

Assurance of an Administrative Body – the Basis of Legal Reliance

The exercise of public authority of an administrative body can lead to limitation/deterioration of a person's right. This issue is particularly painful when there is a pre-announced will by the administrative body regarding the desired legal result. Administrative legislation protects the legitimate expectations of the interested party. The article discusses legal reliance, the basis of which can be the assurance of an administrative body.

Keywords: assurance of an administrative body, legal reliance

1. Introduction

There is an opinion in the legal literature that “administrative law best expresses the character of the state and the people.”¹ I consider it as a correct assessment. Due to the fact that contemporary administrative law deviates from the scope that was characteristic of years ago (police like, repressive) and is getting closer to individuals, not only as a ruler, but as a “partner” of society.² This is even more unusual for Georgia, which had no legal heritage before the adoption of the General Administrative Code. From January 1, 2000,³ with the entry into force of the General Administrative Code of Georgia (hereinafter referred to as the GACG) and the Administrative Procedure Code of Georgia (hereinafter referred to as the APCG), a new life began for both citizens and administrative bodies. The law offered us many innovations, especially in the conditions when there was no trace of such a relationship in our legal memory.

Obviously, if there was a choice, an individual would not allow the state to interfere with his rights, but since the state and society cannot be managed without interference, it is necessary to organize it in such a way that both parties feel supported and treated with dignity as much as possible.

We do not have a definition of legal reliance in GACG. It presupposes a firm belief in the performance of a certain action.⁴ According to Article 10 of the Administrative Procedure Law of Latvia,⁵ legal reliance means the belief of the interested party that the action of an administrative body is legal.

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¹ *Nolte G.*, General Principles of German and European Administrative Law – A Comparison in Historical Perspective, *The Modern Law Review*, 1994, 212 cited from Schemer, ‘Der Einfluß des französischen Vervaltungsrechts auf die deutsche Rechtsentwicklung’ (1963) 16 *Die öffentliche Verwaltung*, 714.

² *Khubua G., Kalichava K. (eds.)*, Handbook of Administrative Science, Tbilisi, 2018, 185-186 (in Georgian).

³ General Administrative Code of Georgia, SSM, 32(39), 15/07/1999, Issued June 25, 1999. Administrative Procedure Code of Georgia, SSM, 39(46), 06/08/1999, Issued 23 July, 1999.

⁴ *Turava P.*, Principle of Legal Reliance (comparative legal analysis), *Review of Georgian Law*, 2007, #2-3, 218 (in Georgian).

⁵ Сборник законодательных актов по административным процедурам, GIZ, BMZ, 2013, 255.

Trust is related to the creation of an advance expectation, the ability to predict the outcome, however “trust is also considered risky as it affects the expectations of others, it cannot be predicted with certainty.”⁶ Despite this, it is generally recognized that a modern democratic state cannot exist without public trust. Trust, the continuity of state institutions and the reliability of the legal system form the basis for the development of human freedom.⁷ “In the modern era, trust, constitution and democracy are inextricably linked.”⁸

The activity of the administrative body, which is related to the exercise of public authority, must, of course, be legal. This is announced both by the Constitution⁹ and by the relevant articles of GACG. According to GACG,¹⁰ administrative acts and activities, which exceed the powers authorized by law, shall have no legal force and must be declared null and void. As for determining the fact of exceeding the authority, it follows the decision made or the action taken, so its determination can be related either to the self-initiative of the administrative body, which is often connected to the use of discretionary authority, or to the filing of a complaint/lawsuit. What are the legal consequences for a person who has received or expects to receive any benefit based on such an illegal act? The existence of the institution of legal reliance is related to this exact issue.

The first data on legal trust are related to the decision of the highest administrative court of Prussia.¹¹ However, there are also opinions that legitimate expectation (as it is referred to in common law countries) finds its roots in English law. The origin of the legitimate expectation was connected to the existence of the procedural (hearing) right and its provision. It served to grant procedural rights to a fair hearing.¹² In general, the influence of the German administrative law’s separate doctrine on the legal systems of other European countries, as well as on the common law system, is so great that it has been compared to a “Trojan horse” by which common law countries are harassed by German administrative law.¹³

2. Purpose of Legal Reliance

According to the definition of the Constitutional Court of Georgia, the principle of legal reliance serves to strengthen citizens’ trust in the applicable law.¹⁴ The doctrine of the legal reliance is based on the idea of fairness.¹⁵ That is why, it can stand above the law. In a society, where there is a high

⁶ *Ulrike K.*, *Wissenschaft und Gesellschaft, Verhältnis – Auswirkungen – Einbindung*, Ein Bericht im Auftrag des Rates für Forschung und Technologieentwicklung, Wien, 2008, 25.

⁷ *Pezzer H.-J.* (Hrsg.), *Vertrauensschutz im Steuerrecht*, 2004, 271.

⁸ *Schaal G.S.*, *Vertrauen, Verfassung und Demokratie*, Wiesbaden 2004, 189.

⁹ See Constitution of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995, Art.4, Art.18.

¹⁰ General Administrative Code of Georgia, Art.5.

¹¹ *Turava P.*, Principle of legal reliance (comparative legal analysis), *Review of Georgian Law*, 2007, #2-3, 216 (in Georgian).

