

The Case Study for the Legislation of Criminal Laws in the Early Joseon Dynasty*

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Abstract

In this paper, I discuss the legislation of criminal laws in the early Joseon dynasty through a case study. It was the homicide case between two brothers in 1478 (the 9th year of King Seongjong's reign). Despite the simplicity of the case, almost 40 higher officials in the royal court participated in the discussion of the case. The reason why the higher officials took the case seriously was that the older brother was a son by a concubine and the younger was a son by the legal wife. There was a deep and rigorous distinction between sons by the legal wife and sons by concubines in the Joseon dynasty. The higher officials thought that the social status order by birth legitimacy was not reflected adequately in The Great Ming Code, the basic criminal code in the Joseon dynasty. They reinterpreted the case from various perspectives in order to establish the firm social status order between sons by the legal wife and sons by concubines. Not only the number of higher officials participating in the discussion, but also the different legal opinions presented in the royal presence exemplify the process and the reasoning of making new criminal laws in the early Joseon dynasty.

KEY WORDS: Social status order, Birth legitimacy, Birth order, Sons by the legal wife, Sons by concubines, Royal edicts, *The Great Ming Code*, *Gyeonggukdaejeon* (The Great Code of Administration), *Sokdaejeon* (Supplement to the Great Code), Analogical application of criminal articles

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I. Introduction

There was a homicide case during the period of King Seongjong (成宗)'s reign (1470~1494) in the Joseon (朝鮮) dynasty. The case was quite simple. A fight broke out between two brothers and an older brother beat his younger brother to death. Despite the simplicity of the case, almost 40 higher officials in the royal court participated in the discussion of the case. What made higher officials in the royal court take this straightforward case so seriously? The main reason was that the older brother was a son by a concubine and the younger was a son by the legal wife. There was a deep and rigorous distinction between sons by the legal wife and sons by concubines in the Joseon dynasty.¹⁾ There was a distinction between the legal wife and concubines in Ming (明) China as well as Joseon Korea.²⁾ However, the distinction by birth legitimacy (嫡庶) was quite peculiar in the Joseon dynasty. If one of his ancestors, for example, was a son by concubine, he could hold no public office in the Joseon dynasty.³⁾ Such distinction by birth legitimacy was codified in *Gyeonggukdaejeon* (經國大典: the Great Code of Administration) of the Joseon dynasty. It stipulated that sons and grandsons by concubines shall be prohibited from taking the state examination for recruiting ranking officials.⁴⁾ The ruling class in the Joseon dynasty made the strict distinction by birth legitimacy in order to keep their

1) For more information on this content, see Lee Jongil, *Joseonsidae Seoelsinbun Byeondongsa Yeongu* [Study on the evolution of social status for the Suh-er during the Yi dynasty] (1988) (Ph.D. dissertation, Dongguk University Graduate School); Ji Seungjong, *Joseonjeongiui Seoelsinbun* [*The status of sons by concubines in the early Joseon dynasty*], 27 SAHOEWAYEOCSA [SOCIETY AND HISTORY] (1991); LEE SEONGMU, JOSEONCHOGI YANGBANYEONGU [A STUDY OF YANGBAN IN THE EARLY JOSEON DYNASTY] (Hangukhaksuljeongbo, 1995).

2) There was a discussion for a distinction between the legal wife and concubines in 1413(the 13th year of King Taejong's reign): See TAEJONGSILLOK [THE ANNALS OF KING TAEJONG], Vol. 25, Mar. 10, 1413; for the annals of the Joseon dynasty, I refer to this website: <http://sillok.history.go.kr>.

3) It was discussed in the royal presence in 1415(the 15th year of King Taejong's reign). TAEJONGSILLOK [THE ANNALS OF KING TAEJONG], Vol. 29, June 25, 1415.

4) See GYEONGGUKDAEJEON [THE GREAT CODE OF ADMINISTRATION], code on culture and education, article on all sorts of state examination. 經國大典 禮典 [諸科] 庶孽子孫 勿許赴文科生員進士試.

exclusive power.⁵⁾

Thus King Seongjong and higher officials in the royal court had the idea that articles in *The Great Ming Code* (大明律)⁶⁾ could not be applied directly to criminal cases between sons by the legal wife and sons by concubines. They thought that the social status order by birth legitimacy was not reflected adequately in *The Great Ming Code*. The founder of the Joseon dynasty, King Taejo (太祖) declared *The Great Ming Code* as the basic criminal code for the new state in his inaugural edict (即位教書).⁷⁾ However, articles of *The Great Ming Code* were not applied to the criminal cases without modification because of the social and cultural difference between Ming China and Joseon Korea. It took almost 100 years before judicial officials comprehensively applied them to criminal cases in the Joseon dynasty.⁸⁾ This case mirrors how *The Great Ming Code* was accepted in the early Joseon dynasty. King Seongjong and higher officials in the royal court reinterpreted the case from various perspectives in order to establish the firm social status order between sons by the legal wife and sons by concubines. Their view was based on the analogical application of articles in *The Great Ming Code* as well as the necessity of making a new criminal law.⁹⁾ Not only the number of higher officials participating in the discussion, but also the different legal opinions presented in the royal presence exemplify the process and the reasoning of making new criminal laws in the early period of the Joseon dynasty.

