

Articles

Law and the Body in Joseon Korea: Statecraft and the Negotiation of Ideology

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Must we really sever people's toes to uphold the law?

—King Yeongjo

Introduction

Joseon dynasty criminal law and punishment was once considered almost exclusively to be the domain of legal scholars, but it is now attracting increasing attention from social, political and intellectual historians of Korea.¹ Through these recent historical studies of not only the conspicuous and the ubiquitous social aspects of punishment and its political context, but also cosmological and moral-philosophical aspects of criminal law, a more comprehensive and historically contextualised picture of the Confucian legal culture of traditional Korea is slowly emerging. These works give a positive evaluation of the role of law in Joseon-period Confucian statecraft and observe a relative shift from 'rule by virtue' to 'rule by law' towards the latter part of the dynasty. In many of the reforms of the period they observe ideologically driven efforts to curtail the influence of the *yangban* elite and protect the interest of the common people (*eokgang buyak* 抑强扶弱), as well as an increasing reluctance to resort to cruel forms of punishment.

The understanding of legal scholars often differs. Although not adhering to the view that could be seen in early scholarship—in which pre-modern Korean law was predominantly dismissed simply as a tool for arbitrary and oppressive social control or subject to unfavourable comparisons with the alleged standards of Western legal culture²—legal scholarship still predominantly focuses on the ideological emphasis on rule by virtue and the personal legal power of

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1. See for example Gu Deokhoe (2007), Sim Jae-u (2003; 2010), Han Sanggwon (2011) and Kim Ho (2012a).

2. Such studies include Hahm Pyong-choon (1967) and Bong Duck Chun (1980). For a more balanced early treatment see William Shaw (1980).

the king, as well as the role of the law to protect the position of the *yangban* elite. Contrary to the understanding of historians, it has been argued that the further we get into the Joseon dynasty, the less rule was based on the system and increasingly became dependent on personal rule by the kings (J. Jo 2008). Furthermore, while acknowledging that the legal reforms of the eighteenth century were sincere efforts to establish a Confucian penal order, it has been suggested that their character at the same time was conservative and an effort to protect the “backward” *yangban*-dominated social order (H. Sim 1998).

Although reaching diametrically opposed conclusions, these works by historians and legal scholars share a focus on Confucian ideology and its tension between ‘rule by virtue’ and ‘rule by law’—the former arbitrary personal rule and the latter rule by the system—respectively observing tendencies toward either end of this spectrum. Through these works both legal scholars and historians alike have highlighted important aspects of Joseon legal culture, but this paper argues that emphasis has been too much placed on the role of Confucian ideology, its inner components and shifts in emphasis between them. Both early and late Joseon provide examples of an intriguing mix of penal benevolence and harsh punishments.

It would, of course, not make sense to deny the importance of Confucianism in Joseon-period statecraft, but we must be careful not to reify the Joseon state as a “Confucian state” and understand all of its actions and the motivation for them from a narrow viewpoint of Confucian ideology. The position of this paper is that the notions of ‘rule by virtue’ and ‘rule by law’ were both ideological tools that the state mobilised in its efforts to maintain the system and protect its interests. However, that does not mean that the formulation and execution of law was arbitrary and that this paper adheres to the dismissive attitude of early legal scholarship. While arguing that the law in eighteenth-century Britain “may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation,” E. P. Thompson also pointed out that:

The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just. And furthermore it is not often the case that a ruling ideology can be

dismissed as a mere hypocrisy; even rulers find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just. (Thompson 2001, 436)

Rather than understanding the dynamics of Joseon legal culture in terms of the tension between ‘rule by virtue’ and ‘rule by law,’ both part of the portfolio of ideological tools mobilised by the state, this paper suggests that it is more fruitful to focus on the tension between the state’s need to maintain the system and uphold social order (as defined by the state) and the need for the state itself to adhere to the basic principles of the ideology that underpinned this system.

This subject is too vast to deal with in a paper of this length. Stimulated by recent work on notions of the body in the Chinese legal system, the focus of analysis in this study will be on the relationship between the judicial process—investigation, interrogation and punishment—and not only ideological but also cosmological and cultural notions of the body. The aim is to exemplify the suggested negotiation between ideology and state needs through an analysis of discussions at court related to law and the human body within the context of both ideology construction and actual statecraft.

Theoretical and Methodological Considerations

Although this paper will look at a wider range of judicial processes, some recent developments in the theoretical understanding of punishment help articulate its approach. In legal scholarship, the aim of punishment was traditionally understood as retribution and deterrence. Later, with the development of a sociology of punishment, Foucault (1977) exerted a strong influence with his work *Discipline and Punish: The Birth of the Prison* in which punishment is primarily understood as a tool for oppressive power and social control. Recent scholarship, however, rather stresses the role criminal law plays in the state’s larger ideology-guided efforts to regulate human conduct (Sarat, Douglas and Umphrey 2011).

This latest development can be seen as a shift of emphasis, from a conflict-based understanding of society according to which social order is “maintained through inducements, coercion, and using law and criminal sanctions as instruments of repression” towards a consensus-based understanding which

maintains that criminal offences represent breaches of standards widely held in society. According to this view, capital offences constitute *mala en se* (crimes wrong in and of themselves) rather than *mala en prohibita* (crimes wrong because the legal system deems them illegal), and the norms that these offences are considered to violate are often the same norms that guide the state's larger efforts to regulate human conduct (Miethe and Lu 2005, 194-95).

It would admittedly be anachronistic to project the notion of regulation as a means of social control in the modern sense onto Joseon statecraft, but if regulation is understood as “the intentional activity of attempting to control, order or influence the behaviour of others” (Dubber 2011, 19), this notion is akin to the construction of Confucian ideology and the purported edification (*gyohwa* 教化) of the population, and therefore useful for our understanding of the relationship between penal law and statecraft in traditional Korea. While penal law in Joseon undoubtedly was employed as a tool to protect the state, its ideology and the privileges of the ruling elite, the social and moral principles of the Confucian ideology that were “protected” by law, were also central to the construction of its ideology.

Despite the ideological paradigm that punishment would be superfluous in a perfect Confucian state, in actual governance penal law was considered to be a useful tool to assist statecraft. As mentioned above, historians and legal scholars of Joseon Korea have tried to detect shifts in the relationship between ‘rule by virtue’ and ‘rule by law,’ but throughout the dynasty the basic understanding was that rule primarily should be based on virtue and that punishment had an important auxiliary role to play. In 1431, while addressing legal officers on the need to approach legal cases with impartiality and sincerity, King Sejong 世宗 (r. 1418-1450) emphatically stated:

Punishment is a tool to help statecraft, so even in the ancient times of flourishing civilization it could not be completely abolished. When Shun became the Son of Heaven he could only be moderate in the usage of punishment, and when Gao Yao became minister he assisted the five teachings by clarifying the five punishments and dexterously combined the two to achieve enlightened statecraft. Ah, how it flourished! But as we reach Shi Huangdi of Qin brutality started to be worshipped and the gang of Zhao Gao employed cruel and cursory laws so that the wise benevolence was lost and the state collapsed after only its second generation. How can we not take warning from this? (*Sejong sillok* 1431:13/6/2)

King Sejong's message is clear: punishment is an inevitable element of statecraft, but the state must be cautious and restrictive in its use lest the ruler forfeits the Mandate of Heaven. Eighteenth-century ruler Jeongjo 正祖 (r. 1776-1800) similarly envisioned the supplementary nature of these two modes of rule. He evoked the simile of society as an ailing body—the state of the body politic since the degeneration from the golden age of Chinese antiquity—and prescribed proper ritual as the food to provide nourishment for the healing of the convalescent, and punishment as the medicine to fight the disease (Han 2011, 289). Given the perceived close relationship between regulation through virtuous rule and edification, on the one hand, and punishment on the other, it can be argued that in the Korean case too, elements of the consensus-based understanding of society, combined with the conflict-based, can facilitate a better all-round comprehension of the position of penal law in statecraft.³

This approach highlights the tension between the need perceived by the state to employ the law to maintain the system and protect social order and the need to abide by the basic tenets of the ideology that underpins the system and social order. To illustrate how this tension was negotiated, this paper will analyse discussions on legal matters at court between the king and his officials. Admittedly such negotiations involved processes beyond the court, but to maintain the focus of the paper only occasional illustrative references will be made to works by Joseon-period scholars or administrative guidebooks.

