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The 2011 Fukushima Nuclear Disaster: Japanese Citizens' Role in the Pursuit of Criminal Responsibility

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The 2011 Fukushima Nuclear Disaster

Japanese Citizens' Role in the Pursuit of Criminal Responsibility

*Erik Herber**

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I. INTRODUCTION

On 11 March 2011 the area off the north-eastern coast of Japan was hit by a powerful earthquake, followed by a massive tsunami. These two disasters were then followed by a third, when a meltdown occurred within the Fukushima Daiichi Nuclear Power Plant complex. As a result of the earthquake and tsunami 15,894 people died, another 2,652 are still missing (as of 10 February 2016), and 6,152 were wounded.¹ The meltdown in addition necessitated the evacuation of those living in the vicinity of the reactors, as radiation caused serious harm to both the surrounding and wider environment.² As of January 2016 around 178,000 people were still displaced as a result of the three disasters of 3/11.³

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1 NATIONAL POLICE AGENCY, *Heisei 23-nen (2011-nen) Tōhoku chihō taihei-yō oki-jishin no higai jōkyō to keisatsu sochi* [Report on police measures and harm caused by the Heisei 23 (2011) Tōhoku region Pacific coast earthquake] (Tōkyō 2016).

2 K. AKAHANE/S. YONAI/S. FUKUDA, The Fukushima nuclear power plant accident and exposures in the environment, in: *Environmentalist* 32 (2012) 136.

3 GOVERNMENT OF JAPAN RECONSTRUCTION AGENCY, *Zenkoku hinan-sha no kazu* [Report on the number of victims of a catastrophe nationwide] (Tōkyō 2016), available at the Government of Japan Reconstruction Agency website: http://www.reconstruction.go.jp/topics/main-cat2/sub-cat2-1/20160129_hinansha.pdf.

On 11 June 2012 1,324 Fukushima citizens united in a group called Complainants for the Criminal Prosecution of the Fukushima Nuclear Disaster⁴ (hereafter: FCP) pressed charges against 33 government officials and executives of the Tokyo Electric Power Company (“Tepco”), the company that operated and still operates the nuclear power plant.⁵ Their basic claim: the nuclear disaster as well as much of the damage that occurred in the aftermath of the earthquake and tsunami of 3/11 could have been prevented, had it not been for these officials’ and employees’ criminal negligence. This case accordingly touches upon issues that have had and still have an immense impact on many Japanese citizens’ lives.

While studying this case is therefore meaningful in its own right, doing so is also fruitful in view of the lack of attention for the criminal justice implications of the events and damages of 3/11. Socio-legal studies have in this regard up until now focused on civil legal issues.⁶ The FCP, however, has been aiming to address, and to get the Prose-

4 This is the official English translation of their Japanese name (福島原発告訴団, *Fukushima Genpatsu Kokuso-dan*) that the group has been using as of 2015. In view of the length of this name, this article will refer to this group as the FCP (Fukushima Complainants for Prosecution).

5 On 15 November 2012 another 13,262 people from all over Japan pressed charges, filing a secondary request for prosecution against the same persons. Japanese law makes a distinction between charges pressed by a direct victim (告訴, *kokuso*), Code of Criminal Procedure (hereafter: CCP) Art. 230, and those pressed by a not directly involved third party (告発, *koku-hatsu*), CCP Art. 239. In this case charges were in first instance pressed by 1,324 direct victims, followed in second instance by the charges pressed by another 13,119 direct victims as well as charges pressed by 143 third persons. *Keiji soshō-hō* (Code of Criminal Procedure), Law No. 131/1948, as amended by Law No. 79/2014; Engl. transl.: Japanese Law Translation website: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2056&vm=&re=>.

6 See e.g. T. II/Y. KANEKO, Asian law in disasters: Towards a human-centred recovery (Abingdon et al. 2016); S. MIYAZAWA, The role of law and lawyers for disaster victims: A UC Hastings-Waseda symposium on the legal aftermath of the Fukushima Daiichi nuclear power station disaster – introduction to the symposium issue, in: *Asian-Pacific Law & Policy Journal* 16 (2015) 116; S. BUTT/H. NASU/L. NOTTAGE (eds.), *Asia-Pacific Disaster Management* (Heidelberg 2014); K. MATSUMOTO, *Genshi-ryoku songai to shōmetsu jikō* [Nuclear power damages and statutes of limitation], in: *Ritsumeikan Hōgaku* 350 (2013) 189; E. ŌSAKA, Corporate liability, government liability, and the Fukushima nuclear disaster, in: *Pacific Rim Law & Policy Journal* 21 (2012) 433; K. NAGAI/S. TSUKUI, *Higashi Nihon dai-shinsai ni okeru bengoshi no hisai-sha shien no kiseki* [The tracks of a lawyer providing support to victims of the great eastern Japan disaster], in: *Saigai Fukkō Kenkyū* 4 (2012) 67. A study by Herber is an exception. While also addressing the FCP case, however, it is focused especially on the content of the FCP’s legal and extra-legal arguments, and how the pressing of charges provided claimants with an opportunity to express their views, experiences and suffering within different public fora. His study in addition predates the second PO (Prosecutors’ Office) decision, as well as the decisions of the PRCs (Prosecution Review Commissions). See E. HERBER, “A crime called nuclear power”: The role of criminal law in addressing post-Fukushima damages, in: *International Journal of Law, Crime and Justice* 43 (2015) 129. The FCP, its members and lawyers have in addition published several books in Japanese on their case, R. MUTŌ/Y. KAIDO/S. AKASHI, *Kyōsei kiso: abakareta Tōden-moto*

cutors' Office to address, 3/11 damages in criminal legal terms. An examination of the FCP case will accordingly bring into focus the largely overlooked criminal justice implications of 3/11. Besides its significance in terms of this focus, such an examination is also meaningful in light of the vast legal reforms that have taken place in Japan in the past years. One of the goals of these reforms is to bring about a transparent legal system close to citizens, and one whose output reflects their involvement.

As part of these reforms in 2009 a lay juror (*saiban-in*) system has been introduced, under which a panel consisting of both laymen and professional judges decide on both guilt and the appropriate sentence for a range of serious offences.⁷ In addition, on the basis of reforms implemented in 2000 and 2008 victims now have various opportunities to participate in criminal proceedings.⁸ Especially relevant for this article, however, are the reformed prosecution review procedures. These reforms too can be understood against the background of the general aim of increased citizens' involvement in legal proceedings, as well as the more specific idea that "prosecution should more directly reflect public opinion."⁹

Under the reformed procedures a panel of 11 lay persons, popularly referred to as a Prosecution Review Commission (PRC, or 検察審査会, *kensatsu shinsa-kai*, literally meaning Prosecution Inquest Commission), reviews prosecutors' decision not to prosecute, pursuant to a victim's or a victim's proxy's complaint regarding said decision. While in the past PRCs' recommendations often went ignored, as of 21 May 2009 prosecutors can ignore the recommendations of a PRC once, but if after a second review the commission again comes to the conclusion that prosecution is appropriate, a "forced prosecution" procedure will take place, in which a lawyer designated by the court will file a public in-

saikō kanbu no tsumi [Forced prosecution: the uncovered crimes of the formerly highest Tepco executives] (Tōkyō 2016); Y. KAIJO/FCP, *Shimin ga akiraka ni shita Fukushima genpatsu jiko no shinjitsu: Tōden to kuni wa nani o inpei shitaka* [The truth about the Fukushima nuclear disaster that citizens brought to light: what did Tepco and the government cover up?] (Tōkyō 2016). FCP has in addition published one book in English consisting of 50 FCP members' statements, in which they relate their personal 3/11 stories as well as their views on who is to blame for especially the damage that resulted from the nuclear disaster, FUKUSHIMA COMPLAINANTS FOR PROSECUTION, *Koredemo tsumi o toenai no desuka!* [Will you still say no crime was committed?] (Tōkyō 2013).

