A Briefing Document on the Civil Liability for Nuclear Damage Bill, 2010: Questions of Constitutionality and Legislative Options Open to Parliament

Pre-Legislative Briefing Service (PLBS)

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EXECUTIVE SUMMARY

The Civil Liability for Nuclear Damages Bill, 2010 (hereinafter "the Bill") introduced in the Lok Sabha on 7th May, 2010 is a complex piece of parliamentary legislation. While there has been a vibrant public debate surrounding a few aspects of this Bill, in this Report we seek to provide a more comprehensive and reasoned legal analysis of this Bill and its implications. The touchstone on which we seek to test this Bill is the Constitution of India. Our conclusions, the reasons supporting which are provided in this report, indicate a range of further actions the government could take. Some provisions are salutary and require little in the way of amendment, others may be struck down for being contrary to the constitutional provisions as interpreted by the Supreme Court and require modification. Yet others, albeit not unconstitutional, are deeply problematic given the ambiguity of the draft text and necessitate clarification.

Starting with the *Statement of Objects and Reasons* of the Bill we point out how the Bill was introduced in Parliament with the objective of providing a legal framework to deal with trans-border liability in the case of nuclear accidents along with a legal mechanism to compensate victims within the country. The representatives of the Central Government however have deposed before this Honourable Committee that the Government's aim behind this Bill is to facilitate lower insurance premiums for private operators of nuclear plants. This however does not find mind any mention in the *Statement of Objects and Reasons.*

With regard to the definition clause, we examine the definitions of 'nuclear damage' and 'nuclear incident' and point out how both these definitions are circular and inconsonant with international practice in this regard. Such circularity will lead to confusion which will most certainly lead to more litigation. We therefore recommend appropriate amendments to these definitions in order to clarify their scope.

Insofar as Clause 3 of the Bill is concerned, the power to notify a 'nuclear incident' which has been placed with the Atomic Energy Regulatory Board (AERB) has created an inherent conflict of interest since the AERB is already tasked with regulation of nuclear

plants. To give it the function of notifying a nuclear incident is to ask it to admit its own failures as a regulator. Further the AERB is not a body created by Parliament, having been created through an Executive Order of the President. The composition and independence of the Board can therefore be compromised by the Central Government without seeking approval of Parliament. In order to rectify the ill-effects arising from this situation we recommend that the power in Clause 3 be vested with an autonomous body, and not the AERB.

With regard to exemptions to operator liability in Clause 5 of the Bill, we are of the opinion that clause 5(1)(i) [the *force majeure* clause] is contrary to the absolute liability jurisprudence of the Supreme Court and inconsonant with international practices. Consequently it should be deleted. We also recommend certain modifications be made to clause 5(1()(ii) [exemptions on account of armed conflict, hostility, civil war, insurrection or terrorism] to bring the provision in line with international treaties which contain best practices in this regard.

Provisions relating to capping of the operator liability, maximum liability in respect of a nuclear incident and by implication, liability of the central government in Clauses 6 and 7 of the Bill, have received the bulk of public attention and media coverage. Insofar as these provisions are concerned, we cover two crucial aspects in the report. First we carry out a constitutional analysis of these provisions in order to understand their implications and whether they could possibly withstand a challenge before the Supreme Court. Our study in this regard indicates that while these provisions may survive a challenge on the basis of the 'Equal Protection' clause of Article 14, they will most certainly not survive a challenge on the basis of Article 21 of the Constitution on account of the expanded interpretation given to it by the Supreme Court. This is because an absolute cap on liability in respect of a nuclear incident obstructs the right to full compensation and environmental restoration, which has been read into Article 21 of the Constitution by the Supreme Court. This does not imply that liability caps on operators of nuclear establishments are *per se* unconstitutional; it merely requires that the same be harmonised with the need to ensure full compensation and environmental restoration. Secondly, we also carry out a comparative study of the Bill with international treaties and

foreign legislations. This puts in sharp perspective the liability caps proposed in this Bill and hence provides key insights regarding its drafting and legislative intention.

With regard to Chapters III and V of the Bill i.e. the powers and functions of the Claims Commissioner and the Nuclear Damage Claims Commission (NDCC), we are of the opinion that the present structure of both these institutions is unconstitutional and contrary to the recent Supreme Court judgment in the case of *Union of India* v. *R. Gandhi, President of the Madras Bar Association* wherein the Supreme Court ruled on the constitutionality of the National Company Law Tribunal (NCLT). The Bill in its current form severely compromises the doctrines of separation of powers and judicial independence both of which are part of the basic structure of the Indian Constitution. We propose several amendments to cure this defect. We also examine the economic and practical viability of providing a separate legal mechanism for only nuclear incidents and instead recommend that the Committee consider shifting the same to the soon-to-be constituted National Green Tribunals.

As far as judicial review of the orders of the Claims Commissioner and the NDCC are concerned, we seek to point out to the Committee that despite the bar in Clauses 16(5) and 32(10) against the judicial review of such orders, all High Courts in India will have the power to judicially review any such orders under Article 226 and 227 of the Constitution. As per Supreme Court precedents the powers of the High Court in this regard cannot be excluded through statute. As a result the High Court may entertain such petitions at its discretion. Instead we recommend that the Bill provides a statutory right to appeal to the High Court but on very limited grounds so as to limit the scope of the High Court's discretion in such matters and ensure uniformity.

While most of the public debate has centred on Clauses 6 and 7 of the Bill, a key concern which has been largely overlooked thus far lies in Clause 46 of the Bill— the interaction of this Bill with other statutes in this field and the possibility of concurrent liability of operators under such other statutes. The phraseology of Clause 46 is inherently ambiguous. It suggests both that the operators are liable to be sued even beyond the claims that may arise under the Bill as well as its exact converse. If civil actions against operators arising out of nuclear incidents can survive beyond this legislation, there

would be multiple forums in which the operator would be defending itself and the *raison d'être of* this legislation as a special machinery for speedy adjudication of specific types of claims would be defeated. Further, under the Air Act, the Water Act and the Environment Protection Act, State Pollution Control Boards have the power to seek compensation from private players who have polluted the environment. It is not clear whether the liability caps suggested in Clauses 6 and 7 of the Bill will be applicable against the State Pollution Control Boards or not. Ambiguity in this provision may destroy the very reason for introducing this Bill in the first place and hence we recommend appropriate amendments to rectify this position.

Our last chapter deals with the need to enhance the scope of vicarious criminal liability, either in this Bill or in the Atomic Energy Act, 1962 in order to hold the management of a nuclear establishment criminally liable for any possible negligence. Such a move would compensate for the capping in operator liability. Normally the threat of monetary damages would deter an operator. However when the scope of such damages is limited through a statute it is necessary to introduce greater criminal sanctions in order to make up for the reduced deterrence effect of a limited liability cap. Though the Atomic Energy Act, 1962 provides for vicarious criminal liability, Parliament needs to widen its scope on the lines recommended in this report.

As India's energy needs grow and the significance of nuclear energy increases, it is imperative that Parliament takes active measures to catalyse the development of the nuclear industry in India. This Bill is a crucial step in this direction. However it is equally imperative that any such development is safe, well-regulated and balanced, taking into account the diverse interests of nuclear suppliers, operators, the government itself and above all the citizens of India. It is motivated by this vision of balanced development of the nuclear industry in India that this report is written and amendments to the Bill suggested. We hope that the Honourable Committee shares our vision.

I. CONTEXTUALIZING THE CIVIL NUCLEAR DAMAGES LIABILITY, BILL, 2010

1. **Ownership and operation of Indian nuclear plants:** As of today, the sole Parliamentary legislation regulating the field of nuclear energy in India is the Atomic Energy Act, 1962. Currently, all nuclear plants are controlled wholly by the Central Government through corporations created by it and there is no private sector participation in the Indian nuclear energy sector[1] despite the fact that a 1987 amendment[2] to Section 3 of the Atomic Energy Act, 1962 allows for the private sector to pick up a minority stake of up to 49%, in a 'Government Company' that is controlling a nuclear power plant.[3] Subsequent to the signing of the 123 Nuclear Agreement with the United States of America, it is expected that the Central Government will move a legislation before Parliament to amend the Atomic Energy Act, 1962 in order to facilitate wholly owned private companies to operate in India.[4] Until Parliament approves of an amendment to the Atomic Energy Act, 1962 no wholly owned private company can operate Indian nuclear plants.

2. **Capping of Liability:** Currently the Atomic Energy Act, 1962 provides for absolutely no liability cap on compensation in the case of a nuclear accident. In the absence of any such liability cap on compensation, the Central Government and its private partners (in the case of a 'Government Company') would be wholly liable, as per existing Supreme

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1 The fact that all Nuclear Plants and Facilities as of date are controlled by the Central Government is clarified in the Statement of Objects and Reasons to The Civil Liability for Nuclear Damage Bill, 2010.

2 Atomic Energy (Amendment) Act, 1987 (No. 29 of 1987).

3 Section 3 (a) of the Atomic Energy Act, 1962 bestows upon Central Government the power "*to produce, develop, use and dispose of atomic energy either by itself or through any authority or Corporation established by it or a Government company and carry out research into any matters connected therewith.*"

4 Media reports indicate that the Prime Minister's Economic Advisory Council has recommended that private investors should be able to own majority stake in nuclear power plants and the Council has recommended amending the Atomic Energy Act, 1962 to this effect. *See* Rajeev Jayaswal & Rohini Singh, *RIL may enter nuclear energy business with US'Betchel Corporation,* Economic Times, 7th June, 2010.

Court precedents,[5] for all claims arising from a nuclear accident regardless of whether or not the 'operator' was at any fault. The only provision regarding compensation under the Atomic Energy Act pertains to the compensation paid towards the acquiring of land for the purposes described under that Act.[6] As the law stands today the operators of nuclear plants, are liable, under tort law, for unlimited damages, which would imply that the operator would be liable to pay for all damages that may arise out of a nuclear accident. The Bill will significantly alter this position since it now seeks to *firstly* cap the liability of 'operators' at Rs. 500 crores & *secondly* cap the entire liability (government + operator) arising out of a single nuclear incident at 300 million SDR.

3. **Legislative Intention:** According to the *Statement of Objects and Reasons,* the main reasons for moving this Bill are: *firstly* to clarify 'trans-border liability' arising from nuclear damages and *secondly* to provide for a legal structure that would adequately and efficiently compensate victims of a nuclear incident. Recent news reports have however indicated that representatives of the Central Government have already deposed before this Honourable Committee, that the liability limits proposed in the Bill are necessary "*for the operating company to take insurance cover*."[7] This aforementioned reason put forth by representatives of the Central Government does not find mention in the *Statement of Objects and Reasons.* The Honourable Committee should seek a clarification, from the representatives of the Central Government on the intentions of the Government as appearing in the *Statements of Objects and Reasons* because the same may be construed to be a manifestation of Parliamentary intent and can be used as an aid by the judiciary to interpret the entire Bill if and when its constitutionality is challenged in a court of law.[8]

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5 *See M.C. Mehta* v. *Union of India,* AIR 1987 SC 1086; *Rajkot Municipal Corporation* v. *Manjulben Jayantilal Nakum*, (1997) 9 SCC 552; *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248.

6 Section 21 of the Atomic Energy Act, 1962.

7 DNA India, 'MP's Panel takes fresh look at nuke liability bill after Bhopal verdict', (available at: http://www.dnaindia.com/india/report_parliamentary-panel-takes-fresh-look-at-nuke-liability-bill-after-bhopal-verdict_1393753

8 *See* P. *V. Narasimha Rao* v. *State* (1998) 4 SCC 626. "*It would thus be seen that as per the decisions of this court the statement of the Minister who had moved the Bill in Parliament can be looked at to*

II. DEFINITION OF NUCLEAR DAMAGE AND NUCLEAR INCIDENT: CLAUSE 2(f) AND CLAUSE 2(h)

4. There are two fundamental problems with the drafting of clause 2(f) defining 'nuclear damage' and its inter-relation with clause 2(h) defining 'nuclear incident'. The first problem is circularity. Clause 2(f) reads:

> "(f) "nuclear damage" means—
>
> (i) loss of life or personal injury to a person; or
>
> (ii) loss of, or damage to, property,
>
> **caused by or arising out of a nuclear incident**, and includes each of the following **to the extent notified by the Central Government**...
>
> (iii) any economic loss, arising from the loss or damage referred to in clauses (*i*) or (*ii*) and not included in the claims made under those clauses, if incurred by a person entitled to claim such loss or damage;
>
> (iv) costs of measures of reinstatement of impaired environment caused by a nuclear incident, unless such impairment is insignificant, if such measures are actually taken or to be taken and not included in the claims made under clause (*ii*);
>
> (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment caused by a nuclear incident, and not included in the claims under clause (*ii*);
>
> (vi) the costs of preventive measures, and further loss or damage caused by such measures;
>
> (vii) any other economic loss, other than the one caused by impairment of the environment referred to in clauses (*iv*) and (*v*), in so far as it is permitted by the general law on civil liability in force in India and not claimed under any such law,

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ascertain the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted."

in the case of sub-clauses (i) to (v) and (vii) above, to the extent the loss or damage arises out of, or results from, ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of, nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter." *(in all cases, emphasis supplied)*

5. Clause 2(h) reads:

"(h) "nuclear incident" means any occurrence or series of occurrences having the same origin which **causes nuclear damage** or, but only with respect to preventive measures, creates a grave and imminent threat of causing such damage." *(emphasis supplied)*

It is clear that the terms 'nuclear damage' and 'nuclear incident' are defined in terms of each other. The definitions hence suffer from the defect of circularity as attempting to understand the meaning of 'nuclear damage' leads to the meaning of 'nuclear incident' which leads back to 'nuclear damage'. As a result, the meaning of the terms remains unclear. This circularity can easily be avoided since the inclusion of the term 'nuclear incident' in clause 2(f) is superfluous.

