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RULE OF LAW IN THE JURISPRUDENCE OF "CHAMELEON COURT" — DECISION OF THE CONSTITUTIONAL COURT OF GEORGIA ON MANDATORY GENDER QUOTA IN LISTS OF POLITICAL PARTIES

INTRODUCTION

On 25 September, 2020 the Plenum of the Constitutional Court of Georgia delivered a judgement on the case "N(N)LE Political Unity of Citizens "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia."[1] Applicants requested the Court to declare the norm of the Organic Law "Election Code" (2nd sentence of paragraph 2 of article 203) as inconsistent with the Constitution, according to which "political parties and electoral blocks have obligation to present lists in which every fifth person must be of distinctive gender."

Although, the disputed regulation had a purpose of woman representation in the Parliament, it was elaborated by the legislator in a neutral language. Consequently, more generality with the aim to establish gender quota in the list of political party gave such content, that in altered factual circumstances, for instance, in case of political party list consisting of majority of women, it would require quota for men. The Constitutional Court did not value legislator's expression of respect, even illusional, towards the constitutional ideal of formal equality.

The plaintiff did not have better choice, except that, by protection of general logic of the principle of formal equality, to argue about contradiction with the Constitution of both occasions of mandatory gender quota. Therefore, the operative part of the Court decision was containing plenty of

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1 Decision of the Constitutional Court of Georgia N3/3/1526 from 25 September 2020.

irony, by which the complaint was partially approved and only requirement of possible male quota in lists of political parties was declared as contradicting the Constitution, and the requirement of female quota was considered as a constitutionally necessary positive norm in light of paragraph 3 of article 11 of the Constitution.

By this court decision the constitutional principle of formal equality was damaged the most. It must be noted that jurisprudence developed during two decades of existence of the Constitutional Court of Georgia, mainly advanced in the area (scope) of this ideal. Despite the fact that standards created by the Court and evaluating constitutional tests lack doctrinal unity, consistency and completeness, content wise it is still possible to see ideal od formal equality in their fundament.

One of the factors, which determined such jurisprudential direction of the court was the texts of article 14 of the Constitution of 1995.[2] The language of this constitutional norm corresponding to the classical ideal of formal equality gave possibility to the court to clearly distinguish concepts of essential equality, state (without explanations) their fundamental inconsistency with the constitutional (formal) principle of equality.[3]

Paragraph 3 of article 11[4] of the new edition of the Constitution enacted in 2018 made the jurisprudential work of the court more difficult. This amendment in the Constitution introduced the language of essential equality, and took from the court the comfort created by the constitutional text to avoid wrestling with the Heracles's mission and try to unify conflicting principles of formal and essential equality in one constitutional doctrine.

In the decision discussed the court was not prepared for such heavy doctrinal burden and lost in its overcoming. Instead of developing consecutive standard and overcoming doctrinal obstacles, the decision discussed is making the content of the constitutional principle of equality and evaluating standards even more inconsecutive and contradictory. Deep value-based collisions, which derive from the conflict of constitutional principles opposed to each other before contradiction, will be showed as trivial by the court and will be hidden in this way, or will be declared decided with prepared formal argumentation, which belongs to more ideological genre, than to serious doctrinal constitutional law discussion.

As a result, the quality of legal certainty by the doctrine and constitutional rules, as well as quality of security decreases significantly. In such way the ground of the rule of law, fundament of

2 Article 14 of the previous edition of the Constitution of 1995 existing before 2018 was stipulated as follows: "all persons are free by birth and equal before the law disregard the race, colour, language, sex, religion, political and other opinion, national, ethnic and social belonging, origin, material condition and ranking, place of living."

3 "For understanding essence of article 14, it is principally important to distinguish equality before the law from equalizing. In the framework of this principle the major aim of the state and its function cannot be fully equaling people, as this would contradict with the idea of equality itself, with the essence of right. The idea of equality serves for ensuring equality of possibilities, that is guaranteeing similar possibilities of self-realization to the people in different spheres. Whether equal chances will be applied equally, depends on skills of each individual. Trying to equalize skills with the effort of the state, in most cases causes discrimination itself." – Decision of the Constitutional Court of Georgia N1/1/493 from 27 December 2010 on the case "Political Unities of citizens "New Rights Party (Akhali Memarjveneebi) and" Conservative Party of Georgia" v. the Parliament of Georgia", II-1.

4 According to this paragraph: "the State ensures equal rights and opportunities for men and women. Th state takes special measures for ensuring essential equality of men and women and precluding inequality."

constitutional order is even more rocked, which if not portrayed in the jurisprudence with proper consistency and completeness of essential link with the formal principle of equality, may be considered as next systemic failure of the Constitutional Court of Georgia.

Moreover, the establishment of doctrinal connection between formal and essential principles of equality within the frame if the Constitution of Georgia still remains undecided by the court, also determination of constitutional content of positive measures for attaining essential equality and determination of limits of discretion of the legislator upon their adoption with clear and distinct rules and/or standards. This situation exists not only in the direction of equality and in general, is the problem of the Constitutional Court of Georgia, as of the institute. This problem clearly shows its fragile institutional condition in the non-consolidated, non-liberal democracy.

In such regimes, similar to authoritarian and hybrid regimes, constitutional courts weakened by light/political institutional attacks[5] are pressured by political and/or societal power centers.[6] Sooner or later, they fall under the influence of diverse formal and informal power actors. It is ironic, but elites of the Constitutional Courts, as in authoritarian and hybrid, as well as non-liberal democratic regimes, have "pragmatic" grounds for justifying their recruitment by the holders of power[7] - they "protect" the institute of the Constitutional Court itself. In the benefit of power holders, "by pragmatic compromises" they leave to the Constitutional Court the possibility to fulfill its constitutional function in such cases, where "red lines" of interests of actors of the power are not defined.

