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Nino Lapiashvili
Ivane Javakhishvili Tbilisi State University

Application of the EU-Georgia Association Agreement by the Georgian Judiciary

A Role Unplayed by the Inert and Under-Reformed Courts

Abstract: This paper analyses the association implementation reports for the purposes of tracking Brussels' perception of judicial reform in Georgia. It argues that since the signing of the Association Agreement (AA), as the initial excitement dissipated the European Union gradually became more critical and open-eyed to the long-standing problem of the under-reformed judiciary, which is among the main obstacles to consolidating democratic institutions in the country.

In addition, the case law of the common courts (Supreme Court of Georgia and Appellate Court of Georgia) as well as of the Constitutional Court of Georgia is being reviewed in order to demonstrate that most of the attempts of either litigants, or the authors of *amicus curie* or the lower courts aimed at facilitation of the effective implementation of Association Agreement via the 'pro-European' judicial activism had been neglected and ignored by the Georgian judiciary ranking superior in the hierarchy. In conclusion, the article does not maintain that there is a direct link between the apparently blind eye turned by Brussels towards

the Georgian Judiciary and the total inertness of the judicial branch, discussed in the second chapter, in promoting the implementation of the AA via its application during the decision-making process . However, it provides a context for the stakeholders that is necessary enough to remain focused on reasons that might cause dramatic democratic backsliding in the future.

Keywords: EU-Georgia Association Implementation Reports, Reform of Judiciary, Application of AA by the courts, Case Law, Judicial Activism, Judicial Inertia

Introduction

Georgia has been praised for quite a long time by the European Union and other Western partners for being a 'torch-bearer' in successfully promoting a democratization agenda among the members of the Eastern Partnership initiative . The turning point for Georgia, since the break-up of the Soviet Union, was the 'color revolution' of 2003, when the first substantial input had been made in building a solid liberal democratic institutions across the country. Another 'game-changing' development took place in 2012, when the region witnessed the first ever power change through peaceful, free and fair democratic elections. Conclusion of the Association Agreement (AA) with the European Union in 2014 as well as extension of the Visa-Free regime by the EU in 2017 was comprehended by the Georgian society at large as a gesture of appraisal by the Western partner for the progress made on its path towards democratization.

Looking through the joint progress reports of the EU Commission and the High Representative on the implementation of the AA, the overall satisfaction of Brussels with the process becomes evident. This held true up to recently, when the seemingly 'smooth path' of democratization took a turn and Georgia ended up in an unprecedented political crisis after the 2020 elections, with a single political party in the Parliament, which was followed up with a brokered 'truce' by Charles Michele, the President of the European Council, whose efforts went in vain, as the content had been hollowed out by the key political actors who did not show any enthusiasm or interest for reforms of, *inter alia*, the Judicial System, which turned into an Achilles' heel for the country.

In a close review of the content of the implementation reports of Brussels and an analysis of failed 'judicial activism' unwilling to apply and to ensure a compliance with the obligations arising out of the AA, the paper claims that the EU apparently turned a blind eye towards the long-standing problem of underperformance in the

Georgian judicial branch, which could have played a very important role in the 'Euro-friendly interpretation' of national legislation, but instead might become a main cause of a democratic backsliding of the country in the near future.

The Progress of the Reform of the judiciary as seen under the Association Implementation Reports on Georgia

Georgia signed the AA with the EU on 27 June 2014, and it fully entered into force on 1 July 2016. It had been provisionally applied since September 2014. In its first joint report on implementation, issued on 25 November 2016, the European Commission together with the High Representative of the Union for Foreign Affairs and Security Policy had been appraising Georgia for the consolidation of the democratic institutions, democracy and rule of law[1]. There was a clear assumption made with regard to the 'independence of judiciary,' which was suggested to have been strengthened through "implementation and consolidation of existing legislation."[2] The report emphasized the success of the reforms that prompted the 'independence, professionalism, accountability and effectiveness' of the judiciary, while, as stated, the so-called 'third package' legislative amendments tackled and advanced 'the protracted lack of transparency in judicial management, including the functioning of and accountability of the High Council of Justice and random allocation of cases.'[3] Among the shortcomings, the report enumerated unclear rationales behind the decision-making processes on the following: 1) holding hearings either publicly or closed, 2) not fully ensured transparency in allocation of cases and the selection of judicial candidates and courts administrators, 3) management of disciplinary procedures, 4) understaffed judiciary, and 5) temporary tenure for judges. Overall, the EU report expresses its satisfaction that "all the fundamental institutions of Georgian democracy are in place"[4], which is in line with its enthusiastic approach regarding the democratic development of the country.

