

Introduction

Rights in Action

Patricia Goedde and Celeste L. Arrington

People in South Korea are increasingly asserting their rights. They make rights claims in public and via the courts, the National Human Rights Commission, legislative and bureaucratic processes, and international human rights mechanisms. In recent years, for example, people with disabilities have litigated for accessible public transit and welfare benefits; citizens have turned to the courts and truth commissions for exoneration and compensation for the Korean government's actions during the Korean War (1950–53) or authoritarian rule (1950s–87); sexual minorities have campaigned for comprehensive anti-discrimination legislation and constitutionally challenged the prohibition against gay marriage; victims of sexual harassment have sued private companies and demonstrated *en masse*; and refugee and migrant advocates have traveled to Geneva to report violations of treaty principles.

This book investigates how rights are enacted, constructed, and challenged in South Korea. Rather than focus on jurists and legal institutions, it adopts a broader conception of rights claiming, which we define as the diverse and changing ways in which people interpret and articulate grievances and engage in claims-making to remedy them. Although the concept of individuals' private rights did not appear until the late nineteenth century in Korea, the Joseon state (1392–1910) did provide legal channels for voicing and relieving *won*, or the sense of having been wronged, to help maintain the rigidly hierarchical social and moral order (see J. M. Kim 2015, chap. 1). Even women were able to bring claims through such petitioning channels, albeit in cases circumscribed by Korea's social hierarchy. Under Japanese colonial rule (1910–45), interesting contests occurred over Korean subjects' legal capacity to bring claims and the legal status of Korean customs. Although wives lacked legal capacity in nearly all contexts and took comparatively few legal actions, they had some rights that they leveraged in claims-making that simultaneously empowered them and solidified Japan's household registry system for controlling Korean subjects. The modern system of law on which rights claims would later be based was thus not just imposed from Japan but also developed through state–society interactions and jurisprudence in Korea (M. S.-H. Kim 2012). After liberation and the US

military occupation, the Republic of Korea created democratic institutions and a constitution that protected citizens' rights. Much rights claiming since then has appealed to the rule of law or for new laws to codify rights. However, these institutions also left room for those in power to circumscribe citizens' rights in the name of anti-communism, national security, capitalist economic development, and family values. As a result, claims-making often entailed contestation over how to interpret and implement rights protections.

From the petition drum of the Joseon period, which allowed subjects to directly appeal to the king regarding perceived injustices, to the Constitutional Court and the presidential Blue House's new online electronic petition system, the institutions and practices that shape rights claiming in Korea deserve fuller analysis. So do the historical experiences and social interactions that imbue rights concepts with distinctive meanings and overtones. We argue that the prism of rights offers a useful framework within which to analyze why and how people in Korea have sought to redress grievances or social inequalities, overcome marginalization, and catalyze social and political change or in some cases fail to do so. Recognizing the modern, Western pedigree of rights as a concept, we remain attentive to the need to examine the underlying logics of indigenous legal practices and institutions.

Since the twentieth century, the language of rights (*gwoilli*) and human rights (*ingwon*) have become increasingly widely invoked in South Korean media, government agencies, schools, and households. For example, anti-government dissidents actively propagated human rights discourses in Korea in the 1970s. The lawyers who defended them called themselves human rights lawyers (*ingwon byeonhosa*) and greatly influenced the development of civil society after Korea's democratization in 1987 (Chang 2015; Goedde 2009). Among poor tenants who felt unjustly evicted by urban redevelopment projects in Seoul, calls for the right to subsistence (*saengjongwon*) morphed into the right to housing (*jueogwon*) in the 1990s (Shin 2018). Discussions about decriminalizing adultery pitched arguments about rights to privacy (*gaein saenghwalgwoilli*) and sexual freedom against arguments about protecting women's economic rights vis-à-vis adulterous husbands (K. Cho 2002). In the early 2000s, people with disabilities asserted a right to mobility (*idonggwon*) when protesting for reforms to make public transit accessible. Increasing numbers of migrant workers, marriage migrants, and North Korean refugees residing in Korea in the new millennium prompted discussions about which groups have access to which rights, leading to complex hierarchies among groups, as Erin Chung details in Chapter 13. Most recently, women's groups gained a boost from the Korean Constitutional Court's April 2019 ruling against the country's six-decade old abortion ban for limiting women's rights to self-determination (*jagigyeoljeonggwon*), health (*geonganggwon*), and life (*saengmyeonggwon*) (M. Kim 2019). This book's chapters analyze the proliferation of rights claiming in Korea from different perspectives and illustrate how rights claiming targets not just the state but also business and societal actors. While the chapters do not explicitly trace any overarching narrative of rights

