

# CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

## ABSTRACT

In the Volume 2, 2020 the Journal of Constitutional Law continues to publish short summaries of the notable recent Judgments adopted by the Constitutional Court of Georgia. Two cases discussed below have been adopted in the second half of 2020 and both deal with complex issues, such as the constitutionality of the appointment of the Supreme Court Members in Georgia and the Gender Quota for the Parliament of Georgia. The controversiality is probably best demonstrated by the dissenting opinions, which are also summarised in the Case Notes. The Journal hopes both the majority and the dissenting opinions will be interesting for our readers worldwide and will support academic discussions regarding the case-law of the Constitutional Court of Georgia.\*

## **30 JULY 2020 JUDGMENT №3/1/1459,1491 JUDGMENT “THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA”**

### *MAJORITY OPINION*

On 30 July 2020 the Plenum of the Constitutional Court of Georgia adopted the judgment in the case of “The Public Defender of Georgia v. the Parliament of Georgia” (constitutional complaints №1459 and №1491). The subject of dispute, in this case, was the constitutionality of norms of Article 34<sup>1</sup> of Organic Law of Georgia on General Courts, which defined the procedure for selecting candidates to be nominated by the High Council of Georgia to the Parliament of Georgia for election to the position of a judge of the Supreme Court.

The Public Defender argued that the legislation did not provide for the requirements of the reasoned judgment of the High Council of Justice on the nomination of candidates to the Parliament for the Supreme Court of Georgia. At the same time, due to secret voting at different stages of candidate selection, the High Council of Justice was not bound by criteria - such as the candidate’s conscientiousness and competence. According to the complainant, only a court established and staffed in accordance with the procedural requirements of the Constitution has constitutional legitimacy. The disputed norms, which did not exclude the arbitrary and unreasonable conduct for the selection procedure, put in question the constitutional legitimacy of the staffing of the court. Accordingly, the complainant argued that the disputed provisions failed to ensure the selection of the best candidates, which was incompatible with the right to hold public office and the right to a fair trial.

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\* This abstract was drafted by the Editor of the Journal of Constitutional Law.

The respondent explained that the selection of candidates by the High Council of Justice of Georgia was not a competition and differed from the appointments of judges to the district (city) court and court of appeals. The role of the High Council of Justice of Georgia in this process was limited to nominating candidates to the Parliament, which did not imply rejection of other persons (candidates), and the final decision on the election of a person as a judge was made by the Parliament of Georgia. Based on the provided arguments, the respondent considered that the election of a candidate for the position of a judge of the Supreme Court did not fall within the ambit of the right to hold public office.

The respondent emphasized that, at any stage of candidate selection, the High Council of Justice of Georgia was bound by criteria - such as the candidate's conscientiousness and competence. Moreover, regardless of the secrecy of the vote, it was possible to identify the factual preconditions underlying the High Council decision, and secrecy, in itself, safeguarded each member of the Council from the external influences. In the light of the foregoing, the disputed norm should have been considered constitutional.

The Constitutional Court assessed the issue of applying the standards established by the first paragraph of Article 25 of the Constitution of Georgia to the position of a judge of the Supreme Court of Georgia. According to the Court, the standards set for the appointments of district (city) court and court of appeals judges could not be fully relevant and identical for the judges of the Supreme Court, because the essence of the position to be held was different, as well as the constitutional bodies authorized to appoint judges at a different level of the judiciary and the role of these bodies.

According to the judgment of the Constitutional Court, the power to select and appoint members of the Supreme Court was distributed between the High Council of Justice (the judiciary) and the representative political power (the Parliament), and the final decision was made by the political authorities. In exercising this power, the discretion of the High Council of Justice of Georgia was limited to nominating the appropriate candidates for the election by the legislature and Parliament had the final decision-making power. According to the Court, the process of selection of judges of the Supreme Court of Georgia, despite the existence of the submission stage by the High Council of Justice of Georgia, was characterized by the elements of elective positions.

The Constitutional Court held that, when making the decision, the Parliament, as well as the members of the High Council of Justice, were bound by the constitutional requirement – judges shall be selected based on their conscientiousness and competence. At the same time, the Constitutional Court of Georgia shared the position of the Parliament of Georgia and indicated that the participation of the two constitutional bodies in the process of the nomination and appointment of judges of the Supreme Court of Georgia and the functions, purpose and status of those bodies, ensured the staffing of the Supreme Court in accordance with the requirements of the Constitution of Georgia – with competent, conscientious judges.

