

I. STUDIES

THE BEGINNINGS OF MODERN CONSTITUTIONALISM IN THE ROMANIAN PRINCIPALITIES¹

(I)

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Abstract:

*To achieve a coherent analysis of the Romanian constitutional development and to capture the constitutional issue that marked the beginnings of Romanian modern state is important to establish the **constitutional periods** with certain common features. Thus, from the point of view of the **constitutional period concept**, the study analyzes the constitutional period from the early nineteenth century until 1864, following the Constitution since 1866 and until 1938 to be considered a distinct constitutional period.*

Key Words: *constitutional cycle, sovereignty, constituent power, constitutional drafting, political reforms, constitutional development*

Preliminary considerations

Constitutionalism is often synonymous with the appearance of the first written Constitution. In the United States, the value of the content and the meaning of the Constitution were clearly expressed in the constitutional documents and constitutions of the former American colonies who led the way to the constitutional process. The first written constitution in the world, the American Constitution of 1787, states in the preamble that: "*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America*", reflecting the spirit of American constitutionalism². The declaration, beyond its formal appearance has a profound significance for the correct understanding of the term **constituent power**, because it creates the link between the expressed sovereign will and its original source: the people. The organic connection between constituent power and the will of the people is indestructible. The expression of the sovereign will of the people is a formal consent to convey a

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² E.S. Tănăsescu, I. Muraru, *Drept constituțional și instituții politice*, vol. I, ed. 14, C.H. Beck Publishing House, București, 2011, pp. 40-45.

Constituent Assembly for enabling a constitution and with the right to revise it. The American (1787) and French (1791) constitutionalism model is adopting a constitution that expresses the general will of the Nation - the subject of the constituent power - through a Constituent Assembly or Constitutional Convention.

On the other hand, modern constitutionalism was dominated in Romanian by key moments of radical changes that have disrupted the natural evolution and consolidation of the Romanian constitutional institutions formed during feudalism. Often Romanian constitutional traditions were denied in favor of imports, due to external influences of complex constitutional engineering, these were achieved through constitutional transplantation, or were denied due to the influence that the "protective powers" manifested in the Romanian Principalities in the first half of the century nineteenth century. These powers imposed an administrative and political organization totally opposed with the constitutional traditions of the Principalities. Moreover, the entire path of the Principalities towards national emancipation was inspired by the French liberal revolutionary model. These revolutionary moments were moments of change in a society in process of achieving democratic principles. Romanian constitutional evolution is marked by this time, by these moments, and as we would see, during the early 17th century until the 1866, there are several constitutional moments, relating both to the legal situation of social and political Principalities.

To achieve a coherent analysis of the Romanian constitutional development and to capture the constitutional issue that marked the beginnings of Romanian modern state is important to establish the **constitutional periods** with certain common features. Thus, from the point of view of the **constitutional period concept**³, the study analyzes the constitutional period from the early nineteenth century until 1864, following the 1866 Constitution until 1938 to be considered a distinct constitutional period.

The **constitutional period** concept should not be confused with the one of constitutional cycle. As prof. Cristian Ionescu says, "a constitutional cycle is a historic cycle, compared with what is considered part of a constitutional development in a society in a certain time limit. The constitutional cycle expresses the constitutional state and reflects the development of life, the evolution of governmental institutions, the relationship between the State and citizen in terms of the Constitution.

The Romanian doctrine⁴ considered that the constitutional development of the Romanian state was developed in the following constitutional cycles⁵:

a) from the foundation of the Romanian feudal states in the 14th century, until the late 18th - century, when it actually reached a definitive form;

b) from the application of the Organic Regulations to the 1858 Paris Convention;

³ Gh. Iancu, *Aspecte teoretice referitoare la ciclurile, perioadele și tradițiile constituționale. Teoria ciclurilor constituționale*, Drept public, Supliment/2014, p. 39.

⁴ C. Ionescu, *Tratat de drept constituțional contemporan*, 2nd Edition, C.H. Beck Publishing House, București, 2008, p. 549.

