

## CRIMINAL LIABILITY OF PUBLIC EMPLOYEES IN THE REPUBLIC OF SERBIA \*

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*Niccolo Machiavelli in his famous work "The Prince" highlighted that the selection of the people surrounding the ruler speaks of his own ability. However, in modern society and organization of the state administration, it is very hard for the head of state to have insight into the abilities and integrity of his/her associates and public employees. Therefore, it is necessary to establish ethics improvement mechanisms in the public sector.*

*Establishing criminal liability of public employees contributes to increasing the accountability of government towards the citizens and strengthening public confidence in the work of the public institutions. Criminal offenses committed by public employees are usually committed to acquire illegal profit. If there is a high probability that some of these offenses will be discovered, employees would restrain from committing them. In some cases, employees do not know the limits of their own responsibilities and believe that if they take certain actions following the instructions from their superior they cannot be held criminally liable. However, such approach does not exclude criminal liability of the employee. A person employed in the public sector has the right to refuse to comply with the orders from his/her superior if he/she considers it to be a criminal offense.*

*Public employees need to treat the property that is entrusted to them in accordance with the law and in an efficient and economical manner. However, it should be noted that, in the recent years, more attention has been paid to preventive measures. Such measures should contribute to the reduction of financial crimes in the public sector. Uncontrolled public spending and tax evasion can have extremely adverse impact on the*

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*macroeconomic situation in the country. It is mainly negatively reflected on the social status of the citizens.*

*In this paper, the authors use a legal-dogmatic approach. At the national level, the focus should be out on adequate protection of the public interests.*

**Key words:** *public employees, criminal liability, financial crimes, prevention*

## INTRODUCTION

Discussions on criminal liability in the public administration are usually centered around public officials, as it is commonly referred to in the relation to prevention and fight against corruption. For that reason, criminal liability of public employees is often neglected. However, the issue of criminal liability of public employees could be linked directly to the actions of public officials as their superiors.

Putting the focus of the analysis on public employees is crucial considering that the public sector employees contribute to a great extent to ensuring the citizens' have trust in the sector and consider it to be reliable, efficient and competent.

Public officials and management have the authority to issue instructions to the employees. This means that the employees must comply with the rules and policies that the management has established. As a rule, the employees have a duty to follow the orders issued by their superiors within the framework of the law. If an employee fails to carry out a lawful order, that is, in principle, considered a breach of duty and in particularly serious cases, it may also be a matter of criminal liability. However, the employees have both the right and duty to refuse to follow an order if the manager has issued and maintains an order that is manifestly unlawful, or which requires the employee to do something that is in itself a criminal offence. These situations put public employees in a challenging situation when they need to assess how to react and when the refusal to follow a superior order is justified.

The authors are analyzing the Serbian legislation from the perspective of criminal acts committed by public employees who are following superior orders and who are challenged with unlawful orders, as well as the preventive mechanism in place.

### 1. DEFINITION OF "PUBLIC EMPLOYEE"

Common understanding and the definition of public employee is the first step that needs to be taken before any discussion of public employees' criminal liability. A "public employee" means both a person employed in the state administration authorities and a person employed in the territorial autonomy and local self-government units and institutions, while the persons employed in the public enterprises and institutions have

the classic employment status (Vranješ, 2015: 50). Bearing in mind the above, this paper deals exclusively with the position of the persons employed in the state administration authorities, territorial autonomy and local self-government units who have a status of public employees, regardless of the fact that the public enterprises established by the Republic, territorial autonomy or local self-government units are also considered parts of the public sector as well.

The rights and obligations of the public sector employees in the Republic of Serbia are regulated under different regulations. In the state authorities, the labor relations are regulated under the Law on Civil Servants, and in the territorial autonomy and local self-government units, they are regulated under the Law on Employees in Autonomous Provinces and Local Self-Government Units.<sup>1</sup>

All public employees are obliged to act in accordance with the principles of conscientiousness and legality, impartiality and political neutrality, the primary interest of the public service, reservation, public employees' responsibility for the expertise and the effectiveness of their work, and in accordance with the principle of liability for damages and transparency (Vlatković, Brković and Urdarević 2013: 86-89; Vranješ, 2015: 63).

However, our applicable legislation does not define the term "public employee", and specifies only the term "state employee", while the Law governing the work of employees in the territorial autonomy and local self-government units does not use the term "officer", but "employee in the territorial autonomy and local self-government unit".

The employer of public employees is the state in which they perform their service. Their rights and obligations are defined under separate regulations. Public employees are obliged to act in accordance with the Constitution, law and other regulations and in accordance with the rules of the profession, in an impartial and politically neutral manner.<sup>2</sup> In accordance with the law, all public employees need to have the knowledge and skills, as well as the qualities and abilities that a public employee is required to have and which influence the successful performance of his/her work.<sup>3</sup> He/she is responsible for the legality, expertise and efficiency of his/her work. Accordingly, no one can influence a public employee to do or not to do something that is contrary to the regulations.<sup>4</sup>

In accordance with the Law, a public employee is obliged to follow an oral order from his/her superior, unless he/she believes that order to be contrary to the regulations or the rules of the profession or that its execution could cause harm, and

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<sup>1</sup> Zakon o državnim službenicima Republike Srbije [Law on Civil Servants of the Republic of Serbia] („Službeni glasnik RS“, broj 79/2005, 81/2005-isp., 83/2005-isp., 64/2007, 67/2007-isp., 116/2008, 104/2009, 99/2014, 94/2017 i 95/2018) i Zakon o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave [Law on Employees in Autonomous Provinces and Local Self-Government Units] („Službeni glasnik RS“, broj 21/2016, 113/2017, 95/2018 i 114/2017-dr. zakon).