- 7 See e.g. D. VANOVERBEKE, *Juries in the Japanese legal system: The continuing struggle for citizen participation and democracy* (Abingdon et al. 2015); T. AOKI, *Keiji shihō kaikaku to saiban-in seido* [Legal reform and the lay juror system] (Tōkyō 2013).
- 8 E. HERBER, *Victim Participation in Japan: When Therapeutic Jurisprudence Meets Prosecutor Justice*, in: *Asian Journal of Law and Society* 3 (2016) 135. These reforms were implemented as a result especially of increased societal interest for victims' rights and the powerful lobby of victim organizations.
- 9 JUSTICE SYSTEM REFORM COUNCIL, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century* (Tōkyō 2001). This aim is also stated in Art. 1 of the Prosecution Review Commission Law, that is aimed at a "proper reflection the popular will" (民意, *min'i*) in the use of the right of public prosecution.

dictment, meaning that the suspects (by then defendants) will have to stand trial.¹⁰ This is in fact exactly what happened in the FCP case: pursuant to a secondary recommendation from a Tōkyō PRC that prosecution is appropriate in the case of three former Tepco executives, these executives have on 29 February been officially indicted.¹¹

The FCP case accordingly provides a valuable opportunity to examine what happens when a reformed PRC is put into action, within the context of an exploration of the overlooked criminal justice dimensions of 3/11. Doing so is fruitful also in view of the debates surrounding the reformed PRCs and forced prosecution procedures. While this system can be said to make the prosecution process more democratic, in the sense that average citizens can now also exert some influence on this process,¹² there are also those who have argued that the reformed PRCs harbor a potential for partisan abuse.¹³

On the basis of an examination of the FCP case this article aims to contribute to this debate. In order to appreciate the functioning of the PRCs in this case, however, one of course has to take into account more general characteristics of Japanese criminal justice, to the extent that these shape the context within which the PRCs function. The article will accordingly address the FCP case and the way it was handled by the Prosecutors' Office and the reformed PRCs within the context of such more general Japanese criminal justice characteristics. By providing an in-context analysis of the FCP case this article will thus bring into focus the criminal justice implications of 3/11 damages as well as the functioning of the reformed PRC against the background of relevant debates. By doing so it contributes to the literature on law's role in the aftermath of 3/11 as well as the functioning of the reformed PRCs.

10 For an excellent overview in English of the history of the PRC, the 2004 PRC reforms, procedures and examples of cases handled by the reformed PRCs, see H. FUKURAI, Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution, in: East Asia Law Review 6 (2011) 1; Y. ODE, *Kensatsu shinsa-kai no kyōsei kiso kengen jitsugen zenshi* [Historical prelude to the realization of the authority of forced prosecution of the prosecution inquest commission], in: Gendai Hōgaku 20 (2011) 49, and H. FUKURAI/Z. WANG, People's Grand Jury Panels and the State's Inquisitorial Institutions: Prosecution Review Commissions in Japan and People's Supervisors in China, in: Fordham International Law Journal 37 (2014) 929.

11 The trial, however, is "expected to be long and is unlikely to start before the end of the year, as preparations to compile evidence and points of issue will require a considerable amount of time" (The Japan Times, 29 February 2016).

12 FUKURAI, *supra* note 10; ODE, *supra* note 10.

13 K. NISHINO, *Shihō seido kaikaku hihan-hoi (7) kensatsu shinsa-kai ni yoru kyōsei kiso seido no mondai-ten* [Supplement to the criticism on reforms of the legal system (7) problematic aspects of forced prosecution through the prosecution inquest commissions], in: Hōsei Riron 46 (2014) 105; N. ODA, *Kensatsu shinsa-kai seido o toinaosu: aratana kensatsu kanshi/fufuku shinsa kikai sōsetsu no teigen* [Re-evaluating the prosecution inquest commission system: a declaration on the creation of a new institution that can monitor and review the prosecution], in: Hōsei Riron 46 (2014) 69; C. F. GOODMAN, Prosecution Review Commissions, the Public Interest, and the Rights of the Accused: The Need for a Grown up in the Room, in: Pacific Rim Law & Policy Journal 22 (2013) 1.

The article first addresses the FCP charges, focusing on the most serious criminal law offence of professional negligence resulting in bodily harm or death.¹⁴ It will do so on the basis of an examination of the various documents the FCP lawyers submitted to the Fukushima District Prosecutors' Office in support of the FCP charges.¹⁵ The article secondly examines the Prosecutors' Office response to these charges in connection with two decisions taken by the Tōkyō Prosecution Review Committee in 2014 and 2015. Both the Prosecutors' Office and PRC decisions will furthermore be contextualized in reference to the findings of the Diet and Cabinet commissions charged with investigating the disasters of 3/11.¹⁶ Doing so will put the Prosecutors' Office and PRC findings within the perspective of more general understandings of 3/11 facts. The article thirdly addresses the implications of both the Prosecutors' Office and PRC decisions, against the background of general characteristics of Japanese criminal and in reference to debates on the reformed PRCs.

II. THE FCP CHARGES

In addressing the issue of criminal responsibility as argued by the FCP lawyers, focus will here be on the most serious criminal law offence of professional negligence resulting in bodily harm or death (Penal Code Art. 211 (1)).¹⁷ Professional negligence here refers to acts a person engages in continuously and repetitively, on the basis of this person's position in daily social life, and that are potentially dangerous to others. Essential

14 Penal Code Art. 211 (1), punishable by up to five years imprisonment, or a fine of less than 1,000,000 Yen. More charges were filed for more offences, including the less serious offence of professional negligence resulting in bodily harm, which is also included in Penal Code Art. 211. In view of the fact that the majority of the suspects were accused of the crime of professional negligence resulting in bodily harm or death, as well as the fact that this was the most serious of the charges, focus in this article will be on the arguments and evidence presented in reference to this offence. *Keihō* (Penal Code), Law. No. 45/1907, as amended by law No. 54/2007; Engl. Transl.: Japanese Law Translation website: <http://www.japanese-lawtranslation.go.jp/law/detail/?id=1960&>.

15 These documents, including the 2014 and 2015 decisions of the Tōkyō Prosecution Review Commissions (hereafter: PRC 2014 and PRC 2015 respectively), the 2013 Prosecutors' Office decision (hereafter: PO 2013), but not the 2014 Prosecutors' Office decision (hereafter: PO 2014, which is in the author's possession), are available at the FCP website: http://kokuso-fukusimagenpatu.blogspot.nl/p/blog-page_95.html.

16 NATIONAL DIET OF JAPAN FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION, *Hōkoku-sho* [Report] (published online 2012, hereafter: Diet report). This report is available at the Prime Minister of Japan and His Cabinet website: <http://warp.da.ndl.go.jp/info:ndljp/pid/3856371/naiic.go.jp/en/report/> (NB this article has made use of the full report, and the executive summary. Both documents are accessible via the link provided. CABINET APPOINTED INVESTIGATION COMMITTEE ON THE ACCIDENT AT THE FUKUSHIMA NUCLEAR POWER STATIONS, *Saishū hōkoku-sho* [Final Report] (published online 2012, hereafter: Cabinet report) 274–275. This report is available at: <http://www.kantei.go.jp/jp/topics/2012/pdf/jikocho/honbun.pdf>.

17 Penal Code, *supra* note 14.

here is that a person who has chosen to commit these acts also has a special legal duty of care. The article will not apply however, unless there is a demonstrable causal link between a person's actions and the damage done.¹⁸

1. 3/11 Facts

The documents presented by the FCP to the Prosecutors' Office describe the events of and after 3/11 as follows.¹⁹ As a consequence of the earthquake that occurred on 11 March 2011 the electrical power supply to the Fukushima Daiichi Nuclear Power Plant came to a halt, as the power plant itself stopped generating electricity. As most of the emergency diesel generators were flooded and external power supply lines were damaged, power to reactors 1, 2 and 4 and eventually also reactor 3 was lost. As the lights inside the plant went out, means of communication were lost and also the central control room was without power, it became impossible to control and oversee the situation. The loss of power thus meant that it became extremely difficult to address the emergency situation in the plant, as the means to address this situation also depended on the use of electricity.