⁵ For further information, see Gh. Iancu, *Aspecte teoretice referitoare la ciclurile, perioadele și tradițiile constituționale. Teoria ciclurilor constituționale*, Drept public, Supliment/2014, pp. 26-40.

c) from the Paris Convention of 1858 pending the adoption of the 1866 Constitution;

d) from the adoption of the 1866 Constitution until the 1938 Constitution (the democratic constitutions);

e) the authoritative constitutional organization (Carol II 's Constitution and the constitutional acts from September 1940);

f) the reinstatement into force of the 1923 Constitution on 31 August 1944 until the proclamation of the Republic on December 30, 1947 (the decline of parliamentary democracy);

g) the socialist constitutional organization (the Constitutions of 1948, 1952 and 1965);

h) the Constitution of 1991 begun a new constitutional cycle.

This study will deal with the first 3 constitutional cycles capturing the development of social life, the development of governmental institutions, the relationships between state and citizen, the principle of representativeness, the nation building, and the transfer of sovereignty from the Ruler to the nation in the light of the constitutional provisions and Constitution's draft that governed the political life of the Principalities until the union and beyond.

I. The problem of the *sovereignty* of the two Romanian Principalities (the political status of the Principalities) 1711/1714 the Phanariot reign

The analysis of institutional and ideological developments and the policy regarding the inception of Romanian constitutionalism⁶ is not possible without a contextual international analysis, in regard with the relations between the major powers and the Principalities that govern the influence spheres in the 17th and 18th centuries. Identifying a Romanian constitutional identity is determined by cultural, social, economic and political particularities and international influences the Romanian people have developed. There is a close link between the birth of the Romanian people and the creation of their own written constitutions.

The Romanian Principalities politics at the beginning of the 18th century is characterized by a strong tendency against the Ottomans, geared towards the relations with Russia, as its role becomes increasingly important in the Eastern policy⁷.

⁶ See prof. G. Alexianu definition of constitutional law, in G. Alexianu, *Probleme de drept constituțional*, in Pandectele Române nr. 6/2013, pp. 75 (article published in Pandectele Române, Caetul 10, 1924, Partea a IV-a, pp. 65): *In ziua în care omul, liber și nestânjenit până atunci de nimeni, a venit în contact cu alt om, în ziua în care deci libertatea lui desăvârșită a trebuit să se restrângă, pentru a putea coexista alături de libertatea celui alt om, restrânsă și dânsa, în vederea aceluiaș scop, în ziua în care s'a tras o margine atotputerniciei voinții omului, în acea zi a apărut, la hotarul despărțitor al voințelor nestăpânite, prima idee de drept. (...) În primul rând el (dreptul constituțional), ne va arăta că dreptul, care nu face altceva decât să urmeze transformările vieții sociale și a îndeplinit cu prisosință acest rol și în domeniul vieții publice. În locul noțiunii abstracte de Stat — putere comandantă, suverană, de esență divină, și-a făcut loc, pe nesimțite, «ideea de Stat-colaborare a membrilor unui grup național, lucrând împreună pentru realizarea justiției și a bunei stări». Această transformare a ideii de Stat aduce o schimbare radicală în modul de gândire și de conduită al oamenilor. Legile de organizare vor fi în strânsă legătură cu această concepție și viața însăși va căuta s'o îmbrățișeze și să și-o aproprie.*

⁷ This attitude of Romanian Principalities is considered by historians a result answer of the Treaty of Karlowitz (26 January 1699).

In Moldavia (in 1711) and in 1716 in Romanian Country, Nicolae Mavrocordat (1711-1715; 1716-1730), who was also ruler in the previous period, opened the new Phanariote Era. What has changed now was not only a reign with another one, but the **political regime** by making changes to the legal status of the Romanian Principalities. This fact was an expression of the consequences of foreign domination in this new period with the new phenomena emerged in the European society. The new scheme marks a restructuring influence of state institutions, which denotes, however, a tendency to modernize the Romanian political and administrative organization.

