1. Introduction

The proliferation of constitutional courts in the 20th century throughout Europe and their impact on legal and political processes is highly evident. Constitutional courts in Europe went far beyond the traditional paradigm of judicial bodies and catalyzed transition processes from planned to market economy, from communism and authoritarian regimes to democracy and rule of law based governance. The courts in certain cases fostered the process of “returning to Europe” and contributed to the realization of aspirations of their respective states towards European Integration. Several courts from Central and East European (hereinafter CEE) and South East European (hereinafter SEE) countries are best examples in this regard, in particular constitutional courts of Hungary, Poland, Slovenia and Croatia. On the other hand, the first generation constitutional courts1 of Germany, Italy and Spain are characterized as strong and activist national courts in Europe. At the regional level in Europe, two strong and activist “quasi constitutional courts” – the European Court of Human Rights (hereinafter ECtHR) and the Court of Justice of the European Union (hereinafter CJEU) are operating and it is obvious that possessing activist and strong constitutional courts is part of European Constitutionalism.

The importance of the role of constitutional courts in the integration process was recently discussed at the workshop in Batumi, Georgia, which was held under the auspices of Technical Assistance and Information Exchange instrument program (hereinafter TAIEX).2 The workshop brought together experts and representatives of the constitutional courts of EaP countries and EU member states. Judges and legal staff of the constitutional courts of CEE states shared

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1 Sólyom, The Role of Constitutional Courts in the Transition to Democracy With Special Reference to Hungary, International Sociology, 2003, Vol 18 (1), 133 (135)
experience with their counterparts from EaP countries. It was once again reaffirmed that, based on the past experience of CEE courts, constitutional courts play a significant role in the approximation and harmonization of national laws with the EU aquis. The issue of synergy of judicial activism and European integration was also discussed during the workshop. From the EU’s perspective, according to Members of the European Parliament (hereinafter MEPs’) an “efficient and independent judiciary (inter alia with constitutional courts) is significant and has principal meaning in the EU’s relation with third countries.”

However, possessing an activist constitutional court is not and has never been a precondition for states aspiring towards the EU. Rather, the preconditions in the integration process are a commitment to strengthening the rule of law, consolidating democracy and respecting human rights and fundamental freedoms, which are enshrined and reflected in the relevant external policies of EU towards third states, for instance in the European Neighborhood Policy Action Plan for Georgia (hereinafter ENP AP), in the Eastern Partnership (hereinafter EaP) and in the EU’s agreements with third countries (for instance objectives and/or human rights clauses in Association Agreements (hereinafter AA). It is noteworthy that the recent resolution of the European Parliament on the negotiations of the EU-Georgia AA, recommend the Council, Commission and EEAS to incorporate in the agreement clauses on the protection and promotion of human rights. Accordingly, attainment of ENP objectives, observing AA conditionality and application of EU aquis will be impossible if the constitutional courts disregard their countries’ will to align themselves with the EU. “Engines of European integration” of third states are basically the legislative and executive branches, however as CEE and SEE countries’ experience illustrates, European integration of third countries within the EU requires active participation of not only

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the executive and legislative branches of the governments of those countries, but inclusion of constitutional courts in the process as well. Therefore, this paper attempts to explore the significance of constitutional – judicial review in the European integration process and to find an answer to the normative question whether judicial activism of constitutional courts and, in particular, activism of the Constitutional Court of Georgia, may foster the European integration of Georgia.

2. Georgia’s aspiration towards European integration and the role of the Constitutional Court of Georgia in the integration process

2.1. Introduction

The concept of European integration is strongly attached to the idea to establish “kind of United states of Europe,”6 to the idea of Unity of European countries, which was articulated long before the arrival of the twentieth century.7 The Council of Europe (hereinafter CoE) and the EU, notwithstanding the fact that they are different institutions and hold two different vocations, both stem from and are results of this idea. The Unification of Europe is a continuous process.8 This process together with its results might be called European integration. Hence, whenever we refer to a certain country’s aspiration towards European integration we refer to that country’s will and intention to align itself closely to the prime European structures – such as the CoE and in particular EU.

It should be said in all fairness that Georgia’s European vector had already taken the shape before the “Rose Revolution” of 2003. Georgia became the first country in the Caucasus region joining the CoE in 1999. But in the EU – Georgia’s relations the determining factor was the “Rose Revolution” and since then both the legislative and executive branches of government of Georgia reflect their European aspirations in their official statements or in their respective

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6 Winston Churchill’s speech at the University of Zurich in 1946, cited in Lenaerts and Van Nuffel, Constitutional law of European Union, in Bray (editor), second ed. (2005) 24.
When discussing the issue of certain countries aspiration towards European Integration, it’s too important to take into account public opinion. The United Nations Development Program (hereinafter UNDP) public opinion survey on the attitude of Georgians towards the EU shows that 79% of respondents would vote for EU membership if there were a referendum. On the question “which organization should Georgia join first – the North Atlantic Treaty Organization (hereinafter NATO) or the EU” - majority of respondents answered in favor of EU. The President of Georgia Mr. Saakashvili on the meeting with the EU High Representative for Foreign Affairs and Security Policy, on the occasion of launching the association agreements for South Caucasus countries has stated that: “Georgia is not paving the way to Europe, rather Georgia is part of Europe and is returning to the European institutions.” This approach is similar to CEE countries attitude towards EU and reminds us of the case of Hungary, since in Hungary public officials were also indicating that Hungary was always part and was returning to European constitutionalism. However, the EU clearly expressed its attitude towards its neighbouring countries by appraising the relations as “more than partnership but less than membership”, but the aspiration of the government of Georgia towards European integration indeed positively influences relations with the EU. Recently, the European Parliament in its resolution on the negotiations of the EU-Georgia Association Agreement recommended to the Council, the Commission and the EEAS recommendation: “to recognize Georgia as a European state and Georgian aspirations, including those founded on Article 49 of the Treaty on European Union, and base the EU’s commitment and ongoing negotiations with Georgia on a European perspective, considered as a valuable lever for implementation of reforms and a necessary catalyst for public support for these reforms which could further strengthen Georgia’s commitment to shared values and the

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principles of democracy, the rule of law, human rights and good governance."\(^\text{13}\) Recommending the recognition of Georgia’s European perspective based on article 49 is an outcome of Georgia’s aspirations and great will to deepen and intensify the integration. Henceforth the core question is how and by which legal means is the Constitutional Court able to realize Georgia’s goal and its aspiration towards the EU?

