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The interplay of *fa* (law) and *ren* (benevolence) in the construction and application of the institution of *liu yang* (remaining at home to support parents)

Geoffrey MacCormack
University of Aberdeen
gmaccormack567@btinternet.com

Abstract
This article seeks to show that the frequent invocation by the Qing Board of Punishments of the adage that *liu yang* represents an exercise of imperial benevolence outside the law is not a mere formality without substantive meaning, but rather reflects the role played by the adage in the reasoning by which permission to remain at home to support an elderly or sick parent was granted or withheld. The Board may argue either that "benevolence" supplies a reason for a grant of *liu yang* in a given case or, on the contrary, that "benevolence" should not be extended to permit such a result. In addition, the article examines the role of the concepts of "pity" and "filial piety" in relation to the operation of "benevolence".
Keywords: Chinese law, Fa, Qing, Benevolence, Filial piety

Introduction: The statutory history of *liu yang*

From the perspective of Western law, whether Roman, civil, or the common law, one of the most intriguing and indeed striking features of the traditional Chinese law is the institution of *cunliu yangjin*: (offenders) remaining at home to look after parents (hereafter abbreviated as *liu yang*). Characterizing to different degrees a vast stretch of time from the fourth century CE to the end of the Qing in 1911, this institution permitted persons convicted even of a capital offence not only to be reprieved from death but also to remain at home, essentially free from further punishment, provided two conditions were satisfied: the offender was an only child; and had parents, who were old or ill, with no one else able to provide support and care.

Before summarizing the history of the laws regulating *liu yang*, we need to say something about the grounding of the institution in the traditional Chinese system of morality. The early sources invoke both the concept of "pity" and that of "filial piety" as explanations for the leniency granted offenders who fell within the category of sole support for an aged or ill parent. Although some scholars have instanced the article on the Qing code (18) on *liu yang* as stemming from and endorsing the value of filial piety,[1] the real underpinning

1 See, for example, Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified in 190 Ch'ing Dynasty Cases* (Philadelphia: University of Pennsylvania Press, 1973

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of the institution lies in the concept of "pity", that is, compassion for the state of parents left without support in their old age.[2]

It is pity for the solitary state of old or ill parents that the Qing Board of Punishments constantly invokes in its discussions of the ambit of the rules governing *liu yang*. For example, in a case of 1843, the governor had refused to permit an only son who had been convicted of theft and sentenced to attachment to an iron bar for five years to be released from the bar, so that he could remain at home to look after his elderly parents. The governor's view appears to have been that the son could still, despite attachment to the bar, to some extent earn a living and so support his parents. The Board reversed the governor's decision on the ground that attachment to an iron bar severely restricted the offender's ability to earn a living and so support his parents. Not to investigate the question of *liu yang*, the Board observed, was to give no consideration to the thought of compassion (*jinxu*) for the old and impoverished.[3]

But how should we interpret the language of "pity", a notion constantly invoked by the Board of Punishments as the justification for *liu yang*? Should "pity" be understood as a moralistic cloak for a legislative measure in reality founded on considerations of expediency and economics? Such an explanation has been advanced by Wu Jianfan. He regards the constantly found language of "pity" as merely a conventional way of talking, designed to stress the leniency of a government that cared for the people. In reality, he argues, the government was worried about the social disturbances that might follow if elderly and poor parents, left without means of support, should die. Since the government was not willing to provide care for them from its own resources, it adopted the expedient of allowing their sons, even though convicted of a capital offence, to remain at home to care for them.[4] This pragmatic, socio-economic explanation of *liu yang* probably underestimates the moral consensus in traditional Chinese society that the care and support of parents was primarily the responsibility of their sons, not the state.

The earliest recorded case of *liu yang* comes from the beginning of the reign of emperor Cheng (326–342 CE) of the Jin dynasty (265–420). The emperor reprieved a man who had committed an offence entailing beheading on the ground

[1967]), 223, n. 2; R. Randle Edwards, "The role of case precedent in the Qing judicial process as reflected in appellate rulings", in C. Stephen Hsu (ed), *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (New York and London: New York University Press, 2003), 187.

2 Several different expressions are used in the legal sources to express the element of compassion or pity that underlies the institution of *liu yang: ce* (grief, affliction, compassion), *jin* (have compassion for), *min* (be sad, sympathize, be compassionate), *jinxu* (have pity for), and *jinmin* (have compassion for). The basic idea present in all these terms is that of sorrow and compassion for the plight of the parents of a son who has committed a capital offence and whose execution or exile will deprive them of their only means of support.

3 Wu Chao and He Yiyan, *Xing'an huilan xubian (Continuation of Conspectus of Legal Cases)*, 10 vols (Taipei: Wen Hai, 1970 [1884]), 1, 308–9. This work is hereafter cited as *Xubian*.

4 Wu Jianfan, "The system in the Qing Dynasty whereby commutation or suspension of penalties was granted to some convicted convicts so as to enable them to take care of their old or sick parents", *Cass Journal of Law* 23/5, 2001, 126–36 (in Chinese).

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that he was an only son with an old father. His justification for leniency was expressed in the words *yi wei ce ke min zhi* (on account of pity (for the father) we can have compassion for the offender).[5] This decision represented a personal ruling by the emperor for a particular case; it did not establish a general law. No such law was established until the time of the Northern Wei dynasty (386–534 CE). The code in force at the end of that dynasty contained a rule which distinguished between offenders sentenced to death or exile. Where a person had committed a capital offence and was an only son with an old parent or grandparent who had no other adult upon whom to rely for support, he might submit a special petition to the throne. The imperial edict issued in response would then determine the conditions upon which the reprieved offender might be permitted to live at home. An offender sentenced to exile in like position was to be beaten and then permitted to remain at home, but after the death of his parent or grandparent the punishment of exile was to be implemented.[6]

The Northern Wei law formed the basis of the more complex provisions on *liu yang* contained in the code of the Tang Dynasty (618–907). Like the Northern Wei code, the Tang distinguished between the position of the offender sentenced to death and the offender sentenced to exile, but it went further and distinguished also the position of the offender who had been sentenced merely to penal servitude. Article 26 permitted persons who had committed capital offences, other than those comprised within the "ten abominations" (the most serious offences such as plotting rebellion, killing a parent), to petition the throne for permission to remain at home. A petition might be made only where the petitioner was the sole adult son upon whom an old or ill parent or paternal grandparent relied for support. The fate of the offender upon the death of the parent or grandparent was to be determined by a further edict.

The same article established a different procedure for offenders who had been sentenced to exile. They, in accordance with the law, that is, not subject to specific imperial approval, were to be permitted to remain at home to look after an old or ill parent or paternal grandparent. On the death of the latter, the offender was then to be sent into exile, even though there had been an amnesty under which he might otherwise have benefitted.

