

Obeying Ministers or Laws?

A Study of Danish Civil Servant's Responses to Illegal Requests

Bischoff, Carina Saxlund

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Carina Saxlund Bischoff
Department of Social
Sciences and Business,
Roskilde University
carinasb@ruc.dk

Abstract

It is part of a civil servants job description to be responsive to its political leadership as well as to uphold legal norms. But what happens when the two types of demands conflict? When legal norms stipulate one thing, but political leaders want another. In modern democracies, observing the rule of law is no less important than holding elections. Respect for legal norms by those who exercise government authority is widely regarded as the cornerstone of democracy and good governance. The question is what role the bureaucracy plays when it comes to defending legal norms vis-à-vis its political leaders. This article investigates this question theoretically as well as empirically. First by exploring the normative and positive theoretical issues involved, and secondly by examining the institutional context and behavior of the civil service in the Danish state administration. The analysis draws on survey data where civil servants have been asked to respond to fictive scenarios that present a conflict between obedience to the minister and observing the law. A substantial share of the civil servants – up to ¼ - choose to compromise legal obligations to comply with Ministerial requests. The findings suggest that educational background, position in the hierarchy, and work place and function matters. Lawyers, leaders, those who work in departments – as opposed to agencies – are thus less likely to show willingness to compromise their legal obligations than their colleagues are.

Introduction

What role should civil servants play in a high quality democracy to ensure that government conforms to the rule of law – and what role do they actually play? At a time when the proliferation of populist sentiments is challenging political and legal institutions in many mature democracies (Foa and Mounk, 2016, Foa and Mounk, 2017), the role of law is moving to the top of the agenda. Populist parties across Europe are threatening the consensus on some of the key tenets of liberal democracy, namely the idea of limits to majority rule, the sanctity of individual rights as well as the principles of division of powers (Albertazzi and Mueller, 2013). Such developments make it important to look closer at the role of key institutions of the state in upholding the rule of law. In this article, I take a closer look at the role of the civil service in this respect. Firstly, by exploring the normative and positive theoretical issues involved, and secondly, by examining the role of the civil service in Denmark in conflicts between political pressure and the law.

At first glance, the normative question – how civil servants ought to act - is deceptively simple to answer; the rule of law is widely regarded as the bedrock of a well-functioning democracy (see O'Donnell, 2004). Some argue that the rule of law is not just a precondition of democracy, but renders it effective (Alexander et al., 2012). Adherence to laws by those who wield governmental power is not only

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* **Carina Saxlund Bischoff** holds a Ph.D from the European University Institute and is currently employed as an Associate Professor and Head of Studies at the Department of Social Sciences and Business at Roskilde University. Her research interests lie in the field of comparative politics where she has worked on questions related to parties and party systems, elections and voter behavior, as well as the civil service in Denmark and the European Union. She has recently published articles in *Public Management Review* and *European Political Science Review*.

a critical safeguard to protect ‘the people’ from abuses of power, but also ensures that legislative majorities control the executive branch. An independent judicial system able to sanction violations typically figures at the top of the list of factors believed to underpin the rule of law (e.g. Russell and O'Brien, 2001). It creates tangible incentives for conformity with legal precepts that positive theories of political behaviour predict are fundamental. While dread of punishment is probably a necessary condition for realising such ends, many believe that it is not sufficient, but requires normative underpinnings. Institutional incentives as well as normative underpinning are therefore likely to play a role in how the civil service performs.

Civil servants essentially work in a subservient position to democratically elected officials and are expected to be responsive to the political agendas and policy aims of their governments. As Dahlstrom puts it, ‘Elected politicians have a legitimate interest in controlling what government organisations do’ (Dahlstrom and Niklasson, 2013). However, the extent to which the political heads of the institutions of government can control them varies considerably across counties, as well as across policy areas within them. Some enjoy relatively high levels of autonomy, while others operate under more direct political control (Peters and Pierre, 2001, Yesilkagit and van Thiel, 2008). In most democracies today politicians are under more or less constant pressure to respond effectively to a wide array of issues that can affect their standing in the volatile polls and secure re-election. At times this can create incentives for politicians to push for politically expedient solutions at odds with established legal principles of public administration. In addition to the ongoing demand of electoral competition, a more serious challenge to the rule of law may emerge when politicians, who view certain laws – particularly those of a higher order that cannot easily be changed (e.g. EU laws, international conventions or constitutional principles) – as impediments to realising the will of the people. It raises the question of how civil servants should and do respond when put in situations where they have to choose between loyalty to their elected superiors and adherence to legal norms.

What specific incentives and norms govern the behaviour of civil servants when it comes to adherence to legal principles is an empirical question, the answer to which is likely to vary considerably. The quality of the public bureaucracy is widely regarded as an important determinant of corruption (Treisman, 2000, Tanzi, 1998), but we do not know very much about compliance with legal standards in public bodies. As Huberts et al write, we are ‘in the dark about the level of compliance within government bodies with respect to laws and regulations in comparison to members of the public and business’ (Huberts et al., 2006). We know civil servants may experience conflicts between legal obligations and other public values such as ‘effectiveness’ for instance (de Graaf and Paanakker, 2015, Beck Jørgensen and Vrangbæk, 2011). We do not know much about how they deal with such conflicts particularly when they involve responsiveness to superiors versus adherence to legal standards.

