup>213</sup> Without legal justification, a testator cannot freely dispose of his estate in a way that would violate his family members' mandatory share.<sup>214</sup> Therefore, the mandatory share doctrine is a rule designed solely for the purpose of limiting testamentary freedom.<sup>215</sup> Why did Taiwan adopt the mandatory share doctrine? How and where did it come from? Furthermore, why does China, a country that has the same Chinese culture and history as Taiwan, use a necessary portion doctrine different from Taiwan's mandatory share doctrine? Why have Chinese scholars proposed to change the necessary portion doctrine and to adopt Taiwan's mandatory share doctrine?

This Part of the article argues that China should adopt Taiwan's mandatory share doctrine for the following reasons. First, China's current necessary portion doctrine, which is derived from socialist theory, does not fit China's culture and current societal needs, and therefore, is outdated. Second, Taiwan's mandatory share doctrine is a product of Chinese culture and tradition. It focuses on family relationships, the duty to support, and proper behavior. Unlike other

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212. See Liu, *supra* note 37, at 95.

213. *Id.*

214. *Id.*

215. *Id.*

civil-law countries' approaches, the foci and purposes of Taiwan's mandatory share doctrine are primarily developed from Chinese history and custom. Therefore, because China and Taiwan share the same Chinese history and culture, Taiwan's approach can meet China's cultural and current societal needs.

*A. China's Current Necessary Portion Doctrine is Outdated*

As described in Part II, China's current necessary portion doctrine only protects intestate heirs who are unable to work and have no source of income. Because the two statutory requirements, "unable to work" and "no source of income," must be met simultaneously, a testator is allowed to leave his entire estate to someone who is not his intestate heir if all of his intestate heirs are either able to work or have a source of income.<sup>216</sup> Under the P.R.C. Inheritance Law, intestate heirs are usually a decedent's family members, such as spouse, children, parents, grandparents, and siblings.<sup>217</sup> So, China's current necessary portion doctrine allows a testator not to leave her estate to her family members if none of her family members meets the statutory requirements.

The P.R.C. Inheritance Law, enacted in 1985, is based on socialist theory.<sup>218</sup> Article 19 of the P.R.C. Inheritance Law includes two socialist principles.<sup>219</sup> First, it encourages people to support themselves by their own efforts as long as they are able to work.<sup>220</sup> It allows citizens to have and freely dispose of their private property. Therefore, it gives a testator very broad testamentary freedom to dispose of his estate by will and does not require citizens to leave any share of their estates to their heirs who are able to work.<sup>221</sup> Second, it also aims to protect a person's right to inherit and takes care of people who are unable to work and have no source of income.<sup>222</sup> To fulfill both purposes, Article 19 of the P.R.C. Inheritance Law leaves citizens broad testamentary freedom with only one limitation: to take care of heirs who are unable to work and have no source of income.<sup>223</sup> However, because China's Inheritance Law was

216. See Bian & Wu, *supra* note 32, at 34.

217. See P.R.C. Inheritance Law, *supra* note 13, at art. 10.

218. See 95 GUIHUA GAODENG EXUXIAO FAXUE JIAOCAI: JICHENG FA [95 SELECTED CASEBOOK FOR LAW SCHOOL EDUCATION: INHERITANCE LAW] 30-43 (Guo Mingrui et al. eds., 1996) [hereinafter CASEBOOK OF P.R.C. INHERITANCE LAW]. For extended discussion of the P.R.C. Inheritance Law, see Louis B. Schwartz, *The Inheritance Law of the People's Republic of China*, 28 HARV. INT'L L.J. 433 (1987).

219. See Cao, *supra* note 118, at 79.

220. *Id.*

221. *Id.*

222. See CASEBOOK OF P.R.C. INHERITANCE LAW, *supra* note 218, at 161-63.

223. See Cao, *supra* note 118, at 79.



enacted in 1985, and scholars in China have argued that China's necessary portion doctrine is outdated and cannot meet China's current societal and cultural needs.<sup>224</sup> Therefore, they have recommended that China adopt the mandatory share doctrine. This Section will examine the source of China's current necessary portion doctrine and show why China should adopt a mandatory share doctrine to fit its current needs.

### 1. China's Current Necessary Portion Doctrine is Derived from Socialist Theory

The P.R.C. Inheritance Law was enacted in 1985, an era after China accepted Marx's communist theory of abolishing citizens' right to have private property and experienced ten years of "cultural revolution."<sup>225</sup> Due to the failure of Marx's communist economic practice during the "Ten Years of Cultural Revolution," in 1976, China was poor and unstable.<sup>226</sup> As a result, in 1978, the Chinese government responded with a radical economic reform program that expanded citizens' rights to accumulate, use, and dispose of private property<sup>227</sup> and "dismantl[ed] the entire State and collective enterprise structure that ha[d] traditionally guaranteed its citizens cradle-to-grave support services."<sup>228</sup> This so-called "socialism with Chinese characteristics" adopted capitalist principles to allow individuals to own private property but still maintained socialism as China's fundamental principle.<sup>229</sup>

The P.R.C. Inheritance Law, therefore, reflects two principles. The first gives citizens the right of inheritance; the second encourages people to consume what they earn by their own efforts and provides care for those who are unable to work and have no source of income. Under the first principle, Chinese citizens have the right of inheritance, and a decedent's private property would not go to the government, but to the decedent's heirs. Under the second principle, unless a testator has heirs who are unable to work and have no source of income, she is allowed to

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224. See *id.*; see also Zhang, *supra* note 9, at 66-68; Zhang, *supra* note 29, at 151-54.

