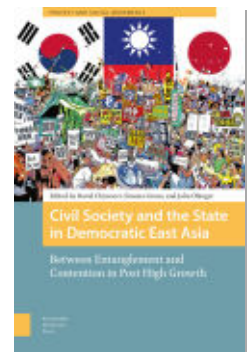




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## 12 Legal Mobilization and the Transformation of State-Society Relations in South Korea in the Realm of Disability Policy

*Celeste L. Arrington*

### Abstract

Since the 1990s, South Koreans have gained better access to the courts as a channel for pursuing social and policy change. In particular, Koreans with disabilities began using the courts to challenge discrimination, enforce their rights, and influence policymaking. Through qualitative comparative analysis of recent legal mobilization by Koreans with disabilities, this chapter investigates factors that influence when and why people mobilize the law. Drawing on sociolegal and social movement theories, it shows that explanations focused on evolving legal opportunity structures – encompassing procedural rules, statutes, and legal interpretations – can only partly explain changing patterns in legal mobilization. Explanations should also consider the ‘support structures’ for legal mobilization: lawyers, advocacy organizations, and funding.

**Keywords:** legal mobilization, Korea, disabilities, reform, social movements

Societal groups have many options when seeking to influence policy decisions. In between elections, they can contact bureaucrats, lobby elected officials, join or support an interest group, raise public awareness via the media or public events, publish reports, protest, or file lawsuits. Mobilizing the law by turning to the courts has long been considered a form of political participation, albeit a challenging one (e.g. Zemans 1983). The complex rules, procedures, and costs of litigation can be daunting. Judicial processes

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are arguably more structured than other forms of political participation. Changes in these rules and procedures can render legal mobilization more or less attractive to those seeking to sway state actions. Yet for marginalized groups, legal activism may be the only path forward when they fail to capture the establishment's attention.

Since the 1990s, South Koreans have gained better access to the courts as a forum for advocacy and grievance articulation. Democratization in 1987 entailed a decline in state interference in judicial processes, and the 1988 establishment of the Korean Constitutional Court became a new channel for claims making (Ginsburg 2003). Institutional and cultural hurdles to legal mobilization continued to fall in the democratic era. Legal reforms increased the size of the private bar, created a system of legal aid and improved the efficiency and predictability of judicial processes (Choi and Rokumoto 2007; Ginsburg 2004). Domestic civil society demand for better access to justice and foreign business pressures for neoliberal deregulation after the Asian Financial Crisis of 1997 propelled these changes (Kim 2011b). New legislation also created justiciable rights and shifted the burden of proof for cases related to product liability and pollution. Greater access to justice and pent-up claims, however, fuelled a dramatic rise in per capital litigation rates. Newer institutions, such as the National Human Rights Commission of Korea (NHRCK), opened non-judicial channels for rights claiming in the new millennium. Impact litigation and other forms of legal activism became important tactics for civic groups in Korea, and they diversified with the emergence of public interest lawyering after 2004 (e.g. Hong 2011; Goedde 2013). Legal mobilization has also served to bolster other forms of political activism, including protest and lobbying.

This chapter traces how particularly marginalized individuals – those with disabilities – are increasingly leveraging the law and making rights claims. Historically, Koreans with disabilities were excluded from society and kept at home or sometimes in residential institutions (Kim 2005). As in many societies, the Korean government first assisted the physically disabled, who were often veterans, and only later those with mental or intellectual disabilities. As economic growth accelerated in the 1980s and social welfare policies were introduced, state assistance for people with disabilities gradually improved. But policies adopted a welfare-based paternalistic understanding of disability, not one that recognized people with disabilities as rights-bearing individuals who should be included in society. Hence, Koreans with disabilities mobilized and drew inspiration from international disability rights activism starting in the 1980s. Emboldened by broader pro-democracy mobilization at the time, they protested the state's superficial

reforms ahead of the 1988 Seoul Olympics and Paralympics. Thereafter, they overcame marginalization to seek other reforms and increasingly use the courts to challenge discrimination, enforce their rights, augment other activism tactics, and influence political agendas and policymaking. The chapter asks: What explains the rise of legal activism among Koreans with disabilities? What do these changes reveal about access to justice more generally?

Liberalizing political opportunity structures contributed to the changing relationship between Korea's disability communities and the establishment in the past three decades. Political institutions liberalized with democratization and spurred judicial reforms. Scholars often emphasize the institutional structures which frame state-society relations and change relatively slowly (e.g. Checkel 1999; Lee 2012; Centeno et al. 2017). I argue that institutional explanations are important but can only partly account for the increased use of legal tactics by persons with disabilities. Scholars recently coined the useful term 'legal opportunity structure' to describe the relatively stable but not static features of legal and judicial systems that encourage or discourage people from mobilizing the law (Andersen 2006; Wilson and Rodriguez Cordero 2006; Vanhala 2012, 2018a). In this concept, they include rules governing access to the courts and the costs of litigation, existing laws and judicial precedents, and sometimes the presence of resources and allies for the litigation process. While scholars have long noted how structural factors like rules on standing (i.e. who has the right to bring suit) or cost shifting affect litigation rates, Hilson (2002) and Andersen (2006) drew on social movement studies' notion of opportunity structures to highlight how some factors that affect groups' propensity to litigate are more contingent than structural. The concept of opportunity structures adds an awareness of the perceptual elements of opportunity to the traditional structural accounts. Opportunities need to be recognized and seized. Relatively few studies of legal opportunity structures, however, have analysed how they change (but see Evans Case and Givens 2010; Vanhala 2012, 2018b).

