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Duties of discipline, between blind obedience and responsible obedience: limits on the discretion of military personnel and that of the judge, in cases of disobedience and failure to comply with instructions

English version of the chapter *I doveri di disciplina, tra obbedienza cieca ed obbedienza responsabile: limiti alla discrezionalità del militare e a quella del giudice nei reati di disobbedienza e di inosservanza di istruzioni ricevute*, in Brigaglia M., Pino. G., Vallini A., *Obbedienza e responsabilità*, Roma Tre Press 2026, pp. 163–197.

ABSTRACT

The question of the criminal relevance (pursuant to Article 173 of the Military Penal Code in Peacetime) of disobedient conduct by a member of the military who has received an illegitimate order cannot be addressed without examining the complex relationship between the review by the criminal court and the administrative merits, nor without considering the constitutional significance of the principle of continuity of the Public Administration's actions. Furthermore, given the structural differences between the offence of disobedience and that of failure to comply with instructions (Article 125 of the Military Penal Code in Peacetime), for the purposes of Article 173, it is the breach of disciplinary duties that is relevant, with the impairment of service remaining in the background.

KEYWORDS

Disobedience; review by the criminal court; administrative merits; illegitimate military order; legal bindingness; impairment of service; failure to comply with instructions.

*Duties of discipline, between blind obedience and responsible obedience:
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of disobedience and failure to comply with instructions²*

SUMMARY: 1. Introduction – 2. The offence of disobedience between protection of discipline and guarantee of service efficiency – 3. From blind obedience to responsible obedience: the offence of failure to comply with instructions as an *a contrario* argument to support the predominant role of discipline in the offence of disobedience – 4. Disobedience and orders involving a high degree of discretion: the motive of the offence, between conservative purpose, ideological objection and orientative aspiration – 5. The relationship between the incidental assessment of the legitimacy of a military order and the exercise of the power to set aside such orders by the criminal court – 6. The contraindications to judicial interference in administrative merits: the *decisum* and the orientation of social behaviour.

1. Introduction

In a scenario dominated by the fluid shifting of domestic and transnational legal rules, along the fault line of newly established geopolitical balances, we are witnessing a sharp shift in the established principles of the organisation of the democratic state and the international community, towards a regimentation of judicial control over the activities of the public administration.

If, as has already been observed, in the “delicate structural balance, like complementary fibres of the same organic fabric, authority and freedom intersect, one sliding along the striations of the other, and ensuring, through a balanced contraction, that constant muscular motion which allows the

¹ Deputy Military Prosecutor at the Military Court of Naples.

² This contribution revisits and expands upon the article previously published by the same author, R. GALASSO, *La risoluzione delle antinomie giuridiche, tra ingerenza giudiziale nel merito amministrativo e solidità argomentativa della decisione, nell'orientamento dei comportamenti sociali*, in “La Legislazione Penale”, no. 1, 2025, pp. 286 ff.

law to keep pace with social evolution”³, it is true that the powerful muscles of democratic institutions are struggling to keep pace with the rapid upheaval of socio-economic structures, the organisation of work and production – not least in light of technological progress, the digitisation of commercial contacts, the triumph of robotics and the associated crisis of traditional business models – to the point of risking a rift within which an authoritarian drift could dangerously take root.

The growing development of Asian and South American economies and the spread of a virtual, global market – characterised by the dematerialisation of business structures and the shortening of the supply chain – together with the relocation of production centres to geographical areas where labour costs can be reduced (while also capitalising on the advantages of less legally sophisticated and labour-protective regulations) on the one hand lead to a rapid saturation of labour demand; on the other, they impose greater competitiveness, including at the regulatory level, moving towards a progressive streamlining of political, administrative and business decision-making procedures.

The possibility is that, in a frantic race towards modernisation and effective competitiveness, certain rights may be trampled upon or certain freedoms sacrificed.

Against the backdrop of rapid change, we are thus witnessing a distinctive characterisation of judicial review that takes on a two-pronged logic: more intrusive in the regulation of economic relations (where the principle should, instead, be that of the broadest possible promotion of private

³ See R. GALASSO, *Profilassi vaccinale illegittima e limiti al sindacato sull'ordine militare relativo alla somministrazione: reato di disobbedienza e principio di continuità amministrativa*, in “L’Indice Penale”, no. 3, 2023, p. 48.

autonomy, pursuant to Article 41 of the Constitution)⁴ and more restrained with regard to the exercise of public power⁵.

From this latter perspective, for example, the changes introduced by Law No. 114 of 2024 (the so-called Nordio reform) would appear to be oriented, where, first and foremost, with the abolition of the offence of abuse of office, the legislator seems to have expressed a clear intention to preserve, more distinctly, the boundaries between the judiciary and political-administrative activity, reducing the scope for judicial review of decisions made by the public administration and the possibility of undue judicial interference⁶.

⁴ The rules governing the renegotiation of contracts between companies, within the framework of settlement procedures, appear to be moving in a similar direction. These are regulated by the new Code on Corporate Crisis and Insolvency (CCII) referred to in Legislative Decree No. 14 of 12 January 2019 (as last amended by Legislative Decree No. 83 of 17 June 2022), No. 83), where specific obligations are laid down for the parties (subject to judicial review) to renegotiate contractual terms where the balance of the contract has been altered by specific economic circumstances, making it clear that “the guiding light of protection would evidently end up illuminating the need to preserve the business, with a view to its continuation, rather than the interests of the creditor class, from a purely liquidation-oriented perspective”, thereby associating “the instrumental suspension of the rules of ordinary law (...) inevitably with the foreseeable risk of a distortion of competition in the market, as the company continues to operate, competing with other entities, but with the advantage of being immune from the exercise of self-protection prerogatives by the faithful creditor, from termination mechanisms and, in general, from expropriation measures”. In this regard, see R. GALASSO, *La gestione della sopravvenienza nell’ambito della procedura negoziata della crisi di impresa, tra intervento del giudice e obbligo di rinegoziazione*, in “Giustizia Civile”, no. 2, 2024, p. 289.

⁵ G. VICICONTE (*Il controllo del giudice penale e del giudice contabile sulla discrezionalità amministrativa: la legalità dell’esperienza giuridica concreta*, in “Rivista della Corte dei Conti”, no. 3, 2021, p. 51) observes that, with a view to providing tools to stimulate the economic cycle, the legislature has initiated a process of scaling back the forms of judicial oversight over the administration’s actions, with the specific aim of curbing the gradual emergence of a so-called ‘defensive’ administration, up to the introduction of the recent regulatory framework specifically dedicated to simplifications, in relation to the fulfilment of whose requirements control over administrative discretion appears to be receding, in a delicate balance between legality and efficiency.

⁶ On the other hand, a similar approach – albeit less evident – appears to emerge, in a transparent manner, from the amendments to the Code of Criminal Procedure, where “the legislature would seem to have expressed the need to limit the prejudicial effects attributable to the public prosecutor’s actions, by introducing more stringent requirements for entry in the register of suspects (as serious indications of guilt are now required, pursuant to Article 335 of the Code of Criminal Procedure); promoting the intensification of judicial oversight of the public prosecutor’s activities (pursuant to Article 335-ter of the Code of Criminal Procedure, the judge for preliminary investigations, when required to perform a procedural act, if he considers that the offence under investigation should be attributed to a person who has not yet been entered in the register of reported offences, after consulting the public prosecutor, shall order that person to be entered in the register by means of a reasoned decree)”, thereby witnessing a “progressive functional divergence between the trial judiciary and the prosecuting judiciary, within the framework of new limits and controls, reflecting a move beyond the conception of the public prosecutor as a guarantor (as outlined in Article 358 of the Code of Criminal Procedure, in light

On the international front, moreover, recent armed conflicts and the rapid geopolitical escalation of tensions are undermining long-established principles regarding territorial sovereignty, retaliation, neutrality and rules of engagement, whilst the debate on rearmament – which had been ideologically sidelined, much like the very concept of war, which had effectively given way for a long time, at least on the Old Continent, to supranational, European or, in any case, diplomatic discourse.

The very principles governing the rescue of shipwrecked persons, asylum and reception are now competing with equally alarming demands for police control, terrorism prevention and the containment of social conflict, whilst, in other respects, there is an urgent need to protect, recognise and integrate those of non-EU origin who were nevertheless born on national territory (so-called *ius soli*).

Thus, the question of the role of the jurist in upholding the democratic order resurfaces, as a guardian of the principles and rules governing social relations, whilst at the same time being called upon – in their role of harmonising innovation and tradition, of which they are the custodian – to assess change with a sense of reality and feasibility.

It is only within such a dialectic that, indeed, the risk of *the impasse* that would otherwise fuel consent to any authoritarian drift seems to be averted. In other words, it seems necessary that the jurist, on the one hand, in safeguarding the founding constitutional values, should interpret the rules from the perspective of the broadest possible flexibility, reflecting the system's capacity to withstand the pressures of socio-economic change, containing them without constraining them, and reabsorbing them into their original state of equilibrium (so-called 'elastic reaction'); on the other hand, that they cultivate a progressive attitude, capable of identifying the areas where innovation may exert pressure to the point of deformation, albeit within the limits of an irreversible yielding (so-called 'plastic reaction').

On the other hand, although dynamic projection is not characteristic of jurisprudence – being a science of observation and harmonisation, of bringing every new body generated by legislation back into the system, and thus looking more to the past than to the future – Jemolo's teaching seems to remain relevant where, in describing the ideal model of a jurist, warned that they “must be a living

of which his office is called upon to seek the truth and, therefore, to carry out all activities necessary for that purpose, including investigations into facts and circumstances in favour of the person under investigation) and, perhaps, in response to the related perceived need to prevent the prejudicial effects associated with initiatives deemed not to have been adequately considered”. Thus, R. GALASSO, *Rapporti tra procedimento penale e valutazione amministrativa per l'avanzamento in carriera del militare che vi sia sottoposto. Le modifiche all'art. 1051, co. 2, lett. a), d.lgs. 15 marzo 2010, n. 66 (Codice dell'ordinamento militare)*, in *Riforma Nordio. Commento alla legge n.114 del 9 agosto 2024*, edited by V. GIORDANO, Merita Edizioni, Turin, 2024, pp. 121 ff.

person, with diverse interests in every sphere, possessing understanding and knowledge across a wide range of fields [...] more vibrant than practitioners of other professions or other branches of knowledge, who are more inclined to confine themselves to circles of interest specific to a narrow group, and to sever communication with those who do not belong to that group”⁷.

