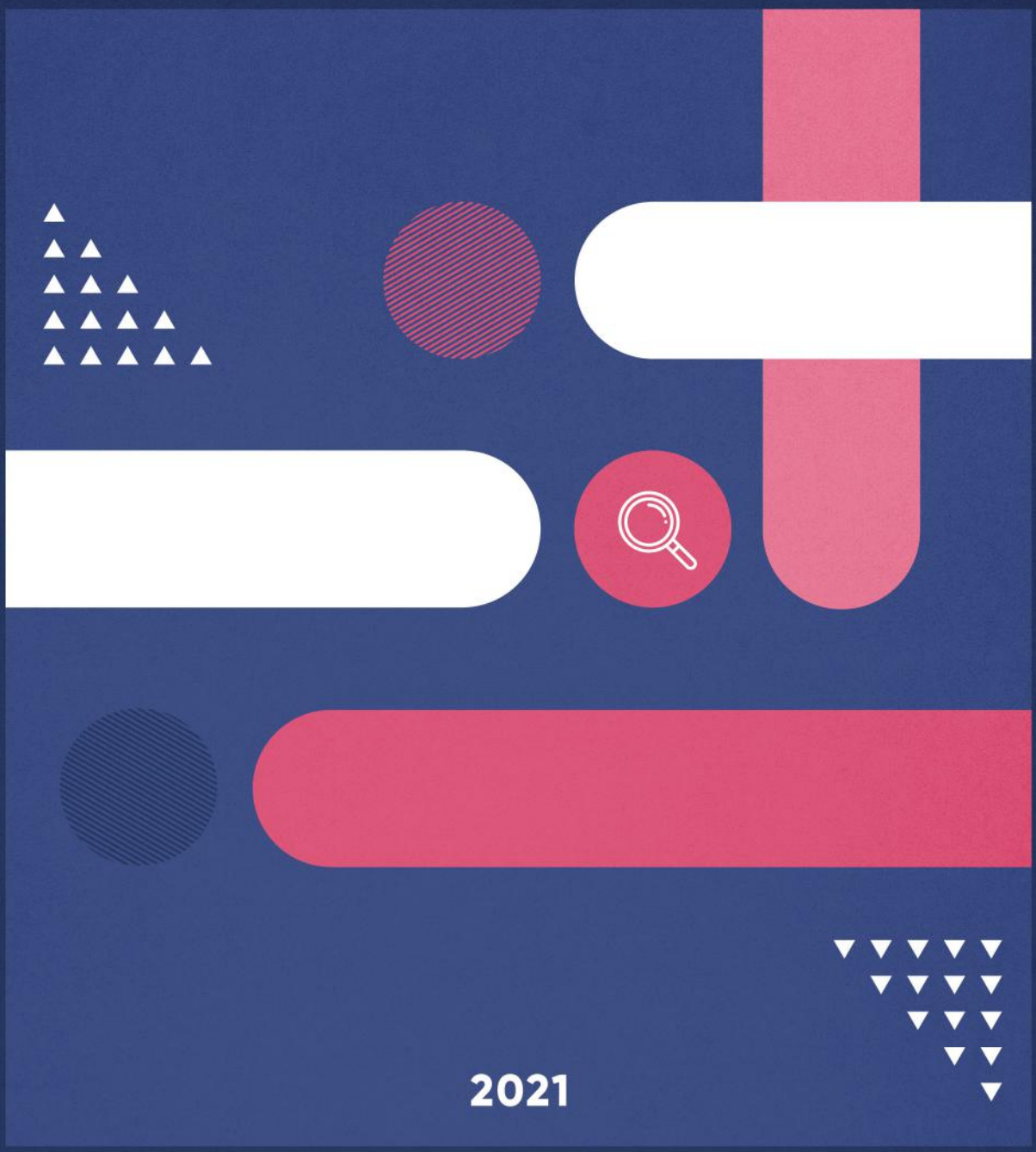
INDEPENDENT INVESTIGATIVE MECHANISM IN GEORGIA

ACHIEVEMENTS AND EXISTING CHALLENGES



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CONTENTS

1. INTRODUCTION

The State Inspector's Service, as the legal successor of the Office of the Personal Data Protection Inspector, started functioning on May 10, 2019. It is an independent state authority accountable only to the Parliament of Georgia.

The State Inspector's Service has been performing investigative functions since November 1, 2019. Establishment of an independent investigative mechanism to ensure an independent, impartial and efficient investigation of crimes committed by law enforcement officials was an important step forward. The need to create this mechanism has been emphasized for years by local and international organizations, as well as by the Public Defender's Office. The establishment of an independent investigative mechanism was also envisaged in the EU-Georgia Association Agenda 2017-2020.[1]

This study is the first document that comprehensively and thoroughly assesses the existing independent investigative mechanism in Georgia. It reflects the analysis of the institutional and legal framework related to the investigative function of the State Inspector's Service, identifies existing challenges and shortcomings, reveals obstacles to the investigation process, and provides specific recommendations that will help improve the capacity of the State Inspector's Service.

This study was prepared within the frame of the project "Supporting the Functioning of the State Inspector Service" which is implemented by the Institute for Development of Freedom of Information (IDFI) in collaboration with the Social Justice Center with the support of "Open Society Georgia Foundation."

[1] Available at: https://bit.ly/3vA0kJ4 Date of access: 05.05.2021.

2. METHODOLOGY

The authors used the following methodology in the process of working on this study:

ANALYSIS OF LEGAL ACTS

The following legislative acts were studied and analyzed by the authors within the scope of this study:

- Constitution of Georgia;
- Criminal Code of Georgia;
- Criminal Procedure Code of Georgia;
- Law of Georgia on the State Inspector Service;
- Law of Georgia on Personal Data Protection;
- Organic Law of Georgia on the Prosecutor's Office;
- Law of Georgia on Operative-Investigative Activities;
- Imprisonment Code of Georgia;
- Law of Georgia on Police;
- Law of Georgia on Conflict of Interest and Corruption in Public Service;
- Law of Georgia on Public Service.

The authors of the study also analyzed the following legal acts:

- Statute of the State Inspector’s Service;
- The rules of service for the employees of the investigative department and the general inspectorate (department) of the State Inspector's Service;
- The code of ethics for the employees of the investigative department of the State Inspector's Service;
- Order N423 of the Minister of Internal affairs of Georgia, adopted on August 2, 2016, on the approval of the typical statute of the temporary detention isolator of Ministry of Internal affairs of Georgia;
- Order N34 of the Minister of Justice of Georgia on determining investigative jurisdiction of criminal cases;
- Order No. 1310 of the Minister of Internal Affairs of December 15, 2005, on approval of the instructions for patrol police service of the Ministry of Internal Affairs of Georgia;
- Order N403 of the Minister of Justice of Georgia on amending the order N35 of the Minister of Corrections and Probation of Georgia on the procedure for conducting surveillance and control through visual and/or electronic means, and for storing, deleting, and destroying recordings;
- Order N35 of the Minister of Corrections and Probation of Georgia, adopted on May 19, 2015, on the procedure for conducting surveillance and control through visual and/or electronic means, and for storing, deleting and destroying recordings;
- Order N537 of the Minister of Justice of 13 May 2020 on the approval of the statute of the penitentiary institution N10;
- Order N663 of the Minister of Justice of November 30, 2020 on approval of the procedure for registration of injuries of the accused/convicted persons as a result of possible torture and other

cruel, inhuman or degrading treatment in penitentiary institutions;

- Order N01/132 of the State Inspector's Service of May 18, 2020 on the establishment of the council and the rules of its work to examine complaints concerning performance appraisal outcomes, matters related to incentives and disciplinary misconduct;
- Order of the State Inspector N01/104 on defining the areas of supervision of the State Inspector, the first deputy State Inspector and the deputy State Inspector;
- Order of the State Inspector of October 30, 2019 N01/271 on defining the action area of the east division and the west division within the investigative department of the State Inspector's Service.

ANALYSIS OF INTERNATIONAL STANDARDS

Alongside the domestic legal framework, the authors of the study also examined relevant international standards, in particular: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); Opinions of the Venice Commission; Istanbul Protocol; Resolution 2000/43 of the Human Rights Committee; Handbooks of UNODC; Decisions of ECHR; Opinions of the Human Rights Commissioner, etc.

ANALYSIS OF PUBLIC INFORMATION

The authors of the study requested public information from the State Inspector's Service, from the General Prosecutor's Office of Georgia, from the Ministry of Internal Affairs of Georgia, from the Ministry of Justice of Georgia, and the common courts. The authors of the study analyzed the statistical and other types of data received from the relevant agencies, internal legal acts, final decisions made as a result of the investigation, verdicts and rulings of common courts of 2014-2020 regarding the crimes falling under the investigative mandate of the State Inspector's Service.

INDIVIDUAL INTERVIEWS

To further identify challenges in the process of investigation and to analyze attitudes and opinions, the project team interviewed investigators and operatives of the Investigative Department as well as prosecutors using the pre-structured questionnaire. Within the scope of the study, a total of 16 interviews were conducted between August and October of 2020. The questions concerned the role of the investigator and the supervising prosecutor in the investigation process, their functions, legislative and practical shortcomings, obstacles in the investigation process, and other issues.

ANALYSIS OF SECONDARY SOURCES

To obtain additional information within the scope of this research, the project team studied reports of the State Inspector's Service and of the Public Defender, assessments, studies, and reports of local non-governmental organizations, opinions of field experts, and other sources.

3. KEY FINDINGS

INSTITUTIONAL ANALYSIS

- Overseeing the lawfulness of personal data processing at the Investigative Division falls exclusively under the mandate of the State Inspector's Service itself, which taking into consideration the conflict of interest, creates potential threats for the independence of the data protection mechanism.
- Even though the State Inspector's Service is responsible to inspect the lawfulness of data processing on its initiative, during 2019-2020 the Law-enforcement Supervision Department has not inspected the Investigative Division, since it has not received information or an appeal from a data subject regarding the lawfulness of personal data processing.
- Overall the existing regulations on the disciplinary proceedings of the Investigative Division employees should be assessed positively. The legislation regulates timeframes for relevant procedural actions, ensures involvement of a collegial body in the process, guarantees the possibility of obtaining evidence, and questioning of witnesses as well as the right to appeal the decisions taken by the Inspector.
- The direct supervisor of the employee subject to the disciplinary proceedings is not entitled to attend disciplinary proceedings with the status of the board member, only in case when the employee is giving an explanatory statement. The involvement of the direct supervisor in all other stages of disciplinary proceedings creates the risk of conflict of interest.
- During disciplinary proceedings, the State Inspector issues the final decision in two instances only: when imposing disciplinary measures for the misconduct of the Investigative Division employee or when releasing the employee from disciplinary liability in case if the misconduct is minor. Existing legislation foresees the possibility of appealing these decisions only, in line with the administrative legislation. Decisions on terminating disciplinary proceedings are taken by the Head of the General Inspection.
- Involvement of applicants in disciplinary proceedings and the rules of informing them about the stages and results of the proceedings is not normatively regulated.
- Existing legislation does not foresee the obligation to proactively publish disciplinary decisions in a depersonalized format.
- The 2020 Annual Report of the State Inspector's Service reflects information on financial and staffing topics, as well as the activities of the Disciplinary Board, which should be assessed positively. However, this obligation is not foreseen by the legislation. Moreover, the legislation does not oblige the State Inspector's Service to publish statistical information on the cases, in which the Prosecutor's Office has not initiated a criminal prosecution, which should be assessed negatively.
- The existing model of appointing the State Inspector does not include sufficient guarantees for avoiding political influence on the process and thus creates risks of taking politically motivated decisions.
- The number of investigators employed at the Investigative Division is particularly low compared to the number of cases, which constitutes one of the major challenges. In 2018 the Prosecutor's Office had significantly more human resources to investigate the cases which now fall under the mandate of the Investigative Division.
- The efficient operation of the State Inspector's Service is hindered by the lack of human, financial, and infrastructure resources.

INVESTIGATIVE JURISDICTION OF THE SERVICE

- The investigative mandate of the State Inspector's Service is restricted by pre-determined subjects and it does not extend to the alleged crimes committed by the Minister of Internal Affairs, Head of the State Security Services, and the General Prosecutor.
- The mandate of the Investigative Division does not extend to non-violent crimes committed by law-enforcement representatives, thus leaving the criminal cases of high public interest outside the scope of an independent investigative mechanism.
- There is no clear legal dividing line between the crime of exceeding official powers through violence or abuse of personal dignity and ill-treatment, due to which the investigative, as well as judicial practice on these crimes, is not uniform.
- Criminal qualification of violence against those under the state control with the general articles of official misconduct, instead of torture, inhuman or degrading treatment, affects the statute of limitations of investigations, which in case of official misconduct is 15 years, while in case of ill-treatment - unlimited.
- The disposition of abuse of power committed through violence or abuse of personal dignity covers the elements of exceeding official powers under the same aggravated circumstances, due to which in practice these acts are rarely given the criminal qualification under this article (article 332, para.3, sub paras “b” and “c” of the Criminal Code of Georgia).
- Scarce judicial practice over the abuse of power committed through violence or abuse of personal dignity indicates that it can be used as an alternative to the crimes, including more severe ones committed by law-enforcement representatives (intentional unlawful arrest or detention).
- According to article 335 of the Criminal Code of Georgia, coercion of a person by deception, blackmail, or other unlawful act by an official or by a person equal thereto to provide an explanation or evidence, or coercion of an expert to provide an opinion constitutes a criminal act. The disposition does not include "coercion to refrain from giving a statement or explanation”, which in practice constitutes a significant problem and requires relevant legal amendments.
- Coercion of a person to give testimony, explanation, or statement through violence or threat of violence endangering life or health (Criminal Code of Georgia, article 335, para 2, sub-para “a”) is effectively identical to the disposition of torture. At the same time, relevant sentences foreseen by the crimes are significantly different. Article 335, para 2 foresees the sentence of imprisonment from 5 to 9 years, while torture is punishable with imprisonment from 9 to 15 years.
- Paragraph 2 of article 378 of the Criminal Code of Georgia (coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence, and coercion of a convicted person to interfere with the fulfilment of his/her civil duties) does not specify the subject of the crime. To extend the mandate of the State Inspector's Service to this crime, it is necessary to include public servants or those with identical status within the subjects of the crime.
- The coercion of a person placed in a penitentiary institution into a refusal to give testimony is omitted from the disposition of the article, which requires relevant legislative amendments.
- Paragraph 2 of article 378 criminalizes coercion of a convicted person to interfere with the fulfilment of his/her civil duties, however, coercion of suspects with the same aim is not included in the article, which requires relevant legislative amendments.

INVESTIGATIVE MANDATE OF THE STATE INSPECTOR'S SERVICE

- One of the main challenges of the State Inspector's Service is delayed receipt of notifications on alleged crimes. Existing legislation does not include the obligation of all relevant state institutions to ensure immediate notification of the State Inspector's Service. Moreover, the legislation does not regulate specific timeframes and forms for submitting notifications.
- The temporary detention isolator ensures fast reporting to the State Inspector's Service on the cases of ill-treatment through text messages, which should be assessed positively. However, this form of communication is not normatively regulated.
- According to the Criminal Procedure Code judge refers to the State Inspector's Service if he/she has a suspicion that the suspect/accused was subjected to torture, degrading, and/or inhuman treatment, or if the suspect/accused makes a relevant statement before the court himself/herself. A similar obligation is not foreseen for the judges hearing administrative cases.
- Even after a year since the establishment of the Investigative Division of the State Inspector's Service, the Operative Agency still conducts its activities without relevant rules of operation.
- Existing legislation does not grant investigators the power to take independent decisions (without the involvement of prosecutors) on such issues as sending motions to the courts for conducting computer data-related investigative activities, or carrying out these activities under the circumstances of urgency, which significantly complicates the process of obtaining evidence.
- It is highly problematic, that two crimes falling under the mandate of the State Inspector's Service (threat of torture; coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence, and coercion of a convicted person to interfere with the fulfilment of his/her civil duties) are not included in the list of the crimes foreseen by the Criminal Procedure Code which can be the basis for conducting covert and computer data-related investigative activities.

ANALYSIS OF THE MAIN OBSTACLES IN THE INVESTIGATION PROCESS

- Existing legislation allows for the recording of the communication between law-enforcement representatives and citizens through technical means only in exceptional circumstances, which complicates the process of investigating cases of ill-treatment.
- Police buildings, their surroundings, and perimeters, as well as police vehicles, are not equipped with necessary video cameras, which complicates the efficient investigation of alleged ill-treatment cases.
- Video recordings obtained by the Investigative Division from the video cameras attached to the shoulder of the policemen are often intermittent, which constitutes a significant challenge for recovering the full picture of the incident occurring between police and citizens.
- Timely access to the video recordings stored in the database of the Ministry of Internal Affairs constitutes one of the main challenges of the State Inspector's Service. Unsubstantiated responses from the Ministry of Internal Affairs on specific reasons for the absence of video materials in its database are also problematic.

- Legal acts of the Ministry of Internal Affairs do not foresee the possibility of archiving audio/video materials stored at the entity for investigative purposes, which creates significant risks of deleting the materials and destroying evidence before relevant court decrees are obtained by the Investigative Division.
- According to the existing legislation, employees of the Investigative Division need special approval to enter penitentiary institutions to conduct relevant investigative activities, which creates risks of delaying investigations and obtaining necessary evidence.
- Whistleblower protection guarantees foreseen by the existing legislation do not apply to the employees of the law-enforcement institutions, which is an additional obstacle in the process of law-enforcement representatives' cooperation with the Investigative Division.
- Due to conflict of interest, the State Inspector's Service is not entitled to use special witness protection measures in the process of investigating alleged crimes committed by the employees of the Ministry of Internal Affairs, since the latter is the only entity responsible for the implementation of the special witness protection measures.
- In practice granting the status of a victim is intertwined with launching prosecution against an alleged suspect. This is particularly problematic since the status of a victim grants individuals multiple crucial procedural rights.
- The State Inspector's Service is not entitled to carry out special witness protection measures, which should be assessed negatively. The Ministry of Internal Affairs cannot serve as a sufficient guarantee for the protection of the witness, since there is a high probability that alleged perpetrators are employed in the system of the Ministry itself.
- During weekends the possibilities of conducting medical checks of alleged victims are limited in East Georgia, while in West Georgia it is complicated to conduct medical checks after 18:00. In response to these challenges, the 2021-2022 Action Plan for Combating Torture, Inhuman and Degrading Treatment or Punishment provides for the appointment of an expert on duty during non-working hours/days, which deserves a positive assessment.
- Within the first months after launching the investigative mandate of the State Inspector's Service, some challenges were evident in regards to the timely delivery of medical examination reports, however, the situation has improved lately. Medical examination reports on the new cases are sent to the State Inspector's service in a relatively shorter period.

THE SCOPE OF PROSECUTORIAL SUPERVISION AND OVERSIGHT

- Regardless of the institutional independence of the State Inspector's Service, the entity is not equipped with sufficient mechanisms for conducting independent investigations. Investigators are limited to conduct independent investigations on criminal cases and take decisions on important investigative measures.
- The Investigative Division is not entitled to access information kept in computer systems (video recordings) without the approval from the Prosecutor's Office even when there is the threat of destroying evidence, which could serve as the main basis for investigating alleged crimes committed by law-enforcement representatives.

- Conducting significant investigative and operative activities requires approval from the Prosecutor's Office, which complicates the process of obtaining necessary evidence in a timely and efficient manner.
- The exclusive instruments aimed at ensuring efficient investigation of the crimes falling under the mandate of the Investigative Division of the State Inspector's Service are not effective in practice:
  - Substantiated proposals on the expediency of conducting investigative activities are not obligatory for the prosecutors; if the prosecutor does not take into consideration the proposal, the process of appealing to the General Prosecutor is time-consuming. The final decision is taken by the General Prosecutor (or by a relevant person selected by the General Prosecutor), while the decision itself is not subject to judicial control.
  - Those personally involved in the process of conducting investigations do not participate in the submission and consideration of the proposals. Instead, those involved in this process are high-ranking officials – the Deputy State Inspector, State Inspector, and the General Prosecutor, which makes the process of decision-making even less flexible.
  - The execution of the Deputy State Inspector's power to review the materials on the case investigated by other entities is dependent on the decision of a prosecutor, who is entitled to reject the request without giving relevant reasons; Moreover, the legislation foresees 48 hours to review the proposals, within the period of which the possibility of destroying evidence cannot be excluded.
- According to the existing legislation, the General Prosecutor is entitled to transfer a case falling under the mandate of the Investigative Division to another entity, without the need of following investigative subordination, which creates the risks of obstructing the operation of the Investigative Division.
- The research revealed that the Prosecutor’s Office tends to change the criminal qualification of the cases falling under the mandate of the State Inspector’s Service. The studied decrees on amending the qualifications are not well substantiated and are not based on specific evidence obtained in the course of investigations. Moreover, some of these decisions were taken on the day of launching investigations, which prevents investigators from handling the cases at their discretion from the very initial stage.
- The Investigative Division and the Prosecutor's Office have different approaches when it comes to launching prosecution. The Prosecutor's Office is reluctant to launch prosecution until all investigative/procedural measures have been carried out, while the Investigative Division sees the necessity to initiate criminal prosecution based on the standard of mutually compatible evidence.
- As a response to a substantiated proposal on the expediency of launching prosecution, the Prosecutor's Office issued a mandatory instruction on conducting additional investigative activities on one case in 2020, which raised the risks of delaying the process of prosecution in the case under the mandate of the Investigative Division.

4. INSTITUTIONAL ANALYSIS

4.1. EXISTING CIRCUMSTANCES AND KEY CHALLENGES PRIOR TO THE ESTABLISHMENT OF THE STATE INSPECTOR'S SERVICE

Over the years, mistreatment, abuse of power, and conduct of investigations through illegal means have been accepted practices implemented at law enforcement and penitentiary institutions of Georgia. These challenging circumstances were reinforced by the multiple cases when no investigations were launched in response to the crimes committed by the employees of law enforcement and penitentiary institutions, added by undue conduct of investigations, delays in obtaining evidence and appointment of medical experts, the conduct of one-sided, biased investigations, their formal character, holding back the process of launching prosecutions, their suspension, and absence of final decisions. Due to these reasons, the law-enforcement system has been the subject of severe criticism on multiple occasions at the international as well as local levels.[2]

The system faced significant challenges in terms of transparency and accountability as well. The politicized Ministry of Internal Affairs and the concentration of excessive power in the hands of this institution required urgent actions.[3] With this aim, the public, civil society, the Ombudsman, and international organizations were calling on undelayed systemic reforms.

The systematic practice of law-enforcement representatives themselves breaching the law was facilitated by the syndrome of impunity. Often the crimes of torture and inhuman treatment were given the qualification of abuse of power or causing minor physical harm. [4] Instead of addressing the problems, the system attempted to hide and conceal the crimes. The law enforcement agents themselves often persuaded the alleged victims to withdraw complaints or confine themselves to formal interviews. [5]

Abuse of power by law enforcement agents during public demonstrations constituted yet another challenge. As a rule, no investigations were conducted on these cases. Moreover, self-incriminating statements were usually sufficient for rendering the decisions of guilty. The practice of obtaining statements through torture, inhuman and degrading treatment had a systematic character. Torture was a widely accepted practice at prisons, detention facilities, police divisions, and security isolators.[6]

Video footage depicting cases of torture leaked before the 2012 parliamentary elections was an example of systemic problem that existed in the penitentiary system. As there was no trust towards investigative and prosecution services, the non-governmental organizations called on for an impartial, independent, and effective investigation and to this end for the establishment of a specific mechanism.[7]

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[2] These challenges are highlighted in numerous reports of NGOs, the Ombudsman, and the European Committee for the Prevention of Torture.

[3] Thomas Hammarberg, Georgia in Transition, Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges, September 2013, p. 20, available at: https://bit.ly/2HGlpNp, access date: 27.11.2020.

[4] National Prevention Mechanism, Ill-treatment in Penitentiary Establishments and Temporary Detention Isolators in Eastern Georgia, 2012, p. 11, available at: https://bit.ly/37aowqY, access date: 27.11.2020.

[5] Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2011, p. 215.

[6] OSGF, Practices of Torture and Inhuman Treatment at the Penitentiary Institutions of Georgia (2003-12), 2012, available at: https://bit.ly/3perCm8, access date: 27.11.2020.

[7] Special Statement of NGOs, September 19th, 2021, available at: https://bit.ly/3fHpZss, access date: 27.11.2020.

Systematic breach of human rights by law enforcement representatives and the syndrome of impunity called for the establishment of an independent investigative body. This would have mitigated the possible negative effects of co-workers investigating alleged crimes committed by fellow employees and would have created the basis for public trust towards law enforcement.[8]

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its report of 2015 identified multiple problems in terms of investigative activities. Some of the problems highlighted were the following: lack of independent investigators, the slow and delayed response of the prosecution service to the complaints of the Ombudsman, delays in the process of obtaining evidence, and leaving prisoners under the supervision of those who would have committed alleged undue actions against them. Moreover, the actions of prison healthcare staff questioned their professional independence, as injuries were not duly documented.[9]

The Ombudsman has emphasized the challenges in terms of independent investigation and obtaining of evidence in almost all of its reports: the alleged victims were not protected from repeated pressure; there was an institutional linkage between the investigators and those alleged of the misconduct;[10] those subjected to the pressure or violence were not acknowledged as victims, thus denying them access to the case materials and proceedings. The actions of law-enforcement representatives were given the criminal qualifications, which entailed less legal responsibility.

Prior to the introduction of the independent investigative mechanism, the European Court of Human Rights found violations of multiple article(s) of the Convention in a number of cases against Georgia, noting that the process of investigations was conducted with severe violations. [11]

Even though the number of ill-treatment cases has decreased and the instances of launching investigations have increased in recent years, the conduct of investigation in a timely, thorough, and objective manner remains to be problematic. The call of the civil sector for the establishment of an independent investigative mechanism, equipped with relevant competence, mandate, and leverages was precisely dwelling from the lack of public trust towards and impunity of law-enforcement representatives.[12]

To address the existing systemic challenges, in 2015, civil society developed a draft law for the establishment of an independent mechanism equipped with the mandate of conducting investigative activities and prosecution. The draft law was based on the principles of the protection and respect for human rights and freedoms, independence and political neutrality, objectivity and impartiality, legitimacy and adequacy, publicity and transparency. Over the year, the civil sector has been

[8] Thomas Hammarberg, Georgia in Transition, Report on the human rights dimension: background, steps taken and remaining challenges, September 2013, p.23, available at: https://bit.ly/2HGIpNp, access date: 27.11.2020.

[9] CPT, Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 31 December 2015, p.20, available at: https://bit.ly/33olnCB, access date: 27.11.2020.

[10] The cases of alleged ill-treatment at the penitentiary institutions were referred by the Prosecutor's Office to the Ministry of Corrections and Probation, even though the correction institutions and the mentioned investigative entity were the subordinates of the Ministry of Justice.

[11] The decision of the European Court of Human Rights, on the case of Shavadze v. Georgia, dated November 19th, 2020 is particularly interesting in this regard, available at: https://bit.ly/37cMbHc, access date: 27.11.2020.

[12] Statement of the Coalition for an Independent and Transparent Judiciary, October 4th, 2017, available at: https://bit.ly/3w0Y8ej access date: 26.01.2021.

supporting the idea of establishing an investigative mechanism equipped with such functions and principles.[13]

Taking relevant measures for ensuring independent, impartial and effective investigations of the alleged crimes committed by law-enforcement representatives were also set out in the Association Agreement Agenda 2017-2020. Subsequently, the Parliament of Georgia adopted the Law on the State Inspector's Service, which equipped the entity with the functions of an independent investigative mechanism, while procedural oversight remained under the mandate of the Prosecutor's Office.

4.2. PROCESS OF ESTABLISHING INVESTIGATIVE DIVISION OF THE STATE INSPECTOR'S SERVICE

The Parliament of Georgia adopted the Law on the State Inspector's Service in 2018. The abolition of the Office of the Personal Data Protection Inspector and the establishment of the State Inspector's Service as its successor was conditioned by granting the latter with investigative powers. In addition to its existing functions,[14] the newly created Service was also granted the mandate to investigate certain crimes committed by law-enforcement representatives, public servants, or those with the status equal to public servants.[15]

The launch of the investigative mandate granted to the State Inspector's Service was postponed several times.[16] Initially, the independent investigative mechanism was planned to come into force from January 1st, 2019, however, it was first postponed until July 1st, 2019, and later until November 1st, 2019.[17] As a result, numerous cases falling under the mandate of the State Inspector's Service remained outside the independent investigative mechanism.[18]

The main reason and the obstacle for the delay in the process of activating the investigative mandate was the allocation of financial resources, which was duly requested by the Personal Data Protection Inspector, however, "the request was not granted in a timely manner."[19] The Government of Georgia delayed the process of allocating relevant financial recourses necessary for the provision of the Service with needed administrative and human resources for almost a year. [20]

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[13] See the Comments of the Coalition for an Independent and Transparent Judiciary on the Draft Law on the State Inspector's Service, available at: https://bit.ly/3dWoSX3, access date: 01.03.2021.

[14] Monitoring the legitimacy of personal data processing and the activities carried out at the central bank of covert investigative measures and electronic communication identification data.

[15] State Inspector's Service, History, available at: https://bit.ly/34FJE7l,access date: 27.11.2020.

[16] Statement of the Coalition for an Independent and Transparent Judiciary, July 9th, 2019, available at: https://bit.ly/2V8b8Of, access date: 27.11.2020.

[17] Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2019, p.87, available at: https://bit.ly/3vQvRXy, access date: 27.11.2020.

[18] EMC; Ill-treatment Prevention in Police Work, 2019. p. 16, available at: https://bit.ly/3cgbvPP, access date: 27.11.2020.

[19] Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2018, available at: https://bit.ly/3vM0WMg, access date: 27.11.2020.

[20] Statement of the Coalition for an Independent and Transparent Judiciary, July 3rd, 2019, available at: https://bit.ly/3fN6Y9W, access date: 27.11.2020.

Prior to setting up the independent investigative division, NGOs and the Ombudsman were emphasizing the gaps in the Law of Georgia on the State Inspector's Service and were requesting relevant actions for addressing them. Some of the existing challenges were: equipping the Service merely with the investigative mandate, under the strong prosecutorial supervision;[21] The limited list of crimes falling under the investigative mandate of the inspector; [22] The authority of the Prosecutor General to transfer cases to the investigative body without complying with the requirements of the investigative subordination;[23] Merging the personal data protection and investigative functions under a single agency;[24] Not extending of the mandate of the State Inspector's Service to crimes committed by the Prosecutor General, the Minister of Internal Affairs of Georgia, and the Head of the State Security Service of Georgia.[25]

In light of these challenges and before the full launch of the State Inspector's Service, the Committee for the Prevention of Torture considered it premature to make a credible assessment of the new, independent investigative mechanism. [26]

Prior to the launch of the investigative mechanism, certain amendments were introduced to the Law on the State Inspector's Service: several types of investigator positions were defined; The notion of intern-investigator was introduced; Additional barriers for recruiting investigators at the Inspector's Service were removed for those already employed in the similar area of criminal law; the deadline of the Deputy Inspector for referring to the supervising prosecutor before the preliminary hearing, regarding the necessity of investigative and procedural measures limiting property rights or right to privacy was extended, while the 20-day deadline of the Deputy Inspector for notifying the supervising prosecutor about the inclusion of the evidence in the relevant list to be submitted to the court was completely abolished.[27]

As a result, the State Inspector's Service started to exercise its investigative mandate from November 1st, 2019, without the concerns of the civil sector and the Ombudsman regarding the challenges in the Law on State Inspector's Service and largely in the criminal legislation been taken into consideration.

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[21] Statement of the Coalition for an Independent and Transparent Judiciary, February 14th, 2018, available at: https://bit.ly/3z97MgW, access date: 27.11.2020.

[22] ibid.

[23] Special Report of the Ombudsman of Georgia on the Effectiveness of Investigating the Criminal Cases of Ill-treatment, 2019, p. 3-5, available at: https://bit.ly/3cbDBMg access date: 27.11.2020.

[24] Opinions of the Coalition for an Independent and Transparent Judiciary Regarding the Establishment of the State Inspector's Service, March 20th, 2018, available at: https://bit.ly/33i8ieb, access date: 27.11.2020.

[25] Comments of the Coalition for an Independent and Transparent Judiciary on the Draft Law on State Inspector's Service, available at: https://bit.ly/3o4TqHM, access date: 27.11.2020. See also the Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2017, p.59-60.

[26] CPT, Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 10 May 2019, available at: https://bit.ly/3meEgzs, access date: 27.11.2020.

[27] 2019 Annual Report of the State Inspector's Service, p. 93-94, available at: https://bit.ly/3uKgK0I, access date: 02.04.2021.

4.3. COMPATIBILITY OF PERSONAL DATA PROTECTION AND INVESTIGATIVE FUNCTIONS OF THE STATE INSPECTOR'S SERVICE

The State Inspector's Service implements its activities in several directions: supervising the lawfulness of personal data processing, monitoring covert investigative measures and the activities carried out in the central bank of electronic communication identification data, and investigating the crimes committed by the representatives of the law-enforcement bodies, public servants or those with the status equal to public servants. [28]

As it has already been emphasized, the civil sector was skeptical towards the idea of combining personal data protection and investigative functions under a single entity. The co-existence of these two mandates under the Service raised concerns regarding the independence of the data protection mechanism and posed risks of conflict of interest.[29] Questions were raised about the effectiveness of monitoring data protection standards regarding the cases falling under the investigative mandate of the State Inspector's Service.[30] Combining these two distinct mechanisms under a single entity was explained by the need of saving financial resources. [31] The Ombudsman was noting that it was necessary to include relevant provisions in the legislation, aiming at avoiding the conflict of interests.[32]

The Law of Georgia on Personal Data Protection entered into force in 2012, however, monitoring covert investigative measures, and supervising the legality of automatic data processing by law enforcement agencies in the process of investigative or operative measures was not included within the mandates of the Personal Data Protection Inspector.

The organized practice of illegal surveillance has been a significant challenge in Georgia for years. Numerous video and audio materials were discovered at the Ministry of Internal Affairs in 2013, recorded with the purpose of intimidation, blackmail, or political influence without relevant court authorization. It was crucial to regulate technical and physical surveillance activities, provide the Personal Data Protection Inspector with needed support and necessary resources for preventing the Ministry of Internal Affairs, the Prosecutor's Office or other relevant executive entities from conducting illegal covert activities without a legal basis and prior permission from the court.[33]

As a result of the legislative amendments of 2014, the Inspector was granted the mandate to monitor covert investigative activities and the actions carried out in the databanks of authorized state institutions.[34] Personal data protection legislation was also extended to the automatic processing

[28] Statute of the State Inspector's Service, article 3.

[29] Opinions of the Coalition for an Independent and Transparent Judiciary Regarding the Establishment of the State Inspector's Service, March 20th, 2018, available at: https://bit.ly/34IgnsN, access date: 27.11.2020.

[30] GDI, Deficiencies of Investigating Ill-treatment Cases by Law Enforcement Representatives and Legal Status of Victims in Georgia, p. 14-15, available at: https://bit.ly/2RXVBTt, access date: 27.11.2020.

[31] Conflict of Interest and Threats – What Does the Establishment of State Inspector's Service Change, available at: https://bit.ly/3fDHSZk, access date: 27.10.2020.

[32] Assessment of the Ombudsman of Georgia regarding the Draft Law on State Inspector's Service, February 15th, 2018, available at: https://bit.ly/2JnPT8r, access date: 27.11.2020.

[33] Thomas Hammarberg, Georgia in Transition, Report on the human rights dimension: background, steps taken and remaining challenges, September 2013, p.21, available at: https://bit.ly/36aLj6w, access date: 27.11.2020.

[34] Report of the Personal Data Protection Inspector, 2014, p.4, available at: https://bit.ly/3g65g27, access date: 3.06.2021.

of data classified as state secrets for crime prevention and investigation, operative-investigative measures, and law enforcement.[35] A law-enforcement oversight body was set up at the Inspector's Service and given the mandate to monitor covert investigative measures, oversee the activities carried out in the databanks of authorized state institutions and supervise the legitimacy of personal data processing by law enforcement agencies.[36]

According to the current legislation, these functions are performed by the Law-enforcement Supervision Division created under the State Inspector's Service.[37] The division is responsible for monitoring the legality of personal data processing by law enforcement agencies or other public institutions, overseeing the covert investigative measures and the activities carried out at the central bank of electronic communication identification data, as well as taking relevant measures against the cases of alleged violations/incidents.[38]

It should be noted that the existing system of controlling the lawfulness of covert investigative measures does not guarantee the complete elimination of illegal wiretapping. Current regulations still fail to ensure strong protection of privacy, since the independence of LEPL Operational-Technical Agency itself is questionable. Besides, the risk of arbitrary activities and the abuse of power is not insured through effective control mechanisms. [39]

Under the current regulation, with regard to a criminal case falling under the mandate of the Inspector's Service, the Inspector's Service does not oversee the covert investigative measures or the activities carried out in the central bank of electronic communication identification data. [40] According to the legislation, such supervision is conducted by a judge of the Supreme Court (Supervising Judge) appointed by the Chairperson of the Supreme Court of Georgia.[41] The rules and provisions for exercising the supervisory mandate are laid out in the Criminal Procedure Code. Thus, current legislation ensures the existence of an external supervision mechanism aimed at avoiding conflicts of interest in the cases linked with covert investigative measures.

The issue of personal data processing by law enforcement agencies is not only considered in the context of covert investigative activities, as the agencies also process large volumes of personal data in the process of carrying out other functions foreseen by the legislation. Law-enforcement agencies collect vast information, including a special category of personal data. Consequently, the existence of special supervision for data protection becomes particularly necessary.

To investigate criminal cases falling under the jurisdiction of the State Inspector’s Service, the entity has the mandate to conduct a full investigation and carry out operative and investigative activities, in cases determined by the law and in accordance with the established procedural regulations as well as obtain, process and analyze information related to the activities of the State Inspector’s

[35] Law of Georgia on Personal Data Protection, article 3.

[36] Report of the Personal Data Protection Inspector, 2015, p. 29, available at: https://bit.ly/2RZYZ06, accessed on: 3.06.2021.

[37] Statute of the State Inspector’s Service, article 10.

[38] Ibid.