¹² *Stott D., Felix A.*, *Principles of administrative law*, London, 1997, 69.

¹³ *Nolte G.*, *General Principles of German and European Administrative Law – A Comparison in Historical Perspective*, *The Modern Law Review*, 1994, 191.

¹⁴ Decision of the Constitutional Court of Georgia of December 27, 2013 on the case “Joint liability company Grisha Ashoredia” vs. Parliament of Georgia”, № 2/3/522,553 II-42.

¹⁵ *Stott D., Felix A.*, *Principles of Administrative Law*, London, 1997, 70.

degree of trust, reliance in its content is balanced by the principle of “give and take”.¹⁶ The legal reliance provides a kind of compromise and concession between the state and the individual.¹⁷

The General Administrative Code of Georgia connects the legal reliance to the assurance of the administrative body (Art. 9), declaration of administrative act as null and void (Art. 60¹) and declaring the administrative-legal act invalid (Art. 61). The aim is, of course, to protect the right of an interested party while maintaining the authority and trust of the administrative bodies.

The institution of legal reliance is related to the institution of annulment of an administrative act.¹⁸ According to the General Administrative Code of Georgia (Art. 60¹), an act shall be null and void at the initiative of an administrative body, at the request of an interested party – on the basis of a complaint (higher administrative body) or a lawsuit (court). The legal basis for declaring the act null and void is its illegal nature.

The legislation does not establish a time limit for the possibility of revoking the act issued to the administrative body, which is related to the purpose of protecting the public interest.

If the complaint of the interested person serves the interest of protecting his right, the administrative body acts on the basis of public goals, and this explains its unlimited opportunity to change or revoke the administrative act issued by it. It should also be noted that the implementation of an administrative act and its binding force apply not only to the addressee of the act, but also to the administrative body itself, despite this, this “legal force is not absolute”¹⁹ and the administrative body has the ability to revoke its own decisions on its own initiative. At the same time, the administrative body is limited by the fundamental principle of general administrative law, the principle of legal reliance, when revoking the adopted beneficial decisions and making new decisions.²⁰

It should be noted that the right to file a complaint is the right of a person to defend a violated or contested right with the help of an administrative body. Based on the functions of the complaint, it not only serves to protect the right (which is the primary task of this institution), but also “forces” the administrative bodies to revise the appealed decision. It turns out that the person himself should be actively involved in order to ensure the protection of his own right and the protection of legality in general. To some extent, the oblique lever of “control” of the legality of the activities of administrative bodies depends on the activity of individuals. If I do not complain, the violation may become “forgivable” to the administrative body, which to some extent means “mitigating” the responsibility of the administrative body. This kind of an approach is incompatible with the functions of “good governance” and “good administration”. Moreover, legislation right away imposes on the administrative body the obligation to comply with the law, defining such requirements within the framework of the principles. If we derive from the basic principles of GACG, the spirit of which is

¹⁶ *Oliver W. L., Klink V. B., Gesellschaftliche Voraussetzungen freiheitlicher Ordnung, Zeitschrift für Politische Theorie, Jahrgang 8, Heft 2/2017, 219.*

¹⁷ *Pezzer H.-J. (Hrsg.), Vertrauensschutz im Steuerrecht, 2004, 181-183.*

¹⁸ *Turava P., Principle of legal reliance (comparative legal analysis), Review of Georgian Law, 2007, #2-3, 212 (in Georgian).*

¹⁹ *Ibid, 214.*

²⁰ *Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of January 24, 2008, case #BS-117-110(K-07).*

that administrative bodies should strictly follow the law and should exercise their powers in accordance with the requirements of the law, it can be assumed that the product of their activity (in this case, an administrative act) should be legal. It is from these reservations that the presumption of legality of acts is derived. Despite this, we cannot rule out violations of the law, examples of which are not so rare in practice.

It is crystal clear, that the purpose of annulment is to protect the principle of legality, there should be no illegal act, therefore, if the administrative act is against the law, it should be annulled (declared null and void). This is where a kind of dilemma arises, which can be related to the conflict of interests: the interest of protecting validity and the interest of protecting the person who has received some benefit or expects to receive such a benefit based on the beneficial administrative act. “Legal reliance can even go beyond the scope of lawful conduct.”²¹

3. The Influence of Good Faith on the Principle of Legal Trust

Who bears the burden of responsibility in case of illegality of the act?

If we rely on the relevant norms of the GACG, it turns out that it is the responsibility of the administrative body to comply with the law, it is the one conducting the administrative proceedings and is therefore obliged to investigate all the circumstances significant to the case. At first glance, an impression is created that the administrative body should not be influenced by external factors and it should not be misled by the interested party. However, this is not exactly the case. To some extent, a kind of burden of responsibility also falls on the interested person, the law requires him to act in good faith. As for the definition of good faith itself, its definition is not given in GACG, although there are separate assessments regarding it both in scientific literature and in judicial practice.²²

In one of the cases, the Supreme Court of Georgia notes, “that the participants of the legal relationship are obliged to exercise their rights and duties in good faith. The obligation to act in good faith is based on the general assumption of good faith in law. The principle of good faith basically means that the contracting party takes into consideration the interests of the other party.”²³ The Supreme Court of Georgia explains, that “the good faith of the tax payer implies a person’s subjective attitude towards the action he has committed. A person believes that his action is legal, not unlawful.”²⁴ It is obvious that a number of circumstances should be taken into consideration when assessing good faith, especially in the conditions when the court does not right away consider a certain violation by the interested person to be illegal, this is confirmed by the assessment of the Supreme

²¹ *Elliot M.*, Unlawful representations, Legitimate Expectations and Estoppel in Public Law, Judicial Review, 2003, 73-74.

