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## Challenges to Effective Investigation of Complaints against Law-Enforcement Official

Policy Brief

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### Summary

Over the years, abuse of power and ill-treatment have been serious problems in Georgia's law enforcement system and penitentiary institutions. Using disproportional force during public demonstrations, obtaining statements through inhuman and degrading treatment, and torture at prisons, detention facilities, and police divisions were well-accepted practices in the country. The inadequate reaction from the state further reinforced the problem of ill-treatment and abuse of power, such as delaying evidence collection, conducting one-sided and formalistic investigations, holding back the prosecutions, and not releasing final decisions.<sup>1</sup> State's failed response had significantly exacerbated the problem of impunity in the system.<sup>2</sup> Consequently, establishment of the independent investigative mechanism for complaints against law enforcement officials is one of the key issues in the Association Agenda between European Union and Georgia.

In its 2015 report, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) identified problems regarding the ineffective state response to the abuse of power: lack of independent investigators, slow and delayed response of the prosecution service to the complaints of the Ombudsman, delays in the process of obtaining evidence, etc.<sup>3</sup> The Public Defender of

\***Guram Imnadze** joined Social Justice Center team in 2013 and in 2019 became a member of the board of directors and manages the organization alongside other members of the board. He is responsible for the management and coordination of the Judiciary and Democracy Programme. The aim of the programme is to promote the establishment of a fair justice system with a high degree of social sensitivity and to insure the creation of law enforcement system with a high degree of accountability that is tailored to the specific needs of individuals. To achieve the stated goal, the programme aims to advocate systemic reforms in the court, law-enforcing organs and the security sector to insure governance based on justice, solidarity, and on the common good of people. As a programme director, Guram is responsible for planning policies, strategies and positioning and implementing them with the rest of the programme team. Moreover, he is also responsible for organizing, coordinating and supporting the programme team.

Georgia has emphasised the challenges in terms of independent investigation in numerous reports. Particularly, these reports noted: an institutional link between the investigators and those alleged of the misconduct; those subjected to the pressure or violence were not acknowledged as victims and did not have access to the case materials; the investigations and prosecutions were launched with inadequate and lenient charges.<sup>4</sup> Furthermore, the European Court of Human Rights found violations of the European Convention on Human Rights in several cases against Georgia, noting that investigations were conducted with severe violations.<sup>5</sup>

Because of systematic breaches of human rights by law enforcement representatives and ineffective state responses, it was necessary to establish an independent investigative mechanism equipped with relevant competence, mandate, and leverage. Ensuring independent and effective investigations of the crimes committed by law enforcement representatives was also set out in the Association Agreement<sup>6</sup> and its agendas.<sup>7</sup> Consequently, in the spring of 2018, the Parliament of Georgia initiated the Law on the State Inspector's Service that abolished the Office of the Personal Data Protection Inspector and established the State Inspector's Service as its successor. The newly created agency was granted the mandate to investigate specific crimes committed by law enforcement representatives and public servants.

During the parliamentary discussions of the draft law, NGOs and the Ombudsman of Georgia stressed several challenges that would decrease the effectiveness of the new agency:

- The State Inspector's Service remained under intense prosecutorial supervision and was not granted the right to conduct major investigative activities (search, seizure, inspection...) without the prosecutor's approval;
- The Inspector's mandate covered a limited list of crimes committed by law enforcement officials;
- Prosecutor General retained the right to transfer cases from one investigative body to another (including cases under the Inspector's mandate) without substantiation;
- The State Inspector's mandate did not include crimes committed by the Prosecutor General, the Minister of Internal Affairs of Georgia, and the Head of the State Security Service of Georgia.<sup>8</sup>

None of these concerns were considered, and the Parliament of Georgia adopted the Law in July 2018. Activation of the investigative duties of the Inspector's Office was postponed four times until 1 November 2019. The main reason for the postponement was the Government's failure to provide adequate funding for the office's logistical support.

<sup>1</sup> 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: 30 August 2022.

<sup>2</sup> Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2011, p. 215.

<sup>3</sup> 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/33oInCB>, access date: 30 August 2022.

<sup>4</sup> See Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2018, available at: <https://bit.ly/3vMOWMg>, access date: 30 August 2022, also, 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: 20 August 2022.

<sup>5</sup> The decision of the European Court of Human Rights, on the case of Shavadze v. Georgia, dated 19 November 2020, is particularly relevant in this regard, available at: <https://bit.ly/37cMbHc>, access date: 30 August 2022.

