Saba Brachveli

THE CRIMINAL STRATEGY FOR COMBATING THE INVASION OF PERSONAL PRIVACY – A ROAD TO NOWHERE

Saba Brachveli
LL.M, University of Edinburgh.

ABSTRACT:

The present article relates to the crime of invasion of personal privacy, a widely spread crime in Georgia. According to the article, this crime has become an extremely grave problem for the country, which was addressed by the state with the legislative amendments of 2016. Nowadays, in fact, all individuals who have had the slightest relation to the materials entailing a secret of personal life may be punished. Despite the unlimited scope of the modified norm (in terms of storing, as well as – disseminating the unlawful material), aggravation of the punishment and mobilization of the law enforcement bodies, the fight against crime still proceeds without significant results. This is attested by the release of secret recordings from time to time and analysis of a particular case.

The article discusses the components of the Article 157[1] of the Criminal Code of Georgia in the international context which constitutes the clearest example of the state policy on fighting against the crime. In the view of the author, the reason for the failure of the criminal law norm and the state's action is multifaceted and indicates the necessity for a systemic revision of the outlined strategy. The article will present argumentation with regard to the need for a new strategy on combatting the crime and will suggest legislative and practical reforms for the implementation of the suggested changes.

INTRODUCTION

In recent years, the spread of secret video recordings of personal life has become an unfortunate characteristic to the everyday life of Georgian society. Despite the varying intervals, the practice of disseminating such videos has not terminated as of yet. Therefore, the state strategy devised to prevent this crime deserves attention, in order to determine whether we fight properly or not against the dangerous crime of leaking secret video recordings.

The aim of the present article is to describe the criminal legal steps taken by the state with regard to the crime of such type and identify the key problems in this regard. The reasoning outlined in the article will clearly show the necessity of changes on a strategic level, including adopting legislative amendments.

Initially, the article will outline the structure of the relevant norm from the criminal code of Georgia which will evidently demonstrate the criminal law resources existing for the fight against this crime. The analysis of the law will be presented in light of comparative analysis of the other state legislations which will make the Georgian state position even more clear. Afterwards, based on a particular example, it will be discussed why the state approach is problematic. Finally, a distinctive view on the fight against this crime will be suggested.

1. THE PERMANENT INCREASE IN THE ACTUALITY OF THE CRIME.

Along with the technological development, retrieving and disseminating of secret recordings have become an endless headache for Georgian society. At first, private conversations of various politicians and other public figures were used to be spread by means of mass media and by the governmental command.[1] Identification of the individual spreading the mentioned material was not difficult – the government used them for discrediting the opponents.[2]

This practice changed gradually. The spreading of secret audio recordings transferred from mass media to the Internet, where the identification of the person(s) behind the leaks, authenticity and

1 For instance the audio recording spread on 6 November of 2007 of the conversation between the former Defence Minister Irakli Okruashvili and formed Chief of the Department of Corrections Bacho Akhalaia, see: https://civil.ge/ka/archives/141851 [retrieved on 31.3.2019].

2 For instance the audio recording spread on November 7 of 2007 of the conversation between Shalva Natelashvili, Levan Berdzenishvili and Giorgi Khaindrava with people who, according to the MIA's information "were operative officers of the Russian counter-intelligence service", see: https://civil.ge/ka/archives/141870 [retrieved on 31.3.2019].

the source of the recordings was impossible.[3] Moreover, the recordings were uploaded from the websites that were not registered in Georgia. It is notable, that the multiple investigations initiated on these occurrences did not reach any result.[4] In parallel, exceptionally grave infringements of the right to private life occurred frequently.[5]

However, it can be stated freely, that a real pandemic of leaking secret recordings started in 2016. On March 11 and 14 of 2016, as well as on 12 of April[6] and 12 of June[7] of the same year video recordings were published by various social networks. These videos contained shots depicting the sexual life of politicians and public persons. One of the recordings involved a direct threat towards other socially active citizens to stop their activities if they wanted to avoid such material concerning their private life becoming public.

The intimate content of the secret recordings became the ultimate straw on camel's back, which resulted in unprecedented resonance and evident steps from the Government. The mentioned case was the first on which the initiated investigation more-or-less ended with some results. The prosecution detained several former high-ranking officials who were found guilty for illegally retrieving the recordings.[8] In addition, several individuals were detained, who were charged for storing the recordings.[9] However, it is noteworthy that the individuals who published the recordings were not identified and the named recordings were disseminated again after the detention of the people mentioned above.[10]

Besides the investigation on concrete cases, the significant change was made in the Criminal Code of Georgia. By virtue of the law of 3 of June of 2016, the relevant legal norm which regulated the retrieval and usage of the information depicting private life was amended. The new article 157^1 was introduced in the Criminal Code of Georgia which envisaged significantly higher sanctions for the offence. Namely, the article 157^1 represents the go-to weapon in the arsenal of the law-enforcement agencies for fighting against the crimes of this category.

