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ABSTRACT

Social movements can be conceptualized as collective activities that seek to alter a regime, and, since a system of legally enforceable rights is part of this regime, these activities, that seek to institutionalize new legal rights, are a form of social movements.

Drawing on the sociology of social movements, this paper presents a simple sequential model of such movements. Further, a series of hypotheses related to their formation, maintenance, and success are constructed. Factors considered are the right to be institutionalized and characteristics of movement participants; availability, resources, and strategies of the leadership; characteristics of the decision-making elite, opponents, and competitors, and their controls over the movement; mobilization of the media and public support; the larger social context; and doctrinal sophistication on the part of the movement.

Hypotheses were tested with examples of movements with varying degrees of success, regarding the environmental right (kankyo-ken), the right to personal integrity (jinkaku-ken), and the solar access right (nissho-ken), all related to prevention or remedies of harms caused by environmental destruction. This paper finds that while lack of access to other policy-making arenas have forced many movements to resort to the judiciary, the increasingly conservative Japanese judiciary is not likely to adopt new rights that have certain characteristics, however sophisticated their doctrinal construction. The paper concludes with an observation that many movements will have to become explicitly political.

1. SUBJECT AND ANALYTICAL FRAMEWORK

This paper analyzes the institutionalization of newly proposed rights as legally enforceable interests in Japan. Specifically, we are concerned with conditions that affect the relative success of the institutionalization of such legal rights.

A right in this paper may be defined as an interest that (1) is legally...
enforceable through mobilization of politically institutionalized norms and legal institutions, (2) is provided justification with some higher-order norms, and (3) is universally available to the public. Numbers (2) and (3) distinguish a right from a special interest that may be legally enforceable, and yet lacks higher-order justifications and limits itself to the privileged few. As will be discussed below, one irony of our society is that a special interest is much easier to institutionalize as a legally enforceable interest. Our goal is to identify factors that determine the relative success of the institutionalization of these rights in this situation. While we intend to make our theory as general as possible, we shall limit our discussion to a specific field, i.e., the remedies or prevention of harms caused by environmental destruction. This seemingly narrow focus can be justified because environmental destruction is really one of the most serious problems facing any industrialized societies.

We cannot expect that any new legal right can be institutionalized by efforts of a single person. That would require collective activities of many people. A system of legally enforceable rights is part of a larger political regime, and collective activities that seek to alter a regime may be called social movements. Then, collective efforts that seek to create new legal rights can also be conceptualized as a form of social movements. Conceptualized this way, we may draw on the sociology of social movements to derive our basic analytical framework.

In the late seventies, the dominant perspective in the sociology of social movements shifted from the relative deprivation approach to the resource mobilization approach. The relative deprivation perspective explained the formation, maintenance, and eventual success of social movements in terms of perceived gaps (relative deprivation) between normative expectations and realities. Olson (1965) found, however, that such perceived gaps might not guarantee formation, maintenance, and success of activities for collective goods, such as universally enjoyable rights, because of the problem of "free riders," who want to benefit from the achievement of other people, while not participating in their movement. More recently, research on social movements has paid more attention to the mobilization of resources that help to organize potential members, keep them in the movement, acquire public support, and eventually win over the decision-making elite and opposition groups (cf., as a programmatic statement, McCarthy and Zald, 1977). This resource mobilization approach does not ignore the need for relative deprivation as an initial factor in such movements. Rather, it has widened the scope of analyses by paying attention to characteristics of movements themselves and bringing in a more dynamic view that sees progression of social movements in terms of interaction between their capability of resource mobilization and environmental factors. Employing this approach, we shall construct our hypotheses.
2. RIGHTS AND JUDICIAL CASES IN JAPANESE ENVIRONMENTAL LAW

There are cases called the four leading pollution cases in Japan, i.e., the Minamata and Niigata mercury poisoning cases, the Yokkaichi pollution case, and the Toyama itai itai disease (chronic cadmium poisoning) case (cf., for Japanese environmental law, Gresser et al., 1981; Upham, 1987: 28-77). These were landmark judicial decisions in which the Japanese judiciary found ways to provide compensations to mass victims for injuries typically caused by multiple sources. Since these were within the scope of traditional torts doctrines, however, and since the central issue was compensation for the past and present damages, these cases did not develop any new right that allows the public to proactively seek preservation of environment itself. In these regards, efforts have thus been made to institutionalize such a new right.