In its second report on AA implementation, as issued on 10 November 2017, the Commission and the High Representative dropped the term 'consolidated' for the

[1] European Commission, *Association Implementation Report on Georgia, European Commission and High Representative of the Union for Foreign Affairs and Security Policy*, Joint Staff Working Document, SWD (2016) 423 final, November 25, 2016, pp. 2–3. At: https://data.consilium.europa.eu/doc/document/ST-15362-2016-INIT/en/pdf, last accessed November 19, 2021.

[2] *Ibid.*, p. 2.

[3] *Ibid.*, p. 3.

[4] *Ibid.*, p. 12.

purposes of characterizing the Georgian democracy and instead turned to using it to describe its outstanding position in the region, saying that it stands as 'a key and strategic partner' which is the result of the 'its sustained reform efforts and ambition to develop further its relations with the EU.'[5] The review of the state of play reveals that there is an overall satisfaction of Brussels with the timely implementation of the AA, including its Deep and Comprehensive Free Trade Agreement commitments[6]. The authors of the joint report's reference to 'meeting the deadlines' should usually be understood in terms of progressing successfully with the legal approximation process prescribed under the AA. However, when it comes to the Judiciary, the first signs of concern already appear: in particular there is a brief reference in the text to a controversy surrounding 'potential political interference' related to 'legal battles over the ownership of TV channels.'[7] One can also notice a somewhat more lengthy review of the shortcomings of the third wave of judiciary reform, along with, of course, the oversight of the positive developments[8]. In particular, the EU eventually comes to underline that even if the level of judicial independence is above average, it is actually decreasing[9], it also makes the highlights regarding the actual lack of the transparency and accountability in the procedures set out by the High Council of Justice for the appointment of judges and presidents of courts. Apart from this, it points to the issue of 'disciplinary procedures', which also begins to seem somehow problematic for Brussels.[10] It is noteworthy to underline that at the time Georgia was celebrating visa-free travel to the Schengen area, granted from 28 March 2017. Even if there is no direct link between the visa-free regime and the consolidation of democratic reforms, in the official speeches of the decision makers of Brussels and the EU Member States capitals one could still easily link this positive development to the concept of the EU-conditionality. This is because in the speeches of the high officials of the EU, the emphasis placed on the successful efforts at democratization and the adherence

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5 European Commission, *Association Implementation Report on Georgia, European Commission and High Representative of the Union for Foreign Affairs and Security Policy*, Joint Staff Working Document, SWD (2017) 371 final, November 9, 2017, p. 1. At: https://www.ecoi.net/en/file/local/1419205/1226_1512477382_171109-association-implementation-report-on-georgia.pdf, last accessed November 19, 2021.

6 *Ibid.*

7 *Ibid.*, p. 4.

8 *Ibid.*, p. 5.

9 This statement is based on the rankings of the World Economic Forum of 2016–2017. World Economic Forum. 2017, *Annual Report 2016–2017*. At: https://www3.weforum.org/docs/WEF_Annual_Report_2016_17.pdf, last accessed November 19, 2021.

10 *Ibid.*, p. 5.

to the European system of values traditionally went along with statements regarding the EU's decision to grant Georgian citizens visa-free travel.