Leaking recordings of private nature did not terminate even after this reform.[11] The prosecution investigated some of the offences with success.[12] However, at the end of January 2019, a new

3 For instance secret audio recordings spread on 24 and 29 October of 2015 of the conversation between Mikheil Saakashvili and Nika Gvaramia, also between Mikheil Saakashvili and Giga Bokeria; As well as, secret audio recordings spread on 2 November of 2015 of the conversations between Mikheil Saakashvili and Nika Gvaramia, and between Mikheil Saakashvili and singer Sopho Nizharadze. http://www.tabula.ge/en/node/101333 [retrieved on 31.3.2019].

4 Parliamentary report of the Public Defender of Georgia of 2016, 406-407.

5 For instance, the so called "case of butts" – video recording spread on 17 October of 2015, which entailed the sexual violence committed by the law enforcement bodies and which was shown publicly in Zugdidi and Tbilisi, see: https://ipress.ge/new/15597-sakhalkho-damcveli-tsamebis-kadrebis-sajaro-chveneba-mdzime-kanondarghvevaa [retrieved on 31.3.2019].

6 http://netgazeti.ge/news/105215/ [retrieved on 31.3.2019].

7 http://www.newspress.ge/sazogadoeba/84899-piradi-ckhovrebis-amsakhveli-kadrebi-isev-gavrcelda.html [retrieved on 31.3.2019].

8 http://pog.gov.ge/geo/news?info_id=1283 [retrieved on 31.3.2019].

9 http://pog.gov.ge/geo/news?info_id=885 [retrieved on 31.3.2019].

10 http://www.newspress.ge/sazogadoeba/84899-piradi-ckhovrebis-amsakhveli-kadrebi-isev-gavrcelda.html [retrieved on 31.3.2019].

11 http://netgazeti.ge/opinion/352460/; also http://pog.gov.ge/geo/news?info_id=1825 [retrieved on 31.3.2019].

12 http://pog.gov.ge/geo/news?info_id=1585 [retrieved on 31.3.2019].

secret recording of intimate nature involving one of the politicians was leaked again which resulted in arresting 17 individuals.[13] On March 27 of 2019, one more person was arrested who allegedly uploaded this recording on the social network Youtube.com.[14]

The detained individuals were charged with the crime envisaged under the article 157^1 of the Criminal Code – unlawful storing and disseminating of the private life secrets. Some of the detainees claim that they received an online link of the recording through the "Messenger" application and did not open it or did not see the content. Others claim that they shared the link to several friends.[15] No particular person is charged with the crime of manufacturing/obtaining the material as of yet.

The arrest of 18 individuals in this case serves as an illustration of the new strategy against the crimes of this category. The whole scope of the article 157^1 of the Criminal Code adopted in 2016 become clear by virtue of this case. As it stands the state intends to punish any person who obtains, stores (or even receives a link through the internet and does not delete the message) or distributes (even among "friends") any material containing a secret of private life of another person.

The previous, unused provision regulating the offences against private life, was in fact, substituted by a new, executable provision, which along with the "initial disseminator", provides an avenue for punishing any person who had a slight connection to the material of such category. Because of the wide scope of application, the constitutionality of Article 157^1 is disputed in the Constitutional Court. Therefore, it is necessary to determine, what this regulation implies in reality.

2. CONTOURS OF THE POLICY OF FIGHTING AGAINST CRIMES

According to Article 157^1 of the Criminal Code:

> "1. Unlawful obtaining, storage, use, dissemination of or otherwise making available secrets of personal life, shall be punished with imprisonment from four to seven years.
>
> 2. Unlawful use and/or dissemination of secrets of personal life through a piece of work disseminated in a certain way, through the internet, including social network, mass media or other public appearance, shall be punished with imprisonment from five to eight years."

The current norm at the same time relates to qualitatively diverse several actions, namely: (1) obtaining, (2) storage and (3) usage, dissemination or otherwise making available. There is no con-

13 http://netgazeti.ge/news/33790f2/ [retrieved on 31.3.2019].

14 https://police.ge/ge/dakavebulia-piri-romelmats-piradi-tskhovrebis-amsakhveli-videochanatseri-/12416 [retrieved on 31.3.2019].

15 http://go.on.ge/1050 [retrieved on 31.3.2019].

troversy with regard to the obtaining element of the offence; as for the second and third elements, they are a subject to public debate.