Timely and effective cooling of the reactor had in addition become extremely difficult, while measures necessary for the prevention of an accident depended heavily on the availability of electricity. As all cooling functions in reactors 1, 2 and 3 were eventually lost, the zirconium of the fuel pipes became extremely hot, leading to a reaction with the present water and steam resulting in large hydrogen explosions, a breach in the reactor vessel in reactor 3 and ultimately the release of massive amounts of radioactive material into the surrounding environment.²⁰

2. 3/11 Damages

The FCP lawyers first pointed out that the public had been exposed to radiation far beyond the legal limit of 1 millisievert (mSv) per year.²¹ On the basis of statistics showing

18 See T. SATŌ, *Keihō nihyaku jūichi-jō ikkō ni okeru gyōmu-jō kashitsu oyobi jūdai na kashitsu no gainen* [The concept of serious negligence or professional negligence in article 211 section 1 of the Penal Code], in: Chiba Daigaku Hōgaku Ronshū 27 (2012) 123, and references listed there.

19 The very much summarized account presented here is based on the FCP Statements of Indictment 1 through 3, and the "Report on the Preventability of the Results," submitted to the Fukushima District Prosecutors' Office, available on the FCP website (*supra* note 15). For a more extensive account of the events summarized here, see HERBER, *supra* note 6.

20 This description of the chain of events 1, 2 and 3 is generally in line with the events as described in the Diet report, *supra* note 16.

21 Art. 20 *Genshi-ryoku kihon-hō* [Atomic Energy Basic Act], Law No. 186/1955, as amended by Law No. 155/2004; Engl. transl.: Japanese Law Translation website: <http://www.japanese-lawtranslation.go.jp/law/detail/?id=2233&vm=04&re=02>; Art. 19 *Hōsha-sei dōi genso ni yoru hōsha-sen shōgai no bōshi ni kansuru hōritsu* [Act on Prevention of Radiation Disease due to Radioisotopes, etc.], Law No. 167/1957.

the incidence of cancer in case of exposure to 1 mSv and other scientific studies, they argued that exposure to radiation beyond this level should be qualified as bodily harm.²² As a result of the 90 quadrillion Becquerel (Bq) of radioactive substances²³ released into the environment they furthermore claimed that there is a large possibility that among those exposed, thyroid cancer and other health damages will occur. In addition to general scientific studies, the FCP lawyers supported their claims by referring to recent Fukushima prefectural government reports showing that in Fukushima prefecture higher than average percentages of children were found to have tubercles and cysts on their thyroid glands and that one case of thyroid cancer had been detected,²⁴ arguing that the low incidence rate of thyroid cancer was irreconcilable with the incidence found.²⁵

22 Among others: N. MASAMICHI, *Hōsha-sen kenkō shōgai no shinjitsu* [The truth about health damage caused by radioactive radiation] (Tōkyō 2012); INTERNATIONAL PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, *Health effects of Chernobyl, 25 years after the reactor catastrophe* (published online 2011), available at the Chernobyl Congress website: http://www.chernobylcongress.org/fileadmin/user_upload/pdfs/chernob_report_2011_en_web.pdf.

23 References not provided in the FCP documents. However, the same number is also provided in the Cabinet report, *supra* note 16.

24 An updated version of this report compiled by the Fukushima prefectural government can be found on this prefectural government's website (published online 2014): <http://www.pref.fukushima.lg.jp/uploaded/attachment/129302.pdf>.

25 A recent (October 2015) report, based on screenings of around 370,000 Fukushima residents aged 18 or younger at the time of the disasters of 3/11, also shows that annual thyroid cancer incidence rates in Fukushima from March 2011 through late 2014 were 20 to 50 times the national level. At the same time, experts from the local region (other than those who compiled this report) "have doubted whether these cases are related to the nuclear disaster." See: The Japan Times website (7 October 2015): <http://www.japantimes.co.jp/news/2015/10/07/national/science-health/new-report-links-thyroid-cancer-rise-fukushima-nuclear-crisis/#.VrdVjP7MtPY>. See also the Cabinet of Japan's account of the result of similar screenings (2014), stating that it is improbable (考えにくい, *kangaenikui*) that recently discovered cases can be attributed to the nuclear disaster of 3/11. PRIME MINISTER OF JAPAN AND HIS CABINET, *Fukushima-ken "Kenmin Kenkō Chōsa" hōkoku – sono 3* [Report no. 3 on the Fukushima prefecture "Health survey of prefecture inhabitants"] (published online 2014), available at the Prime Minister of Japan and His Cabinet website: http://www.kantei.go.jp/saigai/senmon/ka_g67.html.

Similar to the "expert opinions" provided on the Cabinet website, International organizations such as the World Health Organization (WHO) and the United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR) have claimed that "no discernible increased incidence of radiation-related health effects are expected among exposed members of the public or their descendants," and furthermore, that "the most important health effect is on mental and social well-being, related to the enormous impact of the earthquake, tsunami and nuclear accident, and the fear and stigma related to the perceived risk of exposure to ionizing radiation," UNSCEAR, *Sources, Effects And Risks Of Ionizing Radiation – UNSCEAR 2013 Report* (2013), available at the UNSCEAR website: http://www.unscear.org/docs/reports/2013/14-06336_Report_2013_Annex_A_Ebook_website.pdf; "Global Report on Fukushima Nuclear Accident Details Health Risks" (28 February 2013), available at the World Health Organization website: http://www.who.int/mediacentre/news/releases/2013/fukushima_report_20130228/en/.

The FCP lawyers argued that damages had in addition occurred when after the accident hospitals near the plant had to be evacuated. During the evacuation process the condition of some patients worsened. As a result, numerous patients that had been admitted to a hospital located four kilometers from the power plant died.²⁶ They argued in addition that a number of those working at the scene of the accident were injured, and that one farmer had committed suicide as a direct consequence of the meltdown.²⁷ Finally, another 40 persons had died from mental and physical exhaustion resulting from (among others) the evacuation processes and fear of radiation exacerbated by a lack of relevant reliable information.²⁸

On the other hand, it is undeniable that the Fukushima prefecture health surveys show elevated levels of thyroid cancer, although these results could be related to the vastly increased scope of cancer screens since 2011. There are other studies that have predicted very different health effects as a result of radiation exposure (see in this regard for instance Y.H. KOO/Y.S. YANG/K.W. SONG, Radioactivity Release from the Fukushima Accident and its Consequences: a Review, in: *Progress in Nuclear Energy* 74 (2014) 61. The Diet report notes that there is no “widely accepted threshold for long-term radiation damage caused by low doses,” but that “the international consensus is that the risk does increase in proportion to the dose.” Diet report (executive summary), *supra* note 16, 19.

Given these contrasting claims, as a non-specialist it is very hard to decide what to make of the health effects of radiation emitted from the Daiichi power plant. Much like with other risks, unless one is prepared to become an expert oneself, one has to rely, to a certain extent, on the information provided by experts. Given the contrasting information provided by expert sources, the independence of these sources becomes a key factor. In view of the Japanese government’s continued investment in the promotion of nuclear energy combined with the general lack of information and misinformation on radiation issues provided by the government in the aftermath of 3/11 (Diet report (executive summary), *supra* note 16, 19–20, 36), scepticism towards government affiliated experts would seem logical. The impartiality of sources such as WHO and UNSCEAR is arguably hard to assess. The Diet report, drawn up by an independent commission, and based on extensive research (see also *infra*) would appear to be an example of an independent source. This Diet report, published in 2012, is unclear about the health effects from radiation exposure on and after 3/11, Diet report (executive summary), *supra* note 16, 39.

