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# Infringement of Special Categories of Personal Data and the Data Subject's Rights Under GDPR and Georgian Law

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**Abstract:** *Infringement of Special Categories of Personal Data and the Data Subject's Rights are very problematic legal issues in Georgian law and GDPR. The new law of Personal Data Protection stipulates the general regulation of infringement of special categories of personal data and the data subject's rights. The principle of processing of this personal information is very specific and depends on the several aspects especially in special categories of personal data. The content and the term of the special categories of special data is similar in different countries and international legal acts. However, the Georgian approaches are very specific and it is extremely important to analyze the new legal norms and practical problems.*

*The legislative list is exhaustive and strictly defined the types of data that belong to a special category of data. It is also important that special categories of personal data are processed in a different manner than is established during the processing of ordinary categories of personal data. Accordingly, in this present article, there is a comprehensive analysis of the processing of the special categories of personal data under new law of Georgia and GDPR which is the most significant legal act in EU. At the end of this article there are some suggestions, recommendations which might be accepted in Georgian reality.*

**Keywords:** *Special Categories of Personal Data; Data Subject's Rights; private data; special GDPR; Georgian approaches.*

## INTRODUCTION

Protection of special categories of personal data is a challenge of Georgian and not only Georgian law and practice. The issue is relevant from the point of view that the violation of a special category of data, due to its special nature and high degree of protection, assumes stricter legal consequences. These legal consequences are mainly administrative in nature, as the Data Controller and Data Processor are subject to fines. It is clear that imposing a fine on the Data Controller and Data Processor is not beneficial to the data subject. Accordingly, the question arises as to whether the data subject can claim any kind of damages from the Data Controller and Data Processor.

This issue is important as the data subject should have the feeling that his/her violated rights will be redressed (compensated). At the same time, legislation needs to be predictable to enable effective protection of data subject rights. The purpose of this article is to analyze the Georgian legislative norms regarding the processing and violation of special categories of data, to outline the means of protection of the data subject's rights and the rights that the data subject may have the right to demand from the violators.

In addition, it will be analyzed to what extent the Law of Georgia "On Personal Data Protection" and the Civil Code can be used as a legal basis for the data subject's requirements. At the end of the paper, the conclusion will combine the research results and recommendations that should be taken into account in practice.

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## 1. THE LEGAL BACKGROUNDS FOR PROCESSING OF THE SPECIAL CATEGORIES OF PERSONAL DATA

Nowadays, processing of the special categories of personal data is very important. The content and the term of the special categories of special data is similar in different countries and international legal acts. In EU the special categories of personal data is regulated by General Data Protection Regulation GDPR<sup>1</sup> which entered into force in May 25, 2018. In EU the GDPR is the main source for processing of the all kind of personal data including special categories personal data. It should be mentioned that despite the desire for harmonization of European data protection laws, the GDPR has given member states a very significant degree of flexibility to set their own lawful processing conditions,<sup>2</sup> which is very important for the States. It can be said that GDPR is a handbook for Georgian controllers, data subjects and all persons who are involved in the new Law of Georgia on Personal Data Protection<sup>3</sup>.

Article 9 of GDPR regulates the processing of special categories of personal data. The list of sensitive data contained in article 9(1) of GDPR is exhaustive and additional types of sensitive data might not be added to it and the list also includes not just direct indications of sensitive data but also the information that can be used to indicate them indirectly.<sup>4</sup>

Special categories of personal data is separated and covered with enhanced protection in comparison with other personal data because of their particular importance for the protection of the right of privacy and the risk of fundamental human rights.<sup>5</sup> Accordingly, the legal norms for protection of the special categories of personal data is more strict and demand the controller to prove the legality of the processing.