2.2. The role of the Constitutional Court of Georgia in the European integration process

“Scarcely any political question arises ... that is not resolved sooner or later into a judicial question.”\(^\text{14}\) EU – Georgia’s relation is based on the contractual relationship, policy relationship and each of them sets its obligations and objectives which should be observed in order to deepen relations with the EU.

For instance, ENP action plan for Georgia of 2006 determined “strengthening rule of law and democratic institutions, respect for human rights and fundamental freedoms in compliance with international commitments of Georgia (Partnership and Cooperation agreement, CoE, Organisation for Security and Cooperation in Europe (hereinafter OSCE), United Nations)\(^\text{15}\) as the first priority area. In accordance with the ENP Action Plan, respecting and promoting human rights in accordance with European and international standards still remains the challenge in 2011 – 2013 ENP National Indicative Programme.\(^\text{16}\)

In a similar vein, the recent Commission Communication on Cooperation in the Area of Justice and Home Affairs within the Eastern Partnership indicates that “the promotion and mainstreaming of gender equality and fight against discrimination, as fundamental principles of EU Law, shall also be included in the objectives of the cooperation plan and the cooperation with EaP countries should focus on strengthening the respect for human rights, including

\(^{13}\) European Parliament, Resolution of 17 November 2011 containing the European Parliament’s recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement, N (2011/2133(INI)) para 1 (c).


\(^{15}\) ENP AP for Georgia, 2006.

respect for the rights of the child, freedom of expression, freedom of assembly, and the rights of persons belonging to minorities.”

Hence, the EU integration will *inter alia* depend on the implementation of international and regional human rights standards which is highly relevant to the cooperation with EaP partner countries, and with Georgia as well.

**An Association Agreement** is currently being negotiated with Georgia. Since the early nineties agreements concluded between the EC and third countries systematically contain a clause stating that human rights constitute an essential element of the agreement and disregarding of that essential element might result in the suspension of the agreement. The EC/EU has concluded agreements containing human rights and democracy clauses with approximately 150 countries. Scholars are questioning whether human rights and democracy clauses impose any obligation to comply with human rights and democratic principles. However, Elena Fierro argues that human rights clauses envisage that positive measures have to be taken by third countries since European Council and Council of Ministers first mandated human rights clauses in 1991. In a Landmark Resolution of November 1991 of the Council of Ministers states that “the Community and its Member States will give high priority to a positive approach to the conditionality that stimulates respect for human rights and encourages democracy.” She further argues that teleological interpretation (which is also supported by the Vienna Convention on the Law Treaties) will lead to the understanding of human rights clauses as a positive conditionality. The Recent resolution of the European Parliament on Georgia recommends to the Council, the Commission and the EEAS “incorporation in the Association Agreement of clauses on the protection and promotion of human rights reflecting the highest international and European standards, taking full advantage of the Council of Europe and OSCE framework and insisting particularly on the rights of internally-displaced persons (IDPs) and persons belonging to national and other minorities.” Without any doubt, human rights clauses will be placed in the agreement and will constitute essential clauses which create obligation for

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17 COM (2011) 564 final, para 3.5.2 p 15.
18 COM (2011) 564 final para 3.5.2 p 16.
22 EP, Resolution of 17 November 2011, para 1 (r).
Georgia to take positive measures in this regard. Positive measures in the human rights field have to be taken by the executive and legislative branches of government. Nevertheless, the issue of protection of fundamental rights and freedoms very often leads to judicial questions and, in particular, to constitutional question. While adjudicating a case, the Constitutional Court may adhere strictly to the Constitution, simply because judges have sworn that they would be subject and bound by the constitution, to nobody and nothing, save the Constitution.  

Therefore, any constitutional decision which is based strictly on the constitutional text without referring to the abundant international practice will be legal and probably legitimate as well. However, reception of comparative constitutional law (referring to decisions of foreign courts) and interpreting fundamental rights and freedoms in accordance with European and international standards, also treatment of the constitution as a living instrument in order to respond new to social demands, requires activism of the constitutional court. Henceforth, we think that attainment of ENP and EaP objectives and clauses on promoting human rights protection in AA will be observed if the Constitutional Court of Georgia is a strong and activist court. The Constitutional Court of Georgia is in the best place to attain ENP and EaP objectives by means of respecting fundamental rights and freedoms in compliance with Georgia’s international commitment. But in order to discuss the benefits of activism of a constitutional court for European integration we have to define the term “judicial activism” itself.

“Judicial activism” is closely connected to the dynamic - objective reading of constitutional text by the court, or in other words, to constitutional interpretation which requires continual updating of the Constitution in line with the perceived community and social expectations. Judicial activism implies active reception of foreign constitutional standards by the court as well.  

Most of the constitutional courts of CEE countries were judicially activist courts and carried out an essential role in the political, economic and social reforms of their respective countries in the transition phase. Constitutional Courts of Hungary and Croatia, for instance, were actively...
applying comparative constitutional law, in particular European Constitutional law\textsuperscript{25} and, in addition, after the first years of judicial activism, which were mainly related to internal reforms and the fashioning of a new democratic system, these courts have shown that they turned into important actors of the European integration process as well, in response to a new social demand - alignment with and returning to Europe.\textsuperscript{26} The Constitutional Court of Hungary relied on and constructed itself a “national imagery.” The idea behind was that Hungary always belonged to Europe and was currently returning to it and there was a necessity to adapt to the European legal norms and values.\textsuperscript{27} “According to Schepple, in Hungary Europe was seen as the base of liberal Constitutionalism, and having a powerful court was part of being European.”\textsuperscript{28}

Henceforth, taking into account that from the perspective of the EU possessing efficient and independent judicial authorities has an important role to play in relations with third countries and, on the other hand, that respecting and promoting fundamental rights and freedoms is the very precondition for starting and deepening relations with EU, furthermore in the light of the practice of CEE and SEE courts we shall attempt to demonstrate that the Constitutional Court of Georgia will better contribute to Georgia’s integration within EU if it is an activist court.

