A Re-Look at the Civil Nuclear Liability Bill*

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Nuclear Liability Bill1 is a major step contemplated to operationalise the Indo-US civil nuclear deal. Its underlying aim is to limit the monetary compensation which the operator of a nuclear power plant would be required to pay in case of a nuclear disaster. It goes without saying that a pre-requisite for the entry of private operators in nuclear power generation is framing of a clear policy concerning payment of compensation to the victims of a nuclear mishap. Hence, an unambiguous and legally robust system is the call of the hour.

The text of the Bill shows its drafting being undertaken in haste, without due scrutiny. Its contents appear to have been drawn up without requisite home work or consultation with various stake holders. These are replete with numerous errors.

Need and contents of the Bill may be examined on the touchstone of practical, political, legal and humanitarian considerations. To begin with, the timing and propriety of the legislation is a matter of special relevance. At the outset, the relevance of the Bill has been assailed by political parties on the ground that the proposed enactment should have been attempted only after first amending the Atomic Energy Act, 19622. The latter does not offer any scope for entrusting nuclear power generation to any non-governmental entity. Under the existing law, the Government alone is allowed to run a nuclear power generation plant3. State owned Nuclear Power Corporation of India Ltd. (NPCIL) is the sole operator as of now. No other party can enter this field. Hence, it would be logical to assume that requisite changes to the above Act would first be needed to facilitate entry of private companies before the contemplated Bill can be taken up to limit the liability of a non governmental operator to pay compensation.

Text of the Statute has left a number of loopholes which can be exploited skillfully to dodge or delay payment of compensation to the victims or thwart their efforts to obtain monetary relief by dragging them into legal minefields. These require to be addressed. To illustrate, the Bill enjoins an operator to cover his liability to pay compensation by taking out an insurance policy. Suitable care should have been taken to insure that such a liability to pay compensation under Clause 4 should not be contingent upon receipt by the operator of insurance proceeds under Clause 8.

The definition of nuclear damage includes costs of measures of reinstatement of impaired environment caused by a nuclear incident4. Such a risk is manifest in the event of a nuclear radiation leak. However, the Bill offers no clue as to the mechanism to claim damages in the event of such a catastrophe that would witness a wide spread damage. It is also silent about the locus of the person or body authorised to seek claim in situation of this type. Such lack of clarity runs counter to the ‘Polluter Pays’ Principle enunciated by the Supreme Court of India in the matter of Indian Council for Enviro-Legal Action v Union of India5. The Supreme Court had observed – “Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care on his activity. The rule is premised upon the very nature of the activity carried on.” Therefore, it is only the polluter (read operator) who is to make good the entire payment and is not to be sheltered by the Government with the tax payers money.

The meaning of ‘operator’ in Clause 2(l) refers to a person. It is not known whether such a definition would afford its application to a company or corporate entity. It would have been prudent to clarify this aspect in the definition itself as it is a major aspect relating to liability. Moreover, the opposition has questioned the manner in which the law does not fix liability on the supplier, limiting it to the operator. The word ‘nuclear incident’ may also pose problems in case of say three separate events separated by geographical location, time or nature of damage. Would these be treated as three district incidents or as only one?

A trigger mechanism to set in motion the process of liability for nuclear damage is the issue of a notification by the Atomic Energy Regulatory Board (AERB)6. The notification is required to be issued by the AERB ‘within’ 15 days from the date of occurrence of a nuclear incident. The use of ‘within’ creates a doubt about the validity of a notification made after expiry of 15 days. Further, what happens if the full compliment of AERB is not functional due to any reason say sickness, leave or retirement at the time of a nuclear incident? Could the decision by way of notification be liable to be opposed on the ground of “lack of quorum”, where one or more members are absent? Moreover, authority to withhold such a notification is vested in the Board if in its opinion the threat and risk involved is ‘insignificant’. In a case of insignificant nuclear damage, it may be logical to infer that there may not be any notification or order issued. Can the ‘non-decision’ or, in other words, absence of a decision be challenged on the ground of erroneous application or non application of mind. The right to claim compensation shall stand forfeited if the claim is not made within ten years from the date of a nuclear incident7. Such a clause which extincts the right to claim calls for a review because the consequences or ill effects may quite often come to be visible many years or even generations later. The other objectionable clauses are 16(5) and 32(10) where no appeal or review is provided for even when the decision of the Board is erroneous or flawed.