According to the Law of Georgia on Personal Data Protection there are a list of special categories of personal data. The list consists of the following data: data connected to a person's racial or ethnic origin, political views, religious, philosophical or other beliefs, membership of professional unions, health, sexual life, status of an accused, convicted or acquitted person or a victim in criminal proceedings, conviction, criminal record, diversion, recognition as a victim of trafficking in human beings or of a crime under the Law of Georgia on the Elimination of Violence against Women and/or Domestic Violence, and the Protection and Support of Victims of Such Violence, detention and enforcement of his/her sentence, or his/her biometric and genetic data that are processed to allow for the unique identification of a natural person.<sup>6</sup>

Therefore, the legislative list is exhaustive and strictly defined the types of data that belong to a special category of data. It is also important that special categories of personal data are processed in a different manner than is established during the processing of ordinary categories of personal data. This issue is regulated by the article 6 of the Law of Georgia on Personal Data Protection, which stipulates the specific conditions for processing the special categories of personal data. Besides the grounds which should be existed in order to process the special categories of data, the law directly states that the controller shall have an obligation to justify the legal basis for the processing of special

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<sup>1</sup> REGULATION (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

<sup>2</sup> Peter Carey, *Data Protection, A Practical Guide to UK and EU Law*, Fifth edition, Oxford, 2018, p. 87.

<sup>3</sup> The Law of Georgia on Personal Data Protection, Document Number: 3144-XI06-X03.

<sup>4</sup> Ludmila Georgieva, Christopher Kuner, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 373.

<sup>5</sup> Mariusz Krzysztofek, *GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union*, Volume 107, Wolters Kluwer, Alphen aan den Rijn, Netherlands, 2019, p. 113.

<sup>6</sup> Art., 3.b. of the Law of Georgia on Personal Data Protection.

categories of data.<sup>7</sup> Also, the main ground for processing the special categories of personal data is data subject's consent. The processing of sensitive data is permitted when the data subject has given explicit consent.<sup>8</sup> However, the Law of Georgia on Personal Data Protection makes a list when there is no consent needed and the controller has a power to process the sensitive personal data.<sup>9</sup>

## 2. INFRINGEMENT OF PROCESSING OF SPECIAL CATEGORIES OF PERSONAL DATA

### 2.1. General Backgrounds under GDPR

Article 82 of the GDPR states that any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered. It means that GDPR confers a right on data subjects to apply to the courts for remedy in any me where the data subjects consider that the processing of their data contradicts the GDPR.<sup>10</sup> The GDPR does not differ the degree of liability for breaching of the ordinary personal data and special categories of personal data.

If the data subject confirms that the processing of the personal data especially special categories of personal data is unlawful, in general both controllers and processors can be liable for compensation claims.<sup>11</sup> However, the portion of the violation of the personal data might be different. The responsibility of a processor extends to the actions of its sub-processors.<sup>12</sup> It would follow from this that a controller will remain jointly liable with its processor for an infringement by that processor unless it can establish an effective defence.<sup>13</sup>

It should be mentioned that the article 82 is directly applicable in the national system of the Member States which means that even if this article is not implemented in any countries' legislation the data subject is able to apply this article and request a compensation on the basis of this article.<sup>14</sup>

One of the the main issue is that who is the appropriate claimant. As it is indicated in the legal literature any person who has suffered damage as a result of breach of the GDPR may file a lawsuit against relevant controller or processor for compensation and it is not necessary for the claimant to be the data subject in relation to the relevant processing.<sup>15</sup> As for the legal nature of the liability and a compensation, it can be said that the liability under GDPR is non-contractual liability and in practice this means that national courts may apply different criteria to qualify an infringement as a ground for compensation and quantify damage or to find that non-contractual liability is engaged in

<sup>7</sup> Art., 6.3. of the Law of Georgia on Personal Data Protection.

<sup>8</sup> Ludmila Georgieva, Christopher Kuner, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 377.

<sup>9</sup> One of the ground might be if as special categories of data are processed to ensure information security and cyber security; or, if the processing of special categories of data is necessary because of the nature of labor obligations and relations, including for making decisions on employment and assessing the working capacity of the employee etc.