Previously to the Phanariot rule, the relations between the Ottoman Empire and the Romanian Principalities were characterized by granting/concluding, **capitulations**. These **capitulations** involved the conservation of the state, maintaining unchanged the organization and the ecclesiastical hierarchy, noninterference in internal affairs, the court system, taxes, the interdiction of the Muslims through its territory, the lack of troops occupation⁸. In other words, there was a quasi - independent status (external Sovereign) in exchange for material and military obligations. Subsequently, the Phanariot regime established for more than a hundred years over the two countries governed through princes recruited largely from influent Phanariot families, banning the national reigns who represented customs in the Romanian Principalities⁹.

The Phanariot regime altered the political and administrative organization of the Principalities, the changes affected the fundamental institutions, the rule, the Royal Council, and the general political administrative system. The Rulers were appointed directly among influential families, Mavrocordat, Ipsilanti, and some of the Romanian families, but ignoring the traditional procedural formulas of choice. The Reign periods were short, some rulers being changed from one country to another. The limitations imposed by the Ottoman pressure, although extremely serious, didn't deny the autonomy of the countries. The mixture in the internal life of the two countries is visible, the Ottoman Empire interfered with the effective leadership, blurring the princely attributes or taking action regarding socio-political organization¹⁰. Nicolae Iorga, characterized the Phanariote reign as follows: *Toți și toate au intrat în ordinea românească dela noi, și am cules de la dânsii tot ce ni se putea da*¹¹. In general lines, History recognizes the novelty that Phanariot rule brought to modernize the political and administrative institutions in the Principality.

In the internal politics, even still during the first Phanariot reign, the aristocrats were invited to control the financial problems, which meant recognizing an attribute of the States.

The consulting practice of the States through representative institutions acted

⁸ See B. Aurescu, *Noua suveranitate asupra conceptului de suveranitate în teoria și practica musulmană în raporturile cu Țările Române*, All Beck Publishing House, București, 2003, pp. 35-41.

⁹ A.D. Xenopol, *Istoria Românilor din Dacia traiană*, vol. 5, Tipo-litografia h. Goldner, 1892, pp. 7-122.

¹⁰ T. Gemil, *Românii și Otomanii în secolele XIV-XVI*, Academiei Române Publishing House, 1991, pp. 26.

¹¹ N. Iorga, *Au fost Moldavia și Țara Românească provincii supuse fanarioților*, Monitorul Oficial și Imprimeria națională, București, 1937, p. 352.

as a constant in the Phanariot century, especially in the time when the States Assembly were called to legitimize policy reforms by the Mavrocordats. In Moldavia, the States Assembly was represented by different categories of boyars. It is noteworthy that in Phanariotes first half of the century, although appointed directly by the Ottoman Empire, the Ruler will appeal constantly at the collaboration with the States Assembly¹².

Prince Constantin Mavrocordat Constitution contains a real program of reforms in the areas of: law, fiscal, administrative, and agriculture. But furthermore, this document gives us valuable information about the type of political regime¹³ of the Principalities. "The hereditary monarchy was preferred by the Phanariots, because of the fighting between various boyars families which caused different parties or rival factions¹⁴," this fact was supported by the "preamble" of this act: „*Pentru a satisface dorința care ne-a animat întotdeauna de a alina poporul și în conformitate cu sfaturile fostului principe de glorioasă amintire, tatăl și stăpânul nostru Nicolae/Alexandru Mavrocordat, după o serioasă reflecție, am lucrat pentru a elabora prevederile care vor fi prezentate în amănunt. (...) De aceea, cerem ca toți domnitorii, fie din familia noastră sau oricare vor fi cei pe care Dumnezeu îi va ridica la rang de conducător al acestei provincii, să susțină cu toată autoritatea lor forța și obligativitatea acestui decret, pentru că suntem convinși că, prin aplicarea deplină a acestuia, ei vor regăsi utilitatea lor reunită cu cea a întregii națiuni*”. Moreover, the form of government in the Principalities was the monarchy, predominantly the hereditary monarchy, and the monarch was subject to the Ottoman Empire: ”*Sprijinit de brațul Atotputernicului, el a păstrat și conservat această provincie în vâltoarea unui război izbucnit între trei imperii diferite; în sfârșit, ceea ce ne face să simțim cel mai viu ceea ce datorăm Principelui nostru serenissim.....*”¹⁵. The procedure through which the reforms were presented for debate in front of the States Assemblies of the two countries expressed its quasi-constitutional character¹⁶.

