

## The Role of Case Precedent in the Qing Judicial Process as Reflected in Appellate Rulings

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Others have noted how remarkable it was that fewer than two thousand district magistrates were largely responsible for governing a Chinese population that may have numbered 350 million by the mid-1700s. The emphasis of Confucianism on self-cultivation and the state's heavy reliance upon the family, clan, and village structures both helped to avoid and regulate conflict "off the books." Equally important, and still less well understood today than the role of Confucianism and extra-governmental societal institutions, was the Qing legal system.

The highly formalized impeachment process and administrative punishments system kept the bureaucracy focused on compliance with the myriad minutely detailed tasks set forth in the administrative code.<sup>1</sup> In the preface to his pioneering work on the Qing administrative system, W. F. Mayers made the insightful observation that "... the foundations of the Chinese State repose upon an all-pervading officialism. . . ."<sup>2</sup> As for the hundreds of millions of ordinary Chinese, when Confucian self-regulation and the network of extra-governmental societal controls both failed to keep them in line their transgressions were sanctioned by formal criminal law. Where was that law found, and how was it created and applied in specific cases?

Qing criminal law was found primarily in the penal code, which consisted of statutes and sub-statutes. Most of the former were received almost verbatim from the Ming Dynasty. By tradition, the statutes were retained with very few changes throughout the dynasty. The sub-statutes, on

the other hand, grew from a handful at the beginning of the Qing period to almost two thousand by the end of the nineteenth Century. China's rulers had long recognized that law must evolve in response to changing social needs.<sup>3</sup>

Who made the laws? Formally, the emperor was the chief law maker and in certain rather rare instances the emperor might initiate or otherwise leave his personal imprint upon a new sub-statute. As a rule, however, in legal matters the emperor simply approved or rejected recommendations made to him in memorials submitted by officials charged with judicial and legislative authority.

A central government organ, the Statutes Commission, was responsible for periodic code revisions. The Commission did not, however, generate new laws. Aside from its editorial role in code revision, it was essentially a research body that investigated the archives of legal cases and reported its findings to bureaucratic bodies with judicial decision-making authority, such as the Board of Punishments. The senior officials of the Board frequently referred to the Commission complex questions of statutory interpretation or conflicts of case precedents.

So, how did new binding legal rules come into being? The answer is that new rules emerged from the judicial process and through legislative proposals from provincial territorial officials and censors. As officials with judicial authority faced issues not covered by existing statutes or sub-statutes, they would often come up with a reasoned rule by reference to earlier cases. If their decision were upheld by higher authorities, possibly including the emperor, that rule then would become law. A case ruling might acquire the status of prospective law in three forms: as a formally enacted sub-statute; as a "general circular" issued by imperial order to all courts in the country as a binding rule; or without further embellishment remain on the books as a case precedent.

My observations about the role of case precedents in the Qing judicial process will be illustrated by references to eleven appellate cases which I have translated and appended to the chapter. I have also drawn generally on research conducted for me by Ho Min,<sup>4</sup> who examined the role of case precedents as reflected in 1,523 criminal cases reported in the *Xingan Huilan* ("Conspectus of Criminal Cases").<sup>5</sup>

All case decisions which articulated a rule not yet set forth in the penal code might be cited as the basis for decision in like cases in the future. For example, see comment by senior officials of the Board of Punishment in a 1795 case (Appendix, Case 7), revealing that they have refrained from

applying their own preferred statutory interpretation in the case because "... since there is a case precedent, we have no choice but to follow it."<sup>6</sup> An even stronger statement of the role of case precedent in the Qing was made by one of the PRC's [People's Republic of China's] leading scholars of Qing law, the late Zheng Qin, who says emphatically that "*chengan* were precisely case law, decisional law."<sup>7</sup> Zheng quotes the famous handbook for Qing legal secretaries authored by Wang Huitsu as saying that Qing legal secretaries and judicial clerks could not do without *chengan* in handling criminal cases.<sup>8</sup> Imperial decisions which explicitly stated that they were not to be followed in subsequent cases obviously did not become binding precedent.

Aside from direct application of case precedents in the process of adjudication, prior case decisions were a major source of new statutory enactments adopted in the course of the periodic revisions presided over by the Statutes Commission. As Zheng Qin notes, Qing legal specialists often used the expression that "cases give birth to statutes."<sup>9</sup>

The appended cases also shed light on how both statutory and judge-made law was applied in specific cases. Not unlike judges in the Anglo-American common law system, Qing judges were obliged to "treat like cases alike"<sup>10</sup> and apparently were also expected to provide a detailed explanation of the reasoning process they employed to arrive at the statutory interpretation they advanced. While Confucian or Legalist values can be identified as the ideological source of particular statutes, the overriding concern of individual judicial officials and the reviewing authorities in Beijing was to ensure that adjudication conformed to explicit procedural requirements and advanced the aims of consistency and fairness.

Contemporary Chinese leaders and scholars of comparative law should both be encouraged to learn about the role of case precedents and judicial reasoning in the traditional Chinese legal process. Insight into these issues possesses both current functional value and substantial theoretical significance for the comparative study of legal systems.

China today faces the same problem that challenged the Qing emperors—how to regulate the world's most populous society in a manner that the state can afford and that will enhance the regime's legitimacy and its claim to be a champion of justice and fairness. The widespread use of case precedents in the Qing were no doubt one of the reasons for the relative stability achieved under China's imperial bureaucratic governance system. Hence, China's current leaders might benefit from study of a successful imperial legal institution—an indigenous case precedent system—that

helped China's pre-modern rulers to mediate between a formal bureaucratic government and a huge population regulated by a complex combination of formal legal rules, Confucian ideology, and millennial social structures and practices.

The Qing Dynasty judicial archives contain thousands of appellate case decisions that reveal the sometimes sordid details of horrendous crimes. These decisions also represent the written efforts of judicial officials to explain their judgments in a way that would enable them to avoid impeachment for erroneous judgments. In addition, written case decisions officially recorded the state's concerns for values that the average citizen could only applaud—accuracy of fact finding, judgments in accordance with the law, uniformity of results in cases presenting the same issues of law, and commitment to procedural correctness and substantive fairness.

The records of criminal cases reflect how the Qing judicial process dealt with real problems of real people. The eleven cases I have translated and gathered in the Appendix to this paper will provide the reader with three kinds of insights: one, insight into the nature of social conflict and crime in China two hundred years ago; two, insight into the nature of Qing judicial reasoning—a more elaborate exercise than that engaged in by PRC judges today; and three, an insight into the way Qing judges relied upon case precedent to achieve fairness and consistency in a populous and complex society governed by a state with limited resources.

### *Statutory Guidelines*

The Qing criminal code expressly required all judicial officials to cite the statutes and sub-statutes upon which they relied in deciding a case (Code 5:3715; DLCI 5:1277) to ensure that the result conformed to the statutory purpose. A sub-statute in the same section of the code (Code 5:3718, DLCI 5:1277), enacted in 1738, explicitly forbids the invocation of any case precedent that has not been approved by the emperor for issuance as a "general circular" to all courts in the land. My conclusion is that this sub-statute was construed in an extremely narrow way. In fact, prior case decisions were the mainstay upon which judges, legal secretaries, and clerks relied to find an appropriate legal rule to apply in any concrete case.<sup>11</sup> The importance of reliance upon previously decided cases is reflected in the judgments in the appended appellate reports from the *Xin-gan Huilan*.

