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The obedience dilemma. Public administration officials between law and orders in the case of the Erased

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ABSTRACT

The chapter examines obedience to illegitimate orders within public administration, focusing on frontline officials confronted with directives that contravene higher law. Although legal systems provide rules requiring disobedience, in practice adherence to orders often prevails. Drawing on psychology, organization theory, and the concept of disciplinary power, the author advances two hypotheses: (i) the disciplinary force of organizational structures and training often outweighs the authority of legal norms; and (ii) the intensity of this obedience disposition varies across organizational contexts. The case of the Slovenian *Erased* illustrates the argument.

KEYWORDS

Obedience dilemma; Administrative circulars (infra-law); Disciplinary power; Bureaucratic decision-making; The Erased.

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SUMMARY: 1. Introduction – 2. Rules of conflict and the 'obedience dilemma' – 3. (Dis)obedience at the administrative frontlines: the case of the Erased – 3.1. Setting the scene: the formation of a new state and its founding legislation – 3.2. The technical and bureaucratic mechanisms of the Erasure – 4. Obedience to unlawful orders: an initial theoretical explanation – 5. Conclusions.

1. *Introduction*

The issue of obedience to unlawful orders has long been associated with dramatic historical events: the Eichmann case during the Second World War[1] , the My Lai massacre during the Vietnam War[2] , and the torture at Abu Ghraib prison[3] , to name but a few from the last century. However, outside these extreme cases, which mainly concern members of the armed forces, obedience to illegitimate orders has been studied far less. In this article, I address the issue in the context of 'ordinary' state bureaucracies, where obedience to illegitimate orders is not an exception but a much more common phenomenon, or so I argue. Frontline officials operate at the intersection of two

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[1] V. H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, London 2006 [1963].

[2] V.H.C. KELMAN, V.L. HAMILTON, *Crimes of Obedience*, Yale University Press, New Haven & London 1989, ch. 1.

[3] V. P. ZIMBARDO, *The Lucifer Effect: Understanding How Good People Turn Evil*, Random House, New York 2007, ch. 14.

conflicting legal obligations: on the one hand, the principle of legality requires that their decisions comply with the law; on the other, the principle of hierarchical obedience requires compliance with the directives of superiors.

Many legal systems seek to resolve the potential conflicts arising from this dual duty through so-called 'rules of conflict', which prescribe when officials must disobey the directives of their superiors. However, as experience shows, such rules only partially capture the reality of decision-making processes at the administrative frontlines. Officials often comply with unlawful directives even when they have a legal duty to oppose them. I define 'the obedience dilemma' as situations in which the legal duty to disobey unlawful orders is counterbalanced by non-legal factors that support obedience to authority. In this article, I argue that in such cases this is not an anomaly, but the result of deeper organisational dynamics within contemporary bureaucracies.

In this regard, I put forward two hypotheses. The first (H1) is that when the authority of legal norms conflicts with the disciplinary power of organisational structures, the latter tends to prevail: frontline officials show a predisposition to obey the orders of their superiors, including unlawful ones. Secondly (H2), the strength of this tendency varies depending on the organisational context, the intensity of training and the rigidity of hierarchical relationships. To explore these claims further (particularly the first), I examine the case of the 'Erased' in Slovenia, a paradigmatic example of obedience to unlawful orders by civil servants[4]. My analysis of this case draws on insights from social psychology, organisational theory and the concept of disciplinary power. Particular attention will be paid to the role of 'infra-law', and in particular to administrative circulars, as instruments through which disciplinary power is exercised in frontline bureaucracies and obedience is ensured.

[4] This means that I shall omit the issue of obedience to unlawful orders in the context of the armed forces. For a more detailed examination of the subject, see – in addition to the works cited above – also, for example, C. R. BROWNING, *Ordinary Men, Reserve Police Battalion 101 and the Final Solution in Poland*, Penguin Books, London 1992; C. IAFRATE, *Obbedienza, ordine illegittimo e ordinamento militare*, in 'Diritto & Questioni Pubbliche', 16, no. 2, 2016, pp. 312–336; A. SMEULERS, *Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-level Perpetrators. A Social-Psychological Approach to Superior Orders*, in 'Journal of International Criminal Justice', 17, no. 1, 2019, pp. 105–123.

The article proceeds as follows: in the next section (2.), I frame the problem in terms of rules of conflict and the obedience dilemma, and put forward my hypotheses on the matter; then (3.), I present the case of the Erased, focusing in particular on the technical-bureaucratic aspects of the affair. Subsequently, I provide a theoretical explanation of the relevant dynamics that determine the obedience of frontline officials to unlawful directives (4.). Finally (5.), I offer some brief conclusions.

2. *Rules of conflict and the 'obedience dilemma'*

It seems almost superfluous to emphasise that, in making their decisions, frontline administrative officials are required to respect the law. However, to be more specific, their decisions (i) must be based on valid law and (ii) must not contravene that law. These, in summary, are the requirements of the principle of legality as formulated in relation to the executive power and, by extension, to the public administration[5]. On the other hand, frontline officials are also legally bound to obey the orders of their superiors. This requirement of hierarchical obedience derives from the principle of administrative efficiency, a fundamental principle of bureaucratic organisation[6].

Here are two examples of legislative provisions establishing this duty of administrative obedience:

(i) Article 94(1) of the Slovenian Civil Servants Act stipulates that, in the performance of their duties, civil servants are required to comply with the instructions of their superiors (unless they are required by law not to comply with such instructions).

