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THEORETICAL STANDPOINTS ABOUT THE DECREES WITH THE FORCE OF LAW "MAD AS HATTER" ACTS IN THE LEGAL SYSTEM WITH A TWISTED AND UNPREDICTABLE LEGAL NATURE

Abstract

The paper, Theoretical Standpoints about the Decrees with the Force of Law – "Mad as Hatter" Acts in the Legal System with a Twisted and Unpredictable Legal Nature" analyzes the decrees with the force of law as a special type of decrees. Regarding the legal nature of these decrees, they are characterized by greater independence compared to the executive decrees. Particular emphasis will be placed on consequences of their enactment and the legal force of these acts, in terms of their action contra legem, a differentia specifica, that completely changes the physiognomy of these acts, categorizing them as a hybrid category. As stated in the paper, conditions and circumstances may occur in the life of the state that can cause immediate and temporary compromise of the principle of separation of powers, and even jeopardize the survival of the state. This compromise of the principle of separation of powers prompted by specific conditions and circumstances (some of them vis major) can be politically justified. But for the science of constitutional law, the aforementioned twisting of the principle can be justified either by the existing constitutional norms or in case they are not provided for, by a broader legal interpretation. In this case, the established constitutional and legal system remains in force, the state bodies of the central government do not change, but the consequences of the new occurred circumstances, change the division of the competencies among them. Essentially this would mean that the twisting of the principle of separation of powers is aimed at the benefit of the executive and to the detriment of the legislature. Namely, the competences of the executive are expanded and the expansion is within the normative function. Thus, the usual hierarchical legal pyramid through which the legal system is represented gets spherical distortions from which the statics of the construction and its survival are at stake. It seems that the urgent, effective and efficient action in emergency/war conditions, to avoid major problems and damages that the citizens and the state could face, has an additional motive - a return to the original system construction. Finally, this surreal witcher story, which is "narrated" by the decrees with the force of law, has an additionally entangled narrative which refers precisely to the questions, "can only the laws be changed by the decrees with the force of law or the constitution as an act, as well?

Keywords: *constitution, decrees with the force of law, delegated legislation, secundum legem acts, contra legem acts, state of emergency, state of war*.

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I. TERM

The term "delegated legislation" is a binomial construction, i.e. a syntactic whole composed of two parts - "delegated" and "legislation". Simultaneously, the first part of this whole is explaining and specifying the term "legislation".
The term "legislation" comes from the Latin word lex/lege, which means law, regulation, legal provision, and the terms - legislatura, legislacija, legislation, have been derived from it. In modern legal science, the term legislation refers to the totality of all laws, written legal rules and written legal sources in the positive law.
The term "delegated" is part of the aforementioned binomial construction and its purpose is more detailed determination, definition and specification of the term "legislation". The etymological origin of this term should be sought in the Latin term de –lege meaning - to order something, to impose, to entrust.
Hence, the construction of "delegated legislation" is related to a legislation that is not primary (negative definition), as a complete set of general legal acts adopted by the executive government – the executive, based on constitutional or delegated statutory powers.
The construction "delegated legislation" as a generic general name has been used since the beginning of the XX century, while until then the terms "decree", "legal decree", "statutory decree", "order" etc. have been used in the theory. In the contemporary legal theory and modern legal systems, the terms "legislation déléguée", les decrets-lois ("decree legislation" - M. Hauriou), France, "subordinate legislation", "delegated legislation", "subsidiary legislation" - the United Kingdom, Rechtsverordnungen (legal decree) – Germany, are used to denote "delegated legislation". Finally, "delegated legislation" is a generally accepted and widespread legal category characteristic of the European legal systems.

II. NOTION

The conceptual determination of the syntactic whole "delegated legislation" represents a challenge for the legal theory. The terminological inconsistency found in the legal literature and the exceptionally developed practice of adopting various legal acts in different legal systems does not seem to facilitate at all the conceptual determination and its definition. However, there is a tacit consensus on several constants in the conceptual determination of "delegated legislation" in the legal literature.
Namely, the "delegated legislation" is a complete set of general legal acts adopted by the executive government - the executive, based on an authority directly determined by the constitutor or delegated by the legislature. Hence, it can be concluded that a generally accepted definition of what lies behind the category of "delegated legislation" should include the several postulates composing this construction, as follows:

- Delegated legislation consists of general legal acts only;
- Delegated legislation is secondary legislation;
- The bodies of the executive government are the entities competent for their adoption;
- The legal basis for their adoption is either explicit constitutional authority or authority given by the legislature;

- In terms of the hierarchical set-up in the legal system, these legal acts are subordinated to the laws and accordingly should have less legal power than the law as a general legal act.