<sup>10</sup> Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law*, Fifth edition, edited by Peter Carey, Oxford, 2018, p. 153.

<sup>11</sup> Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law*, Fifth edition, edited by Peter Carey, Oxford, 2018, p. 151.

<sup>12</sup> Rosemary Jay, *Data Protection Law and Practice*, Fifth edition, London, 2020, p. 1118.

<sup>13</sup> Rosemary Jay, *Data Protection Law and Practice*, Fifth edition, London, 2020, p. 1118.

<sup>14</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1175.

<sup>15</sup> Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law*, Fifth edition, edited by Peter Carey, Oxford, 2018, p. 152.

particular case.<sup>16</sup> The term damage which is indicated in the GDPR includes financial loss and damage not including financial loss such as distress<sup>17</sup> or moral damages.<sup>18</sup>

One of the famous case which was reviewed by ECtHR was a *I. v Finland* Case where the court made some very important findings on the effectiveness of awarding damages for non-contractual liability for breaches of article 8 ECHR related to unlawful processing of personal data.<sup>19</sup> According to the court:

*“The protection of personal data, in particular medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person’s HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.*

*The Court notes that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorized access occurring in the first place. Such protection was not given here.”<sup>20</sup>*

## **2.2. The legal backgrounds under Georgian law**

As it mentioned, if the controller or a processor infringe the special categories of personal data they are obliged to compensate the damages. However, it should be decided what is the nature of the compensation. More precisely, it should be analyzed what are the legal backgrounds for the compensation.

It is significant that the Georgian legislation does not provide for private legal sanctions (damages) for personal data violations, including special personal data violations, in addition to administrative sanctions. However, this does not mean that the data subject does not have the possibility to apply to the court for compensation.<sup>21</sup>

The Supreme Court of Georgia does not have any practice on the newly enacted law. The only decision that concerns the disclosure of special category data is a case where a clinic has disclosed a person's special category personal data, but the data subject has not claimed any kind of damages for this.<sup>22</sup> In this case, a hospital breached data subject’s special categories of data but the subject matter of the dispute was different. More precisely, it was disputed why the claimant (data subject) was stopped in the hospital against his will. Because of this, the clinic was ordered to pay moral damages. Accordingly, the claimant (data subject) did not request compensation for the damages caused due to the violation of his special personal data, which there was a high probability of. Therefore, at this

<sup>16</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1168.

<sup>17</sup> Rosemary Jay, *Data Protection Law and Practice*, Fifth edition, London, 2020, p. 1121.

<sup>18</sup> In Georgian legal system the term “Moral Damage” is more appropriate.

<sup>19</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1171.

<sup>20</sup> Case of *I v. Finland*, (Application no. 20511/03), Strasbourg, 17 July 2008.

<sup>21</sup> Compare, Jose Pina-Delgado, *Data Protection in the Internet: Cape Verde’s National Report, Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 108.

<sup>22</sup> Decision of the Supreme Court of Georgia, as-1444-2022, December 22, 2023.

moment there is no any prevailing high court practice regarding the infringement of special categories of personal data. The new Law of Personal Data Protection does not stipulate direct legal norms for the damages which might be imposed controller or processor.

Accordingly, it is very important to determine the legal backgrounds for compensation under Georgian law. As it mentioned in legal literature for example in UK in the case of *Google v Vidal-Hall* the court first recognized that misuse of private information is a tort and data subjects can also seek compensation for non-material damage for a breach of data protection law.<sup>23</sup> Therefore, when the data subject demands a compensation and the law of personal data protection does not regulate this issue, some other legal acts should be applied. In Georgian reality the main source of the compensation of the non-contractual damages is the Civil Code of Georgia. Accordingly, the data subject might demand the compensation on the basis of the civil code and the general clause of the tort article 992 and the article 18 as a infringement of the personal non-property rights.<sup>24</sup> The article 18 of the Civil Code of Georgia is very specific article and the applicable of this legal norm is under question.