(ii) Article 16(1) of the Italian Presidential Decree No 3/1957 (Consolidated Act on the Status of Civil Servants) provides that a civil servant must carry out orders issued by their superior in relation to their duties or tasks.

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[5] R. GUASTINI, *Legalità*, in G. PINO, V. VILLA (eds.), *Rule of Law: L'ideale della legalità*, Il Mulino, Bologna 2016, pp. 146 ff.

[6] H.A. SIMON, *Administrative Behaviour: A Study of Decision-Making Processes in Administrative Organisations,* 2nd ed., Macmillan, New York 1997, ch. 2.

Now, we may reasonably assume that, in the normal course of events, such orders (instructions) are in fact consistent with higher law. They provide, for example, an authoritative interpretation of the law that lower-ranking officials must follow in specific cases; they assign to lower-ranking officials the responsibility for fulfilling a statutory obligation; they prescribe internal measures to ensure procedural compliance with higher law, or something similar. In most cases, therefore, we can expect subordinate officials to comply with such orders without this raising further issues.

However, it is also reasonable to assume that, from time to time, orders issued by senior officials may conflict with higher-ranking law. For example, an order may require subordinates to disregard clear legal duties; to exercise powers that fall outside the statutory remit of the body; to arbitrarily restrict access to rights granted by law; to contradict binding court rulings, etc. When such a situation arises, the recipient of an unlawful order faces a normative conflict between two *prima facie* binding obligations, the fulfilment of which would produce mutually incompatible results: compliance with a superior's directive would entail a breach of a hierarchically superior legal norm, whilst non-compliance would constitute a breach of the legal duty to obey authoritative instructions within the administrative hierarchy. How should the official act in such a situation? Fortunately, legal systems tend to provide specific rules precisely for such circumstances – rules which we may call 'rules of conflict'. Let us look at two examples of such rules:

(i) Article 94, paragraphs 2–6, of the Slovenian Civil Servants Act stipulates, first of all, that a civil servant who believes that carrying out a verbal order would require unlawful conduct or cause harm may request a written order. If a written order with the same content is provided, the civil servant is obliged to carry out the tasks requested by their superior. However, if such an order requires unlawful conduct, the subordinate civil servant may refuse to carry it out; furthermore, they must refuse to carry out the order if doing so would constitute a criminal offence[7].

[7] Two consequences follow from this: firstly, a public official who has committed a disciplinary offence or caused damage whilst carrying out an order or written instruction shall be exempt from civil and disciplinary liability; secondly, a public official who commits a criminal offence whilst carrying out an order or instruction from their superior shall not be exempt from criminal liability.

(ii) Under Italian law, Article 17 of Presidential Decree No. 3/1957 provides that an employee who receives an order from their superior which they consider manifestly unlawful must raise an objection to that superior, stating the reasons. If the order is reiterated in writing, the employee is obliged to carry it out. In any event, the employee must not carry out the superior's order when the act is prohibited by criminal law (or constitutes an administrative offence).

It is clear that the purpose of these rules of conflict is to guide the actions of officials caught in the conflict between the obligation to obey substantive law, on the one hand, and the duty to obey superior directives, on the other hand. In principle, these rules give precedence to the latter, establishing a duty to obey orders, including unlawful ones. This obligation, however, has its limits – usually at the threshold of criminal law – when it becomes a duty of disobedience[8].

From a normative perspective, rules of conflict appear to strike a reasonable balance between two types of relevant obligations and offer sensible guidance to officials facing conflicts between the law and an unlawful order. However, as our initial examples clearly demonstrate, in practice matters tend to become more complex. In particular, the complexity of the various decision-making contexts at the frontline and the peculiarities of officials' decision-making mindset mean that following the requirements of rules of conflict is not always so straightforward. In fact, frontline officials sometimes follow unlawful orders even when they ought to disobey. I shall define 'the obedience dilemma' as situations in which the legal obligation to disobey unlawful orders is counterbalanced by non-legal factors that support obedience to authority.

In this article, I will focus on situations in which frontline officials have a legal duty to disobey (manifestly) unlawful orders and challenge the simplistic view that, when faced with such an order, officials actually fulfil their legal duty and disobey when required by law. Instead, I shall propose and defend the opposite hypothesis, namely that frontline administrative officials have a predisposition to obey the orders of their

[8] See V.H.C. KELMAN, V.L. HAMILTON, *Crimes of Obedience*, cit., ch. 3.

superiors, which includes obedience to unlawful orders beyond the limits imposed by law, at least to a certain extent[9].

I base this hypothesis on the premise that, in their decision-making, frontline officials are largely subject to the influence of two types of power: on the one hand, the authoritative power of legal norms and, on the other, the disciplinary power of internal organisational factors[10]. These two types of power very often act concurrently and reinforce one another. This is the case when orders from senior officials comply with legal requirements, which, in fact, happens in most cases. However, the two powers sometimes come into conflict with one another: this is precisely the case where the content of senior officials' directives conflicts with the requirements of substantive law. In such cases, it is legitimate to ask how the officials to whom the unlawful orders are addressed will actually decide. If we follow the simplistic view, based exclusively on the content of the rules of conflict, we will conclude that frontline officials, when required, will disobey the unlawful order and will instead comply with the requirements of substantive law. However, I propose the following opposite hypothesis (Hypothesis 1 – H1):

> When the authority of legal norms and the disciplinary force of organisational factors come into conflict, the latter will tend to prevail over the former and guide the decisions of frontline officials. Frontline officials have a predisposition to obey orders, including unlawful ones – at least up to a certain point.

