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LEADING ACTIVITY OF EXECUTIVE POWER IN DOMAIN OF SUBSIDIARY LEGISLATION – DECREES AND THEIR CATEGORIZATION

Abstract

The central theme of this paper is theoretical consideration of the concept of regulations and their classification. The regulations are the general legal acts of the executive branch, which, by special procedure, are adopted by these bodies.It can be a government (in a parliamentary system) or a head of state (in the presidential and some semi-presidential systems). In most legal systems on the hierarchical scale of the regulation, they are placed under the constitution and laws, and above other by-laws. It is possible to differentiate law enforcement regulations (these are general and executive regulations) as well as regulations on the need.

Instead of the conclusion, the authors pay attention to the concept and categorization of regulations in the constitutional system of Serbia.

Key words: *executive power, regulations, categorization, constitutional system of Serbia*

JEL classification: K10, K23, K29

ВОДЕЋА ДЕЛАТНОСТ ИЗВРШНЕ ВЛАСТИ У ДОМЕНУ ПОДЗАКОНОДАВСТВА - О УРЕДБАМА И ЊИХОВОЈ КАТЕГОРИЗАЦИЈИ

Апстракт

Централна тема овог рада је теоријско разматрање о појму уредби и њихова класификација. Уредбе представљају опште правне акте извршне власти које по посебном поступку доносе ти органи. То могу бити влада (у парламентарном систему) односно шеф државе (у председничком и појединим полупредседничким системима). У већини правних поредака на хијерархијској лествици уредбе се налазе испод устава и закона, а изнад других подзаконских

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аката. Могуће је разликовати уредбе за извршење закона (реч је о генералним и извршним уредбама) као и уредбе по нужди. Контрола уредби може бити парламентарна и од стране Уставног суда.

Уместо закључка, аутори обраћају пажњу на појам и категоризацију уредби у уставном систему Србије.

***Кључне речи**: извршна власт, уредбе, категоризација, уставни систем Србије*

Introductory comments

The absolute domination of the executive power in the field of subsidiary legislation remains unquestionable truth. Subsidiary legislation is its major, already reserved domain (worth noting, the executive power is not the only generator of subsidiary legislation). In theory, it has often been noted that the activity of the executive power is reflected in making abstract legal norms closer to administrative and judicial power for the purpose of creating a situation of a balanced application of laws. This has been achieved by means of decrees. Generic name for the executive power's act is decree, and as such, it remains the most recognized general legal act of this branch of power. The difference between laws and decrees, as separate categories of legal regulations was established in the period of written constitutionality in which a law is considered to be the expression of general will. In the period immediately following great bourgeois revolutions, the legislative power had a respectable supremacy in drafting general legal acts. The entire normative activity was under its exclusive jurisdiction "The law which legislative power establishes shall be executed by executive power". Thus, the division of tasks is following: normative regulation belongs to legislative power, while its execution to executive power. In the strictest sense of this theory, the executive power can pass only those acts which serve the purpose of the execution of laws, the general legal acts passed by the legislative power. However, such understanding of the executive power's role and tasks was not practically feasible. Thus, the execution of laws started to assume that the executive branch of power has both right and duty to perform its basic activity (execution of laws) by adopting subsidiary legal acts. In this way legislative and executive branches of power started to share the role of determining what is law, that is of prescribing normative regulations. Thus, the principle of division of power "very soon assumed the meaning which was not included in the original theoretic scheme" (Jovicic, 2006, p. 380-381). With the appearance of a decree on the legal scene as a general legal act of the executive power, there was a tendency to make a sharp distinction between this act and a law. This was the period of the beginnings of bourgeois democracy and the adoption of first written constitutions. Later on, the line between the decree and the law started to fade as a consequence of the change in understanding of the concept of executive power. In that period the executive power was basically the main representative of monarchy's principle and its protector, but at the same time the political strengthening of bourgeois forces was supposed to prevent its interfering with legislative powers. With the establishment of the republic form of government, the executive power was no longer perceived as the branch of power opposing the people's will. The reason for this lies in