The Danish civil service is a particularly interesting case for exploring this dilemma. In general country comparisons, Denmark lies securely at the top of

the world ratings in terms of the quality of democracy and governance (Economist, 2016, WEF, 2007). In the most recent corruption rating, it was ranked the second least corrupt country in the world (Transparency International, 2018) The civil service is a meritocracy – a feature which is widely regarded as a key precondition for high quality government. In other words, it is a case where we might expect a high degree of compliance with legal standards. However, Denmark also has government institutions with few barriers to political control over the civil service (cf. below). Politically, Denmark generally has a strongly competitive party system with high electoral volatility and low barriers to entry for new parties (Bischoff, 2006). It has seen the rise to power of a populist party, the Danish People’s Party, which on several occasions has proposed policy and voiced opinions – particularly on the issue of immigration - that conflict with legal principles, and expressed scepticism towards compliance with higher order law. The Danish People’s party has served as permanent support party to the government for long periods, 2001-2011, and again 2015-present (Christiansen, 2016). Many observers believe that its positions – particularly on issues related to immigration – have exerted significant influence on government. In any case, several highly publicised cases involving violations of rules in the civil service, some related to issues of immigration, have raised public and scholarly attention to the matter (see Knudsen and Boye Koch, 2014, Tynell, 2016). These factors make Denmark an interesting case for examining the responses of the civil service to cross-pressures between legal obligations and political demands. On a practical level, unique survey data on responses of Danish civil servants to dilemmas of obedience versus adherence to the law make it possible to explore this subject.

In the following, I will first outline the theoretical positions in the literature on the factors that influence civil servants behavior. This sets the background for the following discussion of the key formal and informal characteristics of the Danish state administration that can be expected to influence bureaucratic behavior. Thirdly, the survey data is presented, the interpretation of the legal scenarios discussed, and analyzed. The first part of the analysis focuses on quantitative description and examination of associations, while the second part discusses statements made by the civil servants as commentary to the themes. Finally, the results of the analysis are discussed.

Drivers of bureaucratic behavior and legal constraints

What makes civil servants resist pressures to ‘bend the rules’ and what induces willingness to side-step rules to meet political ends? Explanations of behavior in an organizational context typically draw on one of two major strands of theory associated with rational actor models on the one hand, and various types of sociological accounts on the other.

The rational actor perspective associated with the idea of the rational and self-interested individual plays a dominant role in explanations of political and administrative behavior. The systematic development of this idea and its ramifi-

cations for behaviors and outcomes in a range of different economic, political and societal arenas is found in rational and public choice theory (e.g. Downs, 1964, Niskanen, 1994). The theory rests on two assumptions. The first is that ‘rationality’, which entails weighing costs and benefits of different courses of action is the basis of human agency. Most applications of the theory acknowledge human limitations with respect to the ability to calculate all relevant consequences of different courses of action however expresses human beings make mistakes and use short-cuts in their decision-making processes (Simon, 1987). The second concerns the types of interests that actors seek to maximize. Self-interest is key, which includes increasing wealth such as well as social prestige or power (e.g. North, 1990). In relation to observing legal obligations in a democracy, Weingast formulates the rational choice position very succinctly: ‘the force of law is not normative – citizens and political officials do not obey law because of a duty to obey law. Instead, political officials obey the law because they have incentives to do so.’ (Weingast, 2003: 109).

However, far from all agree with this position and emphasize other drivers of behavior beyond simple self-interests. Perceptions of what is ‘right’ may influence actors who wish to fulfill obligations dictated by a role or identity defined by their group or organizational membership. The ‘logic of appropriateness’ falls into this category: ‘behavior is seen as driven by rules of appropriate or exemplary behavior, organized into institutions’ (March and Olsen, 1995: 30-31). This perspective on human agency draws on socialization theories. Individuals acquire preferences for action by internalizing norms, values and principles prevalent in the groups or institutions they are a part of by cognitive or emotive processes (e.g. Sears, 1993, Conover and Feldman, 1984). In the literature on public administration, the term ‘public values’ has been used to describe drivers of behavior that go beyond simple self-interest. Public values refer to standards for conduct that include honesty, integrity, efficiency as well as the rule of law, and include ‘principles on which governments and policies should be based’ (Jørgensen and Bozeman, 2007: 13). As Andersen et al. discuss, public values can be seen as indispensable to a well-functioning public sector, and the cornerstone of ‘good governance’. Rather than having a single set of values, different sets of values can be described – each associated with a particular mode of governance. For instance, ‘Hierarchy’ enshrines values associated with the traditional Weberian bureaucracy, such as rule-following, due process, neutrality and loyalty to superiors, while ‘Market’ refers to orientation towards customer service, cost-effectiveness and responsiveness to demand. They also mention ‘clan’ values tied to groups and ‘network’ values. Given that the different values do not always support the same courses of action, value conflicts are a recurrent phenomenon (see also Beck Jørgensen and Vrangbæk, 2011).

In a rational consequential logic, we expect civil servants to comply with pressures to bend or break the rules in service to their superiors, if the gains outweigh the losses (or risk of losses). As Kingston puts it ‘‘any minister who makes it clear that they will use their power against the career of anyone who stands up to them will in fact meet no resistance at all, because the costs to indi-

viduals is too great” (Kingston, 2002). If non-conformity with rules is either unlikely to be discovered or sanctioned, and there are immediate rewards associated with following dictates from superiors, the incentives are clear. Job security and prospects of advancement are powerful incentives for civil servants, but whether a minister has direct power over careers depends on the degree of autonomy of the relevant government institution. Naturally, the potential benefits of compliance must outweigh risks of exposure and its anticipated consequences. For some types of functions and tasks, such risks may be high due to the presence of control or high level of attention, while they are small and insignificant for others (de Graaf and Paanakker, 2015).