In this sense, an approach oriented, for example, towards dogmatic insularity within a fragmented landscape of legal microsystems that do not communicate with one another does not seem at all satisfactory (one might consider pan-penal and/or pan-civil law theories, in relation to offences such as fraud or the exploitation of vulnerable persons, which incorporate, as constituent elements, legal concepts specific to contract law, such as voidability due to fraud or nullity due to the contract’s contravention of mandatory rules).

In this regard, it seems outdated to disregard a holistic approach to the analysis of legal rules, opting instead for the creation of monads disconnected from reality.

It is precisely from this perspective that the issue concerning the relationship between the illegality of a military order and the offence of disobedience must be addressed, where – also in light of the principles of administrative law – the continuity of administrative action must be ensured, and whether conduct involving non-compliance with a received order is punishable, even where the order is vitiated by the typical defects of an administrative act.

Within the framework of the general picture outlined above, it therefore seems advisable to resolve the doubt regarding the binding effect of the illegitimate order (subject to its manifest criminality) and the related criminal liability (Article 173 of the Military Penal Code in Peacetime, hereinafter M.P.C.P.) of the disobedient conduct of the military personnel to whom it is issued, without neglecting the provisions of the “New rules on administrative procedure and the right of access to administrative documents” (Law No. 241 of 7 August 1990), applicable – albeit with the necessary exceptions – to the order, there being no question as to its nature as an administrative act.

2. The offence of disobedience between protection of discipline and guarantee of service efficiency

It should be noted that the resolution of legal contradictions (in the relationship between authority and legality) is a contentious issue with regard to the offence of disobedience, as provided for in Article 173 of the M.P.C.P., pursuant to which “a member of the armed forces who refuses, omits or delays to obey an order relating to service or discipline, issued to him by a superior, shall be punished with military imprisonment for up to one year”.

⁷ See A.C. JEMOLO, *Confessioni di un giurista*, Giuffrè, Milan 1947, pp. 32–33.

As a preliminary point, it should be emphasised that, in legal scholarship, there is a clear contrast between authors who – also in light of the systematic classification of the offence of disobedience among those against military discipline, as set out in Book Two, Title Three of the M.P.C.P. – identify the legal interest protected by the provision as discipline (which would rise to the status of “the ultimate value of the military system”, given the “instrumental value of subordination in relation to that very purpose” and, in this sense, would assume constitutional status, “regardless of whether the facts affect military activities or not”) and those who, on the other hand, object that “discipline receives only indirect constitutional protection, and this makes it necessary to select the duties pertaining to hierarchical subordination and subject to criminal protection only those that have a close connection with the requirements of the service”⁸.

Now, if it were considered that the protected legal interest is discipline itself, disobedience would be relevant as such and irrespective of the impact of the non-compliance on the performance of a service (regardless, therefore, of any actual prejudice to the service – and even of the legitimacy of the order – since, for the purposes of establishing the offence, the mere and abstract connection of the violated order to the service is sufficient).

On the other hand, it should be emphasised that, within the framework of the principle of legality of administrative action, one would have to conclude that an administrative act not in conformity with the primary legislation is, as a rule, not binding.

Yet, the non-reviewability of military orders (albeit at odds with the aforementioned principle of legality) would appear to be confirmed by positive law, where the criminal relevance of

⁸ In this regard, see V. SANTORO, *Della disobbedienza*, in *Codici penali militari. Rassegna di giurisprudenza e di dottrina*, edited by D. BRUNELLI, G. MAZZI, Giuffré, Milan, 2001, p. 371 and references therein, in which the author reviews the various approaches. And, thus, from the perspective of the overarching nature of discipline, see, in particular, P. NUVOLONE, *Valori costituzionali della disciplina militare e sua tutela nel codice penale militare e nelle nuove norme di principio*, in “Rassegna della Giustizia Militare”, 1979, pp. 21 ff. According to L. GATTO, *Disobbedienza: il rifiuto, ragionevolmente motivato, di eseguire l'ordine è coerente con l'oggettività della tutela*, in “Rassegna della Giustizia Militare”, 1994, pp. 248 ff., on the other hand, discipline would have an ancillary role in relation to service, even from the perspective of the importance of the proper conduct of administrative action. See also D. BRUNELLI, G. MAZZI, *Diritto penale militare*, Giuffré, Milan 1998, pp. 437–438. In line with a similar approach, aimed at enhancing military public order as a minimum condition for the existence of that part of the military legal system which coincides with the military organisation, see D. BRUNELLI, *Reati contro la disciplina militare*, in “Enciclopedia del Diritto”, vol. XXVIII, Giuffré, Milan 1987, pp. 1224 ff.; B. PELLEGRINO, G. ROSIN, *Brevi note in tema di riforma della legislazione penale militare e sostanziale*, in “Rassegna della Giustizia Militare”, 1978, p. 64; B. PELLEGRINO, *Ordine pubblico e dovere di fedeltà nel sistema penale comune e militare con particolare riferimento ai reati di sedizione*, in “Rassegna della Giustizia Militare”, 1979, pp. 97 ff.; A. ROMEO, *Considerazioni in tema di ordine pubblico militare e comune*, in “Rassegna della Giustizia Militare”, 1979, pp. 401 ff.

disobedience is established (Article 173 M.P.C.P.) even if the order is illegitimate (provided that this does not amount to a manifest incitement to commit a crime).

The relevant sectoral provisions would also appear to support this view. Although, in fact, Article 1349 of Legislative Decree No. 66 of 15 March 2010 (Code of Military Organisation) reiterates that “orders must, in accordance with the regulations in force, pertain to discipline, concern the manner in which service is performed and not exceed institutional duties”, Article 729 of Presidential Decree No. 90 of 15 March 2010 (Consolidated Text of Regulatory Provisions on Military Organisation, pursuant to Article 14 of Law No. 246 of 28 November 2005), which supplements it – in the context of a growing focus on the efficiency of administrative action – provides not only that “a member of the armed forces must carry out orders received promptly, responsibly and accurately, within the limits established by the code and regulations” but also that “a member of the armed forces who is given an order which he or she does not consider to be in accordance with the rules in force must, in a spirit of loyal and active participation, bring this to the attention of the person who gave the order, stating the reasons, and is obliged to carry it out if the order is confirmed”, with disobedience being permissible and indeed obligatory only if the order is “manifestly directed against the institutions of the State or if its execution would in any case manifestly constitute a criminal offence, in which case the soldier has a duty not to carry out the order and to inform his superiors as soon as possible”⁹.

Case law has also reaffirmed that Article 173 M.P.C.P. safeguards the need to ensure the proper functioning of the military apparatus through compliance with orders issued by a superior officer. Therefore, the right and duty of a member of the armed forces not to comply is limited to the case (explicitly indicated in Article 4, paragraph 4, of Law No. 382 of 11 July 1978) where such an order “is manifestly directed against the institutions of the State or whose execution in any event manifestly constitutes a criminal offence”¹⁰.

⁹ See R. GALASSO, *Profilassi vaccinale illegittima e limiti al sindacato sull'ordine militare relativo alla somministrazione: reato di disobbedienza e principio di continuità amministrativa*, op. cit., p. 53.

¹⁰ In this regard, Criminal Cassation, Section I, 27 January 2012, No. 3339, which ruled in a case where a soldier, having been repeatedly ‘ordered’ (by several superior officers) to go to the Military Hospital in Turin for a compulsory fitness examination, stubbornly refused to undergo medical examinations. The Court observed, in response to the defendant’s allegation of persecutory intent on the part of his superiors, that “the subordinate’s claim to question the order issued – in this case, the order to undergo a medical examination due to the soldier’s deviant behaviour, in order to assess his fitness or unfitness for military service – certainly cannot be equated, the latter being the health conditions justifying compulsory medical treatment, is certainly not conceivable in the specific context of military discipline”. It follows, therefore, that “for the commission of the offence in question, generic intent is sufficient – consisting of the conscious will to refuse to obey a service-related order issued by a superior outside the scenario, indicated above, in which the law

In this regard, it should be noted that Article 173 M.P.C.P. itself would seem to point in this direction, in so far as, in its second paragraph – by attributing significance to the act of disobedience, within the context of service, for the purposes of establishing a minimum sentence, not provided for in the basic offence referred to in the first paragraph (in particular by establishing that, if the act is committed whilst on duty, the military prison sentence is from six months to one year) – it would appear to end up placing greater emphasis, in its first paragraph, on the constraint of discipline, albeit with a view to ensuring, in potential (and not yet actual) terms through the relevant protection, the smooth running of the military administration and the proper organisation of the service, which is evidently exposed to the risk of being compromised whenever the hierarchical relationship is called into question (provided that this does not amount to an abuse of authority, entirely disconnected from the need to manage the service itself). In this sense, on closer inspection, a crime of presumed danger would come to the fore¹¹.

The relevance (for the purposes of punishable disobedience) of the illegitimate order, on the other hand, would also appear to be confirmed from the different perspective of the centrality of the service – as the protected legal interest under Article 173 of the Code of Military Criminal Procedure – given that “the need for flexible and prompt intervention, enabling the Public Administration to ensure the effective management of unforeseen events, in order to safeguard interests of constitutional rank (with a view, moreover, to upholding the principle of continuity of administrative action and the

exceptionally requires disobedience – disregarding, for the legal existence of the psychological element of the offence, any motivation put forward by the subordinate to justify such conduct; nor can this situation be regarded as indicative – given the required generality of the intent – of a lack of the aforementioned subjective element, due to the irrelevance, in such a case, of the motives that determined the offender’s conduct”.