<sup>6</sup> ASSOCIATION AGREEMENT between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, available at: <https://bit.ly/2Xe5UUF>, access date: 30 August 2022.

<sup>7</sup> See. Association Agenda Between the European Union and Georgia, 2014-2016 years, available at: <https://bit.ly/3B3MioH>, also, Association Agenda Between the European Union and Georgia, 2017-2020, available at: <https://bit.ly/3Rb59DY>, access date: 30 August 2022.

<sup>8</sup> Comments of the Coalition for an Independent and Transparent Judiciary on the Draft Law on State Inspector's Service, 25 April, 2018, available at: <https://bit.ly/3o4TqHM>, access date: 30 August 2022. See also the Report of the Ombudsman of Georgia on the State of the Human Rights and Freedoms in Georgia, 2017, p.59-60.

As a result, numerous high-profile cases falling under the mandate of the State Inspector's Service were investigated by other law enforcement agencies.<sup>9</sup>

## Legislative Amendments of December 2021

During 2019-2021, State Inspector's Office's performance has been positively assessed by the non-governmental sector and international partners. As part of its activities, the State Inspector's Service has received more than 5,500 reports, and eight law enforcement officers have been convicted during that time. The service quickly and effectively dealt with the facts of possible inhuman treatment of the third president of Georgia, the investigation into which is still underway. Furthermore, observations of the institute have proven that no shortcomings have been identified in practice regarding the compatibility of personal data protection and investigative functions.

Nevertheless, on 25 December 2021, the ruling party introduced a draft law to abolish the State Inspector's Office and replace it with two separate agencies: Special Investigation Service and Personal Data Protection Service. Parliament began considering the legislative amendments on 27 December 2021, holding three readings and passing the amended laws on 30 December 2021. The amendments were signed by the President of Georgia on 13 January 2022. The draft was initiated and discussed in the parliament in a particularly expedited manner, and relevant stakeholders were not granted adequate opportunities to provide their opinions. The State Inspector herself was not involved in the drafting process, and she was informed of the abolition of the institution through the media.

The Explanatory Note to the amended Laws referenced a 2018 joint statement of NGOs raising concerns about a possible conflict of interest in having investigative and personal data protection functions under one agency.<sup>10</sup> However, this statement was issued before the launching of the Service. On 26 December 2021, the authors of that statement issued a statement noting that "observations on the institution have clearly proven that no shortcomings have been identified in practice in terms of the compatibility of personal data protection and investigative functions."<sup>11</sup> The Explanatory Note of the draft did not mention any further research or monitoring report on actual or proven needs for the reform or malfunctioning of the Service. Substantiation for the accelerated procedure for hearing the amendments was also not provided.

The closed nature of the preparation of a draft law and extremely rushed discussions in the parliament were heavily criticised by civil

<sup>9</sup> Statement of the Coalition for an Independent and Transparent Judiciary, 21 August 2019, available at: <https://bit.ly/3COYGKr>, access date: 30 August 2022.

<sup>10</sup> See. The Explanatory Note on draft: <https://rb.gy/jwzvvc>, access date: 30 August 2022.

<sup>11</sup> Joint statement of the NGOs on the possible abolition of the State Inspector's Service, 26 December 2021, available at: <https://bit.ly/3B8Ghac>, access date: 30 August 2022.

society,<sup>12</sup> the ombudsman of Georgia,<sup>13</sup> international organisations, including the Council of Europe Commissioner for Human Rights,<sup>14</sup> the EU Delegation in Tbilisi,<sup>15</sup> the UN Office of the High Commissioner for Human Rights,<sup>16</sup> and the U.S. Embassy in Tbilisi.<sup>17</sup> Later, the Public Defender of Georgia and the State Inspector herself lodged constitutional complaints against the amended laws. The criticism of the above mentioned organisations centred on three main areas:

- The expedited manner in which the draft was discussed and the absence of the substantiation of the legislative changes;
- The immediate and unsubstantiated termination of the State Inspector's tenure;
- The impact that the abolition of the Inspector's Office would have on independent institutions and protection of human rights in Georgia.