Neither article 26 nor its commentary provide any direct explanation of, or justification for, the leniency afforded the capital of exile offender.[7] For this we have to consider the commentary to article 27, which introduces a different regime for offenders who have committed crimes punishable by penal servitude. The punishment is to be replaced with a beating, the number of strokes depending upon the length of the period of labour to which the offender had been sentenced. Thereafter he is to be permitted to live at home to care for his parents.

5 Tung-Tsu Ch'ü, *Law and Society in Traditional China* (Westport, CT: Hyperion Press, 1980 [1961]), 76. For the text of the edict see Shen Jiaben, *Lidai xingfa kao (Studies of Penal Law in Successive Dynasties)*, 4 vols (Beijing: Zhonghua shuju, 1985 [1913–29]), 4, 1797.

6 Ch'ü, *Law and Society*, 77. The law appears to go back to a decree of 488 CE. See Wei Shou, *Weishu (History of the (Northern) Wei Dynasty)*, 8 vols (Beijing: Zhonghua shuju, 1974 [554]), 8, 2879, 2885.

7 Wallace Johnson, *The T'ang Code. Volume I, General Principles* (Princeton, NJ: Princeton University Press, 1979), 154–5.

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The commentary states: “In cases where the household has no other adults, the criminal is exempted from penal servitude and additional beating with the heavy stick is substituted. This is due to pity (*jin*) that the criminal’s household may have their food supply cut off, and the further fears that there may be difficulties and poverty within the household”.[8] This surprisingly full explanation, focused upon the concept of “pity”, although appended to the specific article on penal servitude, can perhaps be taken as equally applicable to capital and exile offenders.

The Ming code presents a somewhat simplified version of the Tang provisions, distinguishing between only two categories of offender: those sentenced to death and those sentenced to exile or penal servitude. Article 18 provides that in the case of a person sentenced to death, where permission to remain at home is sought, a memorial has to be submitted to the throne. In the case of persons sentenced to exile or penal servitude, the punishment is to be replaced with a beating of 100 blows with the heavy stick and the offender then allowed to remain at home.[9] The late Ming commentaries on the code offer brief explanations. Gao Ju explains the leniency granted to offenders with old or ill parents on the ground of pity: “there are circumstances to be pitied (*you ke jin zhi qing*)”.[10] But he also notes that the article is intended to give effect to the virtue of filial piety: “there is nothing better than remaining at home to look after parents to teach (the virtue of) filial piety (*cun lou shi yang wu fei jiao tian xia yi xiao ye*)”.[11] The same thoughts are expressed in the commentary of Wang Qiao and his son Wang Kentang.[12] Gao Ju adds the further important point that, during the Ming, Article 18 was for a long time not implemented.[13]

While Qing Article 18 on offenders remaining at home to look after an old or ill parent is in substance the same as the corresponding Ming article,[14] the approach of the principal Qing commentator, Shen Zhiqi, is not quite the same as that of the Ming commentators. Shen, in his explanatory commentary, emphasizes most the concept of “special favour” (*en*). His general commentary to Article 18 opens with the words: “this clause then is (an example of) the special (imperial) favour which is centrally embodied in the law (*ci tiao nai fa chong zhi fa ye*)”. But Shen goes on to say that one further has “circumstances which can be pitied” (*shi ke jin min qing*).[15]

8 Johnson, *T’ang Code I*, 157.

9 Jiang Yonglin, *The Great Ming Code/Da Ming lü* (Seattle and Washington: University of Washington Press, 2005), 28–9.

10 Gao Ju, *Ming lü jijie fuli (Ming Code with Substatutes and Commentary)*, 5 vols (Taipei: Ch’eng-Wen, 1969 [1610]), 1, 267.

11 Gao Ju, *Ming lü jijie fuli*, 1, 268.

12 Wang Qiao and Wang Kentang, *Da Ming lü fuli jianshi (Commentary on the Great Ming Code with Substatutes)* [1612], in Yang Yifan (ed.), *Zhongguo lüxue wenxian (Juristic Commentaries on the Chinese Penal Codes)*, Vol. II, Parts I–V (Heilongjiang renmin chubanshe, 2005), 4, 137–8.

13 Gao Ju, *Ming lü jijie fuli*, 1, 268.

14 William C. Jones, *The Great Qing Code* (Oxford: Clarendon Press, 1994), 49.

15 Shen Zhiqi, *Da Qing lü jizhu (Commentary on the Qing Code)*, 2 vols (Beijing: Falü chubanshe, 1998 [1909]), 1, 49; P.L.F. Philastre, *Le code annamite*, 20 vols (Taipei: Ch’eng-Wen, 1967 [1909]), 1, 163.

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Of the three concepts invoked in the context of *liu yang* (pity, imperial grace, and filial piety), pity is not only that most frequently mentioned but also that which possesses the most powerful explanatory force. Imperial grace is ultimately the means by which the emperor expresses his compassion for the parents of the offender. It is in effect equivalent to the notion of "benevolence", frequently invoked in Qing judicial decisions. The manifestation of "benevolence" or the grant of "special favour" is predicated upon the compassion engendered for the solitary state of the offender's parents. Filial piety, especially as seen in Qing judgments, is a factor which influences a court's decision to recommend leniency in a particular case, but does not constitute the true basis of the institution of *liu yang*.[16]

Decisions of the Qing Board of Punishments on *liu yang*: invocation of benevolence (*ren*) outside the law (*fa*)[17]

Unlike the Ming, the Qing paid a great deal of attention to *liu yang*, legislated on it frequently, and attempted to define in detail the circumstances under which it might be granted.[18] Hence, we have numerous decisions of the Board of Punishments dealing with various aspects of the legislation. We are not concerned in this paper with a detailed examination of the substatutes on *liu yang*, merely with the light they throw upon the effect of "benevolence" in moulding the law. The most extensive and convenient sources for the attitude of the Qing's highest court, the Board of Punishments (*xingbu*) are the great collections of cases published from the latter part of the eighteenth to the end of the nineteenth century. Those utilized in this study have been the *Xing'an huilan* (Conspectus of Penal Cases), its continuation the *Xing'an huilan xubian*, and the *Bo'an xinbian* (New Collection of reversed Cases).

One general and remarkable feature of the Board's reasoning is worth noting at the outset. This is the constant invocation of the adage: (*liu yang*) represents benevolence (*ren*) operating outside the law (*wai fa*). The term *ren* expresses the general idea of the humane disposition of the ruler, his wish to act benevolently for the wellbeing of his subjects and so to deploy leniency in the application of punishment. *Fa*, a term which denotes "law" in a wider and more general sense

16 Two decisions from the emperor Shizong during the Jurchen Jin dynasty (1115–1234) hold that the very act of committing a homicide shows that the offender has not had filial regard for his parents and is therefore not a son who should be allowed the benefit of remaining at home to look after them: Tuotuo, *Jinshi* (History of the Jin Dynasty), 8 vols (Beijing: Zhonghua shuju, 1975 [1355], 1, 159 and 3, 1019; Ch'ü, *Law and Society*, 77. For examples of the influence of filial piety in the reasoning of the Qing Board of Punishments see below at notes 27, 39, and 55.

