Legislation Between Bad Faith, Improvisation and Disrespect for the Rule of Law

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Abstract

This study aims to analyse the current law-making process. We focus on its shortcomings, which violate not only procedural rules but also substantive rules and the constitutional regime of fundamental institutions of the rule of law. We refer to the emergency ordinance, which has been transformed from an exceptional procedure into the rule in lawmaking, or the engagement of the Government's responsibility, which has broadened its scope to include codes and packages of laws, thus emptying the role of Parliament as the sole legislative authority of the country of its content. Added to this are serious procedural shortcomings, such as the classification and adoption as ordinary laws of normative acts regulating matters falling within the scope of organic law and regulation by derogation, so that the rules laid down in the normative act from which the derogation is made are emptied of content.

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1. Conceptual clarifications

The term *'legislation'* must be explained, starting from the term *'law'*, which has two meanings. *Strictly* speaking, it refers to the act of Parliament bearing this name. Article 61 of the Romanian Constitution[3] defines Parliament as *the*

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[3] The Constitution was published in the Official Gazette no. 233 of 21 November 1991. It was

sole legislative authority of the country, from which it follows that a distinction is made '*between the activity of law-making, which belongs solely to Parliament, and the rest of the normative activity of the state, which falls within the competence of the executive power or the representative bodies of local public administration authorities'.*[4]

Lato sensu (in the broad sense), the term refers to any legal act that is binding on a subject of law.

Based on these two meanings, we will now determine two meanings for lawmaking.

In the first sense, we understand *lawmaking* to mean the specific procedure of Parliament, through which it adopts laws, the rules of which are enshrined in the Constitution and developed in the regulations of the two Chambers and in joint sessions.

These are the Rules of Procedure of the Senate[5], the Rules of Procedure of the Chamber of Deputies[6] and the Rules of Procedure for the joint activities of the Chamber of Deputies and the Senate.[7]

In a second meaning, centred on the broad sense of the term 'law', lawmaking refers to **the procedure for adopting a legally** binding **act** on a subject of law, regardless of who issues/adopts that act and its name[8].

This includes acts emanating from the executive branch, namely Government Decisions, orders, instructions, rules, clarifications, decisions and methodological rules, which emanate from the central specialised subordinate or autonomous administration.

All these acts must comply with certain rules of form, procedure and content and are currently enshrined in Law No. 24/2000 on the rules of legislative technique for the drafting of normative acts[9] and in the Regulation on procedures at the government level for the drafting, approval and presentation of draught

revised by Law no. 429/2003, published in the Official Gazette no. 758 of 29 October 2003, and republished in the Official Gazette no. 767 of 31 October 2003.

[4] Ioan Muraru, Elena-Simina Tănăsescu (coord.) (2022) *Constitution of Romania, Commentary on Articles,* 3rd edition, Ed. C. H. Beck, Bucharest, p. 527.

[5] Approved by Decision No. 28/2005, republished in the Official Gazette No. 22 of 11 January 2024, with subsequent amendments and additions.

[6] Approved by Decision of the Chamber of Deputies No. 8/1994, published in the Official Gazette of Romania, Part I, No. 50 of 25 February 1994, republished in the Official Gazette of Romania, Part I, No. 1181 of 27 November 2024, with subsequent amendments and additions.

[7] Approved by Decision of the Romanian Parliament No. 4/1992, published in the Official Gazette No. 34 of 4 March 1992, republished in the Official Gazette No. 623 of 7 July 2023, with subsequent amendments and additions.

[8] András Sajó (2004), "Militant Rule of Law and Not-so-Bad Law," *Hague Journal on the Rule of Law,* vol. 16: 525–549, https://doi.org/10.1007/s40803-024-00221-8.

[9] Republished in the Official Gazette of Romania, Part I, No. 260/2010, with subsequent amendments.

public policy documents, draught normative acts and other documents for adoption/approval, approved by Government Decision No. 561/2009.[10] *De lege ferenda*, these rules are to be laid down in the future Code of Administrative Procedure, which, unfortunately, has not been adopted, although it is eagerly awaited by theorists and practitioners,[11] but has been adopted in draught form and is awaiting approval by Parliament.