By progressive and/or constitutionally correct decisions made beyond the "red lines" drawn by the power, such Constitutional Courts, on the one hand hold up to their remains of social legitimation, on the other hand by preservation of the remains of this legitimation they reinforce legitimation of the political power, which they serve basically. Such operative system requires mastering art of chameleon from the side of the Constitutional Court.[8] "Red lines" change constantly even in consolidated authoritarian regimes.[9] As for the non-consolidated , so called "non-liberal democracies", here the centers of power change by themselves and therefore, the "red lines", which are drawn by transient powers, are unpredictably changing too. Georgia after restoring independence falls more under this category.

Learning to be chameleon from the side of the Constitutional Court is inconsistent with protection of such constitutional values, as clarity, consistency, certainty, predictability. The rule of law is

5 Wojciech Sadurski, Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a *Governmental Enabler*, 11 Hague Journal on the Rule of Law (2018).

6 Tom Ginsburg & Tamir Moustafa, Introduction: The Functions of Courts in Authoritarian Politics, in Rule by Law: The Politics of Courts in Authoritarian Regimes 1–22 (Tom Ginsburg & Tamir Moustafa eds., 2008).

7 Alexei Trochev & Peter H. Solomon, *Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state*, 51 Communist and Post-Communist Studies 201–214 (2018).

8 I borrowed the metaphor of programmer "judge-chameleon" from Adrian Vermeule, who develops it in the framework of liberal-democratic constitutionalism. However, it must be mentioned that Vermuele often is criticized for the sympathy of authoritarian constitutional ideas. His works often openly is based on theoreticians of authoritarian law and politics. Adrian Vermeuele, System Effects and the Constitution, 123 HARVARD LAW SCHOOL JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS DISCUSSION PAPER SERIES (2009).

9 Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 Annual Review of Law and Social Science 281–299 (2014).

the first victim of chameleon, however, its sacrificing is not done publicly and completely. It is necessary to demonstrate minimum devotion to these values. Hence, their neglection is mainly done through hiding, abuse and strategic calculation.

In this view we will see the thing why we are criticizing the Constitutional Court with regard to the discussed decision, its modus operandi and mechanism of institutional self-preservation. Being constitutional chameleon damages the rule of law and gives possibility to the court to implement it selectively. Vague, contradicting standards, weak and inconsistent constitutional doctrine, chameleon is the core basis of the court. It gives possibility to court to adapt to varying and contradicting "red liners" and tasks defined by constantly changing power centers.

In order to use the analysis of this decision for discussing it in the frame of increasing literature existing about functions of the Constitutional Courts in authoritarian and non-liberal regimes, firstly we need to review main elements of the mentioned literature and outline theoretical basis.

In this regard, particularly important will be stressing attention on the central role of abusing practice of comparative constitutional law "borrowing" (norms and institutes, as well as arguments of normative justification) in the work of Constitutional Courts of authoritarian and non-liberal regimes.

After establishment of this frame, in following parts, we will discuss in details doctrinal inconsistency and superficiality of the decision of the Constitutional Court on gender quotas, by critical, normative-theoretical and comparative analysis of core doctrinal elements of argumentation of the Court, and we summarize conclusions in light of the ongoing and future state of the Rule of law and Constitutional Justice in Georgia.

The critical question, which is posed to such academic work is the following: whether the analysis of jurisprudence of Constitutional Courts obeying authoritarian/non-liberal regimes is justified, beyond the production of empirical evidence of their subordinate condition? In the conclusion of the article we will try to answer this question. Despite the fact that the value of such analysis in normative perspective is really small, especially in the direction of doctrine construction, the jurisprudence of subordinated court still has value in normative theory for developing critical perspective. As for the empirical and practical value of such work, it is not doubted by critics.

CONSTITUTIONAL COURTS IN THE AUTHORITARIAN AND NON-LIBERAL POLITICAL REGIMES

In the literature of comparative constitutional law and political science the leading role of constitutional courts is mainly presented in the context of global spread of constitutional democracy

and revolution of human rights.[10] In the end of previous century, in parallel with the third, uprising, wave of democratization, the authoritarian regimes has lost relevance, especially in the view of optimism of 1990-ies, according to which, the end of Soviet totalitarianism would bring final triumph of liberal democracy, as of the form governance.[11]

In the first decade of 21st century it was already obvious that autocracy, as a form of governance appeared to be resistant toward waves of liberalization and democratization and did not even plan to disappear, but rather showed signs of revival and broadening around the world.[12] Along with the increase of interest of political science towards authoritarian and hybrid political regimes, the interest for institutional particularities of such regimes increased as well.

In the political science already existed theoretical models of studying courts. The mentioned theories, comparing to normative perspective of the law, chose so called positive perspective. The object of their study was not normative legitimation and purposes of courts, but their reality of work in political and governmental system, those real aims and functions, which are performed by courts and which are definitely of political nature based on the consensus of political scientists.[13]

"The insurance theory" by Tom Ginsburg is one of the examples of such "positive political theory", which tries by analyzing motivational structure of actors in the political system to explain their decision, to introduce constitutional judicial control and create constitutional courts.[14] According to the "insurance theory", when political actors agree on creation of constitutional courts and giving out authority, mainly are not driven by normative aims and ideals of liberal democracy.

In the opinion of Ginsburg, by giving power to constitutional courts, political actors insure themselves, that in case of losing power the independent and impartial arbiter will exist, who will protect it from arbitrariness of opponent. The insurance proposed by an independent arbiter is also beneficial when powers that created the Constitution cannot agree and leave numerous key constitutional provisions vague on purpose. In such case the Constitutional Court can spread in time the management of dispute and facilitate development of stable constitutional regime by creative constitutional interpretation.

Therefore, according to the "insurance theory", in the process of liberalization and democratization motivation for creation of constitutional courts and giving them power mostly exists when none of the political actors holds leading position in the process and he/she doesn't expect that will hold such position in the nearest future. Hence, with the mentioned logic, where the democratiza-

10 Kim Lane Scheppele, *Democracy by Judiciary.*, *in* Rethinking the Rule Of Law After Communism 25–60 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 1 ed. 2005).