Professor Cristian Ionescu characterizes the 18th century as the century in which "a new distribution of wealth generated by economic expansion of Western bourgeoisie, entails a new distribution of political power. In other words, the economic progress generated the political progress, and a new distribution of political power means removing the monarchical absolutism. The 18th-century bourgeoisie conquered the economic power and the political power claims. In the struggle for the conquest of political power the political ideas of the eighteenth century are closely linked to economic and social development of society. Their penetration force in the consciousness of the new class is amplified by the unpopular measures taken by the

¹² See, C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*: „Marele hrisov al lui Constantin Mavrocordat la data de 7/18 februarie 1741 sau Constituția Principelui Constantin Mavrocordat, Regia Autonomă Monitorul Oficial, București, 2000, pp. 29-33.

¹³ Negulescu P. and G. Alexianu understand by the concept of political regime, all the legal rules that determine the organization of the state, powers and functioning.

¹⁴ C. Ionescu, *Tratat de drept constituțional contemporan*, ed. 2, C.H. Beck Publishing House, București, 2008, p. 436.

¹⁵ C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, pp. 30.

¹⁶ C. Ionescu, *Tratat de drept constituțional contemporan*, 2nd Edition, C.H. Beck Publishing House, București, 2008, p. 551.

monarchy". In addition, the worsening decadence of the Ottoman Empire and the series Russo-Turkish-Austro wars have brought the new historical of the national liberation movement.

In the Phanariot century history, the Russo-Turkish war caused an interruption of the regime and therefore a substitution of the Phanariote administration with the Russian one. The war between 1768-1774 opened at the international level "a Romanian problem" as a component of "the Oriental Question"¹⁷. "In this context, it was claimed through memoirs and delegations by landlords and boyars the abolition of Ottoman suzerainty"¹⁸.

The call to the historical right was supposed to argue that introducing the Phanariot regime the Ottoman Empire violated the privileges of Romanian Principalities. These statements, through their content represented the attitude of national boyars, confessed at an internationally level and represented a trend that will be the starting point of the revolutionary program of the late 18th century and early 19th century.

II. National awakening (the beginning of 19th century)

In order to analyze the start of the national awakening we should start analyzing the definition of **nationalization**¹⁹.

*What were the processes that helped defining the rights and national identity?
Who was defined and by whom, as the bearer of sovereignty?*

From what moment and through what kind of processes can be defined a nation?

The historical doctrine offers a possible interpretation of these key concepts stating that "often, nationalization of political discourse and the foundation of the nation state do not coincide chronologically. There is a dialectical relationship between cultural processes of identity formation and political history of legal and institutional foundation, describing what is required according to each state through nationalization of key concepts. Following the French Revolution and the Napoleonic occupation of the territories of other states, arose the national political consciousness of the people. Since then, nations played a central role in characterizing the national identity for political communities. The political agenda of first generation rights is articulated only in relation to the **sovereignty of the nation**. (...) Between the old nation-states and the more recent ones (claiming, in political terms, their own state) there were differences not only in time, but also in a semantic transfer processes, especially in the case of multi-ethnic states and empires that lost their influence.

¹⁷ A. Xenopol, *Istoria Românilor din Dacia Traiană*, vol. VI, Tipo-litografia H. Goldner, 1892.

¹⁸ See, Codicele de legi (Kaununnname), that includes fragments regarding the autonomy of Moldavia and Romanian Country at 1792; this document includes information regarding the administrative independence of the Principalities but also financial obligations towards the leadership of the empire.