The chapter traces how the legal opportunity structure for disability-related claims in Korea has improved in the past two decades. New domestic statutes and Korea's ratification of the Convention on the Rights of Persons with Disabilities (CRPD) supplied justiciable rights; changes in rules and judicial rulings related to the burden of proof and statute of limitations have lowered impediments to litigation; new institutions like the NHRCK have facilitated non-judicial rights claiming, sometimes combined with litigation; and courts are making accommodations for persons with disabilities. Drawing on sociolegal and social movement theories, however, I suggest that

a fuller explanation of disability-related claiming must also consider the 'support structures' for legal mobilization: lawyers, advocacy organizations, and funding (Epp 1998). I highlight, therefore, how an infrastructure for legal mobilization has become institutionalized in Korea, enabling claimants to better recognize, utilize, and incrementally pry open legal opportunities.

This research demonstrates the importance of analysing interactions between structure and agency in shaping state-society relations. It provides evidence for the growing awareness that societal actors are hardly passive within structural constraints but can incrementally reshape opportunity structures through strategic litigation and policy innovations (Andersen 2006). Courts in Korea are considered some of the most conservative institutions, so a liberalizing legal opportunity structure indicates that democratic consolidation is reaching the judiciary. By analysing a country with historically low levels of judicial intervention in policymaking and high marginalization of persons with disabilities, this chapter also reveals how legal mobilization is reconfiguring the ways in which disabled persons' organizations engage with the establishment. The shift towards a rights-based understanding of disabilities, which is associated with legal tactics and rights claiming, spurred Koreans with disabilities to demand and achieve a voice in domestic policymaking and thereby realize the CRPD's principle of participation and the global disability activism slogan 'Nothing about us, without us.' Their access to the courts and resources for gaining access to the courts have also improved.

The chapter begins by introducing the issue of disability rights in Korea to explain the theoretical leverage this case gives us for understanding changing state-society relations in one of East Asia's established democracies. It then examines relevant changes to rules governing access to the courts, adjudication procedures and judicial remedies, focusing on how these changes affect the incentive structures for persons with disabilities. It also investigates how claims in court relate to other claiming, such as through the NHRCK. Examining changes in the legal opportunity structure elucidates how relatively obscure or technical aspects of the law can have significant political consequences, especially for patterns of state-society relations.

## Case Selection and Background

As a relatively new democracy and an East Asian case with low rates of litigation historically, Korea represents an ideal case for investigating changes in legal opportunity structures. Korea has become something of a juggernaut

in terms of the growing role of law and courts in politics generally since its democratization. The Korean Constitutional Court, which started hearing complaints in 1988, saw its caseload rise by nearly five-fold between 1996 and 2016.<sup>1</sup> In addition, in the past two decades, the number of new civil lawsuits rose by 150%, and the number of administrative lawsuits rose by 230%.<sup>2</sup> These figures include a variety of private and public causes, only a fraction of which are related to disabilities.

Korean citizens' turn towards the courts constitutes an accelerated version of changes in governance that are happening in democracies worldwide. The trend has been called the judicialization or legalization of politics (e.g. Barnes and Burke 2015; Hirschl 2011; Vallinder 1994). Citizens are demanding and achieving greater transparency and accountability from their governments, often through the courts (Cain et al. 2003; Cichowski 2006). Korean courts have played important roles in political conflicts, including those related to presidential impeachment, state liability for authoritarian-era abuses, and public corruption. Most analyses of the judicialization of politics in Korea focus on such high-visibility cases and the Constitutional Court (Kim 2008; Kim and Park 2012). However, as Ramseyer (1985: 605-606) noted with regard to Japan, private litigation can serve the public interest when it deters rights abuses or catches state misconduct. Private litigation may also have public benefits in that it enhances enforcement and state agencies' regulatory goals, albeit to a lesser extent in Korea than in the United States (Farhang 2010; Kagan 2001). It can reveal information that informs policy debates and adds impetus for policy change. Disputes related to disabilities are increasingly the subject of such legal mobilization, as citizens frame their demands in terms of rights and seek policy change.

Disability policy is an especially fruitful issue area in which to study legal mobilization's role in state-society relations because it advanced rapidly in the past two decades and illustrates the confluence of international factors and domestic forces like democratization. Though adapted by domestic activists, internationally circulating ideas about disability rights and legal tactics for promoting them gained traction in Korea, only to flourish in the past decade. Beginning with the UN Decade of Disabled Persons (1983-1992), rights-based self-advocacy gradually replaced the traditional Korean model of single-disability and service-oriented associations and networks of families of disabled persons that cooperated with the government. Youth

1 Data from the Korean Constitutional Court (KCC) website, <http://www.ccourt.go.kr> (20 February 2018).

2 Calculated from data available in the *Sabeop Yeongam* (Judicial yearbook), various years.

with various disabilities leveraged the 1988 Paralympics in Seoul to protest for reforms, including the introduction of employment quotas and welfare benefits for the disabled. As a result, the Law to Promote Employment among Persons with Disabilities and revisions to the Disability Welfare Law came into force in 1990. The state's welfare support for people with disabilities, which was allocated through a much criticized medically based rating system, and disability accommodations incrementally grew in the 1990s with the introduction of modest social welfare programmes for all (Yang 2017). Social welfare reform policies were consolidated under Korea's first progressive president, Kim Dae-jung, in the wake of the financial crisis of 1997 (Wong 2004), but families and increasingly NGOs were still expected to help care for people with disabilities.

