Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2020

უნივერსიტეტის
გამომცემლობა

Ekaterine Kardava[*]
Iza Kasradze[**]

Legal Grounds and Factual Preconditions for the Reinstatement of Unlawfully Dismissed Public Officer

The legal instrument for reinstating an unlawfully dismissed public officer has been stipulated by Article 118 of the Law of Georgia on Public Service. In case the decision to dismiss the officer is declared null and void, the rule lays down consecutive procedures and establishes guarantees of legal protection.

Dictated by existing normative regulations, following the nullification of the decision on dismissal of the officer, the public authority shall be liable to immediately reinstate the servant to the same position and if such appointment does not exist – to an equivalent position at the same office or, failing that, in the public service system at large. If reinstatement is ultimately impossible, then the officer shall be enrolled in the reserve and granted compensation.

The detailed legislative regulation of the issue should have prevented varied implementation of the norm in practice, however court decisions have highlighted different approaches, in certain cases pertaining to the labor rights of other public officers and thus necessitating scientific analysis.

Key words: *Unlawfully dismissed public officer; Public officer reinstatement; Principle of "primo in tempore, potior in iure"; Principle of legitimate expectations; Restitution of officer's rights.*

1. Introduction

In Georgia a career public service system, founded on the concept of a professional public servant, is in effect. It represents a crucial guarantee for the implementation of a stable and efficient public service. The cornerstone of such a career public service system is formed through public law instruments for protecting officer's rights. To balance out the duty of loyalty,[1] the legislator acknowledges the state's duty to ensure legal and social protection of the public officer by laying down legal mechanisms that shall make up a certain guarantee to restore (restitute) public servant's infringed rights and to procure his or her professional and loyal service to the country.

The public law safeguards to take care of the professional public officer and secure his/her rights foremost serve the protection of public interests. The demand of the society that the officer serve him/her with loyalty, in good faith, impartially and in full accord with the principle of legality, at

[*] Doctor of Law, Associate Professor, Iv. Javakhishvili Tbilisi State University, Faculty of Law.
[**] Doctoral Student at Iv. Javakhishvili Tbilisi State University, Faculty of Law.
[1] See: *Turava P*., *Pirtskhalaishvili* A., *Dvalishvili M*., *Tsulaia I*., *Kardava E*., *Sanikidze Z*., *Makalatia G*., The Law of Georgia on Public Service: Commentary, *Kardava E. (ed.),* Tbilisi, 2018, 43-45 (in Georgian).

the same time denotes the need for the existence of appropriate guarantees for legal protection in law in exchange for such service.[2] In view of such public demand, the Law on Public Service, enacted on October 27th, 2015, regulates in detail the issues of legislative and social protection of the wronged officer. Such an approach from the legislator is different and more exhaustive than the content of the previous law, which may be explained by the necessity to regulate these guarantees on legislative level. Similarly important to note is, that the aspiration of the legislator to lay down a detailed regulation on legal and social protection of the infringed officer, must be underpinned by both executive and legislative powers, so as not to jeopardize the systemic enforcement of public interests by any particular branch of government. The principle of separation of powers must be a safeguard ensuring protection of the officer's rights. The will as formulated in law (the will of the majority, that is) must be enforced with the same spirit as the legislator intended and at the same time, justice should also ensure protection thereof. Hence case law[3] should be deemed unsuitable as the source of law in regards to the legal order affirmed by public law norms.

Chapter XIII of the Law of Georgia on Public Service, adopted within the scope of public administration reforms,[4] regulates issues pertaining to the protection of public officers, including setting out rules and preconditions for reinstating an unlawfully dismissed civil servant. If the decision on dismissal is declared null and void, the duty to reinstate the officer shall be determined on the basis of Article 118 of the Law of Georgia on Public Service. This rule has taken on particular significance in the realm of public service. Additionally, court precedents have likewise emerged with different interpretations of its contents and aims. For public offices, such circumstances have tended to obfuscate the normative instruments for enforcing court decisions and prerequisites for applying thereof. Doubts were also raised about the uniform understanding of the overall intentions as envisioned by the legislator in the Article 118 of the Law of Georgia on Public Service.

As a result, considering all these matters and taking into account protection of officer's rights and interests of public service, special importance should be given to the scientific analysis of the issues related to the reinstatement of the public officer, as it illuminates the actual will and intent of the legislator with regard to the Article 118 of the Law on Public Service.

The aim of this article shall be to analyze the reinstatement of unlawfully dismissed public officer and, if reinstatement is not feasible, to dissect the instruments of legal and social protection that exist to counterbalance infringed rights. The study discussed restitution of rights as it concerns principle of legitimate expectations. In the article presented here, the scientific study of the inappropriateness of applying case law within the framework of administering justice when deciding civil service disputes.

---

2 Ibid, 20.

3 See *Khubua G.*, Legal Theory, 2nd Ed., Tbilisi, 2015, 159 (in Georgian).

4 Notably, the Article 228 of the Association Agreement between European Union and the European Atomic Energy Community and their Member States, on one hand and Georgia, on the other, of June 27th, 2014, prescribes increased protection of labour relations and compliance thereof with internationally recognized standards.