¹⁹ V. Neumann, A. Heinen, *Istoria României prin concepte, Perspective alternative asupra limbajelor social politice*, Polirom Publishing House, 2010, p. 56. In this study we will take into consideration the use of the term nationalization, as it describes the process of forming the Romanian nation, the national identity and the constitutional institutions.

Friedrich Meinecke's hypothesis, *Staatsnation / Kulturnation*²⁰ states that the state exists (or not) before the nation retains its heuristic relevance once we associate the nation's historical semantics with sociology new contributions²¹.

Continuing the line of the proposed definition of nationalism²², four time zones were identified for the development of constitutionalism in relation to nationalism²³. So:

- Area 1, belonging to pre-revolution in France, the revolutionary era and the restoration period, included the constitutions which were built in communities where the state was already formed - here constitutional construction issues were placed exclusively in terms of constitutionalism;

- Area 2 from 1830 to the First World War. This area shows equal concern for both constitutionalism and the national question, but does not identify an identity between state and nation; Prof. M. Gutan places the situation of our country's at the boundary of area 2 and 3;

- Area 3 started after World War I, during this period there was a full identification between state and nation, with anti-liberal manifestations that led to fascism and Hitlerism;

- Area 4 of post-communist states which marks a return to the identification between the state and the nation.

V. Georgescu believes that the entire national movement from the period 1769-1774 is focused on independence and the right to choose national Rulers. The tenacity with which Romanians fought against the Phanariot regime was rewarded in 1822 by returning to the national reign's system, this moment is considered a turning point, recognized by contemporaries as an element of progress²⁴. An issue that raised questions of interpretation of the period is the oscillation between full and limited sovereignty. V. Georgescu²⁵ explained this situation by the diplomatic skills of Romanian politicians which according to foreign reports sometimes claimed **the independence** and other time **the autonomy**. In unfavorable moments of foreign policy they supported the idea of autonomy of the Principalities, but nevertheless this was considered as a step in achieving the ultimate goal, namely **the independence**.

The constitutional engineering of the political and administrative organization of the Principalities presented political and constitutional structures well formed at that time. „*Constituția unui Stat, adică totalul regulelor reputeate ca esențiale pentru organizarea și funcționarea sa, poate fi de două feluri: cutumiară și scrisă*”²⁶. Thus,

²⁰ For further details, see Niels Petersen, *Demokratie und Grundgesetz*, Max Planck Institute for Research on Collective Goods, Bonn, 2008, p. 387.

²¹ V. Neumann, A. Heinen, *Istoria României prin concepte, Perspective alternative asupra limbajelor social politice*, Polirom Publishing House, 2010, p. 56.

²² E. Gellner, *Naționalismul*, Librom Antet Publishing House, București, 2001.

²³ See M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, p. 155 *apud* B. Kissane, N. Sitter, The marriage of state and nation in European Constitutions, în *Nations and Nationalism*, vol. 16/2010, pp. 46 și urm. For further information on this matter also see: E.J. Hobsbawm, *Nations and nationalism since 1780*, Cambridge University Press, 1990 (https://keimena11.files.wordpress.com/2014/01/hobsbawm_nations_and_nationalism_since_1780.pdf).

²⁴ V. Georgescu, *op. cit.*, p. 102.

²⁵ V. Georgescu, *op. cit.*, p. 143.

²⁶ G. Alexianu, *Curs de drept constituțional*, vol. 1, Casa Școalelor, București, 1930, p. 215.

we believe that, in a material sense, every state has a usual constitution, even an unwritten one that has set standards for the organization and exercise of power. Such customary rules are the constitutional traditions of the State, made from its birth, through continuous repetition, and it exists regardless of form or constitution. "It can be assumed easily that the first politically organized human social communities have set certain rules for government behavior (rules regulating the relations between subject and leaders) by habits, by multiplying the same type of regulation, which gradually formed the customary constitution. The customs, even if they have not fully covered the organization of power, have created the legal framework, recognized as such for the good functioning of governmental institutions²⁷".