²² Recommendations developed as a result of regular meetings of judges in the Supreme Court of Georgia in the field of civil and administrative law and uniform practice of the Supreme Court of Georgia on civil law issues, Tbilisi, 2011, 72, <<https://www.supremecourt.ge/files/upload-file/pdf/rekomendatsamoqadmin.pdf>>[10.09.22].

²³ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of April 2, 2020, case № BS-570(K-19).

²⁴ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of May 17, 2022, case № BS-531(K-20).

Court of Georgia, which states that “a person acts in the so-called in the conditions of an excusable mistake, so, he did not know and could not have known that he was committing a prohibited act (offense). In case of a forgivable mistake, a person thinks that there is no norm that prohibits his action. Therefore, he has no consciousness of committing the offense. If the mistake is not excusable (for example, it was acted out of reckless misconduct or negligence), the person cannot be exempted from tax liability.”²⁵ It should also be noted that the verification of a person’s good faith is mainly performed by the court, since the existence or non-existence of the legal reliance becomes the subject of a legal dispute. As noted in the literature, “the legislator is free within the framework of the normative language, while the court represents the true spoken language of the law.”²⁶ It is the court that examines and evaluates the circumstances, which must indicate whether there is an overriding interest in the protection of a person based on a legal reliance. Despite this, there is an opinion in the literature that good faith is less relevant in administrative-legal relations, since it depends on mutual will, and administrative-legal relations are characterized by a subordinate character, a characteristic feature of subordinate relations is the possibility of unilateral intervention in the legal sphere of another participant.²⁷ Therefore, in some cases, they consider it excessive to appeal to it in public-legal relations.

In the scientific literature, there is a viewpoint that the basis of legitimate expectation (legal reliance) can go beyond the purely normative content and derive from the existing order of the state, from the established practice of behavior,²⁸ which in turn does not deviate from the regulations established by law. Such an opinion is conditioned by the belief in establishing a sense of equal treatment and justice.²⁹ Administrative bodies, which are obliged to exercise their authority in accordance with the requirements of the law, must create trust and expectations in society not only through concrete-individual decisions, but also through their behavior.

The responsibility of the interested party regarding the presence or absence of the assurance and legal reliance is established by Article 9, paragraph “c” of the GACG. In this case, an unlawful act of a party is implied, although the exact definition of this action is not specified. We must consider such an action, which goes beyond the scope of not only good faith, but also legality in some cases. e.g. Submission of incorrect information (intentionally), coercion, threats, bribery³⁰... Recent cases can become the basis for starting a criminal prosecution against a person if signs of crime have been identified. However, this already goes beyond the scope of administrative-legal relations.

Georgian legislation protects only a party acting in good faith with legal reliance, the Supreme Court of Georgia states the same in its evaluations.³¹

²⁵ Ibid.

²⁶ *Zoidze B.*, Constitutional control and order of values in Georgia, Tbilisi, 2007, 46 (in Georgian).

²⁷ *Pautsch A., Hoffmann L. (Hrsg.)*, *Verwaltungsverfahrensgesetz, Kommentar*, 2., neu bearbeitete Auflage, 2021, 65.

²⁸ *Stott D., Felix A.*, *Principles of administrative law*, London, 1997, 68.

²⁹ Ibid, 69-71.

³⁰ In the legislation of other countries, the same list is specified as exclusionary circumstances for legal reliance. For example, Germany, Estonia, etc. Georgian judicial practice also focuses on these circumstances to determine the good faith of the interested person.

³¹ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of February 3, 2015, case № BS-428-423(2k-14).

Article 9 of GACG stipulates that no legal reliance in the assurance of an administrative body may exist if:

- “a) it is based on the unlawful assurance of the administrative body;
- b) a person can no longer meet the determined requirements because of amendment of the respective normative act;
- c) it is based on an unlawful act of an interested party.”

We can connect the mentioned circumstances to the legal reliance not only to the assurance, but also to the issued beneficial administrative acts.

The first and second paragraphs of the above-mentioned conditions are beyond the capabilities of the interested party. In the first case (“a”) we are dealing with the incorrect use of the authority of the administrative body, and in the second case (“b”) with a normatively changed circumstance, which changes the possibility in the content of the assurance and worsens the person's situation due to the changed circumstances, since he is deprived of the opportunity to receive the legal result that he expected from the assurance of the administrative body, based on the normatively changed situation.

Similarly, the issue of the absence (exclusion) of legal reliance is considered under the German legislation. In particular, paragraph 42 of the Administrative Procedure Act of Germany (VwVfG) states: “There is no legal reliance if the party:

1. obtained the administrative act by false pretenses, threat or bribery;
2. obtained the administrative act by giving information which was substantially incorrect or incomplete;
3. was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.³²

It can be seen from this list that the named circumstances are completely related to the good faith of the interested party and the legality of his action.