In the concluding remarks of the report, there are passages that imply that a share import of the EU *aquis* is not enough: The sincere attitudes, dedication and ambitions of those in power as well as the effective institutions with the ability to perform are equally important to making this legislation work. In particular, while the report praises Georgia for the continued efforts "to implement its commitments under the AA", it also makes particular emphasis on the standing difference between adoption of the legislation on the one hand and on its proper implementation on the other: "As new legislation is adopted and with institutions in place, renewed political will and strengthened administrative capacity will be needed to continue ensuring successful implementation," therefore, it says: "An effective state and justice apparatus is crucial not only to fulfill Georgia's reform aspirations, but also to further gain the confidence of citizens and investors."[11]

Quite a similar approach related to the state of art of the judicial branch in Georgia can be noticed in the third implementation report of 30 January 2019, which emphasizes that the level of judicial independence was 'on a downward trend' and that the appointments of justices to lifetime tenure had become the subject of vast public criticism[12], and refers as well to potential political interference in the judiciary.[13] Summarizing that important challenges remained, it called for continued efforts to reform the judiciary "with special attention to transparency and accountability in the process of appointing justices."[14] Still, the EU seemed to be satisfied with the level of "consolidation of democracy and quality of governance", which was claimed to be

[11] *Ibid.*, p. 16. The resolution of the European Parliament of 14 November 2018 on the implementation of the EU AA with Georgia (2017/2282(INI)) underlines the need for an independent judiciary to fight corruption effectively (para 22), calls for judicial procedures that are in line with the European standards while adjudicating some particular cases of Turkish residents (para. 25), and states that in the context of ongoing judicial reform there are "signs of greater impartiality and transparency of judiciary". It assumes that the judiciary is at least partially free even if there is a ground of concern that, as per the Venice Commission, the legislative amendments do not ensure the political neutrality of the Prosecuting Attorney's Council (para. 25).

[12] European Commission, *Association Implementation Report on Georgia, European Commission and High Representative of the Union for Foreign Affairs and Security Policy*, Joint Staff Working Document, SWD (2019) 16 final, January 30, 2019, p. 6. At: https://data.consilium.europa.eu/doc/document/ST-5888-2019-INIT/en/pdf, last accessed November 19, 2021.

[13] *Ibid.*, p. 3.

[14] *Ibid.*, p. 18.

progressing as Georgia continued "the process of approximating its legislation and institutional structures closer to EU standards and requirements."[15]

In the next two reports, issued on 6 February 2020 and 5 February 2021, the wording already signaled worrisome alarm with regard to the Georgian judicial branch. The documents underlined not only the standing problem of accountability and independence of the judiciary as well as the issue of the legal certainty related to some high-profile cases, including major businesses[16], but also hinted to the serious problems of the fourth wave of reform by making a clear statement that the selection criteria for the Supreme Court Justices reflected only partially the recommendation of the Venice Commission. It was the first time the term 'failed' is used in relation to the non-transparent process of the appointments of the 14 candidates for lifetime tenure to the Supreme Court.[17] The conclusion states that adherence to the Venice Commission recommendations will be crucial in the future and that "Georgia's commitment to uphold the highest standards of ethics and integrity in its judiciary remains critical."[18]

Under the 2021 report, we can see that it is already becoming too obvious for Brussels that the problem of the judiciary was deeper than previously perceived. It says that by adopting the new legislative amendments on 30 September 2020 and by its immediate application, Georgia neither waited for the requested opinion of the Venice Commission, nor addressed the long-standing shortcomings surrounding the independence and accountability of the judiciary. Brussels seems to be concerned with the fact that the urgent opinion by Venice Commission adopted on 8th of October of 2020 – which suggested increased public scrutiny and for that purposes was recommending making the vote open and providing written justification by the members of the High Council of Justice for each vote during the new appointments in the Supreme Court – had been neglected and ignored. In fact, the High Council of Justice started interviewing candidates for the vacancies in the Supreme Court using the regulations of the amendments of 30 September.[19]

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[15] *Ibid.*

[16] European Commission, *Association Implementation Report on Georgia, European Commission and High Representative of the Union for Foreign Affairs and Security Policy*, Joint Staff Working Document, SWD(2020) 30 final, February 6, 2020, p. 2. At: https://eeas.europa.eu/sites/default/files/1_en_document_travail_service_conjoint_part1_v4.pdf, last accessed November 19, 2021.