6. This is because, the last paragraph of clause 2(f), which has been highlighted above, contains a list of incidents which can actually cause nuclear damage and hence are intended to provide the definitive instances of when nuclear damage is caused. Given such a detailed enumeration exists, there is no necessity of incorporating the phrase 'caused by or arising out of a nuclear incident' in the definition of 'nuclear damage' in clause 2(f). The Consolidated Text of the Vienna Convention on Civil Liability for Nuclear Damage of 21 May, 1963, as amended by the Protocol of 12 September, 1997 (hereinafter "amended Vienna Convention"), in Article 1(1)(k) also excludes the aforesaid phrase[9] as does the CSC in Article 1(f).[10]

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9 The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage- Explanatory Texts (Vienna: International Atomic Energy Agency, 2007) 127, 128; see also http://www.iaea.org/Publications/Documents/Conventions/liability.html.

7. ***Thus the phrase "caused by or arising out of a nuclear incident" in clause 2(f) should be deleted since it serves no additional purpose, creates the problem of circularity and is superfluous given the last paragraph of S. 2(f).***

8. The second issue with the definition of nuclear damage in S. 2(f) is the usage of the phrase **"to the extent notified by the central government**." This is a departure from the definition of 'nuclear damage' in Article 1(1)(k) in the amended Vienna Convention and Article 1(f) of the CSC both of which use the words "**to the extent determined by the law of the competent court."** The *travaux preparatoires* (preparatory documents) to the CSC and the Vienna Protocol Amendment Article 2(2) show that the reason this terminology was used was to increase the number of situations under which compensation could be claimed, while at the same time taking into account significant differences in national laws regarding recoverability of damages.[11]

9. Two issues arise from the said departure. First, in India, this law in this regard has been laid down by the Supreme Court. The Court has allowed claims for economic loss flowing from personal injury. This includes loss of earnings, costs of maintenance as well as losses due to pain and suffering caused.[12] In addition, loss of income has also been held recoverable and principles of computation evolved.[13] Further, costs of measures of reinstatement of the environment are essentially costs of repair. It has been held that costs of repair are recoverable in a damages claim subject to the principle of restoration to the original condition.[14] Even in environmental cases, the Court has consistently held that the cost of restoring the environment is to be borne by the offending industry (the

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10 The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage- Explanatory Texts (Vienna: International Atomic Energy Agency, 2007) 141; see also http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc567.shtml

11 17th Session, Part 2 of the Standing Committee on Liability for Nuclear Damage, *IAEA Doc. SCNL/17.II/INF.7;* see The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage- Explanatory Texts (Vienna: International Atomic Energy Agency, 2007) at 33.

12 *State of Haryana* v. *Santra*, (2000) 5 SCC 182.

13 *Sarla Dixit* v. *Balwant Yadav,* (1996) 3 SCC 179.

14 *Lotus Line* v. *State of Maharashtra,* AIR 1965 SC 1314.

'polluter pays principle').[15] Further, the principle of recovering damages for preventive measures, i.e. a form of mitigation of loss has been laid down by the Supreme Court in *M. Lachia Shetty and Sons* v. *Coffee Board, Bangalore*[16] wherein it was unequivocally held that,

"The well accepted position in law on the question of mitigation of loss is that it does not give any right to the party in breach of the contract but is a concept to be borne in mind by the Court while awarding damages. The non- defaulting party is not expected to take steps which would injure innocent persons. Steps taken by him in performance or discharge of his statutory duties cannot be weighed against him. **The question in each case would be one of reasonableness of action taken by the non-defaulting party**." (emphasis supplied)

Thus it is clear that the principle which will be followed for awarding damages in light of preventive measures undertaken will be to the extent that such measures were reasonable.

10. Hence the law regarding clause 2(f)(iii) — (vi) and the extent to which damages can be recovered under these provisions has been established by the Supreme Court. Thus any government notification in this regard, concerning the extent of loss which will qualify as 'nuclear damage' must be cognizant of the law laid down by the Supreme Court in this regard.

11. Secondly, arises the issue of conflict of interest. Since it is envisaged that several operators of nuclear installations will be the central government, many of the claims will be against the government. For the government hence to either prospectively or retrospectively limit the definition of 'nuclear damage' by limiting the extent to which damage owing to causes in S. 2(f)(iii) — (vi) may be recovered, has the strong possibility of leading to claims of *mala fide* executive action.

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15 *Indian Council for Enviro-Legal Action* v. *Union of India,* (1996) 3 SCC 212.

16 AIR 1981 SC 162.

12. Thus the notification by the Central Government regarding the extent of recoverability is problematic, owing to the matters being pronounced upon by the Supreme Court and the possibility of conflict of interest which may be alleged pursuant to individual notifications. For these reasons, it is proposed that the words "**to the extent notified by the central government"** are replaced with the words **"to the extent provided by law".**

13. ***On the basis of the aforesaid discussion, the following recommendations may be considered by the Honourable Committee:***

i. The phrase "caused by or arising out of a nuclear incident" in clause 2(f) be deleted;

ii. The phrase "to the extent notified by the central government" be replaced by the phrase "to the extent provided by law" in clause 2(f).

III. CLAUSE 3: THE ATOMIC ENERGY REGULATORY BOARD ("AERB")

14. Clause 3 of the Bill under consideration, vests the AERB with the power to notify a nuclear incident after which the provisions of the Bill, including the liability caps, will be operationalised in respect of a nuclear incident. This clause vests the AERB with enough discretion to not notify those nuclear incidents when it is satisfied that those nuclear incidents are of such a nature that they do not pose a significant risk or threat. The AERB is a body constituted by an Order of the President, dated the 15th of November, 1983, under the powers vested in him by the Atomic Energy Act, 1962 and it operates directly under the purview of the Department of Atomic Energy (DAE).[17] The main function of the AERB is to carry out the regulatory and safety functions prescribed under the Atomic Energy Act, 1962. In its own words , the AERB's main functions is as follows:

"*The mission of AERB is to ensure that the use of ionizing radiation and nuclear energy in India does not cause unacceptable impact on the health of workers and the members of the public and on the environment*".[18]

However unlike other regulators such as the Securities and Exchange Board of India (SEBI)[19], the Reserve Bank of India (RBI),[20] the Telecom Regulatory Authority of India,[21] The Central Vigilance Commission[22] and the Competition Commission of India,[23] the AERB is not set up by an Act of Parliament but instead through an Executive Order of the President. In the context of Clause 3 of the Bill, it must be clarified to this Honourable Committee that it is highly unusual, though not unconstitutional, for a parliamentary legislation to vest responsibilities in an institution, such as the AERB, which has not been created through parliamentary legislation. The reason for this is simple: the Executive

17 As per the information available on the website of the AERB available at: http://www.aerb.gov.in/cgi-bin/aboutaerb/AboutAERB.asp

18 *Id.*

19 Securities and Exchange Board of India Act, 1992.

20 Reserve Bank of India Act, 1934 and The Banking Regulation Act, 1949.

21 Telecom Regulatory Authority of India Act, 1997.

22 Central Vigilance Commission Act 2003.

23 Competition Act, 2002 as amended by Competition (Amendment) Act, 2009.

theoretically has the power to frustrate the Parliamentary intent behind the legislation, by modifying the scheme of the AERB to suit its own objectives and escape accountability before Parliament. The functions, powers and appointments of the AERB are decided by the Central Government, provided that they are within the limits prescribed by the Atomic Energy Act, 1962. This also means that the Central Government can dilute or even dissolve the AERB without requiring Parliamentary approval for the same. For these reasons, it is ideal that Parliament should vest the powers in Clause 3 with a statutory regulator.

15. While vesting the AERB with the discretion to not exercise its power under clause 3, the Bill does not lay down any specific criteria as per which the AERB may exercise its discretion. This gives rise to the following issues:

A. CONFLICT OF INTEREST

16. As per the present structure of the Atomic Energy Act, 1962 and the Bill, a regulator (AERB) which is created and staffed by the Central Government and whose duty is to regulate the nuclear industry has been given the power under clause 3 of the Bill to notify a nuclear incident. By vesting in the AERB this discretionary power, the Government has created a conflict of interest for the AERB since the AERB will necessarily have to admit to its failure, as a regulator, when it notifies a nuclear incident under the Bill. Such a conflict of interest is apparent because a nuclear incident is most likely to take place when the AERB itself has failed in its duty of regulation. Therefore by vesting the AERB with the power to notify a nuclear incident it is more likely than not that the AERB will have an active interest in not notifying or publicizing the incident. The Honourable Committee must be informed that many nuclear incidents are not large scale, such as Bhopal or Chernobyl disasters but smaller incidents wherein nuclear waste is either not properly disposed or not securely transferred.[24] Such smaller incidents may

24 One such relatively minor nuclear incident at Kalpakkam was in the year 2003 when several tons of heavy water leaked from a tube leading to a release of radioactivity. The levels of radioactivity have been disputed by experts on either side. *See* T. S. Subramanian, *An Incident at Kalpakkam – A heavy water leak in the second unit of the Madras Atomic Powers Station (MAPS) on March 26th causes widespread concern*, 16(8) FRONTLINE, April 10th - 23rd (1999) *available at* http://www.hinduonnet.com/fline/fl1608/16080270.htm

not be notified by the AERB if it wanted to escape accountability for its failure in adequately regulating the operator responsible for the nuclear incident in question. It is also brought to the attention of this Honourable Committee that a former Chairperson of the AERB has been extremely critical of the AERB's internal workings.[25]

B. LACK OF GUIDELINES/CRITERIA TO NOTIFY A 'NUCLEAR INCIDENT'

17. Clause 3 while vesting powers in the AERB to notify a 'nuclear incident' under this Bill, does not prescribe any guiding principles according to which the AERB may notify a nuclear incident. The entire discretionary power has therefore been vested in the AERB without any specific guiding criteria. The constitutionality of this provision may be challenged on the grounds of excessive delegation i.e. Parliament has delegated an 'essential legislative function' to an executive body. A seven judge-bench of the Supreme Court in the case of *In Re: Delhi Laws Act*[26], has held that while Parliament can delegate certain functions, it cannot at any point of time delegate an 'essential legislative function'. An essential legislative function is normally a question of policy which can be decided only by Parliament and not the executive body. The executive body can therefore only deal with implementation of policy and not framing of policy. It would therefore be unconstitutional for Parliament to vest in the AERB the power to 'notify' a nuclear incident without at least laying down guidelines/principles to guide the AERB in its decision.

For the aforesaid reasons we recommend:

i. ***The power to notify a nuclear incident in Clause 3 of the Bill should vest with a body which is not the AERB. The Committee may explore the possibility of vesting such power in a separate, autonomous body.***

25 *See* A. Gopalkrishnan, *Issues of Nuclear Safety*, 16(6) FRONTLINE, March 13th - 26th (1999) *available at* http://www.thehindu.com/fline/fl1606/16060820.htm

26 [1951] S.C.R. 747.

ii. ***Alternatively, or in addition to the aforesaid, the Honourable Committee must recommend to the government that it declare some guiding principles according to which the discretionary powers in clause 3 may be exercised.***

IV. EXEMPTIONS FROM LIABILITY: CLAUSE 5

18. Clause 5(1) reads:

"5**.** (*1*) An operator shall not be liable for any nuclear damage where such damage is caused by a nuclear incident directly due to—

(i) a grave natural disaster of an exceptional character; or

(ii) an act of armed conflict, hostility, civil war, insurrection or terrorism."

19. There are three issues arising out of this exemptions clause. *First*, is the issue of burden of proof. *Second* is the consistency with international practice and jurisprudence of the Supreme Court of the availability of clause 5(1)(i) as a defence by the operator. *Third* is the widely worded clauses of clause 5(ii) and whether the ambit of exemptions is cast too wide.

A. BURDEN OF PROOF

20. This clause is ambivalent regarding the party on whom the burden of proof lies. Though being an exemptions clause, the burden of proof would be expected to be on the operator, we believe, the same should be made explicit. Such an explicit formulation can be found in Art. IV.3 of the Vienna Convention (as amended by the 1997 Protocol). This provides:

"No liability under this Convention shall attach to an operator **if he proves** that the nuclear damage is directly due to an act of armed conflict, hostilities, civil war or insurrection." *(emphasis supplied)*

The words 'if he proves' makes it abundantly clear that the burden of proof lies on the operator to show that one of the exemption clauses apply thereby exempting him from liability.

B. CLAUSE 5(1)(i)

21. Exception to liability on the basis of a grave natural disaster of an exceptional character, was contained in Article IV.3(b) of the Vienna Convention, 1963. However it was deleted

by the Protocol to Amend the Vienna Convention, 1997 with the rationale that nuclear installations should be built to withstand natural disasters of any kind.[27] Today the Amended Vienna Convention does not contain this exemption. This provision, albeit not binding on India, which is not a signatory to the Convention, should have considerable persuasive value since it was drafted by experts at the International Atomic Energy Agency and agreed upon by several states.

22. Further, the inclusion of this exemption clause, means that the Central Government shall be liable in cases where this exception is successfully argued by the operator. This is provided for by clause 7(c) of the Bill. The international trend is towards imposing primary liability on operators and only in the most exceptional circumstances when the amount of compensation to be paid is excessive, will the government step in to provide compensation.[28] Statutorily imposing liability primarily on the central government in a case deemed non-exceptional by international experts must thus be avoided.

23. The second reason for deleting the clause is conformity with jurisprudence regarding absolute liability developed by the Supreme Court of India.

24. The Supreme Court has specifically differentiated between concepts of strict liability ("Strict liability focuses on the nature of the defendants' activity rather than, as in negligence, the way in which it is carried on"), absolute liability and negligence ("Negligence does not entail liability unless the law exacts a duty in the given circumstances to observe care") in several cases.[29] It has also evolved the idea of near-absolute liability.[30] The Supreme Court discussed the liability of persons operating hazardous industries in *M.C. Mehta v Union of India*:[31]

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27 This suggestion was made at the very first session of the Standing Committee on Liability for Nuclear Damage and was widely supported. See SCNL/1/INF.4, p. 8.

28 Stephen Tromans, *Nuclear Law: The Law Applying to Nuclear Installations and Radioactive Substances in its Historic Context* (Oxford: Hart Publishing, 2010) 166.