225. See HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 452-482; see also JICHENG FA GAIYAO [SUMMARY OF P.R.C. INHERITANCE LAW] 10-18 (He Shan et al. eds., 1985) [hereinafter SUMMARY OF P.R.C. INHERITANCE LAW]; see also Zhang, *supra* note 9, at 67.

226. See HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 472-75.

227. See *id.* at 476-82.

228. Foster, *supra* note 85, at 1200. For a sampling of sources on Chinese welfare reform, see *id.* at 1200-02 nn.7-12.

229. See SUZANNE OGDEN, CHINA'S UNRESOLVED ISSUES: POLITICS, DEVELOPMENT, AND CULTURE 91 (3d ed. 1995) (stating that Chinese socialism after 1978 "is a 'newborn system'" and that "with [China's] reformers, 'socialism with Chinese characteristics,' a cynical label for the adoption of many capitalist methods under the rubric of socialism, become the rationalizing principle for China's economic reforms").

dispose of her estate freely and should not be required to leave any share of her estate to her heirs. Scholars agree that these two principles are fundamentals of socialism and that these principles both protect citizens' right to have private property and promote the care of elders and minors.<sup>230</sup>

Moreover, China's current necessary portion doctrine was influenced by Soviet inheritance law. First, Articles 16 and 19 of the P.R.C. Inheritance Law, which give a testator broad testamentary freedom with only the one limitation of protecting intestate heirs who are unable to work and have no source of income,<sup>231</sup> are similar to the amended version of the Soviet Civil Code enacted in 1945.<sup>232</sup> The amended version of the Soviet Civil Code allowed a testator

‘to bequeath all of his property or part of it to one or several persons from among those belonging to any one of the three above-mentioned classes’ as long as he did not ‘deprive his minor children or other heirs *who are unable to earn*, of the portion which would belong to them under intestate succession.’<sup>233</sup>

Similarly, Article 19 of the P.R.C. Inheritance Law requires a testator to provide a necessary portion only to heirs “who are unable to work and have no source of income.”<sup>234</sup> Chinese courts always consider minors as “unable to work” and with “no source of income.”<sup>235</sup> Second, in 1930, when China was governed by the Republican government, China already had inheritance laws provided in the Civil Code.<sup>236</sup> As discussed above, that code remains in effect in Taiwan today. Articles 1223-25 of the Civil Code provide the mandatory share to intestate heirs of a testator regardless of whether they are unable to work or have a source of income.<sup>237</sup> However, in 1985, when the P.R.C. Inheritance Law was enacted, it did not adopt the mandatory share provisions provided in the 1930 Civil Code. Instead, it adopted a necessary portion doctrine similar to that in Soviet inheritance law. Accordingly, China's current necessary portion doctrine is a socialist scheme.

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230. See ANNOTATED INHERITANCE LAW, *supra* note 25, at 1-7.

231. P.R.C. Inheritance Law, *supra* note 13, at arts. 16, 19.

232. See Frances Foster-Simons, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 32 AM. J. COMP. L. 33, 42-43 (1985).

233. See *id.* at 42-43.

234. P.R.C. Inheritance Law, *supra* note 13, at art. 19.

235. See Case of Ms. Guan, *supra* note 69; see also Inheritance Case No. 25, *supra* note 91, at 63; Inheritance Case No. 2, *supra* note 86, at 140.

236. See Taiwan's Civil Code, *supra* note 15, at arts. 1138-1225.

237. See *id.* at arts. 1223-25.

## 2. China Should Adopt the Mandatory Share Doctrine to Fit Its Current Needs

Today, twenty-five years after the P.R.C. Inheritance Law was enacted, China has experienced significant economic, social, and legal changes. Today, many Chinese citizens are wealthy and have substantial private property.<sup>238</sup> Moreover, citizens are also aware of their rights to dispose of their property by will, and they increasingly exercise this testamentary freedom.<sup>239</sup> Generally, a Chinese testator leaves his property to someone he loves and disposes of his estate as he desires.<sup>240</sup> Because Article 19 of the P.R.C. Inheritance Law allows a testator to freely dispose of his estate if he does not have heirs qualified as “unable to work” and with “no source of income,” testators in today’s China may leave their estates to anyone, even an “Er Nai” (“girlfriend outside of marriage”) or “Xiao Bai Lian” (“boyfriend outside of marriage”), rather than their children or family members.<sup>241</sup> However, both China’s Inheritance Law and Marriage Law emphasize the importance of the duty to support family members, especially within the parent-child relationship.<sup>242</sup> Moreover, if a testator can freely leave his entire estate to

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238. See Cao, *supra* note 118, at 79.