Within this context, there were two major limitations in traditional doctrines. One was the difficulty to obtain an injunctive relief due to the lack of equity tradition. Second, there was the limitation on the standing to sue. Here, traditional doctrines require actual or potential damages to property or some other rights explicitly recognized by statutes. For example, if land owners or fishermen holding use rights of surface public water agreed to the construction of a power plant that might destroy land or marine environment, virtually no other people could take a legal action. Efforts have been made, therefore, to construct and institutionalize a new legal right that would enable a wider range of people to proactively seek an injunction for the preservation of environment.

Looking more closely at this area, there is one new legal right that has been recognized by both the court and the legislature, i.e., nissho-ken or the solar access right. The Japanese have traditionally sought housing that has access to sun light for aesthetic as well as sanitary reasons. In a case where the defendant's illegal addition of floors to his home had completely obstructed all midday sun light and air ventilation to the plaintiff's neighboring house, the Supreme Court recognized this interest in 1972 and ordered the defendant to pay damages to the plaintiff. The Court did not use the term nissho-ken, nor did it elaborate on its statutory or doctrinal bases. This decision was nonetheless followed by similar cases that gradually expanded the application of this basic idea. Moreover, in 1976, the Diet passed amendments to the Building Standard Law so that the protection of access to sun light would have to be prospectively taken into consideration in all construction projects. Although proponents of more radical positions criticize the lack of effective participation of local residents in the planning process, we may say that this solar access right has been institutionalized to a certain extent.

The solar access right covers, however, only a portion of environmental problems in Japan. Two additional ideas have been tried, with the possibility of wider application. One is jinkaku-ken or the right to personal integrity,
and the other is *kankyo-ken* or the environmental right (for a comparison of these three rights, Gresser *et al.*, 1981: 135-201). The right to personal integrity developed from interpretations of Articles 709, 710, 723 of the Civil Code, which recognized compensation to nonpecuniary loss. The construction of this right started with the protection of name, honor, or reputation, but has expanded to cover any interests related to personal well-being. The environmental right was first proposed by the Japan Federation of Bar Associations in 1972. This right embraces not only natural environmental conditions, but also the cultural environment. It is to be enjoyed collectively by the public, both living and unborn, whether or not they have some property rights or other interests with statutory bases. Proponents of this right argue that Articles 13 (protection of rights to seek life, liberty, and happiness) and 25 (right to live) of the Japanese Constitution imply this right, and that where environmental quality is threatened, an injunction should be granted. The major emphasis of the environmental right is to provide people with a basis to seek an injunction on behalf of both themselves and fellow citizens to prospectively protect the environment.

Several groups have used either or both of the personal integrity right and the environmental right in litigation and obtained results with subtle differences. The environmental right is, of course, the most desirable, but no court has yet based its decision on it. In this sense, no movements seeking institutionalization of the environmental right have succeeded in the judicial arena. However, we can still talk about subtle differences among cases. We may ask how far each case proceeded in the judicial system and how much each case obtained. For example, a decision on the merits of the case is still better than outright dismissal for the lack of standing, even when that decision meant dismissal. Likewise, a monetary award for likely future damages is better than a traditional award limited to past damages, even when the court rejects an injunction. In spite of our interest in finding conditions of successful social movements, therefore, we can actually present only those factors that explain such subtle differences in the overall standstill. Since construction and institutionalization of new legal right in this field is our pressing concern, even with these restrictions, we believe that this type of analysis is worthwhile. In fact, our research should illuminate challenges that face any movements in this area. We also expect that our hypotheses will have wider application. Even though different situations will probably require different sets of variables, we expect that factors that impact on the movement in one direction in a certain situation will produce effects in the same way in other settings. Here, we only need to pay our attention to possibility that the absolute levels of achievement will differ from one case to another, depending on the interactions between those basic factors and the characteristics of specific situations.