### Monetary Redemption for the Aged

Article 22 of the Qing penal code states that offenders who commit crimes calling for the punishment of banishment or less, and who have reached the age of 70 or who have become disabled, may be allowed the privilege of monetary redemption of their punishment (Code 1:409; DLCI 2:91). In other words, the statutory punishment might be commuted to a monetary fine. Certain serious crimes, including vicarious implication in treason and rebellion, are excluded from clemency under this statute. Article 23 of the Qing code further states that convicted offenders who were not aged 70 or disabled at the time they committed their offense but had become so by the time the offense was discovered are deemed to be old or disabled for purposes of Article 22 (Code 1:419; DLCI 2:99). Cases 1 and 2 in the Appendix illustrate how case law established further standards for judges that were not set forth explicitly in Articles 22 and 23 nor in any sub-statute under those provisions.

*Case 1: Xu Chaosheng (1792)* This case arose in Guizhou Province and was ultimately decided by the Board of Punishments in Beijing in 1792. It involved a man named Xu Chaosheng, who had been convicted of inciting litigation, a serious crime in imperial China; the governor of Guizhou provisionally sentenced Xu to lifetime banishment, pursuant to the pertinent statute (Code 4:3025; DLCI 4:1019). Given the fact that Xu had already reached the age of 70, the governor requested instruction (*qing shi*) from the Board regarding whether Xu should be granted monetary redemption of his punishment of banishment.<sup>12</sup> The senior officials of the Board of Punishments remanded the case to the governor, with orders for him to determine whether any case precedents existed.

While the governor apparently found no pertinent cases, he did venture an opinion on the rationale of the statute permitting monetary redemption for criminals who had reached the age of 70. He pointed out that clemency for the aged offender is based upon the assumption that he has diminished capacity and, hence, is not likely to repeat his offense. However, if an offender guilty of inciting litigation, who has reached the age of 70 with undiminished mental capacity, were to be allowed commutation of his sentence of banishment to payment of a monetary fine, he might well continue to create trouble, thus undermining the goals of "warning the cunning and reducing litigation."

On receipt of the governor's second report in the case, the Board conducted its own search for a case precedent and discovered no case precisely in point. However, the Board did find numerous other cases where criminals over the age of 70, who had committed serious crimes, were denied monetary redemption. Hence, the Board endorsed the governor's recommendation that monetary redemption not be granted to Xu Chaosheng, thus importing into the law a restriction on monetary redemption for the aged not found explicitly set forth in the governing statute.

*Case 2: Wu Rupan (1816)* This is another case involving the statute allowing monetary redemption for offenders reaching the age of 70. Unlike the Xu case, however, this one has a happy outcome for the offender, who is ultimately granted the privilege of monetary redemption. The different result may stem in part from the difference in crime, though the appellate report does not address the statutory rationale that was central to the ultimate decision in the Xu case. Perhaps the senior officials in the Board of Punishments felt a twinge of peer sympathy for Wu, the 70 year old former official who had been impeached and deprived of his rank for writing an essay for his son's civil service exam. The governor of Jiangsu Province recommended a sentence of lifetime banishment for Wu under the governing sub-statute. He also pointed out that Wu's mother was still living, aged 90, but that it was not necessary to grant Wu the privilege of staying home to care for her, as his son was able to do that (even if he might not have been able to pass the civil service exam without assistance). The governor also dutifully reported that Wu's mother had submitted a request that her son be allowed monetary redemption as he would soon be 70.

The prefect opposed allowing monetary redemption for Wu, arguing that neither Article 22 nor Article 23 authorized commutation of a criminal sentence to a fine for an offender who turns 70 after his crime is discovered. The prefect also invoked as precedent a 1743 case from Zhili Province in which the monk, Liu Erh, was denied monetary redemption in circumstances similar to Wu's. It is worth noting that a prefect in Jiangsu was aware of and thought it appropriate to cite a case decided in another province seventy-three years previously.<sup>13</sup> When the prefect's opinion reached the desk of the provincial judicial commissioner, the latter official pointed out that the Liu Erh case was "an ancient case which, according to sub-statute, may not be invoked as authority." The commissioner

requested instructions from the Board as to whether Wu should be granted monetary redemption.

The Board of Punishments, noting a consistent practice of allowing monetary redemption for criminals who claim to have reached the age of 70 at any time prior to their arrival in Beijing for customary review of their sentence of banishment, concluded that in the Wu case, the Board "naturally should follow the established practice and allow him monetary redemption by referring to the precedents." In other words, a consistent pattern of permissive case decisions had significantly relaxed the explicit limiting standards established by the governing sub- statute.

#### Monetary Redemption for the Disabled

Article 22 of the Qing code also authorized monetary redemption for offenders who commit crimes calling for the punishment of banishment or less, and who are disabled. Article 23 extends the privilege of monetary redemption to those who may not be disabled at the time they commit the crime for which they are sentenced to banishment, but who become disabled before their crime is discovered. The following case illustrates the use of case precedent and self-confident judicial reasoning to limit the extent of the statutory privilege of monetary redemption for disabled criminals.

*Case 3: Li Zhong (1824)* This case involved the question of whether Li Zhong, a disciple of Zhou Tian, a leader of a heterodox sect, should be allowed the privilege of monetary redemption of his statutory punishment of deportation to Hui City<sup>14</sup> because both of his feet were amputated, causing him to become a cripple. The governor of Shandong had asked the Board of Punishments whether Li Zhong might be detained in jail in his home district in perpetuity, given the virtual impossibility of his being able to travel to the place to which he had been deported.

The relevant department of the Board surveyed the case records and found an 1816 Hubei case in which Yang Shengsi, a disciple in a heterodox sect, injured both feet in a fall, leading to infection and double amputation. In that case, the Hubei governor proposed granting monetary redemption to the offender under Article 22's provisions governing disability. In reviewing the governor's recommendation, the Board concluded that Yang's crime was particularly serious, not an ordinary offense where disability would warrant monetary redemption. Most importantly, the

Board reasoned that Yang still represented a substantial danger to the community, as he could continue to worship in the sect and pose the danger of causing disturbances and deceiving the masses. Hence, the Board ruled that Yang should be sent to the assigned place of deportation. The facts of the Li Zhong case were virtually identical to those of the earlier Yang Shengsi case. Hence, the Department for Shandong in the Board concluded that "... we should follow the Yang Shengsi case decision of disallowing redemption. . . ." As for the governor's creative proposal to keep Li Zhong in jail in perpetuity, to avoid forcing a footless man to travel a thousand miles, the Board rejected the notion because "... it is inconsistent with the case precedents so it would be inappropriate to handle the case as proposed."

#### Convicted Criminals Remaining at Home to Care for Parents

Article 18 of the Qing code gave statutory form to an important Confucian value—filial piety. That article stated that a person convicted of even very serious crimes might be allowed to remain at home to care for one or both of his parents. The statute was a lengthy one and appended to it were numerous sub-statutes. Moreover, an examination of the *Xingan Huilan's* table of contents reveals that this article was one of the most widely used of any in the penal code. Three of the cases I have translated and included in the Appendix deal with the application of this provision. Each of the cases sheds light on crime and punishment during the Qing, on laymen's use of legal provisions, and on the vigor of judicial statutory construction and use of case precedent.

