

# CONSTITUTIONAL REFERRAL AND DIALOG BETWEEN THE CONSTITUTIONAL AND ORDINARY COURTS IN GEORGIA\*

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**Abstract.** Constitutional referral is an important procedural tool for the protection of the supremacy of the constitution and human rights, which originates from European law. The Institute of Constitutional referral ensures the growth of the efficiency of the ordinary courts' activities, the implementation of constitutional principles in justice and the establishment of a high standard of protection of human rights. The judicial system, which is represented in Georgia in the form of ordinary and constitutional courts, considers the institution of constitutional referral as one of the important forms of legal relations between these bodies. But does the practice of using constitutional referrals, its normative regulation, and legal activism determine the legal dialogue between the judicial authorities in Georgia? The purpose of this article is the assessment of the ordinary courts' involvement in the implementation of constitutional justice and the constitutional referrals' effectiveness. For this purpose, the article analyzes the role of ordinary courts in the process of safeguarding constitutional legality, the place of constitutional referral in the Georgian model of constitutional review, its normative characteristics and the standard of reasoning required for constitutional referrals. The article identifies corresponding shortcomings, the resolution of which should ensure the effectiveness of constitutional referrals in terms of guaranteeing a high standard of protection of fundamental rights and the establishment of constitutional legality.

**Keywords:** Constitutional Court; constitutional legality; constitutional review; constitutional referral.

## INTRODUCTION

The review of constitutional referrals by ordinary courts constitutes one of the key powers [Zoidze 2007, 188] of the Constitutional Court under the Constitution of Georgia. This institution plays a particularly important role in ensuring the rule of law, introducing constitutional standards into the

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\* This Research was supported by Shota Rustaveli National Science Foundation of Georgia (SRNSFG) [Grant Number: YS-23-869].

administration of justice, and enhancing internal judicial oversight within the system of ordinary courts. The examination of constitutional referrals also positively impacts the work of the Constitutional Court itself, as it enables the provision of a higher quality of constitutional legality. These circumstances should foster the development of a legal dialogue among the bodies of the judiciary [Davituri and Davitashvili 2021, 27]. However, in the Georgian legal context, the institution of constitutional referrals is characterized by numerous normative and practical shortcomings.

To assess the effectiveness of constitutional referrals by ordinary courts, the present article will analyze the legal aspects of the relationship between ordinary and constitutional courts in Georgia. It will examine the legal nature of constitutional referrals, their institutional and normative characteristics, and analyze the statistical and substantive features of constitutional referrals. This will allow for the identification of the challenges associated with this institution and the means to address them. To fully achieve these objectives, the research will employ analytical, teleological, and comparative legal methods. From a methodological perspective, the teleological method is employed in order to conduct a purposive assessment of the institutional nature of constitutional referral within the Georgian legal framework and to identify its specific characteristics. The normative features and practical application of constitutional referral are analyzed through the use of the analytical method. The comparative-law material presented in the paper is of a descriptive nature and aims to substantiate the arguments advanced and to emphasize the Georgian legal context.

## 1. CONSTITUTIONAL BOUNDARIES OF INTERACTION BETWEEN COURTS

In contemporary states, the constitutional court constitutes the highest constitutional authority, endowed with the status of a negative legislator [Garoupa and Ginsburg 2015, 141]. Its principal function lies in declaring acts inconsistent with the constitution as unconstitutional and, consequently, void [Robledo 2016, 283]. It possesses the power to annul a norm or its normative content [Javakhishvili 2017, 334], but not to enact legislation, thereby refraining from exercising the functions of a positive legislator [Brewer-Carias 2011, 31]. In both, the American and European models of constitutional review, it represents the sole specialized institution [Stone Sweet 2000, 61], within the system of state power entrusted with the exclusive competence to deliver the final interpretation of the constitution [Fruchtman 2019, 20]. This underscores the role of constitutional review as a mechanism safeguarding state authority from political influence [Ginsburg 2003, 25].

The Constitutional Court of Georgia, similarly to European constitutional tribunals [Sadurski 2014, 13], is a body of distinguished status and authority, based on the European, Kelsenian model [Comella 2009, 4] of constitutional review. It occupies a special position [Gegenava 2012, 12, 33] among the organs of state power and plays a significant role in the implementation of the principle of constitutional supremacy and the protection of fundamental rights [Kverenchkhiladze 2006, 41]. According to the Constitution of Georgia, the primary function of the Constitutional Court is to declare acts inconsistent with the constitution as unconstitutional.