3. Judicial Activism of the Constitutional Court of Georgia as a catalyst of European Integration

We think that judicial activism of the Constitutional Court of Georgia should be expressed in three principal ways: 1) reception and active application of European human rights protection

\begin{thebibliography}{99}
\bibitem{Solyom} Sólyom, (2003), 133 (136); Also, Omejec, (President of Constitutional Court of Republic of Croatia) speech at 20\textsuperscript{th} Anniversary of Constitutional Court of Republic of Hungary, 24 November, 2009 - Abstract Review of Laws by the Croatian Constitutional Court: Between the Poles of Judicial Activism and Self-Restraint, available at \url{http://mkab.hu/index.php?id=conference} [15.09.2012].
\bibitem{Piqani} Piqani, Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration, (2007), EJLS No. 2, Vol 1, 1 (2).
\bibitem{Schepple} Schepple, Imagined Europe, paper presented at Plenary Address, Law and Society Association Meeting, Glasgow, 1996.
\end{thebibliography}
standards by the court; 2) judicial activism by means of teleological interpretation of the Constitution; and 3) readiness and willingness of the Court to apply and explore EU acquis. We will discuss each of them in details below.

3.1. Fostering European integration by applying European standards of human rights protection

“Toute Société dans laquelle la garantie des Droits n'est pas assure... n'a point de Constitution.”²⁹

The EU sees countries as reliable partners if they share the EU’s goals and values and express their readiness to act in their support.³⁰ The core values protection of fundamental rights and freedoms and respect for democracy and rule of law, are essentially interdependent and complement each other.³¹ Since Georgia is aspiring to the European integration, the Constitutional Court of Georgia while interpreting fundamental rights and freedoms has to be focused and oriented on EU’s human rights protection standards.

Following the Lisbon amendments, Article 6 TEU now views human rights protection system from three angles: the first is the Charter of Fundamental Rights of EU, which has the same legal value as treaties; the second is the European Convention for the Protection of Human Rights and Fundamental Freedoms to which EU shall accede; and finally Fundamental Freedoms as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. As mentioned above, the EU will accede to the ECHR and, according to the Charter of Fundamental Rights of European Union, in particular according to Article 52 (3) of the charter “in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those [Charter] rights shall be the same.”³² Also taking into account the Memorandum of Understanding between the CoE and EU (hereinafter MoU) the European Union “regards the Council of Europe as the Europe-wide

reference source for human rights and ... recognizes unique contribution of the ECHR in human rights protection field ...” Hence whenever we refer to the European standard of human rights protection we basically refer to the ECHR and the case law of the ECtHR since the convention, together with case law of the ECtHR and Charter of Fundamental Human Rights of European Union, constitutes the European human rights protection standard.

The ECHR has to be differentiated from the international treaties, since a) it is the human rights treaty which itself deserves a distinctive approach; b) it is the European human rights treaty which sets as its objective the unity and integration of European states (to which Georgia is aspired) through evaluating common human rights protection standards in Europe; c) pacta sunt servanda requires that states apply the case law of ECtHR since achieving the convention objectives will be jeopardized without taking case law into consideration. Georgia ratified ECHR in 1999. According to the law of Georgia on International Treaties International agreements of Georgia are an integral part of legislation of Georgia. Therefore, the ECHR is directly applicable law in Georgia’s constitutional legal order and the courts are bound by it. However applying the, application ECHR without recognizing the case law of ECtHR, which formally has no binding force upon the judiciary, is meaningless. Scholars argue that ECtHR case law has de facto erga omnes effects on the member states, because “The case law - especially that of the Grand Chamber’s judgments - creates a body of law which encompasses ‘common European standards’ by which states, and in particular their judicial authorities, are bound.” In other words, the ECHR seeks general solutions to general problems with which it is confronted. And last but not least, most European countries treat

34 Memorandum of Understanding (2007) paras 2, 16 (Emphasis added).
38 Judgment on merits delivered by Chamber Rantsev v. Cyprus and Russia, Application no. 25965/04, ECHR, (2010) para 197. The ECtHR held that “The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.”
the convention at least supplementary as a guiding instrument for interpreting their national constitutional standards and, on the other hand, in certain countries ECHR is treated as a surrogate or shadow of constitution. The Convention perceives itself, as expressed by the ECtHR, as the “constitutional instrument of European public order and nucleus of a common European constitutionalisation process in the area of human rights.”

Furthermore, the EU’s accession to the ECHR creates a “European Triangle” which is one of the best possibilities for Georgia (and for other EU - aspiring countries as well) to approximate its human rights protection standards with the EU standards.

![ECHR diagram]

Hence the necessity and importance of application and implementation of ECHR and court’s case – law in non – member states aspiring to the EU is obvious, if they apply and implement ECHR they will apply European Union’s human rights protection standards. The aim is not to catalyze European integration, but the objective is enhancing human rights protection which will itself contribute to the European integration process. The Constitutional Court of Georgia in collaboration with ordinary courts may facilitate Georgia’s inclusion in the “European constitutionalisation mainstream” by means of applying of European human rights protection standards.

