

Women and Property in China, 960–1949, Introduction and Conclusion

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Introduction

Past scholarship has presented a static picture of property inheritance in China, mainly because it has taken as its primary focus men, whose rights in fact changed little over the centuries. When our focus shifts to women, however, a very different and dynamic picture of property rights emerges. Women's rights to property changed substantially from the Song through the Qing and even more dramatically in the twentieth century under the Republican Civil Code. It is through an examination of those transformations in women's claims that we can best discern the larger changes taking place in property rights as a whole. This book is thus at once a study of women's rights to property specifically and a study of property rights in general.

It is also a study that would not be complete without treating both the imperial period and the Republican period. Imperial and Republican inheritance laws were based on radically different concepts of property, the full implications of which cannot be truly appreciated when each period is studied separately. When the two are examined in conjunction, however, each serves to illuminate the other: the distinctive characteristics of the property logic of each period become clear only when studied against the property logic of the other.

The Issues

As is well known, inheritance in imperial China was governed by the principles and practices of household division (*fenjia* 分家): equal division among sons of the father's property. Women, it is generally assumed, had no inheritance rights. At most, an unmarried daughter would be provided with a dowry, if the family could provide one, and a widowed mother would be provided with

* The selections here are drawn from *Women and Property in China, 960–1949* (Stanford University Press, 1999). Used with permission of Stanford University Press, www.sup.org.

old-age maintenance, but neither had the right to an independent share of the property.

As is also well known, household division was accompanied by the principles and practices of patrilineal succession (*chengtiao* 承祧): a man had to be succeeded by a son for ritual as well as for property purposes. If he did not have a son of his own, he had to adopt one to carry on his line and to continue the ancestral sacrifices. Patrilineal succession, it is generally assumed, reinforced household division. They were but two aspects of the same phenomenon—inheritance by sons only.

This understanding of household division and patrilineal succession has given rise to a static picture of the inheritance regime of late imperial China, and understandably so. So long as attention is fastened on fathers and sons, one would indeed be hard put to find evidence of significant change from the Song through the Qing, for their rights in fact changed little.

But as this book will demonstrate, the conventional picture leaves out large parts of the story and distorts important parts of the remainder. And it does so because it fails to consider property from the point of view of women in their different capacities as daughters, wives, and concubines. Seen in that light, household division and patrilineal succession are revealed as separate processes with different implications for property inheritance. The principles and practices of household division came into play when a man had birth sons, and those of patrilineal succession when he did not. Moreover, the rules of succession changed in important ways in the Ming and Qing.

Of the two, although household division was the much more common form of inheritance in imperial China, patrilineal succession was by no means insignificant. Something on the order of one family out of every five did not have sons who survived to adulthood.¹ Thus, inheritance in as many as a fifth of families in imperial times took the form not of household division, but of patrilineal succession.

For a woman, patrilineal succession mattered even more because of her membership in two separate families, her natal and her marital, during the

1 Only an adult son could become his father's full patrilineal heir, meaning that if a son died before reaching adulthood (20 *sui*), he could no longer be considered his father's patrilineal heir and another would be needed to take his place for the father's line to continue. As Ted Tedford found in his study of 41 lineage groups in Tongcheng county, Anhui, from 1520 to 1661, 17 percent of married men had no sons who survived to adulthood [1995: 62, 79]. Liu Ts'ui-jung reports a similar rate, 17–24 percent, among five lineages in central and South China from the fourteenth through the nineteenth centuries (1995: 105, 107). All together, of the 23,029 married men in their two studies, 19 percent (4,348) did not have birth heirs.

course of her life. As a daughter, a woman stood about a 6 to 12 percent chance of being born into a family with no surviving sons.² And as a wife, she stood roughly a 20 percent chance of being married to a man who had no birth heirs. Thus as many as one woman in three was either a daughter without brothers or a wife without sons (or both), and likely to be involved in patrilineal succession sometime in her life.