[39] Institute for Development of Freedom of Information (IDFI), Secret Surveillance in Georgia - Analysis of the Legislation and Practice, 2020, available at: https://bit.ly/2STHr5A , access date: 06.12.2020.

[40] Statute of the State Inspector’s Service, article 4, para 2, sub-paras “b” and “c”.

[41] Criminal Procedure Code of Georgia, article 3, para 32^{1}, article 143^{30} paras 5, 5^{7}, 6^{4} and 7, article 143^{4} para. 3.

Service and implement information systems.[42] This process, by its character, leads to the accumulation of large volumes of personal data in the hands of the investigative division.

It is important to subject the lawfulness of data processing at the Investigative Division of the State Inspector's Service to effective oversight. Observing the principles of data processing is crucial when dealing with personal data. This entails the proportional processing of personal data in accordance with the existing legislation and for clearly defined purposes. At the same time, the data must be valid and accurate and should only be kept/stored for the period necessary to achieve the purpose of the processing. [43] Proper oversight over the Investigative Division of the State Inspector's Service is essential for ensuring effective protection of these principles.

Control over the legality of personal data processing by the Investigation Division is exercised by the Law Enforcement Supervision Department of the Service.[44] Accordingly, the rules for monitoring (inspecting) the legality of personal data processing[45] also applies to the inspection of the Investigation Division. Moreover, the General Inspection (Department) ensures control over the compliance with the requirements of Georgian legislation within the Service.[46] According to the Code of Ethics of the Service, violating the requirements of personal data protection legislation, disclosing the data to third parties, or using data for non-official purposes is prohibited.[47]

According to the existing legislation, the State Inspector's Service is authorized, on his/her initiative or upon the application of an interested person, to inspect any data processor and/or authorized person.[48] To perform this function, the State Inspector has the authority to request relevant information from or enter any institution for inspection and get acquainted with the information stored at the institution, including the materials containing operative or crime investigative data.[49]

The Investigative Division of the State Inspector's Service takes relevant actions against the revealed cases of personal data violations in the course of conducting investigative activities. From November 1st, 2019 to February 3rd, 2021, the Investigative Division found several cases of alleged violations of the personal data of citizens committed by law-enforcement representatives. The Division referred the cases to the Law-enforcement Supervision Department.[50] These facts were revealed as a result of interviews with the alleged victims and information received during the investigation.[51]

In the process of investigating the case of Luka Siradze, significant problems were revealed at the school regarding the illegal processing of personal data of the school employees as well as mi-

[42] Law of Georgia on State Inspector's Service, article 20, paragraphs "a" and "b".

[43] Law of Georgia on Personal Data Protection, article 4.

[44] Letter of the State Inspector's Service SIS72000019484, dated December 1st, 2020.

[45] Decree N2 of the State Inspector's Office of July 2nd, 2019.

[46] Decree N2 of the State Inspector's Service, dated May 6th, 2020, on the Adoption on the Statute of the State Inspector's Service, article 19.

[47] Code of Ethics of the Investigative Division of the State Inspector's Service, article 10.

[48] Law of Georgia on State Inspector's Service, article 15, para 1.

[49] Ibid, paras 3 and 6.

[50] Letter of the State Inspector's Service NSIS32100002225, dated February 11th, 2021.

[51] Ibid.

nors.[52] In the course of investigating the case, the State Inspector's Service decided to inspect LLC Tbilisi Green School, as a result of which the Service declared the school as an offender.[53] Based on the above-mentioned, it can be stated that the Inspector's Service effectively combines investigative and personal data protection mandates.

According to the Georgian legislation, if the rights of a data subject are violated he/she can apply to the Service or the court under procedural regulations determined by law, and if a data controller is a public institution, he/she may also submit an appeal at the same or higher administrative body.[54] A data subject has the right to appeal the decision of a higher administrative body or the Service at the court through following existing procedural regulations.[55]

Subsequently, the appeals can be heard by the Inspector's Service as well as the court, while the decision of the Inspector's Service can be appealed against at the court. It should be highlighted, that at the same time the legislation determines other bases for conducting inspections, which are not linked with the appeals of data subjects, since the latter might not be informed about the breach of his/her personal data at all. In this case, overseeing the legality of data processing falls exclusively in the hands of the State Inspector's Service, which taking into consideration the conflict of interest, creates potential threats for the independence of data protection mechanism.

According to the information provided by the State Inspector's Service, the Law-enforcement Supervision Department has never inspected the Investigative Division, since it has not received information or an appeal from a data subject regarding the legality of personal data processing. [56] At the same time, the Investigative Division and the Supervisory Department actively cooperate on matters of personal data protection. The investigators are trained and provided with consultations on conducting investigative and covert investigative activities and protecting the rights of personal data subjects.[57]

During the interviews, the majority of the investigators noted that they did not see any problems in the compatibility of personal data protection supervision and investigative mandates, since these two directions of the Service are duly separated from each other (including territorially, they are allocated in different offices) and in practice, they never converge.

[52] Letter of the State Inspector's Service NSIS32100002225, dated February 11th, 2021, Annex 1: Decision of the State Inspector's Service Ng-1/005/2020, dated January 6th, 2020.

[53] Green School provided video surveillance in changing rooms and other areas of hygiene. Besides, the video surveillance system on the outside and inside perimeter of the school building was used without placing a warning sign in a visible place, data security was not protected. Moreover, the school provided video recordings to law enforcement agencies only upon verbal request, thus circumventing the law.

[54] Law of Georgia on Personal Data Protection, article 26, para 1.

[55] Ibid, para 3.

[56] Letter of the State Inspector's Service NSIS02000021592, dated December 30th, 2020.

[57] Ibid.

4.4. CONTROL AND SUPERVISION OF THE INVESTIGATIVE DIVISION OF THE STATE INSPECTOR'S SERVICE

An efficient system of accountability is one of the prerequisites for ensuring public trust towards the institutions. Due functioning of the Investigative Division of the State Inspector's Service is significantly determined by the existence of effective oversight and monitoring mechanisms.

4.4.1. INTERNAL CONTROL AND SUPERVISION

An essential element of ensuring accountability is the existence of an effective grievance mechanism and fair procedures for disciplinary misconduct which should be made available to the public. Publicly accessible, fair appeal and procedural mechanisms for disciplinary misconduct is an essential element for ensuring accountability.[58]

Supervision over the activities of the employees of the Investigative Division is the responsibility of the relevant Deputy Inspector.[59] Moreover, the General Inspection Department created under the Office is responsible for performing internal control activities.[60] The head of the Division is a direct subordinate of the Inspector and is accountable towards him/her.[61]

The General Inspection Department undertakes such important functions as ensuring the implementation of relevant laws and Inspector's legal acts by the employees of the Service, detecting the cases of conflict of interest and violation of ethics and internal regulations, reviewing the appeals and complaints regarding the alleged violations of human rights or alleged misconducts and taking relevant counter-measures, studying cases of administrative violations conducted by the employees, drafting conclusions and submitting information to the Inspector, reviewing correspondence within the scope of its competence and performing other important functions.[62] The responsibilities of the General Inspection are regulated by the Statute of the State Inspector's Service.[63]

Disciplinary proceedings against an employee of the Investigative Division may be initiated based on the audit, inspections and/or monitoring results, employee appeals, citizen complaints, obtained operative information, information received from the public and private institutions, and/or disseminated through media, hotline notifications, violations identified as a result of monitoring existing electronic programs, as well as in cases of reasonable doubt regarding disciplinary misconducts.[64]

Disciplinary proceedings within the State Inspector's Service are based on the principle of confidentiality.[65] The process includes the following stages:

[58] UNODC, Handbook on Police Accountability, Oversight and Integrity, 2011, p. IV, available at: https://bit.ly/39yq015, access date: 27.11.2020.

[59] The Law of Georgia on State Inspector's Service, article 6, para 1^1.

[60] The Statute of State Inspector's Service, article 8, para 1, sub-para "k".

[61] Ibid, article 20, para 1.

[62] Ibid, article 19, para 2.

[63] Ibid, para 3.

[64] The Rule on the Employees of General Inspection (Department) and Investigative Division Serving at State Inspector's Service, article 49, para 1.

[65] Ibid, article 44, para 4.

Upon the existence of relevant grounds the head of the General Inspection under the State Inspector's Service takes a decision on launching a disciplinary proceeding and selects a staff member for conducting an official inspection of a relevant employee under the Investigative Division

If a reported incident includes signs of a crime, the Head of the General Inspection, in agreement with the State Inspector sends obtained case materials to relevant law - enforcement entities

Based on the analysis of the case materials an employee of the General Inspection prepares one of the following conclusions:

1. Declares that disciplinary misconduct was committed and imposes relevant disciplinary measures, refers to the Head of the General Inspection with a recommendation or notes that imposing disciplinary measures is not possible;

2. Declares that disciplinary misconduct was not committed.

The Head of the General Inspection, in agreement with the State Inspector, terminates disciplinary proceedings if the objective basis for the disciplinary proceedings is no longer present

The conclusion is submitted to the Head of the General Inspection, which in turn refers it to the State Inspector.

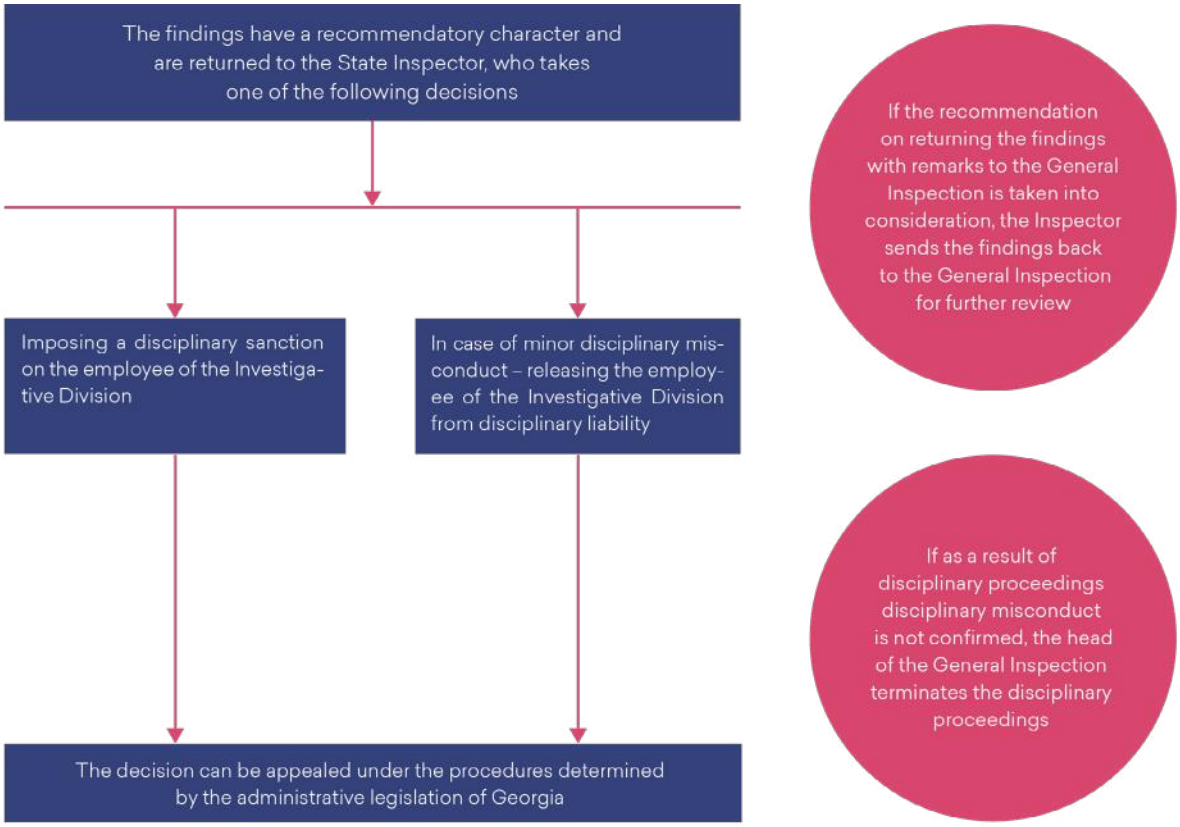
The State Inspector submits a report on the application of the disciplinary measures to the Employee Evaluation Appeal, Promotion and Disciplinary Board, which makes one of the following decisions

Imposes disciplinary liability and determines relevant disciplinary measures

Refuses to impose disciplinary liability and relevant disciplinary measures

Instead of imposing a disciplinary liability for the misconduct of the Investigative Division employee, refers to the Head of the General Inspection with a recommendation

Returns the conclusions to the General Inspection of the Service with comments



The findings based on the analysis of the case materials obtained during disciplinary proceedings include information on the individual committing the alleged misconduct and the description of the misconduct. Moreover, the findings should be well substantiated. When misconduct is not confirmed, the obtained information is described and a document substantiating the absence of the misconduct is produced.[66] Regardless of the outcome, the obligation to develop a well-substantiated decision creates the perspective for an interested party to appeal the decision in the court, which should be assessed positively.

Existing legislation determines the deadline for preparing and sending the report on the main findings of a disciplinary proceeding to the head of the General Inspection Department.[67] Having relevant regulations setting timeframes for conducting disciplinary proceedings should be assessed positively, which, unfortunately, is not a common practice at other institutions.

As shown above, the Inspector submits his/her decision regarding the disciplinary measure to the Employee Evaluation Appeal, Promotion, and Disciplinary Board.[68] The involvement of the collegial body in the process of resolving disciplinary issues should be assessed positively.

The members of the Board are the First Deputy State Inspector, which is also the chairperson of

[66] Ibid, para 9 and para 10.

[67] Ibid, para 11, para 12 and para 14.

[68] Ibid, para 15.

the board, Deputy State Inspectors, out of which the Supervisor of the Administrative Department serves as a deputy chairperson of the board, Head of the General Inspection, heads of Law-Enforcement Supervision, Public Sector Supervision, Information Technologies and Monitoring, Legal, Administrative, International Relations, Analytical, and Strategic Development departments, Deputy Head of the Investigative Division and the Head of Eastern Georgia Unit, and Human Resources Specialist of the Administrative Department (Board Secretary).[69]

The board is eligible to take decisions if at least half of its members are present at the meeting. The decisions are made by open ballot, with the majority votes of those present (the Board Secretary does not take part in the voting procedure). The members of the Board can refrain from participating in the vote. In case of equal distribution of votes, the Board Chairperson takes the final decision.[70]

During the hearing of disciplinary misconduct, the person suspected of alleged misconduct and the Head of the General Inspection (unless attending to present the main findings of the case) are not entitled to attend the Board hearings. Moreover, the direct and upper supervisors of the suspected staff member cannot attend the hearing when the employee is presenting an explanatory statement to the Board.[71] To avoid conflict of interest, it is also important that the immediate supervisor of the employee whose disciplinary liability is being considered is not allowed to participate in the disciplinary misconduct hearing and voting procedures, which excludes any bias in decision-making.

Within the seven working days after receiving the recommendation or revising the report on the conclusions based on the recommendations, the State Inspector decides on the disciplinary measure of the Investigative Division employee, or in case of minor misconduct – on releasing the employee from a disciplinary liability.[72] The decision of the Inspector can be appealed in line with the rules of administrative legislation,[73] which should be assessed positively. However, unfortunately, the Inspector issues a legal act in the above-mentioned cases only. If there is no objective basis for disciplinary proceedings, the Head of the General Inspection terminates the proceedings and agrees the decision with the State Inspector.[74] Administrative proceedings are also terminated if disciplinary misconduct is not proven.[75]

Since the establishment of the Investigative Division of the State Inspector's Service up until January 31st, 2021 there were three disciplinary proceedings launched against the employees of the Investigative Division, out of which two were terminated and one is still under review.[76] In both of the cases, the disciplinary proceedings were terminated because no disciplinary misconduct had

[69] The Decree N01/132 of the State Inspector's Service, dated 18.05.2020, on the Establishment of the Employee Evaluation Appeal, Promotion, and Disciplinary Board and Approving the Rules of Its Operation, para 1.

[70] The Decree N01/132 of the State Inspector's Office, dated 18.05.2020, on the Establishment of the Employee Evaluation Appeal, Promotion, and Disciplinary Board and Approving the Rules of Its Operation, article 3, para 3.

[71] Ibid, article 5, para 1.

[72] Ibid, article 53, para 1.

[73] Ibid, para 2.

[74] Ibid, article 54, para 4.

[75] Ibid, article 53, para 3.

[76] Letter NSIS32100002225 of the State Inspector's Service, dated February 11th, 2021.

been established.[77] The report on the outcome of the case is signed by the employee/employees of the General Inspection of the State Inspector's Service, while the head of the General Inspection signed it with the note "I agree".

It is advisable for the final decision on the disciplinary proceedings to be issued in the form of an administrative act of the State Inspector regardless of its outcome. This would ensure the possibility of appealing all disciplinary decisions through administrative proceedings in the court.

The rules of disciplinary procedure include the possibility of questioning witnesses, however, if the applicant does not at the same time have the status of a witness, his/her involvement in the proceedings is not ensured. Moreover, even the status of a witness does not guarantee full involvement in the proceedings. This is particularly noteworthy since those cases which include instances of harming third persons are also considered disciplinary misconducts. For example, a violation of the Code of Ethics can be qualified as disciplinary misconduct, while at the same time some articles of the Code of Ethics are those directly affecting the interests of third parties. In particular, breaching the requirements of the Law on Personal Data Protection, such as disclosing personal or confidential information to third parties or using this information for unofficial purposes, or discriminatory, abusive, degrading actions or statements against the participants of a criminal process are considered as the violations of the Code of Ethics.[78] Thus, even though disciplinary proceedings are limited to the relationship between the employee and the employer, it is important that the applicants as well have the possibility to be involved in the proceedings as they have a significant interest in the outcome of the case.

Citizen applications constitute one of the grounds for initiating a disciplinary proceeding, however, the rules provide neither for the involvement of the applicant in the process nor for the obligation to inform him/her on the measures taken, the course of the case, or its results. Thus, it is unknown whether an applicant is provided with this information and if so within what timeframes. Taking into consideration that disciplinary proceedings are confidential, there is enough ground to assume that applicants are not informed either about the case proceedings or their outcome. Such ambiguity leaves the impression that the applicants are not given even the slightest opportunity to monitor the proceedings of alleged disciplinary misconduct.

Moreover, it is advisable for the existing legislation to include the obligation of the State Inspector's Service to proactively publish decisions on disciplinary misconducts, in a depersonalized manner. Such regulation would increase the transparency of the State Inspector's Service and public trust towards this institution.

[77] Out of the terminated proceedings, one referred to the case of alleged improper fulfillment of official duties during the questioning procedure, while the other concerned unethical conduct as well, namely the video recording of a citizen during the questioning without relevant consent. Annexes 6 and 7 of letter NSIS32100002225 of the State Inspector's Service, dated February 11th, 2021.

[78] Code of Ethics of the Investigative Division of the State Inspector's Service, articles 9, 10, and 12.

4.4.2. PARLIAMENTARY OVERSIGHT

The State Inspector's Service is accountable to the Parliament of Georgia. The Inspector reports to the Parliament annually, no later than March 31st each year. The report includes information on various directions of the State Inspector's Service, including the information on the state of investigating criminal cases falling under the mandate of the Service and information on the activities undertaken in the reporting year.[79] Report of the State Inspector's Service should reflect the main trends, evaluations, conclusions, and recommendations, as well as statistical information on investigations. The annual reports should not include investigative information on particular criminal cases or their details.[80]

The list of the issues to be included in the annual report of the State Inspector's Service, determined by the legislation, should be increased. The report should reflect information on staff and financial issues, as well as the operation of the Disciplinary Board. The State Inspector's Service should be obliged to publish statistical information on those cases, which have not been subjected to criminal prosecution by the Prosecutor's Office.

The legislation also includes other mechanisms of parliamentary oversight. The Parliament is entitled to summon the Inspector to the parliamentary and/or committee hearings to receive information on ongoing activities of the Service. In this case, the information requested should not be linked with a specific criminal case or its circumstances.[81]

Within the auspices of parliamentary oversight, a member of the Parliament is entitled to refer a question to the entity accountable towards the legislative branch,[82] among them the State Inspector's Service. Providing a timely and comprehensive response to the questions is mandatory.[83] Moreover, a group composed of at least seven MPs, a fraction is entitled to refer a question to the State Inspector's Service through interpellation.[84] The addressee is responsible to personally provide answers to the questions at a plenary session of the Parliament as well as submit a written response.[85] In addition, the State Inspector can address the Parliament on its initiative and the legislative branch will ensure his/her hearing according to the Rules of Procedure of the Parliament of Georgia.[86]

A single case of an MP referring to the State Inspector's Service with an inquiry can be found on the website of the Parliament of Georgia.[87] The question was related to the one-time expenses allocated for the establishment and launch of the institution, as well as the financial resources necessary for the operation of the Service for a year.

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[79] The Law of Georgia on State Inspector's Service, article 12, para 1.

[80] Ibid, para 2.

[81] Ibid, para 4.

[82] Ibid.

[83] Ibid.

[84] Ibid, article 149.

[85] Ibid.

[86] Ibid, article 154.

[87] Available at: https://bit.ly/3ogNH1I, visited on: 02.12.2020.

4.5. RULES FOR THE APPOINTMENT AND DISMISSAL OF THE STATE INSPECTOR, SCOPE OF THE MANDATE TO PARTICIPATE IN INVESTIGATIVE PROCEDURES

4.5.1. RULES FOR THE APPOINTMENT AND DISMISSAL OF THE STATE INSPECTOR

The candidates for the position of State Inspector are selected by the commission established by Prime Minister.[88] The members of the commission are the representative of the Government of Georgia, the Chairperson of the Parliamentary Committee for Human Rights and Civil Integration, the Chairperson of the Parliamentary Legal Committee, Deputy Chairperson of the Supreme Court, the First Deputy Prosecutor General or Deputy Prosecutor General, Ombudsman or a representative of the Ombudsman, and the representative of a non-commercial legal entity with the experience in human rights or personal data protection selected by the Ombudsman based on open competition.[89]

Citizens of Georgia with no criminal record, with higher education in law, no less than 5 years of professional experience in the area of justice, law enforcement, or human rights, and with a high professional and moral reputation can participate in the competition.[90]

The practice of other countries is particularly interesting in this regard. For instance, the head of the relevant state entity in the United Kingdom - Independent Office for Police Conduct (IOPC) should not have the experience of working in the police at all.[91] Different is the approach of New Zealand and Australia, where only acting or previous judges can be appointed as the heads of the independent investigative mechanisms.[92] The general criteria determined by the Georgian legislation ensures the diversity of applicants since candidates with various experiences can participate in the competition.

The commission selects and nominates no less than two and no more than 5 candidates to the Prime Minister, while also taking into consideration the gender balance.[93] Within 10 days, the Prime Minister nominates two candidates to the Parliament.[94] The Parliament votes separately for each candidate. The candidate who receives more votes, but no less than the majority of the full Parliament composition, is considered elected.[95]

The given model of electing the State Inspector does not include sufficient safeguards for avoiding

[88] The Law on State Inspector's Service, article 6, para 2.
The selection commission selects the chairperson out of its members, at the first meeting and adopts the statute of the commission within one week. The statute sets the rules of operation of the commission as well as the rules and timeframes of providing the commission with the candidacies of State Inceptor.

[89] The Law on State Inspector's Service, article 6, para 2.

[90] Ibid, para 1.

[91] Policing and Crime Act 2017.

[92] New Zealand, Independent Police Conduct Authority Act 1988 section 5.

[93] The Law on State Inspector's Service, article 6, para 4.

[94] Ibid, para 5.

[95] Ibid, para 6. If none of the candidates receives a sufficient number of votes, the Prime Minister announces a new competition within 2 weeks.

political influence over the process. The institutional independence of the State Inspector's Service is primarily determined by the political neutrality of its head. The nomination of the candidate by the political figure - Prime Minister, and the election of the Inspector by the majority of the MPs, creates risks of politically motivated decision-making.

It should be noted that already in 2014[96] there was the recommendation of substituting the Prime Minister with a neutral person in the process of electing the Inspector,[97] which was determined by the need of avoiding political influence in the process. Thus, the existence of legal guarantees ensuring the independence and political neutrality of the Inspector is of crucial importance.

The term of office of the State Inspector is 6 years. The same person cannot be elected as the State Inspector for two consecutive terms of office.[98] The set term of 6 years is in line with the standards of EPAC (European Partners against Corruption), according to which, to ensure independence the head of the Office should be elected with a minimum term of 5 and a maximum term of 12 years.[99]

The power of the State Inspector is terminated upon the expiry of 6 years from the date of his/her election or in the case of early termination of powers.[100] The legislation includes the following 7 grounds for the early termination of the State Inspector's mandate:

- Loss of Georgian citizenship;
- Failure to perform official duties due to health condition for four consecutive months;
- Entering into force of a court conviction again the Inspector;
- Declaration of the Inspector by a court as a support beneficiary, missing or dead;
- Holding a position or undertaking activities incompatible with the status of the State Inspector;[101]
- Voluntary resignation;
- Death.[102]

In line with the guiding principles of EPAC, existing legislation does not foresee the possibility for the dismissal of the Inspector based on the decisions made in an official capacity.[103] The legal basis for the early termination of the State Inspector's mandate in this regard is in line with the international standards.

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[96] On December 8th, 2014 within the auspices of the joint project supported by Open Society Georgia Foundation (OSGF) and Office of the United Nations High Commissioner for Human Rights (OHCHR) a group of experts prepared a Draft Law on Independent Investigative Mechanism.

[97] Opinion of Manfred Nowak, the expert of the European Commission regarding the model of independent investigative mechanism for the crimes of torture, 2015.

[98] The Law of Georgia on State Inspector's Service, article 6, para 7.

[99] EPAC, Police Oversight Principles, November 2011, para 2.2.5.

[100] The Law of Georgia on State Inspector's Service, article 6, para 10.

[101] According to article 8, para 1 of the Law on State Inspector's Service duties of the Inspector shall be incompatible with membership in state and local self-government representative bodies of Georgia, any post within state service and public service, and other remunerative work, except for scientific and pedagogic activity or activity in the field of art. The State Inspector shall not be engaged in entrepreneurial activities, shall not directly exercise the powers of the permanent manager of the entity of entrepreneurial activity, a member of a supervisory, control, revision, or consultative body. The State Inspector shall not be a member of any political party or participate in political activity.

[102] The Law of Georgia on State Inspector's Service, article 9.

[103] EPAC, Police Oversight Principles, November 2011, Para 2.2.6.

4.5.2. SCOPE OF THE STATE INSPECTOR'S MANDATE TO PARTICIPATE IN INVESTIGATIVE PROCEDURES

The mandate of the State Inspector is determined by the Law of Georgia on State Inspector's Service[104] and the Statute of State Inspector's Service.[105] According to the legislation, the State Inspector is entitled to intervene in investigative procedures under two alternative circumstances:

1) If a supervising prosecutor of a criminal case does not take into consideration a substantiated proposal of a Deputy Inspector in charge of the Investigative Division, the Inspector is entitled to address the Prosecutor General with the proposal:[106]

- Regarding the expediency of initiating a criminal prosecution, or terminating a criminal prosecution and/or investigation;
- No later than 14 days before the pre-trial hearing – regarding the expediency of investigative or procedural measures carried out based on the ruling of a judge, restricting the inviolability of private property, ownership, or the right to privacy;
- Regarding the inclusion of specific evidence in the list of evidence to be submitted to the Court. [107]

2) The Inspector can address the Prosecutor General in writing with the request of transferring a case for investigation if the State Inspector's Service has the information, that a case falling under the jurisdiction of the Service is referred to one of the investigative units by the Prosecutor General.[108] The request of the State Inspector is decided upon within 24 hours.[109]

It should be highlighted that the Investigative Division does not fall under the supervisory authority of the State Inspector.[110] During the interviews conducted with the investigators within the scope of the project, it was revealed that even though rare, there have still been instances when the investigators studied the details of a criminal case together with the State Inspector, however as a rule the Inspector does not intervene in the investigative process of the cases falling under the mandate of the Investigative Division, and the Inspector only receives general information on the conduct of investigations. In general, the State Inspector is seen as a figure who determines the criminal policy of the Investigative Division.[111]

[104] The Law of Georgia on State Inspector's Service, article 5.

[105] Statute of State Inspector's Office, article 6.

[106] The Law of Georgia on State Inspector's Service, article 19, para 7.

[107] Ibid, para 6.

[108] According to article 33, para 6, sub-para "a" of the Criminal Procedure Code the General Prosecutor can transfer a case from one investigative body to the other, regardless of the investigative subordination.

[109] The Statute of State Inspector's Service, article 6, para 1, sub-para "l". The Law of Georgia on State Inspector's Service, article 19, para 5.

[110] Decree N01/104 of the State Inspector on Determining the Areas Falling under the Supervisory Mandate of the First Deputy and Deputy Inspector.

[111] The information is based on individual interviews conducted during the project implementation with the investigators of the State Inspector's Service.

4.6. SELECTION, APPOINTMENT, AND SCOPE OF POWERS OF THE DEPUTY INSPECTOR SUPERVISING THE INVESTIGATIVE DIVISION

The State Inspector appoints the First Deputy and two Deputy Inspectors[112] and defines their functions and duties.[113]

According to the decree of the State Inspector, the Investigative Division falls under the supervisory mandate of the First Deputy Inspector.[114] Thus the First Deputy Inspector coordinates the activities of the Investigative Division and conducts overall supervision over the employees of the Department.[115] The Deputy determines the main directions and priorities of the structural unit falling under its mandate and represents the unit in the relations with other state entities and/or international and other organizations.[116]

In the absence of the State Inspector, termination or suspension of its mandate, the First Deputy Inspector takes up his/her responsibilities.[117]

The First Deputy is accountable towards the State Inspector,[118] whereas the heads of structural units falling under the supervision of the former are accountable towards the First Deputy Inspector.

According to the legislation, the First Deputy is entitled upon such necessity to refer to a prosecutor with the proposal on the expediency to start prosecution, terminate prosecution and/or investigation; on the expediency of investigative or procedural measures carried out based on the ruling of a judge; and regarding the inclusion of specific evidence in the list of evidence.[119] Such regulation reveals that the Inspector's Service cannot take decisions independently on carrying out a number of investigative measures, which constitutes a considerable challenge in terms of the functional independence of this institution.

If the State Inspector's Service has the information that a criminal case falling under its mandate is being investigated by other units, the First Deputy is entitled to study case materials and address the supervisory prosecutor with a written proposal of transferring the case for the investigation to the State Inspector's Service.[120]

If based on the procedural legislation the Deputy Inspector is excluded from participating in the

[112] The Law of Georgia on State Inspector's Service, article 6, para 11. The Statute of State Inspector's Office, art. 7.

[113] The Statute of State Inspector's Service, article 6, para 1, sub-para "o".

[114] Decree N01/104 of the State Inspector on Determining the Areas Falling under the Supervisory Mandate of the First Deputy and Deputy Inspector. According to the decree among others, the Economic Department also falls under the supervisory area of the First Deputy.

[115] The Law of Georgia on State Inspector's Service, article 6, para 11^1.

[116] The Statute of State Inspector's Service, article 7, para 3, sub-paras "a" and "b".

[117] The Law of Georgia on State Inspector's Service, article 6, para 12. The Statute of State Inspector's Service, article 6, para 2.

[118] The Statute of State Inspector's Office, article 7, para 5.

[119] The Law of Georgia on State Inspector's Service, article 19, para 6.

[120] Ibid, para. 4.

criminal proceedings,[121] the mandate is carried out by the State Inspector. [122]

From January 1st until December 9th, 2020 the Deputy Inspector with relevant authority studied the materials of two criminal cases under the investigation of other units. Due to the absence of the cases falling under the authority of the Inspector's Service no requests were sent to the supervising prosecutor regarding the transfer of criminal cases.[123]

In 2020 the First Deputy Inspector referred to the supervising prosecutor with 31 substantiated proposals, out of which the Prosecutor's Office fully took into consideration 30 proposals and partially considered one proposal.[124]

Unfortunately, the existing legislation does not foresee the opportunity of appealing the decision of the prosecutor on turning down a substantiated proposal to the court.[125] The legislation needs to foresee the opportunity of appealing against such decisions. The existence of judiciary control over this process would increase the trust towards the decisions made on the cases falling under the mandate of the Inspector's Service.

4.7. STRUCTURE AND TERRITORIAL COVERAGE OF THE INVESTIGATIVE DIVISION

4.7.1. STRUCTURE OF THE INVESTIGATIVE DIVISION

The Investigative Division is one of the 11 structural units under the State Inspector's Service. The Division was established in 2019 as a result of relevant reforms implemented at the Inspector's Service.[126] The Division combines four sub-units: East, West, Adjara Autonomous Republic's and Operative agencies.[127] The Agency of the Autonomous Republic of Adjara was added to the State Inspector's Service in 2021.

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[121] According to article 59 of the Criminal Procedure Code a judge, a juror, a prosecutor, an investigator or a secretary of the court session cannot participate in criminal proceedings if:
a) he/she has not been appointed or elected to the position in the manner prescribed by law;
b) he/she participates or participated in this case as the accused, a defense lawyer, a victim, an expert, an interpreter, or a witness;
b[1]) the investigation is in progress concerning the alleged commission by him/her of a crime;
c) he/she is a family member or close relative of the accused, defense lawyer, or of the victim;
d) they are members of one family or close relatives;
d[1]) he/she was a mediator in the same case or on the case closely related to it;
e) other circumstances question his/her objectivity and impartiality.

[122] The Law of Georgia on State Inspector's Service, article 19, para 8.

[123] Letter SIS52000021209 of the State Inspector's Service, dated December 25th, 2020.

[124] Letter SIS72100001356 of the State Inspector's Service, dated January 29th, 2021.
According to the letter, three proposals were related to the termination of the investigations, while 28 concerned the expediency of carrying out investigative measures. Namely, 5 proposals concerned seizure, and 23 were related to carrying out the investigative activities envisaged by Article 136 of the Criminal Procedure Code of Georgia – requesting documents/information. One proposal, which was partially granted, related requesting of information.

[125] Annual Report of the State Inspector's Service 2019, p.125, available at: https://bit.ly/3v2W586, accessed on 7.06.2021.

[126] Ibid, pg. 18.

[127] The Statute of State Inspector's Service, article 13, para 1.

To date, the Investigative Division is the largest structural unit of the State Inspector's Service. The Head of the Division is accountable to the State Inspector and relevant supervisory Deputy Inspector.[128] The Head of the Division distributes duties among the employees, coordinates their activities, and supervises the quality of their work.[129]

The Investigative Division has the mandate to investigate crimes falling under the mandate of State Inspector's Service.[130] In particular, the division is responsible for unbiased and effective investigation of certain crimes committed by the representatives of the law-enforcement bodies, public servants, or those with the status equal to public servants. Based on its mandate, the Division is entitled to conduct full-scale investigations, carry out operative-investigative and forensic activities.[131]

The Head of the Division is responsible for the successful implementation of the duties and responsibilities assigned to the Division.[132] The Head of the Division must have higher education in law (preferably a Master's Degree), 5 years of experience working as a judge, prosecutor, investigator, or attorney, and at least 2 years of experience working in a managerial position.[133]

The Head of the Division has two deputies, one of which supervises the East Agency, while the other - the West Agency. The main duty of the deputies is to support and assist the Head of the Division. They are actively involved in planning, implementing, and proper allocation of resources throughout the Division.[134] In accordance with existing legislation and procedural regulations the Deputy supervises and/or conducts full-scale investigations, investigative and other procedural actions, and upon such necessity carries out operative-investigative activities.

Each structural unit is managed by the Head of Agency, who plans and supervises activities of the Agency, develops initiatives within his/her competence, ensures professional development, motivation, and productivity of the employees, gives directions, assigns tasks, and provides feedback to the staff members of the Agency.[135]

4.7.2. TERRITORIAL COVERAGE

The Investigative Division has three offices around the country: in Tbilisi, Kutaisi and Batumi. Employees of the four Agencies under the Division are allocated in these offices. Their mandate extends much beyond the boundaries of the municipalities they are located at, in the case of Tbilisi, for instance, it covers almost half of the country. The geographical entities falling under the mandates of the East and the West Agencies are determined by the decree of the State Inspector.[136] As a result of adding the Agency of Adjara Autonomous Republic to the structure of the State Inspec-

[128] Ibid, article 20, para 1.

[129] Ibid, para 2, sub-para "f".

[130] The Statute of State Inspector's Service, article 13, para 2. The crimes falling under the investigative mandate of the State Inspector's Service are determined by article 19 of the Law of Georgia on State Inspector's Service.

[131] The Statute of State Inspector's Service, article 13, para 3.

[132] Ibid, article 10, para 2, sub-para "b".

[133] Decree N01/115 of the State Inspector, dated May 6th, 2020, Annex 5.1.

[134] Ibid, Annex 5.2.

[135] The Statute of State Inspector's Service, article 21, para 2.

[136] Decree N01/271 of the State Inspector's Service, dated October 30th, 2019 on Defining the Operational Areas of the East and West Agencies under the Investigative Division.

tor's Service, the Batumi office was also created,[137] which is a step forward in terms of increasing the efficiency of the Service.

The existing number of offices under the Investigative Division is not sufficient. According to the State Inspector's Service Strategy 2020-2021 of the Investigative Division, the Office aims to establish structural units in various regions, which is very important to accomplish, as this need of the Service has been repeatedly identified in the research process.

It should be emphasized that based on the data of December 2018, the Prosecutor's Office had considerably more human resources for investigating the crimes currently falling under the mandate of the State Inspector's Service. Namely, the Prosecutor's Office employed 68 investigators and 23 prosecutors, which were allocated in different regions throughout the country.[138]

During the process of conducting the interviews, the investigators often highlighted that under the given circumstances conducting effective investigations within the set timeframes is particularly challenging. They noted that in a single period of a day the Division can get multiple notifications on crimes committed in Samtskhe-Javakheti, Kakheti, and Khashuri and while it is particularly important to take timely measures on the received notifications, getting to the locations can be highly time-consuming.[139] The crime scene should be inspected and evidence obtained immediately, each minute can have a significant impact on the outcome of the case, especially when the case involves the representative of a law-enforcement agency, which allegedly committed the crime and knows how to hide evidence.[140]

Questioning witnesses in the regions is also problematic. They either refrain from visiting the State Inspector's Service or do not have access to relevant means of transportation. Moreover, due to the lack of human resources, time or technical means investigators cannot always manage to visit the witnesses. Even in cases when they do, investigators lack relevant space for questioning the witnesses, thus they have to seek assistance from one administrative body or the other.[141] A large number of cases and lack of staff members requires significant efforts from the investigators, which will eventually have a negative impact on the efficiency of their activities.