Clause 5 provides a shelter to an operator from payment of compensation, if a nuclear damage is caused by a nuclear incident directly due to certain acts, which include amongst others, an act of terrorism. This stipulation is also open to mischief. What happens, if an operator contests or evades his liability citing the incident to have been caused by a terrorist act? It is noteworthy that 1963 Vienna Convention on Civil Liability for Nuclear Damage and 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy Agency do not have terror as ground for exemption. Further, the likelihood of an operator indulging in foul play to get away from paying compensation cannot be ruled out, given the insertion of clause 16(3), 32(8) or offences under Chapter VI of the Bill.

By keeping the entitlement to compensation without claim for interest for delayed payment, the victims would

be totally at the mercy of an operator. 8 It may also induce the operators to take a complacent attitude.

The bill contains a number of clauses that are apparently ambiguous. For example, it pegs the maximum penalty liability for an operator at Rs 500 crore. On the other hand, the Government is authorised to either increase or decrease the amount of liability of any operator. What then is the rationale to peg a limit at Rs 500 crore? Such a position is legally undesirable also because the operator and regulator are both on the same side as opposed to a victim, who would invariably be at the receiving end.

The rationale for pegging the monetary limit at Rs 500 crore has itself led to major criticism having regard to a like amount having been decided as total compensation to the victims of Bhopal gas tragedy of 1986. The critics point out that the extent of damage in a nuclear incident would be considerably higher and thus warranting bigger amount. In any case, the cost of inflation over past two decades has rendered the value of Rs 500 crore as 'peanuts'. It is noteworthy that the Vienna Convention does not cap nuclear liability but only puts in a minimum floor. Putting a limit of Rs 500 crore upon the liability of an operator would run contrary to the law laid down by the Supreme Court of India in MC Mehta and another Vs Union of India9. The case had firmly established the notion of absolute liability. It was held, "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 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."

The primary purpose of the bill is to provide for civil liability for nuclear damage caused in the nuclear plants owned by the Government and operated by private operators. However, it also gives an indication about nuclear installations other than those owned by the Government10. This ambiguity needs to be explained.

It is significant that the power of the Central Government to increase the liability of an operator beyond Rs 500 crore is based on the "risk involved" in a nuclear installation11. Perhaps it would have been more appropriate to make it dependent upon the 'damage' involved.

By treating a claim decided by a commissioner or a commission as final (under Clause 16(5) or 33(10) respectively) the scope for moving an appeal has not been allowed to exist. Such a position does not appear to be desirable where the basic or initial order is opposed as legally flawed. Take the case where a claims commissioner does not hold a law degree or prior experience in legal adjudication. Can the adjudication by a claims commissioner in such a situation without even application of a legal mind on a serious right affecting the life, limbs or property of individuals or their future generations be allowed to attain finality by denying a chance for putting up an appeal?

The Bill shows lack of clarity with regard to the definition of a beneficiary entitled to receive the compensation. On one hand, clause 14 lists four categories of persons who may submit an application for compensation. On the other, clause 31(2) expects the person who has suffered the damage to himself come up with an application. This confusion needs to be cleared. Further, the damage in the case of a nuclear catastrophe may be quite devastating. What if the complete immediate family has been wiped out or rendered incapable by the evil consequences of a nuclear incident? Who would be allowed to stake a claim in such an event?

Clause 17 deals with legal binding of the culpable groups in case of a nuclear accident. Only the operator (government owned NPCIL) will be able to sue the manufacturer/supplier. Victims will not be able to confront the real defaulter. The option to claim damages from foreign supplier lies with the Government. Decision on such an option is liable to be influenced by diplomatic considerations which could neutralise the rights of victims.

The proposal legislation covers the civil liability for nuclear damage in the sphere of nuclear power generation. However, it does not deal with the victims of nuclear damage caused by naval ships or submarine armed with and propelled by nuclear power. A mobile reactor fitted in a submarine would not fall within the definition of a nuclear installation12. It may be noted that extensive damage may be caused to civilian property in coastal areas or to the neighbouring ships by any mishap on a nuclear submarine. It would be discriminatory for the victims of nuclear submarine mishap not to give them any relief by way of compensation when the law of the land stands changed to provide monetary amends in other cases of major mishap. Therefore, such a contingency should not be left uncovered.

A section of the opposition has called for setting up a committee of scientists to study the pros and cons of the Bill. One of the suggestions calls for introduction of a grading liability according to installed power capacity of a power plant. The Government is indicated to have assured due scrutiny of the Bill by the Parliamentary Standing Committee after the legislation is introduced in the House. However, such an assurance has failed to convince the opposition because the recommendations of the Standing Committee have been often disregarded by the cabinet in the past. A review of the Bill therefore, appears inescapable. Yet another option may be for the President to refer the Bill to the Supreme Court for its opinion and legal scrutiny!

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