<sup>2</sup> Article 5 Zakona o državnim službenicima [Law on Civil Servants of the Republic of Serbia] („Službeni glasnik RS“, 79/2005, 81/2005-isp., 83/2005-isp., 64/2007, 67/2007-isp., 116/2008, 104/2009, 99/2014, 94/2017 i 95/2018).

<sup>3</sup> Article 5a of the Law on Civil Servants of the Republic of Serbia.

<sup>4</sup> Article 6 of the Law on Civil Servants of the Republic of Serbia.

he/she must notify the superior accordingly.<sup>5</sup> However, according to the national regulations, a public employee is obligated to follow a superior order repeated in writing and inform the superior accordingly in writing. If the execution of an oral or written order would constitute a criminal act, the public employee is obliged to notify in writing the manager, i.e., the body supervising the operations of the state authority, in case the order was issued by the manager.<sup>6</sup>

Often, the reason why public employees commit criminal acts is exactly following superior orders and not knowing the limits of one's own responsibility. In accordance with the principle of subjective criminal liability, the manager of a state authority is responsible for his/her own actions, and the employees are equally responsible for their own actions. While the manager is the person who manages the state authority and issues orders to the employees, in accordance with the above principle, every person is exclusively responsible for his/her own actions. In accordance with the Criminal Code, the sanctions and warning measures may be imposed only on the perpetrator who is guilty of the act that was committed. The guilt exists if, at the time of the commission of the crime, the perpetrator was of sound mind and acted with intent, and if he/she was aware or should have and could have been aware that his/her act was prohibited.<sup>7</sup> The Criminal Code does not distinguish between public employees and state employees, and only defines the terms "officer" and "responsible person". In accordance with its provisions, an officer means: "a person performing official functions in a state authority, an elected, nominated or appointed person in a state authority or local self-government unit or a person who permanently or occasionally performs official duties or official functions in those authorities, a notary public, a public bailiff, or an arbitrator, as well as a person in an institution, company or other entity entrusted with the exercise of public powers, and deciding on the rights, obligations or interests of individuals or legal entities or the public interest. In accordance with the provisions of the Criminal Code, a public employee means also a person who is actually entrusted with the performance of certain official duties or tasks or a military person. In addition to the above, a public employee means also a foreign official who is a member, title holder or officer of a foreign country legislative or executive authority, a person who is a judge, juror, member, title holder or officer of a foreign country court or an international court, a person who is a member, an title holder or officer of an international organization or its bodies, as well as a person who is a member, title holder or officer of an international organization or its bodies, as well as a person who is an arbitrator in foreign or international arbitration."<sup>8</sup> However, in addition

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<sup>5</sup> Article 18 of the Law on Civil Servants of the Republic of Serbia.

<sup>6</sup> Article 18 of the Law on Civil Servants of the Republic of Serbia.

<sup>7</sup> Article 22 Krivičnog zakonika Republike Srbije [Criminal Code of the Republic of Serbia] („Službeni glasnik RS“, broj 85/2005, 88/2005-isp., 107/2005-isp., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016).

<sup>8</sup> Article 112 point (3) of the Criminal Code.

to “officer”, the Criminal Code defines also the term “responsible person in a legal entity”. In accordance with its provisions, that is a person who, in accordance with the law, regulation or authorities, performs specific management, supervision or other activities under the scope of activities of the legal entity, as well as a person who is actually entrusted with the performance of those activities. In accordance with that same provision, the responsible person means also an officer, with respect to criminal acts with the responsible person identified as the perpetrator, which are not specified in the chapter on criminal acts against official duty, or as criminal acts committed by officers.<sup>9</sup> Bearing that in mind, for specific criminal acts for which managers may be held liable, other employees may be held liable as well, by virtue of law, regulations, powers or tasks within the scope of activities of the state authority, territorial autonomy or local self-government unit whose performance has actually been entrusted to them, unless the provisions of the Criminal Code require the perpetrator of specific criminal acts to be exclusively the person managing the state authority, territorial autonomy or local self-government unit.

## 2. CRIMINAL ACTS FOR WHICH PUBLIC EMPLOYEES MAY BE LIABLE

Prospective criminal acts committed by public employees are generally prescribed in the group of crimes against official duty. In the case law, the most common crime is the abuse of office. That crime could be committed by any officer by exercising his/her official position or powers, exceeding the limit of his/her official powers, or by failing to perform his/her official duty, if in doing so he/she ensures benefits for himself/herself or another individual or legal entity or causes any harm or serious injury to the rights of another person.<sup>10</sup> In addition, a typical crime against official duty is negligent performance of service. Such an act may be committed by an officer who, in violation of the law or other regulations or general acts, by failing to perform supervisory duties, or by otherwise manifestly acting negligently in the performance of his/her duties, although he/she was aware or should have or could have been aware that that may result in a serious violation of another person's rights or material damage, and if such violation, i.e., damage in excess of a certain amount actually occurs.<sup>11</sup> In order to prevent such crimes, all public employees need to be aware of their rights and obligations, and the limits of their own liability. Internal acts and written procedures that clearly define the tasks and powers of each public employee can also contribute significantly to that end.

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<sup>9</sup> Article 112 point (5) of the Criminal Code.

<sup>10</sup> Article 359 of the Criminal Code.

<sup>11</sup> Article 361 Krivičnog zakonika [Criminal Code of the Republic of Serbia].