- 26 This claim is substantiated by findings of the Cabinet report that states that 50 patients died as an (indirect) result of the evacuation process. Cabinet report, *supra* note 16, 37–38, 380–389.
- 27 After having conceded in 2013 that the Fukushima nuclear meltdown disaster played a part in this farmer’s suicide, Tepco on 1 December 2015 agreed to make a payment to settle a lawsuit filed by the family of this farmer. See: The Japan Times (1 December 2015): <http://www.japantimes.co.jp/news/2015/12/01/national/crime-legal/tepco-settles-suit-over-suicide-of-fukushima-dairy-farmer/#.VuqDxNCQn5J>. The FCP documents do not provide a number of those who got injured working at the scene. The indictment filed on 29 February, however, notes that 13 people, including Self-Defense Forces personnel, got injured as a result of hydrogen explosions at the plant.
- 28 A Government of Japan Reconstruction Agency report (December 2015) notes however that in Fukushima alone 1,979 people died from causes (indirectly) related to the disasters. 30% of these died in emergency shelters because of physical and mental exhaustion, another 30% died because of exhaustion while on their way to an emergency shelter while another 20% died because initial medical treatment came too late, as hospitals stopped functioning. In the

3. *Criminal Responsibility*

The lawyers' arguments showed that Tepco, the company that operated the power plant, had continuously conducted its own scientific research as a basis for safety measures. Such research had in particular been focused on predicting the height of tsunamis that could strike power plant facilities, leading to predictions ranging from 8.4 to 15.7 meters (the tsunami that actually struck the plants on 3/11 ranged from 11.5 to 15.5 meters). The FCP lawyers also showed that Tepco had been aware of other scientific research predicting a massive tsunami earthquake off the Fukushima coast.²⁹ Having shown that the existing 5.7 meter sea wall was not in line with either Tepco's own nor with other scientific findings relevant to measures necessary to protect the plant from tsunamis, the FCP lawyers argued that the suspects had breached their duty of care. They also showed, however, that the earthquake and tsunami would not have had their devastating impact, if the suspects had taken more effective measures to ensure effective back up power supply mechanisms.³⁰

Without paying too much attention to the question of whether Tepco's actions had been in violation of specific industry laws and regulations the FCP lawyers focused especially on the safety measures that Tepco could have taken, on the basis of the knowledge and means available to them, but had not. They did however point out the relevant agencies' failure to effectively regulate.³¹ As a result, the FCP lawyers' argu-

whole of Japan a total of 3,407 people died because of causes related to the disasters of 3/11. GOVERNMENT OF JAPAN RECONSTRUCTION AGENCY, *Higashi-Nihon dai-shinsai ni okeru shinsai kanren-shi ni kansuru hōkoku* [Report concerning Indirect Deaths connected to the great Eastern Japan disaster] (published online 2015), available at the Government of Japan Reconstruction Agency website: <http://www.reconstruction.go.jp/topics/2533125510.html>.

29 An authoritative scientific source that Tepco was aware of in this regard was the 2002 report compiled by the Ministry of Education Headquarter for Earthquake Research Promotion (the HERP report). According to this report (as referred to in the Diet report, *supra* note 16) there was a 20% chance for a M-8 level "tsunami earthquake" to occur within the following 30 years in an area that included the offshore area of the Fukushima Daiichi Nuclear Power Plant (a tsunami earthquake is a type of earthquake that triggers a tsunami that is large relative to the earthquake's magnitude). Significantly, based on Tepco's own calculations conducted in 2008 it was expected that in the event of such a tsunami earthquake the Fukushima Daiichi Nuclear Power Plant would be hit by a 15.7m tsunami, Diet report (full report), *supra* note 16, 25. I will come back to this issue below. While the 2002 HERP report appears to be no longer available online, it was extensively referred to in the Diet report (see also below).

30 On the nature of these measures and how they were lacking, see HERBER *supra* note 6, 136–137.

31 The FCP lawyers did, however refer to the building guidelines that were issued in 2006 by the Nuclear Safety Commission (a Cabinet appointed nuclear safety administration watchdog, abolished as of 9 September 2012 and replaced by the Nuclear Regulation Authority). According to these guidelines a facility should be designed to withstand – without its safety being seriously compromised – a tsunami that could be expected to occur, even if the chances of such a tsunami in fact occurring would be remote. The possibility of an earthquake bigger than the standard should furthermore not be discounted, and measures should be tak-

ments constituted a strong critique of both Tepco officials' actions, as well as the infrastructure within which they operated. Their critique accordingly very much constituted a general critique of the nuclear power industry, and the way in which it has been structured, regulated and operated in Japan. The following sections will examine how the Prosecutors' Office and PRCs responded to this critique.

III. CONTRASTING AND CONVERGING FINDINGS OF FACT

On 9 September 2013 the Tōkyō District Prosecutors' Office (hereafter: PO) announced its decision not to prosecute any of the persons against whom the FCP had filed charges. This decision was taken and announced by the Tōkyō District PO, as a few hours before this decision was announced the case had been transferred from the Fukushima District PO to the Tōkyō District PO. The FCP thereupon filed a petition to the Tōkyō Prosecution Review Commission, asking this commission to investigate the appropriateness of not prosecuting 6 of the 33 persons against whom charges were originally pressed. (As a result of transfer to Tōkyō, the FCP was forced to submit their petition to the Tōkyō Prosecution Review Commission, rather than the Fukushima Prosecution Review Commission. I will come back to this issue below.) The Tōkyō Prosecution Review Commission decided on 31 July 2014 that non-prosecution was inappropriate in case of one suspect, but that prosecution was in fact appropriate in case of three suspects. The Prosecutors' Office, however, again decided, on 22 January 2015, that it would not prosecute, in view of insufficient grounds to do so ("insufficient suspicion"). In response to a second FCP request to review the Prosecutors' Office decision not to prosecute, the Tōkyō Prosecution Review Commission found on 31 July 2015 for a second time that prosecution is appropriate in case of three former Tepco officials. Pursuant to the findings of this PRC Tsunehisa Katsumata (75), chairman of Tepco at the time, and two former vice presidents, Sakae Mutō (65) and Ichirō Takekuro (69), were indicted on 29 February on the charge of professional negligence resulting in death and injury.

This section will address Tōkyō District Prosecutors' Office decisions in connection with those of the Tōkyō Prosecution Review Commission focusing on the "main question" of foreseeability. The Prosecutors' Office decisions will be contextualized in reference to the findings made in especially the Diet report as well as the Cabinet report.³² The reports written by these commissions are arguably among the most authoritative sources on the Fukushima nuclear accident.

en to minimize the risk following from this possibility. The FCP lawyers did in addition devote attention – as indicated – to jurisprudence relevant to their claim that being exposed to radiation could qualify as bodily harm or death.

32 See *supra* note 16.

FCP CASE TIMELINE

11 March 2011	Tōhoku earthquake and tsunami triggering a nuclear accident at the Fukushima Daiichi Nuclear Power Plant
16 March 2012	The group “Fukushima Complainants for the Criminal Prosecution of the Fukushima Nuclear Disaster” (福島原発告訴団 – here: FCP) is formed
11 June 2012	1,324 Fukushima citizens, united in the FCP, press charges against 33 government officials and former Tepco executives at Fukushima District Prosecutors’ Office
15 November 2012	Another 13,262 citizens from all over Japan press charges
9 September 2013	FCP Case transferred to Tōkyō District Prosecutors’ Office
9 September 2013	Tōkyō District Prosecutors’ Office announces decision not to indict any of those against whom charges were pressed
16 October 2013	FCP petitions to the Tōkyō Prosecution Review Commission to review the Tōkyō District Prosecutors’ Office decision not to prosecute
31 July 2014	The Tōkyō Prosecution Review Commission decides: non-prosecution inappropriate in case of one suspect; prosecution appropriate in case of three suspects
22 January 2015	Tōkyō District Prosecutors’ Office decides not to prosecute any of the four remaining suspects
22 January 2015	FCP petitions to the Tōkyō Prosecution Review Commission to review the Tōkyō District Prosecutors’ Office second decision not to prosecute
31 July 2015	Second (binding) decision of the Tōkyō Prosecution Review Commission : prosecution of three former Tepco officials is appropriate
29 February 2016	Tsunehisa Katsumata (75), Sakae Mutō (65) and Ichirō Takekuro (69) were indicted on the charge of professional negligence resulting in death and injury

1. Prosecutors’ Office Findings³³

One of the most fundamental questions, one that will be focused on here, is that of whether the occurring of a tsunami of the proportions that had struck on 3/11 could have been foreseen, as the FCP lawyers had in fact argued. The Prosecutors’ Office stressed in this regard that for the suspects to be found in violation of their duty of care it was