It is interesting that after introducing Article 157[1] in the Criminal Code, Article 157 still remains in the Code. It prohibits analogous actions towards the information representing private life. This became an issue for critics, as far as, according to the views of the Public Defender (Ombudsman), neither in the Code, nor in the explanatory notes there is any indication on the criteria for making a distinction among the legal goods protected under the mentioned norms. In the opinion of the Public Defender (Ombudsman), the ambiguity of the new norm gave "possibility for broad interpretation and arbitrariness", which, considering the differentiation between the sanctions, should have been precluded.[16]

In addition, the ambiguity of norms is deriving from the circumstance that the legislator did not stipulate clearly, either in the norm, or in the explanatory note, the form in which the infringement of the private life secret or invasion of personal privacy takes place. Legislations of all the states, which will be discussed below, pay significant attention to the legal goods protected by the norm (information representing private life), as well as – the definition of invasion. The current formulation of the norm simply does not contain the answer to the question, whether it is possible to commit a crime, for instance, in the form of words, animation or image multiplication.

Article 157[1] of Criminal Code has other and more crucial gaps which will be discussed below. However, it shall be noted, that by now there are two norms in the Code, similar in the content, among which the sentence of imprisonment for four years represents maximal[17] punishment for the one norm, and - minimal[18] for the other. The amount of the sentence is the additional particularity of this norm and will be discussed separately in terms of the disposition of both parts.

2.1. Unlawful storage of the private life secret

Unlawful storage of the private life secret represents a type of a "risk-based possession" offence. The feature of similar offences (such as, for instance, unlawful possession of fire gun, or plundering tools) is the fact that by virtue of the possession of an item, a person creates the threat of committing the future possible crime.[19] The core critic of the existence of such crimes is the factual disregard of the element of intention which emerges in the reversion of the presumption of innocence.

The element of intention in the composition of the crime implies the requirement that the person must have knowledge of the committed action.[20] Theoretically, if a person will be found carrying

16 Parliamentary report of the Public Defender of Georgia of 2016, 408.

17 Criminal Code of Georgia, second paragraph of the Article 157.

18 Criminal Code of Georgia, first paragraph of the Article 1571.

19 Ashworth, A. (2011). The Unfairness of Risk-Based Possession Offences, Criminal Law and Philosophy, Vol.5(3), 239.

20 Simester, A. P., & Sullivan, G. R. (2010). Criminal law: Theory and doctrine (4th ed.). Oxford: Hart Publishing, 161.

the drugs in the pocket or having fire gun at home, the prosecution will be obliged to prove that this person was keeping these items intentionally and knowingly.

In the crimes of possession this principle is not fully realized. As the possession of an item, nearly, represents a crime if inaction,[21] it is almost impossible to determine the intent of a person. The usual solution in such cases is to bring in a presumption, as for instance the doctrine of constructive possession. It decreases the role of fault in the decision-making process on the guilt of a person significantly and declares that if the unlawful item is in the possession of a person, this person is presumed to be the possessor of the item.[22] The analogue of this American doctrine is used in the United Kingdom as well, where a person will be declared innocent only if he or she clearly proves that he/she could not have known about the item in his/her possession.[23]

Therefore, in such crimes, in order to punish a person, it is only enough to prove the fact that he/she had access to the item. Such a resolution of a problem is caused by the fear that offenders may abscond justice. However, this result in undermining of the presumption of innocence as the individual has to refute the *prima facie* evidence against him/her.[24]

The presented reasoning is fully applicable to this part of the disposition of Article 157[1] of the Criminal Code. If a person has access to the secret of private life (for instance, has access to the internet-link, where the respective video is uploaded), it is considered that he had possession over this information and the burden of refuting this presumption is transferred to the defendant.

The similar structure of disposition of an offence represents the classical case of strict liability.[25] This concept is unfamiliar to Georgian theoretical literature on criminal law. By the impact of German law where the principle of correspondence has ა constitutional status,[26] it is considered that one of the elements of the fault/intention, however weak it may be,[27] shall correspond to and be linked with each element of the factual composition of the action.

By itself, the criminal law norms entailing strict liability are not unconstitutional or unfair. By virtue of such methods as the presumption of innocence and reversion of the burden of proof,[28] exclusion of one of the elements of guilt or intention with regard to one or several (sometimes all) ele-

21 Ashworth, The Unfairness of Risk-Based Possession Offences, 242-243.

22 Dubber, M. D., & Kelman, M. G. (2005). American criminal law: Cases, statutes and comments. New York: Foundation Press, 263–272.

23 In this regard, the leading decision is of the House of Lords on the case Warner v. Commissioner of Police for the Metropolis [1969] 2A.C. 256. The defendant was proclaimed guilty for unlawful storage of drugs, however he argued that he did not know what was in the closed box that he was given.

24 Ashworth, The Unfairness of Risk-Based Possession Offences, 245.

25 Fletcher, G. P. (1978). Rethinking criminal law. Boston: Little Brown., 198–199, also Robinson, P. H., & Cahill, M. T. (2006). Law without justice. New York: Oxford University Press., 28–31.

26 Spencer, John R., Pedain A., (2010). Approaches to Strict and Constructive Liability in Continental Criminal Law, In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 267-275.