The governing statute provided that even offenders convicted of capital offenses might be allowed the benefit of remaining at home to care for a parent, provided that their offense was not one excluded from the sweep of ordinary amnesties, and provided that their parent had no other son or grandson 16 or older at home competent to care for them; in other words, the situation had to be just like that where the parents had a sole son (Code 1:357; DLCI 2:61). The presiding judicial official had to submit a palace memorial stating the nature of the crime and the circumstances of the parental dependence. The central authorities would then determine whether or not clemency should be granted. In a case involving an offense calling for the punishment of banishment or penal servitude where a parent or grandparent had no one to care for them, the offender was merely subjected to one hundred blows of the heavy bamboo and allowed

to redeem the remainder of his statutory penalty by payment of a monetary fine, to allow him to remain at home to care for his relative.

*Case 4: I-Lu-Le-Tu (1820)* This case concerned I-Lu-Le-Tu, a Mongolian horse thief, who was a resident of the Chinese territory called Chahar, that extended west of the Great Wall to the Gobi desert and north to the land of the Khalkas and that was inhabited both by ethnic Mongolians and Han Chinese.<sup>15</sup> The case I have translated was reported to the Board of Punishments in Beijing by the Military Lieutenant-Governor of Chahar, who had exclusive jurisdiction over matters involving only tribal people (the governor-general of Zhili Province had superior jurisdiction in civil matters relating to ethnic Chinese). This case involves consideration of the application to an ethnic Mongolian of a quintessentially Chinese institution, clemency in the form of allowing a criminal who is, effectively, the sole surviving son, to avoid serious criminal penalty by remaining at home to care for a parent.

It appears that I-Lu-Le-Tu had been sentenced to deportation within the Chahar Region for horse theft, that he had escaped from his place of deportation, and was subsequently caught. The issue presented on appeal, as reflected in the report I have translated, is whether the offender should be subjected to the penalty prescribed in the penal code for escaped deported offenders or, instead, should be allowed to remain at home to care for his 63 year old mother. The penalty prescribed for escape was transportation for life to Yunnan, Guizhou, Guangdong, or Guangxi. The offender had two younger brothers, both of whom were Buddhist lamas living in a monastery.

The Military Lieutenant-Governor for the Chahar Region proposed that the offender be allowed to remain at home to care for his mother in accordance with the "sole surviving son" statute and pursuant to the precedent of the Peng Chuke case, decided in 1800, in which an escaped deported criminal had been granted clemency to care for a parent. The Zhili Department of the Board of Punishments rejected the Lieutenant-Governor's recommendation on two grounds: one, the offender was not a sole son; two, the Peng case can be distinguished as an "ancient case never issued as a general circular, so that it may not be cited as the basis for judgment in a current case." Indeed, the offender did have two brothers. Hence, the Department stated that the two younger brothers themselves should be convicted of the crime of disrespect by priests and monks for a

parent and should be sentenced to bambooning, to force one of them to return to lay life to care for their mother.

It is worth noting that Cases 3 and 4 both involved the clear statutory policy of subordination of church and "heterodox sects" to state censorship and strict regulatory control. While the judicial authorities in both cases dutifully engaged in close analysis of statutory purpose and strove to create uniformity of law application by adherence to prior case decisions, the state's deep fear of any threat to its monopoly of political power and popular loyalty undeniably influenced both the substance of the pertinent laws and the results of the appellate judgments in these two cases.

*Case 5: Fan Gui (1821)* This case would make a perfect Chinese opera. It features Fan Gui, a very filial eldest son who inadvertently wounds his mother with a knife while trying to admonish and subdue his unfilial and wild younger brother Fan Yuan. Another younger brother has left the family to become the adopted son of an uncle who had no son of his own to continue his family line. The mother, Mrs. Fan nee Wang, has been a widow for more than twenty years. So, it is easy to imagine her shock and dismay when she discovers that Fan Gui, upon whom she depends entirely, has been arrested and sentenced to decapitation for inflicting upon her an accidental wound from which she has already fully recovered.

The appellate report begins with the notation by the judicial reviewing authority in Beijing that Mrs. Fan has submitted a petition to have Fan Gui's death sentence commuted to a monetary payment to enable him to stay at home to care for her. Her petition argues, in effect—as had that of I-Lu-Le-Tu in Case 4—that Fan Gui is her only son, as the youngest son has been adopted out of the family and the second son is worse than no son at all. Moreover, he has caused her so much trouble that she has already formally petitioned the judicial authorities to deport him permanently to Guangdong Province.

Alas, her petition is rejected by the senior officials of the Board of Punishments, who strictly enforce the statutory requirement that for an offender to receive monetary redemption to enable him to care for a parent he must be the sole surviving son. The Board said that the unfilial errant second son could benefit from an amnesty and be returned to his mother, who hoped never to see him again. As for the younger son, the adoption could be undone and he could care for his mother. This tough reasoning is reminiscent of Case 4, in which the Board ruled that one of I-Lu-Le-Tu's

Buddhist lama brothers should be bamboozed and forced to return to lay life to care for his mother. Apparently determined to assure Fan Gui's demise, the Board argued that, even if he had been truly an only son, the crime of injuring one's mother was excluded from the benefit of the statute allowing commutation of punishment to enable a son to care for a parent.

So, the stage seems to be set for a tragic ending to Fan Gui and a broken heart for his mother. But, as luck would have it, Fan Gui escapes death at two successive autumn assizes review. During this time, the youngest brother dies and the bad middle brother is actually deported to Guangdong. So, mother Fan apparently consults another underground lawyer and files a second petition with the Board of Punishments asking for the return of Fan Gui, informing the Board of the death of her youngest son and stressing that if the unfilial middle son were to return from Guangdong, he would just cause trouble for her and for the local authorities.

At this point, it seems that the usually strict constructionist legal experts at the Board of Punishments must have been moved by the poor widow's plight. So, they decided to approve her petition. But, even their compassionate reversal of position was cloaked in the double sanction of statutory construction and citation of case precedents. The Board pointed out that there was no sub-statute governing the precise facts of this unfolding melodrama. Hence, they were able to justify their approval of Mrs. Fan's second petition by citing an unlikely precedent—a case involving a slave.

*Case 6: Feng Kaiku (1825)* The third case falling under the statute governing commutation of a serious criminal sentence to a monetary payment in order to enable a son to remain at home to care for a parent, like Cases 4 and 5, reveals the Board of Punishments to be committed to a very stingy attitude toward granting the requested clemency. In the appellate report, we are not told what crime Feng Kaiku had committed, only that his father had petitioned to have him excused from the punishment of banishment so that he could stay at home to care for the father.

Feng Kaiku has a younger brother, Feng Yi, at home. The issue on appeal is whether Feng Yi is disabled to the extent that he is unable to care for the father, so that Feng Kaiku might be granted commutation to enable him to return home to be the caretaker. The Fujian Department of the Board of Punishments asserts that the level of disability of the younger brother required by statute is that he be unable to earn a living.

The father's petition asserts that Feng Yi has epilepsy. The provincial report on the case also contained sworn statements by the local constable and the neighbors to the effect that Feng Yi developed epilepsy at the age of 22 and lost consciousness. After noting that there is no precise precedent for this case, the Fujian Department recommends disapproval of the request on two grounds. One, it maintains that epilepsy is not truly disabling, as persons with that affliction usually function normally; two, it expresses suspicion that Feng Yi may not have epilepsy at all, as the constable and neighbors may be in collusion to help keep Feng Kaiku at home.