During the more than 500 years the Joseon dynasty lasted, the fifteenth and the eighteenth century in particular saw intensive debates at court on legal matters and statecraft. With the dynasty newly established, the fifteenth century was a period of both ideological construction and the establishment of the legal framework; after a long preparation period the dynastic code, the *Gyeongguk daejeon* 經國大典, was finalized in 1485. In the eighteenth century, King Yeongjo 英祖 (r. 1724-1776), ascending the throne following a period of political, economic and social reconstruction after the Japanese invasion in the late sixteenth century and the Manchu invasions of the early seventeenth, and experiencing serious challenges to his authority at the beginning of his reign,

3. Kim Ho has argued that the legal reforms in eighteenth-century Joseon Korea indicated an ambition to establish a consensus between the state and the people on legal matters based on Confucianism and achieved through edification (H. Kim 2012a; 2012b).

also engaged in substantive ideology-construction and legal reform to solidify his rule and adjust the legal framework to the new social and institutional context. This enterprise was continued by his grandson Jeongjo and the eighteenth century thus saw the compilation of first a supplement to the dynastic code, the *Sokdaejeon* 續大典, in 1746 and later the compilation of a new revised version, the *Daejeon tongpyeon* 大典通編, in 1785.

The intensive legal discussions in the fifteenth and eighteenth centuries provide illustrative examples of the negotiation of ideology in actual statecraft. That this paper will use such examples from these separate time periods displaying different social and political characteristics, should not be understood as an argument that the legal culture of these two periods was identical. The main focus of the argument is on the negotiation argued for above, a process that can take place in different ideological and political contexts.

Finally, this paper focuses on legal discussion and such processes of negotiation related to the human body. The significance of the human body cannot be understood only in ideological terms, therefore the analysis will also take into consideration the relationship between law, cosmology (Jiang 2011) and cultural practices (Garland 1990). The following section is a general treatment of the relationship between notions of the body and the penal system in the larger Confucian legal tradition as well as in Joseon, highlighting some basic themes as a background for the more historically contextualised analysis to follow.

Notions of the Body, Confucian Statecraft and Punishment

In Confucian cosmology, a strong link exists between the human body and Heaven. Spiritual cultivation did not entail transcending this world, but rather manifesting the celestial principles on earth and helping create an ideal society, and the human body therefore wielded forceful symbolic power. When explaining Neo-Confucian cosmology to his students with the diagram “Heaven and Man, Mind and Nature, Combine as One” (*Cheonin simseong hap il ji do* 天人心性合一之圖), the early Joseon Neo-Confucian scholar Gwon Geun 權近 (1352-1409) outlined the whole universe in human shape with heaven and the human body being connected in the human heart. In a similar manner, medical portrayals of the human body would also employ the symbols for heaven and

earth (Kalton 1985; H. Kim 2000, 175).

Two basic concepts in Neo-Confucian cosmology were principle (*i* 理) and material force (*gi* 氣), the former comprising the deep structure of the cosmos represented in all existing things, and the latter comprising the medium in which principle was embedded and which enabled the existence of things. Material force linked heaven with the world and the humans that inhabited it, and in its terrestrial manifestation this force linked generations. According to the Song-period Neo-Confucian philosopher Zhu Xi 朱熹 (1130-1200), whose teachings became orthodoxy in Joseon, the celestial energy had initially created human beings (through the process of *gihwa* 氣化), and thenceforth individuals received their share of this energy from their parents (through the process of *hyeonghwa* 形化) (S. Kim 2008, 317-19). The *Xiao jing* (Kr. *Hyogyeong*, Classic of Filial Piety) states: “one’s parents give birth to one—there is no continuity greater than this” (*Hyogyeong* [n.d.] 1973, 214).

The *gi* running through the body continued to flow even after death. Through ancestor worship this energy could be revived if the person officiating at the ritual had a blood relation with the ancestor. Zhu Xi “likened the succession of generations to the relentless forming and breaking-up of waves; although no one wave is the same as the one that came before or will come after, all waves consist of the same water. Similarly, the same *ki* [*gi*] unites the ancestors and their descendants in the ritual process” (Deuchler 1992, 133). Children and parents are thus in essence one person—although they seem to be different bodies—breathing the same breath and sharing the same pulse (Jiang 2011, 61). The body was something the individual received from his/her parents and which (s)he had a duty to look after. This sanctity of the body has been labelled ‘somatic integrity’ (Brook et al. 2008). In particular, injury or disfigurement was detrimental since it disrupted the energy flowing in the body, the energy that linked the individual to the parents. “Our bodies, hair and skin are received by us from our parents,” the *Xiao jing* said, “and we must not dare injure or wound them” (*Hyogyeong* [n.d.] 1973, 211).

The conditions of human existence in the corporal sense lay at the heart of Confucian statecraft in accordance with the Mencian assertion that the people are the most important element of the state, its base, and that the king occupies the throne to look after the physical as well as mental wellbeing of his people. This understanding was rooted in the notion of the Mandate of Heaven; the king had been bestowed the mandate to rule by Heaven, but if he

did not attend to his people properly Heaven might withdraw this mandate and transfer it to a contender. Heavenly dissatisfaction would manifest itself in natural disasters, among other things, meaning that such threats to the physical wellbeing of the people was the responsibility of the ruler; they were caused by his moral deficiencies, and it was his duty to rectify the situation so as to not forfeit the mandate to rule (Jiang 2011, 28-29).

If, in this sense, concerns about the human body and its wellbeing were central to Confucian statecraft, the implication of the notion of somatic integrity discussed above is that the legitimacy of state violence against the bodies of its subjects was to a certain extent curtailed. The king might in fact forfeit his sovereignty and lose the mandate to rule, and from early on in the Confucian legal tradition, judicial prudence (*heumbyul* 欽恤) and benevolence in punishment (*gwanbyeong* 寬刑) were emphasised and the law codes did not sanction excessive physical violence. Ever since Emperor Wen of Han (漢文帝, r. 180-157 BCE) famously abolished the five “bodily punishments” in 167 BCE, mutilation ceased to belong to the core of punishments in subsequent law codes.⁴ This attitude also resulted in efforts to ensure that punishment did not inflict more harm than intended. In the new penal system after Emperor Wen’s ruling, the lightest form of punishment was flogging. This could be administered with either a whip or a cudgel, but in both cases flogging was to be performed on the buttocks, since Emperor Taizong of Tang (唐太宗, r. 626-649) had prohibited flogging on the back subsequent to observing an acupuncture chart and realising that all the vital organs were located in that area.

The Joseon dynasty having adopted Confucianism as the state ideology, the notions of judicial prudence and penal benevolence became central to ideology construction and the establishment of the legal framework. In Joseon it was King Sejong who in his twelfth year on the throne explicitly forbade flogging on the back to avoid, as he said, unnecessary manslaughter (*Sejong sillok* 1430:12/11/21; 1439:21/2/2)⁵ and, as we will see later, he initially

4. The earlier version of the five punishments was: tattooing, cutting off the convicts’ nose, cutting off the convicts’ heels, castration, and capital punishment (Tomiya 2012).

5. In late Joseon, guidebooks for local magistrates recommended that flogging should be performed after breakfast during forenoon since that was the time the physical vigour was strongest and the risk of physical harm due to heavy flogging smallest, and also to avoid flogging in times of famine when people were weak (*Geogwan daeyo* [n.d.] 1983, 58).

established lenient punishment for thieves and argued against the use of torture. The rhetoric of judicial prudence and penal benevolence would not change in the following centuries, but it is not until we reach the eighteenth century that we can see more comprehensive legal reform according to these principles. Out of the thirty-six entries on judicial prudence in the *Records of the Ministry of Punishment* (*Chugwanji* 秋官志), compiled during the reign of Jeongjo in the late eighteenth century, twenty-two are from the reigns of Jeongjo and his grandfather Yeongjo, and in terms of entries related to the abolition of various forms of punishment and torture (*jebyeong* 除刑) the number is thirteen out of sixteen (*Chugwanji* [1781] 2004, 205-50). Jeongjo also regulated and standardized the tools used in punishment in his *Heumhyul jeonchik* 欽恤典則 (J. Sim 1999).

However, punishment, and in particular capital punishment, is also, as argued by Timothy Brook (2011) for China, the purest manifestation of state sovereignty and to claim his sovereignty and protect the moral values that ideologically supported the state, the ruler had to discipline and punish the bodies of his subjects, creating a tension that necessitated the negotiations argued for in this paper, in particular since the purpose of certain forms of corporal punishment was to violate the same notions of the body that underlay the discussion on penal leniency.