In all three cases, the indicated activity originates from the interested party and is not related to the administrative body. In contrast to the German legislation, in Article 9 of the GACG, the circumstances resulting from the actions of both the administrative body and the interested party are integrated into the exclusionary conditions of legal reliance.

Under Estonian law³³, a legal trust cannot protect a person in the following cases:

1. the deadline for submitting an appeal to the administrative court for revoking the administrative act has not yet passed, as well as during the review of the appeal for revoking the administrative act;
2. the possibility of annulment is provided for in the law or the possibility is left for this purpose in an administrative act;
3. the person has not fulfilled the additional obligation related to the administrative act;
4. the person has not used the money or thing transferred on the basis of an administrative act for the intended purpose;

³² Verwaltungsverfahrensgesetz (VwVfG), §48, <<https://www.gesetze-im-internet.de/vwvfg/>> [10.09.22].

³³ Administrative Procedure Act, Estonia, (HMS), Art.67, <<https://www.riigiteataja.ee/akt/123022011008>> [10.09.22].

5. the person was aware of the illegality of the administrative act or was not aware of it due to his own fault;
6. the administrative act is based on incorrect or incomplete data submitted by the given person or as a result of unlawfully influencing the administrative body by fraud or threat or in any other way.

The submission of incorrect data does not exclude the consideration of trust, if the provision of incorrect or incomplete data was caused by the administrative body and the person did not know and could not have known about the illegality of the administrative act.

In contrast to GACG, Estonian law explicitly mentions the lack of legal reliance in the time limit for appeal of the beneficial act or during the period of consideration of the appeal. In our legislation we do not have an express reservation on this basis of absence of legal trust, although it can be presumed from the legislation.

As GACG notes, legal reliance is excluded if it is based on an illegal assurance by an administrative body. This once again emphasizes the fact that legal trust in this case is also considered within the framework of the protection of the principle of legality. In the present case, the expectation is for the future, unlike in the case of annulment of the act, where the person tries to preserve the present result. In the case of an assurance, this result has not yet occurred and the person expects it. The justification of the expectation on the part of the administrative body is related to its authority and trust in the institutions in general.

The assurance and the occurrence of the desired legal result are related to each other to the extent that the promise itself creates an obligation for the administrative body to fulfill it.

Within the scope of legal trust review, many opinions can be found in the scientific literature. One thing is crystal clear, in any case, it is connected with the administrative body primarily for the purpose of protecting the individual. “The primary function of an administrative law should be to control the excess of state power”,³⁴ more precisely, to subordinate it to the idea of the rule of law and justice. In connection with this issue, the theory of “red and green light” was formed in science. The ‘red light’ theory supports a powerful judiciary within the control of the executive power.”³⁵ This theory emphasizes the rights of individuals and the law, as a brake on government actions.³⁶ On the contrary, the “green light” theory welcomes the so-called “administrative state.”³⁷ If the “red light” theory prioritizes the courts, the “green light” theory favors a lawful and accountable administration.

4. The Criteria of Assurance Legality

GACG mentions the assurance of the administrative body only in Article 9, we do not find any mention of it in other norms. In addition to the existence of a promise, GACG considers its compliance with the law to be an important circumstance. Thus, the basis for fulfilling the obligation

³⁴ *Harlow C., Rawlings R., Law and Administration, Cambridge University Press, 2009, 6.*

³⁵ *Harlow C., Rawlings R., Law and Administration, 2nd edn. (London, 1997), chs.1–2; M. Loughlin, Public Law and Political Theory (Oxford, 1992), 23.*

³⁶ *Harlow C., Rawlings R., Law and Administration, Cambridge University Press, 2009, 6.*

³⁷ *Ibid, 31.*

is not the promise of the administrative body in general, but its legal assurance. Only a legal assurance assumes the existence of a legal reliance. “In determining the legality of a promise, decisive importance is given to the objective side of the issue, that is, whether the assurance is against the law, and not whether the promiser or the interested party knew about the illegality of this promise.”³⁸ Therefore, it is very important to clarify the issue of whether the assurance is in full compliance with the law, the existence of impeding circumstances under Article 9 of the GACG should be excluded.

As for the form of the assurance, it turns out that the law imposes more requirements on it, since it imperatively establishes its written form, while regarding the individual administrative act, it provides for the possibility of oral issuance as well.³⁹ Here it should also be mentioned that despite the existence of an oral form of an individual administrative act, more preference and reliability is directed towards the written form of the act.

Regarding the circumstances excluding trust in Article 9 of the GACG, the law does not impose a cumulative requirement, which means that if at least one of the listed conditions is present, trust towards the promise is already excluded.

Based on the abovementioned, in order to have legal reliance towards the assurance given by the administrative body, it is necessary to have the following composition:⁴⁰

- The assurance must be issued by an authorized administrative body;
- The assurance must be written;
- The promise must be lawful;
- The good faith of the interested party should be evident.

