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Judicial Control of Discretionary Power Used in Administrative Rulemaking Analyses of the US and Georgia Case Law[1]

1. Introduction

Judicial review is one of the essential tools to ensure government accountability. It may have the function of a "fire alarm"-catching cases that the legislative branch of government is unwilling to control.[2]

Especially interesting is the extent of judicial review in cases where the administrative bodies use discretionary power to make administrative rules. Part of the scholars think that administrative systems, that utilize discretionary power, grant the decision-making competence to the agency and not to the court. Thus, according to the view of these scholars, the role of the court in evaluating discretionary power has to be restricted.[3]

This article analyzes standards of judicial scrutiny used by the Georgian and the US Supreme Courts to ensure effective control of discretionary power utilized in administrative rulemaking. The first chapter discusses the US Supreme Court's interpretation of the Administrative Procedure Act's (further APA) "arbitrary and capricious" standard of review. Then it explores importance of hard look and deference doctrines. The second chapter studies the Georgian Supreme Court's approach toward judicial control of discretionary power used in administrative rulemaking. The conclusion summarizes findings of the research.

2. Judicial Control of Discretionary Power Used in Administrative Rulemaking in the US

Generally, as rulemaking, is a "quasi-legislative function," it is subject to softer judicial scrutiny. However, the fact that Congress can apply "specific statutory review,"[4] sometimes puts greater responsibility on the judiciary.[5] The APA "arbitrary and capricious" standard for judicial review applies to informal rulemaking,[6] while

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[2] *Reiss D.R.,* Tailored Participation: Modernizing the APA Rulemaking Procedures, NYU Journal of Legislation and Public Policy, 12, 2008-2009, 366.

[3] *Koch C.H. Jr.,* Judicial Review of Administrative Discretion, The George Washington Law Review, Vol. 54, No. 4, 1986, 470.

[4] Congress sometimes specifies that "substantial evidence" test has to be used for review of the notice and comment rulemaking. However, scholars indicate that "arbitrary and capricious" as well as "substantial evidence" standards are similar and they "have tended to converge in judicial review of informal rulemaking, *Burrows V.K., Garvey T.,* A Brief Overview of Rulemaking and Judicial Review*,* Congressional Research Service, January 4, 2011, 10, <http://www.wise-intern.org/orientation/documents/crsrulemakingcb.pdf.>.

[5] *Note,* the Judicial Role in Defining Procedural Requirements for Agency Rulemaking, Harvard Law Review, Vol. 87, 1974, 801.

[6] According to section 553 of the APA informal rulemaking takes place when agency issues a general notice with the substance of the proposed rule in the Federal Register; gives public opportunity to submit written comments and consequently promulgates the final rule with a "concise general statement of basis and

the "substantial evidence" test, which is a somewhat stricter standard, is used to "review formal,[7] record-producing agency actions."[8]

In this chapter the "arbitrary and capricious" test, hard look review and deference doctrine is discussed based on the analysis of the case law of the US Supreme Court.

2.1. "Arbitrary and Capricious" Test

The US courts utilize "arbitrary and capricious'' test to review administrative rulemaking. While using "arbitrary and capricious" standard of review the courts mostly concentrate on procedural violation during the rulemaking. They defer the formulation of the substance of the rule to the agency and did not intrude in policymaking choices of the agency. The landmark[9] decision establishing "arbitrary and capricious standard" of judicial review for informal rulemaking in the US is the case of *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council Inc.*[10] In deciding the dispute, the D.C. Circuit based its decision on the procedural violation and did not pay much attention to the substance of the rule.[11] The Supreme Court articulated that section 553 of the APA gives "the minimum requirements" for informal rulemaking. According to this section, courts are not allowed to supplement informal rulemaking[12] unless Congress decides otherwise.[13] Furthermore, the Court underlined that "agencies are free to grant additional procedural rights in the exercise of their discretion, but the revie-

purpose." No public hearing, cross-examination or other formal procedure is required in informal rulemaking, *Strauss P.L.,* The Rulemaking Continuum, Duke Law Journal, Vol. 41, 1992, 1466.

7 Formal rulemaking is entailing procedures by which rules are made on the record after opportunity for an agency hearing, *Ibid,* 1466.