The late eighteenth and early nineteenth century statesman and scholar Jeong Yak-yong was very much concerned with law and its administration and the legal culture after the reforms of Yeongjo and Jeongjo, and after he was sent into exile in 1801 after his family's involvement with Catholicism, he wrote extensively on the topic; most famously in his critical handbook on local administration, the *Mongmin simseo* 牧民心書 (Admonitions on Governing the People), and his comprehensive discussion on judicial prudence, the *Heumheum sinseo* 欽欽新書 (Toward a New Jurisprudence), in which he both lauded and criticised Jeongjo's attitude toward the application of the law (H. Kim 2010; 2012a; 2012b).

When deliberating on the punishment administered at county level in *Mongmin simseo*, Jeong Yak-yong divided corporal punishment into three levels. The most severe form of chastisement that could be legally meted out by the magistrate was flogging, and if the magistrate wanted to be benevolent, he argued, the highest level (*sanghyeong* 上刑) would entail thirty lashes with the small wooden stick (*tae* 笞) until the buttocks started to bleed. Meanwhile, the

middle level entailed twenty lashes and the lowest level ten. Jeong Yak-yong further recommended that the magistrate gather the county office staff he had entrusted with administering the punishment to explicate the rationale behind this classification as follows: “[the purpose of] the highest level of punishment is to wound/scare severely, the middle level to inflict great pain, and the lowest level to show [the power of] the law” (Jeong [1818] 1978, 312). Formulated in a slightly different manner, a late Joseon handbook for county magistrates stated that the purpose of the “small” use of the stick was to inflict pain and that the “large” use resulted in bodily harm (*Geogwan daeyo* [n.d.] 1983, 58).

Jeong Yak-yong identifies two important aspects of corporal punishment: the harming of the body and the infliction of pain. Admittedly, in the actual execution of punishment, in most cases, these two aspects would be difficult to separate—to be flogged with thirty lashes until the buttocks started to bleed would presumably be more painful than twenty lashes—but when stating the rationale behind this classification his text demonstrates that the harming of the body was understood separately from the infliction of pain, and that bodily harm was considered a harsher form of punishment.

This brings us back to the notion of somatic integrity. “One who has murdered is himself killed,” Jeong Yak-yong laconically states in *Heumbeum sinseo*. “That is the law,” he continues “and should suffice. But in *The Great Ming Code* (*Daemyeongnyul jikhae* 大明律直解), death is divided into five grades” (Jeong [1819] 1999, 130). It is a pertinent observation; although death is inevitably the result, the method of execution carries significance. In accordance with the severity of the crime, the ascending scale of execution in Joseon based on the Ming code was: strangulation (*gyohyeong* 絞刑, two grades: immediate or after the autumnal equinox), decapitation (*chamyeong* 斬刑, two grades: immediate or after the autumnal equinox), and quartering (*neungji cheocham* 陵遲處斬). Although not included in these five grades, a form of punishment harsher than decapitation was *hyosu* 梟首, which entailed the display of the decapitated head. As rightly pointed out by Timothy Brook et al., the severity of the punishment seems unrelated to the level of pain. Decapitation should be less painful than strangulation, and it rather seems that the principle was: the more severe the crime, the graver the mutilation of the body (Brook et al. 2008, 11). Tellingly *The Great Ming Code* defined strangulation as ‘retaining the whole body’ and decapitation as separating the head and the body (*Daemyeongnyul jikhae* [1686] 2001, 11).

The importance of the act of mutilation is of course most salient in quartering, a punishment which in Joseon, based on *The Great Ming Code*, was reserved for the most heinous crimes out of the 365 offences for which the death penalty was meted out (J. Sim 2011a, 153-54).⁶ Sharing the name *neungji* 陵遲 (Ch. *lingchi*) with the punishment of “death by a thousand cuts” in China, as can be seen by the translation of this in the Korean context, the form this punishment took was different in Joseon.⁷ In the *idu*-translation of *The Great Ming Code*, *neungji cheocham* was replaced with *geoyeol* 車裂, a form of punishment similar to drawing and quartering (J. Sim 2011a, 155). The term *neungji cheocham* was still used, though, and the information on how this was actually executed throughout the dynasty is scarce. But this form of punishment is also commonly known as *osal* 五殺 (“killing by five”) and regardless of how it was performed, all sources indicate that the basic principle was to sever the head and the four limbs. In his study on Joseon penal administration, Yun Baeknam (1948, 101)—unfortunately without indicating any source—makes the claim that it was the practice first to sever the head after which the limbs were severed. If this is correct it is a clear indication that the purpose of this punishment was mutilation rather than the infliction of pain.

This is corroborated by the fact that post mortem quartering was also performed. The most famous instance would of course be the quartering of Kim Ok-gyun’s 金玉均 (1851-1894) corpse after it had been brought back from Shanghai in 1894, but it was also performed after suspects had died as a result of torture in the judicial process. An early case dates from 1410. The statesman Jo Ho 趙瑚 (?-1410) was being interrogated (accused of making treasonous remarks) when he died as a result of torture. The official in charge of the investigation thought that the evidence against him was sufficient and had the corpse quartered. Later when King Taejong 太宗 (r. 1400-1418) heard of this summary treatment of the corpse he protested that applying the

6. The list of fifteen offences included among other crimes: plotting rebellion and great sedition; plotting to kill a paternal grandparent or parent; a slave or farmhand plotting to kill the household head or the household head’s close kin; a wife killing a husband while plotting with an adulterous lover; killing three people in one household (none of which had committed a capital crime); and dismembering a living person to extract vitality (*Jeungbo munheon bigo* [1908] 1957, 607).

7. In China “death by a thousand cuts,” or “slow slicing,” entailed cutting multiple slices of flesh from the body.

harshest form of punishment without a confession ran counter to the principle of benevolence, but faced with a fait accompli he retroactively endorsed the punishment (*Taejong sillok* 1410:10/4/4).⁸ Post mortem beheading (*bugwan chamssi* 剖棺斬屍 / *yuksi* 戮屍) is another example of this kind of mutilation of corpses.

The difference between decapitation and the added punishment of quartering, as well as the wider implications of the latter, can also be seen in the fact that even if the executed person had committed a serious crime and his head was displayed after the execution (*hyosu*), the family could retrieve the head after three days, but if the person had been quartered the remains were sent around the country to be displayed and the family was not allowed to bury the body.⁹ As the material energy was believed to still flow after death, this form of punishment would extend beyond death. Harming the body would harm several generations (*Seungjeongwon ilgi*, Yeongjo 1747:23/7/4). The importance of burial is a matter we will return to later when discussing exhumation.

We have seen above that the manner in which intentionally violating specific notions of the body was part of the rationale behind certain forms of punishments, but also that the rhetoric of penal benevolence and concerns about the physical well-being of the people were central to Confucian ideology. In actual statecraft the use of state violence had to be continuously negotiated in response to the social problem the state wanted to address or the perceived threat to the state and its authority, and below follows an analysis of three themes that were discussed at court relating to law and to ideologically and culturally held notions of the body: mutilation, torture and exhumation.

Thieves and Mutilation

Punishment by mutilation is, of course, closely related to corporal notions. The

8. In another case during the reign of Jungjong, a son was accused of murdering his mother. He refused to confess and died as a result of torture. The fact that the mother had pointed out the son as her murderer before she died was considered evidence enough and his corpse was quartered (*Jungjong sillok* 1534:29/12/19, 25).

9. See for example *Danjong sillok* 1453:1/10/19, 28; In some cases, though, the heads were displayed for seven days (*Yejong sillok* 1468:0/10/27; *Seongjong sillok* 1470:1/2/9; G. Kim 1990, 100).

rationale behind this form of punishment could be retribution and retaliation, but bodily mutilations could also be justified in terms of their incapacitative and deterrent functions (Miethé and Lu 2005, 36). Although Emperor Wen had ruled against the five bodily punishments and thereby set an example in the Confucian legal tradition, mutilation with the purpose to either inhibit physical functions or to shame the convict was still resorted to by the state, as can be seen in how the early Joseon state dealt with theft.

The discussions at court relating to the use of mutilation as a deterrent punishment for theft began during the reign of King Sejong in the fifteenth century. As indicated above, this was a period of both ideology construction and the establishment of the legal framework. Although the founder of the dynasty, King Taejo 太祖 (r. 1392-1398), had ruled that *The Great Ming Code* should be used as penal law code, the dynastic code was yet to be finalised and with this relative latitude King Sejong referred to a wider pool of legal texts when discussing the proper punishment for theft. *The Great Ming Code* stipulated that a first offence should result in the word “thief” (*jeoldo* 竊盜) being tattooed on the criminal’s right arm, a second offence in a tattoo on the left arm as well, and a third offence in strangulation (*Daemyeongnyul jikhae* [1686] 2001, 409). The king, however, pursuing the principle of penal benevolence, decided instead to follow elements from Tang law, according to which pardoned offences were not counted (Han 2007, 30).