the fact that the executive power itself was the expression of people's will embodied in the head of the state in the presidential or semi-presidential systems or in the government in parliamentary systems representing the emanation of a parliamentary majority and the expression of people's will. The division of normative jurisdiction between legislative and executive branches, which took place in the 19th century lasted until the first decades of the 20th century. In this period the legislative body passed fewer laws (which is not the case with the period we are the witnesses of) that, generally, regulated the individual fields of social life. These laws empowered the executive branch to pass decrees related to the elaboration and concretization of legal provisions. The dominance of the executive power in the normative sphere was particularly strong during the World War I when it could be noticed that, while theoreticians discussed the concept and the scope of application of laws and decrees, the practice witnessed gradual spreading of the application of decrees. „The previous standard regime of passing decrees which only served to facilitate the application, that is the execution of laws, undergoes serious changes with the development of institutes with wide parliamentary powers for awarding of these powers (*pleins pouvoirs, pouvoirs speciaux, pouvoirs exceptionnels, pouvoirs extraordinnaires*). Awarding of these powers assumed, even during the World War I, the character of a special legal institute in the legislations of many countries and in in the relations between their legislative and executive branches of power. Although these powers were applied in many countries, in some of them they demonstrated specific traits. However, regardless the fact that the relations between legislative and executive powers differed from country to country, some bourgeois democracies, such as France, Switzerland, England and USA, nevertheless applied similar typical practices of awarding these powers and extending the scope of the application of decrees.

Extending the scope of decree-passing power and types of decrees

The practice of extending the scope of the application of decrees, which became particularly intensive during the World War I, continued to be largely accepted in some countries between the two wars, especially during the World War II. Indeed, it could be said that "this practice has not ceased to grow in peaceful times either, not even until present days" (Kamaric, 1960, p. 135). Extending the scope of decree-passing power was the consequence of the circumstances arising from the wars and political and economic crisis. In addition, a more prominent role of the state in economic and social spheres also contributed to the growth of the domain of decree-passing power. The contemporary legal life brings us in front of a dilemma whether only the laws, as the legal acts of supreme power, next to the constitution, can be used for primary and original, generic regulation of all important social relations, or should we allow the executive power to have a growing influence in regulating these relations? In reality, we are witnessing that decrees play an increasingly significant role in regulating important social relations which is the characteristic of the contemporary executive power, that is of its key activity to, via means of administrative power, as its subordinate level of power, permeates almost all aspects of social life. Of course, a decree must be in accordance with a law since it represents an act used for the execution of legal norms. In addition, a decree consists of general legal rules which remain valid *pro futuro*, and

is issued by the branch of power which is both legally and formally subordinated to legislative branch. A democratic state with the rule of law will always request from a decree-passing branch of power to respect the legislative branch of power, that is the principle that the rules of decree cannot be in conflict with the general rules of law. From a substantive point of view, a decree can be defined as a general legal act which in a relatively comprehensive way regulates an important sphere of social relations. By rule, a decree is a form of the execution of law without constituting new rights and duties. Decree provisions have biding force, either ordering an action to take place or banning its execution. In principle, a decree should not regulate social relations which have not already been the subject of legal regulation. In any case, a decree is a legal act of weaker force than a law and must be in accordance with the law. There is, however, another issue that has been largely discussed in French legal theory – whether decrees should be passed only on the basis of a legislative authorization and only for the purpose of the execution of law. In French Third and Fourth Republic there was a prevailing belief that decrees can be issued only on the basis of a legislative authorization and that decree-passing power does not have an autonomous capacity. Unlike the practice that existed in previous French republics, both theoreticians and practitioners in French Fifth Republic adopted the stand that decree-passing power was by its nature autonomous, but that its activation cannot be in conflict with law. In any case, besides the above mentioned substantive conceptualization of a decree, its formal concept assumes that decree is an act of the executive power. The substantive concept of decrees was particularly elaborated in French legal theory by Leon Duguit and his followers. Thus, Leon Duguit quotes Maurice Hauriou: "Laws are general restrictions set to limit the freedom of individual's activity. Decrees are general rules aimed at securing the organization and execution of public affairs" (Hauriou, 1911, p. 50). In addition, Duguit believed that "a law is, in its essence, just a general rule passed for the purpose of organizing and functioning of a public body. Whether a law in its evolution will eventually become equal to a decree, or on the other side, a decree will come closer to a law, essentially does not matter. What matters is that this transformation has already taken place. Today some rules have already taken the form of a law although they were not passed by the bodies considered to be representatives of people's sovereignty. Therefore, the concept of law is no longer linked to the concept of sovereignty. We would also like to point out one example why it is difficult to find arguments in favor of making a clear distinction between a law and a decree - a complaint related to unlawfulness and a lawsuit related to overstepping the power can be accepted only when they refer to a decree and not when they refer to a law. The distinction is exact, but there is a tendency to fade out, which has already happened in some countries; yet this distinction does not interfere with the nature of the act itself" (Duguit, 1998, p. 75-76). According to this author and given the fact that he favored substantive conceptualization of decree, the distinction between law and decree, as for their contents, does not exist. The reasoning is that a decree also constitutes a legal rule, which is general, new and relevant to the world of law and represents a change in objective law, as well as that the legal act which is passed according to the decree is equally protected as the one which is passed according to the law. This author further states: "I repeat, a decree is a law in a material sense, since it is an act, a rule, which speaks for itself … and a decree and a substantive law are the same thing. Despite a lot of effort, I could not find a single difference between them. I will be thankful to anybody who can point it to me"

