

Overlapping Nuclear Safety Control Provisions of the Atomic Energy Act and Electric Utility Act

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1. Introduction

Before May 17, 2005, Korea's nuclear power plant (hereinafter referred to as 'NPP') regulation system was two-pronged. Every NPP system consists of primary or secondary system, and each type was respectively regulated by the Atomic Energy Act (hereinafter referred to as 'AEA') and the Electric Utility Act (hereinafter referred to as 'EUA'). This unusual regulatory regime gave rise to a number of problems with respect to operation and safety. For this reason, the Enforcement Regulation of AEA and applicable Notice were revised on May 17, 2005 to the effect that all regulation on NPPs subject to EUA was brought under the purview of AEA, except regulation on business license for nuclear power generation under Article 7 of EUA and approval of plan of works for setting up electric installations (hereinafter referred to as 'construction plan') (including approval of any changes; the same shall apply hereinafter) under Article 61 thereof. From the point of view of the Ministry of Science and Technology, the regulation of NPPs by a single law has enhanced their safety. However, the Ministry of Commerce, Industry and Energy retains regulatory authority regarding NPPs. It reviews and approves construction plans for secondary system pursuant to Article 61 of EUA and Article 28 of the Enforcement Regulation thereof. This situation arose because Article 28 of the Enforcement Regulation of EUA continues to provide for matters related with nuclear power. Therefore, continued control of NPPs under EUA ignores the relationship and respective nature of AEA and EUA. There is also possibility of violation of a superseding law. Even if said provision is not in violation of a superseding law, Article 28 of the Enforcement Regulation of EUA poses the possibility of overlapping regulation, which may violate the principle of prohibiting excessive regulation, one of the principles of the Korean Constitution.

Assessment of the dual regulatory system for review of secondary system requires (i) identifying problems by analyzing the nature of AEA and EUA and the regulatory law system on NPPs and (ii) ascertaining the legitimacy of the dual regulatory system according to the legal principles of the Constitution and administrative law.

2. Consistency of the National Legal System

2.1. Significance

All laws should be in accordance with the Constitution, higher laws, and other applicable laws as well as rulings or decisions by courts or the Constitutional Court. There should not be any contradictions or conflicts. Any new law should be reconciled with the national legal system to ensure complete consistency.

There are four general principles to redress contradictions and conflicts among laws: i) matters of governance; ii) prevalence of higher laws; iii) prevalence of new laws; and iv) prevalence of special laws.

2.1.1. Matters of governance

Depending on the form of laws (acts, presidential decrees, ordinances of the prime minister, ministry ordinances, etc.) or relevant matters of governance (such as civil law, criminal law, etc.), affairs that can be prescribed by law are roughly determined a priori. As regards matters of governance by different forms of laws, the parties with the authority of enactment differ according to the form of laws. Thus, any law in violation of this principle becomes null and void.

2.1.2. Prevalence of higher laws

All laws collectively constitute a hierarchy with the Constitution at the top. Higher laws prevail over lower laws.

2.1.3. Prevalence of new laws

If there are two laws at the same level and neither is a general or special law, the new law prevails over the old law.

2.1.4. Prevalence of special laws

In the case of laws at the same level, a special law prevails over a general law. However, differentiation between general and special laws is relative, not absolute.

3. Principle of Proportionality (Principle of Prohibiting Excessiveness)

3.1. Significance

According to the principle of proportionality, when an administrative entity seeks to accomplish a specific administrative goal, there must be a rational and

proportionate relationship between the goal and related means. This is also referred to as the principle of prohibiting excessiveness (excessive regulation). Originally, the principle of proportionality was understood in a narrow sense (principle of appropriateness). With its meaning having been gradually extended, it has become a grand principle that encompasses the principles of adequacy, necessity, and appropriateness (principle of proportionality in a narrow sense).

3.1.1. Principle of adequacy

This means that any actions or measures taken by administrative authorities must be effective toward attaining the intended goals.

3.1.2. Principle of necessity (principle of minimum infringement)

According to this principle, when there are multiple means suitable for attaining administrative goals, an administrative agency must choose the means that imposes the least burden on the counter-party and the general public

3.1.3. Principle of appropriateness (principle of proportionality in a narrow sense)

Even in cases where a certain measure taken by an administrative agency causes minimum infringement, it should not be taken if the disadvantage arising from such measure is greater than the public benefit.

3.2. Rationale for the principle of proportionality

The principle of proportionality is stipulated in Article 37(2) of the Constitution (Even when such restriction is imposed, no essential aspect of the freedom and right shall be violated), Act on the Performance of Duties by Police Officers [Article 1(1)], and the Administrative Litigation Act (Article 27)

3.3. Applicability of the principle of proportionality

The principle of proportionality has mainly been developed for police laws. Obligatory administration is a typical form of administrative action to which this principle applies. For beneficial administration, the principle of prohibiting excessive benefits (the principle that administrative authorities should provide only those benefits necessary for accomplishing its goal) is applied. Furthermore, the principle of proportionality is understood as a principle applicable to all aspects of administration (exercise of the right to cancel/withdraw, circumstantial ruling/judgment, limitations on additional clauses regarding administrative acts, administrative planning, administrative guidance, and

so forth) as a general legal principle that places limitations on discretionary power.

3.4. Effect of violation of the principle of proportionality

The principle of proportionality is a general legal principle or a constitutional principle that was derived from the principle of the constitutional principle of the rule of law. Therefore, any administrative action in violation of this principle is illegal.

2.5. Limitations on the principle of proportionality

When the party to an administrative measure has habitually violated laws or engaged in such acts as concealment of facts and fraud, comparative measurements should be loosely applied or not be applied at all in connection with the principle of proportionality.

4. Conclusion

From the perspective that higher laws prevail, Article 95 of EUA provides that AEA shall apply to safety control (including authorization and permission) regarding the installation, maintenance, repair, operation, and security of nuclear reactors, related facilities thereof and radioactive waste management facilities, as well as the types and release standards of nuclear wastes. This means that the electric utility laws apply only to those nuclear facilities not subject to the atomic energy laws with respect to safety control, including authorization and permission for nuclear facilities.

On May 17, 2005, the Enforcement Regulation of AEA and related Notice were revised, making both primary and secondary system subject to AEA. Accordingly, the provisions on atomic energy in Article 28 of the Enforcement Regulation of EUA are deemed null and void because Article 95 of EUA provides that the subjects of permission as provided in AEA should not be governed by EUA.

From the perspective of the constitutional principle of prohibiting excessive regulation, the purpose, method, and legal interests regarding the construction plan authorization scheme overlap with those of AEA when examined in terms of the adequacy of such purpose and method, minimum infringement, and balance of legal interests. Therefore, the scheme is inadequate, excessively violative, and unbalanced. In turn, the scheme is deemed null and void since it violates the constitutional principle of prohibiting excessive regulation.

REFERENCES

Examination standards for legislation (Ministry of Legislation)