In Western doctrine of constitutional review, the institutional relations between ordinary courts and constitutional courts are characterized by a conflicting nature [Garoupa and Ginsburg 2015, 144]. This arises from the competitive relationship between these two systems of judicial authority [Comella 2011, 273]. Consequently, there is no doubt about the necessity of clearly defining their constitutional mandates through precise criteria [Michelman 2011, 280]. The constitutional court, by its legal nature and specialized procedure, is a distinct body [Sadurski 2014, 120], separate from the system of ordinary courts [Vamberg 2005, 93]. The Constitution of Georgia also draws a clear boundary between these two systems within the judiciary, distinguishing the constitutional court as a body of constitutional review and ordinary courts as bodies of adjudication.<sup>1</sup>

Despite the complex nature of the relationship between the constitutional court and other organs of the judiciary [Gegenava 2012, 25], ensuring cooperation between them is of particular importance. Legal dialogue between these systems within the judiciary, alongside other positive factors, contributes to the consolidation of constitutional legality and the integration of constitutional values into the system of adjudication. This should be achieved through the appropriate legal mechanisms, among which one of the most important is the institution of constitutional referral by ordinary courts to the constitutional court regarding the constitutionality of norms.

## 2. CONSTITUTIONAL REFERRAL IN THE SYSTEM OF CONSTITUTIONAL ADJUDICATION

### 2.1. The Legal Nature of Constitutional Referral

The consideration by the Constitutional Court of constitutional referrals submitted by ordinary courts constitutes a form of constitutional review known as the concrete review<sup>2</sup> of norms [Kakhiani 2011, 206]. A constitutional

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<sup>1</sup> Constitution of Georgia, 24 August 1995, Article 59.

<sup>2</sup> According to Professor Sadurski, the Constitutional Court considers such “concrete” cases under the model of “abstract” review [Sadurski 2014, 91].

referral allows for the safeguarding of the constitution against unconstitutional acts and contributes to the development of predictable and consistent practice within ordinary courts [Ginsburg 2003, 40]. The development of this institution promotes self-regulation within the system of ordinary courts and the protection of fundamental rights. However, it is generally considered an indirect mechanism [Arnold 2003, 110] for the protection of fundamental rights, entirely dependent on the initiative of ordinary courts, and incapable of ensuring the direct protection of such rights.

The institution of constitutional referral developed within the context of European law [Javakhishvili 2022, 84]. Its establishment in Spain was motivated by the view, that judges of ordinary courts should play a significant role in safeguarding the constitution, particularly with respect to initiating proceedings on the constitutionality of existing laws [Comella 2008, 29]. This institution continues to occupy a prominent position in Germany, where “*Richtervorlage*” forms one of the most common procedural bases in the practice of the Federal Constitutional Court [Hausmaninger 1997, 37]. Portugal presents an original model, in which ordinary court judges themselves assess the constitutionality of the applicable norm, while the parties retain the right to appeal the decision on constitutionality to the constitutional court [Comella 2009, 7]. Italy also offers a distinctive approach, allowing individuals to protect fundamental rights through ordinary courts before the constitutional court [Passaglia 2016, 253]. The French Constitution provides for the possibility of constitutional referral, albeit through a complex procedural framework [Paris 2016, 311-12]. Czech legislation enables judges to submit referrals to the constitutional court not only for the review of the constitutionality of a norm, but also to verify compliance with international treaties [Biagi 2020, 171].

The institution of constitutional referral in the European legal order, with rare exceptions,<sup>3</sup> constitutes a significant form of interaction between judicial bodies. Despite the diversity of existing models, this mechanism ensures the participation of ordinary courts in the maintenance of constitutional legality and facilitates the integration of constitutional values into the justice. It is perceived not merely as a technical procedural mechanism, but as an element of the constitutional right to a fair trial and as an essential means of protecting fundamental rights, without the proper realization of which the protection of fundamental rights can never attain the highest standard.

With the adoption of the 1995 Constitution, the foundation was laid for the Constitutional Court of Georgia, which exercises constitutional review through constitutional proceedings [Gegenava and Javakhishvili 2022, 121].

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<sup>3</sup> Revised Report on Individual Access to Constitutional Justice, Adopted by the Commission at its 125th online Plenary Session, CDL-AD (2021)001, European Commission For Democracy Through Law (Venice Commission), Strasbourg, 11-12 December 2020, para. 44.

