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Distinguishing Public Law and Private Law Delicts

An article below reviews similarities and differences between public law and private law delicts. Also, it demonstrates a result preconditioned by differences.

To better show such differences, Georgian regulations for illegal performance of compensation of damages is compared to that of German.

The key difference between public law and private law delicts expresses only in case of one of them, i.e. in case of legal relations preceding the delict; and the article intends to discuss this matter in greater details.

***Key words**: Compensation of damages/loss, responsibility of the state, delict, jurisdiction.*

1. Introduction

Defining legal proceedings for the purpose of verification[1] of compensation of damages due to illegal actions of state authority, represents one of the most difficult matters of legal debates. For instance, in Germany claims deriving from official capacity are decided by civil courts[2], since illegal actions causing damages are imputed not to the state but personally to the private subject (public servant), whose obligation to compensation originates in accordance with general delict standards and provisions (just like in case of any private subject)[3]. One difference is that financial responsibility is shifted to the state[4], i.e. instead of a servant, financial responsibilities are imposed on the state[5]. Such regulations create variety of guarantees, since one subject – state – commits that a debtor – its servant, will fulfill financial responsibilities before the creditor – the victim.

Unlike Germany, in Georgia the established court practice shows that administrative proceedings are applied in order to certify and verify claims for damages caused by illegal actions of the state authority[6]. Indeed, at one glance, this category of damage is pertinent to the private law delict since grounds for claims are envisaged by the Article 1005 of the Civil Code of Georgia; however, on the other hand, if a case like that was considered as a "usual" private law delict, it would not be possible to view the case from the point of view of administrative law. Because of the above-mentioned controversial opinion it becomes necessary to define the nature of delict caused by illegal actions of the state authority and separate it from the private law delict. Therefore, arises a question

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1 Based on Article 142.1 of the Georgian Civil Code, the courts verify claims by their decisions.

2 *Detterbeck S.,* Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht, 12. Aufl., München, 2014, Rn. 1099, 436.

3 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 3, 709.

4 Ibid, Rn. 1, 708.

5 Ibid, Rn. 7, 710.

6 Case № BS-233-224(G-10), Ruling of the Administrative Chamber of the Supreme Court of Georgia from April 8, 2010.

whether the claim establishing provisions for damages caused by public law delict has a basis at all to be envisaged with Georgian Civil Code that concerns relations of private nature. These are the boundaries of the studied topic in the present article.

The relevancy of the researched topic (defining the nature of delict caused by illegal actions of the state authority and separating it from the private law delict) is caused by the topic related main practical problem. Namely, cumulative usage of claim establishing provisions such as articles 992, 997 and 1005 of Georgian Civil Code by judicial practice without separating clearly them from each other. In order to show the distinction between the legal nature of public and private delicts, the present article studies and separates the delicts envisaged by articles 997 and 1005 of Georgian Civil Code, because both of them concern compensation of damages caused while acting on duty. Discussing on studied topics could facilitate the elimination of ambiguity related to claim establishing provisions that concern compensation of damages caused by illegal actions of state authority.

The article below has a following structure: The introduction of the article describes the researched topic, it's relevancy, the boundaries of the research and the legal importance of the results (discussion), the next chapter defines the term delict, the following chapter lists similarities between the private and public law delicts, the next chapter underlines the differences between them and the conclusion indicates findings of the research.

2. Definition of Delict

For definition of delict we need to refer to the Article 317.1 of the Civil Code of Georgia, according to which "for origination of obligation it is necessary to have a contract between participants, except instances where an obligation originates due to caused damages (delict), undue enrichment or other grounds prescribed by law". At the legislative level, delict is linked to the fact of incurred damages. In addition, in case of damages the infringement of law plays a vital role[7]. Therefore, the term "delict" shall be defined as damages incurred due to violation of law.

3. Correlation between Public Law Delict and Private Law Delict

Correlation between public law and private law delicts is evident, as the violation may take place in both, in public and private, areas. Moreover, it is inevitable for the state not to have separate facts of violation, which is preconditioned by broad tasks and multiplicity of legal actions required for their fulfillment[8]. Private as well as Public law infringements may lead to damaging an individual, and that creates the delict construct: a) violation of law; b) damages due to violation of law. Considering that in case of delict, a method of defense of rights depends on a legal nature of the dispute,[9] it becomes necessary to identify differences between the private and public law delicts.