17 Two formulations using the term "benevolence" are commonly found: *fa wai zhi ren* (benevolence which is outside the law), where *ren* functions as a concept, and *fa wai shi ren* (demonstrate benevolence outside the law), where *ren* refers to the performance of an act. The import of the two phrases is essentially the same.

18 See Tom Buoye, "Cun liuyang qin: Qingchao sixing fuge de jingyan (Convicted caregivers: late imperial lessons in death penalty decisions)", in Zhang Zhongqiu (ed), *Zhonghua Faxi Guoji Yantaohui Wenji (China's Legal System. Collected Essays from an International Academic Conference)* (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2007), 250–9.

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than either *lü* (code/statutes) or *li* (substatutes), expresses in this context the formal and regular procedures for the sentencing of offences, especially homicide, as set out in the articles of the penal code. The whole phrase, "benevolence outside the law", draws attention to the fact that, in the particular case of *liu yang*, the emperor is prepared to intervene to set aside the normal operation of the law. Such intervention is not an arbitrary exercise of discretionary power, but itself comes to be regulated by laws (substatutes) which form part of the code.

We may note an illuminating comment of Derk Bodde on the phrase "benevolence outside the law", as it was applied by the Qing courts in a different area of law, though related to that of *liu yang*, namely, the privileges granted the old, young and disabled with respect to the application of punishment:

> By extra legal [the Board] certainly does not mean that the special kinds of treatment are in any way illegal; rather, they are exceptions to ordinary legal procedure, being determined by a special group of laws whose promulgation has been motivated by consideration of humanity. [The Board] would not deny that within the particular social sphere covered by these particular laws, they operate just as regularly and legally as do the laws not motivated by such special consideration.[19]

These remarks are equally applicable to the rules of *liu yang*.

The formulation of the rubric "benevolence outside the law" in the decisions of the Board frequently includes the word "originally" (*yuan*). This word may refer to the state of affairs prior to the introduction of the rules on *liu yang* into the Northern Wei code. At that time permission might be granted on an *ad hoc* basis by the throne to a person sentenced to death to remain at home to care for an old or ill parent. As a special act of mercy, the normal rule of law (*fa*) requiring the execution of the offender was waived. He was reprieved from death and exceptionally by imperial benevolence allowed to remain at home.

If this explanation is correct, we are left with the further question: why should the invocation of the remote origin of the institution of *liu yang* still be of relevance in the eighteenth and nineteenth centuries? Two different but not necessarily mutually exclusive answers suggest themselves. First, the particular substatutes which defined the conditions under which *liu yang* might or might not be granted (as distinct from the general article of the code) could be seen as flowing from the imperial prerogative of mercy, here described as "benevolence" (*ren*). From time to time the emperor in the exercise of this prerogative mitigated or perhaps clarified the regime of the normal law (*fa*) by establishing some new condition for the exercise of the "right" of *liu yang*.

Second, in each particular instance of an offender who was the sole support of aged or ill parents, a petition to remain at home was submitted by the governor of the province in which the offender lived to the Board of Punishments. If it considered the petition in order, the Board then transmitted it to the throne for a final ruling. Imperial endorsement of the petition can be seen as a

19 Bodde, "Age, youth, and infirmity", 139–40.

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manifestation of "benevolence" or mercy for that particular case. The operation of the normal law has been set aside and the offender is reprieved from death or other punishment in order to provide support for an aged or ill parent.

Of these two reasons, it is the first that seems to be of greater relevance for an understanding of the decisions of the Board in questions of *liu yang*. The Board finds it expedient to cite the notion of "benevolence outside the law": when it is confronted with a difficult question of interpretation, did the relevant substatute permit under given circumstances the raising of a petition for *liu yang* or not? In answering this strictly legal question, essentially one of statutory construction or interpretation, the Board might cite the underlying source of the substatute in benevolence as a reason for applying or not applying the substatute in the precise set of circumstances under consideration.[20]

We now turn to an examination of those cases in which the role of benevolence operating outside the law is invoked either to justify the extension of a particular statutory rule or, alternatively, to limit its application.

I. Cases of extension of the scope of a substatute

The most important group of cases to be considered under this head concerns those in which the offender had wounded or killed a senior relative. Other categories of case concern remarried mothers, persons who held a minor government office, or the position of brothers who had collectively committed an offence.

1. Killing or wounding a senior relative

Because of the fundamental relationship involved, the killing or wounding of a senior by a junior relative, under whatever circumstances, was always regarded as a most serious offence. In the case of a parent, for example, such an act not only entailed the death penalty in one of its most severe forms (slicing or decapitation) but necessitated "immediate execution". This meant that, as soon as the sentence had been confirmed by the Board and the Throne, the implementation of the death penalty was to follow without further review. Any question of *liu yang* therefore became irrelevant. However, in strictly limited circumstances a degree of leniency came to be permitted and the death penalty not necessarily implemented. In such cases, the originating court might have to consider a petition for *liu yang*. In supporting the petition, the Board in its reasoning might employ not just the notion of "pity" but also that of "benevolence". The former justified the application of the latter in order to permit leniency.

20 Only rarely does the citation of the maxim by the Board appear, as it does in some statements by legal commentators (see Xue Yunsheng's opening remarks in his commentary on substatute 18.7, dealing with the position where the victim of a homicide is also an only son: *Du li cunyi (Doubtful Points on Reading the Substatutes)*, 5 vols (Taipei: Chinese Materials and Research Aids Center, 1970 [1903]), 2, 66) to be purely formulaic, that is, to express a well-understood, even commonplace, sentiment that adds nothing of significance to the particular discussion. For an example, see a case of 1844, concerning a widow who had kept her chastity for more than 20 years, in which the Board's opening remark on *liu yang* as "benevolence outside the law" played no role in its subsequent reasoning: *Xubian*, 1, 283–5 at 284.

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*(a) The wounding by mistake (*wu shang*) of a parent or senior relative of a higher generation*

Under article 319 of the code[21] the punishment for striking a parent was immediate decapitation, *a fortiori*, if the blow resulted in a wound. The article applied irrespective of the circumstances under which the blow was given, that is, irrespective of whether it was inflicted intentionally, carelessly, accidentally or by mistake. A substatute introduced in 1822 modified this position. Should the blow causing a wound resulting in death have been inflicted by mistake (*wu*), a petition might be submitted to the throne requesting a special edict, the expectation being that the punishment would be decreased.[22]

In 1821, just prior to the enactment of the substatute on wounding by mistake and killing a parent or paternal grandparent, the following case occurred. A, during a quarrel with his mistress, sought to strike her with a pair of scissors. She dodged and A in fact stabbed and wounded his father who had come to investigate the disturbance and was standing behind her. The wound subsequently healed. The governor proposed that A should be sentenced to immediate beheading in accordance with article 319 on children striking their parents. Given the fact that the son had had no intention of wounding his father, the Nine Chief Ministers (*jiu qing*), a group of high-ranking heads of government offices, changed the sentence to beheading after the assizes. At the autumn review the case was entered in the list for actual execution ("facts verified") but then for two successive years transferred to the list for "deferred execution".[23] Thereafter, A was kept in prison for eight years, at which point his parents submitted a petition that he might be allowed to return home to support them, as they had both reached the age of 70.