239. See *id.*; Foster, *supra* note 48, at 118-119. See also Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 321 (2008) (stating that during the “nearly three decades [after 1978], people in China began to regain consciousness of their private property rights and sought further protection of these rights”).

240. See Zhang, *supra* note 9, at 67.

241. See *id.* See also ANNOTATED INHERITANCE LAW, *supra* note 25, at 76 (“The testator has the right to transfer his own property to whomever he wishes. As long as he does not violate legal prohibitions, others cannot interfere.”).

242. See P.R.C. Inheritance Law, *supra* note 13, at arts. 12-14. Article 12 provides that “Widowed daughters-in-law or sons-in-law who have made the predominant contributions in maintaining their parents-in-law shall, in relationship to their parents-in-law, be regarded as successors first in order.” Article 13 provides that “At the time of distributing the estate, successors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share.” Article 14 provides that “An appropriate share of the estate may be given to a person, other than a successor, who depended on the support of the decedent and who neither can work nor has a source of income, or to a person, other than a successor, who was largely responsible for supporting the decedent.” See also Zhonghua Renmin Gongheguo Hunyin Fa [Marriage Law of the People’s Republic of China] art. 15 (Sept. 10, 1980, amended Apr. 28, 2001), available at CHINALAWINFO (last visited Aug. 25, 2010) (“Parents shall have the duty to bring up and educate their children; children shall have the duty to support and assist their parents. If parents fail to perform their duty, children who are minors or are not capable of living on their own shall have the right to demand the costs of upbringing from their parents. If children fail to perform their duty, parents who are unable to work or have difficulty in providing for themselves shall have the right to demand support payments from their children.”).

his "Er Nai" as long as his child is able to work or has a source of income, his child will be unlikely to take care of the testator.<sup>243</sup> In other words, Article 19 of the P.R.C. Inheritance Law allows a testator not to support his children and, as a result, discourages a child to take care of his parents. This is contrary to the support purposes of China's Inheritance Law and Marriage Law.<sup>244</sup>

Furthermore, because the qualifications of "unable to work" and "no source of income" are too narrow, and because the "necessary portion" is unclear, China's current necessary portion doctrine provides insufficient protections to needy heirs and puts the burden of supporting the needy heirs on society.<sup>245</sup> Under Article 19 of the P.R.C. Inheritance Law, an heir must meet the two requirements simultaneously to be entitled to the necessary portion.<sup>246</sup> However, due to an economic depression, people who are able to work might not have an opportunity to work and people who have a source of income may still be unable to pay their living expenses. Therefore, the two requirements for entitlement to the necessary portion cannot sufficiently protect heirs in need.<sup>247</sup>

Moreover, neither courts nor the statutory language define "necessary portion." As a result, courts have a broad discretion to determine how much a qualified heir needs based on the individual situation.<sup>248</sup> Courts also have broad discretion to determine who qualifies as "unable to work" and has "no source of income."<sup>249</sup> In addition, to be entitled to the necessary portion, a qualified heir must meet the conditions "at the time the will becomes effective," not the date of execution of the will.<sup>250</sup> Accordingly, under China's current necessary portion doctrine, a testator cannot predict whether his heir needs the necessary portion, who qualifies, and how much he needs to reserve for the qualified heir. This unpredictability could discourage a testator from reserving shares for his heirs and from disposing of his estate as he desired.<sup>251</sup> Also, the uncertainty of the necessary portion and

243. See Zhang, *supra* note 9, at 66; Zhang, *supra* note 29, at 154. See also Case No. 85, in ZHONGGUO MINFA JIAOXUE ANLI XUANBIAN [COLLECTION OF CHINESE CIVIL LAW CASES FOR TEACHING] 201, 201 (1996) ("It should be made clear that even if an heir performed duties toward the decedent, the decedent can, nonetheless, make a will leaving his or her estate to another person.").