29 *Rajkot Municipal Corporation* v. *Manjulben Jayantilal Nakum*, (1997)9 SCC 552; *Union Carbide Corporation* v. *Union of India*, AIR 1992 SC 248.

30 *Noor Aga* v. *State of Punjab,* MANU/SC/2913/2008.

31 AIR 1987 SC 1086.

"We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. ***The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.*** *Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards.* ***We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious***

principle of strict liability under the rule in Rylands v. Fletcher*. (emphasis added). We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deferent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."*

This is a well established principle of law, and has been followed in cases such as *Research Foundation for Science Technology and Natural Resources Policy* v. *Union of India*[32] *Deepak Nitrite Ltd.* v. *State of Gujarat*,[33] and *Charan Lal Sahu v Union of India.*[34]

25. Insofar as the issue of exemptions and their applicability to cases of strict and absolute liability are concerned, the Supreme Court in *Union of India v Prabhakar Vijaya Kumar*,[35] recognised several exceptions to the concept of strict liability: (1) personal injuries (2) normal uses of land (3) act of god (4) consent of plaintiff (5) common benefit (6) act of stranger (7) statutory authority (8) default of plaintiff. The court said that the concept of absolute liability as stated in the *M. C. Mehta* case (above) was different from the strict liability rule in *Ryland v Fletcher* because it **did not** recognise these exceptions.

26. To conclude, the Supreme Court clearly suggests that an absolute liability standard applies to hazardous industries. In all probability, nuclear plants will fall within that category. Therefore, the liability for nuclear operators should be absolute, and, as has been laid down by the Supreme Court none of the exceptions contained within strict liability jurisprudence should apply.

27. ***Hence we recommend that clause 5(1)(i) be deleted for being inconsonant with international practice and Supreme Court jurisprudence on absolute liability,.***

32 (2005)13 SCC 186.

33 (2004)6 SCC 402.

34 AIR 1990 SC 1480.

35 2008 (9) SCALE 182.

C. CLAUSE 5(1)(ii)

28. The substantive meaning of the heads provided which qualify as exemptions to liability for operators of nuclear installations under clause 5(1)(ii) require careful analysis. First, the Bill departs from Art. IV. 3 of the amended Vienna Convention insofar as it provides for 'terrorism' as a ground for claiming exemption. We believe this is a necessary addition, especially given the fact that providing law and order is a state responsibility and private operators (should they be allowed to set up installations) should not be held liable to compensate victims of nuclear damage pursuant to a terrorist attack. The remaining categories of 'armed conflict', 'hostilities', 'civil war' and 'insurrection' however are unsatisfactorily classified. These words were originally introduced in the Vienna Convention, 1963 in Art. IV(3)(a). Since then the understanding of 'armed conflict' in international humanitarian law has progressed to a significant degree. Though its meaning derives from common Art. 2 of the Geneva Conventions, its scope has significantly expanded, including both international armed conflict (between states) which was the traditional understanding, as well and non-international armed conflict (within a state). The definition of non-international armed conflict was provided by Common Article 3 of the Geneva Conventions, modified by Article 1 of Additional Protocol II to the Geneva Conventions.[36] It was further modified by the Art. 8(2) (c) of the Rome Statute which set up the International Criminal Court.[37] Today, the phrase 'armed conflict', by virtue of including 'non-international armed conflict' clearly compasses 'civil war' and 'insurrection' which are believed to be outdated terms.[38] Thus the latter terms are superfluous and may be deleted from the Bill leaving only the term 'armed conflict' intact.

29. Insofar as the term 'hostilities' is concerned, we believe it should be deleted. Unlike the term 'armed conflict, 'hostilities' is not a term of art with a commonly understood

36 International Committee of the Red Cross, Opinion Paper "How is the term 'Armed Conflict' defined in International Humanitarian Law?" (March 2008) available at http://www.icrc.org/web/eng/siteeng0.nsf/html/armed-conflict-article-170308.

37 http://www.un.org/icc/part2.htm

38 Marco Sassoli, Antoine A. Bouvier, *How Does Law Protect in War*, *Vol. I* (Geneva: International Committee of the Red Cross, 2006) 109.

definition. Even the Explanatory Notes to the 1997 Protocol to the Vienna Convention, which uses the term 'hostilities' says that the term is "rather more ambiguous."[39] Besides, INLEX, the International Expert Group on Nuclear Liability has stated that the term 'hostilities' adds no additional meaning to the phrase, which essentially connotes 'international or non-international armed conflict.'[40] We believe that this latest understanding should be taken into account. In terms of meaning 'hostilities' is encompassed by the term 'armed conflict'. Further, it is an ambiguous term and given the fact that it forms a ground for exemption of operator liability, may be prone to misuse. Hence allowing the term to remain will be both futile as well as counter-productive and consequently we believe it should be deleted.

30. ***On the basis of the aforesaid discussion, the following recommendations may be considered by the Honourable Committee in respect of clause 5:***

i. The words 'if he proves' are inserted in clause 5. Clause 5 will hence read:

> ***"An operator shall not be liable for any nuclear damage if he proves that such damage is caused by a nuclear incident directly due to..."***

ii. Clause 5(1)(i) be deleted

iii. In clause 5(1)(ii) the words "an act of armed conflict, hostility, civil war, insurrection or terrorism" be substituted with the words "an act of armed conflict or terrorism."

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39 The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage- Explanatory Texts (Vienna: International Atomic Energy Agency, 2007) at 49.

40 International Expert Group on Nuclear Liability (INLEX), Fourth Meeting, 7-11 February 2005. *Id.*

V. CAPPING OF OPERATOR AND CENTRAL GOVERNMENT LIABILITY

31. Clause 6 of the Bill achieves three objectives. In sub-clause (1) it specifies the maximum amount of liability in respect of each nuclear incident i.e. the liability of the operator + liability of the Central Government. In sub-clause (2) it specifies the amount of liability for an operator in respect of each nuclear incident. In the provisos, it allows for increase and decrease of the liability of the operator by the central government, subject to the maximum limit in sub-clause (1) and the minimum limit specified in proviso (2).

32. The significance of the objectives of clause 6 extends to clause 7 and clause 8. According to clause 7(1) the liability exceeding the maximum liability of the operator for a nuclear incident and subject to the maximum liability for a nuclear incident, shall be borne by the central government. Hence the cap placed on liability of an operator is relevant for determining the liability of the central government in case of nuclear damage. Second, clause 8 provides that the operator must compulsorily be insured for his liability specified under clause 6(2) subject to the variations made by the central government using the proviso to clause 6(2).

33. Three issues will be analysed in greater detail. ***First***, whether in principle capping of operator liability is constitutional. ***Second***, how the capping of liability in respect of each nuclear incident in clause 6(1), which by implication caps liability on the government relates to Supreme Court precedent on this point. ***Third***, whether the specific cap of Rs. 500 crores in clause 6(2) for operators and the total cap of 300 Million SDR in respect of each nuclear incident is adequate in light of international best practices.

A. CONSTITUTIONALITY OF CAPPING OF OPERATOR LIABILITY

I. Testing the constitutionality of the proposed liability cap under Article 14 of the Constitution

34. The Bill proposes two forms of limitations on the liability arising out of a nuclear accident. The *first* limitation of liability proposed by Clause 6(1) of the Bill is with respect to the total liability in respect of a nuclear incident, which is capped at 300 million SDR.

The *second* limitation of liability proposed by Clause 6(2) of the Bill is with respect to the liability of the operator, which is capped at Rs. 500 crores. The combined effect of these clauses caps the liability of the Central Government, which is liable for the balance between 300 million SDR and the capped liability of the operator.

a. The history of liability caps in Indian and foreign legislations

35. Historically speaking, caps on liability are in effect a reaction by legislatures to the evolution of the law of torts under the common law legal system. The law of torts, a judicial creation under the common law system, was a mechanism used to compensate victims of wrongs such as negligence, defamation etc.[41] The three fundamental requirements of tort law are as follows:

    (i) A duty of care was owed;

    (ii) That duty was breached due to negligence;

    (iii) Damage was caused due to the breach of duty.

36. Therefore if a manufacturer sold a product to a customer, he would have to ensure that the product was safe to use. The manufacturer thus owed an obligation to maintain a certain duty of care towards the general public.[42] If the product malfunctioned, due to the negligence of the manufacturer, causing damage or injury to the customer, the manufacturer could be sued for the same under the law of torts for failing in his duty of care. The duty of care would apply even in the absence of a contractual relationship between both parties. The common law system further watered down the negligence principle in certain cases and instead started to hold certain hazardous industries strictly liable for the damage caused by them i.e. due diligence and due care on the part of the

41 In the case of *Donoghue* v. *Stevenson,* [1932] AC 562 the House of Lords rendered a landmark judgment which laid down the basic principles of negligence based torts. *Also see* for an excellent critique on the various theories of the tort law system) John Goldberg, Twentieth Century Tort Theory, GEORGETOWN LAW JOURNAL, Vol. 90, 2002. Available at SSRN: http://ssrn.com/abstract=347340 or doi:10.2139/ssrn.347340.

42 *Donoghue* v. *Stevenson* [1932] AC 562.

hazardous industry could no longer be an adequate defence.[43] As explained later in the report the Supreme Court of India has further evolved this doctrine into the doctrine of absolute liability.

37. In response to their increasing liability under the law of torts, a number of businesses sought liability caps through the statutory route in order to ensure that their liability under tort law was capped to a fixed amount, over and above which the business would not be liable to the consumer.[44] Given below are a few examples of liability caps in Indian and foreign legislations.

(i) Liability caps in transport and carrier legislations: One of the very first Indian legislations to regulate the carrier's business in India – the Carriers Act, 1865 – limited the liability of the carrier to only Rs. 100, in certain restricted situations.[45] Subsequent legislations such as the Carriage by Air Act, 1972, last amended in 2009,[46] imposes a maximum liability, with respect to the death of a passenger, at 100,000 Special Drawing Units (SDRs). This legislation similarly imposes a liability cap on the damages payable by an airline for the loss of baggage. The Multi-Modal Transportation of Goods Act, 1993 provides for fixed liability (i.e. liability per k.g. is fixed) of the operators in cases of damage or loss of consignment.

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43 The rule of 'strict liability' was laid down by the House of Lords in the case of *Rylands* v. *Fletcher,* (1868) LR 3 HL 330.

44 Todd J. Zywicki, *Public Choice and Tort Reform* (October 2000), George Mason Law & Economics Research Paper No. 00-36. Available at SSRN: http://ssrn.com/abstract=244658 or doi:10.2139/ssrn.244658. The American effort at reforming tort law however has met with several constitutional hurdles. *See* John Fabian Witt, *State Constitutions and American Tort Law: A History* (March 7, 2004). Columbia Law School, Pub. Law Research Paper No. 04-67. Available at SSRN: http://ssrn.com/abstract=515662 or doi:10.2139/ssrn.515662.

45 S. 3 of the Carriers Act, 1865 reads as follows:

"Carriers not to be liable for loss of certain goods above one hundred rupees in value, unless delivered as such. *No common carrier shall be liable for the loss of or, damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the Schedule to this Act, unless the person delivering such property to be carried, or some person duly authorised in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof."*

46 Carriage by Air (Amendment) Act, 2009. This latest amendment Act incorporates the Montreal Convention, 1999.

(ii) Liability caps in case of industrial disasters: With regard to industrial accidents involving certain hazardous substances, as notified by the Ministry of Environment and Forests, the liability of the polluter is fixed under the Public Liability Insurance Act, 1991. This legislation requires all operators of hazardous substances, notified under the legislation,[47] to compulsorily take out insurance policies that will be invoked to cover his liability towards "*death or injury to any person (other than a workman) or damage to any property.*"[48] The maximum liability of the operator is however capped in the Schedule to the legislation. These limits imposed in the schedules are at 1991 rates and are alarmingly low in terms of the value of the rupee in 2010. For example the liability for medical expenses was capped at Rs. 12,500, while liability in the case of death and permanent disability was fixed at Rs. 25,000.

(iii) Liability caps in case of medical malpractice in the U.S.A.: Similarly in some countries like the U.S.A, several states have passed legislations limiting the liability of hospitals and doctors in cases of medical malpractice. The reason for passing such legislations is the fact that increased damages under normal tort law were leading to an increase in insurance premiums for doctors who in turn would pass on the costs of the increased premiums to the patient community thereby leading to an increase in medical costs. These states therefore sought to limit the liability of the doctors through legislations, with the aim of stabilizing the insurance premiums that were required to be paid by doctors and which benefit would ultimately flow on to the patient in the form of reduced medical costs. These legislations have had mixed results when challenged on the grounds of constitutionality.[49]

b. Defending Liability Caps for 'operators' of 'nuclear installations' under Article 14 of the Indian Constitution

47 The list of hazardous substances, to which the Public Liability Insurance Act, 1991 applies, has been notified by the Ministry of Environment and Forest Affairs under the notification no. S.O.227(E) (24/03/1992). The same is available at: http://www.envfor.nic.in/legis/public/so227(e).html

48 Section 3, Public Liability Insurance Act, 1991.

49 *Arbino* v. *Johnson & Johnson*, 116 Ohio St. 3d 468, 2007 – Ohio-6948, *Arrington* v. *ER Physician Group* APMC 04-1235 (La. App. 3 Cir. 9/28/06), 940 So.2d 777.

