

‘Yes Minister’: On a Civil Servant’s Duty to Obey Superiors’ Illegal Instructions, and On the Superior Orders Defense That Should Be Afforded to Such an Obedient Civil Servant

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According to current Israeli case law, a civil servant, in most cases, has a strict duty to obey superiors’ illegal instructions. Furthermore, according to this case law, it seems that a civil servant who obeys illegal instructions will be afforded a relatively extensive superior orders defense. The aim of this article is to examine what the proper legal norm should be on the subject of civil servants’ obedience to illegal instructions. In it I argue that Israeli courts have developed the current norm on the subject without properly taking into consideration the public interests that are relevant to the issue. Instead, they have simply applied the same legal rule to civil servants that has been applied to soldiers – who have been given illegal orders by their commanders – without thoroughly examining whether an analogy can be drawn between these two situations of obedience to illegal instructions. I will show that such an analogy is inappropriate and flawed because of the extensive differences in the considerations that should be taken into account in these two kinds of situations. In light of this conclusion, I suggest an alternative to the current *lex lata*, arguing that it provides a proper balance between the different considerations relevant to the issue of civil servants’ obedience to illegal instructions. In the article (at its beginning and near the end) I will also discuss a specific case, in which the issue of civil servants’ obedience to illegal instructions has recently arisen: the case of Shmuel Hershovich.