244. See *id.*

245. See Cao, *supra* note 118, at 80; see also Zhang, *supra* note 29, at 153-54; Bian & Wu, *supra* note 32, at 34-37.

246. See P.R.C. Inheritance Law, *supra* note 13, at art. 19.

247. See Zhang, *supra* note 29, at 154; see also Liu, *supra* note 37, at 97; Shu, *supra* note 8, at 75.

248. See Cao, *supra* note 118, at 80.

249. See *id.*

250. See Inheritance Law Opinion, *supra* note 25, at art. 37.

251. See Cao, *supra* note 118, at 80.

qualification for the necessary portion could encourage judges to decide cases based on their own experience and perspectives.<sup>252</sup> As a result, this would not only insufficiently protect needy heirs and impose the burden of supporting heirs on society, but also lead to unfair and inconsistent results in different cases. Therefore, because of the economic and societal changes in modern China, reformers have argued that China needs to adopt the mandatory share doctrine to fit its current needs.<sup>253</sup>

*B. Taiwan's Approach to the Mandatory Share Best Fits China's Culture and Current Societal Needs*

Taiwan adopted the mandatory share doctrine in 1930 while China was governed by the Republican government.<sup>254</sup> When the Republican government enacted the Inheritance Law section in Taiwan's Civil Code, it adopted both Chinese traditions and other civil law countries' practices.<sup>255</sup> Four main principles guide Taiwan's inheritance law. Those principles are: (1) abolishing the "Tsung Yao Ji Cheng" doctrine (inheritance under the Kindred),<sup>256</sup> (2) establishing equal rights for men and women under the law; (3) recognizing testamentary freedom; and (4) protecting intestate heirs' inheritance rights.<sup>257</sup> Although the Republican government abolished the "Tsung Yao Ji Cheng" doctrine to promote gender equality, the Inheritance Law section of Taiwan's Civil Code still maintained Chinese historical and traditional principles governing the family relationship, such as respecting elders and supporting minors.<sup>258</sup>

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252. *See id.*

253. *See id. see also* Zhang, *supra* note 9, at 68; Zhang, *supra* note 29, at 154; Shu, *supra* note 8, at 74-75.

254. *See* HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 414.

255. *See id.* at 414-17.

256. "Tsung Yao Ji Cheng" doctrine is a kind of inheritance doctrine practiced in the Chinese history before the Republican government established the Republic of China. It excludes females and heirs from inheritance. It only allows inheritance by descendants who are from a common ancestor and who bear the same family name. *See id.* at 37 (stating that "Tsung" means ancestors and "Yao" means temple of ancestors; so, "Tsung Yao" means worshipping ancestors. China's traditional inheritance practices are from a process of worshipping ancestors); *see also* GEORGE JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 17 (reissued ed. 1970) (stating that under the process of worshipping ancestors, only descendants who are from a common ancestor, who bear the same family name, can be included in the same "Tsung"). According to Jamieson, because females usually get married when they grow up, they will not bear the same family name as their father and will use their husband's name. *Id.* Their children will be named with their husbands' family name. *Id.* Therefore, under "Tsung Yao," females and all persons claiming from females are excluded from the Tsung of the female's father. *Id.* So, the principle of "Tsung Yao" is to determine who can take the same family name and worship the same ancestor. *Id.*

257. *See* HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 417-21.

258. *See id.* at 406-10.

In order to fit Chinese culture and be accepted by the general public, the Family Law and Inheritance Law sections of Taiwan's Civil Code adopted customs of different states in China.<sup>259</sup> Moreover, in creating the 1930 Civil Code, the Republican government incorporated Confucian theory and the "Xiao Dao" doctrine in the Family Law and Inheritance Law sections to regulate family relationships.<sup>260</sup> Therefore, Taiwan's Civil Code still maintains many Chinese cultural and historical concepts and practices. The Inheritance Law section of Taiwan's 1930 Civil Code has been used continuously in Taiwan since 1930.<sup>261</sup> The mandatory share provisions, Articles 1187 and 1223-25 of Taiwan's Civil Code, have never been amended or repealed and are still effective today.<sup>262</sup> Accordingly, Taiwan's mandatory share doctrine is a product of Chinese culture. Because the code derives from Chinese culture, it would fit people's needs in China as well as Taiwan.

#### 1. Taiwan's Mandatory Share Doctrine is a Product of Chinese Culture

Taiwan's mandatory share doctrine comes from the "Tsong Yao Ji Cheng" doctrine and Confucian principles.<sup>263</sup> The "Tsong Yao Ji Cheng" doctrine was a kind of inheritance doctrine practiced throughout Chinese history from the Chou dynasty until the establishment of the 1930 Civil Code.<sup>264</sup> In Chinese, "Tsong" and "Yao" both mean the ancestors from the same kindred.<sup>265</sup> Thus, inheritance in Chinese history was based on the concept of worshipping ancestors.<sup>266</sup> By worshipping ancestors, people would not forget where they came from and who their parents, grandparents, and ancestors were. It was a doctrine to tie family members together and secure the family relationship.<sup>267</sup>

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259. *See id.* at 414-16.

260. *See id.* at 406.

261. *See* Taiwan's Civil Code, *supra* note 15, at arts. 1187, 1223-25.

