

# INSANE OFFENDERS IN QING\*

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Not much was known for certain on how insane offenders were treated by law in ancient China. Legal historians were also in controversy about whether insane offenders were treated differently from sane offenders.

Karl Büniger (1950) asserted that the exemption of lunatics from criminal prosecution was a fundamental notion of ancient China. He cited passages from the ancient Rites of Zhou 周禮 and Tang Code 唐律 which indicated clemency with lunatics.

On the other hand, Van der Valk in 1948 expressed the view (*T'oung Pao*, ser. 2, 38, pp 338 - 343) that lunatics had always been held criminally responsible and were accordingly punished, although sometimes lighter than sane offenders with reference to one Tang case and several Qing cases of punished insane offenders.

Overall speaking, there was apparently a time-honored legal policy of treating the insane with clemency in ancient China. One reason for this was the recognition of insanity as a physiological illness whose etiology and treatment were not fundamentally different from other illnesses since their description in one of the earliest medical treatises such as the Inner Classic of the Yellow Emperor 黃帝內經 complied between 481 B.C. to 403 B.C. Even lay Chinese beliefs for insanity such as retribution for sins, loss of one's soul and spirit possession were seen as quite beyond one's control and were potentially curable by physical or spiritual means (maybe with exception for retribution of sins).

During the Zhou period, the concept of 三赦 (three pardonables) was developed to ensure lenient treatment of offenders who were very young, very old or mentally incompetent 蠢愚. An elaboration of this concept was evident in the Tang Code, on the basis of which relatively light sentences were handed down to those who suffered from incurable diseases 癡疾 and those who suffered from serious illnesses 篤疾, a designation that included insanity. No exegesis on insanity can be found in the Tang Code or in any of the subsequent dynastic codes.

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## INSANE OFFENDERS IN QING

Vivien Ng (1980) studied in depth Qing laws concerning insane offenders and more than 100 cases of insane offenders (mainly killers) culled out from the internal memoranda of the Board of Punishments and other general circulars and various other primary sources and highlighted three themes:

(1) Qing laws concerning the insane, particularly those requiring mandatory confinement of all insane persons, were an integral part of the imperial push for social control;

(2) laws on insane killers revealed a compromise between pro- and anti-punishment officials;

(3) possible exploitation of the insanity plea by sane murderers was a constant concern.

**Table 1. Qing laws for insane offenders**

<b>1699</b>	--- 12.42 taels of silver as funeral money for single homicides committed by insane persons
<b>1731</b>	Order --- mandatory registration and confinement of insane persons
<b>1740</b>	Substatute --- mandatory registration and confinement of insane persons
<b>1754</b>	Substatute --- short-term imprisonment for single homicide
<b>1762</b>	Substatute --- life-imprisonment for single homicide
<b>1766</b>	Substatute --- registration-confinement details spelled out
<b>1776</b>	Substatute --- strangulation after assizes for double homicide
<b>1802</b>	--- strangulation after assizes for single homicide
<b>1806</b>	--- 5-step procedures for handling husband-killing committed by insane women
<b>1823</b>	--- new procedures allowing summary execution of patricides and matricides
<b>1824</b>	Substatute --- decapitation after assizes, to be found "deserving of punishment" for multiple homicide
<b>1831</b>	Substatute --- killing second degree seniors
<b>1852</b>	Substatute --- for single homicide, defer trial 2 to 3 years if unable to testify
<b>1852</b>	Substatute --- Codification of 1806 procedure for husband-killing by insane women

Table 1 shows a chronicle of the additions to Qing laws involving insane offenders. It can be seen that the Qing laws and the judicial attitude towards insane offenders were not static but changed with time. New statutes 例 were ad hoc additions to the Qing Code 清律 pronounced by the Board of Punishments 刑部 to accommodate emerging legal problems and needs as prompted by legal cases. Laws covering insane offenders were enforced by new statutes.

There was an obvious trend in the increase in both complexity and severity of sentences rendered to insane offenders. The purpose was more a prevention of further killing rather than punishment.

### COMPULSIVE REGISTRATION & CONFINEMENT

Insanity was gradually identified as a "law-and-order" problem by Qing officials who had to deal with acts of violence committed by the insane and those who pretending to be insane to escape sentencing. For example, the governor of Shandong submitted a memorial to the Kangxi Emperor in **1689** urging that insane killers should be questioned carefully in order to determine whether they were genuinely ill; if not, they should be sentenced according to the regular statutes for the crimes. Witnesses who gave false testimony about their purported illness should also be punished. He also urged the government to require families of insane persons to watch over them carefully; those who were without families should be made the wards of neighbours and the local agents for social control such as 鄉約 lecturers and local constables 地保. His suggestion was not accepted then.