If civil servants are guided by public values and norms for ‘appropriate behavior’, the balance of the decision-making equation changes from calculation of consequences to choosing what is right. It requires very context specific knowledge to make meaningful predictions concerning actions of civil servants in situations involving orders from superiors that conflict with legal rules, however (Witesman and Walters, 2015). As mentioned above, both ‘rule-following’ and ‘loyalty to superiors’ constitutes core values of the Weberian bureaucratic model and conflict of values even within the same category may therefore arise (see overview in Krause and Meier, 2003). Comparative studies emphasize that merit recruitment is important because it ‘fosters an ethos of professionalism in the civil service’ (Rauch and Evans, 2000). ‘Whereas politicians are accountable to citizens via regular elections, merit recruitment ensures that bureaucrats are accountable to their professional peers and the goals of the organisations’ (Dahlstrom and Niklasson, 2013, Meyer-Sahling and Mikkelsen, 2016). The mechanism suggested here works by fostering loyalty to the civil service rather than to its political leaders.

The Danish civil service – Political control, incentives and norms

As discussed above, the features that are particularly important for the balance of responsiveness versus legality are what powers politicians have over careers and tasks of civil servants, as well as the prospects of sanctions on the one hand. On the other, it is question of meritocracy and professional values. In the following, we will focus on the key characteristics of the Danish state institutions in this respect.

Ministerial powers and constraints

Denmark relies on a hierarchical model of ministerial government, which implies that authority – as well as responsibility - is concentrated in the office of the individual government minister (§13-15 of the constitution). The minister is not only the political, but also the administrative head of a ministry, and has formal the authority to issue instructions to civil servants. In fact, ministers have wide powers to direct business falling within his/her portfolio and face few legal constraints in this regard (see Finansministeriet, 1998, Nissen et al., 2010, Folketinget, 1964, Christensen, 2013). The typical ministry consists of one de-

partment and several agencies reporting to the minister through the department. The specific organizational set-up and division of tasks between agencies and departments varies considerable across ministries. However, Ministers have authority to organize their own ministries and can make changes in the allocation of tasks and responsibilities even on an ad hoc basis (Knudsen, 2000).

Formally, the minister also has wide powers when it comes to hiring/firing employees, but in practice they tend to get involved in top level appointments only, and delegate this competence to others (Knudsen, 2000, Christensen and Grønnegaard, 2004, Bischoff, 2011b). Personnel decisions are subject to legal constraints that prevent different forms of discrimination and promote the meritocratic hiring practices that prevail (Gammeltoft-Hansen et al., 2002: 203-209). With respect to controlling civil servants, the question of employments contracts is important. In the past, civil servants were almost as difficult to get rid of as judges, but today ministers can dismiss civil servants on a discretionary basis and the rate of turnover of top civil servants has increased significantly (Christensen et al., 2014). For the absolute top-level jobs, individual ministers need support of their peers (government committee) to make changes. In practice, ministerial interest in personnel matters is typically confined to the top management and interference below that level is not common – although it does occur (Bischoff, 2011b)

The role(s) of the civil service

In Denmark, as elsewhere, politicians request support from the civil service to fulfil their complex and demanding political roles. They have become dependent on a responsive civil service that delivers qualified political-tactical advice. The literature describes different methods for ‘politicizing’ the civil service, i.e. making it responsive to the political aims of its leadership. On the one hand, ‘direct/formal politicization’ entails appointment by politicians of staff who are loyal to the politicians and/or their political agendas (Bauer and Ege, 2012). The risk in this strategy is that it undermines the neutrality of the civil service. Moreover, side-stepping professional merit potentially backfires if unqualified personnel is recruited (Kopecký et al., 2012). This type of politicization plays an extremely limited role in Denmark where only a few ‘special advisors’ are appointed directly by the Minister where partisan loyalties may play a role (Knudsen, 2011). ‘Professional politicization’, on the other hand, implies that professional civil servants are responsive to the political agendas of those they serve (Peterson, 2006). What is at issue is ‘to adapt the merit civil service in a way that ensures a high degree of political responsiveness’ (Christensen et al., 2014). Denmark has taken the latter path. Civil servants are required to counsel on matters related to political strategy as well as on substantial policy issues. This mix has its own term, namely ‘integrated counselling’ (Salomonsen, 2003: 421) and the ability to give political-tactical advice is considered a key qualification for those seeking high ranking positions in the civil service (Jørgensen and Rutgers, 2014, Bischoff, 2011). The demand for professionals who can aid politicians in the political aspects of their work may blur the traditional lines be-

tween politics and public administration, and it raises the question of whether civil servants can juggle both roles or whether political expedience will in practice challenge the protection of legal and professional standards (see Brans and Peters, 2012, Christensen et al., 2016).