33 These findings are based on investigations conducted by a team of about 20 prosecutors from both Fukushima and Tōkyō. This team was not given any powers of forced investigation, meaning that they could not, for example, conduct a search of Tepco premises or the houses of Tepco executives or compel one of the FCP “defendants” to submit to questioning. That the Prosecutors’ Office apparently concluded that there were no grounds for measures of forced investigation (arrest, search, seizure, etc.), effectively limiting the investigative power of the 20 prosecutors, is significant. I will come back to this issue below.

necessary that *concrete* foreseeability had existed, on the basis of the knowledge available at the time.³⁴

The Prosecutors' Office noted in this regard that neither experts nor government agencies, including those referred to by the FCP lawyers, had generally foreseen an earthquake or tsunami as massive as those that occurred on 11 March 2011.³⁵ As noted earlier however, a report compiled by the Ministry of Education Headquarter for Earthquake Research Promotion (HERP report) in 2002 had predicted a tsunami earthquake that according to Tepco's own calculations could trigger a 15.7 meter tsunami.³⁶ The Prosecutors' Office pointed out, however, that the 2002 HERP report had been the only study to make such predictions. A number of other specialists had furthermore established that a tsunami earthquake had not occurred off the Fukushima coast in the past, and had expressed the conclusion that it would not happen in the future.³⁷ It in addition remarked that the long term predictions made in this report were among specialists not generally accepted as scientifically reliable or convincing.³⁸ The Prosecutors' Office finally noted that the Japan Society of Civil Engineers (JSCE)³⁹ had also come to different estimates (different from the 2002 HERP report), and it was on the basis of these estimates and other JSCE technical recommendations that the power plant buildings had been designed, in accordance also with the at the time prevailing safety standards.⁴⁰

2. Prosecution Review Commission Findings

The Prosecution Review Commission presented a different reasoning with regard to concrete foreseeability from that of the prosecutors. Its point of departure reads in this regard as follows:

When it comes to natural phenomena such as earthquakes and tsunamis it is, to begin with, impossible to *concretely* foresee these to the point of when and where they will occur. If it can be said that it was possible to be aware of tsunamis as something necessitating the taking of measures to maintain safety, it has to be said that concrete foreseeability concerning the occurrence of tsunamis was possible. Furthermore, in case necessary measures in accordance with these predictions were taken, and it can be said that the result

34 PO 2013, *supra* note 15, 2; PO 2014, *supra* note 15, 2; see also H. OTSUKA, *Yoken kanō-sei no handan kōzō to kanri/kantoku kashitsu* [The assessment of foreseeability and supervisory negligence], in: Keihō Zasshi 36 (1997) 359.

35 PO 2013, *supra* note 15, 3; PO 2014, *supra* note 15, 3.

36 See *supra* note 29.

37 PO 2013, *supra* note 15, 2.

38 PO 2014, *supra* note 15, 3.

39 The JSCE was founded as an incorporated association in 1914 "entrusted with the mission to contribute to the advancement of scientific culture by promoting the field of civil engineering and the expansion of civil engineering activities." As of April 2011 it has become a Public Interest Incorporated Association. For more information see the JSCE website: <http://www.jsce-int.org/about>.

40 PO 2013, *supra* note 15, 3, 6; PO 2014, *supra* note 15, 4.

of the accident could be prevented, then one can also recognize the possibility of avoiding the results of the accident.⁴¹

In addressing the foreseeability of the tsunami as well as the nuclear disaster the Commissions, like the Prosecutors' Office, paid much attention to the 2002 HERP report.⁴² In doing so they acknowledged that there had been experts who had indicated that as a source of data this report had its limitations and that accordingly different experts evaluated the report differently.⁴³ The Commission also finds, however that it could not be denied that the 2002 HERP report was published by a prestigious government research institution, based on scientific data. While referring to Japan's history of earthquake related disasters and particularly the Kōbe earthquake of 1995, it notes that the fact that the report notes the possibility of a tsunami earthquake weighs extremely heavily, and was not something to ignore.

Ultimately, it finds that it was foreseeable for those concerned in Tepco that in a worst case scenario a tsunami higher than 10 meters could flood and damage a reactor core, leading to a large emission of radioactive material. In its decisions, Tepco had allowed considerations of costs to prevail over considerations of safety.⁴⁴ Both Commissions conclude by establishing that three of the indicted former Tepco officials, all highly knowledgeable, were responsible for and had the authority to make decisions about safety measures, and were in a position to take the available effective measures and to prevent the accident from happening. It thus finds that the accident was preventable, and that those indicted had a duty to prevent it.⁴⁵

The Prosecutors' Office and the Prosecution Review Commissions accordingly come to very different conclusions especially regarding the issue of foreseeability and the measures that could and should have been taken. Both the findings of the Commissions and the Prosecutors' Office are based on an appraisal of expert opinion and expert knowledge available at the time of the disasters. In order to further contextualize their diverging conclusions, the following section will compare and contrast these with the findings made in the Diet report.⁴⁶

3. Diet Report Findings

The Diet report, published in 2012, was compiled by the National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission, that was established on 30 October 2011. This commission consisted of 10 academics and professionals of various backgrounds such as seismology, chemistry, medicine, law and journalism. Most

41 PRC 2014, *supra* note 15, 4 – my italics; cf. also PRC 2015, *supra* note 15, 14.

42 HERP report, *supra* note 29.

43 PRC 2015, *supra* note 15, 14.

44 PRC 2015, *supra* note 15, 18.

45 PRC 2014, *supra* note 15, 13-18; PRC 2015, *supra* note 15, 24.

46 Diet report, *supra* note 16.

relevant for this discussion is that its mandate included the investigation of the direct and indirect causes of the accident that occurred within the Fukushima Daiichi Nuclear Power Plant complex (in connection with the earthquake and tsunami of 3/11), as well as the direct and indirect causes of the damages resulting from the accident.⁴⁷ The commission's investigation included over 900 hours of hearings and interviews with 1,167 people, as well as nine site visits to different nuclear power plants.⁴⁸ In view of the expertise of its members, the scope of its investigation, its formal independence, emphatic dedication to objectivity and transparency, this Diet report is arguably one of the most authoritative sources on the events of 3/11. How then, do the findings of the Diet report relate to those of the Prosecutors' Office on the one hand, and the Prosecution Review Commissions on the other?

The Diet report paints a shocking picture of a "profoundly manmade disaster," that resulted from "collusion between the government, the regulators and Tepco."⁴⁹ According to the report both Tepco and the governmental authorities responsible for regulating the nuclear power industry⁵⁰ were well aware of the risks of both earthquakes and tsunami, noting that both had a shared awareness of the possibly disastrous impact of such disasters on the Fukushima Daiichi power plant – as the FCP lawyers had also argued.

More specifically the report finds that Tepco had overlooked the *repeated* warnings of experts pointing out the "high possibility" of a tsunami larger than originally postulated, as well as the fact that such a tsunami could cause core damage.⁵¹ The report also paid special attention to the HERP report that had predicted an M-8 level tsunami earthquake offshore of Fukushima that according to Tepco's own calculations could cause a 15.7 meter high tsunami.⁵² It also found that Tepco did not reject the findings of the

47 On the basis of the *Tōkyō Denryoku Fukushima Genshi-ryoku Hatsuden-sho Jiko Chōsa I'inkai-hō* (officially translated as: Act regarding Fukushima Nuclear Accident Independent Investigation Commission), Law No. 112/2011, available at The House of Representatives website: http://www.shugiin.go.jp/internet/itdb_housei.nsf/html/housei/17820111007112.htm.

48 Diet report (executive summary), *supra* note 16, 11.

49 Diet report (executive summary), *supra* note 16, 9, 16.

50 The authorities directly responsible for such regulation were: the Nuclear Safety Commission (NSC), the Nuclear and Industrial Safety Commission (NISA) and a working group consisting of (among others) members of NSC, NISA, the Japan Atomic Energy Commission (JAEC) with expertise on (among others) earthquakes and tsunami. NISA was abolished and replaced by the Nuclear Regulation Authority (原子力規制委員会, *Genshi-ryoku Kisei I'in-kai*) under the Ministry of the Environment (19 September 2012), in response to the criticism related to the fact that NISA was part of the Ministry of Economy, Trade and Industry (METI), which is responsible also for promoting nuclear power.