5. The Problem of Determining the Legal Form of the Assurance of the Administrative Body

Article 9 of the CACG does not specify whether the assurance of an administrative body constitutes an individual administrative-legal act. The assurance of an administrative body has the following features: it is issued by the administrative body, based on an administrative legislation, has an addressee to whom it is addressed, has binding force for the administrative body issuing the assurance. In addition, according to the same Article, “the procedures determined by law for appealing individual administrative acts shall apply to assurance made by an administrative body.” Therefore, there is a reason to consider the promise as an individual administrative act. This opinion is supported by the fact that the assurance (if it is not fulfilled or is fulfilled improperly) can become the subject of a dispute both in the higher administrative body and in the court. The nature of binding force for performance is peculiar to the assurance. If the binding force for the performance of administrative acts is directed to its addressees, in the case of an assurance, as mentioned, this obligation is directed to the administrative body issuing the promise, which implies its obligation to ensure the occurrence of

³⁸ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of September 10, 2008, case NBS-942-903(K-07).

³⁹ General Administrative Code of Georgia, Art.51.

⁴⁰ *Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentary on the Administrative Procedure Code of Georgia, Tbilisi 2005, 200-201 (in Georgian).

the result described by the promise. There is no unequivocal viewpoint about the determination of the assurance as a form of activity⁴¹ of an administrative body. In scientific circles, there is a different opinion regarding this issue. We find the opinion according to which the assurance of an administrative body is an administrative real act according to the legal form of the activity,⁴² although there is a different opinion that considers the assurance as an individual administrative act, based on the fact that the will of an administrative body is declared in it and the intention of an administrative body is also read.⁴³

If we look at the court practice, there are few assessments regarding the determination of the legal form of the assurance of the administrative body. Despite this, there are separate judgments where the court equates the assurance with the beneficial administrative act, although it does not discuss its constituent elements.⁴⁴

In one of the cases, the Supreme Court of Georgia points out that “administrative act is considered to be all those documents issued or confirmed by the administrative body, which may have legal consequences. In addition, the corresponding result should be established not through the issuance of any other administrative act, but directly through this act – without the issuance of another act.”⁴⁵ This is where the main key issue lies in the ambiguity of the legal form of the promise. An assurance does not create a desired legal result for an individual, but it is a preliminary basis for a beneficial individual act to be issued in the future. The assurance of the administrative body does not have a regulatory function,⁴⁶ accordingly, it does not meet the fourth element of the individual administrative act provided for by GACG, which, due to the need for the cumulative existence of the signs of the individual administrative act, excludes its consideration as an act creating a legal result, it only has the function of creating a precondition for bringing a future result.

It is accurate that the assurance does not directly produce the legal result that the interested party expects, although it has a mandatory character to be fulfilled, not for the interested person, but for the administrative body issuing the assurance. By making an assurance, the administrative body falls within the limits of self-obligation and is limited in the possibility of settling the matter in a different way.

The assurance of the administrative body is the basis of expectation, where it is clear to the interested party what rights will be granted and what benefits will be received. Accordingly, the

⁴¹ *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.*, Handbook of General Administrative Law, Tbilisi, 2005, 124 (in Georgian).

⁴² *Uriadmkofeli K.*, The principle of legal reliance in administrative law, doctoral dissertation, Georgian-American University, 2015, 44, 124, <<https://www.gau.edu.ge/storage/app/media/GAU%20Research%20Books%20and%20Documents/Kakhaber%20Uriadmkofeli%20PhD%20Thesis-2016.pdf>>

⁴³ *Pilving L.*, Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalikõiguslikel lubadel. Dissertatsioon. Dissertation defended at the University of Tartu. 2006, 22.

⁴⁴ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of June 6, 2013, case NBS-699-685(K-12).

⁴⁵ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of March 17, 2010, case NBS-939-899(K-09).

⁴⁶ In this regard, see 12. *Turava P., Tskepladze N.*, Handbook of General Administrative Law, Tbilisi, 2013, 176.

assurance is much more predictable for an interested party than, in general, the content of the individual administrative act that is issued after the end of the administrative proceedings. The administrative body is not obliged to in advance create a solid guarantee to the interested party regarding the content of the administrative act to be issued, except for the case when there is an assurance made in accordance with the law.

6. Stability and Retroactive Effect

One of the directions of good public administration, i.e. good governance, involves active communication with society and people,⁴⁷ and communication is ineffective beyond goodwill and trust. Therefore, it is an important capital for the administration itself to gain public trust, which is related to its moral character. Therefore, it is very important for the administrative body to become a reliable partner, the basis of which is the guarantee that “what was said will be fulfilled.” Legal assurance creates a mood “which requires a duty on the part of an administrative body to act fairly by following the promised procedure, based on the principle of good governance.”⁴⁸

One of the “dangers” and impeding circumstances is the normatively changed situation, which deprives the administrative body of the opportunity to issue beneficial administrative act bringing the promised result. In the state a kind of instrument of legal stability is considered to be a limitation of legal reliance and the restriction of the retroactive effect of the normative act,⁴⁹ which gives an opportunity to preserve the existing good.

The legal arrangement of the relationship should precede the events in time, and not the other way around. The retroactive effect of a normative act can become a challenge to the principle of stability. Despite this, it is crystal clear that state institutions cannot be limited in carrying out certain changes. Legislative changes are considered as a kind of “threat” to the assurance of the administrative body and, in general, to the stable legal environment in the state. The Constitutional Court of Georgia offers an interesting assessment, the decision reads: “The trust of the addressees of the law cannot be shaken by unjustified and frequent changes of the rights granted by the law...essentially undefined and uncalculated, unreliable legal development creates a feeling of uncertainty, which hinders the personal development of a person. Legal security is an important prerequisite for an individual's personal freedom.”⁵⁰ To some extent, the future plans of the activities of the administrative bodies should be predictable. “Governmental intervention must be as predictable as possible,”⁵¹ so when making a promise, an administrative body must be bound by a reasonable prediction of future behavior. Such an attitude will deepen public trust and authority towards state institutions.