The challenges related to territorial coverage and infrastructure are also highlighted in the annual report of the State Inspector's Service.[142] These problems have an impact on the efficient operation of the Service, thus addressing them in a timely manner is crucial.

To improve the efficiency of the Investigative Division, in addition to Batumi, it is necessary to open new offices in East and West Georgia and reallocate their territorial jurisdictions, thus decrease the workload on Tbilisi and Kutaisi offices. The population of the capital city equals 1.2 million,[143] and the number of residents in East Georgia is added to this figure. These numbers are particularly high for a single territorial entity.

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[137] For more information on opening an office in Batumi, see: https://bit.ly/3oKy3gv access date: 24.05.2021.

[138] Letter N13/8219 of the Prosecutor's Office, dated February 15th, 2021.

[139] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[140] Ibid.

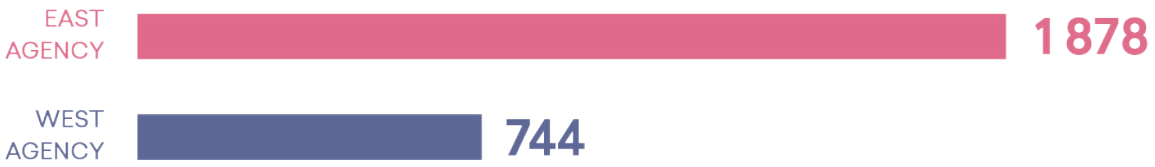
[141] Ibid.

[142] 2019 Annual Report of the State Inspector's Service, p. 126, available at: https://bit.ly/3v2W586 accessed on 4.06.2021.

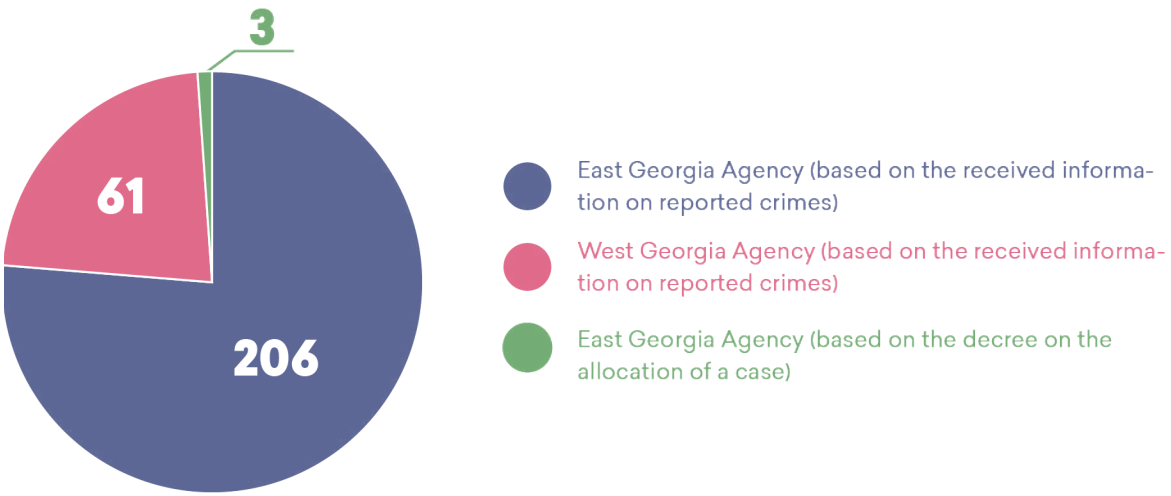
[143] See. Data of the National Statistics Office of Georgia on the population of cities and towns as of January 1st, 2020, available at: https://bit.ly/3fJPv1S, access date: 26.01.2021.

It is advisable to gradually increase the number of regional offices in the country, but the decrease of the workload on the Tbilisi office should be a top priority since the statistical information on alleged crime reports and investigations of the Investigative Department in 2020 demonstrate that much more workload is placed on the Eastern Agency.

TOTAL NUMBER OF CRIMES REPORTED AT THE INVESTIGATIVE DIVISION OF STATE INSPECTOR'S SERVICE



NUMBER OF CASES INVESTIGATED BY THE REGIONAL OFFICES IN 2020



It is advisable to have a central office in each region, which will cover the whole region. Since these changes would require significant financial and human resources, their implementation at once and in a short period might not be feasible. However, as an initial step, it is important to establish an office in Telavi, which will decrease the workload on the Tbilisi office. It should also be noted that setting up the Adjara Autonomous Republic Agency and the establishment of the Batumi Office, constituted a significant positive step.

4.8. QUALIFICATION, SELECTION, AND APPOINTMENT OF INVESTIGATORS

The main prerequisite for the successful operation of any institution is its composition with qualified employees, which requires a competitive selection process. To ensure efficient and impartial conduct of investigations, it is essential to appoint experienced and qualified staff members at relevant positions.

Employees of the Investigative Division are selected based on a competitive procedure unless an employee is transferred horizontally[144] or through mobility.[145] The rules and procedures for the selection of the Investigative Division employees, as well as relevant qualification requirements, are determined by the Law on the State Inspector's Service and legal act[146] of the Inspector.

To select and appoint employees, the Inspector sets up a selection commission and determines the rules of its operation.[147] Based on the requirements of the Georgian legislation, specifications of the vacant position, and relevant needs, the Inspector determines the composition of the selection commission.[148] It is necessary to invite specialists of criminal law and human rights in the composition of the commission.[149] The commission consists of:

a) Employee of the administrative department responsible for managing human resources at the Inspector's Service.

b) First or second rank investigators of the Investigative Division.

c) Invited specialist of criminal law.

d) Invited specialist of human rights.

e) Other employees of the Service determined by the Inspector.[150]

A citizen of Georgia without a criminal record, having higher education in law and at least one year of experience working as a judge, prosecutor, investigator, or attorney can be appointed as an investigator of the State Inspector's Service.[151] The candidate should have appropriate business qualities and a high moral reputation, a command of the language of proceedings, and should have

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[144] The law of Georgia on State Inspector's Service, article 23, para 5.
It is allowed to transfer an employee of the Investigative Division under the State Inspector's Service without a competition, which implies granting him/her other responsibilities and/or functionally similar responsibilities corresponding to the same hierarchical rank and position (horizontal transfer).

[145] The law of Georgia on State Inspector's Service, article 23, paras 1 and 6.
It is allowed to transfer an employee of the structural unit of the State Inspector's Service carrying out the official mandate of inspection without competition through mobility defined by the Law of Georgia on Public Service or horizontal transfer in accordance with the procedure established by paragraph 5 of this article.

[146] The law of Georgia on State Inspector's Service, article 23, para 1.

[147] Ibid.

[148] The Rule on the Employees of General Inspection (Department) and Investigative Division Serving at State Inspector's Service, adopted by the Decree of the State Inspector, dated September 26th, 2019, article 15, para 1.

[149] The law of Georgia on State Inspector's Service, article 23, para 1.

[150] The Rule on the Employees of General Inspection (Department) and Investigative Division Serving at State Inspector's Service, adopted by the Decree of the State Inspector, dated September 26th, 2019, article 15, para 2.

[151] According to article 23, para 4 of the Law on State Inspector's Service, the requirement of prior work experience does not apply to the appointment of a candidate at the position of an intern-investigator.

passed the unified qualification examinations[152] at the Training Centre of Justice of Georgia in the following disciplines: Constitutional Law, International Human Rights Law, Criminal Law, Law of Criminal Procedure, Penitentiary Law, and fundamentals of the Operative-Investigative Activities, can be appointed as the investigator of the State Inspector's Service.[153] These are the main qualification requirement necessary for the investigators of the State Inspector's Service. Setting the requirement of higher education in law for the investigators of the Service should be assessed positively. Unfortunately, such a requirement is not mandatory for all other investigative institutions.

The selection commission evaluates each candidate based on a scoring system,[154] taking into consideration the documents provided by a candidate, results of a written assignment and an interview, work experience, and education.[155] The candidates are tested from different perspectives: their applications are checked against the formal requirements, they have to pass qualification examinations and demonstrate relevant professional knowledge, written and general skills, after which they are interviewed, and only those candidates with relevant skills and experience are advanced to the final stage of the competition.

The selection commission nominates the best candidate for the vacant position to the State Inspector or refuses to nominate a candidate.[156] The candidate nominated by the selection commission is appointed by the Inspector.[157] To review the appeals related to the procedures, stages, and results of the competitions, an appeals committee can be created based on the administrative-legal act of the Inspector.[158] Each participant is entitled to refer to the court with an appeal regarding both the results of the competition and the violations identified during the competition procedures and stages.[159]

Up to 190 applicants participated in the competition for recruiting investigators in 2019. The commission selected 16 special investigators (for cases of particular importance) and 6 operatives. Out of the newly appointed investigators, 2 had worked as attorneys, 7 were employed at the Prosecutor's Office of Georgia, 5 - at the Ministry of Internal Affairs, and 2 - at the Investigative Division of the Ministry of Finance.[160]

In contrast with other investigative entities, investigators of the State Inspector's Service are required to have higher education in law. The existence of this requirement is seen to be the main cause for the high professional qualification and particularly strong legal writing skills of the in-

[152] According to article 23, para 3 of the Law on State Inspector's Service, those who have passed judge, prosecutor, or attorney qualification exams in accordance with the rules established by Georgian legislation, are exempt from the requirement of passing the unified qualification exams.

[153] Law of Georgia on State Inspector's Service, article 23, para 2.

[154] The Rule on the Employees of General Inspection (Department) and Investigative Division Serving at State Inspector's Service, adopted by the Decree of the State Inspector, dated September 26th, 2019, article 17, para 2.

[155] The Rule on the Employees of General Inspection (Department) and Investigative Division Serving at State Inspector's Service, adopted by the Decree of the State Inspector, dated September 26th, 2019, article 17, para 6.

[156] Ibid, article 21, para 1.

[157] Ibid, article 26, para 1.

[158] Ibid, article 24, para 1.

[159] Ibid, article 25.

[160] 2019 Annual Report of the State Inspector's Service, p. 98, available at: https://bit.ly/3v2W586 accessed on 4.06.2021.

vestigators employed at State Inspector's Service.[161] The strong educational background of the investigators constitutes a significant prerequisite for the successful operation of the Investigative Division. Taking into consideration the complexity of the selection procedures, investigators appointed at the State Inspector's Service are less likely to make the same legal mistakes that are highlighted in the 2019 opinion of the Venice Commission on the relationship between the prosecution and the investigators.[162]

During the interviews conducted within the scope of the project, it was highlighted on multiple occasions that employees went through complex competition procedures before their appointment at the State Inspector's Service and selected candidates met high qualification requirements.[163] The competition procedures and evaluation system implemented at the State Inspector's Service ensures the selection and appointment of competent staff members at the positions of investigators.

4.9. HUMAN AND MATERIAL-TECHNICAL RESOURCES OF THE STATE INSPECTOR'S SERVICE

In 2019, the State Inspector's Service underwent a major structural renewal. In addition to granting the Service with investigative powers, the number of its employees increased from 53 to 116.[164] However, the State Inspector's Service is still understaffed. The number of investigators employed at the Investigative Division is not sufficient. During the interviews, it was highlighted on multiple occasions that the number of the investigators fall drastically behind compared to the number of cases at the Investigative Division. Investigators noted that the number of the investigators was sufficient at the initial stage, however, later on along with the constant increase of the cases, the lack of human resources evolved as one of the major challenges of the Service. The Investigative Division carries out its mandate at the expense of a particularly heavy workload placed on its employees,[165] which needs to be addressed accordingly.

According to the 2019 Annual Report of the State Inspector's Service, the entity was well prepared for undertaking the new responsibilities derived from its investigative mandate: Network and server infrastructures are set up in both offices; they are equipped with personal computers and office appliances, video surveillance software and relevant electronic programs (internal file-sharing program, criminal case management program).[166] However, at the same time, the Report highlights

[161] The information is based on individual interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[162] Venice Commission, on the concepts of the amendments to the Criminal Procedure Code of Georgia concerning the relationship between the prosecution and the investigators, Strasbourg, 18 March 2019, p. 9, available at: https://bit.ly/3obtuuv, access date: 26.01.2021.

[163] The information is based on individual interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[164] 2019 Annual Report of the State Inspector's Service, p. 18, available at: https://bit.ly/3uMNTJd, access date: 26.01.2021.

[165] The information is based on individual interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[166] 2019 Annual Report of the State Inspector's Service, p. 96 available at: https://bit.ly/3uMNTJd, access date: 26.01.2021.

problems related to infrastructure (including interrogation rooms), territorial coverage and rented office,[167] as well as an insufficient number of vehicles, which was also highlighted by the investigators of the State Inspector's Service during the interviews. [168]

Undelayed examination and inspection of a crime scene are essential for ensuring efficient investigation. It is necessary to meet the so-called "golden hour" standard, which means that the crime scene should be examined as early as possible to protect the evidence necessary for the forensic examination. [169]

As the Investigative Division of the State Inspector's Service has only three offices country-wide,[170] ensuring fast response to the notifications received from the regions is particularly complicated since it is impossible to visit the crime sights immediately. In conjunction with the travel distance, the picture is complicated by the lack of available vehicles as well. The service has 11 vehicles in total,[171] which is split between the offices of East and West Georgia. The investigators thus have to wait for vehicles to become available so that they can travel to the crime scenes and investigate locations.[172]

In practice, significant problems arise when alleged victims and/or witnesses live/work at a long distance from an administrative building of the Investigative Division. This, on the one hand, creates delays for the witnesses to visit the office and, on the other hand, complicates carrying out investigative measures, due to lack of infrastructure in relevant territorial units.[173]

Due to the lack of resources, investigative measures on the crimes committed outside Tbilisi or Kutaisi, are conducted in the relevant territorial offices of the Prosecutor's Office, which raises question marks regarding the full independence of the investigations and decreases trust towards the Investigative Division.

According to the principles of the UN General Assembly Resolution, those conducting investigations should have access to necessary financial and technical resources.[174] A supervisory body will only be able to effectively carry out its functions if it is equipped with relevant resources.[175]

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[167] To date, the East Agency of the Investigative Division is still located at a leased property, for which substantial financial resources are spent from the budget of the Service annually.
2019 Annual Report of the State Inspector's Service, p. 126, available at: https://bit.ly/3uMNTJd, accessed on: 3.06.2021.

[168] 2019 Annual Report of the State Inspector's Service, pg. 126, available at: https://bit.ly/3uMNTJd, accessed on: 3.06.2021. The information is also based on individual interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[169] Steve P. Savage, Thinking independence: calling the police to account through the independent investigation of police complaints, 2012, available at: https://bit.ly/351D777, access date: 26.01.2021.

[170] Batumi office was added from May 2021.

[171] The information is based on a list of equipment, inventory, and vehicles disclosed by the State Inspector's Service as public information.

[172] Ibid.

[173] 2019 Annual Report of the State Inspector's Service, p. 126, available at: https://bit.ly/3uMNTJd, accessed on:3.06.2021.

[174] UN "Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", General Assembly resolution 55/89 of 4 December 2000, par. 3(a), available at: https://bit.ly/2UWh253, access date: 26.01.2021.

[175] EPAC, Police Oversight Principles, November 2011.

The problem of lack of financing allocated for the State Inspector's Service is not new. The launch of the investigative mandate granted to the Service was postponed several times, precisely due to the failure to mobilize relevant funds in a timely manner.[176] Even though at present the Service manages to carry out its mandate, this is achieved at the expense of the great efforts undertaken by the employees. The government is obliged to ensure the smooth and efficient functioning of the independent investigative body through the allocation of appropriate funding.

Relevant financial resources entail the existence of necessary funds for recruiting staff members and covering their monthly remuneration costs (salaries) as well as additional expenses necessary for their training and capacity-building activities. According to the legislation, State Inspector's Service ensures elaboration and implementation of training modules for maintaining and increasing the qualifications of those employed in the Investigative Division.[177] Moreover, according to the Strategy 2020-2021 of the Investigative Division, inviting international experts and conducting study visits is one of the priorities of the entity. To increase the professional qualification of the employees, regular training is implemented by the Service, however, during almost every interview the respondents were highlighting that they would like to further increase their qualifications and develop relevant skills on various investigative topics through training and educational courses.[178] This requires relevant financial resources as well as allocation of time, which would be particularly challenging taking into consideration the restricted human resources of the Investigative Division.

Insufficient human and material resources have a considerable impact on the efficient functioning of the Service. Ensuring the Service with necessary resources and providing it with a permanent office is essential for the fast transformation of the Service into a trusted institution, which has the capacity to balance the two crucial mandates placed upon it.[179]

5. INVESTIGATIVE JURISDICTION OF THE SERVICE

5.1. INTRODUCTION

Law on State Inspector Service limited the mandate of the independent investigative mechanism to the pre-determined types of crimes and perpetrators. The competence of the State Inspector's Investigative Service was extended to crimes allegedly committed by a representative of a law enforcement agency, state officer or person equated to the latter.[180] The competence areas of the investigative unit now include specific criminal acts committed by these persons, such as:

- Alleged torture, threat of torture, degrading or inhuman treatment;
- Abuse and exceeding of official powers, committed using violence or a weapon, or by offending the dignity of the victim;
- Certain crimes related to use of coercion against participants of the investigation process;
- Other crimes allegedly committed by a representatives of the law enforcement authority, which caused death of a person under the effective control of the state.

Actions beyond the aforementioned offences, which may also entail forms of coercion by a law enforcement official, are automatically excluded from the mandate of the agency. [181]

The present subchapter reviews material elements of the crimes under the mandate of the Investigation Service of State Inspector, related challenges of investigative and judicial practice, the need to amend the substantive criminal law, and the issues related to regulating the list of crimes under its investigative mandate anew.

5.2. SUBJECTS OF THE STATE INSPECTOR INVESTIGATIVE SERVICE

The investigative competence of the State Inspector's Service is limited to specific subjects that commit crimes, the list of which is determined by Article 3 of the Law on the State Inspector's Office. According to the law, the investigative areas under the Investigation Service extends to: 1. an officer; 2. a person equated to an officer; 3. specific crimes committed by a representative of the law enforcement body.

A state officer is any person who is appointed to a public service position for an indefinite term by the state, autonomous republic, municipality, legal entity under public law and who exercises authority under public law as his/her principal professional activity aimed at ensuring protection of public interests by him/her, and who receives relevant compensation and social and legal security guarantees in return.[182]

The circle of persons equated to an official is defined in the Criminal Code and includes a foreign official (including a member of a state body exercising legislative and/or administrative powers), any person performing any public duty for another state, an official of an international organization or body or an employee hired on a contractual basis, as well as any seconded or non-seconded

[180] Law of Georgia on the State Inspector Service, Article 3.

[181] EMC, Prevention of Ill-Treatment in Police Activities, 2019, p. 16, available at: https://bit.ly/3cgbvPP, accessed on: 03.04.2021.

[182] Law of Georgia on Civil Service, Article 3; Law of Georgia on the State Inspector Service, Article 3; Criminal Code of Georgia, Note to Article 332.

person who performs the relevant duties of that official or employee.[183]

The Law on the State Inspector Service itself includes the definition of a law enforcement officer, which covers employees of the Prosecutor's Office, the Ministry of Internal Affairs, the State Security Service, the law enforcement structural division of the Defense Forces, the investigative divisions of the Ministry of Justice and the Ministry of Finance. According to the same legislative definition, the mandate of the service does not extend to investigation of criminal acts allegedly committed by the Prosecutor General, the Minister of Internal Affairs, and the head of the State Security Service.

The exclusion of senior law enforcement officials from the investigative powers of the Service is problematic, especially in case of the Minister of the Internal Affairs and the Head of the State Security Service. It might look as if the risks with regard to the Prosecutor General is balanced through the impeachment procedure provided in the Constitution of Georgia[184], however, even in that case the legislation is not unambiguous and does not clearly define the body authorized to conduct investigations following the impeachment procedure against the Prosecutor General.

Removing the Prosecutor General, the Minister of Internal Affairs and the Head of the Security Service from the definition of a law enforcement officer and, consequently, excluding investigations against them from departmental jurisdiction is a critical issue, as these agencies are highly hierarchical. Superiors have the most concentrated power and are often responsible for and/or are decision-makers about the activities of ordinary employees of the agency, including actions containing signs of crime. Past experience of Georgia[185] also shows that the lack of a response to the bad faith use or abuse of power by law enforcement officials, their impunity, has become one of the main reasons for public distrust of this agency.[186]

Thus, taking into account past experience of the country, in order to respond effectively to cases of high public interest, it is advisable to formulate the legislative definition of a law enforcement representative in such a way that it includes the Prosecutor General, the he heads of the Ministry of Interior and the State Security Service.

5.3. TORTURE, INHUMAN AND DEGRADING TREATMENT

Threat of torture, degrading and inhuman treatment as criminal acts were introduced to the criminal law of Georgia by the legislative amendment in 2005. The pre-existing legislative framework did not recognize the special elements of these crimes. As for the punishment of torture, in the version in force before the amendments it was considered as a separate act and was interpreted to constitute systematic beating or other violence that caused physical or mental suffering to the

[183] Criminal Code of Georgia, Note of the article 332.

[184] Constitution of Georgia, Paragraph 1 of Article 48.

[185] In the case of Sandro Girgvliani, the European Court of Human Rights, in addition to the individual measures, also determined general ones to be taken by the state, which indicates the need for an impartial and independent investigation in cases implicating high-ranking officials. See details: Decision of the Committee of Ministers, September 25, 2014, available at: https://bit.ly/3rWip1v, accessed on: 03.04.2021.

[186] EMC, Prevention of Ill-Treatment in Police Activities, 2019, p. 15-16, available at: https://bit.ly/3cgbvPP, accessed on: 03.04.2021.

victim but did not result in severe or less severe damage to health.

Introduction of the abovementioned norms to the substantive criminal law, and new regulation on the definition of torture was based on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on December 10, 1984 and ratified by Georgia on October 26, 1994.[187]

The Convention establishes the definition of torture as any act intentionally inflicting severe pain or suffering, whether physical or mental. According to the Convention, the purpose of torture is to obtain information or a confession from the victim or a third party, to punish him or her for an act which he or she has committed or is suspected of having committed. The Convention also defines that this action aims to intimidate or coerce the victim or a third party, or has any discriminatory motive, when such pain or suffering is inflicted by a public official or other person acting in an official capacity, at the instigation of, with the consent or acquiescence of a public official.[188]

Apart from the Convention against Torture, the postulate on the absolute prohibition of torture, inhuman or degrading treatment or punishment set out in Article 3 of the European Convention on Human Rights is important. The European Court of Human Rights uses the definition of torture in the UN Convention. According to its practice, torture must be accompanied by an element of intention- pain or other suffering must be inflicted with the purpose of receiving information, of punishing or intimidating.[189]

5.3.1. TORTURE AND THREAT OF TORTURE

The provisions of the UN Convention against Torture were implemented through the introduction of Articles 144^1-144^3 in the Criminal Code.[190]

Initially, responses to the above crimes committed by an official or a person equated to an official, as well as a representative of a law enforcement body, was the competence of the Prosecutor's Office Investigation Services. Since November 1, 2019, the Investigative Service of the State Inspector has this authority. According to existing statistics for 2020, the latter has not launched an investigation on torture and threat of torture, however, at the start of the investigations 26 cases were qualified as degrading or inhuman treatment.[191]

According to Article 144^1 of the Criminal Code, torture is the creation of conditions or treatment of a person, or his/her close relative, as well as a person materially or otherwise dependent on him, which by its nature, intensity or duration, causes severe physical pain, mental or moral suffering. The legislative elements of torture are consistent with the definition of torture set out in the UN and other international conventions, however, in accordance with the approach taken by the state,

[187] See: UN Treaty Bodies Database, available at: https://bit.ly/3mjRaNr, accessed on: 03.04.2021.

[188] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

[189] Philip Leach, How to Apply to the European Court of Human Rights, 2011, p. 254.

[190] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 1), 2011 p. 247.

[191] Report on State Inspector's Activities 2020, p.132 , available at: https://bit.ly/3ceGP1c accessed on: 03.04.2021.

the perpetrators are not limited to public officials or a narrow list of officials. It covers any subject at the age of criminal responsibility and thus sets a higher standard for the protection of human dignity than is present under international law.[192]

Under current law, torture needs to have a specific purpose, which is also defined in the norm: the act must aim to obtain information, evidence or confession, intimidate or coerce, or punish a person for an act committed or allegedly committed by him/her or a third party.

According to Article 144^2 of the Criminal Code, the threat of torture is criminalized along with torture, which, according to the disposition of the norm, implies creation of conditions for torture, threat of such treatment or punishment and like elements of the crime of torture, aims to obtain evidence, information and confession.[193]

As already noted, according to legislation, any person who has reached the age of 14 can be subject of the crime of torture, while commission of an act by a special subject - a public servant is an aggravating circumstance. [194] Another qualifying circumstance of torture is the commission of an act by repeated abuse of the official position against two or more persons, jointly as a group, against a person detained or otherwise deprived of their liberty, in a state of helplessness or otherwise dependent on the offender. [195]

Among qualifying circumstances of torture established by the criminal law, the second part of Article 144^1 of the Criminal Code creates certain ambiguity. As qualifying circumstances, it defines separately in sub-paragraph (a) - the commission of torture by an official or a person equated to an official, and in sub-paragraph (b) - the commission of an act using official position. The division of the said aggravating circumstance into two different sub-paragraphs by the legislator permits interpretation of the law in such a way that torture committed by an official will be an aggravating circumstance regardless of whether the action is linked to his official activities.

Consequently, the question arises as to whether an official should be punished more severely than foreseen under part 1 of Article 144^1 of the Criminal Code for the general subject for acts outside the activities of an official committed for personal purposes, such as torturing a spouse for obtaining specific information, only because he has the status of a public official. The legislature made the status of an officer an aggravating circumstance for torture due to the public interest represented by such persons. Thus, it is unreasonable to punish a public official for the crime committed outside official activities with the same severity as it is appropriate for the same subject within the framework of official activities.

Apart from this, another aggravating circumstance under Article 144^1 of the Criminal Code is torture, committed in violation of the equality of persons on the grounds of race, skin color, language,

[192] Tamar Gvasalia, Torture as a Crime and Punishment as a Mechanism of Legitimate Pressure of the State, in Journal: Law and the World, 4/2016, p.128, available at: https://bit.ly/3dzLfj9, accessed on: 03.04.2021.

[193] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 1), 2011 p. 257.

[194] Criminal Code of Georgia, Article 144^1, Subparagraph "a" of Part 2.

[195] Criminal Code of Georgia, Article 144^1, Part 2-3; Qualifying circumstances also include torture by contract, for the purpose of hostage taking and by violating the equality of persons, for the purpose of making a person confess in having committed a particularly serious crime, or for the purpose of making a false denunciation concerning the commission of a crime by a third person. The third part makes punishable the torture committed by an organized group, as well as using sexual violence, or which resulted in the death of the victim or other serious consequences.

sex, religion, belief, political or other views, as well as in other cases provided by law. Views expressed in the legal literature about the formulation of the norm differ,[196] namely whether the existence of a special purpose is required for torture in the mentioned circumstances, in particular, existence of purposes such as obtaining information, evidence, confession from the victim. Regrettably, the opinion expressed in the literature does not explain why torture in a given situation is sufficient even without a specific purpose. It is clear that as for all other qualifying circumstances, the Code directly links the perpetration of torture in violation of equality to the specific purposes of torture (as set out in part 1 of Article 144[1] of the CC) and does not present a different regulation.

In some cases, difficulties arise in the practice of qualifying an act of torture, as the second part of Article 335 of the Criminal Code provides for similar elements of crime, namely on using life-threatening violence or the threat of such violence to obtain testimony, clarification by coercion. The problem of the overlap between the mentioned norm and the material elements of torture is presented in the chapter where Article 335 of the Criminal Code is discussed.

Alongside the legislation, the project team also reviewed court decisions related to torture. The analysis of the decisions shows that the case law considers torture as intense violence against a person by law enforcement officers - for the purpose of obtaining information, confession, evidence - and the judicial approach in this regard is quite uniform.

According to the current practice, torture is qualified as use of unlawful methods aimed at creation of severe conditions and such treatment of persons deprived of their liberty, nature, intensity and duration of which, causes severe physical pain, mental and moral suffering. The analysis of the verdicts reveals that in such cases the purpose is to intimidate and compel the convicts to perform or refrain from an act which they have a legal right to do. These include filing, withdrawing complaints or denying other legal procedures and punishing for requesting medical care. [197] Judicial practice of interpretation under the present article covers the beating of a detainee for obtaining confession, and various forms of violence against a person deprived of liberty, including blocking of the respiratory organs. [198]

The jurisprudential challenge is to distinguish between acts of torture and ill-treatment. For example, the violent actions of penitentiary staff against convicts punished for listening to the radio with loud voice were reclassified from torture to inhuman treatment. The court did not agree with the qualification of the prosecutor's office and did not consider as torture transfer of naked prisoners to small rooms (bar-fronted cubicles (measuring 1 m by 1.5 m)) for half an hour, placing them in the so-called "box", beating by a group of several penitentiary employees for about five minutes and placing them naked in the same so-called "box" for two days. According to the court, the actions taken against the prisoners clearly went beyond the scope of restriction of liberty characteristic to the prison sentence and caused severe physical pain and suffering, which put the victims under inhuman, humiliating and degrading conditions. However, according to the national court, these actions did not go beyond the criteria established by the case law of the European Court of Human Rights for inhuman treatment, which is why the appealed judgment was amended and the action

[196] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 1), 2011 p. 253.

[197] Judgment of the Tbilisi Court of Appeals of January 6, 2015 in the case 1/ბ-214-14.

[198] Judgment of the Tbilisi Court of Appeals of February 17, 2014 in the case 1/ბ-400-13; Kutaisi Court of Appeal on August 13, 2014 1/ბ-70-2014.

was qualified as inhuman treatment. [199]

The European Court of Human Rights relies on an assessment of the degree (threshold) of cruelty resulting from prohibited treatment to distinguish between torture and inhuman treatment. In case of torture, very severe and cruel suffering, as well as the specific purpose of torture - to obtain information, to punish or intimidate - must be present. In case of inhuman treatment, intense physical or psychological suffering must follow as a result. In making such interpretations, however, the European Court is guided by the evolving nature of the Convention, which allows for the possibility that acts previously classified as inhuman or degrading treatment may, over time, be regarded as torture in order to uphold the fundamental values of democratic societies.[200]

5.3.2. INHUMAN AND DEGRADING TREATMENT

The legislative disposition of degrading or inhuman treatment declares it a punishable act to humiliate or use coercion against a person, to place a person under inhuman or degrading conditions, when these acts cause severe physical, mental pain or moral suffering. The aggravating circumstances are presented as in the second part of Article 144[1] of the Criminal Code. Inhuman or degrading treatment, unlike torture, does not have to be an intentional act and does not require the existence of a specific purpose from the perpetrator.

As the norm shows, constitutive elements distinguish between degrading and inhuman treatment. According to the practice of the European Court of Human Rights, inhuman treatment or punishment is present when intense physical or psychological suffering is identified in the case. In this case the treatment is premeditated, continues for hours and causes real bodily harm or intense physical or psychological suffering.[201]

Treatment or punishment in violation of dignity refers to treatment that causes the victim to feel fear, sadness, or inferior, which can offend and humiliate a person and lead to the breaking of his or her physical or moral resistance. The court may also consider whether the intent is to insult or humiliate the victim, or whether it has had an adverse effect on the individual in a manner incompatible with Article 3 of the Convention. Despite such interpretations, intention to inflict insult or humiliation is not a necessary requirement for establishing a violation of Article 3 and it is sufficient that the victim feels degraded.[202]

There is vast domestic jurisprudence on degrading and inhuman treatment, especially with regard to cases of coercion and violence against persons placed in a penitentiary institution. According to the verdicts examined within the framework of the study, acts of systemic physical and mental violence against prisoners were qualified based on the mentioned article. The same crime was held to be committed when prisoners were unlawfully restricted from walking, hygiene procedures, accessing a doctor, and exercise of other rights through violent, degrading, and inhuman methods in order to create fear, pain, and feeling of inferiority in the victim, as well as to achieve wordless obedience. The so-called "dissolution of quarantine," when prisoners were brought to the corridor

[199] The case of Kutaisi Court of Appeal of August 13, 2014 1/ბ-70-2014.

[200] Philip Leach, How to Apply to the European Court of Human Rights, 2011, pp. 254-255.

[201] Ibid.

[202] Ibid.

of a penitentiary facility, were beaten with hands, kicked with feet and batons, humiliated, verbally abused, and then distributed in cells, was also qualified as inhuman treatment by the Court. [203] Systematic physical violence against convicts by the prison administration in order to establish "order and obedience" in the penitentiary institution, such as forcing to "walk" half-naked in the corridor, pouring cold water in order to humiliate, “kicking in the backside” were held to constitute inhuman treatment as well.[204]

The crime in question is similar to the crime of exceeding official powers using violence and by insulting personal dignity of the victim. The analysis of the court decisions reveals that the court has not established clear criteria for distinguishing between these two crimes. This issue will be discussed in detail in the subchapter on exceeding of official powers.

5.4. EXCEEDING AND ABUSE OF OFFICIAL POWERS IN THE ABSENCE OF AGGRAVATING CIRCUMSTANCES

The investigative mandate of the State Inspector’s Service includes cases of exceeding and abusing power by an official or a person equated to the latter if the act is committed under aggravating circumstances - by insulting victim's personal dignity, using violence, threat of violence or a weapon.[205] In the absence of qualifying circumstances, the mentioned crimes remain under the investigative mandate of the Prosecutor's Office.

Such restriction of the State Inspector's investigative competence excludes the authority to investigate criminal cases that show signs of a crime committed in the course of legal proceedings. This may be reflected in exceeding or abusing of powers by law enforcement officer in the absence of the aggravating circumstances or might require qualification under the special provisions of the Criminal Code (falsification of evidence, intentional unlawful detention, etc.).

In the past, a number of criminal cases, investigation of which was commonly characterized by significant shortcomings, legitimate suspicions of deliberate delays in obtaining evidence, destruction and falsification of probable evidence, decision-making based on political interests, have caused high public interest.

Responding to and investigating public allegations related to law enforcement officials within an independent investigative mechanism is as important as effective investigation of ill-treatment cases. The issue is further intensified by the inefficiency and partiality of the agency responsible for these types of cases - the prosecutor's office. For example, the ongoing investigation of Temirlan Machalikashvili’s death[206] was terminated by the prosecutor's office on the grounds that a criminal act was nonexistent, while the Public Defender indicated a number of questions that were

[203] Judgment of the Supreme Court of Georgia of November 12, 2019 on the case N330100117002024670.

[204] The case of the Kutaisi Court of Appeal of May 22, 2015, 1/ბ-135-2015.

[205] Criminal Code of Georgia, Article 332, Part 3, “b” and “c” subsections; Article 333, Part 3, “b” and “c” subsections.

[206] See: Summary of the ongoing investigation into the murder of Temirlan Machalikashvili, Available at: https://bit.ly/2Q2wRYU, Accessed on: 03.04.2021.

not answered by the investigation.[207] The Office of Prosecutor General had a non-transparent and unsubstantiated response to another high-profile case related to flawed investigation of a murder of juveniles on Khorava Street. Instead of fulfilling the proposal of the Public Defender - to launch an investigation on the facts of official misconduct, the prosecutor's office launched an internal inspection, the results of which are still unknown to the public.[208]

Thus, it is critical that the investigative competence of the State Inspector's Investigative Service extends beyond merely law enforcement officers' violent actions and covers the authority to investigate cases of exceeding or abuse of power by law enforcement officials, which reflects deliberate ineffective conduct of the investigation process, or other types of violations affecting the outcome of the criminal case, identification of the perpetrators, and obtaining of the necessary evidence.

5.4.1. DIFFERENTIATING EXCEEDING OF OFFICIAL POWERS FROM INTENTIONAL UNLAWFUL DETENTION

As mentioned, the exceeding of powers by the officer, without the existence of qualifying circumstances, even after the launch of the independent investigative mechanism, remained under the investigative mandate of the Prosecutor's Office. From the very beginning there were questions with regard to division of the competences over this crime, namely as to whether the Investigative Service would be able to respond to all violent crimes committed by law enforcement officials and whether the division of investigative competence between the two agencies would lead to bypassing the independent investigative mechanism when investigating the cases falling under the investigative mandate of the State Inspector's Office.

Practice also shows that often, when the victim talks about violence inflicted by an officer, the complaint also concerns illegal detention. In interviews, some of the investigators noted that excluding the crime of exceeding of official powers from departmental competence in the absence of aggravating circumstances, creates bit of problems if the applicant complains not (only) about violence committed by law enforcement officers but also the lawfulness of his/her detention. Practice of the agency in such circumstances is that the case is sent to the Prosecutor's office to evaluate the episode of illegal detention – exceeding of powers by an officer without using violence, and if the applicant complains about violence in addition to illegal detention, the State Inspector's Office continues the investigation, which is in fact also desirable, in terms of conducting investigations efficiently, in a timely manner and also in terms of saving human and material resources.

Nevertheless, it can be problematic to qualify illegal detention of a citizen as an exceeding of power by an official, while the law includes a special norm, namely when intentional unlawful detention of a person is punishable under Article 147 of the Criminal Code by imprisonment from 5 to 8 years.

Judicial practice is also inconsistent in regard to the legal assessment of an action. There are decisions, which impose administrative liability on officers for unlawful detention of a person, without proper legal basis and evidence. In one such case, the court explained that the elements of the crime of intentional unlawful detention are present if there was no ground for detaining the person

[207] 2020 Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms in Georgia, p. 36, Available at: https://bit.ly/3sVQqAv, Accessed on: 03.04.2021.