It should be noted that given its scope this article cannot do justice to the different aspects of collusion, lack of transparency and general disregard for concerns of public health and safety on the part of both Tepco and regulating authorities, that the Diet report testifies to.

51 Diet report (full report), *supra* note 16, 22.

52 Diet report (full report), *supra* note 16, 25.

2002 HERP report, but rather based its actions on *financial* and *practical* considerations.⁵³ After all, the taking of countermeasures on the basis of this report's findings, to the extent that these could actually be achieved, would require vast amounts of funds.

With regard to the issue of the foreseeability of a damaging tsunami and the measures taken by Tepco the PRC findings and reasoning concerning foreseeability are thus largely in line with these Diet report findings.⁵⁴ The contrast with the Prosecutors' Office findings and reasoning in this regard, however, are striking. The PO decision emphasizes that the HERP report did not represent the general consensus among experts, qualifying the HERP report as a minority opinion, while noting that the Japan Society of Civil Engineers (JSCE) had also come to different estimates. As we have seen, however, the Diet report paints a picture of a situation in which all parties (including the JSCE)⁵⁵ were aware of this report and did not dispute its findings, noting that over the years experts had issued repeated warnings of a higher than originally postulated tsunami, while emphatically qualifying the nuclear disaster as a man-made disaster.

It should be noted here that Tepco has assumed liability for nuclear damages, and has been paying compensation payments to victims.⁵⁶ If the earthquake and tsunami could be qualified as a grave natural disaster *of an exceptional character*, Tepco would not have to do so.⁵⁷ One should also keep in mind the Diet Commission's stature as an independent body, the first of its kind created in the history of Japan's constitutional government,⁵⁸ and especially the scope of its investigation.

That the facts as presented by both the FCP and the two Prosecution Review Commissions are largely in line with the facts as presented in the 2012 Diet report is accordingly not surprising. But how are we to understand that the Prosecutors' Office would

53 Diet report (full report), *supra* note 16, 29. See also the Cabinet report *supra* note 16, 305–308 for a more extensive account of the background against which Tepco's decision came about.

54 The PRC findings of fact are also in line with the report of the Cabinet appointed Investigation Committee on the Accident at the Fukushima Nuclear Power Stations, i.e. the 2012 Cabinet report, *supra* note 16.

55 The Diet report notes that a Tsunami Evaluation Group of the Japan Society of Civil Engineers (JSCE) had through a questionnaire sought the opinions of five expert seismologists on the HERP report, who expressed the view that “tsunami earthquakes could occur anywhere (including offshore Fukushima)”, was stronger than the judgment that they “cannot occur offshore Fukushima.” Diet report (full report), *supra* note 16, 29.

56 Incidentally, much of these compensation payments, projected to total 126.4 billion yen (around 111 million US dollar) will in fact be paid by Japanese taxpayers. See: The Japan Times (24 March 2015): <http://www.japantimes.co.jp/news/2015/03/24/national/tepcocompensation-cost-taxpayers-estimated-2013/#.VsWg7NCQn5J>.

57 Pursuant to Art. 3 (1) of the Act on Compensation for Nuclear Damage, *Genshi-ryoku songai no baishō ni kansuru hōritsu*, Law No. 147/1961. See on this issue also J. WEITZDÖRFER, Liability for nuclear damages under Japanese law: Key legal problems arising from the Fukushima Daiichi nuclear accident, in: Butt/Nasu/Nottage (eds.), *Asia-Pacific Disaster Management* (Heidelberg 2014) 119.

58 Diet Report (executive summary), *supra* note 16, 10.

base its conclusions on findings of facts that are very different from those of a readily available authoritative report by an independent Diet commission?

The next section will tentatively address this question. To this end it will first highlight some general characteristics of Japanese prosecution practices against the background of characteristics of the functioning of the criminal process within Japanese society. By doing so it will provide insight into the context that generally shapes prosecutors' decisions, something which will help put prosecutors' decisions in this case into perspective. On that basis it will discuss the implications of the FCP case for discussions on the pros and cons of the reformed PRCs.

IV. CONTEXT AND IMPLICATIONS

In Japan those suspected of a crime will be indicted only when prosecutors are convinced that an indictment will also translate into a guilty verdict.⁵⁹ These indictment practices are arguably one of the main factors contributing to the famously high conviction rate of over 99%.⁶⁰ As those who are indicted are typically also convicted, media attention tends to be strongly focused on suspects' arrest, typically followed by an indictment – as arrest is for the guilty.⁶¹

An arrest followed by an indictment accordingly tends to also immediately bring about public (media) perceptions of guilt and social stigmatization.⁶² Such social stigmatization is further aggravated by the fact that Japanese media routinely publicize names and pictures of those arrested.⁶³ Such social stigmatization or “social sanctions,” then,

59 D. T. JOHNSON, *The Japanese way of justice: Prosecuting crime in Japan* (New York 2002) 214–242; E. B. RASMUSSEN/J. M. RAMSEYER, *Why is the Japanese conviction rate so high?*, in: *Journal of Legal Studies* 30 (2001) 53–88; interviews and personal communication with prosecutors from the District Prosecutors' Offices of Kōbe, Shizuoka, Tōkyō and Sapporo (2009–2015).

60 The figure of 99% also includes defendants who confess guilt (94% of all cases). MINISTRY OF JUSTICE, *Hanzai hakusho* [White paper on crime] (published online) 1993–2015, available at the White Paper on Crime website: http://hakusyo1.moj.go.jp/jp/nendo_nfm.html.

61 T. OKU, *Suitei yōzai: Hanzai hōdō no “aporia”* [Presumed guilty: the aporia of crime reporting], in: *Shakai Shirin* 52 (2005) 1.

62 M. WEST, *Secrets, sex, and spectacle: The rules of scandal in Japan and the United States* (Chicago 2008) 36.

63 In different European countries, quite different styles of reporting can be observed. Dutch media, for example, in principle only publish the first name and the first letter of the surname of suspects and (convicted) defendants (e.g. Jan A., Piet B., etc.), while in Belgium last names are typically published only upon conviction (although this depends on the case). In Sweden too, the names of suspects and defendants are withheld until conviction, whereas in Germany the publication of suspects' and defendants' names formally depends on the nature of the crime and the circumstances under which it was committed. RAAD VOOR DE JOURNALISTIEK [Dutch Press Council], *Leidraad van de Raad voor Journalistiek* (Dutch Press Council Guidelines) (published online 2015), available at the Raad voor Journalistiek website: <https://www.rvdj.nl/leidraad>; RAAD VOOR DE JOURNALISTIEK [Belgian Press

may seriously affect people's lives as they may consist of people getting fired, being forced to resign from their jobs, forced to move etc.⁶⁴ This social stigmatization is one reason typically given by prosecutors when explaining their careful indictment policy.⁶⁵ While prosecutors' awareness of such stigmatization thus causes them to be extra cautious when deciding to indict, ironically it is also the same cautiousness that helps maintain the public perception that prosecutors' indict only the "guilty."⁶⁶

There are, however, more cynical or – to be more precise – political reasons why the Prosecutors' Office may refrain from prosecution. Fukurai refers in this regard to a well-documented unwillingness on prosecutors' part to prosecute "members of a select group of privileged elites, despite their egregious conduct."⁶⁷ Fukurai argues that it is precisely in view of such unwillingness that the PRC reforms, and PRCs' new authority to compel prosecution are meaningful. He further notes that PRCs' new powers make it possible for public sentiments and equitable judgments to be inserted into prosecutorial decisions on both politically sensitive cases as well as controversial issues that may affect the broader public.⁶⁸ This argument is thus very much in line with the legal reform goal of criminal justice "democratization" through increased involvement of citizens in criminal justice procedures and decisions.⁶⁹

Council], Code van de Raad voor Journalistiek (Belgian Press Council Guidelines), available at the Raad voor Journalistiek website: <http://www.rvdj.be/code-raad-voor-de-journalistiek>; "What's in a name: crime suspects and the Swedish press," The Local, 23 February 2009, available at the The Local website: <http://www.thelocal.se/20090223/17716>; GERMAN PRESS COUNCIL, German Press Code (published online 2016), available at the German Press Council website: http://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Pressekodex_BO_2016english_web.pdf.