(Duguit, 1928, p.212). In contrast to this substantive understanding of the concept of decree, there is a formal understanding of the decree coming from the pen of French jurists Raymond Carre de Malberg and Maurice Hauriou. Malberg believed that there was only one type of decrees as general legal acts – the decrees for the execution of laws. According to his opinion, there are two scopes of execution: strict and broad and thus theoretically, in accordance to them, two types of execution decrees. If the head of the state, on his own initiative, or at the request of a legislative body, introduces supplementary regulations into state's legal system whose aim is to secure the execution of the law's provision and which are in line and complementary with these provisions, then we are speaking of the execution in a strict sense, that is *stricto sensu* execution. The execution in a broad sense, *lato sensu*, represents a legal situation when entirely new regulations are passed. According to Malberg, the legal grounds for passing a decree lie exclusively in the constitution. The power for passing decrees is exclusively in the hand of the head of the executive power. The mandate of the head of the state, at least in the sphere related to degree-passing power, is always reflected in the execution of laws. There are two options which a head of state may use for the execution of laws by means of decrees: through spontaneous passing of detailed provisions regulating the application of laws or through legislative authorization that includes the degree-passing sphere. In the latter option, the executive power can pass new laws, although it still remains in the sphere of their execution. "Such reasoning, however, led Carre de Malberg finally to conclude that decrees can be divided into two major groups: 1) spontaneous decrees (*reglements spontanes*), that is those decrees which a head of the executive power passes spontaneously and 2) decrees whose passing is ordered by a special legislative authorization (*reglements qui presupposent une habilitation legislative*)" (M.Kamaric, 1957, p.83). In his theoretical structure, this author points to a single type of decrees: the decrees for the execution of laws. Yet, the concept of execution is defined in two senses, which are the antipodes, and as such are unacceptable because in one situation the execution is considered as a substantive concept reflected in the elaboration and concretization of legal provisions. In the second situation, the execution is interpreted in a formal sense, as an answer to the question who is formally authorized to pass decrees. This represents mixing of totally different concepts and terms and implies that there is no difference between the decrees passed to assist in the application of laws, whose purpose is a detailed elaboration of laws and legislative decrees, which are passed on the basis of a legislative authorization. Such approach was also favored by professor Krbek who criticized Malberg's stand. Krbek states:" The same expression is used for two totally different notions, once in a substantive sense, which means a detailed elaboration of legal provisions and the second time in a formal sense, which means a formal authorization that an executive organ may use to pass a decree. Thus, the execution in one sense means to elaborate a law by means of a decree, and in the second sense to pass a decree on the bases of a specially issued legislative authorization. Here we can argue for which of these two cases the execution is a more adequate expression, however, it is absolutely impermissible to use a common word for two totally distinct legal terms. Ideologically speaking, these are two completely different matters: in the first case we are looking into the decree's content, and in the second case we are asking a question who awards jurisdiction, that is authorization, to an administrative body to pass decrees. In the first case we are speaking about the decree that serves for the execution of law, which only further elaborates legislative idea, and in

the second case, we are talking about a legislative order which an administrative body can pass only on the basis of a special legislative authorization" (I. Krbek, 1939, p. 29).