The legal obligations of the Danish civil service

As in any mature democracy, the Danish civil service is positively as well as negatively, constrained by law. The question is what specific regulations apply when civil servants have to balance obedience to superiors with their legal obligations. What takes precedence? At first glance, the duty of civil servants to obey the law is clear. Civil servants should always ‘act in accordance with valid law. They are not allowed to act in violation of the constitutions or other law, including EU law in force.’ (Ministry of Finance, 2015: 20). This formulation stems from Codex VII a document prepared by the Ministry of Finance, which provides an overview of the duties of Danish civil servants. In a legal review of the document, it is stated that the Codex VII summarized existing rules in the area, although it is not exhaustive (Bønsing, 2017). The Codex describes how civil servants in different ways must make sure to act in accordance with valid law. For instance, if there is doubt about the legality of a new proposal for law, it states that they are obliged to warn the minister (Codex VII: 21). On the question of orders from a minister – or other superior – the guidance is that they should ‘refuse, if it is clear that the act is illegal’ (ibid: s.21). Correspondingly, it is illegal for leaders to require employees to carry out illegal acts, and there are several examples of sanctions in such cases (Bønsing, 2017: 2) The duty to obey is, however, strongly emphasized in Danish law. Under the penal code §156, denial to follow orders is subject to punishment. It is a punishable dereliction of duty if a subordinate refuses or otherwise fails to follow an official order (ibid: 4). In a verdict by the supreme court, the court explained ‘a civil servant should faithfully abide by the rules pertaining to his position, c.f. the civil service law §10. Among the duties that follow from this, the duty to obey is central’ (cited ibid: 4). Naturally, the duty to obey does not apply if the law is illegal. Moreover, if a civil servant commits an illegal act, the fact that he or she has followed an order, does not constitute exculpatory circumstances. The problem therefore lies in assessing the legal status of the order. If an order is ‘clearly illegal’, the civil servant has a right as well as a duty to refuse’, but if it is not clearly illegal, there is a right and duty to obey (ibid: 5). A lot therefore rides on the question of whether an act is clearly illegal or just illegal. The implications of this problem in practice is discussed further below.

In short, the Danish system is characterized by few formal institutional barriers to Ministers in relation to the civil service, meritocratic employment practices with professional politicization, a legal framework that strongly emphasizes the duty to obey, but also the duty to act within the confines of the law.

How do civil servants respond to illegal requests?

How do Danish civil servants respond to clearly illegal requests by superiors? What proportion of them chose to obey requests even if it involves violating their legal obligations and why do some civil servants heed their legal obligations, while others disregard them to accommodate the wishes of their superiors? In the following section, these questions will be explored by re-examining responses of civil servants in Denmark to two vignette questions and an open-ended question included in a survey carried out by the Bo Smith committee (BoSmith-Udvalget, 2015)¹. The committee published its report on the state of the Danish civil service in 2015, and subsequently it made the survey data available to researchers upon request.

The purpose of revisiting the survey data and analyzing the results here is to go deeper into the responses of the civil servants to the two legal dilemmas presented in the two vignette questions mentioned above. The Bo Smith committee's presentation and interpretation of the survey data have been subjected to critique of a methodological as well as legal nature (Boye Koch and Bischoff, 2018). This critique makes it particularly relevant to take a closer look at what conclusions the data sustain. The two vignette questions in the survey are particularly interesting in this respect. Before analyzing the data, it is necessary to present the vignettes and discuss in some detail the positions on what legal obligations civil servants have under Danish law when faced with situations such as those presented in the vignettes.

Legal duties of civil servants in the vignette-scenarios

The vignettes depict situations that touch on legal issues that lie at the heart of the rule of law in a democratic state. The first concerns principle of legal basis of rules issued by the administration and the second is concerns the requirement that case-decisions are based in legal rules. The principle of legality is thus at stake in the situations depicted.

The first vignette - the 'legal basis-vignette' - has the following wording:

Your minister wishes to have some rules in the area that you work with changed very quickly. He is convinced that it can be accomplished by issuing an administrative rule. The assessment of your office is that it would require a change in law, since there is insufficient legal basis in existing law to warrant issuing the administrative rule. The minister believes that the case is too small/insignificant to justify disturbing Parliament ('Folketinget') and maintains that the change must be possible in the form of an administrative rule. Will you assist in this?

The wording of the second 'case-decision vignette' is:

You are dealing with a concrete case and you are notified that your minister would be pleased to see that the applicant receives a favorable decision. It is apparent from the media coverage that there is wide public support for this outcome, and that the minister would be in dire straits were the application to be rejected. The law and common practice does not make the desired result possible in your opinion. Would you assist in giving the permission?

Both vignettes have the same four answer options: 1. Yes, without reservations. 2. Yes, but I would raise my concerns/reservations to my superior. 3. Only after a direct order, and I would warn my superior in unambiguous terms and 4. I would clearly say no and not assist.

The question is how civil servants ought to respond. Do they constitute 'clearly illegal' or merely 'illegal' requests? As described above, Danish civil servants have a duty not to comply with clearly illegal orders. In all other cases, they are obliged by law to obey their superiors. Two professors of Public Law at the University of Copenhagen (Ph.D. Michael Gøtze and Dr.Jur Carsten Henriksen) interpret the ministerial requests described in the vignettes as 'clearly illegal' (Boye Koch and Bischoff, 2018: 14-15). As Gøtze has stated in an interview on the matter 'It is clearly illegal if you understand the small vignettes according to their content. It is not just something that is borderline or highly marginal. Here you can give a legal answer because in both cases it is something that violates the legality duty'(Gjerding, 2017). Both professors agree that civil servants who simply choose to assist fall short of their duty to uphold the law. Professor Gøtze argues that civil servants are obliged by law to 'clearly say no and not assist' (answer 4), whereas Professor Henriksen is of the opinion that civil servants who select either answer 3 ('Only after a direct order, and I would warn my superior in unambiguous terms') or 4 would act in accordance with their legal obligations. The latter is thus a broader interpretation of how far civil servants have to disobey superiors when they are asked to assist with clearly illegal acts.

The question is then how the Bo Smith committee present the vignettes and the legal implications of the different answers. There are some ambiguities in the report, and in the statement given in response to the above-mentioned critique on this question. Before turning to the statements given, it is important to observe that the two 'legal vignettes' cited above are in fact just two of seven such vignettes included in the survey. The other vignettes involve norms related to truthfulness and observance of professional standards (BoSmith-Udvalget, 2015: 177-187).