Some disability activists continued to favour direct action even after democratization. For example, many members of the Solidarity for the Right to Move (Idonggwon Yeondae) that formed in the early 2000s to protest for accessible public transportation after the much publicized death of a wheelchair user in the Seoul metro in 2001, had been active in the pro-democracy movement and spearheaded the sit-ins and hunger strikes around the 1988 Paralympics. They achieved the first legal guarantee of a right to mobility in article 3 of the 2005 Transportation Convenience Law, even after the Constitutional Court had denied any government obligation to provide low-floor buses.<sup>3</sup> They also cooperated with the newer self-advocacy groups that had established the Korea Federation of Organizations of the Disabled (Jangchongryeon) in the mid-1990s. Around the same time, more traditional disability groups that include caregivers and researchers had formed the Korea Differently Abled Federation (Jangchong) as civil society blossomed in newly democratic Korea and state-NGO partnerships came into vogue. As umbrella organizations, Jangchongryeon and Jangchong did not cooperate but helped realize policy changes like the 1994 Special Education Law and the 1997 Convenience Promotion Law to facilitate greater participation by people with disabilities in society. Further lobbying for these reforms came from the Research Institute for Disability Rights in Korea (Jangae U Gwonik Munje Yeonguso, RIDRIK), which lawyers and researchers had founded in 1987 and which gained direct access to lawmakers after its first director was elected to the National Assembly in the 1990s. RIDRIK's 35 or so volunteer lawyers led the few early disability-related lawsuits and established a hotline for legal counselling. In short, disability-related civic groups flourished in

3 Gyotong Yakjaeui Idongpyeoneui Jeungjinbeop (Law no. 7382, 27 January 2005). KCC 2002heonma52.

the 1990s, but litigation remained costly and time-consuming. While civil society organizations increasingly used litigation to pursue policy change in other issue areas in the late 1990s (see Shin, in this volume), disability-related litigation was limited by the lack of statutory basis for discrimination claims.<sup>4</sup>

### **Towards a Korean Disability Discrimination Act**

Disability activists overcame internal divisions to realize the historic Act on the Prohibition of Discrimination against Disabled Persons, Remedy against Infringement of their Rights, etc. (hereafter the Korean Disability Discrimination Act, or KDDA) in 2007.<sup>5</sup> The movement for the KDDA began in 2001 when two groups separately published proposals for legislation banning disability-based discrimination. One was Open Network (Yeollin Network), which a few lawyers, scholars and activists had founded in 1999 as an online community to study foreign laws and promote disability rights (Interview AA 2016). The other organization was RIDRIK. Its draft drew heavily on data about common forms of disability discrimination, which RIDRIK had been collecting from its counselling activities for over a decade. As in other countries, the 1990 Americans with Disabilities Act (ADA) and foreign disability discrimination acts were influential models. One Korean activist explained: 'We felt frustrated because, despite the many reforms of the 1990s, the rights hotline we opened [at RIDRIK] in 2000 revealed that horrible things were still happening to persons with disabilities. So we organized presentations about the ADA and the British and German anti-discrimination laws to catch up with these other countries' (Interview RIDRIK 2017). Encouraged by Open Network and others, Jangchong and Jangchongryeon set aside their differences as more than 75 disability groups united to launch the Disability Discrimination Act Solidarity of Korea (Jangchuryeon, hereafter the Solidarity) in 2003 (Arrington and Moon 2020).

Contemporaneously to the KDDA movement, disability rights were spreading globally during negotiations to create the Convention on the Rights of People with Disabilities (CRPD). Korea signed and ratified the CRPD at the same time as it enacted the KDDA, and Koreans were active in the CRPD negotiations. Korean women with disabilities, for instance, co-authored article 6 of the CRPD while helping to draft the KDDA (Kim 2014). Domestically, Korean activists and their government also embraced

4 The Korean Special Education Law (rev. 1994) and Law to Promote Employment among Persons with Disabilities (rev. 2001) included anti-discrimination clauses but provided no specifics or enforcement mechanisms.

5 Jangaein Chabyeol Geumjimit Gwonri Gujedeunge gwanhan Beomnul (Law no. 8341, 2007).



the principle of participation that was articulated in article 4 of the CRPD. President Roh Moo-hyun's 'participatory administration' (2003-2008) launched a joint government-civil society task force in mid-2006 to draft a KDDA under the auspices of the Presidential Committee on Social Inclusion (PCSI 2007). The Solidarity selected representatives from all factions of Korea's disabilities community for the task force, which included officials from all relevant ministries and the NHRCK (as an observer). For expediency, the task force also referenced the draft KDDA bill submitted by a politician from the small far-left Democratic Labour Party in September 2005, which was '90% the same as the Solidarity draft' (Interview LE 2017).

To craft legislation with a reasonable budget and a high chance of passing in the National Assembly, officials on the government-civil society task force reportedly focused on moderating the Solidarity's demands for an independent dispute resolution body capable of issuing binding orders (Interview PCSI 2016). Originally, the Roh administration envisioned enacting general anti-discrimination legislation and tasked the NHRCK with designing it. Roh's progressive predecessor President Kim Dae-jung had created the NHRCK in 2001 after battling conservatives and the Ministries of Justice and Health and Welfare, which saw the new national human rights institution as encroaching on their domains (Koo 2011: 79). Creating a workload for the fledgling institution might bolster its legitimacy and improve its chances of surviving the widely anticipated return of conservatives to the Blue House in the presidential election in December 2007. But disability activists demanded disability-specific legislation and fought against what they considered toothless remedies through the NHRCK with a two-month sit-in at the NHRCK in 2006. Indeed, the NHRCK route would contain challenges to the state, since the NHRCK lacked the injunctive powers and manpower courts had. Ultimately, conservative Christian opposition to LGBTQ rights stymied discussions on general anti-discrimination legislation within the NHRCK, and the NHRCK switched to recommending disability-specific anti-discrimination legislation.

In subsequent deliberations in the government-civil society task force and in the National Assembly, officials continued to advocate the NHRCK rather than an independent disputing mechanism that might overlap with the NHRCK functions. The NHRCK route was seen by many lawmakers as faster and easier; complaints could be filed in person at its central office or one of the four branch offices, as well as online, by fax, or by third parties.<sup>6</sup> Disability activists ultimately acquiesced to this route because 'time was running out with the relatively more receptive Roh administration' (Interview AE 2017).