Equally important, litigation over inheritance in imperial times was overwhelmingly over patrilineal succession, not household division. The reasons for the discrepancy will be examined later. Suffice it to note here that in the collection of 430 Song to Qing inheritance cases on which this study draws, lawsuits over the adoption of an heir for a sonless man outnumbered those over household division by four to one. That disproportionately high incidence of succession suits is also reflected in the relative attention accorded to each process in the Qing code: household division is covered in just four brief statutes and substatutes totaling a little over 200 characters, compared with 11 laws totaling some 1,100 characters on succession. Patrilineal succession was thus constituted as a legal problem in a way that household division was not.

To anticipate our story, the entry point for the analysis of the late imperial period centers on situations in which the inheritance claims of women have to be considered in their own right, because of the absence of brothers in the case of daughters and the absence of a husband and sons in the case of sonless widows. It is these women, as daughters and wives in the absence of men, who bring out in sharpest relief the different implications of patrilineal succession.

Seen from their points of view, property rights turn out to have been very far from static in imperial China, as conventional wisdom would have it. The first big change came in the early Ming, with the adoption of the legal requirement that all sonless families establish a lineage nephew to be the patrilineal heir to the father, or, in the terms of this book, the adoption of “mandatory nephew succession.” That development cost women dearly, seriously diminishing the property claims of both daughters and widows in the ensuing years.

2 Available fertility and mortality data suggest that married men in the Ming and Qing periods had on average three to four children who survived to adulthood (J. Lee et al. 1995: 173–80; Liu Ts'ui-jung 1995: 99–100; Telford 1995: 67). By genetic change alone (and assuming for simplicity's sake a sex ratio of 100 and not 105), we would expect 12.5 percent of those with three children and 6.25 percent of those with four to have all daughters.

For a daughter, the adoption of mandatory nephew succession in the early Ming meant a virtual loss of any right to inherit in the absence of brothers.³ Simply put, whereas in the Song a daughter was legally entitled to inherit the family property should her parents die without any sons, whether biological or adopted, under the rule of nephew succession, the claims of nephews took precedence over her claims. A daughter's likelihood of inheriting property by default was very remote.

For a widow, the new rule meant, if not a total loss, at least a severe contraction in her inheritance rights. Where once she stood to inherit all of her husband's property in the absence of sons, she now had merely custodial powers over it, responsible for preserving it for her husband's heir, one that she herself was now legally obligated to adopt. Moreover, initially under the rules of mandatory nephew succession, she had no choice but to adopt the lineage nephew most closely related to her husband.

In time, however, in a change driven in great measure by the growing power of the chaste widow ideal, that requirement was dropped. As is well known, the Ming and Qing saw the rise and solidification of the cult of female chastity. For a widow, the insistence that she not remarry after her husband's death turned out, somewhat surprisingly, to be empowering, at least as far as inheritance was concerned. In legal practice, Ming and Qing judges, acting out of the conviction that a chaste widow deserved the heir of her choice, consistently allowed the widow to reject her husband's closest nephew. Then, in the mid-Qing, the state adopted formal legislation granting her the right to choose freely from among all of the lineage nephews. That expansion in the range of widowed wife's custodial powers within the nephew succession regime was the second big change to come in women's property and inheritance rights in the late imperial period.

The custodial rights of widowed concubines over property also expanded as a result of the growth of the chaste widow ideal. For a concubine, as we shall

3 My use of the term "rights" to describe women's property claims in the imperial period is based on the analysis of magisterial adjudication in Philip Huang's 1996 book, *Civil Justice in China: Representation and Practice in the Qing*. There he demonstrates that, though the Qing state did not have an abstract conception of rights in the Western sense of absolute rights protected by law and independent of the will of the ruler, the Qing code nevertheless contained numerous stipulations that local magistrates consistently used to uphold legitimate property and contractual claims from infringement by others. Conversely, as he also demonstrates, litigants sought recourse to the courts to safeguard their property. The practical consequence of the legal system was therefore the protection of legitimate claims, and to that extent, one can speak of the existence of "rights" (see especially Huang's chap. 4). For the imperial period, I use "rights" in this sense of rights in practice.

see, widow chastity proved to be the great equalizer, erasing the status distinction that had previously prevented her from sharing any of the wife's claims on her husband's property. By the Qing, a woman's status as a wife or a concubine came to matter less than whether she was a chaste widow. A concubine came to be entitled to the same rights according to any chaste widow, including custodial powers over her deceased husband's property and the right to adopt the heir of her choice.