262. *See id.*

263. *See* HE QIN-HUA, *FALU WENHUA SHI YANJIU III* [A STUDY OF LAW AND CULTURE IN CHINESE HISTORY III] 122-27 (1st ed. 2007) (stating that the Civil Code abolished the Tsong Yao Ji Cheng doctrine for the purpose of protecting gender equality. However, the Tsong Yao Ji Cheng doctrine still has influence on the Civil Code in that it does not allow a testator to freely dispose of his estate and provides a mandatory share to the decedent's heirs); *see also* LU JINGYI, *MINCHU LISI WENTI DE FALU CAIPAN: YI DALIYAN MINSHI PANJUE WEI ZHONGXIN* [LAW AND JUDGMENT OF LI SI PROBLEM] 129-78 (1st ed. 2004).

264. *See* HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 38-43, 405-17.

265. *See id.* at 37; *see also* CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 17.

266. *See id.* at 44.

267. *See id.*; *see also* SUMMARY OF P.R.C. INHERITANCE LAW, *supra* note 225, at 5-7.

In addition, the “Tsong Yao Ji Cheng” doctrine provided a right to inherit a decedent’s political or social title.<sup>268</sup> The person who inherited his father’s title would lead his family in worshipping the ancestors and have authority to rule the family.<sup>269</sup> Moreover, because daughters would eventually get married, females and persons claiming inheritance through females were excluded from the “Tsong Yao” because their children would not have the same last name as their father’s ancestor.<sup>270</sup> Furthermore, under the “Tsong Yao Ji Cheng” doctrine, the person who had the right to inherit his father’s title must be “Di Zhang Zi” (the eldest son of the decedent’s principal wife).<sup>271</sup> If the decedent had no son, the person who had the right to inherit would be an adopted son selected from the “Tsong Tsu” (the clan membership).<sup>272</sup> This was called “Li Si” (choosing the one who can inherit the decedent’s status).<sup>273</sup> Under the “Tsong Yao Ji Cheng” doctrine, the decedent’s title none could inherit other than the “Di Zhang Zi” and the person selected from the process of “Li Si.”<sup>274</sup> In other words, in Chinese history, the person who had the right to inherit his father’s title is the one who had the status of “Di Zhang Zi” or the person selected through the process of “Li Si.” Therefore, the “Tsong Yao Ji Cheng” doctrine was an inheritance doctrine focusing on an heir’s status.

In addition to focusing on an heir’s status, the “Tsong Yao Ji Cheng” doctrine also limited a testator’s testamentary freedom to dispose of his property by will.<sup>275</sup> The limitation was for the protection of intestate heirs’ inheritance right. Under the “Tsong Yao Ji Cheng”

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268. See *id.* at 37-38; see also ZHENG CAI JINGCHAN: TANG SONG DE JIACHAN YU FALU [LEARNING TANG AND SONG DYNASTIES’ INHERITANCE LAW] 67-71 (Gao Mingshi et al. eds., 2007) [hereinafter LEARNING TANG AND SONG DYNASTIES’ INHERITANCE LAW].

269. See *id.* at 39-43; see also CHINESE FAMILY LAW AND SOCIAL CHANGE IN HISTORICAL AND COMPARATIVE PERSPECTIVE 127-39 (David C. Buxbaum ed., 1978) [hereinafter CHINESE FAMILY LAW AND SOCIAL CHANGE].

270. See CHINESE FAMILY LAW AND SOCIAL CHANGE, *supra* note 269, at 277-78; see also CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 17.

271. See CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 70; see also CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 18-19; CHINESE FAMILY LAW AND SOCIAL CHANGE, *supra* note 269, at 127; see also LAW AND JUDGMENT OF LI SI PROBLEM, *supra* note 263, at 22-24.

272. See CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 71; see also CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 18-19; see also LAW AND JUDGMENT OF LI SI PROBLEM, *supra* note 263, at 24-45.

273. See CHINESE FAMILY AND COMMERCIAL LAW, *supra* note 256, at 71.

274. See CHINESE FAMILY LAW AND SOCIAL CHANGE, *supra* note 269, at 127.

275. See LAW AND JUDGMENT OF LI SI PROBLEM, *supra* note 263, at 23-45 (stating that it is illegal to choose a person who is not Di Zhang Zi to inherit his father’s title. Moreover, the person who inherits his father’s title will also take his father’s estate. Therefore, daughters usually will not get any inheritance from the decedent, and the disposition of the decedent’s estate should be consistent with the process of Li Si).

doctrine, the person who inherited his father's title usually had the right to inherit his father's estate.<sup>276</sup> However, if the decedent had more than one son, all sons had the right to inherit the decedent's estate in equal shares.<sup>277</sup> Moreover, starting in the Tang Dynasty, a person could dispose of his property through will.<sup>278</sup> In the Sung Dynasty, the disposition in a will had to be agreed to by Tsung Tsu (the clan membership), and a will disinheriting intestate heirs would be void.<sup>279</sup> In 1910, the Ch'ing Dynasty proposed a "Da Ch'ing Xin Ming Lu" (the "Draft of Ch'ing's Civil Code") and provided mandatory share provisions to protect intestate heirs' inheritance rights.<sup>280</sup> Although the Inheritance Law section in Taiwan's Civil Code abolished the "Tsung Yao Ji Cheng" doctrine, the mandatory share provisions in the Draft of Ch'ing's Civil Code were the basis of Taiwan's mandatory share doctrine.<sup>281</sup>