The Confucian reformers of the early Joseon dynasty stressed the importance of correct punishment, rather than penal lenience, and were critical of the amnesties given by early kings. Given the frequent pardons and amnesties, it was claimed, the rules from *The Great Ming Code* were seldom followed (Shaw 1987; Han 2007, 31). In the sixth month of 1435 the former minister of punishment Sin Gae 申概 (1374-1446) in a memorial to the king more explicitly claimed that the existing punishment for theft was ineffective. To undermine the appropriateness of penal benevolence he stressed the wickedness of thieves and elaborated on the suffering caused by them to innocent people. He attached a list of suggestions on how to deal with theft. Although he himself considered it too harsh, he mentioned the possibility of mutilation, the severing of the Achilles tendon (*dangeun* 斷筋). The king referred the matter to the legal research bureau of the Ministry of Punishment (*Sejong sillok* 1435:17/6/14).

On the 19th day of the following month the legal research bureau reported to the king after discussing Sin Gae’s memorial with the various

ministries. Repeating the claims of rampant theft, the officers supported harsher punishments and referred to Zhu Xi who had maintained: “These days forced labour and banishment is incapable of deterring thieves and lecherous people anymore. If they all were to be castrated and their noses amputated this would harm their bodies but maintain their lives [...] Would that not correspond to the intention of earlier rulers at the same time as it would deal with the current situation?” (*Sejong sillok* 1435:17/7/29).

The officials admitted that punishments of mutilation had long since been abolished, and that they were in fact ignorant of the legal details pertaining to the amputation of noses, but they suggested that Joseon should follow the example of the Song dynasty and sever the Achilles tendon of recidivists. That, they argued, would secure the livelihood of the people without taking lives unnecessarily. The opinion at court was divided, with some arguing that mutilating punishments were not in the Ming code and that the provision of the death penalty would be more effective. When the matter was discussed on this occasion, however, the king ruled against the use of mutilation (*Sejong sillok* 1435:17/7/29).

Nevertheless, when the issue was approached anew the following year in the intercalary sixth month, the king said he would consider harsher punishment, and two months later he agreed to the severing of the Achilles tendon after the State Council once again had invoked the authority of Zhu Xi (while admitting that the early sage kings had not relied on punishment, he had maintained that punitive measures could assist the civilising process and therefore were unavoidable if the state was intent on stopping the occurrence of crime) and argued that severing the tendon actually did not remove any body parts but only reduced physical capacity (*Sejong sillok* 1436:18/intercalary 6/14; 18/8/8). The matter resurfaced two months later when it was decided that since severing the tendon was a harsh punishment it should not be accompanied by flogging. However, the king maintained that for relapsed criminals, tattooing should be retained (18/10/15).

The Ministry of Punishment and the State Council had successfully convinced the king to introduce harsher punishment. Was this caused by actual concerns about the rampancy of theft, or an effort on the part of the bureaucracy to strengthen their voice in the suppression of crime through stricter legislation which was less affected by royal amnesties? It seems to be the former since the matter was still not settled and the degree of mutilation

increased. In 1437 the Ministry of Punishment asked permission to sever the Achilles tendon on both feet. The king did not consent to this, although he did agree to the punishment being performed again if, upon inspection, it was evident that the person could still walk or run (*Sejong sillok* 1437:19/7/21; 19/8/12). In 1439 the State Council once again broached the matter with the king after the Ministry of Military Affairs had raised the issue.

Still numerous people commit theft even after their second Achilles tendon has been severed. The intention of the new law was to cripple these criminals permanently to ensure that they would not relapse into crime, but people are not deterred and a few months after their tendon has been severed the criminals are committing theft again. This is a mutilating punishment in name only and has no effect. We ask permission to sever the front tendon on the left foot. (*Sejong sillok* 1439:21/12/5)

The king agreed to this, but as the problem continued the issue had to be brought up once again at court four years later. Seeing that the severing of the Achilles tendon did not have the intended effect, the State Council suggested abolishing this punishment. Still, they wanted to maintain the element of mutilation and so, instead suggested increasing the shaming by tattooing the word thief on the face of the criminal rather than on the arm. Once again the king agreed (*Sejong sillok* 1443:25/2/5; 1444:26/10/11).

These were extraordinary measures apparently warranted by the social situation and as we can see they occasioned repeated discussions at court. These debates would not abate in later reigns. The severing of the tendon was reintroduced by King Sejo 世祖 (r. 1455-1468) (*Sejo sillok* 1460:6/3/28; 1465:11/7/4; 11/11/8), and as we enter the reign of Jungjong 中宗 (r. 1506-1544) the practice once again occasioned deliberations at court, discussions that shed interesting light on the ideological dimension of punishment and the tension between royal commiseration and legal authority.

The discussion began in 1510 when Special Lecturer Yi U 李瑀 (1469-1517) proposed that this form of punishment should be abolished since the law code already had proper measures to deal with these crimes (*Jungjong sillok* 1510:5/7/7). Subsequently in 1512 it was abolished as the king considered it too harsh, arguing as follows: "Theft is caused by poverty. These last years we have suffered consecutive crop failures and the people's bodies are afflicted by

hunger and cold. It's not that they do not realise that it will cost them their lives, but they have no choice but to become thieves" (1512:7/11/22).

Twelve years later, however, the king was compelled to reconsider this benevolent ruling since theft was once again rampant, it was claimed. His understanding of the causes of the crime had not changed, but he felt that the situation warranted the employment of harsher punishments and he sought support in the notion that punishment was a useful tool to assist proper rule.

Burglary is rampant around the capital these days; this is caused by poverty. If I acted as a moral example and used the people lightly for corvée labour and diminished their taxes, burglary would disappear by itself. But punishment is a tool to help rule and we cannot but be stern when performing it. (*Jungjong sillok* 1524:19/12/25)

The ministers advised against it this time, but despite his compassionate language, the king's attitude was adamant. He ordered his ministers to further debate the matter with the following justification: "I am not arguing that we shall use this law. In kingly rule the law shall be stern but its application benevolent. These days theft is not only a problem in the provinces but also here around the capital, and we cannot but deal with it sternly" (*Jungjong sillok* 1524:19/12/25).

The majority of officials were still opposed since, as they said, if not even the threat of execution could deter people from burglary, this punishment would have no effect. Others, though, suggested utilizing it as a temporary means to deal with the difficult situation.

Admittedly it is difficult to suppress theft with stern laws, but these days the problem is more severe than ever. People do not fear the law and only death can stop them. Should they have their tendons severed their bodies will never be intact again and even if they would want to gather in gangs and rob they would not have the strength to do it. Sometimes punishment needs to be harsh and sometimes it can be benevolent depending on the period. Arguably we do not initiate this form of punishment. At times you must do the utmost to correct a vice. How about applying the punishment of severing the tendons until this problem has abated? (*Jungjong sillok* 1525:20/1/14)

The debate at court on this matter would continue, but for our purposes the above suffices as an illustration of how the perceived need for stern punishment had to be negotiated with the ideological understanding of punishment and the constraints on the extent of harm the state could inflict on the bodies of its subjects. King Jungjong's assertion that in kingly rule the law has to be stern but its application benevolent indicates that within the Confucian politico-legal tradition, benevolence was as much a royal prerogative as the right to punish.

The Discourse Surrounding Torture

Studies on the practice of torture have played a pivotal role in the development of the sociology of punishment. A number of regulatory, expressive and significatory effects converge in this highly symbolic act and it has been highlighted in scholarly explorations of changing penal paradigms and the cultural dimensions of punishment.¹⁰

Torture has often been resorted to in inquisitorial judicial systems to extract confessions (Edwards 1996), and this was also the case in the Confucian legal tradition. To be able to pass a verdict, an official in charge of a criminal investigation needed either solid forensic evidence or preferably a confession from the suspect. Torture in criminal investigations (*gosin* 拷訊) was stipulated by the *Gyeongguk daejeon* ([1485] 1983, 470-71), and the legally sanctioned form was flogging. However, the brutality of torture ran counter to the central Confucian notions of prudence in the judicial process and benevolence in punishment, and the practice of torture as sanctioned by the law code was restricted. Flogging, on each occasion, should be limited to thirty strokes, the strokes should be below the knees, and the flesh should not be wounded. Torture could not be repeated within three days (except for traitors when it could be performed twice in one day), and the national code stipulated that a verdict must be passed within ten days of the torture. It was also understood that the old and the young should not be subject to torture.