### **2.2.1. Material Damages**

According to the article 992 of the Civil Code of Georgia, a person who unlawfully, intentionally or negligently causes damage to another person shall compensate the damage to the injured party. According to the Georgian prevailing court practice, the article 992 stipulates tort liability and the essence of tortious liability is that it originates on the basis of non-contractual damage, reinforces the principle of fault liability and gives the victim (creditor) the right to claim damages against the obligee, and the prerequisites for the application of this article are as follows: damage; wrongfulness of action, Causation and fault.<sup>25</sup> According to the general rule, it is not the damage per se that makes a person liable for damages, but the fault.<sup>26</sup> In civil law, the forms of fault are intent and negligence.<sup>27</sup>

Therefore, the legislation and the court practice declare that responsibility under article 992 might be imposed if there is a fault, otherwise the person is not liable for the damages. In the section of tort law Georgian legislation envisages liability without fault but it is very specific articles and related to the a source of increased danger.<sup>28</sup>

The article 82 of GDPR does not require the existence of fault when establishing the liability of controllers and processors.<sup>29</sup> However, it should be mentioned that the processors are only liable for damages in the following situations if they breach obligations specifically imposed on them under GDPR and if the processor has acted outside or contrary to the instructions of the controller.<sup>30</sup>

As for the exemption from liability, as it mentioned the controllers and processors are liable for the infringement in spite of the fault, but controller may be exempt from liability if he/she proves that the damage was caused by a processor's activities outside or contrary to the mandate received

<sup>23</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1173. Also, the case is available to the following link: <https://www.judiciary.uk/wp-content/uploads/2015/03/google-v-vidal-hall-judgment.pdf> [08.06.2024].

<sup>24</sup> Compare, Vassilios Kourtis V., *Data Protection in the Internet: Greece, Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 233.

<sup>25</sup> The Supreme Court of Georgia, as-5-2024, March 17, 2024.

<sup>26</sup> Ketevan Kochashvili, *Liability without Fault an Exception to the General Rule of Private Law*, Journal of Law, 2023, 2, Tbilisi, p. 67.

<sup>27</sup> Ketevan Kochashvili, *Fault – as a Condition of Civil Liability (Comparative Law Analysis)*, Journal of Law, 2009, #1, Tbilisi, p. 89.

<sup>28</sup> The Supreme Court of Georgia, as-610-2022, February 15, 2023.

<sup>29</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.

<sup>30</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.

from the controller.<sup>31</sup> Similarly, processor will not be liable for the damages if he/she proves that the damage is in fact a consequence of an action he/she conducted on behalf of the controller within the mandate.<sup>32</sup>

It should be mentioned that during the working process if an employee infringes someone's special categories personal data, the usual rules as to vicarious liability will apply and the employer will be liable for actions carried out within the scope his/her employment.<sup>33</sup> In Georgian reality the legal backgrounds for this will be the article 997 of the Civil Code, which states that a person shall be obligated to pay the damages caused to a third party by his/her employee's unlawful act when the employee was on duty. No liability shall arise if the employee acted without fault.

### **2.2.2. Non-Material/Moral Damages**

There is no guidance to determine the level of payment that might be appropriate for the data subject when he/she has suffered distress.<sup>34</sup> However, if the controller or processor breaches the special categories of personal data it is high probability that the level of the liability will be higher than the ordinary personal data's infringement. However, does the data subject have power to demand moral damages in under the question.