From the moment of its establishment, the Constitutional Court was vested with the authority to consider constitutional referrals submitted by ordinary courts, thereby defining the nature of the relationship between ordinary and constitutional courts. In assessing this relationship, it is important to examine the institutional characteristics of the constitutional referral, as well as its practical application and the standards of reasoning applied in its consideration.

## 2.2. Institutional Characteristics of Constitutional Referral

The legal basis for submitting a constitutional referral to the Constitutional Court is provided by the Constitution of Georgia and the Organic Law of Georgia “On the Constitutional Court of Georgia.”<sup>4</sup> Pursuant to Article 60 of the Constitution of Georgia, which is substantially mirrored in the Organic Law, the Constitutional Court of Georgia considers, upon referral by an ordinary court, the constitutionality of the normative act that the ordinary court is required to apply in the course of adjudicating a specific case and which, based on reasonable grounds, may be inconsistent with the Constitution.<sup>5</sup> This institution aims to strengthen constitutional legality in the country and to ensure the implementation of the principles of constitutional supremacy and constitutional legality within the judicial process of ordinary courts [Javakhishvili 2024, 96].

According to the Constitution of Georgia, the “ordinary court” is authorized to submit referrals to the Constitutional Court, although the exact scope of this concept requires clarification. Established practice in constitutional proceedings provides that any court has the right to submit a constitutional referral to the Constitutional Court. Accordingly, a constitutional referral submitted by an ordinary court in which adjudication is carried out by a single judge is signed by that judge; however, the author of the referral is considered to be the court itself [Kakhiani 2011, 210]. In cases where adjudication is conducted by a panel of judges, the constitutional referral is submitted collectively, signed by the participating judges.<sup>6</sup> Therefore, the significance of a constitutional referral transcends the position of an individual judge and is regarded as emanating from the ordinary court as an institution [Shapiro 1981, 30]. Submission to the Constitutional Court may occur either on the initiative of the ordinary court itself or at the request

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<sup>4</sup> Organic Law of Georgia “On the Constitutional Court of Georgia”, 31 January 1996.

<sup>5</sup> Constitution of Georgia, 24 August 1995, Article 60(4).

<sup>6</sup> However, according to recent practice, there are cases when a collegial composition of court refers a constitutional submission to the Constitutional Court, but the submission is signed by a single judge, which can be considered an exception to the rule based on the legislative definition.

of the parties [Sadurski 2014, 91], although the latter does not create a binding obligation for the court.

Considering the legislative regulation of a norm, it is relevant to address the question of whether the submission of a referral by ordinary courts to the Constitutional Court constitutes a right or an obligation of the judge. Doctrinal opinions on this issue differ: some scholars define the submission of a constitutional referral as a right of the ordinary court [Khetsuriani 2020, 64-65], while others consider it an obligation [Javakhishvili 2022, 84]. According to another view, submission becomes an obligation only if one of the parties to the judicial process requests it [Khmaladze 2000, 213]. Some authors, drawing on the example of Germany, argue that in the Federal Republic of Germany, any court is both authorized and obliged to verify the constitutionality of legal norms [Khubua and Traut 2001, 32], however, the judge must be convinced of the norm's unconstitutionality – mere suspicion is insufficient [Heun 2016, 65]. Identifying this issue is important, as the exercise of adjudication by a judge should be based on the presumption that the norms applied are in conformity with the Constitution [Vamberg 2005, 89].

Two models can be distinguished in the constitutional practice of European countries regarding the discretion to refer constitutional referrals to the constitutional court: one group of states grants courts the freedom to act when preparing a constitutional referral [Kovalíček 2023, 23]. The other group, however, clearly emphasizes the judge's obligation to refer the matter to the constitutional court when there is a doubt about the constitutionality of the applicable norm, thus directly linking the use of the referral mechanism to the judge's subjective assessment of the norm's constitutionality.<sup>7</sup> If the judge has no doubt concerning the constitutionality of the norm, the need for constitutional interpretation ceases to exist, and the judge proceeds with applying the contested norm. Despite this model-specific characteristic, in cases of doubt regarding the constitutionality of the applicable norm, referral to the constitutional court should be considered an obligation of the court based on the principle of the rule of law; otherwise, not only the institutional mandate of the constitutional court and the legal dialogue with ordinary courts, but also the supremacy of the constitution and the right to a fair trial would be undermined.