This fact is demonstrated by the historical evolution of Romanian Principalities, which, without the benefit of a written constitution, had rules about the political organization (eg "dregătoriile"), regulating a specific manifestation of authority, customs regarding the succession to the throne, organized relations between rulers and the ruled, and certain roles that the noblemen had in the management process. These were the looming constitutional traditions underlying the constitutional development of the Romanian state; obviously things should be considered with the caution that the social, cultural and political requires at the time. In analyzing the constitutional political structures we consider the following coordinates: a stable name, self-organization, concrete powers and methods of exercising them, institutions with specialized duties as: the reign, the Ruler Counsel, the Divan. These institutions tend to modernize and to consolidate their role. The State Assemblies - based on representative participation of the boyars at the leadership of the country - showed broad categories of constitutional powers, being called to resolve social problems, economic, diplomatic issues until the prerogatives on choosing the pretender to the Ruler²⁸.

1. The Uprising of 1821. Tudor Vladimirescu's revolution (political program, political demands)

1821 is the turning point that removed the Phanariots reign after the revolutionary movement led by Tudor Vladimirescu, and the return to the national reign's system. E. Vărtosu, analyzing the wishes expressed by Tudor Vladimirescu, summarized the situation of the Principalities²⁹: financial and economic situation affecting people's lives, excessive taxation imposed by the Phanariots lords pursuing their own advantage at the expense of the country, free movement of foreigners in the country.

Interesting in terms of constitutional development is the achievement of a coherent link between the types of political regime that Romanian revolutionaries, inspired by French revolutionary conception of 1789 wanted. The revolutionary program of Tudor Vladimirescu arise direct or less direct references to terms such as:

²⁷C. Ionescu, *Tratat de drept constituțional contemporan*, ed. 2, C.H. Beck Publishing House, București, 2008, p. 164.

²⁸See: V. Georgescu, *op. cit.*, p. 155, C. Ionescu, *Tratat de drept constituțional contemporan*, ed. 2, C.H. Beck Publishing House, București, 2008, pp. 551-552.

²⁹E. Vărtosu, *op. cit.*, XIX.

national sovereignty, popular, people, nation, nationality, patriotism, representatives, monarchy, but it is difficult to establish consistency for the establishment of a constitutional monarchy³⁰. However we must note that these terms are thematically related to the concept of **constituent power**. The reforms in the early 19th century, although they were made by representatives of the nobility, as well as individual personalities, such as the T. Vladimirescu, I. Câmpineanu, Mihail Kogalniceanu and others expressed people's social demands. As such is emerging the idea of a **constituent power**. Tudor Vladimirescu was just a soldier, no more than a military strategist, but his political view recommends him, however, and as a statesman, which aims to accomplish reforms that other countries have done throughout the will of a Constituent Assembly.

To talk about **constituent power** from the perspective of the revolutionary movement led by T. Vladimirescu is premature. Moreover, as we distinguish from Tudor Vladimirescu's claims, the concept of representativeness that he promotes is the representation of the country by representatives of the State Assemblies; when we talk about representation we should distinguish between country representation by representatives of the State Assemblies and representativeness based on the principle of representation of the nation, as it appears in Carl Schmitt's theory³¹, which basically involves a democratic principle, as we've seen in the model promoted by the US Constitution. However, without having the necessary consistency in terms of political and constitutional claims, Tudor Vladimirescu's political program demands national reigns and the international recognition of the desire for independence and unification, as complied with the current liberal revolution initiated by the French revolution.

2. Constitutional drafting (Cărvunarilor Constitution 1822)

Cărvunarilor Constitution³² was drawn up on 13 September 1822 by the Moldavian reformed boyars, but the project was not approved by Russia neither rejected, so was never put into force. A.D. Xenopol discovered this Constitution in the Russian archives, and considered it "the first political manifestation of liberation thought"³³.