### Extenuating Circumstances

Cases 7 and 8 involve the question of what circumstances warrant reduction of the punishment prescribed by statute. The sub-statute that governed the offense of mass robbery of government offices in Case 7 expressly authorized a reduction in penalty for extenuating circumstances, without specifying what facts qualified as extenuating. The statute governing the offense in Case 8, homicide during a fight, does not explicitly authorize a reduction in penalty on the basis of extenuating circumstances. Hence, in both cases the higher level judicial authorities must rely upon general principles of statutory construction and case precedents to determine if a penalty reduction is justified.

*Case 7: Hou Santing (1795)* Hou Santing was a follower of Wang Da who led a large number of robbers who plundered the government offices of Hu County. Hou did not actively participate in the illegal entry and plundering, but waited outside to receive his share of the loot, along with Zhao San. Zhao was sentenced to immediate decapitation because he had a previous robbery conviction. The statute prescribed decapitation with exposure of the head for all active participants in a mass robbery of government offices.

The governor of Zhili proposed the comparatively mild punishment of deportation for Hou, arguing that his remaining outside constituted an extenuating circumstance under the governing sub-statute. The Zhili Department of the Board approved the governor's recommendation, further noting both that Hou had no prior robbery conviction and that case precedent supported such a result. The Department cited the 1752 case of Feng Dacheng, who remained outside as a scout during a similar mass robbery of a government office; at that time the Board had concluded that

by remaining outside he qualified for clemency under the extenuating circumstances clause of the governing sub-statute.

The senior officials of the Board disagreed with the Department's analysis of the facts and its statutory construction and expressed a preference for sentencing all the offenders in the case, including Hou, to decapitation. Reluctantly, however, the senior Board officials endorsed the recommendation for clemency for Hou, stating that "... since there is a case precedent, we have no choice but to follow it."

*Case 8: Gao Daxian (1823)* While the offender in Case 7, Hou Santing, was a knowing participant in a mass robbery who got a break because he waited outside for his share of the plunder, the principal in Case 8, Gao Daxian, seems to be a well-intentioned victim of unfortunate circumstances. When Gao's roommate, Liu Xiunglin, contracted a high fever and went berserk and jumped naked into the neighbor's yard, their landlord pleaded with Gao to restrain Liu, who loudly threatened to repeat his romp. Responding to the landlord's entreaty, Gao finally succeeded in forcefully restraining Liu with a few well-placed kicks to the body. Unfortunately for both of them, Liu died from the injuries caused by Gao's kick.

The Board department recommended death by strangulation after the assizes under the statute governing homicide during a fight. The department found in its archives a case precedent from Shandong Province presenting similar facts where the offender received that sentence. On reviewing the department's recommendation, the senior officials of the Board stated: "... we can only follow that precedent." Yet, recognizing that the sentence seemed a bit harsh, the senior officials recommended that at the spring assizes review Gao's case should be classified as "worthy of compassion," provided no actual evidence of a real fight was discovered in the meantime. The likely result was that Gao's death sentence would be subsequently commuted to lifetime banishment.

*Case 9: Li Ming (1829)* Li Ming was a thief who broke into a house inhabited by two unrelated men. In reviewing the case and preparing a draft decision and sentence, the governor of Yunnan treated the crime as a theft of goods from a single family, cumulating the monetary value of all of the items taken from the two victims. As criminal penalties involving theft of movable property were graduated according to the value of the goods illegally taken or received, the governor recommended the sentence of stran-

gulation. His draft sentence was reversed by the Board of Punishments and the case was remanded for re-sentencing. The Yunnan Department of the Board of Punishments pointed out that where a thief takes property from two unrelated individuals, his sentence should be calculated according to the value of the goods taken from the victim who lost the most; the result would be a sentence of penal servitude or banishment rather than the death penalty.

The Yunnan Department of the Board cited the precedent of an earlier case arising in Jejiang Province in which a thief stole property from two unrelated individuals living on the same boat. The department supported its reversal of the governor's proposed judgment by concluding that "Naturally, we should handle the cases uniformly."

*Case 10: Yang Cheng (1802)* Yang Cheng lived together with his father in government quarters belonging to the Board of Rites, where his father worked as a runner. Seeing a chance to pick up a bit of pocket money, Yang Cheng stole an old document. On his way out of the government compound, no doubt en route to a pawn shop, Yang Cheng was caught red-handed by the gate-keeper.

The Board of Punishments Department for Sichuan sentenced Yang Cheng to military banishment on a distant frontier, under a sub-statute governing administrative staff stealing from government offices. The senior officials of the Board approved the recommendation, citing two prior cases in which document thieves were given the identical penalty under the same sub-statute, concluding that "... we find the decision is consistent with case precedents so we should request that the case be handled accordingly."

It is difficult to evaluate this decision without knowing more facts than are contained in the brief appellate report translated in the Appendix. For example, it is slightly troubling that the report indicates Yang Cheng was sentenced under a statute governing administrative staff, when he was merely the dependent of a government runner. It would be interesting to know what rationale was employed to justify equating Yang Cheng with a government employee.

*Case 11: Censor for the Jiangsi Circuit (1833)* This item is, of course, not the report of the appellate resolution of a single criminal case. Rather, it is an example of a rather common and very important way in which uniformity of legislative standards and uniformity of case law was promoted

during the Qing Dynasty. This document is an example of a "general circular," establishing a new rule to be applied throughout the empire in the future disposition of a particular type of case.

The new rule set forth in Document 11 in the Appendix governs future treatment of persons found guilty of having falsely accused another of committing a crime which carries a supplemental statutory penalty of placement in a *cangue* (a portable stock around the neck). The new rule states that the false accuser should receive only the basic punishment of penal servitude or banishment and not the additional penalty of the *cangue*.

The censor, a roving investigator of bureaucratic malfeasance and non-feasance in Jiangsi Province, had discovered that there was no specific statutory rule in point and that provincial judicial officials throughout the country had handled the issue in two different ways, some sentencing the false accuser to the *cangue* and others not. The censor alluded to two important principles of adjudication: one, judges should never go beyond explicit statutory language to impose harsher punishment; and, two, like cases should be handled alike. Hence, he proposed a uniform national rule. His recommendation was discussed by the senior legal officials in Beijing, who agreed with him and forwarded his proposal to the emperor, who approved it as a national legal policy in the form of a general circular.

### Conclusions

The Qing appellate opinions appended to this short essay clearly illustrate the often sophisticated reasoning employed by Qing judicial officials at various levels, as they engage in sometimes closely argued statutory construction. We learn from these cases that every draft opinion must cite properly the governing statute or sub-statute, if any can be found. If no pertinent statute existed, judicial officials in the provinces as well as in Beijing were apparently expected to find and cite case precedents. While it appears that use of ordinary case decisions as the basis for a subsequent case decision was subject to restrictions, there is evidence that the restriction was often ignored. When the officials of the Board of Punishments wished to disregard an "ancient case" ruling that would not support their conclusion, they would invoke the sub-statute barring reliance upon old cases. On the other hand, we see in two of the cases in the Appendix reliance by appellate officials on very old case precedents.