11 FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

12 Anna Lührmann & Staffan I. Lindberg, *A third wave of autocratization is here: what is new about it?*, 26 Democratization 1095–1113 (2019).

13 Martin Shapiro, Courts. A Comparative and Political Analysis, (1981).

14 Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003).

tion process in interrupted by appearance of political power or leader, the less motivation will exist for creating constitutional court and giving it power.

Despite this, spread of constitutional courts in authoritarian and hybrid regimes and their existence there throughout years and practice of work made it necessary to conduct new study and formulate new questions for research. In order to find out why would authoritarian regimes have made a decision to create constitutional courts/preserve their power, the political scientists and researchers of comparative constitutional law became interested in studying those functions, which are performed by constitutional courts and judicial institutions in such regimes.[15]

According to the study results it emerged that in authoritarian regimes courts, including constitutional courts, perform important functions. Some of them becomes similar to those functions, which courts have in constitutional-democratic regimes, however, despite the structural similarity, qualitative distinctions still remain. In the authoritarian regime normative purposes of constitutional democracy are neglected and courts depend on political purposes of the regime.

This also happens when authoritarian regimes create falseness of the fact, that courts are serving normative aims of the constitutional democracy, in particular, by abusing values of constitutional democracy and institutes, attain personal political and other aims.

Functions, which are performed by courts in the authoritarian regimes, on the one hand are related to legitimacy of the regime, stability and survival, but on the other hand – operative necessities of effective conduct of governance by the regime. According to Ginsburg and Mustafa, these functions are: 1) establishing and implementing social control, especially getting rid of political opponents through legal ways; 2) reinforcing claim on legal legitimacy of the regime; 3) controlling of state administrative apparatus and bureaucracy, and checking performance of their tasks, as well as deciding conflicts between different fractions of the regime and problems of coordination; 4) facilitating international investments and trade by implementing the rule of law in the private law with limited amount; 5) implementing controversial public policy in a way that the direct responsibility on it will be avoided from major elements of the regime.[16]

Similar functions are performed by courts in constitutional democracies as well, however in authoritarian regimes their work depends on the purposes of the regime. When the authoritarian regime gives possibility to constitutional courts to repeal certain laws adopted by the regime on the grounds of incompatibility with constitutional rights, they reinforce legal legitimation of the regime. This is attained by the court indirectly, firstly, by self-legitimation and reinforcement of public trust. This helps the court in institutional survival, however, on the other hand firms the legal legitimation of the entire regime.

Hence, the resource of legal legitimation, which is collected by the Constitutional Court within the limits of freedom given by the authoritarian regime, is wasted for attaining purposes of the

15 Ginsburg and Moustafa, Supra, footnote 6.

16 Ibid.

same regime. However, as the analysis of the experience shows, constitutional courts have poor and qualitatively one choice worse than other before the authoritarian regime.

As Martin Shapiro states, authoritarian regime creates kind of Catch 22 paradox situation for constitutional courts, when all choices finally are unreasonable – courts have choice, not to agree to work within the red lines drawn by the regime and therefore, take the burden of legitimation of the regime, or risk perspective of inevitable destroy from the side of regime.[17]

In case of courts the institutional destroy by the regime does not exactly mean the total cancellation. In the dilemma named by Shapiro, the authoritarian regime wishes to reach the first choice, by the real threatening with the perspective of inevitable destroy, it gives to composition of the court (stubborn) ground for rationalizing first choice and "pragmatic" justification. If these judges are not sufficiently "pragmatic", then the threat becomes active (enforced).

Techniques of taming the court, which are in the arsenal of authoritarian governors, are of different types and includes "overloading" court with obedient judges, as well as their bounding and disciplining, starting from restricting jurisdiction, ending with using disciplinary and legal pursuit tools uniformly. These techniques developed by authoritarian regimes are available and successfully used also those political forces and leaders, which stand on the road going backwards to autocracy of standing constitutional democracies.[18]

In such cases, "taking away" the Constitutional Court is often the primary step in transformation from constitutional democracy to hybrid regime, as the change of fundamental coordinates of the constitutional system, needs, at least, inactivity of the Constitutional Court, if not the active involvement. Considering what is the modality, in conditions of authoritarian/hybrid regimes, there are two forms of constitutional judicial control by the courts subordinated to the regime distinguished – strong and weak.[19]

In case of the weak form of abuse, the Constitutional Court "captured" by the regime considers such legislation and constitutional amendments in line with the Constitution, which contradict with the main essence of the constitutional democracy and cause essential degradation of whole constitutional system. In case of strong forms of abuse, the court is itself an initiator of such decisions, it "obliges" (constitutional) legislators with its own acts, to adopt respective norms, which turn upside down the identity of the constitutional democracy.

Such "pragmatism" of the "captured" courts suffers from deficit of consistency with regard to the valuable constitutional fundament. However, this does not mean that such courts reduce the effort (with more or less success) to justify their decisions beyond the pragmatic choice. The chameleon does not want to appear pale, but rather tries to express its flexibility towards the colorful

17 Ibid.

18 David Landau, Rosalind Dixon, Abusive judicial review: courts against democracy, 53 UC Davis L. Rev. 3 (2019)

19 Ibid.

diversity. However, diverse and inconsistent with each other are mostly the purposes of regimes, the burden of justification of which cannot be lifted by "pragmatic flexibility".