6 Minutes of the Health and Welfare Committee, meeting no. 265, 2 (7 February 2007).

In a concession to disability activists, however, the government added clauses to the KDDA permitting courts to hear discrimination cases and order injunctions in cases of non-compliance with the NHRCK's non-binding recommendations (arts 43-46). Furthermore, the KDDA banned four types of discrimination – direct, indirect, refusing reasonable accommodations, and interfering with aides to disabled persons (art. 4). Litigation, as well as complaints to the NHRCK, in the decade since the KDDA was enacted have helped clarify the law's scope.

Thus, the KDDA, the CRPD, and other reforms significantly advanced disability rights in Korean society in the past two decades and helped open legal opportunities. Because the advances occurred not just through the courts, the case of disability policy permits us to explore judicial rights-claiming mechanisms in their broader sociopolitical context. Activists were initially disappointed that state actors channelled discrimination complaints to the NHRCK, but they have discovered ways of leveraging this institution. During the first eight months after the KDDA went into force in 2008, for example, the proportion of discrimination complaints received by the NHRCK that were related to disability leapt from 14% to 61% (NHRCK 2016a: 137). Disability activists frequently file NHRCK complaints simultaneously to lawsuits because doing so 'can increase publicity' and the 'NHRCK officers are very knowledgeable and helpful' (Interview LKLL 2015). Beginning with the 2004 National Assembly elections, Korean political parties also started nominating candidates with disabilities to proportional representation lists, resulting in the election of some from both conservative and progressive parties. Jang Hyang-sook from President Roh's Uri party was in a wheelchair, and Jung Hwa-won from the conservative Grand National Party was visually impaired.

More open political and legal opportunity structures were not unqualified victories for people with disabilities, however. In its first review of Korea's compliance with the CRPD, for instance, the UN Committee on the Rights of Persons with Disabilities (2014: 2) noted how few complaints had elicited NHRCK recommendations and how the NHRCK lacks injunctive powers for remedying complaints. Local government-funded Disability Human Rights Centres are gradually being established to offer advice in discrimination cases and alleviate such backlog. Additionally, the NHRCK established a standing committee on disability discrimination remedies and two disability rights divisions within its investigation bureau, which have conducted on-site inspections of residential facilities. It also recently created a watch team of 178 people – two-thirds of whom have disabilities – to check for disability discrimination (NHRCK 2016b: 38). Meanwhile, disability activists

have capitalized on growing opportunities and resources for recognizing and creating legal opportunities to use the courts to monitor and enhance implementation of the KDDA and other policy reforms.

## Methods

The findings reported in this chapter are based on interpretive analysis of semi-structured interviews that I conducted in Korean with 20 individuals who directly engaged with the legal opportunity structure – lawyers, judges, plaintiffs, and activists – and of various documents, including judicial rulings, litigation strategy memos, legal scholarship, and movement newsletters or websites. Rather than attempting to comprehensively cover all institutional changes, I highlight changes in features generally emphasized by the legal opportunity structure literature and by my informants. I adopt the law-in-action perspective used in the legal mobilization literature (McCann 2004), acknowledging the contingency of judicial interpretations and rule application and emphasizing the value of analysing how litigants perceive and strategically use such structural factors.

I do not claim that legal opportunity structures are the only factors affecting rights claiming by people with disabilities. There are many factors that affect citizens' decisions about when and how to assert their rights. For instance, perceived 'political disadvantage' may drive groups to the courts, as opposed to conventional democratic channels (Cortner 1968; Javeline and Baird 2007; Zackin 2008). Learning from international models or the socialization that occurs in the context of cooperation in international forums can likewise stimulate claimants to use the courts more (e.g. Checkel 2001; Dobbin, Simmons, and Garrett 2007). The presence of lawyers in a movement or the structure and network linkages of an organization may also push towards judicial remedies (Scheppele and Walker 1991; Vanhala 2018a). I argue, however, that any explanation of patterns of legal mobilization needs to consider the ways in which seemingly technical or obscure rules and procedures interact with lawyers and the infrastructures they utilize for litigation.

## The Evolving Legal Opportunity Structure for Disability Rights

As rights claiming through the courts became more common worldwide, sociolegal scholars developed the concept of legal opportunity structures to explain why some civil society groups adopt legal tactics while others do

not. This framework offers a useful lens for identifying and analysing key changes in the incentives that Koreans with disabilities face when deciding how to assert their rights. The emerging consensus is that the core parts of the legal opportunity structure are courts' procedural rules related to access, litigation's costs and rewards, and the existing body of laws and rulings (Vanhala 2018a: 384-385). The legal opportunity structure framework built on the concept of political opportunity structures in social movements scholarship. Like that concept, legal opportunity structure developed fuzzy conceptual boundaries to the extent that it also was 'in danger of becoming a sponge that soaks up every aspect of the social movement environment' (Gamson and Meyer 1996: 275). Political and legal opportunity structures are related concepts but distinguishing them helps avoid conceptual bloat and is important because they affect movements' strategies and issue framing in different ways.

Like the concept of political opportunity structures, legal opportunity structure includes structural and contingent components but focuses on institutions and actors specific to the law. Tarrow (1994: 85) defined the structure of political opportunity as 'consistent – but not necessarily formal or permanent – dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure.' Most political opportunity structure scholarship focuses on how movements' choices are shaped by the accessibility of political institutions, presence of elite allies, and the instability in elite alignments. The concept emphasizes how subtle institutional changes, shifts in state capacity, and changing levels of elite receptivity to claims might become resources external to the group. Some legal opportunity structure scholars include judicial receptivity, the presence of allies for litigation, and even resources for litigation in their conceptualizations of the legal opportunity structure (Andersen 2006; Epp 1998; Evans Case and Givens 2010; Lejeune 2017).