As a generally applicable procedural rule, we can invoke here the **transparency** phase, which is mandatory for all categories of normative acts, in which the draught is published and remains so for a number of days, consultation with associative structures takes place, and as a **substantive requirement,** we can invoke **regulatory unity,** which is provided for in Article 14 of Law No. 24/2000, which requires that a normative act contain rules from the same field, avoiding the accumulation of rules from different areas, as well as avoiding **parallelism in regulation,** as provided for in Article 16 of the same normative act.

2. Forms of Violation of the Rules Applicable to Lawmaking in Both Senses

Addressing such a topic requires, in accordance with the theme of the conference, an interdisciplinary approach requiring the use of knowledge of constitutional law, administrative law or general theory of law[12].

2.1. Legislation by Parliament

As already mentioned, this is the typical form of lawmaking, and the analysis of how Parliament performs this function/mission must start from the constitutional role of this public authority, enshrined in Article 61 of the Constitution, as **the sole law-making authority of the country,** the second in the list, the first being **the supreme representative body of the Romanian people.**

Specialist doctrine recognises that Parliament exercises several functions. Thus, there is talk of a legislative function; the function of establishing the main directions of socio-economic, cultural, state and legal activity; the function of electing, appointing, approving the appointment, forming or dismissing state authorities; parliamentary control; and leadership in foreign policy.[13]

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[10] Published in the Official Gazette of Romania, Part I, No. 319/2009.

[11] Cătălin-Silviu Săraru (2023), *Administrative Law, University Course,* vol. I, Ed. Universul Juridiuc, Bucharest, p. 46.

[12] See for a comparative view Antoine Buyse, Katharine Fortin, Brianne McGonigle Leyh, Julie Fraser (2021), "The Rule of Law from Below – A Concept Under Development," *Utrecht Law Review,* vol. 17, issue 2: 1–7, https://doi.org/10.36633/ulr.771.

[13] Ioan Muraru, Elena-Simina Tănăsescu (2017), *Constitutional Law,* 15th edition, vol. II, Ed. C. H. Beck, Bucharest, p. 174.

Of these, two were established by the Constitution, namely that of the supreme representative body and the sole legislative authority of the country.

Although the second is primarily relevant to the issue at hand, we believe that **they cannot be understood separately, as their meanings are intertwined.**

The status of **sole legislative authority** gives Parliament **supremacy in lawmaking,** similar to its **supremacy** in representation. If we use our imagination a little, Parliament cannot, in our constitutional architecture, be *supreme* in representation *without this characteristic*, which is derived from its uniqueness, in lawmaking.

That is why the attacks currently being levelled at Parliament, with the executive encroaching on its role as the sole legislative body, also affect its supreme representative character.

The ways in which the role of Parliament as the sole legislative body is being undermined, to the point of being ridiculed, are the subject of ongoing critical doctrinal analysis.

We will provide a summary of these below:

A) Legislation by ordinance, as a rule, by emergency ordinance and, more rarely, by simple ordinance. This is the most dangerous procedure because it distorts not only the role of Parliament and the Government, but also affects the balance and separation of powers within the state, the principle of loyal cooperation between the powers and even the requirements imposed by European law and the legal systems of the Member States. While, in the first years after the adoption of the Constitution, the number of emergency ordinances was reasonable, we subsequently witnessed a veritable 'inflation' of such ordinances,[14] despite the fact that the Constitutional Court established a case law sanctioning such abuse. Quite often, the agenda of the Chambers includes draught laws amending emergency ordinances that transposed directives and other European legislative acts into national law. This is caused by the way in which the transposition took place, through emergency ordinances that were not debated in Parliament in a timely manner and had to be corrected, which does not show us in a very good light as a Member State.

B) The excessive use of ordinances transforms the executive into the legislature and exceptions into rules, with serious consequences for the proper functioning of the state.

C) The tendency to violate any rules in lawmaking is the dominant

[14] Mircea Ursuța, Ioan Lazăr (2025), *Administrative Law, University Course,* Ed. Universul Juridic, Bucharest, p. 58. For a broader view see John Coldham, Hannah Barnett, Ailsa Carter (2025), "UK Supreme Court Rules on Bad Faith, Infringement and Interpretation of Brexit Legislation in *SkyKick v. Sky* Trademark Battle," *Gowling WLG Insights*, accessed at 15.06. 2025, https://gowlingwlg.com/en/insights-resources/articles/2025/uk-supreme-court-rules-on-bad-faith-infringement-and-interpretation-of-brexit-legislation.

feature of the Contemporary Parliament. Any reaction, drawing attention and critical approach to these issues is countered, ignored, sometimes blamed, 'accompanied' by the recommendation that those who disagree should refer the matter to the Constitutional Court.

