

Topic : The Role of the Ombudsman Review in the Environmental Field

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1. Introduction

In the environmental field, through the last 25 years, review mechanisms at the national level became required to hold administrative law accountability in environmental decision makings. At the United Nations Conference on Environment and Development, which was held at Rio de Janeiro in 1992 and well known as 'Rio Summit', the concept of access to justice was proclaimed in the context of ensuring access to information and public participation in environmental decision makings. This concept was developed in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which was signed in 1998 and entered into force in 2001. Although the Aarhus Convention is the regional convention, since 2010, the United Nations Environmental Programme has promoted the global diffusion of this concept based on the Aarhus Convention.

Here, along with judicial review and merits review, Ombudsman review is assumed as one of the fundamental layers that composes the system of review on administrative environmental decision makings. However, compared with judicial review and merits review, the importance of Ombudsman review seems to be not fully recognised in the environmental field. It is partly because the Aarhus Convention weights the ability of resolution of individual disputes in its definition of review mechanisms. Still, as a layer of system of review, it is rational to consider that the role of Ombudsman review is significant.

Aiming at distinguishing its role from judicial review and merits review, this paper discusses the role of Ombudsman review in holding executive accountability on administrative environmental decision makings. The discussion is based on the case study of the actual practices of review mechanisms on the Tokyo Electric Power Company's complex nuclear accidents in Fukushima (TEPCO Nuclear Disaster) in Japan. As is well known, Japan does not have the Parliamentary Ombudsman and so there was no Ombudsman review in its system of review. However, facing with this national crisis, the National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) was established. The NAIIC was the first parliamentary institution with statutory mandated investigatory power in the history of Japanese constitutional democracy. Although the NAIIC and the Parliamentary Ombudsman was not completely equivalent, the

comparison of the practice of the NAIC with those of judicial review and merits review would provide useful insight for articulating the role of Ombudsman review in the environmental field.

2. System of review in Japan

The composition of system of review in Japan at the time of the TEPCO Nuclear Disaster was comprised of two layers; namely judicial review and merits review. Reflecting the influence of German-style civil law system, merits review had been structured centring internal review mechanisms, and in many cases, its exhaustion was required before the commencement of judicial review. Judicial review was conducted by the Judicial Court, which had three layers: District Courts, High Courts and the Supreme Court. While District Courts and High Courts had the power to examine facts, in principle, the Supreme Court only examined problems of law. Neither of these two layers had expert body focusing on environmental administration. There was no Parliamentary Ombudsman, and so no Ombudsman review in Japan.

The basic feature of Japanese system of review can be summarised by the structural vulnerability in addressing first instance administrative environmental decisions. By the composition, there was no expert review or systemic review. Regarding judicial review, the court was quite reluctant to examine first instance decisions due to the lack of expertise. In addition, the independence of merits review was quite low not only because merits review was internal review, but also because the officers who conducted the review were frequently not properly trained.

3. TEPCO Nuclear Disaster

The TEPCO Nuclear Disaster was occurred by the severe nuclear power plant accidents in March 2011. It was revealed that the root cause of this disaster was the regulatory capture, which caused the quite insufficient emergency preparedness for a severe nuclear accident. It was this insufficient emergency preparedness that provoked the accidents, brought absolute chaos into the emergency responding and enlarged the damage of the TEPCO Nuclear Disaster. The Cabinet and very top echelon of the government was unable to make sound decisions due to the lack of information. Reflecting the poor emergency preparedness, the emergency response centre at the government was unable to collect and deliver the vital information on onsite to the Cabinet for the first 4 days. These 4 days were the most vital moments for emergency responding. At onsite, there was the shortage of equipment to stabilise the accident. In addition, operators were not familiar with how to cope with a severe accident because they were not well trained. At offsite, the government failed to implement the iodine prophylaxis, and did not provide timely and proper information for evacuation. In consequence, 1,800km² of land was seriously contaminated by radioactive released from the broken nuclear power plants, and 150,000 people evacuated from the contaminated area. At the moment of writing, the radioactive emission to the environment is still continuing.