Prompted by a case of multiple homicide of 4 victims from the same family committed by an insane person, the governor-general of Sichuan in **1731** submitted a memorial to the Board of Punishments in which he requested an imperially-sanctioned decree for the mandatory confinement of all insane persons. An order was then issued for families of insane persons to register them with their magistrates or Banner captain 旗長, after which the insane persons were to be confined at home and kept under strict surveillance by relatives. The relatives and neighbours, magistrates and Banner captains were held accountable for the conduct of the registered insane persons. If the insane person committed suicide, the relatives or neighbours would be caned 80 times with a heavy bamboo; the magistrate or Banner captain would lose the equivalent of 3 months' salary. If the insane person committed homicide, the punishment would be 100 strokes and one year's salary respectively. The recruitment of the *baojia* 保甲

(consolidation of 10 households as a unit) and *dibao* 地保 (local constabulary) systems, which were important devices for detection and prevention of crime, in registering and confining all the insane persons was equivalent to labelling the insane as "criminal deviants".

The subsequent **1740** registration-confinement statute represented the first serious attempt at legislating behavioural disturbances of lunatics in Chinese legal history. However, this statute was not very helpful because it did not outline how registration-confinement should be carried out and how long the insane persons should be immured.

In **1766**, a new statute was formulated to spell out the different procedures for the confinement of insane men and women. Insane men could be turned over to their families only if the authorities who registered them were satisfied that their families had the facilities to keep them locked up at all times. Insane women were automatically returned to their families after their registration owing to the Qing policy of not confining female felons unless they had committed a capital offense such as adultery or homicide.

Requisite locks and fetters were issued by the government to the families. Insane persons who were homeless or whose families were incapable of taking care of them were imprisoned. The exact length of confinement by their own families was not prescribed and they needed to remain confined until their "full recovery". As a family might lie about the recovery, the family had to obtain willing bonds 甘結 from the clan elders, local constable and neighbours before submitting any petition for release. For those confined in government jails, they had to remain imprisoned until "several years" after their recovery.

These registration-confinement statutes were difficult to enforce in practice because most families did not want to be accountable for the insane person's conduct and it was so difficult to apply for release once their family members were registered and confined, especially if in government prisons.

The famous late-Qing jurist, Xue Yunsheng 薛允升 (《讀例存疑》, 1905), commented on this statute as "a product of an irrational fear, stemming from a few isolated cases of homicide committed by insane persons, that all insane persons are potential killers. To punish all because of the fault of one is absolutely irrational".

Despite all these criticisms and the difficulties in putting it into practice, this registration-confinement statute was only stricken off from the Qing Code in **1908** (《大清現行刑律宗語》—沈家本).

## LAWS FOR INSANE KILLERS

During the early decades of Qing dynasty, insane offenders were treated very leniently and even killers were set free without trial. However, the attitude gradually hardened with concern of possible exploitation of the lenient laws by sane criminals.

The subsequent statutes for insane killers codified clemency towards insane killers as well as a growing prevalence of pro-punishment attitude among officials.

In **1699**, the Board of Punishments defined the punishment for single homicide committed by an insane person as a fine of 12.42 taels of silver to the victim's family as "funeral money". This was made a statute in 1727. This statute was put into the same discrete group of statutes and statutes governing 戲殺(killing during sport or horseplay), 誤殺(mistaken homicide) and 過失殺(accidental homicide) although such homicide by insane was not considered as one of these. The fine of 12.42 taels of silver of funeral money was the punishment for accidental homicide. The punishment for killing during sport or horseplay and mistaken homicide was strangulation after the assizes. (There were 2 basic kinds of death penalties in Qing. The first kind was death penalty by immediate execution. The second kind was death penalties after the assizes which meant imprisonment until review at the autumnal assizes 秋決. By then the death penalty would either be commuted to lighter terms or executed if found deserving of punishment.)

Before 1754, insane killers were simply turned over to the custody of their families after the fine. The **1754** statute specified that insane killers should be imprisoned until one year after their recovery from insanity. Probably due to the fact that it was difficult if not impossible to determine accurately whether a released insane killer would relapse and kill again, life imprisonment was instituted the **1762** statute for insane killers.

Still unsettled about the possible abuse by sane killers to escape from execution, the Board of Punishments ordered in **1802** that only insane killers already registered and confined before the homicide could be sentenced to life imprisonment. For those who were not previously registered, they would be given the lighter sentence to strangulation after the assizes if the victim's family supported the killers' claim of insanity, otherwise decapitation after the assizes if the victim's family did not agree. This became a statute in **1806**.

In practice, those unregistered insane killers would probably be commuted to life imprisonment after the

assizes by then further examination should have selected out cases feigning madness and only those who were obviously and unquestionably insane would be spared.

The enactment of laws spelling out penalties for homicides committed by the insane amounted to an official recognition of insane killers as criminals.

## MULTIPLE HOMICIDES

Multiple homicide was considered as a very severe offence and the appropriate penalty for sane killers was immediate decapitation. If the victims were from the same family, then the appropriate penalty would be 凌遲 (death by slicing) and confiscation of property.

However, before 1776, insane killers who had committed multiple homicide even with victims from same family could only be punished by a fine of funeral money alone or with life imprisonment.