8 *McGrath M.J.,* Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking, George Washington Law Review, 54, 1986, 541, Prof. Lubbers cites *Zaring* who notes that the standard applied by the courts is "reasonableness" test, *Lubbers J.S.,* A Guide To Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 429, citing *Zaring D.,* Reasonable Agencies, Virginia Law Review, Vol. 96, 2010, 135.

9 As *Blair Bremberg* mentions: "In 1978, the Supreme Court's landmark decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* constrained to a large degree the role of courts in expanding notice value protections beyond the terms of the APA, *Bremberg B.P.*, Pre-Rulemaking Regulatory Development Activities and Sources as Variables in the Rulemaking Fairness Calculus: Taking a Soft Look at Ex-APA Side of Environmental Policy Rulemakings, Journal of Mineral and Law Policy, Vol. 6, 1990/1991, 11.

10 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 1978.*

11 *Vermont Yankee* underlined that unless enabling statute mandates rulemaking procedures, courts may not impose them, *Taylor K.,* The Substantial Impact Test: Victim of the Fallout from Vermont Yankee?, George Washington Law Review, Vol. 53, 1984, 127, Another review of the decision mentions that *Vermont Yankee* overturned the D.C. Circuit's procedural hard look practice without taking into consideration "quasi-procedural or substantive hard looks, *Keller S.A.,* Depoliticizing Judicial Review of Agency Rulemaking, Washington Law Review, Vol. 84, 2009, 443-444.

12 As Professor Lubbers notes, under *Vermont Yankee* the Supreme Court hindered the elaboration of "judge-made common law of rulemaking procedure," *Lubbers J.S.,* A Guide to Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 8.

13 *Duffy J.F.,* Administrative Common Law in Judicial Review, Texas Law Review, Vol.77, 1998, 183.

wing courts are generally not free to impose them."[14]

Thus, in *Vermont Yankee,* the Supreme Court concluded that courts have no power to invent additional procedural requirements for informal rulemaking.[15] Judicial activism to supplement the APA notice-and-comment rulemaking is disfavored. The Supreme Court noticed that courts have to use the "arbitrary and capricious" standard of review,[16] which provides the agency with more freedom in decision-making.

Generally, while considering if a rulemaking is "arbitrary and capricious," courts have to analyze agency's basis for the decision."[17] When courts utilize "arbitrary and capricious" standard, they pay attention to three facets of the test: "1) whether the rulemaking record supports the factual conclusions upon which the rule is based 2) the "rationality" or "reasonableness" of the policy conclusions underlying the rule and 3) the extent to which the agency has adequately articulated the basis for its conclusions."[18]

Leland underlines with regard to "arbitrary and capricious" review that: "a challenge that a final agency action is "arbitrary and capricious" may depend entirely upon the content of the administrative record. If an agency proves that it has examined the relevant data and articulates a "satisfactory explanation for its decision including a rational connection between the facts found and the choice made," courts will not invalidate the agency's decision.[19]

Thus, when the US courts utilize "arbitrary and capricious" standard, they leave choice of the substance of the decision to the agency. This is a deferential approach to agency rulemaking, as the "courts can void an agency action that is procedurally flawed, even if it seems substantially reasonable."[20]

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14 *Lubbers J.S.,* A Guide to Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 8, Moreover, as Professor Pierce adds: "Absent constitutional constraints or compelling circumstances the administrative agencies should be free to fashion their own rules of procedure," *Pierce R.J, Jr.,* Waiting for Vermont Yankee II, Administrative Law Review, Vol. 57, 2005, 671-672.

15 The Court said that the legislative history of the APA as well as policy considerations militated against such judicial requirement of extra procedural devices," *McFeeley N.D.,* Judicial Review of Informal Administrative Rulemaking*,* Duke Law Journal, 1984, 1984, 354, however Prof. Rubin notes that although, *Vermont Yankee* rejected the "quasi-procedural" hard look doctrine, the requirement that agencies take a hard look at the evidence provided in the notice and comment process… "the substantive hard look doctrine, which announces that courts will take a hard look at the quality of the agency's overall decision making, remains in force," *Rubin E.,* It's time to make the Administrative Act Administrative, Cornell Law Review, Vol. 89, 2003, 140.