In its report, the Bo Smith committee writes that the vignettes are formulated to 'contain a real dilemma, which does not necessarily have an absolutely correct answer' (ibid: 179). The answer categories are presented as points on an ordinal scale and no correct/false label is directly attached to any of the responses. In the comments accompanying the analysis, however, the committee appears to indicate that the situations depicted are in fact scenarios that potentially involve

breaches of law. In a comment on the findings, the committee observes that civil servants are hesitant with respect to setting aside the duty to act in accordance with the law. They explain that this is particularly evident in responses to the second vignette where ‘a decision is to be reached in a concrete case, and where the minister under reference to media coverage and public opinion wants a result, but where neither the law nor administrative practice allows it’ (ibid.: 181-182). In this explanation, it appears as if the committee indicates that assisting would entail violating legal obligations, although it does not use the term ‘clearly illegal’ to describe the request. Discussing that employees in departments - compared to agencies - are less likely to set aside legal duties, they explain that ‘ministerial departments often have legal units and/or legal heads, who have more expertise in the legal field’. Moreover, they write that civil servants there ‘are more aware of what is at stake, if you disregard the legal norms’ (ibid: 185). Normally, when we call on expertise the purpose is to get answers that are more correct. Not just different. It is therefore difficult to reconcile these statements with the general description of all the vignettes as having no legally correct or incorrect answers. However, it is in the comparison of the vignettes that it becomes clear that the situations depicted in the two legal vignettes differ from the other vignettes. The committee highlights this difference when explaining how civil servants respond to the legal versus the other vignettes. The civil servants are much more likely to say they will follow orders in the situations depicted non-legal than in the legal vignettes. The committee explains that this is ‘partly due to the fact that the vignettes [non-legal vignettes] are worded in such a way that it is possible to argue for emphasizing responsiveness [i.e. complying with ministerial wishes] without compromising the duty to speak the truth or the duty to secure a solid professional foundation’ (ibid: 182).

It is difficult to interpret this statement as other than an acknowledgement – albeit indirect – of the fact that the legal vignettes do not in fact make a similar allowance. Here responsiveness entails a breach of legal duties. In responding to the abovementioned critique by the legal experts, the members of the committee state that they disagree with the rigid interpretation given of the vignettes. It is worth citing the answer in full; ‘None of the two vignettes say anything about whether the illegality is clear. In the first vignette, it is solely stated that the assessment of the office of the employee is that the legal basis is “not sufficiently clear to warrant issuing the administrative rule” (Christensen et al., 2018: 98). The description does to indicate whether the office finds that it is clear that there is no legal basis, but the words “not sufficiently clear legal basis” does somewhat point in that direction’. The statement then goes on to repeat the exact same conclusions with respect to the proportion of civil servants whose answers are in accordance with their legal duties as those presented by Boye Koch and Bischoff (2018) that rely on the interpretation presented by Professor Henrichsen mentioned above. It is therefore not clear whether there really is a substantial disagreement. All appear to agree that answers 1 and 2 represent failure to observe legal duties. The disagreement lies in whether civil servants are obliged to refuse

to assist altogether (answer 4) or whether it is sufficient for them to warn and ask for a direct order (answer 4).

Civil servant choices: Responsiveness versus legal duties

In the following analyses, I take a new look at the data in light of this discussion. First, both the narrow (only answer 4 is legal) and the broad (both answers 3 and 4 are legal) interpretations are used to describe the proportion of Danish Civil servants that disregard their legal duties when prompted by the minister to do so. Secondly, the impact of a number of factors variables included in the survey on the likelihood that civil servants disregard their legal duties are investigated. In the final step, the statements of civil servants given in response to an open-ended question in the survey are examined to shed light on the issues involved in opposing requests from superiors in the civil service.

Table 1: Proportion of civil servants that obey and violate legal duties

The vignettes	Illegal compliance in <i>narrow</i> legal interpretation	Illegal compliance in <i>broad</i> legal interpretation	
“Issuing administrative law without legal basis”	74,7 %	23,2 %	n= 1731
“Case decisions without basis in rules”	51,6 %	8 %	n= 1705

Proportion of civil servants in violation of their legal duties

Table 1 presents the share of civil servants who select an answer that in the narrow interpretation or the broad interpretation constitutes a violation of legal duties. Following the narrow legal interpretation, close to 75 pct. will do so in the “legal basis” scenario and just over 50 pct. will agree to assist in the “case-decision” scenario. We might surmise from these astronomical numbers that the lion’s share of civil servants appear to understand their duties more in line with the broad legal interpretation than the narrow one. In any case, it is obvious that most do not seem to regard refusing a request to assist as a viable option – and in fact several civil servants express in the open category that they do not see that as a real option (c.f. below). In the broader legal interpretation, a much smaller, but still sizable share of civil servants chooses an illegal course of action. The numbers are around 23 pct in the “legal-basis” scenario and 8 pct. in the “case-decision” scenario. It thus appears that a much larger share of the civil servant find the option of issuing a warning and requesting direct order to comply to be a more viable course of action.

However, the fact that up to 1 in 4 civil servants select an answer that constitutes a violation of their legal duties does appear to be alarmingly high. Particu-

larly, in light of the fact that these are not ordinary citizens, but representatives of the highest executive authority in the country and part of a highly educated meritocratic civil service. Moreover, considering that this is a fictive survey situation where no real pressure is applied, nothing is at stake, and we might therefore expect respondents to respond as they are expected to - 'social desirability bias' - rather than as they would in real life (see Naher and Krumpal, 2012). Finally, the legal situations depicted are not tricky peripheral legal issues, but implicate core principle of public administration law where we could expect awareness of legal principles to be high. In light of this, there are grounds to question the conclusion of the Bo Smith committee that 'civil servants are very hesitant with respect to setting aside legal norms' (BoSmith-Udvalget, 2015: 181).