With this framework as a backdrop, we will now look at four example cases of litigation, *i.e.*, the Osaka International Airport case, the Nagoya bullet train case, the Date electric power plant case, and the Buzen electric
power plant case (Gresser et al., 1981: 139-225).

**OSAKA INTERNATIONAL AIRPORT CASE.** The litigation of the Osaka Case began in 1970 when 28 local residents (more than 200 later) sought an injunction against the State for the nightly operation of the airport on the basis of the personal integrity and environmental rights, in addition to the compensation for past/future damages based on the standard torts provisions of the Civil Code. Local attorneys assisted the plaintiffs both before and through the litigation. In 1974, the Osaka District Court granted an injunction between 10 p.m. and 7 a.m., as well as compensation for the past damages. Upon appeal from both sides, the Osaka High Court decided more favorably for the plaintiffs. In addition to past damages, it expanded the injunction to start from 9 p.m. and also granted awards for future damages. Both courts based their injunctive relief on the personal integrity right. Subsequently, the State appealed to the Supreme Court. The case was first heard by a Petty Bench with 5 justices, but was later transferred to the Great Bench with all the 15 justices. The Supreme Court finally dismissed the injunction and future damages, and sustained only past damages. The plaintiffs were still able, however, to continue negotiation with the State, and, in 1985, the Transportation Ministry promised that it would not approve any flights after 9 p.m.

**NAGOYA BULLET TRAIN CASE.** The litigation started in this case in 1974 when more than 500 residents sought an injunction against the Japan National Railway (JNR) to reduce the speed of bullet trains when passing through their community on the basis of the personal integrity and environmental rights, as well as past/future damages. Again, attorneys assisted the plaintiffs throughout the litigation. The Nagoya District Court in 1980 recognized, in theory, the personal integrity right, but denied an injunction. The court only granted past damages and the decision was appealed from both sides. In 1985, the Nagoya High Court made its decision and recognized the personal integrity right in theory, but refused an injunction and deeply reduced awards for past damages. The case was appealed by both parties to the Supreme Court. Subsequently, in 1986, the case was settled with a monetary award and the promise by the JNR to pay maximum efforts to reduce noise to a certain level by 1989.

As can be seen, the personal integrity right was recognized at least by the lower courts in both of these cases. In fact, the lower courts in the Osaka case actually granted an injunction and, though it was later denied by the Supreme Court, the plaintiffs could virtually maintain that injunction through negotiation.

**DATE ELECTRIC POWER PLANT CASE.** In 1972, this case of civil litigation started in the Sapporo District Court, when more than 100 local farmers and fishermen sought an injunction against the construction of electric power plant near the sea. This was filed on the basis of the environmental, personal integrity, and property rights. The electricity company had not yet received permission from the governor of the Prefecture of Hokkaido for the public water surface reclamation needed for
the construction of the plant, and no damages had occurred yet. As in both of
the above cases, attorneys assisted the plaintiffs in litigation. The court
granted the standing to sue to the plaintiffs on the ground of the personal
integrity right, but dismissed the case in 1980. The decision was not
appealed and the construction of the power plant was eventually completed.