in Korea, they together demonstrate the overall expansion of rights over time and learning among rights claimants.

Usually, only as a last resort do such strategic assertions of rights entail time-consuming and costly litigation. Before that stage, rights can serve to define injurious experiences as an injustice or violation of some legal principle that is justiciable, imbue a person with legal capacity to make claims, spur mobilization based on shared feelings of injustice, and identify remedies by tapping into international principles and associated policy instruments (Felstiner, Abel, and Sarat 1981). They can also spur backlash, countermobilization, and rights retrenchment. Being cognizant of the discrepancies between ideals and reality – between law on the books and law in action – this book investigates what bases people in Korea use to make claims, what channels they employ, what rights mean to those deploying them and to bystanders, and how rights-based claiming affects their activities and interactions with other actors.

DEFINITIONS

Rights come in many different shapes and flavors, but are usually linked with concepts of human rights, social justice, and rule of law. They may be encoded in national statutes or international treaties like the Universal Declaration of Human Rights or the Convention on the Rights of Persons with Disabilities. Other times they take looser forms, such as when aggrieved parties make demands for some injustice to be rectified. Some scholars criticize efforts to study rights outside specific historical contexts or the economically dominant Global North, which developed notions of individual rights and promoted them via international organizations and NGOs. They emphasize cultural and historical differences and challenge the assumption that norm diffusion automatically or necessarily proceeds from advanced liberal democracies to more marginal polities (e.g., Alford 2007, chap. 7; Ishay 2008; Stammers 1999; Towns 2012). We agree that rights concepts do not necessarily mean the same thing across time and context, and rights sometimes emerge organically in localities. While being sensitive to the conceptual contours of rights as they emerge from our empirical cases in Korea, we reject a sharp contrast between rights claiming in Korea versus in other countries.

For the purposes of this volume, our position is that rights are not completely subjective but are grounded in similar baseline notions about human worth and dignity, state protections and legal restraints on state actions, and the utility of claiming some legal entitlement. We think therefore that there is value from employing the concept of rights. How different groups mobilize and flesh out this shared baseline conception of rights is the focus of our chapters' empirical analyses. We thus move beyond terminological debates about using Western concepts to instead examine rights in action in the context of South

Korea.¹ We investigate claims-making and clarify what the people who invoke rights language and contest rights in Korea understand rights to mean. To scholarship about “Western” rights conceptions, our volume adds evidence about how home-grown conceptions of justice and human dignity grew into rights discourses and about the productive feedback loops between local rights-based mobilization and transnational rights-promotion activities.

“Rights” as used in this book encompasses varied conceptions and subsets, including but not limited to constitutional rights, human rights, substantive and procedural rights; civil, political, social, economic, and cultural rights; citizens’ rights; women’s rights; and minority rights. In so doing, this book broadens the aperture compared to classic studies like William Shaw’s edited volume *Human Rights in Korea* (1991), which focused on civil and political rights. Like Shaw’s volume, however, we find that “there is no monolithic consensus in Korean society, or even within the Korean government, on human rights issues. There is no longer, if there ever was, a single Korean orientation or political culture considering the subject” (Shaw 1991, 5). Indeed, Chapters 4 and 9, for example, show that claims related to violence on Jeju Island in 1948 and workers’ rights have shifted over time in interaction with counterclaiming and socioeconomic changes, respectively. There is thus a baseline conception of rights that then gets shaped, defined, and acted upon within particular temporal-spatial contexts. As Stuart Scheingold (2004) did in his classic work on “the politics of rights,” this volume’s contributors adopt a relational approach to claims-making and investigate *how* diverse groups use rights to frame and debate policy issues, sometimes even before the asserted rights are legally codified or protected by courts. Much as Chaihark Hahm and Sung Ho Kim (2015) emphasize the mutually constitutive relationship between “we the people” and their constitution in their analysis of democratic constitutional founding in Korea and Japan, we employ a bottom-up approach and trace how mobilizing the law and rights language constitutes rights and imbues them with meaning. The mechanisms and iterative processes of claims-making are ultimately how rights become legible.