16 *Jordan W.S. III,* Ossification Revised: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking? Northwestern University Law Review, 2000, 398.

17 *McGrath M.J.,* Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking, George Washington Law Review, Vol. 54, 1986, 561-562.

18 *Lubbers J.S.,* A Guide to Federal Agency Rulemaking*,* 5th ed., American Bar Association's Section of Administrative Law, 2012, 425.

19 *Leland E.B.,* Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking, Report to the Administrative Conference of the United States, 14, 2013, 6, <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf>.

20 *Jordao E., Ackerman S.R.,* Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, Administrative Law Review, Vol. 66, No 1, 2014, 7.

2.2. Hard Look Review Doctrine

Traditionally, the APA's notice–and-comment procedure did not envisage the "development of an evidentiary record." Initially, agencies had to give only general overview of the grounds of the decision. Therefore the judicial control of rulemaking was "necessarily shallow."[21] However, the lower courts did not follow the procedures specified in the APA and "totally transformed the meager requirements for notices of proposed rulemaking contained in § 553 into an elaborate legal procedures."[22]

Throughout the history the "arbitrary and capricious" standard of review took various forms. The *Citizens to Preserve Overton Park Inc v Volpe*[23] was the decision establishing heightened standard of judicial scrutiny.[24] *Overton Park* articulated a new test for review of informal administrative actions (including rulemaking), according to which agencies were required to develop a record of the rulemaking. The Court viewed the record as the essential element for revision of agency's action. [25]

Overton Park, is known as the "seminal case to change the meaning of [the] arbitrary and capricious" standard of judicial review of agency action. Contrary to earlier applications of the "arbitrary and capricious" test, the court in *Overton Park* did not employ a presumption that the agency's decision was supported by the facts; instead, the Court undertook a "searching and careful" inquiry into the factual basis of the decision. The Court in *Overton Park* articulated a new standard of judicial review, requiring it to conduct a "substantial inquiry" . . . exploring "whether the decision was based on a consideration of the relevant factors.[26]

The Court underlined that: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." However, the Court refused to accept "post hoc" rationalizations[27] as a basis for the

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21 *Stewart R.B.,* Vermont Yankee and the Evolution of Administrative Procedure, Comment Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives, Harvard Law Review, 91, 1978, 1812.

22 *Friendly H.J.,* Some Kind of Hearing, University of Pennsylvania Law Review, Vol. 123, 1975, 1307.

23 *Citizens to Preserve Overton Park Inc v Volpe,* 401 U.S. 402 (1971).

24 According to the heightened standard of scrutiny "the agency must allow broad participation in its regulatory process and not disregard the views of any participants. In addition to these procedural requirements courts have on occasion, invoked rigorous substantive standard by remanding decisions that the judges believed the agency failed to justify adequately in light of information in the administrative record*," Asimow M., Levin R. M.,* State and Federal Administrative Law, American Casebook Series, Thomson Reuters, 2009, 592-593, Moreover, Professor *Krotoszynski* notes that usage of record requirement as well as "concise general statement," toward informal rulemaking, is added procedural rules for the "enforcement of the APA itself." He also underlines that: "The APA requires an agency to consider relevant materials and afford interested parties an opportunity to comment on a proposed rule. The APA also requires the reviewing court to ascertain the rationality of the agency's course of conduct, with the burden of proof falling on the agency. Courts mandate new procedures not incident to a generalized procedural review, but incident to substantive "hard look" review of agency action," *Krotoszynski R.J., Jr.,* History Belongs to the Winners: The Bazelon- Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action, Administrative Law Review, 58, 2006, 1013.

25 *Note,* Judicial Review of the facts in informal Rulemaking, Yale Law Journal, Vol. 84, 1975, 1755.

26 Ibid, 155. *McFeeley* explains correctly the outcome of the case: the Supreme Court mandated that courts examine the agency record, and that agencies build a record to facilitate such review. In so doing, the Court "revolutionized the concept of judicial review of informal action," *McFeeley N.D.,* Judicial Review of Informal Administrative Rulemaking, Duke Law Journal April, 1984, 351.