The rushed nature of the drafting of the amendments and its parliamentary hearings raised concerns about nefarious intentions to undermine the independence and effectiveness of the State Inspector's Service. This suspicion is reinforced by the fact that the State Inspector's and her deputies' terms were terminated without adequate due process guarantees. It is also notable that on 7 December 2021, the Inspector imposed an administrative fine on the Ministry of Justice of Georgia and the Special Penitentiary Service for disclosing the personal data of the third President of Georgia, Mikheil Saakashvili. This context also strengthens the concerns about the political retaliation against an institution that has gained political neutrality and public confidence in recent years.<sup>18</sup> Furthermore, the baseless legislative changes and early termination of the State Inspector's occupation, without adequate due process guarantees, created a dangerous precedent regarding the safety of the tenure of heads of other independent bodies in Georgia.

To summarise, the parliament has abused the legislative process, and without verifiable justification for the proposed reform, the amended Laws were adopted in an extremely expedited manner. It raised questions about the legitimacy of the law-making process and has been detrimental to human rights protection in Georgia, particularly in protecting the right to life and freedom from torture, and the right to privacy.<sup>19</sup>

## Current Challenges of the Special Investigative Service

According to the first quarterly report of the newly created Special Investigative Service (SIS), from March-May 2022, the Service received a total of 767 crime reports.<sup>20</sup> Out of them, 664 reports (87%) were alleged crimes committed by representative of law enforcement bodies,

<sup>12</sup> Joint statement of the NGOs on the possible abolition of the State Inspector's Service, 26 December 2021, available at: <https://bit.ly/3B8Ghac>, access date: 30 August 2022.

<sup>13</sup> Public Defender's Statement on Attempt to Abolish State Inspector's Office, 27 December 2021, available at: <https://bit.ly/3q8QyNn>, access date: 30 August 2022.

<sup>14</sup> Council of Europe Commissioner for Human Rights, The Georgian Parliament should reject draft legislation undermining the independent functioning of the State Inspector's Service, 28 December 2021, available at: <https://rb.gy/easvvo>, access date: 30 August 2022.

<sup>15</sup> EU Delegation responds to expedited procedures in the Georgian Parliament relating to the State Inspector's Service and the Judiciary, 28 December 2021, available at: <https://rb.gy/qcfqmb>, access date: 30 August 2022.

<sup>16</sup> UN Human Rights office concerned by possible abolishment of State Inspector's Service in Georgia, 14 January 2022, available at: <https://rb.gy/adlaqe>, access date: 30 August 2022. <sup>17</sup> U.S. Embassy Statement on the Ruling Party's Rushed, End-of-Year Legislation, 3 January 2022, available at: <https://rb.gy/ziva2o>, access date: 30 August 2022.

<sup>18</sup> Joint statement of the NGOs on the possible abolition of the State Inspector's Service, 26 December 2021, available at: <https://bit.ly/3B8Ghac>, access date: 30 August 2022.

<sup>19</sup> OSCE Office for Democratic Institutions and Human Rights, OPINION ON THE LEGISLATIVE AMENDMENTS ON THE STATE INSPECTOR'S SERVICE OF GEORGIA, 18 February 2022, par. 36-40. available at: <https://rb.gy/syv1gy>, access date: 30 August 2022.

by an official, or a person equal to an official.<sup>21</sup> The large majority (67%) of the reports contained no signs of crime; in 11% of reports, an investigation was launched by the service, 4% were forwarded to another agency, as far as it did not fall under the investigative jurisdiction of the Service, 6% of reports were considered as additional information on criminal cases under investigation of the Service; for 8% of reports procedures have already been initiated, while in 4% of the reports the victims denied the information provided in the report.<sup>22</sup> From the investigations launched in March-May 2022, 55 criminal cases were related to alleged crimes committed by a representative of law enforcement or by an official.

During the same period, the Office of the Prosecutor General launched criminal prosecution against 11 persons under the jurisdiction of the SIS. Out of 11 persons prosecuted, two persons are Criminal Police Officers of the Ministry of Internal Affairs; 1 person is a Border Police Inspector; 1 Person is a Leading Specialist of the Border Police; 1 Person is a firefighter-lifeguard of the Emergency Management Service; 1 person is a Patrol Police Office; 1 person is a Military Police Officer; 1 Person is the External Protection Inspector of the Special Penitentiary Service, and 3 are citizens.<sup>23</sup> Mere statistical data is insufficient to make conclusions on the Service's performance, and the existing institutional and legislative setting provides a superior picture of the SIS's impartiality and independence.