This hypothesis may seem counterintuitive and even at odds with our perceived experience. However, I believe this is due solely to our perception of the prevailing experience, in which orders from superiors, at least in the majority of cases, do in fact correspond to substantive law. The repetitive experience of these two types of influence acting in tandem creates a mirage that prevents us from seeing the true nature of the relationship between the authoritative power of legal norms and the disciplinary power of organisational factors, whereby it is in fact the latter, and not the former, that exerts a

[9] I shall briefly explain the significance of this caveat. See note 11 and the adjacent main text.
[10] See M. BRIGAGLIA, *Potere. Una rilettura di Michele Foucault*, Editoriale Scientifica, Napoli 2019, par. 6.1.4.

greater influence on the decision-making of frontline officials – I repeat: at least to a certain point. That this is indeed the case can be seen precisely in instances where front-line officials are faced with unlawful orders, and explains why they often obey them despite the legal obligation to disobey.

At this point, a clarification is in order. The general way in which the above hypothesis is formulated suggests that it applies with equal force to all types of frontline administrative officials. However, this is not the case, or at least that is what I maintain. There is no need to delve into the details of the differences in organisational structures or training regimes, for example, between members of the armed forces, on the one hand, and ministerial bureaucrats, on the other, to understand that the training regime of the former is significantly more intense and focused on instilling in recruits a willingness to obey the orders of superiors, compared to that of the latter group. The same applies to the formal and informal rules establishing the duty of hierarchical obedience. It is therefore reasonable to assume that the disposition to obey (illegitimate) orders is stronger in the case of military personnel than in that of ministry officials[11]. This means that our original hypothesis must be qualified.

A further hypothesis can therefore be formulated as follows (Hypothesis 2 – H2):

The strength of the disposition to obey superiors' directives is not the same across all types of frontline officials. It depends, in particular, on the influence that internal organisational factors exert on a given type of frontline official.

This means, in other words, that the disposition to obey orders will, in different types of frontline officials, be differently resistant to the force of the authoritative power of legal norms. It follows that different types of frontline officials will be willing to obey the illegitimate orders of their superiors against the contradictory dictates of legal norms to varying degrees.

[11] This is where my earlier caveat ('up to a point') comes into play. The organisational factors mentioned above have a decisive influence on officials' 'zone of acceptance', which can be defined, following Simon, as the scope of decision-making within which subordinates accept the authoritative directives of their superiors. If one attempts to exercise authority beyond this point, disobedience will follow, the author states (see H. SIMON, *Administrative Behaviour*, cit., ch. 1). Clearly, the zone of acceptance for each type of official will be determined predominantly by the rigour with which disciplinary processes affect their roles (see more below, 4.).

In light of the above, in this article I shall seek to confirm hypothesis H1 with regard to the category of 'ordinary' civil servants, such as ministerial officials. To test hypothesis H1, in the following section (3.) I shall present the so-called case of the Erased, which in my view is a paradigmatic case of bureaucratic obedience to unlawful orders.

3. *(Dis)obedience at the administrative frontlines: the case of the Erased*

In the early 1990s, the authorities of the newly formed Republic of Slovenia implemented what was later termed 'the Erasure': the removal of over 25,000 residents, originating from other former Yugoslav republics, from the register of permanent residents. This administrative act targeted those who had not acquired Slovenian citizenship following independence from Yugoslavia in 1991, whether through inability or lack of will. Overnight, many became stateless; all lost the right to reside in Slovenia, as well as their fundamental social rights such as work permits, healthcare, pensions and the right to education; and many were exposed to the risk of detention and deportation. Plunged into a state of legal limbo, the Erased were marginalised by society, often without any form of social protection.

In this section, I will first provide the information necessary to better understand the case (3.1), before examining the mechanisms of this unlawful action perpetrated by frontline administrative officials on the orders of their superiors (3.2).

3.1. *Setting the scene: the formation of a new state and its founding legislation*

The relevant legal and political context of the Erasure concerns the early period of the establishment of the Republic of Slovenia, following its secession from Yugoslavia on 25 June 1991[12]. On the same day, the Slovenian Parliament adopted a number of

[12] On the international aspects of Slovenian independence, see, for example, C.G. VILLA, *Un nuevo Estado para un nuevo orden mundial: La independencia de Eslovenia*, Comares, Granada 2019, and P. RADAN, *The Break-Up of Yugoslavia and International Law*, Routledge, London 2002.

fundamental laws establishing the new state, including the laws on citizenship (hereinafter: Citizenship Act) and on the legal status of foreigners (hereinafter: Aliens Act)[13]. The Citizenship Act established two distinct categories of persons and provided for different methods of acquiring citizenship for each: on the one hand, Slovenian citizens residing within the territory of the new State at the time of secession were granted citizenship *ex lege*; on the other hand, for citizens of the other republics of Yugoslavia who were residing in Slovenia at the time of secession, the law established a special regime for the acquisition of Slovenian citizenship under more favourable conditions (compared to 'ordinary' foreigners) – which, however, was valid for only 6 months from the entry into force of the aforementioned law.

By the deadline set by the law (i.e. 26 December 1991), the vast majority of applicants eligible under this scheme had submitted an application and had effectively obtained citizenship[14]; on the other hand, a smaller group of around 26,000 people did not submit an application or had their application rejected[15]. Since the Citizenship Act did not address the consequences of failing to obtain the new citizenship under this special scheme, it was legitimate for these individuals to expect that they would become legal aliens whilst retaining their status as permanent residents.