For overcoming this burden, the practice of abusing Constitutional judicial control knows several techniques. Including "borrowing" from another constitutional jurisdiction. When "borrowing", taking particular norm, institute or doctrinal-constitutional argument out of the context, distorting its normative aims and inversion takes place. "Borrower" court closes eyes in such case on the fact that in the original jurisdiction, institutional, valuable or other context gives completely other normative purpose to the "borrowed" norm, institute or doctrinal constitutional argument, comparing to the one having in local contexts.[20]

Abusing "borrowing" is done by the court to hide its doctrinal inconsistency. However, in most cases this is not done with proper success. The high quality of doctrinal inconsistency of the court decision, along with the procedural violations, are significant grounds for discovering and approving abuse of constitutional judicial control.[21]

According to one opinion, jurisprudential value of the analysis of cases of abusing constitutional judicial control is insignificant and may be useful only for confirming "captured"/"subordinated" condition of the respective court.[22] Despite the fact that the analytical consideration of cases of absurdly irrational inconsistency and breach of fundament does not give possibility to develop doctrinal jurisprudence, in the normative perspective, such analysis is still important.

It is important for the icon of normative ideal to remain lifeful within the constitutional system, based on which the critics of using abuse of constitutional control must preserve its perspective of restoration, firstly, in the legal profession and also – in the broad society. With this strive we will continue the critical analysis of this decision in the following part.

DISAGREED CONTROVERSY BETWEEN FORMAL AND ESSENTIAL PRINCIPLES OF EQUALITY AND UNDETERMINED CONSTITUTIONAL STANDARD FOR EXAMINING POSITIVE MEASURES

The strategy of plaintiff to argue only about constitutionality of the norm based on article 24 of the Constitution (election right), may be explained with the attempt to maximally avoid/restrict

20 Rosalind Dixon & David Landau, *1989–2019: From democratic to abusive constitutional borrowing*, 17 International Journal of Constitutional Law 489–496 (2019).

21 Dixon and Landau, Supra, footnote 18.

22 Jakab, András: Bringing a Hammer to the Chess Board: Why Doctrinal-Conceptual Legal Thinking is Futile in Dealing with Autocratizing Regimes, VerfBlog, 2020/6/25, https://verfassungsblog.de/bringing-a-hammer-to-the-chess-board/, DOI: 10.17176/20200626-003815-0.

definition/usage of constitutional mandate of the positive measures prescribed in paragraph 3 of article 11 of the Constitution of Georgia within the ongoing legal process.

It is obvious that complete realization of this strategy was impossible from the initial stage. Reading the clear text of the Constitution our of the Constitution itself and its ignoring is impossible without evident violation of the Constitution by the constitutional Court. In the current case the respondent, the Parliament of Georgia during the main hearing through its representatives directly indicated that the disputed legislative scheme of quotas was adopted by fulfillment of positive obligation envisaged in paragraph 3 of article 11 of the Constitution.

Therefore, the Constitutional Court faced the necessity to interpret and doctrinally formulate relation of paragraph 3 of article 11 with paragraph 1 of article 11 (constitutional guarantee of formal equality and prohibition of discrimination), as well as with the fundamental constitutional rights. For reaching this purpose, the court must have answered the clear response to several important questions.

First of all, the court had to answer the question whether discrimination prohibition guarantees of formal equality prescribed in paragraph 1 of article 11 of the Constitution are compatible content wise with positive measures envisaged in paragraph 3 of the same article. If the mentioned incompatibility exists and it is impossible to finally decide this conflict on the level of normative theory, whether the court uses in this case such doctrinal and jurisprudential means which are adopted for resolving such constitutional conflicts, such as for instance constitutional principle of proportionality?

Doctrinal regulation of resolving conflict in each particular case based on the principle of proportionality is one possible way, which is known by the comparative constitutional law in the constitutional jurisprudence of equality. This approach belongs to the Federal Constitutional Court of Germany, which it has developed in the interpretation of article 3(2) of the Basic Law of Germany and according to which positive measures adopted based on article 3(2) generally contradict with constitutional guarantee of formal equality, however they may be justified, if they satisfy constitutional requirements of proportionality.[23] This norm of the Basil Law of Germany, and especially its edition after constitutional amendments of 1994,[24] may be considered as inspiration for article 11(3) of the Constitution of Georgia, as similarity between them on the textual level is essential and visible.

Hence, borrowing German doctrinal frame would not be unjustified choice for constitutional regulation for relation between paragraphs 1 and 3 of article 11 of the Constitution of Georgia. However, according to the discussed decision, the approach of the Constitutional Court of Georgia with regard to this relation is ambiguous. On the one hand the majority of Plenum indicated on principal conflict between positive measures and principle of formal equality:

23 BVerfGE 85, 191 (207); 92, 91 (109).

24 "Men and Women have equal rights. The state must encourage real execution of equal rights for women and men, and take measures to eradicate existing inequalities" – see, https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510

> "The Constitutional Court has never established in its practice, that with regard to any legal relation, the sex created the relevant characteristic, which created grounds for considering men and women essentially unequal people. Hence, deriving from the judicial practice, almost with regard to all legal relations, woman and man are considered as essentially equal subjects. Therefore, right to equality envisaged in paragraph 1 of article 11 of the Constitution of Georgia may require obligation for different treatment based on sex on very few occasions."[25]

On the other hand, the Constitutional Court talks about constitutional necessity of eradication of social-political inequality outside the law, as if it is organic continuation of principle of formal equality and there is no incompatible conflict between them:

> "The purpose of the right of equality before law is to ensure equal realization of their skills, equal access to societal benefits, by giving people equal possibilities. However, it must be noted that the realization of possibilities is affected by many social aspects outside the legal area. Equal treatment by the law in different fields, in some occasions, does not ensure equal realization of possibilities. The law operates in particular, given society and considering individualities of this society, it is probable, that in circumstances of completely equal legal regulations particular groups cannot equally implement possibilities, because of artificial barriers created by impact of social environment… In this way, the positive obligation of the state envisaged in paragraph 3 of article 11 of the Constitution of Georgia is directed against the social-political inequality existing outside the law and towards facilitation of equal implementation of possibilities."[26]

Contradiction between principle of formal equality and positive measures is evident from the cited part as well, however, the Court refuses to bring its argumentation to the logical conclusion. Consequently, the Court rejects to recognize principal contradiction of positive measures with the constitutional guarantee of formal equality, which, in case of appealing, would definitely require mandatory examination of *all* positive measures adopted in accordance with paragraph 3 of article 11 in relation to the constitutional principle of proportionality. This assessment is reinforced by the following standard established by the court: "therefore, in each particular case, considering the intensity of restriction of the right and other factors, compatibility of each of such measure with the Constitution may independently become subject of discussion by the Constitutional Court."[27]

From this standard is evident that constitutionality of positive norms adopted on the basis of paragraph 3 of article 11 does not require assessment of the Court in any case. The named relevant factor, which may be basis for examination by the court, is the "intensity of restriction of the right." Its argumentation does not give reasonable possibility to predict this.

