



## ORIGINAL PAPER

# Consequences of Lacking Loyalty towards Constitution in the Rule of Law

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### Abstract

The lack of loyalty in terms of fundamental law of state - the constitution - not only makes it almost impossible to implement it under certain aspects, but even suppresses the exercise of fundamental rights and freedoms, thus depriving the democratic and liberal societies of the right to respect those values assigned to them. Consecutively, unfair behavior towards constitutional law is, in the foreground, reflected in legal dysfunction meant to compromise not only the principle of the separation of powers in the state, but also collaboration between institutions, generating a blockage in the sphere of power and civil society.

**Keywords:** *Constitution; fundamental rights; Rule of law; civil society.*

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### **Introduction**

This article deals with the way in which the lack of loyal behavior towards the norms provided in the fundamental law starts from ignorance, misinterpretation of constitutional provisions or disregard of the powers of a certain authority, or the rush of power into another power by overcoming its own limits of competence and having as a first consequence the impossibility of applying the constitution to the rule of law. A second consequence also arises in the field of human rights and fundamental freedoms, the unconstitutional practices of public authorities in certain states highlighting numerous interferences in constitutional rights that they are, in fact, required to protect. In this context, a legal malfunctioning has emerged, malfunctioning that interferes with political power and civil society in an unacceptably dangerous manner for democratic and liberal states.

The consequences of the lack of loyal behavior towards the constitution undoubtedly cause more dysfunctionalities incompatible with the democratic principles of the rule of law. Starting with the aggravation of the applicability of Montesquieu's theory on the principle of separation of powers in the state and the dilution of the capacity to protect the values of democratic and liberal society guaranteed by the fundamental laws of states, constitutional disloyalty creates major imbalances among democratic political regimes, clearly disturbing the balance of the state powers and creating deficiencies in the cooperation between them, which leads to the production of several juridical conflicts of a constitutional nature difficult to solve. In most cases, in the context of the manifestation of the lack of loyalty to the fundamental law, the conduct of the representatives of the powers falls only formally under the constitutional provisions, not considering the interpretation of the provisions in their spirit. But this is meant to affect the stability of a regime in which the separation of powers should not create institutional blockages. The lack of a loyal attitude to the spirit of the Constitution also means a lack of loyalty to established institutions, civil society and its evolution due to ignoring the in extenso interpretation of constitutional texts. Technically, the failure to interpret these provisions in their spirit will make the procedure applicable in the framework of democratic cooperation difficult between the representatives of the institutions because of their conduct. Therefore, practicing this form of conduct can be characterized by the concept of constitutional disloyalty. The way constitutional provisions of some states are formulated and interpreted make it possible, as will be discussed below, for the exercise by an authority of an abuse of power, creating a disadvantage in both spheres of manifestation of power. This abuse can only be avoided by an interpretation of the fundamental law in its spirit that prevents state authorities from behaving disloyal. Of course, this interpretation cannot be possible if the representatives of power limit to formal constitutional, even explicit, practices that empty the content of the principle of separation of powers in the state and generate the paroxysm of the applicability of the Constitution in its spirit. In such a legal context, an incompatibility would arise between the conduct of state authority and the ideas on which the rule of law is based. The present study highlights, with examples from the practice of some countries, how the abuse of power may implicitly affect the human rights of the people and also create a legal dysfunctionality meant to generate large blockages within civil societies and in the sphere of power.

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### **The paroxysm of the applicability of the fundamental law as a result of unfair behavior towards the Constitution**

If the principle of constitutionalism, in its essence, signifies loyalty to the fundamental law of a state, the manifestation of unfair behavior towards the Constitution results in the de-constitutionalization of some defining values and precepts for the fundamental democratic law, thus preventing its proper application.

In other words, constitutional disloyalty is an understatement of constitutional values, either by overcoming by the public authorities of limits of competence established by the constituent, or by the faulty collaboration between state institutions, or lack of collaboration, adding to them the absence of any attachment to the values protected by those fundamental norms which regulate those relations regarding the social-economic and state organization. In this way, there is a malfunction in the implementation of the Constitution.