At the same time, the Aliens Act similarly distinguished between the legal status of two categories of foreigners: on the one hand, with regard to persons who already had the status of foreigners under Yugoslav law, the new Act provided that the residence permits issued to them would remain valid in the new State; on the other hand, with regard to the group of citizens of other (former) Yugoslav republics with permanent residence in Slovenia who had not acquired Slovenian citizenship under the new Citizenship Act, the Aliens Act merely provided that its provisions would become 'applicable' to them two months after the expiry of the six-month period laid down in the Citizenship Act.

[13] Official Gazette of the RS, No. 1/91.
[14] The number of non-Slovenian residents at the time of secession in 1991 was approximately 200,000, accounting for around 10% of the total population.
[15] Of those eligible, more than 174,000 applied and more than 170,000 were granted citizenship. It is estimated that around 29,000 did not obtain citizenship in this way: whilst around 2,400 had their applications rejected, others did not even apply. See N. KOGOVŠEK ŠALAMON, *Erased: Citizenship, Residence Rights and the Constitution in Slovenia*, Peter Lang, Frankfurt am Main 2016, pp. 80 ff.

Therefore, in short, the provisions of the Aliens Act relating to this group of approximately 26,000 people were due to come into force on 26 February 1992.

One point that must be immediately emphasised in relation to this legal framework is that, as regards this latter category of residents, the provisions of the Aliens Act were vague, and it was by no means clear what the exact legal consequences would be for them once the specified deadline had passed. This uncertainty was further compounded by the fact that the same law clearly stipulated that, as regards 'ordinary' foreigners (individuals who already possessed foreigner status under Yugoslav law), the validity of their residence permits would be extended *ex lege*, a consequence which was not, however, explicitly provided for in respect of the other group of 'new' foreigners.

The fact is that, after the expiry of the deadline set by the law (26 February 1992), the persons concerned were removed from the registers of permanent residents in Slovenia – hence the name Erasure given to this whole affair. At this point, I shall not go into detail about how the Erasure actually took place, as I shall examine this issue in the next section (3.2.). Here I shall confine myself to outlining the broad consequences of the Erasure on the legal and social status of the people concerned.

The consequences of the Erasure were profound and lasting: first and foremost, we must not lose sight of the fact that, until the day before the Erasure, these people enjoyed the same rights as Slovenian citizens[16]. Now, however, having already been deprived of Slovenian citizenship, these individuals suddenly – and unexpectedly – lost the right to reside on the territory of the new state. In other words, from that moment onwards they were regarded as irregular foreigners. The deprivation of this status had a knock-on effect on their other legal statuses. For example, they were deprived of social security benefits, including unemployment benefits, child benefits and pensions; they were unable to obtain or renew their driving licences; they faced great difficulties in obtaining or renewing work permits; they lost their right to housing, which often led to eviction from their homes; due to the loss of resident status, they were considered to be present illegally on the territory

[16] This is because citizens of the Federal Republic of Yugoslavia enjoyed equal rights within the territory of each of the federal units.

and therefore liable to expulsion, and so on[17]. In addition to this more or less complete 'de-legalisation' of their lives, the Erasure also produced significant social and psycho-physical consequences for those affected, including a decline in physical and psychological health and social marginalisation[18].

The details of the Erasure – the fact itself, its scope and intensity – were kept secret from the public for a long time[19]. In the early years, even the courts – from the lower courts up to the Supreme Court – essentially endorsed the executive's decisions, effectively confirming the legality of the Erasure[20]. The resolution of the issue from a legal perspective was largely due to the proactive role of the Slovenian Constitutional Court[21], which, through a series of judgments, laid the foundations for the dismantling of the system that unlawfully deprived more than 25,000 people of their legal status[22]. The final judicial decision on the matter was delivered on 26 June 2012 by the Grand Chamber of the European Court of Human Rights in the case of *Kurić and others v. Slovenia*, which found that there had been a violation of Article 8 (the removal from the register of permanent residents caused prolonged legal uncertainty and exclusion from normal life), Article 13 (failure to provide the applicants with an adequate legal remedy to challenge

[17] For a comprehensive overview of the consequences of the Erasure, see N. KOGOVŠEK ŠALAMON, *Erased*, cit., pp. 110–133; see also N. KOGOVŠEK ŠALAMON *et al.*, *The Scars of Erasure: A Contribution to the Critical Understanding of the Erasure of People from the Register of Permanent Residents of the Republic of Slovenia*, Peace Institute, Ljubljana 2010.

[18] On this aspect of the Erasure, see, for example, J. ZORN, *The Politics of Exclusion During the Formation of the Slovenian State*, in J. DEDIČ, V. JALUŠIČ, J. ZORN (eds.), *The Erased. Organized Innocence and the Politics of Exclusion*, Peace Institute, Ljubljana 2003; N. KOGOVŠEK ŠALAMON *et al.*, *The Scars of Erasure*, op. cit.; the special issue of 'Journal for the Critique of Science', no. 228, 2007.

[19] Although the Human Rights Ombudsman had already highlighted the issue in 1995 in his first annual report.

[20] This means that for seven years, from 1992 until the Constitutional Court's first ruling in 1999, the legislation permitting the Erasure and the subsequent actions of executive officials constituted the law of the land, a status confirmed on several occasions by the Supreme Court, the country's highest judicial authority.

[21] Kogovšek Šalamon is convinced that, had it not been for the Constitutional Court's ruling, the Erasure would probably never have been recognised as unlawful. V. N. KOGOVŠEK ŠALAMON, *Erased*, cit., p. 223.