25 *Supra*, footnote 1, II-23.

26 Ibid. II- 24,25.

27 Ibid. II- 29.

In line with this standard, the court, by using principle of proportionality, examines the disputed legislative scheme of quotas, as interference into the election right. It is understandable that the court is significantly restricted with the claim, however going outside of the limits of the claim would not have happened, if the court had completely and consistently outlined relation of positive measures (paragraph 3 of article 11) with the guarantee of forma equality (paragraph 1 of article 11) and had established constitutional standard for examination of positive measures in line with this compatibility.

With the existing situation, the doctrine of constitutional examination of equality consists of controversial and inconsistent elements. Because of the essential controversy it is impossible that court remains principle of formal equality and at the same time not recognizes that all positive measure in its essence contradicts with this principle and for resolving this conflict it is necessary to use principle of proportionality.

The only alternative way for overcoming this controversy and examining positive measures with less strict constitutional test, is the total refusal of principle of formal equality for the benefit of principle of essential equality. However, this is not the subject of doctrinal choice of the court and the firm basis for that must be given by the Constitution itself. The clear illustration of the mentioned approach is the Constitution of South Africa from 1996 and respective constitutional doctrine of the Constitutional Court of South Africa.

Firstly, it must be noted that before adopting the Constitution of South Africa there was a fight against legally institutionalized racism – regime of apartheid. The proclaimed purpose of creators of the Constitution of South Africa was eradication of result of apartheid and transformation of the society of South Africa on egalitarian grounds.

As stated by the Constitutional Court of South Africa: "the jurisprudence of this court evidences that proper limits of the right of equality must be determined by indicating to fundamental values of our history and constitution. As we see, the major constitutional aim is to create not racial and not sexist egalitarian society… The concept of equality derives from this, which goes beyond simple formal equality and simple prohibition of discrimination, which require identical treatment despite the initial conditions and impact."[28]

The Constitutional Court of South Africa distinguishes constitutional principle of essential equality from other constitutional jurisdictions, specifically from USA: "hence our Constitution fundamentally differs from other constitutions, which take it as implied that everyone is equal and, in this way, they strengthen inequality. Our Constitution recognizes, that the systemic racial discrimination built in during decades by the legal regime of apartheid cannot be eradicated without positive action to attain this result."[29]

28 Minister of Finance and Other v Van Heerden (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004).

29 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).

Finally, the Constitutional Court of South Africa develops comprehensive concept of essential equality: "the concept of essential equality recognizes, that along with the racial, class and gender related attributes of our society, other levels of social differentiation and systemic non-privilege exist, which still remain. The Constitution requires from us their demolishing and preventing creation of new patters for inconvenient situation."[30]

Therefore, after such systemic rejection of the ideal of formal equality, it is obvious that in the constitutional doctrine of South Africa positive measures are not considered as interference into right of equality/against the principle of equality and their constitutionality is assessed independently, by less strict test easy to cope by legislator.[31]

Hereby, it must be underlined, that comparing to constitutional documents of Georgia, section 9(2) of the Constitution of South Africa does not limit positive measures only by sex and gender, and prescribes general and comprehensive mandate of such measures: "for facilitating to reach equality, it is possible to adopt legislative, or other measures for protecting, promoting, persons, or categories of people, who are in vulnerable condition because of the unfair discrimination."[32]

The Constitution of Georgia, comparing to the Constitution of South Africa, does not include such strong concept of essential equality, that the court would have any, even insignificant ground, to read out guarantee for formal equality beyond the Constitution. Moreover, the court tries to retain in its argumentation the major doctrinal elements of the formal equality principle and, what is the most strange and lacks normative-theoretical ground, prove that the positive measures are not only principally compatible with the logic of the forma equality principle, but even more, serves for implementation of its purposes and strive:

> "The purpose of the named provision [paragraph 3 of article 11 of the Constitution of Georgia] is to create circumstances facilitating factual equality and not ensure equality artificially. The aim of the Constitution is to neutralize factors hindering people from showing their possibilities and not neglecting work of person for reaching success by providing simulated equality of results, ignoring the fact of attaining success with personal development and achievement. The purpose of paragraph 3 of article 11 of the Constitution is to create such environment, in which woman and man could make success with equal work and skills. The mentioned may be attained by introducing mechanisms balancing the artificial barriers related to sex and hindering the success deriving therefrom."[33]

30 Van Heerden, *Supra*

31 The test has three elements, in the frame of which the court examines the following: first, whether there are target group, or groups of people, of the measure, who are in the vulnerable condition because of unfair discrimination; second, whether there is a measure created for protection or promotion of such persons, category of persons; and third, requirement implies defining whether this measure facilitates achievement of equality. The named test was developed by the Constitutional Court of South Africa in case Van Heerden.

32 Section 9 (2) of The Constitution of the Republic of South Africa. იხილეთ, https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1

33 *Supra*, footnote 1, II- 28.