2. Constitutional Foundations for Protecting Public Officer's Rights

The Article 18 of the Constitution of Georgia stipulates the right to fair administrative proceedings, access to public information, informational self-determination and compensation for damages inflicted by a public authority. According to the Paragraph 4 of the Article, everyone shall be guaranteed full compensation, through court proceedings, for the illegal damage wrought by the authorities of the State and autonomous republics as well as local self-governance (municipal) bodies or by civil servants from the respective (State, autonomous republics, local self-governance) funds.

The establishment of fair administrative procedures as a constitutional right represents a legal innovation of the 2017 Constitutional Reform.[5] The decision to dismiss the officer from the work is the outcome of administrative proceedings, therefore following the principle of fairness in respect thereto is the requirement of the highest law of Georgia. When an officer is unlawfully dismissed from his or her position, this means that the public authority has enacted an illegal managerial decision and made a judgement conflicting with the law. In that event, "it is necessary for an accessible and efficient instrument to exist by which, in case of an illegal act committed by state authorities and public officials, the person may restore his rights and receive compensation for material or moral damages."[6] The Article 18 of the Constitution likewise expressly states the limits on restitution for damages by prescribing *full* compensation.

In case of unlawful dismissal of the public servant, restitution signifies, first and foremost, the return to the initial state of affairs as much as possible. If reinstatement is unattainable, then the duty to compensate damages shall remain as one of the principal means of restoring rights.

According to the practice of the Constitutional Court, unlawful dismissal may inflict both material and moral damage to the person, the compensation of both of which is guaranteed by the Paragraph 4 of the Article 18 (Paragraph 9 of Article 42 of the previous version of the Constitution). The Court similarly declared that the application of this constitutional rule is not limited to merely regulating damages in a certain field and any kind of harm caused by the actions of public officers of the state authorities, those of autonomous republics or self-governance bodies shall be covered within its scope. The obligation to compensate damages in full as stipulated by the Constitution means not a duty to recompense within limited amounts predefined by a certain subject (or even legislator), but the responsibility to pay the person actual damages inflicted in their entirety.[7] Hence, compensation of damages by the public office may follow the reinstatement of the civil servant.

Regarding the Article 25 of the Constitution of Georgia, the norm establishes that any citizen has the right to occupy any public position, provided the requirements set by law are satisfied. As for the Article 29 of the old version of the Constitution, which had the similar gist as the Article 25 today,

---

5 Constitutional Law of Georgia – On the Amendment of the Constitution of Georgia, № 1324-RS, LHG, 19/10/2017.

6 Decision № 2/4/735 of the Constitutional Court of Georgia, of July 21st, 2017, "Citizens of Georgia – Meri Giorgadze and Pikria Merabishvili vs Parliament of Georgia".

7 Decision № 2/3/630 of the Constitutional Court of Georgia, of July 31st, 2015, "Citizen of Georgia – Tina Bezhitashvili vs Parliament of Georgia".

the Constitutional Court clearly averred that "these Constitutional norms guarantee the right of the citizen of Georgia to occupy both electoral and appointive positions and lay down constitutional grounds for the execution of public service functions. Furthermore, this constitutional rule guarantees not only occupation of a specific position, but also unobstructed enforcement of such positional authority and protection thereof from unjustified dismissal.[8] Likewise, the Article 25 of the Constitution ordains that the provisions on public offices shall be stipulated by law. Hence it is the Law of Georgia on Public Service that prescribes such provisions, which, among else, also regulates, in detail, protection from unlawful dismissal. In particular, Chapter XIII of the Law contains both absolute and other (discretionary) grounds for dismissal of a public officer and thus is in compliance with the objectives of aforementioned constitutional rules.

The Law of Georgian on Public Service of October 27th, 2015, established an even higher standard with regards to reinstating unlawfully dismissed public officer than what was stipulated previously by Chapter XIII alone. The Article 118 includes specific rules on reinstatement and thus in certain ways, conforms to the spirit enshrined in constitutional aims. Specifically, when the officer can not be protected from unlawful dismissal through legal guarantees included in the law, the detailed rules on the reinstatement of the officer should become one of the crucial instruments for the actualization of the objectives of such constitutional norms. Taking into consideration all that has been stated above, the legal provisos in the reinstatement of the public officer is in absolute accord with Constitutional aims and more so, stipulate, in meticulous detail, the rules on the organization of the public service.

3. Legal Grounds for Reinstating Unlawfully Dismissed Public Officer

The admission of an officer into service, as well as his or her dismissal is effectuated on the basis of an individual administrative act. Public servant believing dismissal from public office unlawful has the right to contest the legality of such dismissal within one month after the official familiarization (notification) with the act. As there are administrative rules on protecting rights in public service,[9] the administrative complaint on the annulment of the individual administrative act on dismissal shall be submitted first to a superior authority (an official) and if left unsatisfied, the dismissed officer then shall be entitled to proceed by disputing in courts though a claim. In both instances the nullification of the decision on dismissal, which is an individual administrative act, shall be contingent on it being deemed unlawful,[10] while the burden of proof regarding the legality of the disputed act shall be borne by the public office.[11]

---

8 Decision № 1/2/569 of the Constitutional Court of Georgia, of April of 11th, 2014, "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili vs Parliament of Georgia".