Although the memorial submitted by the judicial commissioner of Sichuan Shi Lijia 石禮嘉 in 1766 to the Qianlong emperor proposing for death penalty for insane multiple killers was rejected, a new statute was enacted in **1776** specifying strangulation after the assizes for insane killers of double homicide.

The punishment for insane multiple killers was made even more severe by the 1824 statute which stipulated either strangulation or decapitation after the assizes (depending on the number of victims and whether they were from the same family) with specification of "deserving of punishment" at the assizes. Hence insane multiple killers had to face almost certain execution after the assizes.

Despite this hardening trend, the punishment was still lighter than death by slicing and confiscation of property for sane killers.

## OTHER EXCEPTIONS

There were a few other exceptions to the general rule of giving a lighter sentence for insane offenders than sane offenders. These exceptions reflected the government's primary concern on maintaining the social order including the infrafamily hierarchy.

Death by slicing was handed down to all individuals, sane or insane, found guilty of committing treason, patricide, matricide or killing of officials.

Killing of senior relatives was also seen as unpardonable and insane killers were given the same punishment as sane killers. The statute in **1831** ensured in effect that insane killers who had killed his second degree relatives would not be treated leniently but would face immediate decapitation.

Owing to the unequal social status between husbands and wives, insane women killing their husbands were

heavily punished by immediate decapitation until a lighter sentence was made possible by a five-step review procedures devised by the Jiaqing emperor in **1802**. This was formally made into a statute in **1852**.

### PAROLE AND AMNESTY

The **1801** statute covering the conditions for granting parole to insane killers stipulated that a killer who had recovered from insanity could petition for release from prison to "continue ancestral sacrifices" if he met the following conditions: (1) he was an only son; (2) his parents were old and had no one to care for them; and (3) his recovery from insanity took place while he was in prison.

The second statute formulated in **1814** extended parole eligibility to those who regained sanity shortly after their arrest with the absolute prerequisite that they had already served five years of their prison terms besides being the only son with aged parents with no one to care for.

These two laws were products of Chinese ideas of filial piety as well as on ancestor veneration and were hence not applicable if the parents had deceased or for women.

For other insane killers who could not benefit from these two laws and female killers, they could only wait for their chance of release by general amnesties which were granted to celebrate special days or occasions for the emperor and "clear prisons" 清理刑/庶獄 edicts which were almost always issued during times of calamities such as flood, drought or war.

Insane killers were previously excluded from such general amnesties before 1796. In the **1796** general amnesty commemorating Jiaqing's accession to the throne, all insane prisoners who were seventy years or older or those who have served more than twenty years of imprisonment were released.

In **1800** insane prisoners were released for the first time under the clearing of prisons edict with the condition that they had fully recovered from their insanity and had served for at least five years in prison.

Occasionally insane might be released after several commutations of their sentences e.g. to exile provided they had recovered from insanity for more than 5 years.

### FITNESS TO PLEAD

A new statute in **1852** stipulated that killers who remained incoherent after their arrest and unable to testify were to be imprisoned for a period of two to three years. If, during this period, they regained their sanity, they were to be tried and sentenced to strangulation after the assizes — the same sentence for

proven insane killers who regained their sanity shortly after their arrest. In both cases, the death sentence were to be reprieved at the assizes to life imprisonment. As for those who failed to recover their sanity, they would be imprisoned for life without chance of commutation.

### ASSESSMENT OF INSANITY

The rationale behind the lenient treatment of insane offenders was the recognition of the fact that these insane persons were not aware of what they were doing. A phrase which appeared in almost every case records involving insane offenders was 瘋發無知 which can be loosely translated as "lacking the capacity to reason or to be aware because of attack of insanity".

Having said that, the judicial officials were left to decide what were the proof of insanity and whether the offender was lacking in the capacity to reason and to be aware at the time of the offence. Possibly physicians were asked in to help in some cases. But from what was noted in the records, more often the officials relied on a stereotype of insane behaviours which was shared by both the medical and popular descriptions including: befuddlement, incoherent speech, senseless mutterings, jumping and dancing in the streets, prancing around brandishing knife, and staring blankly and mutely.

The only acceptable ironclad proof of insanity was previous registration of insanity of the killer to the authorities (which would have resulted in long term confinement at home or in prisons). If not so, the officials were expected to spare no effort to determine whether insanity was feigned by the criminals.

Generally speaking, any apparent motives such as profit, money and grudges would be taken as evidence that insanity was not the cause of the homicide. Furthermore, any behaviour suggestive of any remaining wits such as love of money, covering up the crime etc. should arouse suspicion.

The officials would have to face the same difficulty in assessing the recovery from insanity when requesting for parole or amnesty. On the whole they would rather be over-cautious in giving out lenient sentences to insane killers and in releasing recovered insane offenders as these were already considered as "extra-legal benevolence" 法外之仁 in view of the primacy given to social order in Qing China.

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