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Blind, Responsible, or Tragic. Abstract Models of Obedience and Their Implications for Criminal Law

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ABSTRACT

The article examines the problem of obedience to orders issued by authority in criminal law, starting from the opposition between the model of blind obedience and that of responsible obedience. Through a theoretical and doctrinal reconstruction of Article 51 of the Italian Criminal Code and of the special legislation governing hierarchical relationships, the analysis shows that neither model, if adopted in a rigid form, is capable of accounting for the complexity of concrete situations. Particular attention is devoted to the implications of the two models for the criminal liability of the subordinate, with specific reference to the interpretative issues concerning mistake as to the legality of the order and the notion of an unlawful superior order, the execution of which is excused due to the subordinate's reasonable reliance on authority. The article ultimately proposes an alternative interpretation, inspired by a model of 'tragic obedience', which highlights the conflictual nature of obedience and allows exemptions from liability to be interpreted in terms of limits on what can reasonably be expected, reliance, and the credibility of the authority.

KEYWORDS

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SUMMARY: 1. Introduction – 2. Two models of obedience – 3. The inversely proportional consequences of the two models – 4. Models of obedience in positive law – 5. The recipient's mistake regarding the legality of the order – 6. The unquestionable criminal order – 6.1. Non-questionability as indisputability? – 6.2. Non-questionability as 'ultimately' binding? – 6.3. Non-questionability as psychological pressure – 6.4. Non-questionability as authority – 7. Conclusions.

1. Introduction

The relationship between authority and obedience raises rather complex criminal law issues, situated at the intersection between the functional requirements of public action, the protection of fundamental legal rights, and the nature of criminal liability. In particular, the execution of hierarchical orders raises questions that are not merely technical-legal in nature, but more profoundly concern the very conception of the obedient subject, their role within the authoritative organisation, and the extent to which they can – or must – retain autonomy of judgement and critical capacity with regard to the directives received. The provisions of Article 51 of the Criminal Code, and the accompanying regulatory framework, represent the primary arena in which these tensions emerge most clearly.

Traditionally, criminal law discourse on obedience has developed around two opposing models: on the one hand, a hierarchical and mechanical conception of

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obedience, which tends to resolve the conflict between order and responsibility through a verticalisation of liability; on the other, a more recent and constitutionally oriented conception, which emphasises the subordinate's deliberative role and affirms their shared responsibility for the execution of unlawful or criminal orders. These models, despite their schematic nature, continue to exert a decisive influence on the interpretative options within the current legal framework, serving as the implicit theoretical backdrop to many interpretative solutions.

This paper aims to critically re-examine these models of obedience, highlighting their philosophical and anthropological premises, their dogmatic implications, and their implications for criminal liability. Through an analysis of the concepts of blind obedience and responsible obedience – and their various manifestations in positive law – the paper demonstrates that neither can be adopted in its pure form without producing problematic or unrealistic practical outcomes. The extreme form of responsible obedience risks overlooking the concrete weight of authority and the psychological dynamics inherent in hierarchical relationships, whilst the restoration of spaces of automatic irresponsibility appears difficult to reconcile with the constitutional principles of legality, the personal nature of criminal liability and the democratic nature of the legal system.

Starting from this tension, the analysis focuses on the most controversial aspects of Article 51 of the Criminal Code, with specific regard to the error concerning the legitimacy of the order and the problematic concept of the 'unquestionable criminal order'. The aim is not only to clarify the meaning and scope of the provisions, but also to propose an interpretative framework capable of reconciling the accountability of the subordinate with the recognition of the differential value of authority. From this perspective, the hypothesis of a model of 'tragic obedience' offers itself as an attempt at reconciliation, capable of restoring complexity to a subject that does not tolerate simplistic solutions, because it is structurally marked by the conflict between the duty to obey and the prohibition against committing a crime.

2. Two models of obedience

The more traditional model of 'obedience' is based on a tendency to nullify the responsibility of the obedient party. We might call it the 'model of blind obedience', or even the 'pure model of obedience', since, if one considers the tension implicit in the order or command, one immediately discovers that this is directed towards a peculiar erasure of the recipient's will: through the order, the one who orders seeks in the person addressed not an autonomous will, but a mechanical extension of their own will; they seek a subject ready, even trained, to carry out the command, a cog on the verge of clicking into place, not a reflective knot to be untangled, nor a further will to be formed through argumentation, by adducing reasons that go beyond the mere fact of having communicated one's own will.

According to Hobbes's well-known definition: «COMMAND is, where a man saith, "Doe this," or "Doe this not," without expecting other reason than the Will of him that sayes it. From this it followeth manifestly, that he that Commandeth, pretendeth thereby his own Benefit: For the reason of his Command is his own Will onely, and the proper object of every mans Will, is some Good to himselfe»[2]. The one who commands does indeed seek in the one to whom he commands a will, not an autonomous one, however, but an obedient one, filled with the will of the commander, a will in which it is the will of the commander that is to be fulfilled, not the autonomous judgement of the one to whom the command is addressed; the latter must indeed desire the execution of the command, but only insofar as he has recognised that this execution is the object of the will of the one who issued the command.

In commenting on this passage from Hobbes, H.L.A. Hart adds:

> «[…] The commander characteristically intends his hearer to take the commander's will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of a commander's will that an act be done is intended to preclude or to cut off any independent deliberation by the hearer of the merits pro and con of doing the act. The commander's expression of will therefore is not intended to function within the hearer's deliberation as a reason for doing the act, not even as the strongest or dominant reason, for that

[2] T. HOBBES, *Leviathan*, 1651, Chapter XXV.

would presuppose that independent deliberation was to go on, whereas the commander intends to cut off or exclude it. This I think is precisely what is meant by speaking of a command as 'requiring' action and calling a command a 'peremptory' form of address. […] A second important feature of the reasons intended to be operative when a command is given […] *is* […] the 'content-independent' character of such reasons. […] The content-independence of commands lies in the fact that a commander may issue many different commands to the same or different people, and the actions commanded may have nothing in common; yet in the case of all of them, the commander intends his expressions of intention to be taken as a reason for carrying them out. It is, therefore, intended to function as a reason independently of the nature or character of the actions to be performed»[3].