When we turn our attention to the transition from imperial to Republican law, we find patrilineal succession as a crucial point of change between the old and the new. In the early Republican period, although the Qing laws on mandatory nephew succession remained in force on paper, the interim Supreme Court, or Daliyuan (大理院) chose to interpret them in such a way as to grant widowed wives completely autonomy in the selection of an heir, even if she chose to go outside of her husband's lineage nephews. In so doing, it effectively overturned the basic principle of nephew succession. That was an important change, introduced within the conceptual frame of the old system.

The old system and its concepts were finally overturned by the Republican Civil Code of 1929–1930. Adopting a single new inheritance regime based on the Western concept of individual property, the code removed patrilineal succession from any relevance to inheritance. It did not mandate the appointment of a male heir for a deceased sonless man, nor did it recognize the property claims of patrilineal kin. At the same time, in keeping with its emphasis on gender equality, the code granted women the same inheritance rights as men in principle.

The full implications of those changes in the laws can best be understood through an examination of legal practice as revealed in court case records. The new code was, after all, superimposed on a society long accustomed to operating by household division and patrilineal succession. And it was in the courtroom where the new legal principles came into direct conflict with ages-old established social practices. The result was a complex picture, neither one of simple radical change suggested by the letter of the laws nor one of simple continuity suggested by the powerful persistence of old practices. Rather, contestations between the new and the old manifested themselves at specific points of tension, with varied implications for women in their different capacities. For all the lawmakers' good intentions, women lost old powers even as they gained new ones.

Source Materials

To understand the changes in property rights over time, we must look beyond the codes themselves and study the law in action through court case records.

For the imperial period, the successive dynastic codes, by themselves, offer little evidence of change. At most, they reveal subtle revisions of wording and the addition of new statutes whose implications are not readily apparent. For the Republican period, attention on the civil code alone can all too easily lead to an exaggerated picture of change and a neglect of the practical effects of some Western-derived principles.

For court cases from the imperial period, the book draws on three different types of materials. The first is the original archival records for 68 inheritance-related cases of the Qing period. Those records contain all manner of documentation generated during litigation, notably complaints, countercomplaints, magistrate instructions, and court judgments, and involve five different jurisdictions: Qufu county, Shandong, from the 1710's to the 1890's; Baxian county, Sichuan, from the 1760's to the 1850's; Baodi county, Shuntian prefecture, from the 1830's to the 1900's; Danshui subprefecture and Xinzhu county, Taiwan, from the 1840's to the 1890's; and Taihu subprefecture, Jiangsu, in the 1870's.

In addition, I have drawn on published collections of original court decisions. Some of these works incorporate the judgments of numerous officials (the best-known of this sort being the *Collection of Lucid Decisions by Celebrated Judges* [Minggong shupan qingmingji 名公书判清明集] of the Song period). Others present a single official's judicial rulings. These latter collections, usually put out by the officials themselves right after the expiration of a term in office, consist at most of verbatim reproductions of instructions (*pici* 批词) and judgments (*tangduan* 堂断), and provide only partial documentation of court cases. Without the litigants' complaints for the essential background, it is often difficult to get a complete picture of any particular case. But for my purposes, that disadvantage is more than balanced by the fact that the authors, with eventual publication in mind and out of a desire to showcase their own legal acumen and moral wisdom, tended to write longer and more detailed rulings than was normally the case. They also tended to offer lengthy explanations for their decisions and extended commentary on laws, again something normally not found in the archival documents.