¹¹ In this regard, albeit with specific reference to the criteria for assessing conduct for the purposes of recognising the existence of the special ground for non-punishability referred to in Article 131-bis of the Criminal Code, it has been observed that ‘even whilst adhering to the approach that places the greatest emphasis on service as a legal interest protected by the provision [...] the assessment of the minor nature of the act of disobedience cannot but take on a more rigorous character, given that, whilst without wishing to attribute pre-eminent importance to the disciplinary constraint as such, the organisation of the military administration, the timeliness and efficiency of its actions, are objectively compromised by temporary deadlocks between order and execution, based on possible assessments by the recipient of the order regarding the evidence of its connection to service (or rather, to good service), to the extent of rendering it, de facto (and contra legem), subject to review’. In this regard, see R. GALASSO, *I criteri di valutazione della tenuità del fatto di reato militare: disciplina, continuità dell’azione amministrativa, disobbedienza e limiti al sindacato della Corte di cassazione*, in “Rivista della Giustizia Militare”, no. 4, 2024, p. 4. More generally, on the applicability of the ground for non-punishability referred to in Article 131-bis of the Criminal Code to military offences, see F. P. FASOLI, *L’applicabilità dell’art. 131-bis c.p. e di altre norme simili (artt. 49, cpv., c.p., 27 d.p.r. n. 448/1988 e 34 del d.lgs. n. 274/2000) ai reati militari con particolare riguardo ai delitti di disobbedienza, truffa militare, abbandono di posto/violata consegna ed insubordinazione*, in “Cassazione Penale”, 64, no. 10, 2024, pp. 3243 ff.

stability of legal relationships), appears to take precedence in the organisation of the welfare state, as a criterion for resolving the antinomies normally arising from the consolidation of the effects produced by an illegitimate administrative act, which is not voidable if not challenged within the strict sixty-day limitation period, nor, moreover, annulable (if flawed) or revoked (if inappropriate) by way of self-defence, unless within a reasonable time, taking into account the reliance placed on it by third parties and/or in any event where certain conditions identified by law are met”¹².

3. From blind obedience to responsible obedience: the offence of failure to comply with instructions as an a contrario argument to support the predominant role of discipline in the offence of disobedience

The Military Penal Code in Peacetime (M.P.C.M.) recognises other criminal offences that appear to share, with the offence of disobedience, the element relating to the failure to comply with prescriptions received from a superior.

Book Two, in particular, devotes an entire section (III) within Title Two, Chapter I, to offences against the breach of duties inherent in special services.

Among these, Article 125 M.P.C.M. penalises the conduct of an officer, charged with a mission or a military expedition or operation, who fails, without a justifiable cause, to comply with the instructions received, provided that such conduct has, in fact, prejudiced the outcome.

It must, however, be noted at the outset that the very existence of such an offence would seem to confirm that the (distinct) offence of disobedience, provided for in Article 173 M.P.C.M., protects solely the legal interest of discipline, considered an indispensable value for the effective organisation of military service, since the legal obligation to carry out an order cannot in any way be anchored to the legitimacy of the order itself (without prejudice to any consideration regarding the duty to refrain from carrying out a manifestly criminal order).

In this regard, it should be noted that it certainly cannot be denied that the instructions (referred to in Article 125 M.P.C.M.) would in any case appear to fall within the category of orders, albeit lacking the character of peremptoriness.

It must, however, be considered that, precisely because they operate in sectors characterised by a high degree of specialisation, they are, rather, of a guiding nature, in that deviation from them, in light of the circumstances of the specific case, might not only be justifiable but even necessary.

¹² See R. GALASSO, *Profilassi vaccinale illegittima e limiti al sindacato sull'ordine militare relativo alla somministrazione: reato di disobbedienza e principio di continuità amministrativa*, op. cit., p. 49.

The impossibility of detailing the order, in fact, would be linked to the technical complexity of the activity commanded; to the unpredictability of the variables that may, in practice, characterise it; and to the advisability, therefore, of setting out only indicative guidelines, in the knowledge that deviation from them may constitute a by no means remote possibility (it is no coincidence that the law does not penalise non-compliance when it is based on a ‘justifiable cause’).

The instructions may be contained in directives, circulars, and technical publications, approved by the senior bodies of the Armed Forces and military corps, disseminated down the chain of command, and intended to regulate operational activities.

These may, for example, include flight or navigation rules, including those relating to the planning and preparation of so-called plans, based on complex calculations that take into account the specific behaviour of aircraft or vessels, as well as the fluids within which they move, under certain meteorological and/or aerodynamic and hydrodynamic conditions, or, furthermore, taking into account the impact that such variables may have in terms of impairment or, in any case, reduction of sensory and/or control capabilities, as regards pilots.

Thus, for example, with regard to navigation in confined waters, taking into account the proximity of the coastline and the hydrodynamic and hydrostatic phenomena associated with it, specialized publications¹³ provide for a specific safety margin for calculating danger limit lines (not to be crossed), taking into account the bathymetry (i.e. the depth of the seabed) and the draught of the vessel, in view of the so-called ‘squat effect’, which causes the vessel to sink further into its own wake.

Similarly, in the field of aviation, flight safety management manuals and operational air traffic regulations¹⁴ require careful planning that takes into account the pilots’ ability (where applicable, certified following periodic exercises) to cope with the potential partial failure of instrument systems – which are essential for manoeuvring in adverse weather conditions—as well as the terrain and the presence of fixed obstacles in the flight path¹⁵.

¹³ See, in this regard, the Italian Navy guidelines “CINCNAV/CN-ME 002 NC” on navigation in restricted waters, approved by the Commander-in-Chief of the Italian Navy’s Naval Squadron.

¹⁴ See Directive “S.M.A.–USA-101”, concerning flight rules for operational air traffic, approved by the Chief of Staff of the Air Force.

¹⁵ In particular, pursuant to the aforementioned directive, careful planning is required and the maintenance of a certain minimum night clearance distance (known as DMAN) from the top of the highest obstacle on the ground is mandated, to be observed within 3 NM (nautical miles) of it.

These publications also require careful re-planning where, even during the execution phase, circumstances arise that could compromise the required safety levels¹⁶.

Nevertheless, the instructions, as described above, can only be considered indicative.

If, during maritime navigation, one of the vessels in the convoy becomes, for example, partially ungovernable due to an engine failure, resulting in a delay in the approach, the master of the following vessel may, within certain limits, find himself compelled to delay his own approach (deviating from the planned course whilst taking into account the effects of adverse weather conditions and the associated need to maintain, prudently, further from the coastline) to avert the risk of a collision with the vessel ahead, which has reduced manoeuvrability, the consequences of which would be even more devastating than a grounding, should the latter actually occur.

Thus, there can be no doubt that the sudden need to ensure, even in adverse weather conditions, the landing of the aircraft, affected by a sudden and unforeseeable failure of the on-board instrument systems, would constitute a justifiable cause for deviating from the directive on minimum visibility for visual approach (as in the scenario where the aircraft does not have sufficient fuel to ensure navigation to another runway, with a clear overflight area).

It is, perhaps, precisely in view of the complexity of the decisions to be made that the law identifies the officer alone (who has a higher level of training) as the perpetrator of the offence.

On closer inspection, the instructions constitute a framework within which the military personnel are aware they can operate and, conversely, challenge any order that conflicts with them, issued during the course of duty by a superior who, for example, intends, in defiance of the danger, to push an exercise to the extreme, in the firm belief that only extreme situations hold training value (without, on the other hand, being able to rule out that the order issued may be motivated, rather, by the need to encourage deviation from the directives, where there is a justifiable cause, precisely in order to prevent the risk of a disaster).

On the other hand, they would constitute an order, albeit not a peremptory one, given the admissibility of reasonable deviations, as we are here discussing responsible obedience rather than blind compliance.

This circumstance leads, on closer inspection, to two possible (and opposing) interpretations of the offence of disobedience under Article 173 M.P.C.P., in terms of an offence against discipline (blind obedience) or an offence against the service (responsible obedience).

¹⁶ Furthermore, communication procedures are set out with the so-called control units (runway control unit, known as ATS, Air Traffic Service, and Approach Control Unit, known as APP) which must be informed by pilots of their landing intentions, in order to obtain the relevant clearance, based on the required parameters, with particular reference to weather conditions. In this regard, see Directive “S.M.A.–USA-101”, cited above.

On the one hand, the legislator's choice to make the punishability of the conduct – for the offence under Article 125 M.P.C.P. – contingent upon the operation being compromised (in terms of an objective condition of punishability or the occurrence of the offence) would constitute an argument for maintaining the irrelevance of prejudice to the service (and the relevance of discipline alone) for all cases not covered by it (such as the offence under Article 173 M.P.C.P.), as the issue at hand is rather that of mere (blind) disobedience, based on the principle *lex, ubi nolu, taquit*. From this perspective (which would appear to be the most correct), discipline would constitute the legally protected interest *par excellence* of disobedience, as referred to in Article 173 M.P.C.P. A similar line of reasoning should be applied regarding the non-reviewability of illegitimate but non-criminal orders, since deviation from instructions, which is, conversely, permitted under Article 125 M.P.C.P. where there is a justifiable cause, should never be considered compatible with the peremptory orders referred to in Article 173 M.P.C.P., for which the provision allows no margin for discretion (as there are no express references to the so-called 'justifiable cause'), with, at most, the general defences referred to in Articles 51, 52 and 54 of the Penal Code.

On the other hand, conversely, by emphasising the aspect relating to the existence of an order, as a prerequisite also for non-compliance, as referred to in Article 125 M.P.C.P. (as with disobedience, under Article 173 M.P.C.P.) the significance assumed, in this specific case – from the perspective of the offensiveness of the conduct – by the actual harm caused to the service, would represent the indicator of the absorbing scope (also in the offence of disobedience, referred to in Article 173 M.P.C.P.) of the service, and of the generalised admissibility of responsible obedience alone, with the obvious consequence of broadening (in contrast, however, to the legal provision set out in Article 729 of Presidential Decree No. 90 of 15 March 2010) the scope of the scrutiny exercised by the military personnel over the order received from their superior.

