

The Codifications and Legal Institutions of the Joseon Dynasty*

Jung, Geung Sik**

Abstract

The purpose of this article is to introduce a general summary of the Korean traditional law to foreign scholars. This is done by first examining different codifications, legal books and various cases, while also focusing on its legislating process and the ideological foundation behind it. The family system of Joseon originally contained distinctive features of gender equality, as can be proved by the equal distribution of inheritance between both genders. But this changed to a male-centered system in the late 19th century, due to the reception of Neo-Confucianism and the Zhu Xi's Family Rituals in the late 14th century. This paper examines its transformation process in a social-historical perspective. Litigations were frequent in Joseon society, and the government tried but failed in restraining excessive law suits. In the civilian sector, various legal books dealing with litigation were created and distributed among the people, while a specialized group, consisted of those resembling an attorney, continued to exist till the modern era in spite of a strong prohibition from the government.

KEY WORDS: Korean Traditional Law, Codification, Process of Legislation, Family System, Inheritance, Succession of House-Head, Litigation in the Traditional Korean Society, Legal Books

Manuscript received: Oct. 10, 2013; review completed: Dec. 1, 2013; accepted: Dec 4, 2013.

* This article was funded by the Seoul National University Law School Foundation in 2013.

It was presented in the International Conference "The Spirit of Korean Law: The Identity and Evolution of Korean Law and the Legal System", at Lyon France, April. 11-12, 2013.

** Professor at Seoul National University Law School. Contact: gsjung@snu.ac.kr

Special thanks to Keiran Macrae(M. A. in Graduate School of International Studies SNU) for translation.

I. Introduction

As Korea's international status has risen, so has international interest in Korean law. However, there are few considerations of this subject from an historical perspective. This is because there is little easily approachable literature regarding the history of Korean law for foreigners, while this is likely due to a general lack of researchers within this field. In any case, the laws that exist in Korea today cannot suffice by themselves as an explanation for the contemporary state of Korean law. If one truly intends to understand a nation's laws, one must understand the legal culture acting as their foundation, which is made possible by examining their history.

Just as the present is defined by the accumulation of past events, so is the law. In its contemporary form, Korean law developed following the *Gabo* Reforms of 1894, embracing western (primarily German) law by way of Japan. However, while this disparate foreign law took root in Korean society, it was transformed as it mingled with Korean society and culture. Particularly, Korean people's sense and feeling toward law, or what might be called their 'mentality', affected its application, acting simultaneously as subject and agent therein. In this respect, even now in the 21st century, research regarding the formation of mentality under laws passed down by history still bears considerable significance.

In legal codes, regulations of an idealistic nature, based on the orientation of policy, as well as those of a more realistic nature, reflecting the results of dealing with individual events, are each consolidated. In this manner, laws are both structural and casuistic. On the one hand, history proceeds according to the orientation of the law, which acts as an overarching structure restricting the actions of human beings, while on the other, certain events can transform these laws and even bring about their downfall. In this sense, laws lay bare the historical characteristics of a nation. Accordingly, by examining the flow of history in its laws, as well as by making comparisons with China, one may grasp certain characteristics of Joseon society.

In this article, for the purpose of introducing traditional institutions of Korean law into international academia, existing research is utilized to concisely describe the codification, family, and litigation systems of Joseon,

revealing the foundation and features of its legal system. As well, the unreserved acceptance of the Ming Code (大明律, *Daemyeongnyul*) and the according establishment of a Joseon system of criminal law, a topic of interest in the field of comparative law history, are mentioned briefly.

II. Codification and Principles

The founders of the Joseon dynasty placed Neo-Confucianism at its ideological base, while regarding structural reforms, they employed the Tang (唐) and Ming (明) dynasties as models. The Rituals of Zhu (周禮, *Jurye*), themselves based on Confucian ideals, were to provide the basis for the Sextant System (六分體制, *Yukbuncheje*), according to which legal codification and structures were modified. Citing the chaotic nature of Goryeo society, these founders intended to organize and preserve a well-ordered society. In 1397 (6th year in the reign of King Taejo), still early in the dynasty, the seminal *Gyeongjaeyukjeon* (經濟六典) was codified. Subsequently, with the likes of the *Gyeonggukdaejeon* (經國大典) in 1485 (16th year in the reign of King Seongjong), the *Sokdaejeon* (續大典) proving supplementary materials in 1746 (22nd year in the reign of King Yeongjo), the *Daejeontongpyeon* (大典通編) in 1786 (9th year in the reign of King Jeongjo) and the *Daejeonhoetong* (大典會通) in 1865 (2nd year in the reign of King Gojong), there were several foundational legal codes. Following the publication of these great codes (*Daejeon*; 大典), various legal documents were compiled, including those of the *Songnok* (續錄) class which organized legislation, those of the *Jimnok* (輯錄) class which compiled it, and those of the *Tonggo* (通考) class which comprehensively synthesized the previous two.¹⁾ Furthermore, legal codes compiling legal provisions concerned with litigation amongst the common people, such as the *Gyeolsongyuchwibo* (決訟類聚補), were privately published and distributed. Finally, just before the annexation of Korea by the Japanese in 1905 (7th year in the reign of

1) Sun-Min Hong, *The Trends of Codification and Change of Political Operation in the late Joseon Dynasty (Joseon Hugi Beopjeon Pyeonchanui chuyiwa Jeongchiunyeongui byeondong)*, 21 Hankuk Munhwa: Korean Culture, The Research Center for Korean Culture the Seoul National University 165-205 (1998).

Emperor Gwangmu), the *Hyeongbeobdaejon* (Korean Penal Code; 刑法大全) which had synthesized the *Daejeonhoetong*, the Ming Code as well as the new legislations since 1894, was published in both Korean (Hangeul) and Chinese characters. In this manner, legal codes were continually compiled during the Joseon dynasty, perhaps allowing one to designate it the age of uniform law.

1. The Lawmaking and Codification Process

A legal code is a uniform and systematic amalgamation individual pieces of legislation. In Joseon, the king was sovereign and possessed the power to make laws. Although, while laws were passed based on the king's judgement of individual cases, not all laws were decided in such a unilateral manner. Regarding particular matters, relevant government offices would submit opinions and bills, which were then examined and mediated before being submitted to the king, with his approval enacting a new law.

The lawmaking process was prescribed under the '*Ipbeobchuluicheopsik* (立法出依牒式)' article of the section on Laws of Rituals in the *Gyeonggukdaejeon*. While the Ministry of Rituals (*Yejo*; 禮曹) was in charge of the overall law making process, it would proceed as follows. First, pertinent government offices proposed bills to the Ministry of Rituals, where they would be sanctioned by the king and sent on to the Office of the Inspector General (*Saheonbu*; 司憲府) and the Office of the Censor-General (*Saganweon*; 司諫院), where they were examined in turn and, if deemed in order, recommended as conventions to the Ministry of Rituals. From the Ministry of Rituals, together with the sanction of the king and confirmation (*Seogyong*; 署經) from each of the officers mentioned above, the bill would be returned to its original proposing government office. In this manner, each piece of legislation was enacted.²⁾

However, laws pertaining to specific matters decided by the king were more common than those made according to the clause described above.

2) Geung-Sik Jung, *An Essay on the Regulations of the Enrollment in the 1625* (1625nyeon Hopaesamoke daehan Gochal), *The Task of Modern Public Jurisprudence* (Hyeondae Gongbeobhakui Gwaje), Pakyeong-Sa 382-403 (2002).

These decisions of the king, known as *Gyo* (教) or *Gyoji* (教旨), were known as *Sugyo* (受教) from the perspective of a government office passively receiving them. In other words, a *Sugyo* was the decree of the king enacted by government authorities having the character of a law which had to be obeyed by both administrators and the common people. All government offices stemming from the Six Ministries (*Yukjo*; 六曹) suggested laws pertaining to the management of their respective affairs, and if sanctioned by the king, these became *Sugyo*, or laws. Accordingly, the amount of *Sugyo* became quite extensive. However, as the years passed and *Sugyo* increased in number, while suggested *Sugyo* from any particular government office could contradict previous or future proposals, sometimes proposed *Sugyo* from different government offices could be respectively different as well. Therefore, the common people aside, the administrators enforcing these *Sugyo*, or laws, were confounded by the muddled task of realizing the original intentions of so many conflicting laws. The mission of codification was to evade this chaotic confusion of contradictory laws and promote uniform ones. Codification was the process of uniformly amalgamating and organizing various *Sugyo*. The process of publishing works such as the “*Gyeonggukdaejeon*,” fundamentally reflected this purpose.³⁾

2. The Codification of the *Gyeonggukdaejeon*

In 1397 (6th year in the reign of King Taejo), the proclaimed “*Gyeongjaeyukjeon*” arranged and amalgamated various laws established since 1388, when the army had staged a coup d’état, famously turning back from *Wilwa* Island (威化島). The institution entrusted with this task was a department of the *Geomsangjoryesa* (檢詳條例司) under the *Dopyeonguisasa* (都評議使司). In this department, documents containing ordinances dispatched from the *Dopyeonguisasa* were registered, while worthy *Sugyo* were set aside for codification. In the *Dodang* (都堂), the highest office of resolutions, provisions ultimately marked for recording underwent final arrangements before codification in the *Gyeongjaeyukjeon*. The *Gyeongjaeyukjeon* characteristically emphasized practicality and accessibility

3) Byeong-Ho Park, *The Existence of laws and Legislation*, Anthology of Korean Legal History (*Hankukbeopjesago*), Beopmun-Sa 406-7 (1974).

by employing the *Idu* (吏讀/吏頭) script, reflecting the will of Joseon's founding fathers.

With the founding of a new state, an increase in legislation was but a matter of course. Thus, King Taejong erected the *Sokyukjeonsuchanso* (續六典修撰所) in 1404, while the codification of the *Sokjibsangjeol* (續集詳節) progressed in 1407 (7th year in the reign of King Taejong). Whereas the *Gyeongjaeyukjeonweonjibsangjeol* (經濟六典元集詳節) and the *Sokjibsangjeol* were first completed in 1412 (12th year in the reign of King Taejong), each in three volumes, in lieu of the complexity of the provisions, they were revised and completed by the following year.