64 When people are in fact found guilty, courts in their verdicts nevertheless often mention social sanctions as a factor mitigating the sentence imposed. See K. NISHIZAKI, *Shakaiteki seisai/gyōsei shobun to ryōkei* [Social sanctions/administrative measures and sentencing], in: Ōsaka Keiji Jitsumu Kenkyū-kai [Ōsaka Criminal Justice Study Group] (ed.), *Ryōkei jitsumu taikei* [A treatise on sentencing law and practice in Japanese criminal cases] Vol. 3 (Tōkyō 2011) 247–270.

65 Interviews with public prosecutors, *supra* note 59.

66 The social significance attributed to indictment and the attention indictments generate: these are matters that have also amplified the public attention given to the FCP cause. FCP can accordingly be said to have also benefited from prosecutors' conservative prosecution policies and the media attention that their decisions receive as a result. An Asahi Shinbun newspaper database search reveals that the Asahi Shinbun (along with the Yomiuri Shinbun and Mainichi Shinbun one of the biggest three national newspapers) has devoted a total of 115 articles to FCP. Admittedly, in view of its relatively progressive profile, The Asahi Shinbun newspaper may have devoted more articles to FCP than other media. See Asahi Kikuzou Database website: www.database.asahi.com.

67 FUKURAI, *supra* note 10, 4.

68 FUKURAI, *supra* note 10, 4.

69 *Supra* note 9.

Goodman and others, on the other hand, have pointed out that there is the risk for PRCs to be abused for partisan, political purposes.⁷⁰ On the basis of “emotion, a shared sense that someone must pay, and a potential to embarrass the government” people are needlessly exposed to the stigma of indictment and the burden of having to stand trial.⁷¹ As a result of their once in a lifetime assignment of evaluating the merits of one single case, PRC members might in addition not be able to see the bigger general interest picture beyond the case at hand.

What distinguishes these perspectives is especially the trust or a lack of trust in prosecutors’ integrity on the one hand, and, on the other hand, trust or a lack of trust in PRC members’ ability to come to a decision that sufficiently takes both the public interest and those of the accused into account. What, then, are the implications of the FCP case for this discussion?

The FCP case does raise the issue of prosecutorial integrity. Prosecutors’ Office findings of fact in this case neither engage with, nor are they in line with widely publicized and readily available findings of the independent Diet commission. This bypassing of a well-publicized and authoritative source makes the PO vulnerable to accusations of a lack of thoroughness and prejudice. Such accusations are further fuelled by a newspaper report quoting sources in the PO as stating that the investigation was from the beginning only meant to show that prosecution was impossible, and to allow the PO to say it had done all it could do.⁷²

It is of course possible that prosecutors genuinely believed that prosecution was impossible, in the sense that such a prosecution was unlikely to lead to a guilty verdict (keeping in mind also that forced prosecutions very rarely lead to convictions).⁷³ Such

70 The potential for partisan abuse is typically argued in reference to the forced prosecution of former Democratic Party of Japan leader Ichirō Ōzawa, who in 2011 was charged with, but found not guilty of, violations of the political fundraising reporting statute. See in this regard NISHINO/ODA/GOODMAN, all *supra* note 13.

71 GOODMAN, *supra* note 13, 4. It should be noted in this regard that until the end of 2015 there have been eight forced prosecutions ending in two guilty verdicts; the FCP case will be the ninth. MINISTRY OF JUSTICE, *Kensatsu shinsa-kai no juri kensū, ketsugi kensū tō* [Overview of numbers of cases accepted by the prosecution review commission and the numbers of decisions rendered] (published online 2015), available at the Supreme Court of Japan website: http://www.courts.go.jp/vcms_lf/kensintoukeiH26.pdf. Since 2009 the prosecution review commissions have yearly handled around 2,000 cases. On average prosecution was judged to be appropriate (起訴相当, *kiso sōtō*) in less than 1% of these cases (numbers have ranged from 4 to 8). In the period 2009–2015 prosecution was judged to be appropriate also in second instance in a total of 14 cases.

72 “Zen’in fu-kiso saki ni ketsuron” [The Conclusion that Nobody Will be Prosecuted Came First], Hokkaido Shinbun [Hokkaido Newspaper], 11 September 2013. It is important to remember here, however, that the PO had decided that measures of forced investigation, such as house searches, were not warranted in this case. In this sense, the PO clearly did not do all it could do.

73 *Supra*, note 71. These numbers suggest that prosecutors’ estimates as to whether cases will (not) result in guilty verdicts tend to be right. In this sense, an *a priori* assessment of the FCP

an a priori assumption however, even when based on legal expertise, is inevitably also based on prejudicial assumptions concerning the facts of 3/11.

One should also keep in mind here, however, that in high profile cases such as these the decision to prosecute or not will not be left up to individual prosecutors. In his article on the prosecution of political corruption in Japan Johnson outlines how internal PO guidelines and directives dictate that in high-profile cases prosecutors provide their superiors with reports, and that they request instructions as to the steps to be taken. Johnson further notes that “the PO norm that prescribes hierarchical review of all major prosecutor decisions [...] functionally invites outside review and political control.”⁷⁴ One could accordingly expect such political control in a case as politically sensitive as the FCP case, keeping in mind that the prosecution of Tepco executives inevitably brings into focus that any criminal negligence on the part of Tepco officials would not have been possible without the enabling environment created by government regulatory authorities.

FCP members in any case suspected political motives behind the PO decisions and handling of the FCP case, especially behind the unexpected transferral of their case from the Fukushima District Prosecutors’ Office to the Tōkyō District Prosecutors’ Office. As a result of this transferral the commission that would review prosecutors’ decision would be composed of citizens from Tōkyō, rather than those from Fukushima. The timing of this transferral and decision – the Tōkyō District PO announced the decision not to prosecute a few hours after the case was formally transferred from Fukushima to Tōkyō – further contributed to FCP members’ impression that the way in which the Prosecutors’ Office handled their indictment was both unfair and political.⁷⁵

case as unwinnable could also explain prosecutors’ unwillingness to expose the FCP defendants to measures of forced investigation. At the same time, a (prejudice based) unwillingness to do so obviously also lessened the likelihood of uncovering damning evidence. Furthermore, the information contained in the Diet report arguably raised ample questions relevant to the issue of criminal negligence, to further pursue.

74 D. T. JOHNSON, *Why the Wicked Sleep: The Prosecution of Political Corruption in Postwar Japan*, in: *Asian Perspective* 24-4 (2000) 59.

75 See in this regard the FCP statement, published in response to the first rejection of the FCP request for prosecution, arguing among other things that the Prosecutors’ Office had misrepresented the FCP indictments to the press by suggesting that these included politicians and were therefore political. FUKUSHIMA COMPLAINANTS FOR PROSECUTION, *Nan no tsunami taisaku mo toranakatta Tōden kanbu fu-kiso wa arienai - kensatsu-chō ni yoru fu-kiso riyū no kōhyō o ukete* [The non-prosecution of the Tepco executives who did not take any anti-tsunami measures is absurd. A response to the Public Prosecutors’ publication of their reasons not to prosecute] (published online 2013), available at the FCP website: http://kokusofukusimagenpatu.blogspot.nl/2013/09/blog-post_10.html.

It should be noted that according to a representative of the Tōkyō Prosecutors’ Office the transferral from Fukushima to Tōkyō was unrelated to the PRC issue. It was rather related to the fact that the Fukushima PO and the Tōkyō PO had been working on this case together (*supra*, note 33), and that many of those against whom charges were pressed were Tōkyō residents: “As the Tōkyō PO did most of the investigating, we decided to transfer the case to Tōkyō, on the basis of considerations of unity and stability.”