The Law of Georgia on Personal Data Protection does not regulate the data subject's right to demand moral damages from processor or controllers. According to the article of 413 of the Civil Code of Georgia monetary compensation for non-property damages may be claimed only in the cases precisely prescribed by law. It means that if there is no specific legal norms for the non-contractual/moral damages it is completely impossible to impose the demanded compensation on the controller or the processor. Therefore, the moral damages in civil law is limited and satisfaction of the demand for compensation for moral damages should be based on the grounds provided by the specific norm.<sup>35</sup>

Accordingly, if there is no specific legal backgrounds for moral damages, it is impossible to demand compensation for moral damages. As it mentioned the Law of Personal Data Protection does not envisage such kind of specific article, but the Law of Georgia on Personal Data Protection stipulates that data shall be processed without breach of data subject's dignity.<sup>36</sup> Moreover, the article of 18 of the Civil Code of Georgia says that a person may protect in court, according to the procedures laid down by law, his/her honour, dignity, privacy, personal inviolability or business reputation from defamation. Also, in the case of violation on the basis of the fault, the injured person may also claim compensation for non-property (moral) damages. Moral damages may be recovered independently from the recovery of property damages.<sup>37</sup>

Based on the above, the Georgian legislation envisages the compensation of moral damages only in the event of fault, if information damaging to a person's honor and dignity has been disseminated.<sup>38</sup> Accordingly, in event of the distribution of special categories of personal data and if this data violates the honor and dignity of a person, and at the same time the distribution of this information was caused by fault, gives the data subject the right to demand compensation for moral

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<sup>31</sup> Gabriela Zafir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.

<sup>32</sup> Gabriela Zafir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.

<sup>33</sup> Rosemary Jay, *Data Protection Law and Practice*, Fifth edition, London, 2020, p. 1119.

<sup>34</sup> Rosemary Jay, *Data Protection Law and Practice*, Fifth edition, London, 2020, p. 1124.

<sup>35</sup> Ilona Gagua, *The Burden of Proof in Compensating for Non-Pecuniary Damage*, Justice and Law, 4(72)21, Tbilisi, p. 73.

<sup>36</sup> The Law of Georgia on Personal Data Protection Article 4.a.

<sup>37</sup> Article 18.6 of The Civil Code of Georgia.

<sup>38</sup> Compare, Taro Komukai, *Data Protection in the Internet: Japanese National Report, Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 265.

damages. Otherwise, the personal data subject will not have the right to compensation for moral damages. Of course, the burden of proof that the honor and dignity of the data subject was violated by the processing of his special category of personal data is on the claimant – data subject.

As for a dignity and honor, a dignity in the sense of civil law, can be interpreted as the evaluation of person's own moral or other qualities, evaluation of person's own public importance by the person himself and this self-evaluation is based on socially recognized criteria for evaluating moral or other qualities.<sup>39</sup> The definition of honor should take into account a person's social prestige and the attitude of others to this person.<sup>40</sup>

As for the amount of the compensation of moral damages in infringement of special categories of personal data, there is no court practice but there several cases regarding moral damages in general. In several cases the supreme court of Georgia declares that there is no any specific article regarding the calculation of compensation but in the event of the breach of legal norms which causes damages and compensation, the court determines the content and volume of moral damage (which has no material expression) in the form of reasonable and fair compensation. This issue is the subject of the court's evaluative reasoning and must be decided in each specific case, taking into account the individuality and peculiarities of the case itself.<sup>41</sup>

In other cases, the court determines the aim of the compensation of the moral damages. More precisely, the court says that Compensation for moral damages has three functions: first - to satisfy the victim; second - to affect the person causing the damage; Third - to prevent violation of personal rights by other persons.<sup>42</sup> Compensation for non-pecuniary damage does not aim at full restitution of the damage caused, because the damage caused does not have a monetary equivalent and it is impossible to fully compensate it and the amount of compensation for moral damages must be reasonable and fair.<sup>43</sup> The amount of compensation for moral damages is determined taking into account the property status of the person who caused the damage, the degree of fault of the victim and other specific circumstances.<sup>44</sup>

Taking into account the abovementioned the Law of Georgia on Personal Data Protection is newly enacted, there is no case law on compensation for material or moral damages, but as mentioned, it is likely that the data subject can claim compensation for moral damages only if it is proven that his/her special category of personal data caused damage to the honor and dignity of a person (data subject), otherwise, the data subject should not have the right to compensation for moral damages.