The Constitutional Court emphasized that according to the Constitution of Georgia, only the High Council of Justice of Georgia was competent enough to select the appropriate candidates for the position of a judge. Thus, due to the existing legal guarantees in the procedure of staffing and operating of this body the decision made by the High Council of Justice was

legitimate in itself. Therefore, a model where a decision made by the Council was determined by a vote of its members and did not require additional written justification did not call into question the quality and credibility of the decision. Accordingly, making the decision by the High Council of Justice on the selection of candidates for the Supreme Court without written justification was not incompatible with regard to Article 25(1) of the Constitution.

In addition, the Court clarified that the right to hold public office was not violated by the rule of secrecy of decision-making, as the secrecy of the ballot served to enable an objective and fair decision making, ensuring the safeguarding of the decision-maker.

In assessing the constitutionality of giving preference to a candidate with more work experience in the selection process of the Supreme Court judges by the High Council of Justice of Georgia, the Court held that long experience of working in a specialty was an objective criterion for determining a person's qualification. Thus, in the case of equally divided votes in the High Council of Justice, giving preference to a candidate with longer working experience was not an inappropriate criterion and/or a criterion that contradicted the requirement of competence and conscientiousness.

In the light of the foregoing, the Constitutional Court considered that the disputed norms ensured the staffing of the Supreme Court in accordance with the standards established by the Constitution of Georgia and, therefore, there was no violation of the right to a fair hearing of all other persons. Thus, the Constitutional Court deemed that these norms were in accordance with the Constitution.

#### *DISSENTING OPINION*

The Members of the Constitutional Court of Georgia Teimuraz Tughushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili pronounced dissenting opinion regarding the July 30, 2020 Judgment of the Plenum №3/1/1459,1491.

Firstly, the authors of the dissenting opinion clarified that the model for appointment of the Supreme Court Justices established by the Constitution of Georgia includes evaluating and supporting a person by the non-political judicial branch, as well as the political body where the Parliament completes the professional decision made by the High Council of Justice and grants it a democratic legitimation. Besides, the Constitution determined qualification requirements for the judges, including conscientiousness and competence. Therefore, the will of the Constitution is clear that in the process of selecting judges, decisions based on desirability, that is characteristic of the political process, should be minimized. According to the position of the authors of the dissenting opinion decision-making process without providing the reasoning meant deciding based on expediency, desirability (in this case, the will of the members of the High Council of the Justice). Similar power had only been granted to the political authority by the Constitution with the condition of the direct control exercised by the people.

Dissenting opinion goes on discussing, that because of the lack of constitutional mechanisms of popular control over the High Council of Justice the principle of democracy requires from the Council to make important public decisions based on the law and not on the desirability. It is the requirement of article 25 of the Constitution that the system for selecting the Supreme Court judges should not only allow the Council to adequately assess the consciousness and competency of the candidates but to also preclude the self-intentional decision-making by the Council.

Based on the analysis of the relevant provisions of the Organic Law of Georgia “On General Courts” the authors of the dissenting opinion considered that the stage of the first vote of the selection process did not allow the members of the Council to adequately and objectively assess the candidates. Furthermore, the following steps of the selection process established by the disputed provisions were not prone to make a reasoned decision; could not preclude the artificial advantage or privilege to the candidate; could not provide equal opportunities for them; and undermined the constitutionally established guarantees for any person to be informed about the reasoning for not being appointed to a certain public office. Moreover, according to the authors of the dissenting opinion the secrecy of the voting rendered the decisions made by the members of the Council even less transparent and further diminished the level of their accountability. As for the disputed rule, according to which among the candidates with equal results the advantage was granted to those having longer working experience, without considering the qualitative component of such an experience, it was deemed as inappropriate criterion in the process of selecting judicial candidates.

Finally, according to the dissenting opinion the system established by the disputed provisions completely undermined the principle of accountability of the persons exercising the state authority in a democratic state and violated the right of a person to hold an office of a supreme court judge.

In addition to the above-mentioned, the authors of the dissenting opinion stated that the judgment of the Constitutional Court of Georgia N3/1/1459, 1491 dated July 30, 2020 substantially contradicted the standards firmly established by the Constitutional Court and did not share the spirit thereof.