The unfair behavior towards the Constitution does not mean, however, only the bad collaboration between the state institutions, but, paradoxically, even the close collaboration to create an interference in the exercise of fundamental rights. For example, the German Federal Court was notified in 2006 through a constitutional complaint (Schwabe, Geissler:2013:105), the object of which was to challenge court decisions ordering a preventive search with data filters in all German states, collecting the personal data of all Muslim men or presumed to be Muslim, aged between 18 and 40, in an attempt by the authorities to identify potential terrorists. In this regard, the Judicial Police Federal Office and the Land Police Inspectorates requested the transmission of personal data from numerous public and private entities and created the “*Rasterfahndung*” program that allowed them to do a data comparison process and to examine the predefined features set by the program. The claimants have invoked the violation of the right to informational self-determination, noting that the authorization of these activities by the authorities is an interference with this fundamental right, while claiming the lack of a legally constitutional basis respecting the principle of proportionality. With regard to proportionality, the German Federal Court has pointed out that, according to this criterion, the use of such a means is unreasonable since the limitations to a fundamental right guaranteed by the German Constitution go beyond that protection afforded to the legal good. Indeed, the protection of the land safety, life, liberty of the person, the population, state security are legal assets with a high constitutional significance, but the power exercising the constitutional order did not consider the fact that the program for the collection of personal data affected a large number of holders of the fundamental right to informational self-determination, and established a justified panic among Muslim men aged between 18 and 40, many of whom were university students in Germany. The interference is evidently unconstitutional also from the point of view of the lack of legal basis for taking the measure, as the authorities could not prove that there had been any suspicions of committing a concrete illicit deed so that the state intervention arrogated its right to affect the constitutional freedom of men Muslim faith. Practically, through the measures taken, the authorities have shown unfair behavior towards the Constitution, because, in an abusive manner, in the absence of a specific threat (such as the preparation or conduct of terrorist acts), have conducted a search with a data filter invoking the protection of legal values that are constitutionally of superior rank. The terrorist threat that the legislators invoked in justifying the interference was unlikely because their assumptions

and conclusions were not based on the existence of a concrete danger. Practically, contrary to the constitutionality requirements, the contested court decisions authorized the collection of personal data and, as a consequence, converted the authorization into a “prior mandate”, the judges themselves violating the fundamental right to informational self-determination.

### **1. The consequences of the lack of loyal behavior towards the Constitution in the sphere of fundamental rights and freedoms**

The disloyalty towards the Constitution also makes a mark on fundamental rights and freedoms, making it, in most cases, impossible for them to exercise their constitutional norms.

Paradoxically, in justifying the limitation or violation of a certain fundamental right, the state itself uses the phrase “constitutional loyalty”, even conditioning the employment on a certain position by this loyalty.

An enlightening example is the *Bond v. Floyd* case of the Supreme Court of the United States of America. (Ganea a.o.: 2008:29). The Supreme Court was notified by Bond. The applicant was a member of Georgia’s House of Representatives and was expelled before taking the oath due to some criticisms he made about law enforcement in the military service, saying in a media interview that he denies government policy on Vietnam, positioning itself against the war. Considering that they were discredited, members of the House of Representatives disputed the applicant’s right to occupy that position as a member of the House, arguing that his allegations were made to the advantage of the enemies of the country and violated not only the laws on military service but also the oath to uphold the Constitution, which the legislators are taking. After hearing him only once, the Secretary of the House of Representatives refused the applicant to take up the position of a member, for which reason the latter decided to initiate legal proceedings in order to obtain a declaratory judgment against that Decision. The District Court has unequivocally concluded that, by its remarks, the applicant has exaggerated with the criticism of national policy and cannot meet the attributes required to occupy the position of member of the House of Representatives because, the Court claimed, it could not have taken with good- faith the oath to uphold the Federal Constitution and the Constitution of the State.

Thus, this is how the State itself actually used this “loyalty towards the Constitution” to prohibit the occupation of a position in the state legislature, although, in reality, this measure was unlawful because, leaving the sphere of competence, members of the House of Representatives wrongly attributed the right to limit the applicant’s freedom of expression, considering that his disapproval of the policy of most colleagues or of the state policy would be equivalent to a lack of loyalty to the Constitution.

In contradiction with the District Court Judges, the Supreme Court concluded that, by the allegations made, the appellant did not violate the provisions of the law on military service and that they were made within the limits and by virtue of the right to free expression, which is guaranteed even by the First Amendment to the Constitution of the United States of America.

Therefore, in fact, the one who manifested a lack of loyal behavior towards the Constitution was the state itself that abusively disqualified the applicant from the position of member of the House of Representatives of the state of Georgia, not considering that the expression of views on the controversial political issues is not just a right but, above all, an obligation of legislators, because their voters have the right to be

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informed. However, allowing such a measure within the House has meant that the level of protection of legislators is diminishing compared to that of citizens. Moreover, the legitimate interest of the latter in knowing all the details of a matter of public interest was defenseless. The reasons given by the House of Representatives and the District Court were inadequate and insufficient to justify such an interference in the applicant's exercise of his role as legislator and the exercise of his freedom of expression.

