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Open Dilemma: How to React to Illegal Orders From a Superior?*

Public sector employees are required to respect the work discipline and perform their professional duties and delegated tasks and assignments, conscientiously and diligently. Conscientious conduct implies that they should comply with laws and secondary regulations in their work, and carry out their duties professionally and in the public interest.

As the public administration is a hierarchical organisation, public sector employees have to follow the instructions of their superiors. In carrying out their duties, they are also required to comply with the rules of conduct specified in the Code of Conduct, if there is one.¹ If, however, they refuse to follow the instructions and do not comply with the Code of Conduct, they may be subject to disciplinary sanctions and, in extreme cases, lose their job. As a result, public sector employees need to prove that any such refusal to follow instructions is justified by some exceptional and professionally unacceptable circumstances. A clear-cut situation in which an employee should not follow the instructions is when he/she is instructed to act against the legal requirements valid in a given case or against the Code of Conduct rules.

In more general terms: when is a refusal to follow orders from a superior justified? It is justified in the case when a public sector employee receives an instruction or an order from the superior to act in a manner that is irrational, unethical, contrary to law or the public interest. These situations can cause an ethical dilemma as there is a contradiction between two opposite requirements: 1) to act contrary to the law, rules and regulations,

* We are very grateful to Mr. Francisco Cardona for his valuable input into this chapter.

1 Some categories of civil servants, such as, for example, specific professions (employees in internal affairs authorities) may be subject to special rules of conduct, given the nature of their work.

and the moral values that public servants are obliged to follow, and 2) to respect and act in accordance with instructions given by their superior. Such a situation may force a public sector employee to choose either to stand up against the superior's wrongful instructions and risk resentment or retaliatory reactions, or to follow up loyally the superior's orders, even if they are wrong or even illegal.

These situations may occur in all areas of the public sphere. Illegal superior orders are particularly common in the areas most vulnerable to corruption, such as procurement, recruitment, etc. Another situation that is even more difficult to handle is when the superior's instruction is in line with the law, which may allow discretionary decisions, but is still immoral or clearly against more universal standards such as, for example, the fundamental human rights. Finally, a law may simply be wrong, for example, by including discriminatory provisions. In that case, there is a conflict between acting in accordance with the law and in accordance with universally accepted ethical standards.

Should public sector employees comply with laws or regulations that are illegal? Is an illegal law conceptually possible? Which are the conceptual foundations to refuse compliance with illegal orders or illegal laws?

CONCEPTUAL FRAMEWORK: MINDLESS OBEDIENCE IS PERILOUS FOR SOCIETY

Before going into the practical discussion, we may want to consider the human nature and how people tend to react to obedience, through a conceptual framework based on power relationships. The psychological Milgram experiments conducted by the American psychologist Stanley Milgram between 1960 and 1963, concurrent to the Eichmann trial in Jerusalem (and replicated with consistent results several times since including by Polish researchers in 2016 –17), show a strong propensity of ordinary and decent human beings to obey superior orders even if those orders imply unjustly harming someone else (i.e. committing a crime).² In the experiment, the experiment leaders instructed participants to obey an authority figure who ordered them to perform acts conflicting with their personal conscience and

2 "Conducting the Milgram Experiment in Poland, Psychologists Show People Still Obey", available at: <http://www.spsp.org/news-center/press-releases/milgram-poland-obey>.

moral values. The experiment found that a very high proportion of people were prepared to obey, albeit unwillingly, even if apparently causing serious injury and distress to others. It also showed that only a small proportion of adults are prepared to resist heroically. Milgram first described his research in 1963, in an article published in the *Journal of Abnormal and Social Psychology*,³ and later discussed his findings in greater depth in his 1974 book, *Obedience to Authority: An Experimental View*.⁴

Milgram summarised the experiment in his 1973 article, *The Perils of Obedience*, writing:

“The legal and philosophic aspects of obedience are of enormous importance, but they say very little about how most people behave in concrete situations. I set up a simple experiment at Yale University to test how much pain an ordinary citizen would inflict on another person simply because he was ordered to by an experimental scientist. Stark authority was pitted against the subjects’ [participants’] strongest moral imperatives against hurting others, and, with the subjects’ [participants’] ears ringing with the screams of the victims, authority won more often than not. The extreme willingness of adults to go to almost any lengths on the command of an authority constitutes the chief finding of the study and the fact most urgently demanding explanation. Ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority”.⁵

The same line of thought may be found in some key works of Balkan contemporary literature such as the 2004 *They Would Never Hurt a Fly: War Criminals on Trial in The Hague* by Slavenka Drakulic, where the Croatian journalist in the novel gives an account, resembling the “banality of evil”, as coined by Hanna Arendt, on the personalities of the war criminals from the former Yugoslavia on trial in The Hague.

3 S. Milgram, “Behavioral Study of Obedience”, *Journal of Abnormal and Social Psychology*, 4/1963, pp. 371–378.

4 S. Milgram, *Obedience to Authority: An Experimental View*, Harpercollins, 1974.

5 S. Milgram, “The Perils of Obedience”, *Harper’s Magazine*, December 1973. Available, *inter alia*, at https://is.muni.cz/el/1423/podzim2012/PSY268/um/35745578/Milgram_-_perils_of_obediance.pdf.

To protect public sector employees' ability to resist situations where they receive an illegal or unethical order from their superior has been the object of numerous philosophical research from the classical Greek philosophers such as Plato and Aristotle, Roman authors such as Cicero, and all the way to the Western Middle Ages through Albert the Great (1200–1280) and Thomas of Aquinas (1225–1274). Their basic idea was that natural law had precedence over positive law or, in other words, that human rationality should prevail over the whims of a ruler. These ideas gained special importance during the Nuremberg War Crime Trials, when a large number of indicted war criminals, in their defence, invoked compliance with “superior orders” as the excuse for their actions.⁶

In the Nuremberg trials and in the aftermath of Germany's reunification in 1990, the line of German case law known as the *Mauerschützenprozesse* reiterated the principle that following orders is not a sufficient legal excuse to avoid personal criminal liability. This legal doctrine is also to be found in the Adolf Eichmann trial in Jerusalem (1961). The justification of this doctrine is based on the philosophy of law. It comes, as already mentioned, from the notion of natural law (from Aristotle, Albert the Great and Aquinas) and, since the Nuremberg trials, from the Gustav Radbruch formula, which in a nutshell reads: an extremely unjust law is not law. Therefore, such a law is not binding for anyone.

Later on, that doctrine evolved into an all pervasive human rights movement. The UN Universal Declaration of Human Rights (UNUDHR) includes the notion of human dignity in the equation: Courts now use the concept of dignity to give a meaning to rights, to connect rights, to extend rights, to create new rights, and to weigh rights against each other.⁷ Dignity has become a tool through which courts define, order and extend rights.

From this standpoint, the human right to dignity confers the right of a public sector employee to refuse to comply with instructions that go against his/her conscience, moral values or ethical convictions. In the same vein, from the perspective of causing no harm to others or to the public interest, an employee has the obligation to refuse compliance with instructions that go against his/her conscience, moral values or ethical convictions. This

6 During these trials, which were conducted in accordance with the rules of the London Charter of the International Military Tribunal, it was found that superior order does not relieve officers from criminal irresponsibility, but that it may be a ground for reduction of sentence. L. C. Green, *Superior Orders in National and International Law*, A. W. Sijthoff International Publishing Co., Leiden 1976.

7 See Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, *The European Journal of International Law*, 4/2008, pp. 655–724. Available at: <http://www.ejil.org/pdfs/19/4/1658.pdf>.

understanding is nowadays part and parcel of widely accepted Western philosophical values.

HOW DO THESE PHILOSOPHICAL FOUNDATIONS TRANSLATE INTO CIVIL SERVICE LAWS?