Finally, I have relied on narrative accounts of lawsuits set out in the diaries and autobiographies of local officials. Composed in a storytelling fashion, a typical account begins with the nature and cause of the dispute, continues to the official's interrogation of the litigants, and ends with his resolution of the suit. Interspersed throughout the narrative are the author's personal reflections on the case and the applicable laws. Like the published judicial rulings, these accounts are invariably one-sided and self-glorifying, but they too permit us to see how officials themselves read and understood the law.

For the Republican period, the book relies principally on the original archival court records for 370 inheritance cases. Of that number, 96 are appeals cases heard by the Daliyuan, China's highest court, in the 1910's and 1920's, and 134 are appeals cases heard by the Capital Superior Court (*Jingshi gaodeng shenpan ting* 京师高等审判厅) located in Beijing, also in the 1910's and 1920's. The remaining 140 sets of records cover cases originating at the Capital District Court (*Jingshi difang shenpan ting* 京师地方审判厅) and its successor, the Beijing District Court (*Beijing difang fayuan* 北京地方法院), from the 1910's to the 1940's. In roughly half of those cases, the litigants appealed the district court's decision to higher courts, with the result that for some of the more hotly contested disputes the various court judgments alone ran to more than 200 pages.

The Song Baseline

A word, finally, about the Song, with which this book opens. Past scholarship, mainly Japanese, has for a variety of fortuitous reasons come to see the Song as an exception to imperial China, as a period when a daughter enjoyed independent inheritance rights to property under a half-share law that supposedly entitled her to half of what a son got at the time of household division. Even though scholars have accepted this "law" as fact, it seems to me that none has provided a satisfactory explanation for why the Song should have stood apart from the rest of imperial history.

This book begins with a reexamination of the extant evidence and arguments about the Song in order to construct a solid baseline from which to assess the later changes. Readers should be forewarned that the discussion will, of necessity, be a dense one, given the weight of past scholarship and the need for a close scrutiny of all of the available evidence. That chapter concludes that there was no "half-share law" in the Song and indeed could not have been. Instead, the principles of patrilineal succession applied, and women enjoyed inheritance rights only by default, in the absence of brothers and sons. What set the Song apart from the Ming and Qing was that there was as yet no mandatory nephew succession, with all that that implied for women's inheritance rights.

Conclusion

A focus on women in their various roles shows that household division and patrilineal succession were two separate processes and conceptual complexes

with different implications for property inheritance. The one governed inheritance when a man had birth sons, and the other when he did not. For women, it made all the difference whether they were women in the presence of men or women in the absence of men. Women's rights in household division did not change in the imperial period; from the Song on, they possessed only a claim to dowry and to maintenance. But their rights in patrilineal succession changed substantially.

The imperial period, as we have seen, was characterized by three distinctly different regimes of patrilineal succession. First, in the Song, women could still inherit by default in the absence of men. Patrilineal succession had not yet become a universal legal requirement. In the early Ming, women's rights underwent a sharp contraction with the adoption of mandatory nephew succession. A daughter could no longer inherit in default of brothers, but had to defer to all of her paternal cousins out to fourth cousins. Similarly, a widow no longer had the right to inherit in default of sons, but was merely to serve as the custodian of the property, holding it intact for the required heir (the lineage nephew most closely related to the deceased), whom she herself was now legally obligated to adopt. In the mid-Qing, finally, a widow's custodial powers expanded greatly with new legislation that permitted her free choice among lineage nephews. In that, the law came to recognize what had been long-standing practice in the late Ming and early Qing: judges had been rewarding widows for their chastity by giving them greater latitude in the selection of an heir.

The group most heavily impacted by these changes in women's rights was the father-husband's agnatic male kin. From no rights of inheritance in the face of a surviving widow or daughter, they came to take precedence in the rigidly fixed system of mandatory nephew succession in the early Ming. Although they continued to retain their rights in the Qing, they lost ground as the code was amended to give widows the exclusive say in which nephew was to inherit.