This book’s chapters thus analyze how rights conceptions are deployed and contested in discourses, institutional mechanisms, and other modes of claims-making in South Korea. Discussions of human rights and “rights talk” are ever more prevalent in scholarship about mobilization and the interactions between law and social change outside East Asia (Merry 2006; Risse, Ropp, and Sikkink 1999; Simmons 2009; Vanhala 2018). In addition, there is a burgeoning literature about legal mobilization in East Asia (e.g., Chua 2014, 2018; Diamant, Lubman, and O’Brien 2005; Feldman 2000; Sidel 2010; Steinhoff 2014; Stern 2013). By examining

¹ For similar approaches to rights-based mobilization in Japan and China, see, respectively, Feldman (2000) and Woo and Gallagher (2011).

the strategies and channels that South Korean claimants use to articulate and assert their rights and the tensions or discrepancies in rights language, this volume contributes to this literature.

THIS VOLUME'S BOTTOM-UP AND INTERACTIONIST APPROACH

This volume probes the following questions through diverse case studies, approached via different disciplines and methods. Why and how have people in Korea claimed their rights through institutional mechanisms and extrajudicial tactics? To what extent have state or nonstate actors assisted or limited rights claiming? And what remains fundamentally challenging for groups asserting their rights? Spanning 150 years, the following chapters trace the social and political emergence and development of rights in Korea, analyzing how the experiences of Japanese colonial occupation, war and national division, authoritarian rule, democratization, and the complexification and diversification of contemporary Korea infused the concept of rights with distinctive meanings and institutional operation.

This volume is divided into four main parts: (1) historical cases, (2) existing and emergent institutional channels, (3) the experiences of marginalized Korean communities, and (4) the experiences of noncitizens who seek to become South Korean residents or citizens. Since covering all possible rights claims would require multiple volumes, this book foregrounds instead groups that have been overlooked in the extant scholarship, such as by focusing on the historical cases on women. We adopt an interactionist approach, exploring changes in the institutional contexts within which rights claims occur and in the sources of support available for utilizing different claims-making channels. The chapters analyze the rights narratives and claims-making of diverse groups, including women, victims of state violence, lawyers, workers, people with disabilities, sexual minorities, new citizens, and migrants.

We examine how different groups define and interpret rights and the effects that these processes have on their activities and interactions with other actors. In the process, we uncover tensions and selectivity – both intended and not – in certain rights discourses. The chapters highlight conflicts over contending rights claims, expose disparities between law on the books and law in practice, trace interconnections among some rights in that a violation of one is considered a violation of another, and map emerging trends in the use of rights language. The book's second part analyzes how real or perceived changes and continuities in the institutional context of rights claiming affect the likelihood of rights claiming and its efficacy. We also investigate the sources of support that claimants have in terms of civil society organizations, legal assistance, and funding (Epp 1998). While many of the chapters document how effective rights-based mobilization has been in terms of catalyzing social and legal change in Korea, some reveal the limits of law and legal institutions, including where the state fails to promote rights or remedy grievances.

The case studies in this book trace how people navigate deficiencies in the system or exploit alternative channels for grievance articulation. Finally, many of the chapters look beyond South Korea, to understand how groups engage with international rights discourses and mechanisms, including UN bodies and international treaties.