[22] Two 'systemic' decisions of the Constitutional Court are particularly significant: the first, Decision U-I-284/94, adopted on 4 February 1999, ruled that the Aliens Act was unconstitutional insofar as it did not specify the conditions for the acquisition of permanent residence by persons entitled to obtain Slovenian citizenship under the 'special regime' established by the Citizenship Act upon the expiry of the six-month period; the second, Decision U-I-245/02 of 3 April 2003, ruled, *inter alia*, that the 'Law on Legal Status', adopted with the aim of regulating the status of the Erased, did not recognise their status as permanent residents from the date of Erasure.

the removal and its consequences) and Article 14 (discriminatory treatment based on nationality) of the ECHR, and ordered the State to compensate the applicants and to establish an effective domestic redress mechanism for other affected persons[23].

3.2. *The technical and bureaucratic mechanisms of the Erasure*

Although the Erasure represents one of the most serious systematic violations of human rights in contemporary Europe, it is not this aspect of the case that interests me here. Let us recall that the central issue addressed in this article is the 'obedience dilemma': the supposed decision-making dilemma faced by frontline administrative officials when confronted with superior directives that contravene legal norms. To proceed in this direction, we must therefore focus on the specific internal bureaucratic dynamics that enabled the Erasure. The main question we must answer is therefore: how exactly did the Erasure take place? In this regard, it is possible to highlight several elements of the method employed.

Firstly, you will recall that the 1991 Aliens Act stipulated that its provisions would become 'applicable' to the group of persons concerned (i.e. citizens of the former Yugoslav republics residing in Slovenia but who, for various reasons, had not obtained new Slovenian citizenship) after the expiry of the deadline set by the Act. This vague provision obviously did not provide an explicit mandate for the removal of these persons from the register of residents. However, it granted broad discretion to the Ministry of the Interior, which was the body authorised to apply this law, to provide its own interpretation of the relevant legal provision[24].

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[23] On the problems relating to the implementation of this decision, see N. KOGOVŠEK ŠALAMON, *Constitutional Democracy and the Problem of Erasure from the Registry of Permanent Residents: Challenges and Perspectives*, in M. ŽGUR, N. KOGOVŠEK ŠALAMON, B. KORITNIK (eds.), *Constitutional Law Challenges in the 21st Century. Liber amicorum Ciril Ribičič*, Institute for Local Self-Government and Public Procurement, Maribor 2017, pp. 155–168.

[24] On the implicit and explicit delegation of legislative powers to administrative bodies, see H.S. RICHARDSON, *Administrative Policy-making: Rule of Law or Bureaucracy?,* in D. DYZENHAUS (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, Hart Publishing, Portland (Or.) 1999, p. 311.

Secondly, the physical acts of removing persons from the registers had to be carried out at local level, that is, by officials of the local administrative units responsible for maintaining the registers of residents. These local administrative units perform first-level tasks falling within the remit of various ministries and are therefore directly subordinate to the latter within the scope of those competences. Consequently, in relation to the implementation of the Citizenship Act and the Aliens Act, these units were directly subordinate to the Ministry of the Interior. Now, in order to ensure that the removal was carried out uniformly, the actions of the various local administrative units had to be coordinated centrally by the Ministry of the Interior. To this end, the Ministry organised a series of consultation sessions with local administrative bodies in order to train their staff in the new procedures that came into force when Slovenia became an independent country.

Furthermore, and most importantly, the main administrative mechanism for coordinating all the actions of the local agencies employed by the Ministry consisted of a series of detailed, unpublished 'internal instructions' (i.e. administrative circulars)[25]. In the months leading up to the Erasure, the Ministry issued a series of such circulars with the aim of ensuring a uniform interpretation and implementation of the relevant legislation (i.e. the Citizenship Act and the Aliens Act)[26]. Essentially, on 27 February 1992, the day following the expiry of the two-month transitional period following the six-month deadline for acquiring citizenship, the Ministry issued a circular entitled Instructions on the Implementation of the Aliens Act, by which it effectively ordered the Erasure[27]. In particular, in the first paragraph, the circular noted that with the expiry of the aforementioned deadline set by the Aliens Act, its provisions would come into force in respect of citizens of the other Yugoslav republics who had not applied for Slovenian citizenship or whose applications had been rejected. Therefore, the instruction continued, the status of these persons had to be 'resolved'. At the same time, the registers were to be 'cleaned up'. In the second paragraph, the Instruction explained that any identity

[25] N. KOGOVŠEK ŠALAMON, *Erased*, cit., p. 100.
[26] See N. KOGOVŠEK ŠALAMON, *Erased*, cit., pp. 100 ff.
[27] The Implementation of the Aliens Act – an instruction, No. 0016/4-1496-8, 27 February 1992.

document, even if issued by the competent Slovenian authorities and still valid, would cease to be valid for these persons given the change in their legal status.

4. *Obedience to unlawful orders: an initial theoretical explanation*

In the previous section, we saw a practical example of how obedience to unlawful orders can be ensured within hierarchically organised administrative agencies. In this section, I shall attempt to clarify this example by providing a theoretical explanation.

Before continuing with the detailed analysis of this case, it is essential to make one point clear from the outset: I take it for granted that the frontline officials who physically carried out the Erasure should have and could have known that the orders received from the Ministry of the Interior were unlawful, and yet, despite this, they raised no objections nor refused to carry them out[28]. Understanding this point is important for two main reasons: firstly, because it is essential to realise that the order to carry out the Erasure was, at the very least, of dubious legality, if not manifestly unlawful; secondly, because it is precisely the absence of resistance to this order that indicates the effectiveness of the disciplinary mechanisms of obedience, which I shall examine below, thereby confirming my initial hypothesis – or so it would seem. But let us arrive at this point gradually.

