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**THE STATE'S LIABILITY IN DAMAGES FOR
WRONGFUL ADMINISTRATIVE ACTION ***

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Abstract. *The author basically engages in the analysis of the system of primary and direct liability of the state in damages for wrongful administrative actions. The Essay presents an explication of some aspects of legal regime of primary and direct state's liability in damages and provides a critical consideration of doctrinary and jurisprudential concepts on the reason of state's liability in damages, as a specific form of vicarious liability. The author ends his consideration of the questions posed with his personal view on the state's liability in damages for improper or irregular administrative performance.*

Key words: *direct state's liability, vicarious liability, wrongful administrative performance, risk, organic identity.*

1. INTRODUCTION

Despite the fact that the principle, according to which the person who causes damage shall be held liable thereof, has been known since Roman lawyers' times, the history says that the state has only been held liable for damage in its area of responsibility, wherein it acts as the subject of public authority, since the mid-19th century.¹ Since then till today,

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¹ Until the mid-19th century (even later in some countries), the principle of irresponsibility of the state for damages inflicted on citizens within the sphere of public law had prevailed. Until the mid-19th century, the state had only been held liable for actions taken according to civil law, when acting as a subject of private law. The affirmation of the standpoint that the state was directly liable for damage caused by official actions of its servants marked the judicial reality of the second half of the 19th century; thereby, the principle of the state's li-

the application of the principle of state's liability in damage within the normative reality of states has resulted in several systems of state's liability in damages caused to citizens by wrongful action of its servants. In fact, three systems have been formed in relation to the holder of responsibility against whom a damage claim is filed.

The first system reflects the primary and direct state's liability in damages inflicted by improper administrative work. Consequently, in a damage claim proceedings, a claim may only be directed against the state; whereby, under specific conditions, the state is entitled to compensation from the servants who have caused the damage. From the standpoint of comparative law, the system discussed herein has been accepted in its pure aspect in German law (see Popover, 1992). Also, the system of primary and direct state's liability exists in French law; however, only in regard to certain forms of servants' conduct. Namely, French law is characterised by drawing distinction between a *faute de service* (service-related fault), an official error and a *faute personnelle* (personal fault); whereas state is only directly liable in damage in regard to *fautes de service* and official errors.²

Primary liability of a public officer is a conceptual basis of another system entailing the rule that the aggrieved party files claims directly against a public officer. The rule according to which there is primary liability and subsidiary liability of the state is considered to be a modality of this system, therefore the claimant may realise his claim for damages first against a public officer and if the claimant cannot realise the settlement against the public officer, he may claim damages against the state. The presented system had prevailed in its pure aspect in England by 1947, when it was abandoned by the Crown Proceedings Act that established direct state's liability in damages inflicted on citizens by actions of a servant (see Kavran, 1992). In the current French law, servants are directly held liable for damages inflicted on the basis of the so-called "purely personal faults".³

According to the third system, the liability lies with either the public officer or with the state. This system is characterised with the principle of joint and several liability that provides a possibility to the claimant, under certain circumstances, to claim damages either against the public officer or the state.⁴

ability in damage was added to the conceptual basis of a legal state, which today represents the assumption of its conceptual legitimacy. *O istorijskom razvitku odgovornosti države za štetu* (Borković, 1981). /*On Historical Development of State's Liability in Damage* (Borković, 1981).

² A *faute de service* provides no possibility to disclose the identity of the person who caused the damage. In fact, such damages are done anonymously, thus it is difficult to individualise them and find out where the unlawful action originated from, that is, who did the damage.

An official error is done by an individual servant who causes the damage by misfeasance and it does not lead to personal liability, but only to the liability of an entity of the public authority. There is an example from the practice of the Conseil d'Etat: By mistake, a postal worker transfers money to a person's saving account and the person is actually not the holder of the account; the breach committed consists in failure of the officer to check the identity of the client; however, it is quite clear that he worked at the specific counter at that moment (see Braibant, 2002).

³ "Purely personal faults" are subject to the above explained pattern, where liability exclusively lies with the servant who caused damages. There is conduct that emanates from private life of a servant, without legally significant connection with the performance of the service. An example from French judiciary practice: A custom officer kills a man after a trivial neighbourly quarrel; the widow claims compensation from the state and points out that the custom-officer would not have been able to kill her husband unless he had been provided with a gun by the public service. The Conseil d'Etat replied that there was no relation between the fact that the custom officer was armed and entitled to keep the weapon at home and this completely personal situation (see Braibant, 2002).