Thus, according to Hauriou a decree can be characterized as manifestation of administrative will in the form of a general written rule, issued by a body that possesses a degree passing power. As for a formal concept of a decree, in theory, all acts of the state can be qualified on the basis of the fact which body passed them. "If we start from this criterion that represents the only legal basis according to which one can explain every single act, then laws should be viewed as legislative acts passed by legislative bodies and decrees as executive acts passed by executive bodies on the basis of their decree passing power, which is subordinate to a higher power of legislative bodies. Laws and decrees, therefore, can be considered only in a formal sense and thus the difference between law and decree cannot be made on substantive, but strictly on formal basis" (M.Kamaric, 1957, p. 49-50). However, we believe that it is wrong to look at the decree and define it only from the substantive point of view or, on the other hand, to formulate just the formal concept of a decree. We are closer to accept the views which Paul Laband presented in German legal science. If it is possible to formulate a substantive concept of law along with its formal characteristics, it is also possible to formulate a substantive and formal concept of decree – a cumulative concept. The substantive concept of decree stands in opposition to the substantive concept of law. The decree's norm should be different from the law's norm and its creation is the result of the activities of the government as a central organ of the executive power. "History, however, has taught us that the boundaries between the fields of law and decree are not fixed, moreover, that they are not even clearly established. Yet, in the original and substantive sense, the difference between law and decree is the same, according to Laband, as the difference that exists between law and decree provisions. Decree does not create law, but its scope extends within the boundaries set by law" (P. Dimitrijevic and R, Markovic, 1986, p. 292-293). The formal concept of decree, as already stated, is linked to the body which passed it and it does not correspond with the substantive concept of decree. According to this German theory, the substantive concept of decree corresponds to an act which contains an administrative regulation. However, legislative bodies can also pass the acts which include administrative regulations and, therefore, there is no overlapping of formal and substantive concepts of decree. This is just a form of discord which resulted in the division of decrees into legislative and administrative. The administrative decree, as Ivo Krbek noted: "is not related to citizens and does not penetrate their legal sphere, but only imposes internal regulations to authorities, giving instructions for internal functioning of administrative bodies or even establishing regulations for functioning of various state institutions (*Anstaltsordnungen*, for example, sets regulations related to schools and public libraries) thus affecting the individuals who are in immediate contact with these institutions" (I. Krbek, 1929, p.117). Similar opinion can be found with Slobodan Jovanovic, who also states that administrative decrees are issued by administrative bodies and that their execution "is not in the hand of citizens; for citizens administrative decrees do not represent orders in the strict sense of the word. They only have indirect effects on citizens – only if they come in touch with administrative bodies which work according to these decrees. Since the administrative decrees do not bind citizens, they do not need to be publicly announced as laws: it is enough if they are sent to the bodies which operate according to them. Decrees are issued by the head of the

administrative power, monarch or president of the republic, but they can also be passed by other high administrative bodies, such as, for example, ministers. Generally speaking, it is considered that within an administrative sector higher administrative bodies can issue decrees to lower administrative organs. " (S. Jovanovic, 1990, p.203). This means that within the scope of legally constituted principles administrative decrees are used for establishing special decrees for regulating certain issues and giving instructions which are of less importance than legislative instructions. Legislative decrees are, by nature, laws in a substantive sense and, therefore, they have to be within legislatively established boundaries since they represent a form of subsidiary legislation. This type of decrees regulates individuals' private domain and enriches and modifies state's legal system. Yet, we cannot speak about generally accepted division into legislative and administrative decrees. Our renowned constitutionalist, Jovan Stefanovic, believed that we should not be making distinction between general legal acts, which are related to citizens' rights and duties and those related to the organizational apparatus of state administration and its functioning, that is between legislative and administrative decrees in such a way to allow legislative decrees to have substantive character and to deny such a character to administrative decrees. "Therefore, it is necessary to reject distinction between, so called legislative and administrative decrees, that is between the decrees which regulate the rights and duties of individuals and those that regulate the functioning of administrative bodies, since both former and latter create law" (J. Stefanović, 1950, p.445). Our belief is that there is a place for the formulation of both administrative and legislative decrees and that administrative decrees are the decrees for the execution of laws, that is for their supplementing. The execution of laws means their concretization and application. On one hand, the decrees for the execution of laws represent such regulations which elaborate legal rules, but on the other hand, these decrees represent instructions to state bodies which are bound to accept them and work according to them while executing legal regulations. In the first case, the decrees for the execution of laws comprise legislative rules and represent laws in a substantive sense. In the second case, they include administrative regulations and have nothing in common with legislative regulations. According to Laband, the concept of decree includes its substantive and formal characteristics which would, accordingly, mean that a decree is an act which contains administrative provisions passed by an administrative body "(P. Laband, 1901, p. 379).