At this point, it may therefore be appropriate to examine the matter in greater depth, taking into account further significant provisions set out in Article 125 M.P.C.P., from which it is clear that the offence of non-compliance cannot be reduced to a mere act of disobedience, and that it is consequently impossible to transpose, to the latter offence (Article 173 M.P.C.P.), the structural elements of the former (Article 125 M.P.C.P.), with particular reference to the disruption of service and the legitimacy of the order, as indispensable elements for the punishability of the non-compliant conduct.

First of all, it must be noted that Article 125 M.P.C.P., in its third paragraph, also covers the negligent form of the offence (which is punished less severely).

There can therefore be no doubt that, in light of such a possible interpretation of the conduct, the legal interest protected by the provision must be identified as the service (that is, the mission,

expedition, or operation that the non-compliance would ultimately compromise) and not the discipline.

If, in fact, the legal interest protected by the provision referred to in Article 125 M.P.C.P. were discipline, it would be entirely unreasonable to punish negligent conduct, inasmuch as such conduct is ‘involuntary’ and, therefore, unrelated to any adversarial logic within the hierarchical relationship (the focal point of the offence of disobedience)¹⁷.

From the perspective of the centrality of the service (and the irrelevance of ‘discipline’ to the legal interest protected by Article 125 M.P.C.P.), the classification of the compromise to the outcome of the mission, expedition, or operation, as referred to in the provision, appears complex.

Undoubtedly, in fact, if the legal interest protected, in the immediate sense, by the provision is the efficiency of administrative action, it should be considered that mere non-compliance – which has not been followed by definitive prejudice to the operation – is not, on its own, sufficient to fully constitute the offending content of the conduct.

On the other hand, conversely, in light of the literal wording of the provision – where the occurrence of such a circumstance would appear to be required for the purposes of punishability, and not for the completion of the offence – it would seem necessary to exclude that the prejudice constitutes the event of the offence (in the technical sense), the wording of Article 125 M.P.C.P. referring, rather, to the concept of the objective condition for punishability, as set out in Article 44 of the Penal Code, pursuant to which, when the law requires the fulfilment of a condition for the offence to be punishable, the offender is liable for the offence even if the event on which the fulfilment of the condition depends was not intended by him.

In this regard, however, one cannot overlook the debate¹⁸ concerning the doctrinal classification of this category and whether or not certain of the scenarios contemplated by the Code in (apparently)

¹⁷ Moreover, only incompetence, as a possible form of negligence, would appear compatible with the case in question, in terms of ignorance of the relevant directives. Where, in fact, the military officer in charge has full knowledge of the guidelines, it would be difficult to argue that a deliberate deviation from them, due to mere imprudence, does not amount to wilful misconduct. On the other hand, negligent non-compliance, resulting from errors of judgement regarding the occurrence of circumstances in which, normally, procedures set out in higher-level instructions would need to be implemented, would be conceivable.

¹⁸ On this subject, see, among others: E. ANGIONI, *Condizioni di punibilità e principio di colpevolezza*, in “Rivista Italiana Di Diritto e Procedura Penale”, 1989, p. 1440; E. ANTONINI, *Condizioni oggettive di punibilità*, in *Dizionario di Diritto pubblico*, edited by S. CASSESE, Vol. II, Giuffrè, Milan 2006, p. 1203; S. ARDIZZONE, *Condizione obiettiva di punibilità*, in *Commentario sistematico al codice penale*, edited by M. RONCO, vol. II, tome 1, Zanichelli, Bologna, 2007, p. 599; V. N. D’ASCOLA, *Reato e pena nell’analisi delle condizioni obiettive di punibilità*, Edizioni Scientifiche Italiane, Naples 2004; C. F. GROSSO, *Responsabilità penale personale e singole ipotesi di responsabilità oggettiva*, in “Rivista Italiana di Diritto e Procedura Penale”, 1988, p. 409; ID., *Struttura e sistematica dei c.d. delitti aggravati dall’evento*, in

conditional terms fall within it, given the existence of diverse scenarios¹⁹ (which do not always conform to the formula derived from the pandectist tradition, according to which the objective conditions for punishability represent future and uncertain events, upon the occurrence of which the law makes punishment conditional) and the undeniable contradictions between the mechanism of objective imputation (under Article 44 of the Penal Code) and the principle of culpability (Article 27 of the Constitution).

In any event – in an attempt to offer an interpretation faithful to the literal wording of the provision, in the light of which it would seem necessary to exclude that the prejudice to the mission, operation or expedition, as provided for in Article 125 M.P.C.P., constitutes the event, in a technical sense, of the offence – a tempering would be appropriate, in terms of interpretation, to render the offence compatible with the principle of culpability, given the negative consequences expressed by the disastrous outcome of non-compliance, from the perspective of the service.

If, therefore – in other words – one intends to uphold, on the one hand, the centrality of the service (and the related irrelevance of ‘discipline’ to the legal interest protected by the provision, as referred to in Article 125 M.P.C.P.) and, on the other hand, consistently, not to overlook that the prejudice to the mission, mission, expedition or operation, whilst not amounting to a criminal offence,

“Rivista Italiana di Diritto e Procedura Penale”, 1963, p. 492; F. MANTOVANI, *Responsabilità oggettiva espressa e responsabilità oggettiva occulta*, in “Rivista Italiana di Diritto e Procedura Penale”, 1981, p. 465; V. MORMANDO, *L'evoluzione storico-domatica delle condizioni obiettive di punibilità*, in “Rivista Italiana di Diritto e Procedura Penale”, 1996, p. 610; G. NEPPI MODONA, *Condizioni obiettive di punibilità*, in “Enciclopedia Giuridica”, vol. VII, Treccani, Rome 1988, pp. 1 ff.; ID., *Concezione realistica del reato e condizioni obiettive di punibilità*, in “Rivista Italiana di Diritto e Procedura Penale”, 1971, p. 184; P. NUVOLONE, *I limiti taciti della norma penale*, Cedam, Padua, 1972; ID., *Il diritto penale del fallimento e delle altre procedure concorsuali*, Giuffrè, Milan, 1955; A. PAGLIARO, *Fatto, condotta illecita e responsabilità oggettiva nella teoria del reato*, in “Rivista Italiana di Diritto e Procedura Penale”, 1985, p. 624; A. PAGLIARO, S. ARDIZZONE, *Sommario del diritto penale italiano. Parte generale*, 2nd ed., Giuffrè, Milan, 2006, p. 203; F. RAMACCI, *Le condizioni obiettive di punibilità*, Jovene, Naples, 1971; P. VENEZIANI, *Spunti per una teoria del reato condizionato*, CEDAM, Padua, 1992; P. ZANOTTI, *Punibilità (condizioni obiettive di)*, in “Digesto delle discipline penalistiche”, vol. X, UTET, Turin 1995, p. 534.

¹⁹ Some of these are concurrent with the conduct (such as, for example, being caught in the act of committing the offence of participating in gambling or of public drunkenness); others are not entirely unrelated to the reprehensible nature of the typical offence, with a distinction being made in this regard between extrinsic and intrinsic conditions, or, alternatively, between proper and improper conditions. On the distinction between extrinsic and intrinsic conditions, see P. NUVOLONE, *Il diritto penale del fallimento e delle altre procedure concorsuali*, Giuffrè, Milan 1955, p. 14. See also M. ROMANO, *Commentario sistematico di diritto penale*, vol. I, Giuffrè, Milan 2004, p. 478, who distinguishes between proper and improper conditions, depending on whether they correspond to a different set of criteria from those that led to the legal definition of the offence, or to a phenomenon of criminal progression, whereby the occurrence of the condition actualises a potential offence.

does not even fall within the category of extrinsic conditions of punishability, it will be necessary to assess the foreseeability and/or avoidability of its occurrence²⁰.

Now then – returning to the offence of disobedience, referred to in Article 173 M.P.C.P. – it cannot be overlooked that, for the purposes of punishability, the legislator does not expressly refer (as in the case of the offence of non-compliance, under Article 125 M.P.C.P.) to any circumstance beyond the failure to comply with the order issued by a superior. Nor does the provision explicitly contemplate the possibility of deviating from the instructions received for a justifiable cause (except, of course, for the obligation to refrain from carrying out the order where it appears manifestly criminal).

It would be evident that, when the legislator intends to safeguard the successful performance of the service (and not discipline, as an indispensable value, which in any case constitutes its prerequisite), it expressly considers such a circumstance in the formulation of the offence (as is the case under Article 125 M.P.C.P.) at least in terms of an objective condition of (intrinsic) punishability.

Where, on the other hand, the offence of failure to comply, under Article 125 M.P.C.P., is understood to be a specific form of ‘disobedience’, under Article 173 M.P.C.P. – as if the aforementioned provisions were in a *species-genus* relationship – and to infer, from the reference to the successful outcome of the expedition, mission or operation, made for the purposes of punishability in the former (Article 125 M.P.C.P.) an argument to maintain that failure to comply with orders (in general and, therefore, also within the meaning of Article 173 M.P.C.P.) would always constitute an offence against the service (provided that it has actually prejudiced it), one would arrive at the absurd conclusion that an act of disobedience that is evidently serious, in that it is potentially capable of compromising an expedition, a mission or, in any case, an operation (such as non-compliance under Article 125 M.P.C.P.) should not be punished whenever such compromise does not occur (according to the literal wording of the provision), whilst the act of disobedience referred to in Article 173 M.P.C.P., which may be less serious (because it relates, for example, to an order to move furniture containing an archive to another room in order to free up space in the previously occupied room),

²⁰ In this regard, it has been observed that there are, at times, ‘masked events’, that is, events that are criminal in every respect and, as such, attributable to the perpetrator only if foreseeable and avoidable (A. PAGLIARO, *Trattato di diritto penale. Parte generale*, vol. II, Giuffrè, Milan 2007, p. 227) or in any case preventable (G. LICCI, *Teorie causali e rapporto di imputazione*, Jovene, Naples 1996, p. 358): the danger to public safety in the arson of one’s own property (Art. 423, para. 2); the occurrence of suicide in the offence of incitement (Art. 580 of the Criminal Code); the harm resulting from the unlawful disclosure of correspondence (Art. 618 of the Criminal Code); the failure to fulfil an obligation in the offence of fraudulent insolvency (Art. 641 of the Criminal Code).

should always be punished (except in cases where it is proven that such non-compliance had no significant consequences for the organisation of the service).