The philosophical foundations and historical experiences discussed above provide the conceptual framework for how to judge exceptions from the obligation to follow superior orders. These exceptions are, with some variations, a part of almost all national civil service legislations in the Balkans.⁸ The legislation that governs the status of public sector employees (as a broader category of employees, which, in addition to civil servants, includes employees who work in public services, such as health, education, culture, etc.) is still, unfortunately, not well developed in most countries of the Western Balkans. For this reason, this section will focus only on civil servants.

The civil service legislation in the Western Balkan countries provides that in carrying out his/her duties, a civil servant must comply with the instructions and orders of the superior.⁹ However, if a superior order is illegal (or in breach of the Code of Conduct), or ethically questionable, the civil servant is obliged to warn the superior, and may request from the superior a written order for the required action or decision.¹⁰ If the superior issues a written order, the civil servant is obliged to act in accordance with it, unless that would constitute a criminal offense.¹¹

Some jurisdictions prescribe additional legal protection for civil servants, requiring a civil servant to report all details of the case to another person in the institution (person in charge of the HRM in the Kosovo* institutions, or the head of the authority in Montenegro),¹² or to the authority in charge for supervision of public administration authorities (in Serbia and in the BiH

8 The only exception is the Macedonian Civil Servants Law that does not include the provisions on this matter.

9 Article 61 of the Kosovo* Civil Servants Law; Article 63, Paragraph 1, of the Montenegrin Civil Servants Law.

10 Article 43 of the Albanian Civil Servants Law, Article 62 of the Kosovo* Civil Servants Law, Article 63 of the Montenegrin Civil Servants Law.

11 Article 63, Paragraph 3 of the Montenegrin Civil Servants Law, Article 18, Paragraph 2 of the Serbian Civil Servants Law.

12 Article 14 of the FBiH Civil Servants Law; Article 15, Paragraph 2 of the Montenegrin Civil Servants Code of Conduct, *Official Gazette of Montenegro*, No. 20/2012.

entity Republic of Srpska),¹³ the competent judicial authority (Kosovo*), or to the “competent authority” (BiH and FBiH level).¹⁴

A written order by the superior excludes the civil servant’s material and disciplinary liability, but it does not exclude his/her criminal liability. The Montenegrin Civil Servants Law prescribes that a civil servant is absolved from the material and disciplinary liability if he/she has caused damage or committed a disciplinary offense by acting on a written order of the superior. However, if the civil servant’s conduct constitutes a crime as described in the penal code, he/she is still held criminal liable. This provision is in line with the principle of subjective, individual criminal responsibility, according to which everyone is fully responsible for their own actions. Accordingly, if a civil servant believes that by acting in a specific case he/she might commit a crime, he/she is obliged to refrain from such a conduct.

FROM RULES TO PRACTICE

Although the civil service legislation clearly specifies the rules of conduct for acting on superior orders, they are not always easy to implement in practice. While the legislation contains the basic provisions on how to respond to orders by managers/superiors, it is vague and ambiguous on how to handle particular situations in real-life situations.

In such situations, described at the beginning of this chapter, civil servants face two main dilemmas. The first one relates to the fear of the superior’s resentment and negative reactions, which may result in getting unfavourable performance assessments, lack of promotion, and even loss of job, in response to the civil servant’s refusal to follow his/her superior’s order or instruction. The second dilemma is reflected in the fear of criminal liability, and therefore the loss of job, if he/she does comply with the superior’s order or instruction.

Let us imagine a situation when the superior has given an illegal order. An HRM Officer has received an instruction from the superior that, during the selection process, the highest point score should be given to a candidate in the competition who is not the best candidate. Or, to give another example:

13 Article 18, Paragraph 3 of the Serbian Civil Servants Law; Article 21, Paragraph 4 of the Republic of Srpska Civil Servants Law.

14 Article 62, Paragraph 2 of the Kosovo* Civil Servants Law; Article 17 of BiH Institutions Civil Servants Law.

a Procurement Officer has received an instruction to select the bidder whose bid is not the best bid in terms of price and quality.