For our perception of executive power, it is important to mention the following theoretical views on decrees: first, we would like to point to the decree theory which views it as a collection of details; the second theory views a decree as a means for the execution of laws; the third theory is based on the opion that a decree is an expression of initial and authoritative decree-passing power. French theoretical minds invented a theory that decree is a collection of details. This legal conceptual formulation is based on the opinion that a decree represents a collection of details and that law is a legislative regulation, based on priciples and therefore, it is aa expression of priciples. "The clear formulation of the concept of a decree as a collection of details was given a long time ago by Portalis. In his famous speech related to the draft of the *Code Civil*, he reasoned that legislative regulations differed from standard decrees in the way that laws should comprise basic rules on each matter, while the details related to the execution, provisional and auxiliary measures and matters of temporary or changeable significance belong to

decrees. Later on, the same idea was shared by many authors of both administrative and civil law." (M. Kamaric, 1957, p. 52). The theory which views decree as a collection of details can be the subject of criticism, since a law, particularly the domain of civil law, can foresee detailed regulations, while a decree includes principles, of course, always in line with the existing laws. It should be taken into consideration that every act which prescribes regulations is based on certain principles. Therefore, it is easy to comprehend the relevance of the division which insists on the principles as a distinguished characteristic of law, that is on the elaboration of social relations, which would be, according to this view, the exclusive characteristic of a decree. The other view, a theory of decree as a means for the execution of laws is based on the belief that the decree-passing power is directly linked to the executive power. According to this view, which is particularly indicative for French legal theory, the executive power cannot perform successfully the mission of executing laws unless subsidiary laws are passed which demand their execution. "Thus, according to this theory, a decree is the instrument of the executive power for the execution of laws" (M. Kamaric, 1957, p. 53). In French legal theory, interpreting article 3 of French Constitutional laws, Carre de Malberg viewed the executive power as a constitutional subject which is subordinate to legislative power and exclusively focused on the execution of laws. This French legal theoretician formed this opinion on the basis of the mentioned article which foresees that it is the general duty of the head of the executive power to take care of the execution of laws and that, therefore, each decree must rely on the grounds for its passing, that is, on the law. Since a decree must be exclusively based on law and given the fact it represents an instrument for the execution of laws, Malberg, looking at the execution in a broader sense, came to the conclusion, that is to an interpretation, that a decree is not only restricted to the execution of exactly prescribed legal regulations, but also that it can serve as a means for passing of initial regulations, which lays the legal ground for unrestricted spreading of decree-passing power. The third theoretical view considers a decree as the emanation of original, generic and independent decree-passing power. This theory is the response to the theoretical stand that decree is the means for the execution of laws. Namely, the proponents of this theory, such as Hauriou and Moreau, believe that decree represents a manifestation of ruling of the head of the executive power. Ruling would not be possible unless the head of state, president of government or government itself passed decrees in the situations that were not legally regulated. "According to another opinion, particularly favored by Duguit, the head of the executive power is not only a subordinate executor of laws, but, together with a legislative body, represents a ruling factor, that is a body with the capacity to pass decrees spontaneously and on the basis of the title to rule. Thus, according to this theory, the decree-passing power is based on the power of the executive branch to rule, that is on the authority which is higher than the authority for mere execution of laws." Theoretically speaking there are various categorizations of decrees. Thus, for example, as subsidiary laws, they can be divided into three categories. In this way a distinctions is made between decrees 1) in relation to the legal grounds on which they are passed 2) in relation to their content 3) in relation to the bodies which passed them. Since constitution and law are two major legal acts of state, thus the grounds for passing decrees can be found in both constitution and law. "The Constitution is the act leading the legal order of a state which has the system of firm constitution" and, therefore, it is logical that there is a categorization of decrees based on constitutional