One could suppose, as FCP members did, that the transferral was meant to prevent that a PRC composed of Fukushima citizens would review the PO's decision. A PRC composed of Fukushima residents could arguably have been expected to be especially harsh in their appraisal of the actions of former Tepco executives, and more readily find prosecution of the FCP defendants appropriate. After all, citizens from Fukushima are likely to have an understanding of the events of 3/11 different from that of citizens from Tōkyō, based on their own experiences in connection with 3/11.

At the same time, Japanese citizens anywhere could be expected to have formed an unfavourable impression of Tepco and its (former) executives. One should keep in mind that the widely published Diet and Cabinet reports had in 2012 already reached harsh conclusions regarding Tepco's failure to take appropriate measures to better secure the safety of the Fukushima Daiichi power plant. In addition, while Tepco has been compensating different parties since December 2011, the shortcomings of the Tepco compensation plans as well as the tax money involved in helping Tepco pay compensation are matters that have also been widely covered by the media.

It is not unthinkable that such "background information" has played a part in the PRC decisions in this case. Background information may similarly have played a part in previous cases of forced prosecution, as these were, without exception, high profile cases that had received extensive media coverage before PRCs issued their second recommendation resulting in forced prosecution.⁷⁶

Be that as it may, in line with Fukurai and Goodman's discussion on the pros and cons of PRCs the FCP case brings into focus issues of objectivity and integrity, especially in connection with the PO's investigation. This case is thus a textbook example of a high profile case resulting in forced prosecution.

This case is exceptional, however, in terms of the public interest issues involved. The Japanese government's firm commitment to nuclear energy as the country's most important source of energy has not changed: 42 reactors are reported to be operable and potentially able to restart, while 24 of these are in the process of restart approvals.⁷⁷ The issues raised by both FCP members and the Diet report case may here give pause to once more think about the risks involved in generating nuclear energy in Japan, given both Japan's earthquake-proneness and a history of regulatory failure, and accordingly

76 Those who have served on PRCs have, however shown that they are aware of the risk of (e.g.) prejudicial media reports affecting their decision, and feel confident that they can evaluate facts and evidence objectively nonetheless, FUKURAI, *supra* note 10, 24. When it comes to bias one may furthermore wonder to what extent professional judges truly depart from an assumption of innocence, given the >99% conviction rates, even when assuming an ability on judges' part to ignore the generally prejudicial character of crime reporting in Japan, as referred to earlier.

77 WORLD NUCLEAR ASSOCIATION, Nuclear Power in Japan (published online 2016), available at the World Nuclear Association website: <http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/japan-nuclear-power.aspx>.

to re-examine legal standards concerning what can and cannot be expected from those responsible for nuclear power plants' safety measures as well as those monitoring and regulating the nuclear power industry. I will next address the conclusions that can be drawn on the basis of this and the previous sections.

V. CONCLUSION

This article has examined the FCP complaint in connection with both the Prosecutors' Office response to this complaint, the decisions made by the Tōkyō Prosecution Review Commissions and the findings of the National Diet of Japan Fukushima Nuclear Accident Independent Investigation Diet Commission. On this basis it has addressed the largely overlooked criminal justice dimensions to the events of 3/11, as well as the role of the reformed PRC within the context of "traditional" criminal justice.

PRCs do have a potential for partisan abuse, while PRC members' "once in a lifetime" commitment to their case may go hand in hand with an inability to appreciate bigger picture interests. While there is a risk of partisan PRCs unable to assess bigger picture interests, the FCP case suggests that one should also question the wisdom of trusting the PO to prioritize such public interest issues.

This article shows that there is overwhelming evidence of the foreseeability of an earthquake and tsunami with a possibly disastrous impact on the Fukushima Daiichi Nuclear Power Plant. The Diet report shows that Tepco and regulatory authorities shared an awareness of such evidence but neglected to act, regardless of possible public interest consequences. The article also shows that based on the investigations by a PO team of about 20 investigators without any powers of forced investigation, the PO simply concluded otherwise and made its decisions not to indict any of the FCP suspects. Combined with media reports on PO prejudice as well as the sudden transfer of the FCP case from Fukushima to Tōkyō, these conclusions raise serious concerns about PO objectivity.

Against the background of such concerns about PO objectivity as well as evidence of a manmade disaster in which government officials played a large part, the FCP case brings into focus the importance of PRCs' authority to review PO decisions and make binding recommendations accordingly.

Beside their importance as a review mechanism, these binding recommendations create opportunities to re-evaluate standards of indictment in cases of great societal significance. It remains to be seen whether the forced indictment of the three former Tepco executives will result in a conviction. The very fact that the question of Tepco officials' criminal negligence will be addressed in open court, however, carries a significance of its own. The addressing of this question, that will necessitate an in-court legal debate, will allow for criminal proceedings to live up to their potential as a public, *critical discussion* – in this case: a critical discussion about the legal responsibilities of those operating nuclear power plants in connection with the legal responsibilities of the authorities regulating such power plants. Such a critical discussion will present an opportunity to

also re-evaluate standards of criminal negligence in the face of unusual but not necessarily unforeseen circumstances.

In order for court procedures to live up to their potential as a critical discussion on issues such as these, however, it is important that Japanese citizens are willing to make active use of the possibilities the reformed system has to offer. Such active use of the system of Prosecution Review Commissions could lead to increasing numbers of not guilty verdicts. Not guilty verdicts in highly publicized cases could in turn help strengthen public awareness that criminal court cases are about establishing guilt or the absence thereof, rather than confirming it, and help reduce the social stigma attached to prosecution. Increasing numbers of not guilty verdicts could thus help bring about a shift of (media) attention from the pre-trial to the trial phase. Whether such changes will indeed take place will depend on citizens' preparedness to do what the FCP members have done. Here the ball is in the citizens' court.

SUMMARY

This article examines the charges pressed in 2012 by citizens against Japanese government officials and members of nuclear power plant operator Tokyo Electric Power Company (TEPCO), in the wake of the earthquake, tsunami and nuclear disaster of 11 March 2011 ("3/11"). It further examines prosecutors' decision not to indict, and how this decision was reviewed by two lay Prosecution Review Commissions (PRCs), whose ultimate decisions have become binding pursuant to recent legal reforms. The article accordingly brings into focus the largely overlooked criminal justice dimensions of 3/11 in connection with the reformed PRCs' role. Prosecutors' tactics and findings of fact as well as PRCs' functioning highlight the problem of (the appearance of) prejudice in cases of high societal significance, within a system in which traditionally only "bomb-proof" cases are prosecuted. Whether PRCs will change traditional criminal justice practices will depend on citizens' willingness to use the possibilities the reforms provide for.

ZUSAMMENFASSUNG

Der Beitrag beschäftigt sich vor dem Hintergrund der dreifachen Katastrophe eines Erdbebens, Tsunamis und Nuklearunfalls vom 11. März 2011 mit den im Jahr 2012 von Bürgern eingeforderten Strafverfahren gegen Staatsbedienstete sowie Verantwortliche des Kraftwerkbetreibers TEPCO. Er behandelt die Entscheidung der Staatsanwaltschaft gegen eine Anklage sowie die beiden Überprüfungsverfahren durch sogenannte „Prosecution Review Commissions“ (PRCs). Die zweite, finale Entscheidung durch eine solche PRC ist nach der jüngsten Reform für die Staatsanwaltschaft bindend. Der Beitrag rückt damit die bislang weithin unbeachtet gebliebene strafrechtliche Dimension des 11. März in Verbindung mit dem reformierten System der PRCs in den Mittelpunkt. Das taktische Vorgehen der Staats-

anwaltschaft sowie deren Tatsachenfeststellungen und die Funktionsweise der PRCs verdeutlichen die Problematik der Voreingenommenheit – oder des Anscheins der Voreingenommenheit – in Fällen von großer gesellschaftlicher Bedeutung innerhalb eines Systems, in dem traditionell nur eindeutige Fälle zur Anklage gebracht werden. Ob das System der PRCs zu Veränderungen in der traditionellen Strafrechtspraxis führen wird, hängt von der Bereitschaft der Bevölkerung ab, von den durch die Reform geschaffenen Möglichkeiten tatsächlich Gebrauch zu machen.

(Die Redaktion)