9 Paragraph 1 of the Article 118 of the Law of Georgia on Public Service, LHG, 11/11/2015.

10 On legal grounds for annulling an administrative act, see: *Turava P*., General Administrative Law, 2nd Ed., Tbilisi, 2018 (in Georgian). Also: Article 60^1 of the General Administrative Code of Georgia, LHG 32(39), 15/07/1999. Article 32 of the Administrative Procedure Code of Georgia, LHG, 39(46), 06/08/1999.

11 The Administrative Procedure Code of Georgia, Paragraph 2 of Article 17, LHG, 39(46), 06/08/1999.

The overturning (annulment) of the decision to dismiss the officer by the superior executive authority or by the court is the prerequisite for reinstating the officer, notwithstanding whether such reinstatement was a separate matter of dispute during the proceedings. In essence, reinstatement represents a legal outcome which follows the annulment of the individual administrative act.

"Certain legal norms, alongside with substantive (primary – "*primär*") rules of behavior, also contain procedural (formal) components."[12] The Article 118 of the Law of Georgia on Public Service is precisely such a rule, in essence laying down a procedural norm (hence formal, procedural law) in spite of the fact that the law regulating public service is a set of substantive norms. In fact, majority of substantive laws contain formal, procedural norms in practice.[13] As regulating the matter in such a way constitutes an exception from general rule, it is necessary for the legislator to clearly state the aims of regulating the reinstatement of the unlawfully dismissed public officer through procedural norms. Foremost, it should be noted that "legal norms containing procedural (formal) requirements make up procedural (formal) law. Fundamentally, procedural law encompasses preconditions and outcomes of the operation (functioning) of legislative acts."[14] Substantive norms, on the other hand, are essential (substance) norms. More so, there is quite a close interrelation between procedural (formal) and substantive norms. "The procedure is not a goal within itself, but serves the eventuation of legitimate legal acts, i.e. has ancillary functions. Formal law must be construed in accordance with substantive law, that is, it can not be interpreted in a way that disregards the values of substantive law.[15] Regulating reinstatement through formal rules is occasioned by the intention to achieve a rightful outcome. The substantive legitimacy of law necessitates the existence of "true", "correct" law.[16] Lawfulness as a measurement of a fair decision is a significant value when protecting rights and it is flat-out necessary to recognize and protect this principle when reinstating the unlawfully dismissed public officer. The legislator prescribes detailed procedure in Article 118 in order to arrive at a lawful decision. The procedure encompasses several stages and as a whole, they comprise a cycle guaranteeing the protection of officer's rights. Understandably, through this approach, the legislator endeavors to achieve justice, prompted by the intention to care about the officer as he or she adheres to the duty of loyalty at public office on a regular basis.

The Article 118 of the Law of Georgia on Public Service lays down the stages for the reinstatement of a public officer unlawfully dismissed and sets out preconditions therefor. Similarly, the breaking-down of the restitution process of the public officer's infringed rights into specific stages denotes the attitude of the legislator. Considering the complicated nature of restoring infringed rights, the law envisions several possibilities not as simple alternatives to each other, but as sequential stages, meaning that in case of failure of the first hypothetical reinstatement procedure, the second possible

---

12 *Zippelius R*., Theory of Legal Methods, 10th Ed., GIZ, Tbilisi, 2009, 122 (in Georgian).

13 *Schlieffen K*., *Haass S*., Grundkurs Verwaltungsrecht, Paderborn, Deutschland, 2019, 55.

14 *Muthorst O.,* The Foundations of Law: Method, Definition, System, *Maisuradze D. (Trans.), Miminoshvili M. (ed.),* Tbilisi, 2019, 281 (in Georgian).

15 Ibid, 283.

16 See: *Khubua G*., Legal Theory, Tbilisi, 2004, 43-44 (in Georgian).

scheme should be applied, the non-performance of which creates the prerequisites for performing next one and so forth.

This norm first and foremost calls for the immediate reinstatement of the officer to the same position occupied before dismissal. In general, a position is a career stage with a set of functions, determining the place and role of the officer in the overall public service system.[17] The officer positions are reflected in the staff roster and its existence generally is corroborated based on such an enumeration. To be reinstated to the same place, the presence of such an appointment at the public office is necessary in the same form it existed at the moment of employee's dismissal. Specifically, this means the sameness of the very essence and functions of the position. Granted, it is possible for the name of position to be changed by the time of reinstatement or it may add on other functions, which does not necessarily mean that the position for reinstatement does not exist.