The 'model of responsible obedience' differs from this in that it introduces into the mechanism of obedience a space for deliberation, a pause, situated between the issuance and the execution of the order, during which the recipient is required to engage in deliberation, to assess the order in relation to its conditions (certainly not in terms of opportunity, but) of legitimacy, and therefore in relation to the law; far from being triggered automatically, as in a Pavlovian reflex, in responsible obedience the execution of the order presupposes a sort of Kantian critique of the order received, since the recipient of the order is required to systematically investigate its validity and limits in relation to the body of norms from which the power to command derives in the person issuing the order: and this not only on a formal level – that is, one is not merely required to assess whether the order remains within the external limits beyond which the authoritative relationship does not exist – but also on a substantive level, as one must likewise assess the existence of the factual and legal prerequisites to which the law makes the power to command conditional. What emerges is a sort of, perhaps paradoxical, 'collaborative conception of the order', in which the addressee is not a mere mechanical executor of another's will, but rather both the one who issues the order and the one who receives it conceive their own work as an instrument for the pursuit – not of the will and benefit of the one who issues the order, but – of higher interests expressed to the highest degree in the law, of which both, each in their own role, are called upon to be interpreters. The authority of the person issuing the order does not, therefore, constitute a hermeneutic

[3] H.L.A. HART, *'Commands and Authoritative Legal Reasons'*, in *Essays on Bentham*, Clarendon Press, Oxford 1982, pp. 253–254.

barrier or an interpretative constraint on the recipient of the order; being the recipient of an order does not preclude the interpretation of the rules on the basis of which the order is issued; on the contrary, it requires it; and, if one believes there is a dissonance, a conflict between order and law, one must, «in a spirit of loyal and active participation, bring this to the attention of the one who issued it, stating the reasons» (Article 25(2) of D.P.R. 545/1986; now Article 729 of D.P.R. 90/2010, the so-called Military Regulations). What is set in motion by an order is therefore a dynamic of «loyal and active participation», of collaboration, each according to their own competences, in the pursuit of the public interests underlying the law. *Amicus Plato, sed magis amica veritas*.

We may also rename these two models in other ways. We might call the first the 'model of mechanical obedience', as it is a model in which the subordinate is required to obey mechanically, without the filter of reasoned thought; it is a model dominated by trust in the hierarchical principle, by the view that authority is always a good thing; the subordinate can happily slot into the chain of command, relying on their superior and on the benevolent immanence of the *Stufenbau* of which they are both cogs. Here, the subordinate is required to behave as if suffering from a dissociative identity disorder, in which their identity as a subordinate and that of an ordinary person constitute watertight compartments, each governed by its own morality, by its own system of ethical principles with which they are required not to interact: *when acting as a subordinate*, the subordinate is called upon to be guided by the principle of hierarchy and all that flows from it, without allowing themselves to be led astray by the principles that instead govern their conduct as *a member of the general public*, within the context of ordinary social interactions.

The second model we might instead rename the 'model of judicious obedience', in which, with the barrier between the two identities – between the two ethical systems - removed, the subordinate is required to assess the implications of carrying out the order in the light of that very system of principles, values and rules by which they are guided, or are expected to be guided, as an ordinary person. With the protective screen of the dissociative disturbance between the two identities removed, the subordinate is asked to integrate their role as a subordinate into the broader context of their own ethical life. The order is subsumed within common morality: the subordinate is called upon to account for its execution according to criteria that are ultimately derived from his morality as an ordinary person. Here we can imagine the subordinate as a sensible, balanced person who,

having received the order, weighs it up in the light of legality and the system of the highest ethical principles. What is required of him, therefore, is a judicious obedience.

3. The inversely proportional consequences of the two models

Beginning to trace these two models back to criminal law categories, we can say that the model of blind obedience refers – in a paradigmatic, though not exclusive, manner – to the category of the 'mediated perpetrator', of the executor as a mere instrument of the will of the person issuing the order, a sort of puppet in their hands: the act is entirely within the control of the person giving the order, whose will absorbs that of the person carrying it out.

The model of responsible obedience, on the other hand, refers to the category of 'joint criminal liability', of the shared participation of the person giving the order and the person carrying it out in the commission of the same unlawful act, of the joint liability of the two with respect to the same act: the executor ceases to be an automaton filled with the will of the authority, to become a subject fully liable for the offence; the person giving the order ceases to be the indirect perpetrator of the act materially committed by the executor, and is reduced to the status of instigator, or rather determiner, albeit qualified by their role.

In terms of criminal liability, the two models have consequences that are, so to speak, inversely proportional.

The model of blind obedience verticalizes responsibility in a twofold sense: as it expands the scope of the recipient's internal liability (their liability towards the person issuing the order, and more generally towards the institution in a hierarchical sense), it simultaneously restricts the scope of their external liability (that is to say, their liability towards third parties for the consequences of carrying out the order); the more they are held accountable for disobedience towards the hierarchy (towards their superior, the institution to which they belong, or the public authority), the less they are held accountable for obedience towards third parties; responsibility – disciplinary, but also criminal – for disobedience, as well as for insubordination, reaches here its maximum expansion, while, in inversely proportional measure, the scope of the executor's criminal

responsibility for the crime that the execution of the order integrates is reduced; and, on the other hand, specularly, the scope and force of the superior's claim of obedience towards the subordinate expands, but correlatively they remain tendentially alone in facing the criminal responsibility deriving from the execution of their order.

The model of responsible obedience moves in the opposite direction. In this model, the adjective 'responsible' refers not only to the idea that the subordinate must carry out the order 'with a sense of responsibility', but also to the idea that the person carrying out the order is not exempt from responsibility for their actions: responsible obedience means, amongst other things, that one is (made) responsible for one's own obedience; the more internal responsibility – the bond of blind obedience to authority – is loosened, the tighter the knot of external responsibility becomes for the executor: the conditions of the subordinate's responsibility towards the superior become more complex and nuanced; cases such as disobedience or insubordination become standardised, filled with implicit normative content (relating to the legitimacy of the order received and the subordinate's power and duty to assess it before carrying it out): 'disobeying' is no longer merely failing to do, or failing to do immediately, what the superior has requested, but omission in the full sense, without justification; even 'delay' is such not merely in a chronological sense, but only insofar as it is unjustified; even the 'order' counts as such only if it is *legitimate*. Consequently, the instances of a subordinate's liability *towards their superior* are reduced; conversely, however, and in inverse proportion, the scope of the subordinate's external liability increases – namely, the instances in which they are called upon to answer, *alongside their superior*, for having carried out the order; linked to this, whilst the superior loses a blind executor of their commands, they nevertheless gain a co-perpetrator, a participant in the criminal liability arising from the execution of the order, a *partner in crime*.

4. Models of obedience in positive law

These two models, if interpreted rigidly, are both far removed from actual reality: they are, in fact, ideal types; neither describes the situation of criminal law actually in force under Article 51 of the Italian Criminal Code and the microsystem of special rules

that interact with it (Statute of Civil Servants [D.P.R. 3/1957], Public Security Code [Law 121/1981], Military Code [Legislative Decree 66/2010], Military Discipline Regulations [D.P.R. 90/2010]). Nevertheless, each of these influences positive law differently (and thus has a different degree of penetration within it) depending on whether the law is more informed by authoritarian or, conversely, democratic political-legal principles. Whilst, in fact, the original logic of the relevant Italian criminal norms was more firmly aligned with the model of hierarchical obedience – of which, for example, it is not difficult to grasp the reflection in the institute of the 'unquestionable criminal order' referred to in art. 51 para. 4 – special legislation – which, following the entry into force of the Constitution, has sought to bring the subject matter back into line with constitutional principles, such as*, first and foremost*, those set out in Articles 28.1 («Officials and employees of the State and public bodies shall be directly liable, in accordance with criminal, civil and administrative law, for acts committed in violation of rights») and 52.3 («The organisation of the Armed Forces shall be guided by the democratic spirit of the Republic») – clearly follows the ideal of responsible obedience.