27 Ibid. 237.

28 Green, Stuart P. (2010) Six Senses of Strict Liability: A Plea for Formalism. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005, 3.

ments of the crime,[29] is used not only in the common law countries,[30] but also in France and other countries of continental legal order.[31] The only exception is Germany, where similar to Georgia, this principle evolves only on the level of presumptions rooted in the jurisprudence.[32]

Moreover, it is noteworthy that the doctrine of strict liability has its own margins. Crimes without any form of guilt are remarkable with the small sentences.[33] For instance, in France fine of 3000 euros represents such limit,[34] in Canada – any crime, which foresees imprisonment,[35] and in the US and United Kingdom courts use so-called test of "constitutional innocence".[36] Most of the scholars agree that the strict liability doctrine is admissible only in case of non-stigmatic crimes which do not result in putting a label of a serious criminal on the offender.[37]

In Georgia, on the one hand there is an offence where the intention of a person has not an important significance (because it is nearly impossible to objectively prove it) and the burden of proof is transferred to the defendant; while on the other hand, there is a punishment, which envisages at least 4 years imprisonment and the court that has no specific test in place for limitations.

It is significant, that the argument of individuals arrested in 2019 under the article 157[1] was exactly the same: that they did not know what kind of video they were watching, or they did not know if it was necessary to delete the link from the Messenger application. Some of them also claimed that even while watching the video they could not perceive the aspects, which theoretically are necessary for punishing a person – for instance, they did not know who was in the video, whether the video was obtained unlawfully or not, etc.[38]

According to the discussion presented above, the strict liability doctrine would give state the possibility to punish those individuals anyway. However, this would have been admissible only in case if these individuals could not be at risk of (long term) imprisonment. [39] In the current situa-

29 Simester, A. P. (2010). Is Strict Liability Always Wrong? In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 44.

30 For instance 40% of crimes prescribed under the legislation of England and Wales have the named or other procedural mechanisms characteristic to the strict liability.

31 Spencer, Pedain, Approaches to Strict and Constructive Liability in Continental Criminal Law.

32 Ibid.

33 LaFave, W. R., and Scott A. W. (1986). Criminal Law. Second Edition, Student Edition / by Wayne R. LaFave and Austin W. Scott.. ed. Hornbook Series. St. Paul, Minn: West Publishing, 242.

34 Spencer, Pedain, Approaches to Strict and Constructive Liability in Continental Criminal Law, 256-262.

35 Michaels, Alan C. (2010). Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 224.

36 Michaels, Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience, 223.

37 See: Simester, A. P. (2010). Is Strict Liability Always Wrong?, Husak, D. (2010). Strict Liability, Justice, and Proportionality. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, 10. Green, Stuart P. (2010) Six Senses of Strict Liability: A Plea for Formalism. In Appraising Strict Liability, edited by Andrew Simester. Oxford: Oxford University Press, 2005. Oxford Scholarship Online, Oxford University Press.

38 http://go.on.ge/1050 [retrieved on 31.3.2019].

39 According to the European Court on Human Rights , which represents binding law, the limit lies on the imprisonment. See: Ziliberberg v. Moldova, 61821/00, 2005.

tion, the state does maintain and actively use the possibility to punish citizens by the reversion of presumption of innocence.

2.2. Unlawful dissemination of the secret of private life

The first paragraph of the Article 157[1] deems guilty those who unlawfully use, spread or otherwise make secret of private life available to others. According to the second paragraph, the liability is aggravated if the dissemination was committed by means of the Internet, social network, mass broadcasting, or any other public appearance. The ground for the critics toward the norm is that it does not differentiate the "initial" and "following" disseminators of the prohibited material from each other.[40]

Where should the link between the "initial" and "following" disseminators of the material break, how it should occur and is it necessary or not at all? There is no clear answer to these questions. The approaches differ depending on the legislations of various states. Some countries, similar to Georgia, consider that sharing prohibited material with the third person is enough for criminalization. Such states are Bosnia,[41] Bulgaria,[42] Croatia,[43] Germany[44] and others.[45] The Criminal Code of Canada directly stipulates that the motive of a person during the spreading is irrelevant.[46]

Other states try to elaborate some kind of filter to decrease the number of people to be punished for dissemination. For example, the legislation of Lithuania[47] punishes dissemination only in case when this is committed with the motive of profiteering. It is frequent to require the presence of a specific intent from the person's action in the disposition, – legislations of Finland,[48] United Kingdom,[49] also in US - Virginia,[50] Pennsylvania,[51] Colorado[52] and other states, punish dissemination only when the offender intended to cause psychological harm to the victim. There are some legislations where the offender is punished only when the factual damage was caused.[53] In Czech

40 https://www.facebook.com/GirchiParty/videos/vl.1039638722908022/457746581629945/ [retrieved on 31.3.2019].