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7 *Chikvashvili Sh.,* Commentary to the Civil Law, Book 4, Private part of the Law of Obligations, Vol. II, Tbilisi, 2001, Article 992, 379 (in Georgian).

8 *Ipsen J.,* Allgemeines Verwaltungsrecht, 10. Aufl., Sinzheim, 2017, Rn. 1238, 325.

9 *Muthorst O., transl. Maisuradze D.,* Fundamentals of Law, Tbilisi, 2019, f.n. 71, 292 (in Georgian).

4. Difference between Public and Private Law Delicts

For purposes of demonstration of public and private law delicts' differences, let us review delicts envisaged by Articles 997 and 1005 of the Civil Code of Georgia; they are caused while acting in official capacity. Both concern compensation of damages caused in the limits of labour relations between an employer and an employee. Difference, though, between these delicts lays in nature of legal obligations of official functions of an employee. Generally, for purposes of official duties, first, we need to determine labour relations between the state and the public servant. Legal nature of functions imposed on a servant obtains public law features, and it is causally related to performance of positive obligations of the state. Thus, we can say that the state fulfills its positive obligations through its servants. However, it shall be said that in the process of fulfilling such functions the state my violate its negative obligation. It does not matter which obligation the state violates – positive or negative – as in both cases the delict will belong to that of the public law.

Positive obligation of the state represents an idea, that the state shall positively/actively act to protect human rights. In 1968 at European Court of Human Rights, in one of cases, the claimant used the term "an obligation of doing something", which later turned into the term "positive obligation of the state"[10]. The latter presumes "the state obligation to protect [an individual] from interference of other persons and act for protection of freedoms, restoration in rights and compensation of damages. If the state couldn't or didn't ensure legal procedures for reinstatement in rights or refused to investigate the case, or is incapable of introducing relevant freedom guarantees because of low standards for judicial independence or faulty judicial system, it violates the positive obligation of the state". Not punishing those guilty of crimes does represent violation of the positive obligation of the state[11]. "Positive obligation of the state is similar to "Obligation of compassion to the party". Namely, pursuant to article 316.2 of the Civil Code of Georgia: "depending on its meaning and nature, an obligation of extreme compassion towards the other party, may be imposed on a party". An obligation of compassion is perceived as an obligation of caring about others' rights and interests. In certain cases, a party is also obliged to care about others' rights and interests, as if they were his/hers, although such an obligation is not universal[12]. The party violating the obligation to compassion, may be sanctioned to compensate damages[13] just like the state is imposed an obligation of compensation of damages in case of violation of the positive obligation of the state.

Difference between an obligation to compassion and the positive obligation of the state is evident and distinct. Unlike positive obligation of the state, it is impossible to identify the content of

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10 *Schlagel O.,* Positive and negative obligations in Georgia: "only semantics and nothing else?" Impact of human rights standards on Georgian legislation and practice (collection of articles), Tbilisi, 2015, 213 (in Georgian).

11 *Gotsiridze E.,* Commentaries to the Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Human Right and Freedoms, Tbilisi, 2013, Article 14, 55 (in Georgian).

12 *Batlidze G.,* Responsibility caused by guilty acts in delict law, Georgia Business Law Edition, Tbilisi, 2015, IV, 18 (in Georgian).

13 *Chanturia L.,* Commentary to the Civil Law, Book III, Law of Obligations, General Part, Tbilisi, 2001, Article 317, 35 (in Georgian).

the obligation to compassion at the outset of relations between the parties. It may become mor explicit only in the process of such a relationship[14]. It shall be said that the positive obligation of the state is defined in advance and is linked to specific human rights, i.e. it is always established for a state what goal it shall achieve. For instance, the state shall protect individuals from a third-party interference with his/her rights and the state shall also pay relevant compensation if a person the person lost freedom due to illegal acts of the state[15].

