The Indian Civil Liability for Nuclear Damage Act, 2010 – Legislation with Flaws?

Norbert Pelzer, Göttingen

Offprint
Volume 56 (2011), Issue 1, January

atw – International Journal for Nuclear Power
1. India has had no special legislation so far about liability under civil law for nuclear damage. Instead, the general law about damages outside of contractual provisions applied.

2. The ambitious Indian civil nuclear program requires intensified international cooperation. The potential partners in that cooperation demand that liability regulations be adopted on the basis of the principles of the international nuclear liability conventions so as to grant legal assurance to their export industries.

3. In May 2010, draft liability legislation was introduced into the Indian parliament. Final deliberations were held on August 30, 2010. On September 21, 2010, the President confirmed the draft legislation, thereby making it law. The draft legislation had been a matter of dispute in India from the outset.

4. The law applies to nuclear facilities owned or controlled by the Indian central government. Only the government or government institutions or state-owned companies can be owners of a nuclear facility. The owner is liable without fault having to be proven. The details of liability follow the provisions of the liability conventions.

5. The law does not provide for legal channeling of liability onto the operator of a nuclear installation.

6. Regular courts of law have no competence to rule about claims for damages under the law. Instead, a “Claims Commission-er” appointed ad hoc by the government, or a “Nuclear Claims Commission,” are competent.

7. The 2010 Indian nuclear liability law is a piece of legislation with deficiencies. Key elements are incompatible with the principles of international nuclear liability regimes.

---

**The Indian Civil Liability for Nuclear Damage Act, 2010 – Legislation with Flaws?**

Norbert Pelzer, Göttingen

---

### 1 Principles of the Indian Atomic Law

After its independence in 1947, India started its nuclear program already in 1948, which, as is known, also encompassed the development and further development of nuclear weapons (Nuclear Tests of 1974, 1998).[1] Currently, 19 civil nuclear power plants are put in operation with a total capacity of 4.183 MWe, with 6 further plants under construction (Status: End 2010). Its nuclear capacity is anticipated to increase to 20.000 MWe in 2020 and to 63.000 MWe in 2032.[2]

Since India is not a Contracting Party to the Non-Proliferation Treaty of 1968[3], possibility for cooperation with other States in the area of nuclear energy was rather limited. The Indian atomic energy program is, therefore, initially developed largely independently. This particularity is assumingly also the reason for the limited international knowledge of Indian atomic energy legislation which in India itself is controversial.[4]

The legal basis for the use of nuclear energy is to be found in the “Atomic Energy Act, 1962”[5] and a number of further regulations or supplementary rules.[6] Relevant is also the 1986 Environment (Protection) Act.[7] However, until recently, no special rules on liability for nuclear damage existed. Instead, general non-contractual liability law (tort law, common law) was applicable. According to those general liability regulations, the liability of the operator of a nuclear installation for nuclear damage was unlimited in amount. The operator, and in addition also suppliers or other third parties, could be held liable based on various legal aspects, e.g., under general tort law or product liability law.

Types of liability applied could include fault liability, no-fault liability (liability for risk/strict liability with limited exoneration) or absolute liability (strict liability with no exoneration).[8]

Fundamental in this respect is especially the decision of the Supreme Court in the case M.C. Metha vs. Union of India, which rules that anyone undertaking “hazardous activities” will be held “strictly and absolutely” liable for resulting damages.[9] The Supreme Court further acknowledged in its ruling in the case M.K. Sharma vs. Bharat Electronics, that occupational radiation injury will have to be compensated; the case related to a violation of the fundamental right to life and freedom, and those working in sensitive areas and exposed to radiation were to be guaranteed additional insurance coverage at the expense of the employer: “... should be covered by appropriate insurance, if any, to which as workers at large they may have become entitled”. Of special significance in respect of the liability for nuclear damage are furthermore the liability principles developed in the decision of the Supreme Court in the Bhopal gas accident.[11] That decision, inter alia, also increased the fixed insurance amount for workers as developed in the M.K. Sharma vs. Bharat Electronics case.


---

**Address of the author:**

Dr. Norbert Pelzer

Otto-Wallach-Weg 5

37075 Göttingen

Germany.
This provision states:

“... 3) Without prejudice to the general- ity of the foregoing provisions, the rules re- ferred to in this section may provide for - ... (d) the extent of the licensee’s liability in respect of any hurt to any person or any damage to property caused by ionising ra- diations or any radioactive contamination either at the plant under licence or in the sur- rounding area; ...”.