27 Post hoc rationalization means when the representatives of the agency claim their truth directly before the court.

agency decision, ruling that "to perform its review responsibilities, it must have before it "an administrative record that allows the full, prompt review of the agency's action."[28]

Scholars argue that *Overton Park* announced that "substantial evidence" test should be used for informal rulemaking.[29] Moreover, *Overton Park* established "searching and careful"[30]standard which is usually called "hard look" review and has been afterwards widely utilized by the lower courts to control substantive and procedural issues of rulemaking.[31]

As Professor Garry notes, the hard look review was stricter than the tests utilized by the court previously.[32] The test had two facets. First: to give explanation of fact findings in the record and second, to provide not only rational, but reasonable policy choice.[33]

However, the analyses of the US Supreme Court's decisions demonstrate that the hard look doctrine "as a facet of the arbitrary and capricious standard, has made that standard and the substantial evidence standard quite similar" [34] and today while considering if a rulemaking is "arbitrary and capricious," courts have also to analyze agency's basis for the decision and "determine whether the evidence is substantial enough to support the decision." The same rule applies with regard to the substantial evidence standard. When the Court utilizes this standard, it has to "examine the underlying facts to determine whether there is a rational connection between those facts and the ultimate decision." Finally, this means that both standards are "merely tests of rationality."[35]

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28 *Lubbers J.S.,* A Guide to Federal Agency Rulemaking, 5th ed., American Bar Association's Section of Administrative Law, 2012, 7.

29 *Note,* Judicial Review of the facts in informal Rulemaking, Yale Law Journal, 84, July, 1975, 1755.

30 *Schiller R.E.,* Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, Administrative Law Review, Vol. 53, 2001, 1154.

31 *Garry P.M.,* Judicial Review and the "Hard Look" Doctrine*,* Nevada Law Journal, Vol. 7, 2006, 156.

32 However, some scholars think that hard look review is not as strict as it seems. They argue that: "instead of a strict substantive review, it seeks to ensure that the agency's rule-making process is "reasoned, and candid" *Note,* Regulatory Analyses and Judicial Review of Informal Rulemaking*,* Yale Law Journal, 91, March, 1982, 745, Furthermore, Professor Pierce notes that hard look does not add procedural requirements to informal rulemaking and cites *Pension Benefit Guarantee* according to which hard look review "imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision," *Pierce R.J.Jr.,* Waiting for Vermont Yankee III, IV, and V?A Response to Beermann and Lawson, George Washington Law Review, Vol. 75, June, 2007, 905-906.

33 *Garry P.M.,* Judicial Review and the "Hard Look" Doctrine*,* Nevada Law Journal, 7, fall, 2006, 156, Moreover, to fully describe the idea of the hard look review, Professor *Gary* adds that: "the hard look standard was also quasi-procedural, encompassing "a set of requirements intended to ensure that the agency itself had taken a hard look at the relevant issues before reaching its decision." He also cites (now Judge) Merrick *Garland's* explanation of the hard look doctrine: "As the doctrine developed, the courts demanded increasingly detailed explanations of the agency's rationale…an agency had to demonstrate that it had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen, Ibid, 156, quoting *Garland M.B.,* Deregulation and Judicial Review, Harvard Law Review, 98, 1985, 526-527.

34 "As the hard look doctrine evolved, courts and commentators began to formulate a theory of convergence of the two standards of review. Under this convergence theory, the substantial evidence standard operates in the same fashion as the arbitrary and capricious standard when courts review notice-and-comment rulemaking," *McGrath M.J.,* Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review during Informal Rulemaking, George Washington Law Review, Vol. 54, 1986, 552.

35 Ibid, 561-562.

The analyses of the US Supreme Court's decisions show that despite the fact that the US Supreme Court leaves discretion of rulemaking to the agency, it still demands the review of the reasonableness of the agencies decision.

2.3. Deference Doctrine

Chevron U.S.A. Inc. v National Resources defense Council, Inc.[36] is the supreme courts leading decision providing agencies with wide discretion while interpreting the statute. Decision established the famous deference doctrine which explains how powers have to be separated between agencies and courts in interpreting statutes.