This case illustrates not only the violation of a fundamental right but also a legal malfunctioning in the implementation of constitutional norms, since those who have sworn allegiance to the above-mentioned constitutions have despised the right of the applicant to take the oath, considering discretionary that his opinions contravenes the principle of constitutional loyalty. In a democratic society, such a manifestation is unthinkable, for freedom of expression is undoubtedly beyond a fundamental right, a primordial element of public order.

The consequences of constitutional disloyalty in the sphere of fundamental rights and freedoms cause an imbalance in the domestic law of the state, because any violation of fundamental rights violates the principle of the rule of law. However, disobedience towards the law and regulations is equivalent to violation of the guarantees contained in the Convention for the Protection of Human Rights and Fundamental Freedoms as well as in the violation of the judgments of the European Court of Human Rights, which would lead to a purely schematic interpretation and application of the law. For instance, in the case of *Castells v. Spain* (European Court of Human Right: 23.04.1992: 11798/85), in the complaint to the ECHR, the complainant, a member of the parliamentary opposition, showed that his parliamentary immunity had been withdrawn and was convicted of a suspended sentence after he published an article criticizing the passivity of the Government in connection with several attacks and homicides that had taken place in the Basque Country. Of course, the right to free expression is not absolute, however, the European Court of Human Rights considers, the restrictions or punishments imposed by the state must be compatible with the freedom of public debate, by its nature. So, for a member of the Parliament, freedom of speech cannot be thus limited simply because his claims are considered offensive by members of the Government, who must prove more tolerant to the criticism of political opponents. On the other hand, although the state authorities, as guarantors of public order, may adopt criminal measures against defamatory charges, in the present case they are groundless because the Government had other means of responding to the applicant's accusations and criticisms, the conviction not being necessary in a democratic society.

### **2. Legal dysfunction - effect of disloyalty to the fundamental law**

The jurisprudence of the constitutional states highlights the fact that constitutional practices and behavior towards the fundamental law compromise the proper application of the legal provisions, thereby hindering the formal compliance of the constitutional bodies. These practices and behaviors affect not only the separation of powers in state, but also the good collaboration between the state institutions, resulting in a blockage in the sphere of power and civil society. In the following, will highlight situations in the judicial practice of constitutional states which, either by violation of democratic and constitutional principles or by violation of fundamental constitutional rights, show a lack of loyal behavior towards the Constitution and generate legal dysfunctionality meant to affect or block the legal order.

### **2.1. Undermining the Principle of the Separation of Powers in the State**

The lack of loyal behavior towards the Constitution affects the principle of the separation of powers in the state, giving rise to legal conflicts of constitutional nature based on the lack of cooperation between the state powers or the failure to observe the constitutional obligations incumbent on an authority in the conduct of its work. An example of constitutional disloyalty that affects the principle of the separation of powers in the state is the situation where the Romanian legislature would adopt norms that would run counter to the fundamental law or the decisions of the Constitutional Court. Another disloyal behavior towards the Constitution was manifested by the representative body of the Romanian people, the Parliament, which, using the interpretation of its own statutory provisions, censured a final and irrevocable court decision, ignoring the judged principle of the work authority. (Constitutional Court of Romania, Decision No. 972/21.11.2012). In this respect, the Constitutional Court was notified by the president of the Superior Council of Magistracy regarding the existence of a legal conflict of a constitutional nature between the judicial authority and the legislative authority of the country, the first being represented by the High Court of Cassation and Justice, and the second the Senate of Romania. The referral states that, in the plenum of the Senate, a final and irrevocable court decision regarding a senator's incompatibility was discussed, deciding by (negative) vote the refusal to enforce the judgment. In an illegitimate manner, the Senate has been arguing for legislative authority in a conciliatory judicial power with the courts, censoring a definitive and irrevocable court order in all its aspects, invoking certain provisions regarding the regulatory autonomy of the Parliament. By the ruling handed down, judges of the Constitutional Court have found that such an act can only be illegitimate, since its legitimacy would lay the basis for a situation in which judicial decisions would not be opposable to authorities, institutions or individuals, which would be contrary to the constitutional principle of the rule of law. Therefore, the Parliament has demonstrated a lack of constitutional loyalty in its relations with the judicial authority, disregarding the latter's competences.