When discussing the compatibility of the disputed provisions with respect to the right to a fair trial the authors of the dissenting opinion stated that the personal and professional characteristics of the judges directly exercising the judicial functions is of crucial importance for the practical realization of the right itself. Therefore, the process of selecting the Supreme Court judges had to ensure the appointment of constitutionally required qualified and conscientious judges for the office. According to the authors of the dissenting opinion the stages for selecting judges did not meet the above-mentioned constitutional requirements, namely, they did not enshrine the possibility for thorough assessment of judicial candidates and therefore, the Council was deprived of an ability to make an informed decision based on the criteria established by the Constitution. At the same time, the procedure did not envisage the obligation to provide reasoning of the decision made by the Council at each stage, which, in conjunction with the absence of a link between the results of the secret voting and their assessment grades, made the logic behind the decision unknown.

**25 SEPTEMBER 2020 JUDGMENT №3/3/1526 “N(N)LE POLITICAL UNION OF CITIZENS ‘NEW POLITICAL CENTER’, HERMAN SABO, ZURAB GIRCHI JAPARIDZE AND ANA CHIKOVANI V. THE PARLIAMENT OF GEORGIA”**

*MAJORITY OPINION*

On September 25, 2020, the Plenary Session of the Constitutional Court of Georgia adopted the judgment in the case of “N(N)LE Political Union of the Citizens – ‘New Political Center’, Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. the Parliament of Georgia”. The disputed norm established the obligation for electoral subjects to draw up a party list in order to participate in the parliamentary elections to be held before the October 26, 2024 parliamentary elections in such a way that at least one person in every four members of the list should have been of the opposite sex. Otherwise the registration of the party list would be rejected.

According to the constitutional complaint, the applicant political union developed a system on the basis of which the formation of a party list for participation in the elections depends entirely on the will expressed by the party partners. The disputed norm obliged the applicant party, with the motive of maintaining a balance between the sexes, to make changes in the party list determined by the party partners. According to the applicants, imposing such an obligation unjustifiably restricted their electoral right. At the same time, the political party was forced to ignore the decision made by its own partners, which would negatively affect the issue of party financing by the partners and, consequently, posed a significant threat to the full functioning of the political union.

The respondent explained that the restriction of the electoral right was conditioned by the fundamental right established by Article 11 (3) of the Constitution of Georgia, on the basis of which the state had a positive obligation to take special measures to ensure the essential equality of men and women. In the present case, the legitimate aim of the disputed norm was to improve the balance between the sexes in the supreme legislative body.

The Constitutional Court determined that the imposition of mandatory regulations on the possibility of freely determining the party list for participation in elections restricts applicants’ electoral right. In assessing the constitutionality of the restriction, the Court first assessed the compatibility of the restriction imposed by the disputed norm with the principle of democratic governance and clarified that gender quotas are not linked to the promotion of any particular idea or policy. In addition, quotas are imposed between women and men, who are almost equally represented in the electorate and, thus, do not cause a disproportionate increase in the representation of any group in the Parliament of Georgia. Thus, as a result of the disputed norm, the influence of the state on the choice of citizens is minimal, therefore, it cannot be automatically considered as a restriction incompatible with the principle of democracy.

The Constitutional Court also assessed the compliance of the disputed norm directly with the requirements of the principle of proportionality. The Court noted that even under conditions of equal opportunity for individuals and equal legal regulation, it is possible that certain

groups, due to artificial barriers created by the social environment, could not realize the opportunities equally with others. The positive obligation of the state under Article 11, Paragraph 3 of the Constitution of Georgia is directed against this kind of socio-political inequality, which is beyond the law, and promotes equal realization of opportunities. This provision equips the state only with the authority to adopt special measures based on real needs. It requires the state to use special measures for creating mechanisms to balance artificial public barriers for success due to gender. According to the Constitutional Court, the purpose of this provision is to create conditions promoting not artificial, but factual equality.

The Constitutional Court, based on its analysis of the rate of women's representation in the legislature since the restoration of independence in Georgia, held that their small representation could not be linked solely to natural factors, but rather to circumstances existing in the community that prevents women from participating in politics. In particular, stereotypes in Georgia reinforce the argument for unhealthy, artificial barriers to women's participation in politics and ultimately create an unequal environment for women, including in terms of political participation. Based on the above, the Constitutional Court considered the increase of women's representation in the Parliament as a legitimate aim deriving from Article 11 (3) of the Constitution of Georgia, which can be achieved by limiting the electoral right.

In considering the suitability of the constraint, the Court separately considered the obligation to nominate at least one male candidate in every four members on the party list, noting that there is no logical explanation as to why a female electoral list is restricted when women represented in parliament are significantly less than men and, at the same time, there is no rational expectation of creating the need for quotas in favor of men in the Parliament in the near future. Consequently, such regulation prevents the increase of women's representation in the Parliament of Georgia. Thus, the requirement established by the disputed norm, according to which there should be at least one man in every four members of the party lists, was declared unconstitutional with regards to the first sentence of the first paragraph of Article 24 of the Constitution of Georgia.