The notion of delegated legislation is directly connected to the term legislative delegation. The legislative delegation is a delegation of power which essentially means trusting, entrusting, delegating a right or part of a right (authority) from one entity (delegant) to another entity (delegator), to represent the interests of the entity entrusting the right. Essentially, this legal category implies the occurrence of delegation, i.e. entrusting an authority to the executive government to adopt laws in a material sense in a certain area or for a certain period. However, the categories of delegated legislation and legislative delegation are not synonyms. The legislative delegation suggests the process of materialization of the law, i.e. creation of the delegated legislation[1].

The category of decree legislation (les decrets-lois) is often used in the legal theory. The aforementioned decrees - laws are terminologically very similar to the decrees with a force of law, i.e. the necessity decrees. The main difference between these categories is the fact that the decrees-laws, unlike the decrees with a force of law, as a type of delegated legislation, are an expression of the actual exercise of power, without any constitutional or legal authority existing for this.

The existence of a wide range of diverse legal acts that this category covers, is what further complicates the process of finding a generally accepted definition of the category of delegated legislation. The legal labyrinths constructed by these legal acts are similar to those of Alice's adventures in Wonderland and are not simplified even when trying to classify them according to the body adopting them or the legal power that these acts have. The only guidelines that can be helpful, are the postulates of the Theory of Degrees (Kelzen-MerklStuffentheorie) as well as the general rules of the theory of law and the postulates of legal reasoning. Even the aforementioned guidelines cannot be of much help for some legal categories that fall under the delegated legislation. This is due especially to the fact that they represent completely hybrid categories of legal regulations, sui generis regulations on the one hand, as well as an instrument that points to the disruption and deviation from the "romantic" Montesquieu principle of separation of powers, on the other hand. Such are the decrees with a force of law, i.e. necessity decrees.

Namely, the impression remains that the wild mood swing in the legal systems is most visibly presented through these hybrid categories. Their adoption, duration and legal power are still status of bicameral mind for positive legal systems.

III. DECREES AS ACTS OF DELEGATED LEGISLATION

Kelsen points out that "the general legal acts adopted by the executive government based on constitutional or legal authority are intended to" breathe new life" into the laws, that is, to enable their application."[2] Decrees are acts that are immediately associated with the category of delegated legislation.

The clear distinction between laws and decrees as a separate category of legal acts is historically linked to the emergence of the first written constitutions. Guided by the views embodied in the

[1] Baric S. ,,*Zakonodavna delegacija I parlamentarizam u suvremenim drzavama"*.Pravnifakultet sveucilista u Rieci.2009. p. 55-60

[2] Келзен, Ханс,,*Општа теорија права и државе"*, Београд: Правни факултет Универзитета у Београду,2010 p. 353-355

Declaration of the Rights of Man and of the Citizen of 1789, according to which "in a society in which the guarantee of human rights is not guaranteed and in which there is no separation of powers - there is no constitution at all", the legal theory sets the postulate - the legislature adopts the laws, and the executive government executes and enforces them. This is the essence of the traditional understanding of the principle of separation of powers according to which creation of the norm belongs to the legislature, and the executive belongs to the executive government[3]. Historically, this theoretical view has fully corresponded to the demand for the removal of the remnants of the old regimes of absolute monarchies, and the strengthening of the position of the parliaments. Hence, the heroic victory of the principle of separation of powers, as a condition for a constitutional state, imposed two requirements 1) the pursuit of law as an expression of the will of the people and 2) a decree with precise features of a bylaw, which serves its execution and whose matter is exclusively within the law.

The theoretical standpoints of Paul Laband and Georg Jellinek, according to which the basic difference is based on the fact that only law through its provisions creates new element in the legal system, and the decree does not introduce any new elements in the existing legal order, contribute to the clear differentiation of the law from the decree as legal acts. Therefore, the only law is a legal regulation (Rechtssatz), while the decree is (Verordnung). It is not a law, a legal act, because it does not create a new law. On the other hand, according to Laband and Jellinek, the decrees can only be law in the material sense since they do not have the form of the law, but only it's content[4]. Kelsen adds on the theoretical standpoints of Laband and Jellinek, specifying that the decree is differentiated from the law as a general legal act, as it is the next stage in the process of materializing the law[5].

The establishment of a republican form of the ruling is one of the reasons for the increasing democratization of the executive. At the beginning of the XX century, the executive government gained a more dominant advantage over the parliament in the area of normative function. And it seems that from this moment on, the dystopian disruptions of the principle of separation of powers occur, which loses its "romantic" side. Thus, in modern legal systems, the approximation of the categories of law and decree is more and more obvious. The democratic legitimacy gained by the executive government caused additional overlapping of these legal acts. Jovicic points out that in modern legal systems both the law and the decree are considered to be an expression of the will of the citizens. The only difference is that one act is more direct than the other.[6] In this way, the acts also represent a reflection of the position of the bodies that adopt them.