5) For more information on this content, see LEE SEONGMU, *supra* note 1, 53-98.

6) For the translation of THE GREAT MING CODE and the serial number of articles, I refer to THE GREAT MING CODE: TRANSLATED AND INTRODUCED BY JIANG YONGLIN. Its translation is based on the text of The Great Ming Code contained in, GAO JU (高舉), ed., DA MINGLÜ JIJIE FULI (大明律集解附例) [THE GREAT MING CODE WITH COMMENTARIES ATTACHED BY REGULATIONS], originally published during the Wanli (萬曆) reign (1573~1619).

7) TAEJOSILLOK [THE ANNALS OF KING TAEJO], Vol. 1, July 28, 1392.

8) For more information on this content, see CHO JIMAN, JOSEONSIDAEUI HYEONGSABEOB [CRIMINAL LAW IN THE JOSEON DYNASTY] (Gyeonginmunhwasa, 2007).

9) For more information on this content, see Kim Daehong, Joseonchogi Hyeongsabeobsang Inyulbibue Gwanhan Yeongu [Analogical inference in Confucian jurisprudence: a study of inyulbibu (引律比附) in the early Joseon dynasty] (2012) (LL.D. dissertation, Seoul National University Graduate School).

II. A legal issue of the case

In 1478 (the 9th year of King Seongjong's reign), the former Jeonra (全羅) provincial governor Lee Geukjeung (李克增) reported a homicide case to King Seongjong.¹⁰ In his jurisdiction, a man whose name was Hwang Hyosan (黃孝山) had killed his younger brother whose name was Hwang Igyeong (黃以經). The governor Lee had made the ruling on the case by applying to the accused Hwang the article of striking superior or older relatives of the second mourning degree in *The Great Ming Code*.¹¹ According to this article, the penalty was more severe when a younger brother killed his older brother than when an older brother killed his young brother. The governor Lee was not still convinced that the punishment in accordance with *The Great Ming Code* was sufficient for the accused Hwang, since, although an older brother, he was a son by a concubine.

The former governor Lee pointed out to King Seongjong that there was no article applicable to a homicide between sons by the legal wife and by concubines. The Minister of Culture and Education (禮曹判書) Lee Seungso (李承召) told King Seongjong that the accused Hwang had already been punished, so another penalty could not be imposed on him, but advised King Seongjong to make a new law in order to establish firmly a social status order between sons by the legal wife and by concubines. King Seongjong ordered the council in the royal presence to be called to order for discussion by higher officials.

King Taejo's declaration on *The Great Ming Code* was codified in *Gyeonggukdaejeon* (the Great Code of Administration)¹² and thus it was applied generally to criminal cases. According to it, a lower ranking person's crime against a higher ranking person was punished more

10) SEONGJONGSILLOK [THE ANNALS OF KING SEONGJONG], Vol. 94, July 16, 1478.

11) THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 341 [Striking Superior or Older Relatives of the Second Mourning Degree]. "In all cases where older brothers or sisters strike and kill younger brothers or sisters, they shall be punished by 100 strokes of beating with heavy stick and penal servitude for three years." 大明律 刑律 鬪毆 §341 [毆莽親尊長] 其兄姊毆殺弟妹 杖一百徒三年.

12) See GYEONGGUKDAEJEON [THE GREAT CODE OF ADMINISTRATION], code on penal affairs, article on the application of the code. 經國大典 刑典 [用律] 用大明律.

severely than a higher ranking person's crime against a lower ranking person. The punishment, for example, was penal servitude for three years plus 100 strokes of beating with the heavy stick when an older brother struck and killed his younger brother, whereas it was decapitation when a younger brother beat his older brother to death.¹³⁾

The accused Hwang Hyosan was older than the victim Hwang Igyeong. Thus he had the higher social status than his younger brother in light of his birth order. However, he was the son by a concubine and his younger brother was the son by the legal wife. As noted previously, sons by concubines had a lower social status than sons by the legal wife in the Joseon dynasty. The accused Hwang had a contradictory position against his younger brother. He was in a higher position as the older brother, whereas he was in a lower position as the son by a concubine.

This was the main reason that the former governor Lee asked King Seongjong to re-examine the case. *The Great Ming Code* stipulated the graded punishments for crimes between older brothers and younger brothers, but not for crimes between sons by the legal wife and sons by concubines. The social status order between sons by the legal wife and by concubines was not considered a serious factor in *The Great Ming Code*. Thus the legal issue of the Hwang Hyosan case was clear: which should have legal priority in the Joseon dynasty, social status by birth order or social status by birth legitimacy?