41 Criminal Code of Bosnia, article 175.

42 Criminal Code of Bulgaria, article 171.

43 Criminal Code of Croatia, article 144.

44 Criminal Code of Germany, article 201a.

45 For instance, New Jersey Code 2C:14-9.

46 Criminal Code of Canada, article 162.

47 Criminal Code of Lithuania, article 168.

48 Criminal Code of Finland, section eight.

49 The Act of Criminal Justice of 2015, section 33.

50 Virginia Code 18.2-386.2.

51 Pennsylvania Consolidated Statutes Title 18 3131.

52 Colorado Revised Statutes 18-7-107.

53 For example, Legislation of the US state Utah, see: Utah Code 76-5b-203.

Republic and Estonia the requirements of a special intent and factual damage exist as aggravating circumstances.[54]

Therefore, the determination of the circle of persons who will be punished for disseminating the prohibited material, purely depends on the priorities and opinions of the state. The states decide on their own to what extent they want to criminalize the chain of dissemination. However, it is obvious that if deemed necessary, it is possible to differentiate among the initial spreader of the material and other individuals.

As an example, if Georgia had had the same disposition as the United Kingdom, then the people arrested in 2019 would have avoided the liability. Despite forwarding the material received via the Internet to others, they would not have been punished, unless as it had been determined that their aim was to cause psychological harm to the person in the video. Contrary to this, the explanatory note of the article 157[1] stipulates that there is no need to indicate the damage as "the invasion already causes significant damage."[55]

Hence, prosecuting dissemination in all forms as well as rejecting any kind of filtration in the disposition by imposing requirements for the special purpose, motive or factual damage, represents an evident will of the State. Arresting the mentioned individuals in 2019 is nothing more than a practical execution of the legislative amendments adopted in 2016.

2.3. Punishment for the invasion of personal privacy

The main purpose of the reform implemented in 2016 was toughening the sentence.[56] After imposing the new norm, article 157[1] currently envisages minimal term for imprisonment for 4 years; the punishment for disseminating the material via the Internet is imprisonment from 5 to 8 years, and if other aggravating circumstances are present this term may increase up to 10 years.

Such severe sentences cannot be found in any of the abovementioned legislations. Majority of European countries imposes a fine, or minimum term of imprisonment for such offences. One year of imprisonment is the highest sentence in the legislations of Bosnia, Croatia, Czech Republic, Estonia, Germany and Serbia. The sentence does not exceed 2 years in Finland and the United Kingdom, and 3 years of imprisonment in Lithuania and Bulgaria. In the US, this crime does not exist as a federal crime while the sentences established in 38 states and Washington, D. C. more or less fall in the mentioned limits. Among the countries discussed above, the most severe sentence is prescribed by Canada where the maximal term of imprisonment is 5 years.

54 For example, Criminal Code of Czech Republic, article 183, Criminal Code of Estonia, article 157.

55 Explanatory note to the Draft Law of Georgia "on amendments to the Criminal Code" from June 3, 2016.

56 Ibid.

It is obvious that the criminal law policy chosen by other states is not mandatory. In the Georgian context, this crime, beside its frequent repetition, brings exceptional psychological harm to the victim. However, it shall be noted that dissemination of non-consensual pornography, i.e. revenge porn, occurs often in other countries too. For instance, a comprehensive research held in 2017 in the US ascertained that every eighth user of social media represented a victim of this crime.[57]

Toughening of sentences had some side effects as well. As the invasion of personal privacy became a serious crime, failure to report it represents a separate offence and is punished by imprisonment from 2 to 6 years.[58] This means that the criminal liability may be imposed on those individuals who did not save the link spread via the Internet, did not forward it and deleted it, but did not inform the police about receiving the link.

3. FIGHT AGAINST CRIME IN PRACTICE

The previous subchapters create a clear image of policy on fighting against the dissemination of material involving personal privacy. By means of legislative reform, which was also implemented in practice, the State empowered itself with absolute means to fight against the crime. Article 157[1] of Criminal Code is formulated in a way that not even one potential criminal could nip off from the dredge of law enforcement agencies. This is evidenced by the following:

- The legal goods protected by the norm is formulated ambiguously in the disposition and not mentioned at all in the explanatory note which creates a possibility to hold a person liable for not only disseminating the material itself, but also for disseminating it in animated, cartooned or other form;
- Unlawful storage of the secret of private life is a crime of possession, which puts the burden of proof on the defendant. In comparison to other legislations, these sentences are not small and there is no special judicial test for limiting the boundaries of strict liability doctrine;
- The disposition of the offence of unlawful dissemination of a secret of private life prescribes the most all-encompassing circle of punishable persons. The legislator refused to differentiate among the "initial" disseminators, the persons acting in mal intention, the other individuals on the basis of special intention and refused to require indication of damage, or any other limit;

57 Eaton, Jacobs, Ruvalcaba, (2017) Nationwide Online Study of Nonconsensual Porn Victimization And Perpetration, A Summary Report, available at: https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf [retrieved on 31.3.2019].