A public employee could also be the perpetrator of other criminal acts such as unlawful collection and payment,<sup>12</sup> or misuse of budget funds. The definition of the above act in the Criminal Code was taken from the Budget System Law.<sup>13</sup> The act exists if the responsible person in the budget beneficiary institution creates commitments or authorizes the payment of expenditures and outlays exceeding the amount of one million Serbian Dinars relative to the amount approved in the budget, financial plan or the Government's act determining the level of borrowing.<sup>14</sup> In the above example, the legislator is explicit. The perpetrator can also be the responsible person. Therefore, the perpetrator does not have to be exclusively the manager of the Serbian budget beneficiary institution, territorial autonomy or local self-government unit. That could be any person that is not only entrusted by law or other regulation or authority with the performance of the budget execution management or oversight tasks, but also any person who is actually entrusted with the performance of certain budget execution tasks (although that is not so frequent in practice). Therefore, in this particular case, the perpetrator could be any of the employees entrusted with the exercise of such powers in accordance with the applicable regulations (Šuput, 2012).

An officer, as well as a responsible person, could be the perpetrator of the following criminal acts: fraud in the service,<sup>15</sup> embezzlement,<sup>16</sup> influence peddling,<sup>17</sup> soliciting and accepting bribes,<sup>18</sup> and bribery.<sup>19</sup>

Criminal acts committed by the public sector employees could be linked to the procurement procedures. While it is, of course, true that the head of a state authority or institution signs the contract with the bidder, the public employee is responsible for the activities he/she undertakes during that procedure. Therefore, the criminal acts committed must be linked with the exercise of the official duty (Malinche, 2018: 71).<sup>20</sup> Thus, for the criminal act of misuse in connection with public procurement, the perpetrator may be the responsible person or the officer in the procuring authority who, by abusing his/her position or authority, exceeding the limits of his/her authority, or by failing to perform his/her duty, violates the Law or other public procurement

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<sup>12</sup> The offense of unlawful collection and disbursement is prescribed in article 362 of the Criminal Code of the Republic of Serbia.

<sup>13</sup> Zakon o izmenama i dopunama Krivičnog zakonika [The Law on Amendments to the Criminal Code] („Službeni glasnik RS“, broj 111/09).

<sup>14</sup> Article 362a of the Criminal Code of the Republic of Serbia.

<sup>15</sup> Article 363 of the Criminal Code.

<sup>16</sup> Article 364 of the Criminal Code.

<sup>17</sup> Article 366 of the Criminal Code.

<sup>18</sup> The offense of bribery is prescribed in article 367. of the Criminal Code of the Republic of Serbia.

<sup>19</sup> Article 368 of the Criminal Code of the Republic of Serbia.

<sup>20</sup> Public servant can be responsible for the crime of abuse in public procurement, prescribed in Article 228. of the Criminal Code of the Republic of Serbia if he/she uses his/her position or authority, if exceeds the limits of his/her power or if he/she performing his/her official duties by violation of laws or regulations in public procurement and to thus causing damage to public funds.

regulations, and thus abuses public funds (Kostić, Zirojević, 2017)<sup>21</sup> While this type of criminal act implies a “violation of the public procurement law or other public procurement regulations”, the legislature has remained vague in terms of the violations of the law referred to in the description of the act. The criminal act committed must result in the abuse of public funds. This solution introduces confusion in terms of its interpretation and application, since it refers to abuse of public funds, while referring to the value of the procurement in the description of the more severe form of the act (Matić Bošković, 2017). Before the act of abuse in public procurement was criminalized, such conduct by officers and responsible persons was qualified as a criminal act of abuse of office (Kostić, 2018: 291).

Public employees could also be the perpetrators of criminal acts against legal instruments. Thus, a public employee would be liable for the criminal act of falsifying an official document if he/she has entered false information into an official document, book or a file or if he/she failed to enter an important information, as well as if he/she has verified with his/her signature or official seal an official document, book or a file containing false information. The same act exists if an officer uses a false official document, book or a file in the service as if they were true, or if he/she destroys, conceals, damages, or in any other way renders useless an official document, book or a file.<sup>22</sup>

### 3. FOLLOWING SUPERIOR ORDERS

A particular problem in terms of the performance of official duty and authority by public employees is following a superior order in case the employee believes that complying with such order could constitute a criminal act. In these situations, a question may be raised whether to comply with the superior order or refuse to act in accordance with such order. In the first situation, the public employee may be held liable for a crime, while in the second situation he/she fears losing his/her job or being unable to advance in his/her career. However, notwithstanding the fact that this is the order from their superior, in accordance with the regulations governing the status of public employees, they are obliged to refuse to act under a superior order if they believe that undertaking such activity would constitute a specific criminal act.<sup>23</sup> That is, of course, very difficult to do in practice, and cases of employees acting contrary to a superior order are rare. This is evidenced also by

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<sup>21</sup> Article 228 paragraph 2 of the offense of abuse in public procurement. Mentioned offense is prescribed by Criminal Code in the group of criminal offenses against the economy. The object of its protection includes not only the economy, but also public funds and official duties.

<sup>22</sup> Article 357 of the Criminal Code of the Republic of Serbia.

<sup>23</sup> Article 18 paragraph 3 of the Law on Civil Servants of the Republic of Serbia („Službeni glasnik RS“, broj 79/2005, 81/2005-ispr., 83/2005-ispr., 64/2007, 67/2007-ispr., 116/2008, 104/2009, 99/2014, 94/2017 i 95/2018) and article 31 paragraphs 3 and 4 Law on Employees in Autonomous Provinces and Local Self-Government Units („Službeni glasnik RS“, broj 21/2016, 113/2017, 95/2018 i 113/2017-dr. zakon).