In accordance with the existing legal framework, in such situations, the civil servants should first warn the superior that the order is unlawful or against the institution's procedures and ethical standards. To be able to do that, the civil servant should first make sure that he/she is fully acquainted with all relevant legislation, regulations and rules (including codes of ethics) that apply to the particular situation, in order to be certain about the case – before he/she alerts the superior(s) that the instruction is illegal and improper. In such a situation, expertise and knowledge in the subject matter are the civil servant's "best allies" and the first line of defence. In the cases mentioned above (the HRM and procurement officers), the civil servant may present the provisions of the civil service legislation or procurement legislation and related penal provisions to his/her superior. What sometimes happens in practice is that, when faced with the existing legislation and regulations and the consequences of non-compliance, the superior withdraws his/her instructions.

If, however, the manager – in spite of the civil servant's professional advice and oral warning – insists that his/her instructions should be implemented, the civil servant can take one or more of the following steps. The first one, in line with the civil service legislation, is to request a written order from the superior, which would provide the civil servant with a written evidence of the superior's improper orders. However, the problem is that it is rather unlikely that the manager will issue a written order. That imposes an additional dilemma on the civil servant, because without a written trail he/she is not protected from the disciplinary or misdemeanour liability in case he/she does follow the instructions. For that reason, it is important for the civil servant that he/she makes a written and dated statement of what was requested from him/her by himself/herself and keeps it in his/her records to be used in potential disciplinary or other proceedings. Another useful measure in this situation would be to report the case and request an opinion on how to proceed from his/her trade union or inspection officer, and/or an outside independent body, such as the Ombudsman,¹⁵ Anti-Corruption Agency, Supreme Audit Institution, or another relevant authority.

15 See the case of a Sarajevo professor who has successfully challenged the management of his faculty with the assistance of the Ombudsman. See: A. Hanusic, *Judicial Protection from Discrimination of Bosnia and Herzegovina, Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika, 2013. Available at: http://www.analitika.ba/sites/default/files/publikacije/analitika_-_report-_judicial_protection_from_discrimination_4june2013_eng.pdf, p. 14.

An example of a behaviour of a civil servant who received illegal instructions from his superior

A civil servant in one of the Balkan countries was requested to put on hold all on-going recruitment and selection procedures due to the announced parliamentary elections. He was told by his superior that the head of an institution is not permitted to make new civil service appointments in the course of and until the end of the parliamentary elections. As the Civil Service Law in the respective country did not envisage a suspension of appointments during the parliamentary election period, the civil servant warned his superior that his instruction was not in line with the existing legislation. He also made a written note of the superior's instruction and kept it in his HR file. Furthermore, in order to clarify the situation, the civil servant requested an opinion from an independent outside body, which confirmed the civil servant's view that there was no obstacle in proceeding with the recruitment and selection procedures.

The case, however, did not rest there. After the confirmation from the outside body had been received, a disciplinary procedure was initiated against the civil servant. In the course of the proceedings, however, it was determined that the civil servant did not violate the work discipline and the provisions of the Civil Service Law, and disciplinary charges were dropped.

A civil servant should consider, in particular, whether fulfilling the order of his/her superior would constitute a criminal offense in accordance with the national legislation. If the action or decision in question contains any element of a criminal offense, such as, for example, the broadly defined criminal offence of "abuse of office" or "embezzlement" in some jurisdictions, the civil servant should not only refrain from the requested behaviour, but also notify the head of the authority or the appropriate judicial institution about the incident. In both previous examples, if the civil servants follow the manager's order, they could be subject to criminal prosecution.

HOW TO ADDRESS IMPROPER ORDERS FROM THE INSTITUTIONAL POINT OF VIEW?

The issue of illegal superior orders should be addressed as an institutional rather than individual problem in all public sector institutions. The implementation of the principle of legality, the fundamental loyalty of the public sector employees to the legal order of the country, and the respect for human rights are institutional commitments of any public administration ruled by law and democratic values. That requires the an adequate institutional framework in place, which would guarantee their observance.