The substatute then most relevant to A's position, although it did not precisely govern the facts, was that on a junior relative who beat and killed a senior for whom he was under an obligation to mourn for five months, nine months or one year.[24] This provided that in such cases at the time of sentencing no petition on *liu yang* was to be permitted. Should there be circumstances which truly deserved compassion (*shi ke jin*),[25] a petition was to be submitted to the throne requesting that the punishment be changed from immediate beheading or

21 Jones, *Great Qing Code*, 304.

22 Xue, *Du li cunyi*, 4, 957 (319.10).

23 The statutory law governing homicide distinguished between sentences of immediate decapitation or strangulation and decapitation or strangulation after the assizes. Where a statute or substatute added the words "after the assizes" to the specification of the sentence, the case was to be subjected to an elaborate process of review in the autumn following the final decision of the Board of Punishments. At the "autumn assizes" homicide cases were classified under one of a number of heads, the most important of which were "facts verified" and "deferred execution". In the former case the offender was to be executed once the formal permission of the emperor had been obtained; in the latter case the offender was detained in prison pending further consideration of the circumstances of the homicide and might in the end have his death sentence commuted to exile. On the "autumn assizes" in general see M.J. Meijer, "The autumn assizes in Ch'ing law", *T'oung Pao* LXX, 1984, 1–17.

24 Xue, *Du li cunyi*, 2, 69–70 (18.14); earlier version in Philastre, *Code annamite* I, 160 (DVII).

25 An example would be killing by mistake.

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strangulation (whichever the facts had warranted) to beheading or strangulation after the assizes. The case was then to be classified in the autumn under the heading of "facts verified" for two successive years. Should the offender, through imperial favour (*en*), escape the hook, that is, be reprieved from death, on both occasions he was to be transferred to the list for "deferred execution" and kept in prison. Only at this stage might the governor of the province, which had originally decided the case, set out and submit to the Board the circumstances which might justify permission to remain at home to look after parents.

Two points may be made with respect to this substatute. First, the procedure for the treatment of the case appears at first sight particularly cumbersome, even pointless, involving three separate stages: (i) the obtaining of an edict to change the sentence from immediate execution to execution after the assizes; (ii) the initial inclusion of the case in the list for actual execution; and (iii) the transfer of the case after two years to the list for deferred execution. The reason for this elaborate process lies in the intrinsic nature of the case as involving a breach of one of the fundamental human relationships, the duty of respect owed by a junior to a senior relative. Where there was a significant breach of that duty, such as the infliction of physical harm on a senior by a junior, in principle no leniency or mercy could be expected. Should there be circumstances which prompted the throne to exercise clemency, great care had to be taken to ensure that the serious nature of the act in breach of the fundamental relationship between senior and junior still remained apparent. Hence the final act of mercy had to occur at the end of protracted series of procedural steps which only in stages reduced the severity of the initial sentence.

The second point to be noted is the reference to "worthy of compassion". The subject of compassion in this context is not the old or ill parent, who is left without support, but the offending son himself. The idea expressed in the substatute is not that the position of the parent should be pitied, but that the circumstances under which the offence was committed warrant compassion for the offender and therefore supply a ground for the exercise of imperial leniency. Such circumstances warranting compassion for the offender are varied, but they certainly include the situation in which there had been no intention to injure, as where a wound was inflicted by mistake.

The Board, deliberating on the petition for *liu yang*, balanced two factors. On the one hand, the case of a son by mistake wounding his father was more serious than that of a junior relative wounding by mistake a senior relative for whom he was under an obligation to mourn for five months, nine months, or a year, where no grant of *liu yang* was contemplated by the (present) substatute. On the other hand, the imperial court exercised a good influence through regulations that promoted benevolence (*zhao ting xi lei tui ren zhi dian*). It is to this latter consideration that the Board now gives greater weight. If sons who committed an offence against their fathers were to be excluded from the benefit of *liu yang*,[26] it would be difficult for benevolence to manifest itself in the law (*yu fa nan shi ren zhi zhong*).

26 This is an interpretation of a somewhat difficult passage.

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A further important point, stressed by the Board, was the extent to which the offender had exercised his obligation of filial piety imposed by the fundamental relationship of parent and child. Should he not in the past have been a filial son, then he should not be granted leniency. But, even in a case of wounding his father by mistake, a son who has been filial and is now forgiven by his father is truly someone who can be pitied (*ke jin min*). Hence, the filial conduct of the son appears, together with the element of mistake, as an extenuating circumstance warranting leniency. The Board's invocation of the common formula "worthy of compassion" shows that it supported the petition for *liu yang*.

There were thus two facts which constituted the ground for the Board's decision that the circumstances of the case warranted compassion: the fact that the wound had been caused by mistake and the fact that the offender had always behaved as a filial son. The throne accepted the Board's recommendation in favour of *liu yang*. The imperial edict agreed that the circumstances of the case warranted compassion and therefore that a special favour (*en*) could be conferred on the offender. At the same time, the edict stressed that, since benevolence was here being exercised outside the law (*fa wei shi ren*), the decision should not in the future be cited as a precedent.[27]

A few years later, in 1826, a case occurred in which A fired a bamboo gun at B, but by mistake hit and killed his father's younger cousin for whom he was under an obligation to mourn for five months. The relevant substatute, originally enacted in 1748 and revised finally in 1822, provided that, where a person struck and killed a senior relative to whom he had a mourning obligation of five months, nine months, or a year, should there be extenuating circumstances (literally "circumstances light"), the offender should still be sentenced to immediate beheading under article 317, but the governor was to submit a special report detailing these circumstances to be considered by the Three Judicial Offices (*fasi*).[28] If this body found that the circumstances in truth were such as were worthy of compassion (*shi ke jin min*), a report requesting special consideration should be submitted to the throne, with the expectation that the punishment would be reduced to beheading after the assizes. The essential factor constituting "extenuating circumstances", as indicated in the substatute itself, was that there should have been no intention on the part of the offender to strike and wound his senior.[29]

The substatute itself said nothing about an appeal for leniency on the ground of *liu yang*, but it established the necessary pre-conditions for this appeal, which were in fact met in the present case. The sentence was commuted to beheading after the assizes. On two occasions the offender was included in the list for

27 Zhu Qingqi et al., *Xing'an huilan (Conspectus of Penal Cases)* 11 vols (Taipei: Ch'eng Wen, 1968 [1834, 1886]), 1, 296–7. This work is hereafter cited as *XAHL*. In view of the prohibition of the use of the decision as a precedent, it is unclear whether this case formed the basis of the substatute of 1822 (above) which dealt with sons who wounded and killed a parent by mistake.