Because the "Tsung Yao Ji Cheng" doctrine focused on worshipping ancestors, the family relationship was the most important topic of Chinese inheritance law.<sup>282</sup> The one rule governing the family relationship and society in Chinese history was "Li" (the rules of propriety).<sup>283</sup> The idea of "Li" was created by the "Chou Gong,"

the 'Duke of Chou,' brother of the first ruler [and founder of Chou], Wu Wang ('the martial king'), later regent during the minority of Wu Wang's son, and certainly one of the most influential persons of this time.<sup>284</sup> [He] was the alleged creator of the book *Chou-li* which contains a detailed table of the bureaucracy of the country.<sup>285</sup>

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276. See LEARNING TANG AND SONG DYNASTIES' INHERITANCE LAW, *supra* note 268, at 68-70; see also HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, 252-53.

277. See LEARNING TANG AND SONG DYNASTIES' INHERITANCE LAW, *supra* note 268, at 70; see also HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 256-58.

278. See LEARNING TANG AND SONG DYNASTIES' INHERITANCE LAW, *supra* note 268, at 128.

279. See *id.* at 151-52.

280. See HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 370-71.

281. See *id.* at 371-72.

282. See XU SHULIN, JICHENG FA XINLUN, [DISCUSSION OF AMENDED INHERITANCE LAW] 260 (1st ed. 2007) (stating that "because the Civil Code recognizes the family relationship, the mandatory share doctrine has the purposes of maintaining the family relationship and protecting family members' lives").

283. See CH'U T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA 226-40 (4th ed. 1961).

284. See WOLFRAM EBERHARD, A HISTORY OF CHINA 33 (3d ed. 1969).

285. See *id.*



He used “Li” to rule the human relationship in a feudal and hierarchical concept.<sup>286</sup>

Later, Confucius, China’s best-known philosopher, taught society the “five human relationships” doctrine.<sup>287</sup> The five human relationships are relationships of ruler-subject, father-son, husband-wife, older brother-younger brother, and friend-friend.<sup>288</sup> The five human relationships doctrine must be based on the concept of “Li.”<sup>289</sup> The “five human relationships” are called Wu Lun in Chinese and are superior-inferior relationships.<sup>290</sup> Based on “Li,” Confucius encouraged the person in the superior position to “take care of the subordinate person—provided, of course, that the latter fulfilled his or her own duties.”<sup>291</sup> On the other hand, Confucius also encouraged “obedience, submission, and loyalty from subordinates.”<sup>292</sup> Furthermore, within the “five human relationships” doctrine, the relationships between father and son and between the husband and wife are the most important in a family.<sup>293</sup> Under the “five human relationships” doctrine, the father should be kind to his son and take care of his son.<sup>294</sup> Therefore, in the inheritance context, a father’s estate should be inherited by his sons.<sup>295</sup> As a result, this doctrine influenced Taiwan’s mandatory share doctrine, which requires a testator to leave one-half of a child’s intestate share as the child’s mandatory share and gives children the first priority to claim their mandatory share.

In addition, because Confucius formulated the “five human relationships” doctrine with the superior-inferior concept and encouraged the superior to take care of inferior and the inferior to obey the superior, “Xiao Dao” (a person must take care of, obey, and serve his parents) became the most important principle in the family relationship.<sup>296</sup> Since “Xiao Dao” came from the concept of “Li,” a child must treat his parents

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286. See *id.* at 30-36; see also OGDEN, *supra* note 229, at 16-18. See also JIANG CHUANGUANG, ZHONGGUO FALU SHI ER JIANG [TWELVE LECTURES ON CHINESE LAW] 25-33 (2008).

287. See QU TONGZU, ZHONGGUO FALU YU ZHONGGUO SHEHUI [CHINESE LAW AND CHINESE SOCIETY] 292-303 (2003).

288. See *id.* at 301.

289. See CH’U, *supra* note 283, at 236-37 (“The different human relationships can only achieve perfection through the operation of li.”).

290. See OGDEN, *supra* note 229, at 17-18; see also CH’U, *supra* note 283, at 236.

291. See OGDEN, *supra* note 229, at 18.

292. See *id.*

293. See CH’U, *supra* note 283, at 237.

294. See *id.* at 237.

295. See HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 252.

296. See *id.* at 109 (stating that “Xiao” requires a child to take care of his parents. It requires a child to take care of his parents with “obedience, submission and service”); see also LAW AND SOCIETY IN TRADITIONAL CHINA, *supra* note 283, at 236-37.