the Milgram experiment. Specifically, that is a series of experiments developed by psychologist Stanley Milgram.<sup>24</sup> Their aim was to investigate people's willingness to obey authority figures and act contrary to their own moral principles. Three people participated in the experiments. One of the participants had the role of a "teacher" and was instructed to "read" a list of word pairs to the "learner", after which he/she would test the "learner's" knowledge. If the "learner" made a mistake, the "teacher" was instructed to punish him by administering electric shocks. With every mistake, the "teacher" was instructed to increasing the electric shock intensity by 15 volts. The "learner" did not actually receive shocks, but the real participants were not aware of that. They were played the pre-recorded "learner's" shouts of pain (even violent screams). When the power of the shocks was supposedly increased to 220V, there would be no response from the "learner" heard. The results of the experiment indicated that approximately 60% of the participants continued until the end, even though they could hear the person's reactions to the shocks at all times, and even though they were uncomfortable with it. Notwithstanding that fact that it received universal ethical condemnations for having exposed people to a great deal of stress and for having deceived the participants, the above experiment showed that a large share of participants failed to refuse the orders of an authority figure. In addition, the results of the experiment showed that women are just as obedient as men, and that proximity of an authority figure affects our willingness to obey his/her orders. Based on the results of the experiment, Milgram concluded that some people become part of a group and accept everything the group was doing without any critical consideration. One theory was that the person following someone else's orders saw himself/herself as the other person's tool, and therefore felt that he/she was not responsible of his/her own actions.

The experiment was conducted in 1961, and its aim was to investigate how far people are willing to go to obey the orders of those they perceived as authority figures. People who applied for the experiment thought they would participate in a study of memory.<sup>25</sup>

Researchers from SWPS University of Social Sciences in Poland repeated the experiment in 2015.<sup>26</sup> The results were published in the journal *Social Psychological and Personality Science*. The scientists had the idea to use the experiment to prove the high level of obedience of the Poles. The results showed that as many as 90% of the participants were reportedly prepared to increase the electric shocks at the order of an

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<sup>24</sup> Stenli Milgram described his experiment in more details in the „Behavioral Study of Obedience“, *Journal of Abnormal and Social Psychology*, 4/1963. In addition the results of the survey were published in: S. Milgram, „The Perils of Obedience“, *Harper's Magazine*, December 1973, 62-77, Available at: [https://is.muni.cz/el/1423/podzim2013/PSY268/um/43422262/Milgram\\_-\\_perils\\_of\\_obediance.pdf](https://is.muni.cz/el/1423/podzim2013/PSY268/um/43422262/Milgram_-_perils_of_obediance.pdf) [17.06.2019.].

<sup>25</sup> More information on the website: <http://www.mingl.rs/kolumne/2/2017/02/08/milgramov-eksperiment--traganje-za-objasnjenjem-nacistickog-zlocina.html> [17.06.2019.].

<sup>26</sup> More information about experiment available at: „Conducting the Milgram Experiment in Poland, Psychologists Show People Still Obey“, available at: <http://www.spsp.org/news-center/press-releases/milgram-poland-obey> [17.06.2019.].



authority figure. Although the experiment could not be repeated under the identical conditions due to ethical limitations, the results are similar to those obtained in the Milgram experiment. While the ethical principles prevented the experiment from being fully copied, the researchers created a similar model with electric shocks. The study involved 80 people (40 men and 40 women), aged eighteen to sixty-nine. The participants could press ten buttons, each with a higher intensity of electric shocks. The results showed that the level of obedience to authority figure is the same as in the Milgram experiment. The study has also shown that 90% of people are ready to press the button with the highest level of shock.<sup>27</sup>

When it comes to public service, a public employee has to follow his/her superior orders, naturally with some exceptions. However, the question arises how, in such situations, when an employee believes that following a superior order would constitute a criminal act, he/she could be protected against “the retaliation by the superior”. Even the regulations on minimizing the risk of corruption and unlawful conduct seem to adhere to the rules that employees should inform the management in all events. Thus, according to the Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector, an internal auditor who, in the course of the audit procedure, “identifies indicators of fraud” is obliged to terminate the audit procedure and notify the Internal Audit Manager immediately, who should in turn inform the manager of the public funds beneficiary institution.<sup>28</sup> That means that when the internal auditor establishes that there are grounds for suspicion that a crime has been committed, he/she is obliged to inform the above persons accordingly. However, the question is what happens if the perpetrator of the crime is the head of the institution that is subject to the internal audit. The Serbian Criminal Code prescribes a criminal sanction for failure to report a crime or the perpetrator of a crime if the officer or responsible person knowingly fails to report a crime they have discovered in the course of performing their duty.<sup>29</sup> However, the precondition is that the crime is punishable with a minimum five-year prison sentence. That provision should have a positive effect on reporting crimes against official duty or other criminal acts committed by public employees. However, some of these crimes are punishable with a sentence that is less severe than that of five years in prison, limiting the scope of such a ruling. That is why we believe that the crime of failing to report a criminal act should be extended to include a failure to report crimes punishable with sentences less severe than that of five-year imprisonment.

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<sup>27</sup> More information available at: <http://www.spsp.org/news-center/press-releases/milgram-poland-obey> [17.06.2019.].

<sup>28</sup> Article 20 Pravilnika o zajedničkim kriterijumima za organizovanje i standardima i metodološkim uputstvima za postupanje i izveštavanje interne revizije u javnom sektoru [Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector] („Službeni glasnik Republike Srbije“, broj 99/2011 i 106/2013).

<sup>29</sup> The offense of not reporting about crime and its perpetrator is prescribed in Article 332 of the Criminal Code of the Republic of Serbia („Službeni glasnik RS“, broj 85/2005, 88/2005-isp., 107/2005-isp., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 i 94/2016) in the group of criminal offenses against the judiciary.