The decision established two-step test for resolving the question of statute interpretation.[37] At step one, the court inquires whether Congress has directly spoken about the issue in the statute. If it turns out that the issue is clearly formulated, then the agency has to act pursuant to the "unambiguously expressed intent of Congress" and the court must enforce law. If the issue formulated in the statute is not clear, the court must continue with the step two, where the question is "whether the construction furnished by the agency is one the court could have imposed by making law on its own. If it is, then the court must exercise its limited discretion by deferring to the agency."[38]

As Justice Stevens underlines in the *Chevron* decision: "Judges are not experts in the field, and are not part either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences…While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency... In such case, federal judges-who have no constituency-have a duty to respect legitimate policy choices made by those persons who do."[39]

According to opinions of scholars, the *Chevron* pronounced several important innovations: "First, the Court laid down a new two-step framework for reviewing agency statutory interpretations…Second it departed from

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36 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

37 *Merrill T.W.,* The Story of *Chevron:* The Making of an Accidental Landmark, Administrative Law Review, Vol. 66, No. 1, Spring 2014, 254, Part of the scholars think that Step one looks like a more "legal" step; whereas step two studies how agency makes policy. For the courts is much easier to legitimize their action when they annul an administrative decision for "legal reasons" and not for the unreasonableness of the policy. Therefore, scholars note, that it is rare for a court to set aside an agency action in step two, *Jordao E., Ackerman S.R.,* Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review, Administrative Law Review, Vol. 66, No. 1, 2014, 20.

38 *Liu F.,* Chevron As a Doctrine oh Hard Cases, Administrative Law Review, Vol. 66, No. 1, Spring 2014, 305, According to Antonin Scalia, "Judicial deference to agency decision-making is a function of congressional delegation of authority to an agency…statutory ambiguity is a product not of consensus on the part of Congress, but rather of congressional omission. That is, usually it is the case that where there is a statutory ambiguity or a silence, Congress simply failed to consider the matter altogether. You don't really think that where it's ambiguous Congress said. "Let's leave it ambiguous and leave it up to the agency." That may happen sometimes, but surely not as a general rule," *Scalia A.,* Remarks by the Honorable Antonin Scalia the 25th Anniversary of Chevron v NRDC, American University Washington College of Law April, 2009, Administrative Law Review, Vol. 66, No.1, 2014, 251.

39 As Professor *Rubin* notes *Chevron* raises "conceptual difficulties." Its two-step formula causes problems because "if the statute is clear, the agency interpretation will be reviewed de novo, with no deference given to the agency, but if the statute is deemed ambiguous, deference will be extensive," *Rubin E.,* It's Time to Make the Administrative Act Administrative, Cornell Law Review, 89, 2003, 141-142.

previous law by suggesting that Congress has delegated authority to agencies to function as the primary interpreters of statutes they administer."[40]

3. Judicial Review of Discretionary Power Used in Administrative Rulemaking in Georgia

In this chapter the case law of Georgian Supreme Court is discussed with regard to judicial control of discretionary power used in administrative rulemaking. In this chapter emphasis are also made on the importance of expert knowledge in administrative rulemaking.

3.1. Limited Judicial Control of Discretionary Administrative Rulemaking

It is worth mentioning that the Supreme Court of Georgia establishes limited judicial control in cases where the normative administrative-legal act is made on the basis of discretionary power.

The Supreme Court's judgment of 31 May 2007 bs-565-534 (k-06)[41] is a clear example of restricted judicial control of the normative administrative-legal act issued on the basis of discretionary power. The claimants asked for invalidation of the Autonomous Republic of Adjara's Government Resolution adopted on November 29, 2005 related to the liquidation of the Folklore Research Center, where they worked. The plaintiffs indicated that procedures established by the law were violated in the process of issuing of the normative administrative-legal act. [42]

Firstly, the Supreme Court draw attention to the fact that the normative administrative-legal act was adopted by the use of discretionary power. The Cassation Chamber noted that "rationality of the decision concerning establishment as well as liquidation of a legal person of public law, achieving or impossibility of achieving the objective set before a legal person of public law, the effectiveness of the structural unit established by the government, is subject to discretionary authority of the Autonomous Republic of Adjara's Government."[43]

After establishing that administrative body exercised discretionary power in rulemaking, the Supreme Court noted that the court is unable to review the scope of discretionary power which is utilized by the collegial administrative organ, as the court scrutinizes the normative administrative legal act issued by the collegial administrative organ only on the basis of legality. [44]

The Supreme Court pointed out that pursuant to the Georgian legislation the "different rule of revision of the decision of the collegial administrative body is established and its examination is based only on the legality," which is conditioned "by the special status of the collegial body and because of the non-rationality of limiting its discretionary power."[45]

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40 *Merrill T. W.,* the Story of *Chevron:* The Making of an Accidental Landmark, Administrative Law Review, Vol. 66, No. 1, 2014, 255-257.