The use of torture as part of the investigating process was critically

10. See for instance Foucault (1977) and Silverman (2001).

discussed both in the fifteenth and the eighteenth centuries. We saw above how King Sejong, taking Qin as an example, cautioned against excessive punishment, and he had similar concerns regarding torture. Although torture was only supposed to be used to extract confessions from suspects the investigating officer was certain were guilty, this was not followed in practice and there was a great risk of injury being inflicted on the innocent, going against the harmony of nature and burdening the people with a passionate sense of injustice. This was disregarding the wellbeing of the people, which might lead to natural disasters and the loss of the Mandate of Heaven. As King Sejong put it:

The crime of murder involves life and death and if we fail to get a proper and detailed picture of the case and instead rely on flogging to get a confession, the guilty will surely go free and the innocent be wrongly punished. Punishments are not properly applied and this will evoke grudges and sentiments of unfair suffering and if this resentment is not dispelled, the harmony between Heaven and Earth will be disrupted, bringing floods and droughts. (*Sejong sillok* 1431:13/6/2)

It is apparent that in order to maintain harmony between Heaven and Earth, torture needed to be properly applied in accordance with the regulations and in proportion to the crime committed. To this effect, Sejong ruled that the number of strokes applied during the interrogation should not exceed the stipulated number of strokes in the punishment for the crime of which the criminal was suspected (Han 2007, 34-37). The aim of torture was to inflict pain rather than to mutilate the body and we saw that the law stipulated that the flesh should not be wounded, but concerns that it might cause unintended physical harm were central to the discourse on the practice, and Sejong's ruling was not only prompted by a desire to have torture match the severity of the crime, but also out of concerns that indiscriminate use of torture might cause bodily harm (*Sejong sillok* 1430:12/12/1).

The focus of the discussions at court concerning torture in the eighteenth century was slightly different. Since restricted torture, as stipulated by the dynastic code, loses its effect, extra-legal forms of torture had been used from the beginning of the dynasty. Knee-pressing (*apseul* 壓膝) was frequently used during the reign of Sejong, but the king did not raise this as a problem, and there is only one record of him ordering extra-legal torture, this time "reckless

beating” (*nanjang* 亂杖), to be stopped (*Sejong sillok* 1430:12/10/28). King Yeongjo, on the other hand, is famous for prohibiting a number of these extra-legal forms of torture (Y. Jo 2009).

Yeongjo’s prohibitions can be partly understood in the context of ideology-construction and the importance of penal benevolence that we could also see during the reign of Sejong. In 1725, his first year on the throne, King Yeongjo prohibited knee-pressing, evoking Emperor Wen of Han’s (sic!) prohibition of flogging on the back and also Sejong’s ruling to the same effect in Joseon (*Yeongjo sillok* 1725:1/1/18). However, he was also going to prohibit extra-legal forms of torture throughout his reign, and this rather seems related to the political upheaval he experienced during his reign. In 1728 a large-scale rebellion broke out, caused by factional struggles surrounding Yeongjo’s enthronement and involving accusations that Yeongjo had murdered his half-brother and predecessor King Gyeongjong 景宗 (r. 1720-1724). The rebellion involved a number of high-profile fifth-columnists, and in the process of suppressing the unrest Yeongjo tortured and executed many high-ranking officials (Jackson 2011). As we will see, he made explicit reference to these events when prohibiting some forms of torture—and at times he was prompted by similar but less serious challenges to his authority—and it seems that the continuous prohibition was part of his efforts to re-establish trust between him and the bureaucracy and to put himself forward as a Confucian sage king in order to gain the upper hand over the competing factions that had dominated political life.¹¹

Yeongjo returned to the issue of extra-legal torture in the early 1730s. In 1732 he prohibited some forms of leg-bending (*juri* 周牢). This form of torture, in which the legs were tied together at the knees and ankles and subsequently clubs inserted between the legs and twisted, had emerged in late Joseon. Initially used only on robbers and thieves, it started to be employed more widely during interrogations at the State Tribunal from the early seventeenth century (J. Sim 2011b, 57-60). Regardless of what motivated the king to make this ruling, the case is a good illustration of the cosmological context of legal discourse since

11. Jo Yunseon (2009) has argued that Yeongjo’s prohibition of torture and cruel punishment must be understood within the context of his harsh suppression of political opposition. For a good treatment of Yeongjo’s efforts to deal with the bureaucracy and its factions by putting himself forward as a Confucian sage king, see Haboush (2001).

the country at that time was struck by drought. The king reportedly cried when mentioning the conditions of the people and criticised his own luxurious lifestyle. The officials, on the other hand, were concerned that he would damage his precious royal body by frequently leaving the palace in the hot weather to pray for rain and staying up all night for the same purpose. The officials suggested supplementary measures such as cutting down the time people spent in jail to remove grievances, and it was in this context that the issue of leg-bending was raised and it was decided that certain forms of this torture should be prohibited (*Yeongjo sillok* 1732:8/6/20).

In 1733, Yeongjo also prohibited branding (*nakbyeong* 烙刑), and this time he made explicit references to the events of 1728, as well as a challenge to his authority that had occurred the previous month.

The King was being treated at the Palace Pharmacy and undergoing moxibustion. After a hundred needles he commanded that the treatment be stopped and said: “I have realized that marks of moxibustion are increasingly difficult to endure, and I cannot but feel moved when I think of the suspects being interrogated in connection with the rebellion in 1728.” He continued: “Since times of yore regulating punishments has been within the law. If the practice is extra-judicial, then it runs against the principle of benevolence in punishment, even if it produces a swift and easy confession. And in days of yore, even if extra-judicial practices existed, they were seldom used and we should follow the prosperous example of previous dynasties. I have already prohibited knee-pressing in 1725, and I followed the advice of my ministers and prohibited the leg-bending at the Capitol Police last year. Now branding remains. Last time when I officiated the interrogation of Kim Wonpal we applied branding given the seriousness of the offence. He would not confess and in the end died a pitiful death [...] I order that following the example of knee-pressing, branding shall from now on be prohibited forever. (*Yeongjo sillok* 1733:9/8/22)¹²

12. Kim Wonpal was suspected of putting up defamatory posters which reproduced the content of posters from the 1728 rebellion. According to records he was branded twelve times. There were worries that he was going to die, but the king saw him as the main suspect and ordered that he be interrogated again. In the end he died during these interrogations. See *Yeongjo sillok* (1733:9/7/29; 9/8/7-10).

Having prohibited branding in 1733, Yeongjo did not show the same attention to torture until 1740, when the compilation work for the supplement to the dynastic code, the *Sokdaejeon*, commenced. Addressing the high officials at the Special Lecture (*sodae* 召對) and elaborating on the rationale behind the new law text, he stressed the need to make sure that benevolent rulings were not later reversed. In an implicit manner he likened himself to Emperor Wen of Han, stating that although knee-pressing and branding might not be as cruel as the bodily punishments Wen abolished, they were still heartbreaking and he had therefore ordered them prohibited.

Also, although Emperor Wen had prohibited the bodily punishments, Emperor Wu of Han 漢武帝 (r. 141-87 BCE) had later used them, most famously castrating Sima Qian. Yeongjo's resolve to abide by the principle of penal benevolence was strong though, he claimed, and even if he had felt the urge to resort to branding in the Yang Chan-gyu 梁纘揆 case of 1739, he had not allowed it to be used (*Yeongjo sillok* 1740:16/4/17). Yang Chan-gyu had been arrested in the ninth month of that year, carrying on him papers defaming the king and claiming that he himself was a crown prince (1739:15/9/16). This incident clearly resembles the threats to his authority that Yeongjo experienced early in his reign, and the fact that the king once again refers to torture and emphasises his resolve to not renege on his benevolent ruling corroborates the impression that his prohibition of extra-legal forms of torture were motivated by the tumultuous events of 1728 and his efforts to re-establish trust between him and the bureaucracy and to put himself forward as a Confucian sage king to suppress such challenges and get the upper hand over the factions.

At this occasion in 1740 Yeongjo also made reference to the somatic integrity discussed earlier in this paper, quoting one of the Ming scholar Qiu Jun's 丘濬 (1420-1495) commentaries from his *Daxue yanyibu* 大學衍義補 (Supplement to the Explications of the Great Learning): "It is thanks to Emperor Wen that people can keep their bodies intact and avoid having their shapes mutilated," clearly putting his own rulings within that context (*Yeongjo sillok* 1740:16/4/17).