[17] *Ibid.*, p. 7.

[18] *Ibid.*, p. 18.

[19] European Commission, *Association Implementation Report on Georgia, European Commission and High Representative of the Union for Foreign Affairs and Security Policy*, Joint Staff Working Document, SWD (2021) 18 final, February 5, 2020, pp. 1, 7, 18–19. At: https://eeas.europa.eu/sites/default/files/2021_association_implementation_report_in_georgia.pdf, last accessed November 19, 2021.

These sad developments in the system of the Georgian judiciary prompted the EU to make judicial reform the top priority on the agenda for the negotiations between the ruling party and the opposition. This was undertaken within the frames of the recent unprecedented mediation brokered by the European Council President Charles Michel during March-April 2021. The mediation was aimed at ending the political crises caused by rejection of the official results of October 2020 parliamentary elections results and boycotting the legislative body, a process which eventually wrapped up as a single-party parliament for the first time ever in the history of independent Georgia. On 19 April 2021 the document proposed by President Michel was signed by the ruling party and by representatives of the majority of the Georgian opposition political parties, with the exception of the largest, the UNM. Among the undertaken obligations are proposals on the rules on snap elections, a commitment to resolving cases of politicized justice, guidelines for ambitious electoral reform, and a promise of power-sharing with the opposition in parliament, as well as lengthy passages with very concrete guidelines for reforming the Georgian judiciary. Among the agreed terms there was a the requirement to "refrain from making appointments to the Supreme Courts under existing rules"[20] as well as a point regarding a constitutional amendment aimed at stipulating the election of the Prosecutor General with a vote of a qualified majority of the Members of Parliament for the purposes of ensuring 'broadest, cross-party political support.'[21] The appointments of justices very soon continued under the old rules, and it became obvious that the ruling party was not intending to fulfill any of the undertaken obligations, as it was agreed upon as a result of long mediation. On 28 June 2021 the ruling party declared the Charles Michel document null and void by abandoning it[22], while in September the suggestion on changing the rules of election of the General Prosecutor was rejected. It became a breaking point for all stakeholders to understand that judicial reform had failed. This outcome triggered the EU to halt the transfer of the scheduled Macro Financial Assistance to Georgia, the allocation of which was subject to conditionality: In particular, Georgia was supposed to demonstrate a progress in advancing the rule of law including reforming judiciary[23].

[20] Bullet point 1.c of section 3 "Rule of Law/Judicial Reform."

[21] *Ibid.*, Bullet point 4 of section 3 "Rule of Law/Judicial Reform."

[22] *Note*: The largest opposition political party UNM signed the document only after the ruling party left it.

[23] See the statement by Giorgi Kakauridze, the First Deputy Minister of Finances of Georgia made on the 13th of October of 2021, who confirmed (rather confessed) that MFA from the EU was conditional to successful Judiciary Reform. Before, on the 31st of August 2021 the Prime Minister of Georgia stated that it was not supposed to be understood as a 'sanctions language' from the EU, but rather as an autonomous decision of the Government of Georgia not to accept the offered loan,

The sluggish impact of the Association Agreement on Judicial Activism in Georgia: Judicial inertia instead of a proactive court

The Association Agreement obligates Georgia to import a large share of EU law, which is a very challenging undertaking. This is foremost because of the approximation with the EU *aquis* goes beyond the formal adaptation of national legislation via amendments or the adoption of new packages of law, but definitely also envisages a compliance as well as its proper implementation and enforcement. This means that the reinforced institutional framework and the effective coordination of all branches of government are crucial. Still, the role of judiciary in the process of the correct application of the shared legal framework and the need of uniformity in its interpretation[24] is indeed outstanding. Talking about international treaty law, Mendez mentions that

> it is primarily the executive and legislative branches that are best placed to ensure that the treaty commitments to which the State voluntarily commits are respected domestically… Courts, however, have an increasingly important role to play in giving effect to this form of 'universal legislation'. First and foremost because a substantial portion of this international law-making is likely to find itself transposed into domestic legal norms on which national courts are then called upon to adjudicate. But even where this is not so, courts in most legal systems will find themselves faced with litigants invoking treaty law in support of their claims.[25]