If a position occupied by the officer before dismissal no longer exists,[18] a second procedural stage specified by law is inaugurated, which signifies the search for an equivalent position at the same public office in order to reinstate the dismissed civil servant. To establish equivalency of the position, the law lays down its definition[19] as a position of the same rank and file (category) with the work description/functions and duties as well as qualification requirements identical or mostly similar. Therefore, reinstatement to a lower position is not envisaged by present regulations and hence only an *equivalent* position should be considered for restitution.

In case of infeasibility of reinstating the officer back as mentioned, when there is no equivalent position within the structure of the same public office, then a stage of searching for such a position commences throughout the entire public service system. In this instance, the reinstatement of the public officer to an equivalent position is permitted with his or her consent and that of the particular public office. Notably the procedure calls for the participation of LEPL – Civil Service Bureau, which on the basis of an appeal by the public office, directly undertakes the search for an equivalent vacant position and through this facilitates the functioning of those very normative instruments aimed at protecting officer's rights. Concurrently, the Civil Service Bureau, a neutral body between the public office and the unlawfully dismissed public officer, is involved in the reinstatement of the servant as an authority enforcing supervision of uniform administration of the entire civil service system. Its engagement guarantees the protection of public interests in public officer reinstatement procedures on one hand and promotes organized management of the system in light of the administration of the system as whole. Similarly, the hunt for the equivalent position through the entire civil service system is a symbolic representation of the unity of civil service and in regards to the reinstatement of the dismissed officer, it embodies the collective responsibility of the whole public service as a unified system. More precisely, the issue of reinstatement goes beyond the responsibility of a single public

---

17 Subparagraph (k) of Article 3 of the Law of Georgia on Public Service. LHG, 11/11/2015.

18 The absence of a vacancy may be caused by the position being abolished due to reorganization or by such alterations in the substance and functions that these significantly transform the character of work from its initial variant.

19 Subparagraph (f) of Paragraph 1 of Article 3 of the Resolution № 199 of the Government of Georgia, of April 20th, 2017, on the Rules of Mobility of Professional Public Officers, LHG, 21/04/2017.

office and becomes one of the the whole system, the object of care for the entire united civil service. The LEPL–Civil Service Bureau is involved (within its competence) in upholding this very unity and by this the legislator elevates the restoration of public officer's rights to a higher level.

Following the consecutive implementation of said stages, if, however, the public servant still can not be reinstated back, the final measure for protecting his or her rights shall be to grant compensation in the amount equal to the full work remuneration for a period of 6 months and then to enroll in the reserve system. By regulating the issue of restoration of public officer's infringed rights in such a way, the legislator set up an approach different to that of the Law on Public Service of October 31st, 1997, which prescribed only the immediate reinstatement of the civil servant, even at the expense of other's rights (which were also protected by law).

4. The Absence of a Vacant Position as the Basis for Refusal to Reinstate the Officer and the Principle of Legitimate Expectations

The Article 118 of the Law of Georgia on Public Service deems the non-existence of a vacant position at the public office, the illegal decision of which led to the dismissal of the officer, as well as in the entire public service system as the grounds for finally rejecting reinstatement. It is precisely here, regarding this issue, that determining what legislator meant by stipulating "absence of such position" is important, as this provision has taken on particular significance when the Court of Appeals thought it appropriate to dismiss the officer appointed to the job in order to reinstate the previous unlawfully dismissed servant on the basis of so-called "first come principle"[20] and thus made a decision conflicting with the practice established by the Supreme Court. In particular, the Supreme Court stated that, "The instances when reinstatement is not possible include the absence of a position or the occupation of such a position by another person".[21]

Such interpretation by courts is derived from the spirit of the Article 118 of the Law on Public Service and conforms to the principles of public service law and administrative law in general. First, it must be emphasized that public law norms exclude the possibility of restoring a person's rights at the expense of someone else's. Such an approach has been elevated to a status of a value within the intricate relations protected by public law norms, foundations of which are laid down by the principle of legitimate expectations affirmed by the General Administrative Code. Anyone who trusts the legality of the decision made by a public office should be protected. They likewise should have trust towards those administrative acts which benefit them.[22] One of the functions of administrative acts is precisely to establish such expectations and ensure legal protection.[23]

---

[20] Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

[21] Decision № BS-595-595(2K-18) of the Supreme Court of Georgia, of April 17th, 2019 and Decision № BS-376-376(2K-18) of the Supreme Court of Georgia of December 11th, 2018.

[22] *Seerden R., Stroink F*., Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis, Antwerpen – Groningen, 2002, 119.

[23] *Fleiner T., Fleiner L. R. B.,* Constitutional Democracy in a Multicultural and Globalised World, Verlag, Berlin, Heidelberg, 2009, 259-260.