If such positive measures, which, according to the court words, are directed to "ensuring artificial equality of results", are incompatible with purposes of paragraph 3 of article 11, then the Court might need better justification for considering such "fixed and result oriented quota" as constitutional, as the scheme of quotas considered as constitutional by the court itself. For overcoming this obstacle, the court applies standard argument,[34] that selective positions must be distinguished from professional positions, as in the latter case there are "objectively" determining factors, such as qualification, professionalism, etc.[35]

The strict contrast between elections and inner partial democracy seen by the Court, on the one hand, and on the other hand, between professional area, according to which the first one is entirely empty from such objective factors, which would create possibility to make choice based on the reasonable, valuable argumentation and individual virtues, is in significant contradiction with the principle of democracy, as well as – with the interpretation of political parties about constitutional role. As it will be discussed below, inconsistent and controversial interpretation of these principles is one more unfortunate result of this decision of the Court.

By the discussed decision, the parameters of constitutional discretion of the legislative body while taking positive measures remains undetermined. By the assertion of the court, paragraph 3 of article 11 of the Constitution does not require ensuring equal quantity of representatives of different sex in any field." On the first sight, this sentence is similar to the doctrinal rule, which narrows scope of operation of positive measures. However, this sentence does not satisfy requirements for necessary clarity not only for the rule, but also for the standard.[36]

From the argumentation of the Court it is unknown how those areas of societal life are determined, in which the Constitution does not require taking positive measures. Such indetermination damages legitimacy of the court decision and values of the rule of law, however, on the other hand, it is ideal for the role of "pragmatic chameleon", which is well played by the court.

For the opponent of positive measures this ambiguity gives hope that in the following legal processes they will manage to constitutionally restrict the scope of application of constitutionally admissible measures. Even though for supporters this indication is generally inconvenient, is does not create ground for particular worry.

The Court itself leaves for itself "pragmatic area" for future maneuver in both possible directions. In the discussed decision the court determines positive measure of paragraph 3 of article 11 on the ground of sex. However, it does not control what choice is made in scientific (or cultural) dispute existing around the concept of sex for the purpose of constitutional doctrine, and considers sex only as biological category, or as social construction (as well)?

34 See for example, M. Wrase, Gender Equality in German Constitutional Law, Discussion Paper P 2019–005 Wissenschaftszentrum Berlin für Sozialforschung (2019), https://bibliothek.wzb.eu/pdf/2019/p19-005.pdf

35 *Supra*, footnote 1, II- 63-66.

36 Regarding the difference between rules and standards see from the comprehensive literature for illustration: Frederick Schauer, The Tyranny of Choice and the Rulification of Standards, 14 J. CONTEMP. LEGAL ISSUES 803, 803 n.1 (2005); Cass R. Sunstein, Problems with Rules, 83 CAL. L. REV. 953, 961-962 (1995); JOSEPH RAZ, PRACTICAL REASON AND NORMS (1990).

When the Court states that "almost with regard to all legal relations, woman and man are considered as essentially equal subjects", here the word "almost" does not entail reservation, that certain differences may exist between sexes, which may justify representational disbalance in some areas, all the more, such discussion was already developed by the Constitutional Court of Georgia with regard to the mandatory military service?[37]

While leaving these questions unanswered, the Court does not reject the possibility to entirely refuse category of sex in the Constitutional doctrine on one day, similar to Federal Constitutional Court of Germany, and substitute it with gender, or even with nonbinary concept of gender, and cover the whole spectrum of gender identification, including for purposes of constitutional mandate of positive measures.[38]

In the discussed decision not less problematic is the limitation of legislative discretion of taking positive measures in the part of determining necessity and selecting measures. As stated by the Court: "It is natural that paragraph 3 of article 11 of the Constitution does not entitle the state with power to deviate from requirements of the right of equality before the law without proper factual necessity and use any measures aimed at encouraging any sex."[39]

It is vague, what is the "proper factual necessity"? It is constitutionally determinable notion, if the court "properly" takes any consistent justification presented by the legislative body, if it is not clearly unreasonable, that is demonstrates so called policy of "compromise" towards critics of the legislative body and its expert knowledge? These questions are not answered and are made even more vague by additional criterion "real necessity" (therefore it is important to evaluate, whether this regulation and restriction of election rights represent the real, echo of societal needs, and, deriving from these necessities, mean addressed to balance the results.)"[40]

We may suppose that the court does not follow here the total "compromise policy" and makes assessment of "proper" or "real" necessities independently. However, what is the constitutional-legal standard of assessment? The fact is that such assessment cannot be performed with clear legal standards. In the constitutional theory, especially when it relates to fundamental human rights, the

37 "Organizing State Defence and mobilization or training of human resource for this reason, falls under the governance of the highest bodies of the State Authority, and moreover requires professional military expertise. Therefore, the State must have possibility to make the group eligible for military registration and afterwards mandatory military service (which entails special military training and preparation for combat activities), people who satisfy special requirement for this job and with the extent, which is necessary, as well as according to what is the real capability of professional training, in order to maximally effectively reach the legitimate purposes mentioned above… the fact that different physical and normative may be required for men and women wishing to study in the National Academy of Defence, indicates not to the discriminatory treatment from the state, but on contrary, on protection from such treatment and finally serves for receiving professional quality education and developing contingent of military servants having high competence. Same strict physical standards could on contrary be unequal for women wishing to study in the academy, as well as by introducing less strict standards purposes of the state would not be reachable. However, this does not exclude that individually certain group of women may satisfy the physical norms defined for men, as well as, not all men may satisfy such requirement established for their group" – Decision of the Constitutional Court of Georgia N1/7/580, Citizen of Georgia Giorgi Kekenadze v. the Parliament of Georgia, 30 September 2016, II-31,35.

38 BVerfGE 147, 1 (28).

39 *Supra*, footnote 1, II- 28.

40 Ibid. II- 30.

approach giving up jurisdiction to the legislative body and recognizing its expert knowledge is not popular.[41] However, this approach has its justification as well.