King Yeongjo returned to the issue of extra-legal torture in the 1760s. This was also a period of serious political turmoil. The crown prince, Sado Seja 思悼世子 (1735-1762), had developed signs of mental illness, in the end killing palace slaves and eunuchs. Due to the difficult legal situation of how to deal with a crown prince who committed such crimes, in 1762 Yeongjo had him

demoted to commoner status and locked him in a rice chest where he died. After this two new factions emerged, one that supported the king's actions and one that opposed them (Haboush 2011).

The form of torture that Yeongjo turned his attention to in the 1760s was “reckless beating” (*nanjang* 亂杖). In the discussions surrounding this torture no references are made to the political situation at the time, but this was a form of torture that had been used together with different forms of leg-bending also in high-profile cases, and it is plausible that the difficult political situation once again prompted the king to project himself as a sagacious ruler. Given the type of torture discussed this time, compared to the 1720s and 1730s, the references to somatic integrity were more accentuated.

King Yeongjo first brought the matter up in 1765. Illustrations from late Joseon suggests that when “reckless beating” was ordered as part of the interrogation, either the suspect/convict was placed in a chair and surrounded by police officers, who circled round him beating him indiscriminately, or the suspect was placed under a straw mat and the officers clubbed him from above. However, it seems that the most common form was to tie the big toes of the suspect together and subsequently flog the soles of the feet (J. Sim 2011b, 53-54). Throughout the Joseon dynasty it had frequently been pointed out that the use of “reckless beating” often caused the people subject to it to lose toes and this mutilation was a theme that Yeongjo picked up on in his arguments against it.¹³ There was a famous motto that was coined after Emperor Wen abolished mutilating punishments: “those who are dead cannot again come to life and those who are mutilated cannot regain wholeness.”¹⁴ Yeongjo rhetorically asked if resorting to this form of punishment was to rule according to that motto. He ordered that any official in the capital or the provinces that used this torture without first interrogating properly should be strictly admonished and that reckless beating should be prohibited (*Yeongjo sillok* 1765:41/11/23).

13. See for instance *Seongjong sillok* 1489:20/12/24; *Yeonsangun ilgi* 1497:3/8/3; *Jungjong sillok* 1510:5/1/14; 1512:7/1/4; 1529:24/4/29; and *Gwanghaegun ilgi* 1621:13/6/12. When Jeong Yak-yong discussed this form of torture in *Mongmin simseo*, he in fact defined it as “pulling out toes” (Jeong [1818] 1978, 317).

14. 死者不可復生，刑者不可復續。Emperor Wen abolished the five “bodily punishments” after being touched by the filial piety of a daughter who offered to become a court slave if her father was released, submitting a memorial to the emperor allegedly containing this phrase. For a contextualised discussion of Emperor Wen’s ruling, see Turner (1999).

It seems that this ruling was not followed, because in 1770 the king once again had to order that any officials who used this form of torture should be reported (*Yeongjo sillok* 1770:46/2/12), and later the same year he once again ordered that it should be prohibited. He ordered all high officials in the Border Defence Command and all Censors to be gathered and proclaimed:

Even the basest man born with a healthy body would like to pass away with it intact. That is human nature. I am overwhelmed when I think of all the innocent who have been subject to this punishment and have had their bodies harmed. Ah, I have been on the throne for forty-six years and have yet failed to exert humane rule and now in my old days I decide to prohibit a form of punishment that has not existed elsewhere. I have left the palace and made enquiries and everybody is of the same opinion, so from today I prohibit reckless beating, both in the capitol and in the provinces, so that our people can go and meet their fathers with their bodies intact. (*Yeongjo sillok* 1770:46/6/18)

In the beginning of this passage the link with the notion of somatic integrity is clear, and this is also the occasion at which Yeongjo asked the question that was quoted at the beginning of this paper: “Must we really sever people’s toes to uphold the law?” Yeongjo then finishes with an allusion to the notion from *Xiao jing* that it was the duty of a child towards his parents to look after the body they had given him.¹⁵

Praising the king’s devotion to the wellbeing of his people, and echoing his concerns about somatic integrity, Second Censor Yi Hyeonjo 李顯祚 (1707-?) dared to turn the argument against the king and apply the principle also to political life, alluding to the members of the bureaucracy that were exiled to distant islands.

Your Highness feels pity even for the wicked mob if they fail to protect the bodies they have received from their parents and keep them intact. But how can the sagacious virtue of protecting life be maintained if Your subjects, just for remonstrating, are sent to places whence they never return and the

15. Jeong Yak-yong ([1818] 1978, 317) made a similar comment, stating that people who had undergone the torture of leg-bending, even but once, were permanently disabled and could no longer correctly perform ancestral rites for their parents.

bodies they have received from their parents are turned into feed for the whales?

The king acknowledged that the Censor had a point and ordered that the people who had been exiled to distant islands should have their banishment reverted to land locations instead (*Yeongjo sillok* 1770:46/6/18).

In the discussions surrounding the mutilation of thieves in the fifteenth and sixteenth centuries we could see different positions being put forward. Often, but not always, the king advocated a more lenient penal regime and the bureaucracy harsher punishment. However, when the issue of torture was raised, both in the fifteenth and the eighteenth centuries, there seems to have been no disagreement on the appropriateness of ensuring that the use of torture was not excessive or that extra-legal forms of torture should be prohibited so as to avoid unnecessary harm to the human body. Still, as we can see in the exchange between Yeongjo and Yi Hyeonjo, underneath such a consensus about the need to protect the human body, a political struggle could be waged.

Furthermore, despite the emotionally charged language about the suffering torture caused, the use of legally sanctioned torture was not questioned and some extra-legal forms were never prohibited. The resulting emphasis on the *appropriate* use of *legally sanctioned* torture illustrates the need to negotiate the need to extract confessions at interrogations with the ideological obligation to restrain from causing the bodies of the people unnecessary harm.

Forensic Investigations

Forensic investigations were central to the judicial system providing forensic evidence to supplement the confession that was needed to pass a guilty verdict. It also had an important ideological function to fulfil in ensuring that no wrongdoings or unjust treatment afflicted people. The system implemented in Joseon Korea was an institutional borrowing from China, based on the Yuan-period forensic handbook *Wuyuanlu* 無冤錄 (Kr. *Muwollok*, Guidebook for the Elimination of Grievances). As can be seen in the title of this book, the aim was to address the grievances of the people.

It is obvious that given the importance of forensic investigations in both ideology construction and the establishment of a legal framework, considerable

attention was given to this aspect of the judicial process both in the fifteenth and eighteenth centuries. It seems that the *Muwollok* was first introduced in Korea in 1384, but it was not until the establishment of the Joseon dynasty and the reign of King Sejong that efforts were made to systemize the forensic sciences and the *Muwollok* emerged as the principal guidebook (H. Kim 2003). In 1430 the book was mentioned among the texts for the examination of legal officers (*Sejong sillok* 1430:12/3/18). In 1435 it was stressed that since neither central nor local officials had proper command of forensic medicine, it was crucial that the guidelines of this text were followed. The book should be used for the examination of not only legal officers (*yulgwa* 律科), it was argued, but also for clerks (*igwa* 吏科), while officials at court should also be urged to study it (*Sejong sillok* 1435:17/6/8).

It was also during the reign of Sejong that a domestic textual basis for forensic investigations was produced. Many passages in the *Muwollok* were considered difficult to understand, and the king ordered a Korean annotated edition to be produced. The text was completed at the end of 1438, and in spring the following year the king ordered the book to be printed and distributed to all parts of the country (H. Kim 2003, 16-18). The same year a template for forensic investigations, the *geomsi jangsik* 檢屍狀式, was also produced based on the *Muwollok*, and provincial governors were ordered to make woodblocks, print it, and disseminate it to all counties. A similar order was then repeated in 1446 with more detailed instructions about the handling of these documents (*Sejong sillok* 1439:21/2/6; 1446:28/5/15).

In the eighteenth century we can once again see efforts at systemizing and clarifying the legal framework for forensic investigations. In 1748, during the reign of Yeongjo, the 1438 annotated edition was revised and expanded on royal orders (H. Kim 2003). King Jeongjo also displayed concern for forensic investigations. In 1784 he promulgated an elaborate set of rules for forensic investigations in the capital, the *Gyeongok geomheom samok* 京獄檢驗事目 (*Jeongjo sillok* 1784:8/3/27). He also ordered yet another revision of the annotated *Muwollok* that was completed in 1796. In the meantime a translation of the same text into vernacular Korean had been produced, the *Jeungsu muwollok eonhae* 增修無冤錄諺解, first issued in 1792 and later reissued in 1796 and 1797 (H. Kim 2003).