Rather than stretching the concept by including such factors, I define the legal opportunity structure in line with the emerging consensus: the legal stock and rules related to access to the courts, adjudication procedure, and judicial remedies. First, the legal stock encompasses existing statutes and judicial precedents that constrain how people can frame their claims, how persuasive those claims are, and how disputes are adjudicated (Andersen 2006). Although in civil law systems like Korea's, judicial precedents are not binding, courts still do often reference prior rulings. Thus, prior rulings are 'de facto binding' in Korea (Kwon 2007: 137). Second, procedural rules are numerous, but several are significant for rights claimants considering

litigation: standing rules, fee-shifting rules, the statute of limitations, and the burden of proof. Standing rules determine who can bring cases to court. Prior studies have shown how liberalized rules on standing facilitated NGO litigation in Europe (Alter and Vargas 2000; Cichowski and Stone Sweet 2003), but Korean courts have resisted suits by interest groups except at the Constitutional Court. Statutes of limitations affect when claims can be brought, relative to when the alleged injury or rights violation occurred. The burden of proof and standards of evidence may be shifted through judicial precedent or legislation aimed at increasing access to judicial remedies. And rules on who bears the costs of litigation affect the potential risks and rewards of legal mobilization.

This section discusses noteworthy changes to the legal opportunity structure related to disability rights in Korea. It identifies key changes by comparing features pinpointed in the legal opportunity structure literature with what lawyers and disability activists emphasized. I highlight changes that have lowered barriers to entry, improved the adjudication process for claimants with disabilities, and set important precedents, as well as facilitated claims making through the NHRCK. The section after that explores the development of an infrastructure of lawyers with organizational and financial resources for taking advantage of or even contributing to such legal opportunities.

### Noteworthy Changes

Litigation related to disabilities in Korea began to grow in the 2000s and especially after the 2007 KDDA, following decades of petitions to the government and a few attempts at litigation. In 1967, for instance, families in Busan collected citizens' signatures on petitions after several schools denied their children admittance due to their disabilities. The petitions catalysed policy reforms, and a historic but isolated lawsuit was won in 1982 by a student with disabilities after he was denied admittance to a prestigious university (Hong 2016: 389). But protests and petitioning remained more common than litigation until the 1990s. Individual lawsuits were occasionally effective. In 1994, for instance, a man successfully challenged a local government's decision not to hire him due to his disability.<sup>7</sup> Residents' resistance to a school for people with disabilities being built in their neighbourhood was also deemed illegal in a 1996 ruling.<sup>8</sup> Then, in 2003, Lee Hee-won filed the first disability discrimination complaint at the newly established NHRCK

7 Daejeon High Court 1994 gu 680 (ruling 14 April 1995).

8 Seoul District Court 1996 gahap 158 (21 February 1996).

after he was dismissed from a public service job due to his disability. He simultaneously filed a lawsuit, which he won in February 2004. RIDRIK supported many such early cases, while also lobbying for the legislative reforms discussed above.

Nonetheless, the KDDA's passage notably opened the legal opportunity structure. Article 38 of the KDDA expanded standing to allow organizations that know about discrimination to file NHRCK claims on behalf of people with disabilities (KDLA 2017: 328). Litigation and NHRCK complaints thereafter sought to clarify who has standing to bring claims based on the KDDA. For instance, a 2014 petition to the NHRCK, supported by fourteen civic groups, successfully expanded the definition of disabilities to include HIV/AIDS after some sufferers of the disease were rejected by hospitals (KDLA 2017: 24). NHRCK decisions also clarified that the KDDA applies when disabled individuals are denied insurance due to disability or have their life choices limited in residential facilities.<sup>9</sup>

In addition, broader reforms (most notably in 2002) to the Korean Civil Procedure Act (KCPA) and rulings in cases not related to disabilities had ripple effects for disability-related litigation and made the adjudication process more amenable to people with disabilities (Kwon 2007). In 2010, for example, Korea introduced an electronic litigation system, which has made it easier for people with mobility impairments to file lawsuits.<sup>10</sup> Complaints may now be filed over the internet, rather than just in person. The new law's declared purpose was to 'enhance the swiftness and transparency [of civil procedure] thereby contributing to realizing people's rights.' With its reduced filing fees compared with paper-based filing, it became popular. The new system also expanded the range of material admissible in court to include images, video, and sounds (Baik 2015: 223-224). The increased number of cases, however, raised longstanding concerns about courts being overburdened, and thus perhaps also slowing down disability-related claims. Filing complaints at the NHRCK remains faster and easier, which is partly why lawmakers made it the primary remedy mechanism in the KDDA.

The relatively short duration of the statute of limitations in Korea was long seen as impeding claims making. Tort claims must be filed within three years of when the victim becomes aware of the tortious act and within ten years of when the tortious act was committed (KCPA art. 766). A landmark Supreme Court ruling in 2011, however, waived the statute of limitations

9 NHRCK 2014 jinjeong 001300 decision, 2015 jinjeong 0610400 decision.

10 Act on the Use of Electronic Documents in Civil Litigation etc. (Minsa Sosongdeungesoieui Jeonjamunseo Iyongdeunge gwanhan Beonmul) (Law no. 10183, 24 March 2010).

regarding compensation claims by bereaved families of victims of the police killing of thousands affiliated with the National Guidance League (Bodo Yeonmaeng) in Ulsan in 1950 (Kim 2011a). More than 500 leprosy survivors who suffered forced vasectomies and abortions through the 1980s cited this interpretation of a limitless claim period in cases of state crimes when they filed six collective lawsuits for compensation in 2011 (Arrington 2014). The Supreme Court ruled in the leprosy plaintiffs' favour in 2017 (YN 2017). Anecdotal evidence indicates that such looser interpretations have not been uniformly applied. However, partially successful litigation by persons with mental disabilities who were enslaved in salt farms decades ago cited the leprosy ruling to 'persuade the judges to waive the statute of limitations' (Interview LF 2017). Additionally, disability lawyers argue that the one-year statute of limitations for filing discrimination claims at the NHRCK should be loosened because people with disabilities may take longer to become aware of discrimination they encounter (KDLA 2017: 330).