III. Legal discussion of the case

1. *The legal opinions of higher officials in the royal court*

Several records about the Hwang Hyosan case are found in articles of the annals of the Joseon dynasty. According to them, King Seongjong thought that it was necessary for the higher officials in the royal court to discuss the case. The council in the royal presence took place by the king's

13) See THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 341 [Striking Superior or Older Relatives of the Second Mourning Degree].

order on July 20, 1478.¹⁴⁾ About forty higher officials, including the Prime Minister (領議政) and the Ministers of the Six Boards of the Government (六曹判書), discussed the case and expressed their legal opinions. King Seongjong directed the Ministry of Justice (刑曹) to make a new criminal law in the wake of the council held in the royal presence.¹⁵⁾ The Ministry of Justice summed up the result of the council and submitted the final bill to King Seongjong about three weeks later.¹⁶⁾

The deliberations of the council in the royal presence were composed of two parts. The agenda of the first part was concerned with criminal cases where an older brother by a concubine killed a younger brother by the legal wife, and the agenda of the second part was about criminal cases where a younger brother by the legal wife killed an older brother by a concubine. King Seongjong felt that it was better to expand agenda of the discussion in order to make social status order between sons by the legal wife and by concubines even clearer. Thus he asked higher officials in the royal court to discuss the case in reverse.

In connection with the first agenda, thirty-nine higher officials participated in the discussion. They arrayed themselves into two groups with different legal opinions. Sixteen higher officials insisted on making a new law, whereas twenty-three higher officials insisted on applying the articles of *The Great Ming Code* as punishment for an older brother by a concubine who killed a younger brother by the legal wife. Twenty-three higher officials agreed on the point that there was no appropriate article in *The Great Ming Code* directly applicable to the crimes like the Hwang Hyosan case. However, they insisted on punishing criminals through citation of articles in *the Great Ming Code* analogically close to the crimes.

As for the second agenda, thirty-seven higher officials participated in the discussion and they also split into two groups. The second agenda item King Seongjong presented to higher officials in the royal court was concerned with the appropriate punishment for a younger brother by the legal wife who killed an older brother by a concubine. Twenty-eight higher officials insisted on the same punishment for a younger brother by the legal

14) SEONGJONGSILLOK [THE ANNALS OF KING SEONGJONG], Vol. 94, July 20, 1478.

15) SEONGJONGSILLOK [THE ANNALS OF KING SEONGJONG], Vol. 94, July 21, 1478.

16) SEONGJONGSILLOK [THE ANNALS OF KING SEONGJONG], Vol. 95, Aug. 9, 1478.

Table 1. Higher officials' legal opinions and their official positions, etc.

Legal opinion for the 1 st agenda	Official position	Official rank	Name (Age)	Legal opinion for the 2 nd agenda
To make a new law	Gyeongyeon Yeongsa (經筵 領事)	Senior 1 st	Kim Gukgwang (63)	To impose the same punishment
	Gyeongyeon Yeongsa (經筵 領事)	Senior 1 st	No Sasin (51)	
	Jungchubu Yeongsa (中樞府 領事)	Senior 1 st	Yun Pilsang (51)	
	Uijeongbu Yeonguijeong (議政府 領議政)	Senior 1 st	Jeong Chanson (76)	Not to impose the same punishment
	Uijeongbu Jwuijeong (議政府 左議政)	Senior 1 st	Sim Hoe (60)	
	Gyeongyeon Yeongsa (經筵 領事)	Senior 1 st	Han Myeonghoe (63)	
	Gyeongyeon Yeongsa (經筵 領事)	Senior 1 st	Yun Saheun (56)	
	Gyeongyeon Jisa (經筵 知事)	Senior 2 nd	Lee Geukbae (56)	
	Saheonbu Daesaheon (司憲府 大司憲)	Junior 2 nd	Kim Yu (58)	
	Saganwon Daesagan (司諫院 大司諫)	Senior 3 rd	An Gwanhu (unclear)	To impose the same punishment
	Saheonbu Janglyeong (司憲府 掌令)	Senior 4 th	Lim Sugyeong (unclear)	
	Saganwon Heonnap (司諫院 獻納)	Senior 5 th	Choe Ban (unclear)	
	Saheonbu Jipyong (司憲府 持平)	Senior 5 th	An Seon (38)	
	Saheonbu Jipyong (司憲府 持平)	Senior 5 th	Lee Segwang (unclear)	
	Saganwon Jeongeon (司諫院 正言)	Senior 6 th	Seong Damnyeon (unclear)	
	Saganwon Jeongeon (司諫院 正言)	Senior 6 th	Yu Inho (unclear)	

Table 1. (continued)

Legal opinion for the 1 st agenda	Official position	Official rank	Name (Age)	Legal opinion for the 2 nd agenda
Not to make a new law	Uijeongbu Jwachanseong (議政府 左贊成)	Junior 1 st	Hong Eung (50)	To impose the same punishment
	Ijo Panseo (吏曹 判書)	Senior 2 nd	Gang Huimaeng (54)	
	Hanseongbu Panyun (漢城府 判尹)	Senior 2 nd	Seo Geojeong (58)	
To apply §336 in <i>The Great Ming Code</i>	Yejo Panseo (禮曹 判書)	Senior 2 nd	Lee Seungso (56)	Not to impose the same punishment
	Ijo Chamui (吏曹 參議)	Senior 3 rd	Kim Jajeong (unclear)	To impose the same punishment
	Hojo Chamui (戶曹 參議)	Senior 3 rd	Jeong Eun (unclear)	
	Yejo chamui (禮曹 參議)	Senior 3 rd	Lee Maenghyeon (42)	
	Byeongjo Chamui (兵曹 參議)	Senior 3 rd	Lee Gilbo (unclear)	
	Gongjo Chamui (工曹 參議)	Senior 3 rd	Kim Geukyu (42)	(unclear)
	Byeongjo Chamji (兵曹 參知)	Senior 3 rd	Bak Yangsin (unclear)	
	Hyeongjo Chamui (刑曹 參議)	Senior 3 rd	Gang Japyeong (48)	
To apply §341 in <i>The Great Ming Code</i>	Uijeongbu Uchanseong (議政府 右贊成)	Junior 1 st	Eo Yuso (44)	To impose the same punishment
	Uijeongbu Jwachamchan (議政府 左參贊)	Senior 2 nd	Heo Jong (44)	
	Gongjo Panseo (工曹 判書)	Senior 2 nd	Yang Seongji (63)	
To apply §313 in <i>The Great Ming Code</i>	Ijo Champan (吏曹 參判)	Junior 2 nd	Sin Jeong (unclear)	To impose the same punishment