As mentioned above, the Constitutional Court is best placed and has the pertinent competences to attain ENP objectives by means of respecting fundamental rights and freedoms in compliance with Georgia’s international commitment. For instance, the recent Joint

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Communication on “A New Response to a Changing Neighbourhood” indicates that the new approach aims at providing better protection inter alia of the freedom of thought, conscience and religion.\(^40\) In order to illustrate the practical importance of the reception of European standards we will refer to a recently adopted decision of the Constitutional Court of Georgia. Constitutional complaint N477 concerned the right to conscientious objection to military service. An applicant argued that the Law on Military Reserve Service contradicted the Constitution of Georgia, in particular Article 19, guaranteeing freedom of speech, thought, conscience, religion and belief, since the law on Military Reserve Service did not provide for the possibility of applying an alternative service. Article 19 of the constitution does not explicitly answer the question, whether the right to conscientious objection to military service is constitutionally protected. The Court, by treating the Constitution as a living instrument and by referring to the recent judgment of the Grand Chamber’s decision of ECHR on Bayatyan v. Armenia and other international standards, came to the conclusion that the right to conscientious objection to military service is protected by the Constitution of Georgia.\(^41\) At the European level, only the Charter of Fundamental Rights of European Union in Article 10 explicitly recognizes the right to conscientious objection to military service.\(^42\)

Implementation of the new standard of the ECHR in this particular case, in fact, has approximated Georgian constitutional standards to the constitutional standards of the CoE and EU member states. Therefore, in similar cases application of European standards is a “must" and judicial authorities should implement these standards in their national legal orders.

\(^{40}\) Joint Communication by the High Representative of The Union For Foreign Affairs And Security Policy and the European Commission on A new Response to a changing neighbourhood (2011) final 303, 2.
3.2. Practice of activism in application of ECHR and ECtHR case law by Constitutional Courts of certain SEE Countries and Georgia

3.2.1. Slovenia

As in most European legal order the ECH in Slovenia is superior to the legislation and inferior to the constitution. With regard to the case law of the ECtHR it has to be noted that formally it is not binding upon the constitutional court however, there is almost no decision without reference to the ECHR and its respective case law. According to statistical data, the Constitutional Court of Slovenia has till now referred to the case law of the ECtHR in its 600 decisions and relied on the ECHR jurisprudence in more than 100 cases.

3.2.2. Croatia

The Constitutional Court of the Republic of Croatia (hereinafter CCRC) accepts the binding interpretative authority of all the judgments and decisions of the ECtHR. Formally, the ECHR has a sub-constitutional status, it is above law in terms of legal effect, but lower than the Constitution of Croatia. However, according to the case law of the Court the ECHR has a quasi-constitutional status in Croatian legal. The Constitutional Court of Croatia has so far referred to the European Court and its case law in more than 750 decisions and rulings. Furthermore, the Court in decision U-I/988/1998, of 17 March 2010 checked the constitutionality of the Pension Insurance Act and came to the conclusion that the Court’s case – law (own case - law) was not relevant anymore and directly referred to the ECHR stating that

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the European Court has a developed case law on this subject.\footnote{Decision of Constitutional Court of Republic of Croatia U-I/988/1998, Decision of Constitutional Court of Republic of Croatia U-III-1897/2008.} The internal organisation of the CCRC includes monitoring the judgments of the European Court through a Senior Legal Advisor who observes the case-law of the ECHR, selects important judgments that could have implications for Croatia and makes written reports of the judges and legal advisers.

### 3.2.3. Georgia

The practice in Georgia is quite different concerning reception and integration of ECtHR case law. As illustrated above, Croatia fully satisfies the demand of the CoE with regard to integrating the Court’s case law into its own national case law and seems to be quite effective. We think that this lesson could be learned and practice and approach of the Constitutional Court of Croatia has to be taken into account and shared by its counterpart from Georgia.

From 1996 till 2007 the Constitutional Court of Georgia applied the ECHR and its case law in 7 decisions. From 2007 till now the Court referred to the European standards in 14 decisions.\footnote{According to the decisions provided at the official website of Constitutional court of Georgia Not all of the decisions are uploaded at the official website of Constitutional Court of Georgia and even though this statistical data reflects overall situation, it still might be not precise, \url{www.constcourt.gov.ge} [15.09.2012].} The progress is obvious. However, applicants base their argumentation on the Strasbourg Court more often than the Constitutional Court does in its decisions. There are some cases where the applicant based the argumentation on European standards, but the Court did not draw attention to the applicants arguments and decided the case without applying European standards.\footnote{Decision of Constitutional Court of Georgia 482,483,487,502 (combined cases), Citizens and Political Parties of Georgia vs. Parliament of Georgia. 2011.} This does not mean \textit{a priori} that the Constitutional Court in a certain case refused to enhance a human rights standard. For instance, constitutional claims N 482, 483, 487, 502 (combined cases) were partially upheld and certain unconstitutional provisions in the Law of Georgia on Assemblage and Manifestation were abolished without reference to the European human rights standards.

In the judgment “Public defender vs. Parliament of Georgia” in 2009, the Constitutional Court of Georgia stated that “\textit{the Board thinks that deciding the constitutional issue should be done with}
giving the maximum respect to the requirements of international law, especially international human rights law, considering abundant international experience. However, this does not imply that the Constitutional Court should upgrade any international agreement or covenant to the rank of the Constitution and should replace the constitutional norms with international law norms during its reasoning.”\(^\text{51}\) We share this opinion and agree with the statement that an international agreement should not replace constitutional norms, but, on the other hand, when interpreting certain constitutional rights and freedoms and while building the argumentation the Court should not only “respect,” rather be willing and ready to actively implement international and European standards where the circumstances of the case give the possibility to do so. In conclusion, it should be noted that reception of European standards by the Constitutional Court of Georgia has to be the rule in its judicial activity, rather than exception.

3.3. Judicial Activism of the Constitutional Court by means of teleological Interpretation

3.3.1. Overview

Judicial activism may be expressed not only by active application of European standards of human rights protection but by means of employing teleological interpretation of constitutional text as well. Scholars\(^\text{52}\) classify three basic types of Judicial Activism: 1) Judicial Activism as conflict with classical policymakers; 2) methodological activism – methods and arguments used in constitutional interpretation; and 3) Procedural activism of the courts which in practice means disregarding procedural limits that allow more extensive intervention of the judiciary\(^\text{53}\) – for instance, opening the door to more litigants.