The German law upholds the principle of legitimate expectations, which is connected with the fundamental principle of protecting trust (*Vertrauensschutz*).[24] At the same time, in some instances these principles are deemed to be identical to each other[25] and it takes up a special place in the law of the country.[26] When declaring administrative acts null and void, the review of legitimate expectations is undertaken both to protect the interests of the addressee (the subjective side of legitimate expectations) and those of public at large (the objective side of legitimate expectations).[27] Likewise significant is not only to review what subjective result will be achieved through the repeal of an administrative act, but also necessary to comprehend the scale of objective harm in detriment of public interests caused by the disregard of the principle of legitimate expectations. As such expectations are of the evaluative category in administrative law, their examination and protection are unconditionally necessary to ensure realization of principle of fairness.[28] "Legitimate expectations existent to benefit citizen's interests are the good by which a law-based state affirms its legal order".[29]

The Georgian law likewise recognizes the validity of legitimate expectations both with regards to the decision issued by the administrative authority as well as to the promises made.[30] The expectations of the citizen must be considered as more important than the interests protected by the administrative body.[31]

The officer appointed to the position of the unlawfully dismissed servant has legitimate expectations towards the empowering administrative act on his/her appointment (*bona fide* acts)[32] and such expectations should be honored and protected. The officer partakes in governmental procedures starting from the day of his appointment and thus executes acts of legal significance. Simultaneously, the interests worthy of protection in this case are stand high as the annulment of the act will result in self-evident harm to him/her.

The aim of the principle of legitimate expectations is to protect the rights of an "innocent" person even in case of an illegal administrative act. This also means that an illegal act can not be

---

24 *Potestà M.*, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 7, <https://lk-k.com/wp-content/uploads/potesta-legitimate-expectations-inv.-treaty-law-2013.pdf> [26.04.2020].

25 *McKinnon T.,* The Doctrinal Foundations of Legitimate Expectations, 2013, 7, <https://www.academia.edu/4841134/Thoughts_on_the_Doctrinal_Foundations_of_Legitimate_Expectations> [26.04.2020].

26 See: *Rennert K.,* The Protection of Legitimate Expectations under German Administrative Law Paper given on the occasion of the seminar on the protection of legitimate expectations of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) on 21 April 2016 in Vilnius, Lithuania, <https://www.bverwg.de/medien/pdf/rede_20160421_vilnius_rennert_en.pdf> [26.04.2020].

27 *Wolff H. J., Bachof O., Stober R.* – "Verwaltungsrecht I", 10. Auflage, München, 1994 , 745.

28 *Kopp O. F., Ramsauer U.,* Verwaltungsverfahrensgesetz – Kommentar, vollstaendig ueberarbeitetet Auflage, Muenchen, 2016, 49-30.

29 *Battis U*., Allgemeines Verwaltungsrecht, 3. Aufl., Heidelberg, 2002, 179 (quotation translated by *Kardava E*.).

30 Article 9 of the General Administrative Code, LHG, 32(39), 15/07/1999.

31 See: *Turava P*., General Administrative Law, 2nd Ed., Tbilisi, 2018, 122 (in Georgian).

32 *Seerden R., Stroink F.,* Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis, Antwerpen – Groningen, 2002, 119.

voided within the scope of legitimate expectations [i.e. if they are present]. This legal provision is the guarantee of "untouchability" of the officer, of his or her "protectability".

The Article 97 of the Law of Georgia on Public Service of October 31st, 1997, directly accounted for the reinstatement of the unlawfully dismissed servant as the grounds for dismissal of (other) officer as it overlooked the principles of the General Administrative Code.[33]

Acknowledging the public service reform as a priority, the legislator had, by Resolution №627 of the Government of Georgia, of November 19th, 2014, on Approval of the Concept of Public Office Reforms and on Certain Measures Pertaining Thereto affirmed the need for the public service rules to be in compliance with requirements of the General Administrative Code and stipulates, that "Reinstatement of a person shall not entail dismissal of a person appointed to a position from the civil service structure. It shall be deemed impermissible to protect rights of one through the infringement of another's. The State shall take care of the employment of such a person. The principle of cadre stability demands for the law to precisely define the legal grounds for the dismissal of a public officer from work as well as legal and social protection guarantees.[34]

5. The Principle of *Primo in Tempore, Potior in Iure* and Priorities of Protecting Rights in Public Service Law

Considering that during administration of justice, the approach laid down by the Law of Georgia on Public Service, of October 31st, 1997, nowadays criticized based on numerous conceptual studies and brought down by current effective legislation, was applied through the lens of the principle of *primo in tempore, potior in iure* ("First in time, greater in right."), it would be appropriate to define the essence of such principle and its admissibility in public law relations. However, what also must be stated, is that the during such administration of justice the courts are bound by Constitution and effective laws alone, which rules out the possibility for the court to pass judgement outside of law and renders the creation of law through case law unjustifiable in light of existence of detailed public law rules regulating the disputed matter. "Case law is the act of imposing law and not making law".[35] The case law does not envisage formulation (drawing-up) of rules. It is not intended for general regulation and only in certain circumstances does it allow for the factual assessment of the law. When the case law is used to rectify the law, it, in substance, challenges the Constitution and thereby endangers the principle of separation powers.[36]

---

33 The General Administrative Code of Georgia was promulgated on June 25th, 1999 and therefore, the Law of Georgia on Public Service of October 31st, 1997, could not have been in compliance with the principles of general administrative law.