There are various definitions of what is meant by the term decree in the legal literature. Maurice Hauriou defines it as "manifestation of the administrative will, in the form of a general written rule, which is adopted by a body that has regulatory authority at its disposal[7]. Ratko Markovic emphasizes that "the decree is a law enforcement act. It contains general legal rules, intended to apply pro futuro, but they are adopted by the secondary and derivative government"[8]. Ivo Krbek states that "the content of the decree does not differ from the law, and it is not adopted by the

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[3] Јовичић. Миодраг 2006.,,*Устав и уставност"*. Службени гласник. Београд p. 380-383

[4]Laband, ,,*Deutsches Reishssatztsrecht"*, Tubingen 1909 p. 130, for more details see Симовић. М ,,*Уредба као извор права"*. Зборник XLVI p. 97-103

[5] Келзен Ханс.,,*Општа теорија права и државе"*, Београд: ПравнифакултетУниверзитета у Београду. 2010. p 358

[6] Јовичић. Миодраг ,,*Устав и уставност"*. Службени гласник. Београд, 2006. P. 381

[7] Hauriou, Mourice., (1933), *Precis de droit administrative et de droit public*, Paris: Librairie du Recueil Sirey, p. 555, Taken from: Марковић, Р.,Извршна власт Београд Савремена администрација(1980), p. 85.

[8] Марковић, Ратко., ,,*Извршна власт*" Београд Савремена администрација 1980, p. 82-87

legislature, but by the administrative power. By its content, it is not a legislative act, but an administrative act in a broader sense of the word. [9]"
Finally, in modern conditions, decrees are often adopted to originally regulate relations or a matter that is not regulated by law. This means that decrees can be supplemented or amended by laws. However, even in this case, there is a material and formal connection between the law and the bodies of the executive government that adopt the decrees. In this sense, the decrees with a force of law or the necessity decrees are specific and are classified as a special hybrid category of legal acts of the delegated legislation.

IV. DECREES WITH THE FORCE OF LAW

1. The following terms are used in the legal literature to determine decrees with a force of law: "necessity decrees", "decree based on statutory authority", "decree based on constitutional authority", "order replacing a law", etc. However, it seems that the term "decrees with a force of law" most often appears and dominates in the legal literature.
2. Decrees with a force of law are a special type of decrees by which the bodies of the executive, based on delegated legislative authority or under certain conditions, may primarily regulate certain issues that represent legal materiae [10]. Pajvancic points out that the legislator may entrust certain legislative powers to the executive government only if the constitution explicitly allows it and provided that the delegated powers are limited, most often in terms of the subject of regulation, the deadline for adoption, validity, and the obligation to submit it to the parliament to be confirmed[11].Kosnica defines the decrees with a force of law as a special type of decrees, the so-called constitutional decrees, for the adoption of which a body of the executive government has been authorized, and which are adopted in a state of emergency[12].
The decrees with a force of law are a special type of decrees. They can be adopted either based on the constitutional authorization of the executive government under certain conditions or based on a decision of the parliament by which, under certain conditions, even without constitutional authorization for such action, a part of its normative function is transferred by the parliament to the executive government[13]. For Jovicic, the main difference is in the legitimacy of the legislation to adopt decrees with a force of law. In the first case, the source of this authority is the constitution (ex constitutionem), while in the second case they appear as delegated authority from parliament. On the other hand, what these decrees have in common is that they are used for "not only spontaneous but also primary and original regulation"[14]. The possibility to derogate the legal regulations with these decrees is their differentia specifica. And in that case, as Jovicic states, the decrees with a force of law do not represent secundum legem (they are not adopted to apply the law, and accordingly there is no obligation to be bound by law and to regulate the matter within its borders). To him, these decrees are not even intra legem (there is no obligation for them to move within the framework of a positive law). By the act of derogating from the law, these

[9] Крбек, Иво. *Upravnopravo*, I, Zagreb: Tisak i naklada Jugoslovenske štampe 1929 p. 103
[10] Милосављевић, Б., Поповић, Д. М. „*Уставно право"*, 3. изм. идоп. изд., Београд: Правни факултет УниверзитетаУнион у Београду – Јавно предузеће Службени гласник. 2009, p. 23.
[11] For more details see: Пајванчић, Маријана „Уставно право" Нови Сад. Правни факултет 2016, p. 215
[12] Kosnica, Ivan. Uredbe iz nuzde precednik aRepublika Hrvatske iz 1991-1192. Zbornik Pravnog fakulteta u Zagrebu godina 61-broj 1. Zagreb 2011 p. 150
[13] Јовичић. Миодраг *Устав и уставност*. Службени гласник. Београд, 2006. p. 385
[14] ibid