Nevertheless, the legal code of the founders (*Weonyukjeon*; 元六典), could not be hastily revised, even while among their provisions existed those that could not be applied in reality or that did not comply with subsequent *Sugyo*. Thus, toward solving this problem, the 'Principle of Respect for the Intentions of the Founding Fathers (*Jojongseongheonjonjungjuui*; 祖宗成憲尊重主意)' was established in 1415. According to this principle, in the event that provisions of the *Weonyukjeon* required alteration, they were to be recorded verbatim with attached annotations explaining revisions. This practice was consistent with the basic principles of codification of the Joseon dynasty.

With principles of codification and lawmaking established during the reign of King Taejong, this situation remained largely unchanged up until the reign of King Sejong. The establishment of the *Yukjeonsuchansaek* (六典修撰色) in 1422 (4th year in the reign of King Sejong) set the codification process in motion once again, eliminating *Sugyo* that contradicted the *Weonyukjeon* as well as amalgamating *Sugyo* according to content passed after the *Sogyukjeon*. During this process, a new principle of codification emerged. Hereby, *Sugyo* were classified according to content as those which were 'laws' (*Jeon*; 典) that must be eternally obeyed and those which were temporary 'precedents' (*Rok*; 錄), applicable for fixed periods of time.

While the latest stage of codification was completed in 1426, it soon underwent reexamination. After the completion of the *Yukjeon* (legal code) established according to the Sextant System in 6 volumes, and the *Deungnok* (騰錄; its appendices) in 1 volume in 1428, they were issued following a year of revision in 1429. Nevertheless, due to their deficiencies, these underwent revision once again and finally in 1433 (15th year in the reign of

King Sejong) the newly edited *Gyeongjaesokyukjeon* (新撰經濟續六典), composed of the Canon (*Jeongjeon*; 正典) and *Deungnok*, each in six volumes, were published. However, this was yet again inadequate. While King Munjong also set out to codify the law, he was unable to see it through to completion either.

The codification that had taken place up until the reign of King Sejong was that of supplementing existing legal codes by adding *Sugyo*. As long as codification continued in this way, the creation of comprehensive legal codes was impossible. However, codification required political stability, and that in turn required a strong king. Seizing power by a coup d'état, King Sejo set out to complete a permanent legal code.

Immediately after King Sejo ascended the throne, in July of 1455, Seongji Yang (梁誠之), proposed law revisions, and in 1457, he proposed the systematization of a comprehensive legal code once again. Accordingly, in the following year, by establishing the *Yukjeonsangjeongso* (六典詳定所), the task of creating a permanent code was set in motion once and for all. In July of 1460, with the completion of the Treasury Laws (*Hojeon*, 戶典), the new codification, which amalgamated the *Weonyukjeon*, the *Sokyukjeon* and the *Sugyo*, was called the *Gyeonggukdaejeon*. Then in the following year, the Penal Code (*Hyeongjeon*, 刑典) was completed. While examining and enacting these two bodies of law, the four remaining bodies were worked on simultaneously. As King Sejo envisioned an absolutely flawless codification of law, these works passed through two phases of inspection in 1466 and 1477, although with his passing in September of 1468, they went unpublished. In September of 1469 (1st year in the reign of King Yejong), the *Gyeonggukdaejeon* was submitted to the king for sanction and in November, it was decided that it take effect in the following year. As this was the very first completed version of the *Gyeonggukdaejeon*, it was dubbed the '*Gichukdaejeon* (己丑大典)'.⁴⁾ However, King Yejong died before seeing this matter through.

Amid the process of its enactment, the *Gichukdaejeon* proved insufficient once again and underwent revision in November of 1470 (1st year in the reign of King Sejong), before it was determined that it be enacted in the

4) The Preface and Royal Documents (*Chanjinmun*, 箋) of the *Gyeonggukdaejeon* still existing today were drawn up at this time.

following year (*Sinmyodaejeon*; 辛卯大典). Upon enactment of the *Sinmyodaejeon*, it was immediately deemed inadequate as, amongst other defects, it was discovered to have omitted 130 articles while possessing extra *Sugyo* too. Surrounded by the need to manage this misadventure, some called for revision while others, citing the Principle of Respect for the Intentions of the Founding Fathers, argued that the “*Gyeonggukdaejeon*” be merely supplemented with annotations in the form of the *Deungnok* (appendix). Eventually, revisions were carried out in the latter manner and in November of 1473 (4th year in the reign of Seongjong), it was determined that these be enacted in February of the following year (*Gabodaejeon*; 甲午大典). At this time, those *Sugyo* not included in the *Gabodaejeon* were codified separately in its appendices (*Daejeonsongnok*; 大典續錄).⁵⁾

With the codification of the *Gabodaejeon* and the “*Daejeonsongnok*,” the codification of law was almost at a close. However, comprehensive and permanent codification was ever impossible. In 1481 (12th year in the reign of King Seongjong), it was once again submitted that the laws be improved, and King Seongjong participated directly setting the task of improving the *Gyeonggukdaejeon* and the *Daejeonsongnok* in motion. In November of the following year, just as the amendments to the *Gabodaejeon* were reaching completion, a controversy over legitimacy between the High Council (*Uijeongbu*; 議政府) and the Six ministries continued inconclusively. Finally, in June of 1484, Seongjong decided to terminate the codification. Seongjong’s revisions and codification of the *Daejeon* did not amount to the enactment of new laws, but provided supplementation to the provisions of existing *Sugyo* and appendices, and while revisions did exist, as they were few, there is no need to discuss them further. Thus, in December of that year, after detailed inspections, King Seongjong’s codification was enacted in the first month of 1485 (16th year in the reign of King Seongjong; *Eulsadaejeon*, 乙巳大典). This is the only *Gyeonggukdaejeon* that exists today, while the other editions of *Gyeonggukdaejeon* does not currently exist. This is because, for laws to be enforced uniformly, when new code is enacted, previously existing ones were disposed of.⁶⁾

5) This *Daejeonsongnok* is different from the *Daejeonsongnok* (Published in 1492 [23rd year in the reign of Seongjong]) that currently exists.

6) For more information on this content, refer to Byeong-Ho Park, *The Korean Legal*

The codification of the *Gyeonggukdaejeon* organized and amalgamated existing *Sugyo*, but it rested on an ideological foundation. That is, the lawmakers were grounded in Confucian ideals. Succinctly, the ideals expressed in the preamble to the *Gyeonggukdaejeon* are as follows. First, distortions to the Natural Order (*Cheonjisasi*, 天地四時) must be eliminated. Second, laws congruent with *Cheonjisasi* can be found in the ancient laws of Zhu. Third, the intentions of the founding fathers must be eternally obeyed. Fourth, laws must adhere to the principle of Good Law and Gracious Will (*Yangbeobmiui*, 良法美意-*altes gutes Recht* [in German]), which also means that they must concur with public sentiment. These maxims acted as standards of judgments when debating validity and effectiveness over the course of the creation, enactment and abolition of laws.

Cautious lawmaking was especially valued, and legal codification was not considered for the purpose of creating laws, but for that of finding ancient pre-existing laws and recording them. The trust of the people provided the basis for lawmaking, expressed in the highly regarded concept of *Yangbeobmiui*, which acted as a deterrent to careless lawmaking as well as the people's misgivings that accompanied it. Particularly during the reign of King Sejong, surveys directly enquiring about the opinions of the common people were employed.⁷⁾ In the early Joseon period, it was constantly said within the lawmaking debates, "When laws are made, troubles follow (*Beomnibipyesaeng*; 法立而弊生)," as well as, "It's easy to make laws, but hard to enforce them (*Ibbeobii jibbeobnan*; 立法易而執法難)," reflecting the caution exercised in lawmaking. However, the enactment of new laws was necessary to meet social change and, in subsequent times, the Principle of Respect for the Intentions of the Founding Fathers existed only as a formality, though it continued to act as a deterrent to careless and overzealous lawmaking.⁸⁾

History (Hangukbeopjaesa), Minsokweon 39-43 (2012).

7) In 1430 (12th year in the reign of King Sejong), in the process of adopting a new tax system, a survey spanning the entire country enquired the opinions not only of administrators, but even farmers, collecting a total of 172,806 opinions before ultimately determining to terminate the new tax plan. The Chronicles of King Sejong, King Sejong 12th year August 10th, The Annals of Joseon Dynasty (Oct. 1, 2013), <http://sillok.history.go.kr>.

8) Byeong-Ho Park, *ibid*, 70.

3. Legal Codes after the Gyeonggukdaejeon

Though as a legal code, the *Gyeonggukdaejeon* could claim to be the epitome of perfection, without need of supplement or revision, this was simply idealistic, and in reality new legislation continued to emerge. In lieu of this fact, in order to prevent chaotic law enforcement, *Sugyo* were continually organized and used as the basis for the consolidation of new legal codes.

1) *Daejeonsongnok* (大典續錄): Following the enactment of the *Gyeonggukdaejeon* in 1485, until 1491 (22nd year in the reign of King Seongjong), legislation was arranged, codified and then enacted on May 7th, 1493.

2) *Daeheonhusongnok* (大典後續錄): This legal code was charged with the task of restoring the legal system following the King Yeonsangun. This was first codified in 1513 (8th year in the reign of King Jungjong), but was discarded after remaining incomplete, and worked on again until its enactment on November 14th, 1543 (38th year in the reign of King Jungjong). The provisional nature of each of these legal codes, each endowed with the nominal suffix 'nok', connecting them to the (*Gyeongguk*)*daejeon*, is evident in their titles.