The interpretations of the Constitutional Court of Georgia are noteworthy, according to which, when resolving an issue, the focus should not be on a general argument regarding the norm, but rather on the judge's own assessment of the constitutionality of the norm to be applied: "In the event,

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<sup>7</sup> Study on Individual Access to Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary Session, CDL-AD(2010) 039rev, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 17-18 December 2010, paras. 215-216.

that a judge concludes, that the norm to be applied in resolving a specific case may be inconsistent with the Constitution of Georgia,<sup>8</sup> the use of the constitutional referral mechanism constitutes not a discretionary power but an obligation.<sup>9</sup> Accordingly, if a judge does not submit a referral to the Constitutional Court, it is presumed that the judge did not have a reasonable belief regarding the potential unconstitutionality of the norm.<sup>10</sup> Given that the judicial system serves to ensure the effective implementation of the principle of constitutional supremacy, which in turn entails the reinforcement of the Constitution and the values enshrined therein,<sup>11</sup> the judge's obligation to submit a referral to the Constitutional Court derives directly from the principle of constitutional supremacy and the architecture of the judiciary.<sup>12</sup>

Regarding to the nature of the request, several points should be noted. First, the request for a review of constitutionality applies only to normative acts. It is noteworthy that, according to the practice of the Constitutional Court, not only normative acts, but also individual acts possessing normative content have fallen within the scope of constitutional review.<sup>13</sup> Accordingly, it is likely that such individual acts may become subject to constitutional referral in the future. Furthermore, the normative act whose constitutionality is requested to be reviewed, must be a norm that the ordinary court is required to apply in the adjudication of the case. Consequently, the Constitutional Court will not accept a constitutional referral, if the contested norm indicated therein does not constitute applicable law in the ordinary court for the ongoing case.<sup>14</sup> It is also necessary that the normative act has substantive significance for the resolution of the case – that is, there must be a reasonable assumption that, in the event of the norm being unconstitutional, the ordinary court would have reached a different decision in the case [Kakhiani 2011, 14].

The submission of a constitutional referral to the Constitutional Court by ordinary courts results in the suspension of proceedings in the ordinary court, until the Constitutional Court renders its decision. As in other countries, this suspension is a prerequisite for the acceptance of the constitutional referral into proceedings [Vamberg 2005, 89]. According to established practice, the continuation of proceedings prior to the issuance of the

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<sup>8</sup> It is a shareable view that a judge should refer a case to the Constitutional Court even when the norm allows for multiple interpretations. See Comella 2011, 274.

<sup>9</sup> Ruling No. 3/7/1286 of the Constitutional Court of Georgia, 15 December 2023, para. II-15.

<sup>10</sup> *Ibid.*, para. II-16.

<sup>11</sup> Decision No. 3/4/1648 of the Constitutional Court of Georgia, 21 April 2022, para. II-10.

<sup>12</sup> Ruling No. 3/7/1286 of the Constitutional Court of Georgia, 15 December 2023, para. II-15.

<sup>13</sup> Ruling No. 1/7/436 of the Constitutional Court of Georgia, 09 November 2007; Decision No. 2/5/700 of the Constitutional Court of Georgia, 26 July 2018; Ruling No. 1/4/1691 of the Constitutional Court of Georgia, 22 February 2023.

<sup>14</sup> Recording Notice No. 3/2/1520 of the Constitutional Court of Georgia, 26 February 2021, para. II-17.



constitutional decision is possible if the norm deemed unconstitutional in the referral no longer constitutes applicable law in the suspended case.<sup>15</sup> This approach is based on the interest of ordinary courts in preventing the application of a norm, that is likely unconstitutional.<sup>16</sup>

It is also noteworthy to consider, whether an ordinary court may, without submitting a referral to the Constitutional Court, render a decision based directly on a constitutional norm. It is widely accepted, that they may rely on the direct effect of the Constitution only when no normative act regulates the matter in dispute and the relevant constitutional provision is formulated in a manner that allows its practical application [Khetsuriani 2020, 57-58]. It should be noted that the legislation of certain European countries explicitly prohibits ordinary courts, when adjudicating disputes, from applying legal norms that are incompatible with constitutional values and principles.<sup>17</sup>

### 2.3. Standard of Reasoning for Constitutional Referrals

Under Georgian legislation, a constitutional referral must be reasoned.<sup>18</sup> It should contain the evidence that, in the view of the author of the referral, supports the validity of the referral. A constitutional referral may concern the compliance of a norm with any provision of the Constitution, and in this respect, ordinary courts are not limited to Chapter II of the Constitution (Fundamental Rights) when providing reasoning.<sup>19</sup> The requirement to reason the referral is important, because it ensures both - the confidence of directly interested parties in the decision and the proper perception of the decision by society, which is of particular significance in a democratic society [Dixon 2023, 245]. The requirement to provide justification substantially exceeds the mere expression of the judge's doubt regarding the constitutionality of the norm [Autheman 2004, 16]. Accordingly, based on the practice of the Constitutional Court, it is important to assess and define the standard of reasoning for constitutional referrals.