### **2.3. Jurisdiction of the court**

The territorial scope of application of data protection rules is very broad.<sup>45</sup> Accordingly, it is rather difficult to determine the relevant court which has the jurisdiction. The relevant court which has a jurisdiction for the claim will be the court country, where controller has an establishment or the courts of the country in which the data subject is habitually resident.<sup>46</sup> The use of the principle of the respondent's place of residence (location) in determining international jurisdiction is very practical

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<sup>39</sup> The Supreme Court of Georgia, as-979-940-2014, September 10, 2015.

<sup>40</sup> Sergi Jorbenadze, *The Commentary of Civil Code of Georgia*, Book I, Article 18, Editor Lado Tchanturia, p. 118.

<sup>41</sup> The Supreme Court of Georgia, as-1503-2023, March 22, 2024.

<sup>42</sup> The Supreme Court of Georgia, as-1503-2023, March 22, 2024. Also, as-660-660-2018, July 20, 2018 and as-1040-2018, July 26, 2019

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

<sup>45</sup> Christina Breunig, *Martin Schmidt-Kessel, Data Protection in the Internet: National Report Germany, Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, P. 206.

<sup>46</sup> Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law*, Fifth edition, edited by Peter Carey, Oxford, 2018, p. 152.

and creates profitable conditions for both sides of the process.<sup>47</sup> It will be easier for the respondent to defend its rights in the country of his residence, while it is much easier for the claimant, if he/she wins the case, to demand the seizure and enforcement of his property in the country of the respondent's residence.<sup>48</sup>

Under GDPR the person who claims for compensation does not have a choice of jurisdiction when the controller is a public authority of a Member State because in this situation the Member State where that authority is established has jurisdiction and this rule is priority over other general jurisdictional rules.<sup>49</sup>

In relation to disputes arisen from private international law nature, Georgian courts are guided by the relevant provisions of the Law of Georgia on Private International Law<sup>50</sup> and the Civil Procedure Code of Georgia<sup>51</sup> (unless an international treaty or agreement to which Georgia is a contracting party provides otherwise).<sup>52</sup> According to the the Law of Georgian on Private Intrnational Law, Georgian courts shall have international jurisdiction if a claim concerns damages inflicted by an unlawful or an equivalent act and the act was committed or damages were inflicted in Georgia.<sup>53</sup> According to the Japan law, if damage such a privacy infredgement occures in Japan the Japanese law on tort liability will be applied.<sup>54</sup>

Accordingly, if the harmful event happened in Georgia, Georgian courts have jurisdiction to review the case. In General, cases relating to tort, the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case.<sup>55</sup> However, when the case is related to the infredgement of the special categories of personal data determining the exact place of the harmful event might be difficult. This situation is especially difficult when a tort is committed a number of or a whole series of events. Out of that number of series a particular event will then have to be considered as being of particular importance.<sup>56</sup> It will be very difficult and specific regarding the infredgement of the special categories of personal data.

Based on the above mentioned, it can be said that in most cases in the event of a tort the most important criteria to determine court jurisdiction is the event which caused the damages.<sup>57</sup> Therefore, if data person wants to demand compensation on the basis of the infredgement his/her special categories of personal data Georgian courts will have jurisdiction if the infredgement took place or the damages occurred in Georgia.

#### **2.4. The applicable law to the subject matter of the dispute**

The article 42 of the Law of Georgia on Private International Law regulates the applicable to the subject matter of the dispute if the case is related to the tort. It is important to mentioned that this article is very flexible and gives an opportunity to the claimant to choose which law is more appropriate for his/her interest from the 2 options: a) the law of the country in which an action or a

<sup>47</sup> Zviad Gabisonia, *Georgian Private International Law*, the second edition, Tbilisi, 2011, pp. 412-413.