⁴ So, there is such system in regard to certain *fautes personnelles* in France. Actually *fautes personnelles* are actually the ones that may also lead to state's liability, either because contemporaneously there is also a *faute de*

2. CHARACTERISTICS OF LEGAL REGIME OF DIRECT LIABILITY OF THE STATE IN WRONGFUL ACTIONS OF ADMINISTRATION IN THE CURRENT LEGISLATION OF SERBIA

In the current legislation of Serbia, direct and primary liability of the state is established as the basic principle of liabilities in damage inflicted to citizens in unlawful and improper official actions. The said statement is founded on the constitutionally proclaimed principle of primary and direct liability of the state in damage caused by unlawful or irregular work of a state body, entity exercising public powers, body of an autonomous province or local self-government unit. Thereby, the Constitution entrusted the law maker to stipulate the conditions under which the aggrieved party may claim compensation for damage directly from the person that caused the damage (the Constitution of the Republic of Serbia, Article 35).⁵

In our law, the general regime of civil and law liability for damages is established by the Law on Contracts and Torts⁶, wherein there is no liability of the state in damage as such. Namely, the Law on Contracts and Torts does not regulate the state's liability in damage, but, within special cases of liabilities, it includes liability in damage caused by terrorist acts, public protests and manifestations, in regard to which, the liability to compensate for damages lies with the state (the Law on Contracts and Torts, Articles 18-184).

Therefore, from a legal and technical standpoint, the state's liability in damage in the current law of Serbia represents a special regime of property and law liability detached from the general regime of civil and law liability in damage. The state's liability in damage, on the basis of the aforementioned constitutional basis, is regulated with legal texts concretising thereof.

In accordance with the Law on the State Administration (Article 5),⁷ the State is liable in damage caused to natural and legal entities by unlawful or irregular work of the State administration bodies, whereas the entities holding public powers are held liable in damages caused to natural and legal entities by unlawful or irregular work while performing the State administration duties.

Herein, we point out the rules of the Law on Public Servants⁸ that confirm the principle of primary and direct state's liability in damage caused to third party by unlawful or irregular work by a public servant while performing his duties or in connection to his duties. At the same time, in the aforementioned legal text, the aggrieved party is entitled to claim compensation for damage against the public servant directly, provided that the servant caused the damage intentionally; and the state is entitled to compensation if the public servant caused the damage intentionally or due to gross negligence (see Article 124).

service or because it represents both a *faute personnelle* and a *faute de service* at the same time. With regard to this, Leon Blum points out: "If a *faute personnelle* has been done while performing the service, if the service availed the means and instruments, by which the fault has been done, to the responsible person, if the contact between the claimant and the responsible officer has only been made through the service, in a word, if the fault done has been preconditioned by the service ... a *faute personnelle* may be detached from the service, but the service cannot be detached from the fault". (see Braibant, 2002).

⁵ Official Gazette of RS, no. 98/06.

⁶ "Official Gazette of SFRY, 29/78, Articles 154-209.

⁷ Official Gazette of RS, no. 79/05 and 101/07.

⁸ Official Gazette of RS, no. 79/05, 81/05, 83/05, 64/07, 116/08

Bearing in mind the presented provisions of the current law of Serbia and, since the state cannot act directly by itself, but it does so through its officials or servants, understandably, the state's liability in damage is a specific form of "vicarious liability".

From the conceptual viewpoint, vicarious liability is evinced in the rule that instead of the wrongdoer (or together with him) another entity is held liable in damage, which the wrongdoer is in a specific legally significant relation with.

Here, we accept Tomić's understanding that the structure of vicarious liability consists of two relatively detached spheres of relationships: the sphere of relation between the responsible officer and the person whose actions caused the claim for liability and the sphere of relation of the responsible officer towards the damaging event itself against which liability is stipulated (Tomić, 1983). In regard to that, Tomić says: "The eventual culpability (fault) of a responsible officer is detached and differs from the culpability (fault) of the person for whose actions one is held liable for. Therefore, in relation to vicarious liability, there is a specific, twofold basis of liability. The basis of liability for the actions of a person is not the same as the basis of liability for the damaging event." However, Tomić further points out that, essentially, liabilities can consist "either of culpability - then it refers to subjective liability or of risk (liability regardless of culpability) - objective liability" (Tomić, 1983), in our opinion, this can only be accepted in regard to culpability. And, why "risk" is not the only basis of objective liability will be explained later.