**BUZEN ELECTRIC POWER PLANT CASE.** The Buzen case litigation
started in 1973 in the Kokura Branch of the Fukuoka District Court. There
were only 7 plaintiffs. They were led by a writer and included a school
teacher and a labor union official, but farmers, fishermen, and other people
who held property rights or use rights that might be adversely affected by
the proposed construction of the power plant were not included. The
plaintiffs consulted attorneys before the litigation and, receiving negative
advice, carried out the litigation totally without assistance from counsel.
This was done even at the Supreme Court stage. An injunction of the
construction against the electricity company was sought solely on the basis
of the environmental right. The District Court dismissed the case in 1979
saying that the environmental right was not a concrete, private right
recognizable under the present system of positive law. The appeal was
dismissed by the Fukuoka High Court in 1981, and, for lack of standing, the
Supreme Court dismissed the further appeal in 1985. Interestingly, many
proponents of the environmental right, particularly attorneys, criticized the
plaintiffs, saying that if they lost in this ill-prepared litigation, the decision
would nonetheless be used as a controlling precedent, arresting movements
for the environmental right through the foreseeable future.

The Date and Buzen cases differed from the Osaka and Nagoya cases in
that the former started before any damages were caused and won nothing,
even at the trial court level. There was also a subtle difference between the
Date and Buzen cases. The Date plaintiffs were granted the standing to sue
on the basis of the personal integrity right, while the Buzen plaintiffs were
denied any status to seek a remedy.

While all of these four cases failed to convince the court to recognize the
environmental right, there were still slight differences among them with
regard to their relative achievement. These differences deserve
explanations, if we wish to understand the environmental right movement
and the difficulties it has had to surmount. Indeed, we may derive, even from
these very rough descriptions, some suggestions about the relationship
between the results of these cases and factors, such as the characteristics
of the right to be institutionalized, the lack or existence of actual
depreivation and its extent, the number and characteristics of movement
members, and the availability of professional expertise. If our theory is to
explain outcomes of any social movements for any new legal rights, it should
certainly be able to explain differences among these four cases, and among
the solar access right, personal integrity right, and environmental right.

Below we shall present a basic model and hypotheses and show how those
hypotheses fit the differences among these cases and rights.
3. SEQUENTIAL MODEL OF SOCIAL MOVEMENTS FOR NEW LEGAL RIGHTS

As an analytical model of collective behavior or social movements, Smelser's (1962) value-added models are early, well-known examples. His concept of norm-oriented movement (Smelser, 1962: 270) includes a movement for a new law. The stages identified in his models do not represent temporal sequences, but rather logical requirements that a new stage is reached only when logically requisite conditions are met. A Japanese sociologist, Shiobara (1976: 336-349), expanded Smelser's model and presented his own model that dealt with the entire process of social movements. His model does not use a temporal sequence, but recognizes the possibility of introducing temporal sequences in the actual application. Borrowing his basic structure, our model is summarized by Figure 1.

Figure 1. Sequential Model of Social Movements for New Legal Rights

(1) Contradictions and dysfunctions of the social system

(2) Strain in the life system of the actor, dissatisfaction of the need

(3) Emergence of social dissatisfaction and anxiety caused by deprivation

(4) Exploration of a new order, formation of an orientation toward a new order

(5) Formation of collective activities and organizations

(6) Selection of a decision-making arena and level

(7) Formation of coalition with part of the elite, power realignment

(8) Acceptance or rejection of the proposed new legal right by the decision-making elite

(9) Shifting to another arena or level; stable functioning of the new legal right; continuation as a movement without expectation of success in the near future or as a movement that challenges the larger system itself; disappearance of the movement; or reappearance as a movement to revitalize the neglected right

Characteristics of
A. Trigger factor
B. Proposed right
C. Movement members
D. Leadership
E. Doctrinal construction
F. Decision-making elite
G. Opposition groups
H. Other social movements
I. Public opinion
J. Larger social situation
The nine stages from top to bottom indicate the process of formation and progression of the movement. When the movement shifts from one decision-making arena or level to another, it returns from (9) to (5). When the movement reappears to revitalize the once institutionalized, but later ignored right, it also returns from (9) to an earlier stage. Since there are different decision-making arenas (e.g., the legislature, the judiciary, and the executive branch), as well as different levels (e.g., local, prefectural, and national), the movement cannot stop at one arena or level. If the movement wants to institutionalize and stabilize the proposed right in all arenas and at all levels, there will be no end for the movement. We, nonetheless, believe that our model is still useful when we compare several movements, at least in the same arena and at the same level. We also expect that this model can be used to compare those movements that have succeeded in more than one arena and at higher levels with other, less successful ones. Let us detail Figure 1.