### **2.2. Defective collaboration between state institutions**

As for the collaboration between the state institutions, it derives precisely from their obligation not to manifest an unfair behavior in relation to the constitutional norms, because an unfair behavior would affect the regime of the fundamental institutions of the state, i.e. "all the components that define their legal regime - organizational structure, functioning, competences, material and financial resources, number and status of personnel, salary, category of legal acts that they adopt". (Constitutional Court of Romania, Decision No. 1257/07/10/2009: III). An edifying example is represented by the law for the approval of Government Emergency Ordinance no. 23/2009 regarding certain improvements of the public administration, the content of which affected the legal and constitutional regime of the civil service by the politicization of the governmental structures within the administrative-territorial units. This manifestation of constitutional misconduct by public authorities took place only one year after the Constitutional Court made it clear that emergency ordinances cannot be adopted if, through the regulations they contain, they produce negative consequences in the areas in which they occur. (Constitutional Court of Romania, Decision No. 1189/06.11.2008). Therefore, because the Ordinance itself presented the vices of unconstitutionality, the law of its approval was itself unconstitutional, because, according to the case law of the

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RCC, the vice of unconstitutionality of an ordinance, whether simple or urgent, issued by the Government, cannot be covered by its approval by the Parliament.

### **2.3. Generating a blockage in the sphere of power and civil society**

The manifestation of an unfair behavior towards the Constitution does not mean merely a violation of constitutional values, because, by adopting some normative acts, there may be blockages in the sphere of power which, in turn, generate other blockages in the civil society. There are situations in which some constitutional states question the quality of persons subjects of law, omitting, by adopting normative measures related to state security, to protect even their fundamental right to life. For example, the Federal Court of Germany concluded that empowering the armed forces, through the law of airspace safety, to directly dismantle a flight apparatus following to be used against people's lives is unconstitutional from the perspective of incompatibility with the right to life and the guarantee of human dignity, especially if on board of the aircraft would be people who are not involved in committing the deed. (Schwabe, Geissler, 2013:153).

The criticized norm raises constitutional law objections if the military action is directed against an aircraft with human presence on board, including those to whom the attack can be attributed to, because life, the right to life as the basis of human dignity enjoys a high constitutional value and, as a consequence, no man should be deprived of it. However, by empowering the armed forces, the Court stresses that the state, which is obliged to defend every human life, intervenes in the fundamental right to life, regardless of its own constraint to protect the life of each individual and to protect him against possible attacks and unlawful interference by third parties.

By the legislative measures adopted by the German state, people have been transformed into objects of the state, for through violation of compliance with the intrinsic value of man's - that of being - the public authority removes the status of the subject of law of the individual. Practically, if an aircraft were turned into an offensive weapon that would be used to commit a criminal offense, the passengers on board could no longer influence their own life circumstances independently, becoming the objects of the perpetrators first of all, and of the state, secondly, because by implementing the provisions of the law of airspace safety, the passengers of the aircraft become objects of the rescue operation of the state which understands to protect its society and territory. In fact, the aircraft's passengers become victims twice, once they take control of the aircraft and once victims of the German state who deliberately act to break down the aircraft, being deprived of any form of defense of their inalienable right to life, and of the human dignity that derives from this right. It can be said that no state rationality justifies the right of the state to unilaterally dispose of people's lives, or empowering the German armed forces to act in the way described above would mean premeditatedly killing some persons, which would violate not only the state's obligation to protect human dignity, but even conducting non-belligerent military missions. This manner of acting of the state in order to protect people's lives by killing other people does not remove the state's ban on killing. Therefore, the state itself cannot invoke the obligation to protect human life as the grounds of the intervention of the armed forces in this way, because by acting it actually intervenes against human life. In this way, a legal malfunctioning occurred, because for the state itself, on the one hand, is impossible to combat a possible terrorist attack on the members of society and, as a consequence, the possibility of fulfilling its obligation to protect life is considerably restricted. On the other hand, the means by which the state itself understands to fulfill this obligation

violates the very obligation of the state, creating an almost unreal scenario in which the direct constitutional deployment of the armed forces is incompatible with constitutional norms. Thus, a blockage is created in the sphere of the exercise of state power due to a legal malfunction.

