

Retroactive Application of New Safety Standards under the Atomic Energy Act

Chang Gun-Hyun, Kim Sang-won, Koh Jae-Dong, Kim Chang-Bum, Jung Myung-Mo, Song Jae-Myung, and Ahn Sang-kyu

KINS (Korea Institute of Nuclear Safety), #19 Guseong-dong, Yuseong-gu, Daejeon, k363cgh@kins.re.kr

1. Introduction

The Atomic Energy Act (hereinafter referred to as “the Act”) contains no provision that sanctions the retroactive application of new safety standards to nuclear facilities in operation to satisfy the development of technology (hereinafter referred to as “new safety standards”). In addition, the periodic safety review under Article 23-3 of the Act does not set forth application of, nor assessment under, new safety standards. When the fatal and overwhelming impact of nuclear accidents is taken into account, it is advisable to apply the new safety standards retroactively to nuclear facilities in operation.

However, retroactive application of new safety standards to nuclear facilities in operation would entail a modification in the standards for permits, etc. Therefore, there exists a risk of violating the principles of the Constitution and administrative laws, namely the principles of the prohibition of retroactive application, safeguarding of good faith and so forth. Accordingly, this report scrutinizes the possibility of introducing retroactive application of new safety standards under the Act (hereinafter referred to as “retroactive application”), based on the theories of Constitution and administrative laws.

2. Relevant Theories of the Constitution and Administrative Laws

Among the relevant theories of the Constitution and administrative laws are the principle of the rule of law, principle of the prohibition of retroactive legislation and the general principles of administrative laws.

2.1. Principle of the Rule of Law

The principle of the rule of law stipulates that people’s rights can be restricted only by a law legislated by the National Assembly.

2.2. Principle of the Prohibition of Retroactive Legislation

The principle of the prohibition of retroactive legislation means that retroactive legislation is not recognized because it disrupts the stability and predictability of the legal system from the perspective

of the people and violates the principle of the rule of law and the principle of safeguarding of good faith.

This principle is based on Article 13(1) and 13(2) of the Constitution. Article 13(1) of the Constitution stipulates “no citizen shall be prosecuted for an act which does not constitute a crime under an act in force at the time it was committed, nor shall he be placed in double jeopardy.” Article 13(2) of the Constitution provides that “no restrictions shall be imposed upon the political rights of any citizen, nor shall he be deprived of property rights, by means of retroactive legislation.”

2.3. General Principles of Administrative Laws

The general principles of administrative laws include the principle of the safeguarding of good faith and the principle of the prohibition of excessive measures.

2.3.1. Principle of the Safeguarding of Good Faith

The principle of the safeguarding of good faith means that if a person trusts an administrative agency’s remarks and actions and if such trust is worthy of safeguarding, the trust must be protected.

The principle of the safeguarding of good faith is legally effective only when each of the following conditions is satisfied:

- o The administrative agency expresses an official opinion to an individual, which becomes the basis for such individual’s trust;
- o The person is not held accountable for unreasonably trusting the expression of an opinion by the administrative agency to be fair;
- o The person trusts such expressed opinion and takes certain actions in relation therewith; and
- o The administrative agency enforces an administrative measure that goes counter to said opinion and consequently results in infringement of the interests of the person who trusted such opinion.

2.3.2. Principle of the Prohibition of Excessive Measures

The principle of the prohibition of excessive measures is based on Article 37(2) of the Constitution and Article 1(2) of the Act on the Performance of Duties by Police Officers. Article 37(2) of the Constitution provides that the “freedom and rights of

citizens may be restricted by laws only when it is necessary for national security, maintenance of order or public welfare. Even when such restriction is imposed, no essential aspect of the freedom and rights shall be violated.” Article 1(2) of the Act on the Performance of Duties by Police Officers stipulates that the “authority of a police officer as prescribed by this Act shall be exercised within the minimum extent necessary for said officer’s performance of duties, and shall not be abused.”

Among the detailed principles under the principle of the prohibition of excessive measures are the principles of appropriateness, the choice of the least violative measure and the balance between public interest and cost to the individual.

2.3.2.1. Principle of Appropriateness

The principle of appropriateness requires that the means to accomplish the purposes of administration must be suitable and useful for the attainment of such purposes.

2.3.2.2. Principle of the Choice of the Least Violative Measure

The principle of the choice of the least violative measure means that in cases where there are two or more measures available, the least violative measure must be chosen.

2.3.2.3. Principle of the Balance between Public Interest and Cost to the Individual

The principle of the balance between public interest and cost to the individual means that if the cost incurred by a person due to a specific administrative measure is greater than the public interest served by such measure, such measure shall not be applied.

3. Conclusion

Rulings by the Supreme Court indicate that the Supreme Court does not, in principle, acknowledge retroactive legislation because it is disruptive to the stability and predictability of the legal system from the perspective of the people.

The Constitutional Court holds the same opinion as that of the Supreme Court, in principle. However, it exceptionally acknowledges retroactive legislation in such cases where there exists a significant public interest that prevails over the principle of the safeguarding of good faith.

For example, if a retroactive application of a law can prevent a nuclear accident, it can be generally regarded

as serving a significant public interest that prevails over the principle of the safeguarding of good faith.

In conclusion, from the standpoint of legal theories, it is possible to insert a provision allowing retroactive legislation by an amendment of the Act.