The eighteenth-century discourse at court relating to forensic investigations also shed interesting light on how the legal system had to be negotiated as

regards notions of the body; in particular discussions on the appropriateness of exhuming corpses for forensic investigation. The context for this is, of course, the notion of somatic integrity and the understanding that the energy continues to flow in the body even after death. Harming a corpse was therefore a very sensitive issue.¹⁶ In the practice of forensic medicine in Joseon Korea, in accordance with *Muwollok*, the basic principle was that the body was left intact, no autopsy was performed, and the cause of death was investigated by looking at discolorations and other surface phenomena.¹⁷ The few cases of dissection that could be found in the history of China and Korea were strongly criticised by Joseon intellectuals (Shin 2010).

How can we understand this increased interest in forensic investigations in the eighteenth century? As it was often the compilation of revised versions of the dynastic code that occasioned these discussions, it seems that this interest was part of an overall effort to systemise and clarify the legal framework. As was indicated earlier in this paper, the need to systemise the overall legal framework was a result of the social and demographic changes of the period, and it seems that to a certain extent the same was true also for the attention given to forensic investigations. The elaborate regulations for forensic investigations in the capital promulgated in 1784 indicate that demographic changes and urbanisation had created a social situation in which new procedures were needed.

As for the discussions on exhumation, they seem to have been warranted specifically by the difficulties the unclear guidelines caused criminal investigations. The instructions in the forensic guidebook displayed ambivalent attitudes towards exhumation. While acknowledging the inappropriateness of this practice, the *Muwollok* stressed the importance of performing forensic investigation and settling matters related to life and death. In conclusion they endorsed exhumation but stressed that factors such as the severity of the crime and the time period since burial needed to be taken into consideration (*Sinju Muwollok* [1440] 2003, 192-95). In the Joseon dynasty, however, it seems that the basic principle had been not to exhume.

References to these difficulties were made during the reigns of both

16. Shin Dong-won (2004) has provided a very interesting reading of the story of Byeon Gangsoe in which the corpse of Byeon is ground in retribution for his insolence against the spirits.

17. For a brief summary of the forensic techniques used in *Muwollok*, see Kim Ho's introduction to his translation of *Sinju Muwollok* (2003).

Sukjong 肅宗 (r. 1674-1720) and Yeongjo, and they both made rulings related to exhumation. However, since this was a sensitive matter, the kings' attitude was also somewhat ambivalent, and it was not until the reign of Jeongjo that we see an effort to resolve the matter more thoroughly. In 1692, prompted by the alleged negligent management of murder cases in the provinces, Sukjong made his contribution to the discourse on exhumation, albeit in an indirect manner. He stressed that in murder cases forensic investigations are imperative, but that recently in the provinces magistrates had started to perform these investigations capriciously. Consequently, cases were not concluded properly and people fell ill and died while being incarcerated. It seems that the main concern was the reluctance to exhume since he ordered that thenceforth investigating officers should personally take charge of "opening the coffins and performing the examinations" (*Sukjong sillok* 1692:18/12/20). This became a ruling that Jeongjo later was going to refer to.

An interesting case from the reign of Yeongjo well illustrates the reluctance to exhume and the difficulties this caused. Kim Sibal 金時發 was a former magistrate suspected of killing a neighbour of lower social status. Both the first and second investigation reports stated that although no sign of physical violence could be detected on the body, it was the parents of the deceased neighbour who had claimed that their son had been beaten to death by Kim Sibal. The governor of the province asked the following rhetorical question in his report: "Kim Sibal is a person of power, so how could these poor people have dared to accuse him of murder if it was not the case?" and in a subsequent report that was produced, the investigating officer claimed that there indeed had been clear signs of physical violence.

With these two contradictory reports the central government was faced with a conundrum. It was proposed that the corpse should be exhumed and yet another forensic investigation performed, but as this was considered an offence to the dead body, instead all involved were punished. As Yeongjo said: "If the governor held excessive doubts about the first two reports, then he did wrong even if it was out of concerns for the weak, and if the investigating officers concealed anything out of fear for the suspect, then they did wrong." In the end the governor was dismissed from office and Kim Sibal exiled (*Yeongjo sillok* 1738:14/10/8). The king would rather have all involved punished in 1738 than exhume the corpse to seek further evidence.

In 1765 Yeongjo revisited the issue and this time also made a ruling that

Jeongjo later would refer to:

Whenever I hear a forensic report the heartache is unbearable. Furthermore, what is this talk about performing a forensic investigation on a body that has already been buried? In the days of yore King Wen of Zhou would bury bone remains, but these days we instead consider conducting forensic investigations on skeletons! In my opinion such behaviour is tantamount to murdering the person twice and indeed a most cruel act. Henceforth, in case a person has been murdered and furtively and unceremoniously buried, and therefore a forensic investigation is performed according to the regulations, the authorities shall be in charge of the re-burial. And in those cases where a proper burial has been performed, no forensic investigation is allowed. (*Yeongjo sillok* 1765:41/2/2)

Yeongjo did not explicitly endorse exhumation, but indirectly acknowledged it by stressing that in those cases in which it was performed—and he did specify that it had to be murder cases where the corpse had been furtively and unceremoniously buried (*ingmae* 匿埋)—it was the responsibility of the authorities to re-bury the body. He instructed that this ruling should be adopted as a royal edict, and it seems that later, when referring to this, emphasis was rather put on the section that prohibited exhumation when the body had been properly buried (*ye* 瘞).

Yeongjo's and Sukjong's indirect endorsements apparently had little impact in terms of clarifying the situation, and it was left to Jeongjo to try to settle the matter. In 1777, the first year of his reign, the issue was again debated at court. It started on the sixth day of the fifth month when a group of officials from the Office of Special Advisors submitted a petition to Jeongjo. They reminded the king that despite the fact that the forensic guidebook *Muwollok* sanctioned the act of exhuming corpses for investigation so as to be able to conclude a case, in Joseon this was “not permitted.” The consequence of this, they lamented, was that when bodies had been hastily buried after a covert agreement between the two involved parties, or when suspicious circumstances were not revealed until a long time after the death had occurred, the officials had to rely on indecisive testimony that could result in misguided rulings. “So how can we guarantee that wrongdoings are not committed?” they asked, and urged the king to allow the investigation of already buried bodies (*Jeongjo sillok* 1777:1/5/6).

Four days later Jeongjo addressed the matter after Third State Councillor

Jeong Jon-gyeom 鄭存謙 (1722-1794) had also broached the topic, expressing apprehension over the fact that guilty people might evade punishment if corpses were not examined simply because they had already been buried. This situation, argued Jeong Jon-gyeom, was due to the earlier ruling made by the king's grandfather Yeongjo and he asked the king to supersede that ruling with an edict ordering that henceforth the regulations in the *Muwollok* were to be abided by. The king asked the opinion of the other ministers present, and they all agreed with the councillor.

After reviewing the edicts relating to this issue promulgated by his predecessors, the king cautiously proceeded to clarify his own position. Seemingly contradicting what had been discussed before, the young king claimed that the last time his advisors had urged him to allow the investigation of buried bodies to avoid injustice, he was only aware of King Sukjong's ruling. But since then, having looked into the issue, he had become aware of King Yeongjo's edict. In Jeongjo's opinion, however, Yeongjo's edict did not prohibit the investigation of buried bodies as such either, and the reason why such corpses were not investigated was because the officials in charge did not properly understand the purport of the edict.

The purpose of the regulation in *Muwollok* allowing buried bodies to be exhumed and investigated is to repress the iniquitous practices of people reaching covert agreements or furtively burying bodies. My predecessor said that in cases where a person has been murdered and furtively buried, a forensic investigation should be performed according to the regulations, so how can this be different from King Sukjong's decree that the regulations in the *Muwollok* should be abided by? When discussing this matter these days some people might be under the misapprehension that the latter statement—that in those cases where a proper burial has been performed, no forensic investigation shall be performed—is a royal prohibition of exhumation, but that is certainly not the case. It only refers to the examination of skeletons. There is thus no need to revise these regulations, the edicts of both my two predecessors can be followed. (*Jeongjo sillok* 1777:1/5/10)

Having thus averted contradiction of either of his predecessors, the king concluded by stressing that disinterring skeletons to examine them under the pretext of this clarification, and thus causing discord and inciting lawsuits, ran

counter to the sincere purport of his predecessor's edict.¹⁸ To prevent this from occurring he ordered that any corpses buried before this clarification could not be considered for investigation, and in those cases in which it was necessary to exhume a buried corpse, a report should always be dispatched to the king before the work commenced.