For the assessment of the legal nature of constitutional referrals, the 2015 precedent-setting decision is of particular importance, as it established the basis for a new standard of reasoning. According to the Constitutional Court's interpretation in this case, insofar as ordinary courts act within the framework of a constitutional referral to protect public interest, they do

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<sup>15</sup> Decision No. 3/4/1648 of the Constitutional Court of Georgia, 21 April 2022, paras. II-20-21.

<sup>16</sup> Despite this risk, the legislation of certain European countries does not provide for the possibility of suspending judicial proceedings. Constitution of the Kingdom of Spain, 6 December 1978, Article 163.

<sup>17</sup> Constitution of the Portuguese Republic, 25 April 1976, Article 204.

<sup>18</sup> Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Article 31(2).

<sup>19</sup> Decision No. 3/4/641 of the Constitutional Court of Georgia, 29 September 2016, para. II-23.



not pursue the annulment of a norm as unconstitutional. Their objective is to safeguard the constitutional guarantees of the participants and institutions involved in the judicial process.<sup>20</sup> Furthermore, the Constitutional Court, on its own initiative, amended the constitutional provision indicated by the author of the referral and deemed it necessary to review the contested norm against another provision of the Constitution. Through this decision, the Constitutional Court emphasized the significance of public interest in the consideration of constitutional referrals, ensuring that a norm likely to be unconstitutional does not remain in force.<sup>21</sup>

In this decision, the Constitutional Court of Georgia considered it sufficient for the referral to merely indicate the constitutional issue, since it could not disregard the problem raised in the referral on the formal ground of incorrect identification of the constitutional provision. Otherwise, the constitutionality of the norm to be applied would remain in doubt.<sup>22</sup> Accordingly, the Constitutional Court of Georgia rejected a narrow, formalistic interpretation of the law, under which the author of the constitutional referral bears the obligation to identify the relevant constitutional provision. Nonetheless, the indication of an “incorrect” constitutional basis by the author of the referral highlights the issue of reasoning in constitutional referrals.

Proper reasoning of a constitutional referral is a mandatory legislative requirement, however, it is equally important to correctly perceive the scope of the Constitutional Court’s competent mandate. In one referral submitted by the Supreme Court, the problem concerned the submission of the issue to an inappropriate body in relation to the required standard and the incorrect perception of the Constitutional Court’s competence. Accordingly, even where a constitutional referral meets a high standard of reasoning, it could not be assessed by the Constitutional Court. According to the Court’s assessment, in this case, the issue did not concern the misidentification of the law to be applied by the Supreme Court, but rather the author’s incorrect understanding of the legally defined limits of the Constitutional Court’s competence.<sup>23</sup> Consequently, the constitutional referral was deemed insufficient both in terms of the request and its reasoning and was not accepted into proceedings.

When considering a constitutional referral, the Constitutional Court may go beyond the reasoning provided in the referral and, in a sense, “fill in” gaps in the arguments. For instance, in one case, the Constitutional Court, using the teleological method of interpretation, extended the legal benefit, protected

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<sup>20</sup> Decision No. 3/1/608,609 of the Constitutional Court of Georgia, 29 September 2015, para. II-6.

<sup>21</sup> *Ibid.*, II-9.

<sup>22</sup> *Ibid.*, II-7-8.

<sup>23</sup> Ruling No. 3/3/ 685, 686, 687, 688, 689, 736, 737, 758, 793, 794, 820 of the Constitutional Court of Georgia, 29 September 2016, para. II-10.

by the contested norm to individuals, who were not granted the specific right to enjoy that benefit under the law. Through this decision, the Constitutional Court of Georgia entirely went beyond the grammatical formulation of the norm indicated in the referral and established a completely new regulatory arrangement.<sup>24</sup> This approach, though required to safeguard public interest, also raises questions about the reasoning behind constitutional referrals.