For litigation regarding sensitive or stigmatizing issues like disabilities, Korean courts have introduced some innovations to protect the parties' privacy (Arrington 2019). Since anyone with a complaint's number can look up plaintiffs' names and other details online, Korean attorneys often closely guard case numbers and ask reporters to conceal their clients' names. A researcher at RIDRIK noted that legal professionals only gradually realized the risks of 'secondary victimization' for plaintiffs in cases related to disabilities in the early 2000s and began 'monitoring media interviews and developing procedures for getting plaintiffs' approval before using their stories in advocacy related to the lawsuits, such as press conferences or demonstrations' (Interview RIDRIK 2017). Some of the privacy innovations began in cases involving people with disabilities. For instance, an activist reported: 'The prosecutor in the recent Dogani case [involving sexual abuse of disabled minors] used witnesses' real names only once, as the judges required. After that he called them "witness" in court to minimize their exposure. I think he became aware of privacy concerns and stigma through his wife's work as a lawyer with sexual violence victims [which was the first area to adopt privacy protections]' (Interview AC 2013). Disability rights advocates also observe that some judges are 'more aware of the issue of secondary victimization' from the court process (Interview AA 2017). The Supreme Court began redacting names and addresses from rulings made available online starting in 2013 (Won 2016: 82-83). The introduction of such measures lowers the disincentives to litigation for people with disabilities.

Enhancing procedural justice and courts' openness has long been a reform goal because, in the past, Korean courts' adjudication procedures posed

numerous hurdles to claimants. The judicial process was like ‘dripping water,’ with oral hearings happening only every few months (Baik 2015: 229). Judges had to revisit the facts of the case each time, and the sporadic pace clashed with the frequent rotation of judges. Korean judges historically weighted documents more than witnesses and oral arguments (Kwon 2007: 132). The courts’ reliance on paper documents was seen as impeding citizens’ ability to understand and participate in adjudication process, particularly for people with disabilities. The Korean Civil Procedure Act overhaul in 2002 aimed at increasing procedural efficiency, and the Supreme Court began recommending more dynamic argumentation (Kwon 2007: 142).

While not necessarily always accessible for parties with disabilities, increasingly active discussions in oral arguments signalled greater flexibility in courtroom procedures and opened up opportunities for people with disabilities to participate in various ways. In the intercity bus lawsuits, for example, judges agreed to ride the bus to personally observe the challenges people with disabilities face (Interview RIDRIK 2017). One judge explained that many judges are ‘wanting to hear more from the plaintiffs and from all parties to the lawsuits in the past ten years to increase public trust in the courts. Whereas I used to call one witness, now I call two or three’ (Interview JA 2015). He said he explains things more carefully and clearly now in oral hearings. The move towards electronic records also enabled judges to use PowerPoint in the courtroom and facilitate oral debates. Furthermore, disability rights lawyers have fought to enhance accommodations for people with disabilities in the courtroom, including sign language interpreters, captioning, and simpler presentation of points (Interview LKLL 2015). The Korean Supreme Court published – with significant input from activists and lawyers – a set of Guidelines for Judicial Assistance for Persons with Disabilities in 2013, but its implementation has been uneven according to the UN Committee on the Rights of Persons with Disabilities (2014: 2).

Additionally, provisions to shift the burden of proof away from plaintiffs enhanced the prospects for private rights enforcement in Korea. For instance, Korea’s Supreme Court has ruled in several cases to relax the KCPA’s high bar for tort liability. Article 750 requires proof of (1) intention or negligence, (2) an unlawful act, (3) plaintiffs’ losses or injuries, and (4) a (proximate) causal relationship between the unlawful act and the injuries. Negligence or intention and causation are usually hardest to prove. Hence, article 47 of the KDDA shifts the burden of proof to the alleged discriminator. And in 2014, judges recognized partial liability for the first time in determining damages awarded due to the rail company’s failure to provide reasonable



accommodations in a lawsuit brought by a person with visual impairment, who was injured after falling onto the tracks.<sup>11</sup>

Yet, the challenge of overcoming courts' propensity to issue narrow rulings remains in Korea. For instance, in the first lawsuit filed in 2011 by five wheelchair users over inaccessible intercity buses, the court ruled in 2013 that the KDDA prohibited limits, exclusions, or rejections of usage based on disability but did not require equipment for equal usage by people with disabilities on all forms of transportation.<sup>12</sup> In addition, the Constitutional Court ruled in 2014 that the Election Law did not require campaign leaflets to be printed in Braille, as the plaintiff demanded, because persons with visual impairments could get the information from other sources, such as TV or the internet.<sup>13</sup>

More generally, the judicial impact of the KDDA and its enforcement decree took time to be felt. The first ruling to clearly articulate the judicial remedies available under the law was in July 2014 (Hong 2016: 408). It found that Seohae University had discriminated when dismissing the plaintiff, who had become disabled after a traffic accident in 2010.<sup>14</sup> A Seoul court also ruled in 2014 that the amusement park Everland had violated the KDDA with its official policy of barring unaccompanied people with mental disabilities from rides (RIDRIK 2016: 12-17). Due to the remaining challenges of litigation, some disability activists opt more often for protest. For example, the Solidarity's successor organization, Solidarity against Disability Discrimination (SADD, or Jeonchangyeon), has protested to promote independent living and de-institutionalization based on the Korean Constitution's rights to self-determination (art. 10) and personal liberty (art. 12). Nonetheless, disability-related litigation has increased, and courts' accommodations for people with disabilities and their rights are changing prosecutors and police behaviour as well.<sup>15</sup>

