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Narrative Section of a Successful Application

The attached document contains the grant narrative and selected portions of a previously funded grant application. It is not intended to serve as a model, but to give you a sense of how a successful application may be crafted. Every successful application is different, and each applicant is urged to prepare a proposal that reflects its unique project and aspirations. Prospective applicants should consult the Research Programs application guidelines at http://www.neh.gov/grants/research/fellowships for instructions. Applicants are also strongly encouraged to consult with the NEH Division of Research Programs staff well before a grant deadline.

Note: The attachment only contains the grant narrative and selected portions, not the entire funded application. In addition, certain portions may have been redacted to protect the privacy interests of an individual and/or to protect confidential commercial and financial information and/or to protect copyrighted materials.

Project Title: Law and Custom in Korea

Institution: St. Cloud State University

Project Director: Marie Seong-Hak Kim

Grant Program: Fellowships Program

Law and Custom in Korea

Marie Seong-Hak Kim

1. PROBLEM AND CONTRIBUTION

My project sets forth the evolution of Korea's civil law and legal culture in the modern period with a focus on customary law. The dichotomy of tradition and modernity presents a perennial question for scholars of East Asia. The process of legal modernization and its relationship with indigenous custom and national identity in Korea constitute issues of particular poignancy because of the country's colonial past. Korea became Japan's protectorate in 1905 and remained a Japanese colony from 1910 to 1945. One of the thorniest dilemmas in Korean legal history is that the establishment of modern law and legal system was accompanied by a progressive loss of national independence. In Korean legal historiography, the view that legal changes initiated by Japan were essentially geared to promote imperial interest remains predominant, and many scholars have focused on the suppression and distortion of the Korean legal tradition and culture by the colonial authorities. Yet their general reluctance to discuss colonial modernity has left unresolved the problem of drawing a connection between Korea's traditional law and its modern system based on the Romano-German legal tradition.

My main thesis is that the transplantation of European civil law in Korea was facilitated by the colonial authorities who constructed a Korean customary law; this constructed customary law served as an intermediary regime between tradition and the demands of modern civil law. My project thus revises dominant views in Korean legal historiography in several important aspects. Historians have viewed that Chosŏn Korea (1392-1910) had its own system of private law in the form of customary law. But asserting the existence of custom in premodern Korea as a spontaneous legal order is a result of misplaced emphasis. It amounts to postulating indigenous law in order to show that it was distinct from laws imported either from China during the dynastic period or from the West under Japanese rule. This way of thinking involves approaching Korean law from a Western frame of reference. Conceptual definitions of private law or custom are conspicuously deficient in Korean legal historiography, and scant attention has been paid to the risk of methodological flaws of imposing imported Western concepts and legal categories on Korea. I argue that the concept of custom in the legal meaning of the term did not exist anywhere in premodern East Asia and that Korean "customary law" was the creation of the Japanese colonial jurists. It was under Japanese rule that old customs of Korea were redefined and institutionalized as legal rules.

Once one acknowledges that there was no custom as the true source of private law in Chosŏn Korea, and that what Korean legal historians refer to as "custom" was rather the historical construct of the Japanese jurists who were given the task of formulating a modern legal order in Korea, the assertion that its customary law was destroyed by the Japanese colonists loses much of its relevancy. Instead the important question to be answered becomes not whether Korean custom was intentionally distorted as part of its imperial policy but how closely the Japanese chose to engage in reconciling the pre-modern Korean legal tradition with the demands of modern civil law principles, and how these choices influenced the way that modern Korean law today addresses essential issues in private law relations.

My project approaches customary law from a comparative perspective. There has been much debate in colonial historiography on the topics of the "invention of tradition" in European colonies in Africa and Southeast Asia. European imperial powers introduced law of European origin as the general law of the colonial territories, but also allowed the continuance of indigenous legal practices and local institutions. From various and often contradictory decisions and representations made in the native courts, colonial officials tried to ascertain what the fundamental rules of colonized peoples were, and having done so labeled them "customary law." But what was enforced in colonial courts was far from a reflection of indigenous traditions. Following the imperial trend, the Japanese recognized the legal force

of “custom” as governing most private legal relations among the colonized subjects in Korea. Yet Japan's approach to native custom and the justice system differed from the European approaches. In colonial Korea, indigenous customary rules were interpreted and implemented exclusively by the state court judges who decided customary law cases according to the metropolitan legal procedures with little participation of the native population. Legal pluralism was inherent to European colonial order, and the basic separate categories of "citizen" and "indigenous subject" underpinned a dual system of law and courts. In contrast, Japan's decision to eschew multiple legal forums suggests that its legal civilizing mission departed from the European imperial pattern grounded in "colonial difference," a rule based on racial differences, which led the natives to be excluded from the otherwise universal liberal reforms. Precisely because Japanese officials were not influenced by any sense of legal relativism, they applied Japan’s civil law directly to Korea, and thus facilitated a more efficient process of legal transplantation.