The status of international treaties in the national legal system of Georgia is defined under the 1995 Constitution, the Organic Law of Georgia on Normative Acts adopted on 29 October 1999, and the Law on International Treaties of Georgia adopted on 16 October 1997. The recent constitutional amendments of 13 October 2017 and 23 March 2018 did not change the old concept on the status of the international treaties in the domestic legal hierarchy of the country: Article 4(5) of the Constitution stipulates that "the legislation of Georgia shall comply with the universally recognized principles and norms of international law. An international treaty of Georgia shall

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which was substantiated with the high economic growth as well as the willingness of Georgia to reduce the foreign debts. Available at https://tabula.ge/ge/news/674494-kakauridze-eu-s-dakhmarebaze-iqo-riski-rom-tankha, October 13, 2021, ~~14:24,~~ კაკაურიძე EU-ს დახმარებაზე: იყო რისკი, რომ თანხა ისედაც არ ჩამოირიცხებოდა.

[24] A. Lazowski, "Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union", *Common Market Law* Review, vol. 45, no. 5 (2008), pp. 1433–1458.

[25] M. Mendez, *European Journal of International Law*, Oxford: University Press 2010, p. xvi. See also კ.კორკელია, *ადამიანის უფლებათა ევროპული კონვენციის გამოყენება საქართველოში*, ევროპის საბჭოს საინფორმაციო ბიურო საქართველოში 2004, ~~გვ. 93–94~~ (K. Korkelia, *Application of the European Convention on Human Rights in Georgia*, Information Bureau of the CoE in Georgia 2004, pp. 93–94~~)~~.

take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia."Therefore, an international treaty remains to be accepted as an inalienable composite part of the national legal system. Besides, as per sections 1 and 5 of Article 7 of the Organic Law of Georgia on Normative Acts, an international treaty of Georgia is a national normative act and has a superior legal force over all other normative acts aside from the Constitution and the Constitutional Agreement.

Georgia has not adopted any special law on application of the EU-Georgia Association Agreement that could clarify the criteria and standards of its direct effect, the forms of its implementation, the tools of its application or the methods of its 'Euro-friendly interpretation' in the national courts. Besides, the status of the mandatory decisions of the treaty body – the Association Council – in the hierarchy of national normative acts remains unclear.

Irrespective of the fact that the special law on application of the AA was not adopted, the national courts of Georgia can ground their decisions on the international treaties as per Article 6(3) of the Law on the International Treaties of Georgia, which envisages the provision enabling the direct use of international treaty on conditions that the following three-tier test is met: 1. the treaty is to be officially published, 2. the provisions of the treaty should establish the rights and obligations of a concrete nature, and 3. It is not supposed to be the subject of clarification via an additional domestic normative act.

Before conclusion of the AA, the Georgian courts showed no enthusiasm to apply the provisions of its predecessor, the Partnership and Cooperation Agreement,[26] as the legal grounds for adjudication and making decisions. There is a record of the sporadic, inaccurate, inconsistent and unsystematic reference to the EU *aqius* by the judiciary itself, the Constitutional Court of Georgia and the common courts, especially the Supreme Court of Georgia, and by the parties in case.[27] Still, decisions had never been based on the EU Law because the only rationale to refer to it was to strengthen legal arguments grounded on the national law, while occasionally it was the result of mistaken assumption on its obligatory nature.[28]

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[26] The Partnership and Cooperation Agreement (PCA) between the European Communities and their Member States, on the one part, and Georgia, on the other part was signed on the 22nd of April of 1996. It entered into force on the 1st of July of 1999.

[27] G. Gabrichidze, "Legislative Approximation and Application of EU law in Georgia". In: P. Van Elsuwege, R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?*, London–New York: Routledge 2014, pp. 189–190.

[28] *Ibid.*

Unfortunately, there has been no dramatic change in judicial activism since the signature of the AA in 2014, even though it triggered a very intensive legislative approximation process, as a result of which a substantial amount of EU law was successfully imported.