authorization. On the basis of this authorization, constitutional decrees can be passed, while special legislative authorization is needed to pass legislative decrees. "According to G. Jelinek, constitutional decrees (*verfassungsmässige Verordungen*) are characterized by the fact that the body which passes them does not need any special law which would authorize this body to pass decrees, since such an authorization is already embodied in the constitution." Constitutional decrees can be of two types: independent and non-independent. The degree-passing body uses independent decrees to regulate a certain matter, while non-independent decrees serve for the concretization of the provisions of a concrete law for the purpose of its application." It can be said that non-independent decrees are accessory legal acts. They owe their legal life to a concrete law. If a law to which they are related ceases to exist, the non-independent decrees also cease to exist in a legal system. In our older legal history, decrees were called orders. The following was written about independent decrees: "An independent order also must be *secundum et intra legem*, but it is not determined by a special law - only restricted by it. Among independent constitutional orders, special place is given to the orders which were passed instead of laws (*gesetz-vertretende Verordnungen, les decrets – lois).*" Special type of independent decrees are those which temporarily substitute laws and last during the state of emergency. In Serbian theory of administrative law, Nevenka Bacanin pays much attention to legislative decrees and the criterion that she uses for such categorization of decrees is their link to laws. According to the opinion of this author, legislative decrees, similar to the constitutional decrees that we have already discussed, can be divided into independent and non-independent, within which further classification to classical and special can take place. This means that both independent and non-independent decrees can be classical and special. The decrees which are, for the purpose of regulating its subject matter, determined by law are non-independent decrees. The non-independent decrees serve for the execution of laws, they are subordinate to laws and prevailing in most legal systems. The fact that they serve for the execution of laws means that these subsidiary general legal acts of the executive power cannot be used for the regulation of social relations if these relations are not already regulated by law. "They are passed on the basis of the law and for the purpose of the execution of law by the concretization of its principles and provisions and it is irrelevant whether the decree-passing authorization is foreseen by a constitutional or legislative act. These are classical non-independent decrees. The exception comes in the form of non-independent decrees which, on the basis of legislative authorization, are used for changing, amending or replacing certain legal provisions which actually comprise this decree-passing authorization; they therefore, possess legislative power and instead of concretizing legal provisions, they actually serve to change, amend or replace them, which is at decree-passing body's liberty to decide depending on the regulation of a concrete issue. However, they cannot be considered to be independent decrees since they are in a certain way linked to the concrete law. This decree - a special non-independent decree is restricted by a corresponding law and, therefore, it cannot be said to possess an original legislative content. Nevertheless, the issue of the constitutional grounds for this type of legislative delegation is significant from the theoretical and positive law point of view since it can be allowed, forbidden or even overlooked by the constitution" (N. Bacanin, 2011, p. 79). Although N. Bacanin made a classification of decrees on the basis of their link to the law, she indirectly accepts that it is also possible to classify decrees on the basis of the

constitutional grounds on which they are passed. Following the classification of legislative decrees to independent and non-independent, we would like to underline that independent decrees represent exception and deviation from the definition of a decree as an act for the execution of law since they regulate those issues, that is those fields of social life which are not the subject of legislative regulation. As it was the case with non-independent decrees, the independent, that is autonomous decrees can also be divided into classical autonomous decrees and special autonomous decrees. Classical autonomous decrees are those which regulate certain issues outside the legislative sphere, that is the issues whose subject matter is not of legislative nature. Special autonomous decrees, unlike classical ones, are passed to regulate those fields which include legislative matter and they are passed instead of laws. In order to pass these decrees, the decree-passing power does not need a legislative act and these decrees are not used to concretize a legislative norm. Instead, for passing these decrees, a decree-passing body needs to have grounds in the highest general legal act – the constitution. In his classification of decrees, Miodrag Jovicic, establishes a difference on the basis of the relation between a decree and general legal acts of higher significance – constitution and laws. Decrees for the execution of laws are passed "on the basis of the explicit legislative authorization , that is an order. That type of decree, as the initial type in the development of decrees, is the only type that entirely corresponds to the original concept of decree as a legal act, which is, if necessary, used for concretizing the legislative provisions that could not be adequately applied since they were not enough precise and concrete" (M. Jovicic, 2006, p. 383-384). Jovicic further distinguishes the decrees for the execution of laws passed on the basis of general constitutional authorization . They are called spontaneous decrees and are the result of strengthening of the position of the executive power. Within this type of decrees, a distinction can be made between two subtypes. The first subtype of decrees appeared as a result of the need to introduce a certain law into legal life and to apply it. However, the law did not give an authorization to the executive power to start the phase of its concretization elaboration, and the executive power did it spontaneously. When the executive power uses decrees of this subtype to elaborate legal provisions, it remains exclusively linked to this law and acts within its boundaries. The second subtype of spontaneous decrees, according to Jovicic, are the decrees, which are passed under the constitutional jurisdiction of the executive power. In this case, the executive power has the authorization to apply the existing legislation whenever it feels it is necessary. These provisions regulate social relations initially, that is from the beginning, which is the characteristic of a law and is in contrast to the decrees which are passed for the application of a certain law where the social relations are regulated in a derivative way. Decrees with the power of a law belong to the third type of decrees classified on the basis of the relation between the decree and general legal acts of higher significance. They are passed either on the basis of the authorization given to the executive power by the constitution - to pass these decrees under certain conditions or by a legislative decision. In the latter case, a parliament can transfer, even without a constitutional authorization, a part of its normative function to the executive power. "The difference is in the legitimization of the executive power to pass decrees with legislative force (in the first case, it is in accordance with the constitution, while in the second case it appears in the form of the delegation of powers for which a parliament is not constitutionally entitled according to the prevailing theoretical opinion); the common