decrees become contra legem (contrary to the law), so this features completely change the physiognomy of decrees, categorizing them as a completely hybrid category.
Regarding the legal nature of these decrees, they are characterized by greater independence compared to the executive decrees. This means that in case the delegating law based on which they have been adopted ceases to be valid, they will have an independent existence and will continue to have legal effect. However, this seems to be of secondary importance, due to the fact, that these decrees can amend and supplement certain legal provisions, introduce new provisions or replace a law regardless of the majority with which it was adopted in the representative body. The law can be derogated with the decrees with a force of law. If, above all, their legal force has been taken into account, which is identical to the legal force of the law, and the fact that although they are bylaws, in their essence they are still a law in a material sense, then it can be completely concluded that they represent a separate category with very specific legal nature.
When analyzing these decrees, Stefanovic goes so far as to highlight that by inserting them in the constitution as a separate constitutional category, the constitutor intentionally disrupts the constitutional division of the competencies between the holders of the state government[15]. Kosnica, claims the same, stating that "in general, the adoption of necessity decrees by the executive government in the system of government, causes a disturbance in the competencies between the legislative and executive bodies, in favour of the executive bodies"[16]. However, he points out that the executive bodies are given such authorities because they can act quickly in times of crisis, are in permanent session and are relatively homogeneous.
3. In terms of the question of which body is responsible for the adoption of these decrees, the fact that their adoption is within the competence of the executive, is a constant factor in the legal systems and constitutions where these decrees are a constitutional category. The aforementioned solution is justified by the fact that the problems that are of vital interest to the citizens and the state, caused by the extraordinary circumstances, should be solved urgently, efficiently and effectively, and this cannot be expected from the parliaments, whose work is not characterized by this. The alternatives where their adoption is the responsibility of the head of the state (the President) or government, are a variation on this topic. The theoretical views on how this issue is regulated are divided. It can be concluded that the fact that it can be expected for an individual body to act more efficiently and dynamically in the conditions when the decrees with the force of law are adopted, is an advantage to the decision these decrees to be adopted by the individual body (the President). However, if we take into account 1) the circumstances when these decrees are adopted, 2) the fact that they per se represent a disturbance of the political system, and 3) at the moment of their adoption there were no effective instruments for balancing the holders of state government, such a solution hides the danger of abuse of power. On the other hand, the decision designating the government as the holder of the authority to pass the decrees with the force of law has its advantages and disadvantages. Thus, the aforementioned solution reduces the risk of abuse of power, but on the other hand, it increases the risk of much lower efficiency. Different political systems provide for different solutions, related to this issue. Thus, in the USA, although the Constitution of 1787 does not regulate the issue of legislative delegation, the decrees with a force of law are present in practice. Namely, such is the adoption of the so-called executive orders within the competence of the President, based on a delegation of legislative authorities by the United States Congress. *The Constitution of Denmark of 1915* provides for that "in case of

[15] Stefanovic Jovan. *„Ustavnopravo FNRJ I komparativno".* Zagreb 1950.p.112-128
[16] Kosnica I. *„Uredbe iz nuzde precednika Republika Hrvatske iz 1991-1992".*Zbornik Pravnog fakulteta u Zagrebu godina 61-broj 1. Zagreb 2011 p. 151

emergency the king has the power to "enact laws"[17]. *The Weimar Constitution of 1919* also provided for that "if, in the German Reich, public order and security are disturbed or threatened, the President of the Reich may undertake the necessary measures for their re-establishment[18]." The undertaking of certain measures also meant a temporary partial or complete suspension of constitutionally guaranteed rights (personal freedom, inviolability of the home, the secrecy of correspondence, etc.). The constitutional solution of the Weimar Constitution referring to the introduction of these legal acts as a constitutional category is probably the most appropriate example of disrupting the organization of the state government in favour of the executive, but not so much to the detriment of legislation as to the detriment of the Constitution itself. *The Constitution of Brazil of 1937 (*specific for its categorization as the imposed Republican Constitution - Vargas Constitution) also provides for the competence of the President of the Republic to adopt "decrees-laws" in a state of war or state of emergency. Article 76 of the Constitution of the Italian Republic of 1947 provides for that the Government is the competent body for the adoption of decrees with a force of law (*decreto legislativo*), but they are promulgated by the President of the Republic[19]. Article 38 of the *Constitution of the French Fifth Republic of 1958* appoints the Government to adopt decrees with the force of law based on a legal authority entrusted by the Parliament[20]. In the constitutional legal literature, France is referred to as the cradle of the delegated legislation. The fact that historically the first constitutional text that introduces the category of decrees with a force of law is the French Charter of 1814 goes in this context. The Constitution of the French Third Republic used the term decree-laws (decret loi), but this term, with the entry into force of the de Gaulle Constitution, has been connected to autonomous decrees. Decrees with a force of law are referred to as *ordonnances*. In Switzerland, the matter of decrees with a force of law "*les ordonnances de substitution*" is regulated in Article 164 paragraph 2 of the *Swiss Federal Constitution*. Their adoption is in the competence of the Executive Council based on legislative delegation[21]. In the United Kingdom, the "statutory orders in the Council" are adopted by the Queen in the Council. Of course, it is a nominal authority, given that the Council always accepts decisions proposed by the government and for which it is responsible.