Finally, the issue of reasoning in constitutional referrals submitted by ordinary courts remains problematic, as evidenced by decisions issued by the Constitutional Court, both in the form of rulings and recording notice. For example, in one act, a constitutional referral was partially not accepted into proceedings, because the court had simply not provided any reasoning in support of its request.<sup>25</sup> Accordingly, multiple problems are identifiable in constitutional referrals submitted by ordinary courts, including the incorrect identification of constitutional norms, inadequate reasoning, failure to provide sufficient argumentation, and a misperception of the role of the Constitutional Court. These issues are directly related to the effectiveness and practical impact of constitutional referrals.

### 3. EFFECTIVENESS OF CONSTITUTIONAL REFERRALS

As previously noted, the review of constitutional referrals submitted by ordinary courts by the Constitutional Court constitutes a special means of safeguarding the supremacy of the Constitution [Javakhishvili 2022, 86], conferring practical force on constitutional values.<sup>26</sup> It serves as an important instrument for preventing the adjudication of cases by ordinary courts on the basis of an unconstitutional norm.<sup>27</sup> In reviewing the constitutionality of the contested normative act, the Constitutional Court takes into account not only the literal meaning of the norm but also its practical application, which includes the authoritative interpretation provided by the ordinary court.<sup>28</sup>

Georgian legislation imposes an obligation on judges of ordinary courts to provide reasoning for constitutional referrals. This entails the judge fully articulating their position regarding the compliance of the norm to be applied with the Constitution, using legal arguments, presenting evidence and circumstances relevant to the case, referencing national and international acts, and addressing all legal factors that enable a complete understanding of the

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<sup>24</sup> Ruling No. 601 of the Constitutional Court of Georgia, 16 June 2014.

<sup>25</sup> recording notice No. 3/13/1715 of the Constitutional Court of Georgia, 04 November 2022, paras. II-4, II-10.

<sup>26</sup> Decision No. 3/4/1648 of the Constitutional Court of Georgia, 21 April 2022, para. II-11.

<sup>27</sup> However, there is a view in the doctrine that this institution is a weak tool for the Constitutional Court to exert legal influence over the ordinary courts. See Garoupa and Ginsburg 2015, 141.

<sup>28</sup> Decision No. 1/2/552 of the Constitutional Court of Georgia, 04 March 2015.

judge's position and its competent assessment. According to the practice of the Constitutional Court, while the Court will not refuse to consider a referral solely on the basis of insufficient reasoning, this does not relieve the judge of the obligation to provide proper reasoning. The obligation to justify a constitutional referral in European states is based on the principle, that the referral must clearly demonstrate to the constitutional court that resolving the constitutionality of the contested law is essential for the outcome of the case and that the referral is not of a random or arbitrary nature [Vamberg 2005, 89].

Constitutional referrals, submitted by ordinary courts, as previously noted, present multiple problems in terms of reasoning. These include the thematic brevity of referrals, inadequate quality of evidentiary arguments, reference to inconsistent constitutional grounds, and partial reasoning of the referral – deficiencies that are most commonly observed in the practice of constitutional proceedings. This situation necessitates the implementation of appropriate measures.

First and foremost, it is important to raise judges' awareness regarding constitutional issues, as well as, to provide them with institutional support and encouragement, so that concerns about case delays or the time required to prepare a referral, do not discourage them from submitting referrals. It is also crucial to develop informal formats that allow for direct interaction between ordinary and constitutional judges, which will foster a dialogue on constitutional legality. The combination of these measures should promote increased judicial activism regarding constitutional referrals and facilitate effective communication within the judicial system to ensure constitutional compliance.

The significance of a constitutional referral is fundamentally linked to the enhancement of its justification standard. In this regard, in addition to measures ensuring the involvement of ordinary courts, the stance of the constitutional court is also crucial. Regardless of the practice it has developed, it is important, that the court itself does not correct deficiencies in the referral's justification but establishes a clearer standard for justification. This approach prevents ordinary courts from avoiding the justification of norms and from making referrals on insignificant issues [Zoidze 2007, 159]. By doing so, the constitutional court promotes judges' self-monitoring and, consequently, the qualitative improvement of referral justifications, as well as the resolution of constitutional issues upon which ordinary courts will base their subsequent activities [Ginsburg and Garoup. 2011, 549].