It therefore seems possible to observe that, by adhering to the approach (opposed here) according to which the legal interest protected by the offence of disobedience, under Article 173 M.P.C.P., should be identified as the service, and thus linking the punishability of non-compliance to the relative impairment, one would introduce, by way of interpretation (and in defiance of the principle that *lex ubi voluit, dixit, ubi noluit, taquit*) a sort of hidden objective condition for punishability (expressly provided for, however, in other cases, such as the offence of non-compliance under Article 125 M.P.C.P.).

4. Disobedience and orders involving a high degree of discretion: the motive of the offence, between conservative purpose, ideological objection and orientative aspiration

From a criminological perspective – apart from cases where disobedience amounts to mere indolence on the part of the soldier – the motive of the non-compliant conduct may vary, with scenarios arising in which:

1) carrying out the order would expose the service member to the risk of jeopardising their employment (where, for example, the order concerns undergoing a drug test and the service member refuses, certain of a positive result, in order to avoid the imposition of a disciplinary sanction) or, indeed, to the possible initiation of criminal proceedings (where the aforementioned drug test has been ordered to confirm a condition of impaired capacity, observed during service, pursuant to Article 139 M.P.C.P.);

2) the refusal stems from a desire to preserve one's status (where, for example, the service member has reason to fear that the required appearance before the hospital medical board to assess their fitness for service exposes them to a real risk of a negative assessment);

3) through the refusal, the soldier demonstrates an inner attitude of opposition, not so much to a legal rule (such as the duty to comply with an order) as to the value judgement underlying the order (when the latter, for example, concerns the signing of the soldier's assessment document – the so-called characteristics – and they consider the assessment expressed by his superior to be unfair, and the superior then submits that document to them for their perusal);

4) the refusal constitutes a means of safeguarding one's own health (where, for example, the service member evades the mandatory administration of a specific medical treatment – such as a vaccine – essential for their deployment to a particular theatre of operations);

5) the refusal constitutes a means of boycotting the chain of command.

In the first three cases, the disobedience would appear to stem from purely instinctive dynamics, beyond any rational calculation, since, in the first, the prejudice one seeks to avoid is, in essence, equivalent to that which the refusal itself brings about (that is, one seeks to avoid the initiation of disciplinary or criminal proceedings and, by disobeying, runs the risk of prosecution under Article 173 M.P.C.P.); in the second instance, prolonged absence from duty (which can only be resumed following the medical board's assessment) leads, in any case, to a finding of unfitness; in the third instance, the administrative assessment procedure continues regardless (with judicial and legal remedies against the decision being available).

In reality, on closer inspection, the choice to disobey – thereby exposing oneself to the risk of criminal proceedings being initiated – could nevertheless constitute the culmination of a careful weighing up of the interests at stake, given, for example, the by no means remote possibility that, following a positive result in the drug test, the serviceman, a habitual user, may be permanently expelled from the Armed Forces or the Corps (scenario 1). Similarly – aware of his own precarious mental state – the soldier, trusting in the transitory nature of a disorder, might choose to disobey the order to submit to the medical board's assessment, hoping to be found fit for service at the next summons (scenario 2).

The refusal – by a service member who does not agree with its content – to sign the assessment document (scenario 3), on the other hand, would appear to be motivated by purely ideological factors, given, moreover, the existence of judicial and administrative remedies (such as, for example, an appeal through the chain of command) that could potentially overturn the outcome of the superior's assessment.

Finally, in the other two cases, the service member, by disobeying orders, may, in theory, hope to achieve their objective, since (scenario 4) – with the exception of compulsory medical treatment (including, for example, so-called T.S.O.) – refusal always effectively prevents the administration of treatment (it being understood that, for mandatory treatments – albeit not enforceable through coercion –, the imposition of measures, including those of an interdictory nature, applies in the event of refusal, as occurred, for example, with regard to vaccines against the COVID-19 pandemic, where failure to undergo vaccination resulted in healthcare workers being barred from carrying out their work activity).

Finally, boycott (scenario no. 5), by undermining the superior's authority, may in practice expose him to the risk of being replaced by a higher authority, due to the impasse created by the oppositional attitude of the disobedient military personnel.

It is also possible, bearing in mind the scenarios listed, to distinguish between disobedience based on self-preservation (nos. 1, 2 and 4) and disobedience aimed at influencing policy (nos. 3 and 5): the first type of conduct aims to prevent developments detrimental to one's military position; the second, to prompt organisational or evaluative decisions that better meet one's expectations.

Generally speaking, however, disobedience would appear to stem from utilitarian motives, with the risk of facing criminal proceedings representing the 'price' that the military personnel are willing to pay in an attempt to subvert an order that conflicts with their own interests and/or expectations.

It is worth noting, in any case, that instances of disobedience of a conservative nature occur with a certain preponderance, with a clear prevalence of cases of non-compliance with orders related to the organisation of medical-health control activities or the provision of related services. This would suggest a tendency for military personnel to show greater resistance to accepting orders not immediately linked to the organisation of military service in the strict sense, but rather those functional to the performance of activities, only at the outcome of which the recipient can be deployed for service.

From this perspective, therefore, it would appear that the internalisation of orders of an 'instrumental' nature (especially as they relate to sensitive interests) is less pronounced than that pertaining to 'final' orders, with disobedience being perceived, in such cases, as ethically less reprehensible than the failure to comply with peremptory provisions intended to regulate operational activities.

The greater resistance to these categories of orders could also be explained by the reduced accessibility to (and diminished controllability of) technical knowledge, which underlies the discretionary assessments to be made at the conclusion of the proceedings that those orders are designed to initiate (consider, for example, medical-health assessments concerning fitness for service); which would demonstrate, on closer inspection, that the lower the degree to which a decision can be reviewed, the greater the recipient's resistance to complying with it.

On the other hand, where the order proves to be readily reviewable (in fact, not in legal terms, as non-reviewability is inherent to military orders), the recipient will be prompted to make more responsible decisions, aware of the inevitability of a challenge, pursuant to Article 173 M.P.C.P., in the event of non-compliance.

When, however, the ordered action constitutes the prerequisite for the initiation of proceedings with a highly discretionary outcome, the recipient – possibly fearing (with more or less justification)

exploitation and/or injustice, given the evident subjectivity of the judgement – appears more inclined towards conservative approaches.

The tendency to question, in other words, would seem to be inherent in the internalisation of any type of order and, where scrutiny is in fact impeded or not fully feasible—due to the complexity of the assessments to be made – the probability of disobedience is higher.

5. The relationship between the incidental assessment of the legitimacy of the military order and the exercise of the power of disapplication by the criminal court

As noted above, the question of whether the criminal court is required to review the legitimacy of a military order, for the purposes of establishing the offence of disobedience under Article 173 M.P.C.P., would appear to be mirroring that of the admissibility of the exercise of the power to disapply the law by that same court.

The prevailing doctrine regarding the methods of review exercised by the criminal court over administrative action has noted that, among the most significant, are those relating to the non-application of the administrative measure (although the law attributes this power exclusively to the civil judge) and those attributable to the so-called substantive conception of criminal protection (of the territory, in particular) which, however, would ultimately result in a disguised or covert non-application²¹.

The criminal court, in particular, would end up exercising “review over the administrative measure and, therefore, over administrative action, thereby also encroaching upon discretionary assessment”²². In this regard, it is in relation to so-called building offences that the greatest openings in the case law on this matter have emerged.

As a preliminary point, it should be noted that, having abolished the special courts vested with jurisdiction over administrative litigation, in both civil and criminal matters, and having transferred, by virtue of Article 1, the relevant disputes to the ordinary courts, the Law on Administrative Litigation (Annex E to Law No. 2248 of 20 March 1865) specified, in Article 2, that the transfer concerns “all matters in which a civil or political right is at issue, however the public administration

²¹ See S. PERONGINI, *Il sindacato del giudice penale sulle valutazioni discrezionali dell'amministrazione*, in “Diritto Amministrativo”, no. 2, 2023, pp. 229 ff.

²² Where ‘the administrative measure serves to negate the offence; in particular, it appears as a negative normative element of the criminal offence’. Consider, in this regard, the so-called building offences or abuse of office, now abolished.

may be involved, and even where measures have been issued by the executive power or the administrative authority”.

Any matter not covered by those referred to in Article 2, however, remains within the remit of “the administrative authorities” and their respective powers to issue measures, subject to “appeal through the chain of command” (Article 3) and – following the establishment of the Fourth Section of the Council of State with judicial functions (by Law No. 5992 of 31 March 1889) and subsequent legislative measures in the same vein (up to Law No. 1034 of 6 December 1971, establishing the administrative courts) – the transfer to the administrative court of “disputes concerning legitimate interests and, in the specific matters indicated by law, subjective rights, relating to the exercise or failure to exercise administrative power, concerning measures, acts, agreements or conduct attributable, even indirectly, to the exercise of such power, carried out by public administrations” (Article 7 of Legislative Decree No. 104 of 2 July 2010, the so-called Code of Administrative Procedure).

In line with the limits established by Article 2 cited above, the provision set out in Article 4 stipulates that “where the dispute concerns a right alleged to have been infringed by an act of the administrative authority, the courts shall confine themselves to ruling on the effects of that act in relation to the subject matter brought before the court”. Although “the administrative act may not be revoked or amended except upon appeal to the competent administrative authorities” (which in any event “shall comply with the final judgment of the courts in so far as it concerns the case decided”) it is clear that the ‘cognitive’ prerogative referred to in the provision will be exercised by the ordinary courts in the context of a review of the legality of the administrative act, since “in this as in every other case, the judicial authorities shall apply administrative acts and general and local regulations insofar as they comply with the law” (Article 5). And it is precisely from this latter provision concerning the application (only) of acts in accordance with the law that the corresponding duty to disapply illegitimate acts is derived.