In particular, the legislative body is widely representative body, which has more direct relation with all systemic elements and interests of the society, as well as it reacts faster to changed circumstances and, what is more important comparing to the Court, it has unmeasurably wide access to special expert competence and resources, which are necessary for finding dispersed information, processing, analyzing and forming as public policies.

Courts do not have such resources themselves. Therefore, the assessment of reasonableness of argumentation based on special knowledge and expertise is needed, for this they address expert witnesses for help and often study the arguments presented by parties during days. Such practice is not unfamiliar for the Constitutional Court of Georgia, however, somehow in this case the court felt itself particularly firm in the area of social sciences in terms of its expert knowledge.

Consequently, the courts diving in the direction of social sciences or theories, leaves more questions, rather than creating more persuasive arguments. For example, when examining usefulness of the women quota schemes, the Court asserts: "for the comprehensive argumentation on the disputable issue it is necessary to take into consideration results of the elections of the Parliament of Georgia in 2016 in the context of sex balance. "[42] It is an alphabet of methods of social study, that any methodological choice requires justification. The court does not have such justification.

However, the high status does not free the Constitutional Court from the obligation of such justification. Moreover, it uses scientific discourse unfamiliar for itself for giving additional weight and persuasiveness to the argumentation. It, therefore, is obliged to obey internal requirements of this discourse. Without deep methodological analysis, facts brought up in the argumentation of the Court cause legitimate doubts about the fact, why the "sex balance" of only results of 2016 elections is relevant.

Some paragraphs above, for demonstrating reality of problem of women's political representation, the Constitutional Court brings the following factual data: "index of women's representation in the Parliament is significantly low and during las three convocations it varies from 5 to 16 percent. There is a reality in the country that the best index, which was shown between elected deputies, through proportionate system, in terms of women representation in the history of independent Georgia, is 23,28 percent (Parliamentary elections 2016). The low representation of women is not occasional, but rather having continuous nature (in the circumstances of independent Georgia, women representations never was more than 16 percent.)"[43]

It is interesting, why the Constitutional Court is not interested in the dynamics of this data. In particular, whether the increase of women representation was recorded during years? Which

41 T.R.S. Allan, Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory, 127 L. Q. Rev. 96 (2011).

42 *Supra*, footnote 1, II- 50.

43 Ibid. II- 31.

independent and dependent variables were used social scientists for analyzing these dynamics? Whether such analyses exist at all and what hypotheses or conclusions are possible to be made out of that by social scientists? Whether this information had any impact on formation of disputed legislative scheme? These questions remain unanswered and along with that, it remains unjustified why only the "sex balance" of last parliamentary elections of 2016 is relevant factor for deciding on the necessity of quotas.

Hereby we must repeat, that the court is not obliged to base its legal justification to social sciences or other scientific knowledge, however, when it refers to this knowledge for grounding or reinforcing doctrinal or jurisprudential argument, it is obliged to follow the criteria of validity established in these areas.

Beyond the discretion of defining necessity, for taking positive measures in the court decision, discretion of choosing particular means is not formulated with less determination. According to the court: "it must be noted, that mentioned constitutional provision does not restrict activity of the state with particular measures. The latter defined purpose, for attaining of which, while selecting used method and mechanism, the state has slightly wider discretion. Also, it is obvious that existence of such constitutionally declared purpose, despite its increased public importance, cannot justify any action of the state taken with the aim to eradicate disbalance between sexes."[44]

Notwithstanding indications of the Court, that this "comparatively wide discretion" may be subject to examination, as we already have mentioned, if there is not an issue of intensive restriction of fundamental right by the court, using principle of proportionality by the court is doubtful. Therefore, this impacts the severity of analysis of proportionality, when there is interference in other constitutional rights as well (as in the discussed case). In such case, examination of proportionality cannot be less strict, as the interference falls under guarantee of formal equality, as well as other constitutional rights. Not recognizing the mentioned in the discussed case by the Constitutional Court of Georgia, directly causes less severity of examination of proportionality.

This is the reality created by the discussed decision. When with this condition, the principle of formal equality remains as general principle of the Constitution of Georgia, and the logic of essential equality existing in the fundament of positive measure prescribed in paragraph 3 of article 11 – as an exception. Hence, the court may not be able to refuse resolution of this conflict by using the principle of proportionality.

Therefore, it is inconsistent and lacking constitutional logic to examine constitutionality of positive measures envisaged in paragraph 3 of article 11 based on the formal equality principle, only in case when the measure to be examined restricts any of the constitutional rights beyond the formal equality guarantee. It is necessary to examine all positive measures taken based on paragraph 3 of article 11, disregarding whether additionally other constitutional rights are interfered.

44 Ibid. II- 29.

FROM PREFERENCE OF THE CONTEXT TO BLINDNESS OF TOWARDS THE CONTEXT IN THE FRAME OF ONE DECISION – PRINCIPLE OF DEMOCRACY AND PARTY DEMOCRACY

For justifying necessity and proportionality of quotas in lists of parties the Constitutional Court showed particular sensitivity to social context. Certain paragraphs of the court decision are read as wide social commentary on sexist stereotypes of Georgian Society and factual inequalities and oppressing resulted or related thereto.

Considering this, maybe it was not ungrounded that the expectation of the court being interested in relatively narrow context, which is created by parties in the politics of Georgia, even more, considering the fact that major addressees of appealed measures are political parties.

Instead of this, the court was basically limited to repeating general principles and formally annulling several main arguments, which created basis for justification of European Constitutional Courts establishing unconstitutionality of quotas. The Court does not cite any of the decisions, however the newest out of them, argumentation of the Constitutional Court of the Thuringia Land of Germany on the unconstitutionality[45] of gender quotas had impact on the argumentation of the plaintiff on this case, as well as – court justification.