To start from the experience of the common courts, there are only two cases, both adjudicated in 2019[29]. These are cases brought on the cassation at the Chamber of the Civil Law of the Supreme Court of Georgia, where references to the obligations stemming from the AA made by the lower court can be observed.

The first, *case no 5237-2019* of 17 May 2019, is about a request made to the court by a bank operating in Georgia, the applicant in this case, to rule an order about the repayment of the remainder of a mortgage by the respondent, a physical person, who did not pay the due interest after s/he was dismissed from their place of employment. However, the respondent was rejecting the claim because of a provision written in the contract regarding their unemployment insurance, which was claimed to be provided as a bonus by the bank at the time of conclusion of the contract.

The applicant claimed that the operationalization of the insurance provision in the contract was conditional because there was a reservation that made it a subject to signature of Annex ix, which had never been signed by the client. The Appellate Court of Georgia used a teleological method of interpretation in order to clarify whether the provision about the insurance in the case of unemployment was an 'essential element' of the contract – i.e. a subject of the normal and standard proposal by the bank in general circumstances. The appellate court investigated the object and purpose of the provision of the contract and decided that it was intended to be interpreted in the best interests of the client, who was acting in a good faith and could not make assumptions independently regarding the additional requirements to sign the annex to the contract unless the bank were to make clarifications.[30] This is the point after which the Appellate Court says that this interpretation is in line with the international instruments and

[29] Generally, it is very complicated to retrieve the decisions and other documents of the Common Courts of Georgia, including in the cases where the public interest is substantially high. The rational behind the rejection to grant access is the claimed objective of protecting the personal information. There is an ongoing discourse in Georgia whether this approach is in compliance with the provision of Article 62.3 of the Constitution of Georgia, which stipulates that the Decision of the Court should be public. Those who support more open access actively refer to the Decision of the Constitutional Court of Georgia made on June 7 of 2019 (N1/4/693,857), which ruled that those provisions of the Georgian Law on Protection of Personal Information as well as of the General Administrative Code that stand as a hindrance to provide an access to the court documents issued on the open hearings – are unconstitutional.

[30] See paras. 26–27.

that even if the EU *aquis* (Directives and Regulations) is not mandatory for Georgia, the importance of the AA and obligations undertaken within its framework leads the court to consider the reference to the EU Directives as well as the case law of the ECJ regarding consumer protection to be important.[31] Afterwards, it goes through the content of the specific EU Directive on consumer protection without indicating any particular provision of the AA; as well, it cites and reviews the paragraphs out of three cases adjudicated by the ECJ. It seems that the long passages on the EU law serve the sole purpose of supporting and fortifying the main argument of the court, which leads to the conclusion that the claim of the bank was to be rejected.[32] If one looks closely at how the court formulates its wording regarding the AA, it becomes clear that the court does not accept it as a part of national legislation but treats it as an example to be drawn from international practice.

The Supreme Court did not accept the case on merits due to a lack of legal grounds necessary for the review on cassation. However, it made clear that it was aligning itself with those arguments of the Appellate Court which were supporting the logic about the respondent's actual inability to assume the need to sign an additional annex without necessary clarifications, unmade by the bank. Hence, the Supreme Court supported upholding the decision without reservations.[33] However, in this case it did not make any reference to those arguments of the Appellate Court which discussed the importance of the AA, nor to the relevance of reviewing the EU *aquis* and the case law of the ECJ.

The same court, one month later, on 28 June 2019, while making a decision on accepting *case no. 586-2019* for the review on cassation, made a very clear statement that it did not agree with the justices of Appellate Court who elaborated their legal arguments based on the AA, EU *aquis* and ECJ case law. The applicant, an energy company, was requesting from the respondent, a physical person, to pay both – the bill for consumed electricity as well as the interest envisaged under a renewed contract. The respondent was refusing to accept interest payment obligation. Both the first instance court as well as the appellate court rejected the claim of the energy company and declared the renewed contract null and void. The court based its arguments on the provisions of article 54 of the Civil Code of Georgia and said that even if formally the renewed contract was not breaching any law, it was nonetheless inconsistent with morals and was violating the principle of social justice and was therefore in breach

[31] *Ibid.*, para. 28.