Both the Law on Civil Servants and the Law on Employees in Autonomous Provinces and Local Self-Government Units prescribe public employees' labor rights and obligations. According to the Law on Civil Servants, public employees are obliged to act in accordance with the Constitution, law and other regulations, as well as to act in accordance with the rules of the profession, in an impartial and politically neutral manner.<sup>30</sup> In accordance with the Law, public employees are responsible for the legality, expertise and efficiency of their work, and no one can influence a public employee to do or not to do something that is contrary to the regulations.<sup>31</sup> Accordingly, a public employee is obliged to follow an oral order from his/her superior, except when he/she believes that such order is contrary to the regulations or the rules of the profession or that his/her actions on executing the order could result in a violation, which he/she is obliged to communicate to his/her superior. If such an order is repeated, the public employee is obliged to execute it and inform the manager accordingly. However, he/she is also obliged to refuse to execute an oral or written order if such an act would constitute a criminal act and to inform the manager, i.e., the authority that supervises the work of the state authority if the order was issued by the manager, in writing.<sup>32</sup>

Similarly, the employees in the Autonomous Province authorities and local self-government units are obliged to act in accordance with the Constitution, law and other regulations, and the rules of the profession, and to be impartial and politically neutral. Accordingly, no one should influence an officer to do or not to do something that is contrary to the regulations.<sup>33</sup> In accordance with the principle of professional conduct, all officers are obliged to act in accordance with the law, the rules of the profession and the code of conduct, and to undertake all measures and actions to enable legal entities and individuals to exercise their rights and interests guaranteed by the law and other regulations.<sup>34</sup> In accordance with that same principle, an officer is obliged to follow an order from his/her manager, unless he/she believes that the order is contrary to the regulations or the rules of the profession, and he/she is obliged to notify the manager accordingly, in writing. An officer is obligated to act in the same way if he/she believes that the execution of such an order could result in damages, and he/she is obliged to notify the manager accordingly, in writing. In case the manager repeats the order in writing, the officer is obliged to execute the order and inform the head of the authority that supervises the work of the manager who has issued the order in writing. That means that in these situations the officer is relieved of any disciplinary responsibility and civil liability (liability for damages).

However, different rules apply when it comes to a superior order that constitutes a criminal act. In such cases, the officer is obliged to refuse to execute

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<sup>30</sup> Article 5 Law on Civil Servants.

<sup>31</sup> Član 6 Law on Civil Servants.

<sup>32</sup> Article 18 of the Law on Civil Servants. The obligation of such conduct exists when it comes to suspected superior order execution is a criminal offense and when there is a suspicion that the compliance with such an order is misdemeanor.

<sup>33</sup> Article 16 Law on Employees in Autonomous Provinces and Local Self-Government Units.

<sup>34</sup> Article 30 Law on Employees in Autonomous Provinces and Local Self-Government Units.

an oral or written order if it would constitute a criminal act. If the order is issued by the head of a provincial authority or the head of administration, i.e., the head of the service or organization established by the competent authority of the Autonomous Province, local self-government unit or the city municipality, the officer is obliged to inform the executive body of the Autonomous Province or the city, i.e., municipal council overseeing the work of the administration accordingly.<sup>35</sup>

There is a need to ensure mechanisms for the effective protection of public employees from disciplinary responsibility, considering that failure to follow superior orders or negligent, untimely or incomplete execution of superior orders constitute grounds for disciplinary responsibility. Similarly, unlawful work, i.e., unlawful production of official documents, inaccurate or otherwise improper processing of official documents or failure to perform acts the officer is authorized to perform, which result in the employer liability or damages, also constitute grounds for disciplinary responsibility.<sup>36</sup> When it comes to an employee refusing to act upon a superior order he/she believes to constitute a crime, it is possible that he/she fears at same time that such conduct may constitute grounds for disciplinary responsibility. Therefore, the best solution would be to adopt a rulebook on handling such situations at the level of the public sector institution, prescribing the conduct of each employee in such situations. In addition, the rulebook on disciplinary responsibility of employees at the level of the institution should refer to the application of such rulebook in specific situations. That rulebook could stipulate that a written instruction from the superior, together with the employee's arguments for refusing to act in accordance the instruction needs to be forwarded in a timely manner (within the prescribed deadline) to both the human resources service and the top management of the institution. That rulebook could also stipulate that the top management of the institution is obliged to respond as soon as possible to the public employee who has forwarded his/her immediate superior's order and explained in a letter why he/she does not want to comply with it. That public employee's explanation could later be used as evidence during disciplinary proceedings if the immediate superior were to consider that such conduct by the employee constituted a grave violation of the labor rights and obligations. In his/her explanation, the public employee should indicate the date of issue of both the oral and the written orders, explaining in detail the situation and stating the reasons for refusing to comply with the order. In addition to the date, this explanation needs to include also the signature of the public employee refusing to comply with the superior order. Similarly, a written order from the superior should always include the date and signature of the superior issuing the order (Rabrenović, Kostić, Matić Bošković, 2018: 310-311).

Comparative experience could be useful for overcoming the current dilemma that exists in the Serbian legislation. For example, in Denmark, public employees have a so-called right to disclosure. This means that public employees have a right to give

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<sup>35</sup> Article 31 of the Law on Employees in Autonomous Provinces and Local Self-Government Units.

<sup>36</sup> Article 138 paragraphs 1 i 2 of the Law on Employees in Autonomous Provinces and Local Self-Government Units.

the press and other external parties information in cases when there may be questions of unlawful administration or other types of wrongdoing in the public administration, e.g. obvious misuses of public funds.<sup>37</sup> In general, public employees may freely disclose non-confidential information to the press or other external parties. This also applies in cases when there may be a question about unlawful administration or other types of wrongdoing in the public administration, including clear misuses of public funds. If the matter concerns confidential information, according to the Criminal Code such information may only be disclosed to the press or other parties if it serves a manifest public interest or is in the best interest of oneself or others. Public employees cannot be required to have given a prior internal notification about wrongdoing or irresponsible circumstances if the employee determines that such notification cannot be expected to achieve a result. In such cases, the employee may instead go directly to the press, the Parliamentary Ombudsman or the National Audit Office.