Table 1. (continued)

Legal opinion for the 1 st agenda	Official position	Official rank	Name (Age)	Legal opinion for the 2 nd agenda
	Byeongjo Champan (兵曹 參判)	Junior 2 nd	Kim Sunmyeong (43)	
	Hyeongjo Champan (刑曹 參判)	Junior 2 nd	Lee Geukgyun (41)	
	Hanseongbu Jwayun (漢城府 左尹)	Junior 2 nd	Yun Ho (54)	
	Seungjeongwon Doseungji (承政院 都承旨)	Senior 3 rd	Sin Jun (34)	
	(unclear)	(unclear)	Yu Ji (unclear)	
	Hojo Panseo (戶曹 判書)	Senior 2 nd	Yun Heum (unclear)	
	Byeongjo Panseo (兵曹 判書)	Senior 2 nd	Eo Segong (46)	Not to impose the same punishment
	Ijo Panseo (吏曹 判書)	Senior 2 nd	Yun Gyegyoom (36)	

* I refer to the Annals of the Joseon dynasty and *Gyeonggukdaejeon* (the Great Code of Administration) for higher officials' official positions and their ranks.

wife, whereas nine higher officials insisted on the less severe punishment. Higher officials who insisted on the same punishment considered social status by the birth order and that by the birth legitimacy equally in the examination of offenses.

Most of the higher officials participating in the council in the royal presence had their official ranks from the first to the third degree, except the judicial officials who had the lower official ranks from the second to the sixth degree. The officials from the judicial or the auditing agencies had the privilege of discussing important state affairs with the higher officials in the Joseon dynasty. The highest officials, such as the Prime Minister and the ministers of each government department, freely expressed their legal opinions in the council. Other higher officials showed some similarity in their legal opinions. It appeared that they had meetings, shared opinions

and mediated differences in advance of the council in the royal presence. It eventuated that similar opinions were held among higher officials at the same degree of the official rank but not among those in the same government department.

2. *Whether or not to make a new law*

All higher officials participating in the council in the royal presence had the same legal opinion that the penalty that the governor Lee Geukjeung imposed on the accused Hwang Hyosan was not sufficiently severe. They were worried that the social status order in the Joseon dynasty would be seriously damaged if the Hwang Hyosan case was set as the precedent for the crimes between sons by the legal wife and by concubines.

However, they had the different legal opinions on how to solve the legal issue of the case. Sixteen higher officials tried to persuade King Seongjong to make a new law. They justified their argument with the rationale as follows. First, the strict distinction between sons by the legal wife and by concubines was very significant in the Joseon dynasty. Second, the articles in *The Great Ming Code* were codified without considering the social status order by birth legitimacy. Thus it was inevitable that a new law must be made for the crimes between sons by the legal wife and by concubines in the Joseon dynasty.

Twenty-three other higher officials admitted that *The Great Ming Code* did not reflect the social status order by birth legitimacy. They, however, had the idea that the article of deciding cases without specific articles in *The Great Ming Code*¹⁷⁾ would be appropriately used for the crimes like the Hwang Hyosan case. The article of deciding cases without specific articles in *The Great Ming Code* stipulated the application of criminal laws by analogical inference. In the criminal cases where there were no applicable articles, it was allowed to cite closely analogous articles in *the Great Ming*

17) THE GREAT MING CODE, Laws on Punishments and General Principles, article 46 [Deciding Cases without Specific Articles]. "The provisions in the Code and Commandment will not cover all matters. When there is no specific article in deciding a penalty, cite (a closely analogous article in) the Code and decide the case by analogy." 大明律 名例律 §46 [斷罪無正條] 凡律令該載不盡事理 若斷罪而無正條者 引律比附.

Code in order to prevent the criminals from avoiding punishment.