link is that the decrees of this type are used not only for the spontaneous, but also for the initial and generic regulation, as well as for the derogation of legal provisions" (M. Jovicic 2006, p. 385). There are two ways to suspend certain legislative regulations - either to change the content of the law or the law temporarily becomes invalid and is replaced by such a decree. Thus, an equality sign can be placed between this type of decree and law. These decrees are, however, in opposition to law - they are neither *secundum legem* nor *secundum legem.* Their legal nature is such that they represent *sui generis* category of legal regulations.

Bearing in mind this characteristic of decrees with legislative power, the question is raised how they are treated in various constitutions. The Constitution of French Fourth Republic (which preserved a parliamentary regime) in article 13 explicitly forbids the existence of such decrees: "The National Assembly has the exclusive right to pass laws. This right cannot be transferred." The semi-presidential Constitution of Portugal uses an enumeration system to establish for which matters the legislative branch is responsible to pass laws, so called reserve legislative powers (article 167), and then explicitly allowes the possibility of the existence of decrees with legislative power. Namely, "the Assembly of the Republic can authorize Government to pass decrees with legislative power for the matters which are in its exclusive jurisdiction, but first it must determine the subject matter and the scope of this authorization, as well as its duration, which can be extended. Legislative powers can be used only once, which does not dismiss the possibility of their partial execution. These powers cease to exist with the end of the Government which holds these powers, the expiration of Assembly's mandate or with the dissolution of the Assembly" (article 168 of the Constitution of Portugal). The elaboration of this norm of Portuguese Constitution is given in the section of the Constitution which regulates the government responsibilities. Besides those responsibilities of political and administrative nature, the Government also has prerogative powers in legislative field. In performing its legislative function, the Government is entitled to pass decrees with legislative powers in the matters which are not reserved for the Assembly. Also, the Government is entitled to pass decrees with legislative powers in the matters which are reserved for the Assembly, provided it receives the authorization by the Assembly. "Without a special authorization, only on the bases of a general, *ex constitutione* authorization, the Government can pass decrees with legislative powers for the execution of principles or general concepts of legal regime which are included in corresponding laws. In addition, the Constitution authorizes the Council of Ministers (a smaller body than the Government) to pass decrees with legislative power which are needed for the immediate execution of the Government's program. Finally, the Government is also authorized, and this is the only normative power the Government is regularly entitled to, "to pass regulations needed for the adequate execution of laws, that is the decrees for the execution of laws (in short, classical decrees)" (M. Jovicic, 1979, p. 10).

A distinction should be made between the mentioned decrees with legislative force and necessity (urgency) decrees. However, there are also some similarities between the decrees with the force of law and necessity decrees, such as that necessity decrees, upon the lapse of a certain period, that is the removal of the circumstances which caused the emergency situation in the country, are also submitted for the approval to a legislative organ and have the force of law. The difference is that, unlike the decrees with the force of law, necessity decrees "are passed in extremely difficult, emergency situations,