The Constitutional Court also responds for instance to arguments coming from older decision of the Constitutional Council of France from 1982. In particular, the Constitutional Council indicated on the constitutional principle of public sovereignty, where it comes from that "nation", as a political sovereign, is unified, it acts as one "electoral body", which develops common choice. It is impossible to preserve this normative assumption in practice, if the ideal of formal equality during the organization of elections will not be implemented exactly and inviolately.[46]

In response to this argument the Constitutional Court of Georgia proves that: "the disputed regulation does not reduce involvement of the society in governance of the State, but rather increases it. As a result of operation of the norm, the possibility that there will be 100 percent representation of the population in the parliament, instead of mostly men, increases." To forget about the mathematical element of this sentence and its logic for a brief period, the courts wants to prove that women quota does not divide "electoral body", but unifies it and more completely represents it in the execution of the power. Any ways, it "increases the possibility".

Predicting or studying such or any other effect of quotas is impossible without consideration of structure of parties and mechanisms for making decision within parties. In most empirical studies social scientists take as one of the variables the structure of party and mechanisms for internal

45 http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/$File/20-00002-U-A.pdf?OpenElement

46 See https://www.conseil-constitutionnel.fr/decision/1982/82146DC.htm; Éléonore Lépinard, The French Parity Reform, in Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe 62–93 (Éléonore Lépinard & Ruth Rubio-Marín eds., 2018).

democracy/decision-making.[47] Other studies indicate that quotas have desirable effect in closed proportional lists of parties, only when obligation to implement quotas forces party elites to apply more centralized[48] and bureaucratized[49] mechanism for making party lists.

For the Constitutional Court which uses contextual arguments as selectively and inconsistently, as normative and doctrinal justification, these observations made by social scientists, probably, is completely uninteresting. By the conclusion of the Constitutional Court, the disputed scheme is an interference by the state into freedom of action, internal democratic process of parties and in the formation of the will of electorate, however not "essential", which would make it unconstitutional.

According to the court argumentation, nonessential nature of interference is based on the assumptions that quota is neutral in its point of view and depersonalized, it does not provide result guaranteed by identifiable opinions/ideologies and by legally forcing representation of persons. Here the Constitutional Court of Georgia neglects the argumentations developed in the decision of the Constitutional Court of Thuringia, which is based on specific role of political parties in the process of forming democratic political will and decisions. Taking into consideration this, the Constitutional Court of Thuringia requires that this process goes "independently from the state" ("staatsfrei").

"Freedom from state" is understood by the constitutional Court of Georgia as neutral interference, in terms of point of view, into rules and procedures of making decisions of parties. Hence, despite the fact that the Constitutional Court does not assess independently the compatibility of challenged measure with article 26 of the Constitution, in the framework of discussion on compatibility with the principle of democracy, there are still emerged certain parameters justifying interreference.

Obviously, the Constitution of Georgia allows interreference into the freedom of parties. However, deriving from the constitutional role of political parties, the mentioned interference even in case of serving legitimate purpose, must not be in conflict with structure of parties and constitutional principles of their activity, including internal principle of democracy of parties. One crucial part of requirements established towards parties by the legislative body serves for ensuring democratic frames for functioning of parties.

In circumstances, when closed system of parties urges internal democracy of parties and competitive selection of candidates, obligation to implement quotas created additional justifying terms for more centralization, bureaucratization and closing of this process. Obligation to implement quotas will be additional and quite firm argument for feudal parties of Georgia, in order to postpone

47 For example, according this recent study, internal rules of party are also important for those careerist politicians who have guaranteed places (incumbents). If the internal rotation rules of party do not change, gender quotas may have very important results. Stephen A. Meserve, Daniel Pemstein & William T. Bernhard, Gender, Incumbency and Party List Nominations, 50 British Journal of Political Science 1–15 (2020).

48 Maarja Luhiste, Party Gatekeepers' Support for Viable Female Candidacy in PR-List Systems, 11 Politics & Gender 89–116 (2015).

49 Elin Bjarnegård, Pär Zetterberg, Political Parties and Gender Quota Implementation: The Role of Bureaucratized Candidate Selection Procedures, Comparative Politics. 2016;48(3):393.

introduction of mechanisms ensuring internal democracy of parties and free competition for an indefinite period.

For this bargaining chip argument, they will be ready to pay as a tribute considering more women in the network of their clients. In such patrimonial system, if more women become part of elite clientelist network in politics, this would not transform this system qualitatively and neither in terms of freedom, and therefore would not make it equal. The Constitutional Court is indifferent towards this reality, and that does not give it possibility to properly realize threats of forced impact of the state on *results* of democratic political process, including political process of parties, which must be neutral in terms of point of view.

The mentioned position of the Court does not affect severity of assessing equality in this case, which finally ends with approval of constitutionality of the disputed scheme.

CONCLUSION

The decision of the Constitutional Court in the discussed case is built on inconsistent and controversial grounds. As it was already mentioned, this "chameleon court" derives from general strategy. With this decision, the constitutional status of positive measures is far from doctrinal development and constitutional-legal reinforcement.

In the introduction, when we indicated to pragmatic grounds for chameleon nature of the Constitutional Court, we on purpose did not limit argumentation among actors of outside influence by indicating branches of political government. Existence of so called "networks supporting court" is not less important for the Court, as the court cannot refuse cooperation perspective with oppositional political networks and preserving their kind-heartedness.

Considering this, the decision made on this case by the Court was predictable. Disputed scheme of quota was developed with the almost unanimous consensus of ruling parliamentary majority, big oppositional groups and civil society. The distinguished opinion for this court appeared to be in the minority of influential groups. Therefore, by this decision the Constitutional Court made more friends than enemies. The Rule of Law, which became the thing acceptable "for me and my friend", appeared to be less prioritized once more.

However, as we have mentioned, achievement of the "chameleon court" still leaves room for hope, that one day, in proper circumstances, other court will bring clarity and consistency to the doctrinal mess left.