The subjects of rights, law, citizenship, and social change are fertile for analysis from diverse disciplinary angles in history, law, sociology, political science, geography, and gender studies. This collection offers unique breadth in its analysis of rights claiming in Korea by providing opportunities for cross-issue and cross-temporal comparisons of institutional and legal developments, patterns of mobilization, both domestic and international civil society activism, and linkages to global rights discourses. Drawing on scores of original interviews, systematic analysis of court rulings and statutes, close reading of primary sources in archives and online, and interpretive analysis of news media coverage in Korean, this volume illuminates rights in action. Some of our contributors bring not only their specific disciplinary training and insights but also their direct advocacy experiences in rights activism and claiming.

THE VOLUME'S CONTRIBUTIONS

Rights Claiming in South Korea makes several significant theoretical contributions, including to scholarly debates that have focused mostly on Western contexts to date. First, we elucidate how rights-based mobilization relates to other forms of political participation or exclusion. Through careful case studies, this book's chapters explain how diverse groups leverage rights as they seek to influence the media, attentive bystanders, and the government. The nuanced picture that emerges from our volume offers rich material for comparative analysis and challenges the common perception that Korea is a "Republic of Demonstrations" (S. Kim 2009). Rather than just protest, Korean rights claimants use diverse combinations of litigation, protest, lobbying, and media campaigns as part of a repertoire of tactics. However, this volume reveals the interrelationships across different tactics because, as one review article noted, the importance of legal versus other tactics varies even when rights language and lawyers are involved (Marshall and Hale 2014, 663). As summarized in our conclusion, the case studies demonstrate how activists obtain the synergies between legal tactics and other forms of activism. The volume thus advances scholarship about how societal actors do not just respond to perceived judicial receptivity to particular rights claims but also shape it.

Second, this volume adopts more of a bottom-up approach than existing work on law and courts in Korea and places rights claiming and judicial processes in their broader sociopolitical context (for a similar approach in the Chinese context, see Woo and Gallagher 2011). Studies of Korean legal reform usually focus on substantive legal content, case analysis, or politico-institutional developments without including claimants' voices (K. Cho 2010; Ginsburg 2004; Mayali and Yoo 2014).

Research about the “judicialization of politics” in Korea tends to emphasize the role of political and judicial elites and new institutions like the Korean Constitutional Court (e.g., Ginsburg 2003; Kim and Park 2012). It also often focuses on “mega-politics” questions, such as the president’s impeachment or the disbanding of political parties (Hirschl 2004). In contrast, we analyze a variety of forms of rights claiming in diverse contexts, including the courts, National Human Rights Commission, civil society organizations, the streets, and international human rights bodies. Our interactionist and bottom-up approach reveals the fluid and plural meanings of rights and unintended or intended hierarchies that emerge from rights discourses, as elaborated in the Conclusion.

Meanwhile, in the existing research focused on social movement mobilization and civil society in Korea, rights talk is usually taken for granted rather than explicitly analyzed in terms of legal discourse, tactics, and outcomes for rights claiming. *South Korean Social Movements* edited by Gi-Wook Shin and Paul Chang (2011) partially remedies this gap by including topics on discursive shifts and institutional mechanisms such as the National Human Rights Commission of Korea and public interest lawyer groups. Importantly, it asks, in part, whether the institutionalization of social movements has helped to advance or co-opt causes. While prior scholarship on Korea offers excellent studies detailing how intertwined democracy and human rights became in challenging Korea’s abusive authoritarian regimes (Chang 2015, chap. 6; H. Cho 2010), the lens of democratization or democratic consolidation is insufficient for capturing the range of rights discourses and mobilization our volume details. Indeed, democratization and rights are related but not synonymous, though channels for rights claiming proliferated in democratic Korea. Our volume thus builds upon Korean scholarship that addresses methods of legal advocacy and reform for civil, political, economic, and social rights since democratization (Minbyeon 1998; 2018; Park 2003; Yoon 2010, chaps. 12–13).