The state, for purposes of fulfilling positive obligations, is granted an authority of discharging certain public law related actions. For instance, an administrative body can apply various public-administrative forms like issuance of individual and normative administrative-legal acts, real action; it also may perform criminal law actions: investigation of crimes, inditing individuals, etc. There are other legal actions, like, for instance, dispute resolution by the court.

The state may have an obligation of compensating damages due to violation of its positive obligation; Namely, for non-fulfillment of the obligation to investigate[16]:

Case materials demonstrate that a landmine exploded in hands of a child, as a result of which the child has been severely injured; in fact, injuries would be life-threatening. The state started an investigation under the premise of intentionally inflicting minor bodily injuries despite rather severe injuries; investigation has never been completed despite statute of limitation, i.e. deadlines, in the limits of which an individual could have been held responsible. As a result of investigation that lasted years, no person responsible for compensation of damages – offender – has been identified. The victim requested compensation of non-property (intangible) damages based on the positive obligation of the state.

Civil and Appellate Courts rejected a claim in the part of property loss compensation since health injuries were not related to non-fulfillment of state obligations; the state could not avoid such damages by preventive measures.

On the other hand, the Courts admitted claims concerning non-property damages compensation. According to Courts, the state has an obligation to identify a person, responsible for compensation of incurred damages; however, in this case that had never been done.

In addition, despite risks to life, the investigation was commenced under the article of minor injuries. It is one thing to avoid factors leading to losses, and another thing is the positive obligation of the state to conduct the effective investigation into the case. According to the Court, based on existing bodily injuries, conducting investigation for many years where reasonable as well as maximally allowable deadline prescribed by the Criminal Procedures Code of Georgia to hold an offender accountable, has expired (under both – current and abolished provisions)[17]; the state created an

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14 Ibid, 34.

15 *Gotsiridze E.,* Commentaries tot eh Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Rights and Freedoms, Tbilisi, 2013, Article 14, 58-59 (in Georgian).

16 Case №BS-252-250(K-17), Ruling of the Administrative Chamber of the Supreme Court of Georgia from May 25, 2017.

17 Investigation shall be conducted within reasonable timeframes, but it should not exceed the statute of limitation established by the Criminal Code of Georgia. Article 103, Criminal Procedure Code of Georgia, LHG, 31, 03/11/2009.

impression (for the victim) that the law is not applied fairly and adequately to him/her; also, the state created a feeling of hopelessness and frustration, and that represents violation of the principle of human dignity. Therefore, an obligation of compensating for moral damages was imposed on the state for failure to fulfill its positive obligation to conduct effective investigation[18].

The state appealed the Decision to the Supreme Court of Georgia and requested abolishment of the Decision of the Court of Appeals based on the argument that Administrative Chamber of the Court exceeded limits of its competence and exercised oversight over investigation. Also, the state indicated that damages shall be compensated by the infringing party (identity of whom was not established despite expiration of all legal deadlines).

Administrative Chamber of the Supreme Court of Georgia did not admit/rejected the complaint, although explained that "the state shall effectively respond to facts of threats to health or life as the state is not only prohibited from violating rights (negative obligation), but also it shall provide for effective protection mechanisms in case such rights are violated, and to fulfill its positive obligations"[19]. Besides, it shall be noted that "the Administrative Court reviewing the case may assess an issue of relevant fulfillment of the positive obligation by the state[20].

In the process of discharging the positive obligation of the state in a form of public law actions, the state shall also refrain from violation[21] of human rights and from unjustly interference with such without relevant grounds for doing so[22]. This is called a negative obligation of the state. This obligation concerns cases where the state is a potential violator as its actions naturally contain threats of breaching this or that public good and it prohibits the state to unjustly interfere/intervene with protected areas of right of private subjects[23].

Relationship where the state via its servants fulfills obligations imposed on it towards the private person, is called an external relationship (Außenverhältnis)[24].