38. A fundamental concern in regards the cap on liability arising out of a nuclear incident is whether or not it would survive a challenge under Article 14 of the Indian Constitution. Article 14 of the Indian Constitution ensures that all citizens of this country enjoy the fundamental right to equality. It assures the citizens that they shall have 'equality before law' and 'the equal protection of laws'. Of significant importance for the purpose of this report is the 'Equal Protection' clause.[50] This clause does not require the State to blindly apply the same law to all the citizens because the fact remains that different citizens are in different situations in different parts of the country.[51] To therefore apply the same law uniformly across a disparate groups of individuals may lead to a situation of grave injustice. Article 14, and the 'Equal Protection' clause contained therein, therefore allows for the State to apply the law differently to different classes of persons provided that the different classes have been reasonably classified and that such classification has a reasonable and rational nexus to the stated objectives of the legislation. Therefore, the state may classify different communities of the same population as forward and backward communities and provide only the backward communities with special benefits, since the aim of the legislation is to improve the social welfare of backward communities. As long as the criteria to differentiate between forward and backward communities are reasonable, the statute will be considered valid under the 'Equal Protection' clause of Article 14. In the last few years the Indian Supreme Court has, in some cases, replaced the 'reasonable standard' test with the 'strict scrutiny' test wherein the State is required to show a 'compelling interest' that justified the discrimination against the person so claiming compensation.[52] The standard of 'strict scrutiny' is however not yet the norm followed by the Supreme Court during the course of judicial review of parliamentary legislations.

39. The possible Article 14 arguments against the Bill are articulated in greater detail below.

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50 *See* M.P. Jain, *Indian Constitutional Law* 5th Ed. (New Delhi: Wadhwa Nagpur, 2003) at 1000 – 1030.

51 *Id. Also see Chiranjeet Lal* v. *Union of India*, AIR 1951 SC 41; *Sri Srinivasa Theatre* v. *Govt. Of Tamil Nadu,* AIR 1992 SC 1004.

52 *See Anuj Garg* v. *Hotel Association of India,* AIR 2008 SC 663; *Ashoka Kumar Thakur* v. *Union of India*, 2008 (5) SCALE 1. *Also see* Tarunabh Khaitan, Beyond Reasonableness - A Rigorous Standard of Review for Article 15 Infringement (April - June 2008), JOURNAL OF THE INDIAN LAW INSTITUTE, Vol. 50, No. 2, pp. 177-208, April-June 2008. Available at SSRN: http://ssrn.com/abstract=1246892.

(i) Discrimination against the operators of conventional power plants**:** A possible argument against the liability cap offered in Clause 6 of the Bill for operators of nuclear plants is that the law protects only the liability of nuclear power plants and not conventional thermal or hydro-electric power generation plants. It would be argued that the artificial capping of the liability of a nuclear power plant makes it possible for them to compete and possibly even under-cut competition from conventional power-plants. It could therefore be argued that Clause 6 of the Bill denies operators of conventional power plants their Article 14, 'right to equality before the law'. This argument however has to necessarily fail on the basis of the 'Equal Protection' clause contained in the latter half of Article 14. The Bill in question creates a clear and distinct class of nuclear plant operators which is defined on reasonable parameters. Further the reasonable classification bears a rational nexus to the stated objectives of providing cheap, sustainable electricity to the people of India. The liability cap proposed in Clause 6 of the Bill achieves this by ensuring that insurance premiums for nuclear power plants are lower than would have been the case in the absence of such a liability cap. The lower insurance premiums would translate into lesser costs being transferred to the consumer therefore fulfilling the policy objective of providing cheap electricity from nuclear power plants. At the end of the day Clause 6 is analogous to a subsidy in the long list of subsidies provided by Parliament to various industries.

(ii) Discrimination against victims of a nuclear accident: The most obvious and logical argument that would take place against a challenge to the liability cap is that while Parliament has not capped the tortious liability of other industrial accidents such as gas leaks, oil spills, (save for those industrial disasters covered under the Public Liability Insurance Act, 1991) it has specifically sought to cap the liability of a nuclear accident despite the fact that the nature of both accidents may be equally disastrous.

Using the language of Article 14, a petitioner could argue that Parliament has engaged in an unreasonable classification in distinguishing nuclear accidents from regular industrial accidents and imposing a cap on liability on only the former. As a result the victims of a regular industrial accident may claim well in excess of 300 million SDR while the victim of

a nuclear accident would be limited by the proposed Bill to claim only 300 million SDR regardless of whether or not the actual liability was more than 300 million SDR.

However, in our view, a cap or limitation on the liability only in the cases of nuclear accidents and not other industrial accidents can be defended, to a limited extent, on the basis of the 'Equal Protection' Clause under Article 14 of the Constitution. The government is in a position to defend the constitutionality of the cap on the ground that the legislation reasonably classifies and differentiates a 'nuclear incident' from other industrial accidents by accurately defining the same in Clause 2(h) of the proposed Bill. The Government may further argue that such a classification bears a reasonable and rational nexus to Government's policies as stated below:

(a) *Firstly* achieving cheap and sustainable electrical power through the operation of nuclear plants by the operators. The government could substantiate this by stating that in the absence of a liability cap for the operator, the insurance premiums of the operator would be so high as to negate the possibility of cheap electricity from nuclear plants owned by the operator. To this extent the Government may successfully argue the special treatment towards the nuclear industry and the requirement of a liability cap for the same.

(b) *Secondly* it could be argued that the limitation of liability bears a rational nexus to the advantages that accrue from becoming a party to the Convention on Supplementary Compensation for Nuclear Damage, 1997 (hereinafter "CSC"). The Convention requires all its members to provide for a minimum liability of 300 million SDR and although India has not yet signed the Convention, the *Statement of Objects and Reasons* to the Bill indicates that the Government intends to sign the Bill. The most important benefit under this Convention is that in case the liability from a nuclear accident increases beyond 300 million SDR, it will require all signatories to the Convention to contribute to the compensation, of the nuclear accident in India, in proportions calculated as per the provisions of the Convention.

40. Although the above arguments substantially establish the legality of the liability cap for the nuclear industry under Article 14, the fact of the matter remains that the liability cap

for both operator and the government is liable to be struck down if challenged on the basis of Article 21 of the Constitution which provides a fundamental right to life. As will be explained in the next section, Article 21 will make it necessary for at least one party i.e. either the Government or the operator to bear unlimited liability in cases of nuclear damage.

B. CONSTITUTIONALITY OF CAPPING OF TOTAL LIABILITY IN RESPECT OF A NUCLEAR INCIDENT

41. According to clause 6(1) of the Bill, total liability in respect of a nuclear incident is capped at 300 million SDR. The difference between the total and the capped liability in respect of an operator (Rs. 500 crores) will be borne by the government according to clause 7(a). Irrespective of whether the capped liability of the operator under the proviso to clause 6(2) is increased or decreased, total government liability is capped, since the outer limit for liability compensation in respect of a nuclear incident is fixed at 300 million SDR. This capping of total liability and consequently governmental liability in respect of nuclear damage has a significant inter-relation with the interpretation of Article 21 by the Supreme Court.

42. Two principles read into Article 21 by the Supreme Court are relevant in this case. First, is the principle of public law compensation payable by the state when Article 21 has been violated. The second is the principle of polluter pays, and its underlying rationale of full compensation.

I. Compensation under article 21:

43. In relation to the payment of compensation under Article 21, in *M. C. Mehta* v. *Union of India*[53] (Oleum Gas Leak case) the Supreme Court held that compensation could be awarded under Art. 32 for violations of Art. 21 under the following situations,

"The infringement of the fundamental right must be gross and patent, that is incontrovertible and *ex facie* glaring and *either such infringement should be on a large scale affecting the fundamental rights of a large number of persons* or it should appear

53 (1987) 1 SCC 395; MANU/SC/0092/1986.

unjust or unduly harsh or oppressing on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the Civil Courts (emphasis supplied)."[54]

The Court further stated,

"If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards...The measure of compensation in such kind of cases must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity by the enterprise."[55]

44. In *Nilabati Behera* v. *Union of India*[56] A.S. Anand J. (as he then was), in a concurring judgment held,

"The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting compensation in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen...The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the

54 *Ibid.*, at ¶7.

55 *Ibid.*, at ¶31.

56 (1993) 2 SCC 746; MANU/SC/0307/1993.

wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen."[57]

45. In *D. K. Basu* v. *State of West Bengal*[58] the Supreme Court held,

"In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do, That award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will of course, depend upon the peculiar facts of each case and no straitjacket formula can be evolved in that behalf."[59]

46. Summing up the aforesaid cases, in *Sube Singh* v. *State of Haryana*[60] the Court said,

"Award of compensation as a public law remedy for violation of the fundamental rights [is] enshrined in Article 21 of the Constitution."[61]

47. From the aforesaid precedents, it is clear that compensation can be awarded by the constitutional courts under Art. 32 and 226. It will be awarded in those cases where there is large scale infringement of fundamental rights and a large number of persons are affected, as had happened in *M. C. Mehta* v. *Union of India*[62] (oleum gas leak case) wherein it was held that the gas leak and debilitating effects therefrom were violative of Article 21. Secondly, the purpose of awarding compensation under Article 32 read with Article 21 is focally directed at making monetary amends for the breach of a public duty. Thus the twin rationales of such compensation are to ensure restoration to *status quo*

57 *Ibid.,* at ¶36.

58 (1997) 1 SCC 416; MANU/SC/0157/1997.

59 *Ibid.,* at ¶55.

60 (2006) 3 SCC 178; MANU/SC/0821/2006.

61 *Ibid.,* at ¶12.

62 (1987) 1 SCC 395; MANU/SC/0092/1986.

ante for the victims who have suffered a violation of their fundamental rights as well as fixing accountability on the government for its breach. Finally, as held in *D. K. Basu* v. *State of West Bengal*[63] the amount of compensation will depend on the facts of each case, and no formula can be used in this regard for a prior determination of the same.

48. It is beyond doubt that nuclear damage, should it occur, will cause damage to a large number of persons and would thus attract the *ratio* in *M. C. Mehta* v. *Union of India*,[64] thereby allowing the courts to award public law compensation under Article 32. In this light, capping of total liability in respect of a nuclear incident may be considered unconstitutional because it hinders the possibility of full compensation to victims for violation of Article 21, fails to hold the government to account, commensurate to the damage it has caused and is tantamount to pre-judging the maximum quantum of liability, irrespective of the facts and circumstances of the case. As has been seen with nuclear incidents in the past, most specifically the Bhopal Gas Tragedy and the Chernobyl Gas Leak, compensation amounts are considerably beyond 300 million SDR. If such damage is allowed to remain un-compensated, as the cap on liability allows, then victims would be left without redress for their losses leading to a violation of Article 21. It would equally fail to serve the significant policy aim of fixing accountability for damage, by allowing both the operator and the government (if government is not the operator itself) to pay compensation disproportionate to the damage caused. Thus capping of liability in respect of a nuclear incident, and impliedly capping governmental liability may be held unconstitutional, for militating against the current interpretation of Article 21 and Article 32 by the Supreme Court, in relation to the possibility of public law compensation to make monetary amends to the losses suffered by victims, especially in large industrial accidents.

II. Polluter Pays Principle

49. According to the Supreme Court, the 'polluter pays' principle derived from international environmental law, is part of Article 21 of the Constitution of India, read with directive

63 (1997) 1 SCC 416; MANU/SC/0157/1997.

64 (1987) 1 SCC 395; MANU/SC/0092/1986.

principles in Articles 47 ("Duty of the State to raise the level of nutrition and the standard of living and to improve public health") and 48A ("State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country") as well as the fundamental duty under Article 51A(g) ("to protect and improve the natural environment including forests, lakes, rivers and wild life..." The clearest statement of the principle, as applied in India, was provided by the Court in *Vellore Citizens' Welfare Forum* v. *Union of India*[65] wherein it was held that,

"The 'Polluter Pays' principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such [the] polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."[66]

50. The principle has been used in several landmark cases in order to affix liability on the polluting industry for both costs of environmental degradation for which a fund is usually created, as well as for damage suffered by victims, chiefly health-related concerns. In the aforesaid case itself, 170 tanneries which were discharging untreated effluents into the river Palar, the primary water source for residents of Vellore, were ordered to pay compensation, which would be determined by an authority, taking into account the environment damage caused and health-related problems suffered by the residents; in *Research Foundation for Science and Technology* v. *Union of India*[67] 133 containers of hazardous waste oil was ordered to be incinerated and the costs of incineration would be borne by the industry in light of the principle; in *M. C. Mehta* v. *Kamal Nath*[68] damages for the harm caused to the environment (interfering with the natural flow and river bed of the Beas River) was ordered to be paid by the offending hotelier respondent on the basis of this principle. Several other cases, both in the

65 (1996) 5 SCC 647; MANU/SC/0686/1996.

66 *Ibid.,* at ¶12.

67 (2005) 13 SCC 186; MANU/SC/0013/2005.

68 (1997) 1 SCC 388; MANU/SC/1007/1997; See also subsidiary decision in *M. C. Mehta* v. *Kamal Nath,* (2000) 6 SCC 213; MANU/SC/0416/2000.

Supreme Court and the High Courts have used this principle to order compensation for environmental damage and ancillary suffering by victims caused by the polluting industry.[69]

51. The underlying objective which emerges from the Court's usage of the polluter pays principle is that the damage caused due to pollution, both on human beings as well as the environment, must be compensated entirely. If the liability caps in clause 6 are tested against these propositions, then it is without doubt that the affixing of liability in respect of a nuclear incident at 300 million SDR is violative of the principle, as it potentially prohibits an effective redressal of all environmental and human losses suffered. It, by implication, also limits the compensation which has to be paid by the government, thereby resulting in the goal of full compensation, the cornerstone of the polluter pays principle, remaining unfulfilled. For these reasons, the capping of liability in respect of a nuclear incident at 300 million SDR falls foul of the polluter pays principle which has been enshrined by the Supreme Court of India in Article 21 of the Constitution.