41 Decision N bs-565-534 (k-06) of 31 May 2007 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

Consequently, the Court considered that the Autonomous Republic of Adjara's Government was authorized to make the most acceptable decision pursuant to the law, based on the evaluation of public and private interest, including the decision on liquidation of the Folklore Research Center. [46]

Despite the fact that the court left the decision making freedom to the administrative body, it also added that the use of discretionary power does not exempt the administrative authority from the non-compliance with the procedures prescribed by law, because: "conferral of power to publish legal norms independently, conferral of administrative rulemaking power to the executive organ is an essential part of the competence of any administrative authority which, conditions the proper protection of implementation of such power.[47]

Based on the formulation above, the Court found that because of the procedural violation resulting in a non-promulgation of the notice of administrative rulemaking, as well as non-promulgation of the project of the normative administrative-legal act, the Government Resolution of the Autonomous Republic of Adjara is invalid. The court especially highlighted the lack of the notice and comment procedure, which resulted in zero public participation, and noted that this amounted to infringement of the section 1 of article 60^1 of GAC, pursuant to which the normative administrative-legal act has to be set aside…when the statutory procedures of its preparation or promulgation are "substantially violated."[48]

Thus, in this case the Supreme Court used restricted judicial control over discretionary administrative rulemaking, but at the same time, it especially highlighted the importance of compliance with the procedural rules prescribed by law in issuing the normative administrative-legal act. By underlining the importance of procedural compliance with law, the Georgian Supreme Court used the same standard of review of discretionary administrative rulemaking as the US Supreme Court utilizes in "arbitrary and capricious" test.

3.2. The Administrative Body's Expert Knowledge as a Basis for Discretionary Administrative Rulemaking

The use of the limited judicial control of discretionary power is underlined also in the Supreme Court of Georgia's decision of 23 May, 2013 bs-622-610 (K-12).[49] The Georgian Supreme Court announces that where the decision is based on the administrative body's expert knowledge, the administrative body has wide discretion. According to the facts of the case in the claimants requested the issuance of the normative administrative-legal act related to the payment of the debt pursuant to the subparagraph "g" of Article 48.1 of the "Law on State Debt." [50]

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46 Decision N bs-565-534 (k-06) of 31 May 2007 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

47 Ibid.

48 In this case, the Supreme Court considered violation of the notice and comment procedure the "substantial infringement" of procedural rules that caused invalidation of the normative administrative-legal act. The Court did not stop here; it further mentioned that when promulgating the normative administrative-legal act the administrative authority had to apply not only the notice and comment procedure but also offer a public hearing, decision N bs-565-534 (k-06) of 31 May 2007 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

49 Decision N bs-622-610 (K-12) of 23 May 2013 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

50 Ibid.

The Supreme Court observed that the introduction of a clear payment mechanism of state debt required a difficult financial calculation. This demanded special knowledge and expertise of the administrative body. Particularly, "considering the extraordinary character of the issue… the need for mobilization of large amounts of funds, the lack of budgetary funds, the need for a rational economic approach to the settlement of the issue, considering the budget crisis, the economic-financial capacity, the need to balance the budget and a number of other issues, the Cassation Chamber acknowledges that it is necessary to study thoroughly the problems related to debt payment and to develop the strategy for drawing up appropriate resources for the issuance of requested sub-legal normative act."[51]

The Court specifically draws attention to the administrative body's need to use a "rational economic approach" in deciding the issue. The Court mentions that the administrative body has to decide all problematic issues related to the debt-payment mechanism rationally and reasonably.[52]