with "Li" in order to be "Xiao."<sup>297</sup> Confucius interpreted "Xiao" as "when parents are alive, treat them with 'Li'; when they die, bury them and worship them with 'Li.'"<sup>298</sup> To treat parents with "Li" and fulfill the concept of "Xiao," the child must take care of his parents when they are old, be a servant of them, not dispute with them and not disobey their words and teachings.<sup>299</sup> Therefore, if a child disobeys his parents, does not visit or take care of his parents, or even physically or mentally abuses his parents, he will be called "Bu Xiao" ("Bu" in Chinese means "not"; therefore, Bu Xiao refers to a child not treating his parents with "Xiao").<sup>300</sup> In Chinese history, Bu Xiao was treated as a serious crime. From the Tang Dynasty to the Ch'ing Dynasty, Bu Xiao was one of ten most serious crimes ("Shi E").<sup>301</sup> If a child committed Bu Xiao, his parents could file a suit against him, and the child would usually be charged with the death penalty.<sup>302</sup>

In 1930, the Republican government advocated the Confucian teachings of "Xiao Dao" and applied the concepts of "Xiao Dao" to the Family Law and Inheritance Law sections.<sup>303</sup> Therefore, even though the Inheritance Law section in Taiwan's Civil Code abolished the "Tsong Yao Ji Cheng" doctrine, the Confucian principles of "Xiao Dao" still exist in Taiwanese inheritance law. As discussed above, Article 1145(5) of Taiwan's Civil Code, which allows a parent to disinherit a child if the child seriously abused the parent and which does not allow the child to regain his right to inherit by subsequent forgiveness of the parent,<sup>304</sup> is an example of the "Xiao Dao" principle. Furthermore, Taiwan's courts have expressly stated that, according to the Chinese "Xiao Dao" tradition, a child who abandons and fails to visit his parents for a long time leading up to his parents' deaths, commits a seriously abusive act, and the child forfeits his right of inheritance.<sup>305</sup> So, if a testator mentioned in his will that his child was forbidden to inherit his estate based on the child's failure to visit or other acts that a Taiwanese court would treat as "Bu Xiao," and he disinherited the child, such child would

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297. See HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 109-110.

298. See *id.* at 109.

299. See *id.*; see also CH'U, *supra* note 283, at 236 ("To warm the comforter in winter and to cool the mat in summer; to inquire after the health of his parents morning and evening; to inform them when going out and to present himself before them on his return; to keep no private property . . . this was the li for the young.").

300. HISTORY OF CHINESE INHERITANCE LAW, *supra* note 163, at 111.

301. *Id.*

302. *Id.*

303. See *id.* at 406-07.

304. See *supra* Part III.B.2.

305. See *supra* notes 169-191 and accompanying text.

not be entitled to his mandatory share under Article 1223 of the Taiwan's Civil Code.

In sum, because of the "Tsung Yao Ji Cheng" doctrine and Confucian principles, the family relationship was the most important human relationship in Chinese history. The mandatory share doctrine, which required a person to reserve a forced share for his children, existed in Chinese history. In 1930, the Republican government incorporated this Chinese tradition of honoring the family relationship into the mandatory share provisions of its new Civil Code, which remains effective in Taiwan today. Therefore, Taiwan's mandatory share doctrine is a product of the Chinese culture and tradition.

## 2. Taiwan's Mandatory Share Doctrine Resolves the Problems of China's Necessary Portion Doctrine and Meets China's Current Needs

Taiwan's mandatory share doctrine protects a testator's intestate heirs, usually the testator's family members, from disinheritance. It limits a testator's testamentary freedom by reserving a definite forced share for the testator's entitled heirs. It also provides individuals and courts a clear definition of who is entitled to the mandatory share. Article 1187 of Taiwan's Civil Code provides that "A testator may freely dispose of his property by a will so far as it does not contravene the provisions in regard to the mandatory shares."<sup>306</sup> Article 1223 of Taiwan's Civil Code provides that a mandatory share for a testator's lineal descendants, spouse, and parents is one-half of their intestate share, and for the testator's siblings and grandparents one-third of their intestate share.<sup>307</sup> Moreover, under Taiwan's mandatory share doctrine, only heirs who can inherit under intestacy are entitled to the mandatory share.<sup>308</sup> According to Article 1138 of Taiwan's Civil Code, the right to inherit is in the following order: (1) lineal descendants by blood; (2) parents; (3) siblings; and (4) grandparents.<sup>309</sup> A spouse always has the first priority to inherit under intestacy and has the right to claim his or her share with other heirs.<sup>310</sup> In other words, except for a spouse, when both children and parents of the decedent survive the testator, only children can claim their mandatory share under Article 1223.<sup>311</sup>

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306. See Taiwan's Civil Code, *supra* note 15, at art. 1187.

307. *Id.* at art. 1223.

308. See FAMILY LAW AND INHERITANCE LAW OF THE CIVIL CODE, *supra* note 154, at 338.

309. Taiwan's Civil Code, *supra* note 15, at art. 1138.

310. *Id.* at art. 1144.

311. *Id.* at art. 1223 (providing that a spouse can always claim his/her mandatory share under Articles 1144 and 1223).