34 The Paragraph 7.3 of the concept as approved by the Resolution №627 of the Government of Georgia, of November 19th, 2014, on Approval of the Concept of Public Office Reforms and on Certain Measures Pertaining Thereto, GLH, 20/112014.

35 *Khubua G.*, Legal Theory, 2nd Ed., Tbilisi, 2015, 160 (in Georgian).

36 *Schmidt R.,* Allgemeines Verwaltungsrecht, 16. Auflage, 2013, 57.

["[T]he notion that being there first somehow justifies ownership rights is a venerable and persistent one."].[37] Such an idea is directly linked with the main gist of the principle of "*primo in tempore, potior in iure*". The "first come" principle ("*primo in tempore, potior in iure*" in Latin) mentioned in the decision of the Court of Appeals,[38] is an ancient principle and humans have long since abided by it in their social interactions as unwritten law.[39] It was applied already by the times of Emperor Caracalla (213 AD) and since then has taken up a special place in the law of intellectual property and property law (law of things)[40] in general.

Notably the "first come princple" has both typical and atypical applications. Its typical manifestation is extrapolated from the legal system itself and originates in Roman law while the atypical one is the choice of the legislator.[41] In specific areas of law the principle of "*primo in tempore, potior in iure*" is formulated through legislation (law) and complements other core principles of the relevant field. In particular this means that the application of such an approach must be sanctioned by law itself, more so in subfields of law that belong to public law.

The precedent for applying this principle in Georgian public service law was laid down by the decision of the Tbilisi Court of Appeals, which expounds that "If the reinstatement of the unlawfully dismissed public officer to same position as existed before dismissal and now occupied by another employee shall engender the dismissal of such person hence resulting in the juxtaposition of two honorable interests: first, the interest of the unlawfully dismissed and subsequently reinstated employee to take back the position occupied before dismissal and second, the interest of the person appointed to such position to keep the place to which he was assigned lawfully, then such conflict of interests should be resolved in favor of the public officer first appointed to this staff job, subsequently dismissed unlawfully and legally reinstated. Resolution of conflict of interests this way is in accord with the principle instilled in the legal doctrine - "First in time, greater in right." (i.e. first come principle) as well as adheres to the understanding of custom law and fairness."[42]

To reinstate the unlawfully dismissed officer, the issue of applying the principle "*primo in tempore, potior in iure*" as the grounds for dismissing another civil servant requires reflection in light of existing regulations and public law principles.

It must be taken into account that, in line with first paragraph of Article 106 of the Law of Georgia on Public Service, the officer shall be dismissed from work only when the grounds for such are included in that law and reinstatement of another (previous) public officer is not one of them.[43] The aforementioned decision by the Tbilisi Court of Appeals also specified that "Reinstatement of a

---

37 *Berger L,* An Analysis of the Doctrine That "First in Time is First in Right", Nebraska Law Review, Vol. 64, Issue 3, 1985, 354, cited in *Becker L.,* Property Rights: Philosophic foundation, 1977, 24.

38 Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

39 *Berger L.,* An Analysis of the Doctrine That "First in Time is First in Right", Nebraska Law Review, Vol. 64, Issue 3, 1985, 350.

40 *Hoog L. M.,* De prioriteitsregel in het vermogensrecht, Bodegraven, 2018, 261, <https://openaccess.leidenuniv.nl/handle/1887/66890> [20.04.2020].

41 Ibid 265.

42 Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

43 Articles 107 and 108 of the Law of Georgia on Public Service, LHG, 11/11/2015.

person back to the same position may denote the positional relocation of another to an equivalent or other appointment".[44] In accordance with the the Law of Georgia on Public Service, the positional relocation of the employee, horizontal advancement or, in other words, career development, is linked with the will of the public officer himself while demotion to a lower position has its own causes and the law does not lay down any exception therefrom.

For this reason, such ruminations of the Court of Appeals do not conform to the rules set out in the Law of Georgia on Public Service. Moreover, there are in contradiction with the principles recognized by administrative norms themselves and as public law exhaustively regulates this contentious matter within the scope of Article of 118, discarding this rule and its "substitution" with a private law approach lacks scientific basis and may lead to unenforceable decisions in practice. Similarly, decisions enacted outside the procedures of the Article of 118 will assuredly entail the infringement of other rights protected by the Law of Georgia on Public Service and/or conflation with other legal relations and may even lead to organizational crisis.

On the question of the prioritization of interests and ways of protecting the rights of the unlawfully dismissed public officers, the law proposes coherent alternatives for the reinstatement. In such a way, the context of conflict of interests is not relevant to the present question at hand. The Article 118 of the Law of Public Service expressly prescribes, stage-by-stage, instruments serving to protect the rights of the unlawfully dismissed public officer and such it does not encroach on the interests of other public officers. As the Supreme Court elaborates, the Paragraph 3 of Article 118 of the Law of Georgia on Public Service envisages a myriad of regulations depending whether or not a possibility of reinstatement exists so the right to work of another person is not infringed upon. However, the Chamber underlines, that "the possibility for the dismissal of a person assigned to a disputed position can not be encompassed within the terms of reinstating the officer as it is unacceptable for the right of the civil servant to be protected at the expense of another officer's rights".[45]

Additionally to be taken into account is that a position in public service is no "fox"[46] nor an object of property law or even private law and different legal frameworks apply to it in the form of administrative law.