That is an unusual provision but it is not known whether in practice it would have or had any meaning.

Despite these specific provisions, the law in general was of little satisfaction. Since the use of nuclear energy was, and still is, completely in the hands of the State, it was assumed that irrespective of any le- gal obligations, the State could, based on its general duty of care, be held liable to compensate for nuclear damage caused by State installations. However, this would probably rather involve ex-gratia benefits, which would be difficult to enforce in court. Also Section 29 of the 1962 Atomic Energy Act, would pose obstructions to procedures for compensation:

“No suit, prosecution or other legal pro- ceeding shall lie against the Government or any person or authority in respect of an- ything done by it or him in good faith in pursuance of this Act or of any rule or or- der made thereunder.”

Ergo, the State’s liability will not be based on strict liability, but the victim must prove that it has not acted in “good faith”. [14]


2 The Nuclear Liability Act – A subject of controversy

The new Nuclear Liability Act is not prima- rily the result of national efforts in order to redesign existing liability provisions with the aim to improve the protection of vic- tims. Rather, the main impetus for this legis- lative initiative is to be found abroad. [16] India’s ambitious nuclear program is not feasible without international cooperation, especially without international supply. In- dia had to give up its former special posi- tion and open up to the international mar- ket.

Firstly, this has consequences in the sensitive area of nonproliferation of nucle- ar weapons, which led to the conclusion of appropriate agreements with the IAEA. [17] But as a result, also the Indian liabili- ty law moved into the center of attention. The liability risks for foreign suppliers needed to be transparent. As such, the French-Indian Agreement of 30 September 2008 [18] contains in Article VIII an explic- it provision regarding the regime of liabil- ity for nuclear damage, where the Contract- ing Parties agree in paragraph 2 of that ar- ticle that: “chaque partie crée un régime de responsabilité civile nucléaire reposant sur les principes internationaux établis.”[19]

Also for the United States the civil liabil- ity regime is of crucial importance. Before it could conclude the so-called “123 Agree- ment” with India [20], the US Government had to obtain national authorization to de- viate from certain requirements under Sec- tion 123 of the U.S. Atomic Energy Act, 1954. [21] This was done by the so-called Hyde Act (22) of 2006, concerning the con- ditions for the United States to conclude the cooperation agreement. Section 103 (b) (3) (E) of that Act provides that it is the policy of the United States to encourage In- dia to adopt the “Convention on Supple- mentary Compensation for Nuclear Dam- age (CSC)” of 1997. [23] The CSC, howev- er, requires national nuclear liability legis- lation that is consistent with the Annex to the Convention. This Annex sets out the main principles of the international nucle- ar liability conventions. It provides, for exam- ple, in Article 3 (9) and (10), that liability for nuclear damage is channelled exclu- sively to the operator of a nuclear installa- tion. Suppliers may therefore not be held directly liable. Such provisions that would facilitate American export were of essen- tial importance for the United States. The adoption of the CSC and the introduction of legal channeling of liability by India, was also for India an identifiable element based upon which the United States would conclude and implement the Agreement. India thus agreed to the implied obliga- tion (24) to make its national nuclear liabili- ty legislation in such a way that it con- forms to the Annex of the CSC in order to become party to this Convention and to imple- ment legal channeling of liability into national legislation. [25]

However, national criticism in India about the draft nuclear liability Bill [26] ig- nited on this very point. “Is it civil liability for nuclear damage or corporate immunity for national damage law?”, is the title of an article that aptly describes the reason for the criticism. [27] It was alleged that the supplier would be relieved from liability ei- ther entirely, or, at any rate, disproportion- ally far-reaching. [28] Subject to criticism was furthermore the limitation of liability to such a low amount that appeared to be inappropriate particularly in light of the Bhopal disaster. The draft law was consid- ered to be contrary to Articles 21 and 48A of the Indian Constitution [29], as it would be contrary to the polluter-pays principle and the precautionary principle and other principles of liability law and environmen- tal law. [30] Others further stated: “The

provisions of the Nuclear Liability Act further con- tinue the ideology supported by the Indian Atomic Energy Establishment; an ideology based on secrecy, individual centralism and personality cult and bureaucratic dom- inance.” [31] Controversial discussions over “The Civil Liability for Nuclear Damage Bill, 2010” were also held in the Parlia- ment, and continued up to the final parli- amentary consultation. [32] According to American commentary, the new Nuclear Liability Act was a “flawed civil nuclear liability legislation” which is not compatible with the US-India Agreement. [33]

This is not the place to assess the Indian criticism of the law, in particular the ques- tion of whether the law is compatible with the Constitution of India. The concerns about the low amounts of liability are un- derstandable. Also, relieving the supplier from liability by channeling liability exclu- sively to the operator of an installation is not convincing without further context, but it will be if one takes into account the aim and effect to simplify and facilitate mass claims handling procedures and con- ciders legal channeling in the overall con- text of harmonizing international liability rules, for it is an essential element thereof.