4. Consequence of the lack of Ombudsman review

The necessity of the emergency preparedness for a severe nuclear accident has been globally recognised as the most important lesson of the Chernobyl Nuclear Disaster in 1986. Nevertheless, in Japan, the regulatory capture prevented the application of this lesson. Facing with this reality, it should be examined why such a systemic corruption had been overlooked in a parliamentary democracy until 2011. Especially, why the existed system of review failed to hold executive accountability needs to be clarified.

From the 1970s to 2011, the rationality of planning approval for seven Japanese nuclear power plants, of which safety was doubtful, had been litigated. However, the rationality of the first instance administrative decisions on safety had not been properly reviewed. In the course to the litigations, merits review did not address the merits of the cases at all due to its quite low independence. Judicial review also did not fully address the rationality of the administrative decisions. The main reasoning was the court's trust on the expert judgment of the first instance decision maker and its lack of expertise. These attitudes of review mechanisms invited the moral hazard and the lack of accountability, and resulted in the regulatory capture. In his lecture held at Kyoto University in May 2014, the former Supreme Court judge Prof Fujita noted that the court should never have over-trusted the first instance administrative decisions.

Under such a situation, it was the NAIIC that revealed the root cause of the TEPCO Nuclear Disaster. The NAIIC was a temporary institution comprised by independent experts. It existed only seven months, but successfully clarified the regulatory capture and the lack of accountability in Japanese nuclear regulation. In contrast, both judicial review and merits review overlooked this root cause for four decades. As its model was the investigation commission scheme of the United States Congress, the NAIIC was not completely equivalent with Parliamentary Ombudsman. However, it should be emphasised that this parliamentary independent investigation commission clarified the systemic problem, which invited the TEPCO Nuclear Disaster.

5. Post TEPCO Nuclear Disaster reform

When it was established, the NAIIC was expected to play central role in rebuilding the collapsed administrative framework on nuclear regulation. For this purpose, the statutory mandates of the NAIIC included the proposals for improving nuclear safety and for the establishment of new regulatory body. Thus, in its report, the NAIIC made various recommendations in order to catch up to the global standard of nuclear safety. The bottom line of these recommendations was to establish parliamentary control over the nuclear administration. In this context, a new nuclear regulator was proposed as an independent institution that was accountable to the Diet.

However, at the moment of writing, many of the NAIIC's recommendations are not fully implemented. Especially, the recommendation for establishment of the new regulatory body was ignored in order to smoothly restart the operations of the remaining nuclear power plants. Instead, the government adopted its own proposal, in which the new nuclear regulator was accountable to the executive, but not to the legislature.

Among the several factors invited this consequence, the most influential one was that the NAIIC was a temporary institution. It was established in December 2011, and was dissolved shortly after its submission of

report in July 2012. Hence, unlike the Parliamentary Ombudsman, there was no time for the NAIIC to follow up its recommendations. Furthermore, unfortunately, as it was the first parliamentary investigation commission in the history of Japan, the Diet was not familiar with how to cope with its recommendations, and the nuclear promoters had very strong influence on politics. Under this circumstances, without continuous and authoritative follow-up, the public pressure for the implementation of the NAIIC's recommendations did not last for long.

6. Conclusion

From above, the significance of Ombudsman review in the environmental field could be summarised as its abilities of resolving systemic problems and that of ensuring implementation of its recommendations. For the former, as Japanese case clearly showed, in the environmental field, systemic problems could cause quite serious and irreversible damage on both natural environment and the society. While the other layers of system of review do not address the systemic problems, Ombudsman review can address systemic problems and propose resolutions. For the latter, as Japanese case exemplified, without a permanent oversight, it is difficult to resolve systemic problems, especially when there is strong influence from the status quo. While temporary institutions cannot follow up its recommendations, Ombudsman review can follow up the cases to ensure implementation of its recommendations. Therefore, the role of Ombudsman review is essential to resolve systemic problems and to realise a good governance in the environmental field.

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