The blockages in the sphere of power generate, in turn, a blockage in the sphere of civil society, which is manifested by tensions, imbalances and conflicts between members of society or between power and the people. Such a situation is the adoption by the Government of Romania of the famous Emergency Ordinance no. 13/2017 through which was amended the Penal Code and the Criminal Procedure Code when, without justifying the emergency, the executive power not only made amendments to the two codes, but introduced several provisions, including the decriminalization of abuse of office in case of damages of maximum 200 thousand lei, which would have led to the impossibility of the bodies to prosecute the persons who were guilty of committing such a criminal offense. The provisions adopted resulted in more protests being organized in several cities across the country, for several days, at the largest of them taking part over 600,000 people. Due to the pressure that civil society exerted on the government, the Romanian Government had to repeal the normative act that encouraged, among other things, committing the deed of abuse of office. Thus, it was possible in a state of law that the executive power not only should be entrusted with legislative power, but also adopt a series of measures in favor of a certain category of persons, largely exceeding its sphere of competence, but this is incompatible with the principle of the lawfulness of the administration deriving from the principle of the separation of powers in the state. By adopting the Emergency Ordinance No. 13/2017 the behavior of the state bodies in the discharge of its duties was one that was meant to influence the opinion of the people regarding the implementation of a common and indispensable good, prioritizing the good of a professional category (that of public officials) at the expense of right.

Another example of action of the public authorities which is directly reflected in the sphere of civil society is highlighted in the case law of the German Federal Court, which was referred to a complaint concerning the federal government's intervention in the 1976 election campaign, for the German Parliament, adopting many measures it framed in the type of public relations activities. (Schwabe, Geissler, 2013: 534) The Court found that the fundamental law forbids such an action of the executive power, for if it would allow it, representatives of state bodies would identify themselves with political parties or even with those who run for election and would thus influence the voter's decision by advertising, which is contrary to fundamental law. Moreover, the Federal Court judges point out that the federal government's act of presenting itself for reelection as a constitutional body during the election campaign is contrary to the constitutional principle stating the limitation of the mandate over time for the federal government and for the federal parliament.

### **Conclusions**

Of the arguments put forward in this article it follows that, in the absence of a loyal behavior towards the constitution, the constitutional norms cannot be properly applied and make impossible the implementation of the fundamental law in the democratic and liberal state which must operate under a constitutionalized system. The political system must be constitutionalized and, therefore, the acts exercised by the public authorities must comply with the legal regulations which, necessarily must contain restrictive provisions to act. The Constitution must enjoy supremacy in relation



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to other legal norms and, therefore, the drafting by authorities of norms that do not meet constitutional requirements equals to the lack of loyal behavior towards the Constitution.

As can be deduced, the consequences of the lack of loyal behavior towards the Constitution determine an imbalance in the domestic law of the state, because any overrun of powers by the authorities and any violation of fundamental rights violate the principle of the rule of law. However, disobedience to the law and is equivalent to violation of the safeguards contained in the fundamental laws of the states.

Taking into account the characteristic features of the lack of loyal behavior towards the Constitution in the rule of law, finally, it is necessary to make a draft of constitutional disloyalty and, consequently, to make a definition that establishes the significance of the manifestation of practices contrary to the constitutional spirit.

*Constitutional disloyalty is the manifestation, in an anti-constitutional spirit, of formal and accurate practices of state powers that facilitate exercising an abuse of power against another power through the overcoming of the limits of constitutional competence conferred, affecting the implementation of the democratic principles of the rule of law.*

*The manifestation of practices in an anti-constitutional spirit is the conduct of the representatives of the state powers, who, through lack of collaboration, faulty collaboration or close collaboration, prove lack of attachment to the values guaranteed by the Constitution and cause legal dysfunctions that considerably compromise any form of democratic government.*

By pointing out all these aspects, we can conclude that the lack of loyal behavior towards constitution (constitutional disloyalty) overturns the hierarchy of values in the rule of law, causes a legal disorder in the exercise of powers by the representatives of the power within the limits of competence so that observance of the principle of separation of powers remains almost a constitutional mood that no longer concerns the consultation, collaboration or cooperation between the authorities regarding the execution of competing competencies, but the summary fulfillment of some obligations through the abusive exercise of rights guaranteed by the Constitution. These aspects, because they are not compatible with the rule of law, affect the state itself, because the right of the state to apply constitutional norms is limited by the lack of loyal behavior towards these rules, the state itself being impossible to protect fundamental rights and freedoms. Practically, this limitation is also circumscribed by the occurrence of a legal dysfunctionality that results in blockages between civil society and the sphere of power. All these consequences, caused by the manifestation of loyal behavior to the provisions of the fundamental law, not only compromise the principles of the rule of law but diminish or relativize those values assigned to the democratic and liberal society.

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#### Article Info

*Received:* April 10 2019

*Accepted:* May 02 2019

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