3) *Gaksasugyo* (各司受教): A compilation of royal commands from the government branches (*Gagksa*) managing the affairs of the ministries. This was arranged in its first phase in 1571 (4th year in the reign of Seonjo), then supplemented around 1636 (14th year in the reign of King Injo). Particularly, this compilation included *Sugyo* of the six ministries, as well as the Seoul City Office (*Hanseongbu*; 漢城府) and the Office of Servants (*Jangnyeweon*; 掌隸院), which were in charge of land and servants respectively, and in employing *Idu*, revealed these *Sugyo* in their nascent form.⁹⁾

4) *Gyeonggukdaejeonjuhae* (經國大典註解, Commentary on the *Gyeonggukdaejeon*): As an effective legal code possessing authoritative interpretations of chaotic sections of the *Gyeonggukdaejeon*, it was begun in 1550 (5th year in the reign of King Myeongjong) and published in 1555, with

9) The only copy of this compilation can be found at the Kyujanggak Institute for Korean Studies at Seoul National University.

annotations for every one of its 62 articles. However, materials published in October 1554 in Cheongju (淸州), Chungcheong Province (忠淸道) are now located in Japan. In these materials, there are annotations for 831 articles regarding such matters as the esoteric terminology of the *Gyeonggukdaejeon* and places where authoritative interpretations could not be adopted.¹⁰⁾

5) *Sugyojimmok* (受教輯錄, Compilation of *Sugyo*): Following the codification of the *Gaksasugyo*, Joseon encountered two periods of war and, as it lapsed into political chaos, legislation exploded in breadth, entailing its reorganization. This was advocated in 1664 (5th year in the reign of King Hyeonjong), but it did not come about in full force until 1683 (9th year in the reign of King Sukjong), before finally reaching publication in March of 1698. While taking the *Gyeonggukdaejeon* as its foundation, articles were added in each section and, among the *Sugyo*, the Principle of Respect for the Intentions of the Founding Fathers was discarded, while later *Sugyo* took precedence.

6) *Jeolloktonggo* (典錄通考): Owing to their variety, consisting of the likes of the *Gyeonggukdaejeon* and the two *Songnoks*, legal sources in the 18th century had a difficult time enforcing the law. Thus, the two *Songnoks* were arranged according to the standards of the *Gyeonggukdaejeon*. This undertaking began in 1701 (27th year in the reign of King Sukjong), before being completed in 1706 and published in 1707 (33rd year in the reign of Sukjong). On the one hand, reflecting the Principle of Respect for the Intentions of the Founding Fathers, the *Gyeonggukdaejeon* was not to be revised, but regarding those cases where it was inevitable, opinions were submitted reflecting contemporary social mores.

7) *Sinbosugyojimmok* (新補受教輯錄): While in 1732 (8th year in the reign of King Yeongjo) there were calls to supplement the *Sugyojimmok*, in March of 1743 (19th year in the reign of King Yeongjo) King Yeongjo first expressed the necessity of resolving this matter. In that year, *Sugyo* recorded between the years of 1648 (26th year in the reign of King Injo) and 1738 were supplemented. However, while the *Sokdaejeon* was codified in 1744, it went

10) Geung-Sik Jung, *Compilation and its Meaning of Gyeonggukdaejeonjuhae* (*Gyeonggukdaejeonjuhae ui Pyeonchangwa geu Uimi*), Commentary and Translation of 'Gyeonggukdaejeonjuhae' by Jung and Others, Korean Legislation Research Institute 5-30 (2009).

unpublished and remains only in manuscript form. Those sections in the *Sugyojibnok* and the *Sinbosugyojimmok* falling under the authority of the six ministries were reflected to the letter in the *Sokdaejeon*, while these also acted as foundational materials in the codification of the *Sokdaejeon*.¹¹⁾

4. *The Sokdaejeon and Subsequent Legal Codes*

While codification after that of the *Gyeonggukdaejeon* simply integrated new *Sugyo*, for the codification of the '*Daejeon*', a systematic arrangement of existing *Sugyo*, what was now needed was social stability and sufficient time. The first and most basic task involved in this matter was the codification of the next *Daejeon*, which was an amalgamation of a colossal quantity of *Sugyo* resulting from two periods of war.

1) *Legal Codes*

① *Sokdaejeon*: While Yeongjo decisively took hold of the reigns of political power in 1729, he decreed the revision of the *Gyeonggukdaejeon* in 1730 (6th year in the reign of King Yeongjo). While the *Sinbosugyojimmok* of 1743 provided a starting point for codification, calls for codification began to appear in 1740 (16th year in the reign of King Yeongjo), with this process proceeding in full force by 1744. In that year, the title of "*Sokdaejeon*," as well as the specific provisions, was determined directly by the king. Work was first completed in 1745, but was not published until 1746, following further assessments. Within the *Sokdaejeon* are arranged and amalgamated *Sugyo* related to and based on the *Jeolloktonggo*. Thereby, the *Daejeon* consisted of both the '*Gyeonggukdaejeon*' and the '*Sokdaejeon*'. What is especially remarkable in the *Sokdaejeon* is that, in them, barbaric punishments within the Penal Code were abolished, while those articles pertaining to litigation, murder cases or other such criminal suit procedure, were drastically supplemented. These were legal provisions in alignment with past experiences, and could also be seen as reflecting the will of King Yeongjo, who was adamant about protecting the common people from the oppression of the *Yangban*.¹²⁾

11) Byeong-Ho Park, *op.cit.*, 44-49.

12) Sun-Min Hong, *op.cit.*, 193-199, & Geung Sik Jung, *An Essay on an Evaluation of the*

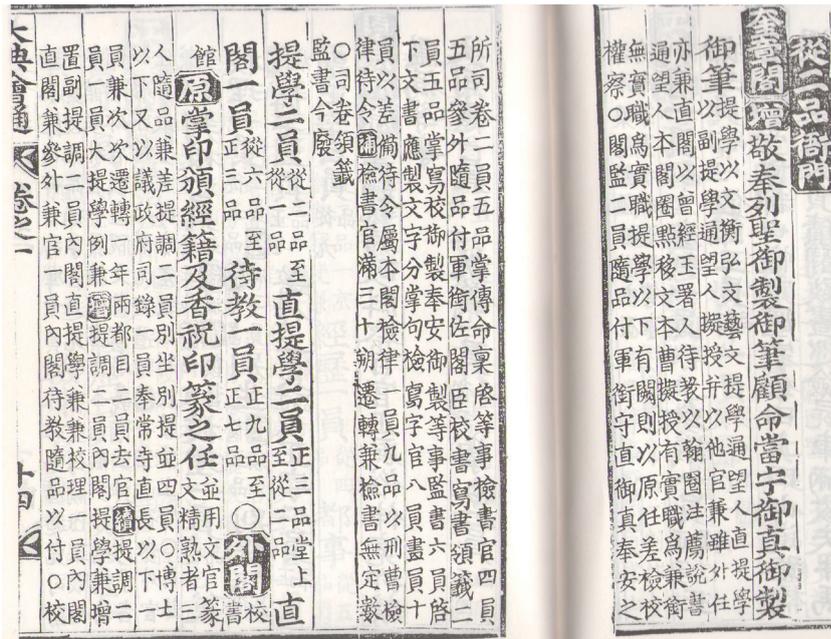


Figure 1. Daejeonhoetong Principle of Respect for the Intentions of the Founding Fathers

② Daejeontongpyeon (大典通編): With the codification of the Sokdaejeon, the Daejeon existed in two legal codes. At this time, the courts were fettered by the need for close readings of these two legal codes as well as the Ming Code, the Gukjooryeui (國朝五禮儀) and new Sugyo. With the intention of eliminating this awkwardness, King Jeongjo established ambitious plans to unify all legal codes, but faced with the enormity of this task, the supplementation of the Sokdaejeon soon took precedence. In 1784 (8th year in the reign of King Jeongjo), with renewed calls for the codification of the legal codes, Jeongjo endowed this task with his blessing. This was completed in September of 1785. The Daejeontongpyeon consolidated the Gyeonggukdaejeon, the Sokdaejeon and new Sugyo. First, characters in the two legal codes were rearranged to promote convenient reading. At this time, according to the Principle of Respect for the Founding Fathers, the

Soktaechun (Sokdaejeonui Wisange daehan Sogo), 46 No.1 Seoul Law Journal, The Law Research Institute Seoul National University 312-338 (2005).

regulations of the *Gyeonggukdaejeon* were written under the heading ‘*Weon* (原)’, the provisions of the *Sokdaejeon* under ‘*Sok* (續)’ and added provisions under ‘*Jeung* (增)’. Although provisions in the two legal codes were abolished and revised, these were left intact, with annotations added marking abolished provisions as “Now Abolished (今廢)”.¹³⁾

③ *Jeonyultongbo* (典律通補): Here, while ‘*Jeon* (典)’ refers to the *Daejeontongpyeon* and ‘*Lyul* (律)’ to the Ming Code, this legal code reflects the original intentions of the *Daejeontongpyeon*. In 1786 (10th year in the reign of King Jeongjo), Yunmyeong Gu (具允明) inherited the task of completing this legal code from his father, Takgyu Gu (具宅奎), but failing to complete it in his old age, the legal code remains only in manuscript form. The character of this legal code was such that it boldly broke from the tradition of the Principle of Respect for the Founding Fathers, recording only applied provisions and, while also recording *Sugyo* not included in the *Daejeontongpyeon*, once again focusing on realistic application, it naturally included records of legal books and documents such as the *Gukjooryeui*, *Gukjosokoryeui*, and the *Sangnyebopyeon* (喪禮補編), and even the Books of Rituals, the *Tongmungwanji* (通文館志) and the privately published *Gyeolsongyuchuibo*. This legal code is composed of both original and supplementary content, with provisions of the first kind codified according to the Sextant System and those of the latter assisting administrators by including records of various rituals and documentation styles. Especially, rather than adhering to principles of codification, this legal code is distinguished by its emphasis on practicality.

④ *Daejeonhoetong* (大典會通): As the last amalgamated legal code codified in 1865 (2nd year in the reign of King Gojong) in the Joseon dynasty, following the publication of the *Daejeontongpyeon* in 1785 (9th year in the reign of Jeongjo), the Sextant System was a compilation of *Sugyo*. Gojong’s father, Heungseondaewoengun (興宣大院君), by this time having overturned the long-established political power of the Andong Kim family (安東 金), set out codifying the law for the purpose of strengthening royal authority. Codification of the *Daejeonhoetong* was prepared in March of 1865, proceeding in earnest in May (a leap month; 閏月) and was completed

13) In the *Daejeonhoetong*, this principle in regards to added or amended provisions is expressed as *Bo* (補).

for publication in December. One particular quality of this legal code was that, in compiling *Daejeon* provisions according to the Principle of Respect for the Founding Fathers, one could peruse transformations therein that had occurred over time.