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\(^\text{53}\) Aaviksoo, (2007) 60 (61).
3.3.2. Methodological activism

The subject of our interest is methodological activism. Methodological activism is basically related to the issue of constitutional interpretation and it signifies judicial argumentation that does not entirely rely on the text of the Constitution or which diverges from the intention of the authors of the Constitution. The Australian constitutional law academic, Professor Craven equated judicial activism with constitutional interpretation and he appraised activism as “progressivism” as well. According to Barak, the ultimate purpose of interpretation is modernization, updating the constitution in accordance with new social demands while treating the legal text as a living instrument.

We think that the Constitutional Court of Georgia should apply methodological activism in order to realize Georgia’s goal and aspiration towards European integration. But the question is, which interpretation method of the constitution will better contribute to Georgia’s integration within EU.

Since the goal of interpretation is to find the right answer to the hard cases, to achieve and realize social goals, and also to realize the purpose of the text, it is not difficult to conclude that it is the purposive interpretation, or in other words teleological interpretation, which should be employed by constitutional courts. Although, it does not disregard other methods of interpretation, for instance, historical or systematic interpretation of the constitution, because any theory of interpretation of constitution aims at perfecting the constitution, any approach to the founding document must ultimately be perfectionist in the sense that it attempts to make that document as good as it can possibly be. However, we would like to emphasize the importance and necessity of the purposive interpretation as an emanation of judicial activism, because “primacy must be accorded to the spirit and not the letter of the text.”

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interpretation is closely connected to the objective-dynamic understanding of legal texts. It tries to read the text in dynamic and to investigate the objective of the constitutional text. Justice Brenan expressed this idea in the following remarks: ‘We current Justices read the constitution in the only way that we can: As twentieth Century Americans.” In 1977 the German Constitutional Court in life the imprisonment case stated “Neither original history nor ideas and intentions of the framers are of the decisive importance in interpreting particular provisions of the Basic Law. Since adoption of the Basic Law, our understanding of the content, function and effect of basic rights has deepened. Current attitudes are important in assessing the constitutionality of life imprisonment. New insight can influence and even change the evolution of this punishment in terms of human dignity and principles of constitutional state.”

Hence Constitutional Courts of Spain, Italy and Germany interpret constitutional texts in up-to-date manner, responding to the demands of contemporary society.

Continental law has long recognized teleological interpretation. The good illustration is ECJ and ECHR acting as “constitutional courts.” The shifting of these two courts towards teleological interpretation has characterized the last decades in Europe. It won’t be excessive if we refer to the teleological interpretation as a European standard of interpretation. ECHR treats the convention as a “living instrument” and establishes different human rights standards periodically. On the other hand, the ECJ before the development of teleological method, employed the doctrine of "effectiveness", called by its French name, “effet utile". Effet Utile doctrine provides that once the purpose of a provision is clearly identified, its detailed terms will be interpreted so "as to ensure that the provision retains its effectiveness." The ECJ in van Gend en Loos pronounced the essence of the method of interpretation: it applies to the Treaties, stating that "it is necessary to consider the spirit, the general scheme and the

wording" of the provision in question.68 The “spirit” – purposive interpretation used by the ECJ in its further case – law gave critics reason to qualify the court as an “activist court” or “engine of European Integration”. Judge Constantinos Kakouris of the ECJ stated “[t]he Court constantly uses teleological interpretation… [and] seeks to apprehend the meaning of law in the light of its purpose …” The Court, he said, "must arrive at criteria by reference to the beliefs and common values of the people of Europe.”70

Purposive interpretation is applicable and advantageous not only for international treaties (such as ECHR, EEC, TEC, and TFEU) but for constitutions as well, since constitutions, roughly speaking, are also “contracts”, “agreements” between people and those who are in charge of exercising collective will – the governments. Purposive interpretation has to be preferred because the constitution is a unique legal document “It reflects events of the past, lays down the foundation for the present and determines how the future ought to look like. It must therefore be capable of growth and development over time to meet new social, political and historical realities.”71 Using purposive interpretation contributes to the attainment of the objective and fundamental values enshrined in the constitutions. The ECtHR and the ECJ are good examples for EU – aspiring countries. These two courts, by means of teleological interpretation of their founding documents, have built the two biggest successful systems on the continent – human rights’ protection system on the one hand, and closer union between peoples of Europe on the other hand. We think that the advantages and benefits of these two systems, for peoples of Europe, are beyond doubts. Therefore, it is much more desirable and important that the constitutional courts of EU – aspired countries are activist in such a manner that they use European standard of interpretation – purposive interpretation of the constitutions since countries of South Caucasus, inter alia Georgia, are post – communist countries (even though several decades passed) and dynamic – objective interpretation will assist to leave “post –communist constitutionalism.”72 Accordingly, if constitutional court employs the European method of legal interpretation this will support the ordinary judiciary to

72 Omejec, (2009)
follow the constitutional court’s practice and Soviet – born methods of legal interpretation might be simply left behind. An article concerning the Europeanization of third country judiciaries was published in Cambridge journal in 2011, which ascertained the role of the Russian and Ukrainian judiciary in the European integration process. This article illustrates *inter alia* the importance of teleological interpretation in the Europeanization process. However, as most post – soviet states “Homogeneity of the legal systems of both Russia and the Ukraine with the EU has not yet been achieved, because the Russian and Ukrainian judiciaries are not yet acquainted with European methods of teleological interpretation.”

Therefore, in order to make ties with European legal traditions and to realize Georgia’s goal “to return to Europe,” the Constitutional Court of Georgia besides active interpretation of the Constitution of Georgia in line with European human rights protection standards, has to employ teleological interpretation in its judicial activities as well.