<sup>48</sup> The Supreme Court of Georgia, a-2135-sh-46-2015, October 26, 2015.

<sup>49</sup> Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary*, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1177.

<sup>50</sup> The Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998.

<sup>51</sup> The Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997

<sup>52</sup> The Supreme Court of Georgia, as-287-2020, September 16, 2020.

<sup>53</sup> Article 9.c. The Law of Georgia on Private International Law.

<sup>54</sup> Taro Komukai, *Data Protection in the Internet: Japanese National Report, Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 267.

<sup>55</sup> Mathijs H. ten Wolde, Kirsten C. Henckel, *Business and Private International Law in the EU*, second edition, Netherlands, 2023, P. 135.

<sup>56</sup> *Ibid* P. 137.

<sup>57</sup> Compare, Polčák R., Kasl F., Míšek J., *National Report: Czech Republic, Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 157.



circumstance that gave rise to a claim for damages took place or b) the law of the country in which the interests protected by law were prejudiced.<sup>58</sup> Accordingly, if the infringement of special categories of personal data the data subject can choose the most appropriate law for his/her interest.<sup>59</sup> The means of choice of applicable law is very important for data subject. Therefore, it can be said that if the dispute has an international private law nature, the Georgian legislation is useful for the protection of legal rights of the data subject.

## CONCLUSION

Based on the presented analyzing, it is possible to say that special categories of personal data are processed in specific cases. Accordingly, as a result of their infringement, the data subject has the right to demand damages. However, the GDPR gives the data subject the opportunity to claim both material and non-material/moral damages.

The Georgian legislation and the newly enacted Personal Data Protection Law do not contain a direct regulation which gives the power to the data subject to demand compensation for damages. It also should be mentioned that the Supreme Court of Georgia does not have any practice on the newly enacted law. Accordingly, it is very important to determine the legal backgrounds for compensation under Georgian law. In Georgian reality the main source of the compensation of the non-contractual damages is the Civil Code of Georgia. Accordingly, the data subject might demand the compensation on the basis of the civil code and the general clause of the tort article 992 and the article 18 as a infringement of the personal non-property rights.

The article 18 of the Civil Code of Georgia is very specific article and the applicable of this legal norm is under question. It is important that Georgian legislation envisages the compensation of moral damages only in the event of fault, if information damaging to a person's honor and dignity has been disseminated. Accordingly, in event of the distribution of special categories of personal data and if this data violates the honor and dignity of a person, and at the same time the distribution of this information was caused by fault, gives the data subject the right to demand compensation for moral damages. Otherwise, the personal data subject will not have the right to compensation for moral damages. Of course, the burden of proof that the honor and dignity of the data subject was violated by the processing of his special category of personal data is on the claimant – data subject. As for the amount of the compensation it is up to the court and there is no guidelines which might be applicable when the court analyzes the infringement of special categories of personal data. Therefore, in Georgian legal system the compensation from the special categories of personal data will be based on the article 992 and 18 of the Civil Code of Georgia.

Also, as it analyzed above, the court jurisdiction and applicable law to the subject matter is very important. The Law of Georgia on Private International Law regulates both of the situations and stipulates very specific legal rules for determining applicable law and the relevant court which has jurisdiction. It showed that the most cases in the event of a tort the most important criteria to determine court jurisdiction is the event which caused the damages. Therefore, if data person wants to demand compensation on the basis of the infringement his/her special categories of personal data Georgian courts will have jurisdiction if the infringement took place or the damages occurred in Georgia. As for the applicable law rules, Georgian legislation is very flexible for this issue because the data subject is able to choose the law which is more useful or appropriate for his/her interest.

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<sup>58</sup> Article 42.1 The Law of Georgia on Private International Law.

<sup>59</sup> Compare, Vassilios Kourtis V., *Data Protection in the Internet: Greece*, , *Data Protection in the Internet*, editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 239.

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