To begin with, the nature of relationships within complex structures such as bureaucratic organisations is so intricate that an explanation from the perspective of a single scientific approach would necessarily be overly simplistic and therefore incomplete. To gain a comprehensive understanding of the phenomenon, we must therefore broaden our horizons to include various fields of scientific research in the explanation. Accordingly, I present below three key concepts that I consider crucial to understanding our topic and which draw on social psychology, social theory and the sociology of law.

[28] However, it cannot be entirely ruled out that some officials protested internally, without this ever becoming public knowledge.

Firstly, this work draws on situationalism in social psychology, namely the view that emphasises the central importance of situational forces on individual behaviour. This view contrasts with the historically predominant dispositional view, which instead emphasises the role of an individual's personality traits in explaining their behaviour[29]. More specifically, here I adopt Zimbardo's model, which broadens the situationalist approach by including in the model the role that systemic factors play in individuals' behaviour. In a key passage from his book *The Lucifer Effect*, Zimbardo explains that 'the System includes the Situation, but is more enduring, more widespread, involving extensive networks of people, their expectations, norms, policies and, perhaps, laws. […] Systems are the engines that run situations that create behavioral contexts that influence the human action of those under their control'[30].

This insight is fundamental to our purposes, as it recognises that specific decision-making situations, however important they may be in determining an individual's choices, are themselves already embedded within broader decision-making contexts with their own characteristics. To understand situational decision-making, therefore, it is first necessary to understand the type of systemic environment in which it takes place. In our discussion, the role of the System is played by the structure of bureaucratic administrative organisations, with their complex networks of vertical and horizontal division of labour, formal and informal rules, procedures and methods of communication, roles with corresponding competences, control and sanctioning mechanisms, etc[31]. The elements of these complex organisational networks are interconnected in various ways, thereby providing multiple mechanisms of influence on the decision-making processes of their employees. In this paper, I focus on the legal and formal systemic influences of the

[29] The 'fundamental attribution error' in social psychology refers to the tendency for people to overestimate the role of personal traits (dispositions) and underestimate the role of situational factors when explaining the behaviour of others. See L. ROSS, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in L. BERKOWITZ (ed.), *Advances in Experimental Social Psychology*, Academic Press, New York 1977, pp. 173–220; P. ZIMBARDO, *A Situationist Perspective on the Psychology of Evil. Understanding How Good People Are Transformed into Perpetrators*, in A.G. MILLER (ed.), *The Social Psychology of Good and Evil*, Guilford Press, New York 2004, pp. 21–50.
[30] ZIMBARDO, *The Lucifer Effect*, cit., p. 179.
[31] V. M. WEBER, *Economy and Society: An Outline of Interpretive Sociology,* edited by G. ROTH and C. WITTICH, University of California Press, Berkeley 1978 [1921]; R. MERTON, *Bureaucratic Structure and Personality*, in 'Social Forces', no. 4, 1940, pp. 560–568; H. SIMON, *Administrative Behaviour*, cit.

organisation, leaving aside other factors, such as extra-organisational and informal ones. Among the factors considered, particular emphasis is placed here on (i) 'external' influences, which operate through the formal transmission of orders; and (ii) 'internal' influences, which operate primarily through the formal training of employees[32]. These two mechanisms of influence on decision-making processes are, in turn, manifestations of two main types of power exercised by bureaucratic organisations over their employees, namely normative power in the strict (or authoritative) sense and disciplinary power[33].

This distinction, particularly in its Foucauldian interpretation[34], is the second key concept underpinning this analysis. What is most relevant to our discussion is the relationship that develops between these two types of power within a given bureaucratic organisation. Here I can only provide a simplified description of the relevant dynamics.

The relationship between the two types of power and its development is not necessarily temporal in nature, but can rather be described as structural. Authoritative power originally provides the formal structure of the organisation[35]. It operates through the issuance of binding directives, the authority of which is based in part on the recognition of a meta-rule according to which such directives should guide the recipient's choices without further deliberation. Although fundamental to the functioning of an organisation, this mode of influence is subject to cognitive limitations that compromise compliance with rules, particularly in contexts characterised by high cognitive loads[36]. On the other hand, disciplinary power, which initially appears to be opposed to authoritative power, proves very useful in neutralising these vulnerabilities through systematic training focused on the observation and repetition of selected behavioural patterns, thereby incorporating selected models of action into the official's repertoire as

[32] Cf. Z. OBERFIELD, *Becoming Bureaucrats: Socialisation at the Front Lines of Government Service*, University of Pennsylvania Press, Philadelphia 2014, pp. 32 ff.
[33] It is also possible to identify a third type of power exercised by public administrations, one that is more indirect, namely 'governmental' power. See M. FOUCAULT, *Security, Territory, Population. Lectures at the Collège de France (1977–1978)*, Palgrave McMillan, New York 2009; M. BRIGAGLIA, *Potere*, cit., ch. 6.2.
[34] See, in particular, M. FOUCAULT, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York 1995.
[35] H. SIMON, *Administrative Behaviour*, cit., p. 177.
[36] On so-called 'ego depletion', see R.F. BAUMEISTER, *Ego Depletion and Self-Control Failure: An Energy Model of the Self's Executive Function*, in 'Self and Identity', no. 1, 2002, pp. 129–136.

automatic responses linked to specific stimuli (disciplining)[37]. This process of disciplining progressively reduces the individual's scope for discretion, making deviation from the prescribed conduct increasingly unlikely. The crucial point is that, in practice, disciplinary power tends to overlap with authoritative power. It does so by transforming the initial deliberate compliance with specific rules and directives into a routine and automated adherence to the cues of senior officials, thereby ensuring a more stable and predictable alignment between frontline action and organisational directives[38]. More specifically, the main aim of this process is to instil in officials a disposition to observe the directives of superiors without reconsidering them. As will be shown, the crucial point to understand is that disciplining – at least in this sense – refers to the automation of the response not to the specific content of the directives, but to the source of those directives, namely senior officials. This also applies, as will be illustrated below, to the typical forms in which such directives are transmitted by the relevant source.