Historians have long debated on the relationship between colonial institutional modification and postcolonial appropriation. A number of scholars asked whether dazzling economic success of Korea in the 1960s and on was due to so-called Japanese “developmental colonialism.” A similar question can be posed regarding legal development. What Africans demanded during the course of anticolonial movement in the 1950s, i.e., a unified legal system, integration of customary law and modern law, and a single hierarchy of courts open for all, had already been achieved in Korea during the colonial period. This suggests that Koreans may have been better prepared to operate a postcolonial judiciary than their African counterparts.

In contemporary Korea, colonial customary law is a topic of political saliency. During the past few years, both the Supreme Court and the Constitutional Court of Korea have been caught up in discussion of “tradition” and “custom” as they grappled with the judicial and constitutional ramifications of those terms. A recurring issue in the debates that took place before the court and in wider legal circles was whether certain provisions in the Korean Civil Code could be deemed constitutional on the grounds that they were deeply rooted in Korean tradition. Colonial customary law has thus become a subject of not merely historical inquiry but also of critical constitutional consideration.

My study embraces a critical vision of the recent post nationalist approach that argues for the need to go beyond the obsession with overcoming colonialism. It is beyond dispute that the modern legal system established under Japanese rule functioned to buttress colonial governance. But a study of the history of Korean civil law untrammeled by the nationalist paradigm and free from the historiographical confines of the past is urgently needed. To date, no work has been done outside Korea to examine Korean colonial law and its impact on postcolonial law. My project will be the first comprehensive study of Korean customary law in English and one of the few studies in Korean legal history available for non-Korean readership.

2. METHODS, MATERIALS AND SKILLS

My project examines Korean law and custom from a broad theoretical and empirical perspective. Any study of the evolution of civil law should begin with the discussion of the often difficult concept of custom in history. Here my formal training in both history and law (I am a licensed attorney) has enabled me to undertake an in-depth interdisciplinary study of legal traditions. In particular, my background in European history with nearly thirty years of research in early modern French history is essential, because the legal notion of custom developed in medieval Europe and the codification of civil law originated in France. Comparisons of customary law in Europe and Asia will bring fresh light on legal history.

A major emphasis of my study is placed on Korean colonial jurisprudence and doctrinal writings. The Chosŏn High Court's case reports, the key source for my research, has not been systematically studied even by Korean historians. My language skills in Korean (my native language) and Japanese

(near-native proficiency) allow me to conduct a serious investigation of these sources. My study traces the influence of the European civil law tradition on intellectual innovations in Meiji Japan and Korea, and my proficiency in French is crucial in examining contemporary European legal theory. I have published in four languages (Korean, Japanese, French, and English).

No previous work has examined customary law policy in European and Japanese colonies together. Comparative study of colonial custom is important because the various conceptions of colonialism and indigenism influenced different trajectories of legal development in postcolonial societies. My research aims to present a workable framework for comparing East Asian colonial law with European colonial law, and again my background on French history will facilitate this effort. Finally, a significant part of my study will be devoted to the analysis of modern Korean jurisprudence of customary law. I have a sufficient background in studying modern Korean law.

My project is grounded on the premise that Korean legal history can benefit from what Marcel Detienne has called "le regard éloigné" ("the distant gaze"). By casting their eyes beyond national borders, historians can undertake research cutting across regions and areas, either geographically or chronologically removed. While an impressive amount of research on Korea has recently appeared in Korean language, there are as yet few signs of a live dialogue between Korean scholars and scholars outside Korea. I believe that comparative research is essential in tackling provincialism in the writing of legal history. Korean legal history remains a sorely isolated and underdeveloped field. I can make a unique contribution to filling this gap in scholarship.

3. TIMETABLE AND DISSEMINATION PLANS

The NEH fellowship is requested to support the project in the crucial stage leading to completion. The project has been in progress for some time and substantial research outcome has accumulated. My goal is to finish a book-length manuscript during the award period.

During the last two years I have published four full-length articles related to the project in leading journals. The topics that have been covered include law and custom in Chosŏn Korea (The Journal of Asian Studies; The Journal of Early Modern History—forthcoming), colonial jurisprudence (The American Journal of Comparative Law), and Japan's legal policy during the protectorate period (The Journal of Japanese Studies). The remaining subjects to study include (1) the colonial legal structure and the evolution of Japan's legal policy following annexation; (2) comparisons of customary law policy in Asian and European colonies; and (3) customary law in modern Korean jurisprudence. I plan to complete research on these topics before June 2010. I will be ready by July 2010 to start composing book chapters, developing a comparative analytical framework in a coherent interpretive scheme. I intend to prepare the manuscript fully ready for publication by the end of the award period in June 2011.

The timing is essential because the year 2010 marks the 100th anniversary of the annexation of Korea by Japan. Publication of what is expected to be the first monograph in English on colonial law will place a meaningful mark at the beginning of the new century of the Korea-Japan relationship. I will continue submitting articles for publication in journals. My ongoing research results are also planned for communication to scholars at conferences both in the U.S. and abroad, including the American Society for Legal History Conference, Association for Korean Studies Europe Conference, and Association for Asian Studies Annual Meeting. A number of international conferences and symposia are planned throughout 2010 and onward to commemorate the centennial of annexation. They will serve as critical venues for disseminating my research results and building a collaborative network of scholars in Korean studies. I hope my research can make a modest contribution to promoting collaborations between Korean and Japanese historians and jurists and also among scholars worldwide.

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