

Structuring of Tort Liability from Corrective and Distributive Justice

From the Analysis of Fukushima Nuclear Accident

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RÉSUMÉ. — L'accident nucléaire de Fukushima a engendré une série de problèmes nouveaux. Comme il s'agissait d'une responsabilité stricte, les victimes n'ont pas eu à prouver la négligence mais ils ont entamé une action pour obtenir davantage de dédommagements pour atteinte morale. Ceci conduit à poser la question de la culpabilité pour négligence et stricte responsabilité. Je propose de ne pas entendre culpabilité au sens moral mais d'y voir une déviation par rapport à la norme. Plus grande sera la déviation, plus grande la culpabilité, sans se soucier de ce qui a entraîné la responsabilité. Quant aux dommages, lesquels peuvent être compensés et lesquels ne le peuvent pas, voilà la question. Il était important de trouver des critères pour étayer cette décision et de les justifier. Pour cela, il faut étudier la structure de la responsabilité pour faute (négligence aussi bien que stricte responsabilité) et voir comment les principes fondamentaux de la justice distributive et de la justice commutative s'appliquent à cette structure.

MOTS-CLÉS. — Aristote – Fukushima – dommages

INTRODUCTION

Confronted with emerging new problems in various types of tort and struggling to find the just solution for the victim and the wrongdoer, the theory of tort law is constantly facing new challenges. During this process of struggle, sometimes the tort law theory confirmed the soundness of the traditional rules, but sometimes it moved to discard the old and establish new theories. The nuclear accident in Fukushima on March 11, 2011 brought totally new problems into the legal world.¹

¹ The author was the chairman of the Nuclear Damage Compensation Dispute Examination Committee (hereafter just Committee) which discussed the guidelines for compensation of nuclear damages. The contents of the guideline can be seen on the website of the Ministry of Education, Culture, Sports, Science and Technology.
https://www.mext.go.jp/b_menu/shingi/chousa/kaihatu/016/index.htm

Many of the issues we faced were unprecedented. Broad and comprehensive effect on the residents caused new types of harm and damages we never thought of before. Application of traditional doctrines did not help much. But deviation from these doctrines also needs justification from the basic principles, especially from the perspective of corrective justice (commutative justice)² and distributive justice. In this article I would like to address some of these problems which I think would be of common interest to us all.

II. — THE NUCLEAR ACCIDENT IN FUKUSHIMA

A. — *Outline of the accident and the compensation*

Let me give you an overview of the Fukushima nuclear accident and the compensation provided to the victims. This accident was caused by a huge earthquake and tsunami, which knocked down the power supply system necessary for cooling the reactor at the power plant. This caused overheating of the reactors, melting of the fuel rods, and followed by hydrogen explosions of the building (not the reactor itself). A great amount of radioactive materials was released into the air and the emission caused serious contamination in the surrounding areas. The government issued evacuation orders to the residents within a 20km radius from the reactor, and indoor sheltering orders to the residents within a 20km to 30km radius. Also groundwater was contaminated and it spread to surrounding soils, rivers, and finally into the sea. The residents of this area suffered a wide variety of harm and damages and thus claimed compensation against TEPCO. According to the material published by TEPCO,³ the amount compensated as of November 2021 was as follows: (1) damages to individuals caused by evacuation, mostly damages for mental suffering (excluding damages of lands and houses), 2.036 trillion yen, (2) business damages to corporations and individuals, 3.1357 trillion yen, (3) property damages (to individuals and corporations), 1.962 trillion yen, (4) decontamination costs (first paid by the government and the municipalities and afterwards reimbursed by TEPCO), 3.0385 trillion yen. In total 10.14 trillion yen.