[208] Ibid, p. 37.

under the Code of Administrative Offenses, despite commission of a wrongful act. As for the officer's intent to detain, the court found that police officers were aware of the limits of their authority, as well as of the circumstances in which they had the right to detain a person, they were aware of the lack of grounds for detention in that particular case, but still intended to detain and detained the person.[209] A similar case was qualified as exceeding of power by the officer in the Court of Appeals, where the victim was detained on the basis of an administrative offence without proper grounds.[210]

If general and special norms on criminal responsibility collide, including when it comes to legal assessment of the official conduct, such as of the law enforcement officer, preference should be given to special norms established by criminal law. It is important that the circumstances characterizing the incriminating act are reflected in the indictment in a way that accurately describes it and does not create the risk of being overlapped by other offenses. Attention is due to this because the power of the court to reclassify an action to another crime under more relevant article provided for in the substantive law, is limited by the principles applicable to recharacterisation of charges, enshrined in Article 6 of the European Court of Human Rights.

According to this principle, judicial authority to recharacterize the charge upon own initiative and to qualify it under another, more appropriate article provided by law if evaluation and analysis of the examined evidence does not show connection between the accused's action and the result caused by it, is limited. The restriction arises from the obligation to properly and fully inform the accused about the charges, including about the recharacterization. In such situation, when a charge is recharacterized, the European Court of Human Rights requires that the accused be given adequate time and opportunity to respond to it, which might be delayed if recharacterization of the charge takes place at the trial stage.

According to the European Court of Human Rights, requalification of an action is not considered as a violation of the right of defense if it is foreseeable for the defense that the changed qualification is substantively an integral aspect of the charges.[211] Georgian case law is cautious about recharacterizing the charges, and in case of deviation, if the court deems the legal qualification of the charges as inaccurate, it tends to avoid requalification of the crime and in order to comply with the standard in question, outrightly leans towards acquittal.[212] Thus, conduct of investigation and prosecution with the appropriate legal qualifications plays an essential role in reaching a final outcome in the case.

[209] Case 1/ბ-46-2015 of Kutaisi Court of Appeals of July 10, 2015.

[210] Judgment of the Tbilisi Court of Appeals of March 12, 2018.

[211] Nana Mchedlidze, Standards for the Application of the European Convention on Human Rights by the Common Courts of Georgia, pp. 117-118, Available at: https://bit.ly/3uNBXGM, Accessed on: 03.04.2021.

[212] Lavrenti Maghlakelidze, Understanding the Principle of Immutable Characterizaiton of Charges According to the Practice of the Georgian and European Courts of Human Rights, German-Georgian Criminal Journal, 2017, p. 75, Available at: https://bit.ly/31NtWpn, Accessed on: 03.04.2021.

5.5. ABUSE OF POWER USING VIOLENCE AND INSULT TO THE PERSONAL DIGNITY OF THE VICTIM

Among the criminal acts provided for in the chapter on official misconduct, the investigative mandate of the State Inspector's Service includes abuse of official power by using violence, threat of violence or insult to the personal dignity of the victim.[213]

Abuse of power is considered to be use of the authority granted to an official or a person equated to the latter in the course of his/her official activities, against the public interest, for the benefit of one's own or someone else's interests, which resulted in substantial violation of the legitimate interests of the individual or legal entity, the public or the state.

The norm is problematic in terms of its content, which is also demonstrated by the lack of investigative and judicial practice on this crime. Since the launch of the Investigative Service of the State Inspector, no case has been investigated under the mentioned qualification.[214]

As it is clear from the disposition of the norm, the crime of abuse of official power is considered to be an action that is lawfully linked to the official activity of the officer due to his/her position and is foreseen by the relevant normative acts.[215] The commentary on the Criminal Code considers act as an abuse of power by using violence when an official tries to compel victim to commit an illegal act or terminate a lawful activity through psychological or physical coercion, beating, infliction of physical pain, damage to health, in the official's unlawful interest.[216]

According to the commentary, use of a weapon implies the actual use of its destructive properties or the demonstration of a weapon, the threat of its use, which causes the victim to feel a real danger.[217] The commentary does not discuss the case law or specific examples of the said act committed by an officer.

As already mentioned, the main element of abuse of power is the use of legitimate means and leverage, granted in the course of official activities, against private or public interest, for personal motives or in exchange for other person's benefits. Exercise of official, legitimately granted authority by using weapons, violence, and insults to the victim's personal dignity automatically constitutes an abuse of power, because a public servant, including one for whom the use of coercive measures or weapons is permissible under the law, is authorized to only use them in circumstances specifically determined by law in observance of the principles of necessity and proportionality. Otherwise, in the absence of a proper legal basis, a public servant, when using a weapon or coercive measures (force), goes beyond his official authority and exceeds it. According to the views expressed by the investigators of the Investigative Service during the interviews, it is hard to imagine the launching of an investigation and, moreover, criminal prosecution under their mandate, on the basis of this article since in the presence of the crime elements in the norm, the officer is automat-

[213] The act is foreseen under subparagraphs "b" and "c" of part 3 of the Criminal Code;

[214] 2020 Annual Report of the State Inspector's Service, p. 132, Available at: https://bit.ly/3ceGP1c Accessed on: 03.04.2021; 2019 Annual Report of the State Inspector's Service Activity Report, 2019, p. 110, Available at: https://bit.ly/34PKaQd, Accessed on: 03.04.2021.

[215] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 1), 2011, p. 137.

[216] Ibid, p. 138.

[217] Ibid.

ically seen to be exceeding official powers.[218]

The case law in relation to the issue is also interesting and it further demonstrates that multiple interpretations and inconsistent application of the objective elements of this crime are possible. In a judgment of the Tbilisi Court of Appeals issued on April 15, 2020,[219] two law enforcement officers were found guilty of abuse of official powers, committed using violence and insult to the victim's personal dignity.

According to the verdict, the convicted officers learned that their colleague, a patrol police officer, negligently fired a shot during an arrest procedure, which resulted in the death of one of the detainees. Afterwards, in order to preserve the image of the patrol police and to help the patrol inspector avoid criminal liability, the detainees and the deceased person were unjustifiably accused of assaulting police officers, and firearms brought to the scene after the incident were planted to them. According to the decision, high-ranking police officials artificially created evidence to prove the allegations against the detainees, planted various firearms and ammunition to the unlawfully detained young persons and created factual preconditions for documenting those in the procedural documents as if these illegal items were seized during the arrest, which was covered by the media after staging the scene with the involvement of the press service of the Ministry of Internal Affairs.

This verdict describes the sequential process of artificially creating evidence by police officers, falsifying procedural documents, material evidence, initiating criminal proceedings against specific individuals on the basis of this evidence, and finally, under a plea agreement, qualifies the above-mentioned police actions under sub-paragraphs "b" and "c" of part of Article 333 of the Criminal Code.

In the said decision, despite the description of specific acts of official misconduct by law enforcement officers - falsification of evidence and intentional unlawful detention of innocent persons with prior knowledge, the court did not discuss the necessity to apply the special norms of the Criminal Procedure Code. In the present case, officers were implicated in falsification of evidence,[220] as well as intentional unlawful arrest,[221] which led to the grave consequences, namely, to entirely ungrounded criminal liability of young persons for assaulting police officers and purchase and illegal movement of weapons.

Falsification of evidence and acts of intentional unlawful detention of a person give rise to a special crime of abuse of power by an official, as only a representative of a law enforcement agency is in the position to create false evidence in a criminal case, detain a person and falsify procedural documents.

The analysis of the case law also showed that different types of official misconduct are confounded with each other. For example, in one of the judgments of the Tbilisi Court of Appeals, the court discussed the legal qualification of an act by a police officer, who used a firearm while using transport outside official duties injuring the health of several persons, which entailed signs of exceeding of official powers using violence. However, in fact the court only interpreted the constituent elements

[218] The information is based on individual interviews with investigators from the State Inspector's Office held under the project.

[219] Case N 1ბ/259-19 of the Tbilisi Court of Appeals of April 15, 2020.

[220] Criminal Code of Georgia, Article 369[1].

[221] Criminal Code of Georgia, Article 147, Part 2.

of crime of abuse of power.[222]

Due to the ambiguity of the legislative disposition of the crime under consideration and its overlap with other norms of criminal law, there remains a wide opportunity for officials, law enforcement officers, to escape responsibility or to face a lighter punishment due to incorrect legal qualifications. This is also confirmed by non-uniform and scarce case law, and therefore, appropriate changes to the criminal law, including the removal of violence and insults to personal dignity from the qualifying circumstances of Article 332 of the Criminal Code, need to be discussed.

5.6. EXCEEDING OFFICIAL POWERS USING VIOLENCE AND INSULT TO THE PERSONAL DIGNITY OF THE VICTIM

In assessing the effectiveness of the fight against ill-treatment, for years investigations and prosecutions in cases of violence by law enforcement officers under Article 333 of the Criminal Code have been considered problematic.[223] The subject of criticism was the practice of bypassing the special articles provided for in the law when qualifying acts of torture and ill-treatment and also practice of conducting investigations under relatively less strict articles.

The mentioned crime, committed using violence, threat of violence or insults to the personal dignity of the victim, is under the mandate of the State Inspector's Investigative Service and is characterized by the highest statistical rate both in terms of launch of criminal investigations and prosecutions - in 2020 - 202 cases out of 270 investigations were qualified under Article 333 (3) (b), accounting for about 75% of all investigations launched during this period.[224]

Among the crimes under the investigative mandate of the State Inspector, the said crime is one of the most problematic ones. The reason for this is 1. Collision between the crime of exceeding of official powers and those under the special norms of the Code; 2. Different statutes of limitation for crimes under the conflicting norms 3. Non-uniform case law.

The provisions of the article and the sanctions have not changed significantly since its introduction. Regarding the disposition of the mentioned norm, academic literature in the area is scarce, and the explanations given in the commentary of the Criminal Code do not answer the essential questions for the practice - how to distinguish the exceeding of official powers using violence from inhuman or degrading treatment; what the criteria for are distinguishing the exceeding of official powers by insulting the personal dignity of the victim from degrading treatment.

According to the authors of the commentary on the substantive part of the criminal law, the danger of the crime under Article 333 lies in the fact that an official or a person equated to the latter deliberately commits an act clearly beyond his authority, which leads to substantial violation of citizens' rights, public and state interests. According to the same commentary, precise definition of the scope of officer’s authority through the relevant normative acts, as well as of concrete facts

[222] Judgment of the Tbilisi Court of Appeals of September 22, 2020 in the case n1ბ/580-2020.

[223] 2017 Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms in Georgia, p.22-23, Available at: https://bit.ly/3uMr2NN, Accessed on: 03.04.2021.

[224] 2020 Annual Report of the State Inspector’s Service, pp. 132-133, Available at: https://bit.ly/3ceGP1c, Accessed on: 03.04.2021.

of violations and their legal qualification are necessary.[225]

Regarding the aggravating circumstances of the exceeding of official power, the authors of the commentary point to the explanations applicable to the aggravating circumstances of the abuse of power (Article 332 of the Criminal Code). Consequently, even in this case, beating the victim, inflicting physical pain, causing damage to health, restriction of liberty, etc. are considered as violence. The authors associate use of weapons by an officer with the purpose of physical or psychological coercion of the victim.[226]

In the opinion of the investigators of the State Inspector's Office, in order to characterize an act as the exceeding of official powers using violence by an official during investigation, it is important to have a normative act defining the powers of an official.

If resisted in the course of investigative or procedural measures, the law enforcement officer may use the proportionate means of coercion. [227] Similarly, in order to carry out police activities, a police officer is authorized to use appropriate measures proportionately, only when necessary and within the intensity that will enable him to achieve a legitimate aim.[228] In order to exercise this general authority, it is important for law enforcement officials to have a unified departmental document on permissible types, forms, methods, and appropriate means of repelling coercion, which ensures clarity in the performance of police functions. This issue was also marked as problematic when the staff of the Investigative Service of the State Inspector were interviewed.

According to the information provided by the Ministry of Internal Affairs, the police officers are undergoing theoretical and practical training on the use of force at the Police Academy,[229] however, a unified document on standard detention procedures, action and permissible measures against resistance is still non-existent. The exception is the Special Tasks Department of the Ministry of Internal Affairs, whose staff, is trained on the use of proportionate coercive measures while conducting detention procedures or facing resistance, in accordance with the combat training program approved by the Deputy Minister.[230]

5.6.1. DIFFERENTIATING EXCEEDING OF OFFICIAL POWERS FROM ILL-TREATMENT

The disposition of the crime of exceeding official powers by violating personal dignity of the victim is also problematic, due to the existence of a special norm in the Code with similar elements. According to the collective of authors, the crime refers to an action of an official that degrades a person in a way that is contrary to the rules of cohabitation established in society.[231]

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[225] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 2), 2009, p. 145.

[226] Ibid.

[227] Criminal Procedure Code of Georgia, Article 111, Part 7.

[228] Police law of Georgia, Article 31.

[229] Letter of the Ministry of Internal Affairs of Georgia 16.02.2021, MIA 121 00366738; EMC, Prevention of Ill-Treatment in Police Activities, 2019, p. 21, Available at: https://bit.ly/3cgbvPP, Accessed on: 03.04.2021.

[230] Letter of the Ministry of Internal Affairs of Georgia, 16.02.2021, MIA 121 00366738.

[231] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 2), 2009, p. 143.

The disposition of exceeding official power using violence and insult to the personal dignity of the victim raised questions especially after the addition of special provisions on torture, inhuman and degrading treatment or punishment under Articles 144^1-144^3 of the Criminal Code. Following the legislative changes, in addition to torture and the threat of torture, degrading or inhuman treatment also became punishable acts, the legal dispositions of which are discussed above. After the mentioned norms were introduced in the Criminal Code, it became difficult to differentiate the articles on exceeding of official power through violence or insult to the personal dignity of the victim and degrading treatment by an officer. In this regard, investigative practice and jurisprudence have also developed in a non-uniform manner.

According to the legislative definitions, the main difference between Article 333 of the Criminal Code and Article 144^3 of the Criminal Code is the degree of pain, physical or psychological suffering caused to the victim during violence. Interviews with investigators at the Investigative Agency revealed that an act of violence or insult to the victim's personal dignity by an officer is assessed as exceeding of official powers when the factual circumstances, namely the degree of violence allegedly committed by law enforcement officer, the victim suffering, and humiliation do not reach the minimum threshold necessary to qualify an act as degrading treatment. The interviews cited as examples a single act of violence by a police officer against a person under his or her control - slapping in the face, as well as relatively mild forms of violence - physical pain or psychological suffering, that did not result in the minimum level of cruelty required for qualifying as degrading treatment.[232]

Distinguishing exceeding of official powers and degrading treatment on this ground is difficult both substantively and formally (based on relevant evidence). According to the case law of the European Court of Human Rights, treatment can be considered degrading if there is a minimum level of cruelty, depending on the circumstances of the case, duration of the treatment, and its physical and mental effects.[233] Treatment that causes fear, feelings of inferiority, helplessness, anguish in an individual is considered degrading treatment. According to the established practice, it is sufficient for the victim to feel humiliated in their own eyes, regardless of the views of others.[234] In its jurisprudence, the European Court of Human Rights has deemed an act of impulsively slapping someone, without prior intention, which did not have any serious or long-term effects on a person, as degrading treatment only because the act was committed by a law enforcement officer.[235] Accordingly, the current criminal law contains conflicting, broad provisions for the legal assessment of police violence, which complicates the proper qualification of the action and leaves much room for maneuver by the investigative body.

As for the domestic case law on the crime in question, the analysis of the judgments clearly indicates non-uniformity. On the one hand, the court tends to qualify minor violence by the officer under part 3 of Article 333 of the Criminal Code in many judgments of conviction and in theory, supports criminal prosecution of law enforcement officers for a single slap of the detainee.[236] How-

[232] The information is based on individual interviews with investigators from the State Inspector's Office held under the project.

[233] Ireland v. the United Kingdom, no. 5310/71, 18.01.1978, §162.

[234] Vasyukov v. Russia, no. 2974/05, 05.04.2011 § 59; Đorđević v. Croatia, no. 41526/10, 24.07.2012, § 95 M.S.S. v. Belgium and Greece, no. 30696/09, 21.01.2011, §220, Bouyid v. Belgium, no. 23380/09, 28.09.2015, §87.

[235] Bouyid v. Belgium, no. 23380/09, 28.09.2015, §105-106.

[236] Judgment of Tbilisi City Court of October 18, 2016.

ever, the Supreme Court has taken a completely different approach to the same issue in one of the cases in which a public servant was accused of abusing his authority – with the single act of slapping of a military serviceman. The Chamber of Cassation clarified in the present case that a single hit using the hand - does not constitute exceeding of official powers using violence by an official, which resulted in a substantial violation of the rights of individual or legal entity, public or state interests. According to the Chamber of Cassation, from a formal point of view there was a qualifying circumstance under Article 333, part 3, Subparagraph "b" of the Criminal Code - violence, however, a single hit using the hand, which did not result in any injury to the victim and did not cause any substantial violation of the rights of the victims and their legitimate interests, could not be considered as an exceeding of official powers, committed using violence, as necessary element of such a crime - substantial violation of the rights of individuals, public and state interests, was absent. Due to the absence of any damage to health or other serious consequences the Supreme Court qualified this action as other violence, which, at the time of sentencing, was provided for in the first part of Article 125 of the Criminal Code.[237]

In the same judgment, the Cassation Chamber did not qualify the act of throwing bottles at his subordinates and verbal abuse of military personnel by a state political official under the disposition of the exceeding of official powers by insulting the personal dignity of the victim. According to the court, throwing a bottle that has not hit anyone is indeed unacceptable and questionable from a moral point of view, but as such it could not be assessed as an insult to the victim, which violates the legitimate interests of individuals, the public and the state. The Cassation Chamber pointed to the absence of the necessary element of the crime, such as the occurrence of an unlawful result - a substantial violation of the rights of an individual or legal entity, the legitimate interests of the public or the state as the ground for such decision. The court concluded that the act should have been considered as an unworthy conduct contrary to the general moral norms, which was a disciplinary misconduct, but not a crime under the Criminal Code.[238]

Regarding the crime in question, it is also common practice for courts to qualify violence against a person deprived of liberty for the purpose of torture, inhuman treatment and obtaining of confession, under the same article. The analysis of the practice revealed that convictions for exceeding of official powers by an officer using violence, insult to personal dignity are associated with cases, in which officers "for the purposes of punishment, locked up military servicemen in the bath of brigade premises under direct official supervision and subordination, where the heaters were turned off, they were deprived of food and held in unbearable conditions for two days, which caused psychological and moral suffering to the soldiers."[239] The court also qualified the actions of the employees of the Counterintelligence Department, aimed at obtaining confessions through psychological violence against the photographers arrested on espionage charges, as exceeding of official powers using violence and insult to personal dignity. In case of refusal to testify about espionage, blackmailing of the detainees with threats in relation to their children, and of publishing of photos revealing details of their private lives, use of physical violence against the detainee and threatening with guns at night in the cemetery, were qualified by the court under the Article 333 of the Code of Criminal Procedure. The Court explained that aggravating circumstance provided for in sub-paragraph (b) of paragraph 3 – violence implies both physical and psychological coer-

[237] Judgment N12ბ3-14 of the Supreme Court of Georgia of July 14, 2014.

[238] Judgment N12ბ3-14 of the Supreme Court of Georgia of July 14, 2014

[239] Judgment N12ბ3-14 of the Supreme Court of Georgia of July 14, 2014.

cion. According to the court, it was precisely psychological coercion that was the reason for giving confessions. According to the decision, exceeding of official powers, through insulting the personal dignity of the victim, must be assessed based on the factual circumstances of each case, and in the present case, "victim photographers were forced to confess to espionage against their own country, which is a clear violation of personal dignity." Threatening to publish a personal photo of the detainee, as well as forcing him to stand with his hands on his neck and to walk while kneeling to the temporary detention facility, were also qualified as violation of the victim's dignity. [240] It is clear that in the cases considered, the court completely ignored the special purpose of punishing the victims and obtaining their confession.

According to investigators' assessments, apart from the established case law on exceeding of official powers through violence, which often presupposes one-time, minor violence by an officer as sufficient grounds of criminal liability under this norm, disproportionate sanctions (imprisonment for 5 to 8 years) are also a problem.[241] For example, the Investigative Service has launched a criminal case against a police officer accused of exceeding his official authority using violence against a detainee who verbally abused his mother for several hours. In the circumstances when the policeman's mother was newly deceased, the officer slapped the detainee in the face in order to stop the detainee from swearing, which was qualified as exceeding of official power through violence. Accordingly, the law enforcement officer was sentenced to imprisonment from 5 to 8 years.

Duplication of the disposition in question and the special norms prohibiting ill-treatment is also problematic in terms of the statute of limitations as grounds of exemption from criminal liability. In particular, the Criminal Code does not extend the statute of limitations to acts of torture and ill-treatment (Articles 144^{1-3} of the Criminal Code),[242] while the statute of limitations for official misconduct (Articles 332-342^{1} of the Criminal Code) [243] is 15 years.

In conclusion, neither legislation nor case-law provides a clear distinction between exceeding of official power using violence and insult to the victim's personal dignity and degrading treatment. In practice, this raises issues of overlaps between norms on ill treatment, also in regard to proper conduct of investigations and adequate determination of criminal liability, and therefore calls for legislative changes.

5.7. COERCION TO PROVIDE AN EXPLANATION, TESTIMONY OR STATE AN OPINION

The competence of the Investigative Service of the State Inspector extends to the coercion to provide an explanation, testimony, or state an opinion, which is a crime under Article 335 of the Criminal Code. According to the objective disposition of the norm, it is punishable to force a person to give an explanation or testimony and/or expert to provide an opinion by an official or a person equated to him/her by threatening, deceiving, blackmailing or through other unlawful action.

The commentary on the Criminal Code refers to the mentioned crime as a special form of exceeding official powers by an official. The public interests safeguarded by the crime are the normal

[240] Judgment of the Tbilisi Court of Appeals of January 8, 2018 in the case N 1/ბ-779-17.

[241] The information is based on individual interviews with investigators from the State Inspector's Office held under the project.

[242] Criminal Code of Georgia, Article 71, Part 5^{1}.

[243] Criminal Code of Georgia, Article 71, Part 1, subsection "c^{1}".

functioning of the state authorities, lawful conduct of the investigative activities, and additionally, lawful interests of an individual and citizen.[244]

The objective element of the action consists in coercion to provide an explanation, testimony, to state an opinion, and the method of committing a crime is left to be determined by the legislator. These can be threats, deception, blackmail or other unlawful methods.

It is clear from the disposition of the norm that among punishable actions, along with coercion to give a testimony (explanation), coercion to refrain from testifying is not included, which is problematic in the investigative practice. In particular, the situation, when the investigator demands that the citizen does not to give a testimony favorable to the defendant's interests, will fall outside the scope of this article. In theory, in order to properly respond to this type of unlawful action of an official, the investigative body can initiate an investigation under the second part of Article 378 of the Criminal Code, which concerns the coercion to refrain from testifying, however, the article can only be invoked if the officer demands refusal to testify from a person who is in a penitentiary institution. Otherwise, such exertion of pressure on a witness/person under interrogation, who is outside the penitentiary institution, is neither an element of the objective disposition of the norm under Articles 335 or Part 2 of Article 378 of the Criminal Code.

Article 372 of the Criminal Code in the chapter on crimes in violation of the procedural rules for obtaining evidence, may also be relevant with regard to the coercion of citizens by an official to refrain from testifying. The norm, among other things, criminalizes acts of instructing or persuading a person under interrogation, a witness, a victim, an expert to refrain from providing information or testifying. The investigative and judicial practice related to this article, as well as the legislative decision to place Article 372 in the chapter on non-official crimes, show that the subject of the action is not an official, but a private person trying to influence the participant in the criminal process.[245] Thus, this provision cannot be considered either.

The State Inspector's Investigative Service has investigated cases based on abovementioned crimes. Namely, law enforcement official, who, aiming to avoid responding to a citizen's statement regarding the theft, persuaded the citizen to change the content of the statement, in a way as if instead of complaining about a crime, the person was seeking the return of items given as a gift to others by his father, was charged under this article. Thus, the police officer could still return the lost items to the applicant and would not be obliged to initiate an investigation. The agency qualified the action as coercion to give an explanation, even though the court case law qualifies such cases as abuse of power.[246] In this case, a guilty verdict was also rendered under Article 335 of the Criminal Code. In terms of achieving prevention of physical or psychological violence within the activities of law enforcement officials, the decision of the investigative body to investigate the case must be positively evaluated.

The second part of Article 335 of the Criminal Code defines as a punishable act the coercion by an official or a person equated to him/her to give an explanation, testimony or state an opinion using violence or threat of violence dangerous for life or health. The disposition of the norm is similar

[244] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 2), 2009, p. 150.

[245] Ketevan Chomakhashvili, Salome Osepashvili, Crimes Against Justice, 2017, p. 75, Available at: https://bit.ly/3sTXU6X, Accessed on: 03.04.2021.

[246] Judgment of January 31, 2018 of Tbilisi City Court; Judgment of December 14, 2015 of the Tbilisi City Court.

to the elements of the crime of torture. In this case, on the one hand, the objective act, as in the disposition of torture, is determined by the purpose. On the other hand, here too, the use of violent methods, such as life-threatening or health-threatening violence or the threat of such violence, is necessary to achieve the purpose (coercion to explain, testify or state an opinion).

Both provisions describe the act in the same way, define similar methods of violence and the identical purpose of the criminal act - to obtain information, explanation, and testimony from a person. The only difference between the articles is the grammatical-linguistic change, which can create problems in terms of applying the norms in practice, qualifying the action, and holding officers accountable.[247]

Against the background of the similarity of the objective disposition of the articles in question, attention is drawn to the sharp difference between the sanctions imposed for these crimes, namely, coercion using life-threatening violence to provide an explanation, when qualified under Article 335 of the Criminal Code of Georgia, leads to imprisonment from 5 to 9 years, while the same act when qualified as torture, under the Article 144[1] (2) (a) of the Criminal Code of Georgia, can lead to imprisonment of an officer from 9 to 15 years.

Thus, in order to avoid duplication of norms, as well as for uniform formulation of investigative and judicial practice, it may be advisable to repeal part 2 of Article 335 of the Criminal Code and, in the presence of the objective elements of the crime, to qualify the act as torture, threat of torture, degrading or inhuman treatment according to particular factual circumstances. In addition, in order to eliminate the legislative gap, the disposition of "coercion to refrain from testifying" should be added to the list of punishable actions.

5.8. COERCION OF A PERSON PLACED IN A PENITENTIARY INSTITUTION

The act of forcing a person placed in a penitentiary institution to change the testimony or refrain from testifying is under the mandate of the State Inspector's Investigative Service.[248] According to the same norm, coercion of a convict in order to interfere with the performance of a civil duty is punishable.

The competence of the independent investigative mechanism over the crime in question raises concerns given the systemic structure of the entire article and it should be assessed whether or not the subject of this crime is a representative of a law enforcement body, an official or a person equated to latter.

Article 378 of the Criminal Code is included in the chapter on crimes against the enforcement of judicial acts and is titled as interference with or disorganization of the activities of a penitentiary institution. The first part of the norm criminalizes disobedience to the lawful request of an employee of a penitentiary institution, accompanied by threats against him or his close relative regarding the official activities of an employee of the penitentiary institution, or other forms of obstruction of the institution's activities, disorganization of the working process. The object of criminal protection

[247] Giorgi Burjanadze, Prohibition of ill-treatment under the Substantive and Procedural Criminal Law of Georgia and Its Compliance with International Standards, Journal: Review of Modern Law, 2013, N1, p. 75, Available at: https://bit.ly/3sTR7Kz, Accessed on: 03.04.2021.

[248] Criminal Code of Georgia, Article 378, Part 2.

is the normal functioning of the detention and penitentiary institution, additionally, the safety, personal inviolability and health of the administrative staff of the institution, and of the persons placed in the institution.[249]

Criminal act given in the second part of Article 378 of the Criminal Code is different from the one in the first part, namely it describes violence against a person placed in a penitentiary institution in order to force him/her to 1. change the testimony; 2. refrain from testifying or 3. coercion of a convicted person intended to interfere with the fulfilment of his/her civil duties. The third part of the article imposes punishment for assaulting an employee of the penitentiary institution and for any other form of violence during his/her transfer to another place.

A prerequisite for the investigation of this crime by the Investigative Service of the State Inspector is that it was committed by an official, a person equated to an official or a representative of a law enforcement body. According to the commentary on the Criminal Code, regarding the second part of Article 378 of the Criminal Code, the act has a specific subject - a person in custody or in a penitentiary institution.[250] The structure and logic of the article, aimed at protecting the normal functioning of the institution and the safety of employees in the first and third parts, reference to a law enforcement officer or official in the second part of the article raises doubts. The general legislative technique of the Criminal Code should also be taken into account, according to which an officer (a person equated to him) is explicitly named as a special subject of certain crimes. Based on the analysis of the interviews with investigators held as part of the study, this article is inoperative in their investigative practice and presumably, the subject of this norm is a person placed in a penitentiary institution as well.

With regard to the crime under consideration, the problem is that the norm criminalizes the coercion of a person placed in a penitentiary institution to change his testimony or to refrain from testifying. Coercion of a person placed in an institution to testify is not part of the objective disposition of the same article.

In addition, the second part of Article 378 of the Criminal Code describes as a punishable act coercion of a convict aimed at interfering in the fulfilment of his/her civil duty. Clarification is needed, on the one hand, as to what is considered under a civil duty and, on the other hand, why the coercion of a convict placed in a penitentiary institution is punishable in this case, while cases of pressuring defendants are neglected.

The legal definition of the performance of a civil duty is not given in the Criminal Code, it is not even present in the provisions of other crimes provided by the Code. However, substantive definition of civil or public duty implies fulfillment of obligations imposed on a citizen by the Constitution or other acts, such as preventing a citizen from committing an offense, reporting a crime to the authorities, exposing perpetrators, and appearing as a witness before the investigation/court. Participation in elections can also be considered as a civil duty. The latter had not been part of the objective disposition of the norm under consideration since the adoption of the Criminal Code till the amendments to the Constitution of Georgia were introduced on January 9, 2012, as the Constitution completely deprived a convict in a penitentiary institution of the possibility to vote. According to the amendments introduced to the Constitution in 2012 and 2017, first persons convicted

[249] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili, Commentary on the Private Part of Criminal Law, (Book 2), 2009, p. 317.

[250] Ibid, p. 320.

for less serious crimes were given the right to participate in elections, later the right was granted to the convicts charged with serious crimes, too.[251]

Thus, under the current legislation, hindering persons convicted for less serious and serious crimes can be considered as an interference with the fulfilment of the civil duties, however, in any case, it remains unclear why protection from the obstruction of their civil duties applies only to convicts and why accused persons are excluded from the legislative disposition.

To conclude, it must be noted that the shortcomings of the provision under the second part of Article 378 of the Criminal Code should be addressed through changes. In particular, the subject of violence against a person placed in a penitentiary institution should be specified and should include both an accused and a convict placed in a penitentiary institution, as well as a public servant in the institution. Therefore, an official or a person equated to the latter should be added to the said norm as a special subject. Apart from that, the coercion of the person placed in the institution to testify, along with coercion to change the testimony and refrain from testifying, should be added to the objective disposition of the crime. In addition to the coercion of a convict placed in a penitentiary institution, a similar type of pressure exerted on a defendant should also be made a punishable act.

5.9. OTHER CRIMES AGAINST PERSONS UNDER THE EFFECTIVE CONTROL OF THE STATE

In addition to the above crimes, the investigative mandate of the Service also includes criminal acts committed against a person under the effective control of the state, which resulted in the death of this person. [252] The law provides for the definition of a person under the effective control of the state, which means a detainee, or a person deprived of liberty in any other way, as well as any person whose freedom of movement and the right to voluntarily leave the location is de facto restricted by an official, regardless of whether the person is on the territory of Georgia or outside of it.[253]

Prior to the launch of the Independent Investigative Mechanism, extending the investigative mandate to persons under effective control of the State was criticized among civil society, indicating that the effective control of the State is a factual issue to be established in the course of the investigation and is not appropriate as a criterion for determining the competence of the mechanism.[254]

The current practice of the Investigative Service shows that in 2020, 15 cases were investigated in connection with the death of a person under the effective control of the state.[255] All of these cases were related to the violation of the internal rules by the employee of the Special Penitentiary Service, which resulted in the loss of human life. [256]

[251] Legislative amendments of 23.03.2018 and 09.01.2012 to the Constitution of Georgia, Articles 28 and 24.

[252] Law of Georgia on the State Inspector Service, Article 19.

[253] Law of Georgia on the State Inspector Service, Article 3, Subparagraph "j".

[254] Statement of the Coalition for Independent and Transparent Judiciary, February 14, 2018, Available at: https://bit.ly/3umUWbr, Accessed on: 03.04.2021.

[255] 2020 Annual Report of the State Inspector Service, p. 132, Available at: https://bit.ly/3ceGP1c, Accessed on: 03.04.2021.

[256] Criminal Code of Georgia, Article 342[1], Part 2.

In connection with the said provision on the investigative mandate, the interviewed investigators of the agency noted, that as a rule, launch of the investigations were connected with the death of a person (convict, defendant) in a penitentiary institution.

Problems arise in practice, when a person under the effective control of the state receives a life-threatening injury in a penitentiary institution, however, the fact of death occurs elsewhere, for example in a private medical institution.[257] In such a case, the requirement for invoking investigative mandate - the death of a person under the effective control of the state - is not explicit, nor is unambiguous the presence of a criminal action of special subjects under the service mandate - law enforcement officer, officer or a person equated to the latter. Rather, the cause of death may be improper treatment provided by the medical staff of a private clinic. However, the investigating agency still launches an investigation into such cases, arguing that the person may have been injured while under effective control of the state.

While analyzing the general provision on the competence, interviewees named the ambiguity of the term of effective control of the state as a problem in some cases. Namely, it was emphasized that consideration should be given to cases where a person is not in a detention facility (temporary detention facility, penitentiary facility) or in a law enforcement office. The existence of effective control should be established in situations, in which the law enforcement officer has started communicating with a citizen, even when issues related to the citizen's free exercise of his/her will/freedom of movement is not obvious from the legal relationship. For example, when law enforcement officers arrived at a specific location after being called, a conflict situation arose with a citizen, after which the person committed suicide. The response to the case required an assessment of whether the death of the citizen took place under the effective control of law enforcement officers, and although this was not incontrovertible, the investigation was conducted by the State Inspector's Investigative Service.

To summarize, all hypothetical cases that may arise in practice cannot be regulated by the legislative definition of effective control of the state. Rather, judging from the purposes of introducing an independent investigative mechanism, the State Inspector's Investigative Service should primarily investigate all cases where an unlawful act by a law enforcement officer, resulting in the loss of a person's life, is suspected.

5.10. EXTENDING THE MANDATE OF THE INVESTIGATIVE SERVICE

Prior to the launch of the Independent Investigation Mechanism, the mandate of the Investigative Service was widely discussed among local and international human rights organizations, and the need to include those crimes on which there is high public interest and which are related to public charges against law enforcement officers' activities under the investigative mandate of the agency was emphasized.[258] Various models of investigative mandate were developed, aimed at ensuring independent and impartial investigation of human rights violations whenever there was a suspi-

[257] The information is based on individual interviews with investigators from the State Inspector's Office held under the project.

[258] Statement of the Coalition for Independent and Transparent Judiciary, February 14, 2018, Available at: https://bit.ly/3rR2iSY, Accessed: 03.04.2021.

cion that law enforcement agencies were implicated.[259]

Under the law finally adopted, the Investigative Service of the State Inspector was established as a mechanism for combating violence and ill-treatment in the law enforcement system. Crimes common in the past, such as falsification of evidence, premeditated unlawful arrest, crimes committed during the investigation, and cases with some political interest remained beyond the mandate of the Investigative Service. The extension of the mandate of the investigative service in these cases remains critically important - in the context of limited investigative mandate, an independent investigative mechanism should have priority competence over criminal matters of high public interest.

5.10.1. ACTS OF RESISTING AN OFFICER OF A LAW ENFORCEMENT AGENCY/PENITENTIARY INSTITUTION

Based on the one-year experience of the investigative agency, the views of the current investigators on the issues of departmental subordination were interesting for the research. It was clearly stated in the interviews that the extension of the investigative mandate of the Service is justified in terms of the efficiency and effectiveness of the investigative process in relation to a number of crimes, however, a necessary prerequisite for this should be the creation of adequate human and material resources. With such a reservation, the interviews focused primarily on the inclusion of Articles 353 and 353[1] of the Criminal Code under the mandate of the Service.

Under the mentioned crimes, assaults on a representative of a law enforcement body or an employee of a penitentiary institution while performing official duties is criminalized. Investigators explained that the specifics of this type of criminal case are similar and are often characterized by reciprocal accusations between the law enforcement officer and the person(s) under his or her control, with both parties pointing to assault and physical abuse. In this type of case, different investigative bodies[260] run parallel investigations, while the investigative actions in the case are completely identical. This creates, on the one hand, a technical problem, as the same witness has to be questioned several times on the same facts in different investigative services, and on the other hand, double human resources are spent by the state.

According to the experience of the Investigative Service of the State Inspector, the existence of a criminal case under Article 353 of the Criminal Code can become known to them only if it is reported by the applicant and otherwise, they cannot get information on the matter, while in cases when it became known to them, they have responded accordingly, and a police officer has been prosecuted for violence against a citizen charged under Article 353.

[259] Thomas Hammarberg, Georgia in Transition - Report on Human Rights, 2013, Available at: https://bit.ly/2HGIpNp, Accessed on: 03.04.2021.

[260] The State Inspector's Service investigates cases of possible violence against a citizen, Ministry of Internal Affairs - cases of assault on a police officer, the General Inspectorate of the Ministry of Justice - cases of violence against a officer of penitentiary service.

5.10.2. CRIMES COMMITTED IN THE COURSE OF INVESTIGATIONS

The competence of an independent investigative mechanism may extend to crimes in violation of procedural rules of evidence-gathering, such as destruction and falsification of evidence (Articles 368 and 369 of the Criminal Code), intentional unlawful arrest and detention (Article 147 of the Criminal Code), intentional criminal prosecution of an innocent person (Article 148 of the Criminal Code).

Both the country's past experience and case law indicates a close link of this type of crime to the violent actions of law enforcement officials and large-scale violations of citizens' rights during the administration of justice. There is a high public interest in this type of cases and there is a special expectation for an independent, transparent and objective investigation.