### 3.3.3. Procedural activism

In contrast to methodological activism, procedural activism means expanding the standing requirement and allowing more applicants to lodge complaints with the court. Scholars define it in the following way: “The procedural approaches to judicial activism identify judicial activism according to procedural criteria without considering the substance of the matter. In this approach, judicial activism is defined as disregard for procedural limits or the interpretation of theirs that allows for more extensive intervention of the judiciary. The main procedural limits that are tackled within the framework of that dimension are the doctrine of standing...”

The Constitutional Court of Georgia encountered procedural judicial activism only recently. The Court was asked to recognize as unconstitutional norm of the “Organic law on the Constitutional Court of Georgia” which enumerated who was entitled to apply to the Court. It excluded foreigners and stateless persons from the list of potential petitioners. The case was

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73 Petrov and Kalinichenko, *The Europeanization of Third Country Judiciaries through the application of the EU acquis: the cases of Russia and Ukraine*, International and Comparative Law Quarterly, vol 60, April 2011, 325 (353).

74 Aaviksoo, (2007) 60 (64).
particularly complicated by the fact that the respondent — representative of the Parliament of Georgia, was arguing that the norm of the Constitution which sets forth competences of the Constitutional Court did not grant the right to apply to the Constitutional Court to foreigners and stateless persons. The Court declared that everyone despite citizenship has the right to apply to the Court and the Constitution expresses the will of the citizens that individuals shall have the remedy to protect their rights and this aim may not be achieved through the approach differentiating between citizens and foreigners since they are equally entitled to the fundamental human rights recognized by the Constitution. Accordingly, the disputed norm which omitted foreigners and stateless persons from the list of potential petitioners was declared unconstitutional. Consequently, the Court’s door is now opened to much more litigants than a year before. Several constitutional complaints were submitted to the Court by foreigners after this decision had been rendered by the Court. The decision in question is a manifestation not only of procedural judicial activism but of substantive judicial activism as well - i.e. interpreting constitutional text in a teleological way. An analysis the of case – law of the Constitutional Court of Georgia shows that it is not rich with similar cases, where the court in such a bold manner uses teleological interpretation and exposes procedural activism. Although, the Court has to follow this practice, i.e. apply European methods of interpretation in its future decisions.

Except by actively applying of European human rights standards and interpreting the Constitution by means of European methods of interpretation, the Constitutional Court of Georgia may contribute to Georgia’s integration process by means of application of EU acquis in its judgments. This issue will be discussed below.

3.4. Application of EU Acquis by constitutional courts – the case of the Association Agreement with Georgia

Negotiation, on the AA with Georgia were launched in July 2010 and are still ongoing. This new contractual relationship between Georgia and the EU will create a strong political bond and

promote further convergence by establishing a closer link to EU legislation and standards.\textsuperscript{76} When exactly the AA will be concluded and what will be the precise content of it – is difficult to assume, but it is obvious that that AA will boost EU – Georgia’s relations through “creating higher level of political association”\textsuperscript{77} and gradual integration in the EU’s economy through establishing DCFTA. Hence, in this section we intend to review at the early stage the legal rank of AA in Georgia’s constitutional legal order and how the judiciar and, in particular, the Constitutional Court of Georgia, can apply the EU \textit{aquis} after concluding the AA. We will try to find some legal background in this regard in Croatia and Hungary as lessons for Georgia.

Article 6.2 of the Constitution of Georgia (1995) states that: “an international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, the Constitutional Agreement,\textsuperscript{78} shall take precedence over domestic normative acts.” Henceforth, the AA will have superior legal force in the domestic legislation of Georgia. Furthermore, the Law of Georgia on International Treatie of Georgia reiterates the provision of the Constitution and declares that: “International agreements of Georgia are in integral part of the legislation of Georgia.”\textsuperscript{79}

In the same vein as PCA, AA will constitute an integral part of the legislation of Georgia. Hence, we have to explore what are the mechanisms for the Constitutional Court of Georgia to apply the AA. In contrast to Croatia and Hungary, the Constitutional Court of Georgia is not authorized to decide on conformity of laws with international treaties. Therefore, there are basically three possibilities for the Court to look inside and apply the AA. Firstly, the Constitutional Court may generally apply the AA as an integral part of the legislation of Georgia and exploit AA for its argumentation while deciding cases. Secondly, an international agreement may be challenged in the Constitutional Court if it is alleged to violate constitutional rights and freedoms, therefore by means of the constitutional complaint the ombudsman of Georgia, citizens and other individuals have the right to apply to the court.\textsuperscript{80} It is unlikely that

\begin{itemize}
\item COM(2008) 823 final, 3.
\item Constitutional Agreement Between Georgia and Apostle Autocephalous Orthodox Church of Georgia (2002).
\item Law of Georgia on International Treaties of Georgia (1997) Art 6 (1).
\item Organic Law on Constitutional Court of Georgia (1996) Art 19 (E) and Art 39 (1).
\end{itemize}
the AA will contradict constitutional rights and freedoms, although hypothetically and in theory it is possible since it greatly depends on the content and provisions of the AA. The third way for the Constitutional Court to look inside the AA is the competence of checking the constitutionality of international treaties of Georgia. However, there are two mechanisms of checking constitutionality of an international treaty – through ex ante and ex post review of constitutionality of international treaties. We think that the Constitutional Court should be given opportunity to check the constitutionality of AA since prior checking the agreement is essential for three basic reasons: 1) it will fortify reliability and security of constitutional legal order of Georgia (legal certainty); 2) it will instruct ordinary courts and public administration in applying AA; 3) it will support European Integration process

We will discuss each of them in details below.