Legal reliance “insures” against changes, although we must also remember that no one can prohibit the state and the administration from changing the established rules. It is in this chain of

⁴⁷ *Izoria L.*, *Modern State, Modern Administration*, 2009, 116-119 (in Georgian).

⁴⁸ *Hawke N., Parpworth N.*, *Introduction to Administrative Law*, 1996, 165.

⁴⁹ *Stott D., Felix A.*, *Principles of administrative law*, London, 1997, 275-276.

⁵⁰ Decision of the Constitutional Court of Georgia of December 27, 2013 on the case “Joint liability company Grisha Ashoredia” vs. Parliament of Georgia”, № 2/3/522,553 II-42.

⁵¹ *Schwabe I.*, *Decisions of the Federal Constitutional Court of Germany*, 2011, 320 (in Georgian).

changes that the interest of a specific person or group of persons is represented as one of the links. The state, just like the society, strives for a better future. Accordingly, acceptance of the future is achieved by a certain legal regulation, which does not exclude the painful consequences of the changes. Here lies the risk of conflict of interest.

Retroactive effect is equivalent to a change of condition that follows a pre-existing promise. It is true that an assurance does not in itself lead to the occurrence of a legal result, however, it creates a solid expectation of the occurrence of a foreknown result. It would be desirable, based on the goal of proportional protection of public and private interests, for the legislation to show more support for the interested party and instead of the completely exclusionary reservation of trust in Article 9 of GACG, to propose the absence of trust unless the basis of changed circumstances harms the public or a third party's legally protected interest. By doing so, it would be closer to the content of Article 60¹, paragraph 4 of the GACG.

7. Proportional Limitation Test

Protection of human rights has an important place in a legal state. Interfering with protected rights, limiting the rights of an individual is permissible to protect a more important and valuable good. One of the indicators of the permissibility of interfering with human rights is the assessment of the existence of “best necessity”.⁵² “Geeignetheit” (appropriateness) and “Erforderlichkeit” (necessity, need) are also considered as a measure of proportionality in Germany.⁵³

When determining proportionality, “the greater the degree of non-satisfaction or damage to one principle, the greater the importance of satisfying the other should be”.⁵⁴ Regarding the competition of the principle of legal reliance and legality in administrative law, it should first be noted that it is the principle of legality that gives rise to legal trust. I suppose the rule of law creates the possibility of stability, equality and predictability.

We recognize that often the interests of the individual must give way to the greater public good, of which he can become the addressee, however, “the individual sphere of the citizen cannot be limited to a greater extent than is necessary”,⁵⁵ the limitation must be proportional to the result and the goal.

GACG does not directly determine the priority of interests, it does not even explicitly indicate the priority of public interest when making a specific decision. Despite this, the law is clearly on the side of public interest, which is not at all strange and not alien to the legislation of other countries.

⁵² *Wong G.*, Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality. Public Law, 2000, 95-103.

⁵³ *Nolte G.*, General Principles of German and European Administrative Law – A Comparison in Historical Perspective, The Modern Law Review, 1994, 193.

⁵⁴ *Kumm M.*, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, “Law & Ethics of Human Right”, NYU Law School, 2010, 149.

⁵⁵ *Burduli I., Gotsiridze E., Zoidze B. and others*, Commentary on the Constitution of Georgia, Chapter Two, Tbilisi, 2013, 24 (in Georgian).

The presence of the threat of harming the public interest determines the peculiarities of a number of actions. Legislation determines priorities in the hierarchy of interest protection, following certain criteria, “it is not enough that the interference with the right serves a legitimate purpose. But proportionality must also be preserved.”⁵⁶ In the decision “Megadat.com v. Moldova”, the European Court of Human Rights notes that “the failure of national state authorities to balance the private and public interests involved in the case is likely to be used against the respondent state.”⁵⁷

As for the conflict of interests, which is characteristic of the administrative-legal relationship, the law focuses on the principle of proportionality when making a decision. The latter implies measurability. The importance of this principle is especially great in the conditions of “good governance”, where the state and the administration are considered not as a ruler and only a sovereign, but as a reliable support, a partner.⁵⁸

The years have changed the approach towards administrative law, administrative law is not only related to the possibility of carrying out repressive measures, it has become even closer to individuals and their interests. According to the opinion expressed in the literature, “the state has the ability to intervene in one or another area of the life of individuals based on the authority granted by law, although the same individuals can in some cases resist such intervention and restrain it. Crossing this line is exactly the biggest puzzle of administrative law.”⁵⁹ Any restriction is justified in order to protect a more valuable legitimate interest. “Any measure restricting a person's right must be the least restrictive means necessary to achieve a legitimate goal.”⁶⁰

Protection of proportionality implies such a balancing of interests, where each side makes concessions. This is the need for the coexistence of public and private interest in the decision-making process and their reasonable protection. Of course, this principle is actualized when using the discretionary powers of the administrative body. Discretion is considered as a kind of “moderate threat” in relation to the principle of legal reliance, since we see “danger,” which is associated with a legally limited, but still somewhat free possibility of action, where there is often a risk of an outcome that may be undesirable for the interested party. The issue is aggravated by the fact that checking the appropriateness of such a decision often goes beyond the possibility of court. The court respects the discretionary power of an administrative body and in many cases leaves it to itself to determine the legitimate purpose of making such a decision. The court requires from the administrative body a

⁵⁶ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of May 21, 2020, case NBS-268(K-19).