Twenty-three other higher officials insisting on the application of the criminal law by analogical inference suggested three different articles in *The Great Ming Code*, such as the article of honorable and mean persons striking each other,¹⁸⁾ the article of striking superior or older relatives of the second mourning degree,¹⁹⁾ and the article of killing others in affrays or by intention.²⁰⁾

The higher officials insisting on the application of article of honorable and mean persons striking each other mentioned one sentence from a Confucian classic: it should be the worst among Yukyeok(六逆: the six types of retrogression) for the mean to disturb the noble and for the young to disregard the older.²¹⁾ They thought that the relationship between sons by the legal wife and by concubines should correspond to that between the noble and the mean. There was no clear difference in the social status order by birth legitimacy in Ming China, so the relationship between sons by the legal wife and by concubines was subject to birth order. However, there did exist a fundamental distinction between sons by the legal wife and concubines in Joseon Korea. The higher officials insisted that the social status order by birth legitimacy should have precedence over that by birth order in the Joseon dynasty. They concluded that the article of honorable and mean persons striking each other in *The Great Ming Code* was the most analogical to the relationship between sons by the legal wife and by concubines, since their relationship was represented as that between the noble and the mean.

Another group of higher officials insisted on the application of the

18) THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 336 [Honorable and Mean Persons Striking Each Other]. "In all cases where slaves cause honorable persons' death, they shall be punished by decapitation." 大明律 刑律 鬪毆 §336 [良賤相毆] 凡奴婢毆良人者 死者斬.

19) THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 341 [Striking Superior or Older Relatives of the Second Mourning Degree]. "In all cases where younger brothers or sisters cause older brothers' or sisters' death, they shall be punished by decapitation." 大明律 刑律 鬪毆 §341 [毆尊親尊長] 凡弟妹毆兄姊者 死者皆斬.

20) THE GREAT MING CODE, Laws on Penal Affairs, Homicide, article 313 [Killing Others in Affrays or by Intention]. "In all cases of killing others, the offenders shall all be punished by strangulation." 大明律 刑律 人命 §313 [鬪毆及故殺人] 凡鬪毆殺人者 並絞.

21) See ZUOZHUAN [左傳] (COMMENTARY OF ZUO). 以賤妨貴少陵長 爲六逆之首.

article of striking superior or older relatives of the second mourning degree in *The Great Ming Code*. According to the five mourning degrees within one's own lineage in *the Great Ming Code*, the brothers belonged to one's relatives of the second mourning degree.²²⁾ They interpreted the meaning of an older brother and a younger brother from a normative perspective. They thought that the social status order should be decided by birth legitimacy rather than by birth order. A younger brother by the legal wife should be an 'older' brother, whereas an older brother by a concubine should be a 'younger' brother regardless of their age. They concluded that the article of striking superior or older relatives of the second mourning degree in *The Great Ming Code* was the most analogical to the meaning of brothers interpreted from the viewpoint of the birth legitimacy.

The rest of higher officials insisted on the application of the article of killing others in affrays or by intention in *The Great Ming Code*. They also thought that an older brother by a concubine that killed a younger by the legal wife should not be punished by the same penalty as older relatives killed younger relatives. However, they did not agree to the idea that an older brother by a concubine should be considered as the mean person or the younger relative. They identified the relationship between sons by the legal wife and concubines as that between two ordinary persons. They concluded that the article of killing others in affrays or by intention in *The Great Ming Code* was the most analogical to the contradictory positions of the two sons, since the collision of two social status orders by birth legitimacy and by birth order established parity of social status.

3. *Whether or not to impose the same punishment*

After listening to the discussion of higher officials in the royal court, King Seongjong posed them a hypothetical case. What should be the appropriate punishment if a younger brother by the legal wife killed an older brother by a concubine? The positions of criminal and victim were reversed in the hypothetical case. Thirty-seven higher officials expressed their legal opinions on this question. Twenty-eight higher officials insisted

22) See THE GREAT MING CODE, the diagram of [General Mourning Degrees] and the diagram of [Five Mourning Degrees within One's Own Lineage].

that the same punishment should be imposed on a younger brother by the legal wife who killed an older brother by a concubine. Only nine higher officials held the legal opinion that the less severe punishment should be imposed on a younger brother by the legal wife that killed an older brother by a concubine than on an older brother by a concubine that killed a younger brother by the legal wife. There was no higher official insisting on the more severe punishment for a younger brother by the legal wife that killed an older brother by a concubine.

The higher officials insisting on the same punishment pointed out that an older brother by a concubine violated the social status order by birth legitimacy, whereas a younger brother by the legal wife violated the social status order by birth order. They thought that neither of two social status orders should be ignored in the Joseon dynasty and that capital punishment should be imposed on anyone who violated either of them.

The other higher officials insisting on the less severe punishment for a younger brother by the legal wife showed legal consistency in evaluating the social status orders. They put the social status order by birth legitimacy before the social status order by birth order. They emphasized that sons by the legal wife should be always treated as the nobler ones than sons by concubines regardless of their age difference.

The Minister of Culture and Education Lee Seungso was one of higher officials insisting on the less severe punishment for a younger brother by the legal wife that killed an older brother by a concubine. His argument showed logical consistency well above the opinions of the other higher officials. He claimed in respect to the first agenda of the council in the royal presence, that an older brother by a concubine who killed a younger brother by the legal wife should be punished by the application of the article of honorable and mean persons striking each other in *The Great Ming Code*.²³⁾ He identified a son by the legal wife as a noble person, whereas a son by a concubine as a mean person. He thought that the distinction between sons by the legal wife and by concubines was so critical in the

23) THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 336 [Honorable and Mean Persons Striking Each Other]. "In all cases where slaves cause honorable persons' death, they shall be punished by decapitation." 大明律 刑律 鬪毆 §336 [良賤相毆] 凡奴婢毆良人者 死者斬.