One of the reasons why public employees commit criminal acts is their lack of knowledge of the provisions of the Criminal Code. Not all public employees are graduates or law students. That is why, in some situations, they have a difficulty distinguishing criminal liability from other types of liability, and they are not familiar with the principle of subjective criminal liability. Although the knowledge of legal regulations is one of the requirements for performing public service, the state exam that public employees are required to take includes subjects such as Constitutional Law, Administrative Law, European Union System, Civil Service System, Labor Legislation and Administrative Procedure with Elements of Office Procedures and Administrative Disputes.<sup>38</sup> Therefore, our proposal is to introduce Basic Criminal Law as a separate subject in the existing public employee state exam system. In addition, another possibility is to include in the examination questions within the existing subjects contents that would help public employees to become aware of both the limits of their criminal liability and the limits of their misdemeanor responsibility. That might encourage public employees to refrain from committing acts that constitute criminal offenses in accordance with the applicable regulations in the course of performance of their duties. Of course, that would not suffice without other preventive mechanisms in place.

#### **4. IMPORTANCE OF PREVENTIVE ACTION**

The activity of the National Audit Office and inspection bodies, such as the budgetary or tax inspectorate, can contribute to a great extent to the detection of crimes committed by the public sector employees. In accordance with the Law governing its

<sup>37</sup> White Paper No. 1553/2015 on public employees' freedom of expression and whistleblower schemes.

<sup>38</sup> Article 6 Regulation on the program and manner of taking state exam („Službeni glasnik RS“, broj 16/2009-7, 84/2014-4, 81/2016-3, 76/2017-4, 60/2018-7).

activity, the above institution is obliged to immediately file a request for the initiation of a misdemeanor procedure, or file a criminal complaint, with the competent authority, if in the course of the procedure it identifies any action indicating a criminal act. In addition, the institution is obliged to inform the Public Attorney about all cases when an action of the audited entity, i.e., a legal entity trading with the audited entity, has resulted in misuse of public assets.<sup>39</sup> That is why the role of the National Audit Office is of great importance when it comes to detecting criminal offenses committed by the public sector employees, i.e., public employees. With their knowledge, they can contribute not only to the detection of criminal acts, but also to the acquisition of the evidence necessary for the initiation of criminal proceedings and the issuance of the final judgment (Šuput, 2014). The National Audit Office was established to ensure financial discipline in the public sector. Detecting criminal offenses is not the primary focus of its activities. However, combating crime in accordance with the current trends in the field of criminal policy requires a joint action of the society as a whole, and not only the police and judicial authorities (Šuput, 2014). As some authors have noted, the relative effectiveness of crime deterrence increases due to the increased effectiveness of issuing final judgments (Begović, 2010: 63).

Strengthening citizens' confidence in the work of the public sector and the state administration could be improved if they would adhere in practice to what Machiavelli stated in his work "The Ruler". According to him, selecting people who would be the key decision makers in certain areas is not a trivial matter. That depends solely on the thoughtfulness of the person who appoints them to such positions (the ruler). The first conclusion that could be made about a ruler's ability, which in today's world could apply to managers, is based on the deliberate choice of the people who surround him. If his choice was good, according to Machiavelli, he could be considered wise too, because he was able to identify good people and to connect them to himself. If they were not good, one could not have a good opinion of such a ruler. His first mistake was exactly the choice that he had made. (Machiavelli, 2009: 115). Carefully selecting staff to perform public functions would certainly be the first level of prevention of unlawful conduct by public employees.

Certainly, it is the interest of all states to suppress illicit, i.e., unlawful conduct, which should contribute to their officials exercising their powers within the limits of the prescribed laws or by-laws (Simić, Jovašević, 2008: 50-51). In addition to the fear of criminal liability, i.e., detection of criminal offenses committed in the performance of public service, an important precondition for the prevention of unlawful conduct is strengthening public employee ethics.

The authors define the term public employee ethics as a set of social rules and values that a public employee accepts as his/her own criteria for his/her actions in the course of performing public service (Vlatković, 2009: 106). These actions relate to the public employee's attitude towards citizens as individuals, his/her relation to the

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<sup>39</sup> Article 41 Law on State Audit Institution („Službeni glasnik RS“, broj 101/2005, 54/2007, 36/2010 i 44/2018-dr.zakon).

society, his/her attitude towards the organization, and his/her attitude towards work (Pusić, 1993: 247). The acceptance of these rules and values depends primarily on the personality of public employees, which should be taken into account both in their selection and subsequently, in the course of their career advancement.

The provisions of both the Law on Civil Servants and the Law on Employees in Autonomous Provinces and Local Self-Government Units prescribe the manner in which public employees should act in situations when they suspect corruption. Both the laws stipulate that in case of suspicions of corruption, the public employee is obliged to inform the manager in writing if in the course of his/her work he/she becomes aware of corruption in the authority in which he/she works. However, the law neglects the fact that the perpetrator of the crime of bribery and the related crimes could also be the manager, who, if informed, may take measures to cover up the evidence of his crime. The law stipulates that a public employee or an employee enjoys protection in accordance with the law from the date of the written notification.<sup>40</sup> Notwithstanding the above obligation, and the provision of the Criminal Code stipulating the obligation to report the perpetrators of criminal acts identified by public employees during the performance of their duties, additional measures need to be taken to improve the mechanisms for prevention of crimes committed by public employees.

Encouraging public administration employees to alert to irregularities occurring in their organization has proven to be a successful model for reducing the state budget losses in some countries. Thus, according to Transparency International, over the period from 2002 to 2012, South Korean Commissioner for Corruption and Civil Rights seized USD 50 million based on the whistleblower reports.

Whistleblowers, as employees in the public administration, are in a unique position to detect fraud and corruption cases within their institutions. They have a significant role in enhancing accountability, action against corruption, and transparency. However, whistleblowers risk retaliation such as abuse at work place, discrimination and harassment. Legal protection mechanisms regulated by law are crucial to prevent retaliation against whistleblowers. The OECD<sup>41</sup> and the Council of Europe,<sup>42</sup> as well as Transparency International,<sup>43</sup> have issued a number of documents that are relevant for whistleblower protection.