This is not, however, an evolutionary movement with a single trajectory. Even in the law currently in force, whilst generally informed by democratic principles and therefore – as mentioned – more inclined to accommodate the demands of the model of responsible obedience, there remain situations in which interpretative options more in line with the other model, or in any case discordant and not perfectly attuned to the logic of responsible obedience, find their way in.

Moreover, if certain interpretative solutions diverge from the model of responsible obedience, it is not necessarily the case that this occurs merely due to anachronism. It must in fact be borne in mind that even this model, if understood in a rigid, fundamentalist manner, risks leading to questionable practical outcomes. In particular, it risks becoming an unrealistic model, based on an imaginary conception of authority and the mechanisms of decision-making within hierarchical, and more generally authoritative, relationships. Whilst the model of blind obedience is based on obedience as pure automatism, on the figure of the obedient person as a cog in a machine, the model of responsible obedience is in turn based on a figure of the obedient subject which, when taken to extremes, also appears problematic: the figure of an obedient person who is 'all Ego', 'all conscience

and conscientiousness', disembodied and detached from the actual dynamics of decision-making.

Rather than the unrealizable model of an obedience always and at all costs responsible, it is perhaps more reasonable to turn to a variant of it, which we might call 'tragic obedience', which seeks to reconcile the demands of responsible, conscious obedience – ultimately grounded in democratic principles – with that 'unconscious', that peculiar emotional dimension which inevitably underlies and influences the decision-making process within the context of relationships of subordination. A model that gives due weight to the fact that – once the screen between the two 'divided identities', between the two ethical systems, which characterises the model of blind obedience, has been removed – the subordinate, having been made responsible, becomes the focal point for the conflicts, always possible, between those very identities, between those very systems; which places him in a tragic condition. Once the protective screen of the dissociative disturbance of the two identities has been removed, and order has been subsumed into common morality, the fact remains that order remains order, the subordinate remains a subordinate, and the hierarchy advances its claims: authority cannot be hastily discarded, nor can the requirement that sometimes arises for the prompt and certain execution of directives issued by the hierarchical superior (see, to give but one example, Article 1347 of Legislative Decree 66/2010). Above all, we cannot easily dispense with the different positions of power occupied by the parties to a hierarchical relationship; otherwise, other constitutional principles would be compromised, including, on the one hand, the principle of equality (since one cannot equate the position of the person carrying out the order with that of an *ordinary citizen*, who does not normally find themselves in the same situation of psychological pressure as the former) and, on the other hand, that of the personal nature of criminal liability (since the weight of authority and the hierarchical bond, insofar as they contribute to defining the objective contours and psychological implications of the situation in which the person carrying out the order acts, cannot fail to be reflected in the assessment of their criminal liability).

5. The recipient's mistake regarding the legality of the order

Traces of these considerations of reasonableness can, in fact, already be found in the way in which the relevant provisions are interpreted and applied. I provide two examples below, relating to the well-known exegetical problems posed by the last two paragraphs of Article 51 of the Italian Criminal Code.

I begin with the third paragraph of Art. 51, which establishes that «of the crime» consisting in the execution of a criminal order, not only the one who ordered its commission is responsible (para. 2), but «also the one who executed the order, unless, through mistake of fact, they believed they were obeying a lawful order». Why does the provision specify that only «mistake of fact» is relevant? How is this explicit mention to be understood? How, therefore, are the meaning and limits of the defence to be traced?

According to a first interpretative option, the provision in question limits itself, in a substantially tautological manner, to recalling the general rule of art. 59 para. 4 on putative justification (constituting in turn an application to justifications of the more general principle established in Art. 47)[4] : the expression «mistake of fact» would not have the literal meaning ordinarily attributed to it to distinguish it from 'mistake of law' by reason of the cause (respectively perceptive or interpretative of factual elements, or evaluative-interpretative of norms or normative elements); it would instead refer to that same type of error to which norms such as Arts. 47 and 59(4) attribute exculpatory effect: that is, mistake as to the fact, the erroneous representation of the criminal act one is committing, as opposed to the erroneous representation of its criminal-law qualification (mistake as to unlawfulness or as to the precept), of its criminal unlawfulness. That this is the meaning in which the expression is used in the language of the code emerges, moreover, from the heading of Art. 47, which – even in the face of a normative content referring, as said, to mistake as to the fact – precisely reads 'mistake of fact'. By evoking this expression, the third paragraph of Art. 51 would then merely reiterate the entire

[4] See, for example, F. ZACCARIA, *I limiti al dovere di obbedienza nel rapporto di pubblico impiego*, Santini, Rome-Sarzana 1962, p. 90; A. PAGLIARO, *Principi di diritto penale*, PG, 9th ed., Giuffrè Francis Lefebvre, Milan 2020, p. 481; F. MANTOVANI, G. FLORA, *Diritto penale*, PG, 12th ed., CEDAM, Padua 2023, p. 242; G. FIANDACA, E. MUSCO, *Diritto penale*, PG, 7th ed., Zanichelli, Bologna 2014, p. 292; C. FIORE, S. FIORE, *Diritto penale*, UTET-Wolters Kluwer, Milan 2016, p. 462.

normative content of the articles in question: «[*i*]f the agent mistakenly believes [*meaning, as to the fact*] that circumstances excluding punishment exist, these are always evaluated in their favor. However, if the mistake is determined by negligence, punishability is not excluded, when the act is made punishable by law as a negligent crime» (Art. 59(4)). Any mistake, whatever its cause, would have the exculpatory effect indicated in the provision, provided that it induces the subject to act in the erroneous belief of «obeying a lawful order»: even a 'mistake as to a law other than the criminal law' (such as, for example, an erroneous evaluation-interpretation of norms pertaining to discipline or service, or to the superior's powers, or again to one's duties towards them) «excludes the punishability» of the subordinate, «when», having induced them to believe that the received order was lawful (Art. 51(3)), «it has caused in them a mistake as to the fact constituting the crime» (according to the provision of Art. 47(3)). Nonetheless, although Art. 51 establishes nothing in this regard, from the indirect reference to the provisions of Arts. 47 and 59 it should also be inferred that the subordinate's responsibility in the form of negligence is not excluded, if their mistake is negligent and the act committed is made punishable by law as a negligent crime.

According to a second interpretative option, instead, the reference to «mistake of fact» in para. 3 of Art. 51 should be understood in a literal sense, thus excluding – besides mistake as to the criminal unlawfulness of the act – mistake as to an extra-criminal law, even when this translates into a mistake as to the fact[5] . Relevant would be only the perceptive mistake or one based on an erroneous interpretation of factual circumstances, while responsibility would not be excluded in the case in which the subject commits the act without erring about it, but convinced, due to erroneous interpretation of extra-criminal norms (for example, on competence or form), that it is lawful, and the order that has it as its object is legitimate. The basis for this interpretation, at least insofar as it refers specifically to the case of hierarchical orders rather than police orders[6], can easily be

[5] Thus, for example, D. SANTAMARIA, *Lineamenti di una dottrina delle esimenti*, Jovene, Naples 1961, p. 93.