6. Legislative Alternative to the Restitution of Rights of the Unlawfully Dismissed Public Officer and Extent Thereof

Taking into consideration what was stated above, a logical question arises on how can the legislator restore the rights of the unlawfully dismissed officer when another servant appointed to the position (before the decision on dismissal was declared null and void) had legitimate expectations?

---

44 Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.

45 Decision № BS-376-376 (2K-18) of the Supreme Court of Georgia, of December 11th, 2018.

46 In United States property law, the precedential case *Pierson v. Post* lies at the foundation of the "first come" principle, which concerned a dispute in 1802 regarding property rights over a fox on an uninhabited land between two locals. See: Pierson v. Post, Supreme Court of New York, 3 Cai. R. 175 Supreme Court of New York, <http://www.courts.state.ny.us/reporter/archives/pierson_post.htm> [24.04.2020].

Similarly, as the principle of "*primo in tempore, potior in iure*" is inadmissible in public service law and it is outright prohibited to restore one's rights at the expense of another's, what does the legislator offer to the wronged public officer considering the obligation of legal and social protection? Such issue is relevant from the standpoint of restoring justice as well. The lawmaker shall, if the person's reinstatement is not possible, stipulate the obligation to enroll him/her in the reserve system and compensate accordingly and with that, considering the circumstances at hand and by social protection instruments, substitute the inability to restore rights with these alternative legal methods.

In line with Paragraph 3 of Article 118 of the Law of Georgia in Public Service, annulment of the individual administrative act on the dismissal of the public officer from work is sufficient for the restoration of claimant's rights borne before the disputed order was issued.[47] Concurrently, this norm sets out the coherent alternatives allowing the restitution of the dismissed public officer's rights. It is true that the principle of fairness requires such restoration to be complete and that the person should return to the state of affairs that existed before dismissal, however such restoration can not be of absolute character, not the least for the natural passage of time alone. Similarly, restitution may not lead to the return to the same configuration as existed before the right was infringed upon. Therefore the impossibility to restore rights in absolute terms also leads to the presence of duty to compensate as a kind of balancing instrument. Compensatory justice is extremely conservative and multifaceted spectrum of its application, as a rule, serves the restoration of status quo ante.[48]

Whether compensation is sufficient or not may be the subject of endless dispute and individual assessment. For the purpose of preventing

these very ambiguities, the lawmaker itself defines the sum (value) of compensation in form of a definite amount or a periodic payment and thus rendering the issue somewhat more foreseeable and transparent.[49] Public service legislation is no exemption in this case as the Article 118 stipulates a set predictable 6-month period compensation to offset the right not restituted in full. This, in turn, foremost excludes vague decisions in the reinstatement cases of the unlawfully dismissed public officers and likewise such formal rule ensures smooth, unimpeded operation of public offices and protects them from unenforceable decisions or more severe cases of rights infringement.

7. Conclusion

The Article 118 of the Law of Georgia on Public Service lays down the priority of successive measures following the nullification of the decision to dismiss the officer from work. The exhaustive, consistent regulation on reinstatement of the unlawfully dismissed public officers echoes the spirit formulated through the prism of legal protection of the officer in counterbalance to the duty of loyalty.

---

47 Decision № BS-944(K-19) of the Supreme Court of Georgia, of October 10th, 2019.

48 *Goodin R. E.,* Compensation and Redistribution, Nomos*,* Vol. 33, Compensatory Justice, 1991, 143.

49 For example, Paragraph 2 of Article 82 of Organic Law on Prosecutor's Office provides a compensation of 7000 GEL if the employee of the Prosecutor's Office suffers bodily damage or other kind of deterioration in health conditions during the line of duty, following which he/she will be qualified as a person with a disability or such shall also possible in case of mutilation.

The mechanism for reinstating a public officer prescribed in current law establishes a foundation for protecting one's rights that does not encroach on the principle of legitimate expectations of other public servants. Through such a resolution, the public service law affirms the values enshrined in general administrative law.

Likewise so, by defining legal instruments for reinstatement to an equivalent position, compensation and reserve, the lawmaker lays down rules on reinstatement that leave no place for the principle of "*primo in tempore, potior in iure*" in legal relations within the public law sphere.

Hence, the substance of the Article 118 of the Law of Georgia on Public Service does not envisage the dismissal of a public servant from work to reinstate another as it enables the interests and rights of both to be protected.