58 Criminal Code of Georgia, article 276, paragraph 2.

- Sentences foreseen for the invasion of personal privacy are significantly high in comparison to other states. Besides, the harshness of prescribed sentences results in criminalizing failure to report a crime, which widens the all-encompassing circle of possible offenders even further.

Together these circumstances create a possibility to strictly punish any person, who had any, in certain cases – even unintentional relation with the spread material, Harshly punishing as many individuals as possible by the most comprehensive, wide and unpredictable norms – this is the criminal law strategy for with regard to the combatting the invasion of personal privacy nowadays.

It is obvious that this strategy is not by itself unconstitutional or unlawful. Depending on the content and graveness of the crime, it is up to the state to decide by which methods it will prevent the crime. As the law has a wide scope of application and readiness of law enforcement bodies for the implementation, it should normally result in possible offenders abstaining to commit a crime. Generally, people should refrain from committing an action for which the punishment is practically inevitable. In addition, unforeseeability and ambiguity of the norm create an additional stinging effect for dissuading a potential criminal.

Based on the frequency and permanency of leaking the video and audio recordings, it is possible to assuredly claim that this approach simply does not work and the result of a practical application of the norm is quite different. Events that took place on 26 of March of 2019 serve as a shred of clear evidence to this.

On 26 of March, at 23:00, by the public statement of one of the politicians, it became clear that recordings of private life, which were spread at the end of January 2019, were uploaded to the Youtube.com and were accessible to everyone.[59] The video was not deleted until the morning of 27 of March. Therefore, in the night of 26 of March, for several hours it was possible to observe the reactions of the society and state with regard to this crime.

The only measure taken by the state was the announcement made by the MIA, which was broadcasted at 00:57. According to the announcement, "the MIA was properly reacting" to the spreading of the video material, however what was implied under the reaction, or what was the particular plan for limiting the access to the video, was not elaborated further.[60]

Owing to the inaction of the law enforcement bodies, the number of viewers of video increased rapidly. Whereas at 00:15 the number of viewers was about 4600, at 01:15 the numbers increased up to 5024. At 02:15 the video was seen by 5786 viewers, at 03:15 – 7980 viewers, and at 04:15 – 9076 viewers. For 05:00 the number exceeded ten thousand viewers.

Users of the social networks emphasized the simplicity of the accessibility of video. For accessing the video, they just recommended to each other to search the name of the politician on You-

59 https://www.facebook.com/watch/?v=344590756171287 [retrieved on 31.3.2019].

60 https://www.interpressnews.ge/ka/article/538979-shss-saministro-socialur-kselshi-piradi-cxovrebis-amsaxveli-kadrebis-gavrcelebastan-dakavshirebit-reagirebas-axdens [retrieved on 31.3.2019].

tube.com Indeed, it was possible to find the video by such a simple search. Users were aware that their action could have been prohibited. They did not know exactly which action was prohibited in particular, but they realized that signs of a crime could have been found in their action. Instead of facilitating the prevention of spreading this video, the response of addresses of the norm was two sided:

Firstly, users elaborated the mechanism of learning, which was the direct outcome of the State's punitive measures. Instead of sending the link of video directly, they taught others how to find the video, and this way they tried to minimize the limits of personal responsibility. Therefore, we can simply assume that additional punishing measures, overall, may be unproductive. The society may only learn out of this, that they shall not repeat the same actions for which other individuals were charged and share information in other manner to avoid the punishment.

In addition, the possibility of a harsh punishment had no preventive use. On the contrary, it promoted deviant behavior and became a kind of a solidarity action. Users encouraged each other with different phrases, which reinforced the legitimacy of their actions and incited repetition of such behavior. The reason behind this might lie in an ambiguous formulation of the legal norm, which punishes everybody, but at the same time it cannot act as a preventive tool towards anybody.

Finally, the existing strategy on combatting the invasion of personal privacy is not only ineffective, but also counterproductive. Increase of the sentence and its application against a particular group does not entail a general preventive function. On the contrary, the doubts existing in regard to the legitimacy of the harsh sentences boosted the increase of the feeling of solidarity towards defendants, attraction towards "forbidden fruit" and repetition of the crime.

The only evident outcome of the reform of 2016 was the arrest of particular individuals, which was an action of reactive nature and did not relate to the reduction of damage. Only reactive, punitive measures do not fulfill the obligation to protect the private life. Fighting against this crime requires a substantively different approach.