Finally, we document how infrastructures for legal mobilization – including advocacy organizations, funding, and lawyers – are becoming increasingly institutionalized in Korea. Charles Epp (1998) argued that advocacy groups, funding, and lawyers were necessary “support structures” for effective rights claiming. Sociolegal scholars have shown that subsets of the private bar in many countries have used their professional skills to curb state power and protect citizens’ rights, but this “cause lawyering” literature has largely overlooked East Asia (e.g., Sarat and Scheingold 2001, 2006; also see Arrington 2014; Arrington and Moon 2020; Goedde 2009; Liu and Halliday 2011; Tam 2013). The cases in our book add substantial empirical evidence about the interactions between rights-based movements and lawyers in East Asia.

To date, most English-language studies of legal mobilization in Korea have been scattered across academic journals and edited volumes in diverse disciplines (e.g., Arrington 2014, 2019; K. Cho 2007; Goedde 2011; H. J. Kim 2012). Or they concentrate on activism related to North Korean human rights (Goedde 2010; Yeo and Chubb 2018). One notable exception is Hyunah Yang’s *Law and Society in Korea*,

which ours complements by bringing together scholars from more diverse disciplinary perspectives to examine a wider range of claims (Yang 2013). We now proceed to introduce the volume's chapters as a way of elucidating the genealogies of rights and rights claiming in Korea.

ORGANIZATION AND CONTENT: A GENEALOGY OF RIGHTS IN KOREA

Part I: Rights in Historical Perspective: Bringing Women Back In

Part I of this volume provides a panoramic treatment of how women's rights were articulated or transformed in the Joseon, Japanese colonial, and postliberation eras. In so doing, we highlight a group in Korean history – women – that has been relatively overlooked by scholars (but see J. M. Kim 2015; Kim and Pettid 2011; Lim 2019). We see how the legal capacity of women to bring claims to the state varied under the different governing structures of the time and as women went from being subjects of a kingdom, to colonial subjects, and finally to rights-bearing citizens in a democratizing nation.

However, the notion of rights must be deconstructed when applying it to Korean history. “Rights” and “legal consciousness” were not part of the indigenous vocabulary. Nonetheless, the acts of seeking to right a wrong or to remedy a grievance are universal behaviors. Strategically making rights-like claims has a long history in Korean society and arguably predates Korean use of the words rights (*gwolli*) and human rights (*ingwon*). Hahm Pyong-choong's (1986) influential assertion that Koreans were averse to resolving disputes legally has been refuted (Shaw 1981; Yang 1989). Alongside sophisticated legal codes and administrative protocols, the language of “law” and “(in)justice” was pervasive in the Joseon period, thus allowing petitioners a framework with which to address grievances. However, pursuit of legal claims occurred without invoking the Western concept and language of individual (natural) rights to be claimed vis-à-vis the government (Yang 2002, 191).

While acknowledging the distinctions between contemporary conceptions of rights and their precursors, chapters in Part I trace how claimants creatively leveraged the fact that Joseon-era and Japanese colonial authorities permitted and heard people's grievances, albeit primarily to maintain an orderly and strict social hierarchy. These state–society interactions colored the subsequent formation and implementation of legal codes in the postliberation period as Koreans constructed democratic institutions. Chapters in Part I highlight the understudied claims-making activities of women, even though they were not the most numerous claimants and mobilized the law within restricted confines delineated by family and inheritance laws and neo-Confucian traditions (for a sampling of typical cases during parts of the Joseon era, see Shaw 1981 and Kim and Kim 2014). As we discuss in the conclusion chapter, claims-making by Korean women in the

nineteenth and early twentieth centuries reveals that legal mobilization can be both empowering and stymied by existing rights hierarchies and social orderings that privilege men above women and *yangban* (elites) over peasants. As such, the sociocultural context of Korea colored conceptions of rights and rights claiming across the decades.

Instead of retrofitting Western or modern concepts, Jisoo Kim in Chapter 1 begins with the puzzling prevalence in the Joseon period of hundreds of petitions from women, whom scholars usually characterize as silent outside the domestic sphere. Based on the neo-Confucian principle that the ruler's mandate depended on listening to his people's grievances, however, women used petitions to try to rectify infringements of the privileges they enjoyed within their status. Through an analysis of such petitions, the chapter shows that petitioning complicated gender dynamics in Joseon society. On the one hand, petitioning reinforced rigid hierarchies because women used narratives of domesticity. On the other hand, women also constructed a sense of legal identity and personhood through their petitioning. Challenging the mischaracterizations of Joseon women as having no legal capacity, this chapter parses the vernacular and narrative strategies of women who petitioned. While the discourse of (equal) rights (*gwolli*) only began appearing in official documents and public writings in the last two decades of the nineteenth century, Koreans' practices of engaging institutional mechanisms to make claims related to life, property, and inheritance were evident in the cases brought to the Joseon kings.