Past scholarship has not grasped these changes because it did not separate out patrilineal succession from household division, and it did not separate the two because it considered inheritance principally from the perspective of men. In that light, the two processes merely reinforced each other as two sides of the same coin of inheritance by sons. That is the basic view of both Niida Noboru and Shiga Shūzō, arguably the two giants in the field. Both assume a complete congruency between household division and patrilineal succession, and both, as a consequence, assume an essential continuity in inheritance throughout the imperial period. It is only when patrilineal succession is separated out from household division and analyzed on its own terms that we can fully grasp the patterns of change in inheritance in imperial China.

For the Republican period as well, it is essential to see the two as separate systems with different conceptual underpinnings and different consequences. To be sure, changes in one affected the other, but inheritance as a whole could not be completely revamped without overturning the separate logics and processes of both.

The early Republican period was a time of transition. The Qing code and its provisions on inheritance remained in force, adopted by the early Republican authorities as the law of the land. The Daliyuan therefore operated within the legal frameworks of household division and patrilineal succession. Yet, at the same time, it interpreted the old laws to give widows completely autonomy in the choice of a successor. If by the mid-Qing, a widow no longer had to follow the lineage order in her selection of a nephew as heir, she could now bypass a nephew altogether. The high court's rulings effectively put an end to mandatory nephew succession. That was the most important change in inheritance in the Daliyuan period, and it came wholly within the laws on patrilineal succession.

The Guomindang lawmakers were determined to overturn the very logic of the old inheritance regime, not just to reinterpret it. They focused their energies on patrilineal succession, in their view the source of the "feudal" ideas and practices that disenfranchised women. If they dismantled patrilineal succession and replaced it with individual property (as opposed to family property) and gender equality (as opposed to inheritance by sons only), they assumed, they would deal a death blow to the old inheritance regime and women would thereby gain the same rights as men.

What actually happened ran counter to their expectations in several ways. First, by failing to target household division as a separate process, they unwittingly allowed it to continue. Their assumption was that granting women equal inheritance rights would spell the end of sons-only household division. But, in fact, their Western-derived inheritance theories took effect only upon the death of the property owner, with women inheriting equally only postmortem. That in effect gave legal sanction for old household division practices to continue under the rubric of gift-giving during the property owner's lifetime. A father could disinherit his daughters simply by parceling out his property as gifts before his death. As a result, daughters did not gain the inheritance rights the lawmakers had intended for them.

Second, the lawmakers took away the custodial powers that a widow had enjoyed under earlier law. Once her husband died, his estate passed in shares to his heirs as separate individuals, regardless of her wishes. She no longer had the right to adopt an heir as a way to secure her control over his property. To be sure, the lawmakers granted a widowed wife a set portion of her

husband's property, but that gain in inheritance came at the cost of her custodial powers over his entire estate. Their elimination of patrilineal succession had an even greater impact on widowed daughters-in-law and widowed concubines, for the loss of custodial rights was not balanced by any gain in inheritance rights to their husbands' property. These issues did not occur to them because they did not consider inheritance from the point of view of women in their different capacities.

The "modern" law of the Guomindang therefore had mixed consequences for women. There was no simple transition from a regime of no property rights for women to a regime of full property rights for women, as the lawmakers intended. Instead, the practices of household division persisted, albeit in a different legal guise. And the custodial powers enjoyed by women under patrilineal succession vanished completely, only to be partially offset by the acquisition of inheritance rights. In the end, women lost even as they gained under the Republican Civil Code.

It might be well to reflect briefly, by way of closing, on the implications of this book for women's history. When I began this study, I was not at all certain whether it would merely tell an untold part of the story of inheritance or whether it would have broader implications for our understanding of late imperial and Republican inheritance in general. Now at the end of the project, I can say that the focus on women led me to an entirely different understanding not only of women's inheritance, but of the very logics and consequences of the two conceptual complexes governing inheritance. The women's story, then, is not just about women, but about rethinking the subject of inheritance as a whole.

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