During the interviews, when discussing the future changes in the investigative mandate of the Investigative Service, the view was expressed that the mandate of the Service should extend to the re-investigation of criminal cases, in which violation of the Convention rights was proven by the European Court of Human Rights and the enforcement of these decisions by re-investigating is the state duty.[261]

Currently, the Georgian Prosecutor's Office is conducting investigations based on the decisions of the European Court of Human Rights. The Prosecutor's Office was instructed to take measures to enforce the decisions in 42 cases rendered against Georgia prior to 2017. Most of the cases concerned substantive and procedural violations of Articles 2 (right to life) and 3 (prohibition of torture) of the Convention. [262]

The rulings in the said cases concerned human rights violations committed before 2013, while prosecutions in these cases were launched after 2013, following the change of government, which eventually led to the conviction of 15 individuals. [263]

With regard to the process of launching or resuming investigations into criminal cases by the prosecution for the enforcement of the European Court judgments, it is noteworthy that responsibility for objective and effective investigation (cases of ill-treatment) or for procedural supervision in the investigation was vested with this agency before the Court found these violations. The responsibility for subsequent response to the finding of violations by the European Court in the cases remained with the Prosecutor's Office, and in fact, after failing in its obligation to conduct an objective investigation in specific cases, correction of procedural errors still falls under the authority of this agency. Therefore, it is natural that questions arise about the willingness and readiness of the Prosecutor’s Service to admit own mistakes after the improper performance of its duties.

Accordingly, it may be justified to extend the competence of an independent investigative mechanism to re-investigations for enforcement of the European Court judgments. However, even in this case, it should be borne in mind that the mandate given to this agency is directly related to the protection of the right under Article 3 of the European Convention - hypothetically, in case of improper investigation by the State Inspector Service and the finding of the violation by the

[261] The information is based on individual interviews with State Inspector Service investigators held as part of the project.

[262] 2018 Report of the Chief Prosecutor of the Prosecutor's Office, p. 37, Available at: https://bit.ly/31NxkAG, Accessed on: 03.04.2021.

[263] Ibid, p. 39.

European Court, reinvestigating the same case by the same body also raises issues of conflict of interest. The solution may be respective granting of investigative mandate over such cases to the prosecutor's office.

5.10.3. CRIMES AGAINST INVIOLABILITY OF PRIVATE LIFE

Investigators of the Investigative Service also expressed their opinion that the crimes under Article 157-159 of the Criminal Code – on the cases of violation of personal information, personal data, and violation of the secrets of private communication should be included under investigative mandate of the Service. [264]

Given the current functional arrangement of the State Inspector's Service, it is responsible for overseeing the lawfulness of the processing of personal data by public and private institutions.[265] For this purpose, the Service takes preventive measures and also responds to detected violations, however, in cases where the violation of privacy in the process of responding to a wrongful act reveals the signs of a criminal offense, the case is sent to the relevant investigative body for response. The extent to which criminal cases related to the unlawful processing of personal and confidential information can be brought under the mandate of the same agency needs to be assessed in terms of conflicts of interest, the goals and resources of the investigative service.

The experience of the last years of the country has shown us that in addition to the absolute impunity of persons for torture and ill-treatment in the law enforcement system, the systemic challenge was covert surveillance and interceptions, pressuring citizens with personal life records. This was particularly acute in the spring of 2013, when the Ministry of Internal Affairs released information about the massive violation of privacy in 2005-2012, the existence of thousands of hidden and illegal audio and video recordings. [266]

This issue did not become a subject of a proper political or legal assessment by the state in the following years, no responsibility was imposed on the officials who created the secret materials. The unlawful dissemination of materials containing records of personal life of politicians continued periodically after the change of government,[267] which show that there are still risks of manipulating with this issue and using them as a leverage for targeted blackmailing of the public. It is noteworthy that under the draft law prepared by the civil organizations,[268] the investigative competence of the independent investigative mechanism included investigation of the crimes in which the interests of the government would be identified.

Given the practice of using crimes against privacy for political purposes and the public interest related to covert interceptions, there is a high public demand of effective investigation. Accordingly,

[264] The information is based on individual interviews with State Inspector Service investigators held as part of the project.

[265] Law of Georgia on the State Inspector Service, Article 2.

[266] Mikheil Sharashidze, Constitutional Analysis of the Right to Inviolability of Private Life in Georgia in *the Collection of Articles: Protection of Human Rights and Legal Reform in Georgia,* 2014, p. 212, available at: https://bit.ly/2RaQvlV. Accessed on: 03.04.2021.

[267] Statement of Campaign "This Affects You", 04.03.2016, Available at: https://bit.ly/3wp4RPT, Accessed on: 03.04.2021.

[268] Ibid.

from the outset, extending the mandate of the Investigative Service beyond just cases of torture and ill-treatment - has been a topic of discussion between the state and support groups of an independent investigative mechanism.

The starting point for resolving the issues may be the introduction of priority competence of the State Inspector Service in respect of any offense where there is a doubt that a conflict of interest may arise in the course of the investigation. Priority competence will allow that, especially sensitive cases that fall outside its exclusive jurisdiction, but run the risk of conflicts of interest and, consequently, ineffective investigations, are subject to the investigative mandate of the Service.

6. INVESTIGATIVE MANDATE OF THE STATE INSPECTOR'S SERVICE

6.1. LAUNCHING INVESTIGATION

Undelayed launch of investigations on the cases falling under the mandate of the State Inspector is essential for the outcome of a case.[269] Questioning of witnesses and gathering evidence on time are particularly important for ensuring a comprehensive investigation of these crimes.[270] Taking swift and effective measures immediately after the launch of an investigation is necessary, since the risk of hiding evidence or influencing witnesses/victims is high, which complicates the process of investigation and may even render it impossible.

Based on the practice of the European Court of Human Rights, timing constitutes one of the important principles of an effective investigation. To maintain trust towards the rule of law, investigations should be conducted immediately and without any delays.[271]

Identifying and addressing legal and practical challenges at the stage of launching an investigation is crucial for the effective functioning of an independent investigative body. The sub-chapters below will review the existing problems in the area, which were identified based on the analysis of the existing legislation and the interviews conducted with the investigators.

6.1.1. REPORTING CRIMES

Based on the existing legislation an investigator or a prosecutor is obliged to launch an investigation if he/she receives information on a crime, if such information was published or broadcasted on media, or was obtained during court hearings.[272] An investigation can also be launched based on an anonymous report.[273] To ensure immediate receipt of the notifications, the State Inspector's Service operates a 24-hour hotline and an electronic system of report management.[274] The Inspector's Service has not developed uniform rules for registering received reports on the cases containing signs of crime or other information.[275]

In 2020 the Investigative Division of the State Inspector's Office received a total of 2622 reports.[276] The majority of the reports came from the temporary placement isolator of the Ministry of Internal

[269] The importance of the undelayed launch of investigation and conduct of investigative measures promptly is also highlighted in the report of the State Inspector's Service.
2019 Annual Report of the State Inspector's Service, p. 107-108, available at: https://bit.ly/34PKaQd, access date: 02.04.2021.

[270] For instance, when the alleged victim has physical injuries, after a certain period the traces would be impossible to report through medical checks. Moreover, the delay may provide the accused law-enforcement representatives with the time to psychologically influence the victim and convince him/her to refuse cooperating with the investigative bodies. There is also the risk of deleting video materials containing important evidence.

[271] Jonny Byrne, William Priestly, Police Oversight Mechanisms in the Council OF Europe Member States, p. 5, available at: https://bit.ly/2LjAzvb, access date: 13.01.2021.

[272] Criminal Procedure Code of Georgia, article 1, para. 1.

[273] Ibid, para. 3.

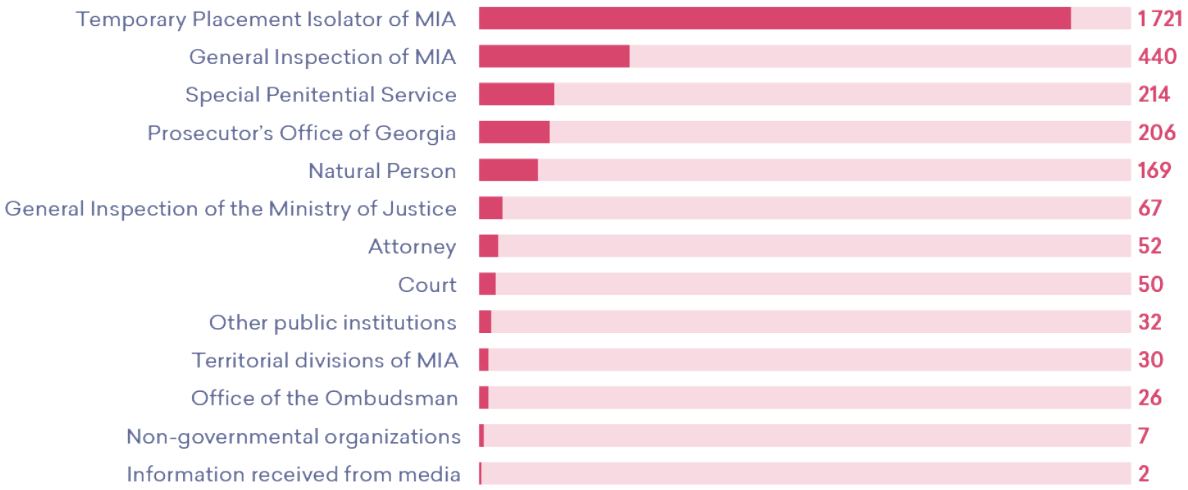
[274] 2019 Annual Report of the State Inspector's Service. p. 99-100, available at: https://bit.ly/34PKaQd accessed on 4.06.2021. The hotline operators are provided with cell phones, which are used by several state entities to send information on alleged crimes.

[275] Letter NSIS02000021592 of the State Inspector's Service, dated 30.12.2020.

[276] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

Affairs (MIA). The chart below gives the statistical information on the reports submitted to the Investigative Division[277] ranked by the authors of the notifications:

REPORTS RECEIVED BY THE INVESTIGATIVE DIVISION OF THE STATE INSPECTOR'S SERVICE DURING 2020



Citizens mainly contact the Service through the hotline, however, the overall number of reports submitted by the citizens is not high.[278] This may be caused by the lack of public awareness of the mandate of the State Inspector's Service. Attorneys, non-governmental organizations, and the Ombudsman mainly report to the Service in writing, when notifying about the cases containing signs of alleged crimes.[279] However, reports from the Ombudsman's Office are also submitted through the hotline of the Service.[280]

Reports from the temporary placement isolators of MIA are mainly submitted by the health workers of the entity or its heads.[281] Health workers send notifications, if signs of physical harm or violence

[277] In certain cases, the State Inspector's Service receives the same notifications from different sources. To produce comprehensive statistical information, in these cases the notifications are counted under each reporting entity/source. Taking into consideration the above-mentioned, the overall number of the sources of notifications is higher than the overall number of the reports.

[278] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[279] Ibid.

[280] Based on the individual interviews with the investigators, notifications are sent in writing if during the interview an alleged victim notifies the representative of the Ombudsman's Office that he/she was subjected to ill-treatment. There have also been cases when the representative of the Ombudsman's Office witnessed the facts of ill-treatment and informed the State Inspector's Service about the incident.

[281] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

are detected on the bodies of detained suspects which raises doubts of ill-treatment; or if the detained suspects themselves note that they have been subjected to violence from law-enforcement representatives.[282] Health workers report the cases promptly through WhatsApp or Viber and provide the Service with additional case documentation later on.[283] This practice is in line with the Istanbul Protocol, however unfortunately it is not regulated by the national legislation. The provision of information through text messages is only regulated based on a verbal agreement between the temporary placement isolator and State Inspector's Service.[284]

The Rules of Operation of the Typical Temporary Placement Isolators under the Ministry of Internal Affairs, oblige the heads of the isolators to report to the State Inspector's Service under particular circumstances, however, the legal act does not regulate the method or timeframes of the reporting, which places somewhat wide discretion on the heads of the isolators. Namely, under the circumstances foreseen by the Rules of Operation, the head of the isolator is obliged to send a notification to the Service in writing and/or through other means of communication,[285] which does not constitute sufficiently clear wording.

Notifications from the General Inspection of MIA submitted by the Emergency Response Center (112) and the General Inspection (126) are sent to the State Inspector's Service.[286] When submitting reports on the ill-treatments majority of the citizens refer to the General Inspection of MIA.[287] Other departments of MIA (except for the temporary placement isolator) submit reports first to the General Inspection, after which the latter redirects the reports to State Inspector's Service.[288]

The submission of the notifications received by the Emergency Response Center and other departments of MIA (except for the temporary placement isolator) to State Inspector's Service through the General Inspection is particularly problematic. Even though the General Inspection notifies the Service of the received reports immediately, this arrangement still has a negative impact on the process of taking timely steps. This is a significant obstacle for conducting effective investigations since, in addition to the delays in redirecting the reports, the law enforcement representatives committing the crime can find out that a complaint is submitted against him/her.[289] When citizens refer to 112, the Emergency Response Center redirects the notifications to regional police departments, after which the latter informs the General Inspection.[290] Thus, the law-enforcement representatives employed at the institutions can take actions to cover up evidence, negotiate with or threaten witnesses and take other actions to obstruct investigations on the crimes they are suspected in.

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[282] 2019 Annual Report of the State Inspector's Service, p. 104, available at: https://bit.ly/34PKaQd accessed on 4.06.2021.

[283] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[284] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[285] The Rules of Operation of Typical Temporary Placement Isolators approved by the Decree N423 of the Minister of Internal Affairs, article 7, paras. j.a, j.b, j.c, j.d and j.e.

[286] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[287] Ibid.

[288] Ibid.

[289] Ibid.

[290] Ibid.

Thus it is essential, that State Infector's Service receives information on alleged cases of ill-treatment directly from the Emergency Response Center and other departments of MIA. If relevant steps need to be taken in terms of disciplinary sanctions, the system of simultaneous reporting to the General Inspection and the State Inspector's Service can be developed.

Notifications from the Prosecutor's Office are referred to State Inspector's Service if during the initial, preliminary, or main hearings of a case the defendant states that a crime falling under the mandate of the State Inspector has been committed against him/her,[291] or if such notification is received by the General Prosecutor's Office.[292] The obligation to notify the Investigative Division and the relevant deadline of 24 hours are foreseen by the internal decree of the Prosecutor General.[293] All other relevant entities must have similar deadlines set by the legal act for notifying the State Inspector's Service.

Notifications from penitentiary institutions are sent by medical personnel or the employees of the General Inspection under the Ministry of Justice if the accused or convict has signs of injuries and the medical staff has the suspicion of ill-treatment or if the accused/convict refers to the facts of violence committed by the law-enforcement representatives (regardless of the existence of injuries).[294] In these cases, the medical staff member of the penitentiary institutions is obliged to immediately notify the State Inspector's Service over the phone and to provide relevant documentation as soon as possible through the electronic file-sharing system.[295] In the event of a physical injury only (when the patient does not refer to the facts of violence against him/her and the medical personnel does not have the suspicion of ill-treatment), the doctor of the institution notifies the General Inspection of the Ministry of Justice.[296] The State Inspector's Service is immediately informed through a phone call if there is a deceased inmate or a violent incident in the institution.[297] However, the statements of the accused/convict are sent relatively later on, on the same or the following day.[298]

Written notifications from the criminal chambers of the courts, mainly relating to the inmates of the penitentiary institutions are rarely received by the State Inspector's Service. [299] In certain cases, the notifications are sent by the prosecutors and not by the judges.[300]

It should be noted that relevant amendments were introduced to the Criminal Procedure Code of

[291] 2019 Annual Report of the State Inspector's Service, p. 105, available at: https://bit.ly/34PKaQd, accessed on 4.06.2021.

[292] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[293] Decree N159-c of the Prosecutor General, dated November 5th, 2019.

[294] 2019 Annual Report of the State Inspector's Service, p. 104, available at: https://bit.ly/34PKaQd, accessed on 4.06.2021.

[295] Decree N663 of the Minister of Justice, dated 30.11.2020 on Registering the Injuries of Accused/Detained Caused as a Result of Alleged Torture, Inhuman or Degrading Treatment at Penitentiary Institutions, article 6, para. 1.

[296] Ibid, para. 2.

[297] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[298] Ibid.

[299] Ibid.

[300] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

Georgia in 2018.[301] Namely, Article 191[1] was added to the Code obliging judges to refer to a relevant investigative body in cases of ill-treatment: If at any stage of a criminal proceeding, a judge suspects that accused/convict has been subjected to torture, degrading, and/or inhuman treatment, or if the accused/ convict himself/herself has stated about it before the court, the judge shall refer to a relevant investigative body.[302]

As for those detained for administrative offenses, the number of reports on the cases of possible violations received by the State Inspector's Service from the Administrative Chambers of the courts is low.[303] This might be due to the fact that investigators receive information on cases of ill-treatment against those detained for administrative violations relatively early before the cases are heard at the court.[304] Hence, during the court hearings, judges might already be informed that the State Inspector's Service has already taken relevant measures against the ill-treatment. However, it should be emphasized that, according to the report of the State Inspector's Service, the number of reports received from temporary placement isolator *"is significantly higher in regards to those detained for administrative violations".*[305] At the same time, the Ombudsman has been referring to the worsening tendency of ill-treatments against those detained for administrative violations.[306]

It should be noted that administrative judges are not obliged to report cases of ill-treatment to relevant entities. Similar to the criminal procedural legislation, administrative judges should also be obliged to refer to relevant investigative bodies, when they have the suspicion that the detained/ accused was subjected to torture, degrading, and/or inhuman treatment, or if the detained/accused himself/herself reports a similar incident to the judge.

[301] Came into force on May 10th, 2019.

[302] Criminal Procedure Code of Georgia, article 191[1].

[303] 2020 Annual Report of the State Inspector's Service, p. 119, available at: https://bit.ly/3ceGP1c, access date: 02.04.2021.

[304] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[305] 2020 Annual Report of the State Inspector's Service, p. 117, available at: https://bit.ly/3ceGP1c, access date: 4.06.2021.

[306] 2020 Annual Report of the Ombudsman, p. 59, available at: https://bit.ly/3uOCf0f, access date: 02.04.2021.

6.1.2. TIMING OF RECEIVING REPORTS ON THE CASES OF ALLEGED ILL-TREATMENT

One of the significant challenges highlighted by the State Inspector's Service is occasional delays in the reporting process, when the Service receives notifications after a certain period has already passed from the moment of committing a crime, which creates substantial drawbacks in the process of obtaining evidence, establishing factual circumstances and may even deem it impossible to conduct an investigation.[307]

According to investigators, notifications from the Prosecutor's Office and the Public Defender are usually sent promptly, however, there are cases when the reporting process is delayed for days. The State Inspector's Service is notified via a hotline, shortly after the detained is placed in the temporary placement isolator, relevant forms related to physical injuries and appeals are filled in.[308] The General Inspection of the Ministry of Internal Affairs also acts immediately after receiving a notification, however, the timing of receiving reports from 112 and relevant departments of MIA (except for the temporary placement isolators) remains to be particularly problematic.[309] For example, if a notification from 112 or other departments of MIA is received by the General Inspection on Friday, it may take 2-3 days until the information reaches the State Inspector's Service.[310]

Due to the reporting delays significant evidence is often lost, it may be difficult to extract video recordings, obtain information, report physical injuries, communicate with witnesses, etc.[311] Moreover, timely arrangement of the meeting between an investigator and the alleged victim is essential for an effective investigation.

Currently, the rule of reporting ill-treatment cases from temporary placement isolators through text messages is implemented in practice only and to a certain extent, it is up to the head to decide on the means of reporting.[312] The obligation to report to the State Inspector's Service 'immediately', in writing and/or in another form established by the rules of operation of typical temporary detention isolators under the Ministry of Internal Affairs, does not provide sufficient guarantee that the existing practice will be maintained. In case the existing practice of communicating via text messages established between the temporary detention isolators and the State Inspector's Service changes, there is a threat that the investigators will not meet the detained person in a timely manner.[313]

Based on the above-mentioned it is advisable to normatively regulate specific reporting deadlines and means of communication between the state entities and the State Inspector's Service. Furthermore, each department of MIA should be obliged to directly report to the State Inspector's Service.

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[307] 2019 Annual Report of the State Inspector's Service, p. 121, available at: https://bit.ly/34PKaQd accessed on 4.06.2021.

[308] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[309] Ibid.

[310] Ibid.

[311] Ibid.

[312] Ibid.

[313] Ibid.

6.1.3. CHANGE OF THE POSITION BY THE APPLICANT

Changes in the positions of the applicants constitute one of the main challenges in the investigative activities of the State Inspector's Service.[314] The problem is mainly related to the notifications received from the Ministry of Internal Affairs.[315] As noted by the investigators of the State Inspector's Service, this may be caused by the misperception of use of force during the arrest or by being under the influence of alcohol or other substances when reporting.[316]

Among the possible reasons, it was also stated that the applicants are usually those accused of criminal or administrative offenses, which have not yet been charged with preventive measures and/or have not faced the hearings for determining measures of administrative detention and they may have the impression that cooperating with the State Inspector's Service will have a negative impact on the process.[317] This also applies to the cases when the alleged victim contemplates signing a plea bargain. As noted by one of the investigators, "*the policeman may make a promise that they will not request administrative detention during the trial, the judge will simply give a notice to the defendant, they will sign a plea bargain, which causes the change of the position by the applicant.*"

It should be noted that the fear of law-enforcement representatives serves as the basis for changing the positions relatively more often in the regions of Georgia.[318] At the same time, lack of trust towards the investigation also has a negative effect on the process.

If an applicant changes his/her statement, the relevant investigator of the State Inspector's Service prepares an explanatory note and an investigation is launched. However, the conduct of the investigation is significantly complicated.[319] According to the investigators, when the victim refuses to give details and turns down the offer to conduct a medical check, the only possible evidence left are video recordings, based on which the investigation can be completed with the relevant outcome.

6.1.4. CHECKING THE INFORMATION RECEIVED AND CONDUCTING INTERVIEWS

The powers and obligations provided by the Criminal Procedure Code apply to the investigators of the State Inspector's Service as well.[320] Investigators and prosecutors are obliged to launch investigations as soon as they receive information about a possible crime.[321] **The legislation defines the grounds for termination of the investigation** and/or **non-initiation or termination of prosecution**. The law does not provide for the **grounds for not initiating an investigation**, which once again indicates the imperative requirement of the law - investigation must begin as

[314] Ibid.

[315] Ibid.

[316] Ibid.

[317] Ibid.

[318] Ibid.

[319] Ibid.

[320] The Law of Georgia on State Inspector's Service, article 23, para. 8. Criminal Procedure Code of Georgia, article 34, para 1.

[321] Criminal Procedure Code of Georgia, article 100.

soon as information on a crime is received.[322]

Regardless of the above-mentioned, receiving a notification about a crime is not always sufficient to launch an investigation, and the Law on Operative-Investigative Activities provides investigative bodies with the possibility to conduct pre-investigative activities.[323] The same applies to the Investigative Division of the State Inspector's Service. The parallel and mutually exclusive regulations of the legislation create the basis for implementing bad practices in the system since they provide investigators with the discretion to operate in a simple, code-free space. In the process of conducting operative-investigative activities, the operative-investigative bodies and relevant operative workers, are not subjected to effective oversight. It can be concluded that the current legislation regulating the conduct of operative activities is not in line with the human rights-based and democratic principles of policing.[324] It is important that along with reforming the investigative system, the government starts to fundamentally transform the area of operative activities, which in turn would apply to the State Inceptor's Service as well.

Thus, an investigation is not always launched automatically after the State Inceptor's Service receives information on a crime. As a rule, part of the notifications goes through the filter of interviews.[325] It should be noted that filtering notification through interviews can be a subject of debate. On the one hand, the decision to launch an investigation is based on the personal perception and evaluation of an investigator, and on the other, the practice of launching an investigation on each received notification requires significant human and material resources, which may cause the overload of the Service. According to the investigators, they check/verify information or clarify the facts contained in the notifications to avoid launching investigations over non-existent facts.[326] Sometimes applicants refer to crimes, while the factual circumstances suggest otherwise[327] or the notifications received are irrelevant.[328] Thus, conducting interviews is an established practice at the State Inspector's Service aimed at clarifying the factual circumstances of the case.[329]

Upon receiving notifications from the temporary placement isolator investigators of the State Inspector's Service conduct interviews with alleged victims by default.[330] If notifications are received over the night investigators try to arrange interviews with the detainees before 10 a.m., as by

[322] Article 105 of the Criminal Procedure Code defines the grounds for the termination of an investigation and/or non-initiation or termination of prosecution.

[323] EMC, Analysis of the Investigative System, p. 26, 2018, available at: https://bit.ly/3w3CuWV, access date: 14.01.2021.

[324] EMC, Operative Activities at the Law-Enforcement Institutions, 2019, p. 14, available at: https://bit.ly/2TxrdiW, access date: 09.03.2020.

[325] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[326] Ibid.

[327] For instance, applicants might be noting that law-enforcement representatives abducted an individual, while in reality the person was detained based on a ruling.

[328] Some of the irrelevant notifications refer to the crimes committed by law-enforcement representatives before the date of activating the investigative mandate of the State Inspector's Service – November 1st, 2019 or to the crimes which do not fall under the investigative mandate of the Service.

[329] According to the investigators, launching investigations without interviews would have created a number of difficulties in the process of investigations.

[330] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

this time they are transferred to the court.[331] When the notifications are received from temporary placement isolators in the regions, investigators are often unable to conduct interviews with the alleged victims due to the time restrictions.[332] According to the investigators, if a meeting is not arranged with an alleged victim before 10 a.m., reaching him/her at a later time can be significantly complicated. However, during the pandemic, the practice of conducting remote interviews was introduced. Investigators use video interviews to reach the alleged victims in the regions.[333] The decision on launching an investigation is taken based on the assessment of an interview.[334] When an individual claims that he/she incurred physical injury before the arrest and does not have any claims, it is an established practice to take into consideration the adequacy of the explanation on the origins of the injury.[335]

As a follow-up to the notifications received through the hotline and to clarify factual circumstances as well as give a qualification to the case, interviews are conducted immediately either through phone calls or face-to-face by traveling to the locations where the alleged ill-treatment took place.[336] In the case of penitentiary institutions, the need of obtaining entry permits, which is relatively time-consuming constitutes an obstacle for the investigators - investigators may receive the permit to enter these premises with the delay of a full day.[337]

This problem is highlighted in the 2020 Annual Report of the State Inspector's Service, according to which the necessity of obtaining special permits enabling investigators to enter temporary detention and penitentiary institutions negatively affects the conduct of investigations.[338] It is crucial to take relevant measures in this direction and authorize investigators from the State Inspector's Service to enter penitentiary and temporary detention facilities without the need of obtaining special permissions. This would facilitate arranging timely meetings with alleged victims and eliminate the risks of destroying evidence.

After completing interviews, investigators produce minutes of the meetings.[339] If after the interview it is confirmed that the notification is well-substantiated and there are signs of a crime, an investigation is launched based on the notification and the minutes of the interview.[340]

Upon the receipt of notification, when it is necessary to conduct interviews, the case is registered in the electronic program as being at a pre-investigation stage. If later on it is determined that the case does not contain signs of a crime, it is taken down from the program, which requires the elec-

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[331] Ibid.

[332] Ibid.

[333] Ibid.

[334] Ibid.

[335] Ibid.

[336] When an individual refers to the State Inspector's Service, they are contacted on the same day and an interview is held.

[337] To receive approval, the investigator should refer to a penitentiary institution and he/she will be granted the right to enter the premises only after going through relevant procedures.

[338] 2020 Annual Report of the State Inspector's Service, p. 181, available at: https://bit.ly/3ceGP1c accessed on 4.06.2021.

[339] The minutes of the interviews are uploaded in the electronic system, through which prosecutors have access to them.

[340] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

tronic consent of the prosecutor.[341] This is the only means through which prosecutors can access information on the activities undertaken in response to the notifications which did not proceed to the stage of an investigation. In case the information contains signs of disciplinary misconduct or a crime falling under the mandate of other entities, the case is sent to relevant state institutions.[342] Unfortunately, the existing legislation does not include the obligation of the State Inspector's Service to notify the General Inspection of the relevant entity about the cases containing signs of disciplinary misconduct, relevant procedures, and rules.[343] Subsequently, State Inspector's Service does not have the authority to request information on the outcomes of disciplinary cases referred to relevant entities.

6.1.5. TAKING DECISIONS REGARDING THE INITIATION/NON-INITIATION OF INVESTIGATIONS

Investigators of the State Inspector's Service have access to the electronic file management program of criminal cases which is used for processing each stage of the case, including the launch of investigations, providing registration numbers, and uploading information on investigative activities.[344]

Decisions on launching investigations and undertaking relevant measures in response to notifications are taken by the investigators independently.[345] According to the Criminal Procedure Code, the investigator should immediately notify the prosecutor if he/she decides to launch an investigation on a case.[346] Furthermore, the author of the notification has the right to receive a written notice confirming the receipt of the notification.[347] The criminal qualification of the cases is also determined by the investigators, however, in certain cases, the decisions are agreed upon with the managers.[348] The notification on launching an investigation and the information on the criminal qualification of a case is sent to the relevant prosecutor on the same day by telephone, text message, or e-mail.[349]

According to the information provided by the State Inspector's Service, a large portion of notifications, which were followed by the launch of investigations are received from the Temporary Placement Isolator Department of the Ministry of Internal Affairs.[350] The chart below includes the information on the number of notifications received, which served as the basis for launching investigations, with reference to the authors of the notifications:

[341] Ibid.

[342] Ibid.

[343] 2019 Annual Report of the State Inspector's Service, p. 125-126, available at: https://bit.ly/34PKaQd accessed on 6.06.2021.

[344] Ibid, p. 100-101.

[345] Investigators register all cases in the electronic system with the status of being at a pre-investigative stage, which is also accessible for prosecutors and they can view case materials from the pre-investigative stage at any time.

[346] Criminal Procedure Code of Georgia, article 100.

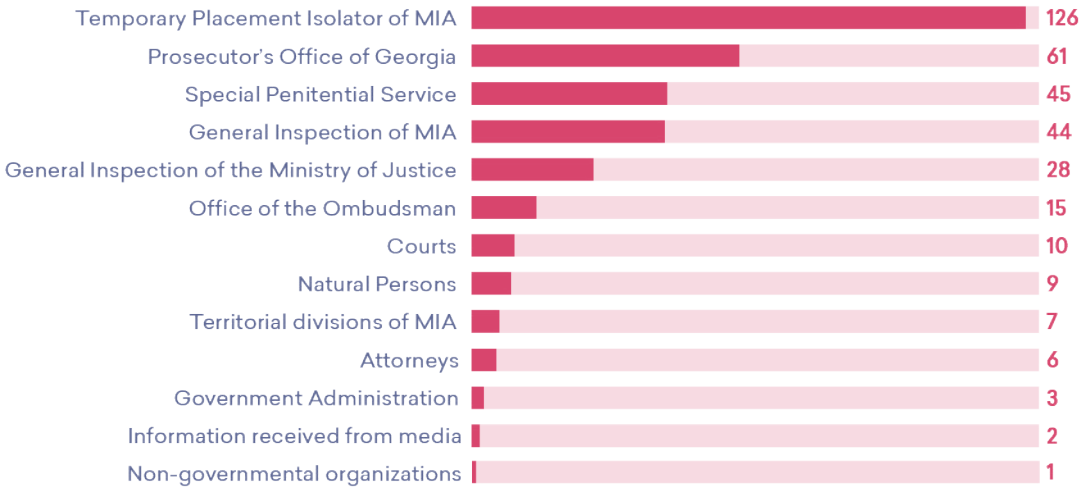
[347] Ibid, article 101, para. 2^1.

[348] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[349] Before the launch of an investigation, relevant investigators have no communication with prosecutors.

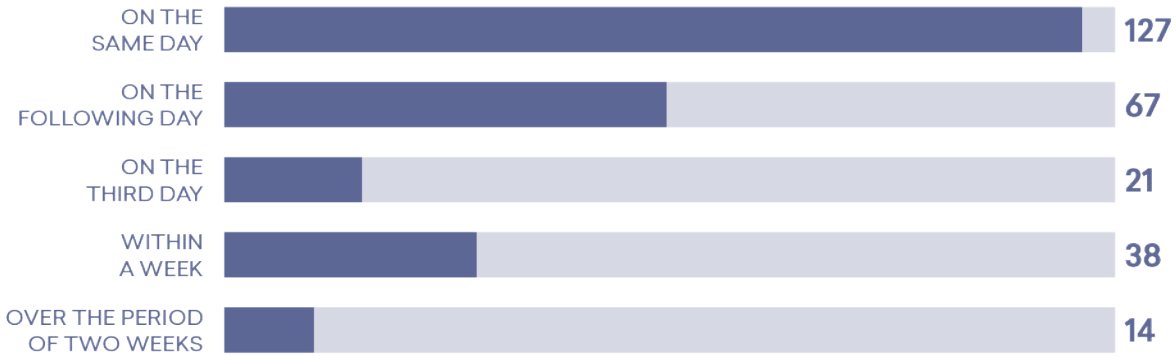
[350] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

NOTIFICATIONS ON WHICH INVESTIGATIONS WERE LAUNCHED BY THE AUTHORS OF NOTIFICATIONS



In 2020, investigations on the notifications containing signs of criminal offenses were mostly launched on the same or the following day:

CRIMINAL CASES BY THE LENGTH OF TIME BETWEEN RECEIVING NOTIFICATIONS BY THE STATE INSPECTOR'S SERVICE AND LAUNCHING INVESTIGATIONS



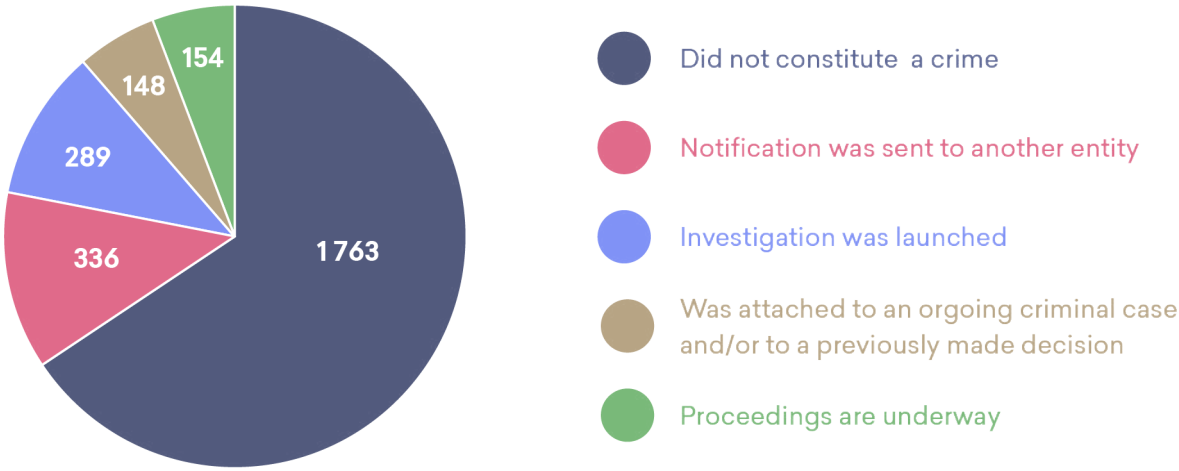
According to the information received from the State Inspector's Service, investigations were launched with the delay of several days on those notifications, which did not include information on the facts of the case, and thus it was necessary to clarify them with the applicants. In these cases,

investigations were launched immediately after establishing factual circumstances.[351]

Investigators take decisions both on initiating or not initiating investigations. In this process, they may consult with the managers, however, they are solely responsible for making the final decisions.[352]

The chart below demonstrates the information on the measures taken in response to notifications received in 2020, with reference to the number of victims:

NUMBER OF ALLEGED VICTIMS BY THE FORMS OF RELEVANT ACTIONS TAKEN AS A RESPONSE TO THE NOTIFICATIONS RECEIVED BY THE STATE INSPECTOR'S SERVICE IN 2020



The chart shows that during 2020 no investigations were launched on the cases related to 1763 alleged victims because they did not constitute crimes.[353] Investigations were launched on the cases involving 289 possible victims only.

The decisions of the investigators to not initiate investigations can be caused by several factors, namely:[354]

- the notification refers to disciplinary misconduct only;
- the notification includes information on the facts that do not constitute either a criminal act or disciplinary misconduct, but the applicant perceives the acts of a policeman as such;

[351] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

[352] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[353] According to the letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021, 2622 notifications received in 2020 referred to 2690 alleged victims.

[354] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

- the State Inspector's Service receives information on an alleged crime based on the evidence of physical harm, however, after conducting an interview it is revealed that the detained does not have any complaints or that he/she received physical injury before being arrested.

If based on the severity of the injury, the place where it was incurred, and other circumstances an investigator suspects that the person is trying to mislead him/her, an investigation is still launched.[355]

Certain minor technical problems are evident in the process of making decisions to not initiate investigations: when a pre-investigative case is registered in the electronic program and later it is revealed that the reported facts do not constitute a crime, a technical notice is produced regarding the decision to not launch an investigation.[356] To write off a case, the approval of the prosecutor is necessary. Otherwise, the task will not be written off and will retain the status of an ongoing case.[357] Since investigators are solely responsible for launching/not launching investigations, it would be advisable if the prosecutor's approval to write off a case in the electronic program was not necessary.

6.2. OPERATIVE ACTIVITIES

The existence of operative activities in Georgia in conjunction with investigative measures constitutes one of the most significant problems in the entire law-enforcement system. However, given that all investigative bodies have the mandate to carry out operative activities, it is natural that the State Inspector's Service is granted the authority as well.

To ensure the efficiency of the Investigative Division, an Operative Agency was established at the State Inspector's Service as a result of the changes introduced in 2019.[358] The Agency is led by the manager and has 7 operative workers,[359] distributed through Tbilisi and Kutaisi offices.[360] The Inspector's Service is authorized, to conduct full-scale investigations and carry out operative-investigative activities on criminal cases falling under its mandate, in accordance with the established procedures.[361] Employees of the Investigative Division have the powers and responsibilities provided by the Law on Operative-Investigative Activities, and they should be guided by the Law when carrying out operative activities. [362]

Through setting up the Operative Agency and grating it the authority to carry out operative-investigative activities, an important step was taken in terms of the structural division of the State Inspector's Service. Such separation of investigative and operational activities should be assessed

[355] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[356] Ibid.