4. A NEW STRATEGY FOR FIGHTING AGAINST THE CRIME

As we have discussed, the existing legislation allows unlimited authority to the police to fight against the crime, but practical results cardinally differ from the expectations. One of the reasons for that is the criminological axiom – the police cannot be effective, if people consider that it uses its

authority illegitimately and unjustifiably.[61] Democratic police cannot be effective and cannot resolve crises in such a manner, which exceeds the ideas, expectations and the moral framework of the society.[62] In a State with liberal values strong-armed police will not yield positive results, if it does not derive legitimacy from societal consensus.

Moreover, prevention of crime does not represent the exclusive obligation or capability of the police anymore. in order to effectively combat crime the police are obliged to have close cooperation with international organizations, the private sector, citizens and diverse social groups.[63] Relationship of the society towards police is determined by political, social, cultural, demographic and other factors,[64] but law enforcers have resources to make their actions more legitimate and come closer to people.[65]

As counterintuitive it may be, the trust of the society is less related to the decrease in criminal offending statistics. Even more so, the decrease of offending does not automatically translate into the reduction of fear and increase of the trust towards the police.[66] The trust in police historically,[67] as well as in the modern context,[68] was always based on reaching societal consent. Crucial components of the societal consent and legitimacy are use of minimal force, legality, impartiality and uniformity.[69]

It is necessary for the Georgian law enforcement bodies to consider these components. In the current context, mistrust towards police represents a grave problem. So-called signaling crimes are precipitated in the memory of society, which create a cumulative image of the police. Georgian police have stepped over the principle of application of minimal force,[70] legality[71] and other principles necessary for the legitimacy in various rumored cases. In particular, the so-called "practice of planting evidence", which caused the loss of trust towards police in certain segments of society is noteworthy. There are questions regarding the uniformity of applying the law in this case as well. Among individuals arrested at the end of January 2019, some were political activists.[72]

61 Smith, D. J. New challenges to Police Legitimacy, in Smith D. J. and Henry A. (eds), (2007) Transformations of policing, Aldershot: Ashgate Publishing Ltd., 273-305. ასევე: Reiner, R. (2000), The Politics of the Police, 3rd edn, Oxford: Oxford University Press. See Sanders, A. and Young, R. (2003), Police powers, in T. Newburn (ed.), Handbook of Policing, Cullompton: Willan, pp. 228-58.

62 Smith, D. J. (1983), Police and People in London, vol. I: A Survey of Londoners, London: Policy Studies Institute, No. 618. 10-13.

63 Dixon, D. (2005). Why Don't The Police Stop Crime? Australian And New Zealand Journal Of Criminology, Apr, Vol.38(1), pp.4-24, 5-6.

64 Zedner, L. (2006), 'Policing before and after the police: the historical antecedents of contemporary crime control', British Journal of Criminology, 46(1), 78-96.

65 Reiner, R. The Politics of the Police 51-59.

66 Dixon, Why Don't The Police Stop Crime? 5-6.

67 Loader, I. and Mulachy, A. (2003), Policing and the Condition of England. Oxford UP. Chapter 1 – 'Losing faith? The desacralization of English policing since 1945'.

68 Zedner, L. (2006), Policing before and after the police: the historical antecedents of contemporary crime control, British Journal of Criminology, 46(1), 78-96.

69 Emsley, C. (2008), 'The birth and development of the police', in Newburn, T. Handbook of Policing. Willan.

70 For instance, case of Zviad Ratiani.

71 For instance, case of "Birzha Mafia".

72 http://www.tabula.ge/ge/story/143717-eka-beselias-piradi-kadrebis-youtube-ze-atvirtvis-gamo-erti-piri-daakaves [retrieved on 31.3.2019].

Therefore, law enforcement bodies stand before a dilemma. If they roughly continue to apply article 157[1] of the Criminal Code, they will lose support and legitimation from the society even more. Similarly, the overwhelming and absolute nature of the norm causes a decrease of its own preventive force – as much as the State will use the repressive power, it will be considered as selective and unfair to the greater extent.

On the other hand, if the repressive measures are not taken, the article 157[1] will lose its existing minuscule preventive force. In fact, this would be a sign of capitulation in the fight against crime, which would harm the right to private life additionally. Both ways are fated to failure. This is the showcase, which has no real outcome. This is a road to nowhere.

Additionally, it would not have been reasonable to assume that the crime of the invasion of personal privacy would decrease in number. Considering the speed of technological progress, the opposite is more likely. It is not necessary to overcome physical barriers to obtain material describing a person's intimate space. Sending viruses to smartphones or laptops is easier and more manageable than entering somebody's flat. Moreover, in the digital world individuals give out such material by themselves and in case they delete the material, it still remains at other person's server, or just on the server of a webpage.

Consequently, it is crucial to come up with a substantively new policy, which mainly will be focused on zemiological perspective. The change of the approach shall be expressed by accentuating decrease of the damage and introducing reassurance policies. Police must be not a frightening outsider with the cudgel, who may arrest citizen anytime (including by virtue of "planting evidence"), but the body coordinating the fight against crime, that will struggle alongside with the civil society and diverse professional (including technical) groups against the problem.