⁵⁷ Megadat.com SRL v. Moldova, № 21151/04, §74, 08.04.2008,- Quoted from the decision of the Court of Cassation, case NBS-268(K-19)

⁵⁸ *Khubua G., Kalichava K. (eds.), Handbook of Administrative Science, Tbilisi, 2018, 185-186 (in Georgian).*

⁵⁹ *Rawlings H., Law and Administration, , Cambridge University Press, 2009, 17.*

⁶⁰ 2014 decision of the Constitutional Court of Georgia on the case of Georgian citizens – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia, #1/2/569, 11.04.2014.

complete justification of the decision. The court does not check the expediency of the decision made by the administrative body, but its legality and justification.⁶¹

When evaluating the legality and expediency of a decision made within the scope of discretionary powers, it is important to determine whether the administrative body has investigated all relevant circumstances before issuing the act, so the court verifies the correctness of the factual circumstances.

8. Judicial and Legal Reliance Principle

The actualization of the issue of legal reliance means that the issue refers to the cancellation of a beneficial individual administrative act, or the dispute is related to the existence of an assurance of an administrative body and, accordingly, the request to issue an individual administrative act or perform an action. This issue, as a subject of dispute, is often assessed and decided by the court. In modern governance there is an attempt to interpret the various requirements as liberally as possible in favor of the individual.⁶² Even the procedural norms with which the legislation is saturated, in many cases serve to protect the interests of the individual.⁶³

As the current reality demonstrates, “regarding legal reliance, it should be noted that in many cases it becomes a matter for consideration by the court, and the intensity of its protection in relation to administrative bodies, beyond the dispute, is rarely found.”⁶⁴ Such a view of the issue confirms the opinion in the legal literature that courts are better positioned in the area of rights protection compared to administrative bodies.⁶⁵ That is why, in many cases, the issue of existence or non-existence of legal trust will be decided by the court within the framework of the dispute. It is also noted in the scientific literature that “the court has to step from time to time into the space owned by the executive branch in order to verify whether the decisions made are in accordance with the law and whether the administrative bodies respond to the standards of fairness that the legislator must have intended.”⁶⁶

As mentioned above, the presence or absence of legal reliance is sometimes subject to judicial review. The plaintiff's claim may relate to the issuance of an act based on legal trust, the performance of an action, or the maintenance of the existence of a beneficial act. The court checks whether there is place for the existence of the legal reliance of the plaintiff. “The court has full jurisdiction to resolve the dispute, however, taking into account the specificity of the field, the degree of regulation of the discretionary field of the administrative body, the density and intensity of judicial control differs, therefore, the control of the court in these conditions must be appropriate and proportionate, depending

⁶¹ Uniform practice of the Supreme Court of Georgia on administrative cases, (II half of 2014 – 2015), Supreme Court of Georgia, Tbilisi, 2017, 19, <<https://www.supremecourt.ge/files/upload-file/pdf/ertgvarovani-praktika-administraciuli.pdf>> [17.11.2022].

⁶² *Hawke N., Parpworth N.*, Introduction to Administrative Law, 1996, 132.

⁶³ *Ibid*, 131.

⁶⁴ *Pezzer H.-J. (Hrsg.)*, Vertrauensschutz im Steuerrecht, 2004, 257-258.

⁶⁵ *Kumm M.*, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, “Law & Ethics of Human Right”, NYU Law School, 2010, 142.

⁶⁶ *Rawlings H.*, Law and Administration, 2009, 13.

on the importance of the object to be protected, a stricter test for discretion is not excluded to be used.”⁶⁷

Unlike the court, when submitting an administrative complaint, the administrative body reviewing the complaint is itself authorized to use discretionary powers, which gives the administrative body a wider opportunity to discuss the appropriateness of the decision. “Judicial control of decisions made within discretionary authority is limited by the constitutional principle of separation of powers, the court cannot turn into a higher administrative body and cannot exercise discretionary authority itself. The peculiarity of judicial review of discretionary power is that the court does not make a final decision and thus does not interfere with the discretion of an administrative body.”⁶⁸ Accordingly, the court often uses the 4th paragraph of Article 32 of the APCG on the basis of which it declares an individual administrative act as null and void and instructs the administrative body to issue a new act after investigating and evaluating the circumstances.

Unlike Georgia, the German Code of Administrative Procedure⁶⁹ separately considers the possibility of judicial control of the decision made on the basis of discretionary powers. Article 114 of the German Administrative Procedure Code includes the possibility of checking the legality of an administrative act, refusal or action taken by an administrative body within the scope of discretionary powers.