Joseon dynasty, that the social status order by birth legitimacy always had priority over that by birth order. He concluded that an older brother by a concubine should be characterized as a mean person even when he became a victim to a crime caused by his younger brother by the legal wife.

The higher officials insisting on the same punishment identified an older brother by a concubine as a noble person when he was in a position of a victim, though they put heavy emphasis on a strict distinction between sons by the legal wife and by concubines. This legal opinion seems less logical than that of Lee Seungso, the Minister of Culture and Education. However, the majority of the higher officials participating in the council in the royal presence claimed that an older brother by a concubine had priority by birth order and a younger brother by the legal wife had priority by birth legitimacy. They admitted the incompatibility of the two social status orders, but felt the need to protect both of them. Thus they insisted on the same punishment for crimes that infringed on either of them.

4. The final bill introduced by the Ministry of Justice

After the council in the royal presence, King Seongjong decided to follow the argument of the same punishment. He said that a young brother's death by his older brother violated the social status order by birth legitimacy and an older brother's death by his younger brother violated the social status order by birth order. He directed the Ministry of Justice to make a new criminal law for crimes between sons by the legal wife and by concubines with reference to the article of striking superior or older relatives of the second mourning degree in *The Great Ming Code*.²⁴⁾

The Ministry of Justice submitted to King Seongjong the final bill for punishing the crimes of homicide, injury, and affray that violated birth legitimacy. In the final bill, the Ministry of Justice said that there was no strict distinction between sons by the legal wife and by concubines in Ming China, so *The Great Ming Code* did not consider birth legitimacy in deciding criminal cases that occurred between them. An older brother by a concubine had the right of birth order, whereas a younger brother by the

24) See THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 341 [Striking Superior or Older Relatives of the Second Mourning Degree].

legal wife had the right of birth legitimacy in Joseon Korea. The Ministry of Justice suggested that the same punishment should be imposed for the crimes committed by each, since each had the right conferred by their respective social status order.

In the bill introduced by the Ministry of Justice, it was stipulated that the crimes of homicide, injury and affray between sons by the legal wife and by concubines should be punished by the penalty in accordance with the article of striking superior or older relatives of the second mourning degree in *The Great Ming Code*. It was also stipulated that the crimes of homicide, injury and affray between a nephew by the legal wife and an uncle by a concubine should be punished by the penalty in accordance with the article of striking superior or older relatives of the third mourning degree or more distant in *The Great Ming Code*.²⁵⁾

The penalty stipulated in the former was more severe than that in the latter on the whole. In case of homicide, both articles stipulated the punishment of decapitation. In case of injury, however, the former stipulated 100 strokes of beating with the heavy stick and life exile to 3,000 *li*, whereas the latter did 90 strokes of beating with the heavy stick and penal servitude for two and one-half years. In case of affray, the former stipulated 90 strokes of beating with the heavy stick and penal servitude for two and one-half years, whereas the latter did 70 strokes of beating with the heavy stick and penal servitude for one and one-half years.

There was a reason why the Ministry of Justice decided to impose the more severe punishment on crimes between sons by the legal wife and by concubines than on those between a nephew by the legal wife and an uncle by a concubine. Brothers, uncles, and nephews were all considered one's relatives of the second mourning degree according to the five mourning degrees within one's own lineage in *The Great Ming Code*.²⁶⁾ In Joseon Korea, however, the relationship between brothers was closer than that between uncles and nephews: brothers were in the second degree of kinship, whereas uncles and nephews were in the third degree of kinship. The

25) See THE GREAT MING CODE, Laws on Penal Affairs, Affrays and Batteries, article 340 [Striking Superior or Older Relatives of the Third Mourning Degree or More Distant].

26) See THE GREAT MING CODE, the diagram of [General Mourning Degrees] and the diagram of [Five Mourning Degrees within One's Own Lineage].

Table 2. The final bill introduced by the Ministry of Justice

In case of homicide							
the article of striking superior or older relatives of the second mourning degree		victim		the article of striking superior or older relatives of the third mourning degree or more distant		victim	
		a younger brother by the legal wife	an older brother by a concubine			a nephew by the legal wife	an uncle by a concubine
offender	a younger brother by the legal wife		decapitation	offender	a nephew by the legal wife		decapitation
	an older brother by a concubine	decapitation			an uncle by a concubine	decapitation	
In case of injury							
the article of striking superior or older relatives of the second mourning degree		victim		the article of striking superior or older relatives of the third mourning degree or more distant		victim	
		a younger brother by the legal wife	an older brother by a concubine			a nephew by the legal wife	an uncle by a concubine
offender	a younger brother by the legal wife		3,000 <i>li</i> , 100 strokes	offender	a nephew by the legal wife		2.5 years, 90 strokes
	an older brother by a concubine	3,000 <i>li</i> , 100 strokes			an uncle by a concubine	2.5 years, 90 strokes	
In case of affray							
the article of striking superior or older relatives of the second mourning degree		victim		the article of striking superior or older relatives of the third mourning degree or more distant		victim	
		a younger brother by the legal wife	an older brother by a concubine			a nephew by the legal wife	an uncle by a concubine
offender	a younger brother by the legal wife		2.5 years, 90 strokes	offender	a nephew by the legal wife		1.5 years, 70 strokes
	an older brother by a concubine	2.5 years, 90 strokes			an uncle by a concubine	1.5 years, 70 strokes	

Ministry of Justice considered the difference in kinship distance between Ming China and Joseon Korea. For this reason different punishments were stipulated for them.