[357] Ibid.

[358] 2019 Annual Report of the State Inspector's Service, p. 93, available at: https://bit.ly/34PKaQd accessed on 4.06.2021.

[359] Decree N01/103 of the State Inspector's Service, dated May 6th, 2020, annex 8.

[360] During the interviews it was noted, that similar to the investigators, the number of operative employees needs to be increased as well.

[361] The Law of Georgia on State Inspector's Service, article 20.

[362] Ibid, article 23, para. 8.

positively and it is advisable for other entities to implement similar practices.

According to one of the operative employees of the State Inspector's Service, due to their mandate, the Operative Agency does not use multiple measures foreseen by the Law on Operative-Investigative Activities, since there is no such need.[363] The measures most commonly used by the operative employees of the Service are conducting interviews and collecting factual information, as for the controlled supply, controlled purchase, the establishment of conspiracy organizations, and the use of confidantes, such measures are not implemented by the entity.[364]

The operative employees of the State Inspector's Service find that the main aim of the operative activities is ensuring the effectiveness of investigations.[365] To reach this goal, the operative employees visit crime scenes, obtain various evidence, draft lists of witnesses, conduct inquiries, collect other necessary information, etc.[366] The main task of operative employees involved in the process is preventing the destruction of evidence.[367]

One of the important grounds for conducting operative-investigative activities is the receipt of relevant tasks either from prosecutors or from investigators (with the approval of prosecutors), regarding a pending criminal case under their mandate.[368] The tasks refer to the cases which are already under investigation and include information on the deadlines for taking relevant measures in line with the Criminal Procedure Code.[369] Based on the existing legislation, the State Inspector's Service is not entitled to take independent decisions on carrying out investigative or operative-investigative activities. Such dependency on other state institutions does not ensure the full independence of the Service.[370]

According to the operative employees, the Operative Agency under the State Inspector's Service participates in relevant proceedings after the investigation is already launched on a case.[371] Investigators and operative employees act in coordination with each other, thus ensuring the optimal spending of the investigators' time. For example, to identify witnesses and collect evidence, operative employees record the video camera locations around the scene, identify their owners, collect information on the availability of video recordings, closely inspect the footage after receiving video recordings, question witnesses, etc.[372] Thus, with the approval of and in cooperation with investigators, operative employees take prompt actions on the notifications received, collect necessary information, and facilitate the successful implementation of investigative activities.[373]

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[363] The information is based on the interviews conducted during the project implementation with the operative employees of the State Inspector's Service.

[364] Ibid.

[365] Ibid.

[366] Ibid.

[367] Ibid.

[368] Ibid, article 8, para 1.

[369] EMC, Operative Activities at Law-Enforcement Institutions, 2019, p. 33, available at: https://bit.ly/3fONn9a, access date: 13.01.2021.

[370] 2019 Annual Report of the State Inspector's Service, p. 125-126, available at: https://bit.ly/34PKaQd, access date: 13.01.2021.

[371] The information is based on the interviews conducted during the project implementation with the operative employees of the State Inspector's Service.

[372] Ibid.

[373] Ibid.

The results of operative activities usually serve as a prerequisite to prepare and carry out investigative and procedural activities, prevent crimes, ensure the implementation of pre-trial activities and ultimately solve cases.[374] However, based on the nature of the crimes falling under the mandate of the State Inceptor's Service, the operative activities carried out by the relevant employees of the entity are not aimed at crime prevention. For example, the crimes of ill-treatment committed by law-enforcement representatives cannot be predicted in advance, and hence no preventive measures can be implemented. This was confirmed during the interviews with the operative employees when they noted that they only start to implement relevant activities after they receive information that an alleged crime had already been committed, and thus they do not carry out any preventive measures.[375] Accordingly, the analysis of the existing practice indicates that at the given stage, the operative-investigative activities implemented by the State Inspector's Office aim at serving as an auxiliary mechanism of investigations.[376]

Immediate response is essential for ensuring the effectiveness of operative activities, thus operative employees start to carry out relevant measures within 12 hours after the launch of investigations. Since the establishment of the Agency, barely any requests have been referred to the prosecutors to extend the deadline.[377]

As noted by the operative employees themselves they are regularly involved in investigative activities,[378] which once again highlights the absence of a clear distinction between investigative and operative activities. It can be stated, that the Law on Operative-Investigative Activities itself fails to draw a clear dividing line between the responsibilities of investigators and operative employees, thus serving as the basis for existing challenges in practice.[379] However it should also be noted, that operative employees do not carry out investigative activities in its classical definition. Their main responsibility is identifying possible evidence of a case.[380]

According to the Criminal Procedure Code and the Law on Operative-Investigative Activities, prosecutors are responsible for the supervision of investigative-operative activities and for ensuring that they are carried out in compliance with existing legislation.[381] The General Prosecutor and his/her subordinate prosecutors also examine the legality of the decisions taken in the process of con-

[374] The Law of Georgia on Operative-Investigative Activities, article 11, para. 1.

[375] The information is based on the interviews conducted during the project implementation with the operative employees of the State Inspector's Service.

[376] Relevant information can be found in the annual report of the State Inspector's Service: „Operative employees assist investigators in the process of conducting investigative and procedural activities." 2019 Annual Report of the State Inspector's Service, p. 112.

[377] The information is based on the interviews conducted during the project implementation with the operative employees of the State Inspector's Service.
Regarding the extension of the period for conducting operative-investigative activities see also decision N2/1/484 of the Constitutional Court of Georgia, dated February 29th, 2012.

[378] During the individual interviews conducted within the auspices of the project, operative employees highlighted that they mainly participate in investigative activities, such as searches.

[379] EMC, Operative Activities at Law-Enforcement Institutions, 2019, p. 42, available at: https://bit.ly/3fONn9a, access date: 13.01.2021

[380] e.g., visiting the scenes to identify CCTVs and collect information, which enables investigators to prepare motions and collect video footage based on the court rulings.

[381] The Law of Georgia on Investigative-Operative Activities, article 21, para 1.

ducting operative-investigative measures.[382] During the interviews, it was noted that prosecutorial oversight has a formal character.[383] Operative employees barely communicate with prosecutors. Investigators provide prosecutors with the information on the operative-investigative activities, however, prosecutors find that the activities linked with conducting interviews and collecting evidence do not require special supervision.[384] (For detailed information regarding prosecutorial oversight see Chapter 8.)

According to the operative employees, it is advisable to replace the existing model of oversight with a supervision mechanism within the entity, since the head of the entity is proactively informed about the ongoing activities, which would ensure the existence of efficient oversight.[385] In practice, the method of internal supervision over operative activities is considered to be the most effective. However, without the existence of an external control mechanism, it would be challenging to maintain trust towards this form of oversight, since adopting regulatory acts for carrying out operative activities, planning operations, determining the strategy, and implementing it would fall under the mandate of a single entity, and often under the responsibility of a specific individual.[386]

Operating without relevant guidelines for implementing the responsibilities of the Operative Agency remains to be one of the main challenges of the State Inspector's Service. Even after a year since the establishment of the Agency, there are no rules of operation which would serve as the guidelines for the employees to implement relevant activities.[387] Currently, the rules of operation are under development, and according to the State Inspector's Service, the document will soon be accessible to the employees of the Operative Agency.

Even though the independent agency does not carry out operative activities which pose particularly high risks to the protection of human rights, as in the case of other entities, ensuring high standards of human rights protection remains to be challenging for the State Inspector's Service in the course of implementing its operative mandate. The problem mainly dwells on existing legislation. Legislative acts regulating operational activities require fundamental changes, which should be implemented in conjunction with the reform of the investigative system. Ensuring high standards of human rights protection in the process of operative activities, not only by the State Inspector's Service but by all other entities with the relevant mandate, is of crucial importance. Before the implementation of the reform, it is necessary to ensure that the legislation provides a clear distinction between investigative and operative activities, review the basis for carrying out operative activities, set strict restrictions on the use of operative measures with high risks to human rights, and establish solid supervision mechanism over the operative activities.

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[382] Ibid.

[383] The information is based on the interviews conducted during the project implementation with the operative employees of the State Inspector's Service.

[384] Ibid.

[385] Ibid.

[386] EMC, Operative Activities at Law-Enforcement Institutions. 2019, pg. 65, available at: https://bit.ly/3fONn9a, access date: 14.01.2021.

[387] The rules of operation should regulate the basis for implementing specific activities, their scope, and regulation. For instance, to conduct visual surveillance, operative employees are not allowed to use technical means without prior approval from the court, which creates ambiguity. In case this issue is regulated with an internal sub-legal act, the mandate of the Operative Agency will be clear and will facilitate the work of operative employees.
The information is based on the interviews conducted during the project implementation with the operative employees of the State Inspector's Service.

6.3. CONDUCTING COVERT INVESTIGATIVE ACTIVITIES AND INVESTIGATIVE ACTIVITIES RELATED TO COMPUTER DATA

Covert investigative measures could be decisive for the efficient investigation of the crimes falling under the mandate of the State Inspector's Service. Due to the lack of trust towards the process of investigation or pressure and manipulation by law enforcement representatives, alleged victims of ill-treatment often refrain from assisting or cooperating with the independent entity.[388] Covert investigative and/or computer data-related activities are particularly important for facilitating the process of investigations that are conducted without assistance from victims/witnesses.

According to the current legislation, controlling covert investigative measures on the criminal cases falling under the mandate of the State Inspector's Service falls under the responsibility of a supervising judge.[389] The existence of the control mechanisms outside the Inspector's Service and granting relevant responsibilities to the supervisory judge should be assessed positively.

It should be noted that the standards and principles of covert investigative measures are also applicable to the investigative activities linked with computer data, which constitutes one of the main challenges for the investigators of the State Inspector's Service.[390] The Criminal Procedure Code of Georgia grants the responsibility of submitting motions linked with requesting information from computer systems and databases to the prosecutors only.[391] Similarly, extracting information from computer systems of public or private entities, under the circumstances of urgency can only be conducted with the decree of a prosecutor.[392]

Thus to carry out investigative activities linked with computer data investigators of the State Inspector's Service should first refer to a prosecutor. Under the circumstances of urgency, investigators will only be able to collect required data after the prosecutor approves their application and issues a relevant decree. The need of referring to the prosecutor creates significant drawbacks in conducting swift investigative activities when there is the risk that data stored in the computer of a public entity, including law-enforcement institutions can be deleted.[393] Moreover, in practice prosecutors are reluctant to issue such decrees in relation to public entities.[394] It should also be taken into consideration that the necessity of conducting such investigative activities might arise when the working hours of a prosecutor are over, thus creating additional obstacles for obtaining evidence.[395] Video materials kept at the computers of public or private entities are one of the most important pieces of evidence for the investigators of the State Inspector's Service. These materials can easily be deleted in a short period while applying the standards of covert investigative mea-

[388] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[389] Criminal Procedure Code of Georgia, article 3, para. 32^1.

[390] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[391] Criminal Procedure Code of Georgia, article 136, para. 1 and para 4.

[392] Ibid, article 143^3, para. 6.

[393] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[394] Ibid.

[395] Ibid.

sures to these materials further increases the risk.[396]

According to the information provided by the State Inspector's Service, during November-December 2019 and in 2020, prosecutors referred to the courts with 610 motions regarding the request of information from computer systems on the cases under the investigation of the State Inspector's Service. As for covert investigative measures of wiretapping and recording, 6 motions were referred to the courts (3 of these motions related to extending the duration of ongoing covert investigative measures). All of the motions were granted by the courts.[397] Within the same period, prosecutors referred to the courts with 4 motions (among them only once in 2020) on approving the measures of obtaining information from computer systems under the circumstances of urgent necessity.[398] No motions were submitted to the courts regarding the approval of covert investigative measures carried out under the circumstances of urgency.[399]

Unfortunately, the State Inspector's Service does not record the statistical information on the cases when investigators refer to the prosecutors with the requests to file motions on retrieving information from computer systems or conducting covert investigative activities. No information is recorded regarding the requests of the investigators to issue decrees under the circumstances of urgent necessity either. This is because communication between the investigators and prosecutors are conducted verbally,[400] thus rendering it impossible to track in how many cases prosecutors granted the requests of the investigators.

It should be emphasized that some of the crimes falling under the investigative mandate of the State Inspector's Service are not included in the list of the criminal actions which can be the basis for conducting covert investigative actions foreseen by the Criminal Procedure Code of Georgia.[401] These crimes are the threat of torture[402] and coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence, and coercion of a convicted person to interfere with the fulfilment of his/her civil duties.[403] Neither of these constitutes serious or particularly serious crimes or those crimes, which based on the Criminal Procedure Code of Georgia can be the subject of covert investigative measures. Thus carrying out activities related to computer data is not allowed with regard to these crimes, since they are subject to the rules applicable to covert investigative measures.

Based on the specifications of the investigative mandate granted to the State Inspector's Service, it is advisable to provide the Service with the authority to make independent decisions on conducting investigative activities linked with computer data on the criminal cases under its investigation.

Moreover, requesting information from computer systems does not restrict human rights and freedoms to such an extent that would require subjecting it to the same high standards as applicable to covert investigative measures, which are restricted to certain categories of crimes only. Accordingly, it is necessary to introduce amendments to the legislation which will enable conducting this investigative measure on every category of crimes.

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[396] Ibid.

[397] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

[398] Ibid.

[399] Ibid.

[400] Ibid.

[401] Criminal Procedure Code of Georgia, article 143^3, para. 2, subpara. 'a'.

[402] Criminal Code of Georgia, article 144^2.

[403] Ibid, article 378, para. 2.

7. ANALYSIS OF THE MAIN OBSTACLES IN THE INVESTIGATION PROCESS

7.1. INTRODUCTION

When an incident occurs between the citizen and the law enforcement officer, the main challenge facing the investigation is to obtain neutral evidence and find neutral witness. An evidence is neutral if it excludes any element of bias or subjectivity and objectively confirms or denies the existence of a fact.[404] The scarcity of such evidence is due to an objective inexistence of unbiased witnesses for the cases of ill treatment or their low willingness to cooperate with the investigative body. Non-obligatory manner of audio or video recording the communication between the citizen and the law enforcement officer complicates the identification of individuals responsible for crimes under the mandate of State Inspector's Investigative Service.

The following chapter will focus on legislative and practical challenges with regards to obtaining evidence in the investigation process and retrieving information, important for the investigation, from public agencies and other bodies, the shortcomings and obstacles related to the recognition of a person as a victim and granting him/her appropriate procedural guarantees, as well as the conducting a medical examination, will be analyzed.

7.2. OBTAINING EVIDENCE

7.2.1. COMMUNICATION OF LAW ENFORCEMENT OFFICERS WITH CITIZENS VIA TECHNICAL MEANS

Out of all law enforcement agencies, the Ministry of Internal affairs has the most intense contact with citizens, taking into consideration preventive, police, investigative and operative functions assigned to it. [405] Allegations of ill treatment are, therefore, mostly directed to the representatives of this agency. [406] Thus, the fixation of the contact between police officers and citizens, via technical equipment, becomes of special importance for the effective investigation of cases. According to current legislation, the Ministry of Internal Affairs does not define the obligation for its subordinate employees to video record their communication with citizens. The obligation of the law enforcement body to audio/video record the interrogation of a state-controlled individual is also not defined at a legislative level and is, therefore, one of the recommendations of the State Ombudsman for the prevention of ill treatment that has not been implemented until today. [407]

The exceptional rule for recording police communication with citizens by the body-worn cameras (BWCs) applies to the conduct of special police control, so called raid, only. [408] Any other type of communication with the citizen, while conducting police, operative or investigative measures, is

[404] Special Report of the Public Defender, The Efficiency of Investigating Criminal Cases of Ill Treatment 2019, p 17, available at: https://bit.ly/3cbDBMg, date of access: 19.04.2021.

[405] EMC, Prevention of Ill Treatment in Police Activities, 2019, p 33-34, available at: https://bit.ly/3uSB7J3, date of access: 19.04.2021.

[406] Activity Report of State Inspector's Investigative Service 2020, p 140, available at: https://bit.ly/3ceGP1c, date of access: 19.04.2021.

[407] Report of the Public Defender on the state of human rights and freedoms in Georgia 2019, p. 8-9, available at: https://bit.ly/3vLSAEh, date of access: 19.04.2021.

[408] Article 24, The Law of Georgia on the Police

allowed bypassing the usage of technical means.[409]

In the law enforcement agency, only the patrol police are equipped with body-worn cameras (BWCs) due to their official functions, the employees of the Central Criminal Police Department and territorial bodies also communicate with citizens, however, in this process, they do not use technical means, due to the absence of such mandatory rule.

With regards to the patrol policemen, they have the right to conduct audio/video recording within the scope of patrolling, in order to protect public safety and security and the rights of citizen and policemen, to respond to the violation of law and to investigate the case fully, thoroughly and objectively.[410] Therefore, turning on technical means attached to the uniform solely depends on the will of the patrol police. These technical means allow for 12 hours of continuous video recording and the video image captures date and time of shooting.[411] The data obtained by body-worn cameras (BWCs) during the patrol is stored on a special server for the duration of 30 days. [412]

In terms of technical equipment, absence of cameras in the vehicles of law enforcement officers is also a challenge. Vehicles transferred to the use of police departments and division of the Ministry of Internal Affairs do not have such technical means. The exception is patrol police vehicles with cameras on board. [413] Its field of vision covers outer perimeter and does not capture the situation inside the vehicle.

In addition to the absence of technical equipment, the problem lies in existing legislation, which does not require from the law enforcement officer to immediately transfer the individual from the place of detention to the temporary detention facility. Normatively, only criminal or administrative detainees have to be taken to the nearest police station (or other law enforcement agency). Mentioned gaps are ultimately abused by delaying and ill-treating detainees in police vehicles.[414] This is confirmed by the statistics of State Inspector's Office, according to which 30%of alleged crimes of 2019 were committed in police cars.[415]

Equipping police divisions with indoor and outdoor video surveillance cameras is another effective tool for the prevention of ill treatment, which is of particular interest to the investigation, in case there are allegations of ill treatment. The data storage duration for the video surveillance systems, installed on administrative buildings of the Ministry of Internal Affairs, depends on the characteristics of these technical means, however, the data can be stored for no less than 14 days and no

[409] EMC, Prevention of Ill Treatment in Policea Activities, 2019, p 33-34, available at: https://bit.ly/3cgbvPP, date of access: 19.04.2021.

[410] Article 14, of the decree N1310, of 15 December 2005, of the Minister of Internal Affairs on the Approval of Instruction for the Rule of Patrolling by Patrol Police Service of the Ministry of Internal Affairs of Georgia

[411] EMC, Prevention of Ill Treatment in Police Activities 2019, p 34, available at: https://bit.ly/3cgbvPP, date of access: 19.04.2021.

[412] Article 12^1, of the decree N1310, of 15 December 2005, of the Minister of Internal Affairs on the Approval of Instruction for the Rule of Patrolling by Patrol Police Service of the Ministry of Internal Affairs of Georgia

[413] EMC, Prevention of Ill Treatment in Police Activities 2019, p 35-36, available at: https://bit.ly/3cgbvPP, date of access: 19.04.2021.

[414] ibid, p 28.

[415] Activity Report of State Inspector's Investigative Service 2019, p. 125-126, available at: https://bit.ly/34PKaQd, date of access: 19.04.2021.

more than 3 years. [416]

Over the years, the Public Defender's Office and human rights organizations have been criticizing adequate indoor and outdoor coverage of the administrative buildings of the police, for the purposes of combatting ill treatment. Even when using indoor technical means of police buildings, the problem remains that video cameras are not located in the areas of direct communication with citizens (eg interrogation rooms) and mainly cover only the entrance area of the building. [417] These issues are still relevant for the effective investigation of the cases of violence towards state-controlled individuals and affect the work of independent investigative mechanism.

7.2.2. RULE OF VISUAL CONTROL IN PENITENTIARY INSTITUTIONS

Carrying out surveillance via visual (and/or electronic) means in penitentiary institutions and proper retention of records is not of any less importance for the investigation of cases of ill treatment.

Deriving from the safety of convicts or other persons and from other legitimate interests – in order to prevent suicide, self-harm, violence against others, and other offences – electronic surveillance is carried out in penitentiary institutions via audio/video means. [418] As a rule, such control is of permanent nature in corridors, workplaces of convicts, yards and outside perimeter of the institutions[419], while personal hygiene and common use areas, as well as rooms for long appointments are free from electronic surveillance.[420]

Information recorded on the video is automatically stored for the duration of 30 days. [421] In case a person in the penitentiary institution dies, or alleged crime is revealed, in the interests of court proceedings, [422] the recorded material can be archived for the duration of 120 hours.[423] Thus, the investigative department has one month to obtain records from the penitentiary institution and, before the decision is made, the later ensures the storage of this data for 120 hours, on the bases of the investigator's application or substantiated decision of the director of the institution.[424] Under such normative regulation, the investigative body can access video footage, kept in the institution,

[416] EMC, Prevention of Ill Treatment in Police Activities 2019, p 37-38, available at: https://bit.ly/3cgbvPP, date of access: 19.04.2021

[417] See 2017-2019 reports of the Public Defender on the State of Human Rights and Freedoms in Georgia, available at: https://bit.ly/2S1bFE1, date of access: 19.04.2021.

[418] Article 2, Decree N35, of 19 May 2015, of the Minister of Corrections, Probation and Legal Assistance of Georgia, on ' the Rule for the Conduct of Surveillance and Control via visual and/or electronic means, on the Storage, Deletion and Termination of Records'.

[419] Ibid, article 3.

[420] Ibid, part 2 of article 3.

[421] Ibid, article 15.

[422] Ibid, part 2 of article 15.

[423] Article 3 of the Decree N403, of 13 May 2015, of the Minister of Justice of Georgia on the amendment to the decree N35, of 19 May 2015, of the Minister of Corrections, Probation and Legal Assistance of Georgia, on ' the Rule for the Conduct of Surveillance and Control via visual and/or electronic means, on the Storage, Deletion and Termination of Records'.

[424] Part 3 of Article 15, Decree N35, of 19 May 2015, of the Minister of Corrections, Probation and Legal Assistance of Georgia, on ' the Rule for the Conduct of Surveillance and Control via visual and/or electronic means, on the Storage, Deletion and Termination of Records'.

without any artificial obstacles; this is also confirmed by the practice of investigators.[425]

7.2.3. STATE INSPECTOR'S INVESTIGATIVE SERVICE'S ACCESS TO VIDEO RECORDINGS

State Inspectors' Investigative Service faces number of legislative and practical barriers, in terms of obtaining video evidence. These include delayed or incomplete receipt of information of the existence of video recordings from the relevant agency, fragmentariness of recordings, and the refusal to store (archive) video recordings before obtaining court decision, in order to avoid the deletion of records.

According to the explanation of investigators, as soon as the investigation into the criminal case commences, the letter is sent to the relevant agency, requesting information on video recording in law enforcement/police buildings or alleged places of violence against citizen; on equipping employees with body-worn cameras (BWCs); on the spots for video cameras in the police building. Delayed response of the Ministry of Internal affairs to such letters is problematic in practice, and has, in several cases, led to the expiration of (14-day or 30-day) storage duration of video recordings and, therefore, their deletion. [426] This problem is especially acute when requesting information onbody-worn cameras (BWCs), since, in this case, the investigative department requires verified data on the special number of patrol-policeman's body-worn cameras (BWCs) from the Ministry of Internal Affairs, before it can submit the motion. Similar letters, regarding video-recording in general, in addition to the Patrol Police, are sent to other police divisions. According to the investigators, response to such requests is often so delayed that the data is deleted from the hard drive, due to the expiration of its storage duration.[427]

The investigation is also hampered by template responses of the Ministry of Internal Affairs, which, on the one hand, refers to technical reasons for the absence of video recordings from the hard drive and, on the other hand, does not specify what the technical defect was. Since the recordings are requested from the agencies, employees of which may be convicted in illegal actions, failure to provide records, or the provision of scarce, unsubstantiated information, raises questions, especially when recordings are requested immediately, within few days of an alleged crime.[428]

In obtaining video evidence, the investigative department significantly relies on the good faith of the Ministry of Internal Affairs, since the Ministry has full and exclusive access to any type of video recording in the system. Therefore, the investigative department is unable to verify information received on video recordings. According to investigators, obtaining video evidence in the investigation process requires time necessary for the preparation of motion and for the issuance of court ruling. In order to avoid deletion of video recordings, found in the system of the Ministry of Internal Affairs, the investigative departments, before filing the ruling, appeal to the Agency with the request to store/archive data. The Ministry does not take this into account and, relying on the Personal Data Protection law, defines preliminary storage of video recordings, before the ruling is

[425] The information is based on individual interviews, conducted within the frames of the project, with investigators of State Inspector's Investigative Service.

[426] Ibid.

[427] Ibid.

[428] Ibid.

filed, as illegal data processing, which, in fact, does not lack legal grounds.[429]

In these circumstances, it is important to regulate video evidence, kept in the system of the Ministry of Internal Affairs and having a crucial role for the investigation, at a normative level, excluding the definition of archiving as the violation of personal data. Current law on Personal Data Protection sets out different data processing rules, when the data is processed for the purposes of investigation into the crime. However, this requires direct and special regulation of specific matter by the legislation, as a precondition.[430] As an example, the matter of archiving recorded video material is directly considered in a normative act defining video surveillance in penitentiary institutions, creating legal grounds for the investigative body to request archiving of video recordings, before requesting them, within the scope of responding to the alleged crime committed in the penitentiary institution. [431] The Ministry of Internal Affairs does not allow for such an opportunity. Therefore, it is advisable to normatively define the rule for archiving video recordings, kept in the system of the Ministry of Internal Affairs, before the court ruling is obtained.

Additional problem in the process of obtaining information on criminal cases, reflected via technical means, is the intermittent nature of video recording led by police employees. In the practice of an investigative department there have been cases when the applicant of an alleged ill treatment revealed that law enforcement officers periodically turned off body-worn cameras (BWCs) to avoid recording of their own misconduct and only turned the camera on when the applicant was aggressive.[432]

Low quality of recording by video cameras placed on administrative buildings and outer perimeter of law enforcement agencies is also a challenge. This complicates the identification of persons and their actions. Also, as mentioned previously, the area of video cameras in police buildings does not cover all the places where participants of the process move, while the practice indicates that the violence against citizens commonly take place in such places.[433]

Thus, legislative amendments in the direction of defining the mandatory rule for uninterrupted video recording by body-worn cameras (BWCs) on the one hand, and on the prompt provision of relevant information to the Investigative Department, on the other hand, are important. In addition, for the efficiency of State Inspector's investigative activities, law enforcement agencies shall take relevant measures, when Investigative Department addresses them, in order to exclude the possibility of the deletion of video recordings, which can be achieved by defining the issue at the normative level. It is also necessary to place video cameras in every area of citizen movement and communication in the law enforcement administrative buildings. Police cars shall be equipped with cameras and care should be taken to place quality cameras in the inner and outer perimeters of police buildings.

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[429] Ibid.

[430] Article 3 of the Law of Georgia on the Protection of Personal Data.

[431] Article 3, Decree N403, of 13 May 2019, of the Minister of Justice of Georgia.

[432] The information is based on individual interviews, conducted within the frames of the project, with investigators of State Inspector's Investigative Service.

[433] EMC, Prevention of ill treatment in police activities 2019, p. 27, available at: https://bit.ly/3cgbvPP date of access: 19.04.2021.

7.2.4. COOPERATION OF STATE AGENCIES WITH THE INVESTIGATIVE DEPARTMENT

The efficiency of investigation significantly depends on the timely receipt of information from the participants of the criminal case and from public/private agencies. Thus, challenges facing State Inspector's Investigative Service in this regard were assessed in the frames of the research.

Despite the introduction of an effective mechanism for the receipt of notification on the signs of crime in the Investigative Service, current legislation does not allow investigators to enter penitentiary institutions immediately. This problem requires regulation at a legal level, since the investigation of violence against individuals in the penitentiary institutions and their death falls under the mandate of the Investigative departments and its swift response should not be hindered by the permission of the penitentiary institution.

The current detention code recognizes two modes for the entry into penitentiary institutions. It defines the list of individuals who can visit the facility without special permission; these include authorized persons from the Prosecutor's office, Public defender, representatives of special preventive group, members of parliament; However, the representative of State Inspector's Investigative Service cannot be found in the list. [434] The procedure for persons entering the penitentiary institution without the special permit is defined by the statute of the relevant institution. In this case, any person (except the staff of the penitentiary institution and of the Ministry of Justice) are subject to the special permit issued once for a specific occasion by the director or deputy director of the institution. Investigators are allowed to the institution on the basis of official certificate and the permit.[435]

According to the investigators of Investigative Service, swift response to the receipt of notification and obtaining necessary permit for the visit in a short period, via cooperative relationship with penitentiary institutions, is not problematic in the practice. [436] However, it is important that this matter is regulated legally, beyond practice, and that the investigators are allowed to enter the institution without special permit.

In the part of cooperation of state agencies with State Inspector's Investigative Service, for the purposes of obtaining evidence, the conduct of investigative activities in the agency, against employees of which criminal case is underway, is interesting. The practice of the Investigative department is familiar, for instance, with the cases of inspecting police stations, and requesting video recordings from 112, as an urgent necessity, however, interviews still emphasize the significance of prosecutor's will in the conduct of investigative activities under such circumstances, since in several cases, investigator is unable to take decision, independently from the prosecutor's office, on the conduct of investigative measures.[437] According to the practice of the Service, law enforcement bodies provide documentation requested for the criminal case (administrative violation and arrest protocols, list of law enforcement staff etc.) without hindrance, except for the information related to video recordings.

[434] Article 60, Code of Detention.

[435] See for example, N10 on the approval of the statute of penitentiary institution, article 58.

[436] The information is based on individual interviews, conducted within the frames of the project, with investigators of State Inspectors Investigative Service.

[437] Ibid.

7.2.5. LAW ENFORCEMENT OFFICERS IN THE INVESTIGATION PROCESS

Interviewing individuals employed in investigative structure, as witnesses, and obtaining from them information, interesting for the investigation, is also of specific nature.

Unlike neutral witnesses, employees who are the subject of appeal, or who were present at the scene, do not create obstacles in terms of appearing or testifying at the investigative agency. According to the established investigative strategy of the Inspector's Service, preference is given to questioning law enforcement officers after other relevant evidence is gathered for the criminal case. This approach is aimed at critically questioning the officials after gathering as much information as possible, since the investigative body does not expect cooperation from an employee who might be convicted in committing a crime.[438]

According to the investigators, the process of questioning law enforcement officers differs from obtaining information from ordinary citizens, since professional experience, legal education and applicants' allegations against them, make the officers wary of the testimony. [439] One of the reasons for the law enforcement officers' refusal to testify against their colleagues are perceptions, adopted in the practice, about their own role; these perceptions sharply distinguish highly trusted insiders from outsiders, who are treated with principal mistrust from law enforcement officers. [440] Such approach is particularly striking in the work culture of policemen, since their day-to-day activities are associated with life and health threatening risks and they depend on each other's reliability and loyalty in critical situations. This, in turn, reinforces the significance of professional unity in police employees and critically reduces the degree of their collaboration in investigating allegations against their colleagues.[441]

Even in the case of desire of law enforcement officers to cooperate with investigative body, the ineffective disclosure mechanism, which is still considered as an effective means against corruption and other offenses in the public service, is also problematic. The whistleblowing institute is directed to the formation of organizational culture in which each civil servant is responsible for the decisions made in the public service, monitors the decision-making process, and, in accordance to the principles of good faith and in the public interest, identifies violations.[442]

The rule for whistleblowing in the public service, or informing the authorized body (as well as the investigator, the prosecutor, public defender and the civil society) about the violation of law, was first defined in 2009 in Georgia, and in 2015, the reform was applied for its sophistication.[443] Nevertheless, the whistleblowing institute is still not active in investigative structures and even in case when there is a will to expose illegal action of law enforcement officers, the whistleblower is not protected by the law from possible prosecution.

With regards to the protection of whistleblowers, the law requires the adoption of special normative

[438] Ibid.

[439] Ibid.

[440] Rafael Behr, Cop Culture - Der Alltag des Gewaltmonopols, p. 139.

[441] Ibid.

[442] Nino Tsukhishvili, The institute of whistleblowers in public service – the relation between the freedom of expression of the civil servant and the commitment towards loyalty to the State; in the journal: Administrative Law 2016, N2, pages 43-55, available at: https://bit.ly/3akl7Z2, date of access: 19.04.2021.

[443] Transparency International, Disclosure mechanism in Georgian public Service, 2020, available at: https://bit.ly/3uRrfz2, date of access: 19.04.2021.

rules, if the disclosure concerns the activities of State Security Service, the Ministry of Internal Affairs or the Ministry of Defense, however, such special legislation has not, to date, been developed. [444] Therefore, the employees of this agency are vulnerable to the possible retaliation for the disclosure and are unable to enjoy protection guarantees granted to the whistleblower by the law.[445]

7.2.6. COOPERATION WITH NEUTRAL WITNESSES AND THEIR PROTECTION GUARANTEES

Finding unbiased witnesses is a great challenge in terms of obtaining evidence for the criminal case under the investigation of State Inspector's Investigative Service. In order to decide on the criminal liability of a person, in addition to conflicting explanations of the applicant and the law enforcement officer about alleged violation against state controlled person, it is important to obtain neutral evidence, which may be video recording or a testimony by the witness.

Investigators explain that most citizens are reluctant to releasing information against law enforcement officers and limit themselves to claiming that they have not heard or seen anything, despite being present at the scene. Such behavior of witnesses is often motivated by the mentality on cooperating with investigative service, by defending self-security and by avoiding future hostile attitude form the side of law enforcement officers[446]. Therefore, for the purposes of cooperation with investigative agencies, it is important to inform citizens about the activities of State Inspector's Investigative Service and to work on building trust in this investigative body and well as to take advantage of security tools granted to the witnesses by the law, within the scope of the criminal case.

In these circumstances it is especially important to the State Inspector's Security Service to ensure effective mechanism for witness protection. Such mechanism is the usage of special measure, aimed at ensuring the safety of personal life and health of a participant of the process (or his family member). [447] Personal protection measures become necessary when public hearing of a criminal case may harm personal life of the participant of the process; threaten property, life or health of the central figure of the case or his/her relatives; or when the participant of the process is, in any way, dependent on the convict.[448]

The legislation defines types of special measures, including anti-traceability measures (changing name, last name and any identification data of the participant), appointment of personal security guard, temporary or permanent change of residence. [449] The decision on the specific measure is made by the prosecutor's resolution, while its execution is the responsibility of the Ministry of Internal Affairs. [450]

The matter of involving a person in the program of special protection measures for criminal cases subordinate to State Prosecutor's Investigative Service, may be decided on any ground defined by

[444] Article 20[11] of the Law of Georgia on the Conflict of Interest and Corruption in Public Institutions.

[445] Article 20[4]-20[5] of the Law of Georgia on the Conflict of Interest and Corruption in Public Institutions.

[446] The information is based on interviews, conducted within the frames of the project, with investigators of State Inspector's Investigative Service.

[447] Commentary to the Criminal Procedure Code of Georgia 2015 p. 240.

[448] Article 67 of the Criminal Procedure Code of Georgia.

[449] Article 68 of the Criminal Procedure Code of Georgia.

[450] Article 71 of the Criminal Procedure Code of Georgia.

the legislation, however, when conducting investigations against representatives of law enforcement agencies, the matters of safeguarding life, health and safety of witnesses/victims, are raised most often.

Granting the authority of enforcing special protection measures exclusively to the Ministry of Internal Affairs, precludes State Inspector's Investigative Service from applying this measure in case the criminal case concerns alleged offense by the employee of the Ministry of Internal Affairs. The vast majority of criminal cases in Investigative Department investigate the activities of the representatives of this agency. [451] That is why it is important, for the physical safety and security of witnesses, that the investigative body has an access to special protection measures, independently from the Ministry of Internal Affairs.

In addition to the natural contradiction between the agencies, is should be note that the Investigative Department is limited in being granted witness protection rights, as well as the right to receive technical assistance from the state agency, for the employees of which, alleged offense is being investigated.[452]

Therefore, it is important that State Inspector's Investigative Service has an access to ensuring safety of case participants, bypassing the Ministry of Internal Affairs, which requires different regulation of legislative, material and technical matters related to the application of special protection measures.

7.3. GRANTING THE STATUS OF A VICTIM AND RELEVANT RIGHTS

Victim participation is one of the important preconditions for ensuring the conduct of efficient investigations. The Criminal Procedure Code of Georgia defines the legal basis and procedures for granting the status of a victim. The importance of recognizing a person as a victim and providing him/her with relevant procedural guarantees is the topic of particular significance at the international level. One of the five basic principles of police oversight established by the case law of the European Court of Human Rights is ensuring the involvement of victims in procedural activities to protect his/her legitimate interests. [453] An efficient investigation must be reasonable, proportionate, and expeditious and must enable the applicant and other interested parties to be effectively involved in the process.[454]

According to the national legislation, a victim is a person which incurred moral, physical, or material damages.[455] If a crime resulted in the death of a victim, the rights and responsibilities of the victim are transferred to one of the close relatives (legal successor). An investigator, prosecutor, or judge cannot refuse the successor to exercise the rights guaranteed to the victim.[456]

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[451] Activity Report of State Inspector's Investigative Service 2020, p 139, available at: https://bit.ly/3ceGP1c, date of access: 19.04.2021.

[452] Article 20, the Law of Georgia on State Inspector's Service.

[453] Opinion of the Commissioner for Human Rights, Concerning Independent and Effective Determination of complaints against the Police, March 2009, p. 3. See also McKerr v UK, no. 28883/95, Judgment 4 May 2001.

[454] IOPC, Statutory guidance on the police complaints system, 2020, para. 13.2, available at: https://bit.ly/3oSKZQz, access date: 14.01.2021.

[455] Criminal Procedure Code of Georgia, article 3, para. 22.

[456] Ibid, article 56, para. 3.