In the following sections, the Nuclear Liability Act will be presented and evaluat- ed in more detail. The starting point and key reference will be the international nu- clear liability conventions [34], the liability principles of which were adopted world- wide by more than 50 States. Also the au- thors of the Indian nuclear liability law probably aimed at drafting the Act accord- ing to international principles. [35]

3 The provisions of the Nuclear Liability Act

The Nuclear Liability Act consists of 7 Chapters with in total 49 Sections [36]: Chapter I: Preliminary (Sections 1-2), Chapter II: Liability for Nuclear Damage (Sections 3-8), Chapter III: Claims Com- missioner (Sections 9-12), Chapter IV: Claims and Awards (Sections 13-18), Chapter V: Nuclear Damage Claims Com- mission (Sections 19-38), Chapter VI: Of- fences and Penalties (Sections 39-42), Chapter VII: Miscellaneous (Sections 43- 49). The Act will, according to Section 1 (5), enter into force at the moment the Central Government declares its by publica- tion. [37] For certain individual provisions it can declare different moments of entry into force.

3.1 Scope and definitions

Section 1 provides the geographical and material scope of the Act. It will be applica- ble in “the whole of India”, which includes

atw 56. Jg. (2011) Heft 1 | Januar
the airspace over India, and in certain maritime areas and on board Indian ships and aircraft. The provision clearly reflects the geographical scope as provided in Article IA of the 1997 Vienna Convention.

The material scope set out in Section 1(4) of the Act is restrictive:

“It applies only to nuclear installations owned or controlled by the Central Government either by itself or through any authority or corporation established by it or a Government company”.

A separate note in the text of the Act clarifies that the term “Government company” has the same meaning as in Section 2(1)(bb) of the 1962 Atomic Energy Act [38]. According to that provision, a government company is a company in which the Central Government owns no less than 50% of the shares. Consequently, in Section 2, which contains definitions, the term “operator” is defined as follows:

“...(m) “operator”, in relation to a nuclear installation, means the Central Government or any authority or corporation established by it or a Government company who has been granted a licence pursuant to the Atomic Energy Act, 1962 for the operation of that installation; ...”[39]

Nuclear energy in India thus continues to remain an exclusive State affair. That could of course not have been changed by the Nuclear Liability Act, since such would require an amendment of the 1962 Atomic Energy Act. The conclusion of the agreements with France and the United States would have been a plausible occasion to open the nuclear energy market to the private sector.

In other aspects, the definitions in Section 2 essentially coincide with those of the 1997 Vienna Convention in so far as they do not concern subjects specific to the Nuclear Liability Act.

3.2 Liability principles

Notification of a nuclear incident. The occurrence of a nuclear incident[40] will have to be made public within a period of 15 days from the date of the incident by the Atomic Energy Regulatory Board constituted in accordance with the 1962 Atomic Energy Act. [41] Such notification is not required if, in the opinion of the Board, it involves an incident of which the “gravity of threat and risk” are “insignificant” (Section 3(1)). It is unclear what the legal effect of this notification is. If it only serves to provide possible victims at an early stage to assert claims for compensation, the provision is welcomed. Such interpretation would further be in line with paragraph 2 that requires “wide publicity” of the notification. On the other hand, a more systematic evaluation of the provision which is placed immediately at the beginning of the Chapter dealing with nuclear liability principles, may also give way to the assumption that it may have a legal effect beyond mere information.

This is at least the case in so far as “the date of occurrence of the incident notified” - ergo, only the event when notified - constitutes the beginning of the absolute prescription period.[42] However, beyond that, the notification could also be a substantive requirement for making claims. As such, the regime would follow the law of the United States concerning the establishment of an “Extraordinary Nuclear Occurrence” (ENO).[43] In both cases, an administrative authority shall decide by an order within its discretion on the application or non-application of the liability rules, i.e., on the allocation of rights and commitments of third parties. This is constitutionally not acceptable. This applies especially to the Indian legal regime, when placed in the context of the in Section 1 of this article described right of the Board to determine the extent of liability.