In addition, it was stipulated, in the final bill, that crimes between sons by concubines should be punished in accordance with the original articles in *The Great Ming Code*. It meant that only birth order should be considered in deciding the punishment between sons by different concubines. A man might have more than one concubine in the Joseon dynasty. The Ministry of Justice confirmed that all concubines had the equal status and the social status of their sons was decided only by birth order.

IV. An analysis of the council in the royal presence

When there were no specific articles applicable to cases, it was allowed to decide cases by citing articles analogically close to them in Joseon Korea as well as Ming China. It is argued that the names of punishments were a more critical factor than the names of crimes in deciding criminal cases by the analogical application of articles.²⁷⁾ It means that the judicial officials focused on finding the names of punishments proportionate to the seriousness of crimes. However, the names of crimes were still considered important.

It has been shown that the higher officials participating in the discussion of the Hwang Hyosan case suggested various articles in *The Great Ming Code*, such as the article of honorable and mean persons striking each other, the article of striking superior or older relatives of the second mourning degree, and the article of killing others in affrays or by intention. The penalty was the capital punishment in accordance with each article. The higher officials agreed on the point that the capital punishment was the penalty appropriate to the case, but they had different legal opinions as to which article was the most clearly analogical.

What caused the higher officials to spend time in discussing a range of

27) For more information on this content, see SHIGEO NAKAMURA, PANLYELEUL TONGHAESIO BON CHEONGDAE HYEONGBEOB [CRIMINAL LAW IN THE QING PERIOD REFLECTED IN CRIMINAL CASES] 194-201 (Lim Daehee & Park Chuntaek trans., Seogyongmunhwasa, 2004).

articles, all of which stipulated the same capital punishment? It was admitted that the judicial officials seemed to give first consideration to the name of the punishments prescribed in criminal cases where no specific article in *The Great Ming Code* was found applicable. However, in this evaluation they paid careful attention to deciding the degree of the punishment that would be proportionate to the harm caused by the crime. It was significant that they felt strongly that the punishments imposed on criminals should be appropriate. After deciding the names of punishments, the judicial officials sought the articles that were the most clearly analogical to the cases in *the Great Ming Code*. It was the name of the crime that made a ruling persuasive and brought legal stability, since the ruling would set a precedent: the same article would be cited in deciding the similar cases in the future.

According to the article of deciding cases without specific articles in *The Great Ming Code*, the judicial officials were obliged to report the cases to the higher officials. The higher officials were then required to memorialize the cases to the throne. The king decided the cases finally, but the higher officials and the primary judicial officials participated in the discussion of which articles should be applied to criminals. Before the final decisions, even the opinion of the king was not absolute and capital cases were subject to repeated review. This procedure made it possible to render such decisions fairly convincing and to deter judicial officials from making arbitrary rulings.

The application of the articles analogical to the cases functioned as the supplement to *The Great Ming Code*, because the articles in *The Great Ming Code*, as the codifiers of them admitted, could not cover all matters. The discussion on the analogical application of the criminal articles often led to new legislation. When the higher officials agreed that there was no specific article applicable to the cases in *the Great Ming Code*, the king often gave an order to make new laws in the final discussion to be held in the royal presence. In the Hwang Hyosan case, King Seongjong also suggested another agenda to the council in the royal presence. He ordered the higher officials to consider a broader range of crimes that violated birth legitimacy and directed the Ministry of Justice to prepare a bill for them.

V. The difference of legal culture between Ming and Joseon

The social status order by birth legitimacy was not reflected in the articles in *The Great Ming Code*, since there was no strict distinction between sons by the legal wife and by concubines in Ming China. This sort of difference of legal culture made the king and the higher officials in the Joseon dynasty undertake new legislation. There was another example of the cultural difference between two dynasties. The relationship with the relatives of one's wife was closer in Joseon Korea than in Ming China. It resulted from the different wedding customs. The Joseon dynasty had the tradition of matrilocal residence. A married couple usually resided with the wife's parents and the children were raised by their mother's side. It was said in the Joseon dynasty that a son-in-law regarded his parents-in-law as his own parents since he owed everything he had to them.²⁸⁾

On the contrary, the relationship with the relatives of one's wife was quite distant in Ming China. According to the mourning degrees for the wife's relatives in *The Great Ming Code*, the relationship with the parents of one's wife belonged to the fifth degree, the most distant in the general mourning degrees. The relationship with the sisters of one's wife did not even belong to the five mourning degrees, since a husband did not need to wear any mourning for them. The relationship with the relatives of one's wife was so distant in *The Great Ming Code*, that it was not accepted in Joseon Korea where there was a tradition of matrilocal residence. In Joseon dynasty the relationship with the parents of one's wife was usually considered as the second mourning degree.