By examining the codification of the *Daejeonhoetong*, one can observe the process of legal code codification in the Joseon period. First, temporary institutions such as the *Gyosikchanjibso* (教式撰輯所) were established for the codification of new *Daejeon*, while organizations like the *ChanjibDangsangwan* (撰輯堂上官) and the Higher Officers (堂上官) supervised the codification process. The task of codification was divided into the process of amalgamating, arranging and selecting *Sugyo*, performed by the *Chanjibdangsanggwon*, and that of 'Halbu (割附)', whereby *Sugyo* selected by the *Gyojeongdangsanggwon* (校正堂上官) were examined, classified, edited and arranged in existing legal codes. Finally, after receiving the sanction of the king, selected *Sugyo* were registered in the legal codes. During the *Halbu* process, existing *Sugyo* were arranged as well as freshly added, reflecting the views at this time not only of the king, but also of the administrators.¹⁴⁾

2) Case Records

While provisions recorded in the legal codes were legislated on the basis of individual cases, since all matters could not be regulated by the law, precedents were required for properly enforcing the law according to its purpose, resolving novel incidents. Thus, following the stabilization of society after the war under King Yeongjo, case records were published continuously.

① *Chungwanji* (春官志): This manuscript was compiled in 1781 (5th year in the reign of King Jeongjo), though Maenghyu Lee (李孟休) first edited it in 1744 (20th year in the reign of King Yeongjo). It collected cases pertaining to the Ministry of Rituals (禮曹), such as those concerning rituals, foreign relations or adoption.

② *Chugwanji* (秋官志) and *Simnirok* (審理錄): The *Chugwanji* was first

14) Geung-Sik Jung, *The Codification of the Taechunhoetong and its Meaning (Taechunhoetongui Pyeonchangwa geu Uimi)*, 41 No.4 Seoul Law Journal, The Law Research Institute Seoul National University 323-344 (2001).

edited in 1781 (5th year in the reign of King Jeongjo) before being revised and released as a manuscript in 1791 (15th year in the reign of King Jeongjo). In it were records of organization and history relating to general tasks and servants, and various kinds of prohibitions, penalties and incidents concerning the Penal Code. From 1775, when Jeongjo ascended to the throne relieving his ailing grandfather, Yeongjo, until his death in 1800, the *Simmirok* compiled death penalty verdicts, reaching completion in 1801 (1st year in the reign of King Sunjo). Although it concentrated on the verdicts of King Jeongjo, it still enables one to understand the entire process of a murder case. In actuality, the low rate of death sentences enforced reflected King Jeongjo's concern for policies of considering convictions cautiously (*Heumhyul*; 欽恤) and love for the people (*Aemin*; 愛民). These two books, along with Yagyong Jeong (丁若鏞)'s privately published *Heumheumsinseo* (欽欽新書), are important for research on criminal cases.

③ *Eundaepyeongo* (銀臺便考) and *Eundaejorye* (銀臺條例): The 'Eundae', being another name given to the Royal Secretariat (*Seungjeongweon*; 承政院), arranged legislation, guidelines and procedures pertinent to its jurisdiction. These were edited in the era of King Heonjong during the latter half of the 19th century, and later supplemented under King Cheoljong. As well, they were arranged according to the duties of the 6 departments (*Yukbangseungji*; 六房承旨) of the Royal Secretariat. The *Eundaejorye* was an abridged version of the voluminous *Eundaepyeongo* and was published in 1870 (7th year in the reign of King Gojong). Qualitatively, they reflected the will of Heungseondaeweongun to strengthen the power of the throne.

④ *Yukjeonjorye* (六典條例) and *Yangjeonpyeongo* (兩銓便考): The *Yukjeonjorye* progressed alongside the codification of the *Daejeonhoetong* and was the sole publication including the complete records of administrative affairs published in May of 1867 (4th year in the reign of King Gojong). It divided public offices according to the Sextant System and kept records regarding organization, government officials and concrete administrative conventions and budgets. Notably, it placed only those public offices linked with the royal family ahead of the Law of Personnel (*Ijeon*; 吏典). The *Yangjeonpyeongo* was a guide of compiled cases and regulations related to affairs of personnel in the Ministries of the Interior (*Ijo*; 吏曹) and Defence (*Byeongjo*; 兵曹). This was edited alongside the *Daejeonhoetong* in 1865 (2nd year in the reign of King Gojong), and was published as a revised book in

1870.¹⁵⁾

The legal institutions of the Joseon period were composed of a standard compilation of all legal documents integrating its basic framework, the *Daejeon*, as well as relevant *Rok* (appendices), while those records of actual cases in which these standards were applied operated to enhance this arrangement.

III. Legal Institutions and their Characteristics

1. *The Penal Code and the Ming Code*

To remedy a chaotic social system, modification of the legal system was needed, whereby the Ming Code was adopted and applied as the basis for a general penal code. During the transition between the Goryeo and Joseon periods, as legal codes such as the Yuan (元) Empire *Jijeongjogyeok* (至正條格) competed with the Ming Code for legitimacy, the founders of Joseon finally settled on the latter. In the *Joseon Gyeonggukjeon* (朝鮮經國典), Dojeon Jeong (鄭道傳) declared the application of the Ming Code, and in 1395 (4th year in the reign of King Taejo), the Ming Code was adapted in Idu and published as the *Daemyeongnyuljikkae* (大明律直解). Titles of public office were translated and changed according to the various existing institutions of Joseon, and while provisions pertaining to family terminology and the family system as well as to servants and the class system were markedly different from the Ming Code, these reflected the intrinsic character of Joseon.

With the article entitled *The Use of a Penal Code* (*Yongnyuljo*; 用律條) under the Penal Code (刑典) of the *Gyeonggukdaejeon* stipulating, “The Ming Code is applied,” the Ming Code was settled upon as the basis for a general penal code. However, this was no simple process. In early Joseon, besides the Ming Code, various codes of law existed, such as the Tang Code

15) The codes and legal books mentioned above were reprinted with commentaries by Kyujanggak Institute Seoul National University, 1997~2001. I abbreviated each citation for convenience.

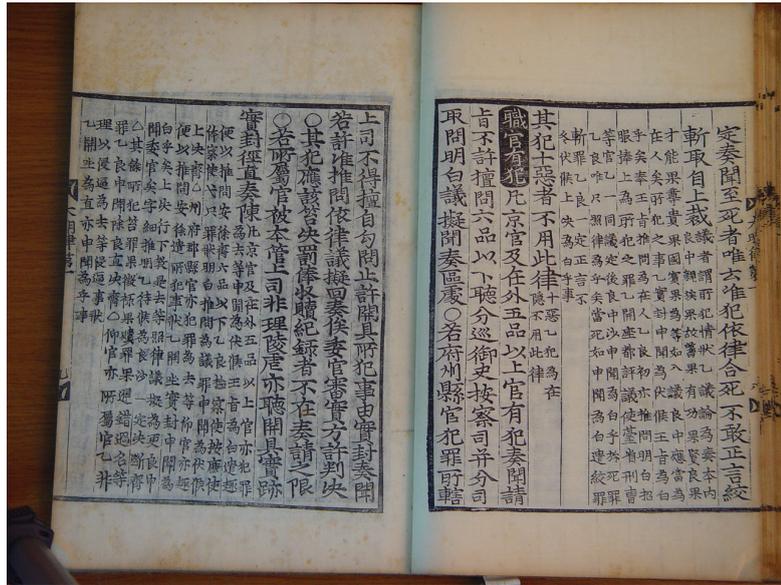


Figure 2. The Daemyeongnyuljikkae

(唐律疏議), the Yuan Empire *Jijeongjogyek*, and the *Uihyeongiram* (議刑易覽), and to resolve individual cases, various legal codes such as these were employed and adjusted for the particular circumstances of Joseon. Thus, in order to understand the Ming code, various relevant commentaries like as *Yulhakhaeyi* (律學解頤), *Yulhawbyeonui* (律解辨議) were imported and utilized. This process improved understanding of the Ming Code before it was finally settled upon as regular law.

Nevertheless, as the Ming Code did not correspond to Koreans' sense of law, special laws had to be established via *Sugyo*. Especially, the class and family systems were problematic. While the servants of Joseon formed a hereditary class, this was not the case in China and thus the servant-master stipulations of the Ming Code could not be applied without change. As well, in China, regarding family relationships, paternal lines had been emphasized according to *Bokje* (服制), while maternal lines were neglected. On the other hand, in Joseon, where both lines were regarded as important, those stipulations regarding the maternal line could not be applied as they were either. Finally, the Ming Code also had to be adjusted for discrimination between legitimate and illegitimate children, also a

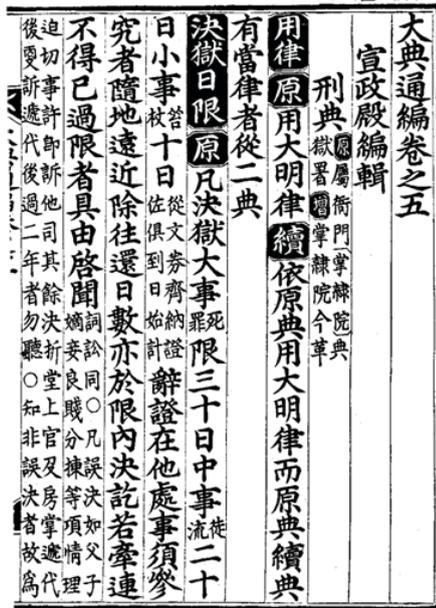


Figure 3. Sokdaejeon The Use of a Penal Code

phenomenon unique to Joseon.

While in the beginning special stipulations were few, as time passed they increased in number until, as it was asserted in the *Sokdaejeon*, “The Ming Code is applied according to the *Gyeonggukdaejeon*. If relevant stipulations are evident in the *Gyeonggukdaejeon* or the *Sokdaejeon*, these are applied.” Thus, the status of the Ming Code was made explicit. This was the process of comprehending the Ming Code while establishing a penal code appropriate to Joseon.¹⁶⁾

2. Family System

Joseon pursued a family system based on a patrilineal kinship system (*Jongbeob*; 宗法), or the succession of the paternal line, which, though adjusted to reflect the intrinsic character of Joseon, was stipulated in the

16) Ji-Man Cho, *The Ming Code and the Gyeonggukdaejeon as Criminal Law in the Joseon Dynasty* (Joseon Sidaewi Hyeongsabeop), Seoul: Kyeongin Munhwasa 349-356 (2007).