28 The Three Judicial Offices were the Board itself (*Xingbu*), the Censorate (*Dachayuan*), and the Supreme Court (*Dalisi*). In cases of homicide, officials from the Board in conjunction with officials from the Censorate and Supreme Court assembled to finalize recommendations to the throne.

29 Xue, *Du li cunyi*, 4, 936 (317.7).

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actual execution and then transferred to the list for deferred execution. At this point the provincial governor submitted a petition that the offender should be reprieved from death and be allowed to remain at home to look after his father now aged 71.

In its consideration of the petition for *liu yang* the Board commenced its remarks with a citation of the maxim on benevolence outside the law as a broad justification for the grant of *liu yang*. The maxim should not be used as a gate through which evildoers could escape the consequences of their acts. Its application was justified in the present case since the victim's death had not been intended by the offender, but brought about inadvertently. The implication is that a junior who by mistake wounded and killed a five-month mourning senior relative was not a real evildoer.[30]

(b) Plotting to kill an elder sister

We have one relevant case from 1824 in which A, on the instructions of his father, strangled his adulterous elder sister for whom he was under an obligation to mourn for nine months. Under the code the punishment for plotting to kill a senior relative within this category of mourning was immediate decapitation.[31] In view of the fact that A had been acting on the orders of his father, a petition was submitted to the throne requesting clemency. An edict changed the sentence to beheading after the assizes. Afterwards the case was transferred once from the list for actual execution to the list for deferred execution. It now transpired that A's parents were both aged over 70 and that his elder brother was totally incapacitated (*can fei*) and so unable to support them. Under these circumstances the governor proposed that the substatute on a junior beating and killing a senior relative (18.14)[32] should be applied by analogy.

The Board observed that a case of plotting to kill (*mou sha*) was different from (more serious than) one of beating and killing a senior relative. However, in one crucial aspect, noted in the substatute, there was a similarity, that is, the circumstances of the killing were worthy of compassion. Should the offender truly be the sole support of parents aged over 70, then imperial benevolence (*huang ren*) naturally ought to be applied and a petition for *liu yang* allowed. Here the notion of "benevolence" (*ren*) is used to justify the extension of the substatute on beating and killing a senior relative to a case in which there had been a plot to kill an elder sister. The exercise of benevolence was appropriate because the circumstances of the plot to kill were "light" in that A had merely followed his father's instructions in killing an elder sister who had committed adultery. These facts aroused "pity" which in turn prompted the exercise of "benevolence".[33]

(c) Beating and killing parents-in-law

A case arose in which a son-in-law had beaten and killed his parents-in-law and now, as he had aged parents, sought the benefit of *liu yang*. The facts constituted

30 *XAHL*, 1, 291; Bodde and Morris, *Law in Imperial China*, 223–8.

31 Article 284: Jones, *Great Qing Code*, 269.

32 For this substatute see above at n. 24.

33 *XAHL*, 1, 294–6.

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dou sha (killing in a fight) and not the more serious kinds of homicide represented by *gu sha* (intentional killing) and *mou sha* (premeditated killing). The governor thought that *liu yang* should not be granted since the offender had killed a senior affinal relative for whom he was under an obligation to mourn for three months. The Board discounted this argument on the ground that *liu yang* was already allowed in cases of beating and killing a senior relative of one's own family for whom the mourning obligation was three months.

In its reasoning the Board stressed that the rules permitting *liu yang* were an example of "benevolence manifested outside the law". As such *liu yang* could be applied to cases of beating and killing a senior relative in the following fashion. Whether or not the offender should be allowed to remain at home initially depended upon whether the case should be classified at the autumn assizes in the list headed "facts verified" (for actual execution) or in that headed "deferred execution". The appropriate classification in turn depended upon whether the circumstances of the beating and killing were "light" or "serious". Where the circumstances were "light", the case might be classified under the heading of "deferred execution". This meant that the grounds for permitting the offender to remain at home to care for an aged or ill parent might be investigated. Hence, in the present case, the possibility of *liu yang* depended upon whether the *dou sha* of the parents-in-law was classified in the autumn under the heading of "facts verified" or that of "deferred execution".[34]

2. Cases of remarriage by a widowed mother

The statutory history of widows in the context of *liu yang* appears to date from 1746. In that year a substatute was enacted, the first clause of which provided: "where the only son of a widow committed the kind of offence typified by *xisha* (killing in a game) or *wusha* (killing by mistake), provided his mother has kept her chastity for a period in excess of (*yi yu*) 20 years, the governor or governor general is clearly to establish that the victim is not equally an only son. Then he is to prepare a petition for examination by the *fasi* (Three Judicial Offices) who are to memorialize the throne for a grant of *liu yang*".[35] Subsequently, in 1781, this clause was combined with other clauses to constitute the general substatute that now appears in Xue Yunsheng's compilation as number 18.2.[36]

The delimitation of the time for which a widow is to remain chaste, that is, not remarry, was described in language different from that used to describe the age of a parent who qualified for *liu yang*. Article 18 specified that such a parent should be aged 70 or above (*yi shang*). On the face of it there was a discrepancy in the application of the rule on *liu yang* to the case of the widow and to that of the parent. The widow was required to keep her chastity for more than 20 years. The parent need live only to the age of 70. In fact the Board and the Throne appear to have granted *liu yang* in the case of widows

34 *XAHL*, 1, 323–4.

35 *Qing huidian shili (Institutes of the Qing with Supplementary Regulations and Substatutes),* 12 vols (Beijing: Zhonghua shuju, 1991 [1899]), 9, 92–3 (732.3b–4b).

36 Xue, *Du li cunyi*, 2, 62. An abridged version appears in Guy Boulais, *Manuel du code chinois* (Taipei: Ch'eng Wen, 1966 [1924]), 59 (para. 99).

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who had just completed 20 years of chastity. But the problem of the wording of the clause on the chaste widow ("already exceed 20 years") remained.[37]

The legislative discrepancy between the article on aged parents and the substatute on chaste widows was eventually corrected in 1833 in response to a censorial memorial. In that year the *fasi* considered and approved a censorial memorial recommending the deletion of the words "more than" from the substatute. In support of their contention the Three Judicial Authorities stated that, should a widow, who had maintained her chastity just for 20 years, not meet with special favour outside the regulations (*yao en wai ge*), the standard of conduct required by ritual propriety (*li*) was not respected; nor was effect given to the benevolence and pity expected from the emperor (*huang ren jin*). Here the language of *en, ren* and *jin* is combined in a powerful endorsement of the need to award *liu yang* as soon as a widow had remained chaste for 20 years.[38]

To keep one's chastity for a woman meant that she had not remarried after the death of her husband. Consequently a problem arose in the construction of the substatute where a mother had remarried after the death of her first husband, or divorce from him, and had then been widowed, perhaps for the second time. If she had not again remarried for 20 years could she be deemed to have kept her chastity within the meaning of the substatute?