III. Proviso to Clause 6(2)

52. We must now turn our attention to the proviso to clause 6(2) which allows for an increase or decrease in maximum operator liability. This is problematic for two chief reasons. First, it does not allow for changes in the maximum liability in respect of a nuclear incident; second as it stands, it is arbitrary and hence violative of Article 14 of the Constitution of India. It is clear that the proviso is applicable to clause 6(2) and not clause 6(1). As a result the maximum liability for nuclear damage arising out of a single nuclear incident remains fixed at 300 million SDR and is not subject to revision. As the Chernobyl disaster shows, claims arising out a mass industrial accident are open-ended, continuously increasing as newer side-effects emerge and today amount to nearly 8,000

69 For illustrative examples see *Indian Council for Enviro-Legal Action* v. *Union of India,* (1996) 3 SCC 212, MANU/SC/1112/1996; *The reports and application of 113 villagers of Digwal village* v. *Management of Global Bulk Drugs and Fine Chemicals Ltd.,* MANU/AP/1309/2001; *Deepak Nitrite Ltd.* v. *State of Gujarat,* (2004) 6 SCC 402, MANU/SC/0482/2004.

million GBP which is approximately Rs. 5600 crores.[70] A similarly massive amount of compensation was deemed necessary in the aftermath of the Bhopal Gas Tragedy and continues to be demanded today.[71] This is significantly higher than the cap of 300 million SDR which is Rs. 2045 crores. Thus the inapplicability of the proviso to clause 6(1), thereby preventing a raising of the cap in liability arising out of a nuclear incident, should the occasion so demand, fails to achieve the stated objective of the Bill which is to provide for accident compensation and does not conform to Article 21 of the Constitution for the reasons stated aforesaid.

53. Secondly, the proviso as it stands is liable to be struck down under Article 14 of the Constitution as it does not specify reasonable criteria on which such liability can be increased or decreased by the central government. This, we believe allows for arbitrariness which is an established ground leading to a violation of Article 14 of the Constitution.[72] The only factor to be taken into account is the risk involved in the nuclear installation. This is insufficient because judging the risk involved in the nuclear installation *ex ante,* without guidelines, is vague. This is because the extent of damage, both in terms of geographical scope and effects on persons are difficult to discern.[73] Thus there needs to be further criteria established before liability can be increased or decreased. A useful model could be Art. V.2 of the Vienna Convention which allows liability to be amended (decreased) only after taking into account the nature of the nuclear installation, the nuclear substances as well as the likely consequences of a

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70 Stephen Tromans, *Nuclear Law: The Law Applying to Nuclear Installations and Radioactive Substances in its Historic Context* (Oxford: Hart Publishing, 2010) 166; See also *Contemporary Developments in Nuclear Energy Law* (Nathalie L.J.T. Horbach ed., The Hague: Kluwer Law International, 1999) 54.

71 Ingrid Eckerman *The Bhopal Saga : Causes and Consequences of the World's Largest Industrial Disaster* (Hyderabad: Universities Press, 2005).

72 *E. P. Royappa* v. *State of Tamil Nadu,* AIR 1974 SC 555*; Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597; *Ajai Hasia* v. *Khalid Mujib,* AIR 1981 SC 487.

73 This has been seen especially in the aftermath of the Bhopal Gas Tragedy whose ill-effects continue to be felt today with newer side- effects emerging. See Ingrid Eckerman *The Bhopal Saga: Causes and Consequences of the World's Largest Industrial Disaster* (Hyderabad: Universities Press, 2005).

nuclear incident originating from the installation.[74] These three factors could be introduced into the proviso to clause 6(2) to offset its existing arbitrary formulation.

C. ASSESSING THE ADEQUACY OF THE LIABILITY CAPS

54. The maximum liability for each nuclear incident shall be the Indian Rupee equivalent of 300 million SDR, which, at the time of writing, is currently valued at 1 SDR = 68.1988 INR. The Indian Rupee equivalent is thus more than Rs. 2045 crores (Rs. 20,459,649,552.18 exactly). Of this amount, the liability of a private operator shall be Rs. 500 crores which is less than 1/4th the total amount. Both this baseline liability for operators as well as the maximum liability for each nuclear incident will be compared with the international treaty regime and comparative national legislations to assess their justification.

I. International Treaties

55. Article V(a) of the amended Vienna Convention, allows states to cap liability of an operator with respect to a nuclear incident at an amount not less than 300 million SDR. Though Article V(b) permits a decrease in the capped amount to 150 million SDR, the balance, up to at least 300 million SDR must be provided by the government. As a transitional provision, for fifteen years only (operational till 4 October, 2018) Article V(c) allows the cap to be reduced to not less than 100 million SDR. Signatories to the Vienna Convention are Argentina, Armenia, Belarus, Bolivia, Bosnia, Brazil, Bulgaria, Cameroon, Chile, Columbia, Croatia, Cuba, Czech Republic, Egypt, Estonia, Hungary, Israel, Latvia, Lebanon, Lithuania, Mexico, Montenegro, Morocco, Niger, Nigeria, Peru, Philippines,

74 Art. V.II of the Convention reads,

"Notwithstanding paragraph 1 of this Article, the Installation State, having regard to the nature of the nuclear installation or the nuclear substances involved and to the likely consequences of an incident originating therefrom, may establish a lower amount of liability of the operator, provided that in no event shall any amount so established be less than 5 million SDRs, and provided that the Installation State ensures that public funds shall be made available up to the amount established pursuant to paragraph 1."

Moldova, Poland, Romania, Russia, St. Vincent & the Grenadines, Senegal, Slovakia, Spain, Macedonia, Trinidad and Tobago, United Kingdom, Ukraine, and Uruguay.

56. According to Article III of the CSC, states are liable to ensure 300 million SDR "*or any greater amount"* (emphasis supplied) for compensation in respect of a nuclear incident. For a transitional period of 10 years however the minimum liability which must be borne by states is 150 million SDR. The Convention is silent on operator liability and the proportions in which liability is to be divided between the operator and the state. Argentina, Australia, Czech Republic, Indonesia, Italy, Lebanon, Lithuania, Morocco, Peru, Philippines, Romania, Ukraine and the U.S.A. are signatories to this convention.

57. The Protocol to Amend the Paris Convention, 2004, in recommendation H provides that Article 7 of the Convention should be amended to provide that the minimum amount at which liability for an operator in respect of one nuclear incident can be capped shall be 700 million Euro (approximately Rs. 3960 crores). Further, a reduction is permissible to not less than 70 million Euro (approximately 396 crores). Signatories to the Paris Convention are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

II. <u>Relevant National Legislations in Jurisdictions</u>

58. There are two categories of national law insofar as civil nuclear liability is concerned:

a. Countries that are signatory to one or more conventions, and have national laws to reflect the same:

Amongst countries in this category, **Germany** has unlimited operator liability and requires €2.5 billion security which must be provided by the operator for each plant; in **Finland,** domestic lawrequires operators to take at least €700 million insurance cover, and operator liability is unlimited beyond €1.5 billion (provided under the Brussels Convention); **Russia** has a domestic nuclear insurance pool comprising 23 insurance companies covering liability of $350 million; **Sweden's** Nuclear Liability Act requires operators to be insured for at least SEK 3300 million (EUR 302 million), beyond which the

state will cover to SEK 6 billion per incident; the **Czech Republic** increased the mandatory minimum insurance cover required for each reactor to CZK 8 billion (EUR 296 million) in 2009; in **Ukraine**, operator liability is capped at 150 million SDRs (€180 million); and in the **United Kingdom**, the Energy Act 1983 provides for operator liability to the extent of £140 million and the government provides the remaining amount to comply with the conventions.

b. Countries that are not signatories to the Vienna or Paris conventions, but still have civil nuclear liability laws in place:

Amongst countries in this category, in **China** the government's 1986 'Official reply' ('*guo han 44')* on nuclear liability corresponds with international conventions and though the liability limit was initially 18 million RMB (US$ 2.6 million), it has from September 2007, been largely made to conform with international levels in **Japan, t**wo laws regulate nuclear liability– the Law on Compensation for Nuclear Damage and the Law on Contract for Liability Insurance for Nuclear Damage. Plant operator liability is exclusive and absolute, and power plant operators must provide a financial security amount of 60 billion yen (US$ 600 million). From 2010 this doubles to 120 billion yen (US$ 1.2 billion). Beyond that, the government provides coverage, and liability is unlimited; **Canada**'s Nuclear Liability and Compensation Act is also in line with the international conventions and establishes the licensee's absolute and exclusive liability for third party damage. Passed in 2008, it limits operator liability to $650 million; **Switzerland** has signed but not yet ratified the international conventions. Its domestic laws require operators to insure up to €600 million per installation. Finally in the **United States (signatory only to the CSC)**, the Price Anderson Act devises a complex system for nuclear insurance based on economic channelling of liability. The Price Anderson Act envisages a "three tier" liability. In the first tier the individual operator is liable for a maximum amount of US$ 300 million. The first layer is thus the operator's liability, for which the operators are required to have the maximum level of primary insurance available which at present is US $ 300 million. In the event of an accident the operator's primary insurer makes this payment. The second layer is jointly provided by all US reactor operators through a secondary insurance pool. It is funded through *retrospective* payments in the event of an accident of up to $111.9 million per operator per accident. Each individual operator's

contribution is collected in annual instalments of a maximum of $17.5 million from each operator per year until either a claim has been met, or their maximum individual liability (the $111.9 million maximum) has been reached. This amount is contributed only in the event of a nuclear accident. The Act has several provisions to ensure that the operators have the financial solvency to make this payment as and when the situation arises. The first and the second layer, in combination provide coverage of US$ 10 billion. Beyond this cover and irrespective of fault, the government provides the third layer of compensation to make up the difference between US$ 10 billion and the actual loss caused.

This staggered liability regime ensures that each individual operator is safeguarded from unlimited liability while at the same time giving the entire industry incentive to pool together their resources to ensure accident prevention by spending more on research.

59. From a comparative analysis of these provisions with clause 6 of the Bill, it is clear that in both absolute and relative terms, the Bill provides an extremely low cap on maximum liability in relation to a nuclear incident as well as operator liability. In relation to maximum liability in respect of a nuclear incident, none of the international conventions surveyed provide an absolute maximum extent of damages payable in respect of each nuclear incident. The limitations operate only on operators in respect of each nuclear incident. Hence the Bill, by fixing maximum liability for a nuclear incident at 300 million SDR, as opposed to maximum liability of an operator for a nuclear incident, has chosen to fix the lowest possible cap and hence made the least possible baseline provision for compensation in case of nuclear damage, a position uncommon in international practice.

60. Equally problematic is the issue of operator liability. Under the amended Vienna Convention, which is the leading and most recent international convention in this area, two options for fixing operator liability exist. States can either set operator liability at a minimum of 300 million SDR (Rs. 2045 crores approximately). Alternatively they can set it at a minimum of 150 million SDR (Rs. 1023 crores approximately) with the state providing cover for the additional liability to a minimum total of 300 million SDR.[75] In the

75 A third provision for transitional periods is irrelevant for our purposes.

Bill however operator liability is fixed at Rs. 500 crores which is less than half of the second option above and 1/4th of the first option. Further there is no provision for upward revision of the amount. The value of Rs. 500 crores in ten years will not be the same as the value today. Thus future fluctuations in value of the Indian Rupee have not been taken into account. Hence in absolute terms the operator liability is excessively low and will remain so in light of a lack of provision for its upward revision. Further, Rs. 500 crores is lower than the minimum limit fixed by all international conventions and national legislations surveyed which have been brought up to international levels. These developments should be taken into account by the Bill and the maximum liability of an operator should be appropriately revised.

61. ***On the basis of the need to balance operator liability with full compensation, comply with Supreme Court precedent on this issue and international and comparative practice, we recommend to the Honourable Committee that the following amendments be considered:***

i. Clause 6(1) is made to apply to the maximum liability borne by an *operator* in respect of each nuclear incident and does not fix the maximum in relation to a nuclear incident in its entirety. Hence clause 6(1) should read:

> ***"The maximum amount of liability of an operator in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights."***

ii. Clause 6(2) be deleted and the provisos attached to clause 6(2) transferred instead to clause 6(1);

iii. The current proviso 2 to clause 6(2) [recommended as proviso to clause 6(1)] should specifically contain additional criteria regarding nature of the nuclear installation, nuclear substances used and likely consequences of a nuclear incident which must be taken into account by the government before increasing or decreasing the liability of an operator ;

iv. The reference to clause 6(2) in clause 7(1) be substituted with a reference to clause 6(1).

VI. THE CONSTITUTIONALITY OF CHAPTER III AND V OF THE PROPOSED BILL- THE CLAIMS COMMISSIONER AND THE NUCLEAR DAMAGE CLAIMS COMMISSION

62. Chapter III and V deal with the institutions that the Government proposes to setup in order to deal with claims of compensation that are bound to arise in the aftermath of a nuclear accident. Chapter III provides for the appointment for a Claims Commissioner. As per the scheme of the Bill, as soon as the AERB notifies the nuclear incident, the Claims Commissioner having jurisdiction over that area is required to publicly invite applications from all those persons, or their legal representatives, who have been affected by the nuclear incident. On receiving such applications the Claims Commissioner is required to hear both the operator and the claimant and decide the application within a period of 3 months from the date of receipt and make an award accordingly.

63. Chapter V provides for a Nuclear Damages Claim Commission (NDCC). The NDCC may take over the tasks of a Claims Commissioner if the Central Government is of the opinion that the quantum of damages will cross the liability cap specified in clause 6(2) or if the situation demands a speedier adjudication than would be possible by the Claims Commissioner. As per the provisions of the Bill the NDCC may be staffed by a maximum of 6 members, excluding support staff. The Commission too must adjudicate a dispute within 3 months of an application being filed. The Commission may be dissolved at the discretion of the Central Government under clause 38 of the Bill and any pending matters may be transferred to the Claims Commissioner.

64. The main issues which arise, with respect to the Claims Commissioner and the NDCC relate to the separation of powers and the independence of the judiciary.

A. THE LACK OF INDEPENDENCE OF THE 'CLAIMS COMMISSIONER' FROM THE CENTRAL GOVERNMENT

65. The institution of the Claims Commissioner, as it stands, basically gives the Central Government the power to appoint a person as Claims Commissioner so that he may decide the liability of the operator, which currently can only be the Central Government itself and pass an award against it. Further, the Claims Commissioner, who is appointed

by the Central Government,[76] will have to carry out these functions, knowing fully well that the terms and conditions of his tenure and his salary are both fixed by the Central Government.[77] Given the complete and total control that the Central Government has over the Claims Commissioner it is highly doubtful as to how inclined a Claims Commissioner would be in awarding damages against an operator which is owned or partly owned by the Central Government.