Regarding the normative content of the disputed norm, which obliges electoral subjects to have at least one female candidate for every four members on the party list, the Court pointed out that the disputed measure is one of the most effective mechanisms for achieving results in a short period of time and guarantees, at least by a small percentage, the representation of women. In this regard, the Constitutional Court drew attention to the fact that it is fundamentally incorrect to compare members of the Georgian Parliament to persons of different professions. According to the Court, unlike professional positions, where better management and successful results are directly related to the selection of people with the best knowledge and experience for this position, the Parliament of Georgia is staffed entirely by the will of the people as a sovereign, and proper performance of a parliamentary activity is not related to the special skills that typically characterize men. Thus, according to the Court, the mandatory quotas established by the disputed regulation will not prevent the successful implementation of the activities of the Parliament, in contrast to the areas of professional activity. In addition, the Court took into account the temporary nature of the disputed norm, as well as the fact that the freedom of electoral subjects is restricted to a minimum not only by

imposing less quantitative demands on members of the opposite sex, but also by the very nature of regulation. In particular, the restriction is aimed not at selecting candidates on the basis of any particular characteristics, but by the requirement (sex), which by its nature is one of the easiest barriers to overcome. Based on the above, the Court considered that the disputed norm rightly establishes a balance between private and public interests and the obligation to include at least one woman in every four members of party list does not contradict the first sentence of the first paragraph of Article 24 of the Constitution of Georgia.

### *DISSENTING OPINION (1)*

Justice Eva Gotsiridze expressed the dissenting opinion on the judgment of the Plenum of the Constitutional Court of Georgia №3/3/1526 of 25 September 2020 and pointed out that the judgment failed to establish a fair value balance. Moreover, there was no factual, legal, or logical basis for declaring the disputed norm and any of its "normative content" unconstitutional.

According to the author of the dissenting opinion, the disputed provision indeed served the legitimate interest of achieving equality between the sexes in the respective legal relationship. At the same time, the purpose of the provision is to support the oppressed sex in legal relations and not specifically a woman or a man, which is directly in line with the principles established by Article 11(3) of the Constitution. It is noteworthy that in this provision the Constitutional Court rightly saw the special positive obligations of the state of ensuring equality between women and men.

According to the author of the dissenting opinion, the disputed provision requires that at least one person in every four members on the party list is of an opposite sex, therefore, it achieves the legitimate aim with minimal interference in electoral right. Accordingly, beyond this restriction, the parties have a broader margin of appreciation with regard to drawing up their party lists.

According to the author of the dissenting opinion, the Constitutional Court wrongly decided the constitutionality of the gender quota benefitting men. Namely, the main purpose of the disputed regulation was to have a more or less equal representation of both - women and men in the Parliament. Therefore, creating equal quotas for both genders does not contradict the idea of equality, but expresses it in the most clear and direct way. At the same time, Article 11(3) of the Constitution of Georgia refers to substantial equality of both women and men in the Parliament, not to the increased representation of women only. Consequently, if the legitimate aim of the Constitution is not only to increase the number of women in the Parliament but to eliminate gender inequality, then it is difficult to say that male quotas do not serve such legitimate purpose and that there is no reasonable and rational connection between them. According to the dissenting opinion, the Constitutional Court considered the legitimate aims of ensuring the substantial equality of women and men, on the one hand, and increasing the representation of women in the Parliament, on the other hand, to be incompatible with each other, which led to the wrong decision on the disputed case. Increasing the representation of women helps to ensure gender balance in the Parliament.

According to the author of the dissenting opinion, normative reality created by the decision of the Constitutional Court contains considerable risks. More precisely, by declaring gender quotas for men unconstitutional, the Court made the disputed, content-neutral regulation discriminatory in its nature and thus interfered with the right to equality itself. Moreover, the Court, in fact, allowed the existence of women only political parties, while denying the same right to men. Giving such priority to women poses a threat for gender equality and for increasing the quality of democracy in general; and such a decision cannot be easily justified by the legitimate purpose of increasing women's representation in the Parliament.

The author of the dissenting opinion points out that by resolving the dispute in this way the Constitutional Court of Georgia, in fact, acted as a positive legislator.