[6] For the distinction between these two types of 'order', see, among others, T. PADOVANI, *Ordine criminoso e obbedienza gerarchica nel sistema penale italiano*, in 'Dei delitti e delle pene', 1987, p. 478: the former 'issued […] within the context of a legal relationship of subordination linking two subjects

identified in considerations perfectly consistent with the model of responsible obedience, as is clearly evident from the words of one of its authoritative proponents: in the case of hierarchical orders («which undoubtedly represent the most substantial and significant aspect of the issue»[7]), «the subordinate is institutionally bound to know the rules that underpin and govern his hierarchical subordination and the consequent duty of obedience, because otherwise he would end up as a laughing stock in the hands of any authority, without ultimately assuming any responsibility for obedience rendered *perinde ac cadaver*»[8] .

Finally, there is a third interpretative option: the concept of 'mistake of fact' in Article 51(3) should indeed be understood in the sense that this expression has in the heading of Article 47 (thus including all cases of mistake *of fact*, both those of factual origin and those of legal-interpretative origin: mistake regarding non-criminal law); however, this same type of mistake would be subject to different rules in the two cases, since, as mentioned, Article 51(3), unlike Articles 47 and 59 of the Criminal Code, does not provide for the possibility of liability for negligence where the error regarding the lawfulness of the order is 'negligent' and the offence committed is also punishable in the form of negligence; which would indicate a legislative intention to exclude such a possibility. *Ubi lex non dixit, noluit*: this principle applies all the more so in the present case, if it is true, as is correctly pointed out, that, as a general principle, in our legal system «every instance of punishable negligence must be expressly provided for by law (Article

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equally endowed with public-law status', the latter 'directed at one or more private individuals'. See also F. MANTOVANI, G. FLORA, *Diritto penale*, op. cit., p. 241.

[7] T. PADOVANI, *Ordine criminoso*, cit., p. 479.

[8] Ibid., p. 478. It has been stated in the text that this interpretation is consistent with the assumptions of the model of responsible obedience. However, there have been those in legal scholarship who have argued the exact opposite. I refer, in particular, to Marcello Gallo, according to whom «[*i*]nexplicably – *or all too explicably, if one considers the ideology of blind, prompt and absolute obedience* – the liability of the person who carried out the order is excluded only when, due to a factual error, they believed they were obeying a lawful order (Art. 51, paragraph 3, of the Criminal Code)», whereas the superior, «according to the general rules, may invoke in his defence not only an error regarding the fact constituting the offence (Article 47, paragraph 1, of the Criminal Code), but also an error regarding a law other than the incriminating law when it has caused an error regarding the fact constituting the offence»: M. GALLO, *Diritto penale italiano. Appunti di parte generale*, I, Giappichelli, Turin 2014, p. 310 (italics added).

42(2) of the Criminal Code)»[9] : a person who carries out a criminal order believing it to be lawful, due to a mistake of fact (whether factual or legal), would not be liable, not only where their mistake is blameless, but also where it is culpable and even if the act committed in execution of the order is punishable as a negligent offence[10] .

This latter interpretation appears preferable to the previous ones because, based on the idea that the legislator intended to «treat the [*subordinate*] with greater leniency in view of the state of moral subjugation in which he undoubtedly finds himself vis-à-vis the superior issuing the order»[11], which clearly moves in the direction of what we have referred to above as the 'model of tragic obedience'. In this way, it provides a reasonable corrective to the particular, perhaps excessive severity of the consequences that instead follow from the other interpretations.

Severity of the second interpretation, which is overly oriented towards a strict application of the dictates of responsible obedience, to the extent that it – considering a type of mistake (that concerning extra-criminal law) incapable of excluding the subordinate's liability, whereas, in application of the general rules (Art. 47(3)), it can certainly serve to exclude the superior's liability when it has led him to an error regarding the ordered act – leads «to the curious consequence that for the superior the scope of the exculpatory putative situation would be broader than for the subordinate»[12].

However, the first interpretation is also severe; whilst it allows for a broader scope of excusability regarding mistakes as to the legality of the order, by admitting a

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[9] S. CANESTRARI, L. CORNACCHIA, G. DE SIMONE, *Manuale di diritto penale*, PG, 2nd ed., il Mulino, Bologna 2017, p. 602.

[10] See C.F. GROSSO, *L'errore sulle scriminanti*, Giuffrè, Milan 1961, pp. 242 ff. In agreement with this view, F. ALBEGGIANI, *Art. 51 c.p.*, in *Codice penale commentato*, edited by M. Ronco and B. Romano, 4th ed., UTET, Turin 2012, p. 407; F. PALAZZO, R. BARTOLI, *Corso di diritto penale*, PG, 10th ed., Giappichelli, Turin 2024, pp. 370 ff.; S. CANESTRARI, L. CORNACCHIA, G. DE SIMONE, *Manuale*, cit., pp. 601–602.

[11] C.F. GROSSO, *L'errore*, cit., p. 243. See also F. PALAZZO, R. BARTOLI, *Corso*, cit., p. 371: «The meaning of this provision, interpreted in this way, probably lies in the consideration that the hierarchical relationship nevertheless exerts a strong *psychological* influence on the subordinate, such as to make it problematic to formulate a reproach of negligence or superficiality against him in verifying ("scrutinising") the legitimacy of the order».

[12] For this criticism, see C.F. GROSSO, *L'errore*, cit., p. 206, and p. 242, note 54.

responsibility of the executor who negligently believed the order to be lawful it operates a teleological reduction *in malam partem* of the provisions of Article 51(3) of the Criminal Code, which makes no mention whatsoever of such liability. It appears preferable, not least to avoid reducing the provision in question to a mere redundancy[13], to interpret it not as a mere – useless and indeed unjustified (why include it only in relation to the execution of the order and not also in relation to the other criminal defences?) – reference to Articles 47 and 59(4), but as a special provision in relation to them: special not in the sense of the phrase 'mistake of fact', but in terms of the rules to which such a mistake is subject, given the specific nature of the situation to which this provision refers.

6. The 'unquestionable criminal order'

The fourth paragraph of Article 51 raises no less intricate interpretative issues. If we take the provision literally, read in sequence with the preceding paragraph, it serves to exclude the liability of the executor, regardless of whether the latter was mistaken as to the unlawful nature of the order, in cases where the law does not permit him to question that nature. The execution of an 'unquestionable criminal order', even if the person carrying it out is aware of its illegality, cannot be attributed to that person's liability: liability would remain solely with the person who issued the order.