Bibliography:

1. Constitutional Law of Georgia – On the Amendment of the Constitution of Georgia, № 1324-RS, LHG, 19/10/2017.
2. Resolution № 199 of the Government of Georgia, of April 20th, 2017, on the Rules of Mobility of Professional Public Officers, LHG, 21/04/2017.
3. Resolution № 627 of the Government of Georgia, of November 19th, 2014, on Approval of the Concept of Public Office Reforms and on Certain Measures Pertaining Thereto, LHG, 20/112014.
4. Law of Georgia on Public Service, LHG, 11/11/2015.
5. Administrative Procedure Code of Georgia, LHG, 39(46), 06/08/1999.
6. General Administrative Code of Georgia, LHG, 32(39), 15/07/1999.
7. *Battis U.,* Allgemeines Verwaltungsrecht, 3. Aufl. Heidelberg, 2002, 179.
8. *Berger L,* An Analysis of the Doctrine That "First in Time is First in Right", Nebraska Law Review, Vol. 64, Issue 3, 1985, 350, 354.
9. *Fleiner T., Fleiner L. R. B*., Constitutional Democracy in a Multicultural and Globalised World, Verlag, Berlin, Heidelberg, 2009, 259-260.
10. *Goodin R. E.,* Compensation and Redistribution, Nomos, Vol. 33, Compensatory Justice, 1991, 143.
11. *Hoog L. M.,* De prioriteitsregel in het vermogensrecht, Bodegraven, 2018, 261, 265, <https://openaccess.leidenuniv.nl/handle/1887/66890> [20.04.2020].
12. *Kopp O. F., Ramsauer U.,* Verwaltungsverfahrensgesetz – Kommentar, 17. vollstaendig ueberarbeitetet Aufl., München, 2016, 49-30.
13. *Khubua G*., Legal Theory, 2nd Ed., Tbilisi, 2015, 159-160 (in Georgian).
14. *Khubua G*., Legal Theory, Tbilisi, 2004, 43-44 (in Georgian).
15. *McKinnon T.,* The Doctrinal Foundations of Legitimate Expectations, 2013, 7, <https://www.academia.edu/4841134/Thoughts_on_the_Doctrinal_Foundations_of_Legitimate_Expectations> [26.04.2020].
16. *Muthorst O.,* The Foundations of Law: Method, Definition, System, *Maisuradze D. (Trans.), Miminoshvili M. (ed.),* Tbilisi, 2019, 281, 283 (in Georgian).
17. *Potestà M.,* Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept, 7, <https://lk-k.com/wp-content/uploads/potesta-legitimate-expectations-inv.-treaty-law-2013.pdf> [26.04.2020].

18. *Rennert K.,* The Protection of Legitimate Expectations under German Administrative Law Paper given on the occasion of the seminar on the protection of legitimate expectations of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) on 21 April 2016 in Vilnius, Lithuania, <https://www.bverwg.de/ medien/pdf/ rede_ 20160421_ vilnius_rennert_en.pdf> [26.04.2020].
19. *Seerden R., Stroink F.,* Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis, Antwerpen – Groningen, 2002, 119.
20. *Schlieffen K., Haass S.,* Grundkurs Verwaltungsrecht, Paderborn, Deutschland, 2019, 55.
21. *Schmidt R.,* Allgemeines Verwaltungsrecht, 16. Aufl. Grasberg bei Bremen, 2013, 57.
22. *Turava P*., *Pirtskhalaishvili* A., *Dvalishvili M*., *Tsulaia I*., *Kardava E*., *Sanikidze Z*., *Makalatia G*., The Law of Georgia on Public Service: Commentary, *Kardava E. (ed.),* Tbilisi, 2018, 43-45 (in Georgian).
23. *Turava P*., General Administrative Law, 2nd Ed., Tbilisi, 2018, 122 (in Georgian).
24. *Wolff H. J., Bachof O., Stober R.,* Verwaltungsrecht I, 10. Aufl. München, 1994, 745.
25. *Zippelius R*., Theory of Legal Methods, 10th Ed., GIZ, Tbilisi, 2009, 122 (in Georgian).
26. Decision № 3B/1195-19 of the Court of Appeals of Tbilisi, of October 16th, 2019.
27. Decision № BS-944(K-19) of the Supreme Court of Georgia, of October 10th, 2019.
28. Decision № BS-595-595(2K-18) of the Supreme Court of Georgia, of April 17th, 2019.
29. Decision № BS-376-376(2K-18) of the Supreme Court of Georgia, of December 11th, 2018.
30. Decision № 2/4/735 of the Constitutional Court of Georgia, of July 21st, 2017, "Citizens of Georgia – Meri Giorgadze and Pikria Merabishvili vs Parliament of Georgia".
31. Decision № 2/3/630 of the Constitutional Court of Georgia, of July 31st, 2015, "Citizen of Georgia – Tina Bezhitashvili vs Parliament of Georgia".
32. Decision № 1/2/569 of the Constitutional Court of Georgia, of April of 11th, 2014, "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili vs Parliament of Georgia".
33. Pierson v. Post, Supreme Court of New York, 3 Cai. R. 175 Supreme Court of New York, <http://www.courts.state.ny.us/reporter/archives/pierson_post.htm> [24.04.2020].