Table 2: Explaining illegal compliance with requests

	Case-decisions without basis in rules		Issuing adminis- trate law without legal basis	
	Odds ratio	Sig.	Odds ratio	Sig.
<i>Binary logistics regression</i>				
Age	1,01	0,26	1,00	0,73
Woman	1,19	0,38	0,93	0,55
<i>Education dummy (Reference: Law)</i>				
Economics (MSc)	0,68	0,46	2,14	0,01
Political Science (MSc)	0,95	0,89	2,35	0,00
Other Social Science (MA/MSc)	2,38	0,00	2,75	0,00
Other University (MA/MSc)	1,49	0,11	2,69	0,00
Other Degree	2,18	0,09	2,12	0,03
<i>Head dummy</i>	0,70	0,27	0,57	0,01
<i>Primary tasks (Reference: Analysis & Policy)</i>				
Servicing Ministers	1,03	0,92	1,28	0,19
Case work	1,13	0,61	1,76	0,00
Other	0,85	0,58	1,14	0,50
<i>Department</i>	0,71	0,22	0,48	0,00
<i>Constant</i>	0,04	0,22	0,19	0,00
<i>Nagelkerks R2</i>	3,90		8,7	
n	1616		1641	

What explains differences in how civil servants respond?

Table 2 presents the results of a binary logistical analysis, where the dependent variable is defined in accordance with the broad legal interpretation. That is, 1 = illegal responsiveness to the minister's wishes (answer 1 or 2), and 0 = when resistance to such wishes is expressed (answer 3 or 4). The analysis includes the

following independent variables that were in the survey, namely: age, gender, education, position in the hierarchy, work place and job functions.

As discussed above, there are much fewer respondents who chose to disregard their legal duties in the ‘case-decision vignette’ and only a few of relationships investigated are significant (see table 2). It would probably require a larger sample to analyze responses to this vignette and focus is therefore on predicting responses to the ‘legal basis vignette’. The results for that analysis show that legal training matters. *Lawyers* have significantly lower odds of responding to illegal requests by the minister than other educational groups do. In fact, the odds that a lawyer would disregard legal duties are less than half of what they are for other educational groups. The decline of lawyers in leading positions in the state administration is therefore not inconsequential. In the early 90’s 6 of 10 top positions were filled by civil servants with a background in law, today it is down to 1 out of 4, while the number of political scientists has quadrupled (Hegelund and Mose, 2015). What *primary job functions* civil servants fulfill is also relevant. Working with concrete case-work increases the odds of illegal compliance by a factor of about 1,8 compared to working with analysis- and policy. It may be correct to interpret this as knowledge acquired at work, since when the same analysis is done for the ‘case-decision vignette’, case-workers no longer distinguish themselves from the other groups. However, servicing the minister directly does not appear to have an effect on behavior, as civil servants in this function do not differ in their responses from those working with analysis and policy. We might have expected proximity to the minister to matter, but there is no support for this. Position in the hierarchy clearly matters, however. Heads are less likely than subordinates to comply with illegal requests. This might be expected as they are more likely to face blame and possibly sanctions due to their positions in the hierarchy. The odds of illegal compliance are reduced by a factor 0,6 compared to their subordinates. Finally, those working in the departments are much less likely to set aside their legal obligations compared to those working in agencies. One might expect that their proximity to the minister would make compliance more likely, as mentioned above, but this is clearly not the case. The odds of that occurring are half compared to agency employees. A more cynical interpretation would be that those who work in the departments – as well as heads - are more keenly aware of the implications of their answers and thus also more strategic in their replies. The analysis reveals that age and gender do not matter to the responses².

What do the civil servants themselves say?

In addition to the closed question in the survey, respondents were invited to comment more broadly on the theme of the survey: “*In the questions above, you have been asked to give your best judgement on some dilemmas as a civil servant. If you would like to elaborate on your answers or provide supplementary remarks, you can write them here*”³. Some 386 civil servants – or 20,5 % of the total number of respondents - used the open category to make a comment. The statements are therefore not representative of all civil servants, but contain inter-

esting perspectives on the questions at hand that are worth exploring. Before going into the statements themselves, it is important to look at systematic patterns with respect to 'who' used the open category. The data revealed that there was no significant overrepresentation of either age, sex, educational background or position in the organizational hierarchy. However, people employed in a department were overrepresented by some 4,5 pct. compared to agency employees. Primary job functions also mattered. There were some 10 pct. fewer of those working with concrete case work compared to the other groups (servicing minister, analysis- and policy tasks and other) who used the opportunity to express themselves in the open category (see details in Appendix I). This finding supports the expectation that respondents who feel more strongly about the issues are more likely to take the opportunity to express themselves. In general, employees in the department and those working directly on servicing the minister or on analysis and policy tasks are closer to the 'political action' and are therefore more likely to feel more strongly about subject matter.

Refusing to obey: Rights, duties and consequences?