when the legislative branch of power cannot perform its activities" (D. Vranjanac and G. Dajovic, 2007,p. 140). The principal characteristic of these decrees is that they comprise new legal norms, which in standard circumstances, is the domain of constitution and legislation. Necessity decrees are passed by the executive branch of power in emergency situations: (war, imminent war), regardless the fact whether a situation has already been a subject of regulation. Their characteristic trait is temporariness. "Given the fact that the constitution maker and the legislator are excluded from the regulatory process, the legal effect of the decree is linked for the period in which constitution makers and the legislators are unable to act regularly, that is during the situation which required emergency regulation." (S. Čiplić, 1996, p. 106). The existence of necessity decrees in a constitutional system represents a big risk for democracies and for citizens' rights and liberties. In non-democratic regimes, in the sphere of constitutional and administrative law, necessity decrees are sometimes the equivalent, that is a synonym for the abuse of power at the expense of human rights. They survived the time of theoretical work of Boris Mirkin Getzevich and, as it has been said "Necessity decrees (*les ordonnances de nécessité*) were a constant practice in old Austria and infamous article 14 of the Austrian law was considered to be a weapon against people. In pseudo-constitutional regimes, necessity decrees always represented a means for royalty to stay in power at the expense of public interests" (M. Kамарић, 1957, p. 94-95). The best solution are those constitutional models of democratic regimes which regulate down to the smallest detail a large quantum of power which the executive branch receives in a state of emergency circumstances. Such a precise regulation of the executive powers during a state of emergency represents a dam preventing the abuse of existing powers. In this way, principally, the relationship between the key constitutional factors (legislative-executive) is not spoilt, although we find adequate to note the opinion of Slobodan Jovanovic "that growth of the executive authority during a state of emergency actually means the strengthening of executive powers towards the citizens and not towards the legislators." (S. Jovanovic, 1934, p. 163).

Instead of conclusion - decrees in Serbian constitutional system

Writing the Constitution of 2006, the legislator was modest in regulating the matters which fall within the scope of decrees. The decrees were mentioned in relation to the bodies responsible for their adoption, as well as to the purpose and circumstances for their passing. Those constitutional norms whose subject matter is of general nature, such as hierarchy, publishing, prohibition of retroactive effect of laws, as well as the control of constitutionality and legality are also indirectly related to decrees. The Law on Government, Law on State Administration and Rules of procedures of the Government also comprise some of the matters regulated by decrees.

In the constitutional system of Serbia, the Government as the central body of the executive power is the major decree-passing organ. There are some exceptions from this rule when the chief of state - the president of the Republic, and the head of parliament - the president of the National Assembly can appear as the decree-issuing subjects. The Government can autonomously use the constitutional authorization to pass decrees. It is used in regular procedures and circumstances to pass decrees for the purpose of

the execution of laws which does not need the approval of another body (article 123, parag. 1, line 3 of the Constitution). As for passing non-independent decrees, there are two situations that need to be distinguished. These are the situations of outstanding circumstances for the nation and the state. Namely, in the case of a state of emergency (article 200, parag. 6 of the Constitution), the Government needs a co-signature of the President of the state for passing the measures which provide derogation from human and minority rights. In the case of a state of war (which is a more serious case when the state, people and property are in danger), the Government needs the co-signatures of the President of the state and the President of the National Assembly for passing the measures which also provide derogation from human and minority rights (article 201, parag. 4 of the Constitution). The constitutional system recognizes three phases of the decree-passing procedure: preparation and submission of a draft decree, reviewing and approval of the draft decree and the third phase – decree's signing, publishing and coming into effect (M. Pajvančić, 1995, p 139-140, 143-145).

In order to pass a decree, the Government, as an executive body, needs to have an explicit authorization based on law. These are, so called, executive decrees. Based on the decree, the Government "shall regulate in more detail a relationship governed by law, in accordance with the purpose and aim of the law" (article 42 parag. 1 of the Law on Government). Delegated legislation, as well as autonomous decrees are the categories not known to the legal system of the Republic of Serbia. Since it is not authorized by the Constitution, the Government cannot pass, so called, autonomous decrees which originally and generically regulate social relations. Also, the National Assembly does not have a constitutional authorization to pass fully authorized laws (so called habilitation) that would allow the Government to pass decrees with the force of law. " Obviously, the author of the Constitution, considered that the delegation of legislative powers to the Government would mean that the execution of peoples' sovereignty would be passed from a representative body to a non-representative body" (R. Markovic, 2010, p. 342).

In a hierarchy of general legal acts in the constitutional system of the Republic of Serbia, decrees are subordinate to the Constitution, generally accepted international laws, ratified international agreements and laws, while they are superior to other subsidiary regulations and bylaws. Given the fact that decrees are the acts of inferior legal force compared to those ranked higher on this hierarchy, this means that they must be in accordance to the Constitution, generally accepted international laws, ratified international agreements and laws. The Constitutional Court can exercise control of decrees once they come into effect through, so called, abstract dispute concerning constitutionality. The Constitution does not foresee a legislative body's control of the enforcement of decrees, except in the situation of a subsequent ratification of necessity decrees.

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