But what, exactly, is an 'unquestionable criminal order'? Let us begin by saying that we can define *as criminal* an order to commit an act that falls within the scope of a criminal provision, which no other legal provision authorises to be issued, nor therefore to be carried out. It follows that a criminal order, being an order that no legal provision authorises to be issued, is an «unlawful order» (according to the wording found in the fourth paragraph of Article 51). The two concepts, however, are not equivalent: every criminal order is unlawful, but not every unlawful order is criminal. The illegality of the order may depend, as is well known, on a lack of formal legitimacy requirements (form of the order, competence to issue it, competence to receive it) or substantive requirements (factual or legal prerequisites for the exercise of the power to order). It is not necessarily

[13] This is also noted by F. VIGANÒ, *Art. 51 c.p.*, in G. MARINUCCI, E. DOLCINI, G.L. GATTA (eds.), *Codice penale commentato*, 5th ed., Wolters Kluwer, Milan 2021, pp. 875 ff.

the case, however, that the absence of such requirements renders the order subsumable under a criminal provision: the unlawful order might concern the performance of a perfectly lawful act (in which case the unlawfulness of the order would not depend on what was ordered, but simply on the fact that the person who issued the order did not have the power to do so) or the performance of an act that is unlawful but not criminally relevant.

To summarise, therefore, a criminal order is an unlawful order—that is, one which the person issuing it has no authority to issue—whose object is the commission of an act constituting a criminal offence.

Having defined the criminal order in this way, what is meant when it is said that it is 'unquestionable'? On this point, as is well known, there are various interpretative options; and here too, as we saw previously with regard to paragraph 3, these are options that to a certain extent are influenced by, or aligned with, one or the other of the models of obedience we have indicated. Furthermore, as the preferred concept of non-questionability varies, so too does the way of understanding the nature (objective or subjective, justifying or excusing) of the exclusion of criminal liability of the subordinate that is derived from it.

6.1. Non-questionability as indisputability?

What we commonly refer to as an 'unquestionable' order is described in the wording of Article 51(4) as a situation in which «the law does not […] allow [*the executor*] any review as to the lawfulness of the order». If taken in a strict, literal sense, this description seems to refer to situations in which the subordinate receiving the order cannot oppose any kind of resistance, objection, scrutiny or judgement: they cannot object in any way or in any form («the law does not allow them any review») with regard to the order, but must simply carry it out promptly. This first version would constitute a very strict application of the model of blind obedience, in which any complaint or objection can already be regarded, if not as insubordination (e.g., through insult under Article 189(2) of the Code of Military Criminal Law), as refusal or delay liable to disciplinary or even criminal sanctions (Article 173 of the Code of Military Criminal Law).

It is not, however, difficult to demonstrate that such an understanding of unquestionable order is now precluded by a series of provisions which, in regulating public-law authority relationships, are guided by principles decidedly more in line with the model of responsible obedience: both in the sector of civil servants (Article 17, D.P.R. 3/1957 and the various National Collective Labour Agreements that reflect its provisions) and in the military sphere (Article 729, D.P.R. 90/2010) or in similar sectors (Article 66, Law 121/1981), it is in fact now established as a general principle – albeit applied in varying ways depending on the characteristics of the sector – that a person who considers an order received to be unlawful has *a duty to protest and/or report it*: there are, therefore, no criminal orders, or more generally unlawful orders, that can be defined as unquestionable in the specific sense of orders against which the recipient cannot in any way object, resist or protest.

6.2. Non-questionability as 'ultimate' binding force?

There is, however, scope for considering that an unlawful order may be non-challengeable in a second sense, namely as an order which the subordinate, despite having reported its unlawfulness, cannot *ultimately* refuse to carry out. The admissibility of orders of this kind – unquestionable *in that* they are ultimately *binding* – appears to find a legal basis in the principle of *confirmation*, which complements the principle of protest mentioned above: once the subordinate has pointed out that the order is, in their view, «manifestly unlawful», or in any case «not in accordance with the rules in force», if the order is repeated, he is required to carry it out (see, for example, Article 17(2) of D.P.R. 3/1957, Article 66(3) of Law 121/1981, and Article 729(2) of D.P.R. 90/2010). This dynamic, according to some authors[14] , means that in certain cases the subordinate is in effect bound, obliged, and required to carry out even orders which he considers, and which in the final analysis might indeed be, unlawful in that they are criminal. Following this approach, the 'principle of confirmation' would, in short, entail a significant qualification in the application of the rules governing public-law authority relationships to the model of responsible obedience: the subordinate's accountability would not extend

[14] E.g., M. GALLO, *Diritto penale*, cit., p. 311; F. VIGANÒ, *Art. 51 c.p.*, cit., p. 877.

beyond the power and duty to articulate their reasons for concern, their doubts regarding the legitimacy or criminality of the order received, encountering an insurmountable limit in the face of the superior's firmness and obstinacy, to which the subordinate, in the final analysis, would therefore have to yield, if not 'blindly' then at least reluctantly.

Such a conclusion, however, could not apply to civil servants: Article 17, paragraph 3, of D.P.R. 3/1957, in fact, specifies that «The employee must not, in any event, carry out the superior's order when the act is prohibited by criminal law»; with the consequence that, in such a case, the repetition – even if in writing – of the criminal order cannot render it binding.

The situation is different, at least *at first glance*, for military personnel and those treated as such, for whom there is indeed a duty to disobey an order – even a repeated one – but only where the order (is *manifestly* subversive or) *manifestly* constitutes a crime[15] . The question therefore remains as to whether an order that is criminal but not manifestly so might instead be considered binding on the military personnel; in which case, the possibility of challenging it would merely indicate the subordinate's ability to raise doubts regarding its legitimacy, without, however, precluding the fact that, once reiterated, the order (provided it is not manifestly criminal) must be carried out.

Given the non-reviewability in this sense (and within these limits), the resulting legal conclusion is that the provision referred to in paragraph 4 of Article 51 constitutes a ground for justification defence, the basis of which lies in the fact that, in certain cases (specifically those involving military personnel or similar), the requirement for prompt and certain execution of the order (or, to quote Bettiol, «the State's interest in hierarchical discipline»[16]) would take precedence over the protection of the interest which is violated by such execution[17]: it would not be «therefore the order as such that has exculpatory

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[15] See, for example, Articles 1349(2) of Legislative Decree 66/2010 and 729(2) of D.P.R. 90/2010. However, this is a 'counter-limit' which, even before the enactment of these provisions, part of the doctrine considered to be in force, by virtue of an interpretation essentially consisting of a teleological reduction *in malam partem* of the scope of application of Article 51.4. See, for example, G. BETTIOL, *L'ordine dell'autorità nel diritto penale*, Vita e pensiero, Milan 1934, p. 69.

[16] Ibid., p. 75.

[17] See, for example, G. DELITALA, *Adempimento del dovere*, in ID., *Diritto penale: Raccolta di scritti*, Vol. I, Giuffrè, Milan 1976, p. 472; G. BETTIOL AND L. PETTOELLO MANTOVANI, *Diritto penale*, 12th ed., CEDAM, Padua 1986, p. 374; G. CONTENTO, *Corso di diritto penale*, Vol. II, 3rd ed., Laterza, Rome-

effect in relation to the subordinate's action, but rather the rule that imposes on the subordinate the duty of obedience so that the activity of public bodies is not paralysed»[18].