### Appendix

#### Case 1: Xu Chaosheng (1792)

[X AHL 1:416, lines 11 to 417, line 2]

The Governor of Guizhou reported a case in which Xu Chaosheng incited litigation and was sentenced to banishment. In view of the fact that he has already reached the age of 70, the governor requests instruction from the Board regarding whether Xu might be granted monetary redemption of his punishment. *The senior officials of the Board of Punishments ordered the governor to investigate to determine whether or not any similar case had been handled* and to indicate whether or not monetary redemption should be allowed. With these provisos, the Board conditionally approved the governor's proposed sentence of banishment. Pursuant to the order of the Board's senior officials, the governor investigated and found that the basic rationale for the statutory rule that persons aged 70 are permitted monetary redemption is that they possess diminished capacity so that they will not repeat their offense.<sup>16</sup> Nothing in the statute itself expressly sets forth such a rationale. Nor can it be found in the general commentary following the statute, or in any of the sub-statutes. In the upper section of the code page containing the statute one finds a quote from the private commentary by Shen Zhiqi that "... the essence of this statutory provision is respect for the elderly. ..." Hence, the diminished capacity rationale has either evolved over time through case law or has been invented on the spot by the reviewing authorities in the Board of Punishments. For this reason they are granted special clemency to show compassion. This general rationale does not address personal characteristics of the individual offender. If an individual who happens to have reached the statutory age and has undiminished mental capacity were to be allowed monetary redemption, and to be excused from criminal punishment, he might continue to trouble the ignorant rural people. This would not seem to further the statutory purpose of warning the cunning and reducing litigation!

We have researched and found *no previous case like this has been handled by the various departments of the Board of Punishments*. However, cases involving criminals who have committed serious crimes calling for banishment or military banishment, and who have reached the age of 70 but are denied monetary redemption, occur from time to time. Given the fact that the said governor's declaration asserts that the circumstances of the said



offender's crime are relatively serious, it seems that we should not allow monetary redemption.

Qianlong 57, Memorandum

Case 2: Wu Rupan (1816)

[XABL 1:429, lines 8 to 430, line 7]

The governor of Jiangsu has reported a case in which Wu Rupan, a criminal sentenced to banishment, turned 70 years of age on the way to his place of banishment. We note a statute [Article 23; Code 1:419; DLCI 2:95] which provides that, when a person neither old nor infirm at the time of committing a crime becomes old or infirm before his crime is discovered by the authorities, he shall be deemed old or infirm. We further note a sub-statute which stipulates that a criminal who, upon arriving at the Board of Punishments, claims to be old or to have become infirm en route to Beijing and upon investigation indeed proves to be old or infirm, may also be allowed to redeem his punishment.<sup>17</sup> Carefully expounding the meaning of the pertinent statute and sub-statutes, we find that the crux of the matter is always whether or not the person committing the crime is actually old or infirm now. The statutory reference to being old or infirm when the crime is discovered specifically refers to the time when the crime is discovered. If one is 69 years of age when one commits a crime and 70 when it is discovered then the case should be adjudicated and sentence proposed according to the statute governing those who are old or infirm at the time their crime is discovered.

Where one is not yet old or infirm when one's crime is discovered but after the case is concluded, or when the case is reported and the prisoner escorted to the Board of Punishments and the criminal actually becomes old or infirm en route, and there is no false claim, then the matter shall be decided and sentenced according to the provision governing claiming to be old or to have become [so] on arrival at the Board of Punishments or en route to the Board. The specific stipulations of the statutes and sub-statutes are quite clear and cases in the past have been handled accordingly.

In this case Wu Rupan, a salaried licentiate who has already been impeached and deprived of his official status for having composed and handed in an essay for his son's civil service examination was tried and sentenced by the governor under the sub-statute governing handing in a

substitute exam paper, which prescribes the penalty of military banishment at a nearby frontier. In submitting his recommendation, the governor declared that the mother of the criminal, Mrs. Wu nĒe Shen, is already more than 90 years of age but that she has the criminal's son to take care of her so that it is unnecessary to examine and handle the case under the statute governing criminals being allowed to remain at home to care for aged parents. The palace memorial from the governor, dated in the twelfth month of last year, and this Board's reply dated the second month of this year, are both on record. Now, we have received a report stating that the said criminal's mother, Mrs. Wu nĒe Shen, has requested that her son be allowed to redeem his sentence by a monetary payment as he turns 70 this year. We further find on review of the educational records that, based on calculations from the time the said criminal began his studies, he is indeed 70 years of age this year.

The prefect argued that the said criminal's case does not conform to the terms of the statute governing those who are old or infirm at the time their crime is discovered. Moreover, he invoked the Zhili Province case of the monk, Liu Erh, decided in the eighth year of Qian Lung [1743], in which the criminal was not allowed monetary redemption.<sup>18</sup> The prefect's opinion was reported to the judicial commissioner of Jiangsu Province, with the request that it be reviewed and an instruction issued. The judicial commissioner noted that the case of the monk, Liu Erh, invoked by the prefect, was an ancient case which, according to sub-statute, may not be invoked as authority; further noting that the said criminal has already reached the statutory age for redemption, he has submitted to the Board of Punishments a request for instructions as to whether the criminal should be permitted monetary redemption.

We note that *in all cases* involving criminals reported to the Board under escort with a report stating that the criminal is aged, the *criminals have hitherto all been allowed monetary redemption*.

Furthermore, the criminal in this case had already attained the age of 70 before he began his escorted journey to Beijing. Therefore, *we naturally should follow the established practice*. As the case cited by the prefect of the monk Liu Erh is an ancient case, it is improper to take it as a basis for judgment.

As on investigation it has been determined that the criminal, Wu Rupan, has indeed turned 70 this year, on review the facts seem similar to those of criminals who on arriving at the Board have claimed they are old.

*Naturally we should allow him monetary redemption by referring to the precedents.*

Jiaqing 21, Memorandum

Case 3: Li Zhong (1824)

[XABL 2:839, lines 4–12]

The governor of Shandong has reported to the BOP [Board of Punishments] that in the case of the heterodox sect criminal, Zhou Tianming, a disciple in the sect named Li Zhong, who had been tried and sentenced to deportation, had both feet amputated so that he had become a cripple. The governor asked whether Li should be sentenced to detention in jail in perpetuity. On investigation, we find that *in cases involving heterodox sects, when offenders sentenced to deportation become crippled, they are not allowed the privilege of monetary redemption of their punishment.* As for whether such an offender should be sentenced to detention in jail in perpetuity, *there is no explicit governing language among the sub-statutes.*

On investigation we find that in Jiaqing 21 [1816] the Hubei governor reported that in the case involving Sun Jiawang and others who worshiped in a sect and proselytized disciples, Yang Shengsi, who was sentenced to deportation, fell into a ditch and injured both feet. His feet became infected and efforts to treat the infection were unsuccessful. Both feet were later amputated, so that he was unable to get around. The said governor proposed allowing the offender the benefit of monetary redemption under the statute governing the handicapped. On review, this Board reasoned that since the offender had worshiped a sect leader, had joined the sect, and had chanted the sect's magic incantation, his offense should be classified as an accomplice in the offense of practicing heterodox religion; his crime was a serious one. We concluded that it was different from the situation where someone involved in an ordinary crime becomes crippled and is allowed the privilege of monetary redemption of his punishment. Furthermore, although the said criminal had become crippled, he could still worship in the sect and make converts. *If he were allowed monetary redemption and were permitted to remain in the interior of China, we feared that he would stubbornly repeat his offense and create the danger of causing disturbances and deceiving the masses.* We ruled that he should not be allowed monetary redemption but an order should be issued that he be escorted to his place of deportation.