The state liability in damage caused to citizens by unlawful, that is to say, irregular administrative performance represents "objective liability" of the state since the obligation to compensate for damage is not conditioned with eventual culpable conduct of the employee. Therefore, in our law, there is a system of objective unlawfulness, thus the burden of proving unlawfulness falls upon the claimant only; whereas, the servant's personal culpability, in regard to his standing, is absolutely irrelevant.

The state will only be held liable in damage if the following assumptions are met: unlawful or irregular official work while performing or in relation to the performance of his service, existence of damages, and causal relation between the official error committed and the damage caused. In the following lines, not pretending to be exhaustive, we will only analyse some aspects of the regime of property and law liability of the state in damage in our law; there is no unanimity in administrative law doctrine thereof.

First, the state's liability in damage is a consequence of unlawful or irregular work of the person who performs the service. Unlawful, that is, irregular official performance can appear in a form of active performance of a person, that is, a body (commissive wrongful act) or in a form of omission to act or pass an act that should have been passed in line with the regulations (ommissive wrongful act). There are two aspects of unlawful, that is, irregular commission as the condition for the state's liability in damage: for unlawful administrative act and for unlawful administrative action. Administrative acts and administrative actions that contradict legal norms are announced unlawful, while actions that offend the standards of carefulness of official conduct and performance of normal and good service are considered to be irregular administrative performance. Therefore, irregular work has broader meaning than unlawful work. However, it is important to emphasise here that there are situations in which the state is liable in damage although official action is not unlawful. Namely, in the concrete case, a damaging event may be unlawful, whereas official action may not be unlawful. Thus, there is no unlawful official conduct in relation

to the state's liability in damage against hazardous matters or dangerous activities, but the damage is unlawful, therefore the claimant is entitled to file claims against the state.

Legal doctrine knows considerations that state's liability in damage should be excluded if caused due to "petty official errors", and, in that sense, state's liability in damage is conditioned by the form and gravity of the unlawfulness.⁹ Here, we stand up against the stated standpoint. In the concrete case, either there is unlawfulness or there is not; if there is not unlawfulness, there is no liability; however, if there is one, then along with other conditions, there is liability; since "smaller" unlawfulness does not release from liability. It is important whether lawfulness resulted in damage. Any unlawful official performance leads to liability independently of its manifestation forms if such action had an impact, that is, contributed to the existence of damage (see Brkić, 1956).

Furthermore, if the damage is caused by unlawful administrative act, there are two possibilities of filing compensation claims. The regular manner leads to basic court of law as the competent forum for making decision following a complaint for compensation against damage of natural persons and to commercial court of law when a legal entity appears as a claimant. The other possibility expresses the right of the aggrieved party to file compensation claim before the Constitutional Court in a dispute of full jurisdiction. Bearing in mind the aforementioned, some light should be shed on some issues. First, a question is posed whether the aggrieved party may directly file claim before competent court of law although he did not previously use regular legal remedies that he was entitled to by law. Thus, the claimant has suffered damage due to the performed administrative act and the possibility to deny lawfulness of the administrative act using regular legal means is also at his disposal. Since the administrative act becomes enforceable, by rule, at the moment of acquiring the characteristic of finality, if there was an obligation to use regular legal remedies, the claimant would have to initiate administrative and judicial procedure. On the other hand, in the event that the administrative act had been performed before it became final, the claimant would be obliged to file complaint in an administrative procedure, and then, if not satisfied with the second instance decision - to file charges in an administrative dispute. Herein, we find that it is expedient to anticipate the obligation of the claimant first to file the complaint in an administrative procedure against the unlawful administrative act, and then, if not satisfied with the second instance decision - to file charges in an administrative dispute, whereby the state's liability would be excluded since regular legal remedies have not been exercised (see Krbek, 1960). However, in the current Serbian law, the aggrieved is not obliged to do so, thereafter the claimant is entitled to file charges before litigation court of law although he has not used regular legal remedies in an administrative or administrative-judicial procedure, and the litigation court will decide on the lawfulness of the administrative act in the form of the previous issue.