The Court then explains the meaning of administrative rulemaking. According to the Court's view, the idea of delegation is that in compliance with the requirements of the law the special capacity and professional knowledge of the executive branch is to be used for carrying out the regulatory tasks.[53]

Thus, the Court notes that the decesion to cover the state debt is beyond the scope of judicial competence, since this is a special competence of the administrative body and requires the special capacity of the executive branch. However, the court underlines that discretionary power does not release the administrative body from non-complying with the procedures established by the law and based on this argument remands the case back to the Appellate Court stating that it has to look through the factual circumstances of the case and determine if the rules concerning the issuance of the normative administrative legal act are observed.[54]

This decision of Georgian Supreme Courts resembles the deference doctrine established by the US Supreme Court in *Chevron* as the Georgian Supreme Court specially underlines the importance of expert knowledge of administrative bodies and their independence in interpretation of the law issued by the Parliament.

Despite the fact that above analyzed cases of the Georgian Supreme Court follow the path of the US Supreme Court and review the legality of the exercise of discretionary power there still remains one case where the administrative body's discretionary power was left without judicial control.

3.2. Deviation from Established Practice

In contrast with the decisions analyzed above the Supreme Court of Georgia did not use the already established approach to the control of discretionary power in its 2007 decision bs-107-101 (K-07)[55] handed down on July 11, a month after to the decision bs-565-534 (k-06). According to the facts of the case the claimants asked for invalidation of the resolution N 52 of 6 June 2006 of the Ministry of Labor, Health and Social Protection of the

[51] Decision N bs-622-610 (K-12) of 23 May 2013 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

Autonomous Republic of Adjara related to the liquidation of the Social Protection Unit of Batumi and the decree of the Head of the Social Protection Unit, according to which they were released from their jobs. The claimants noted that the procedures prescribed by law were infringed while issuing the normative administrative legal act. [56]

The Cassation Court emphasized the importance of discretionary power utilized by the administrative authority in this case and noted that pursuant to article 28^1 of the Law on "the Structure, Authority and Rules of Conduct the Government of the Autonomous Republic of Adjara's Government" the decision on the creation, transformation or termination of the Ministry's territorial authority is the exclusive decision of the government and represents it's discretionary power. The Court pointed out that the legislation does not provide any reservation or condition for the realization of this discretionary power, which will legally restrict the competence of the Autonomous Republic of Adjara's Government in deciding the above mentioned organizational-structural issue. Thus, according to the Court's view, the Government had the exclusive right to liquidate the Unit.[57]

After emphasizing that the discretionary power was the basis of the decision, the Court added that the discretionary authority of the Autonomous Republic of Adjara's Government does not exclude the obligation of the Autonomous Republic of Adjara's Government to act as an administrative agency to observe the rules established by the legislation for the issuance of a normative administrative-legal act. [58]

Despite underlining the importance of compliance with the law in making discretionary decesions and despite the fact that the Supreme Court did find violation of the notice and comment procedure, the court considered infringement of procedure as a "general harm" which will never trigger invalidation of normative administrative-legal act[59] and thus deviated from its established practice, where the Court reviewed the legality of discretionary power.

Based on the analyses of the decisions it is evident that the Supreme Court of Georgia, like the Supreme Court of the United States, in most cases grants the policy making freedom to the administrative bodies, however in contrast with the US court, Georgian Court not always fully review the legality of the rulemaking decision made on the basis of discretionary power.

4. Conclusion

The research shows that the US and the Georgian Supreme Courts leave policy making choice to administrative body. However, when the US Court mentions that it has limited power to control discretion used in administrative rulemaking, it still applies "test of reasonableness" to scrutinize the legality of the decision.

Georgian Supreme Court follows the path of the US Supreme Court and underlines that the administrative body while using discretionary power in administrative rulemaking has to comply with the law. However, the Supreme Court of Georgia not always controls the legality or reasonableness of utilized discretionary power. Therefore for the effective judicial control of discretionary administrative rulemaking, it will be preferable if Georgian courts in all circumstances review the legality of discretionary administrative rulemaking.

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[56] Decision N bs-622-610 (K-12) of 23 May 2013 of the Supreme Court of Georgia available at the electronic search engine of the Supreme Court judgments.

[57] Ibid.

[58] Ibid.

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