In the Republic of North Macedonia, the Constitution in Article 126 stipulates that, during a state of war or emergency, the Government, in accordance with the Constitution and law, issues decrees with the force of law. The authorization of the Government to issue decrees with the force of law lasts until the termination of the state of war or emergency, on which the Assembly decides"[22].

4. The adoption of decrees with a force of law is always linked to the fulfilment of additional preconditions. One of these assumptions is among the reasons for which the decrees with a force of law have been adopted, i.e. the circumstances due to which the request for their adoption has been imposed. The legal theory points out that it is difficult to define specifically what a state of emergency or a state of war means. In this context, the theoretical view of Carl Schmitt, according to which "the essence of the state is affirmed, not in a" normal situation ", but primarily in a state of emergency because only in that specific moment the modern ideas for power and management

[17] Constitution of Denmark 1915 Art.25
[18] Constitution of Germany of 1919 (Weimar Constitution) Art. 48
[19] Constitution of the Italian Republic of 1947 Art.76 and Art. 87. par.3 i.2
[20] Constitution of the French Republic Art. 38.
[21] Constitution of Switzerland Art. 164
[22] Art.126 of the Constitution

are affirmed. Only in such a state of emergency it is the Decision that, "unrelated to the norms", keeps the order from within, in certain areas in which the norm cannot "be applied"[23]. Hence, the technique of descriptive explanation is often used, and if we limit ourselves to constitutional solutions, the technique of enumerating these various circumstances by nature is often used. Most often the examples include war, imminent military danger, declared war, state of alarm[24], disturbance or endangerment of public safety or order[25], "state of military readiness, state of emergency, state of siege"[26], natural disasters, epidemic diseases of humans, animals or plants. Jasna Omejec classifies all the cases which in the legal doctrine are marked under a generic term "state of emergency" as an antonym of "regular-normal state". She points out that this includes 1) war, i.e. immediate danger of war, 2) riots, unrests and similar internal larger scale movements, 3) major natural disasters such as catastrophic earthquakes, floods, forest and other fires, epidemic diseases of humans (but also the flora and fauna), and more recently, conditions caused by atomic radiation[27].

In the Republic of North Macedonia, the Constitution in Article 126 stipulates that, during a state of war or emergency, the Government, in accordance with the Constitution and law, issues decrees with the force of law. The constitutional provisions determine that: 1), A state of war exists when the direct danger of military attack on the Republic is impending, or when the Republic is attacked, or war is declared on it[28]" and 2), A state of emergency exists when major natural disasters or epidemics take place"[29].

5. In addition to the issue of the assumptions for the adoption of decrees with a force of law, the issue of their scope is extremely important for the legal theory and practice. This surreal witcher story, which is "narrated" by the decrees with a force of law, has an additionally entangled narrative which refers precisely to the questions, "can only the laws be changed by the decrees with a force of law or the constitution as an act, as well?" An additional dilemma in the context of the aforementioned has occurred, that is, if a constitutional revision is conducted by a decree with a force of law, whether it will refer to a part of it or the decree will make the existing constitution null and void. These issues are of special importance for the science of constitutional law because it depends on them whether the decrees with a force of law will limit the constitutionally guaranteed rights and freedoms of man and citizens, and thus whether the legitimacy of the established system will be indirectly questioned.

And like all other aspects that refer to the decrees with a force of law: 1) those that constitute acts of special legal nature, 2) exception to all conventional rules that apply in the legal system, 3) acts that dominate in a special regime, 4) the legal force they have, 5) extremely reduced and limited opportunity for their control, their scope is a mind-blowing spark-plug in the legal theory. Hence, there is a need for a deeper analysis of the specifics of the legal situation in which the decrees with a force of law are adopted. Namely, when the Constitution lays the foundations of the constitutional order, this act determines the holders of certain functions of the state government and their competencies. Consequently, each of these state bodies acts within its scope

[23] Schmitt, Carl. , *Political Theology: Four Chapters on the Concept of Sovereignty*." 2005 Chicago: The University of Chicago Press, taken from Kukavica Sebastijan,

[24] Vargas Constitution- Brasil 1937

[25] Weimar Constitution of 1919

[26] Constitution of the Kingdom of Spain of 1978 Art. 116

[27] Omejec Jasna., *Izvranredna stanja u pravnoj teoriji I ustavim apojedinih zemalja (poredbena studija hrvatskog I srodnih europskih ustavno pravnih modela".*Pravni vjesnik. Osijek 1996. p.173

[28] Art 124 of the Constitution

[29] Art.125 of the Constitution

of constitutionally provided competencies and does not encroach on the competencies of the other state bodies. If it does, the act adopted outside the competencies provided for by the constitution will be unconstitutional.