Cărvunarilor Constitution contains provisions relating to freedom and social equality, principles for the organization and functioning of a Legislative Assembly, the Royal Divan and concentration of power in the hands of the Ruler³⁴.

For an analysis in accordance to the requirement in relation to our theme of research, we will try to analyze this legislative act in terms of: legitimacy, rights and freedoms, and the principle of separation of powers.

³⁰ See M. Guțan opinion regarding Șotropa. M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, p. 164.

³¹ See C. Schmitt, *Théorie de la Constitution*, PUF, Paris, 2012, p. 212-215.

³² See, C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, p. 112-123.

³³ A.D. Xenopol, *Istoria partidelor politice în România*, vol. I, București, 1910, p. 112.

³⁴ See R. Carp, I. Stanomir, *Inventarea Constituției*, C.H. Beck Publishing House, București, 2009, pp. 3-25.

1. *Legitimacy.* The Constitution was drafted by the reformed boyars, Cărvunarii, who in accordance with the current socio-political trend tried to gain political power and strengthen their position in the state structure. It can be seen that the text doesn't appeal to the principle of national sovereignty, the organization of the state is justified by appealing to tradition: pt. 19: „*Norodul, spre a i se ocărmui treburile sale cele din lăuntru în chipul cuviincios, ca să se poată folosi cu dreptățile vechilor sale privilegiuri, cere să i se cutărească și legiuirea aceia a sfatului obștesc ce au avut-o pământul acesta iarăși din vechime, legiuire după care puterea ocărmuirii și a împlinirii să fie în singură mână a Domnilor, iar puterea hotărârei să fie pururea în mâna Domnului împreună cu sfatul obștesc*³⁵.”

Also the assertion of the democratic principle is conspicuously absent, according to the democratic principle the reign and the Civic Counsel should be considered as representatives of the nation. Thus, the presence of noblemen in the Civic Counsel is not the expression of the will of the nation, but the historical right of the nobility. In these circumstances we cannot talk about a manifestation of any constituent power following a revolution³⁶, while the people and citizens "have remained silent and passive actors on a stage where the socio-political stakes were played only in the boyar's social class³⁷".

2. *Rights and Liberties.* The project promoters were inspired by French revolutionary from 1789 and included in the project the some of the rights from the Declaration of the Rights of Man and of the Citizen of 1789. Among the rights and freedoms included in this project were: the right to defense, the right to property - pt. 5, labor freedom - pt. 13, freedom of conscience, freedom of the press, the right to petition, equality - pt. 14 and 18, the inviolability of the home, but not abolishment of any rank, mansions and class privileges and tax inequality³⁸.

3. *Separation of powers.* As Michel Troper specified, not any particular institutional arrangement involving a division of powers may fall within the scope of semantic theory of separation of powers, "the rule of separation of powers is a purely negative right one and not only ensures freedom to be respected, but makes no guarantee of efficiency. On the contrary, to the extent that the functions are prioritized, it seems destined never to be enforced because the holder of the highest functions could usurp the other functions³⁹". The content and design of this document shows resemblance to the type of social demands that in other countries were supported within Constituent Assembly and converted in a Constitution throughout a constituent process. **We have shown that the conditions in the first decades of the 19th century could not have formalized the constituent power**, institutionalized it,

³⁵ C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, p. 114.

³⁶ See H. Ardent, *On revolutions*.

³⁷ M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, p. 180.

³⁸ See C. Ionescu, *Tratat de drept constituțional contemporan*, ed. 2, C.H. Beck Publishing House, București, 2008, p. 554 și M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, pp. 180-181.

³⁹ M. Troper, *La separation des pouvoirs et l'histoire constitutionnelle française*, LGDJ, Paris, 1980, p. 109. Also see the first part of: *La separation des pouvoirs comme critère de classification des constitutions*.

but it was present as a vocation, it existed, is manifested by representatives of social classes interested in the political modernization of the Romanian state.