In addition, Taiwan's mandatory share doctrine encourages children to take care of their parents. Under Article 1145(5) of Taiwan's Civil Code, if a child seriously abused or humiliated a testator, such child may not claim his mandatory share if he "has been forbidden to inherit by the deceased."<sup>312</sup> As stated in Part III, Taiwan's courts have applied the concept "Xiao Dao" from Confucian theory and interpreted serious abusive or humiliating conduct as physically or mentally abusing the decedent or not visiting the deceased for a long period of time until the decedent's death.<sup>313</sup> Thus, in Taiwan, a child who fails to take care of his parent may be legally disinherited and may not claim his mandatory share.<sup>314</sup> Moreover, a child who forfeits the right to inherit under Article 1145(5) may not regain his right by the decedent's subsequent forgiveness.<sup>315</sup> Therefore, Taiwan's mandatory share doctrine not only protects the right of inheritance of children who fulfill their duty to support their parents; it also punishes children who fail to fulfill their support duties.

Accordingly, Taiwan's mandatory share doctrine resolves the problems of China's necessary portion doctrine described above.<sup>316</sup> The doctrine fulfills two major goals of Chinese inheritance law—promoting the family and ensuring support of the decedent's family survivors. Unlike the necessary portion doctrine, Taiwan's mandatory share doctrine limits its protection from disinheritance to the testator's heirs—his closest family members. The doctrine prevents a testator from disinheriting the heirs he has a duty to support. Moreover, because the mandatory share doctrine also includes forfeiture of the right of inheritance, it encourages children to take care of their parents and to maintain good family relationships. Finally, Taiwan's mandatory share doctrine addresses another major flaw in current Chinese inheritance law and practice. Unlike China's necessary portion doctrine, Taiwan's approach clearly defines who can take the mandatory share and how much they can take. As a result, it provides guidelines for individuals and helps courts reach fairer and more predictable decisions in inheritance cases.

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312. *Id.* at art. 1145(5).

313. *See supra* Part III.B.2.

314. *See id.*

315. *See id.*

316. *See supra* Parts II.B., IV.B.2.

## V. CONCLUSION

Chinese inheritance law focuses on need rather than status.<sup>317</sup> It protects heirs who are unable to work and have no source of income by awarding them a “necessary portion” of the decedent’s estate.<sup>318</sup> This Article has shown that China’s necessary portion doctrine is only a remnant of China’s socialist past.<sup>319</sup> This scheme no longer fits China’s current societal needs. Due to economic reform, social change, and the end of China’s “cradle-to-grave” welfare system, the necessary portion doctrine is outdated and perhaps even harmful.<sup>320</sup> It undermines the family, discourages support, and impedes predictable and fair distribution of decedents’ estates.<sup>321</sup>

Chinese reformers have recognized the flaws of the necessary portion doctrine and are currently considering whether to abandon this approach and adopt the mandatory share model of civil-law countries.<sup>322</sup> This Article has argued that they should do so. The mandatory share approach would promote and preserve the family by ensuring that decedents’ wealth is distributed to their closest family members.<sup>323</sup> It would expand support by removing the limitation that heirs must both be unable to work and have no source of income.<sup>324</sup> It would also reduce the unpredictability and uncertainty of China’s discretionary scheme by providing courts with fixed rules regarding qualification for the mandatory share and the size of that share.<sup>325</sup>

This Article has proposed one particular version of the civil-law model—Taiwan’s mandatory share doctrine.<sup>326</sup> Taiwan’s scheme has all the advantages of the general civil-law model but with an important difference. It has modified that model to reflect distinctive cultural traditions.<sup>327</sup> This Article has presented one example—incorporation of the Confucian “Xiao Dao” concept to disqualify wrongdoers from receiving their mandatory share.<sup>328</sup>

When China codified its necessary portion scheme in 1985, proponents proclaimed that this scheme “proceeded from national

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317. *See supra* Part II.

318. *See supra* Part II.A.

319. *See supra* Part IV.A.1.

320. *See supra* Part IV.A.2.

321. *See id.*

322. *See supra* Part II.B.

323. *See supra* Part IV.B.2.

324. *See supra* Parts II.B, IV.B.2.

325. *See id.*

326. *See supra* Part IV.B.

327. *See supra* Part IV.B.1.

328. *See supra* Part III.B.2.

conditions and respected China's national traditions."<sup>329</sup> In twenty-first-century China, however, this is no longer true. It is Taiwan's mandatory share doctrine that now best uses China's past to address the needs of China's present and future. Thus, China should adopt Taiwan's mandatory share doctrine.

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329. Inheritance Case No. 8, *in* ZHONGHUA RENMIN GONGHE GUO XIANXING FALU PANLI FENXI QUANSHU [THE COMPLETE VOLUME OF ANALYSES OF CURRENT P.R.C. LEGAL PRECEDENTS] 92-93 (1995).