One has to add that this would be a rather peculiar ground for justification, which is at odds with some of the characteristics usually attributed to the category of justification defences. First, in terms of *its basis*, since the exculpatory effect would not in this case derive from directly balancing the harmed interest, protected by the criminal provision, against the interest satisfied by the conduct of executing the order[19], but rather against the general interest in the prompt execution of orders, whatever that may be and whatever interest they therefore actually satisfy: a type of balancing which – without being identical to it – bears greater resemblance to that underlying mere grounds for non-punishability (or non-exculpatory defences), rather than to that which properly constitutes a justification defence[20]. There are peculiarities, however, also in terms of *the effects*, since the execution of an unquestionable criminal order, although justified, would remain preventable by self-defence[21], and furthermore the justifying effect would not extend to

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Bari 2008, p. 270 ('the *ratio legis* of the defence – as regards the effect attributed to an order that is not lawful but binding […] – is certainly to ensure, by enshrining the primacy of the duty of hierarchical obedience, the functionality and efficiency of the actions of public administration bodies'); F. VIGANÒ, *Art. 51 c.p.*, cit., pp. 876 ff.

[18] G. BETTIOL, L. PETTOELLO MANTOVANI, *Diritto penale*, cit.

[19] G. BETTIOL, *L'ordine*, op. cit., pp. 73 ff.

[20] Justification defences strike a balance between two interests that come into direct conflict *in* the commission of the same act: the same conduct, whilst infringing upon a certain interest, also fulfils another interest that is in direct conflict with the first, such that the infringement of the interest protected by the criminal provision serves as a means of safeguarding the counter-interest that the justification seeks to protect. In the case of mere non-punishability, instead, the infringement of the interest protected by the criminal provision serves no purpose; it is not in itself a means directly serving to safeguard the counter-interest underlying the provision that renders the act non-punishable. On the difference between these two types of balancing, see, for example, F. PALAZZO, R. BARTOLI, *Corso*, cit., pp. 202 ff. In the case of an unquestionable criminal order, something analogous to this second type of balancing occurs: the executive conduct would be 'justified' not so much in consideration of the value directly realised through it (since, given the criminal order, that value cannot certainly be greater than that protected by the criminal provision violated), but in consideration of a more general value (obedience, the hierarchical principle, that the action of the state should not be paralysed or severely disrupted: G. BETTIOL, L. PETTOELLO MANTOVANI, *Diritto penale*, cit., p. 371) which underlies that conduct.

[21] See, for example, M. GALLO, *Diritto penale*, cit., pp. 311–312.

all those involved (not in particular to the superior who gave the order), but would apply only to the subordinate who carried it out[22] .

However, setting aside the doctrinal difficulties, the notion that a criminal order is beyond question and therefore binding – and thus serves as a justification for executive action – also raises concerns of a different nature. It is not easy to reconcile this idea with the fact that, as already noted, various provisions stipulate that a subordinate, even if military or equivalent, has a duty to disobey a criminal order when it is manifestly so. The 'manifest criminality' that acts as a counterbalance to the (supposed) non-questionability of the order is, in fact, not something qualitatively different from that 'manifest unlawfulness' or 'not in accordance with the rules in force', which already entitles the subordinate to raise an objection; if anything, it is a specification of it. The subordinate has the right to protest if they consider the order to be blatantly unlawful, or in any case not in accordance with the regulations in force: if the order is reiterated, they must carry it out, *unless* the reason for its (perceived) unlawfulness lies in its being (perceived as) manifestly criminal. However, and this is a crucial point, if it was immediately evident to the subordinate («manifestly», «believes») that the order was unlawful *because it was criminal*, the repetition of this order certainly cannot trigger the obligation to carry it out, as such an effect is already precluded by what the subsequent part of the provision stipulates for the case where the reason for the order's unlawfulness was precisely its «manifest criminality»: in such a case, in fact, the criminal nature of the order was 'manifest' from the outset, if only to the subordinate to whom the order was addressed[23].

Furthermore, the 'manifest' nature of criminality places this counter-limit on an epistemological plane: as succinctly summarised by Gaetano Contento, «the illegality of an order must be considered manifest whenever it is *certain, indisputable* and *beyond question*, whether it is *merely* apparent or, conversely, has been artificially concealed or

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[22] See, for example, G. MARINUCCI, entry *'Cause di giustificazione*', in *Digesto delle discipline penalistiche*, II, UTET, Turin 1988, p. 137; F. VIGANÒ, *Art. 51 c.p.*, cit., p. 877.

[23] The only possible, though rather far-fetched, exception to this reasoning might perhaps be the case where the order is indeed (not manifestly) criminal, but for reasons other than those that had originally led the subordinate to believe it, although not criminal, was nonetheless 'manifestly unlawful' or in any case 'not in accordance with the rules in force'.

masked by false premises that do not in fact exist»[24] (but, we might add, it is nonetheless evident to the person to whom the order is addressed). Understood in this way, the manifest nature of criminality, and its significance as a counter-limit to non-reviewability, seems to pertain more to the subjective aspect of criminal liability than to the objective one. Moreover, as is also acknowledged by supporters of the justifying nature of the defence[25] , the counter-limit in question is grounded in the fact that, when the criminality of the order is evident to all, or when in any case its recipient is certain of it, the general presumption of the legitimacy of orders issued by hierarchical superiors ceases to apply, whilst it is precisely this presumption that justifies the non-questionability of orders from authority. Understood in this way, however, the counter-limit ends up appearing at odds with an objectivist-justifying conception of non-questionability: as Padovani rightly notes[26], whether or not the criminal nature of the order is manifest, if its relevance is constructed in subjectivist terms, as a limit to the possibility of protesting one's ignorance of the criminal nature of the order, one ends up attributing to it a significance entirely different from the objectivist-justifying one, which is instead founded, as has been said, on the prevalence of the interest in the prompt and certain execution of the order, even if criminal. The counter-limit of manifest criminality constitutes, in essence, a mechanism for giving concrete form to the judgement of non-reviewability, and thus to the limit of the subordinate's liability in the case of a non-reviewable order; as such, it is a dogmatic-normative instrument that allows non-questionability to be used not as a rigid, standardised parameter linked to legislative presumptions, but to be applied in light of the specific circumstances of the individual case. In short, it is an equitable parameter which, operating in an osmotic manner with respect to the non-reviewability to which it is opposed, shares its nature: if one is subjective in nature, so too must the other be.

Moreover, once it is asserted – as is done by those who frame non-reviewability as binding force and its legal effect as justification – that, in cases of non-reviewable criminal orders, the interest in hierarchical discipline takes precedence over the legal object of the criminal provision that has been breached, it is not clear why the mere fact

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[24] G. CONTENTO, *Corso*, cit., p. 273.

[25] See, for example, G. DELITALA, *Adempimento*, cit., pp. 473, 474; and also F. VIGANÒ, *Art. 51 c.p.*, cit., p. 878.

[26] T. PADOVANI, *Ordine criminoso*, cit., p. 485.

that the criminality is or is not manifest should overturn the outcome of that balancing exercise[27] .