Operator’s liability. According to Section 4(1), the operator of a nuclear installation is liable for nuclear damage resulting from a nuclear incident. Its liability “shall be strict and shall be based on the principle of no-fault liability” (paragraph 4). The liability includes incidents occurring at its installation and during transport of nuclear materials. The specific provisions of the liability regime are similar to those of the international liability conventions. This applies to joint and several liability of operators, to exonerations [44] and to contributory negligence. The Central Government “shall be liable for nuclear damage” in the following cases, when:

(a) liability exceeds the fixed amount of liability of an operator;
(b) occurs in a nuclear installation owned by it; and
(c) occurs as a result of a grave natural disaster of an exceptional character or an act of armed conflict, hostility, civil war, insurrection or terrorism.

The Central Government can take on liability for an installation that it does not operate, if it deems this necessary in the public interest. As the Act according to Section 1(4), only applies to State-owned or State-controlled installations anyway, the Central Government will in respect of large nuclear incidents also in other cases hardly ever be able to escape liability.

However, the question as to the relationship between the strict liability of the Central Government as operator of an installation under Section 4(1) or its liability under application of Section 7, and the provision in Section 29 of the 1962 Atomic Energy Act, remains unanswered. Section 29 allows proceedings against the Government or persons authorized by it, only if not acting “in good faith”, i.e., acting negligently. The principle on specificity (lex specialis derogat legi generali) can probably remedy this only if the causation of nuclear damage would be interpreted to fall outside of Section 29, while reducing its scope to the causation of other types of damages. The same may also apply in respect of application of the principle on lex posterior derogat priori.

Another provision of the Nuclear Liability Act poses some further questions in this respect. Section 47 provides:

“47. No suit, prosecution or other legal proceedings shall lie against the Central Government or the person, officer or authority in respect of anything done by it or him in good faith in pursuance of this Act or any rule or order made, or direction issued, thereunder.”

Presumably, this provision aims to guarantee the personal immunity of the acting Government employees, and does not exclude any action against the Central Government in cases in which it is liable according to Section 4 or 7. However, a recourse action against employees based on Section 17(c) [45] would be consistent with the immunity provision, as in these cases the employees would not have acted in “good faith”.

Liability limits, financial security. The liability of the operator is limited per nuclear incident to an amount in Rupee equivalent of 300 million Special Drawing Rights of the International Monetary Fund (= about 340 million Euro) or a higher amount fixed by the Central Government; should damages exceed this amount, the Government “may take additional measures” (Section 6(1)). For low-risk installations, liability limits are fixed between 168.000 Euro and 25 million Euro, in Rupee equivalent (Section 6(2)).

The operator is obliged before beginning operation of its nuclear installation, to take out insurance or other financial security to cover its liability. (Section 8(1) (2)). In an explanation, the Law defines “financial security” as “a contract of indemnity or guarantee, or shares or bonds or such instrument as may be prescribed or any combination thereof”. For nuclear installations that belong to the Central Government, the mandatory insurance provision is not applicable (Section 8(3)).

Time limits for compensation claims. Subject to the provisions of Section 18, applications for compensation must be made within 3 years from the date of knowledge of nuclear damage by the person suffering such damage. (Section 15(2)) This period will thus start also if the victim does not know the liable person.[46] In accordance with Section 18, property damage claims will expire after 10 years, and personal injury after 20 years, from the date of the in-
cident as notified under Section 3(1). If nuclear damage was caused by nuclear ma-
terials which, prior to such nuclear inci-
dent, had been stolen, lost, jettisoned or
abandoned, the period of ten years for
property damage shall be computed from
the date of such nuclear incident, but, in
no case, it shall exceed a period of 20 years
from the date of such theft, jettison, loss or
abandonment.