The point arose in a case from 1812. A, in defence of his mother, had pushed B, causing him to trip, fall and die, an offence entailing the punishment of exile. A's mother had two grounds upon which to base a petition for *liu yang*. She was aged over 70 and had kept her chastity for more than 20 years. The complication with respect to the latter ground was the fact that she had remarried after the death of her first husband, the father of the offender. In supporting the petition for *liu yang*, the Board emphasized that cases of *liu yang* constituted the essence of imperial favour displayed outside the regulations (*zhao ting ge wai zhi en*), in which the favour was based upon pity (*min*) for an aged or ill parent. The element of compassion (*jin xu*) was even stronger should the parent have no person other than the offender upon whom to rely for support. The Board then turned to a possible counter-argument, constituted by the mother's remarriage. With respect to this point, the Board observed that, although the mother had broken her bond with the offender's father, her son had continued to live with her on her remarriage and had supported her for more than 20 years after the death of her second husband. The son had thus continued to demonstrate filial piety despite the second marriage and so should be allowed to remain at home to continue to look after his mother.[39]

Three points should be noted about this decision. First, it is predicated upon the manifestation of imperial *en* (grace) rather than *ren* (benevolence). Here *en* is effectively used as a synonym for *ren*, the underlying idea being the exercise of a special favour as an act of benevolence based upon compassion. Second, the concept of filial piety is invoked as additional support for the grant of *liu yang* in a case where the widow had remarried. The son, despite the remarriage, had

37 The version of the substatute translated by Philastre, *Code annamite*, I, 163 (DII) still uses these words.

38 *XAHL*, 1, 303–4.

39 *XAHL*, 1, 301.

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continued to respect and support his mother. The third point is that the decision does not directly address the problem of the meaning of "chastity", given that the mother in this case was aged over 70. Not until 1835 did the Board definitely rule on the question of whether a remarried mother could still be considered "chaste" within the meaning of substatute 18.2.

In that year the governor of Zhili submitted to the Board the following issue. A, who had been sentenced to strangulation after the assizes on account of *dousha*, was the only son of woman B who had kept her chastity for 20 years after the death of her second husband, A's father. The difficulty raised by the governor was that woman B had previously been married to someone who had sold her to A's father as his wife. In the governor's view she had thereby lost her chastity but had nevertheless remained a widow for 20 years after the death of A's father. Should *liu yang* not be granted, the situation very much could be pitied (*shu ke min*). Here "pity" appears primarily to refer to the solitary and desolate state that would befall the widow should her only son be executed for his offence.

The Board answered the governor's question in the affirmative, predicating its reasoning upon the concept of "benevolence". It held that, if the present facts were not to fall within the ambit of the clause on a widow and only son in substatute 18.2, the way of imperial benevolence (*wang ren zhi dao*) would not be followed.[40] By implication the Board endorsed the governor's invocation of pity as the ground for leniency. For this reason it was appropriate for the throne to manifest "benevolence" and grant *liu yang*.

3. Offences by persons in an official position

In 1818 the Board noted that the substatutes did not give a clear answer to the question, whether an offender who held office should be granted *liu yang* or not? The facts of the case before it were that the offender, the warden in charge of a local prison, had allowed a prisoner under sentence of death to escape. For this offence he had been sentenced to penal servitude. Was he to be allowed to remain at home to care for an aged parent? The Board held that he should be so allowed on the ground that the statutory clauses on *liu yang* under which special favour was granted outside the law (*en shi fa wai*), just as the ritual duty (*li*) of children serving their parents, applied equally to the common people and officials. *En* is here again used as a synonym for *ren*.[41]

The essence of the Board's argument is that the benevolence manifested by the emperor should not be restricted to cases in which ordinary persons had committed an offence. Benevolence ought equally to be exercised in respect of offences committed by an official who was an only son. Additional support for this argument is supplied by the reference to *li*. The fact that the offender had been a filial son was applicable equally to ordinary people and officials, the assumption being that the warden had been such a son.

40 *XAHL*, 9, 3987–8.
41 *XAHL*, 1, 367.

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4. Offender's fugitive son

Questions might arise concerning the status of the offender as "the sole support" of his aged parents. In 1824 a case arose in which a father and son collectively committed the offence of "snatch and grab". The father was sentenced to exile, but the son had fled and had not yet been caught. The offending father's mother was both aged over 70 and had kept her chastity for over 20 years. Nevertheless, the governor refused to permit the father to remain at home to care for her, since he was not the "sole support". His son, aged 18, when captured could be permitted to remain at home to care for his grandmother. The Board reversed this decision. One of the reasons it advanced was that to allow an old and solitary woman to remain without support until the eventual and problematic capture of her grandson was quite contrary to the thought embedded in the maxim *fa wai shi ren*. Here benevolence is invoked to justify a particular interpretation of the clause of the substatute on *liu yang* dealing with sole support.[42]

II. Cases of restricted application of benevolence

A point frequently stressed by the Board is that the substatutes permitting *liu yang* should not be used in such a way as to provide a loophole for evildoers to escape the consequences of their crimes. Underlying this point is an implicit distinction between offences in which the circumstances were considered "light" and those in which they were considered "heavy". This distinction in turn adverts to a related distinction between real villains or evildoers and persons who have committed offences in circumstances that can arouse pity. Hence, especially in cases of homicide, the Board was always concerned to identify factors which might establish a ground for compassion (in its extended sense of "extenuating circumstances"). If such a ground could not be established, then the offender did not fall within the class of person to whom *liu yang* might be granted, even should he be the sole support of an aged or ill parent. We can group the cases in which the Board showed a disinclination to apply the maxim on "benevolence outside the law" into those involving fights where the circumstances were "heavy", those involving two or more brothers who collectively committed an offence, and those involving adopted sons, the son of the victim, or the offender as "sole support".

1. Killing in a fight where the circumstances were "heavy"

The attitude of the Board is well illustrated by an early case of 1750, submitted from Shandong province. This concerned a serious case of beating and killing (*dousha*) in which A, in a quarrel with B, responded to a blow from the latter's fist by picking up an iron implement and inflicting a number of wounds from which B died. The question was whether in these circumstances A should be permitted *liu yang* as the sole support of his father now aged over 70.

In approaching this question the Board relied upon an earlier memorial from the judicial commissioner (*anchashi*) of Zhejiang province which had acquired

42 *XAHL*, 9, 3985.

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the status of a "general circular",[43] that is, possessed an authority virtually equivalent to that of a substatute. The judicial commissioner's memorial was directed at the danger of deceitful and abusive practices in the process by which the entitlement to *liu yang* was established, especially with respect to the issue of whether or not the offender was the "sole support" of his parents.[44] In this context the commissioner stated that the rule permitting an only son to remain at home was a great favour conferred outside the law (*wai ge hong en*). The implication of his remarks, relied upon by the Board, is that the rule should not be applied in an unrestricted or unconditional fashion.

The particular condition or restriction governing the application of the rules on *liu yang* relevant to the present case was not deceit or abusive practice as to the status of the offender as sole support of an aged parent, but rather the circumstances under which the death of the victim had occurred. These were "heavy" (serious) in the sense that the savagery of A's response to B's blow with the fist was out of all proportion to the nature of the original assault.