In Chapter 2, Sungyun Lim contests the postcolonial Korean narrative that wives had no legal capacity (*cheoui muneungnyeok*) during the colonial period. She argues that Korean women had some space in which to claim legal entitlements, especially when it came to separate property rights as introduced under the Japanese colonial legal system. Though heavily discriminatory against Koreans, the modern judicial structure opened more litigation channels to Koreans, explaining the rise of lawsuits among Koreans during the colonial period (M. S.-H. Kim 2016). Relying on civil court records, Lim relates how widowed household-heads were surprisingly successful in defending and developing their separate property rights during this period. The chapter shows how the colonial judicial system accommodated Korean women's ability to bring certain suits by granting them full legal capacity to do so, despite their being colonial subjects. The cases studied reveal contests between legal rights and Korean customs and how the Japanese colonial state's prerogatives, especially regarding the household registration system, influenced the outcomes of such contests and the lawsuits.

In Chapter 3, Eunkyung Kim carries the discussion of women's legal capacity forward into the postcolonial era, arguing that although women became equal rights-bearing subjects under the new Republic of Korea's democratic Constitution of 1948, they retained their unequal status in family law, which was codified in 1958. As lawmakers debated family law reforms in the context of post-coloniality and institutionalizing democracy in South Korea's first decade,

patriarchal family traditions and aspirations for capitalist economic development justified gender discriminatory features in the new Civil Code. The new legal framework restricted women's rights in the private family sphere and undermined women's full rights as equal citizens relative to men in the family hierarchy. The author also recounts her experiences during the democratization demonstrations of the 1980s, wherein gender equality was similarly subjugated to more basic civil and political rights, ultimately deprioritizing women's rights. Korea's democratization efforts abortively began in the 1940s, resurged around 1960 and 1979–80, and were finally successful in 1987. This chapter provides a fascinating and understudied historical lens on the position of women's rights in this fitful process of democratization and enriches our understanding of more recent battles over the discrimination and sexual harassment of women in Korea.

*Part II: Institutional Mechanisms for Rights Claiming and Support Structures
for Claiming Rights*

For rights claims to result in recognition and remedies, institutional mechanisms and support structures are needed. These include various state institutions, such as courts and commissions, as well as legal professionals to interpret and apply the laws that guarantee certain rights. Part II examines the legal and quasi-legal institutions and mechanisms that have arisen since the transition to democracy in 1987: the Constitutional Court, Truth Commissions, the National Human Rights Commission, the modern judiciary, the expanding professional bar, and public interest law groups. From the chapters in Part II, we can see the different channels open to rights claimants, to what extent these channels have been used to defend and develop different rights, the role of various institutional actors in creating legal opportunities through structural reforms, and how the institutional context is influenced by domestic politics or international norms. This part addresses broader concerns, such as whether litigation has become more accessible to the public or if rights claiming has had a democratizing effect on judicial procedures. At the same time, the chapters in this part also investigate the National Human Rights Commission's lack of enforcement power, constraints on judicial activism, limited budgets and political will for truth commissions, the precedential impact of negative court decisions, and remaining challenges of public interest lawyering.

Chapter 4 serves as a bridge between the historical section and the book's contemporary analyses. In it, Hun Joon Kim follows the variations in rights claims stemming from the postliberation and Korean War events on Jeju Island (commonly known as the 4.3 or April 3 events), when communist revolts were violently suppressed, leading to the massacre of more than 30,000 people by state forces. Kim uses social movement theory to show how victims and opponents shifted their framing of rights claims over the ensuing seventy years of activism and counter-activism, essentially expanding rights claims on a range of bases – individual,