Finally, let us examine one of the techniques by which senior officials secure such disciplined obedience to their directives from frontline officials. A set of regulatory mechanisms that perform this task can be termed 'infra-law'[39]. Infra-law is the name given to a set of flexible and informal regulatory instruments, produced by the administration itself, primarily to regulate the behaviour of its own employees. The term applies to a diverse range of instruments, including memoranda, protocols and even informal communication tools such as FAQs or directives disseminated via social media (e.g. tweets). It is important to note that administrative circulars are also a typical example of this category. Despite its variety, infra-law nevertheless shares several common

[37] For Weber, 'disciplining' means 'the probability that, by virtue of habituation, a command will receive prompt and automatic obedience in stereotyped forms from a given group of persons' (M. WEBER, *Economy and Society*, op. cit., p. 53).

[38] This idea is perhaps best explained by Brigaglia, who argues that 'disciplinary power can therefore be far more pervasive than normative power. With its infinite flexibility, disciplinary power can permanently imprint patterns of action, mental patterns and roles that are far more complex than those that could be imposed by rules. Whereas normative power can only cause or prevent actions described in general terms, disciplinary power can shape them in detail' (M. BRIGAGLIA, *Potere*, op. cit., pp. 256–7).

[39] The term 'infra-law' was first introduced by the French jurist and sociologist Jean Carbonnier in his reflections on legal pluralism. He understood it as a set of social rules specific to subcultures, similar to law but lacking essential characteristics such as organised coercion or justiciability. Among the examples he cited were customary law, children's law, popular law, etc. See J. CARBONNIER, *Sociología jurídica*, 2nd ed., Tecnos, Madrid 1982, pp. 124 ff.

characteristics, such as, for example[40]: (i) proliferation and flexibility: it can be produced rapidly and in large quantities by any administrative organisation; (ii) secret or unorthodox dissemination: infra-law is often kept hidden from the public or published in atypical ways, such as on government websites, internal portals or social media; (iii) temporariness and specificity: generally, infra-legal provisions have a limited duration, a high turnover rate and are designed to address very specific issues. Above all, although infra-legal instruments do not usually fall within the traditional category of codified legal sources[41], they nevertheless tend to exert a significant influence on frontline decision-making processes. Indeed, referring specifically to administrative circulars, Romano goes so far as to argue that 'administrative bodies, in carrying out the activities within their remit, operate almost exclusively on the basis of the circulars issued to them, generally neglecting to take direct account of the statutory texts, for the application of which these circulars are issued'[42].

Finally, we are only left to explain how infra-law – and, in particular, administrative circulars – functions as a vehicle for the disciplinary power of senior officials. Here, circulars serve as physical manifestations of the disciplinary power that senior officials exercise over frontline staff within clearly established hierarchical relationships in bureaucratic organisations. Indeed, it appears that in organisations with an intricate and elaborate division of labour, where each individual official (especially those at lower levels) controls only a very narrow part of the entire process, the systemic decision-making power of the office at the top of that structure – the only one with an overview –

[40] See I. GJERGJI, *Immigrazione e infra-diritto: dal governo per circolari alla tweeting governance*, in 'Etica & Politica', XXII, 2020, pp. 323 ff.; A. LO CALZO, *Emergenza e infradiritto. Limiti ai diritti fondamentali, regole di condotta e canoni di interpretazione*, in 'Etica & Politica', XXII, 2020, pp. 395 ff.; L. MILAZZO, *Infradiritto, controdiritto e "regressione del giuridico"*, in 'Etica & Politica', XXII, 2020, pp. 303 ff.

[41] For some recent works on the general theory of sources of law, see, for example, G. PINO, *Sources of Law*, in L. GREEN AND B. LEITER (eds.), *Oxford Studies in Philosophy of Law*, vol. 4, Oxford University Press, Oxford 2021, pp. 58 ff.; M. CARPENTHIER, T. SPAAK, *Sources of Law,* in L. BURAZIN, K.E. HIMMA, G. PINO (eds.), *Jurisprudence in the Mirror. The Common Law World Meets the Civil Law World*, Oxford University Press, Oxford 2024, pp. 241 ff.