The main task of the police while fighting with the crime of such category must not be detention of a maximal number of individuals, as it creates the problem of selectiveness. On the opposite, the State must maximally refuse the 'low-hanging fruit' of punishing individuals that bring less social harm in order to increase the legitimacy for using power. Besides, it is necessary to take effective steps for reducing damage. On 26 of March, accessibility of particular material for 6 hours indicates to the unjustified inactivity of the State.

Despite the rich history of spreading the material describing private life, the mechanism for fast blocking of the accessibility to the content still does not exist. In order to interrupt the spreading of undesirable content, in the past the State Security Service had blocked accessibility to the social network entirely.[73] In all of these cases there was no legislative framework in place based on which the Service acted. These actions, besides having unclear legislative character, were also ineffective as the interested user was easily visiting mentioned portals through the VPNs.

Hence, we may outline several key recommendations, which are crucial to combat the pandemic of spreading the secret of private life:

73 https://www.mediachecker.ge/ka/analizi/article/47302-2018-02-28-18-17-36; also http://go.on.ge/1ow [retrieved on 31.3.2019].

- The State shall take responsibility for the caused harm. Dissemination of protected material must not result in detention of simple, "secondary" suspects. Instead of transferring the responsibility to citizens,[74] law enforcement agencies shall assume their own responsibility that these materials are accessible to everyone for hours;

- Taking responsibility shall be expressed in the establishment of the mechanisms for reducing harm. Legislation must prescribe the mechanism for blocking such materials, that will result in determining technical activities for prompt reaction by means of close cooperation with social networks and different groups;

- For the prevention it is also necessary to conduct a wide awareness raising campaign and actively cooperate with vulnerable groups. Victims of such crimes mostly are socially and politically active women, and it will be very important to help them;

- On the legislative level it is necessary to make cardinal changes to the article 157^1 of the Criminal Code, in order to narrow the scope of application. It will be naïve to expect cooperation from citizens, if they feel that every moment they may become next victims of the norm and be threatened with at least 4 years of imprisonment;

- Amendments to the article 157^1 must relate to the reduction of liability limits for storage of the object of crime and for its dissemination. As a result of introducing a requirement for a specific intent, motive, or other filters of harm, the focus of the State shall transfer to the initial obtainer and publisher of the forbidden material. It is necessary because if the scope of the norm is narrowed, law enforcement bodies will be tempted to avoid responsibility by arresting ordinary citizens;

- Narrowing the article 157^1 shall not mean abating the fight against this crime. Even though the envisaged sanction is quite high, this can be justified with the context of the country and its harsh experience. Change of the disposition and introducing filtering, also transmitting the focus from ordinary citizens towards the main culprits will halt the protest from society and the gravity of sentence will be justified.

Only in this way it is possible to retain the balance between the fight against crime and alienation of the society with police. Law enforcement bodies shall not forget that fighting for legitimacy in the mentality of society is not less important than combatting the crime.

74 http://netgazeti.ge/news/351786/ [retrieved on 31.3.2019].

CONCLUSION

In the present article there were discussed the forms of combatting a widely spread crime of invasion of personal privacy. The State now has a carte blanche and in fact, may punish any person who has had a slight, even accidental relation to the secret recordings. By introducing various positive obligations, the punishment of a person has been made possible despite his/her intention, the harm caused and other factors.

The State has mobilized police resources and wants to suppress the crime. However, it fails, because the ambiguous, all-encompassing nature of the norm and repressive actions of the State are perceived as selective and unfair. Fight against crime proceeds unsuccessfully, which is a result of the non-existence of the preventive mechanism, but also of an erroneous systemic approach.

Reoffending must be a sign for the state to change the systemic reaction. If police continue to use power roughly, without legitimation from society, it will be doomed for failure from the beginning. It is less probable that a number of such crimes will decrease and even in case it happens, without active policy from the State it will not increase the trust in police automatically, or vanish the fear related to this crime, as the signaling crimes remain in the collective memory for a long period.

Instead of this, the State must change the strategy for combatting the invasion of personal privacy. Instead of a high number of repressive actions, a lot of defendants and decrease in the statistics, the aim of the State must be to control the extent of harm and handling society's reaction. This will give the State possibility not to be seen as an aggressive oppressor, but rather as an ally combatting the crime together with the people.

Particular recommendations represented in the final part of the article will assist the State in limiting its powers and taking responsibility. By virtue of narrowing the scope of application of the norm, unrealistic expectations will become controllable. These changes are necessary not because the current legislation is unconstitutional, unlawful or unprecedented (however we may argue about this issues as well), but because the existing strategy does not lead to effective prevention and is a clear example of how the State transfers responsibility to citizens in order to cover failure to fulfill its obligations.