However, as stated in the legal theory, conditions and circumstances may occur in the life of the state that can cause immediate and temporary compromise of the principle of separation of powers, and even jeopardize the survival of the state. This compromise of the principle of separation of powers prompted by specific conditions and circumstances (some of them vis major) can be politically justified. But for the science of constitutional law, the aforementioned twisting of the principle can be justified either by the existing constitutional norms or in case they are not provided for, by a broader legal interpretation. The aforementioned interpretation may be applied in conditions of constitutional emptiness, legal vacuum and lack of established practice, which additionally complicates the already specific circumstances. Namely, the aforementioned compromise of the principle of separation of powers, has a completely different meaning and highly uncertain effects, because the state faces a specific and concrete danger. In this case, the established constitutional and legal system remains in force, the state bodies of the central government do not change, but the consequences of the new circumstances change the division of the competencies among them. Thus, in these newly created circumstances, the acts for the adoption of which one body is competent are adopted by another body. Essentially this would mean that the twisting of the principle of separation of powers is aimed at the benefit of the executive government and to the detriment of the legislature, but the possibility that it may be to the detriment of the constitutional government has not been ruled out. Namely, the authorities of the executive government are expanded and the expansion is within the normative function. The acts for the adoption of acts of which the legislature is competent, pass into the competence of the executive government. Hence, the matter that would normally be regulated by law, now instead of materiae legis, becomes a materia regulated by decrees with a force of law.

Decrees with a force of law substitute the existing legislation, so the decrees with a force of law can also regulate a matter that would normally be regulated by organic or systemic law. Moreover, the legal nature of these acts to act contra legem can completely derogate the existing laws, regardless of the majority by which they were adopted.

Thus, the usual hierarchical legal pyramid through which the legal system is represented gets spherical distortions from which the statics of the construction and its survival are at stake. It seems that the urgent, effective and efficient action in emergency conditions, to avoid major problems and damages that the citizens and the state could face, has an additional motive - a return to the original system construction.

In the context of the aforementioned, two situations are generally stated in the constitutional legal literature. The first one, when the constitutor recognized the specificity of the state of emergency and the deviation from the division of competencies among the holders of the state government, and consequently, normalized it constitutionally. And the second one when it did not foresee it or introduced only a general clause and a general formulation. In the first case, the constitutor practically intentionally introduced divergence in the system of government organization. Thus, the explicit constitutional provision that regulates the decree with a force of law in extraordinary circumstances does not make inadmissible the deviation from the principle of separation of powers, and the adopted acts unconstitutional. That is, it is constitutionally explicitly provided that the executive is allowed to encroach on the competencies of another state body. In this case, no special authorization from the legislative body is required at all, for the executive government to adopt decrees with a force of law. Practically the Constitution is the source of these acts.

Another area of interest for the science of constitutional law is whether the decrees with a force of law, as an instrument of deviation from the principle of separation of powers, can only be involved in the legal matter (*materiae legis*) or the decrees can also be involved in the constitutional law matter (*materiae consitutionis*). That is, whether the decrees with the force of law can substitute only laws or the constitutional norms can also be influenced. In the context of the foregoing, there is no doubt in the answer to the question that the decrees with a force of law may encroach on the legal matter. They can substitute laws, and even completely derogate them. The entity responsible for their adoption is not bound by the existing law which is substituted by the decree, nor by the existing legislation. Upon their adoption, the executive government acts *suo sponte*, and the decrees can also be *contra legem*. In terms of the question whether decrees with a force of law can be involved in a constitutional matter, the constitutional law history also provides for an affirmative answer. Thus, probably the most appropriate example is the Weimar Constitution of 1919, which provided for that a number of constitutional provisions directly related to the personal rights and freedoms of citizens could be substituted by decrees with a force of law. Namely, the constitutional provisions for such extraordinary circumstances, provided for the temporary suspension of a number of its articles (Art. 114, Art. 115, Art. 117, Art. 118, Art. 123, Art. 124) which referred to personal freedom, inviolability of the home, the secrecy of correspondence, telephone communication or telegraph messages, freedom of expression, right of retention, inviolability of private property[30].

In the Republic of North Macedonia, the Constitution in Article 54 stipulates that the freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution. The freedoms and rights of the individual and citizen can be restricted during states of war or emergency, under the provisions of the Constitution. The restriction of freedoms and rights cannot discriminate on grounds of sex, race, the colour of skin, language, religion, national or social origin, property or social status. The restriction of freedoms and rights cannot be applied to the right to life, the interdiction of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offences and sentences, as well as to the freedom of personal conviction, conscience, thought and religious confession"[31]. Article 21 of the Constitution stipulates that citizens have the right to assemble peacefully and to express public protest without prior announcement or a special license. The exercise of this right may be restricted only during a state of emergency or war[32].