B. THE LACK OF INDEPENDENCE OF THE NUCLEAR DAMAGES CLAIMS COMMISSION FROM THE CENTRAL GOVERNMENT

66. The above concerns, with respect to the Claim Commissioner are substantially applicable to the Nuclear Damages Claims Commission (NDCC). The appointments to the NDCC are decided by the Central Government.[78] Although the Act provides for a fixed term of 3 years for the members of the NDCC,[79] the Central Government has the power to remove these members on a number of grounds.[80] Also the salary and other terms of conditions of the members are decided by the Central Government itself.[81] The only safeguard with regard to salary is the proviso to clause 22 which states that the salary, allowances and other terms may not by varied to the disadvantage of the members of the Commission. With regard to tenure of appointment, Clause 21 of the Bill provides for a three year term with a possibility of a further extension of another three years term. This possibility of an extension creates a conflict of interest because all those members who want an extension may not pass orders prejudicial to the Central Government since it is the Central Government that controls the re-appointment scheme. Further, the support staff and other employees who are to assist the Commission are to be provided for by the Central Government as it deems fit.[82] If the support staff is weak, the Commission itself

76 Clause 9(2) of the Bill.

77 Clause 11 of the Bill.

78 Clause 20 of the Bill.

79 Clause 21 of the Bill.

80 Clause 24(2) of the proposed Bill.

81 Clause 22 of the proposed Bill.

82 Clause 30 of the proposed Bill.

will be weak.

C. THE CONSTITUTIONAL REQUIREMENT OF MAINTAINING THE INDEPENDENCE OF 'JUDICIAL OFFICES'

67. Since the Claims Commissioner is in effect carrying out an intrinsic judicial function, i.e. deciding a *lis* between two parties, it is for all practical and legal purposes a 'Judicial Office'/Tribunal. This is further substantiated by the fact that the Bill expressly excludes the jurisdiction of all Civil Courts in matters related to liability arising from a nuclear incident. Excluding the jurisdiction of Civil Courts and creating specialized Tribunals to handle specific adjudication is not prohibited by the law and in fact the Constitution has been amended to allow for the creation of specialized tribunals under Articles 323A and 323B. While creating these Tribunals, Parliament has the power to prescribe the criteria for appointments to the tribunal as also the terms and conditions of the members while they are in office. However, Parliament is under a constitutional obligation to ensure that such Tribunals are able to function in a manner independent from any kind of interference from the Central Government. Therefore while Parliament is well within its power to exclude the jurisdiction of the High Court and the Civil Courts, it is under the obligation to ensure that the Tribunals, taking over these functions, enjoy the same level of independence enjoyed by the High Court and Civil Courts. This obligation arises from a combination of Article 50 of the Constitution along with a plethora of Supreme Court precedents which have held that separation of powers and the independence of the judiciary are basic features of the Indian Constitution.[83]

68. This principle has been reiterated in a recent Constitutional Bench judgment of the Supreme Court in the case of *Union of India* v. *R. Gandhi, President of the Madras Bar Association*[84] wherein the petitioners successfully challenged the constitutionality of the proposed National Company Law Tribunal (NCLT). In pertinent part, the Supreme Court held the following:

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83 *See generally Keshavananda Bharati* v. *State of Kerala,* 1973 (4) SCC 225; *Chandra Mohan* v. *State of Uttar Pradesh,* AIR 1966 SC 1987; *Indira Gandhi* v. *Raj Narain,* 1975 Supp SCC 1; For tribunalisation of justice and its constitutionality see *Sampath Kumar* v. *Union of India,* (1987) 1 SCC 124; L. *Chandra Kumar* v. *Union of India,* 1997 (3) SCC 261.

84 Civil Appeal No. 3067 of 2004 before the Supreme Court of India. Judgment delivered on 11th May, 2010.

"35. But when we say that Legislature has the competence to make laws providing which disputes will be decided by courts and which disputes will be decided by Tribunals, it is subject to constitutional limitations, without encroaching upon the independence of judiciary and keeping in view the principles of Rule of Law and separation of powers. If Tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such Tribunals should possess the independence, security and capacity associated with courts...

40. Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive. Another facet of Rule of Law is equality before law. The essence of equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the Executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model.

41. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum."

69. In order to ensure separation of powers and independence of the judiciary, the Honourable Committee should ensure that the appointment process and the removal process are vested in committees staffed by a majority of those persons whose interests do not conflict with those of the Central Government in order to maintain its independence. As per Supreme Court precedents the delegation of 'essential functions'

is unconstitutional and any such provision delegating 'essential functions' is liable to be severed from the main legislation.[85]

70. Under the present scheme of the proposed Bill, of the power to appoint Claims Commissioner vests solely with the Central Government under Clause 9(2) of the Bill. The appointment process to the NDDC under is more elaborate since Clause 20 of the proposed Bill specifies that the Chairman and Members of the NDCC will be appointed on the recommendations of a Committee consisting of:

(i) Cabinet Secretary;

(ii) Secretary, Department of Atomic Energy;

(iii) Secretary, Ministry of Law & Justice

71. As is obvious from above, the entire appointment committee consists of only senior government bureaucrats. It may also be clarified to this Honourable Committee that most judicial appointments are, at least *de jure*, made either by the President of India or in his/her name. Of late the best practices adopted for some statutory bodies, such as the Central Vigilance Commission, includes recommendations from both the Prime Minister and the Leader of Opposition.[86] In the case of *Union of India* v. *R. Gandhi, President of the Madras Bar Association*[87] the Supreme Court was confronted with the question of the composition of the Appointment Committee to the National Company

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85 *Re: Delhi Laws Act*, [1951] S.C.R. 747.

86 Section 4 of the Central Vigilance Commission Act, 2003 (No. 45 of 2003) reads as follows: **4.** (*1*) *The Central Vigilance Commissioner and the Vigilance Commissioners shall be appointed by the President by warrant under his hand and seal: Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of—*

(a) the Prime Minister — Chairperson;

(b) the Minister of Home Affairs — Member;

(c) the Leader of the Opposition in the House of the People —Member.

Explanation.—For the purposes of this sub-section, "the Leader of the Opposition in the House of the People" shall, when no such Leader has been so recognised, include the Leader of the single largest group in opposition of the Government in the House of the People.

87 Civil Appeal No. 3067 of 2004 before the Supreme Court of India. Judgment delivered on 11th May, 2010.

Law Tribunal (NCLT). Clause 10FX of that Bill provided for a selection committee consisting of either the Chief Justice of India or his representative, a Secretary from the Ministry of Finance, a Secretary from the Ministry of Company Affairs, a Secretary from the Ministry of Labour and Secretary from the Ministry of Law and Justice. However in order to ensure that the independence of the appointment process the Supreme Court, held that the appointment committee should consist of the Chief Justice of India or his nominee, a senior judge of the Supreme Court or a Chief Justice of the High Court, the Secretary from the Ministry of Finance and Company Affairs & Secretary from the Ministry of Law and Justice [para 56(ix)(a)]. The Supreme Court therefore sought more judicial representation in the appointment process to the NCLT.

72. ***It is therefore recommended to this Honourable Committee that in the interest of ensuring judicial independence, both, Clause 9(2) and Clause 20 of the Bill be amended to ensure that appointments in both cases i.e. as Claims Commissioner or Member of the NDCC are made by a committee consisting of at least some Judges or Ministers. In no case should the Honourable Committee allow only bureaucrats to be members of the appointment committees. We further recommend that in the interest of gender equality, the word 'Chairman' in Clause 20 be replaced with the gender neutral 'Chairperson'.***

D. THE CRITERIA FOR APPOINTMENT AS CLAIMS COMMISSIONER OR A MEMBER OF THE NDCC – IS IT CONSTITUTIONAL?

73. As per cause 10 of the proposed Bill the Central Government may appoint as a Claims Commissioner a person who is either (a) a District Judge or (b) a sitting or retired Joint Secretary, or equivalent post, in the Central Government and who "*possesses special knowledge in law relating to nuclear liability arising out of nuclear incident*".

74. As per Clause 20(4)(a) of the proposed Bill a Committee of senior civil servants of the Central Government may appoint as a member of the NDCC only such person who has held or is holding or qualified to hold the post of Additional Secretary to the Government of India or any other equivalent post, provided that such person possesses special knowledge in law relating to nuclear liability arising out of nuclear incident.

75. While it is legally permissible to have former government officers as members of Tribunals, we would like to point out that the Constitutional Bench of the Supreme Court held in the case of *Union of India* v. *R. Gandhi, President of the Madras Bar Association*[88] that it is unconstitutional for *sitting* bureaucrats to be members of any tribunal as the same would dilute the independence of a tribunal. In pertinent part the judgment of the Supreme Court stated the following as the law of the land:

"*45. The issue is not whether judicial functions can be transferred from courts to Tribunals. The issue is whether judicial functions can be transferred to Tribunals manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. We have already held that the Legislature has the competence to transfer any particular jurisdiction from courts to Tribunals provided it is understood that the Tribunals exercise judicial power and the persons who are appointed as President/Chairperson/Members are of a standard which is reasonably approximate to the standards of main stream Judicial functioning. On the other hand, if a Tribunal is packed with members who are drawn from the civil services and who continue to be employees of different Ministries or Government Departments by maintaining lien over their respective posts, it would amount to transferring judicial functions to the executive which would go against the doctrine of separation of power and independence of judiciary...*

47. A lifetime of experience in administration may make a member of the civil services a good and able administrator, but not a necessarily good, able and impartial adjudicator with a judicial temperament capable of rendering decisions which have to (i) inform the parties about the reasons for the decision; (ii) demonstrate fairness and correctness of the decision and absence of arbitrariness; and (iii) ensure that justice is not only done, but also seem to be done.

48. We hasten to add that our intention is not to say that the persons of Joint Secretary level are not competent. Even persons of Under Secretary level may be competent to discharge the functions. There may be brilliant and competent people even working as

88 Civil Appeal No. 3067 of 2004 before the Supreme Court of India. Judgment delivered on 11th May, 2010.

Section Officers or Upper Division Clerks but that does not mean that they can be appointed as Members. Competence is different from experience, maturity and status required for the post."

84. On the basis of this precedent, it is our considered opinion that it is unconstitutional for Parliament to allow sitting bureaucrats to be either the Claims Commissioner or alternatively a member of the NDCC.

85. ***We recommend to the Honourable Committee that clause 10(b) and clause 20(4)(a) of the Bill be amended accordingly, to restrict sitting bureaucrats from appointment as Claims Commissioner and members of the NDCC.***

E. THE STATUTORY PROCESS FOR THE REMOVAL OF THE CLAIM COMMISSIONERS

86. While clause 24 of the Bill vests in the Central Government the power to remove a member from the NDCC, there is surprisingly no prescribed procedure in the Bill for the removal of the Claims Commissioner. Referring to the case of *Union of India* v. *R. Gandhi, President of the Madras Bar Association*[89] which definitively lays down the law on this point, the Supreme Court of India has held that a member or Chairperson of the NCLT can be suspended only with the concurrence of the Chief Justice of India.

87. ***In order to comply with Supreme Court precedent, the Honourable Committee may strongly recommend to Parliament that the proposed Bill provide for a similar process to remove the Claims Commissioner. This process may also be utilised for removal of a member/Chairperson of the NDCC, should the Honourable Committee deem it expedient.***

F. CLAUSE 30 OF THE PROPOSED BILL VESTS IN THE CENTRAL GOVERNMENT ALL POWERS TO PROVIDE THE NDCC WITH SUPPORT STAFF

88. The NDCC will require a functioning secretariat in order to effectively carry out its function. The Bill provides the Central Government with all the powers to provide for such support staff and employees to staff the secretariat. The Bill does not state which

89 Civil Appeal No. 3067 of 2004 before the Supreme Court of India. Judgment delivered on 11th May, 2010.

Ministry exactly will be vested with this responsibility. Again, in the case of *Union of India* v. *R. Gandhi, President of the Madras Bar Association*[90] the Supreme Court in pertinent part has stated the following:

"The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department." [para 56(xiii)]

89. ***The Honourable Committee may therefore consider amending Clause 30 of the Bill to specifically mention the Ministry of Law and Justice as the relevant Ministry.***

G. THE ECONOMIC & PRACTICAL VIABILITY OF CLAIMS COMMISSIONERS AND THE NUCLEAR DAMAGE CLAIMS COMMISSION

90. One of the most serious questions before this Committee is whether the task of deciding liability of nuclear plant operators should even be vested with the Claims Commissioners and the Nuclear Damage Claims Commission. As the Honourable Committee is already aware, the history of nuclear accidents in India has been relatively low when compared to other industrial or environmental disasters. In this backdrop it is necessary to ask the Government whether we need dedicated institutions such as the NDCC to deal with such disasters. Moreover since both the NDCC and the Claims Commissioners are notified by the Central Government only after the occurrence of a nuclear accident, a lot of time will be spent in merely appointing the members and allocating office spaces and sourcing the support staff. Given that both these institutions seek to respond to emergency situations it is not in public interest to waste time in technicalities such as the notification process, the appointment process, the allotment of office space, the appointment of support staff etc. These institutions may therefore end up being inefficient and also a drain on the public exchequer.

90 Civil Appeal No. 3067 of 2004 before the Supreme Court of India. Judgment delivered on 11th May, 2010.

91. One of the options before the Honourable Committee is to explore the possibility of allocating the tasks of liability and compensation claims to the National Green Tribunals, which will be setup once the National Green Tribunal Bill, 2009 is passed by the Rajya Sabha. This Honourable Committee has already debated the National Green Tribunals Bill, 2009 and has also submitted its Report on the Bill to Parliament.[91] These specialized tribunals are being setup for the purpose of speedy adjudication of environmental disasters and will be adequately staffed by not only judicial members but also expert members who are well versed in environmental sciences. An added advantage of these specialized tribunals is that they will have certain amount of flexibility in deciding their location.[92] Therefore they will be able to have their hearing close to the site of a nuclear accident, thereby ensuring the victims do not have to travel long distances for their hearings. Since environmental disasters, especially from industrial pollution, are unfortunately a regular phenomenon in this country it is expected that the National Green Tribunal will be working around the year and it is presumed that it will eventually develop a high level of expertise in dealing with issues of liability and compensation claims. Since environmental disasters and nuclear accidents will be of similar profile, in the sense that both will affect the environment and a large number of people, it would be administratively efficient and financially viable to vest all adjudicatory functions under the proposed Bill with the National Green Tribunals. However any such decision must be taken only after the Honourable Committee has invited the views of the Ministry of Environment and Forest Affairs.

