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Fully Automating the Administrative Act and its Accompanying Risk

In recent decades, technological innovations have significantly changed the behavior of the state and society. Consequently, technological development has had a huge impact on public administration activities, since the development of technology and their integration are mostly related to the need for electronic governance¹. Digitization of processes, switching to electronic forms, and sometimes automation have become necessary. Digitalization and automation must be discussed independently of each other as digitalization of the same digital governance is an important prerequisite for automating the public administration process².

The article analyzes the extent to which the automated decision meets the requirements of the administrative act and how the automated actions of the state affect the procedures and its basic principles. The article refers to the importance of automated production and the forms of applying an administrative act on its basis, definitions of electronic and automated acts, and the difference between them. The special focus is on the legal problems and challenges of a fully automated act issued by an administrative body in implementing public administration, and its constitutional-legal grounds.

Keywords: *Public Administration, Administrative Body, Administrative-Legal Act, Electronic Act, Automated Act, Artificial Intelligence*

1. Introduction

“Artificial intelligence” as a term in the field of public administration is associated with modern technological approaches when taking various actions. The particular importance of artificial intelligence is that the processes used to be implemented by humans can be fully switched to technical systems where decisions are made based on algorithms according to a pre-established and agreed formula³.

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¹ E-governance, or digital governance, is associated with the introduction of innovations and technologies in the field of public administration.

² Tskhadadze K., E-Government Implementation on the Example of Georgia, TalTech Journal of European Studies, 14(1), 2024, 254.

³ Emphasizing this issue in the legal literature dates back to 1950: Ludwigs M., & Velling A., Vollautomatisierte Verwaltungsakte im deutschen Recht. In Digitalization as a challenge for justice and administration = La digitalizacion como reto para la justicia y la administracion= Digitization as a challenge for the judiciary and administration. Würzburg University Press, 2023, 37; The 1976 version of the German Administrative Proceedings Act 1976 provided for the possibility of imposing administrative acts with the help of “automatic devices”.

The administrative body regulates relations arising in the field of public administration through administrative acts. An administrative act is an instrument of public administration bodies to ensure legal security⁴.

According to the Georgian administrative legislation, legal forms of the activities of an administrative body are issued in the form of individual⁵ and normative⁶ administrative-legal acts differing from other forms of activities of the administrative body, in particular, administrative or private contracts and realacts. An individual administrative legal act is aimed at the occurrence, alteration, and reconnaissance of a legal outcome for a specific entity, or regulating a particular relationship, unlike a normative administrative act, which in turn implies a general rule of conduct and is reusable.

The issuance of administrative acts is usually based on the detection of human will by an administrative body. However, with the help of technology, it is possible to make decisions exclusively, through a machine. “Automation” primarily involves ensuring the decision of an administrative body in an automated manner, without the intervention of human resources, which means making decisions without detecting or processing human will. Automated individual solutions are based on automated processing. This means that the decision is made without a substantial evaluation of the factual circumstances and the legal assessment of the issue and the decision is made only by the algorithm, regardless of the intervention of the natural person, the detection of his/her will⁷.

The main purpose of a fully automated act is to establish simple truths, such as offenses in the field of taxation, violation of traffic rules, etc. The more complex actual composition has less chance of being fully automated because “automatic orders” can rest on a “simple” rules-based algorithm that only checks the presence of certain requirements. These algorithms are built on correlations, which means that acts are based on similar, identical cases.⁸ Accordingly, decisions connected to simple arithmetic operations, regulated by tax legislation, are naturally more permissible to make decisions through a machine than where the actual content component is high⁹.

The full automation of administrative proceedings in practice creates problems because automated individual decisions that are made based on computation may seem objective and neutral but they can be false¹⁰ or even contrary to fundamental principles such as legality, determination, and

⁴ Maurer H., Waldhoff C., Allgemeines Verwaltungsrecht, Munich: CH Beck, 2006, 149.

⁵ see the General Administrative Code of Georgia, Article 2(1)(d), Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

⁶ see the General Administrative Code of Georgia, Article 2(1)(e), Agencies of the Parliament of Georgia, 32(39): 15/07/1999.

⁷ Of course, the exception is the programming of the algorithm by an individual. Included: *Rechsteiner D.*, Der Algorithmus decreed. Constitutional and administrative law aspects of automated individual decisions, Jusletter vom. 2019 16 Nov. (8), 4.