In the context of the issue of restriction of human rights and freedoms during a state of war and state of emergency, the different views in the decisions of the Constitutional Court of the Republic of North Macedonia are peculiar. Namely, in one of its decisions, the Constitutional Court refers to Article 54 of the Constitution. However, it is particularly specific that the Court refers only to the first three provisions of the article, omitting the provision by which the Constitution precisely states absolute freedoms and rights that can not be subject to restriction[33]. Thus, the Constitutional Court invoked restrictions on the freedoms and rights under Articles 21, 27 and 38, but not on those guaranteed freedoms and rights which cannot be subject to restriction. On the other hand, in

[30] A similar solution of deviation in the system to the detriment of the Constitution itself was also provided for in the Constitution of Brazil of 1937, the Constitution of Lithuania of 1922 Art. 34, Constitution of Portugal of 1911 Art. 47

[31] Art.54 of the Constitution

[32] Art.21 of the Constitution

[33] U.br.49/2020

another decision, the Court explicitly stated the freedoms and rights that could not be subject to restrictions, referring to the provision of paragraph 4 of Article 54[34].

The legal situation is completely different when the constitution does not provide for the deviation from the principle of separation of powers through the adoption of decrees with a force of law or it does so with general wording. In this case, if such a divergence in the system occurs, and decrees with a force of law are adopted as a direct encroachment of the executive on the authorities of the parliament, then these acts will be unconstitutional, completely irrespective of the circumstances that imposed their adoption.

6. Finally, among all the questions concerning the matter of decrees with a force of law, which seem to riddle more than to solve dilemmas, is the question of their control. And in this context, it seems that the basic starting premise is that this control over the decrees with a force of law is always complimentary. Namely, it is expected and justified because the purposefulness of the control over these acts is being questioned, in conditions and circumstances that initially imposed their adoption, and which require fast and efficient action and undertaking measures and instruments in various area of the social life. The second premise refers to the entity that needs to implement this control. In this sense, the additional a posteriori control over these acts is performed by the representative body, i.e. the legislative body (parliamentary control). This is also understandable and expected, given that the adoption of the decrees with a force of law is a reflection of the divergence and shifting of the principle of separation of powers in favour of the executive government, and initially to the detriment of the legislature. In the systems of control of constitutionality which is implemented by special constitutional courts specialized for that purpose, the control of constitutionality over these acts can be performed by these bodies in the role of "guardian of constitutionality".

In terms of the additional parliamentary control over decrees with a force of law, modern constitutional systems usually overlook it and constitutionally regulate it. The United States of America are an exception to this. In the USA, executive decrees are issued by the President, but they are not subject to additional parliamentary control by the United States Congress. In case of disagreement of the Congress with how the matter is regulated in the executive decree or how measures and instruments are provided for, the Congress has the opportunity to provide by law a different solution from that provided in the decree of the President. In practice, the Congress does not decide on such a step because, within the principle of checks and balances, the President has the right to use the suspensive veto on this law, whereupon a 2/3 majority vote is required to override it.

In Switzerland, the Constitution does not regulate the oversight of the decrees adopted by the Federal Council, but by legal analogy, the general constitutional authority of the Federal Assembly to exercise control over the work of the Federal Council is considered applicable. However, the Law on Protection of Democracy, the Rule of Law and the Acting in Extraordinary Circumstances limits the duration of decrees and provides for an obligation to be ratified by the Federal Assembly. Thus, if the Federal Council adopts such a decree to protect the interests of the country, this decree will be valid for a maximum of 4 years. If it is necessary to extend it, the Federal Council may renew it once again, but it will cease to be valid if it is not submitted for confirmation (ratification) by the Federal Assembly within 6 months of its extension. The need for ratification of the decrees by the Federal Assembly was also foreseen in cases when the decree was valid for less than 4 years[35]. The main purpose of submitting a draft law for ratification of