Gyeonggukdaejeon. Nonetheless, the reality was different from China; a law is an ideal, but reality is the basis on which it is carried out. Therefore, the process by which actual families digested idealistic laws is one worthy of attention.

1) Marriage

Marriage requires a standardized ceremony in which a man and woman are joined together, as well as a new residence, in which they and their descendants can reside. In China, a virilocal (夫處制) system of marriage, based on the *Chinyeongnye* (親迎禮) stipulated in the Zhu Xi's Family Rituals (朱子家禮), saw the groom take his bride to his home where the marriage ceremony would be carried out and they would reside together. This acted as the basis in creating patrilineal kinship groups. Conversely, Joseon observed an uxorilocal (婦處制) system where the home of the bride acted as the location for the wedding ceremony, as well as the residence of the couple thereafter. Therefore, there was no basis for the development of paternal line succession family groups.

With the intention of its propagation, the *Chinyeongnye* was first performed amongst the royal family of King Taejong, but this failed. By the end of the 15th century, knowledge of the Zhu Xi's Family Rituals had improved and as they were applied in everyday life, debate over the implementation of *Chinyeongnye* arose. While those for it were grounded in Confucian ideals, those against it were grounded in reality. By the middle of the 16th century, the semi-*chinyeongnye* (半親迎禮), a compromise between these two positions, appeared. This stipulated that after the wedding ceremony held at the home of the bride, the couple would travel to the groom's house where they would perform *Chinyeongnye*, before returning to reside in the house of the bride. As time passed, the period of residence at the bride's house shortened. By the late Joseon period, patrilineal family groups formed the basis for the proliferation of *Chinyeongnye*, whereby same-surname villages became deeply rooted. The existence of patrilineal family groups proliferated on the basis of a patrilineal family system, whereby the family system was transformed.¹⁷⁾

17) Hae-in Park, A Study on the Korean Traditional Marriage Rites: In the Perspective of Family History (Hangukui Jeontonghonrye Yeongu), Research Institute of Korean Studies

2) Household Succession

The contemporary ancestral memorial rites and its system of succession, performed by the eldest son in his home on behalf of the preceding four generations, with the succession of the eldest grandson thought of as ideal, remained entrenched in the civil code as the system of succession of the family head (*Hojuseunggyejedo*; 戶主承繼制度) until 2007.

Family succession was manifest in the ancestral memorial rites. Here, priority was given to legitimate sons and ancestral memorial rites ranked for three generations according to the status of the sons, while the principle of patrilineal succession was adapted. However, in reality this was not the case. With high regard for blood relations, illegitimate sons took precedence over adopted ones and, instead of only the eldest son

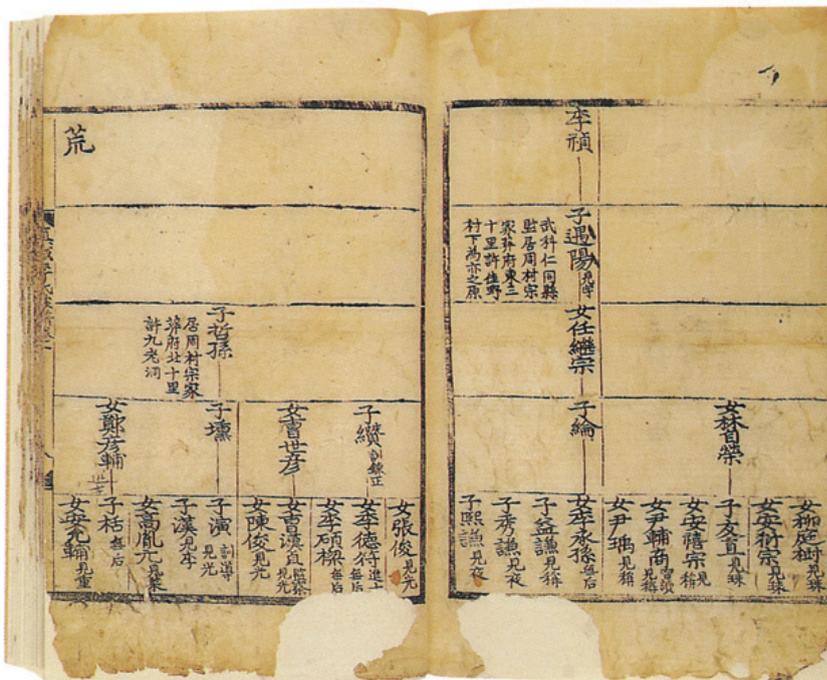


Figure 4. the Family Record of Jinseong Lee (*Jinseonglee Kyeongjabo* 眞城李氏庚子譜, 1600)

performing ancestral memorial rites, it was customary for sons and daughters to take turns, while grandchildren observed them in honor of their grandparents on their mother's side too. Also, if one had no descendants, instead of adoption, it was permitted for one to entrust ancestral memorial rites to a servant. Thus, while the laws were ideals, reality was situated in Goryeo customs.

This family system was easily discernible in 16th century family records (*Jokbo*; 族譜). Unlike those of the late Joseon dynasty, in the Family record of Andong Kwon's (*Andonggweonssiseonhwabo*; 安東權氏成和譜) of 1476 (7th year in the reign of King Seongjong) and the Family record of Munhwa Yu's (*Munhwayussigajeongbo*; 文化柳氏嘉靖譜) of 1565 (20th year in the reign of King Myeongjong), children were entered sequentially according to age, instead of according to sex, with boys first and girls second, while daughter's children were also included and there were even many instances where there were no descendants at all.¹⁸⁾

The transformation of family succession was inexorably tied to the transformation of marriage. As the semi-*chinyeongnye* disseminated, the period in which children resided in their mother's family home shortened, weakening bonds therein. Bonds created between living relatives were of course important for ancestral memorial rites, as these entailed that one continued to faithfully serve ancestors even after their passing. Thus, as these ties weakened on the mother's side of the family, therein sincerity regarding ancestral memorial rites weakened in turn. A direct example of this can be seen in the final testament (*Jeonhumunseo*; 前後文書) of Myeongyeol Kim (金命說) of Buan (扶安), Jeolla Province (全羅道), written in 1669 (10th year in the reign of King Hyeonjong). Here, he writes, "It is customary for sons and daughters to share the burden of performing ancestral memorial rites. However, this is not in keeping with propriety, nor is it when sons-in law, or their sons, perform this ceremony. In the future, these men must not perform the ceremony, but sons shall take turns in its performance and for this, daughters shall receive only 1/3 of the inheritance."

18) Jun-Ho Song, *The History of Family Records and its Interpretation in Korea (Hanguke yisseoseoui Gagyegirokui yeoksawa geu Haeseok)*, A Study on the Social History in Joseon (Joseonsahoisayeongu), Iljogak 28-35 (1987).

已酉十一月十一日傳後家書

右文為宗家奉祀之信和社禮文既重且廣多矣若地
 田民金鈔奉祀於宗家不悉輪於家子若我國宗家之信
 懷已久輪於家子夫家方或視信則不可不重焉至於女子則
 出嫁之後便作他人之從夫之義重於人則禮亦再降教請夫
 但輕世尚士夫家奉祀輪於女婿家者信之有之而律記人之
 女婿及外孫等准請奉祀者多矣雖或再之物非精潔禮兩
 減敬及不為不行之為愈覺宗家則宜以此事重之也 先人喜也
 新賢宜已懸斷可輪於女婿外孫之家使之家世遵行父情
 禮則雖是問於男女和法前無奉養之道死後無祭之禮則禮
 以田民其男子身分女子則以田民三分之一分之後敬請信之者
 可女子及外孫等何敢有越兩相事之心乎見此文而推其意
 其善哉雖謂其異實規而不可不宗子孫承其德則則奉祀可若
 遵而輪於其曾白者有子孫乎

自奉通訓大夫平山府使命說

巨敬部用說書

通德部推說書

Figure 5. The Final Testament of Myeongyeol Kim

As marriage residence regulations changed, daughters and their descendants were excluded from the ceremony of ancestral memorial rites, with this resulting in a ranked system of inheritance. However, a shared system of ancestral memorial rites between sons was not the immediate conclusion to this process. As sons were busy with their lives, they would perform ancestral memorial rites carelessly or fail to altogether. In the end, for the preservation of these rites, there was no other method but that of entrusting it entirely to the eldest son. However, the performing of ancestral memorial rites was a great economic burden. Therefore, taking exclusive charge of this ceremony, the eldest son demanded a greater portion of the inheritance. However, the *Gyeonggukdaejeon* stipulated equalized inheritance, and this could not be easily overstepped. Accordingly, a method of evading this contradiction was necessary. In the *Gyeonggukdaejeon*, under the article entitled *Bongsa* (奉祀條), it was written that the ancestral memorial rites successor should receive 1/5 more of the inheritance. Putting this provision into action, in return for the eldest son taking charge of ancestral memorial rites, he received preferential treatment

in terms of inheritance. However, while by the late Joseon period services honoring four generations were widely practiced, the law merely stipulated “1/5,” without making this content explicit. The eldest son would inherit the *Bongsajo* (奉祀條, compensation for performance of ancestral memorial rites) from the previous four generations, as well as that of the *Bulcheonwi* (不遷位, national heroes deemed worthy of eternal worship) kept separately in family shrines. As the son took full control of the ancestral memorial rites, he monopolized the compensation for the performance of the ancestral memorial rites. Consequently, the practical regulatory power of equalized inheritance stipulated in the *Gyeonggukdaejeon* was lost.¹⁹⁾

Regarding secondary wives` sons, their status in family succession was ambiguous, while the sons of these illegitimate wives met with many legal and social restrictions beginning early in the Joseon dynasty. However, they were yet the blood relations of their fathers. In the clause on *Bongsa* of the Laws of Rituals in the *Gyeonggukdaejeon*, it was stipulated that, if a legitimate eldest son was lacking, a younger son, if not then the son of secondary wife, should succeed the responsibility of performing ancestral memorial rites, but in the clause on adoption (*Iphu*; 立後), if there was no legitimate or illegitimate eldest son, adoption was to be settled upon. According to the clause on *Bongsa*, younger sons were placed above the sons of secondary wives, while this was the opposite case in the clause on *Iphu*, where adoption was not allowed if an illegitimate son existed. The status of secondary wives was determined by the blood tie and bond of her son with his father, as well as the family`s social status and reputation (*Myeongbun*; 名分). Ultimately, until the 16th century, blood ties were highly regarded and sons of secondary wives were guaranteed a place within the family succession, whereas in later times, emphasizing family succession and reputation except in special cases, this state of affairs did not continue, and despite that which was written in the *Gyeonggukdaejeon*, even when sons of secondary wives existed, instances of adoption increased.²⁰⁾

19) Geung-Sik Jung, *The Patrilineal Succession of ancestral memorial rites and Change of Family System in the Late Joseon Society (Jongbeopjeok Jaesaseunggyewa Gajokui Byeonhwa)*, A Study on the Korean Social History (Hanguksahoisayeongu), Nanam 45-65 (2003).