3.4.1. Security of the constitutional legal order of Georgia

According to the Constitution of Georgia “Apart from the international treaties and agreements providing for ratification, it shall also be obligatory to ratify an international treaty and agreement which inter alia requires a change of domestic legislation, adoption of necessary laws and acts in order to fulfill international obligations.” As far as the AA is concerned, it should be assumed that it will require change of Georgian legislation, since according to the Commission Communication, the new agreement “will create a strong political bond and promote further convergence by establishing a closer link to EU legislation and standards.” If we assume that AA will include a binding harmonisation commitment, then it has to be ratified by the Parliament. The Parliament of Georgia may submit constitutional submission before the ratification of an international agreement, and the ratification process will be temporarily stopped, henceforth ratification of the respective international treaty or agreement shall be impermissible before adjudication by the Constitutional Court. If the Constitutional Court will conclude that an international agreement or a provision of its unconstitutional then, according to the Organic Law on the Constitutional Court of Georgia recognition of an international treaty

83 Organic Law on Constitutional Court of Georgia (1996) Art 38 (2) and Art 65 (4).
or agreement or certain parts thereof as unconstitutional shall result in the inadmissibility of ratification of that international treaty or the agreement. In this case, the Law on International Treaties of Georgia gives the solution to legislature and provides that the agreement in question will be binding on Georgia only after appropriate amendments to the Constitution. Since the AA is being negotiated we cannot presume what is the content of it, although it is theoretically possible that certain provisions might appear in contradiction to the Constitution of Georgia. Therefore, it is better that this non-conformity is eradicated at the early stage by means of amending the Constitution or renegotiation of certain provision rather to deal with a Treaty which is signed or is in force. If the Treaty is signed and then the Constitutional Court through a posterior abstract review will establish unconstitutionality of a certain provision of the agreement, it will endanger the legal security principle, because an international agreement (or its provision) will lose binding effect at domestic level, i.e. in the Georgian constitutional legal order, but still it will be binding at international level. Therefore, non-execution of an international treaty at domestic level will necessarily lead to the violation of international obligation. A similar situation existed in Hungary with regard Europe agreement. The Case in the Constitutional Court of Hungary concerning competition rules might have much more common with AA with Georgia since, AA with Georgia will presumably also include approximation clauses in the field of competition. This Case concerned ascertaining the constitutionality of Europe agreement with Hungary. The Constitutional Court of Hungary through a posterior review established that a certain competition provision of Europe Agreement was not directly applicable and implementing rules of Europe Agreement were unconstitutional. Article 62 of the Europe Agreement reiterated Article 85 and 86 of the EEC treaty concerning competition rules. The Constitutional Court of Hungary recognized that

84 Organic Law on Constitutional Court of Georgia (1996) Art 23 (5).
85 Renegotiation of certain provisions is not efficient way of solution of the problem in question, since it highly depends on the parties’ will and takes quite long time.
86 Our assumptions are based on the Commission Communication for Eastern Partnership on the one hand, and on Comprehensive strategy in competition policy which was adopted by Georgian Government recently on the other, which significantly coincides with Articles 101, 102 of TFEU. For further information please see English version http://www.government.gov.ge/files/41_32357_225550_Comprehensive20StrategyinCompetitionPolicy.pdf [15.09.2012].
implementing rules of Article 62 of Europe Agreement were unconstitutional, but it did not annul the rules. In contrast, the Court saved article 62 of Europe Agreement. Janos Volkai criticized the Court’s decision stating that: “Although the Court’s decision not to annul Article 62 (2) EA might at first glance show genuine self-restraint, by giving guidelines on how that implicitly unconstitutional article could be applied in a constitutional way, the Court acted in an activist manner. Undoubtedly, the Court lacks any kind of legislative power to do so, since it may only decide on a provision’s constitutionality or unconstitutionality. In other words, it may declare Article 62 (2) EA unconstitutional or may save it, but it cannot save it and at the same time limit its applicability.”

As mentioned above, checking an international treaty after its ratification and finding it unconstitutional creates quite an inconvenient legal situation which might adversely affect legal security. Therefore, it is better if these issues are resolved before ratification of the treaty. Prior checking will not eradicate but reduce the risk of challenging the treaty in the constitutional court afterwards. Furthermore, it will also serve as guidance for ordinary courts and public administration in applying AA.

### 3.4.2. Instructing ordinary courts and public administration in applying the Association Agreement

Prior checking of AA will instruct the courts and public administration in applying treaty in their cases. There are lots of issues which might be difficult for ordinary courts and public administration to deal with, for instance, whether AA provisions may have direct effect or not, issue of direct effect of secondary treaty legislation – Association Council’s decision, application of EU’s secondary legislation and etc. Application of AAs and secondary association law in associated states generally requires recourse to community law. For example, Article 62(2) of the Hungarian Association Agreement provided that any practice contrary to the competition provisions laid therein “…shall be assessed on the basis of criteria arising from the application

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of the rules of Articles 85 and 86 of the [Rome] Treaty.” Similar language is present in other association agreements and has been retained in the Stabilization and Association Agreements (hereinafter SAA) too. Presumably, similar clauses might be included in the AA with Georgia as well. If such provision is provided in the AA with Georgia, the Constitutional Court has to give guidance to courts and other authorities in applying secondary EU Law. For instance, the Constitutional Court of Croatia concerning SAA took a teleological interpretation and showed that it understands the core of European law. The Constitutional Court of Croatia stated that: “... SAA and Interim Agreement oblige Croatian bodies in charge of protection of competition, that when resolving cases, not only to apply Croatian competition law, but also take into consideration the rules of competition law of the European Community.”

Boris Stanic appreciates this decision as long-awaited judgment and attributes to it great importance since it instructs the Croatian judiciary how and when the criteria and standards of the comparative law of the European Community should be applied.

All above mentioned issues (direct effect of treaty provisions, application of secondary treaty law and EU’s aquis in general) are very essential in constitutional legal orders of associated states and we think that constitutional courts are in the best place and ultimate arbiters in deciding these issues.

4. Supporting European integration

We have already discussed the reasons why ex ante review of the AA with Georgia might support integration process, although in this part we will sum up these arguments. First of all, ex ante review will reduce the risk of challenging the treaty in the Constitutional Court after it is ratified and henceforth ex ante review fortifies reliability of parties that the agreement in question is deemed to be constitutional. On the other hand, since the Constitutional Court is the ultimate arbiter in deciding constitutional issues and its decisions are highly circulated in judiciary, and since decisions of the Court are electronically available for everyone, the decision

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of the court will be the guidance for concerned individuals, ordinary courts and other public authorities while applying AA in their cases.