[34] U.br.42/2020

[35] https://www.admin.ch/opc/fr/official-compilation/2011/1381.pdf, 05.05.2016

the decrees to the Federal Assembly is to legalize the decisions and provide consent for the measures undertaken with the decrees adopted based on direct constitutional authority.
The Croatian solution provides for that the President of the Republic is obliged to submit the necessity decrees to the Croatian Parliament for confirmation, as soon as it will be able to meet[36]. If the necessity decree is not submitted to the Croatian Parliament for confirmation as soon as it can meet or it has been submitted and the legislative body did not confirm it, it ceases to be valid[37].
In the legal theory, upon conducting this type of additional parliamentary control over the decrees with a force of law, the legislative body has the opportunity to approve or reject these acts. However, the action of the legislative body, in exercising this additional control over the decrees with a force of law, aims at 1) to restore the balance distorted during the deviations in the principle of separation of powers and 2) to re-establish the stability of the constitutional statics.
In this context, constitutions may overlook various constitutional solutions related to the need for further confirmation of decrees with a force of law. Some constitutional solutions provide for a deadline within which the decrees should be submitted for confirmation. In that case, submitting the decree with a force of law to be ratified by the legislative body within the constitutionally provided deadline is a constitutional obligation. Namely, the fulfilment of this constitutional obligation is a condition for extension of the measures and instruments provided for by the decree. Failure to submit the decree to the legislative body within the constitutionally provided deadline means that it will not produce a legal effect after the expiration of this period. On the other hand, if the constitutor did not provide for any deadline within which the decree should be submitted for confirmation, the conventional interpretation of the legal theory is that it should be done as soon as the conditions and opportunities for it are provided.
In conditions when the constitution will not provide for the duty to submit the decrees with a force of law for additional confirmation before the representative body, their submission is not necessary at all. Namely, there is no constitutional obligation for them to be additionally controlled, nor there is a constitutional obligation for their submission due to additional control. However, the legislature always has the opportunity to conduct this control and to further legalize these decrees, or to repeal them by law and thus remove them from legal circulation.
The issue of additional control of decrees with a force of law seems to be further complicated in cases when the constitution did not regulate the matter for decrees with a force of law and did not explicitly provide a basis for their adoption, or when the overall matter for the state of emergency was regulated too general or with one clause. In this case, the problem seems to deepen further when the decrees will be adopted due to the imposed circumstances, which might be politically justified, but not constitutionally substantiated. Then these degrees with a force of law, adopted without constitutional or legal basis shall be considered unconstitutional. In the sense of the aforementioned, the question about the additional parliamentary control of these decrees for the adoption of which there was no legal basis is being raised again. In this context, the dilemma arises whether the legislature can retroactively provide legal force to these necessity decrees after the end of the extraordinary circumstances. In this case, the legal theory adheres to the conventional legal interpretation that the only way to bridge this gap of unconstitutionality caused by the decrees with a force of law adopted without any grounds is for the parliament to legislate them retroactively (acting from the moment of adoption of decrees). Finally, the spiral of unconstitutionality that primarily originated in the adoption of these acts without a constitutional

[36] Constitution of Croatia Art. 110 par. 3
[37] For more details see: Смердел. Сокол. „*Уставно право" Загреб*. 2009. p. 322

or legal basis for it further creates new divergent categories such as "legalization with additional/subsequent confirmation, with retroactive effect". And ultimately, the abyss of these legal situations could end only if the constitution provides a basis for adopting laws with retroactive effect. In conditions when the constitution does not provide for such a possibility even "legalization with additional/subsequent confirmation with retroactive effect" could not be used as a "legal remedy", and these acts will remain unconstitutional[38]. In the end, it depends on the legislative body whether this opportunity will be used to apply the aforementioned "legal remedy". No one can restrict the legislature from further discussing the legal force of decrees adopted without any legal basis, and to provide them with an additional basis for the legal effect they had. But also no one can oblige the legislative body to do the same because the constitutional and legal basis for the adoption of these acts did not exist, no matter how much the legal theory "through a constitutional vacuum" leaves room for that.

V. CONCLUSION

- Decrees with the force of law are a special type of decrees. Regarding the legal nature of these decrees, they are characterized by greater independence compared to the executive decrees.
- The decrees with the force of law do not represent *secundum legem* (they are not adopted to apply the law, and accordingly there is no obligation to be bound by law and to regulate the matter within its borders). These decrees are not even *intra legem* (there is no obligation for them to move within the framework of a positive law). By the act of derogating from the law, these decrees become *contra legem* (contrary to the law), so this features completely change the physiognomy of decrees, categorizing them as a completely hybrid category.
- In terms of the question of which body has competence for the adoption of these decrees, the fact that their adoption is within the competence of the executive is a constant factor in the legal systems and constitutions. The alternatives where their adoption is the responsibility of the head of the state or government, are a variation on this topic.
- The adoption of decrees with the force of law is always linked to the fulfilment of additional preconditions such as war, imminent military danger, declared war, state of alarm, disturbance or endangerment of public safety or order, "state of military readiness, state of emergency, natural disasters, epidemic diseases of humans, animals or plants.
- Another area of interest for the science of constitutional law is whether the decrees with the force of law, as an instrument of deviation from the principle of separation of powers, can only be involved in the legal matter (*materiae legis*) or the decrees can also be involved in the constitutional law matter (*materiae consitutionis*). In terms of this question, the constitutional law history also provides for an affirmative answer.
- In the context of the control of the decrees with the force of law in comparative constitutional law different models are implemented. The common constitutional solution is the additional a posteriori control, performed by the representative body, i.e. the legislative body (parliamentary control). In the systems of control of constitutionality which is implemented by special constitutional courts specialized for that purpose, the control of constitutionality over these acts can be performed by these bodies in the role of "guardian of constitutionality".

[38] Stefanovic, Jovan. „*Ustavno parvo FNRjugoslavije I komparativno*". Zagreb 1950. p 112-121

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