⁸ *Rechsteiner D.*, The algorithm has. Constitutional and administrative law aspects of automated individual decisions, Jusletter of 2019 16 Nov. (8), 2.

⁹ *Denk M.*, *News on Digitization in Administrative (Procedural) Law*, the present written version corresponds to the lecture of 4.11.2021.

¹⁰ *Braun Binder N.*, Orders of the machines in individual cases are considered to be dispositions – Dystopia or future everyday administrative life? ZSR/RDS Vol. 139, Issue 1, 2020, 253.

fair production. Therefore, it is important to analyze whether the administrative body violates these principles when issuing automated or partially automated acts.

2. Definition of concepts: electronic act, complete and partial automated acts

First, we need to distinguish the following terms Automated Administrative Act and Electronic Administrative Act from each other. These terms are intertwined on the grounds of their preparation and issuance, order, and factual circumstances.

However, an electronic act is an electronic form of an act issued in the form of a material, or paper by an administrative body. It is provided in the same form as the usual written act using human resources, differently from the form of its publication. The automated act is issued automatically with the help of technical means without the intervention of human resources (e.g., issuance of an administrative act based on the excess of video eye speed). Human functions are transferred to artificial intelligence, in which case the purpose of automation is, first of all, to replace the relevant administrative procedures completely or partially without human intervention. Therefore, today citizens often receive digitalized services as a means offered by the modern administration.

Also, the difference between electronic and automated acts lies in the fact that electronic administrative acts primarily involve the digitization of existing processes, which may still require human decision-making and are aimed at improving the effectiveness of administrative tasks by digitizing traditional methods. Automated acts focus on automatically completing tasks, based on predetermined rules, or algorithms that eliminate the need for human processing and aspire to further simplify processes through automation by reducing manual intervention or eliminating it. In general, the issuance of an administrative act is directly related to the detection of the will of an administrative body, which, in the case of the issuance of an automated act, is directly replaced by a pre-programmed/computational procedure with technical means.

2.1. The Concept of Electronic Act

An electronically issued administrative act plays a central role in the digital public administration model. Accordingly, the term “electronic administrative act” has emerged alongside an act published in writing, oral, or other form in the legislation of some countries, which primarily implies an electronically issued act.

The amendments made to the General Administrative Code of Georgia in March 2021¹¹ regulated the issuance of an individual administrative act in electronic form and defined the terms of an electronic individual administrative act (Article 2(1) (d1) of the term).¹² According to the legal definition of the concept, an electronic individual administrative act is an act that is issued using

¹¹ On Amendments to the General Administrative Code of Georgia, March 30, 2020, # 419-IV MS-XMp.

¹² Electronic Individual Administrative Act – an individual administrative act issued in electronic form using automated management tools, which meet the requirements of the Law of Georgia on Electronic Documents and Electronic Trust Services, see the General Administrative Code of Georgia, Article 2(1)^(d1), Agencies of the Parliament of Georgia, 32(39): 15/07/1999.

automated management tools. In addition, an administrative body is authorized to use software and unified automated management tools for proceedings and access to information¹³.

This record primarily arranges the forms and grounds of electronic communications, based on which it is permissible to apply the form of an electronic document if otherwise stipulated by law. All legislative requirements for an established written administrative-legal act apply to an administrative act issued electronically by an administrative body¹⁴. It shall have the same legal force as a document issued in a material form¹⁵. The issuance of an electronic act shall be vested in an authorized body that imposes a written act signed with a qualified electronic signature/certificate of qualified electronic seal¹⁶.

An administrative body can receive or provide any information and/or documents using unified automated management tools if the interested person has not selected another form of receipt¹⁷. However, the administrative legislation does not regulate issues related to the preparation, issuance, and enforcement procedures of the electronic act except for the definition of the term. In addition, conducting electronic production is not regulated. It is important to regulate the issuance of electronic administrative-legal acts in case of digitization of the powers of the administrative body. Besides, this issue is related to the fundamental values of democracy, the basic principles of the activities of the administrative body, and the right of a person to participate in administrative proceedings. This primarily requires a special legal basis, which implies the regulation of procedural guarantees¹⁸.

2.2. Automated Administrative Legal Act

An automated administrative act is issued with fully automatic devices. Automation is limited to creating an administrative act¹⁹. Considering an automated administrative act, it is interesting to set an example of Germany where the issuance of an automated act was fully regulated as a result of the amendments in the legislation of administrative proceedings in 2017²⁰. German Law on Administrative Proceedings grants the administrative body the authority to issue an administrative act²¹ by fully automated means if it is provided by law and is not related to the exercise of discretionary powers.