A final objection can be raised against the objective-justifying interpretation of Article 51(4), and it is perhaps the strongest and most decisive: for a criminal order – not manifestly so – to become binding once repeated, it would be necessary for the failure to carry it out to constitute an offence for the subordinate, that is, for the subordinate to be liable to punishment for having failed to carry it out; which, however, is not the case: failing to carry out a criminal order, even if not manifestly so, does not render the subordinate liable to punishment; he commits no offence[28] : neither disciplinary nor criminal, since, for example, Article 173 of the Code of Military Criminal Law does indeed punish disobedience as a criminal offence, but it is now settled that what is relevant for the purposes of that offence is not the unlawful order, let alone a criminal one[29],

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[27] To overcome this objection, it would be necessary to construct the concept of 'manifest criminality' in an objective, rather than subjective, sense, something which, however, to my knowledge has never been proposed to date. One could, for example, apply the adjective 'manifest' to the 'seriousness' of the ordered offence, rather than to the fact that its criminality is known, either generally or even just to the recipient of the order: a criminality *so serious* that it should be evident to everyone, indeed manifest. This reasoning is in some ways analogous to that underlying the well-known 'first Radbruch formula', according to which even an unjust law is law, and therefore a binding norm, but ceases to be so when it is intolerably unjust (I draw this suggestion from a discussion with Dr Gaetano Carlizzi during the ABIDE meeting held in Palermo on 12 June 2025). What would be relevant, from this perspective, would not be the element of knowledge, or the more or less widespread awareness, of the criminal nature of the ordered act; rather, the gravity of that act would be relevant, regardless of whether or not this is known: 'manifest' would here have a normative-moral value, not an epistemic one; it would not be a matter of criminality that everyone is aware of (e.g., because it derives from a law that has been the subject of extensive public debate), but of criminality that is evident to anyone who exercises their moral and civic sense appropriately: a criminality regarding which there is no relativism amongst reasonable persons, criminality that is beyond dispute, which anyone who exercises their moral judgement appropriately should ultimately be convinced to recognise.

[28] See, for all, T. PADOVANI, *Diritto penale*, 14th ed., Giuffrè, Milan 2025, p. 300; D. PROVOLO, *Esecuzione dell'ordine del superiore e responsabilità penale*, CEDAM, Padua 2011, p. 99.

[29] See, for example, D. NOTARO, *Lineamenti di diritto penale militare italiano*, 2nd ed., Giappichelli, Turin 2025, pp. 276 ff.

already for the fact that it is difficult for such an order to be considered, as required for criminal liability, «pertaining to service or discipline»[30].

6.3. Non-questionability as psychological pressure

It therefore seems we must conclude that there are no criminal orders in our legal system that can be described as non-questionable in the sense of being – even if only *in the final analysis*, after *confirmation or reiteration* – legally binding[31] . This conclusion, however, not only strips the fourth paragraph of Article 51 of its normative content but also risks leaving the subordinate in a position of such full and pervasive accountability that it overlooks the actual decision-making mechanisms in cases where a hierarchical relationship exists between the ordering party and the recipient, characterised, as in the military, by a particular rigidity: the subordinate thus finds himself caught in a situation in which two regulatory frameworks weigh upon him: one consisting of the superior's authority and his ability to retaliate against any disobedience by exercising a power which, however abusive or otherwise questionable in its legal legitimacy, remains entirely real, concrete, factual and pending; the other, by contrast, consists of criminal law, which prohibits the commission of the ordered act when it is criminal. It is clear that the normative force of the two pressures is different and, if you like, inversely proportional: whilst the force of criminal law is imperative in the abstract, that of the superior is so in concrete terms; whilst the criminal order is open to challenge in the abstract and is not legally binding, it is not necessarily the case that it does not exert any kind of pressure or coercive force on its recipient.

For this reason, whilst not attributing to it a legal binding nature or a justifying effect that it cannot possess, it is nevertheless appropriate not to deprive so-called 'non-questionable' orders of any exculpatory significance, nor, therefore, to disregard entirely

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[30] See, for example, B. PELLEGRINO, *Sindacato di legittimità sostanziale dell'ordine e disobbedienza nel sistema penale militare*, in «Giustizia penale», II, 1974, pp. 185, 198; D. PROVOLO, *Esecuzione*, cit., pp. 72–73; see also the contribution by D. NOTARO in this volume.

[31] E.g. F. PALAZZO, R. BARTOLI, *Corso*, cit., p. 371: «Today, under the new constitutional framework, it is held that there are no longer any orders that are beyond question, with the consequence that the subordinate is always obliged not to carry out an unlawful criminal order».

the provisions of Article 51(4), but rather to interpret it differently, so as to conceive of it in strictly subjective terms, that is, as an exculpatory ground[32] .

Even a subjective interpretation of non-questionability, however, can be articulated in (at least two) different ways.

In a first sense, it can be understood as psychological pressure[33] . The basis of Article 51(4) would therefore lie in the fact that «the person bound by an obligation of prompt obedience does not […] have the normal freedom of self-determination necessary to demand different conduct in accordance with the law»[34]. This interpretation, however, in addition to excluding cases which, as we shall see shortly, appear worthy of consideration, would in turn require that 'manifest criminality' be constructed not in subjective but in objective terms, broadly in line with that interpretation of 'manifest criminality' as 'intolerable gravity', which was hypothesised *above* in note 27: indeed, for the psychological pressure of an unquestionable order to arise, it is always necessary that the subordinate recognise such criminality, that it be at least manifest to him; otherwise, he would lack a legally sufficient reason to feel psychologically compelled to carry out the order received. This places us at a crossroads: either, understanding 'manifest' criminality in an epistemically-subjective sense, we resign ourselves to considering it present in every case of psychological pressure (and therefore, according to the interpretation considered here, in every case of relevant 'unquestionability'), but this would result in a paradoxical effect of structural self-sabotage of the defence of Art. 51(4) (prevented from functioning by one of its own conditions of operation), or, if one wishes to leave a margin of applicability for the defence of non-questionability as psychological pressure, one must resign oneself to constructing the counter-limit of manifest criminality not in a subjective-epistemic sense, but in an objective one, as exceeding that threshold of gravity of the prescribed offence, beyond which the balance

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[32] This is the view of the majority of recent legal scholarship: e.g., F. MANTOVANI, G. FLORA, *Diritto penale*, cit., p. 243; T. PADOVANI, *Diritto penale*, cit., pp. 299–301; M. ROMANO, *Commentario sistematico al codice penale*, Vol. I, *Arts. 1–84*, 2nd ed., Giuffrè, Milan 1995, p. 517; C. FIORE, S. FIORE, *Diritto penale*, cit., pp. 463–466; G. FIANDACA, E. MUSCO, *Diritto penale*, cit., p. 293; S. CANESTRARI, L. CORNACCHIA, G. DE SIMONE, *Manuale*, cit., p. 602.

[33] E.g., S. CANESTRARI, L. CORNACCHIA, G. DE SIMONE, *Manuale*, cit., pp. 602–603.

[34] G. FIANDACA, E. MUSCO, *Diritto penale*, cit., p. 293.

between the harm to the interest protected by the violated criminal provision and the requirements of the hierarchical principle could no longer reasonably tip in favour of the latter. This, however, in an unexpected and once again rather paradoxical manner, would lead us back to an objective-justifying conception, of which non-questionability as psychological pressure therefore risks appearing to be a mere disguise.