On the other hand, filing charges before the administrative court of law, the claimant may request the court to decide upon his compensation claim in an administrative-judicial procedure (Article 16 of the Law on Administrative Disputes).¹⁰ Thereby, the Administra-

⁹ In Yugoslav legal doctrine, Ivo Krbek advocated for the stand that the state is only responsible for "sensitive fault". In Krbek's opinion, the state cannot be held liable for every smallest fault as some faults are unavoidable in the state's apparatus, and the citizens must bear the consequences of such faults as a sort of civic duty, that is, as a burden on behalf of the advantages they receive from the public service (see Krbek, 1960).

¹⁰ RS Official Gazette, no. 111/09.

tive Court will only decide on a compensation claim in a dispute of full jurisdiction if the established factual state provides a reliable basis for decision making. On the contrary, the court will direct the complainant to litigation.

Additionally, although a complaint in administrative dispute has no suspension effect as a rule, the court may adjourn the enforcement of the administrative act at request of the complainant, on the basis of which it has been decided in an administrative matter meritoriously, till a court decision is made if the enforcement would inflict damage to the complainant, which would be compensated with difficulties, and the adjournment is not contrary to public interest, or the adjournment would inflict major or irreparable damages to the party, that is to the interested person (Law on Administrative Disputes, Article 23 paragraph 2). Hereby we welcome this novelty in our law and add that the Law on Administrative Disputes (Article 23 paragraph 3) allows a party in an administrative procedure to submit a request to the court to adjourn the enforcement of the administrative act even before filing a complaint (in emergency or when an appeal is filed that has no adjourning effect by law, and the procedure following the appeal has not been completed).

In regard to the existence of injury and loss, all elements of the classic regime of civil and legal liabilities against damages are applied. The said implies that the loss suffered (*damnum emergens*) and the profit lost (*lucrum cessans*) are compensated, both material and immaterial loss. The state will not be held liable for loss if it occurred accidentally, due to a force majeure event or a third party fault or the claimant's fault, therefore it may be established that the state's liability for loss towards the belonging elements does not represent essentially different legal regime in relation to general civil and legal regime of liability for loss.

Since the state is liable for actions of its public servants, the question arises: in regard to which public servants the state is liable for. To answer the question posed, it is relevant that the person performs the function for the state and on behalf of the state; it is decisively significant that the person performs the public service, independent of the personal status he has. Therefore, this is about persons who already have specific authorisation to act officially and who perform official affairs on behalf of the state, whose activities are considered the activities of a state body, regardless of their status as servants (professional public servants, persons who only temporarily participate in the state body's work, factual servants). If there is no specific official relation between the state and the person who caused the damage, in regard to the existence of the authorisation of the concerned person to perform public service, understandably, the state will not be held liable to compensate the damage (see Brkić, 1956).

The state is not liable for all actions of its servants. The state is only obliged to compensate damage for procedures that represent official work. When an action is undertaken out of working hours, that is, the action is not related to the service, the person acts as a citizen without a capacity of a servant, thus he is personally held liable for the damage caused. The state is in priority liable for unlawful official actions. An official action is considered to be the one performed by a servant within the area of responsibility of his office, that is, of his official powers. However, sometimes there will be a need that the judiciary establishes the capacity of a concrete action of the public officer in the concrete case (for instance, whether the use of physical enforcement exercised by the public officer in response to the provided resistance means carrying out the act or torturing the citizen). It is not justifiable to charge the state for damages that are caused by actions that are not an expression of official conduct.

In regard to actions undertaken by violating actual or functional jurisdiction (for instance, actions that are under the jurisdiction of another body or another servant), the state's liability for damage cannot be excluded. The violation of the rule on jurisdiction is in the sphere of unlawfulness, thus the state must be held liable for the damage caused by such actions. There are concepts in the doctrine that the state's liability should be excluded in the event that the damage was caused by the so-called "simple usurpation of service". "Simple usurpation of service" would be, according to this stand, expressed in undertaking an act by a person that is not authorised for the undertaking, either because there is no official capacity or because of the fact that the act he undertakes does not have capacity of an official action (see Brkić, 1956). Considering the status of regulations and judicial practice in Serbia, it is hard to come up with a resolute statement here. In our opinion, only the following is absolutely indisputable: if the person in the case given had official capacity and the action undertaken was within the framework of his official duties, it would not be legally valid to exclude the state's liability for damage independently of the gravity of the form of non-jurisdiction.