92. ***We therefore recommend that the Honourable Committee explore the possibility of allocating the tasks of liability and compensation claims to the National Green Tribunals, which will be setup once the National Green Tribunal Bill, 2009 is passed by the Rajya Sabha, in order to achieve administrative efficiency, speed and functional synergy.***

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91 203RD REPORT ON THE NATIONAL GREEN TRIBUNAL BILL, 2009, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON SCIENCE & TECHNOLOGY, ENVIRONMENT & FORESTS (2009).

92 *Ibid* at Para 8.8.

VII. JUDICIAL REVIEW OF THE DECISIONS OF THE CLAIMS COMMISSIONER AND THE NUCLEAR DAMAGE CLAIMS COMMISSION

93. Under clause 16(5) and clause 32(10) of the Bill, all decisions of the Claims Commissioner and the Nuclear Damage Claims Commission (NDCC) respectively are final in the sense that the same cannot be appealed to a higher court. It must however be pointed out to the members of the Honourable Committee that even with this restriction it is still possible to file a writ petition against this Order before the High Court under Article 226 of the Constitution. In the case of *L. Chandra Kumar* v. *Union of India*[93] the Supreme Court of India has made it amply clear that the jurisdiction conferred upon the High Courts under Articles 226 and 227 and upon the Supreme Court under Article 136 was a part of the basic structure of the Constitution and that the same cannot be excluded by a parliamentary legislation. It is thus obvious that judicial review of some kind will exist, the question is just what extent of review will be possible: will it be review like administrative actions are reviewed (the *Wednesbury* principle, which just checks for illegality, arbitrariness and irrationality) or substantive review, which looks at the content of decision making.

94. In the case of *Tata Cellular v Union of India*[94] the Supreme Court quoted the following paragraph with approval:

"A modem comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction:

*"**Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final.** At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision.*

93 1997 (3) SCC 261.

94 AIR 1996 SC 11.

The courts will not themselves embark on a rehearing of the matter... But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. The courts will ensure that the body acts in accordance with the law. .. If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. .. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding so unreasonable that a reasonable person would not have come to it then again the courts will interfere. If the decision making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorized by law, its decision will be set aside."

95. Some foreign legislations on nuclear liability are also clearer about the extent of review possible. An example of this is provided by sections 55 to 57 of Canada's Nuclear Liability and Compensation Act.[95] While decisions of the tribunal are generally conclusive and final, one level of statutory appeal is provided for. Further, the Act allows for limited circumstances in which courts have review jurisdiction. While the Canadian act seems to restrict review jurisdiction to operator claim complaints, it shows that it is feasible to provide a clearer right to appeal or right of review to both victims and operators.

96. As already stated above, regardless of Clause 16(5) and Clause 32(10) of the Bill, High Courts already have the power under Articles 226 and 227 to review the workings and decisions of the NDCC and the Claims Commissioner. The degree of judicial review however is left to the discretion of the High Court. This discretionary power of the High Court can be clarified by Parliament by providing the aggrieved party with a statutory

95 Decisions of the tribunal can be reviewed in a court only on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of the *Federal Courts Act*, that is, if the Tribunal acted beyond its jurisdiction or refused to exercise its jurisdiction; failed to observe a principle of natural justice or procedural fairness or any other required procedure; or the decision was founded on fraud or perjured evidence. For more see Legislative Summary of Bill C-20, "An Act respecting civil liability and compensation for damage in case of a nuclear incident" available at http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c20&source=library_prb&Parl=40&Ses=2#6rehearing

right to appeal on limited grounds. A clarification of this nature will greatly reduce the scope for the High Court's discretion and provide clarity as well as uniformity.

97. ***In light of the Supreme Court precedents which necessarily vest the power of judicial review in the High Court, pursuant to a tribunal decision, the Honourable Committee may seek to insert a statutory right of appeal on limited grounds to the High Court by amending clause 16(5) and clause 32(10). This will clarify the current state of affairs under which the High Court may exercise considerable discretion while entertaining a writ petition against the orders of the NDCC or the Claims Commissioner.***

VIII. CLAUSE 46 & CONCURRENT LIABILITY OF THE OPERATOR UNDER OTHER LAWS

A. TORT LAW LIABILITY IN CIVIL COURTS

98. Clause 46 of the Bill reads: "The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, be instituted against such operator." There are two issues which arise regarding the question of concurrent liability under other laws for the time being in force. The first relates to claims under tort law for victims of nuclear damage; the second relates to claims under special environmental legislations by the state for nuclear damage caused.

99. The first issue relating to clause 46 is with regard to claims by victims of nuclear damage under other laws. Apart from clause 46, the other relevant clauses are clause 9(1) and clause 35. Clause 9(1) reads thus: "Whoever suffers nuclear damage shall be entitled to claim compensation in accordance with the provisions of this Act." Clause 35 expressly seeks ouster of civil court jurisdiction. It reads: "No civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter, which the Claims Commissioner or the Commission, as the case may be, is empowered to adjudicate under this Act, and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

100. A plain reading of clause 9 suggests that it is a permissive provision, allowing those who have suffered nuclear damage to claim compensation under the Act, rather than a restrictive provision which *only* allows those with claims relating to nuclear damage to claim compensation under the Act. Clause 35 excludes civil court jurisdiction for claims which may be brought before the Claims Commissioner or the Commission under clause 9(1) of the act. Criminal proceedings are thus not ousted. The civil claims

referred to, are those which arise out of a nuclear incident leading to nuclear damage, falling under one of the substantive heads listed in clause 2(f)(i)-(vii). This would ordinarily suggest that no claim under tort law or any other law in force, brought by way of suit in a civil court would be permissible since the claim would arise out of nuclear damage, would consequently be covered under clause 2(f) thereby being within the jurisdiction of the Claims Commissioner or the Commission, and hence ousted from the jurisdiction of the civil court.

101. However the wording of clause 46 is problematic. Clause 46 contains two propositions. The first proposition states that the Act shall not override any other law for the time being in force and shall merely supplement them. If there is no inconsistency between the Act and other laws for the time being in force, this proposition may be read literally. But if an inconsistency arises, then the Act itself does not contain an overriding clause. Hence courts will have to construe whether this Act or the law to the contrary, will override. Given the special nature of this Act, it is likely that provisions of this Act will prevail, in light of the canon of statutory construction that special statutes override general statutes.

102. The second provision however is more problematic. A literal reading suggests that nothing contained in the Act ("herein") shall exempt the operator from *any* proceeding which might be instituted against him, apart from this Act. This clause is ambiguously worded owing to two contradictory references to the Act. The first reference ("herein") suggests that nothing contained in the Act shall exempt the operator from any proceeding. The second reference ("apart from this Act") qualifies the first by allowing exemption of operators from proceedings brought elsewhere, which might have been brought under this Act. This makes the wording of the clause circular. This is primarily owing to the ambiguity of the phrase "which might, apart from this Act". Does this mean all other proceedings apart from this Act? Alternatively does it mean all other proceedings apart from those which are to be specifically brought under this Act? The said ambiguity needs clarification.

103. In our opinion, it is anomalous that the act, despite creating a special machinery for adjudicating claims of those suffering from nuclear damages, would be equivocal

about allowing the same claims to be litigated under other laws. The words 'apart from this Act' are unclear, vague and thus do not clearly state that such civil proceedings cannot be instituted. This may lead to multiplicity of proceedings, duplication of work and would in essence render meaningless the liability cap and the insurance scheme mandated under clauses 6, 7 and 8 of the Act. In brief, it would militate against the very rationale for providing a special statute which would override the provisions of a general statute *pro tanto.*

B. LIABILITY UNDER SPECIAL ENVIRONMENTAL LEGISLATIONS

104. The next question that arises on reading Clause 46 of the Bill, is whether or not the liability cap in Clause 6 extends to those legal actions that are initiated under other special purpose environmental legislations.

105. Under special purposes environmental legislations such as the Water (Prevention and Control of Pollution) Act, 1974, the polluter is liable to pay all such sums that may be incurred by the Government in cleaning up the pollution caused by the polluter. Under Section 33 (4) the State or Central Pollution Control Boards, constituted under the Act, may move an application to a Court to make the polluter pay the Board all such sums that may have been incurred by the State in cleaning up the affected water body. Similar powers are granted to State and Central Boards under Section 22(A)(4) of the Air (Prevention and Control of Pollution) Act, 1981.[96] Similarly, Section 9(3) of the Environment Protection Act, 1986 allows any authority or agency to recover from the polluter any amounts that may have been incurred by any such authority or agency in effecting remedial measures to combat the pollution.

106. There are no liability caps under any of these legislations. Moreover, as explained below, all the above three statutes have savings clauses:

96 It should be noted that the Air Act, 1981 unlike the Water Act, 1974 has a saving clause in Section 52 which states that "*Save as otherwise provided by or under the Atomic Energy Act, 1962 (33 of 1962), in relation to radioactive air pollution the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.*" However since the Atomic Energy Act, 1962 does not mention any specific compensatory mechanism, the Air Act, 1981 will still be operational in those respects.

Section 60 of the Water Act, 1974: *Overriding effect – The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.*

Section 52 of the Air Act, 1981: *Effect of other laws: Save as otherwise provided by or under the Atomic Energy Act, 1962 (33 of 1962), in relation to radioactive air pollution the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.*"

Section 24 of the Environment Act, 1986: *Effect of other laws: (1) Subject to the provisions of sub-section (2), the provisions of this Act and the rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.*

(2) Where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act.

107. As is obvious from the aforesaid sections, special purpose legislations operate in their own sphere without any restraints from other legislations such as the proposed Bill. A State Pollution Control Board could therefore easily argue that it should be compensated for the entire sum of its claims since the legislations in question do not provide for a cap of liability themselves.

108. The manner in which clause 46 has been drafted leaves considerable ambiguity as to whether Clause 6 (cap on liability) will apply to claims made by State and Central authorities under the special purpose environmental legislations discussed above especially since a nuclear accident causing nuclear damage will necessarily violate all three legislations stated above. The operator could technically make the argument that a special purpose legislation such as the Bill under consideration would impliedly override other legislations dealing with compensation for pollution. However since Clause 46 of the Bill does not claim to override all other legislations in the field it is completely possible for State Pollution Control Boards to argue against the liability cap proposed by Clause 6 of the Bill. This matter hence requires urgent clarification.

109. ***On the basis of the aforesaid discussion regarding concurrent liability, we recommend:***

(i) Clause 9 be amended to read:

"Whoever suffers nuclear damage shall only be entitled to claim compensation in accordance with the provisions of this Act."

(ii) Clause 46 be amended to read:

"The provisions of this act shall be in addition to, and not in derogation of, any other law for the time being in force.

Provided no civil proceeding, arising out of nuclear damage, covered by the provisions of this Act, shall be instituted against the operator or any other person under any other law for the time being in force."

(iii) ***The Central Government must be made to clarify the question of whether or not the State Pollution Control Boards can sue for liability higher than as provided for in Clause 6 of the Bill by either amending the environmental legislations surveyed to make a specific exception for this Bill or Clause 46 of the Bill itself***

IX. OMISSION OF VICARIOUS CRIMINAL LIABILITY FOR NEGLIGENCE

110. The Bill's objective, as is evidenced by the *Statement of Objects and Reasons* is to ensure that damage caused due to a nuclear accident is adequately compensated. It is hard to find fault with an objective as salutary as this. However the objection to this has to do *not* with what the Bill *says* but rather with what it *leaves out* from saying. What it leaves out is something that the Honourable Committee may consider an equally significant objective which the Bill *ought* to espouse. This objective, which a Bill of this nature *ought* to espouse is to optimally ensure the *prevention* of nuclear accidents. The telling flaw of the Bill is that it altogether ignores this objective. Highly regarded exponents of the common law, beginning with William Blackstone, have emphasized that the *primary* object of a law governing civil wrongs is to ensure *prevention* of wrong and the *secondary* object is to provide compensation.[97] As the eminent jurist H.L.A.Hart argued secondary obligations of *repair* are a mere *pis aller*(back up) when the *primary* obligation of prevention of a wrong, break down.[98] The law must try to do its best to ensure accident prevention: it must increase the possibilities of the wrong not taking place in the first place. Subsequently if the wrong does occur there must be adequate repair.

111. The Bill is not sensitive enough to this primary objective. One key omission, especially significant in the aftermath of the Bhopal Gas Tragedy and the lessons learnt, is the issue of vicarious criminal liability for negligence in the event of a large industrial accident. The Bill, in its current form, does not provide for any criminal liability (vicarious or otherwise) in the event of *negligence* of the operator causing a nuclear accident. The absence of this provision detracts from the objective of accident prevention. Vicarious

97 Peter Birks ' Primary and Secondary Obligations' in D. Owen *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995).

98 H.L.A.Hart 'Legal Duty and Obligation' in *Essays on Bentham* (Oxford: Clarendon Press, 1982) at 253-54.

criminal liability for negligent operations would provide an adequate deterrent to negligence in the operation of a nuclear establishment. There ought to be vicarious criminal culpability and *exemplary* penal liability for *negligently* causing a nuclear accident, leading to loss of life and property. Such a penal provision assumes special significance for furthering the primary object of accident prevention, given that in the present statute the cap on civil liability for a nuclear accident is fixed at present at an artificially low amount. This low cap does not incentivize optimum accident prevention. In other words a low civil liability cap *dilutes* incentives of the operators for optimally ensuring accident negligent accident prevention. Such a penal provision would incentivize measures by the operator to take maximum care and aid in accident prevention and make up to some extent for the dilution of incentives to take maximum care for accident prevention. As Shavell notes ' a final way of *mitigating dilution of incentives* is resort to criminal liability. A party who would not take care if only his assets were at stake might be induced to do so for fear of criminal sanctions'.[99] Hence vicarious criminal liability for negligence is particularly significant and pertinent given the artificially low cap on civil liability.