Upon the existence of a relevant legal basis, a prosecutor, grants a person the status of a victim or a legal successor, either on his/her initiative or based on relevant applications.[457] If within 48 hours the prosecutor does not grant the application, the applicant has the right to apply to the supervising prosecutor with the request to be granted the status of a victim or his/her legal successor.[458] If the supervising prosecutor rejects the request, the applicant is entitled to appeal the prosecutor's decision to the district (city) court based on the territory of the investigation. [459] The court decision on the subject cannot be further appealed.[460]

If it becomes evident that there was no sufficient ground for granting a person the status of a victim, the prosecutor revokes the relevant decree.[461] The applicant has the right to appeal the decision to the supervising prosecutor. The decision of the prosecutor to refuse the request can be appealed against at the district (city) court based on the territory where the crime was committed.[462] The court decision on the subject cannot be further appealed.[463]

According to the Constitutional Court of Georgia, the decision on granting or refusing the status of a victim is not the discretion of a prosecutor. Prosecutor is obliged to grant a person the status of a victim provided relevant legal basis and criteria are present.[464]

Having the status of a victim is the prerequisite of exercising multiple procedural rights.[465] One of the most significant of these is the right to access case materials, which is an important guarantee for participating in an investigative process. It should be emphasized, that based on the decision of the Constitutional Court of Georgia dated December 18th, 2020, the normative content of article 57, paragraph 1, subparagraph 'h' according to which victims were automatically refused access to copies of case materials and other information on the conduct of investigations was declared unconstitutional. The court further reiterated that effective access to information in the relevant format constitutes a prerequisite for exercising freedom of information, which entails the right to obtain copies of relevant documents.[466]

Moreover, the victim has the right to refer to the supervising prosecutor with the appeal against the decision on terminating the investigation and/or prosecution.[467] In case of the crimes falling under the mandate of the State Inspector's Service, a victim has the right to appeal the decision of a prosecutor at a district (city) court based on the territory where the crime was committed. The decision of the court cannot be the subject of further appeal.[468]

Juvenile victims have the additional right to free legal aid.[469] Furthermore, if the victim has not reached the full legal age, a judge specialized in juvenile justice has to be included in the compo-

[457] Ibid, para. 5.

[458] Ibid.

[459] Ibid.

[460] Ibid, para. 7.

[461] Ibid, para. 6.

[462] Ibid.

[463] Ibid, para. 7.

[464] Decision N2/12/1229,1242,1247,1299 of the Constitutional Court of Georgia, dated December 14th, 2018, § II-28.

[465] Criminal Procedure Code of Georgia, article 69.

[466] Decision N1/3/1312 of the Constitutional Court of Georgia, dated December 18th, 2020.

[467] Criminal Procedure Code of Georgia, article 106, para. 1^1.

[468] Ibid.

[469] Juvenile Justice Code, article 15, para. 1.

sition of the collegial judicial bodies hearing the case at the level of district/city courts, courts of appeals, and the Supreme Court.[470]

Subsequently, having the status of a victim grants an individual important procedural guarantees, the right to access relevant information, and leverages to oversee the activities of the prosecution.[471] Granting the status of a victim facilitates public control over the administration of justice and supports the accountability of the investigative bodies.

'Successful investigation of a crime, identification of possible suspects, due qualification of the case and consequently rendering a just decision on a case is the primary interest of a victim'.[472] The legal rights granted to the victim aim at realizing this interest.

From November 1st, 2019 to December 1st, 2020 nine applicants referred to the State Inspector's Service Investigation Supervision Department under the Prosecutor's Office with the request of being granted the status of a victim. All nine applicants were turned down.[473] The refusals were appealed against to the supervisory prosecutor in 5 cases, while two cases were brought to the court. None of the decisions was changed as a result of the appeals. During the same period, 6 applicants were granted the status of victim based on the decisions of the prosecutors.[474]

As a rule, prosecutors are reluctant to grant the status of a victim unless sufficient evidence has been collected for initiating criminal prosecution.[475] This practice undoubtedly fails to meet the requirement of the law and needs to be changed.

During the individual interviews conducted with the investigators of the State Inspector's Service, it was noted on multiple occasions that investigators constantly update victims with the information on the conduct of investigations. Based on the requirement of the law, they keep the victims informed and aim to ensure their involvement in the process. However, this cannot substitute the procedural rights of the victims, the realization of which is necessary for both protecting the interests of the victims and ensuring efficient conduct of investigations.

The application of special protection measures is closely related to the status of a victim. These measures are essential for ensuring the safety of victims and their families. According to the UN Human Rights Commission resolution, investigative bodies should be entitled to apply relevant measures to alleged victims, to avoid their intimidation or other forms of convincing, resulting in their refusal to participate in investigations.[476]

Based on the existing legislation prosecutor may, with the consent of the General Prosecutor of Georgia or his/her deputy, apply a special measure of protection to the participant or possible participant of a criminal case, or any other person related to the person, and/or his/her close relative, with their consent.[477] The application and execution of the special protection measures are ensured

[470] Ibid, article 17, para. 3.

[471] Decision N2/12/1229,1242,1247,1299 of the Constitutional Court of Georgia, dated December 14th, 2018, § II-23.

[472] Decision N1/8/594 of the Constitutional Court of Georgia, dated September 30th, 2016, § II-10.

[473] Letter N13/71772 of the General Prosecutor's Office of Georgia, dated December 28th, 2020.

[474] Ibid.

[475] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector's Service.

[476] Commission on Human Rights resolution 2000/43 Torture and other cruel, inhuman, or degrading treatment or punishment, 20 April 2000, E/CN.4/RES/2000/43, para. 3(b).

[477] Criminal Procedure Code of Georgia, article 68, para.2.

by the Ministry of Internal Affairs.[478] Hence, the State Inspector's Service is not authorized to ensure the protection of the victims/witnesses. The Ministry of the Internal Affairs, cannot suffice to guarantee the protection of victims/witnesses since the alleged perpetrators would most probably be employed within the system of the Ministry.

According to the standards of the European Committee for the Prevention of Torture, an applicant should in any case have effective access to the investigative procedures.[479] A victim or his/her successor should be involved in the investigative process to the extent necessary for protecting his/her legitimate interests.[480]

According to the Resolution of the UN Human Rights Commission and the Istanbul Protocol, alleged victims of torture and inhuman treatment, as well as their representatives should not only have access to case materials and information on the case hearings but should also be enabled to present proofs and evidence.[481]

Victims should be entitled to request conducting certain activities and participate in investigative measures. They should be regularly informed about the conduct of investigations, their progress and decisions taken.[482]

Effective public oversight over the investigation is necessary to ensure its transparency in theory as well as in practice. Victims (or in certain cases their close relatives) should be involved in the investigation process to the extent which is necessary for protecting their legitimate interests.[483] Relevant standards related to the public oversight as well as the victim's right to access case materials and request conducting investigative activities are set by several decisions of the European Court of Human Rights.[484]

Based on the above-mentioned, granting the status of a victim and exercising relevant procedural guarantees is essential for protecting the legitimate rights of the victims and ensuring public oversight of the investigative process.

Taking into consideration the existing challenges in Georgia, the prosecutors must grant the status of victims to relevant individuals, without the need of waiting until sufficient evidence is collected for initiating criminal prosecution. Moreover, the State Inspector's Service should be granted the mandate to refer to the supervisory prosecutor with a substantiated proposal to declare a relevant individual as a victim. It is also important, for the State Inspector's Service to have the authority to use special protection measures, which would ensure strong guarantees of protecting victims, their close relatives, or family members.

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[478] Law of Georgia on Police, article 17, para 1, subpara 'g'.

[479] Bati and Others v. Turkey, Judgment of 3 June 2004, applications no. 33097/96 and 57834/00, para. 137.

[480] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 36.

[481] Commission on Human Rights resolution 2000/43 Torture and other cruel, inhuman, or degrading treatment or punishment, 20 April 2000, E/CN.4/RES/2000/43, para. 4. Istanbul Protocol, para. 116, available at: https://bit.ly/2WEZM5b, access date: 14.01.2020.

[482] Erik Svanidze, Effective Investigation of Ill-treatment, Guidelines on European standards, second edition, Council of Europe, para. 4.5.1.

[483] Standards of the European Committee for the Prevention of Torture, p. 166, para 36, available at: https://bit.ly/3mhsMKP, access date: 14.01.2021.

[484] Erik Svanidze, Effective Investigation of Ill-treatment, Guidelines on European standards, second edition, Council of Europe, p. 58, para. 4.5.1. Chitayev and Chitayev v. Russia, Judgment of 18 January 2007, application no. 59334/00, para. 165. Hugh Jordan v. the United Kingdom, no. 24746/94, para. 109, 4 May 2001. Khukhalashvili and Others v. Georgia, Applications nos. 8938/07 and 41891/07, August 2020, para. 134.

7.4. MEDICAL EXAMINATION

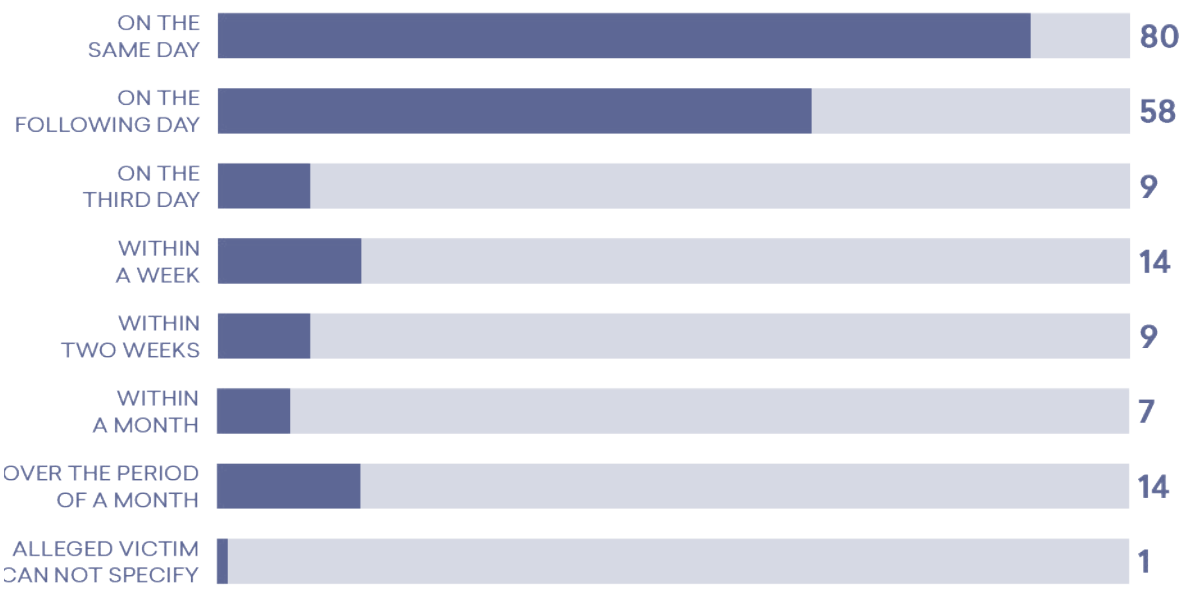
Results of medical examinations are particularly important for ensuring efficient and comprehensive investigation of the cases falling under the mandate of the State Inspector's Service.

According to the Istanbul Protocol, conducting medical examinations is by default mandatory in cases related to torture or ill-treatment. However if more than 6 weeks have passed from the incident, an immediate medical examination is even more important, since there is a high risk that the trace of torture will disappear.[485]

The Istanbul Protocol also stipulates the necessity of conducting psychological examination and evaluation of the psychological condition of the alleged victims of torture.[486] Council of Europe Committee for the Prevention of Torture emphasizes that psychological examinations should also be conducted on the cases of ill-treatment where necessary.[487]

In 2020 the State Inspector's Service received 267 notifications of alleged crimes.[488] Out of 267 criminal cases under the instigation of the State Inspector's Service 226 medical examinations were conducted on 192 cases.[489] The chart below reflects the number of the cases by the period of their submission to the State Inspector's Service from the moment when they were committed:

CRIMINAL CASES ON WHICH MEDICAL EXAMINATIONS WERE CONDUCTED BY THE PERIOD OF THEIR SUBMISSION TO THE STATE INSPECTOR'S SERVICE FROM THE MOMENT WHEN THEY WERE COMMITTED



[485] Istanbul Protocol, para. 104, available at: https://bit.ly/34VymME , access date: 23.12.2020.

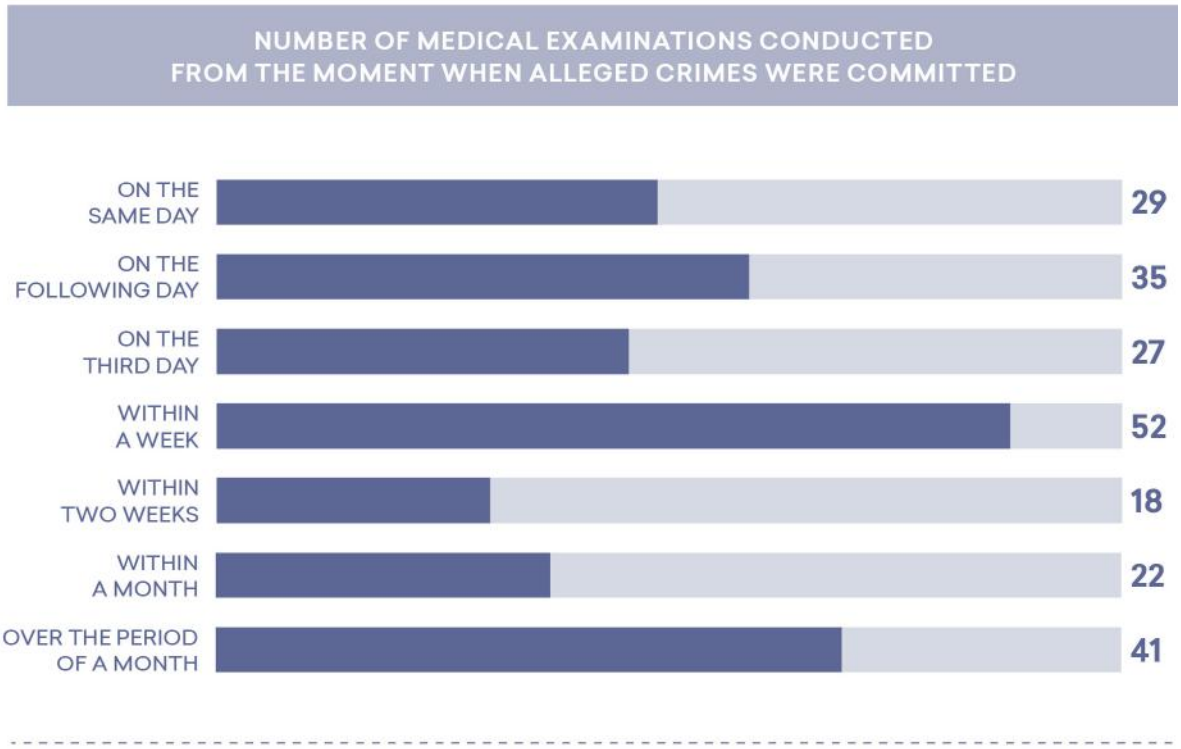
[486] Ibid.

[487] CPT, *Combating Impunity*, p.3, available at: https://bit.ly/3cnCAQu, access date: 12.03.2021.

[488] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

[489] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

The chart below demonstrates the number of medical investigations conducted on the cases investigated by the Investigative Division during 2020, by the period of their conduct from the moment when alleged were committed:



Note: One of the alleged victims, which was the subject of medical examinations twice, could not recall the exact time of the crime.

As demonstrated by the chart above, although the State Inspector's Service received notification on the crimes within three days in 147 cases, medical examinations on the same, following or the third day were ordered in 91 cases only. Most of the medical examinations – 52, were ordered within a week.

As pointed out by the investigators, medical examinations are ordered by the State Inspector's Service upon such necessity after the launch of investigations.[490] To conduct medical examinations, the Service refers to Levan Samkharauli National Forensics Bureau.[491] The examination determines the existence of physical injuries, their severity, location, methods, and time of their application.[492]

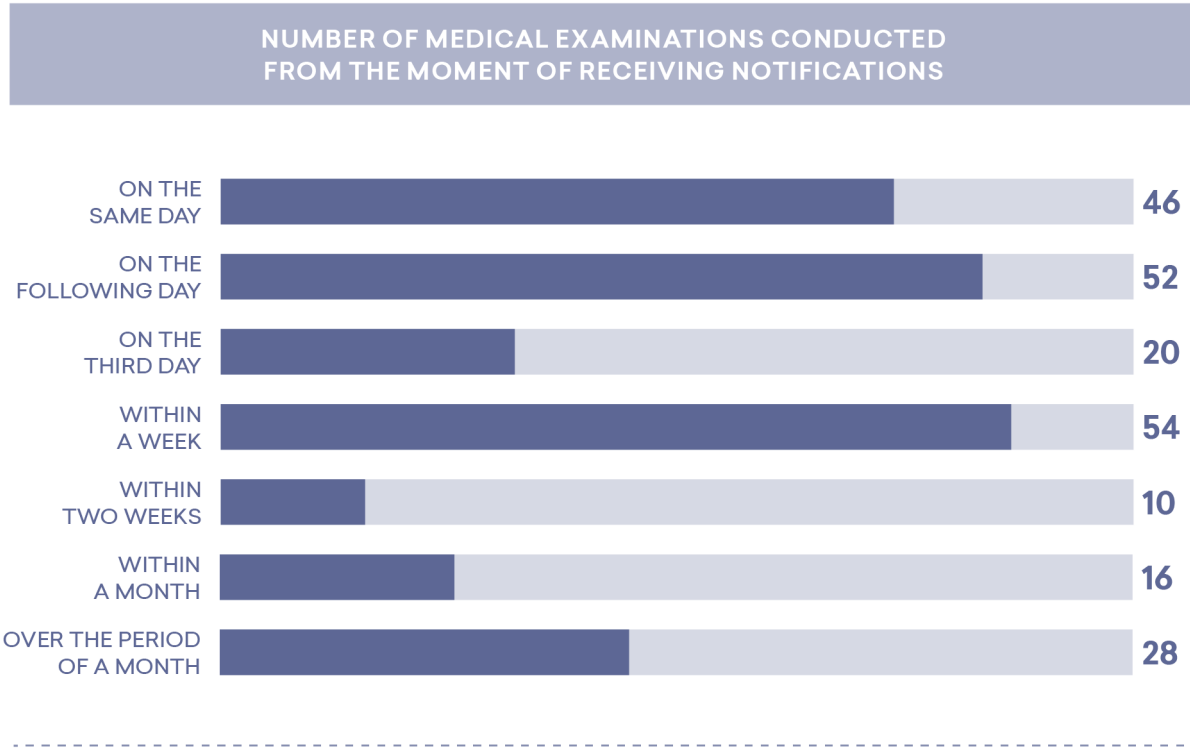
During 2020 267 investigations were launched by the State Inspectors' Service, out of which 226 medical examinations were ordered on 192 cases. 64 alleged victims refused medical examinations, however, examinations of medical documents were still conducted on these cases.

[490] E.g. when an alleged victim has signs of violence – information is based on the interviews conducted with the investigators of the State Inspector's Service during the period of the project implementation.

[491] 2019 Annual Report of the State Inspector's Service, p. 114-115, available at: https://bit.ly/34PKaQd accessed on 7.06.2021.

[492] Ibid, p. 115.

The chart below present the cases on which medical examinations were conducted in 2020, by the period between receiving notifications on the alleged crimes by the State Inspector's Service and conducting examinations:



According to the information provided by the State Inspector's Service, the reasons for conducting medical examinations after a month or more than a month from receiving notifications,[493] were:

- Alleged victims refused to attend medical examinations. Later on, examinations were conducted on medical documents only;
- The notifications concerned old crimes and physical signs of injuries were no longer present. Later on, examinations were conducted on medical documents only;
- In two cases physical signs of injuries disappeared in a short period. In these cases examinations were conducted later on medical documents only;
- In one case medical examination was conducted immediately after the launch of the investigation, however, new circumstances of the case were determined after questioning the alleged victim and conducting two additional examinations was deemed necessary;
- A medical examination was conducted immediately after the launch of the investigation, however additional examination was conducted to clarify relevant information in medical documents.

[493] Letter NSIS72100001356 of the State Inspector's Service, dated 29.01.2021.

In 2020, a psychological examination was ordered on a single case only, however, the examination was not conducted due to the refusal of the alleged victim to attend the examination.[494]

In regards to ordering and conducting medical examinations, the Annual Report of the State Inspector's Service refers to the following challenges: some alleged victims refuse to participate in medical examinations; moreover, conducting medical examinations by relevant commissions is often delayed.[495]

The reasons for the inability to conduct medical examinations on the cases falling under the mandate of the State Inspector's Service are the refusal to cooperate with the investigative body, lapse of a long period from the moment of committing an alleged crime, and disappearance of the traces of violence (this also includes delayed notifications).[496]

The challenges linked with the timely access to medical examinations vary in East and West Georgia.[497] Unlike West Georgia in East Georgia physical presence of the alleged victims at the national forensics bureau is not possible over the weekends, while the traces of physical injuries might disappear during this period. In West Georgia, experts are available over the weekends, however, presenting victims to the examinations after 6 pm is problematic.[498] In response to these challenges, the 2021-2022 Action Plan for Combating Torture, Inhuman and Degrading Treatment or Punishment provides for the appointment of an expert on duty during non-working hours/days,[499] which deserves a positive assessment.

Within the first months after launching the investigative mandate of the State Inspector's Service some challenges were evident in regards to the timely delivery of medical examination reports,[500] however, as a result of the interviews conducted with the investigators, it was revealed that the situation has improved lately. Medical examination reports on the new cases are sent to the State Inspector's Service in a relatively shorter period.[501]

[494] Letter NSIS72100001356 of the State Inspector’s Service, dated 29.01.2021.

[495] 2020 Annual Report of the State Inspector’s Service, p. 147-149, available at: https://bit.ly/3ceGP1c accessed on 7.06.2021.

[496] 2019 Annual Report of the State Inspector’s Service, p. 116, available at: https://bit.ly/3z6hfFC accessed on 7.06.2021.

[497] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector’s Service.

[498] Ibid.

[499] 2020 Annual Report of the State Inspector’s Service, p. 108, available at: https://bit.ly/3ceGP1c accessed on 7.06.2021.

[500] 2019 Annual Report of the State Inspector’s Service, p. 115, available at: https://bit.ly/3z6hfFC accessed on 7.06.2021.

[501] The information is based on the interviews conducted during the project implementation with the investigators of the State Inspector’s Service.

8. SCOPE OF PROSECUTORIAL SUPERVISION AND OVERSIGHT

8.1. INTRODUCTION

Within the scope of investigative subordination, defined by the Georgian legislation, the State Inspector's Service is authorized to conduct full-scale investigation into the criminal case and to carry out operative-investigative activities.[502] Similarly to any other investigative body, investigative activities of this Service are also subject to prosecutorial supervision and oversight. This, along with the conduct of criminal prosecution and support to state prosecution, is the authority of the relevant department at the General Prosecutor's Office of Georgia.[503]

The following subsection of this study analyzes interrelation between the activities of the State Inspector's Service and the Prosecutor's Office overseeing the Service. The subsection also discusses the scope of prosecutor's involvement in the implementation of specific investigative activities and the scope of investigator's and prosecutor's decisions on measures relevant to the case, ultimately revealing that being attached to other state body in the process of investigation, poses significant barriers to the functional independence of the Service.

8.2. THE ROLE AND AUTHORITIES OF THE PROSECUTOR IN THE INVESTIGATION PROCESS

The rules for conducting the investigation, defined by the criminal procedure legislation, as well as provisions defining authorities and status of an investigator, fully apply to the State Inspector's Investigative Service, while certain procedural issues are further regulated by the Law of Georgia on State Inspectors Service.

Investigators from the State Inspectors Investigative Service carry the status of prosecution. [504] At the same time, the current code of procedure obliges them to conduct the investigation thoroughly, fully and objectively.[505] An important precondition for performing this function is the operational independence of the investigator, reflected in the lawful authority to independently plan and conduct the investigative process. Carrying the status of the prosecution and, simultaneously, the provision of thorough, objective investigation are incompatible.[506]

In addition to conflicting legislative records regarding the status and functions of the investigator, excess authority of procedural oversight of the investigation, lawfully granted to the prosecutor, as well as the strong subordination of the investigator to the prosecutor, are also problematic and completely remove the line of responsibility between individuals conducting investigation and those carrying out prosecutorial oversight.[507]

According to the criminal procedural legislation, the function of the prosecutor can be divided into

[502] Article 20 of the Law of Georgia on State Inspector's Service.

[503] Article 22 of the Law of Georgia on State Inspector's Service.

[504] Part 6, article 3 of the Criminal Procedure Code of Georgia.

[505] Part 2, article 37 of the Criminal Procedure Code of Georgia.

[506] EMC, Analysis of Investigative System, 2018, p. 40, available at: https://bit.ly/3w3CuWV, date of access: 07.04.2021.

[507] EMC, Analysis of Investigative System, 2018, p. 43, available at: https://bit.ly/3w3CuWV, date of access: 07.04.2021.

three main directions[508]. These include prosecution, procedural supervision of the investigation and supporting state prosecution in the court.[509] Between the stages of initiating the investigation and taking the case to the court, the prosecutor is actively involved in the investigative process and, for the purposes of carrying our procedural supervision, receives information on case proceedings. The prosecutor often plans the investigative strategy and issues mandatory instructions for investigators. It is the prosecutor's exclusive authority to take a decision on conducting the criminal prosecution and to support prosecution in the court.[510]

In addition to the mentioned functions, the Code of Criminal Procedure allows the prosecutor to participate in the case with the status of an investigator, where the prosecutor is entitled with every right and responsibility of the investigator.[511] In addition, without the direct involvement of the prosecutor, it is impossible to carry out number of investigative and procedural activities, restricting constitutional rights, defined under the procedural legislation. The prosecutor has a discretion to refuse the prosecution and to decide on its termination.[512] The prosecutor is also authorized to disentitle the investigator from investigating the case and to transfer the case for investigation to another investigator.[513]

Prosecutor's active involvement in the case before commencing and conducting the investigation and before the identification of perpetrators complicates the identification of individuals and agencies responsible for conducting impartial and qualified investigation and the separation of investigative and prosecutorial powers.[514] Triggering the investigative mechanism in order to combat ill-treatment, in the face of such misbalanced distribution of functions between the investigator and the prosecutor, impedes the functional independence of the Service and raises legitimate questions on the real possibility of conducting thorough, full and objective investigation.

It should be noted that the problem of the separation of investigative and prosecutorial powers has been somehow recognized by the State in the preparation of the concept for the reform of investigative system.[515] The aim of the reform is to create solid legislative guarantees for conducting qualified and impartial investigation and to ensure proper balance of prosecutorial and investigative powers. The assessment prepared by the Venice Commission also confirms that, by the implementation of the reform concept, the effectiveness of the investigation will increase, however, the implementation of the concept has been suspended by the legislative and executive authorities.[516]

[508] Commentary on the Criminal Procedure Code of Georgia, 2015 p. 154.

[509] Article 32 of the Criminal Procedure Code of Georgia.

[510] Article 33 of the Criminal Procedure Code of Georgia.

[511] Subparagraph 'b', part 6, article 33 of the Criminal procedure Code of Georgia.

[512] Article 105 of the Criminal procedure Code of Georgia.

[513] Subparagraph 'a', part 6, article 33 of the Criminal procedure Code of Georgia.

[514] EMC, Analysis of Investigative System, 2018, p. 37-38, available at: https://bit.ly/3w3CuWV, date of access: 07.04.2021.

[515] EMC, Opinions to the Venice Commission on the reform of investigative system in Georgia 2019, available at: https://bit.ly/3dGHfgP, date of access: 07.04.2021.

[516] Venice Commission, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, 2019, available at: https://bit.ly/3rXRMJM, date of access: 07.04.2021.

8.2.1. THE ROLE OF THE HEAD OF STATE INSPECTOR'S INVESTIGATIVE SERVICE IN THE INVESTIGATION PROCESS

Taking into consideration the wide range of powers of the Prosecutor's Office in the criminal case, one of the important issues, for the purposes of this study, was to assess the degree of functional independence of the State Inspector's Investigative Service.

After the receipt of notification on the potential crime, the investigator of the investigative service independently decides on the specific form of responding to the information, on initiation/non-initiation of the investigation and on the legal qualification of the case. The agency also has a practice of consulting with other investigators and the management of Investigative Service on disputable circumstances arising in the investigation process.

A special electronic system – 'Investigative Plan' has been developed in order to monitor internal investigative activities of the Service and the effectiveness of the investigation. The program is accessible to the heads of Investigative Service units and investigators only. The program reflects every criminal case in the Service, as well as the list of investigative plans, investigative and procedural activities carried out and to be carried out for each case. It also features fields reflecting performance against the plan. After carrying out every activity defined by the plan, conclusive decision, relevant to the results, is taken. [517] It is the prerogative of an investigator to plan the investigative strategy and to carry out measures for obtaining the evidence.[518]

The status and function of the head of Investigative Service in this process is also interesting. In practice, heads of Investigative Service play an important role in the conduct of criminal proceedings. However, the current Code of Procedure does not recognize the latter as subjects of the process at all.[519]

There is a different legislative background in relation to the Head of the State Inspector's Investigative Service, whose functions are directly defined in the Law on State Inspector's Service. The main objective of the Head of Investigative Service is to coordinate the activities of the investigative unit of the Service and to, within his competence, exercise official oversight for the activities of investigators. [520] As a result of interviews with prosecutors and investigators, within the scope of this study, it was revealed, that department heads, as well as the deputy curator, mainly participate in resolving administrative issues (relocation, other technical matters) for the purposes of facilitating investigators' work. The function of the head also includes substantive involvement in the investigative process, mainly reflected in periodic hearings of reports on ongoing cases of the Agency, as well as in consultations with investigators on problematic legal matters.[521]

With regards to the involvement of the prosecutor, according to the usual practice of the Service,

[517] Information is based on individual interviews, conducted within the scope of the project, with managers of State Inspector's Investigative Service.

[518] Information is based on individual interviews, conducted within the scope of the project, with investigators of State Inspector's Investigative Service.

[519] EMC, Analysis of Investigative System, 2018, p. 40, available at: https://bit.ly/3w3CuWV, date of access: 07.04.2021.

[520] Part 11^1 article 11 of the Law of Georgia on State Inspector's Office.

[521] Information is based on individual interviews, conducted within the scope of the project, with investigators of State Inspector's Investigative Service.

the prosecutor is immediately, within few minutes or at investigators earliest opportunity, via telephone or by text message, notified on the initiation of investigation on the case.[522] There is no unified rule for notifying prosecutors, established by the procedural legislation.

8.2.2. PROSECUTOR'S AUTHORITY TO AMEND THE QUALIFICATION

One of the powers of the prosecutor in the investigation process is to amend the qualification of the criminal case, assigned to the case by the investigator.[523] According to the practice of State Inspector's Investigative Service, at the start of the investigation, the investigator independently decides on qualification, based on factual circumstances. Further amendment of qualification, based on prosecutor's decision, is allowed at any stage of investigation, even right before the commencement of criminal prosecution.

The experience of the Investigative Service reveals that, in the period from last year up until 31 March 2021, the qualification was changed for 20 criminal cases by the decision of the prosecutor. In 11 cases, alleged acts of degrading or inhuman treatment, determined at the initial stage of investigation, were requalified as the abuse of prosecutor's power. While for 5 cases, the qualification of the abuse of power was amended as degrading treatment committed in various aggravating circumstances. For 3 cases, the qualification was specified under the same article, within the scope of aggravating circumstances of ill-treatment, and for 1 case the qualification of 'compulsion to testify' was added to the qualification of the abuse of power.[524]

Interviews with investigators and prosecutors revealed that there is no verbal or written communication between the agencies prior to the amendment of qualification, however, in number of cases, their views on qualifications, assigned/amended for the case, differ.[525] According to the interviews with prosecutors, the matter of assigning qualification to the case is the integral part of prosecutorial oversight and the Investigative Service expects this matter to be consulted upon with its employees. In case the investigator chooses not to share the decision on the qualification of the case, the qualification is then amended by the relevant decision of prosecutors.[526] With regards to the position of investigators, according to their opinion, the investigator, who is well-aware of every details of the criminal case, can assign the qualification in more accuracy and it is important for the full-scale investigation that the qualification assigned by the investigator is confirmed.[527]

In order to assess this issue, the research team has studied 5 randomly selected decisions on the amendment of qualification for criminal cases under the investigation of State Inspector's Investigative Service. In one case out of the provided procedural documents, the abuse of power was reclassified as degrading or inhuman treatment, while in 4 cases ill-treatment was reclassified as the abuse of power.

[522] Article 100 of the Criminal Procedure Code of Georgia.

[523] Subparagraph 'i', part 6, article 33 of the Criminal Procedure Code of Georgia.

[524] Letter SIS 1 21 00006698 of 1 April, 2021 of State Inspector's Service.

[525] Information is based on individual interviews, conducted within the scope of the project, with investigators and prosecutors of State Inspector's Investigative Service and prosecutors.

[526] Information is based on individual interviews, conducted within the scope of the project, with prosecutors overseeing the State Inspector's Investigative Service.

[527] Information is based on individual interviews, conducted within the scope of the project, with investigators of State Inspector's Investigative Service.

None of these decisions contain legal justification as to why the qualification assigned at the investigation stage was incorrect and what circumstances indicated the expediency of the amendment of qualification. The afore-mentioned 4 decisions, in the same pattern, stipulate that 'since the combination of evidence obtained (and/or as a result of information found in the record of testimony) revealed the fact of the abuse of official authority, not of the inhuman treatment, it became necessary to amend the qualification of the case'. The decision to reclassify the qualification as 'inhuman treatment' is similarly unjustified.

In addition, it is noteworthy that two of the provided decisions were adopted on the day of the initiation of the investigation into the criminal case[528], making grounds for immediate amendment of qualification even more obscure; since it is not feasible to rule out the accuracy of qualification before the establishment of factual circumstances of the case via investigative and procedural activities.

8.2.3. PROSECUTOR'S MANDATORY INSTRUCTIONS

Within the scopes of procedural oversights of the investigation, the prosecutor is authorized to, at any stage of criminal proceedings, after the commencement of the investigation or criminal prosecution, give out mandatory instructions for investigators, thereby determining the course of the investigation.[529]

Prosecutor's mandatory instructions apply to the conduct of those investigative activities, on which, according to the current procedural legislation, the investigator is authorized to make a decision. It is noteworthy that the concept, developed within the frames of the reform of investigative system, envisaged an approach according to which the prosecutor would only be entitled to issue mandatory assignments for investigative units after the commencements of prosecution while, in the course of ongoing investigation, the prosecutor's authority would be limited to the issuance of recommendations regarding the conduct of investigative activities.[530]

The Criminal Procedure Code does not define the form of mandatory instruction, however, according to the investigative practice of the State Inspector's Office, it is issued in writing. According to last year's statistical data, mandatory instructions were issued for 15 criminal cases. 14 applied to criminal cases for which the criminal prosecution had not yet been commenced, while 1 was issued after the commencement of the prosecution.[531]

Interviews with investigators revealed that the time for the issuance of mandatory instruction is not related to the commencement of criminal prosecution, when prosecutor's interest to substantiate charges before the court is obvious, but it is also issued at the stage of the investigation. According to them, the conduct of investigative activities, requested by the mandatory reference, were already part of investigative plan and strategy for all cases, however, the agencies might

[528] Decisions of 19.09.2020 and 11.09.2020 on the change of qualification attached to Letter SIS 1 21 00006698 of 1 April, 2021 of State Inspector's Service.

[529] Article 33 of the Criminal Procedure Code of Georgia.

[530] Venice Commission, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, 2019, available at: https://bit.ly/3rXRMJM, date of access: 07.04.2021.

[531] Letter SIS 5 20 00021209 of 25 December 2020 of the State Inspector's Service.

have held conflicting views on the appropriate timing for the conduct of these activities. [532] According to the interviews with prosecutors, the issuance of mandatory instruction does not imply the choice of wrong course for the investigation, but this authority is rather used when prosecutors see the need of clarifying certain matters in the case.[533]

The institute of mandatory instruction is one of the manifestations of the excess authority of the prosecutor and secondary role of the investigator in the investigation process. This tool, via close connection with the Prosecutor's Office, limits evidence-gathering activities of investigative units, ultimately resulting in the fragility of functional independence of State Inspectors Investigative Service and of other investigative agencies.

8.2.4. CONTROL OVER INVESTIGATIVE ACTIVITIES

The Code of Criminal Procedure fails to ensure balanced distribution of functions between the prosecutor and the investigator and the prosecutor is, in fact, given leverage to fully lead the investigation. A clear manifestation of this is the necessity of prosecutor's direct involvement in certain investigative activities, inevitable in the work of State Inspectors Investigative Service and other investigative agencies.

Only the prosecutor is entitled to prepare a motion for the adoption of court's preliminary ruling on the conduct of restrictive investigative measures (search, seizure, inspection) during the investigation process. [534] Investigators are also not entitled to question the witness before magistrate judges, [535] which is one of the important investigative activities for the cases of ill-treatment. Only in case of urgent necessity, can the investigator independently conduct restrictive investigative measures, legality of which will be examined by the court on the ground of a relevant motion of the prosecutor. [536] The investigator is not eligible to request document or information from the computer system. Making this decision, including in times of urgent necessity, is entirely the prerogative of the prosecutor.[537]

According to the practice of investigative agencies, including that of the State Inspector's Investigative Service, the prosecutor prepares motion on the conduct of investigative activities, while the investigator is obliged to prepare, attach and physically present in the court the case materials relevant to the factual circumstances indicated in the motion[538]; This results into artificial division of one action between the two agencies and, in terms of time resource as well, requires simultaneous involvement of prosecutor and investigator.

In addition, it was clearly stated in the interviews with investigators, that the investigators are the ones who always apply to prosecutors with the initiative to prepare motion for the adoption of court

[532] Information is based on individual interviews, conducted within the scope of the project, with investigators and prosecutors of State Inspector's Investigative Service.

[533] Ibid.

[534] Article 33 of the Criminal Procedure Code of Georgia.

[535] Paragraphs 4 and 9, article 114 of the Criminal Procedure Code of Georgia.

[536] Part 5, article 112 of the Criminal Procedure Code of Georgia.