The Board relied upon a substatute of 1749[45] which distinguished in cases of *dousha* between a participant who was "in the right" (*li zhi*) and one who was "in the wrong" (*li qu*). The former was one who inflicted only light wounds, the latter one who used a metal knife or the like to inflict wounds or who continued to beat his opponent until he died. The benefit of *liu yang* was to be allowed only to a participant who was "in the right" and had inflicted light wounds. In the present case A should be denied *liu yang* since B had died as the result of a number of wounds inflicted with a sharp-bladed weapon.[46]

In 1801 two cases arose which indicate that the Board's interpretation of "heavy" circumstances in cases of *dousha* was perhaps not as wide as it had been in 1750. The particular question concerned the appropriate classification of the cases at the autumn assizes, in particular, whether their original classification as "facts verified" should be changed to "deferred execution". The first case involved an eleven-year-old boy who pestered a debtor of his mother, clinging to him and repeatedly demanding repayment of the debt. The debtor, in irritation, tried to pry the boy loose and in the end struck him with an iron implement so that he fell to the ground and died. Given the disparity in age between the offender and victim and the fact that an iron implement was used to inflict wounds, one might have thought that the Board would have treated the circumstances as "heavy" and maintained the original classification of the case under the heading of "facts verified". However, in view of the fact that the killing had not been intentional, the Board recommended that special favour

43 On "general circulars" see Fu-mei Chang Chen, "Provincial documents of laws and regulations in the Ch'ing Dynasty", *Ch'ing-shih wen-ti* 3.6 (December 1976), 71–2.

44 The memorial recommended that all relevant enquiries should be made at the time of the initial inquest into the death of the victim, when the state of mind of the offender's family members and neighbours was less likely to be prone to deceit and abuse.

45 The substatute does not appear in Xue's *Da li cunyi*. See *Qing huidian*, 9, 991 (732.2b–3a).

46 Quan Shichao, *Bo'an xinbian (A New Collection of Reversed Cases)* [1781, 1861], in Yang Yifan (ed.), *Lidai panli pandu (Collection of Precedents from Various Dynasties)*, 12 vols (Zhongguo shehui kexue chubanshe, 2005), 7, 12–5.

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(*en*) be shown and that the offender be allowed to remain at home to care for his mother, now aged 80.

The second case concerned a drunken attack by a husband upon his wife and her mother. After first wounding his wife, he turned on her mother, who had tried to protect her daughter, and with a knife inflicted several wounds from which she died. The Board found that the circumstances of the attack upon a senior affinal relative were "heavy". On this ground the classification under the heading of "facts verified" should have been maintained. However, the Board now adverted to the fact that the offender was the only heir of two branches of one family (those of his father and a brother of his father). Should he be executed, both branches of the family would be extinct. This constituted a state of affairs worthy of compassion (*ke min*). Hence the case might be transferred to the list for "deferred execution". The Board then adds the crucial words that the transfer to the "deferred list" already constituted an application of benevolence and that no further benefit, such as *liu yang*, should be granted. The point is that the offender under the rules governing the classification of cases of *dou sha* at the autumn assizes should have been left in the list of those destined for actual execution. By an exercise of imperial benevolence he was allowed a transfer to the list for deferred execution. But benevolence could be stretched no further. Hence no petition for *liu yang* could be entertained.[47]

Finally, there is a late case from 1868 in which a soldier on leave quarrelled with, stabbed, and killed a civilian. The governor advanced a number of reasons for permitting the soldier the benefit of *liu yang*. The Board adopted a position similar to that it had taken in the much earlier case of the drunken husband (above). It pointed out that, although the circumstances of the killing were "heavy", the soldier had still been transferred to the list for "deferred execution" on the ground that his brother had already been killed on active service on behalf of the state. No further benefit in the form of *liu yang* could be conceded.

The Board again emphasized that the substatutes permitting persons who had committed capital offences the benefit of *liu yang* originally were a manifestation of benevolence. Hence, the benefit necessarily should be accorded only where the circumstances were "light". The point here is that there had already been an exercise of benevolence in the transfer of the case from "facts verified" to "deferred execution". Benevolence could not be stretched further (in a case where the circumstances were "heavy") to permit *liu yang*.[48]

2. Collective offence by two brothers

A substatute, originally promulgated in 1725, provided that, where two (or more) brothers had collectively committed an offence for which each had been sentenced to death, a petition might be submitted to allow one of them to remain at home to care for an aged parent.[49] Two cases illustrate restrictions on the scope of this substatute in the sense that the notion of benevolence, which underlay it, could not be given an unlimited range of operation.

47 *XAHL*, 1, 366–7.
48 *Xubian*, 1, 27–30.
49 Xue, *Du li cunyi*, 2, 61–2 (18.1); Philastre, *Code annamite*, 1, 163 DI.

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In 1840 the question arose as to whether the substatute could be applied in a case where the mother of the two offending brothers had maintained her chastity for only 16 years. Both brothers had been sentenced to immediate strangulation as accomplices in a case of plotting to kill the father of the principal offender. The Board held that *liu yang* was not permissible. The substatute was originally enacted as a result of "benevolence outside the law (*fa wai zhi ren*)". Hence, for its application, it was absolutely necessary that the brothers' mother had attained the age of 70 or had maintained her chastity for 20 years. In this case she was aged only 55 and had maintained her chastity for only 16 years and so neither of the brothers could be allowed *liu yang*.[50]

In 1858 two brothers were sentenced to military exile under a substatute on villains (lit. "bare sticks – *gun tu*) disturbing the peace, which did not explicitly permit the granting of *liu yang*. The question was whether the substatute on collective offences committed by two brothers could be applied in favour of the elder brother since the younger had already died in prison. The Board, while holding that the younger brother, if he had lived, could have been allowed to stay at home to care for an aged parent under the substatute, refused to extend that benefit to the elder brother on the younger brother's death. The substatute on two brothers collectively offending was a manifestation of benevolence outside the law. The limit of "benevolence" in this case was the extension of *liu yang* to the younger brother (presumed to be less guilty than his senior). Where the younger brother had died, "benevolence" could not be extended to the elder (surviving) brother, since in that case no one would have been made liable for the original offence.[51]

3. Adopted son

While a properly adopted son from the same clan could take the place of a naturally born son as heir to a family, problems could arise where offenders were hastily adopted as sons in order to provide a reason for the grant of *liu yang*. Adoption of this kind constituted one of the abuses, against which the Board continually warned, by which offenders might escape the legal consequences of their acts. Two cases illustrate the strictness with which the Board examined applications for *liu yang* by adopted sons.