The mobilization of resources in the model means that in order to move from one stage to another, there is always a need for acquisition of proper resources, and these are not limited to financial ones. Such intangibles as information, expertise, and legitimation could be more important than fiscal matters. As indicated, the characteristics of the factors A to J in the box determine the availability of resources at each step and, hence, the formation and progression of the movement.

In this model, stage (2) is the starting point. The potential actors, namely, movement members must first perceive some deprivation or threat. When an explanation (i.e., a resource in the form of information) is provided about the preceding stage (1) and the potential movement member is taught that there is someone to blame, he will move to stage (3). It should be noted that the relative deprivation approach in the sociology of social movements has paid particular attention to this stage. In order for the potential member to start exploration of a new order and get to stage (4), however, another resource has to be provided in the form of information and legitimation. The potential member must know that the existing system cannot alleviate his situation or prevent the likely deprivation. Further, he must believe that it is possible and legitimate to seek a new order that will more effectively provide protection, not only to himself, but also to other people in the same situation. Therefore, the need for leadership, either from among the potential members, or from the outside, is obvious. We should mention here that it is possible to have a movement without experience of actual deprivation. That is the movement of "conscientious constituent" (Zald and McCarthy, 1979: 174). Such people are also potential sources of various supports, including leadership.

To move from stage (4) to stage (5) and really start a movement, leadership must be provided, and those leaders must expend their resources to organize potential members into a group. Information about the impact of the larger organization and its legitimacy is among such resources.

At stage (6), the selection of a decision-making arena/level is often limited
by the elite. Here, access to more arenas and levels is really the crucial resource. In any society with unequal distributions of access to the political decision-making process, particularly at the national level, the judiciary is often the only arena available to people who challenge the status quo. This brings us to a dilemma, i.e., the creation of a new legal right that will alter the existing system of positive law is sought in the arena which is most strongly bound to the existing legal system and scrutinizes whether the parties' argument fits the existing statutes and precedents. Thus, the movement members, particularly leaders, have to carefully balance the ideal content of the proposed right and its acceptability to the decision-making elite, i.e., judges. In this setting, legal expertise becomes an important resource.

At stage (7), the movement actively seeks a coalition formation with part of the elite or further realignment of the power structure, so that its position will prevail. The movement, for instance in the judiciary, will start with the persuasion of one lower court, proceed to several lower courts, and finally succeed to persuade the highest court. At this stage, both professional legal expertise and public support may be particularly important resources. Then, at stage (8), the existing or newly-formed decision-making elite will decide whether to accept or reject the proposed new right. Subsequently at stage (9), if the movement still has sufficient resources, it will move to another arena or level, either to further develop the new legal right or to seek a chance of another try. Even when the movement realizes that the possibility of the early realization of their purpose is slight it still may continue to exist as a movement if resources are still available, but with a less focus and more broad in scope. If it lacks these resources, the movement may disappear. If the new legal right becomes stable, there will be no more need for the movement, except that it may reappear as a movement to revitalize the right.