[32] *Ibid.*, para. 29–32. The Court refers to paragraphs 5.1, 6 and 49 of the EU Directive 93/13/EEC as well as cases of ECJ no C-137-08, C-40/08, C-240/98.

[33] *Ibid.*, para. 66.

of the public order[34]. The rationale was that during the conclusion of the renewed contract, the respondent, residing with their sick and poor elderly parents, was helpless while electricity at the residence was cut off. Hence, the court expressed its belief that a level playing field had not been provided, as the applicant had the excessive power to impose influence and to force the respondent to sign a new contract against their will.[35] The Appellate Court said that apart from this argument, it additionally considered it necessary to make a reference to the EU *aquis* on consumer protection as well as to review the ECJ case law.[36] It underlined the importance of the AA, evaluating it as an 'action plan' to approximate with the EU,[37] and said that the envisaged sector cooperation undertakes intensive approximation with EU standards and experience-sharing, and supports intensive reforms, including in the sphere of consumer protection.[38] Hence, it went into a detailed explanation of the purposes of the Directive 93/13/EEC, indicating that its key principles were subject to mandatory implementation under the AA.[39] What follows are long paragraphs with profound clarifications of the content of the directive, with a focus on the concept of fair contracts as well as a review of the relevant case law of the ECJ.[40]

The Supreme Court did not admit the case on merit, but it assured that it supported the decision of the Appellate Court in declaring the new contract null and void. However, under the separate paragraph 54, the Supreme Court made the unambiguous statement that it did not agree with the reasoning of the appellate court, which was based on the review of the EU *aquis* and the case law of the ECJ in paragraphs 27-29. However, it did not provide any rationale for that disagreement. It merely said that disagreement in that regard would have no influence over the final outcome. Therefore, a good attempt of the Appellate Court to act as a pioneer in promoting the direct enforceability of the AA and engaging in 'Euro-friendly interpretation' of national legislation via the judicial activism was rejected without explanation, which apparently was understood as an instruction from the higher court not to further pursue any similar practices.

As for the Constitutional Court of Georgia, it is to be admitted that since its establishment in 1996 it had been actively engaged in discussing the obligations arising

[34] *Ibid.*, paras. 20–22.
[35] *Ibid.*
[36] *Ibid.*, para. 23.
[37] *Ibid.*, para. 24.
[38] *Ibid.*, para. 25.
[39] *Ibid.*, para. 26.
[40] *Ibid.*, para. 27–31. The Appellate Court is referring to the following case law of ECJ- C-415/11, C-472-10, C-168/05, C-397-11, C-137-08, C-40/08, C-240/98, C-243/08.

from the international treaties during adjudication of cases. However, when it comes to the AA, it seems that the court is reluctant to express its attitude with regard to its status in the domestic legal system or the methods of its application.

In particular, since the signing of the AA, there have been only several occasions when the agreement itself or the obligations undertaken within its frames were highlighted. The initiative to make reference to the AA were mostly made by the authors of *amicus curie*[41] or the witnesses of the litigants representing the respondents[42] in the majority of cases, and only once did an initiatory step come from the applicant's side[43]. In most of these cases the court kept silent and ignored the arguments which had been based on the provisions of AA. Even in the single case in which the court aligned itself with the position elaborated under the *amicus curie* by Vakhtang Lejava – which was extensively grounded on a review of the AA and the respective EU *aquis* – the court merely made a decision which was generally supportive of the author of the *amicus curie*, however, in its reasoning it did not make any reference to the EU Law-based arguments elaborated in the document.

There were only two occasions where the court showed some signs that AA could have been a relevant legal source for consideration during adjudication of a case. The first one is a concurring opinion of a justice who reviewed international practice quite intensively, including the annexes of the AA and the articles of the EU Directive, which he considered to be appropriate for the consideration during the decision-making process. This concurring opinion is also interesting for the fact that its author elaborated the arguments on the issue of compliance of the national legislation of Georgia *vis-a-vis* the provisions of the relevant EU Directive.