[537] Article 136 of the Criminal Procedure Code of Georgia.

[538] Information is based on individual interviews, conducted within the scope of the project, with investigators of State Inspector's Investigative Service.

decision. This is because individuals responsible for case proceedings are always in better position to identify measures necessary for the investigation process.

Interviews with employees of investigative units revealed that increasing the authorities of investigator, making investigators entitled to take decisions on investigative activities independently from the prosecutor will play an important role in conducting the investigation in a timely and effective manner. As univocally stated in interviews, conducting investigative activities promptly, in a limited time, is crucial for obtaining evidence on the cases of ill-treatment. If current legislation entrusts investigators with the authority to conduct activities such as search or seizure in times of urgent necessity, it becomes unclear why it excludes investigator's authority to prepare the motion and submit it to the court for preliminary ruling for similar matters without urgency. Among other circumstances, the workload of supervising investigators should be taken into account, as it may hinder the preparation of motion within their competence. According to the position of investigators, they should be free to prepare motion, take the verdict and conduct investigative measures (that, under the article 112 of the Code of Criminal Procedure of Georgia, are already within their authority) in times of urgent necessity, independently from other agencies and during non-working days.[539]

Limiting the scope of matters that, according to criminal procedural legislation, fall under the competence of investigator, and investigators' strong subordination to prosecutors hinder independent operation of Investigative Service, which is institutionally separate from other state agencies, and pose barriers to thorough, objective investigation by, in fact, imposing investigative functions on the prosecutor.

Such distribution of powers is problematic since the prosecutor can exercise exclusive authority of criminal prosecution. The conduct of prosecution is based on effectively managed investigation. That is why the prosecutor is equipped with the function of procedural supervision of investigation, the most important part of which is the control of the legitimacy of actions undertaken by investigators in the process of obtaining evidence. In addition, prosecutor's active participation in the investigation, beyond supervising the legality of investigator's activities, poses risks that the investigation will be conducted only in the interests of prosecution, rather than in the direction of obtaining thorough evidence.[540]

Thus, the separation of prosecutorial and investigative authorities will increase the effectiveness of the work of State Inspector's Investigative Service, especially taking into account the legal education and professional qualification of investigators of the Service. It is important to minimize the involvement of the prosecutor in the investigation process, since the prosecutor, as the prosecution side and the supporter of prosecution in the court, cannot remain neutral in the evidence-gathering process; Prosecutor's intense involvement in the investigation process will always be motivated by the effective conduct of prosecution.

[539] Information is based on individual interviews, conducted within the scope of the project, with prosecutors of State Inspector's Investigative Service.

[540] EMC, Analysis of Investigative System, 2018, p. 42, available at: https://bit.ly/3w3CuWV, date of access: 07.04.2021.

8.2.5. CONTROL OVER COVERT INVESTIGATIVE ACTIONS

The Code of Procedure ensures prosecutor's exclusive competence to obtain legal permission necessary for conducting covert investigative actions. According to the law, covert investigative actions – covert surveillance and recording of telephone communication, removal and fixation of information from the communication channel, identification of geolocation in real time, control of postal and telegraphic messages, covert audio- video recording or photo shooting, as well as electronic surveillance via technical means – can only be conducted pursuant to the court ruling obtained on the ground of prosecutor's motivated motion.[541] Even in times of urgent necessity, the legislator only entrusts the preparation of the motion to the prosecutor. [542] Taking into account the gravity of the interference into human rights by the conduct of covert investigative actions, it is important that the legislation establishes high degree of judicial control. Even in times of urgent necessity, within 48 hours before the court examines the legality of covert investigative actions, the abuse of such measures by investigative bodies should be ruled out. Therefore, assigning prosecutor as a decision maker on the necessity of covert investigative actions and excluding investigative bodies from this process is a logical decision of the legislator.

This provision of the Code of Procedure defines the rule for conducting actions essential for the investigative process, on the one hand, and, on the other hand, it creates difficulties in terms of practical application. In particular, according to the norm, the regime of covert investigative actions applies to the identification of geolocation in real time, restricting the actual conduct of this measure to specific types of crime and appropriate legal grounds.[543] In parallel to the investigation, the identification of geolocation in real time can be used within the scope of operative-investigative work, for the purposes of administering the case of wanted person and of identification of location of such person. In such case, it, in fact, becomes impossible to obtain court permission for the conduct of this measure, since the investigation stage, necessary for filing the motion, no longer exists. Therefore, it is essential to formulate the rule for investigative activity in such a way that authorized bodies are given the opportunity to identify the location of wanted individuals beyond criminal proceedings, even after the final decision of the court is made.

Another challenge for the investigative practice is the current rule for the retrieval of information from the computer system, to which the procedure for the conduct of covert investigative actions applies in a classical sense. In particular, pursuant to article 136 of the Criminal Code of Georgia, requirements established for the conduct of covert investigative activities extend to the request of information, important for the criminal case, from the computer system or from computer data storage medium. [544] This excludes the possibility of requesting information from the computer system of private or state agencies at the initiative of the investigator, both in case of urgent necessity and on the grounds of preparing motion for obtaining the court decision.

A great practical importance of this investigative action in the work of investigative department is emphasized by the statistics of investigative actions conducted for criminal cases under the proceedings in Investigative Service in 2020. The data reveal that out of 641 motions filed to the court by the Prosecutor General's Office, for the purpose of obtaining permission on investigative actions

[541] Article 143^1 of the Criminal Procedure Code of Georgia.

[542] Part 6^2, Article 143^3 of the Criminal Procedure Code of Georgia.

[543] Article 136 of the Criminal Procedure Code of Georgia.

[544] Articles 143^2-143^{10} of the Criminal Procedure Code of Georgia.

to be conducted, 517 (80%) were for information/documentation requests.[545]

According to the legislation, computer system is understood as any mechanism or a group of interconnected mechanisms, that automatically processes data through a program. This may imply computer, mobile phone, or any other similar device. With regards to the concept of computer data, it is understood as any information in a computer system, suitable for processing, that serves the operation of the system.[546]

It is noteworthy that the procedure for requesting information, defined by the Code of Procedure, has undergone several substantial changes. In particular, according to first edition of the law, rules of article 112 of the Criminal Procedure Code of Georgia applied to the afore-mentioned investigative action and the preparation of motion for the court decision was the prerogative of the prosecutor, while, in times of urgent necessity, the investigator also had such power. [547] By the legislative amendment of 2014, the rules of covert investigative actions were extended to the measure of information request and it became the subject of prosecutor's motivated motion only.

This amendments became problematic for the investigative practice as, on the on hand, it defined prosecutor as the subject of action (excluding the participation of investigator and defense) and, on the other hand, the provision became subject of mixed interpretations. In particular, according to the practice developed by the court, only prosecutor's motivated motion became necessary for obtaining the court ruling on the request of information or documentation from the computer system and attaching it as an evidence to the criminal case, both in case of urgent necessity and in an ordinary situation. This approach excluded the voluntary release of information stored in the computer system by its addressee to the investigative body.[548] In addition, in practice, questions arose as to the extent to which the request of information was the subject of provisions defined by the law for the stages of planning, implementation and post-completion of investigative activities, such as the obligation to notify the addressee of covert actions, send the resolution of court ruling to the registry issuing the ruling on covert investigative actions, to the prosecutor and to the Supreme Court.[549]

Eventually, as defined by the court practice, article 136 of the Code of Procedure applies to the request of any information or document from the computer system or computer data storage medium (and not only to the request of customer related information from service providers). [550] According to the decision of 2017 of the Constitutional Court, the defense was also entrusted with the authority to request information from the computer system. [551] With regards to the application of procedural obligations of covert investigative actions to the article 135 of the Criminal Procedure Code of Georgia, the court clarified that, pursuant to the article 136 of the Criminal procedure Code of Georgia, procedure established for the initiation of investigative actions applies to the request of information only in the part of justification of the motion and presentation standard, equally for both parties, while other normative content, specifically characteristic to covert investigative

[545] Activity Report of State Inspector's Service 2020, p. 160, available at: https://bit.ly/3ceGP1c, date of access: 07.04.2021.

[546] Parts 27 and 28 of article 3 of the Criminal Procedure Code of Georgia.

[547] Edition of article 136 of the Criminal Procedure Code of Georgia, valid until 24 September 2010.

[548] Decree N1/552-17 of 16 February 2017 of Tbilisi Court of Appeals.

[549] Articles 143^{2}-143^{8} of the Criminal procedure Code of Georgia.

[550] Decree of 9 December 2014 of the Investigative Collegium of Tbilisi Court of Appeals.

[551] Decision №1/1/650,699 of 27 January 2017 of the Constitutional Court of Georgia.

actions, applies to the prosecution only, due to the fact that, pursuant to articles 143^{2}-143^{10} of the Criminal Procedure Code of Georgia, the prosecutor is the subject of a motion for the court ruling. In addition, as per the clarification of the court, requesting information, stored in the computer system, is different from covert investigative actions, where the defense has no power at all. [552]

According to the experience of investigators of State Inspectors Investigative Service, effective conduct of investigation is hindered by the current legislative regulation, where the investigator has no right to retrieve information from the computer system, in case of urgent necessity. [553] One of the reasons for this was formulated as a specific nature of the crimes of ill-treatment, where the lack of neutral evidence is a general problem and especially when investigators prompt access to the video files of private or state entities is the cornerstone for obtaining important information for the investigation. The role of video recordings of law enforcement workplaces and shoulder mounted cameras attached to the uniform of police employees is irreplaceable in terms of the direct evidence. [554] Investigators' direct dependence on the prosecutor in the process of requesting this information increases the risk of destroying the evidence by procrastination of investigative measure, especially in a situation where the target of an investigative measure is the agency, employees of which are being investigated. In addition, the Prosecutor's Office, in some cases, refrains from requesting mentioned information from other State agencies, as a matter of urgency.[555] In such a case, State Inspector's Investigative Service has, in fact, no leverage to either immediately, at its own initiative and without the dependence on the prosecutor, obtain information relevant to the investigation from the computer system or to verify how timely and thorough is the information issued by the agency. At the same time, limiting the investigative body by prosecutor's decision and the delay in retrieving information/documentation may become an obstacle for the investigative body in terms of planning other investigative actions as well.

8.2.6. CONTROL OVER OPERATIVE ACTIVITIES

The Office of State Inspector exercises full authority of operative-investigative activities in the field of investigation. [556] State Inspector's Investigative Service has access to the implementation of all operative measures defined by the law, for the purposes of which, under the request established by the law, the adoption of internal departmental instructions is necessary. The latter is an ongoing process in the Office of State Inspector.[557]

The law defines three types of control over operative-investigative activities – departmental, prosecutorial and judicial oversight. Of these, legislative record on the real essence and grounds for judicial control lacks content, as there are no operative measures left that require special court

[552] Decree №1ბ/960-17 of 19 July 2017 of the Investigative Collegium of Tbilisi Court of Appeals.

[553] Information is based on individual interviews, conducted within the scope of the project, with investigators of State Inspector's Investigative Service.

[554] EMC, Preventing Cases of Ill treatment in the Work of the Police 2019, available at: https://bit.ly/3cgbvPP, date of access: 03.04.2021.

[555] Information is based on individual interviews, conducted within the scope of the project, with investigators of State Inspector's Investigative Service.

[556] Subparagraph 'a', article 20 of the Law of Georgia on State Inspector's Service.

[557] Letter SIS 72100001987 of 9 February 2021 of the State Inspector's Service.

permit.[558]

The prosecutor general of Georgia and his subordinate prosecutors control the accurate and uniform implementation of law during the conduct of operative-investigative measures and the legality of decisions made in this process. [559] This competence of prosecutors does not apply to either the matters of cooperation with investigative agencies or the methods, tactics and procedure for obtaining operative-investigative information.[560]

The mechanism of prosecutorial oversight is the weakest and most ineffective out of statutory mechanisms. The law does not specify how specifically prosecutorial oversight is expressed and methods or means for enforcing it. [561] According to the practice of State Inspector's Investigative Service, the conduct of operative measures is always initiated by the investigative unit; prosecutors do not issue such assignments at their own initiative before the appeal from investigators. Prosecutor's written consent is the precondition for the conduct of operative measures.[562]

In addition to prosecutorial control, operative-investigative activities carried out by the investigative unit are also subject to departmental control, since the heads of units responsible for implementing operative-investigative measures are personally liable for the legality of organization and conduct of operative-investigative measures. [563] Imposing liability on the head of the unit responsible for the conduct of operative activities is logical of the legislator, especially considering the fact that the agencies responsible for the conduct of operative measures issue instructions or other normative acts related to these operative measures.[564]

The practice of operative activities reveals that departmental control is the most effective and efficient out of all control mechanisms, since the head of the unit in charge of implementing operative measures is directly informed and involved in the assessment of the need and necessity of such measures, as well as in the process of planning and implementation and, unlike the prosecutor, has full access to the acts related to operative activities. [565] Despite the efficiency of departmental control, its criticism lies in the fact that the stages of normative regulation, planning and implementation of operative measures are united under one body.[566] However, it is possible to discuss different types of control, according to the types of operative measures.

The problem for the investigative body is the delay of operative response necessary for the identification of potential evidence. This delay may be related to obtaining prosecutor's written permit for

[558] EMC, Operative Activities in Law Enforcement Agencies, 2019 p. 69, available at: https://bit.ly/2TxrdiW, date of access: 07.04.2021.

[559] Article 21 of the Law of Georgia on Operative-Investigative Activities.

[560] Part 2, article 21 of the Law of Georgia on Operative-Investigative Activities.

[561] EMC, Operative Activities in Law Enforcement Agencies, 2019 p. 65-66, available at: https://bit.ly/2TxrdiW, date of access: 07.04.2021.

[562] Information is based on individual interviews, conducted within the scope of the project, with investigators and operative workers of State Inspector's Investigative Service.

[563] Article 19 of the Law of Georgia on Operative-investigative Activities.

[564] EMC, Operative Activities in Law Enforcement Agencies, 2019 p. 65, available at: https://bit.ly/2TxrdiW, date of access: 07.04.2021.

[565] ibid.

[566] ibid.

the conduct of any operative measure, necessary under the current law.[567] As indicated in practice, obtaining written permit requires an important time resource; in particular, the investigator shall notify the prosecutor on the need for conducting operative measure, while the latter, at its own discretion, decides whether to prepare written consent. Afterwards, the investigative agency has to physically obtain the permit for the conduct of operative measures from another agency. Only after this stages can operative worker carry out actions relevant to the case, such as arrival to the scene, for instance. Going through this, even formal, stages for obtaining prosecutor's consent required by the Law on Operative-Investigative Activities, especially at the initial stage of investigation, delays the process of the identification of potential evidence.[568]

To sum up, it should be noted that the main goal of the operative work of State Inspector's Investigative Service is to promptly identify potential evidence by the initiation of the investigation. Legitimate prosecutorial oversight for this activity is ineffective. In addition, inefficiency of control and oversights established by the law in relation to the usage of operative measures by investigative agencies is a general problem. The law itself requires fundamental change, which taking the nature of operative measures into consideration, will impose different regime for operative measures of operative and investigative purposes and will reflect part of them in the Criminal Procedure Code.[569]

8.2.7. THE AUTHORITY OF TAKING CONCLUSIVE DECISION

It is within the competence of the prosecutor to take any kind of conclusive decision on a criminal case.[570] At a certain stage of investigation, the prosecutor, based on the existing evidence, decides on the termination of investigation or on initiation of criminal proceedings.

According to the data from previous year, criminal proceedings were initiated against 5 individuals.[571] The ground for the termination of investigation for 23 cases was the absence of action defined by the law,[572] while for one criminal case, the prosecutor rejected the accusation.[573]

According to the established practice, the prosecutor's office and investigative units act in a coordinated manner before the conclusive decision in taken. There is also a practice of consultation on certain matters between investigators and supervising prosecutors. All investigative and procedural actions are completed before the decision on the termination of investigation is taken on the grounds defined by the Code of Procedure.[574]

With regards to the decision on the commencement of criminal prosecution, prosecutorial approach differs from that of investigative units. According to the Prosecutor's Office, all investigative and

[567] Subparagraph 'a', part I, article 8 of the Law of Georgia on Operative-Investigative Activities.

[568] The information is based on interviews, conducted within the frames of the project, with investigators and operative workers of State Inspector's Office.

[569] EMC, Operative Activities in Law enforcement Bodies, 2019, p 14-16, available at: https://bit.ly/2TxrdiW, date of access: 07.04.2021.

[570] Article 33 of the Criminal Procedure Code of Georgia.

[571] Letter SIS 5 20 00021209 of 25 December 2020 of the State Inspector's Office.

[572] Subparagraph 'a', part 1, article 105 of the Criminal procedure Code of Georgia.

[573] Subparagraph 'h', part 1, article 105 of the Criminal procedure Code of Georgia.

[574] The information is based on interviews, conducted within the frames of the project, with investigators and prosecutors of State Inspector's Service.

procedural actions shall be completed before a person is found guilty, [575] even though, procedurally, investigation and gathering of evidence continues after the commencement of criminal prosecution. According to the assessment of Investigative Service, when there is sufficient evidence in the case for the initiation of criminal prosecution, the need for the completion of all investigative actions should not delay the decision making process.[576]

According to the information provided by the Investigative Service, relevant deputy of State Inspector submitted substantiated proposal on the expediency of the commencement of criminal prosecution for one case from previous year to the supervising prosecutor. The proposal was rejected and, as a response, the prosecutor issued written instruction requesting the conduct of further investigative actions. The appeal of the refusal on the commencement of prosecution with Prosecutor General was also unsuccessful, since the latter entrusted the head of the department overseeing the State Inspector's Investigative Service with the authority of decision-making on the substantiated proposal.[577]

Such an approach of Prosecutor's Office – refusal to commence criminal prosecution and its delay, when the Investigative Service considers gathered evidence as sufficient for indictment, is extremely problematic. Before the creation of independent mechanism, the full responsibility for the large-scale problem of inefficient investigation of the cases of ill treatment lied with the Prosecutor's Office, since such types of crimes were subject of its investigative subordination. The establishment of a special investigative body followed the Prosecutor's office's unwillingness to conduct full, thorough and objective investigation into such cases. Therefore, the decision to refuse the initiation of criminal prosecution, without proper substantiation and arguments, raises legitimate questions, taking into consideration previous practice of not prosecuting law enforcement offices of the Prosecutor's Office.

In addition, deliberate delay of making the decision on the commencement of criminal prosecution, may result in unintended consequences for the prosecution. In particular, deliberate delay of criminal prosecution may cause inadmissibility of all evidence obtained after sufficient grounds have been established for the commencement of criminal prosecution against a person.[578]

8.2.8. CHANGE OF DEPARTMENTAL INVESTIGATIVE SUBORDINATION BY THE PROSECUTOR GENERAL

Additional challenge for the effective functioning of independent investigative mechanism is an exclusive authority, given to the prosecutor general under the current procedural legislation, to withdraw case from one investigative body and transfer it to the other, despite the investigative subordination.[579] In the investigative practice of the State Inspector there has been no case of

[575] The information is based on interviews, conducted within the frames of the project, with investigators and prosecutors of State Inspector's Service.

[576] The information is based on interviews, conducted within the frames of the project, with investigators and prosecutors of State Inspector's Service.

[577] Letter SIS 5 21 00005440 of 19 March 2021 of State Inspector's Service.

[578] Paragraph 9, article 169 of the Criminal Procedure Code of Georgia.

[579] Subparagraph ‚a', part 6, article 33 of teh Criminal Procedure Code of Georgia.

transfer of the case to other body without the protection of departmental subordination, however, the current provision is viewed as a theoretical obstacle to the independent investigative activity by the Service itself.[580]

In response to this exclusive authority of prosecutor general, the law on State Inspector defines the authority of Investigative Service to submit substantiated proposal with the request to transfer case for investigation.[581] The prosecutor general will consider the matter of changing his decision within 24 hours of the submission of substantiated proposal.

In terms of the independence of institutionally separate Investigative Service, the subject of criticism are both – the authority of the Prosecutor General to change the investigative subordination and transfer the case to another agency and the legislative procedure for changing the decision. In particular, the record on the change of departmental investigative competence does not directly imply the obligation to substantiate such decision. In addition, the Code of Procedure does not define grounds for the transfer of case for investigation, despite its investigative subordination. Moreover, after the transfer of the case, assigned to the investigative mandate of the independent service by the Prosecutor General, the Prosecutor General is again in charge of considering the transfer of the same case to the State Inspector's Service. In this case as well, the law does not define either the obligation to substantiate Prosecutor General's decision or the ability to appeal the refusal to transfer the case to the Investigative Service. The absence of judicial control over the taken decision increases the risks of arbitrary usage of the legislative record and of the adoption of unreasonable, biased decision.

8.3. PROCEDURAL GUARANTEES FOR THE INDEPENDENCE OF STATE INSPECTOR'S INVESTIGATIVE SERVICE

The Law on State Inspector's Service establishes special rules for the submission of opinions on different matters, arising during the investigation of criminal case between the head of State Inspector's Investigative Unit and the supervising prosecutor. Such special authorities of the head of investigative agency are established in connection with the operation of independent investigative mechanism only and do not apply to the work of other investigative bodies.

8.3.1. THE INSTITUTE OF SUBSTANTIATED PROPOSAL

The relevant deputy of State Inspector can submit substantiated proposals, on a criminal case under departmental subordination, to the supervising prosecutor, with following subjects: 1. The adoption of conclusive decision on the case (on the expediency of the commencement of criminal prosecution or termination of criminal prosecution and/or investigation); 2. The conduct of investigative actions that are carried out on the basis of prosecutor's motion and court ruling; 3. The inclusion of a specific evidence in the list of evidence to be examined by the court

According to the experience of the Service, substantiated proposal with the request to amend the

[580] The information is based on interviews, conducted within the frames of the project, with investigators of State Inspector's Service.

[581] Part 5, article 19 of the Law of Georgia on the State Inspector's Office.

list of evidence had not been sent to the Prosecutor's office. [582] This can be explained by the fact that criminal prosecution index for cases subordinate to the investigative agency is generally not high. In addition, it is the prerogative of the prosecutor, not the investigator, to determine appropriate evidence for the purposes of supporting prosecution in the court. With regards to the proposals requesting the termination of investigation – supervising prosecutor received 3 substantiated proposals in 2020, out of which, all were satisfied.[583]

Substantiated proposal requesting the conduct of investigative measures is also actively applied in the practice of Investigative Service. According to the statistical data from previous year, State Inspector's authorized deputy submitted 29 substantiated proposals to the supervising prosecutor; 24 of these proposals were related to the request of information from computer system, and 5 – to the conduct of seizure. One out of all submitted proposals was partially satisfied, while all the rest were fully satisfied.[584]

For the cases of rejected substantiated proposal, legislative appeal mechanisms are ineffective. Prosecutor's rejection can be appealed once to the Prosecutor General, who makes decision within 72 hours. [585] Within this term, the legal dispute may no longer make sense, due to the destruction of evidence caused by delayed investigative measure, for instance. It is additionally problematic that the law does not allow appealing prosecutor general's decision. This problem became obvious last year, when the Prosecutor's Office rejected substantiated proposal of the Investigative Service on the expediency of commencing criminal prosecution.[586]

As revealed during interviews, substantiated proposals are submitted to the Prosecutor's Office according to case-specific needs and this leverage is generally used when there are conflicting views between the investigative agency and the supervisory body. As mentioned, the legislation entrusts the prosecutor with the authority of taking final decision and does not allow its verification through the judicial control. Unlike the Investigative Service, the Prosecutor's Office does not perceive existing legislative framework as problematic.[587]

It should be noted in conclusion that the authority to submit substantiated proposal equips the State Inspectors Investigative Service with a role different from that of other investigative agencies, precisely because of its mandate to effectively investigate cases of ill-treatment. Nevertheless, this tool is not timely and effective in the investigation process, since substantiated proposal is not of a binding nature and its satisfaction solely depends on the will of the Prosecutor's Office. In addition, the necessity of direct involvement of high ranking officials – State Inspector and Prosecutor General, instead of individuals in charge of the production of case, in the process of appealing the rejection, as well as delayed terms of appeal, make its application, in fact, useless.

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[582] The information is based on interviews, conducted within the frames of the project, with investigators of State Inspector's Service.

[583] Letter SIS 5 20 00021209 of 25 December, 2020 of State Inspector's Service.

[584] Letter SIS 5 20 00021209 of 25 December, 2020 of State Inspector's Service; Activity report of State Inspector's Service 2020, p. 160, available at: https://bit.ly/3ceGP1c, date of access: 07.04.2021.

[585] Part 7, article 19 of the Law of Georgia on State Inspector's Service.

[586] Activity report of State Inspector's Service 2020, p. 162-163, available at: https://bit.ly/3ceGP1c, date of access: 07.04.2021.

[587] The information is based on interviews, conducted within the frames of the project, with investigators and prosecutors of State Inspector's Service.

8.3.2. THE AUTHORITY TO STUDY THE CASE UNDER THE PROCEEDING IN A DIFFERENT AGENCY

In order to respond to crimes within departmental competence, the legislator defines several cases for subordination to the State Inspector's Investigative Service: 1. when other investigative unit started the investigation and the subordination to State Inspector's Service was identified afterwards. In such case, after the conduct of urgent investigative measures, the case, pursuant to its subordination, is transferred to State Inspector's Investigative Unit; [588] 2.when the case features signs of simultaneous subordination to the State Inspector's Office and to other investigative units, after the conduct of urgent investigative measures, the case is partly or fully transferred to State Inspector's Service; [589] 3.When State Inspector's Investigative Service has information that the crime under its mandate is being investigated in another agency, the Service is authorized to request access to case materials and, in case the information is confirmed, transfer the case for investigation. [590]

In an event when the independent service has information that other law enforcement agency is investigating case under its mandate, the relevant deputy of the State Inspector requests case materials from the agency managing the investigation and, on the basis of substantiated proposal, requests transfer of the case under the subordination of State Inspector's Service. Supervising prosecutor's rejection of the substantiated proposal can be appealed once to the prosecutor general, who shall review the substantiated proposal of the deputy within 24 hours; his decision is final and is not subject to the court verification.

According to the data from previous year, material from two criminal cases, under the investigation at a different investigative agency, was studied as a result of the request of State Inspector's authorized deputy. However, as a result of inspection, no signs of subordination to State Inspector's Investigative Service were revealed and, therefore, the proposal for the transfer of criminal case for investigation was not submitted to the supervising prosecutor. In addition, 11 criminal cases were sent to the agency for investigation from other investigative units. [591]

Special regulation of subordination matters, under the law on State Inspector, serves the purpose of a perfect response to the potential cases of torture and ill-treatment. At the same time, the law urges law enforcement bodies to take the decision on the transfer of cases by subordination immediately, after the completion of urgent investigative measures.

Failure to take the decision as soon as proper grounds have arisen may result in inadmissibility of evidence obtained after the grounds for the transfer of the case have arisen. [592] Therefore, protection of departmental subordination is directly related to the usefulness of evidence obtained as a result of investigative measures. Thus, the case where other investigative body conducts investigation into the criminal case that, according to the information of State Inspector's deputy, falls within his departmental subordination, is of special interest.

According to the experience of the investigative body, main sources of information on the probable conduct of investigation on the crime that falls within its departmental competence, are media or notifications from citizens. The Deputy State Inspector has an experience of submitting substan-

[588] Part 2, article 19 of the Law of Georgia on State Inspector's Service.

[589] Part 3, article 19 of the Law of Georgia on State Inspector's Service.

[590] Part 4, article 19 of the Law of Georgia on State Inspector's Service.

[591] Letter SIS 5 20 00021209 of 25 December 2020 of State Inspector's Service.

[592] Commentary on the Criminal Procedure Code of Georgia; 2015, p. 332.

tiated proposal for the review of case material for the case under different investigative body, however, departmental subordination to State Inspector's Office was not confirmed after the inspection. In practice, there also was a case, when a case was referred to the Investigative Service before the official submission of substantiated proposal.[593]

The review of case materials and the verification of other investigative body's departmental investigative authority by the authorized deputy of State Inspector's Office is a type of tool for ensuring the protection of subordination in the investigation of criminal cases. At the same time, this authority creates a kind of inconvenience between investigative agencies: if it is confirmed that the investigation was carried out in violation of subordination, questions arise not only on the competence, but also on subjective interest and motivation of the law enforcement agency in charge of violating the subordination.

With regards to this lawful authority of the independent investigative mechanism, it is also problematic that practical realization of this authority, granted to the deputy inspector, substantially depends on the receipt of notification/information from outside the agency; and, in terms of obtaining evidence, as a result of delayed transfer of the case, the investigation of criminal case by the independent service might not make sense.

8.4. CONCLUSION

The analysis of legislative gaps and challenges revealed in practice, since the launch of independent investigative mechanism, conducted within the frames of this study, demonstrates that the investigative service, institutionally separate from other agencies and created for the purpose of combating torture, is still essentially under the influence of a criminal prosecution body. This is due to the current legislative order, excess limitation of investigative powers and full subordination of investigative process to the prosecutorial control.

Procedural legislation treats investigator as a prosecution and, in the investigation process, binds him to the decisions of prosecutor. The prosecutor, from the very initial stage of the investigation, takes decisions on essential matters of the criminal case, such as criminal qualification, conduct of investigative actions, appeal to the court, issuance of mandatory instructions at any stage of the criminal case. Within the scope of procedural oversight, beyond controlling the legality of investigation, the prosecutor has a significant influence over the investigative process via decision-making on the conduct of investigative and operative measures.

The legislation allows for the amendment of State Inspector's investigative subordination and does not define judicial control over this decision of Prosecutor General. Under this circumstances, ensuring the conduct of independent, thorough and objective investigation remains dependent on the state agency, activities of which were subject of severe criticism for years, due to its inefficient response to the cases of torture and ill-treatment.

Therefore, the separation of investigative and prosecutorial activities, is a necessary precondition for achieving functional independence of State Inspector's Investigative Service, as well as of other investigative agencies. For this purpose, it is critically important to increase investigative powers in the investigation process, to limit prosecutorial oversight to the control of the legality of investigation only and to distance the prosecutor from making decision on investigative actions.

[593] The information is based on interviews, conducted within the frames of the project with investigators of State Inspector's Service.

9. RECOMMENDATIONS

INSTITUTIONAL ANALYSIS

- To avoid conflict of interest and exclude bias, the direct supervisor of the employee subject to the disciplinary proceedings should not be entitled to attend disciplinary hearings and participate in relevant voting procedures.

- The decisions on terminating disciplinary proceedings should be issued in the form of an act of the State Inspector. This would ensure the possibility of appealing the decisions at the court in line with the administrative legislation.

- It is important to ensure the participation of applicants in the disciplinary proceedings and their provision with information on the stages and results of the proceedings.

- Legislation should include relevant provisions on proactively publishing disciplinary decisions in a depersonalized format. This will facilitate the transparency of the Service and will increase public trust towards the institution.

- It is crucial to increase the list of the topics in the legislation that should be included in the annual reports of the State Inspector's Service. The list should include information on the activities of the Disciplinary Board, financial and staffing issues, as well as the statistical information on the cases which were not subjected to prosecution.

- It is advisable to elect the State Inspector with the 3/5 majority of the Parliament composition.

- To ensure the efficient operation of the State Inspector's Service, it is crucial to provide it with necessary human and material resources and establish additional structural units in the regions of Georgia.

INVESTIGATIVE JURISDICTION OF THE SERVICE

- Relevant legislative amendments should be introduced in the area of official misconduct. The duplication of the provisions prohibiting torture and other ill-treatment (articles 144^1-144^3) and official misconduct (articles 333, 335) should be eliminated by introducing clear distinctive criteria.

- Investigative and judicial practice should pay particular attention to prioritizing the use of the articles prohibiting torture, degrading, and inhuman treatment, over the articles including general provisions on official misconduct.

- Abuse of official powers through violence or degrading treatment is in collision with the article on exceeding official powers and the special part of the Criminal Code, which renders the article non-functional from a practical as well substantive point of view. Thus to avoid overlap between the dispositions of the articles relevant legislative amendments should be introduced.

- The legislation should ensure a clear distinction between exceeding official powers through vio-

lence or insulting personal dignity and degrading treatment.

- It is advisable to add "coercion to refrain from giving a statement" to the disposition of article 335 (Providing explanation, evidence or opinion under duress).

- Duplication between the dispositions of article 144[1] and paragraph 2 of article 335 of the Criminal Code should be excluded.

- The subjects of the crimes committing ill-treatment against those placed at penitentiary institutions should be specified. For this purpose, the first sentence of article 378, paragraph 2 – "coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence", should be added by "committed by suspects or convicts placed in the penitentiary institution, public officials or those with the status identical to public servants".

- The composition of paragraph two of the same article together with amending testimony or refusing to testify should include "coercion of those placed at penitentiary institutions to give testimony." Moreover, it is advisable to give a clear definition of "civil duties" and add coercion of "suspects", to the sentence of coercion of convicted persons aimed at interfering with the fulfillment of their civil duties.

- The mandate of the Investigative Division should extend to the alleged crimes committed by the Minister of Internal Affairs, the Head of State Security Service, and the General Prosecutor.

- Establish the pre-emptive jurisdiction of the State Inspector's Investigative Division for any offenses which raise the risk of conflict of interest in the investigation process. The pre-emptive jurisdiction will empower the Inspector's Service to extend its mandate over the sensitive cases which are now left outside its jurisdiction, and which create risks of conflict of interest and hence ineffective conduct of investigations.

- The investigative mandate of the Division should include the crimes committed in the process of investigations, namely falsification and destruction of evidence, illegal detention, and purposeful mishandling of investigations.
  With this aim, the investigative mandate of the State Inspector's Service should be extended, provided the entity is ensured with relevant human, material and technical resources. The investigative mandate of the State Inspector's Service should additionally include:

  - The first paragraphs of articles 332 and 333, committed by law-enforcement representatives;

  - Additional numerals of articles 147, 148, 368 and 369 of the Criminal Code of Georgia.

- Crimes foreseen by articles 157-159 of the Criminal Code could in the future be added to the investigative mandate of the Service taking into consideration high-public interest. These cases could involve the disclosure of information on private life or personal data, violating the privacy of communication, wiretapping, and other covert investigative measures used for political purposes.

THE INVESTIGATIVE MANDATE OF THE STATE INSPECTOR'S SERVICE

- Existing legislation should regulate specific (shortest) timeframes and forms of sending notifications on alleged crimes to the State Inspector's Service.
- Legislation should foresee the obligation of administrative judges, similar to the judges hearing criminal cases, to refer to the State Inspector's Service if a judge has a suspicion that a person was subjected to torture, degrading and/or inhuman treatment, or if the person makes a relevant statement in front of the court himself/herself.
- It is important to work towards raising public awareness of the State Inspector's Service. Relevant steps should be taken to provide the public with the information on the hotline of the Service, which will ensure direct notification of the Inspector's Service on the crimes falling under its mandate.
- Rules of operation of the Operative Agency under the State Inspector's Office should be developed and adopted.
- Carrying out covert investigative activities and conducting investigative measures linked with computer data should be possible on all crimes falling under the mandate of the State Inspector's Service.

ANALYSIS OF THE MAIN OBSTACLES IN THE INVESTIGATION PROCESS

- Existing legislation should include the obligation to ensure video/audio recording of the communication between law-enforcement representatives and citizens.
- The buildings, inner and outer perimeters, as well as service vehicles of law-enforcement entities, require relevant technical equipment, which would ensure recording the communication between law-enforcement representatives and citizens.
- Policemen should be required to conduct continuous video recordings of their communication with citizens using the video cameras attached to their shoulders, which will ensure access to the full picture of the incidents in case of such necessity.
- The legislation should set short deadlines for public entities to provide the Investigative Division with the information aimed at obtaining evidence on the cases falling under its mandate. If providing the information is not possible, public entities should have the obligation to give reasoned responses.
- The Ministry of Internal Affairs should amend its internal legal acts, and ensure archiving audio/video materials for a certain period, which will protect the evidence on the cases before they are heard at the courts.
- The legislation should authorize the employees of the Investigative Division to have undelayed

access to penitentiary institutions. Relevant amendments should be made to the Prison Code of Georgia, and the right to access penitentiary institutions without special permission should be extended to the investigators of the Division.

- To ensure the full application of whistle-blower protection mechanisms, it is important for the Ministry of Internal Affairs, Ministry of Defence and the State Security Services to adopt relevant regulations based on the best international practice. Alternatively, existing legislation on whistle-blower protection should apply to the employees of these institutions without any reservations.

- Similar to other investigative bodies, the Investigative Division of the State Inspector's Service should be entitled to carry out special witness protection measures, which require relevant legal amendments.

- Conducting medical checks of alleged victims should be possible at any time.

- The State Inspector's Service should be entitled to refer to the supervising prosecutor with a substantiated proposal on granting an individual the status of a victim.

- State Inspector's Service should have the authority to carry out special witness/victim protection measures, which will serve as a guarantee for protecting witnesses/victims, their relatives and family members.

THE SCOPE OF PROSECUTORIAL SUPERVISION AND OVERSIGHT

- Together with institutional independence, the State Inspector's Service should also be granted strong functional independence. This can be ensured through the timely and comprehensive implementation of the investigative reform initiated by the Ministry of Internal Affairs. The reform should establish strong legislative guarantees for conducting high-quality unbiased investigations, ensuring professional independence of the investigators as well as the distinction of and balance between prosecutorial and investigative mandates.

- Investigators of the State Inspector's Service should have the authority to take independent decisions on such issues as – implementing investigative measures restricting human rights, questioning of witnesses at the court, requesting information from state institutions, etc. This can be made possible through due implementation of the investigative system reform.

- The rules, timeframes, and appealing procedures related to substantiated proposals and communication with other entities on investigative subordination of cases should be refined. This requires the introduction of efficient legislative mechanisms.

- The possibility of transferring cases falling under the investigative mandate of the State Inspector's Service to other entities by the General Prosecutor should be amended.

- The Investigative Division of the State Inspector's Service should have pre-emptive jurisdiction over investigations of cumulative crimes (when a particular aspect of the case does not fall under the mandate of the Service) without the necessity of separating the part of the case.

- Decisions on amending the criminal qualification of the cases falling under the mandate of the State Inspector's Service should be well substantiated, based on relevant evidence, and taken in coordination with the investigators involved in the process, especially before the stage of launching criminal prosecution.

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