## Growing Infrastructure for Legal Mobilization

What is driving these changes? While judges' behaviour and policy reforms are part of the explanation, we must not neglect the demand side. An increasingly

11 Seoul Central District Court 2013 na 39826 (ruling, 29 April 2014).

12 Seoul Central District Court, 2011 gadan 472077 (ruling, 15 July 2013).

13 KCC, 2012 heonma 913 (ruling, 29 May 2014).

14 Jeonju District Court 2013 gahap 2599 (ruling, 3 July 2014).

15 For example, Seoul Central District Court 2009 gadan 99509 (ruling, 10 September 2010).

institutionalized infrastructure for legal mobilization related to disabilities in Korea has spurred some of the changes in legal opportunities and has equipped disability activists to recognize and utilize these changes. Epp's (1998) comparative research demonstrated that groups seeking to use the courts to push for sociopolitical change depend on 'support structures' comprising advocacy organizations, funding, and especially rights-advocacy lawyers. Lawyers supply not just legal expertise. Even if legal victories prove elusive, lawyers can also help recruit plaintiffs, frame causes, devise movement strategy, build alliances with other civil society organizations and pressure state officials (inter alia McCann 2004; Jones 2006; Marshall 2006; Shdaimah 2006). More critical assessments argue that lawyers can deter grassroots mobilizing, narrow the scope of a cause, or redirect a movement (e.g. Burstein 1991; Handler 1978; Levitsky 2006; McCarthy and Zald 1977). While they are not necessary to legal mobilization, lawyers with the capacity to mobilize financial and organizational resources facilitate strategic litigation (Arrington and Moon 2020).

In the wake of Korea's democratization, numerous civil society organizations formed, often with significant input from activist lawyers. Many of these activist lawyers were also members of Minbyeon (Lawyers for a Democratic Society, also Romanized as 'Minbyun'), which was launched in 1988 and today includes more than 900 members (about 7% of all lawyers). In the 1990s, lawyers and the NGOs they worked with used combinations of lobbying, protest, media campaigns, and strategic litigation to sway public opinion, advance civil and political rights, and unravel leftover authoritarian laws (see Shin, in this volume). The largest NGOs – People's Solidarity for Participatory Democracy (PSPD, or Chamyeyeondeae), Citizens' Council for Economic Justice (Gyeongsilyeon), and Korean Federation for Environmental Movements (Hwanggyeonyeonhap) – all used litigation in their political activism. For instance, PSPD had a Public Interest Law Centre already when it was founded in 1994.<sup>16</sup> Yet PSPD litigation peaked in 1999 and declined after the progressive administration of President Roh Moo-hyun appointed many lawyers and PSPD activists to positions in government (Hong 2011). By the early 2000s, a key PSPD figure had moved on to cultivate what he called *gongik byeonhosa* (public interest lawyer), which was imported from English to denote a broader and less politicized range of causes than the work of human rights lawyers who had represented political dissidents in the 1980s (Goedde 2013). Disability rights was one such cause.

Since the early 2000s, more and more legal professionals have been engaged in reform litigation by marginalized groups, including people with disabilities.

16 PSPD Public Interest Law Center, <http://www.peoplepower21.org/PublicLaw> (9 March 2018).

For instance, the Korean Bar Association added a separate chapter about disability rights in its human rights report in 2001 (KBA 2001). Minbyeon also established a minorities subcommittee and began offering small grants as seed money for reform litigation (Interview LB 2015; Interview LK 2015; Interview LL 2015). The progressive Christian Lawyer Fellowship formed a disabilities subcommittee, and one of its members became the lead author of the KDDA in the *Solidarity*. In addition, the revised Lawyers' Act of 2000 required all lawyers to perform at least 30 hours of pro bono work per year. Consequently, large law firms like Bae, Kim & Lee (Taepyeongyang) founded public interest working groups, often with a disability law team. These lawyers became core nodes in an increasingly institutionalized 'infrastructure' for disability-related litigation (see also Morton and Knopff 2000: 25).

Since 2004, new organizational forms emerged in Korea to institutionalize these networks: public interest law firms and public interest foundations within large law firms. Lawyers in these firms and their networks have played crucial roles in disability-related cases, brokering reform coalitions, improving legal education and in opening legal opportunities by pushing judges to innovate or adopt looser interpretations of various rules. They have also used the courts in innovative ways to advance various reforms. Gonggam was Korea's first public interest law firm, established in 2004 by one of the founders of Minbyeon and PSPD, the lawyer Park Won-soon, who became Seoul's mayor.<sup>17</sup> Gonggam was a pioneer, has the broadest focus among Korea's public interest law firms, and does most in terms of legal education and support for NGOs (Goedde 2013: 141-143). Its ten attorneys' original practice areas were disability rights, violence against women, and migrant worker rights, but now include sexual minorities, the poor and workers. Gonggam helped found several other public interest law firms. For instance, Hope and Law (Heuimangbeop, also called Korean Lawyers for Public Interest and Human Rights) was founded in 2011 and has nine attorneys who belong to Minbyeon, work closely with Gonggam, and focus on disability rights and sexual minorities.<sup>18</sup>

Public interest law foundations, meanwhile, were pioneered by the large law firm Taepyeongyang when it established Dongcheon as a non-profit in 2009.<sup>19</sup> Dongcheon employs three attorneys and several interns and fellows and works closely with Taepyeongyang's Pro Bono Committee. Disability rights is a core practice area and advances its mission to serve the 'socially

17 Gonggam, <http://www.kpil.org/> (1 March 2018).

18 Heuimang Beop, <http://www.hopeandlaw.org/> (1 March 2018).

19 Dongcheon Public Interest Foundation, <http://www.bkl.or.kr/> (5 March 2018).

disadvantaged and minorities' and foster 'public interest organizations, activists, and pro bono lawyers while engaging in research on public interest law, pro bono legal counselling, and legal and policy reforms' (Dongcheon 2016). In addition to representing clients, Dongcheon awards grants to public interest organizations and scholarships, hosts symposia on public interest law, and recently established a legal centre for NPOs. In 2016, it gave its Public Interest Law and Human Rights award to the successor organization of the Solidarity. More recently, the law firm Jipyong established Duru as its public interest law foundation in 2014.<sup>20</sup> Its nine attorneys work on a similar range of issues as Dongcheon, as well as cases related to freedom of expression and labour (Jipyong 2016). Jipyong provides matching grants to NGOs and to the public interest law firms described above. Duru lawyers also drafted the revised article 48 of the KDDA to specify court remedies for cases of disability discrimination.