¹³ see the General Administrative Code of Georgia, 35¹, Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

¹⁴ see the General Administrative Code of Georgia, 51 and 52¹, Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

¹⁵ Law of Georgia on Electronic Document and Electronic Trust Services, Article 4, Agencies of the Parliament of Georgia, 639-II, 10/05/2017.

¹⁶ Law of Georgia on Electronic Document and Electronic Trust Services, Article 3, Agencies of the Parliament of Georgia, 639-II, 10/05/2017.

¹⁷ see the General Administrative Code of Georgia, 351, Agencies of the Parliament of Georgia, 32(39), 15/07/1999.

¹⁸ *Rechsteiner D.*, The algorithm has. Constitutional and Administrative Law Aspects of Automated Individual Decisions, Jusletter of 2019 16 Nov. (8), 1.

¹⁹ *Siegel T.*, Electronic Administrative Action – On the Effects of Digitization on Administrative Law. JURA-Juristische Ausbildung, 42(9), 2020, 927.

²⁰ Administrative Procedure Act on 1 January 2017 by Article 20 of the StVfModG.

²¹ Administrative Procedure Act, art. 35a.

The issuance of fully automated administrative acts is allowed by law and its scope is limited by discretionary powers because an administrative body can't have a discretionary authority or the opportunity to assess as the acts are issued based on the algorithm without the determination of the factual circumstances. The algorithm fails to define legal content or terms. For example, the administrative protocols and decrees on imposing administrative penalties for violation of tax legislation issued by the tax authority are not based on the scope of discretionary powers. At this time, the number of fines is not defined but based on the algorithm, it is possible to issue a fine of the exact number predetermined in advance. This implies that when making a fully authorized decision, an administrative body does not have a scope of action.

It is also interesting the difference between fully automated and partially automated acts. A fully automated administrative act differs from a partially automated administrative act in a “fully” automated manner. A fully automated administrative act fully responds to an administrative-legal act in the sense of administrative law. Automation is limited to an administrative act while creating further notification may take place in a non-automated way, which does not undermine the characteristics of a fully automated administrative act²².

3. Automated Administrative Act and Constitutional-Legal Issues

Constitutional-legal issues of an automated administrative act can appear on the agenda, which are related to electronic and automated administrative proceedings and the issuance of a legal act on their basis. The constitution does not indicate the mechanization of public administration, since the authors of the constitution (especially in countries where the basic law has operated for several hundred years) expand such a development. They could not be foreseen, but, based on the primary principles of the constitution, one of the main functions in administrative proceedings is to implement important principles such as the principles of a democratic, legal, and social state. In addition, its task is to further clarify the above principles in specific productions²³. The application of electronic and technological means due to the expediency of the economy and efficiency of the procedures should not neglect constitutional provisions. Economics and efficiency are important principles of administrative law but using electronic means on their basis is only possible following the principles of the constitution²⁴. Therefore, it is critical to discuss the connection of automated information and communication technologies with the principle of the legal state.

3.1. Principle of the Legal State

The principle of a legal state is related to all areas of activity of the state's bodies. It creates the main directions of state authorities. The principle of the legal state requires the administrative act

²² Siegel T., *Electronic Administrative Action – On the Effects of Digitization on Administrative Law*, Legal Education, published by De Gruyter, 2020, 928.

²³ *Relevance of Constitutional-Legal Principles for Administrative Law*, Journal of Administrative Law, No 2, 2016, 6.

²⁴ Glaser A., *The electronically acting state*, E-Legislation, E-Governance, E-Justice, Journal of Swiss Law, Volume 134, II, 2015, 319..

issued by the executive authority based on the legislation to be clarified in its contents, purpose, and extent that allows a citizen to foresee the actions to be carried out following the act at a certain level.²⁵ Accordingly, the principle of a legal state applies not only to the decision made in the usual manner but also to fully automated production²⁶. This expression shall be found by an administrative body in the realization of the principles of law, legality, determination, and foreseeability, which are elements of the principle of a legal state.

Administrative legislation provides the obligation to justify an administrative act²⁷ in a written form, but it must apply to electronic and automated administrative acts. In addition, the addressee of the act must be informed in advance in which form the act will be issued, in written, electronic, or automated form. The legislation gives the administrative body several opportunities to choose the form of issuing the act but in this regard, it shall not be completely free because if an administrative body acts within the scope of discretionary powers, all the factual circumstances essential in issuing an administrative act shall be indicated in the written justification.