The author of the dissenting opinion also considers that normative content of the disputed norm declared unconstitutional by the Constitutional Court could not be considered a true normative content of the impugned provision. Thus, in her opinion, the disputed regulation possesses only one normative content which implies mandatory quotas for candidates of both in the political party lists. Consequently, it is the "quota of both sexes" that creates one normative reality which is why the Plenum of the Constitutional Court should either recognize the disputed norm entirely constitutional or declare it entirely unconstitutional.

According to the author of the dissenting opinion, the Constitutional Court has created a new dilemma by resolving the dispute this way. In particular, the Court ruled out the possibility for men to argue on the constitutionality of differential treatment on the grounds of sex with regard to electoral right.

### *DISSENTING OPINION (2)*

Justices Irine Imerlishvili and Teimuraz Tughushi expressed a dissenting opinion regarding the second paragraph of the Ruling part of the Judgment №3/3/1526 of the Plenum of the Constitutional Court of September 25, 2020, according to which the Court should have fully upheld the constitutional complaint and declared the mandatory quota rule unconstitutional.

The authors of the dissenting opinion point out that the disputed rule, which obliges the citizens of Georgia to elect a certain number of women deputies in the Parliament of Georgia, is aimed at restricting the freedom of choice of the citizens of Georgia and not at promoting it. The disputed norm establishes an order that is alien to the electoral process based on freedom of choice, and thus the disputed norm imposes severe restriction on this right.

The authors of the dissenting opinion do not deny that there is a significantly lower level of women representation in the Parliament of Georgia compared to their number in the society. However, this, by itself, does not prove that such factual reality is mostly caused by unhealthy or stereotypical attitudes towards women in society. According to the authors of the dissenting opinion, even if the above-mentioned situation is present, Article 11 (3) of the Constitution of Georgia does not create a basis for the application of a special measure provided by the disputed norm, as the latter is not aimed at equalizing the starting conditions of persons, but is directly focused on the result. The purpose of the mentioned constitutional



provision is to ensure equal starting conditions for women and men by removing social barriers and not to equalize them in results. Respectively, the disputed norm goes beyond the scope of authority conferred on the state by Article 11, paragraph 3 of the Constitution of Georgia and there is no legitimate basis for its validity.

When discussing the suitability of the restriction, the authors of the dissenting opinion noted that the Constitutional Court had not thoroughly investigated the effectiveness of the mandatory quotas in neutralizing stereotypes in society. In their view, such a regulation, on the contrary, might contribute to the strengthening of unhealthy attitudes towards the role of women, since the artificial determination of the number of women MPs creates a risk of promoting public opinion about their undeserved entry into office. At the same time, the representation of women provided by the disputed norm, even in its absence, was almost achieved after 2016 parliamentary elections. Accordingly, the disputed regulation does not change the expected data in terms of improving the representation of women in the Parliament of Georgia, due to which it cannot be considered as a suitable means of achieving a legitimate aim.

Discussing the necessity stage, the authors of the dissenting opinion noted that the results of the 2008-2016 parliamentary elections indicate a growing rate of women's representation in the Parliament of Georgia. Women representation in the Parliament as a whole has increased from 6% to 12% and then to 16% in the last three parliamentary elections. Additionally, in the proportional system women representation increased from 10.66% to 14.29% and then to 23.38%. In 2016, the representation of women in the Parliament as a whole, as well as in the part of the proportional system, more than doubled, and in fact, the representation of women provided by the disputed norm was almost achieved. In the presence of these data, the Constitutional Court's claim that the dynamics of increasing the representation of women in the Parliament of Georgia under natural conditions is insufficient is baseless. Thus, the authors of the dissenting opinion considered that there was no necessity to impose a restriction by the disputed norm and that it did not constitute the least restrictive measure.

Discussing the issue of proportionality *stricto sensu*, the authors argued that representative democracy implies that the policy-making decisions of a country are made by those individuals who are elected with the most support based on the free will of the electorate, and that any artificial interference should be ruled out as much as possible. Consequently, like a professional position, it is no less dangerous to entrust the adoption of the most important decisions for the country to a person with the lack of appropriate support and, thus, with insufficient legitimacy. The fact that the disputed measure was introduced four months prior to the parliamentary elections, is also noteworthy. Political parties were not given a reasonable amount of time to take care of popularizing the appropriate number of women candidates and properly increasing their support. At the same time, those political parties that had naturally high female representation found themselves in an advantageous position over other political parties that did not have sufficient number of female candidates with appropriate political ratings. Due to above-mentioned factors, the authors of the dissenting opinion consider that the obligation to include at least one woman in every four members on the party list contradicts the electoral right protected by the first sentence of the first paragraph of Article 24 of the Constitution of Georgia.