Negative obligation of the state is identical to negative obligation of the private person (subject). Public law indicates at that, according to which "imperative provisions of civil laws protect others from abuse of rights. Actions, which contradict such provisions, shall be considered as null and void, except cases where the law directly prescribes otherwise"[25]. In addition, "parties to legal relations shall duly exercise their rights and obligations"[26]. Both provisions serve the purpose of protecting others' rights by establishing restrictions and obligations". [27]

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18 Case №3B/604-16, Decision of the Administrative Chamber of the Tbilisi Court of Appeals from September 27, 2016.

19 Case №BS-252-250(k-17), Decision of the Supreme Court of Georgia from May 25, 2017.

20 Ibid.

21 *Korkelia K.,* Towards integration of European Standards: European Convention of Human Rights and Experience of Georgia, Tbilisi, 2007, 14 (in Georgian).

22 *Gotsiridze E.,* Commnetaries to the Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Human Rights and Freedoms, Tbilisi, 2013, Article 14, 55 (in Georgian).

23 *Demetrashvili A., Gogiashvili G.,* Constitutional Law, Tbilisi, 2016, 99-100 (in Georgian).

24 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 16, 715.

25 Article 10.3 Civil Code of Georgia, Parliamentary Gazette, 31, 24/07/1997.

26 Ibid, Article 8.3.

27 *Chanturia L.,* Commentary to the Civil Code of Georgia, Book I, Tbilisi, 2017, Artilce 10, field 20, 59 (in Georgian).

Considering the above, Article 997 of the Civil Code of Georgia envisages the result, which is received when an employer, by means of an employee, i.e. in discharging his/her official capacity, violates an obligation of compassion (positive obligation) as well as a negative obligation – negative obligation of the private law subject. Similarly, Article 1005 of the Civil Code of Georgia envisages the outcome which takes place when an employer, via the employee discharging his/her official functions, violates positive or negative obligation of the state. Thus, Article 1005 of the Civil Code of Georgia, unlike Article 997, is applied only when the employer, notwithstanding the area of law of the subject, violates positive or negative obligations of the state. Therefore, an issue arose: how to establish existence of a positive or a negative obligation in case of incurring damages when discharging official functions by the employee?

The best method of establishing existence of either positive or negative obligation of the state in case of incurring damages by an employee discharging official functions may be a theory of special law (modified subject), number of proponents of which increases steadily[28]. According to the theory, based on the provision of the law, a right or an obligation belongs to the area of public law if it is assigned or imposed only to one single subject[29]. For instance, the right to issue a construction permit or an obligation to oversee construction activities. Contrary to that, the right or the obligation belongs to the area of private law if it is assigned or imposed on all, i.e. any individual. Therefore, a party to the private law relations may be any person indeed[30]. There are contradicting opinions regarding appropriation rights (cases when the state has a right to demand registration of a claim on property which is not in private ownership). According to one opinion, the right to appropriate property represents the right under the public law, since only the state is authorized to request registration of the right to property, which is not in private ownership; and, according to the opposing opinion, it belongs to the area of private law since in case of such a claim the state represents not the one discharging authorities, but a property owner and is a subject to civil circulation/transactions[31]. One aspect requires attention in deciding this matter: according to explanations offered by the special theory, a provision is considered as a public law if it – in any form of its application – assigns a right or imposes an obligation only to a person with public authorities[32]. The right to appropriation – if the prerequisite of its use is removed (movable property is not in private ownership) and if we leave it in a form of a pure right – then we will have a situation, where the state may register the right to claim and any person may have that right; because of that the right of the state to appropriate shall represent a right under the private law. Therefore, the above-mentioned contradicting opinions come to consensus. Thus, in case of correct application of the special theory, i.e. when legal nature of pure (without consideration of factual composition of the provision) right or an obligation, then the above-mentioned theory gives an opportunity of receiving an outcome even in most complicated cases.

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28 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 14, 47.

29 *Ipsen J.,* Allgemeines Verwaltungsrecht, 10. Aufl., Sinzheim, 2017, Rn. 29, 8.

30 *Chanturia L.,* Commentaries to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 8, field 3, 48 (in Georgian).

31 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 13, 47.

32 *Detterbeck S.,* Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht, 12. Aufl., München, 2014, Rn. 27, 12.