3. LEGAL NATURE OF THE STATE'S LIABILITY IN DAMAGE AS A SPECIFIC FORM OF VICARIOUS LIABILITY

The disagreement of practitioners of jurisprudence in regard to the basis of the state's liability in damages inflicted to citizens by improper conduct of its servants determined the existence of several various theoretical concepts.

According to one standpoint (Đorović, 1982), the state's liability in damage as a form of vicarious liability is based on assumed official error of the state due to a poor supervision over subordinate personnel (*culpa in inspiciendo*) or due to a weak selection of subordinate personnel (*culpa in eligendo*). Compliant to the governing hierarchical principle of organising management of administration of a modern state, supervision of performance of subordinate personnel is performed by hierarchically senior servants over hierarchically subordinate servants. Acceptance of this concept would require establishing a possibility for the state, as the responsible entity, to prove that it conducted a conscientious supervision or that it made a conscientious selection of servants. So, in our law, parents are liable for damage caused to another person by their child of over seven years of age, unless proving that the damage was inflicted without their fault (see Article 165 paragraph 4 of the Law of Contracts and Torts). Thereafter, the right of the responsible person to prove in proceedings that the damage has been inflicted without his fault inevitably suits the principle of the assumed culpability. In the current Serbian law, the state is directly liable in damage independently of the fault of the servant/tort-feasor; and from the standpoint of our current law, it is meaningless to speak about the value of the concept of poor supervision of the state. However, independently of the presented positive and legal groundlessness of this stand, its legal and doctrinary sustainability is also being questioned. Namely, despite the most conscientious supervision of a hierarchically senior officer, a servant may cause damage because illegal official service that causes damage represents intellectual process that is evinced in the wrong interpretation of regulations or the wrong application of regulations by the responsible servant. Thus, Dragaš Denković is quite right when saying: "It is difficult to accept that a continuous supervision can be per-

formed over an intellectual process carried out when the official duty is performed, since a modern state with numerous public services and servants cannot perform continuous supervision over its servants in order to prevent their eventual unlawful actions, since even with the most conscientious supervision, servants can cause damage. On the other hand, one cannot speak about culpa in eligendo, since it cannot be about a poor selection of servants, as even the best servant can cause damage (see Denkočić, 1962).

Secondly, in legal doctrine, there are concepts that explain the basis for liability of the state with a principle of reciprocity between the benefit of the state from the official work and its detrimental consequences. At this point, it is indicative to point out the following Lilić's observation: "The most persuasive explanation is given by Eisemann who says that the best basis for liability is the reciprocal connection between the benefit and the service itself. The state is liable as the perpetrator of the damage is its administrative servant and the state benefits from his activity or the detrimental activity of the service is beneficial for the state. This concept can explain each case of liability for damage caused by acts of public servants. This explanation of the nature of administrative liability also includes cases in which activities of the administration create specific risks..." (Lilić, 2010). The standpoint presented undoubtedly matches the organisation framework and business activities of the employer that is held liable for injury or loss caused to third party by its employee (see the Law of Contracts and Torts, Articles 170-172). The business activity of an employer is a field of private interest and, understandably, of conceptually defining profit principle. Thereafter, it is quite meaningful to base liability of employer for the actions of its employee/ tort-feasor on the basis of reciprocity of benefit (profit) from work of its employees and detrimental consequences that occur while working or in relation to work. However, unlike an employer, the state does not use activity of its servants since performance of official duties is of general interest. Business activities of state bodies and conduct of state servants is a space wherein public interest represents a guiding idea that is conceptually incompatible with the element of benefit (profit). Therefore, it seems to us that the presented standpoint about the reciprocity of benefit and damage represents an attempt to transpose private and legal formula of liability of employer for injury or loss into the field of public and legal activities of the state, that is, to our mind, groundless.