In this case, Li Zhong is an accomplice in a heterodox sect case who has been sentenced to deportation. Although the said offender's two feet have been amputated, making him a cripple unable to go to the distant place of deportation, the said offender has already practiced a heterodox religion. If he remained in the interior of China in detention in jail, it would be difficult to guarantee that he would not willfully again cause trouble. *Naturally, we should follow the Yang Shengsi case and disallow redemption and order the offender to be escorted to his place of deportation,* in order to suppress trouble-making. With respect to *the said governor's proposal* to sentence Li Zhong to detention in jail in perpetuity, *it is inconsistent with the case precedents so it would be inappropriate to handle the case as proposed;* hence, Li Zhong should still be sent to Hui City as a slave pursuant to the original sentence. The senior officials of the Board affixed the notation to the department's proposed sentence that "Your proposal is quite correct. Handle it accordingly."

Daoguang 4, Memorandum

Case 4: I-Lu-Le-Tu (1820)

[XABL 1:362, lines 4–11]

The Commandant of the Chahar Region has reported a case posing the question of whether or not a criminal named I-Lu-Le-Tu, who has escaped from the place to which he was deported, should be allowed to remain at home to care for his parents. In this case, I-Lu-Le-Tu is a Mongolian who stole horses and was sentenced to deportation. Now, he has escaped from the place to which he was deported. According to the pertinent sub-statute, he should be sent to Yunnan, Guizhou, or Guangdong. The mother of the said offender is now 63 years old. The two younger brothers of the criminal are both lamas living in the temple. The said Commandant has provisionally applied to the said criminal the special provision allowing a sole son to remain at home to care for parents.<sup>19</sup> He has also cited a Jiaqing 5 [1800] case precedent in which this Board reviewed and approved a report from the previous commandant requesting the Board to issue an advisory opinion on whether the escaped deported criminal Peng Chuke should be allowed to remain at home to care for his parents. Our investigation reveals that it has been a long time since I-Lu-Le-Tu was deported for stealing. Now, he has escaped from his place of deportation.

This case is different from cases where a criminal sentenced to deportation has not yet been deported or has just arrived at his place of deportation. Indeed, it does not even qualify for review and reconsideration. Moreover, the said criminal still has two younger brothers now serving as Buddhist lamas. They could still return to the lay life and care for their parents. In no way can this situation be compared to that where the criminal is the only son. *As for the case precedent cited in the commandant's original report*, concerning the escaped deportee Peng Chuke being allowed to remain at home to care for his parents, *that is an ancient case never issued as a general circular so that it may not be cited as the basis for judgment in a current case*. The criminal I-Lu-Le-Tu should be sent away according to the pertinent sub-statute and should not be allowed to remain at home to care for his parents. The two younger brothers of the said criminal are both lamas. If they are not willing to care for their parents, they should be convicted under the statute governing monks and priests who do not show respect for their parents,<sup>20</sup> and should be sentenced to bambooning to compel one of them to return to the lay life to care for their mother so that the elderly woman will have someone upon whom to rely. Handling the case in this way also conforms to the established sub-statute, so that the law and the facts will be harmonized.

Jiaqing 25, Memorandum from the Zhili Department

Case 5: Fan Gui (1821)

[X AHL 1:298, lines 1–9]

The Jejiang Department of the Board of Punishments reported a case in which Mrs. Fan nEe Wang petitioned to have her eldest son, Fan Gui, released from his criminal sentence to stay at home to care for her. We find on investigation that Fan Gui accidentally wounded his mother when, after quarreling with his younger brother, Fan Yuan, he picked up a knife and threatened to stab him. Fan Gui was tried and provisionally sentenced to immediate death by decapitation by the BOP department;<sup>21</sup> that draft sentence was reduced to decapitation after the assizes by the senior officers of the BOP.

Now, according to the petition submitted by Mrs. Fan nEe Wang, she has observed vows of chastity for more than twenty years (after the death of her husband).<sup>22</sup> She gave birth to three sons; the youngest, Fan Bao, has been adopted by his eldest uncle. The second son, Fan Yuan, had never

worked at a real job, so his mother had petitioned the government to have him deported to Guangdong. The petition asks whether Fan Gui might be released to care for her, in accordance with the sub-statute governing release of a sole son for purpose of caring for a parent [Article 18–2; Code 1:358–359; DLCI 2:62].

On investigation we find that the sub-statute governing the release of a sentenced criminal for the purpose of caring for a parent requires that he must be an only son. On review, finding that the circumstances of Fan Gui's crime were rather light, only then did we allow further inquiry and processing of his mother's petition.

In this case, Mrs. Fan nEe Wang gave birth to three sons. As for Fan Bao, who had been adopted, he could be ordered to return to his natal family, and Fan Yuan, who had been deported, has just benefited from an imperial amnesty, so that he too could be ordered back to his native place. Naturally, we cannot disregard these two sons in order to enable the son who had committed a crime warranting a severe penalty to remain home to care for his mother. Moreover, the facts of Fan Gui's original crime called for the sentence of death by decapitation under the statute governing beating one's mother; such facts do not warrant the application of the sub-statute provision allowing a son to remain at home to care for a parent. Even if he had truly been an only son, it would still not have been allowed. After investigation, the BOP senior officers had directed that the petition be rejected (Jiaqing 25, Memorandum).

Subsequently, in the twelfth month of the first year of Daoguang, we again received a petition presented at the BOP by Mrs. Fan nEe Wang; the petition stated that she had observed vows of chastity for more than twenty years, that her third son had died, and that her second son, Fan Yuan, had indeed been deported. Moreover, he is truly an unfilial rascal; if he were released and returned home, he would behave wildly. Hence, she requests that her eldest son, Fan Gui, be allowed to remain at home to care for her.

This Board notes that Fan Gui has already survived two assizes at which his sentence was classified as correct; subsequently, his classification was changed to "deserving of commutation." *Further, noting that there is no directly pertinent sub-statute, we cited a case precedent from Jejiang involving a slave named Long*, and submitted a palace memorial to the emperor proposing approval of the petition. An imperial decree was received allowing Fan Gui to remain at home to care for his mother.

Daoguang 1, Memorandum

## Case 6: Feng Kaiku (1825)

[X AHL 1:360, lines 7–11]

The department for Fujian Province of the Board of Punishments tried and handled a case in which Feng Dacheng, the father of the criminal Feng Kaiku who had been sentenced to banishment, filed a petition prior to his son being sent to his place of banishment, requesting that the son be allowed to remain at home to care for him.

On investigating, we note that allowing someone who commits a crime to remain at home to care for a parent represents extra-legal clemency. To qualify, the criminal cannot have a younger brother. If the criminal does have an older or younger brother or son or grandson at home, that person must genuinely be crippled or disabled to the extent that he is unable to earn a living. Only then will the criminal be allowed to remain at home to care for his parent.

As for epilepsy, the statutes and sub-statutes do not in fact contain language that treats it as disablement. Moreover, *no case like this has ever been handled before*. In truth, persons with epilepsy usually function normally. When an epileptic episode happens, the individual gradually gets better and better over time. Their condition is different from those who are crippled or disabled and hence unable to earn a living. Furthermore, on reading the original report in this case we find only sworn written statements by the local constable and by the neighbors to the effect that the criminal's brother, Feng Yi, developed epilepsy at the age of 22 and lost consciousness. How do we know that the constable and neighbors were not in collusion to enable Feng Kaiku to petition to remain at home to care for his parent? It would seem inappropriate on the basis of the report willy-nilly to approve the request that the criminal be allowed to remain at home to care for his parent.