Despite the reference to the protection of civil and political rights in Article 2 cited above, legal scholarship and case law have long held that the exercise of a power to disapply a provision is permissible (not only by civil courts, in order to protect individual rights, but) also by criminal courts, where the act referred to – as a constituent element of the offence – in the criminal provision is, in fact, illegitimate.

In particular, it has been argued in legal scholarship²³ that whilst Article 4 of Law No. 2248/1865, Annex E, refers to the judge’s power to disapply illegitimate administrative acts that

²³ See S. PERONGINI, *Il sindacato del giudice penale sulle valutazioni discrezionali dell'amministrazione*, op. cit., pp. 229 ff.

infringe a subjective right (when, indeed, “the charge relates to a right that is alleged to have been infringed by an act of the administrative authority”), it is Article 5 of the same law that generalises the remedy, in that it establishes the possibility of exercising it “in this, as in any other case”.

Conversely, it has been observed, however, that such an interpretation of Article 5 would ultimately deprive the first paragraph of Article 4 of its normative value. In particular, “according to the argument under consideration, ‘in this case’, that is to say ‘when the dispute concerns a right claimed to have been infringed by an act of the administrative authority’, and ‘in every other case’, the judicial authorities shall apply administrative acts and regulations, both general and local, insofar as they comply with the laws”, but “if in all cases the judicial authorities apply administrative acts and regulations, insofar as they comply with the laws, Article 4(1) has no normative value, because Article 5 already incorporates the provisions of Article 4(1)” and, in this sense, “the provision of Article 4(1) becomes entirely superfluous”²⁴.

Differently, it has been emphasised that the provision of Article 4 would come into play whenever the subject matter of the proceedings is the infringement, by the administrative measure, of a subjective right. In such a case, there would be “a situation of direct jurisdiction”, whilst the provision of Article 5 would come into play “when the court, in order to rule on the subject matter of the proceedings, must examine, incidentally, an administrative measure”, resulting, in this case, in “a situation of incidental jurisdiction”²⁵.

In light of these arguments, the Supreme Court²⁶ ruled that the provisions of the aforementioned articles do not introduce a generalised principle of non-application of illegitimate administrative acts by the ordinary courts (whether civil or criminal) for reasons of objective law. The review of the legitimacy of the administrative act, in fact, would be strictly limited by the legislator to acts that

²⁴ The author observes that, rather, “the phrase ‘in any other case’ indicates the scenario in which the subject matter of the proceedings is not the infringement of a right by the administrative measure, but is of a different nature and the administrative act plays a different role”, as occurs in “proceedings concerning the ownership of property, in the course of which one of the parties bases their claim on an administrative measure”: in such a case, “the possible illegitimacy of the latter permits its non-application”, with Article 5 retaining “its own independent normative value”.

²⁵ On the other hand, where the legislator – outside the provisions of the aforementioned Articles 4 and 5 – has intended to confer the power of non-application on the court, it has done so expressly, introducing specific cases, such as “Article 7(5) of Legislative Decree No 546/1992, which confers such a power on the tax court” and Article 63(1) of Legislative Decree No 165/2001, which “refers to the ordinary court, acting as a labour court, all disputes relating to employment relationships with public administrations, with the exception of those referred to in Article 1(4) [...] even where underlying administrative acts are at issue”, establishing that “where the latter are relevant to the decision, the court shall set them aside if they are unlawful”. If, therefore, there was a perceived need to intervene in individual cases, it would be because Articles 4 and 5 do not apply to all courts.

²⁶ See Court of Cassation, United Sections, 31 January 1987, No. 3, in “Cassazione Penale”, No. 5, 1987, p. 878.

adversely affect subjective rights and to the specific condition that it concerns an incidental assessment, which allows the effects that the act itself is capable of producing outside the proceedings to persist, only to later return to the matter²⁷, establishing, in particular, that the offence provided for in Article 20, (a) of Law No. 47 of 28 February 1985 (for non-compliance with the provisions set forth in the same law as well as in Law No. 1150 of 17 August 1942, in building regulations and in urban planning instruments, or with the requirements and implementation procedures laid down in the permit for unauthorised building works) would exist even when the work has been carried out on the basis of an illegitimate building permit.

In this regard, whilst emphasising that “the criminal court is not entrusted [...] with any so-called review of the administrative act (building permit)”, the Court does not, however, rule out, in substance, that the court may superimpose, upon the assessment of the public administration, its own assessment as to whether the authorised works comply with urban planning instruments, the judge being in any case “required to ascertain the conformity between the factual circumstances (works to be carried out or already carried out) and the legal provision, in view of the substantive interest that such provision is intended to protect, in which the aforementioned non-criminal elements converge organically, taking on a descriptive significance”.

Such a prerogative would not be intended “to encroach upon the sphere of powers reserved to the public administration, and thus to exercise undue interference, but finds its basis and justification in an explicit statutory provision, which postulates the judge’s power to proceed to a concrete identification of the sanctioned legal situation”²⁸.

Now, setting aside any consideration regarding the admissibility of implied powers vested in the public authority and, in particular, in the judicial authority, and any consideration regarding the related interference with the principles of legality and precision in criminal law, the judge’s generalised review (whether direct or implicit) of the legitimacy of the administrative act, outside of cases where it is required by the criminal provision itself, would appear to be excluded, not least

²⁷ See Court of Cassation, United Sections, 12 November 1993, No. 11635, in “*Rivista Giuridica dell’Edilizia*”, I, 1995, p. 269.

²⁸ From this perspective, “it cannot be held that, given the established inconsistency of the building works with regard to urban planning regulations or the technical rules implementing the general development plan, the criminal court must nevertheless conclude that there is no criminal offence merely because a building permit has been issued, which, in terms of its content as well as the structural and formal characteristics of the document, is not capable of exhaustively defining the urban planning and building status of the work to be carried out without referring to the framework of the provisions of the urban planning instruments and to the project’s own graphic representations, following the approval of which this administrative act is issued”.

because of the complexity (and non-replicability) of the assessments normally entrusted to the public administration.

The recognition of a prerogative to disapply the law, vested in the criminal court, “would amount to a violation of the principle of the separation of powers and would result in an inadmissible interference by the judicial power in areas reserved for the political and discretionary choices of the public administration”, considering, moreover, that “the criminal court adopts a generic and indefinite concept of discretion” far removed from “its configuration as a comparative assessment of the various interests involved in the case”²⁹.

²⁹ In this regard, see S. PERONGINI, *Il sindacato del giudice penale sulle valutazioni discrezionali dell'amministrazione*, op. cit., pp. 229 ff. who emphasises that, with regard to “certain cases indicative of an abuse of power, such as a breach of the principle of proportionality [...] the evaluative judgement, as is well known, incorporates the cultural, political and legal perspectives of the interpreter”. On this subject, G. CONTENUTO (*Giudice penale e pubblica amministrazione. Il problema del sindacato giudiziale sugli atti amministrativi in materia penale*, Laterza, Bari, 1979, p. 79) observes that, through their review of administrative action, the criminal court judge would end up dictating criteria and guidelines to the Public Administration, in the interests of the public good. With particular reference to the offence of abuse of office (prior to recent amendments and its subsequent abolition), it has, however, been observed that, for the offence to be established, one cannot disregard the attribute of injustice in the damage or advantage caused (focusing attention exclusively on the violation of law or regulation), such that, where the outcome of the administrative action falls within the range of those that are theoretically possible, there would be no scope for examining its intrinsic injustice (since this can only arise from a misuse of discretion), beyond any assessment of non-compliance with the rules that should have guided the administrative action. In this regard, see A. VALLINI, *L'abuso d'ufficio*, in *Delitti contro la pubblica amministrazione*, edited by F. PALAZZO, Edizioni Scientifiche Italiane, Naples 2011 (*Trattato di diritto penale*, edited by S. MOCCIA, vol. II), p. 315. Developing the consequences of such a statement, it is clear that a judicial review of the measure, *ex post*, in light of the established illegality that characterised one or more stages of the proceedings, *ex ante*, would ultimately result in the judge re-exercising administrative power, with an inadmissible interference on the part of the judge in the merits of the case. Nor would the provision of Article 21-octies of Law No. 241 of 7 August 1990, concerning non-invalidating defects in administrative acts, appear to call into question the aforementioned principle of non-interference by the judge (in general) in the assessments of the Public Administration. Indeed, there can be no question of the (administrative) court reviewing the substance of the act, given that an assessment of its non-annullability is permitted only in cases where “due to the binding nature of the measure, it is clear that its operative part could not have differed from that actually adopted one”. Outside such cases, it would not in any event be the judge, but rather the defendant administration – in order to secure the dismissal of the application for annulment in the proceedings brought to challenge the failure to notify the initiation of the procedure (paragraph 2, second part) – that could demonstrate that “the content of the measure could not have been different from that actually adopted”. More generally, in view of the non-trivial overlap between defects in the administrative measure and the existence of the criminal offence, and the necessary separation of the criminal court’s jurisdiction from the administrative merits, see also E. MATTEVI, *L'abuso d'ufficio. Una questione aperta. Evoluzione e prospettive di una fattispecie discussa*, Edizioni Scientifiche Italiane, Naples 2022, p. 259, which, after noting that “the defect in the measure would arise both when a substantive provision is breached and when a procedural provision is breached, because the invalidating effects of a formal breach often reverberate on the substantive

That said regarding the issues underlying the encroachment of the criminal court's prerogatives into assessments proper to the public administration – both in light of the principles of precision in criminal law and those of the separation of powers –, in the offence of disobedience the question arises in exactly the opposite terms. The administrative measure, in fact, constitutes a positive element of the offence. Indeed, non-compliance presupposes the existence of an order, so that the issue is not whether its illegitimacy renders the conduct unlawful, but rather to ascertain what consequences arise from its illegitimacy, in terms, where applicable, of the absence of the offence.