Relatively light punishments were imposed for the crimes involving the relatives of one's wife, since their relationship was distant in *The Great Ming Code*. When a man committed fornication with his mother-in-law, for example, he was punished by a three-year penal servitude plus 100 strokes of beating with the heavy stick in accordance with the article of committing fornication with relatives in *The Great Ming Code*.²⁹⁾

28) SEJONGSILLOK [THE ANNALS OF KING SEJONG], Vol. 48, June 1, 1430; SEJONGSILLOK [THE ANNALS OF KING SEJONG], Vol. 72, Apr. 20, 1436.

29) THE GREAT MING CODE, Laws on Penal Affairs, Committing Fornication, article 392

In the Joseon dynasty, however, it was not considered a sufficient punishment for the fornication between sons-in-law and mothers-in-law.³⁰⁾ The king and higher officers in the Joseon dynasty suggested that more severe punishment should be imposed for it. As a result, a royal edict(敎書) was issued in 1423(the 5th year of King Sejong' reign).³¹⁾ According to it, a man committing fornication with his mother-in-law should be punished by the analogical application of the article of slaves or hired laborers committing fornication with household heads' wives in *The Great Ming Code*.³²⁾ The punishment was decapitation in accordance with this article.

No more detailed explanation about the royal edict is found, so the reason why the article in *the Great Ming Code* was cited is not clear. The royal edict was codified in more abstract form in *Sokdaejeon*(續大典: supplement to the Great Code), the second *Daejeon*(大典: the Great Code) of the Joseon dynasty. The article is as follows: a man committing fornication with his mother-in-law shall be punished by decapitation.³³⁾ The article in *Sokdaejeon*, as we see, erased the title of the article cited from *The Great Ming Code* and stipulated only the punishment.

VI. Conclusion

The Great Ming Code, the basic criminal code of the Joseon dynasty, was

[Committing Fornication with Relatives]. "In all cases of committing fornication with the fifth degree of mourning, they shall each be punished by 100 strokes of beating with the heavy stick and penal servitude for three years." 大明律 刑律 犯姦 §392 [親屬相姦] 若姦緦麻以上親 各杖一百徒三年.

30) For more information on this content, see PARK BYEONG-HO, SEJONGSIDAEUI BEOBLYUL [LAW IN THE SEJONG ERA] 73-74 (Sejongdaewangginyeomsaebhoe, reprinted in 2005) (1986).

31) SEJONGSILLOK [THE ANNALS OF KING SEJONG], Vol. 22, Oct. 27, 1423. This royal edit was cited in 1489 (the 20th year of King Seongjong' reign). See also SEJONGSILLOK [THE ANNALS OF KING SEJONG], Vol. 235, Dec. 22, 1489.

32) THE GREAT MING CODE, Laws on Penal Affairs, Committing Fornication, article 392 [Slaves or Hired Laborers Committing Fornication with Household Heads' Wives]. "In all cases where slaves or hired laborers commit fornication with their household heads' wives or daughters, they shall each be punished by decapitation." 大明律 刑律 犯姦 §394 [奴及雇工人姦家長妻] 凡奴及雇工人姦家長妻女者 各斬.

33) See SOKDAEJEON [SUPPLEMENT TO THE GREAT CODE], code on penal affairs, article on committing fornication. 續大典 刑典 [姦犯] 常賤之姦妻母者 斬.

not fully in place at first in spite of the founder's declaration. Normative discussions for criminal cases were necessary to adapt *The Great Ming Code* to the different legal culture of Joseon Korea with the aim of establishing a criminal justice system for the new state. The king and higher officials in the royal court discussed the analogical application of the articles for exceptional criminal cases to which no specific article in *the Great Ming Code* could be applied. The discussion in the royal presence often led to new legislation in the form of a royal edict.

The Hwang Hyosan case triggered the necessity of new legislation for the crimes violating birth legitimacy, since there was strict distinction between sons by the legal wife and by concubines in Joseon Korea. The higher officials expressed various legal opinions in the council in the royal presence and King Seongjong ratified the final bill that the Ministry of Justice introduced in the wake of the council. However, the royal edict issued as a consequence was not finally codified in the articles in *Daejeon*(the Great Code) of the Joseon dynasty.

The relationship with the relatives of one's wife was even closer in Joseon Korea than in Ming China because of the different wedding customs. This cultural difference also led to new legislation for the crimes against the relatives of one's wife. There was a royal edict, for example, citing the article in *The Great Ming Code* by analogical inference in order to impose a more severe penalty on the fornication between sons-in-law and mothers-in-law. The royal edict on the fornication between them was codified in abstract form in *Sokdaejeon*(supplement to the Great Code) of the Joseon dynasty.

The royal edicts were the prototype of new legislation in the Joseon dynasty. The discussions whether to make new criminal laws were animated in the early period of the Joseon dynasty for the cases where there was no applicable article in *The Great Ming Code*. Some royal edicts issued in the wake of the discussions were codified in *Daejeon* of the Joseon dynasty, whereas others were not. It is clear that royal edicts were edited in the process of the codification of *Daejeon*. However, further study is needed to find out the process by which the royal edicts were transformed into final legislation.