D) In this spirit, genuine parliamentary customs have been created**,** which are **unconstitutional**, whereby laws approving ordinances are 'amended' with new provisions that were not the subject of the ordinance, creating a genuine 'transgender' between the procedure for approving an ordinance and the legislative initiative of parliamentarians or the Government.

E) Legislation by derogation, which has become a practice in recent years, justified by the economic and financial crisis into which is not Parliament but the Government has led the country. Obviously, with the help of Parliament, which has legitimised, through its approval, all the measures taken by the Government through emergency ordinances.

Such 'anomalies' in lawmaking continue to occur, even though the Constitutional Court has established a consistent case law on declaring a regulation wholly or partly unconstitutional on the grounds that **it violates the requirements of the quality of law,** as derived from Article 1(5) of the Constitution and developed by the provisions of Law No. 24/2000.[15] For example, in Decision No. 78/2024[16], the Court ruled that *'the legislator has the obligation, on the one hand, to regulate a text of law with normative content that ensures its effectiveness, proportionality and dissuasive character, in accordance with the provisions of Article 53(2) of the Constitution (...)'. (2) of the Constitution (...)'.*

All of these, individually and collectively, could be the subject of a doctoral thesis, and we hope that this will happen. The fact that we are discussing them is not necessarily motivated by a desire to criticise certain realities; we do not want sterile criticism. What we want is for them to be known and recognised because only then can they be corrected.

2.2. Forms of 'legislation' exercised by other public authorities

We refer, first of all, to the normative power derived by the Government, based on the legislative delegation regulated by Article 115 of the Constitution, which takes the form of simple or emergency ordinances.

We have already referred to emergency ordinances in the previous section and highlighted their shortcomings.

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[15] For an analysis, see Ramona Delia Popescu (2025), „Annual Chronicle of the Case Law of the Constitutional Court of Romania for 2024"*, Public Law Review* no. 1/2025, pp. 82–93.

[16] Decision of the Constitutional Court no. 78/2024 on the exception of unconstitutionality of the provisions of Article 14(1)(d), Article 44(1)(a) and (3), Article 57(4)(b) and Article 70(1)(c) of Law No. 295/2004 on the regime of weapons and ammunition, published in the Official Gazette No. 229 of 19 March 2024.

As regards simple ordinances, these generally fall within constitutional parameters, given that it is Parliament that sets the limits of their intervention through enabling legislation. '*The fundamental element left to the discretion of parliamentarians concerns the obligation to submit them to Parliament for approval, in accordance with the legislative procedure.'*[17] However, we note that the subsequent adoption of simple ordinances by Parliament is practised, even if it is not mandatory, as Parliament is cautious and imposes it as a rule through the enabling law.

However, both types of ordinances have some shortcomings, and we refer to those concerning **the disregard of the principle of transparency** by allowing insufficient time for public consultation.

Another aspect concerns the formal and insufficient consultation with associations in the areas covered by the regulations.

Another shortcoming stems from **the failure to comply with the rules laid down in Law No. 24/2000,** which should **be a veritable constitution in the field of regulatory technique**, but which has been ignored just as much as the Constitution itself.

Principles such as regulatory unity, avoidance of parallelism, unclear wording, ambiguity or contradictions are frequently violated, despite the consistent case law of the Constitutional Court on the clarity and predictability of the law.

3. Conclusions

There is no doubt that the Romanian state is currently undergoing a process of reorganisation, but unfortunately not always in a positive sense, of its regulatory technique.

We could characterise the current period, somewhat maliciously, as one in which the only rule is **that rules are not really respected**. When a goal or interest is pursued, all rules of lawmaking, regulation and exercise of powers are disregarded. We hope that the adoption of the Code of Administrative Procedure will temper these excesses. Otherwise, the Romanian legal system will become fragile and incapable of defending the authentic values of democracy and the rule of law.

[17] Dana Apostol Tofan (2023), *Administrative Code. Commentary on articles, Vol. I (Parts I-II/Articles 1–74),* Ed. C. H. Beck, Bucharest, p. 204.

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