In the Essay, we have already stated that "risk" is not the only basis for objective liability although such a stand prevails in our administrative-legal doctrine. Namely, the main protagonists of this concept advocate the stand that the state is not vicariously liable independently of culpability since it secures its citizens against the risk arising from the activities of the state; therefore it bears the risk against injury or loss caused to the citizens by the activities of its servants (Denkočić, 1961; Tomić, 1983). Stipulating the foundations of liabilities, the Law of Contracts and Torts provides that whoever causes injury or loss by objects of property or activities generating increased danger for the environment is held liable regardless of fault; and liability for injury or loss regardless of fault ensues also in other cases specified by law (Article 154). On the basis of the aforementioned, it follows that objective liability exists in several cases: liabilities for damages caused by objects or activities generating danger, parental liabilities, and state's liability in damage due to unlawful or improper performance of official duties. Is "risk" the reason for vicarious liability, that is, for objective liability in all cases for which the state is liable in damages due to wrongful performance of its employees? In our opinion, the answer is

negative. Namely, "risk" as a reason is characteristic for liabilities in damages against hazardous objects and hazardous activities. Thus, the state is also subject to liabilities in damage against hazardous objects and hazardous activities because of the inherent risks; therefore the assumption of causality is established, as follows: "Injury or loss occurring in relation to a hazardous object or hazardous activity shall be treated as originating from such object or activity, unless proven that these were not the cause of injury or loss (Article 173 of the Law of Contracts and Torts). However, almost in all other events of injuries or loss caused by wrongful performance of official duties, the state's liability is based on "risk". Namely, the state does not secure its citizens against risk arising from the activities of its bodies and servants, but it provides them with security, to use the terminology of the advocates of this standpoint, against illegal and improper conduct of its servants. Looking into the matter comprehensively, the state's activity does not represent by its characteristics a "hazardous" activity, so we would not be able to proclaim "risk" the reason for the liability of the state in damage. Anyway, "risk" cannot be the basis for objective liability of parents; if so, children would have to be proclaimed hazardous objects! Thus, "risk" in regard to the state's liability in damage has a totally limited application; to be more precise, "risk" is as a reason for liability applicable for hazardous objects and hazardous activities, as well as with the liability of the state in damages due to terrorist acts, public protest and manifestations. In all other cases, "risk" cannot serve as explanation for the state's liability for the actions of its servants. If so, how to explain the state's liability for the actions of its bodies and servants? In our opinion, the state's liability for the actions of its servants is derived from the state's organic identity, its bodies and servants.¹¹ The state's bodies are parts of the state's personality; therefore the state's bodies and servants' faults are the faults of the state itself. Herein, we shall use the argumentation of the protagonists of the theory of "risk". So, professor Tomić advocates for the stand that the state's vicarious liability is a liability based on "risk", "since the state bears the risk of the official actions of its employees, since it created a legally significant relation between them and itself, thus performing its work and assignments" (Tomić, 1983); however, in our opinion, exactly this "legally significant relation" is of the decisive significance, not the "risk". Thus, the state is liable in damage caused to citizens due to wrongful performance of official work, independently of culpability, however, not on the basis of "risk", but exactly because of the "legally significant relation", that is, of the organic identity that it created between itself, its bodies and servants. The state acts through its officials and servants with whom it stands in an organic unity; therefore, the deeds of its servants are its own deeds, consequently the state appears in the role of a liable entity in claim compensation against third parties. Organic identity, herein standing as "existent" and not as "fictional" term, is completed by the idea of unlimited continuous duration appertaining to the state; thereupon, the reason for the state's liability in damage is incomparable with the reason for other lawfully established entities' vicarious liabilities.

Finally, in order to explain objective state's liability in damage, it is necessary to respect the need to protect subjective rights and interests of the citizens who significantly appropriate state's objective liability in a modern state's order. The principle of the state's

¹¹ Organic standpoint in Serbian jurisprudence is advocated by Milan Petrović (see Petrović, 2011).

objective liability in damage represent, in a way, an attempt of "reconciliation" of public and private interest; hence, because of the emphasised interventionists' concept of a modern state, the state's objective liability in damage inflicted to citizens exists as an assumption of its legitimacy and survival.

SUMMARY

In the current legislation of the Republic of Serbia, direct and primary liability of the state is established as a basic principle of the state's liability in damages inflicted to citizens by unlawful or irregular official work. Bearing this in mind and as the state cannot directly act by itself, but it does it through its public officers or servants, understandably, the state's liability in damage is a specific form of "vicarious liability".