There is a high number of statements expressing that refusing to follow orders from a superior (option 4) is not a viable option for a civil servant. Some appear to doubt that they have the right – or duty -to say no, while others portray it as a certain death to one's career. There were thus civil a high number of respondents who seemed incredulous that option four is even be on the table. Here are a few:

The option you give of 'saying clearly no and not assisting' I find difficult to imagine as a practical possibility since it would cause severe trouble. - The last answer category is about refusing to do your job. You cannot do that. - I don't think that as a civil servant I can refuse to do what my boss/superior asks me to – I can choose to resign. - Naturally, as an employee you cannot 'say clearly no and not assist' – that is unless you do it by finding another job. - as an ordinary employee it is very difficult to go against a leadership decision even in areas where you believe as a lawyer there is a lack of legal basis. – As a civil servant, I do not believe that I can say clearly no, but only warn my superior unambiguously.

The reason for the clear dismissal of the possibility of saying no may rest on the notion that obedience and loyalty to leadership that constitute core duties of civil servants trumps other obligations, as discussed above. There are in fact a high number of statements emphasizing the responsibility of leadership. Some, as the following, reflect a normative emphasis on the responsibility of leadership to decide and subordinates to follow:

Generally, I do not feel that it is my responsibility to say no to decisions reached by my superiors. Not in the scenarios presented in this

survey at least. - ... my superiors will have to say no to those higher up in the system. If higher levels in the system decide that we are going with a different decision that the one that I believe is right, I feel obligated to follow the decisions of the leadership/permanent secretary. – This decision and the ensuing consequences have to belong at leadership or ministerial level. - A leader has to take responsibility and it is my job as a subordinate to follow – otherwise I have to find a different leader. -My course of action will generally be to argue factually and persistently and tenaciously point out that presenting false or incomplete information is wrong, but I will bend to the decision of my superior in the end. Generally, I feel...that it the decisions rest with my superiors and it is therefore their responsibility. - The leader has the responsibility. When attention has been drawn to concerns/reservations then it is the responsibility of the leader to decide how a given case should be handled. - I find it a bit different to assess whether you – when you are at the bottom of the hierarchy – ought only comply after a direct order and when you ought not to assist. Fundamentally, a superior can always overrule and thereby compel an employee to assist, even if the person really doesn't want to.

However, many respondents also cite loss of employment and career prospects as the direct reason for compliance:

'I would clearly say no and not assist' entails dismissal or another 'sanction' like having assignments taken from you or losing career prospects. If you have done it once, I don't think you will want to do it again". – "I would generally say no in the aforementioned cases, but end up giving in as a no to comply with orders could end in a dismissal or degradation" – "I have not made use of the option 'I would clearly say no and not assist' because my many years in civil service functions tell me that 'you cannot do that' if you want to continue being in the system" - "the option of saying clearly no and not assisting would probably be viewed by many as the prelude to writing your own redundancy notice". "Refusing to carry out an order would be to make oneself impossible in a way that would be strongly detrimental to a future career. - " It is evident that as a civil servant you have to deliver what is politically in demand – irrespective of whether it is professionally defensible or not. If you cannot deliver what is being asked of you, you will be deemed uncooperative and might as well begin to look for another place to work!

The concern for consequences is also reflected in the documentation-strategy used by civil servants to deal with requests believed to be contrary to law. Many civil servants emphasize the importance of not only voicing their concerns and

providing relevant facts to their superiors, but also making sure that a paper trail exists that can exonerate them from blame should the actions attract attention and come under scrutiny later on;

I have to obey my superior or minister – and then I have to create protect myself by being able to document that I have raised concerns etc. if the issue arises at some a later point.” – To me, it is completely clear that I will of course do as I am told, but when I believe that something is illegal, I will always send my reservations in writing to my superior. – It is not fun to be the one who points to the illegality of a desired solution. I do it routinely if I believe it is illegal. But if my superior wants the illegal solution I carry out the task and make sure to protect myself with the necessary documentation. - I would ‘comply’ with my superior’s request... But I would in every single case make a note with my assessments, recommendations and the order from my superior that are put on file. Then, one can only hope that the note is deemed to belong with documents covered by the public information act, if a request to access documents pertaining to the case is submitted later” – I have in a few cases handled it by sending my reservations (by mail) to my superior with an eye to placing the responsibility on the leadership....I have saved these mails as documentation that I as a civil servant have tried to show “due diligence” and that I want to place responsibility elsewhere. – In difficult dilemmas, I use his method to force my superior to issue a clear order and get documentation for my superiors’ decision in the form of an email correspondence or minutes from a conversation that are journalized on the case. – ...I would do the practical work, but ask my superior to sign it if I cannot vouch for the result myself. - ..I know employees who certainly feel that they have been overruled in matters pertaining to facts and decisions, and whose learning partly consists in documenting all correspondence, partly distrust of leadership and some resignation.

The statements appear to reflect a belief by the civil servants that they can escape legal ramifications if they can only document their concerns and the requests/orders issued by their superiors. On the other hand, it also gives evidence of a concern for possible personal consequences of action taken and not only whether they are ‘right’ or ‘wrong’ per se.

Political pressure: Sources and directions?

Not surprisingly, in a hierarchical organization such as the state administration, directions flow from the top. The minister – her agenda or interests - is frequently mentioned as a source of political pressure. Statements such as:

Sometimes it feels as if we are campaigning for the minister” or “The reality today is that ministers and their spin doctors demand the solution they believe will position the minister best in the public eye

identify the minister as the source of political pressure. Many also emphasize the role of top civil servants and leadership in general in facilitating this, however:

Under XX minister’s ‘reign’ there was a clear tendency for politicized case work (sagsbehandling) in the agency (styrelse) and it was shocking that the top tiers of leadership just played along without a murmur”. Some civil servants point out that it can be difficult to distinguish between political and bureaucratic sources of pressure: “possibly the request does not originate with the minister every time, but the politicization and the wish to present the numbers in an advantageous manner is present in both leadership and middle-management layers” or “[I] cannot see if it [the political pressure] stems from the minister herself or from ambitious bosses who want to please the minister by giving what they think she wants.