Another, and thus far the latest, case in which the AA was referred to by the court is a dissenting opinion by four justices of the Plenum of the Constitutional Court. The case was brought by the Public Defender of Georgia, who was requesting the Constitutional Court to declare unconstitutional those regulations which had not ensured a transparent and merit-based system of appointments of the justices in the

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[41] Constitutional Court of Georgia. 2016, April 19th. Case no 2/2/565, Ilia Lejava and Levan Rostomashvili *vs* Parliament of Georgia; Constitutional Court of Georgia. 2019, April 18th. Case no 1/13/655, LTD "SKS" *vs* Parliament of Georgia; Constitutional claim of 'New Politician Centre' no 1525 13th of July of 2020 and the *amicus curie* submitted against this claim on 31st of August of 2020.

[42] Constitutional Court of Georgia. 2017, December 28th. Supra Case no 2/2/565; Case no 2/9/745, ltd "Georgian Manganese" *vs* Parliament of Georgia; Constitutional Court of Georgia. 2018, July 3rd. Case no 1/2/671, LEPL "Evangelical-Baptist Church" and others *vs* Parliament of Georgia; Supra case no 1/13/655.

[43] Constitutional Court of Georgia. 2018, February 22nd. Case no 2/2/863, Gucha Kvaratskhelia and others *vs* Parliament of Georgia.

Supreme Court of Georgia. The request was rejected on merit. In their dissenting opinion, the four justices made a statement that the respective Plenum of the Constitutional Court should have had taken into consideration, *inter alia,* the latest AA implementation report of Brussels where, as they claimed, the lack of transparency during appointments of Supreme Court justices was clearly indicated.[44] Sadly, there are no other traces that could provide evidence of any willingness of the Constitutional Court to contribute to the pro-active implementation of the AA.

Conclusion

The first chapter summarized the state of the art of the judicial branch in Georgia as exposed in the association implementation reports of the European Commission and the High Representative, from the signing of the AA up to recently. It took more than five years for the European Union to realize that the problem of the judiciary in Georgia was a 'black hole' which denies a level playing field for all stakeholders and restricts an enabling environment for quite a weak democracy to consolidate. Approximation with the EU *aquis* undertaken as an obligation within the frames of the AA was spread out over the agreed timeline, sometimes even to eight years, a period during which the Georgian judiciary could never stand out as a guarantor of its 'Euro-friendly' definition, correct application and proactive implementation. It is hard to find a direct link between the apparently blind eye turned by Brussels to the Georgian Judiciary and the total inertness of the courts, as discussed in the second chapter, to promote a successful compliance with and the implementation of the Association Agreement. However, this provides a context, and perhaps a mental workout, for all the stakeholders to keep a close eye on the reasons that might cause dramatic democratic backsliding in the future.

Whether we shall be able to witness a continuous and an effective reform for the purposes of making the Georgian judiciary strong, independent and impartial – largely depends on the political will of the incumbent power. However, the influencers might be different when one thinks of the options for providing the solutions to judicial inertia in their application of AA during the adjudicatory process: a reasonable assumption can be made that Georgian courts do not apply AA and hence, neither support it's implementation process nor rectify it's violations by the other branches of the government just because of the inadequate education system. While the targeted education

[44] *Ibid*., para. 119, footnote 17.

aimed at the development of the theoretical and practical skills should be a part of the reforms package of the government, the key recommendation for other influential actors would be to support intensively the training measures in the EU Law and AA for all Georgian lawyers including the members of the courts. The development of the programmes in EU Law, availability of EU law textbooks in Georgian language, discussion of the CJEU case law on the special workshops, seminars and conferences as well as provision of the guidelines on the methods of application of AA including via highlighting the best practices of other associated countries - could be the options to think about. Whether in the coming years Georgia turns the 'Judiciary challenge' into the window of opportunity is impossible to predict; however, this is for sure a crossroad where the choice of the path will have a profound historical significance.

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