The active application of EU *aquis* is currently debated in Ukrainian judiciary as well. “Some Constitutional Court judges advocate the necessity of applying more elements of the EU acquis in their decisions, due to Ukraine’s pro-European policies and its aspirations for EU membership.”

The Constitutional Court of Ukraine has several times referred to EU Law in its decisions as persuasive source of law.

In conclusion, *ex ante* review of the AA with Georgia will inevitably make the Constitutional Court to explore case law of the CJEU, its attitude toward AA, importance of AA in EU’s legal order and its interpretative tools while deciding cases, which might lead the Constitutional Court towards Europe – friendly decisions in the future.

5. **Legality and legitimacy of judicial activism**

Every year a vast number of articles and research papers is dedicated to the issue of judicial activism. This is one of the most contested terms in constitutional law and it is often said to be “a court’s decision one does not like.” Judicial activism of constitutional courts, which we advocate as one of the significant attributes in Georgia’s European integration process, is attacked from two fronts. The first is the Counter – majoritarian arguments to constitutional – judicial review which challenges the legitimacy of constitutional justice itself (institutional challenge). The second argument indicates that judicial activism is in contrast to and departs from constitutional intent (substantive challenge). As for the institutional issue, while holding the occupation in the constitutional courts, judges overrule laws and policies of directly elected governments and legislatures, that is to say, “judges who are not politically responsible are

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93 Petrov and Kalinichenko, (1996)
telling the people’s elected representatives that they cannot govern as they’d like, because constitutional - judicial review gives unelected judges a special position above and inside the political system and accordingly they can declare decisions produced by elected governments and legislatures." Here the question - where is peoples’ say? – arises. This is known as the counter-majoritarian objection to judicial review. Therefore, more the court is activist and a strong institution, the more the questions arise concerning its legitimacy.

In response to the counter – majoritarian objection to judicial review, according to counter – counter majoritarian arguments “Courts can be more democratic ... than legislatures." The fact that parliament is elected, while on the other hand, judges are not, is not sufficient to assume that the former is more democratic than the latter because “majorities sometimes do not have power to decide... And in addition quite often the realization of political equality through elections, representation, and legislative process is imperfect. Electoral systems are often flawed... All in all, it should be said in all fairness that the election is not the end of democratic society or democracy. One should also bear in mind that democratic legitimacy of the judge may be attained not only through democratic election but if the judge defends democracy itself." The constitution is the people’s instrument on giving their say, therefore the review of legality of an act against compliance with the constitution, would in fact be the supervision of the acts’ conformity with the people’s say. Furthermore, judges are selected from the “people that are not segregated by lines of race, religion, income and wealth, for instance.” In addition, judges do have qualities that other public servants do not possess and they exercise their duties transparently.

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Concerning judicial activism of constitutional courts, we think that activism is justified to the extent that the court safeguards and promotes fundamental rights and freedoms. Therefore, the decisions where the Constitutional Court of Georgia imported (or in the future will import) a high level of human rights protection standards and by means of teleological interpretation will recognize rights that are not indicated in the Constitution, or in any case where the court will interpret the norm in order to enhance human rights protection, even though they are a product of judicial activism, will still remain legal and legitimate. The answer on legality and legitimacy has to be found in the Constitution of Georgia itself. Three articles of the Constitution of Georgia gives the court possibility to be activist, the first - Article 6 according to which:

“The legislation of Georgia shall correspond to universally recognized principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts.”

Another article which might “legalize” judicial activism is Article 7 of the Constitution of Georgia.

“The state shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as directly applicable law.”

Finally, Article 39 of the Constitution will always justify recognition and importing of the right that was not expressly laid down in the Constitution:

“The Constitution of Georgia shall not deny other universally recognised rights, freedoms and guarantees of an individual and a citizen, which are not referred to herein but stem inherently from the principles of the Constitution.”

These are legal grounds that might be referred to as the “legal basis” for judicial activism. Without any doubt what is legal is not legitimate per se. Legitimacy in political sociology is described as a capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society or, in other words, a value.

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100 There is only one constitutional agreement in Georgian constitutional legal order – Constitutional Agreement between Georgia and Apostle Autocephalous Orthodox Church of Georgia.
whereby decisions and acts of institutions or public officials are recognized and accepted as right and proper.\textsuperscript{101} In reality, there is no textbook answer on the legitimacy of judicial activism, because it greatly depends on various circumstances, \textit{inter alia}, on the society's assessment of the activity of the Court.

In conclusion, it should be noted that activism of the Constitutional Court of Georgia will be justified and legitimate as long as it preserves constitutional rights and freedoms. Analysis of practice of the Constitutional Court of Georgia illustrates that it tries to expand and evaluate human rights in Georgian constitutional legal order and this attitude has to be maintained and developed further, since it supports, on the one hand, enhancing human rights standards in national legal order, and on the other hand, contributes to the integration process in a manner described above.

6. Conclusion

The idea of this research paper was to explore the significance of constitutional – judicial review in European integration process and to find an answer on the normative question whether judicial activism of constitutional courts and, in particular, of the Constitutional Court of Georgia, may foster European integration process. We came to the conclusion that judicial activism of the Constitutional court of Georgia, if expressed in active reception of European human rights standards, as well as in employing teleological interpretation and application of the EU \textit{aquis}, may in fact catalyze the European integration of Georgia.

The research contains valuable recommendations that might be interesting and useful for constitutional courts and in particular for the Constitutional Court of Georgia since Georgia has clearly made its choice – paving the way towards the European Union. On the other hand, our study has shown that the Constitutional Court of Georgia has competences and legitimacy to realize Georgia’s choice – align Georgia with European Union. Therefore, where there is will, there is way!