20) Geung-Sik Jung, *The Secondary Sons` Rights of ancestral memorial rites in the 16th century (16segi Cheopjaui Jaesaseunggyegweon)*, 53 Society and History (Sahoewa Yeoksa), Korean Social History Association 169-181 (1998).

The adoption system (*Yangjajedo*, 養子制度) was intimately connected with family succession. In the *Gyeonggukdaejeon*, blood ties and generational succession were highly regarded, specifying that only agnate sons could be adopted to ensure the family succession. The development of adoption in the registry of first-level state examinations (*Samabangmok*; 司馬榜目) is as follows. Up until the 16th century, adoption did not proliferate. By the mid-16th century it had begun to spread and by the early 18th century the portion of adoptions in family succession had reached 10%, while now it is as high as 17%.²¹⁾

This passage reflects the tendency to attach great importance to family succession in the latter Joseon period. Underpinning the proliferations in adoption were systematic changes. Since the adoptee was recognized as equal to a real son in every way, the *Gyeonggukdaejeon* stipulated strict prerequisites, where parents on both sides of the adoption, including the mothers, as well as the Ministry of Rituals, had to provide permission. However, the *Daejeontongpyeon* required the consent of only one of the families, while the *Daejeonhoetong*, moving one step further, required that if the parents on both sides had passed away, the consent of a family elder was required. Furthermore, both of these contained reflecting customs of abnormal adoption. While only adoption of children was possible, if an appropriate candidate was lacking, a system of *Chayangja* (次養子) was employed where one could adopt someone of the same generation. Then, when he had a son, that son would be adopted and the original adoption dissolved. However, in reality, children even the age of grandchildren were adopted, where these children's deceased fathers were formally adopted (*Baekgolyangja*, 白骨養子/神主養子).

Nevertheless, those among the noble *Yangban* (兩班), otherwise known as the *Pyeongmin* (平民, common people) did not adhere to a patrilineal system of adopting sons, often adopting sons not of the paternal line and of different surnames. Here, a son adopted before the age of three was referred to as a *Suyangja* (收養子), and treated identically to a real son, while

21) Geung-Sik Jung, *The Characters of Adoptions in the 16th Century by Biographies: Analyzing the Samabongmok (Jeongjaryoe natanan 16segi Yangjaui teukjing)*, 12 No.4 Journal of International and Area Studies (Gukjejiyeokyeongu), Graduate School of International Studies the Seoul National University 108-110 (2003).

those adopted after the age of two were referred to as *Siyangja* (侍養子). While in the *Yangban* class, reflecting the clan code, it was emphasized that adoptees succeed the family head by performing the ancestral memorial rites among the common people, the principle of faithfully serving ancestors was regarded over that of family succession. Adopted sons with different surnames were outlawed during the Japanese colonial period.²²⁾

3) Inheritance

The most important assets were servants and land. Since the late Goryeo dynasty, this had all been distributed equally. In the *Gyeonggukdaejeon*, the article on private servants (*Sacheon*; 私賤) in the penal code stipulates, “Servants that are not distributed by the Parents shall be equally distributed among the children without discrimination between sons and daughters. The same principle applies for land as well.” The principles of inheritance of the *Gyeonggukdaejeon* are as follows.

① Inheritance for Blood Relations: As inheritance was the passing of family assets (*Joeob*; 祖業) from ancestors to descendants, it had to occur between blood relations. Therefore, a secondary wife, who was not connected by blood, could not inherit the assets of a legitimate mother. Moreover, wills stipulated that it was forbidden for inheriting descendants to sell-off assets to sons unconnected by blood, and if this was violated, the perpetrator would be punished for impiety and that another descendant buy back the assets.

② Ranking between Legitimate and Illegitimate Children: Illegitimate sons of common mothers received 1/6 the inheritance of legitimate sons, while illegitimate sons of mothers of low birth inherited 1/9. However, the stipulations of a will overruled this principle. This reflected the concern of a father considering the unfortunate situation of an illegitimate son.

③ The Importance of Ancestral Memorial Rites: Legitimate eldest sons received 1/5 more inheritance than other legitimate children to use in performing the ancestral memorial rites. In cases where no legitimate son

22) Geung-Sik Jung, *A Study on Legal System of Succession of Family in the Traditional Korean Society (Joseonsidaeuui Gagyegyeseungbeopje)*, 51 No.2 Seoul Law Journal, The Law Research Institute Seoul National University 69-93 (2010).

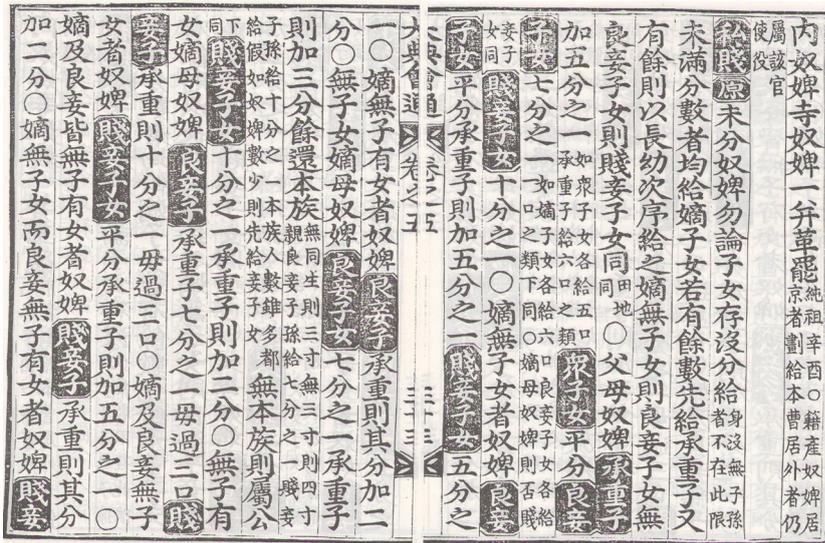


Figure 6. The articles on private servants in the *Daejeonhoetong*, The Equal inheritance

existed, an illegitimate son could receive this inheritance, as well as a fixed portion of the assets of the legitimate wife, though they were unrelated by blood. Moreover, the son assuming the role of performing the ancestral memorial rites inherited the family shrine.²³⁾

④ The Scope for Defining Heirs: Where children did not exist, relations up to four times removed, in order of younger brothers or sisters, nephews and nieces, second cousins, uncles, and cousins, could inherit. If none of these existed, the inheritance came under the jurisdiction of the state, while the ancestral memorial rituals for the deceased was managed and observed by the village.

According to these principles, shares of inheritance for each heir were stipulated in detail. Furthermore, via a will, parents, grandparents, and grandparents on the mother’s side could distribute their assets within their own lifetimes. It was particularly customary to issue an inheritance to one’s children after marriage, a fact that was also taken into consideration when

23) Moon Sook-Ja, A Study on Heritage and Family in the Joseon Dynasty (Joseonsidae Jaesangsangsokgwa Gajok), Gyeonginmunhwasa 174-178 (2004).



Figure 7. Madame Han’s Will at 1654 (婦人韓氏分財記): Example of Equal Inheritance

the rest of the assets were distributed upon the parents’ death.²⁴⁾

After the mid-16th century, in the event of the death of a childless mother, the fact that descendants with no blood ties to her or her husband could inherit her assets was problematic. At first, while the right of the husband to inherit was denied, ultimately this practice gave way to recognizing the right of inheritance based on the practice of the ancestral memorial rites.

Equal inheritance was not something formalized, but simply something practiced. In distributing inheritance, servants’ sex, age and health, as well as the land’s total area, fertility and distance, all had to be considered. Equalized distribution was based on the uxori-local system of marriage and fostered vigilance between siblings and the preservation of family assets, while also bearing relation to the policies of an aspiring centralized national government seeking to curb the power of local governors. In the late Joseon period, as the collapse of the servant system as well as war led to the impoverishment of the land, the system of equalized distribution collapsed, giving way to a system favoring the eldest son. This transformation progressed in the following ways. First, the eldest son directly managed the *Bongsajo* (奉祀條), thus effectively inheriting it. Second, while the eldest son

24) Byeong-Ho Park, *op.cit.*, 274-278.

was heir to the inheritance passed down by his ancestors, that which the parents accumulated alone was distributed equally. Third, land in the vicinity was passed on to the son and more distant land was passed on to the daughter, emphasizing the patrilineal succession group.

By the late Joseon dynasty, assets had ultimately depleted in scale, whereby the eldest son's preferential treatment in inheritance turned to monopoly. This was not something that took place only within patterns of inheritance, but which was interconnected with changes in the whole of Joseon society taking place at that time.

4) *The Transformation of the Family*

The transformation of Joseon society was brought about by two periods of war with Japan and the Qing, and King Injo's coup d'état of in 1623 (仁祖反正). While wars ushered in the collapse of rural society, King Injo's coup strengthened the doctrine of justification. Following the wars, with those left alive attributing their survival to the virtue of their ancestors, they intended to reestablish a rural society revolving around family ties. As well, as war had seen servants flee and the land impoverished, the economic basis for equalized inheritance between men and women was lost.