### *Institutional Independence*

For the overall institutional independence of the service, the head of the SIS must be selected through procedures that guarantee his/her independence and political neutrality. At the initial stage, the commission established by Prime Minister nominates candidates to the Parliament for the position. 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, the Deputy Chairperson of the Supreme Court, the First Deputy Prosecutor General or Deputy Prosecutor General, Ombudsman, and a representative of a non-commercial legal entity with experience in human rights or personal data protection selected by the Ombudsman.<sup>24</sup> Georgian legislation does not ban former law enforcement officials from the competition. The only requirements for candidates are no criminal record, higher education in law, no less than five years of professional experience, and a highly professional and moral reputation.<sup>25</sup> The commission selects and proposes no less than two and no more than five candidates to the Prime Minister, and the latter nominate two candidates to the Parliament of Georgia. The Parliament makes the final decision on the appointment by a simple majority.

<sup>20</sup> First Quarterly Report of the Special Investigative Service, 2022, p.20. available at: <https://rb.gy/vt7deg>, access date: 30 August 2022.

<sup>21</sup> Ibid, p.27.

<sup>22</sup> Ibid, p.30.

<sup>23</sup> Ibid, p.25.

<sup>24</sup> The Law on Special Investigative Service, article 6<sup>1</sup>.

<sup>25</sup> Ibid.



The existing model of appointment of the head of the service does not provide sufficient safeguards for avoiding political influence over the institution. The first stage of the candidates' selection at the commission is politically influenced, as there is a strong presence from the ruling party in the commission; then the Prime Minister solely makes a political decision about the nomination of candidates to the Parliament; and the final stage in the Parliament is also majority driven, as the existing procedures do not require more significant professional or political consensus on the candidate to be appointed.

Besides the politically influenced selection and appointment process, it is also problematic that the existing legislation does not exclude former or current state agents or representatives of law enforcement agencies elected as the head of the SIS. Unsurprisingly, the newly appointed head of the SIS – Mr. Karlo Katsitadze, is a former high official of the Prosecutor General. Mr. Katsitadze worked as a prosecutor from 2009 to 2022. During 2013-2015, he was the head of the division of the Procedural Guidance of Investigation Unit of the Chief Prosecutor's Office. During that time and afterward, Mr. Katsitadze was responsible for prosecuting crimes allegedly committed by law enforcement officials.<sup>26</sup>

The term of office of the Head of the SIS is six years, and the same person cannot be elected for two consecutive terms. The set term of six years is in line with the standards of European Partners against Corruption (EPAC), according to which, to ensure independence, the head of the Office should be elected with a minimum term of five and a maximum term of 12 years.<sup>27</sup> The legislation sets concrete grounds for the early termination of the tenure of the Head<sup>28</sup> of SIS. Existing legislation does not foresee the possibility of the dismissal of the Head because of his/her decisions made in an official capacity. In that regard, Georgian legislation is in line with international standards. The same guarantees were provided by the Law on State Inspector's Service, but alongside its abolishment, parliament also removed the State Inspector. As the SIS appears to be a continuation of the Inspector's Office in terms of investigative mandate and responsibilities, this raises serious concerns about why dismissal has been undertaken outside due process. As mentioned above, a dangerous precedent was that a legislative amendment resulted in the early termination of the head of an independent body.

### ***Operational Independence and Capacities***

Since the launching of the State Inspector's Service, it has been evident that there is a need to strengthen the service's capacities. There have been calls to increase the agency's independence in conducting investigative actions and broadening its competence. The need for in-

<sup>26</sup> Information about the head of the Special Investigative Service is available at: <https://rb.gy/byzx4u>, access date: 30 August 2022.

<sup>27</sup> EPAC, Police Oversight Principles, November 2011, para 2.2.5. available at: <https://rb.gy/fpocy0>, access date: 30 August 2022.