9. Legal Reliance and Third Party Legitimate Interests

The rule of law implies the compliance of public power with the law⁷⁰ – this phrase accurately conveys the main obligation of administrative bodies to limit and fall within the limits established by law. If it were not for the violation of the law, the illegal beneficial act would not exist. Accordingly, the administrative body would not face a kind of conundrum due to the principle of legality and protection of the essential good of the individual. Therefore, not only the goal of protecting the individual should be sought in this principle, but also the “retraction” of the state due to its own mistake. As Prof. Besarion Zoidze notes,⁷¹ “Constitutions are based on human rights, not human rights on constitutions.” Obviously, we have to believe in the state authorities and we have to trust them. Trust in this case can be imagined in a broad sense, which implies benevolence and the belief that the state acts within the framework of law and justice, therefore, the existing trust in it is conditioned by a caring attitude. And on the other hand, trust is directed towards a specific legal act, a promise, and creates a reasonable expectation of the occurrence of a specified result or its maintenance.

⁶⁷ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of February 13, 2013, case NBS-448-443(K-12)

⁶⁸ Decision of the Chamber of Administrative Cases of the Supreme Court of Georgia of March 7, 2019, case NBS-797 (K-18).

⁶⁹ Verwaltungsgerichtsordnung, (VwGO), § 114, <<https://www.gesetze-im-internet.de/vwgo/>> [17.11.2022].

⁷⁰ Rainer Arnold, The Role of the Rule of Law in the development of constitutional law, *Journal of Constitutional Law Review*, #8, 2015,21.

⁷¹ *Zoidze B.*, The Principle of Preserving the Essence of the Basic Right, *Review of Constitutional Law*, #6, 2012, 140 (in Georgian).

The public interest or the legally protected interest of a third party is considered to be the main obstacle to legal reliance. “A right granted by law has a superior force, which means that it is worthy of preferential protection compared to a legal reliance, if the issue is related to the protection of a third party or the public interest.”⁷² If the goal of balanced limitation of the parties' interest, proportional protection of their interest is important when determining proportionality, protection of the legal right of the third party becomes preferable. That is why, if the beneficial administrative act at the same time limits the rights of the third party, the interest of protecting the third party will outweigh the legal reliance. Obviously, the addressee of the beneficial administrative act will enjoy the right to receive compensation.

"Where the public interest does not prevail and the requirements of the law are clearer, the interests of individuals are more protected."⁷³ If we talk about the conflict between legal reliance and the rule of law, we must also mention that the rule of law does not exclude the possibility of obtaining a foreseeable and predictable result, moreover, legal trust itself is tied to the principle of legality, as long as administrative bodies are not authorized to perform any action beyond the requirements of the law, i.e. presumably, any of their actions, any of their decisions is considered legal. It is this assumption that sets up this kind of “maintenance” and “expectation of solid guarantee”, with the principle of “I deserve, I own.”

The Supreme Court of Georgia makes an interesting assessment, where it is stated that “citizen's trust in the action of the governing body should be evaluated more significantly than the interest protected by the administrative body.”⁷⁴

10. Conclusion

As the European Court of Human Rights points out, the behavior of authorities (administrative bodies) creates certain expectations in an individual.⁷⁵ The administrative body must take into consideration the expectations created in the society at the basis of its activities and assurances.

A formal approach to the issue is insufficient. It is important to use a measure of reasonableness. Thus, both the administrative body and the court, when evaluating the issue in each specific case, should use the measure of determining reasonableness in order to correctly calculate the harm or risks that may inevitably occur when deciding based on the conflict of interests. Public interest, at first glance, feeding the function of “lifeline” for the administrative body, will not always be an argument.

The basis of legal reliance is, of course, the obligation of the administrative body to act lawfully. Which indicates that any action taken by it is in accordance with the law. An administrative

⁷² J. Mertens de Wilmars, *The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy in Mixed-Economy Systems*, 1983, 15-16.

⁷³ *Hawke N., Parpworth N.*, *Introduction to Administrative Law*, 1996, 130.

⁷⁴ Uniform practice of the Supreme Court of Georgia on administrative cases, (II half of 2014 – 2015), Supreme Court of Georgia, Tbilisi, 2017, 19 <<https://www.supremecourt.ge/files/upload-file/pdf/ertgvarovani-praktika-administraciuli.pdf>> [17.11.2022].

⁷⁵ Case 289/81 *Mavrides v. European Parliament* [1983], E.C.R. 1731, paragraph 21

body must not go beyond the established legal framework, therefore, what emanates from it, including the promise, gives us a legitimate basis to trust and accept as inevitable.

The basis of expectation is not a person's subjective state of mind and irrational ideas, but existing legislation and even established practice. Thus, it is important to think about how honest the attitude is towards an individual for whom the government, administrative body or official, represents an authority, gets disappointed by them and becomes a victim of a false assurance. This destroys the moral image of administrative bodies in front of the public.

The vacillation of administrative bodies within the framework of regulating relations, their future-oriented behavior to the detriment of a person's interests should not hang like a sword of Damocles. It is important to maintain legal stability. All the more so when the administrative bodies are not limited in time to review and change (even revoke) their decisions. "Public interest" should not turn into a whale that can swallow all the good things that can counterbalance it. Stability is an important value for the rule of law. It provides an opportunity to predict the future of people, which in turn gives them the opportunity to plan their lives and where it becomes necessary to interact with the administrative body, participate in public-legal relations, to anticipate certain outcomes beforehand.

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