While the Confucian scholars attempted to bring their ideals to the political centre, they found themselves confounded by *Sahwa* (士禍, conflict between scholarly factions) in the 16th century and returned to the country to cultivate their foundations. These men, in an attempt to realize the elevation of the status of the *Ibhyangjo* (入鄉祖, ancestors who settled down in countryside community), worked to gain political control therein. The virtue of the *Yangban* lay in the '*Bongjaesa* (performance of ancestral rites), *Jeopbingaek* (neighbourly hospitality; 奉祭祀接賓客), or the performance of ancestral memorial rites and neighbourly hospitality, but these were impossible without an economic basis. Just as the proverb that says, '9 generations of only sons, 9 generations rich (9代獨子 9代萬石君),' in these conditions, the destitution of assets caused by equal inheritance distribution could no longer be sustained. Owing to a Confucian conception of justice, ancestor worship became highly regarded and the discrimination between legitimate and illegitimate children more severe, while the Family Rituals of Zhu Xi, based on Confucian ideals, were propagated throughout society.

Under these conditions, the semi-*chinyeongnye* was rapidly diffused,

beginning the gradual formation of a patrilineal society based on the Family Rituals of Zhu Xi. As a result, daughters were excluded from the succession of the ancestral memorial rites, while receiving a ranked inheritance in turn. Moreover, sons given a greater share of the inheritance took turns performing the ancestral memorial rites. In the countryside, as the *Iphyangjo* ascended in status, so too did ancestral memorial rites and, accordingly, eldest legitimate grandsons. Nonetheless, an economic basis was necessary for the perpetuity of ancestral memorial rites, which was to be greater inheritance given to the eldest son, owing to his performance of the ancestral memorial rites. As assets were depleted, daughters were wholly excluded from the inheritance while younger sons were increasingly discriminated against.

Although there were differences according to one's geographical location and class, if one wished to categorize transformations in the family during Joseon, it would go something like this: The sons and daughters' rotational performance in ancestral memorial rites (諸子女輪廻奉祀) / *Seoryubugahon* (壻留婦家昏) / Equalized inheritance among them (男女均分財產相續) → The sons' rotational performance in the rites (諸子輪廻奉祀) / the semi-*chinyeongnye* (半親迎禮) / Preferential treatment for sons pertaining to inheritance (男女差等財產相續) → The eldest son's performance in the rites (長者單獨奉祀) / the semi-*chinyeongnye* (半親迎禮) / Preferential treatment for the eldest son pertaining to inheritance (長者優待財產相續). The symptoms of this transformation were evident in the mid 16th century and could be said to have proliferated across society as a whole by the end of the 19th century.²⁵⁾ The Family Head system (*Hojujedo*, 戶主制度) in the Korean Civil Code (enacted in 1960), influenced by the Japanese colonial period, confirmed these customs. After undergoing piecemeal amendments, the Family Head system was abolished in 2005, as Hunbeob jaepanso (Constitutional Court) declared it incongruent with constitutionally guaranteed gender equality (effective 2008).²⁶⁾

25) Geung-Sik Jung, *The Patrilineal Succession of ancestral memorial rites and Change of Family System in the Late Joseon Society (Jongbeopjeok Jaesaseunggyewa Gajokui Byeonhwa)*, A Study on the Korean Social History (Hanguksahoisayeongu), Nanam 45-65 (2003).

26) Geung-Sik Jung, *The Transformation of Customary Laws in the Colonial Period and the Korean Family Laws (Sikminjigi Gwanseupheopui Hyeongseonggwa Hangukgajokbeop)*, 40 Korean Journal of Legal History (Beopsahakyeongu), The Korean Society of Legal History 1-12

3. *The Litigation System*

In Joseon society, under the auspices of Confucianism, it is thought that litigation was uncommon. However, spanning the period between the late Goryeo and early Joseon periods, litigation was quite frequent, while politicians even attributed litigation as one of the factors contributing to the downfall of the Goryeo dynasty. Thus, at the advent of the Joseon period, the ideal of a society without litigation was pursued, although since in reality this impossible, a rational legal system was constructed to resolve disputes.

1) *Judicial System*

The judicial system was modified along with the provincial administration system. While the county magistrate (守令) handled all civil cases and incidents involving lashings, the governor (觀察使) took charge of civil cases pertaining to the court of appeals, as well as those of flogging and banishment. The Ministry of Justice (刑曹) handled the death penalty and the final court of appeals, though the decision of the king was ultimate. Especially in the latter Joseon period, instances of the common people pleading their case directly to the king by way of *Sangeon* (上言, written appeals to the king) or *Gyeokjaeng* (擊錚, the act of standing by the road and striking a gong to catch the attention of the king as he passed) dramatically increased. The Administration Officer office also served as the Judicial Officer, and while in the *Gwageo* (科舉, highest-level state examination to recruit government officials) there was a section on law, those who passed this section only performed as assistants to the county magistrate or provincial governors. Early on, the system of appeals was completed and for the realization of a society without litigation, gratuitous litigation was strongly suppressed. Nevertheless, in reality litigation was ceaseless. Particularly, those who committed *Birihosong* (非理好訟), meaning the submission of cases to multiple venues, were punished with *Jeongasabyeon* (全家徙邊), ranked just below the death penalty, they and their families

were banished to the borderlands or were flogged 100 times and banished to a distance of 3000 *Li* (里). Despite state policy, litigation remained frequent even in the late Joseon policy, and this tendency yet continues today.

In early Joseon, a policy forbidding litigation was enacted for the mitigation of conflict. Be that as it was, as all litigation could not be outlawed, it was stipulated in the *Gyeonggukdaejeon* that there be a five-year statute of limitations on appeals. Although, important cases, such as those concerned with the violation of property, were treated as exceptions. By the latter half of the Joseon period, this statute was extended to thirty or sixty years.

There were two sides to the suppression of litigation. On the one hand, it prevented conflict to allow for the realization of a stable society (stability of trade), while on the other, genuinely rightful people could be wronged (injustice; 冤抑). National policy danced between these two ideals, and with the latter ultimately winning out, this served to compound the problem of frequent litigation.

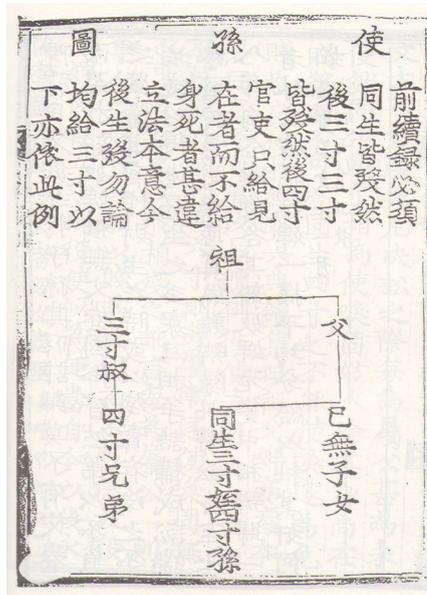


Figure 8. The Scope for Defining Heirs

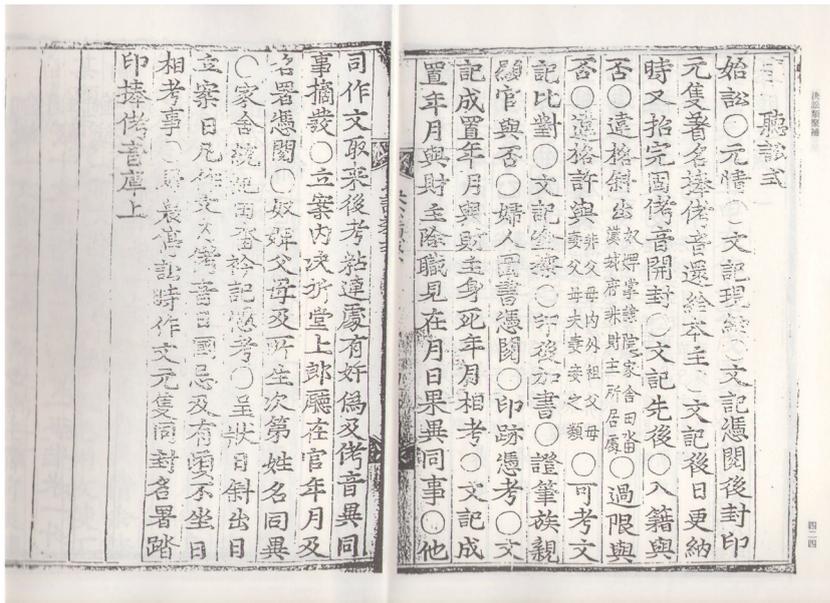


Figure 9. Cheongsosik in the Sasongyuchui & Gyeolsongyuchuibo

2) Privately Published Legal Books and Groups of Lawyers

The county magistrates handled various affairs and, among these, the processing of litigation was important. However, while state examinations contained sections pertaining to the likes of the *Gyeonggukdaejeon*, the county magistrates were generally ignorant of the law, and this led to trouble when they held trials. As well, at this time, the legal codes were quite various, based on such documents as the official Code, stemming from the *Gyeonggukdaejeon*, the Ming Code and various *Sugyo* decreed by the King. Accordingly, private practical legal books which compiled only those legal provisions necessary for the running of an actual trial, were published in the second half of the 16th century. It is estimated that there are currently six kinds of these books from the 16th century. Therein, only the *Sasongyuchui* (詞訟類聚) has a known editor and year of publishing, while the rest are of unknown authorship and are located in Japan. The *Sasongyuchui*, published in 1585 (18th year in the reign of King Seonjo) was first edited by Baekgan Kim (金佰幹) and then later by his son, Taejeong Kim (金泰廷), the governor of Jeolla province (全羅道). This book deals with stipulations regarding civil suits procedures. Also within the book, are