When a revised version of the dynastic code, the *Daejeon tongpyeon*, was compiled in 1785, Yeongjo's edict from 1765 was included with the important difference that it now explicitly endorsed exhumation in murder cases where the body had been furtively and unceremoniously buried while maintaining the prohibition against exhuming properly buried corpses (*Daejeon tongpyeon* [1785] 1963, 659). Since Jeongjo had perceived no reason to challenge the rulings of his predecessors, his views were not reflected in the new law code.

This clarified codification did not settle matters, though, and in 1799 the issue was once more brought up for discussion. On this occasion it was scholars who had been involved in legal compilation works who maintained that the phrasing in the *Daejeon tongpyeon* was still too vague and that this could disrupt the performance of forensic investigations in the capital and in the provinces. They argued:

When the regulations from year *jeongyu* [1777] state that forensic investigations shall not be performed on bodies already buried, it refers to the examination of skeletons and corpses that have been buried for a considerable time. Furthermore, it has never been the case that a body cannot be exhumed for examination, even if it has been buried for a considerable time, if there is an urgent need for an investigation, regardless of whether the two sides have agreed to bury the body or whether it has been furtively interred. And when it comes to simple commoners wound up in a straw mat and temporarily covered up, we cannot really say that they have been properly buried. In such cases it is indeed appropriate to disinter the body and examine it, while at the same time informing the king of it. (*Jeongjo sillok* 1799:23/11/6)

The king agreed to issue a new edict.

18. In fact, the forensic guidebook endorsed the examination of skeletons (*Sinju Muwollok* [1440] 2003, 196-99).

To conclude, the question of whether or not to exhume continued into the nineteenth century (*Sunjo sillok* 1809:9/6/17). There were still times when corpses were not exhumed because they had been properly buried, and Jeong Yak-yong was very critical of this. In both *Mongmin simseo* and *Heumbeum sinseo* he stressed that three kings, Sukjong, Yeongjo and Jeongjo all had issued edicts that allowed exhumation and accused the compilers of the *Daejeon tongpyeon* of not having made this properly clear. He reiterated that regardless of whether the coffin was in the funeral parlour or had been properly buried, exhumation was allowed, and that the only exception was the exhumation of bones (Jeong [1818] 1978, 310; [1819] 1999, 210). It was not until the 1865 revision of the dynastic code, the *Daejeon hoetong*, that it was confirmed that the prohibition against exhumation only related to skeletons. The new clause stressed the point that if the period since burial is not taken into consideration, it is difficult to argue for an insufficient burial ([1865] 1985, 734).

The discussions surrounding the exhumation of corpses continued from the late seventeenth century into the nineteenth and illustrate well the tension between the need to conduct forensic medical investigations to successfully conclude a case, something also of ideological significance since this would ensure that no wrongdoings or unjust treatment afflicted people, and the need to abide by ideologically and culturally held notions of the body. Although it is difficult to discern any differing views between Yeongjo and his officials, it seems that the effort to clarify the situation during the reign of Jeongjo was driven by the bureaucracy. The overall impression is that it was the ruler and the officials in charge of actually performing the investigations who showed reluctance to exhume—the former maybe ideologically motivated and the latter maybe due to the unclear guidelines and having to face next of kin—and that it was the officials in the central bureaucracy that were most keen to straighten up the procedures to facilitate the conclusion of criminal cases.

Concluding Remarks

This paper has aimed to show the process of negotiation the Joseon state engaged in between employing the law and punishment to protect the system and social order on the one hand and the need for the state itself to adhere to the principles that supported this system and its social order to legitimize its

power on the other. Addressing the role of law and punishment in statecraft, the analysis is based on a theoretical framework that combines a conflict-based understanding of society with a consensus-based one. Admittedly, there are substantial limitations to the “social consensus” or the ubiquity of norms and values in the above discussion, since it mainly reflects discussions at court embedded in the Confucian ideology of the ruling elite. Presumably Buddhist and Shamanistic notions would also have influenced notions of the body in society at large.

The purpose here, however, has been to show how the state, when mobilizing the law to protect ideology and its underlying cosmology, also needed to negotiate with the same norms and values when executing the law. Punishing in the name of moral and cosmological principles circumscribed the arbitrary use of the law as a tool for social control and provoked lengthy discussions at court on the legitimacy of certain forms of punishment and other judicial practices. A strong state might disregard such scruples, but these norms and values surfaced in the process of ideology construction and the edification of the populace, as well as in power conflicts at court—the king wanting to present himself as a sagacious king to get the upper hand over the bureaucracy, or the bureaucracy evoking Confucian norms and values to circumscribe the authority of the king.

Focussing on ideological and cosmological notions of the body, it argues on the one hand for the existence of a tension between the ideological duty of the state to look after the well-being of the people and respect their somatic integrity, and on the other the perceived need to discipline and punish those same bodies. In terms of applying the law and punishment for their deterrent effect, we have seen that the rationale behind capital punishment in its various forms in fact was to violate that somatic integrity. Also, when the situation allegedly so demanded and it was ideologically justifiable—as in the case of theft in early Joseon and the proclaimed duty to look after the wellbeing of honest people—the concerns about somatic integrity would be disregarded, although the appropriateness of this caused debates at court.

On the other hand we have also seen that protecting this somatic integrity was part of the rhetoric behind both the cautions against the excessive use of torture and the prohibition of various forms of extra-legal torture. Furthermore, in the case of forensic investigations, we have seen a reluctance to exhume corpses for investigation, but that after lengthy negotiations from the late

seventeenth century into the nineteenth, eventually the law text was revised to clarify that this was indeed permitted to enable the successful conclusion of criminal cases and reach a verdict. Also in this case the disregard for somatic integrity could be justified with the ideologically based claim that this would ensure that people did not suffer unnecessary grievances.

The negotiations also reflect the relationship between the ruler and his bureaucracy. In periods of ideology construction the rulers would argue for penal benevolence and respect for the somatic integrity of the people to put themselves forward as sagacious Confucian kings. We could see this in Sejong's initial reluctance to punish thieves harshly and the eighteenth-century kings' ambivalent position on exhumation. The bureaucracy, on the other hand, often advocated legal stringency. In the discussions at court relating to torture, nobody would question the appropriateness of limiting damages or prohibiting extra-legal forms of torture, but also in this case the power balance between the king and the bureaucracy was in the background with Yeongjo dominating the discourse, attempting to get the upper hand over the competing factions that had dominated political life in the bureaucracy. Second Censor Yi Hyeonjo's remarks offer a fascinating glimpse of a counter-discourse.

Unlike previous studies by both historians and legal scholars, this focus on continuous negotiation does not provide a clear picture of change or development along the spectra of 'rule by virtue' versus 'rule by law' or 'arbitrary/personal rule' versus 'rule by the system.' The argument, however, is not one of overall continuity in legal culture; the main focus is on the process of negotiation rather than the larger politico-legal or socio-legal context in which it was embedded. The hope is that this approach can highlight one dynamic aspect of the Joseon legal system and facilitate an understanding of the intriguing mix of penal benevolence and harsh punishment that can be observed throughout the Joseon dynasty.

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Abstract

Once considered almost exclusively to be the domain of legal scholars, Joseon dynasty criminal law is recently attracting increasing attention from social, political and intellectual historians of Korea. Despite often reaching opposing conclusions on the characteristics of Joseon legal culture, historians and legal scholars share a strong focus on the dominating role of Confucian ideology. While acknowledging the importance of Confucianism for Joseon statecraft, this paper argues that in actual statecraft and the application of the law, this ideology was negotiated with the perceived needs of the state. The focus of analysis is the relationship between the judicial process—investigation, interrogation and punishment—and cosmological, ideological and cultural notions related to the body. The purpose is to show the tension between the state need to maintain the system and uphold social order (as defined by the state) and the need for the state itself to adhere to the basic principles of the ideology that underpinned this system. Addressing the role of law and punishment in statecraft, the analysis is based on a theoretical framework that combines a conflict-based understanding of society with one that is consensus-based. While on the one hand the violation of notions related to the body was the purport of punishment when dealing with the most severe crimes against the state and its ideology, we can also see how such notions influenced the discourses on penal benevolence, torture and exhumation, whilst partly constituting the reason why some forms of torture were prohibited.

Keywords: punishment, torture, mutilation, exhumation, somatic integrity