The legal basis for the compensation of these damages is the Nuclear Damage Compensation Act in accordance with the *Paris Convention on Nuclear Liability*. According to this law it is the operator (owner) of the nuclear power plant who is liable for damages and it is strict liability, proof of negligence is not necessary (Art.3).⁴ However, the liability is exempt if the cause of the accident was a huge natural disaster of exceptional nature or a social

2 Though the term "justice commutative" is used in France I would like to use the term "corrective justice" in this article, because it suits better in the context of tort, that is non-voluntary transaction between the wrongdoer and the victim. How to understand corrective justice is controversial. See for ex., Ernest J. Weinrib, *Corrective Justice*, 77 *Iowa L. Rev.* 403 (1991-1992), *The Gains and Losses of Corrective Justice*, 44 *Duke L.J.* 277 (1994), *Toward a Moral Theory of Negligence Law*, in Michael Bayles and Bruce Chapman (ed.), *Justice, Right and Tort Law*, pp. 123-148 (1983) and Richard W. Wright, *Substantive Corrective Justice*, 77 *Iowa L. Rev.* 625 (1992). My position is close to Wright.

3 TEPCO's website https://www.tepco.co.jp/fukushima_hq/compensation/results/ provides us the newest information.

4 Article 3 of the Act provides: In the course of operating a nuclear reactor, if the nuclear damages are caused by the operation, the operator is liable for the damages thus caused, except in cases of huge natural disaster of exceptional nature or social upheaval.

upheaval. The earthquake in Fukushima, though the magnitude counted 9.0 was huge, it was of a predictable scale, and thus held by the court that it did not fall within the grounds for exemption.⁵ The government agreed. TEPCO also did not dispute.

Independent from the strict liability of the operator, it is also possible that the government will be held liable based on *State Liability Act*, if the failure of its regulatory power was proved to be illegal and the cause of the disaster.⁶ Some related problem will be discussed later.

B. — *Theoretical issues on liability and compensation*

1. — *Structure of the liability*

At first sight, the strict liability of the nuclear operator seems simple and nothing is worth discussing concerning the liability. When “nuclear damages” are caused by the operation of the nuclear reactor, the operator is liable for these damages, without any proof of negligence. This strict liability is basically a tort liability and therefore all the principles and provisions of tort of the Civil Code will be applied except the part of requirements necessary to establish the liability, that is negligence requirement. The basic tort provision in Civil Code provides in article 709 as follows.

“A person who has intentionally or negligently infringed any right or legally protected interest of others shall be liable to compensate any damages resulting thereof.”

Comparing the tort provision and the strict liability we realize there is an intricate problem concerning the nature and function of the liability. The key question is how do we determine the scope of liability when the defendant is strictly liable.⁷ In the case of liability for negligence, it is the negligence or the duty of care, which controls the scope of liability. For example, the pure economic loss suffered by a user of the road due to the blocking of the road by a traffic accident is excluded from the compensation by denying negligence of the driver in relation to the economic loss.⁸ But what happens if it was strict liability such as nuclear liability? Are all the economic losses going to be compensated if the wrongdoer is strictly liable? Of course, this is unreasonable. In many cases the purpose of the strict liability will limit the scope of liability. For example, the *No-Fault Car Accident Compensation Act* provides that the strict liability only applies to personal injuries. If there is no clear provision in the law referring to the criteria for limiting the scope of liability, the court must find a criterion by interpretation, but sometimes this does not help much. The *Nuclear Damage Compensation Act* also does not have clear provision. Then how do we decide the scope of liability under this

5 Maebashi District Court, Judgement March 17, 2017, *Hanrei Jiho* 2339, 4.

6 Eri Osaka, Corporate Liability, Government Liability, and the Fukushima Nuclear Disaster, 21 *Pac. Rim L & Pol'y J.* 433 (2012) argues the government is liable.

7 I distinguish the problem of “scope of the liability” from the problem of “scope of damages”. The latter is a problem of determining the compensability of the subsequent damages or consequential damages. The scope of damages is under the Japanese law decided by adequate causation.

8 There are many ways of regulating pure economic loss, See V. Palmer and M. Bussani(ed.), *Pure Economic Loss: New Horizons in Comparative Law*, (2009).