Turning to the factors listed in the box of Figure 1, we may divide them into three groups: a situational factor (A), factors of the movement itself (B, C, D, E), and factors of the environment facing the movement (F, G, H, I, J). These terms are expected to exert interaction effects on the movement process. That is, the less favorable one group of variables are to the formation, maintenance, and success of the movement, the more favorable other groups of variables must be. A typical situational/trigger factor is a moral outrage caused by insensitive behavior on the part of the sources of deprivation or the decision-making elite. This factor is unpredictable, but is still crucial in maintaining high morale among the movement members throughout the entire process.
4. CHARACTERISTICS OF THE MOVEMENT

This and the next sections will present hypotheses about impacts of specific factors and illustrations concerning the three rights and the four cases described in Section 2. Our hypotheses are meant to apply in any decision-making arena or level. In order to facilitate understanding, however, we use those examples in the judicial arena. We should add that our discussion cannot be exhaustive, but briefly reviews a few major points. Moreover, since our hypotheses were originally constructed in our effort to make sense of the situation in Japan, their validity may be, to a degree, limited. We suspect, however, that given basic similarities of the structure of liberal, capitalistic societies, our hypotheses will have applicability in other societies, too. Below we deal with factors of the movement itself, and in the subsequent section, we discuss factors related the environment surrounding the movement.

CHARACTERISTICS OF THE PROPOSED RIGHT. The characteristics of the proposed right itself will have significant impact on the possibility of forming and maintaining the movement, of the mobilization of public support, and of eventual coalition formation with the decision-making elite. The first element is the degree of diffuseness of the potential beneficiaries. A right is a right because it benefits all the people, but its very nature introduces the "free-rider" problem. For this reason, it seems more difficult to form a movement for a right than for a special interest. The visibility of the expected benefit of the proposed right is another element. A right that will bring monetary awards or specific building designs will be easier to attract potential members and public support, compared to a right such as the environmental right that will merely preserve environments that are already present. Another element is the characteristics of the people who will bear obligations under the proposed new legal right. If the right imposes obligations to the public entities, most typically the state, coalition formation with the elite will be more difficult. The fourth element is the substantive content of the right. If it is political, rather than economic, and it allows proactive interference with the decision-making process, coalition formation with the elite will be more difficult. Finally, the nature of the remedies are important. If it is prospective, rather than retrospective, the elite will resist more.

CHARACTERISTICS OF MOVEMENT MEMBERS. First, members' respectability from the viewpoint of the conventional public may be an important element in mobilization of support from both the public and the elite (cf., for the impact of cultural conventionality, Black, 1976: 61-83). The Buzen case plaintiffs were not residents of the site of the proposed power plant, and their occupations were not common to those local residents. They were not respectable people. The second element is the visibility and extent of damages. If movement members already received some visible damages or at least are in a position to receive visible damages, mobilization of support from the public and elite will be easier. The Buzen plaintiffs were in a
difficult situation. They had not been damaged, were not holding any conventional rights over land or water, were not living in the area, and were promoting a right that would present only an invisible benefit. The third element is size of the movement (cf., Black, 1976: 85-103). The sheer size may be an important factor in attracting more members, in raising funds, gaining legitimacy and public support, and persuading the elite. The Buzen case, however, had only 7 members. Fourth is the degree of organization (cf., Black, 1976: 85-103). Bureaucratization of the movement may have adverse effects. Still, if a preexisting organization can be used as a ground for the movement, it may be easier to form and maintain. We see this in the Osaka and Date cases, where plaintiffs could base their movements on the preexisting neighborhood or occupational organizations. Further, the Nagoya movement developed its own networks of people through an earlier movement to refuse TV fees. Sixth is the relationship with potential bearers of obligations. Here, continuous, dependent relationships may actually deter the movement. For example, the first mercury poisoning litigation did not started in Minamata, where the poisoning was first found. An explanation for that is the dependence of the entire town on the defendant company. Likewise, in the Buzen case, local people relied on the fund from the defendant company to rebuild their Shinto shrine. It must be difficult to attract more members and gain public support in such situations. Finally, the relationship with potential suppliers of the leadership will be important. The Osaka and Nagoya movements were in a better position because attorneys in those areas were most interested in the creation of the environmental right. On the other hand, the Buzen plaintiffs came to know that idea through the media.