### 3.3 Legal channeling of liability onto
the operator of an installation

According to its full title [47], the Nuclear
Liability Act deals with “civil liability for
nuclear damage ... through a no-fault lia-

bility regime channeling liability to the op-
erator …”. The law, however, does not con-
tain a provision that ensures that the liabil-
ity is exclusively channeled to the opera-
or, or, a provision that other persons be-
sides the operator are not liable, or, a pro-
vision that the operator is liable only on
the basis of the Nuclear Liability Act. These
principles jointly, however, constitute the
so-called legal channeling of liability of the
operator of an installation, which is the ba-
sic concept of all nuclear liability agree-
ments. [48] The Act also does not contain a
so-called economic channeling of liability
on the basis of which the operator of an in-
stallation will have to cover the liability of
other persons, like the liability regime of
the United States does.[49] Finally, there is
also no “modified” channeling in line with
the Austrian nuclear liability law that
allows liability of suppliers only after es-
blishing that claims against the operator
cannot be asserted by court action. [50]

The Indian Nuclear Liability Act con-
tains, in contradiction to its title, no such li-
ability channeling. In contrary, it contains
explicit provisions that foresee that other
persons than the operator of an installa-
tion will have to cover the liability of
other persons, like the liability regime of
the United States does.[49] Finally, there is
also no “modified” channeling in line with
the Austrian nuclear liability law that
allows liability of suppliers only after es-
blishing that claims against the operator
cannot be asserted by court action. [50]

The Indian Nuclear Liability Act con-
tains, in contradiction to its title, no such li-
ability channeling. In contrary, it contains
explicit provisions that foresee that other
persons than the operator of an installa-
tion will have to cover the liability of
other persons, like the liability regime of
the United States does.[49] Finally, there is
also no “modified” channeling in line with
the Austrian nuclear liability law that
allows liability of suppliers only after es-
blishing that claims against the operator
cannot be asserted by court action. [50]

According to Section 17, the operator
responsible for causing the damage, has a
right of recourse only in three cases, if: a)
such right is expressly provided for in a
contract in writing;

b) the nuclear incident has resulted as a
consequence of an act of supplier or his
employee, which includes supply of
equipment or material with patent or
latent defects or sub-standard services;

c) the nuclear incident has resulted from
the act or omission of an individual
done with intent to cause nuclear dam-
age.”

Whereas the rights of recourse contained
in paragraphs a) and c) are also to be found
in the nuclear liability agreements [51],
paragraph b) provides a legal right of re-
course that is not to be found in those
agreements. This legal right of recourse is
not based on any special contract that
would allow a right of recourse against the
supplier, nor does it contain any qualifica-
tion of the damaging activities that would
necessitate such recourse. The mere defi-
cient supply of products or services allows
for recourse. In case of any defects in sup-
ply, the operator can therefore shift its en-
tire liability risk by recourse onto the sup-
plier. The right of recourse thus results into
a full liability transfer onto the supplier.
This recourse right is also imposed on the
supplier in absence of any fault in respect
of its deficient supply. This is not compat-
ible with the basic concept of concentrating
liability to the operator of an installation.

Clearly, this incompatibility was known
in India. In his comprehensive study
Balachandran [52] refers to the laws of
other States; also there, similar provisions
were to be found. Especially, the nuclear li-
ability law of South Korea “has an almost
similar condition”. [53] The author sum-
marizes then as follows:[54]

> “Section 17(b) of the Indian bill may be
held contrary to the requirements of CSC
and the international conventions. But that
by itself is no bar against foreign suppliers
willing to supply nuclear items to India.
South Korea, for example, has vendors
from Canada, France, USA etc. supplying
nuclear items without being unduly per-
turbed by the Operator’s right of recourse
against the supplier, unless, of course, the
suppliers have special agreements regard-
ing rights of recourse.”

There were proposals to fix this right of
recourse with a view to reconstructing the
channeling of liability.[55] Whether such
proposals would be successful before a
court is however doubtful because Section
17(b) is not the only provision that is con-
tary to the principle of legal channeling.
More important than Section 17, on which
the discussion so far has been concentrat-
ed, is assumingly Section 46 that states:

> “46. 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 proceedings which
might, apart from this Act, be instituted
against such operator.”

This provision is further strengthened
by a procedural rule in Section 35. Accord-
ing to that provision the exclusive compe-
tences of the Claims Commissioner and the
Claims Commission as prescribed in the
Act apply only “save as otherwise provided
in section 46”. To that extent, the concen-
tration of actions for compensation as for-
seen in the international nuclear liability
regime does therefore not apply. [56]

According to Section 46, the operator
can unquestionably also be held liable un-
der legal regulations other than the Nucle-

ar Liability Act. This is not in conformity
with the channeling principle, too. Moreo-
ver, the first part of Section 46 raises the
question whether claims can also directly
claim against other persons than the op-

erator outside the Nuclear Liability Act. This
question can possibly not be answered un-
animously, since the text of the law is
unclear. However, the general phrasing of
the first part of the provision may thus sup-
pport the interpretation that also claims
against other persons on other legal
grounds are allowed. Suppliers can, for in-
stance, be held directly liable under the
product liability law.[57]

If, according to Section 46, other liabil-

ity provisions apply to damage caused by
a nuclear incident, then those provisions will
determine the basis and extent of the lia-

bility. That applies also to the question
whether the liability is limited in amount
or unlimited.