[42] A. ROMANO, *In tema di circolari amministrative*, in 'Rivista di diritto finanziario', no. 2, 1959, p. 117; G.W. HOGAN, *The Legal Status of Administrative Rules and Circulars*, in 'The Irish Jurist', no. 22, 1987, p. 194; M. CHITI, *Circolare (amministrativa)*, in *Enciclopedia giuridica*, VI, Treccani, Roma 1988.

inevitably tends to carry the greatest weight[43]. Efficient work under such conditions requires the coordination of the various decision-making processes from above. Senior officials who use these tools to communicate with their subordinates rely on the fact that training the latter to be willing to obey their directives will prompt the recipients of the directives to almost blindly obey the content of the circular, thereby ensuring efficient coordination and decision-making[44]. This is because, as we have seen, the training in question aims to instil in the recipients a disposition to obey, almost automatically, directives coming from a particular source – in our case, officials from the Ministry of the Interior – without examining their content. Indeed, these 'pure forms', which can absorb almost any type of content, are therefore a perfect tool for creating a framework of obedience anchored to the source rather than to the content of the directive[45]. The disciplinary power exercised through circulars thus enables senior officials to promote decision-making frameworks in which frontline actions are continuously aligned with the

[43] Referring specifically to the management of migration in Italy, Gjergji argues that: 'The concentration of functions and powers in the immigration sector within a few specialised offices and the gradual spatial separation of these offices from the others thus seems to be driving the creation of ideal conditions for an accentuation of the hierarchical nature of the entire organisational structure of this particular sector of the Ministry of the Interior. In such a complex structure [...] orders issued directly by the bodies at the top of that structure end up acquiring greater significance. In other words, [...] conditions are created whereby circulars acquire binding force and represent one of the most important sources of legislation on immigration' (I. GJERGJI, *Circolari amministrative e immigrazione*, FrancoAngeli, Milan 2013, p. 92).

[44] We should not forget that this obedience is reinforced by the fact that senior officials directly control many aspects of their subordinates' careers, such as promotions, transfers, rewards and sanctions, etc. In this sense, a police officer's statement, explaining why they apply the interpretation of the law provided to them by their ministerial superiors, is particularly revealing: 'it is not that the law has no value in itself, but it can be interpreted in many ways and we, having to choose an interpretation, choose the one the ministry imposes on us [...], after all, our career depends on the manager, on the ministry. I don't know if I've made myself clear?" (I. GJERGJI, *Circolari amministrative e immigrazione,* cit., p. 102).

[45] This does not, however, mean that the content and, more specifically, the type of language used in circulars is not a significant factor contributing to compliance (or non-compliance). Many authors agree that the more specialised and technical the language, the greater the likelihood that frontline officials will comply. This point is particularly well highlighted by Gjergji, who argues that 'it is important to note how objectively complex and difficult it is for individual public administration officials to disregard circulars that conflict with legislative provisions, despite the obligation to disregard circulars *contra legem* having been established on numerous occasions by case law as well. The problem arises, in fact, primarily in cases where circulars constitute an elusive and creeping violation of legislative provisions, sometimes concealed behind cryptic phrasing that does not allow for an easy and direct identification of the circular's *contra legem* character. In such cases, therefore, for the unlawful circular to be disregarded, a very high level of legal expertise and constitutional awareness is implicitly presumed and required of every single public administration official. A condition – as is easily understood – that is objectively difficult to achieve in practice' (I. GJERGJI, *Circolari amministrative e immigrazione*, cit., p. 46).

objectives set at senior management levels, whilst ensuring a high level of administrative efficiency. Consequently, the overlap of disciplinary power with the authoritative power conveyed by circulars makes frontline decision-making far more effective.

5. *Conclusions*

The case of the Erased highlights a paradox of modern bureaucracies: whilst legality is formally upheld as a guiding principle of public administration, in practice it is often supplanted by the more insidious force of organisational discipline. Legal systems that provide 'rules of conflict' assume that the normative clarity of statutory provisions can resolve the dilemma of unlawful orders. However, as the case of the Erased demonstrates, officials often comply with directives that they know – or ought to know – are unlawful. To explain why this happens, it is necessary to move beyond the narrow legal-doctrinal framework and pay attention to the deeper power dynamics at work within administrative organisations.

As Zimbardo's situational model reminds us, individual behaviour cannot be reduced to personal traits or isolated decisions; it is shaped by systemic contexts that create, constrain and normalise choices. In bureaucratic contexts, this systemic environment is defined by the intersection between authoritative power (the formal validity of the law) and disciplinary power (the internalised routines of obedience instilled through training, supervision and repetition). Foucault's description of discipline clarifies how such power operates primarily not on the content of norms, but on the dispositions of agents, embedding obedience as a modelled and quasi-automatic response to hierarchical directives. In this sense, administrative circulars are more than pragmatic tools of coordination: they are material instruments of disciplinary power, crystallising the expectation that orders from above must be followed regardless of their legality.

As I have demonstrated, the Erasure thus confirms my initial hypothesis H1: when authoritarian and disciplinary forces clash, the latter tend to prevail. The compliance of frontline officials in the case in question was less a matter of deliberate legal

misjudgement than the result of a long disciplinary process that prioritised organisational cohesion over fidelity to the law. At the same time, the case also indirectly illustrates the conditional nature of this mechanism, in line with hypothesis H2: the intensity of obedience is mediated by the specific organisational context, with ministry officials displaying a strong but not absolute propensity for obedience, whilst other contexts – such as the military – might exhibit an even more ingrained reflex of obedience.

A significant conclusion emerges from the above: legality is structurally vulnerable when confronted with the disciplinary logics of bureaucracy. This vulnerability cannot be remedied simply by refining the (legal) rules of conflict, because the obedience dilemma is not primarily a matter of normative uncertainty, but of power operating through organisational forms. The lesson of the Erased is therefore both practical and theoretical. As far as the latter is concerned, it shows us that the robustness of legality depends not only on the quality of legal provisions, but also on the way in which disciplinary power is produced, disseminated and countered within the administrative organisations that implement those provisions. To overlook this dimension is to remain captive to the illusion that the law alone can guarantee disobedience to illegitimate authority.