Daoguang 5, Memorandum

## Case 7: Hou Santing (1795)

[X AHL 3:1017, lines 6–13]

The Department for Zhili Province of the Board of Punishments has investigated and found a sub-statute which stipulates that in robbery cases involving also homicide, arson, rape of a wife or daughter, breaking into and plundering jails or government storehouses or infringing upon city

walls, moats, or county government buildings, where as many as one hundred persons participate, the punishment is immediate decapitation with display of the head without regard to whether the individual has received any loot.<sup>23</sup> As for criminals who remain outside looking and later receive some of the loot but who do not actually enter the building to remove property, *the sub-statute contains no language barring the submission of a recommendation for clemency based on extenuating circumstances*.

On investigation, we have discovered that in a case arising in the seventeenth year of Qianlong [1752] a Shensi Province robber named Fan Xiho and others robbed the Hu County government offices. A member of the gang named Feng Dacheng, together with others, stayed outside to keep watch and act as scouts. This Board reasoned that *the pertinent robbery sub-statute distinguishes between criminal facts making amnesty difficult and criminal facts where there are extenuating circumstances*; the case did not involve the clause barring distinction in punishment because of infringement upon city walls, moats, or county government buildings. Hence, we sentenced Feng Dacheng and the others to deportation in accordance with the sub-statute authorizing exemption from the death penalty.

In the present case, Hou Santing followed Wang Da and others in plundering the government offices of Juli County. The said offender [Hou] waited outside to receive his share of the loot. Another one waiting with him to receive loot was Zhao San who, because of his having previously robbed Li Zhuocheng and other residents of Wei County, was tried and sentenced to immediate decapitation. As for Hou, as he had not previously been involved in a robbery case, the Governor of Zhili issued a provisional sentence of deportation under the sub-statute authorizing exemption of a robber from the death penalty when there are extenuating facts. On review, we find that the governor's provisional sentence is *consistent* both with the spirit of the pertinent sub-statute and *with the case precedent of Feng Dacheng who was sentenced to deportation*. It seems appropriate to issue a confirmatory reply to the governor.

The senior officials of the BOP affixed the comment that it seemed that all the offenders should be sentenced to immediate decapitation and display of the head pursuant to the first and last clauses in the governing sub-statute. *However, since there is a case precedent, we have no choice but to follow it*.

Qianlong 60, Memorandum

## Case 8: Gao Daxian (1823)

[HAHL 5:1940, lines 5–14]

The Censor for Southern Beijing referred to the Board of Punishments a case involving Liu Xiunglin, who died from wounds. On investigation, we find that in this case, the deceased Liu Xiunglin went with Gao Daxian to live in a dwelling they rented from Wang Datong. Liu became ill with a high fever, becoming troublesome and wild, running naked and jumping into the neighbor's yard. Gao Daxian and others managed to get him back into the house with force. Liu was not willing to get on to the bed; he began to swing his fists wildly and shout loudly that he was determined to go out again. Wang Datong was afraid that he would indeed run out again and cause trouble, so he ordered Gao Daxian and the others to tie Liu's hands and force him back on to the bed. Because Liu cursed and struggled mightily, Gao kicked him in various parts of his body, finally subduing him; later that night Liu died. Investigation revealed that Liu died from his wounds. We have reviewed the records in this case and conclude that, while Liu and Gao did not actually fight, Gao kicked Liu because he was wildly thrashing around.

Now, Gao has testified that it is true that he kicked and injured Liu. Moreover, the coroner's inquiry has revealed that Liu's death was caused solely by the wounds he received from Gao. Naturally, we should sentence the offender to atone with his life in accordance with the statute governing homicide committed during an affray.<sup>24</sup> It seems difficult to reduce his sentence. The sentence recommended by the said department, strangulation after the assizes, seems fair. The case should be handled accordingly. Moreover, we find in the records a case from Shandong Province which was referred to the president of the BOP, who stated in a comment on the Gao case that "Inasmuch as research has revealed that there is a case precedent in Shandong, *we can only follow that precedent (zhi ko zhao ban)*. Quickly call a meeting of the three legal tribunals and submit a memorial to the emperor within fifteen days. Moreover, this decision should be entered into the records. At the time of the spring assizes (*chao shen*), if no evidence of a fight is discovered, it would seem appropriate to categorize Gao's offense as worthy of compassion (*ko qin*)."

Daoguang 3, Memorandum from the Jiangsu Department of the BOP in a Case Arising in Beijing

## Case 9: Li Ming (1829)

[HAHL 3:1212, lines 13 to 1213, line 4]

The Department for Yunnan Province of the Board of Punishments reports: We have investigated a case in which Li Changsheng and Zhao Shengan, individuals with different surnames, both temporarily resided in a hideaway where they were trying to avoid contracting a contagious disease. They definitely did not constitute a single family. Their individual property should be restored to each individual owner. After their dwelling was robbed and they reported the crime to the authorities, naturally the latter should have distinguished which person lost what property and should have determined what was the monetary value of the property and, based on the total value of the property belonging to the victim who had lost the most, should have calculated the thief's criminal punishment. Instead, the said governor failed to distinguish the clothes belonging to the two separate households and to estimate their separate value. Instead, he mistakenly lumped together the total value of the stolen goods, roughly estimating it to be around 120 silver taels, and submitted a draft sentence of strangling according to the statute governing stealing from persons in a single family.<sup>25</sup> The two theft victims were definitely not members of the same family, so the governor should have distinguished the amount of goods stolen from each victim. Instead, he said the victims lived in the same home, entering and leaving by the same door; hence, they were just like members of a single family. The governor's draft sentence of strangling was seriously in error. In this case, Li Ming stole goods from two theft victims who lived in the same building. On review, *we find the facts of this case similar to the Jejiang case* in which Wang Yongxian stole property from two theft victims on the same boat, Hu Yiyu and Yao Miaoli.<sup>26</sup> *Naturally, we should handle the cases uniformly.* The decision is hereby reversed and the governor is ordered to submit a revised draft decision.

Daoguang 9, Memorandum

## Case 10: Yang Cheng (1802)

[HAHL 3:1203, lines 11 to 1204, line 1]

The Sichuan Department of the BOP tried and prepared a draft sentence in a case in which Yang Cheng, the son of Yang Qilung, a runner in the

Board of Rites, stole a draft document. The department's research revealed a case arising in the sixth year of Jiaqing, in which Zhou Si stole a bound book of archives from the Board of War; and another case arising in Jiaqing 14 [*sic*] in which Kong Fumao stole an old document draft from the Board of Civil Appointments. The offenders in both cases were sentenced to military banishment in accordance with the sub-statute governing administrative staff stealing from government offices.<sup>27</sup>

In the present case, Yang Cheng is the son of a Board of Rites runner, Yang Qilong; he lived in government quarters with his father. The said offender stole an old document draft from the Department of Ceremonies, planning to sell it for money to spend, but he was caught immediately by the gatekeeper.

The Sichuan Department sentenced the said offender under the sub-statute governing administrative staff stealing from government offices, to military banishment at the most distant frontier, a distance of fully 4,000 li. On review, we find the decision is consistent with the case precedents so we should request that the case be handled accordingly (*hu yu cheng'an xiangfu, ying qing zhao ban*).