### 3.4 Adjudication of compensation
claims

Section 9 of the Nuclear Liability Act pro-
vides:

> “9. (1) Whoever suffers nuclear damage
shall be entitled to claim compensation in
accordance with the provisions of this Act.

(2) For the purposes of adjudicating up-
on claims for compensation in respect of
nuclear damage, the Central Government
shall, by notification, appoint one or more
Claims Commissioners for such area, as
may specified in that notification.”

Therefore, in respect of the settlement
and adjudication of claims for compensa-
tion of nuclear damage not the regular
courts are competent, but one or more
Claims Commissioners. They will have to
that extent the authority and function of a
‘civil court’ (Section 12). The Central Gov-
ernment can appoint one or more Commis-
sioners, thus from individual persons, but
also a “Nuclear Damage Claims Commis-
sion” according to Section 19:

> “19. Where the Central Government,
having regard to the injury or damage
caused by a nuclear incident, is of the op-
inion that it is expedient in the public inter-
est that such claims for such damage be ad-
djudicated by the Commission instead of a
Claims Commissioner, it may, by notifica-
tion, establish a Commission for the pur-
poses of this Act.”

The Commission has “original jurisdic-
tion to adjudicate upon every application for
compensation” that will be claimed or
referred to it (Section 32). Notwithstanding
the provision of Section 46, no civil
court, with the exception of the Supreme
Court and the High Court in cases of Arti-
cles 226 and 227 of the Constitution, is
competent for damage claims that are

---

*Refers to the Austrian Nuclear Liability Act.*

*Refers to the Indian Nuclear Liability Act.*
referred to the Claims Commissioner or the Claims Commission under the Nuclear Liability Act (Section 35).

According to Section 32(4), the Claims Commission will not be bound by normal civil procedural law, but “shall be guided by the principles of natural justice”. [58] With the creation of the Commission, all pending claims for compensation before the Commissioner will have to be transferred to the Commission (Section 33). As such, the Government can, whenever it considers this necessary in the public interest, retract cases before the Commissioner, by the creation of a Commission.

Decisions [59] by the Commissioner or Commission “shall be final” (Sections 16(5), 32(10)). Such decisions can therefore not be appealed. However, this does ostensibly not apply in relation to cases brought before regular courts under Section 46. The establishment of a Commission to decide upon nuclear damage claims is also provided in other legal regimes, such as, for instance, Canada, The Netherlands and the United States. But in these States the Commission will have only jurisdiction in certain cases, for instance, in respect of compensatory damages that surpass the liability of the operator [60], or in preparation of a civil court decision. Also is the appeal before a regular court as a last resort not excluded. [61] The Indian resolution may, to an extent, be called unique.

The question is whether the Commissioner and the Commission have the appropriate judicial independence. The Central Government is obliged, when nuclear damage is suffered, to appoint a Claims Commissioner (Section 9(2)). To that extent there exists no room for discretionary power. The Commissioner can, however, at any point be replaced by a Commission, when the Government considers this to be necessary in the public interest (Section 19). Already this construction places some doubts on the judicial independence. Such doubt is further strengthened, when considering that the State will be the defendant in all compensation claims procedures, since nuclear energy usage is a monopoly of the State. From that it may be concluded that the Nuclear Liability Act in fact denies the State, the discretion in nuclear energy compensation procedures.

The inquiry of the Act, whether the Indian Nuclear Liability Act of 2010 is a law with deficiencies is, will unfortunately have to be answered positively. The Act does not provide for the basic legal concept of legal channeling of liability only to the operator of a nuclear installation even though the law states so in its title. Not only does the liable operator have a legal right of recourse against a supplier for defects in its supply, but the Act further can be interpreted that claims against third persons on the basis of other legal grounds (laws) are not barred.