All of these requirements are essential to implement the principle of the rule of law because a person should be aware of the reason why the act may limit his right or interest.

3.2. Principle of Lawfulness

One of the most important requirements of the legal state is to regulate the legal relations between a citizen and a state following the legislation. Therefore, the principle of lawfulness is an important tool for the activities of public administration and the exercise of its powers. The activities of administrative bodies and the acts issued by them should be understandable for an addressee to foresee them easily. Hence, it is important to have a detailed regulation of automated production as well as acts or actions issued on its basis. Administrative legislation shall include a clear regulation of the procedure in which the act is issued. In addition, any decision made by an administrative body, regardless of its form, should be based solely on factual and legal prerequisites. The administrative body²⁸ is obliged to investigate all the circumstances important to the case and make decisions only as a result of the assessment of the circumstances. An automated, machine decision does not require officials to process the fact because it is independently adopted by a pre-determined algorithm, which may question the principle of legality.

²⁵ Ibid.

²⁶ *Polomski R.M.*, *The Automated Administrative Act, The Administration on the Threshold of Automation to Information and Communication Technology*, Duncker & Humboldt, Berlin, 1993, 92.

²⁷ According to Article 53 of the General Administrative Code of Georgia, an individual administrative act issued in written form shall contain written substantiation. The justification precedes the resolution part of the administrative act. A legislative or subordinate normative act or its respective norm shall also indicate an administrative act based on which this administrative act has been issued. The administrative act may also indicate the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its supplementary protocols, and the precedents of the European Court of Human Rights on similar legal issues that have been applied when making decisions. But the law also provides for an exception, in particular, in the case of issuing a written act without substantiation by urgent necessity, a written substantiation must be issued within a week after the issuance of an individual administrative act.

²⁸ The General Administrative Code of Georgia, Article 96(1), Parliament of Georgia, LHG, 32(39), 15/07/1999.

3.3. Principle of Coherence

In addition to the above, the principle of a legal state in the context of administrative law also implies the existence of the coherence principle to implement the activities of government bodies²⁹. Taking into account the proportionality of public and private interests, the administrative body should weigh these interests in each specific case and confront them, which is also important for electronic production, especially in terms of the protection of personal data during automated administrative proceedings³⁰. In automated production, the principle of coherence is not followed, and decisions are not made based on the reconciliation of public and private interests.

3.4. Right to Hear Participants of Administrative Proceedings

Hearing of the parties in the administrative proceedings is of great importance. In automated administrative proceedings may be a danger of making decisions without passive or hearing from the participants. This is a prime component in conducting administrative proceedings to ensure the possibility of involvement and submission of an opinion of a party whose right or legal interest is restricted by an administrative act.³¹ The mentioned right to be “heard” shall also serve the interests of the administrative body. The participation of interested persons is not always mandatory, except when an individual administrative act that is to be issued may worsen the legal status of a person³². The legislation also considers the cases when the delay in issuing an individual administrative act may cause substantial damage to the public and private interest³³.

Fair administrative proceedings as a constitutional right provided by Article 18 of the Constitution of Georgia imply the right of a person to apply to an administrative body, participate in the proceedings, express opinions, and be heard by an administrative body. According to modern administrative proceedings, a citizen is assigned an active role. Simultaneously, the administrative proceedings obligate the administrative body to hear the parties involved in the case and investigate the circumstances of the case. This compels an administrative body to make a fair and objective decision³⁴.

4. Risk Factors for a Fully Automated Decision

The issuance of automated administrative acts is accompanied by significant risks primarily related to the absence of a will in the issuance of the Act. The forms of activity of an administrative

²⁹ *Tskhadadze St.*, Relevance of Constitutional-Legal Principles for Administrative Law, Journal of Administrative Law, No. 2, 2016, 10.

³⁰ *Polomski R.M.*, The Automated Administrative Act, The Administration on the Threshold of Automation to Information and Communication Technology, Duncker & Humboldt, Berlin, 1993, 103.

³¹ The General Administrative Code of Georgia, Article 13(1), Parliament of Georgia, LHG, 32(39), 15/07/1999.

³² The General Administrative Code of Georgia, Article 95(2), Parliament of Georgia, LHG, 32(39), 15/07/1999.

³³ *Ibid.*, Article 95(6).