Based on the theory of special law, an obligation which may be imposed on one person and which serves the purpose of protecting rights of a person from third party interferences, shall be considered as a positive obligation of the state. For instance, obligations like investigation of a crime, construction activities' oversight and other similar obligations.

As mentioned, negative obligation of the state is identical to that of the private law subject since both imply that an acting subject shall not violate rights of other persons in carrying out such an action. The only difference between the public and private law subject's negative obligations lays in legal nature of an action causing a violation. Negative obligation of the state may be violated only by public law actions, and the negative obligation of the subject to private law – by actions under the private law. Therefore, if a delict is caused by the action under the public law, then violated is the negative obligation of the state, and in case of actions under the private law – the negative obligation of the subject to private law is violated. In order to establish legal nature of an action we can apply the theory of special law and define whether any person or only one (for purposes of fulfilling positive obligation of the state) had a right to carry out an action leading to violation since for achieving other goals fulfillment of public law actions is inadmissible and impossible.

Considering all said above, Article 1005 of the Civil Code of Georgia shall be applied in case of a delict where a positive or negative obligation of the state is violated due to discharge of official functions; that predetermines public law nature of the delict. In this regard, the latter Article differs from responsibilities envisaged by the Article 997 of the Civil Code of Georgia and, moreover, it is the only delict in entire private law area, which is directly linked to compensation of damages caused by violation of the positive or negative obligation of the state. Thus, it is questionable whether such different issues and public law delicts shall be regulated by the private law.

The causing reason is a condition that, as known, Civil Code of Georgia was designed based on the German Civil Law, which, in its turn, regulates an obligation of the state to compensate for damages incurred by the state due illegal actions. Mentioned obligation, according to the Article 839 of the German Civil Code, unlike Georgian Civil Code, is assigned to the public servant and not the state. There are two reasons for that: one – "theory of mandate" was used as a basis for the obligation to compensate damages. The theory implies that the state transfers the mandate to its servant to carry out legal actions only. Illegal action goes beyond the limits of the mandate and that is why the actions leading to damages are imposed on a servant and the state[33]. Therefore, actions causing a delict represented private law and not public law actions; thus public law may not even regulate it; secondly – due to territorial arrangement, federal and lands' competences of Germany, it was impossible to regulate this issue by the federal law[34]. In case of Georgia, such obstacles do not exist.

Public law delict features differ from the private law delict. In case of the latter, as of the day of the Civil Code adoption it is recognized that before the private delict there is no any legal relation between the person incurring damage and a victim[35]. On the contrary, in case of public law delict,

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33 *Ahrens M.,* Staatshaftungsrecht, 2. Aufl., Köln, 2013, Rn. 8, 5.

34 *Dörr C.,* BGB Staatshaftung, Grosskommentar, Altustried-Krugzell, 2019, Rn. 7, 12.

35 *Chikvashvili Sh.,* Commentary to the Civil Code of Georgi, Book IV, Law of Obligations, private part, Vol. II, Tbilisi, 2001, Article 992, 379 (in Georgian).

even prior to damages, there is always legal relation between the person incurring damage and a victim it may be called a pre-delict legal relation. Existence of a pre-delict legal relation is preconditioned by legal regulations, which defines relations between the state and a private subject in an abstract and general manner[36]. Without such general relations, it is impossible for the state to exist and in the limits of the abstract and general relations violation of obligations (positive or negative) towards the private subject is included into the construct of claiming compensation of damages from the state; it is prescribed by the provision of the Article 1005.1 of the Civil Code of Georgia, which reads: "…violates… obligation towards another person…". Therefore, unlike private law delict, there is always a pre-delict legal relation in case of a public law delict.

Pre-delict legal relations between the person incurring damages and a victim may exist in a form of administrative act, real act or virtually.

Example I: Individual Administrative act originates a pre-delict legal relation, when an administrative body deems a construction performed by an individual, as illegal due to which it may take a decision on fines/penalties and dismantling of the building; based on such decision an "illegal" site may be destroyed/dismantled. Later is becomes evident that a decision on dismantling contradicted provisions of the Georgian law and, therefore, an individual incurred loss due to illegal actions of an administrative body. As we can see from an example, before the delict, i.e. before the illegal actions leading to losses, the specific legal relation existed between an individual incurring the damage and a victim of such damage a in a form of an administrative act.