It appears, however, that the question of the limits to the criminal court's review of the legitimacy of a military order arises in similar terms, save that the aforementioned techniques would operate – in relation to the offence of disobedience – *in bonam partem*, since, as anticipated, the finding that the act is illegitimate (where deemed admissible) would not result in the criminalisation of the conduct, but rather in the impossibility of bringing a charge against the military personnel who failed to comply with the illegitimate order.

aspect”, emphasises how asking the criminal court to verify whether the breach of the procedural rule has indeed affected the adoption of the final decision (to assess, for example, whether, in the event of failure to notify the commencement of proceedings, the measure has been altered due to the failure to take into account the interests of the party who has been bypassed, or whether, in the event of a lack of preliminary investigation, the choice made was incorrect) “would often mean asking the judge to take the place of the administration in weighing up the interests”. Greater openness, however – including with regard to the (now abolished) offence of abuse of office – is expressed by T. PADOVANI in *Vita, morte e miracoli dell'abuso d'ufficio*, in “Giurisprudenza Penale Web”, 7-8, no. 6, 2020, p. 14, who observes that “in principle, the criminal court does not review administrative activity at all; it assesses whether criminal conduct exists in accordance with the typical requirements established by a criminal provision; and, if it does exist, there is no question of administrative ‘merit’. Administrative merit and criminal ‘merit’ are mutually incompatible within the same legal sphere: where one exists, the other cannot, and *vice versa*”. The author emphasises, in particular, that “administrative merit, with regard to offences committed by public officials within the public administration, is not, and can never be, a free zone exempt from judicial scrutiny, as the criminal court cannot and must not, therefore, halt the investigation in the face of any barrier, however artificially erected, nor confine it within the limits of mere legitimacy according to the canons of administrative law”. The court “is, on the contrary, required to do exactly the opposite, namely to examine with the utmost rigour every single aspect, every substantive detail, every aspect of the decision-making process in the activity carried out”, given that “when the exploitation of official power for personal gain is found, one ends up establishing that an ‘administrative merit’, strictly speaking, does not exist at all, and that instead there is a ‘private merit’ of a criminal nature”. On this subject, see also ID., *L'abuso d'ufficio e il sindacato del giudice penale*, in “Rivista Italiana di Diritto e Procedura Penale”, 1989, p. 88, and *L'abuso d'ufficio*, in *Studi in onore di G. Vassalli. Evoluzione e riforma del diritto e della procedura penale 1945-1990*, edited by M. C. BASSOUNI, A. R. LATAGLIATA and A. M. STILE, Vol. I, Giuffrè, Milan, 1991, pp. 595 ff.

On the other hand, the issue of the expansive scope of criminalisation, attributed to the technique of non-application (so-called *in malam partem*), represents – as mentioned above – only one of the arguments against the exercise of such a power by the criminal court.

Furthermore, it does not seem possible to ignore the fact that the legal system envisages the consolidation of the effects of an inappropriate or illegitimate administrative act, given the importance attached to the practical effect of administrative action.

In this regard, it should be noted that, pursuant to Article 21-quinquies of Law No. 241 of 7 August 1990, the revocation of an administrative measure with lasting effect – normally permitted (not only for supervening reasons of public interest or in the event of a change in the factual situation unforeseeable at the time of the measure's adoption, also) in the event of a reassessment of the original public interest – is not permitted (on that specific ground) for measures granting authorisation or conferring economic advantages, precisely because of the reliance on the preservation of the acquired advantage generated in the beneficiaries.

As regards the *ex officio* annulment of the illegitimate measure (pursuant to Article 21-octies of the same law) ordered, in self-protection, by the very Administration that issued it, Article 21-nonies of the aforementioned law makes this conditional not only on the existence of grounds of public interest, but also on compliance within a reasonable period, in any event not exceeding twelve months from the date of adoption of the measures authorising or granting economic advantages, including cases where the measure was adopted pursuant to Article 20, and taking into account the interests of the recipients and the parties concerned (without prejudice to the liabilities associated with the adoption and failure to annul the illegitimate measure).

A similar requirement for legal certainty and continuity of administrative action appears to apply *a fortiori* within the hierarchical structure of the military administration, from which follows the direct corollary that the relevant orders are not subject to review, serving to ensure the efficiency of a service responsible for the defence of the Fatherland (Art. 52 of the Constitution) and aimed at curbing criminal activity, maintaining public order and safeguarding democratic institutions themselves.

From this perspective, in the arduous quest to strike a balance between the costs and benefits arising from this legal antinomy, even the violation of criminal law becomes tolerable – insofar as it is aimed at ensuring military order and the resulting promptness of defensive action – where the military personnel's conduct is in accordance with the hierarchical order received (since it is, precisely, peremptory), provided, naturally, that the relevant execution does not manifestly constitute a criminal offence (with the exception of the defence provided for in Article 51(4) of the Penal Code).

6. *The contraindications to judicial interference in administrative merits: the decisum and the orientation of social behaviour*

The holistic perspective outlined above seems to suggest a certain degree of caution in the exercise of *actio finium regundorum*, between the prerogatives of the judge and administrative discretion.

Amidst a constant tension between the principle of legality and that of the effectiveness of public administration action, we are indeed witnessing – where interests of constitutional rank, possibly of a supra-individual nature are involved – not only a retreat of legal regulation in favour of administrative action³⁰, but even a downgrading of the principle of legality, such that the persistence of an illegitimate act is tolerated, in the interests of the continuity and certainty of legal relationships.

Within this framework, the organisation of the military administration and the service it provides are clearly characterised by the need for procedural efficiency and the peremptory nature of orders relating to service and/or discipline.

Whilst the requirement for a review of legality in the exercise of public powers remains non-negotiable, judicial review therefore appears to be guided, on the one hand, by the principle of non-interference by the court in the substantive aspects of the administration's decisions; on the other hand, towards the logic of maximum argumentative rigour, where the reasoning – when the court is nevertheless called upon to intervene – assumes a fundamental role, including with a view to limiting the knock-on effects that (once the specific case has been resolved) the judicial ruling may trigger (more generally) in relations between military personnel and the administration to which they belong, generating a dangerous stalemate in administrative action (linked, for example, to the conviction, on the part of the former, of the admissibility of a review, on their part, of orders received from a superior).

Where, for example – with particular reference to the scope of application of the ground for non-punishability due to the minor nature of the act of disobedience, as provided for in Article 173 M.P.C.P. – it is stated that “the subject of the decision is [...] a concrete assessment of the possible prejudice caused to the service by the conduct of non-compliance with the order” and that the

³⁰ On the other hand, the theory of inalienable rights now appears to have been superseded, since, within the modern conception of the welfare state and the associated intertwining of public and private interests, the existence of positions beyond the reach of administrative action must reasonably be ruled out. See, in this regard, F. URBANI, *La cassazione torna a occuparsi del rapporto tra riparto di giurisdizione e diritti fondamentali*, in “Corriere Giuridico”, No. 5, 2017, p. 649.

“significance and offensiveness of the conduct, for the purposes of Article 131-bis of the Penal Code (...), must be measured against the specific factual circumstances in which the breach occurred”, as it is necessary to investigate the “‘impact’ of the breached order, at least in prospective terms, on the regularity and efficiency of the service (according to the prognostic assessment referred to above)”³¹, it will be necessary not to take into account, in such an assessment, circumstances entirely unrelated to the specific administrative area affected by the impasse generated by the failure to comply with the order received and that are relevant, if anything, from the perspective of the intensity of the intent.

Consider, for example, the case of a military personnel summoned to a meeting who refuses to comply with the order to stop recording the conversation (prohibited in military premises for security reasons) which he had, in the meantime, admittedly started. In such a case – setting aside any consideration regarding the possible redundant nature of the order, if it merely confirms a prohibition already established by law, and the related absence of the offence of insubordination – the suspicion, whether well-founded or not, that during that meeting the superiors will attempt to exert undue pressure to obtain a retraction of the terms of a complaint lodged against them, by raising the spectre of retaliatory measures, may be relevant, if at all, in exculpatory terms, through the operation of self-defence, even putative (provided that, given the absence of previous similar conduct, the actuality of the offence must not be excluded, to the entire advantage of an inadmissible preventive defence) or, furthermore, from the perspective of the intensity of the intent, the failure to comply being based on reasons of caution rather than on a failure to recognise authority³².

Nor, on the other hand, would it be correct to invoke – for the purposes of recognising the particularly minor nature of the offence – any compensatory effects of the disobedient conduct (*compensatio lucri cum damno*). Indeed, setting aside any considerations relating to the principle of the separation of powers, such judicial review would ultimately encroach upon the administrative discretion, not without the risk of a dangerous slide towards assessments inspired by the so-called *raison d'état* (since it would not be considered, for example, that the recognition of the minor nature of the offence could be based on the good service rendered, *ex post*, by the disobedience, in terms, for example, of the prevention and/or containment of the criminal initiative of the person issuing the violated order, where the latter does not itself constitute the means of the conduct)³³.

Returning to the aforementioned scenario, from such a perspective the judge will not be able (without even verifying the purely pretextual nature of the summons) to base the judgement on the

³¹ Thus, Criminal Cassation, Section I, 3 September 2024, No. 33369.

³² See R. GALASSO, *I criteri di valutazione della tenuità del fatto di reato militare: disciplina, continuità dell'azione amministrativa, disobbedienza e limiti al sindacato della Corte di cassazione*, op. cit., pp. 33–34.

³³ *Ibid.*

minor nature of the disruption to service – for whose proper execution the order was issued (namely, the prompt dialogue with the subordinate summoned to report for duty, for reasons pertaining to the service, compromised by the refusal to interrupt a prohibited recording) – on the indirect (potentially positive) effects produced by the disobedient conduct on the proper functioning of another service (such as, for example, the successful outcome of the investigation launched by the judicial police, following the report made by the subordinate against their superiors, the contents of which remained unknown to the accused precisely because of the interruption of the meeting with the reporting party, caused by his refusal to stop the prohibited recording)³⁴.