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<sup>40</sup> Article 23a of Law on Civil Servants and article 37 of Law on Employees in Autonomous Provinces and Local Self-Government Units.

<sup>41</sup> Protection of Whistleblowers – Study on Whistleblower protection frameworks, compendium of best practices and guiding principles for legislation, 2012, <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf> [17.06.2019.].

<sup>42</sup> Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers; Protection of whistleblowers: a brief guide for implementing a national framework, 2016

<sup>43</sup> International Principles for Whistleblowers Legislation – best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013, Transparency International, [http://www.transparency-se.org/Whistleblower-Principles\\_final\\_web.pdf](http://www.transparency-se.org/Whistleblower-Principles_final_web.pdf) [17.06.2019.].

The Western Balkan countries are still at the initial stages of establishing legal protection of whistleblowers.<sup>44</sup> Consequently, whistleblowers continue to be exposed to various forms of retaliation and abuse. Public opinion surveys about whistleblowing in the Southeast European countries show that whistleblowers have a relatively weak support by the public.<sup>45</sup> Slightly more than one half of the respondents believe that whistleblowers should be supported, and only one third agree with the view that whistleblowing is acceptable in their society. What is even more worrying is that every sixth respondent believes that whistleblowers should be punished for their activities.

## CONCLUSION

In accordance with the principles of subjective criminal liability, all public employees are responsible for their actions. All public sector employees are required to comply with the law when exercising their rights and obligations. This implies not only knowledge of the regulations governing public service, but also other regulations in other areas, such as for example, public assets management and public procurement procedures.

However, superior orders that a public employee believes to constitute a crime are a particular problem. In these situations, the problem is how a public employee can refuse to follow a superior order. On the one hand, he/she fears losing his/her job, and on the other hand, he/she fears criminal liability. However, in some situations, public employees themselves do not know the limits of their own responsibilities. While it is true that the head of the institution is responsible for the legality of its operations, in accordance with the criminal law, each person is responsible for his/her own actions. Thus, for example, regardless of the fact that the public procurement contract that will be implemented later is signed off by the head of the institution or the person authorized by the head of the institution, the employees are responsible if, for example, they select a less favorable bidder in the public procurement procedure based on a prior agreement with the bidder. Such a principle is in line with the principle of subjective criminal liability. To prevent crimes committed by public employees, there is a need to improve their knowledge of the criminal law. In this context, public employees should be encouraged to refuse to follow a superior order in accordance with the applicable regulations if performing such an act would imply committing a criminal act. However, there is a need to ensure effective mechanisms at the institution level to protect public employees from possible disciplinary liability

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<sup>44</sup> Albania passed a Law on Protection of Whistleblowers in 2014, Bosnia and Herzegovina in 2013, Kosovo in 2011, North Macedonia in 2014, Montenegro in 2014 and Serbia in 2014.

<sup>45</sup> Regional Cooperation Council (RCC) conducted a survey on the attitudes of citizens in the region. The results of the survey are available on the website of the Regional Anti-Corruption Initiative: <http://rai-see.org/wp-content/uploads/2017/04/2017-04-10-Whistleblowing-Web-Final.pdf> [17.06.2019.].

or retaliation in such situations. That can also be achieved through the adoption of internal rules, instructions or procedures specifying the required conduct of public employees in such situations. In addition, ensuring effective protection and support of public employees in such situations requires also the will of other employees, including other managers. That applies also to whistleblowers who are afraid of reporting crimes because of possible retaliation and abuse. Therefore, there is a need to improve their position not only by adopting legal regulations, but also by ensuring the support and assistance by other employees in the institution, without the fear that that would jeopardized their own livelihood. Supervisory institutions such as the National Audit Office, budgetary and tax inspections also have an important role in the prevention of crimes committed by public employees. Their efficient activities increase the possibility of detecting anomalies in business operations, and therefore detecting possible crimes. That would have a deterring effect on the potential perpetrators of crimes by reinforcing their fear of punishment.

Moreover, these measures would minimize the possibilities for public employees to follow unlawful superior orders. There is a need to increase public employees' awareness of criminal liability and strengthen the mechanisms for refusing to follow unlawful orders and disclosure of unlawful orders.

In addition, there is a need to introduce legislative amendments to improve the normative framework. Considering that not all public employees are law graduates, in some situations, they might be unaware of the limits of their own responsibilities. Knowledge of legal regulations could be a deterrent for potential perpetrators. Therefore, it is our view that there is a need to revise the Decree on State Examination Program and Methodology either to include Basic Criminal Law as a separate subject or to include additional examination questions concerning basic criminal law within the existing subjects to ensure that public employees are aware of the limits of their own criminal liability. It is our view that such a solution would be effective also in terms of preventing crimes committed by public employees.