³⁴ *Tskhadadze St.*, Good Governance – Constitutional Guarantees of Basic Rights in the Framework of Constitutional Reform in Georgia, Journal of Constitutional Law Review, 2017, 50.

body are based on the detection of a will, unilaterally through the issuance of acts or in multilateral contractual relations. The issuance of fully automated acts is followed by an absence of a will. According to legitimate concepts, acts are issued conforming to the will of a person while programmed technical means do not consider it.

The issuance of a fully automated act should be provided within the scope of the reservation of the law rested on special legislative regulation. Further regulations are also problematic in determining the automated procedure, and the rule of its publication, which is beyond regulation at this stage.

Fully automated decisions can expose the rights of a person to the risk. Individuals only become a state processing facility when it is difficult to take an individual approach to a particular case.

It is also important to make a decision without studying and examining the actual circumstances. Fair administrative proceedings undertake a decision to be made only after the examination and verification of all factual circumstances. Therefore, following the legality of the acts and the constitutional law the participation of a person in the decision-making process is essential.

However, there is no legal standard for judicial control of automated administrative acts. It can be said that the principle of effective legal protection is not ensured. There is almost no judicial practice concerning administrative acts published in a fully automated manner.

In making a fully automated decision, it is also difficult to identify errors in the decision-making system, in particular, discrimination and other violations of the rights of a person. Automated production can always be a “black box”, so people will always depend on the appropriate procedural guarantees designed to protect rights determined by law³⁵.

5. Conclusion

Based on the above, administrative proceedings may be either fully or partially automated. Full automation is the transfer of a complete process to artificial systems that do not require human intervention. This is the process in which systems make decisions based on algorithms that are pre-developed by programmers or the learning system known as AI. The algorithm, on the other hand, can be described as mechanical because it can solve only those that were pre-programmed. AI can solve problems and process experiences.

In the course of partial automation, decisions are made by persons special civil servants. Partial automation goes beyond simple electrification, to the extent that automation technology independently produces intermediate results and contributes significantly to the content level of the decision-making process. Thus, machine decision no longer requires fact-processing by humans, and officials, but is independently made by a pre-determined algorithm.

A fully automated decision is made when an administrative act is adopted without human intervention³⁶. The term “full automation” does not necessarily involve the automated conduct of administrative proceedings in general, but rather the possibility of issuing a specific act within a

³⁵ *M artini M., Nink D., When Machines Decide...-Fully Automated Administrative Procedures and the Protection of Personality, Neue Zeitschrift für Verwaltungsrecht-extra, 36(10), 10, 2017.*

³⁶ *Comp.: brown binder N., Dispositions of the machines in individual cases ... – Dystopia or future everyday administrative life? ZSR/RDS Volume 139, I Heft, 2020, 253.*

specific administrative procedure³⁷. In contrast, partial automation implies the adoption of the act not completely, autonomously, but only as a result of the expression of the will of a natural person.³⁸ However, it is difficult to discern when the act is fully and partially automatized.

“Automated” means that “the individual did not evaluate the content and did not make a decision on its basis”. The addressee of the act must have the opportunity to express his/her opinion if he/she requires it and can also request the revision of the decision by the individual. Automated administrative acts include the usage of algorithms and automated systems to perform tasks that traditionally require human intervention from the moment of processing the applications to the review and decision-making stage. In such cases, the legal status of individuals, and addressees raises questions referring to the transparency of the process, responsibility, and protection of personal data.

The acts issued in this form have their strengths and weaknesses. The strengths are the release of administrative staff from making routine decisions, automatic processing of cases, saving time and human resources, and increasing the effectiveness of administrative activities. Weaknesses are manifested in complex decisions without appropriate criteria for non-existent individual decisions, detailed regulations, and lack of judicial control.

Based on all of the above, the integration of automated administrative acts into administrative law is a significant benefit in the implementation of public administration but it has some challenges. Accordingly, it is essential to impose detailed legislative regulations for automated productions and create a legal framework in terms of adherence to the principles of foreseeability and legal reservation to determine the scope of powers.

As administrative law is the administrative procedure characterized by transparency and accountability the basis of the decisions should be clear to the addressee. It is also necessary to regulate the scope of authority in case of errors or disputes. The act issued in such form does not threaten the legitimate interests of the addressee.

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³⁷ Comp.: *Herold V.*, Democratic Legitimation of Automated Administrative Acts, Ducker & Humboldt, Berlin, 2019, 32.

³⁸ Ibid.

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