<sup>28</sup> The Law on Special Investigative Service, Article 9<sup>1</sup> sets following grounds for the early termination of tenure: a) Loss of Georgian citizenship; b) Failure to perform official duties due to health condition for four consecutive months; c) Entering into force of a court conviction against the Inspector; d) Declaration of the Inspector by a court as a support beneficiary, missing or dead; e) Holding a position or undertaking activities incompatible with the status of the State Inspector; f) Voluntary resignation; g) Death.

stitutional and functional strengthening of the Service is highlighted in the Council of Europe Committee of Ministers' decision on the Tsint-sabadze Group's case in 2020, also in the country recommendations of the UN Universal Periodic Review. The State Inspector herself, in the annual reports submitted to the Parliament of Georgia, constantly pointed out the need to increase the office's capacities.<sup>29</sup>

In May 2022, Parliament adopted legislative changes that improved the social and legal protection of SIS employees. Also, the deputy head of the SIS has been granted the right to submit a motion to the prosecutor to use the special measures of protection.<sup>30</sup> Furthermore, investigators of the SIS have been granted the right to enter a penitentiary institution without a preliminary permit.<sup>31</sup> Those amendments increase the legal guarantees of witnesses and victims of crimes investigated by the SIS, but further legislative changes are needed for the office to have enough operational independence.

There is a strong subordination of investigators of the SIS to the relevant prosecutor. Through procedural oversight, the prosecutor still possesses excessive authority over the investigation. The prosecutor actively participates in the investigative process, receives information on case proceedings, often plans the investigative strategy, and issues mandatory instructions for investigators. The legislation allows the prosecutor to participate in the case with the status of an investigator, where they are entitled to every right of the investigator.<sup>32</sup> In addition, the prosecutor has the exclusive right to decide on carrying out some investigative and procedural activities that restrict constitutional rights. The prosecutor is also authorised to disentitle the investigator from investigating the case and to transfer the case to another investigator.<sup>33</sup> Furthermore, the Prosecutor General is entitled to transfer the case from one investigative agency (for example, SIS) to another.<sup>34</sup> Such extensive involvement of the prosecutor in the investigation impedes the functional independence of the SIS. It raises legitimate questions about its capacity to thoroughly and objectively investigate crimes allegedly committed by prosecutors or representatives of other law enforcement agencies.

Besides the legislative guarantees, it is also essential for the effectiveness of the office to be equipped with adequate financial and human resources. Notably, from 1 March 2022, the SIS investigates not only the crimes of ill-treatment committed while performing official powers but also violent crimes committed by representatives of law enforcement bodies while off-duty. According to the legislative amendments, the new list of crimes in the amended Law covers a range of serious offences including murder and intentional killings, bodily injury, rape and sexual offenses, and trafficking. Additionally in the amended SIS Law, there is reference to a range of crimes that falls under the man-

<sup>29</sup> Joint statement of the NGOs on the possible abolition of the State Inspector's Service, 26 December 2021, available at: <https://bit.ly/3B8Ghac>, access date: 30 August 2022.

<sup>30</sup> The Law on Special Investigative Service, Article 19.

<sup>31</sup> Law of Georgia, Imprisonment Code, article 60.

<sup>32</sup> Criminal Procedure Code of Georgia, Article 33.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

date of the institution, including violations of freedom of speech, privacy violations, and electoral interference.

Considering that the subject of those crimes can be either a public servant or an ordinary citizen, the workload of the SIS will increase significantly compared to the previous status quo. Despite this increased workload, Parliament did not grant the Service with increased financial resources in the legislative amendments of December 2021. The lack of sufficient budgetary resources is considered one of the institution's main challenges in the SIS's first quarterly report.<sup>35</sup>

## Recommendations

To ensure the operational and institutional capacity and independence of the Special Investigative Service, the following steps are needed:

- The rules of appointment of the Head of the SIS should be amended to more consensus-oriented procedures. For that purpose, the Parliament should make the decision on the appointment by a qualified (possibly, by 3/5<sup>th</sup>) majority;
- The mandate of the Service should extend to the alleged crimes committed by the Minister of Internal Affairs, the Head of State Security Service, and the General Prosecutor;
- The SIS should be granted pre-emptive jurisdiction for any offences that present the risk of conflict of interest in the investigation process. This kind of jurisdiction will empower the Service to extend its mandate over the sensitive cases which might be left outside its jurisdiction;
- Investigators of the SIS should be granted to take independent decisions on implementing investigative measures restricting human rights, requesting information from state institutions, conducting covert investigative measures, etc.;
- The possibility of transferring cases falling under the investigative mandate of the Service to other entities by the General Prosecutor should be abolished;
- The SIS should be adequately funded to implement its duties effectively.

<sup>35</sup> First Quarterly Report of the Special Investigative Service, 2022, p.17. Available at: <https://rb.gy/vt7deg>, access date: 30 August 2022.