The Act does not provide for the basic concept of legal channeling of liability only to the operator of a nuclear installation even though the law states so in its title. Not only does the liable operator have a legal right of recourse against a supplier for defects in its supply, but the Act further can be interpreted that claims against third persons on the basis of other legal grounds (laws) are not barred.

The assessment of legal acts of a foreign legal regime is difficult. It demands caution, since often well-known legal concepts within one legal regime have a totally different connotation in another regime. Nonetheless is an assessment of the Indian Nuclear Liability Act of 2010 without specific knowledge about Indian law, possible and tenable. The nuclear liability laws of numerous States are based on the basic concepts and regulations of international nuclear liability agreements. These constitute the common denominators upon which the treaty drafters ("founding fathers") from various legal regimes have drawn. The Nuclear Liability Law is per se internationally law. When judging the Indian Nuclear Liability Law by the international liability agreements, reference to an international yardstick will be sought and not that of one national legal regime. [63] In this case, foreign criticism of the law appears to be also tenable because the internal Indian criticism of the law basically surrounds the same provisions.

The Indian Nuclear Liability Act in fact incorporates various elements of the international nuclear liability agreements. This applies to the definition and the liability principle of no-fault liability. Also the provision on liability for damage that results from a nuclear accident during transport of nuclear materials, literally copies those of the international agreement. The same applies in principle to the liability exonerations. The basic structure of the law and that of the agreements are similar. But there the similarities end. Three important areas, where essential incompatibilities exist, need to be emphasized here:

- Nuclear is, to which extent the State, its representatives and State controlled institutions can indeed be held liable. Various provisions in the Nuclear Liability Act on the one side, and in the Atomic Energy Act, on the other side, complicate understanding. Since the use of nuclear energy lies within the hands of the State, this would require a special degree of legal clarity, because the State will be the defendant in all nuclear damage claims procedures.

- The Act does not provide for the basic concept of legal channeling of liability only to the operator of a nuclear installation even though the law states so in its title. Not only does the liable operator have a legal right of recourse against a supplier for defects in its supply, but the Act further can be interpreted that claims against third persons on the basis of other legal grounds (laws) are not barred.

- Claims for compensation of damage need, as the case may be, to be adjudicated. Insofar, the Nuclear Liability Act does not refer, like usual and also provided in the nuclear liability agreements, to a regular court, but to ad hoc by Government established not-judicial institutions the decisions of which are final and against which no further legal remedies seem to be allowed. In India, the State will always be the defendant in damage compensation procedures, and it also determines the competent judge. This is not only incompatible with the international nuclear liability agreements, but also with the in India applicable "Principles of Natural Justice". [64]

The question posed in the title of this article, whether the Indian Nuclear Liability Act, a law with deficiencies is, will unfortunately have to be answered positively. The Act is indeed a "flawed legislation", as an author had stated. [65] Liability provisions will firstly have to ensure and secure the compensation of damage and provide for an adequate legal procedure (due process). Nuclear liability will have to protect the victims of a nuclear incident. The Indian Nuclear Liability Act, because of the above mentioned doubts, serves this object only in an insufficient manner; on the other side, the Act grants the in nuclear energy matters anyway all-powerful Central Government rights of interference with the liability law and the procedural law which the Executive is not entitled to.

If, and to which extent the Nuclear Liability Act should take into account the economic interests of the supplier industry,
can, in the individual case, be arguable. In any case, a State that wants to build nuclear power plants, will have to set legal conditions which make it possible for the industry to build. The Contracting Parties of the international nuclear liability agreements have decided for a nuclear liability regime that contains legal channeling which comprehensively relieves the supplier from liability. India has committed itself in bilateral agreements with France and also with the United States, to incorporate the international basic concepts of the international nuclear liability treaties including the channeling of liability, in national law or to become party to one of these treaties.[66] The provisions of the Indian Nuclear Liability Act of 2010 trigger the questions if India does not violate these bilateral treaty obligations with its current Law. Independent of these bilateral problems, India cannot on the basis of its Civil Liability for Nuclear Damage Act, 2010, become party to any of the existing international nuclear liability treaties, because it does not meet their basic requirements. For the time being, the opportunity was given away to include India in any of the global nuclear liability regimes.

Footnotes:


[9] Supreme Court of India, M.C. Mehta vs. Union of India (All India Reporter (AIR) 1987 Supreme Court (SC) 860, 865, 1099).