LEADERSHIP. Leaders may be provided either from among movement members or from the “conscientious constituents.” Since internal conflicts are possible if leaders and members do not share the same perspectives and normative expectations, it is better to have leaders from within the movement. A problem with any movements for new legal rights, however, is the need for legal expertise, stable organization, and independent financial bases. It is natural, therefore, to find the bar as the almost only external source of leadership. Lack of this professional leadership was another tragedy of the Buzen case, although the members themselves did not recognize such a need.

DOCTRINAL CONSTRUCTION. If the movement lacks access to decision-making arenas other than the judiciary, doctrinal construction will play a large role. Again the dilemma is that this very fact arrests the movement, since the movement has to invent a construction which is acceptable to the conventional system of doctrines, while at the same time asking for its amendment. That may explain the difference between the limited acceptance of the personal integrity right and the complete rejection of the environmental right. We should note a point, which seems particularly strong among Japanese judges and legal scholars, i.e., their neglect of the Bill of Rights of the Japanese Constitution as positive law. Proponents of
the environmental right based it on human rights provisions of the Japanese Constitution, and this doctrinal construction is widely supported by Constitutional scholars. However, a majority of judges and law scholars in other fields do not regard such provisions as part of positive law. They look down at any construction that invokes the Constitution as a sign of lack of doctrinal sophistication.

If these hypotheses are valid, then, we may say that the environmental right is most difficult for any movements to institutionalize, and that the Buzen case was the most difficult from the very beginning. In order for these right or case to achieve more, either an extraordinary amount of resources has to be mobilized or factors of the environment surrounding the movement have to be extraordinarily favorable to them. Let us turn to this issue.

5. CHARACTERISTICS OF THE ENVIRONMENT OF THE MOVEMENT

DECISION-MAKING ELITE. The decision-making elite, such as legislators, judges, and administrators, are targets of the movement. In order to control the decision-making process, the movement has to form a coalition with part of them or replace them with their representatives. The most important element in this respect is control of the movement by the elite, for it can inhibit such efforts on the part of the movement. We can list various examples. One is limitations on the access to certain decision-making arenas. Since the movement is likely to appear from among those people who suffered from some aspect of the status quo, they are likely to lack access to the legislature or the executive branch. The movement will be forced to resort to the judiciary, where a proposal of changing existing doctrines is least received. This is a powerful social control mechanism affecting all the movements in the field of environmental law. Another example of this type of control is efforts of the Japanese government to establish extrajudicial, conciliatory mechanisms to deal with environmental complaints. We may take this as an effort to deprive complainants of a chance to make environmental issues as a matter of legally enforceable right (Upham, 1987: 28-77). Internal control of the elite is another important aspect. The movement cannot expect to prevail the decision-making process unless there is a division among the elite themselves. In this regard, a critical development is the judicial politics of the General Secretariat of the Supreme Court. The Supreme Court is supposed to apply its authority as the highest court through its review of individual cases. Instead, the General Secretariat now calls upon lower court judges handling certain types of cases and holds a conference to inform them of its position. Contents of such conferences are not always available to the public. In fact, there was an expose of a secret document circulated among judges that recommended conservative decisions in environmental cases involving injunction requests. The Secretariat can also control judges through
relocation. It actually transferred lower court judges to different courts in some environmental cases where decisions favorable to plaintiffs were expected. We cannot expect that this situation will change. Internal control of judges are more likely to be tightened.