Referrals by ordinary courts to the Constitutional Court depend on the initiative of the courts, which to some extent results in limited proactivity on the part of ordinary courts. In this context, a statistical analysis of constitutional referrals is particularly important: from 1997, when the first constitutional referral was registered, until January 2004, a total of 15 constitutional referrals

were submitted to the Constitutional Court.<sup>29</sup> Between 2004 and 2013, ordinary courts did not submit any constitutional referrals to the Constitutional Court. From 2014 to 2025, 74 constitutional referrals are being searched on the Constitutional Court's website.<sup>30</sup> Accordingly, over a span of 29 years, a total of approximately 90 constitutional referrals have been submitted to the Constitutional Court, which cannot be regarded as constituting a meaningful dialogue within the judicial system under this institutional framework.

The thematic aspect of constitutional referrals must also be taken into account. Despite several interesting referrals on which the Constitutional Court has issued significant decisions, the thematic scope of these referrals – most of which concern the compliance of norms applied in criminal cases with the Constitution – cannot be regarded as reflecting a diverse practice. As evidence, it can be noted, that of the constitutional referrals mentioned above, approximately 40 concern the constitutionality of only two articles of the Criminal Code.

The statistical and substantive analysis of constitutional referrals reveals that ordinary courts do not perceive the constitutional court as a competing institution – which is consistent with the legal nature of the constitutional court and is not unusual in the European constitutional discourse – but rather that the role of the constitutional court as the primary interpreter of constitutional issues is disregarded, and insufficient attention is given by ordinary courts to resolving constitutional matters. This undermines the involvement of the judicial system in strengthening constitutional legality and in ensuring the supremacy of the constitution.

It is widely argued, that ordinary courts should be considered not merely as implementers of the results of constitutional review, but as active participants in an institutional dialogue with the Constitutional Court [Mendes 2013, 145-48]. Unfortunately, this view does not correspond to the current legal reality in Georgia. Ordinary courts make use of constitutional practice only formally. While the work of judges in ordinary courts is primarily related to the application of existing legislation, its legal foundation is the Constitution of Georgia. Accordingly, their work cannot be viewed solely in technical terms or within the narrow framework of specialization, as it often involves values and interpretations closely connected to the Constitution [Rosenfeld 2019, 38-45].

In this regard, the low level of judicial activism is partly determined by certain normative factors. Specifically, under Georgian criminal procedural

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<sup>29</sup> See <https://constcourt.ge/ka/judicial-acts?quantity=10&type%5B0%5D=278&type%5B1%5D=279&type%5B2%5D=281&dateTo=30-01-2004&competence%5B0%5D=368&page=1> [accessed: 19.11.2025].

<sup>30</sup> See <https://www.constcourt.ge/ka/judicial-acts?quantity=10&type%5B0%5D=1829&page=1> [accessed: 19.11.2025].

legislation, a decision of the Constitutional Court is considered a newly discovered circumstance.<sup>31</sup> However, unlike criminal procedure, civil procedural legislation does not recognize a decision of the Constitutional Court as a newly discovered circumstance, which affects the protection of fundamental rights in this area in Georgia. Accordingly, it is important, on the one hand, to raise constitutional awareness and support ordinary courts in the implementation of constitutional decisions, and on the other hand, to adopt the necessary legislative amendments that recognize a constitutional court decision as a newly discovered circumstance and oblige ordinary courts to (re)examine cases on that basis.

Under Georgian legislation, a constitutional referral is essentially considered in the absence of the author of the referral and the body whose act is challenged in a specific case. The timeframe for examining a constitutional referral is nine months, with the possibility of a two-month extension. This period covers the time from the registration of the referral to its substantive consideration; however, no deadline is established for the issuance of a decision. As a result, the issuance of decisions on constitutional referrals is often unreasonably delayed.<sup>32</sup> Considering that the regulation of decision deadlines, as a rule, is uncommon in foreign constitutional practice,<sup>33</sup> it is important for the Constitutional Court of Georgia to take into account the interests of justice, the significance of its role as a body of constitutional control, and to issue decisions on constitutional referrals within reasonable timeframes. In this regard, it is advisable for the constitutional court to take into account the legal nature of the constitutional referral, the public interests associated with its consideration, and to ensure the possibility of examining constitutional referrals promptly and on an extraordinary basis. It is also important that clearer guidance regarding the priority consideration of referrals be established in legislation. The law may additionally specify concrete timeframes for rendering decisions on constitutional referrals.