[15] No. 38 of 2010 (The Gazette of India, Extraordinary, Part II Section 1 No 47, September 22, 2010). In the extensive version the title of the Law reads: “An Act to provide for civil liability for nuclear damage and prompt compensation to the victims of a nuclear incident through a no-fault regime channeling liability to the operator, appointment of Claims Commissioner, establishing a Nuclear Damage Claims Commission and for matters connected therewith or incidentally thereto”.


[22] Henry J. Hyde, United States-India Peaceful Atomic Energy Cooperation Act of
[23] IAEA Doc. INFCIRC/567.

[24] An explicit provision on India joining the CSC or – in so far as less clear than the French-Indian Agreement (Fn. 18) – on the design of the Indian Nuclear Liability Law is not found in this agreement.


[28] Compare Indrajit Basu, Cracks in India’s Nuclear Law, Asia Times, 2 September 2010, at: http://www.atimes.com/atimes/South_Asia/1I02D04.html.

[29] Artikel 21 states: “No person shall be de- ported of his life or personal liberty except according to procedure established by law.” Artikel 48A provides: “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”


[31] The licence requirements for installation and materials are regulated in Article 14 Atomic Energy Act, 1962. Licence holder is the Central Government.


[35] See Balachandran (Fn. 16) pp. 11-15.

[36] The individual provisions of the Bill are referred to as “clauses”. Only the “Act” contains “Sections”. See also the references in Fn. 30. Concerning legislative procedure in general, see Articles 107 and 111 of the Indian Constitution.

[37] The Atomic Energy Act (Fn. 5) defines the concept “notification” as publication in the Law Bulletin (Section 2(d)).

[38] See infra under this paragraph “time limits for claims for compensation”.

[39] Section 11(j) juncto Section 170 (n) U.S. Atomic Energy Act (Fn. 21).

[40] While in the revised nuclear liability conventions, a grave natural disaster will no longer be recognized as exonation, the Indian Act does exonerate the operator of liability in this case.

[41] See at Section 17 under section 3.3 of this article.

[42] The nuclear liability conventions require the victim to have knowledge or ‘ought to have knowledge’ of the damage and the liable operator; see Article 8 (c), especially (d) PC 1960 und 2004, Article VI (3) VC 1963 and 1997, Article 9 (3) Annex CSC.

[43] See Fn. 15.


[45] Sections 170 (a – d) juncto 11 (i) and (w) Atomic Energy Act (Fn. 21).

[46] See Fn. 15.

[47] Section 16 (2) Atomhaftungsgesetz 1999 (BGBl. 2; Austria) 1998/170, 2001/98, 2003/33).


[50] Balachandran (Fn. 16) refers apparently to Article 4 (1) of the South Korean “Act on Compensation for Nuclear Damage” (Act No. 2094 of 24 January 1969 as last amended by Act No. 6350 of 16 January 2001, in: Nuclear Law Bulletin Supplement to No. 68 (2001/2)). The compari- son with South Korea is however not en- tirely correct, because the South Korean Law requires intent or gross negligence for the existence of a deficient supply.


[54] The notion “principles of natural justice”, also “procedural fairness”, describe in some common law countries a number of principles that are attributed to the natural law. For India, for example, they are defined as follows: “a. No man shall be Judge in his own cause; b. Both sides shall be heard, or audi alteram partem” (Justice T.S.Sivaganam, Principles of Natural Justice, Lecture delivered at Tamil Nadu State Judicial Academy on 01.06.2009, at: www.hcmdras.tn.nic.in/jacademy/articles/Principles%20of%20Natural%20Justice%20T.S.%20Sivaganam%20.pdf). See further: Justice Smt. Sujata V. Manohar; Principles...
of Natural Justice: “(i) The right to be heard by an unbiased Tribunal, (ii) The right to have notice of charges of misconduct, (iii) The right to be heard in answer to that charge”, at: http://www.italonline.org/articles_new/index.php/principles-of-natural-justice/.

[59] The Act does not call the decision a judgment, but an award.

[60] The original Bill submitted by the Government (Fn. 26) provided in Section 19 that a Claims Commission could also be established if “the amount of compensation may exceed the limit specified under sub-section 2 of section 6”. The Parliament deleted this sentence.


[63] Balachandran (Fn. 16) pp. 11–15), in paragraph on “Requirements of a Civil Nuclear Liability Bill”, likewise refers to the international principles by explicitly taking into account the IAEA Handbook on Nuclear Law and describes international practice.

[64] See Fn. 58.

[65] See Fn. 33.

[66] See supra Section 2.