**OPPOSITION GROUPS.** The most important opposition groups are those who are likely to be imposed new obligations if the proposed right is adopted. *Conventional respectability* will also play a role here, only that its impact is the opposite of that of the movement members. Usually the state and large corporations have an advantage in this area. However, the existence of visible damages may reduce their respectability. The defendants in the Osaka and Nagoya cases had this problem, while those of the Date and the Buzen cases did not. *Social control by opposition groups* is another element. This social control needs not be carried out by themselves. Because of their conventional respectability, they may rely on formal social control agents or even potential movement members. In the Buzen case, a plaintiff tried to block reclamation by a boat. He was arrested, and had to leave his job. The plaintiffs also built a barric as a watch post near the construction site. They were asked to remove it by local residents who had their Shinto shrine rebuilt by the defendant company. In the Nagoya case, some train operators cooperated with the movement and reduced the speed to show its effect. The JNR reprimanded them, and the movement lost their cooperation.

**OTHER RELATED SOCIAL MOVEMENTS.** When there are conflicts among such movements about strategies and tactics, any movement cannot be too effective. The Buzen case is again an example. Those groups of attorneys who were most strongly committed to the idea of the environmental right did not regard it a proper case.

**PUBLIC OPINION.** In this regard, interest of the media in the movement may be particularly important in gaining legitimacy and mobilizing public support. The Nagoya plaintiffs first published its own newsletters, which in turn caught attention of the mass media. The Buzen case did not enjoy as much support from the media.

**LARGER SOCIAL SITUATION.** Finally, the larger social situation may provide the movement with either a favorable or an unfavorable background. It seems most helpful for the movement if similar problems appeared at various places at the same time so that many people can understand the universal significance of the movement and hence recognize its legitimacy. Otherwise, the movement can be seen as being very shallow. In this sense, those days when the four leading pollution cases just started might have been the best opportunity for the proposal of the environmental right. Here, social realities and human imaginations did not come together.

Discussed this way, environmental factors do not vary much from one right or case to another. In fact, most variable may be the impact of other social movements. While plaintiffs of other cases maintained a good relationship with the largest group, namely, the bar, those of the Buzen case failed to form it.
6. CONCLUSION AND PROSPECT

We have presented a sequential model of social movements for new legal rights. Further, we have applied hypotheses derived from it to the three rights and the four litigation cases from the field of environmental law in Japan.

To summarize, the solar access right is most narrowly focused, and is most accepted. The personal integrity right can justify itself as an extension of conventional doctrines. It is accepted at least to the extent it provides damage awards, while still unable to justify an injunction. The environmental right can find a basis only in the Constitution, and is least accepted. It is difficult to tell the relative importance of each factor or distinguish direct effect from interaction effect. We may still conclude, however, that our hypotheses fit this ordering of these three rights.

Among the four litigation cases, the Osaka and the Nagoya cases involved actual damages. At least past damages were recognized, and the personal integrity right also received some support. The Date and the Buzen cases did not involve actual damages. While the Date litigation was dismissed on the merits of the case, the Buzen litigation was dismissed outright. These differences were miniscule compared to the ultimate goal of creating the environmental right. Still, these differences are important at this stage of the movement for the environmental right, and our hypotheses provide explanations for them.

Then, is there any prospect for the institutionalization of the environmental right in the near future? A pessimistic answer is inevitable, unless something extraordinary happens, e.g., a series of serious pollution cases occur, the system of judges as career bureaucrats is abolished, and the Liberal Democratic Party loses its permanent control of the legislature so that more people will obtain access to the legislature and the executive branch. Disastrous pollution must of course be avoided. Then the latter two scenarios remain, but these are sheer politics. The movement for the environmental right will be forced to survive as a movement aiming not at an immediate legal change, but at a gradual change in social thoughts. At the same time, some of its members will want to join explicitly political movements that seek some fundamental changes in the Japanese political system, including the judiciary. We suspect that social movements for new legal rights in many other fields find themselves in the same situation.

REFERENCES

Black, Donald

Gresser, Julian, Koichiro Fujikura, and Akio Morishima

McCarthy, John D., and Mayer N. Zald
American Journal of Sociology, 82, 1212-1241.

Olson, Mancur

Shiobara, Tsutomu

Smelser, Neil J.

Upham, Frank K.

Zald, Mayer N., and John D. McCarthy (eds.)