## REFERENCES

1. Begović, B. (2010) "Ekonomska teorija generalne prevencije", [Economic theory of general prevention] *Crimen*, number 1, 150-65.
2. Kostić, J., Zirojević, M. (2017) "Objekt zaštite krivičnih dela protiv privrede" [The object of protection of criminal offenses against the economy], *Privredna krivična dela [Economic Offenses]*, (eds. Stevanović I. Čolović V.), Belgrade: Institute for Criminological and Sociological Research and Institute of Comparative Law, 257-268.
3. Kostić, J. (2018) "Krivično delo zloupotreba u vezi sa javnom nabavkom – *de lege lata* i *de lege ferenda*", [The crime of abuse in public procurement *de lege lata* and *de lege ferenda*,



- Finansijski kriminalitet [Financial Crime]*, (eds. Kostić J. i Stevanović A.), Belgrade: Institute of Comparative Law, Institute for Criminological and Sociological Research, 289-301.
4. Makijaveli, N. (2009) *Vladalac [The Prince]*, Belgrade: Mono i Manjana.
  5. Malinche, D. M. (2018) "The Liability of Public Servant Perspectives of Law and Public Administration" *Societatea de Stiinte Juridice si Administrative*, vol. 7(1), 67-71.
  6. Matić, M. (2013) "Vrhovne revizorske institucije i borba protiv korupcije" [Supreme Audit Institution and the fight against corruption], *Borba protiv korupcije – iskustva i poređenja, [The fight against corruption - experience and comparison]*, (ed. Ćirić J.), Belgrade: Institute of Comparative Law, 123-154.
  7. Matić Bošković, M. (2017) "Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni", [Criminal act abuse in public procurement – implementation challenges], *Privredna krivična dela [Economic crimes]*, (ed. I. Stevanović, V. Čolović), Belgrade: Institute for Criminological and Sociological Research and Institute of Comparative Law, 215-229.
  8. Pusić, E. (1993) *Nauka o upravi [The Science of Administration]*, X revised edition, Zagreb: Školska knjiga.
  9. Rabrenović, A., Kostić, J., Matić Bošković, M. (2018) "Open dilemma: How to React to Illega Order From a Superior", *Integrity and Good Governance in the Western Balkans*, (eds. Rabrenović A., Knežević Bojović, A.), Belgrade: Institute of Comparative Law, Danilovgrad: Regional School of Public Administration and Oslo: Centre for Integrity in the Defence Sector of the Kingdom of Norway, 303-314.
  10. Simić, I., Jovašević, D. (2008) "Krivična dela korupcije i kaznena poltika sudova u Republici Srbiji", [Criminal offences of corruption in light of penal politics in Republic of Serbia] *Bezbednost [Security]*, number 4, 50-65.
  11. Šuput, J. (2012) "Interna finansijska kontrola u prevenciji krivičnog dela nenamensko korišćenje budžetskih sredstava", [The role of internal financial control in preventing the offense improper use of budgetary funds] *Nauka, bezbednost policija [Science, Security, Police]*, number 1, 153-163.
  12. Šuput, J. (2014) "Uloga Državne revizorske insittucije u prevenciji kriminaliteta belog okovratnika u javnom sektoru" [The Role of the State Audit Institution in prevention of white-collar crime in the public sector]. *Zbornik radova pravnog fakulteta Univerziteta u Nišu [Collection of Papers, Faculty of Law, University of Niš]*, number 67, 331-346.
  13. Vlatković, M. (2009) *Službeničko pravo [Law on civil servants]*, Banja Luka: Besjeda i BLC.
  14. Vlatković, M., Brković, R., Urdarević, B. (2013) *Službeničko pravo [Law on civil servants]*, Belgrade: Dosije studio.

15. Vranješ, N. D. (2015) *Položaj službeničkog sistema u reformi javne uprave u zemljama postsocijalističke tranzicije* [The position of the civil servants system in the reform of public administration in the post-socialist-transition countries], doktorska disertacija [doctoral dissertation], Belgrade: University of Belgrade, Faculty of Political Science.

### **Legislation:**

1. Krivični zakonik [Criminal Code] ("Službeni glasnik RS", broj 85/2005, 88/2005-ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016).
2. Pravilnik o zajedničkim kriterijumima za organizovanje i standardima i metodološkim uputstvima za postupanje i izveštavanje interne revizije u javnom sektoru [Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector] ("Službeni glasnik Republike Srbije", broj 99/2011 i 106/2013).
3. Uredbe o programu i načinu polaganja državnog ispita [Decree on State Examination Program and Methodology] ("Službeni glasnik RS", broj 16/2009-7, 84/2014-4, 81/2016-3, 76/2017-4, 60/2018-7).
4. Zakon o državnim službenicima [Law on Civil Servants] ("Službeni glasnik RS", broj 79/2005, 81/2005-ispr., 83/2005-ispr., 64/2007, 67/2007-ispr., 116/2008, 104/2009, 99/2014, 94/2017 i 95/2018).
5. Zakona o Državnoj revizorskoj instituciji [Law on Supreme Audit Institution] ("Službeni glasnik RS", broj 101/2005, 54/2007, 36/2010 i 44/2018-dr. zakon).
6. Zakon o zaposlenima u autonomnim pokrajinama i jedinicama lokalne samouprave [Law on Employees in Autonomous Provinces and Local Self-Government Units] ("Službeni glasnik RS", broj 21/2016, 113/2017, 95/2018 i 114/2017-dr. zakon).

### **Other Sources:**

1. International Principles for Whistleblowers Legislation – best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013, Transparency International, [http://www.transparency-se.org/Whistleblower-Principles\\_final\\_web.pdf](http://www.transparency-se.org/Whistleblower-Principles_final_web.pdf) [17.06.2019.].
2. <http://www.mingl.rs/kolumne/2/2017/02/08/milgramov-eksperiment--traganje-za-objasnjenjem-nacistickog-zlocina.html> [17.06.2019.].
3. <http://www.spsp.org/news-center/press-releases/milgram-poland-obey> [17.06.2019.].

4. Protection of Whistleblowers – Study on Whistleblower protection frameworks, compendium of best practices and guiding principles for legislation, 2012, <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf> [17.06.2019.].
5. Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers; Protection of whistleblowers: a brief guide for implementing a national framework, 2016 [17.06.2019.].
6. Regionalne antikorupcijske inicijative <http://rai-see.org/wp-content/uploads/2017/04/2017-04-10-Whistleblowing-Web-Final.pdf> [17.06.2019.].
7. White Paper No. 1553/2015 on public employees' freedom of expression and whistleblower schemes [17.06.2019.].