From the conceptual viewpoint, vicarious liability is evinced in the rule that instead of the tort-feasor (or together with him) another entity is held liable in damage, with whom the wrongdoer is in a specific legally significant relation. The state's liability in damage caused to citizens by unlawful or irregular official work is the state's "objective liability" since the liability to compensate for damage is not conditioned by eventual culpable behaviour of servants. Therefore, there is a system of objective unlawfulness in our law, thus the claimant is only burdened by proving the unlawfulness; and the personal culpability of the servant, from his stand, is absolutely irrelevant.

The Essay represents an explication of the elements of the current Serbian legal regime of the state's liability in damage, which are not essentially different, in our opinion, from general civil and law regime of liabilities for damage. On the other hand, doctrinary and jurisprudential standpoints on the reason for the state's liability in damage are critically considered. We have explained the standpoint on the assumed official error of the state for a poor supervision over subordinate personnel (*culpa in inspiciendo*) or a poor selection of subordinate personnel (*culpa in eligendo*), then the value of the principle of the reciprocity of benefit and damage, as well as the standpoint on the "risk" as the basis of the state's liability in damage. In our opinion, the state's liability for actions of its servants is derived from the organic identity of the state, its bodies and servants. The state acts through its officials and servants with whom it stands in an organic unity; therefore, the deeds of its servants are its own deeds, consequently the state appears in the role of a liable entity in claim compensation against third parties. Organic identity, herein standing as "existent" and not as "fictional" term, is completed by the idea of unlimited continuous duration appertaining to the state; thereupon, the reason for the state's liability in damage is incomparable with the reason for other lawfully established entities' vicarious liabilities.

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ODGOVORNOST DRŽAVE ZA ŠTETU USLED NEPRAVOVALJANOG POSTUPANJA UPRAVE

Miloš Prica

U važećem pravu Republike Srbije ustanovljena je neposredna i primarna odgovornost države kao osnovni princip odgovornosti države za štetu pričinjenu građanima nezakonitim ili nepravilnim službenim radom. Imajući to u vidu, a kako država ne može sama neposredno delovati, već to čini putem svojih funkcionera ili službenika, razume se da je odgovornost države za štetu poseban oblik „odgovornosti za drugog“.

Pojmovno gledano, odgovornost za drugog očituje se u pravilu da umesto štetnika (ili zajedno s njim), za štetu odgovora drugi subjekt sa kojim štetnik stoji u određenoj pravno značajnoj vezi. Odgovornost države za štetu prouzrokovanu građanima nezakonitim odnosno nepravilnim upravnim radom je „objektivna odgovornost“ države, jer obaveza naknade štete nije uslovljena eventualnim skrivenim ponašanjem službenika. S toga, u našem pravu postoji sistem objektivne protivpravnosti, pa za oštećenog stoji samo teret dokazivanja protivpravnosti, a lična krivica službenika, s tačke njegovoga položaja, potpuno je irelevantna.

Rad predstavlja eksplikaciju elemenata važećeg srbijanskog pravnog režima odgovornosti države za štetu, koji se, po našem mišljenju, bitno ne razlikuju od opšteg građanskopravnog režima odgovornosti za štetu. S druge strane, kritički su razmatrana pravnodoktrinarna gledišta o razlogu odgovornosti države za štetu. Objasnili smo gledište o pretpostavljenoj službenoj grešci države zbog slabog nadzora nad podređenim osobljem (culpa in inspicendo) ili zbog slabog izbora podređenog osoblja (culpa in eligendo), zatim vrednost načela uzajamnosti koristi i štete, kao i stanovište o „riziku“ kao osnovu odgovornosti države za štetu. Po našem mišljenju, odgovornost države za postupke svojih službenika proizlazi iz organskog identiteta države, njenih organa i službenika. Država deluje putem svojih funkcionera i službenika sa kojima stoji u organskom jedinstvu, pa su dela službenika njena vlastita dela, usled čega se država prema trećim licima pojavljuje u ulozi odgovornog subjekta za naknadu štete. Organski indentitet, koji ovde stoji kao „zbiljski“, a ne „fiktivni“ pojam, zaokružuje državi pripadajuća ideja neograničenog kontinuiranog trajanja, usled čega je razlog odgovornosti države za štetu neuporediv sa razlogom odgovornosti drugih pravom ustanovljenih subjekata odgovornosti za drugog.

Ključne reči: *neposredna odgovornost države, „odgovornost za drugog“, nepravovaljani upravni rad, rizik, organski identitet.*