Indeed, to reason otherwise would mean that it would be the judge (and not the public administration) who would reconcile the various interests involved in the proceedings, arrogating to itself (unadmissibly), through its unquestionable judgment, the identification of the prevailing interest to be realised, with serious prejudice not only to the principle of the balanced distribution of powers among the various constitutional bodies, but also to the continuity of administrative action, compromised by the attribution, first to the subordinate and then to the judge, of a right to review military orders (traditionally unreviewable)³⁵.

If, in fact, the subordinate were granted the power to assess in which cases to comply with or disregard an order (to interrupt, for example, a recording) depending on the more or less worthy aim they set out to achieve through disobedient conduct, the danger of completely neutralising the principle of hierarchy and, with it, the organisational model of the military administration would emerge with stark evidence.

In this sense, it would not seem possible to argue that the disobedient conduct was minor on the basis of the positive outcome of the administrative proceedings initiated following the report by the subordinate who had denounced his superiors, since – if one were to reason from this perspective – one would end up disregarding the very reasons for which he was summoned by his superiors (rendering the assertion of a mere suspicion regarding their retaliatory intent apodictic) and, with them, the prejudice that the disobedient conduct caused to the service (for the proper execution of which the need to speak with the subordinate had been assessed, thwarted by the refusal to refrain from unauthorised recordings in military environments)³⁶.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, where it is emphasised that “in this latter sense, however, the Court of Cassation, 3 September 2024, No. 33369, appears to be moving, [...] which, by quashing without referral the judgment of the Military Court of Appeal of Rome, 9 November 2023, No. 54 [...] observed that ‘in its analysis of the mitigating aspects of the offence, the Court of Appeal completely disregarded the circumstance – by no means marginal – of the existence of elements of ‘secrecy’ in the service report drawn up by Capt. A.A., which he – through the expedient of the recording – intended to protect’. In

The risk of effects similar to those just described appears to lurk in other decisions, again on the subject of disobedience, with particular reference to the consequences of a ruling of unconstitutionality regarding the law conferring and/or regulating administrative power, on the order issued subsequently in accordance with that law, and on the very punishability of the military personnel who have evaded the related breach.

In particular, regarding the relationship between the order concerning the administration of vaccines declared essential for the deployment of military personnel in specific operations requiring preventive prophylaxis, the subsequent declaration of constitutional illegitimacy³⁷ of Article 206-bis of Legislative Decree No. 66 of 15 March 2010 (Military Code) – under which the military administration is authorised to identify the aforementioned compulsory medical treatments – and the offence of disobedience, referred to in Article 173 M.P.C.P., charged against a member of the armed forces who, by refusing vaccination, disobeys an order issued by a superior, it has been observed that “the repeal of Article 206-bis” – of the Code of Military Law, following its declaration of constitutional illegitimacy – “consequently also entailed the absence of the legal basis on which the order had been issued and which conferred jurisdiction upon the administrative body issuing the order”, with “the relevance to service and discipline also correspondingly ceasing to exist, given that the order to report to the infirmary to undergo vaccination ultimately falls within a sphere of action that has now become outside the superior’s sphere of competence”³⁸. It is emphasised, in particular, that the superior’s order should not be classified “in terms of nullity or annulment due to illegality, because it is vitiated by a defect of (relative) abuse of power or violation of the law, but must rather be considered legally non-existent, as this is a case of absolute lack of competence, since the

this regard, the Supreme Court, having emphasised that the appeal judge himself had highlighted – in the context of the groundlessness of the defendant’s allegations regarding the fear that had prompted him to make the recording – the circumstance in light of which ‘A.A.’s service report nevertheless ‘ran its course’, it states that ‘this aspect is of primary importance [...] in order to support the particular insignificance of the offence’. According to the Supreme Court, ‘the issue at stake is, in fact, that of a concrete assessment of the possible prejudice caused to the conduct of the service by the conduct of non-compliance with the order. And, on this point of the matter to be decided, it can be stated – on the basis of the facts as reconstructed at first instance and without the need for referral – that the prejudice to the regularity of the service was absolutely marginal, given that the failure to record A.A.’s statements (on the occasion of the summons under consideration) did not give rise, even on a hypothetical basis, to any real difficulty in carrying out military service’ since ‘the report submitted by A.A. would not have been – for that reason – discarded, as indeed happened’”.

³⁷ See Corte cost., 9 February 2023, No. 14.

³⁸ In this regard, see the Preliminary Investigations Judge at the Military Court of Naples, judgment of 28 April 2023, No. 36 (who had raised the question of constitutional legitimacy).

administrative body has issued an act in a matter entirely outside its own administrative competence, affecting a sphere of subjective rights that falls outside the superior's sphere of competence"³⁹.

Nevertheless, it should be noted – with regard to the consequences of a ruling of unconstitutionality of the law conferring and/or regulating administrative power on the measures adopted subsequently in accordance with it – that there is now no doubt as to the stability of an act that has not been promptly challenged before the administrative court, as it is only in that forum that the relevant ground for annulment may be raised, subject to the initiation (and positive resolution) of proceedings concerning the constitutionality of the intervening provision.

Administrative case law has clarified, in particular, that, in substantive terms, an administrative act adopted on the basis of a law declared unconstitutional is voidable, since a law in conflict with the Constitution is an invalid law, even if it remains effective until the publication of the Constitutional Court's judgment declaring it invalid. From this perspective, such a judgment, by producing retroactive effects on pending cases, would deprive the administrative measure, with retroactive effect, of its legal basis and, therefore, "the consequence will always be the annulment and not the nullity of the act, even where the provision declared constitutionally invalid is the sole source of the power"⁴⁰.

Indeed, "there is no relationship of consequentiality between the law and the administrative act analogous to that discernible between the preparatory act and the final act of the administrative procedure, inasmuch as the administrative act, as an autonomous manifestation of executive power, has a life and individuality of its own and is not directly rendered void by the cessation of the provision's effectiveness", with emphasis on "the autonomy of the administrative moment" and "the need to protect the reliance placed by citizens"⁴¹.

Conversely, the aforementioned perspective of a relationship of strict presupposition between the provision conferring power and the legitimacy of the measure issued subsequently – in particular, in the direction of the lapsing (and not merely vitiating) effect of a ruling of constitutional invalidity (so as to exclude, once the provision has been censured, any obligation to challenge the administrative measure independently and subsequently, which is instead automatically overturned) – would seem, perhaps, not to take full account of the specific implications of such an outcome (through the recovery

³⁹ On this subject, see R. GALASSO, *Profilassi vaccinale illegittima e limiti al sindacato sull'ordine militare relativo alla somministrazione: reato di disobbedienza e principio di continuità amministrativa*, op. cit., pp. 48 ff.

⁴⁰ Council of State, Section VI, 11 September 2014, No. 4624.

⁴¹ See on this point, F. CARINGELLA, *Manuale ragionato di diritto amministrativo*, Dike Giuridica, Rome, 2022, p. 956, who emphasises that the power of the Public Administration to withdraw the illegitimate act by way of self-protection, where the conditions are met, and the ability to invoke the judgment of constitutional illegality in proceedings still pending, remain unaffected.

of a review of the order received, evidently far more extensive than that permitted precisely by manifest illegality) on the relationship of interdependence (in the specific military context) between the principle of authority and the proper conduct of administrative action, taking into account, moreover, the aforementioned position regarding the mere annulment of the administrative act adopted on the basis of a law declared unconstitutional⁴².

And it is for these reasons, in particular, that the reasoning behind the decision (regardless of its outcome) takes on paramount importance, especially given that, where it is otherwise possible to justify an acquittal (or a decision to dismiss the case) – for example, on the separate grounds of defences and, in particular, that relating to the exercise of a right (Article 51 of the Penal Code) to refuse medical treatment (Article 32 of the Constitution), which is no longer to be considered mandatory since, given the proposed methods of administration (of a number of vaccines that should instead have been administered separately over a longer period), it does not correspond to the type identified by the relevant technical standards (without prejudice, at least on an experimental basis, to its therapeutic suitability) – it would perhaps be inadvisable to invoke categories (such as the non-existence of the order, on the grounds of the illegality of the intervening primary provision) liable to generate, amongst military personnel receiving an order designed to ensure their operational readiness, the belief that they may question the constitutional validity of the law conferring the power exercised by their superior. On the other hand, the need to refer the question of constitutionality (of Article 206-bis of the Code of Military Justice, in the present case) to the Constitutional Court appears to be motivated precisely by the impossibility, for the referring court, of proceeding with a constitutionally oriented interpretation of the provision, the inapplicability of which can only be determined by the Constitutional Court. In this sense, it would not appear possible to establish the existence of that manifest criminality which alone would be capable of justifying the act of disobedience.

In the scenario just described, therefore, it appears that the role of the criminal court – precisely in the face of an increasing complexity of the relationships between sources and/or acts and a progressive shift in the legal system, in the resolution of legal antinomies, towards non-traditional frameworks (also due to new geopolitical tensions and, in any case, to a more complex organisation of economic and institutional relations) – assumes a particularly delicate position, with a view to containing the risk of violent systemic ruptures, whilst naturally continuing to be entrusted with the task of guaranteeing *habeas corpus*, and, at the same time, being called upon to grapple with the complexity of social relations and the organisation of society and to express, through sound

⁴² R. GALASSO, *‘Profilassi vaccinale illegittima e limiti al sindacato sull’ordine militare relativo alla somministrazione: reato di disobbedienza e principio di continuità amministrativa*, op. cit., p. 60.

argumentative technique, an understanding of the aforementioned multifaceted nature of the interests at stake, prudently avoiding one-dimensional and incommunicative assessments and thereby ensuring the credibility of the *decisum*, which enhances its guiding significance.

It seems, on the other hand, that the jurist must continue to operate, wisely, with Occam's razor, choosing the simplest solution among equally valid ones and avoiding abrupt leaps forward that risk triggering – by denying the principle of authority – authoritarian tendencies.

It is, rather, within the more balanced logic of non-interference between the powers of the State and the mutual recognition of their respective prerogatives that a constructive debate on the stability of the democratic system seems to be able to develop.