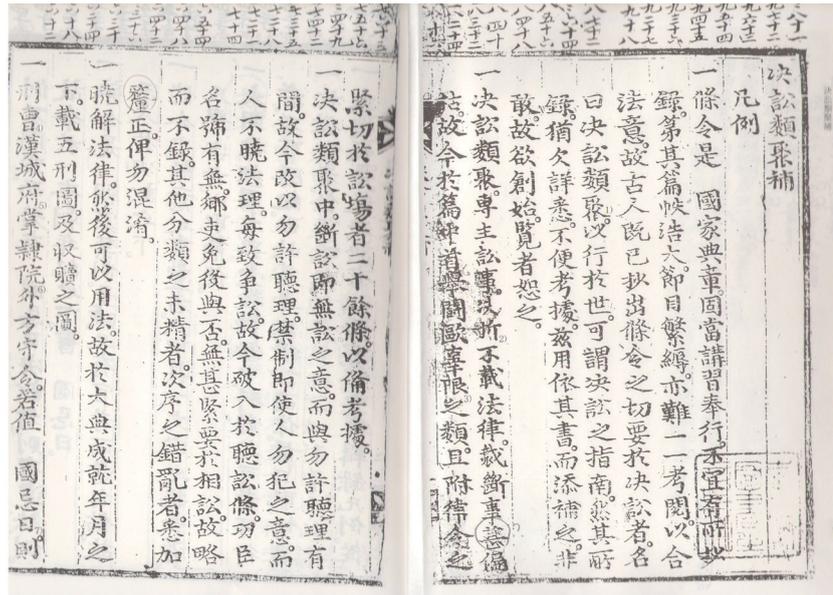


Figure 10. Gyeolsongyuchuibo Explanatory Notes

appendices including the *Cheongsongsik* (聽訟式), which briefly arranged trial proceedings and discriminating methods of forged documents, and the *Sasando* (使孫圖), which explained the scope and sequence for the selection of heirs. Before its publication, this book was also distributed in manuscript form.

As the *Sasongyuchui* largely dealt with civil law and procedures, it was lacking in terms of regulations pertaining to criminal litigation. To complete this deficiency, the *Gyeolsongyuchuibo* (決訟類聚補) was published in the mid 17th century. The contents of this book were much more abundant, expanding the original from 24 to 42 sections, moving the appendices to the front of the book and also adding appendices to the back unrelated to trial procedures, such as the 'Methods For Calculating Land-surface Area (田算法)', which was practically useful for county magistrates. Notably, within the *Gyeolsongyuchuibo*, the clause entitled, 'Suppress Litigation (斷訟, Dansong)', from the original *Sasongyuchui*, was replaced with the article, 'Do not Accept Litigation (勿許聽理, Mulheocheongni)', which reflected changes in state policy regarding litigation. Representative of late Joseon dynasty legal books, many of the *Gyeolsongyuchuibo* still remain.



Figure 11. Yuseopilji Explanatory Notes

The civil suits of the Joseon period were thoroughly documented and, when someone wished to plead a case, the filing of a lawsuit was strictly required. This entailed that one draw up a petition (所志, *Soji*). As the content and style of *Soji* were unfamiliar, its preparation was difficult even for the *Yangban* class, let alone for the common people. Responding to this needs, the *Yuseopilji* (儒胥必知; a book which *Yangban and Seori* must know), consisting of legal formulae, was published in the late 18th century. It is conjectured that its publication took place after that of the *Daejeontongpyeon* in 1785 (9th year in the reign of King Jeongjo) and before 1844 (10th year in the reign of Heonjong), and while its publishers are unknown, it is suspected that they were low-level administration officials (胥吏, *Seori*).

Whereas legal books primarily existed on behalf of implementing administration and governance, as its name suggests, the *Yuseopilji*, a book responding to the common people’s demands for laws, reflected their strong sense of justice and their pride in interacting with the law at a working-level. While its contents are various, it consists of such materials as the *Sangeon* and *Gyeokjaeng* of the *Yangban*, by which they made appeals to the king, the *Soji*, by which the common people made appeals to public offices, and plans corresponding to sentencing. After publishing, it was continually supplemented so that now over 100 copies remain. Finally,

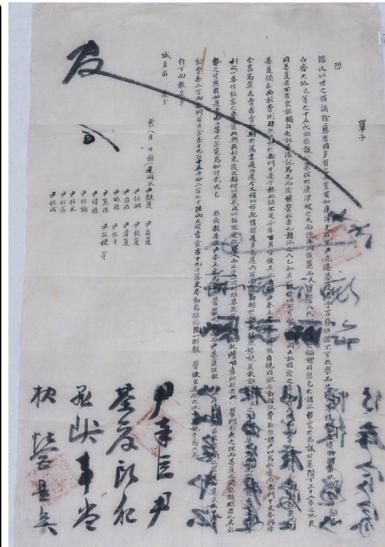
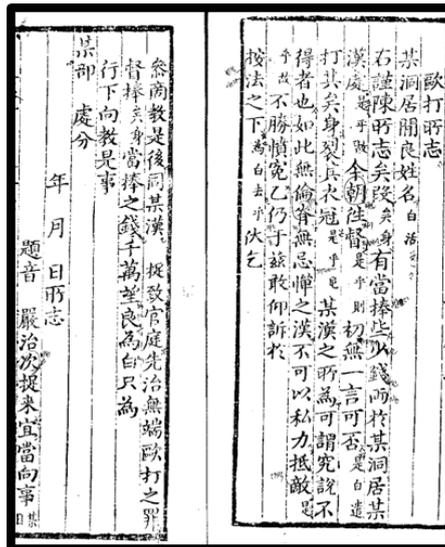


Figure 12. a Petition (Soji) in the Yuseopilji

Figure 13. a Sample of Soji

supplemented with new laws and forms (新式儒胥必知, New Yuseopilji), these was published following the Gabo reforms in 1894.²⁷

Although various policies were enacted toward realizing a society without litigation, it only increased and accumulated, as reflected in this lamentation during arbitration, “The greed for litigation is the custom of the people.” The foundation for this society rife with litigation was the people’s sense of ownership, based on a strong sense of justice and rights. Although the common people asserted their rights and resolved disputes through litigation, mediation or arbitration by family groups or regional cooperative organizations was all but nonexistent. Moreover, there was the force of a state pursuing strongly centralized power, but the existence of lawyers advocating the rights of the common people made this situation possible.

Supporting the litigation of the common people, the Woejibu (外知部) were a cause of great distress in the governance of the late 15th century. The title of Woejibu comes from the Dogwanjibu (都官知部), another name for the

27) Geung-Sik Jung, *Joseon as Nation of Litigation, its Solution (Sosongui Nara Joseon, Geu Haegyeol Bangbeop)*, Joseon Practical Books (Silyongseoro Yingneun Joseon), Geul Hangari 144-179 (2013).

Jangyeweon, which was in charge of servant litigation. A *Piljib* (筆執), who prepared documents, was required for trade in goods, as fixed contract standards had to be written clearly, as well as for preserving the strength of evidence. It is possible that the *Piljib* developed into these professionals. The *Weojibu* would hang around the vicinity of the *Jangyeweon* and ghostwrite accusations for visiting parties. Little by little, they would assist in litigation, teach the party a case strategy and even go so far as to instigate greater litigation. In the arbitration, *Weojibu* were seen as the cause of the enormous extent of litigation. Therefore, in order to suppress them, they were dealt the second severest punishment of banishment, while those reporting the *Weojibu* received rewards as if they had reported burglary. The existence of these *Weojibu* was not acknowledged at the state level, so they are not visible in the historical records after 1607 (40th year in the reign of King Seonjo) and are absent in the legal codes as well.

Nonetheless, simply because the term '*Weojibu*' disappeared does not mean their work did. After the 17th century, the *Weojibu* continued to exist as "those who work in litigation" or "those pursuing profits while living in Seoul." In the perspective of the state, these descendants of the *Weojibu* were a nuisance, but according to the common people, they were valued as those that restored and realized their rights and resolved injustice.²⁸⁾ With the assistance of these advisors, the common people were able to consistently assert their rights through litigation, a state of affairs that has survived into contemporary society.²⁹⁾

IV. Conclusion

In this paper, the legal codification and consolidation, legal documents and family and litigation systems of the Joseon period were briefly examined. In a summary of this content, one may observe their characteristics and changes.

On the one hand, Joseon legal institutions could be said to be based on a

28) They were officially recognized in the 1895 Law of Court Organization and 1905 Attorney-at-Law Act. Although, in 1895 they were referred to as "*Daeonin* (代言人)".

29) Byeong-Ho Park, *op.cit.*, 164-166.

system of compiling written laws, but practically speaking, they were based on a system of legal precedents. This was the practice of legal precedents confirming existing conventions, referred to as *Yangbeobmiui*. While matters pertaining to everyday life were resolved on a case-by-case basis, these judgements were known as *Sugyo*, reflecting the final approval of the king, which continued to exercise regulatory power even after their recording in the legal codes.

Codification style reflected the Principle of Respect for the Founding Fathers, whereby laws that had lost effectiveness were not simply thrown away, but endowed with annotations labeling them as abolished or amended. As it strived to fulfill Confucian ideals, Joseon society left little room for its own inherent characteristics. However, with high regard for the efficacy of the law, it recorded customs in the legal codes and valued them as the intentions of the founding fathers. While Joseon law was heavily influenced by the Chinese, this principle, while acting as a preventative mechanism against the harmful effects of careless lawmaking, served to maintain a system of law unique to Joseon by preserving laws derived from its customs and traditions.

The intrinsic character of the family system was diluted with the procession of history, and one could say the influence of the Chinese became overwhelmingly powerful. Forming the basis for this transformation, were the propagation of Neo-Confucianism and the implementation of the Zhuxi's Family Rituals. Thus, the gender equality of early Joseon gave way to patriarchy, with Korean families eventually becoming more Chinese than the Chinese. With this family system becoming so engrained as to be treated as inherent tradition, it only strengthened over the course of the colonial period, a fact confirmed in the Family Head system delineated in the Civil Code of 1960.

Although a society without litigation was pursued in order to create social harmony, this was not to be. The state conceived a number of preventative measures, but they all failed. This was due to the Joseon people's strong sense of rights and entitlement. Legal advisors, though encountering strong oppression and repudiation from the state, ceaselessly protected the rights of the common people, and continued to survive. Ultimately, a society without litigation was impossible, leaving no other course but the rational pursuit of conflict resolution.