In 1835 the offender was sentenced to strangulation after the assizes on account of *dousha* (killing in a fight). At the assizes he had already twice been entered in the list for "deferred execution". Now in 1838 he was adopted as heir by a man aged 76 and on this account submitted a petition for *liu yang*. The Board observed that, where an adopted son sought permission to remain at home to care for his adopted father, it was necessary that there be reliable evidence of the adoption at the time of the original trial. Only then might the situation be encompassed by the wide limits of imperial benevolence. Should the evidence show that the offender was adopted as heir only after the affair giving rise to the trial and sentence, then *liu yang* should not be permitted. Otherwise

50 *Xubian*, 1, 230–3.
51 *Xubian*, 1, 239.

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the way would be open for deceitful practices to frustrate the proper course of the law.[52]

In 1845 the Board had to consider a case in which an offender who had been sentenced to strangulation after the assizes on account of *shansha* (killing without authority), and placed in the list for deferred execution, was at that stage adopted by his father's brother aged 72, who had just lost his own son through illness. In rejecting the petition for *liu yang*, the Board observed that the substatute permitting an adopted son as heir to remain at home to care for an old parent originally was an example of imperial benevolence outside the law (*sheng zhao fa wai zhi ren*). Consequently, it was absolutely necessary that the adoption be completed before the occurrence of the offending affair. Only in this way could deceit and abusive practice be prevented.[53]

4. Victim himself an only son

A substatute, originally enacted in 1725, provided that, where the victim was an only son and his parents had no other person upon whom to rely for support, then the offender (killer) was to be denied the benefit of *liu yang*.[54] In 1819 a case arose which seems to have been responsible for the addition of a clause to the substatute. In this case it was shown that the victim, although an only son, had not during his lifetime been filial. He had left home, offered no support to his parents, and indeed had been expelled from the parental home. In such circumstances the rule prohibiting *liu yang* should be displaced and the killer be allowed the benefit of remaining at home. This ruling was then incorporated in the substatute.

The Board in its reasoning makes the (almost trite) point that *liu yang* was originally a manifestation of benevolence and then turns to the necessity that the victim should not himself have been an only son. The implication here of the citation of "benevolence" seems to be that, although this concept explains the creation of the institution of *liu yang*, it should not be extended to cover the situation in which the victim has been an only son, with the result that his parents, through the act of the offender, have been left without support. In the Board's view the substatute precluding *liu yang* in the case where the victim was an only son shows the limits (or extreme) of justice achieved through benevolence (*ren zhi yi jin*). The idea here seems to be that, where "benevolence" was extended to the family of the victim, should he have been an only son, there were still limits to its operation. Should such an only son turn out to have been unfilial, the restriction applied to the operation of the grant of *liu yang* to the offender should no longer apply.[55]

52 *Xubian*, 1, 249–50.
53 *Xubian*, 1, 250–1. I have not been able to identify in Xue's *Du li cunyi* the particular substatute cited by the Board.
54 Xue, *Du li cunyi*, 2, 66–67 (18.7); Boulais, *Manuel du code chinois*, 60 (para. 101), giving an abridged version.
55 *XAHL*, 1, 354.

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5. Offender as sole support

A problem frequently encountered by the Board was the possible existence of persons other than the offender who might be able to support an aged parent. One form in which the problem arose was in the case where the existence of a brother of the offender was admitted, but it was alleged that physical or mental incapacity prevented his being able to support a parent. The Board often rightly doubted the truth of such allegations. In a case of 1825 it argued that, in view of the origin of *liu yang* in benevolence outside the law, it was absolutely necessary that there be no second adult (such as a brother) able to support the offender's parents. Where there was such a second adult, there must be clear evidence that he was totally incapacitated (*can fei* or *du yi*) and quite unable to earn a living. A person subject to epileptic fits could not be deemed to be a person who was totally incapacitated. Hence on the present case the offender's epileptic brother constituted a second adult who still might earn a living and support his parents. *Liu yang* should therefore be denied.[56] Benevolence should not be stretched to permit leniency where the offender had a brother, albeit ill, who might still be capable of supporting a parent.

Conclusion

The moral quality of "humanity" or "benevolence", characteristic of a good ruler, should be displayed in all aspects of his government, including the application of the penal law. The emperor as supreme legislator and judge might at any time intervene in the legislative or judicial process to correct a perceived injustice on the ground of "benevolence". With respect to individuals convicted under the code of an offence, such intervention was typically expressed in the language of "pity" or "compassion". Where the circumstances of the case warranted compassion, whether for the individual offender himself or for some person connected with him such as his father or mother, the exercise of benevolence was justified.

Individual cases prompting the exercise of benevolence might display a coherence and consistency which in time led to the institutionalization of such cases in the form of rules introduced into the penal code. A good example of such institutionalization is supplied by the recurrence of cases in which persons convicted of a capital offence such as homicide were found to have elderly or ill parents for whom they supplied the sole means of support. From a very early period (the Northern Wei) the dynastic penal codes contained an article permitting an only son with elderly or ill parents to escape the normal consequences of his criminal behaviour (death or at least exile) by remaining at home to care for his parents. The text of the relevant article does not use the language of "benevolence" or "compassion". But the Qing courts, when faced with problems of its interpretation and application, recognized and continually stressed the origin of the rule as an imperial act of clemency which permitted the setting aside of the normal consequences for homicide. Although by the eighteenth century

56 *XAHL*, 1, 360; Edwards, "The role of case precedent", 202. The Board also suspected that the allegation of epilepsy was a collusive attempt at deceit.

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the conditions under which sons might be permitted to remain at home to care for a parent were regulated in detail by the substatutes that had been added to the code during the Qing, continual references to *liu yang* as an institution derived from benevolence and not law were intended as a reminder of the fact that the normal operation of the law for convicted killers was displaced.

The extent to, and the conditions under, which the normal law was to be displaced as expressed in the substatutes and the decisions of the Board of Punishments are examined in this article. The Board in particular chooses to predicate its analysis of the law and to justify its conclusions upon the concept of "benevolence" (*ren*), used interchangeably with that of "imperial favour or grace" (*en*). In effect the Board in its recommendations to the emperor is laying down the parameters within which "benevolence" or "special favour" should or should not continue to be bestowed. In so far as the Board is examining and possibly correcting recommendations submitted by provincial governors, we have a potential source of disagreement among the local and central judiciary as to the extent to which the emperor should manifest benevolence by granting leniency as a special favour. Other studies have drawn attention to this aspect of "judicial politics", raising the question for example of the Qianlong emperor's (r. 1736–95) concern at the excessive leniency advocated by provincial officials under the rubric of "benevolence".[57] One can detect from the decisions of the Qing Board of Punishments on *liu yang* in the eighteenth and nineteenth centuries a similar concern, no doubt reflecting the position of the throne, that benevolence should not be construed too widely and leniency should not be taken to excess.[58]

57 I would like to thank one of the reviewers of this paper for drawing my attention to this point and citing an article by Wei Shumin, which unfortunately I have not been able to consult: "Between the monarch and his subjects: the political history of the Emperor's edicts on autumn trials during the Qianlong period of the Qing Dynasty", *Ming Qing Shi* 2013/2, 18–25.

58 I am grateful to the *Bulletin*'s two anonymous reviewers for the suggestions they have made to improve this paper.

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