To ensure that public sector employees are able to abide by the rule of law, avoid disciplinary liability, and provide adequate evidence in case of

potential disciplinary or legal proceedings, it is recommended that the senior management of a public sector institution adopts written guidelines that would regulate the situation of acting upon illegal orders. Such guidelines would provide detailed instructions on how to act in specific situations when there is a justified reason to react in order to avoid illegal actions or decisions. This would reduce the severity of the dilemmas caused by illegal orders for all participants in public administration (managers, subordinates, and external or internal controllers of the public behaviour). Although such guidelines would not have a legal nature, a public institution could oblige all its employees to abide by them.

Written guidelines on the issue of improper orders could address, for example, the following issues:

1. If he/she considers that acting in accordance with the instruction or order by his/her superior would be in breach of regulations or the ethical values, a public sector employee is obliged to request that the instruction or the order is submitted in writing, indicating who ordered him/her to act in such manner and when (provided that the civil servant is obliged to keep written records of the conversation, indicating the date when he/she spoke to the manager). In the meanwhile, the instruction or order should be put on hold and not implemented. A copy of the written instruction should be forwarded simultaneously to the HR department (if it exists) and to the senior management of the institution, along with the comments or critical observations by the incumbent employee.
2. Guidelines should establish a short timeline for the response of the immediate superior or the senior manager of the institution to the public employee's request. Once such a request has been submitted, it should be acted upon without delay. The response should be based on the facts in the situation and the rules and regulations prescribed by the law, and not simply refer to hierarchical authority as the reason to abide by the superior's instruction or order. The reason is that instructions to subordinates need to be rational, i.e., based on facts and human reason. What is questioned is the rationality or legality of the given instruction or order, and the issue is whether it is illegal or unethical or not. A superior should not expect mindless obedience from a subordinate, as the human dignity of subordinates should be protected.
3. Guidelines should spell out the obligation of the public sector employee to prepare written records, including the written requests and written instructions (if submitted by the manager). The records should contain the signature of the person who prepared the records, in addition to the date and a detailed description of the specific situation, indicating the reasons for refusing to act in accordance with the superior's instruction or order.

A question may be raised whether a public sector employee is obliged to inform the senior management about his/her refusal to act. In these situations, it would be reasonable that the employee informs his/her immediate superior's superior about the situation in writing. This would allow timely implementation of appropriate measures by the senior manager towards the lower-level management that has acted illegally in carrying out their duties and powers. In addition, in some situations, the immediate superior may refer to an order of the senior management, which may be false, and thus informing the senior management directly would ensure that the head of the institution is notified about the new situation. Given the fact that he/she is responsible for the legality of the institution's operations, there are good reasons why he/she should act.

An additional problem that may become visible in practice is insufficient knowledge of the law among public sector employees, especially the criminal code provisions or the fundamentals of human rights. It is possible that a public sector employee is not aware that his/her conduct is illegal and/or constitutes a criminal offense, or that it might constitute a violation of human rights. In order to overcome this problem, it is necessary to ensure continuous education and training of public sector employees, including police officers and military personnel, on democratic values, human rights, ethics, accountability mechanisms, and whistleblowing.

Another useful institutional approach to the issue of illegal instructions, including ethically questionable requirements by hierarchical superiors, would be to create a counsel or internal complaints mechanism, which could be established within the Human Resource Management departments, where they exist. The role of such a unit would be to provide advice and guidance, in addition to representing a competent eyewitness in case of a future legal conflict between the institution and the employee in question. Complaints units may also act as a checks and balances instrument to deter a superior from giving illegal or ethically questionable instructions to subordinates. Additionally, the legislation should also foresee, as in the case of retaliation on whistle-blowers, a sort of a sanction mechanism for managers who knowingly give illegal instructions or orders.