Public interest law firms and foundations provide important resources for legal mobilization beyond legal representation. Their institutionalization in the past decade means that the resources for legal mobilization are more visible and accessible for potential claimants. They are sources of funding, key nodes in networks of legal professionals, and centres for research. In 2011, lawyers who had helped the Solidarity achieve anti-discrimination legislation also founded the Korea Disability Law Association (KDLA) with prosecutors, judges and scholars to create a network for identifying test cases for litigation, advising on disability cases, researching foreign examples and policy advocacy. These groups serve as mobilizing structures for reform litigation. For example, KDLA members and several large law firms' disability rights teams are cooperating on litigation over the inaccessibility of intercity buses (Interview LI 2017). Such networks have also been writing manuals, which are useful for elucidating legal opportunities. The KDLA published a manual through the Supreme Court Administration for lawyers and judges in 2013 (Interview LGLH 2015). Thus, Korea's infrastructure for more effectively recognizing and using, as well as sometimes even creating, legal opportunities, including disabilities-specific ones, has developed significantly.

## Conclusion

This chapter traced the liberalization of structures of legal opportunity for people with disabilities in Korea. It showed how Koreans with disabilities

20 Duru Public Interest Foundation, <http://duroo.org/main/ko/> (5 March 2018).

have gained access to an increasingly institutionalized infrastructure for supporting legal mobilization in the past decade. I highlighted the emergence of public interest law firms and foundations, as well as networks of legal professionals with disability law expertise, because they serve as mobilizing structures for legal activism and conduits of knowhow that enable claimants to better recognize, utilize and sometimes pry open legal and political opportunities. While the state succeeded in containing litigation by channelling most discrimination complaints through the NHRCK, activists (including those unrelated to disabilities) have found creative ways of leveraging synergies between the NHRCK and courtrooms. Moreover, litigation is not the only tactic disability activists use today in Korea. Protests continue in conjunction with litigation over accessible intercity buses. Moreover, after a 1,842-day sit-in at a major metro station in Seoul by people with disabilities, President Moon Jae-in – who was elected after his predecessor’s impeachment in 2017 and is a left-leaning former human rights lawyer – pledged to further improve disability rights by abolishing the medically-based rating system for disability welfare benefits (Ho 2018). Critics of this proposal fear ballooning deficits (e.g. *KH* 2017).

Despite the institutional changes to facilitate legal mobilization and the rise of public interest lawyering, societal resistance to people with disabilities persists. In 2017, for instance, residents in western Seoul protested construction of a special education school, even though a court had ruled in 1996 that the detriment to neighbours of such schools was outweighed by the detriment of denying education to disabled students (Bak 2017, and see note 15 above). As recently as 2016, a plurality of Koreans surveyed (42.2%) responded that the human rights of people with disabilities were still not respected (SSK Human Rights Forum-Hyundai Research 2016). The NHRCK is also hardly an unqualified ally. Of the 1,638 disability-related discrimination complaints the NHRCK handled in 2016, it rejected 1,194 cases and dismissed 383 (NHRCK 2016b, 65). Just 19 cases received NHRCK recommendations, and another 32 were settled or resolved through conciliation. Moreover, while Korea has experienced a liberalizing structure of legal opportunities for disability rights in the past 20 years, this trend could reverse. Continued political activism by people with disabilities will help forestall backsliding and continue the trend of increasing participation by people with disabilities in crafting and implementing policy.

More broadly, this study contributes to our understanding of what role courts play in state-society relations and policy processes. Scholars have observed the judicialization or legalization of politics in various policy fields and investigated the spread of US-style ‘adversarial legalism’ (Kagan 2007).

Due to the outsized global impact of the ADA, which encouraged disability-related litigation in the United States (Burke 2004), it makes sense to ask if the spread of disability rights in Korea similarly signals the ‘Americanization’ of its legal framework (Kelemen 2008). This chapter suggests not. Korean activists’ demands for judicial remedies were diluted in negotiations for the KDDA, wherein state actors pitched the NHRCK route as an easier and more flexible dispute resolution mechanism. The Solidarity’s original demands of punitive damages and class action possibilities (both of which Korea largely lacks) were also rejected. In exchange, however, lawmakers permitted cases of non-compliance with NHRCK recommendations to be taken to court. With support from an increasingly institutionalized infrastructure for legal mobilization, litigation – albeit often in conjunction with NHRCK claims – has become a more and more viable mechanism for enforcing disability rights and influencing policy implementation. As one Korean researcher noted, ‘creative claims, including harassment, are now being pursued in court’ (Interview RIDRIK 2017). On balance, the relatively accessible NHRCK, the possibility that courts can halt ongoing discrimination and remedy past discrimination via the KDDA, and a growing support structure for disability rights claiming has improved the outlook for Koreans with disabilities. This research indicates, however, that a full understanding of changing state-society relations requires analysing both changes in structural constraints and how social groups and professionals, including within the state, may interact to stretch or creatively use such constraints.

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