A. THE NEED FOR VICARIOUS CRIMINAL LIABILITY

112. The Bill must impose vicarious criminal liability for negligence. *Why* is vicarious criminal liability so important and *who* should be vicariously criminally liable? The answer to both these questions is intertwined. Those in the helm of affairs in the company are in the best position to ensure that they have best operational practices that maximize the possibility of best possible care to be taken to avoid accidents. Vicarious criminal liability is the best way to ensure that those who are in the helm of affairs of the nuclear operator have an overwhelming incentive to ensure prevention of 'negligent' operations. The best way to ensure safety and prevent negligence would be to make the top executive officers of the company liable; furthermore the senior officers in charge of the day to day operations of the nuclear establishment including those responsible for the technical functioning of the nuclear plant ought to be liable as well.

99 Steven Shavell, *Foundations of Economic Analysis of Law* (London: Belknap, 2004) at 232.

Vicarious criminal liability may be unjustified and even unreasonable in most spheres of activity. However operations of a nuclear establishment must be viewed differently from other ordinary activities, even other ordinarily risky activities. The potential for loss of life and loss of property in nuclear operations is so huge that it *justifies* any measure that optimally ensures prevention of such loss. As argued here vicarious criminal liability of those at the helm of affairs in the company is the measure that would optimally ensure deterrence.

B. THE NEED FOR SPECIFIC PROVISION IMPOSING VICARIOUS CRIMINAL LIABILITY IN THE PRESENT BILL

113. Given that vicarious criminal liability is so crucial for furthering the primary object of the present Bill, the next question that immediately arises is whether the provisions of the Indian Penal Code are not sufficient for this purpose. There are two provisions which may be thought to adequately cover the cases being referred to here. The two provisions are Section 304 (Culpable Homicide not amounting to murder punishable with up to 10 years imprisonment) and Section 304 A (Death by rash and negligent act not amounting to culpable homicide punishable with up to 2 years imprisonment).

114. It must be noted that the said provisions of the Indian Penal Code which would be attracted in such cases do not provide an adequate sanction in this context primarily because it is well settled position of law that the Indian penal code does not recognize a general principle of vicarious liability. In several judgments, most prominently, *Maksud Saiyed* v. *State of Gujarat*[100] and *S .K. Alagh* v. *State of Uttar Pradesh*[101], the Supreme Court held that the Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company; and that vicarious liability of the Managing Director and Director would arise only if any provision exists in the statute providing for the same. In a recent judgment giving a clear summary of the law Justice Muralidhar of Delhi

100 (2008) 5 SCC 668.

101 (2008) 5 SCC 662.

High Court in *Avnish Bajaj* v. *State of Delhi*[102] observed that in order to fasten vicarious criminal liability on directors and others in charge of the affairs of a company a specific provision to that effect in a statute is absolutely essential and that in absence of such a specific provision no vicarious criminal liability can be assumed. Justice Muralidhar noted:

" As far as the IPC is concerned there is no automatic criminal liability of a director where the company is arraigned as an accused... The absence of such a provision in the IPC could be viewed as a lacuna but is not to be lightly presumed as there have been numerous statutes enacted by Parliament thereafter which have incorporated such provisions. (paragraphs 16, 17)"

115. The introduction of such vicarious criminal liability in the Bill would not be a revolutionary or unprecedented move. There are several statues that specifically impose vicarious criminal liability on directors, managers and others in the helm of a company's affairs. In fact the Atomic Energy Act 1962 also imposes vicarious criminal liability for contravention of the Act and rules made therein. Some other statutes specifically providing for vicarious liability are:

- **Section 47 of Water (prevention and control of pollution) Act, 1974;**
- **Section 40 of** Air (prevention and control of pollution) Act, 1981;
- Section 141 of Negotiable Instruments Act 1881;
- Section 140 of Customs Act 1962;
- Section 33 of Insecticides Act 1968
- Section 10 of Essential commodities Act 1955;
- Section 85 of Information Technology Act 2000

102 MANU/DE/0851/2008.

116. Notably, the two statutes dealing with environmental protection noted above, the Water Act and the Air Act expressly recognize the principle of vicarious criminal liability. Given the magnitude of damage to human life and property and the environment that can be caused by a nuclear accident, it is important that vicarious criminal liability be introduced by the present Bill.

117. The recent developments in the Bhopal Gas tragedy case also underline the crying need for such a provision. Recently Justice Ahmadi, in interviews to several newspapers, justified his quashing of charges under Section 304 in 1996 against the accused in the Bhopal Gas tragedy case, on the ground that the Indian Penal Code does not recognize vicarious liability.[103] The Law Minister Shri Veerappa Moily commenting on the lessons for legal reform to be learnt from the Bhopal case noted that "There is need to take note of the lessons learnt [from the Bhopal case], while looking at [questions of] investigation, liability, compensation and punishment."[104]

118. The judgments quoted aforesaid emphasise the need for a specific law imposing vicarious criminal liability for negligence, with specific emphasis on the act of negligently causing death. The present Bill must incorporate such a clause. It must also be stressed that the punishment provided must be contingent on the gravity of the loss caused. Loss to human life due to negligence must invite punishment of *at least* 10 years (the equivalent of Section 304 of the IPC). As Mr. Moily himself noted in the interview referred to hereinabove the punishment of merely two years imprisonment under S. 304A of the IPC for 'human error' resulting in losses on the scale of the Bhopal tragedy, amounted to virtually "extinguishing the criminal charge."[105] Hence it is necessary that the extent of punishment reflect the gravity of the loss caused.

119. There are two further points that need to be made in way of clarification. It was noted earlier that the Atomic Energy Act 1962 has provision for vicarious criminal liability. The Atomic Energy Act 1962 and the rules made thereunder, are in the form of safety

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103 *The Hindu*, 8th June 2010. http://beta.thehindu.com/news/national/article450222.ece.

104 *The Hindu* 7th June 2010 . http://beta.thehindu.com/news/national/article448978.ece.

105 Reported in *The Hindu* 7th June 2010 . http://beta.thehindu.com/news/national/article448978.ece.

regulations; they purport to give specifications for the operation of a nuclear establishment and purport to punish transgressions thereof. In light of these provisions, it may be argued that there may be no need for additional safety regulations to be incorporated by the present Bill. Despite these regulations, we believe, there is still a pressing need for a provision penalizing negligently causing a nuclear accident for two reasons. First, the presence of safety regulations with specific requirements can never rule out the possibility of negligent operations or human error. Even after having met each of the safety regulatory requirements, there are a myriad ways in which negligence can creep into the operation of an establishment which is otherwise set up and geared to operate in accordance with safety regulations. The likelihood of an accident caused due to negligence, even though the establishment has met each and every requirement specified under the Atomic Energy Act 1962 is a live possibility. The culpability of negligence is apt to act as a 'catch all' category, calculated to root out any negligent operation. The safety regulation prescribes a minimum standard that must be met in the setting up and operation of a plant, a provision penalizing negligently causing an accident will engender technology and care on part of the operator to a far greater extent than that specified by the safety regulations. Moreover one needs to be mindful of the potential loss of life and property an act of negligent operations can cause. Surely, a negligent act causing death needs to be treated separately and punished more severely than a transgression of a safety regulation which does not lead to or does not have the potential to lead to such disastrous consequences. Furthermore as it was noted earlier, the culpability of negligently causing a nuclear accident (leading to death) needs to be at par with culpable homicide not amounting to murder and must carry punishment at least equivalent thereto.

120. Secondly, as was earlier noted, a key objective of the Bill ought to be accident prevention. It was argued how the low cap placed by the Bill dilutes incentives for maximum safety and accident prevention. The penalizing provision will to some extent mitigate the effects of such dilution, giving the operator maximum incentives for accident prevention including investment in technology, which he would not otherwise have an incentive to do.

121. ***On the basis of the aforesaid discussion, the Honourable Committee may consider the following recommendations:***

i. ***The Bill must introduce a penal provision providing vicarious criminal liability for directors and other executive officers at the helm of affairs in the operator company to cover cases of nuclear accidents caused due to rash or negligent acts.***

ii. ***Cases where death ensues as a result of negligent nuclear accident must invite punishment at par with that for culpable homicide not amounting to murder i.e. imprisonment for 10 years.***

iii. ***In cases not leading to death a lesser punishment may be provided for depending on the gravity of the loss caused by the accident.***

iv. ***Alternatively, the legal position recommended can be achieved by amending the Atomic Energy Act to contain such a provision.***

X. SUMMARY OF RECOMMENDATIONS

The recommendations contained in the report are extracted and summarised hereunder for the benefit of the Honourable Committee.

1. CLAUSE 2(f) AND CLAUSE 2(h):

a. The phrase "caused by or arising out of a nuclear incident" in clause 2(f) should be deleted since it creates circularity.

b. The phrase "to the extent notified by the central government" should be replaced with the words "to the extent provided by law" in clause 2(f) to conform with Supreme Court precedents in this regard.

2. CLAUSE 3:

a. The power to notify a nuclear incident in clause 3 should not vest with the AERB. The Committee may explore the possibility of vesting such power in a separate, autonomous body in order to avoid a conflict of interest.

b. Alternatively or in addition to the aforesaid, the Honourable Committee must recommend to the government that it declare some guiding principles according to which the discretionary powers in clause 3 may be exercised.

3. CLAUSE 5:

a. The words 'if he proves' should be inserted in f clause 5 to clarify the burden of proof. Clause 5 will hence read:

"An operator shall not be liable for any nuclear damage *if he proves* that such damage is caused by a nuclear incident directly due to..."

b. Clause 5(1)(i) be deleted for being inconsonant with international practice and the absolute liability jurisprudence of the Supreme Court.

c. In clause 5(1)(ii) the words "an act of armed conflict, hostility, civil war, insurrection or terrorism" should be replaced with the words "an act of armed conflict or terrorism" which would avoid any ambiguity which may arise.

4. CLAUSE 6:

a. Clause 6(1) (providing for 300 million SDR as the maximum liability in respect of a nuclear incident) should be made to apply to the **maximum liability borne by an operator** in respect of each nuclear incident and should not fix the maximum in relation to a nuclear incident in its entirety. This is in keeping with international practice and the salutary principle of ensuring full compensation. Hence clause 6(1) should read:

> "The maximum amount of liability of an operator in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights."

b. Clause 6(2) as it currently stands, for being incorporated wholly within the new clause 6(1) suggested above, should be deleted and the provisos attached to clause 6(2) transferred instead to clause 6(1).

c. The current proviso 2 to clause 6(2) [recommended as proviso to clause 6(1)], which allows for the central government to increase or decrease operator liability, should specifically contain additional criteria regarding the nature of the nuclear installation, nuclear substances used and the likely consequences of a nuclear incident which must be taken into account by the government before increasing or decreasing the liability of an operator, to conform with Supreme Court jurisprudence relating to Article 14 of the Constitution.

d. The reference to clause 6(2) in clause 7(1) be replaced by a reference to clause 6(1).

5. CLAUSE 10(b) AND CLAUSE 20(4)(a):

a. Clause 10(b) and clause 20(4)(a) should be amended to restrict sitting bureaucrats from appointment as Claims Commissioner and members of the NDCC in the interest of judicial independence.

b. Appointments in both cases i.e. as Claims Commissioner or Member of the NDCC, should be made by a committee consisting of at least some Judges or Ministers, to comply with

Supreme Court precedent on this issue. In no case should the Honourable Committee allow only bureaucrats to be members of the appointment committees.

c. In the interest of gender equality, the word 'Chairman' in Clause 20 should be replaced with the gender neutral 'Chairperson'.

6. CLAUSE 24:

a. The process of removal should be subject to the same restrictions as recommendation 5 above and should include removal of Claims Commissioners in the interest of judicial independence and comprehensiveness.

b. This process should also be utilised for removal of a member/Chairperson of the NDCC, should the Honourable Committee deem it expedient.

7. CLAUSE 30:

In the interest of clarity, clause 30 should be amended to specifically mention the Ministry of Law and Justice as the relevant ministry for providing support staff and employees to the secretariat of the NDCC.

8. CLAUSE 46 AND CLAUSE 9:

a. Clause 9 should be amended to limit claims relating to nuclear damage to claims under this act only. It should thus read:

"Whoever suffers nuclear damage shall *only* be entitled to claim compensation in accordance with the provisions of this Act."

b. Clause 46 be amended to clarify that concurrent civil liability under other acts shall be barred, keeping in mind the rationale for a special legislation with a dedicated administrative machinery. It should thus read:

> "The provisions of this act shall be in addition to, and not in derogation of, any other law for the time being in force.

Provided no civil proceeding, arising out of nuclear damage, covered by the provisions of this Act, shall be instituted against the operator or any other person under any other law for the time being in force."

c. The Central Government must explicitly clarify the question of whether or not the State Pollution Control Boards can sue for liability higher than as provided for in Clause 6 of the Bill.

9. PENAL PROVISIONS:

a. The Bill must introduce a penal provision providing vicarious criminal liability for directors and other executive officers at the helm of affairs in the operator company to cover cases of nuclear accidents caused due to rash or negligent acts.

b. Cases where death ensues as a result of negligent nuclear accident must invite punishment at par with that for culpable homicide not amounting to murder i.e. imprisonment for 10 years.

c. In cases not leading to death a lesser punishment may be provided for depending on the gravity of the loss caused by the accident.

d. This legal position can also be achieved by amending the Atomic Energy Act to contain such a provision, if the Honourable Committee so pleases.

ABOUT US AND CONTACT DETAILS

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- To provide rigorous, independent and non-partisan legal and policy analysis of Bills introduced in Parliament
- To suggest appropriate legal reform to enable bills to pass tests of constitutionality if challenged
- To suggest appropriate policy reform if the legislative policy is to be sound in principle and efficacious in practice

Members:

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