To create additional institutional synergies in tackling the issue of improper superior orders, public sector employees should be enabled to use additional checks and balances mechanisms, or control mechanisms, such as internal audit and/or whistle-blower protection. Internal auditors could potentially have an important role in identifying illegal superior orders. The role of internal auditors is to advise the senior management on how to eliminate or reduce risks of illegal and improper behaviour, including corruption and other

criminal offenses, at the level of the institution.¹⁶ After the risk assessment, auditors usually proposes the adoption or modification of guidelines for public sector employees on specific matters, predominantly of a financial nature. However, as their primary role is to assist in assessing risk factors at the institutional level, internal auditors could take the initiative and request the preparation of guidelines on how to act in case of improper orders, as outlined above, especially when instructions to carry out a specific action may result in a criminal offense.¹⁷

In practice, if the internal auditor notices in the course of his/her work that a public sector employee has acted illegally or committed a criminal offense, he/she is obliged to inform the senior management about it. In addition to the report, internal audit is required to document all allegations in their report, which should include any written trail of improper superior orders, and which can later be used as evidence before the competent authorities in disciplinary or criminal proceedings.¹⁸

Finally, improper superior instructions could also be addressed through whistle-blower protection mechanisms, where they exist. Whistle-blower protection has some unique features and applies to a much wider array of issues, in addition to improper superior orders. It encourages public sector employees to inform about and give warnings of all irregularities that take place in their organisations or in their relationships with external partners, and it has proven to be a successful model for reducing losses in the state budget in some countries.¹⁹ The whistle-blower institute should be tailored specifically to handle illegal or unethical orders and instructions as well.

Public sector employees are in a unique position to discover fraud and corruption within their institutions. To act as whistle-blowers, however, they need to know that the whistle-blower role is protected. The role of whistle-blowers is important for strengthening accountability, countering corruption, and fostering transparency. However, whistle-blowers could be at risk of consequences of their warnings such as bullying, discrimination, and harassment. Therefore, the existence of sound legal protection mechanisms, embedded in statutes, is of vital importance for the prevention of retaliation against whistle-blowers.²⁰

16 Standard 1210.A2.

17 In accordance with Standard 2060 on the potential of the occurrence of criminal offenses at the organisation level, internal auditors are under obligation to notify the senior management.

18 Standard 2330.

19 Thus, according to Transparency International, in the 2002–2012 period, the South Korea Anti-Corruption and Civil Rights Commissioner had seized USD 50 million based on reports filed by whistleblowers.

20 Whistleblower protection has been given special attention in the documents developed within OECD and the Council of Europe, as well as by Transparency International. Cf: Protection of Whistleblowers – Study on Whistleblower protection frameworks,

Some Western Balkan countries have recently introduced whistle-blower protection in their legislation.²¹ It should be noted, however, that these countries are still at the early stages of implementation of the statutory whistle-blower protection. Consequently, whistle-blowers may still be exposed to various forms of retaliation and abuse. However, that should not discourage public sector employees to act with integrity in order to protect the rule of law and their personal and institutional ethical values.

CONCLUSION

On the basis of the brief analysis of improper superior orders in this chapter, we may conclude that although it may be seen as quite peculiar, this issue is encountered rather often in a public sector employee's career in the Balkans. Despite that, very little attention has been paid to it by policy-makers and international and national institutions specialised in integrity building. A public sector employee is often left completely alone with an important integrity dilemma – whether to follow his/her superior's instructions or act in accordance with the law and his/her conscience. Therefore, the authors hope that this final chapter of the publication will provide some basic guidelines for public sector employees on how to act in such situations. In addition, there is a need also to initiate and stimulate a wider debate on how to establish a sound institutional framework for handling illegal or unethical orders and instructions in the public sector, and put an end to the difficult dilemmas they represent for public servants who are exposed to them. The ultimate goal should be to eradicate illegal and unethical orders and instructions. Building a solid integrity shield in the public sector will be the key to achieving that goal.

compendium of best practices and guiding principles for legislation, 2012, <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>; Recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistleblowers; Protection of whistleblowers: a brief guide for implementing a national framework, 2016; International Principles for Whistleblowers Legislation – best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013, Transparency International, http://www.transparency-se.org/Whistleblower-Principles_final_web.pdf.

21 Albania has adopted the Law on the Protection of Whistleblowers in 2014, Bosnia and Herzegovina in 2013, Kosovo* in 2011, Macedonia in 2014, Montenegro in 2014, and Serbia in 2014.