Example II: During technical inspection of a vehicle and administrative body failed to identify its faults and was considered that a vehicle passed technical inspection/evaluation. In several days after inspection, the vehicle creates an accident due to it faults; as a result of an accident the car damages/breaks as well as a pedestrian. Obligation of compensating damages originates only in case of a pedestrian and not the owner of the vehicle, since due to legal relations between the state and a private subject, i.e. virtual legal relations, the state shall have a safety obligation towards participants of traffic and not towards insuring financial interests of a private subject[37].

We shall specifically and separately mention that general relationship between the state and a private subject, which at the same time serves the state as in establishment, as well as in restriction[38], may not fall under relations listed in the Article 1 of the Civil Code of Georgia. Pursuant to Article 1 of the Civil Code of Georgia "this Code regulates private property, family and personal relations based on equality of individuals".

Private nature of relations is determined by the private autonomy of a subject, i.e. by "freedom of expression of will and willingness to establish relations with other persons"[39]. Therefore, general relations between the state and the private subject may not bear private character since – as said above

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36 *Erbguth W., Guckelberger A.,* Allgemeines Verwaltungsrecht, 9. Aufl., Baden-Baden, 2018, Rn. 6, 143.

37 *Toradze D.,* Obligation towards other persons in case of discharge of public authorities (based on examples of the German and Georgian Administrative Law), Tbilisi, 2018, 15 (in Georgian).

38 *Maurer H., Waldhoff C.,* Allgemeines Verwaltungsrecht, 19. Aufl., München, 2017, Rn. 8, 45.

39 *Chanturia L.,* Commentary to the Civil Code of Georgia, Book I, Tbilisi, 2017, Article 1, field 5, 2 (in Georgian).

– it serves the purpose of establishment and restriction of the state and not assignment of private autonomy to it. Thus, pursuant to the Civil Code of Georgia, regulating relations of private nature, imposition of an obligation to compensate damages does not fit limits established by the same Code.

5. Conclusion

This article reviewed similarities, differences between public and private law delicts as well as results deriving from such differences.

For purposes of demonstrating differences, we compared delicts under Article 997 and 1005 of the Civil Code of Georgia, since both concern compensation of damages incurred in the limits of labour relations.

Both – private and public delicts – have one thing in common: they concern damages caused by violation of law.

Public law delict differs from the private law delict in following legal aspects:

1. An issue of pre-delict legal relations between the parties. In case of the public delict, legal relations between the person incurring damage and a victim always exist prior to incurrence of loss (pre-delict legal relations). This derives from construct of requesting compensation of damages from state for the losses incurred. According to it the claim originates only when an obligation "towards another person" is violated. Pre-delict legal relations may be expressed in a form of administrative act, real act or virtually.
2. The nature of delict relations. In case of public delict, positive or negative obligations of the state are directly violated, and that gives it public nature. During public delict private relations exist, which derives from Article 1 of the Civil Code of Georgia.
3. Legal nature of performed official functions. In case of public law delict, labour relations between an employer and an employee and deriving official capacity thereto, which is a precondition of compensation of loss as prescribed by Article 1005 of the Civil Code, has public law features/nature. It is regulated by the public legislation.
4. Legal nature of actions leading to damages/losses. In case of the public law delict, actions, or forms of actions of an incurring damages administrative body, fall under the public law and rules for their implementation are provided by the public law; at the same time, their application serves the only purpose – fulfillment of the positive obligation of the state;

Based on listed aspects, positive obligations of the state and actions thereto (external relations), labour relations between the state and the public servant as well as his/her official responsibilities (internal relations), pre-delict legal relations – all these issues are regulated by the public law; because of that damages caused by illegal actions of the state, i.e. delict, is public in nature.

Based on said above, since the delict is public in nature, compensation of loss caused by illegal actions of the state shall be regulated bot by private, but by public legislation.

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