Another procedural feature related to the timely adoption of decisions by the constitutional court concerns constitutional referrals: referrals from ordinary courts are considered by the plenary session (Plenum) of the constitutional court.<sup>34</sup> However, the court renders decisions on certain

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<sup>31</sup> Criminal Procedure Code of Georgia, 09 October 2009, Article 310 (D).

<sup>32</sup> For example, the Constitutional Submission No. 1543 of the Telavi District Court, dated October 23, 2020, was accepted for consideration by the Constitutional Court of Georgia on February 26, 2021, but the decision was issued only on July 12, 2024. See, Decision No. 3/4/1543 of the Constitutional Court of Georgia, 12 July 2024.

<sup>33</sup> Study on Individual Access to Constitutional Justice, CDL-AD (2010) 039rev, No.538/2009, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 27 January 2011, 41.

<sup>34</sup> Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Article 21.1.

competences (including individual constitutional claims) in a collegial session.<sup>35</sup> Given that the decisions of both the plenary and the collegial sessions carry equal legal force, and that a collegial session allows for a faster examination of cases, it is advisable to grant the collegial session the authority to consider constitutional referrals from ordinary courts. Moreover, for complex cases, Georgian legislation provides for the transfer of matters from the collegial session to the plenary, and this possibility would also apply to constitutional referrals.

The consideration of constitutional referrals from ordinary courts in Georgia is characterized by a procedural peculiarity whereby the referral is examined without the presence of its author.<sup>36</sup> However, it should be noted that the possibility of an oral hearing allows the parties to provide oral explanations, which can serve as a prerequisite for correcting deficiencies and perfecting the justification of the constitutional referral. Accordingly, involving the author of the referral and other interested parties in the proceedings, in addition to ensuring procedural transparency, will facilitate a high standard of justification for the referral and enable the constitutional court to examine the matter thoroughly, thereby contributing to the establishment of institutional dialogue between the judicial systems.

Taking all of the above into account – the statistical data, the lack of thematic diversity, and the practice of ordinary courts in applying constitutional jurisprudence – it can be concluded, that the institution of constitutional referrals is an ineffective mechanism for ensuring constitutional legality in Georgia. For the refinement of constitutional referrals, it is important to take into account the institutional, legislative, and procedural recommendations presented in this article, which will contribute to the institutional improvement of constitutional referrals: enhancing the standard of justification, addressing procedural challenges, increasing judicial activism, and ultimately establishing institutional dialogue between judicial systems. This, in turn, ensures the realization of the right to a fair trial and the implementation of the rule of law.

## CONCLUSION

The institutional relationship between constitutional and ordinary courts, facilitated through legal mechanisms, is a hallmark of a modern democratic state. This type of interaction ensures, on the one hand, an increase in internal judicial oversight, the enhancement of the effectiveness of court decisions, and the participation of courts in strengthening constitutional

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<sup>35</sup> The Constitutional Court of Georgia is composed of a plenary session (Plenum) of nine judges and two collegial panels, each consisting of four judges.

<sup>36</sup> Organic Law of Georgia “On the Constitutional Court of Georgia”, 31 January 1996, Article 42.1.

legality, and, on the other hand, the integration of constitutional decisions into the judicial process. This positively reflects on the image of both systems. However, the quality of the application of constitutional decisions by ordinary courts, the limited use of constitutional referrals, their thematic uniformity, and the problematic standard of reasoning in Georgia do not ensure a meaningful legal dialogue within the judicial system.

In this regard, it is important to implement institutional, legislative, and practical measures related to constitutional proceedings that enhance the effectiveness of constitutional referrals. Such measures would have a positive impact on the reputation of both constitutional and ordinary courts, strengthen constitutional legality, and facilitate the conduct of legal dialogue within the judicial system.

In light of the above, it is important to implement the institutional, legislative, and procedural measures presented in this article, including, among others, raising judges' awareness and providing institutional support, promoting systemic dialogue, controlling the admissibility of referrals, prioritizing the consideration of constitutional referrals and establishing the possibility for a referral to be reviewed by a constitutional court panel and decided through oral hearing. These recommendations will enhance the effectiveness of constitutional referrals, which will positively impact the image of both constitutional and ordinary courts, strengthen constitutional legality, and facilitate the conduct of legal dialogue within the judicial system. This, in turn, will contribute to the elevation of the standard of fundamental rights protection, the integration of constitutional principles into the administration of justice, the legal safeguarding of the constitution, and ultimately, the realization of the rule of law.

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