Jiaqing 7, Memorandum

Case 11: Censor's Proposal for Statute to Resolve Conflict  
in Case Precedents (1833)

[HAHL 7:2939, lines 6 to 12]

The Censor for the Jiangsi Circuit has submitted a palace memorial stating that where someone falsely accuses another person of having committed a crime punished by blows of the light bamboo the false accuser is given a punishment two degrees more severe; where someone falsely accuses another person of committing a crime punished by banishment, penal servitude, or blows of the heavy bamboo, the false accuser is given a punishment two degrees more severe. A false accusation of a crime punished by military banishment is itself punished by military banishment. With respect to false accusations of a variety of different crimes where the special provision governing such crimes prescribes the additional punishment of placing the offender in a cangue, the provinces have not been uniform in prescribing the cangue for false accusers. It would appear desirable to deliberate and establish a uniform rule.

We have investigated and found that in the criminal code section containing laws on litigation procedures there is explicit language only with respect to how to punish persons who have lodged false accusations of crimes punished by military banishment or by blows of the light or heavy bamboo, banishment or penal servitude. There is no statute stating that one who falsely accuses someone else of a crime for which the cangue is prescribed should himself also be placed in a cangue. Those who preside over criminal trials obviously should not go beyond the language of the governing statute to impose harsher punishment. Thus, we have never heard of a judicial practice of uniformly tattooing those who falsely accuse someone else of a crime for which the statute prescribes tattooing. Similarly, one can properly infer that it is not necessary uniformly to place in the cangue persons who falsely accuse others of crimes for which the cangue is prescribed as an additional punishment.

However, *previously decided cases have handled the matter in two different ways*. Naturally, the meaning of the statute should be clearly announced by the enactment of a provision specifically governing the matter.

*The senior legal officials in the capital have jointly deliberated and have recommended that the emperor adopt a rule that henceforth, in order to achieve uniformity in all cases involving false accusation of a crime where the special provision prescribes the cangue, the false accuser should be given the enhanced punishment stipulated by statute for false accusation of crimes whose penalty ranges from the light bamboo to military banishment. In no case shall the false accuser be subjected to the cangue.*

Daoguang 13, General Circular

NOTES

1. Thomas A. Metzger, *The Internal Organization of the Ch'ing Bureaucracy*, Cambridge, MA, Harvard University Press, 1973.
2. Preface dated 1877, Peking. W. F. Mayers, *The Chinese Government*, Kelly & Walsh, London, 1897.
3. For example, see the Qianlong Emperor's 1740 preface to the revised penal code. Code 1:13.
4. In 1992, when she was a doctoral candidate at the China University of Political Science and Law, Ho Min joined me at Columbia Law School as my research

assistant, where she conducted a thorough search of the 1,523 criminal cases reported in the *Xingan Huilan*, finding references to 360 *chengan*.

5. The *Xingan Huilan*, hereinafter referred to as XAHL, is a collection of several thousand appellate decisions in criminal cases, selected from the archives of the Board of Punishments in Beijing, the central reviewing authority for draft criminal judgments reported to the capital from all over China. Compiled by experienced Qing legal officials during the Daoguang period, two continuation series were published later in the nineteenth Century. My citations are to the reprint edition issued by the Chengwen Publishing Company in Taipei in 1968.

6. In *The Spirit of Traditional Chinese Law*, Geoffrey MacCormack concludes that while central and provincial courts in the Qing were not strictly bound "... by decisions of its own or by those of a superior tribunal, [they] ... did from time to time rely on decisions of the Board as pointers to the correct decision to be reached in a particular case"; The University of Georgia Press, Athens & London, 1996, p. 175.

7. *Qingdai Sifa Shenpan Zhidu Yanjiu* (A Study of the Qing Dynasty Adjudication System), Hunan Education Press, 1988, p. 157.

8. *Id.*

9. *Id.*, p. 158.

10. The goal of "uniformity" (*hua-yi*) is a persistent theme in Qing law. For example, the first sub-statute under Article 415 states that in trying cases and in proposing sentence governors-general and governors must carefully weigh the facts and the proposed punishment and memorialize a draft judgment that will achieve uniformity. Code 5:3716 (all citations to the Qing penal code are to the 5-volume reprint edition issued in Taipei by Wen Hai Press in 1964). See also Xue Yunsheng's *Du Li Cun Yi* (Doubts on Reading the Sub-Statutes), a key Qing law reference work—I cite the 5-volume edition edited by Huang Jingjia, published in Taipei in 1970 by the Chinese Materials and Research Aids Service Center, hereinafter cited as DLCI.

11. Cf. Zheng Qin, *supra* note 7.

12. The *qing shi* system (still used in the PRC today) is a long standing practice of China's bureaucratic system in which provincial officials deferred to higher levels in complex situations where statutory guidelines were non-existent or ambiguous or where relevant case precedents conflicted with one another. From the subordinate official's viewpoint, deference to superiors was wise when a single honest mistake might result in impeachment and dismissal from the civil service. Despite the fact that this practice took time and created a vast amount of paper work, it did promote centralization of policy formulation and consistency of statutory interpretation, both worthy goals from the central government's point of view.

13. Compare MacCormack's suggestion that the existence of precedents (*chengan*) "... might even be known only to the originating province and the

Board itself." *Supra* note 6, p. 176. This case suggests that knowledge of and reliance upon case precedents may well have been nationwide.

14. Article 162-6; Code 2:1415-1417; DLCI 3:423.

15. See Mayers, *supra* note 2, p. 98.

16. Article 22; Code 1:409; DLCI 2:91.

17. I find no such sub-statute in the code. However, in Article 23 itself there is a clause which extends the benefit of monetary redemption to individuals serving a three year sentence of penal servitude if they turn 70 during that period. Hence, it was reasonable for the judges of the time to extend the same benefit to offenders who turn 70 after their crime is discovered but before they begin serving a sentence of banishment or penal servitude. An unofficial commentary by Shen Zhiqi, in the upper portion of Code 1:419, draws a similar conclusion.

18. This case is summarized in the upper portion of Code 1:419-420, just above the text for Article 23, the basic statute governing the Wu case.

19. Article 18.

20. Article 176; Code 2:1481; DLCI 3:440.

21. The BOP apparently applied sub-statute 319-7 (Code 4:2827-2828; DLCI 4:956).

22. This claim is obviously dictated by a statutory prerequisite for the clemency sought, found in sub-statute 18-2 (Code 1:358-359; DLCI 2:62). Reading between the lines, I think it is reasonable to infer that Mrs. Fan, and some of the other individuals whom we meet in these cases, was carefully coached by anonymous lawyers whom the government tried vainly to suppress. For an important study of the social importance of the Qing lawyers who operated dangerously on the border of legality, see Melissa Macauley, *Social Power & Legal Culture: Litigation Masters in Late Imperial China*, Stanford, CA, Stanford University Press, 1998.

23. Article 266-1; Code 3:1959; DLCI 3:589.

24. Code 4:2497; DLCI 4:829-830.

25. I am unable to find this statute.

26. The Board's decision in the Wang Yongxian case is reported in the *Xingan Huilan* immediately after the current case, which cites it. See XAHL 3:1213, lines 5-10.

27. I am unable to locate this sub-statute.