Furthermore, this interpretation is difficult to reconcile with the provisions of Article 51(4) of the Criminal Code: since, as we have seen, there are no cases in which a criminal order can be said to be legally binding, it is unclear how, from the perspective of psychological pressure, the phrase «where the law does not allow him any discretion as to the lawfulness of the order» should properly be interpreted. In short, if the provision is to be read in terms of psychological pressure, this pressure must stem from the conflict between one law – criminal law – which prohibits the act, and another law which instead prohibits questioning the order even though it is criminal: in this respect too, therefore, the psychological pressure argument proves to be a sort of disguise for the argument that bases the defence on the (alleged) binding nature of the criminal order. If, in fact, it is to be compatible with the letter of Article 51(4), psychological pressure can only be understood as the manifestation, in the subordinate's psyche, of a genuine normative conflict between the imperativeness of the criminal law , which prohibits the commission of the act, and a supposedly binding nature of the order, despite its criminality[35] .

6.4. Non-questionability as authority

It seems more plausible to interpret non-questionability as an expression of the epistemic and moral authority, or ordinary reliability, of the authority in question. This

[35] This difficulty is clearly highlighted by C. FIORE, S. FIORE, *Diritto penale*, cit., pp. 465–466, who believe they can overcome it by distinguishing between an objectively insurmountable conflict – which would not arise in the present case given the non-binding nature of the criminal order – and a conflict nevertheless remaining on a subjective level, which would instead be the one faced by the subordinate, who, for that reason, would indeed be excused. The clarity of the argument, however, does not alter the literal wording whereby Article 51(4) requires that it is «the law» which does not allow the subordinate any review regarding the legitimacy of the order: if the argument of psychological pressure is to be made compatible with this provision, the conflict cannot be merely internal or subjective, but must already be found at the level of the law.

approach is consistent with the general conception of *authority as service*, famously defended by Joseph Raz, according to which authority performs a service for the benefit of those subject to it, helping them to better conform to the reasons for acting that they already possess; thus, rather than replacing individual judgement, it mediates it, providing guidelines that make rational action more effective and coordinated[36] . Similarly, a superior holds authority over a subordinate, not only moral authority (with regard to determining what is necessary or at least appropriate to do in a specific case), but also epistemic authority (with regard to the competence to judge the legitimacy, and more specifically the criminal lawfulness, of what they order to be done): the subordinate must be able to rely on the fact that the superior is adequately aware of the applicable rules, and applies that knowledge appropriately when issuing orders, thereby making it reasonable for the subordinate, in carrying out what has been ordered, to proceed on the basis of a general, ordinary presumption of the order's legitimacy[37]; non-questioning is therefore to be understood in the sense that the subordinate is ordinarily required to trust the authority issuing the order, its competence not only in fact but also in law, as well as its ordinary good faith, that is, the fact that normally the superior will not exploit their authority to instigate the commission of criminal acts. The non-questionability of an order, even if criminal, marks, in short, as has been effectively stated, «*the limit of the enforceability of the duty to disregard the execution of the order*. It is precisely around this limit that the non-punishability of the executor essentially revolves: when he lacks the powers of verification and control necessary to enable him to perceive its criminality, he cannot be required to refuse to carry it out, as he is in principle obliged to do»[38].

From this perspective, the exclusion of liability is grounded here in a situation essentially comparable to a mistake as to the criminal unlawfulness of the act, in line with Article 5 of the Criminal Code as amended by Constitutional Court Decision 364/1988. The non-questionability of the criminal order as a special case of excusability of the

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[36] See, e.g., J. RAZ, *The Morality of Freedom*, Clarendon Press, Oxford 1986.

[37] See *supra*, note 25 and corresponding text.

[38] T. PADOVANI, *Diritto penale*, cit., p. 300. Similarly, D. NOTARO, *Lineamenti*, cit., p. 64; D. BIANCHI, *Art. 51 c.p.*, in T. PADOVANI (ed.), *Codice penale*, Vol. I, 7th ed., Giuffrè Francis Lefebvre, Milan 2019, p. 432.

mistake of law[39] . Devoid of any claim to objective legal binding force, it can be traced back to a subjective dimension of excusability, based on the ordinary presumption of legitimacy and on the epistemic authoritativeness of the ordering authority.

This interpretation not only allows for practical solutions that do not take the dictates of the model of responsible obedience to extremes – whilst taking due account of the differential value that authority introduces into the subordinate's decision-making process – but also provides a clear explanation of the counter-limit of manifest criminality. This is understood, in turn, not as an external and incongruous corrective, but as an epistemic threshold beyond which trust is no longer reasonable or legally tolerable, thus acting as a limit that consistently operates on a subjective-epistemic level, which is triggered when the subordinate is certain of the criminality of the order (*individually manifest criminality*) or the criminality of the ordered act is so blatant that it cannot reasonably be believed that he was unaware of it (*generally manifest criminality*).

7. Conclusions

The general conclusion we can draw from the foregoing is that the models of blind obedience and responsible obedience, despite their heuristic function, prove to be inadequate when taken as rigid paradigms: the former tends to dissolve the obedient subject into a mere instrument of another's will, whilst the latter risks projecting onto the subordinate an excessively rationalised and abstract image, incapable of grasping the actual weight of hierarchy and authoritative pressure.

Positive law, as we have seen, as it is interpreted, does not adhere fully to either of these models. Rather, it operates in an intermediate zone, in which obedience is indeed subject to a process of accountability, but without the legal significance of the hierarchical bond being completely denied. The interpretative difficulties that have emerged in relation to paragraphs 3 and 4 of Article 51 of the Criminal Code clearly demonstrate this ambivalence: on the one hand, the legal system requires the subordinate to make a critical

[39] For a similar interpretation, see G. ROSIN, *Il militare tra dovere di obbedienza e dovere di disobbedienza. L'esecuzione dell'ordine criminoso*, in «Rassegna di giustizia militare», 1982, pp. 203 ff.; D. PROVOLO, *Esecuzione*, cit., pp. 111 ff.

assessment of the legitimacy of the order; on the other, it recognises that such an assessment faces limits on what can reasonably be expected, linked both to the institutional position of the individual and to the authority of the superior issuing the order.

From this perspective, the idea of ‘tragic obedience’ appears to be a particularly fruitful interpretative key. It allows us to take seriously the often-overlooked reality of the conflict weighing on the subordinate once the protective shield of mechanical obedience has been removed: a conflict between criminal law and hierarchical command, between personal responsibility and reliance on authority. Far from justifying the automatism of obedience, this model invites us to consider how authority exerts a normative and psychological force that cannot be ignored when assessing the perpetrator’s responsibility.

Ultimately, criminally relevant obedience cannot be understood either as blind submission or as an isolated exercise of individual conscience, but as a *situated practice*, intrinsically conflictual, which calls upon criminal law to strike a difficult balance between demands of discipline, protection of fundamental interests, and respect for the person as a center of imputation of responsibility. It is in this tragic space, and not in the purity of abstract models, that the democratic soundness of obedience to authority is played out.