In addition to leadership in general, it is clear that for civil servants working in one of the agencies, the ‘department’ is viewed as a major source of political pressure. For instance: *The department rarely accepts a ‘no’ regardless how great the uncertainty associated with the notes/calculations is*” or *“The pressure comes from the department that repeatedly sends the same comments and want the same things erased”*. One civil servant mentions working on a report

Where certain information was left out and certain formulations were softened because they might reflect poorly on the minister. The department took the decision even though as professionals in the agency, we had raised concerns several times.

Or as one civil servant bluntly comments: *“it is a problem that the directors and the department interferes in concrete cases”*. However, other civil servants describe pressures coming simply from their superior without specifying a particular position in the hierarchy:

If my superior requests a particular direction then I have to find the arguments/numbers and analyses that indicate that direction, which can often be difficult.

Political pressures are also described as deeply embedded in the organization. Some indicate that they experience a bureaucracy whose whole culture and iden-

tity appears to be skewed towards political expedience at the expense of adherence to civil service norms and standards:

I started out in a very rule-based, but also heavy civil service, but we now operate in a very political and solution-oriented environment, where legal considerations from being a basic condition has become something that can best be described as a disturbing formalistic element.

This perception is echoed by the experiences of a lawyer who says that “*my profession – the lawyers – is frowned upon. It is in the air that we are reactionaries and those that always say ‘no’ and cannot think politically*”.

The types of pressures mentioned by the respondents are different in nature. As mentioned in the citations above, pressures to bias letters, reports, proposals to support a particular political agenda, special interests or media are mentioned in the comments. As one civil servant says:

It is particularly with respect to finding an angle for press releases and letters to parliament (FT breve) that there can be problems balancing civil service standards and political considerations, and where you can feel you are pushed to a certain presentation of a matter

While another comments that

It is mostly in connection with the final brush-up of political proposals that I have experienced being exposed to massive pressure in the form of erasing information from texts with the result that the texts appear incorrect

Some express that the pressure is in a grey area:

It is not necessarily something which is flat-out wrong, but perhaps just watered down to such an extent, that there is wide scope for interpretation so you can always read a positive angle into it. We are really good at that.

There are fewer examples of pressures towards direct illegalities, but they are there and describe situations ranging from pressures to change particular case-decisions to broadly being asked to sign off on legislative proposals contrary to higher order law. One civil servant describes being asked to “*find a paragraph to base a denial of a request for access to public records even though in my legal opinion there was no basis for such refusal*” and further admits “*I didn’t dare to*

hold my ground and rejected the request". Some describe situations where bills are being pushed through that do not accord with higher order law:

How do you, for example, answer your boss the third time he/she states that it is not a question of whether a particular initiative can be executed, but how it can happen? ... How do you deal with the fact that you are informed that the EU-office in the Ministry of Justice will not be heard even though the initiative is about XX [a key issue for EU law] because they will only say "no" (if you try to get a second opinion and something to anchor your arguments to).

Several statements underscore how legal uncertainty can be abused to push through illegal acts:

It is very rare that we can say with a 100 % certainty that something will be illegal in relationship to the EU so we pass the proposal in spite of the fact that we are 99,9 % sure that Denmark will lose the case at the European Court of Justice. It is politically forgotten in 2-5 years anyway when the case has worked its way through the system.

Discussion of results

What conclusions we draw from the analysis? It is always a difficult exercise to determine how much 'deviance' from the norms constitutes a threat to the health of a system. It is simply impossible to give a precise answer to this. Nonetheless, when the number of those who do not abide by their legal duties is as high as 1 out of 4 in a fictive scenario with none of the pressures of real life, it should at least raise eyebrows and be the starting point of a serious discussion. Politicians need bureaucracies that serve their political agendas in order to rule effectively. In Denmark, the civil service has become 'professionally politicized', which holds the promise of combining high levels of skill with high levels of political responsiveness. The question is whether it has come at the cost of maintaining professional norms. The quantitative analysis supports that education – and possibly training on the job – matters. It is likely that awareness of responsibility – and the threat of sanctions - can explain why heads as well as department employees are less likely to transgress legal norms. Some of the comments by civil servants indicate that perceptions of responsibility may in fact not be in line with their legal duties. It would require more research to investigate and validate these findings, however. The data does not allow us to assess how many hold the views expressed, since civil servants were not asked directly. If the findings are validated by further studies, one path to take would be to increase the share of lawyers in the administration and providing better training to raise awareness of responsibilities would make civil servants less likely to deviate from their legal duties. However, if the experience of civil servants in their jobs is that resisting

requests from superiors comes at the cost of career or even job, it is unlikely that education and raising awareness will do the trick. In that case, other institutional solutions would be required. There is a need for further studies that give us better insight into the experiences, perceptions and values of civil servants before possible solutions can be discussed.

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Notes

¹ The committee was appointed by DJØF, a union that represents some 90.000 academics employed in the public and private sector.

² The findings thus differ from those reported in the Bo Smith committee report (2015), and that analyses by Christensen et. al (2016), where the dependent variable is treated as continuous and an OLS regression is made. They find, for instance that gender and age matter.

³ "I ovenstående spørgsmål er du blevet bedt om at give din bedste vurdering i nogle dilemmaer som embedsmand. Hvis du har nogle uddybende bemærkninger til dine svar eller øvrige bemærkninger kan du anføre dem her."