The Constitution confirmed an elective constitutional monarchy, the ruler was to be chosen by the Public Assembly and then he would be confirmed. The legislative power shall be exercised jointly by the Ruler and the Civic Counsel. The executive power belonged to the Ruler. The Civic Counsel was formed by bishops and the whole congregation of country noblemen. The judiciary was considered a branch of the executive power⁴⁰.

III. The Organic Regulations 1831/1832⁴¹

We would analyze these acts, which even if they are not called "constitution" have such a value for the Principalities, regarding the: legitimacy, the separation of powers, and the modernization of the political institutions⁴².

The Treaty of Adrianople imposed *de jure* the Russian protectorate over the two Principalities and paved the way for the accomplishment of reforms that responded to the many projects submitted by the Romanians to Petersburg. Two committees formed from Wallachian and Moldavian boyars, led by the Russian General Minciaki drafted the text of the Organic Regulations, which were considered to be the first "constitutions" of the modern Principalities. Approved by Russia and a public assembly, these acts have been ratified by the Ottoman Empire and remained in force until the Paris Convention (1856). The Organic Regulations were implemented in the Principalities on 1st July 1831 in Wallachia and on 1 January 1832 in Moldavia and replaced in 1858 with the Paris Convention⁴³. From the point of view of their content, the Organic Regulations were considered by the Treaty of Petersburg in January 1834 as real Constitutions, and they were approved⁴⁴. However, unlike the Constitutions adopted in the same period in other liberal countries in Europe, the Organic Regulations were a compromise dictated by Russia and Turkey. It is noted that the Organic Regulations contained constitutional provisions on and fundamental rules relating to the political and administrative organization of the each Principality⁴⁵.

A. *Legitimacy*. The two drafts of regulations have been prepared separately by two committees, in Iasi and Bucharest, however there are not major differences between them. After being drafted, the projects were sent to Petersburg to be examined by a committee of both Romanians and Russians, and then they were subjected to debate in an extraordinary public Assembly in the Principalities. After

⁴⁰ C. Ionescu, *Tratat de drept constituțional contemporan*, 2nd Edition, C.H. Beck Publishing House, București, 2008, p. 554.

⁴¹ C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, pp. 150-170.

⁴² A. Iorgovan, *Tratat de drept administrativ*, vol. I, 3rd Edition, All Beck Publishing House, București, 2001, p. 113.

⁴³ G. Alexianu, P. Negulescu, *Regulamentele organice ale Valahiei și Moldovei*, Vol. I., Ed. Întreprinderile Eminescu SA, București, 1944, pp. I-XV.

⁴⁴ C. Ionescu, *Tratat de drept constituțional contemporan*, 2nd Edition, C.H. Beck Publishing House, București, 2008, p. 555.

⁴⁵ Idem, p. 556.

their approval, they were recognized by Turkey and entered into force in 1831 the Romanian Country and in 1932 in Moldavia. Analyzing the geopolitical situation of the Regulations we consider them to be a national legislative work, even if, in the discussions and elaboration there were strong foreign influences⁴⁶. Returning to the discussion of constituent power, Mircea Djuvara states in his "General Theory of Law" that: "The power to make constitutional law is called constituent power. It cannot be regulated in its forms. History proves that sometimes constitutions were made by one man (The Sovereign can octroia a constitution); another time, an assembly or a people⁴⁷." Thus, according to his point of view, the holder of the constituent power is the one, that through his manifestation of will, can put political and social foundations to build a state. We have to look at this aspect from a diachronic perspective: for every age and every cultural space there are some peculiarities corresponding, and in relation to each of these, we can speak of different holder of constituent power. As prof. D.C. Dănișor⁴⁸ said, we cannot compare different types of regimes and the constituent power that was involved, because it would be a kind of *reductio ad absurdum*. The constituent power is legitimized by a grid of values in regard of their acceptance by the subjects/the people, basically this acceptance gives them legitimacy, so cannot speak of a hierarchy of legitimacy.

However, given the definitions and valences it is given to the concept of constituent power since 1787 by the Founding Fathers, and in 1789 by Sieyes, we cannot speak of a genuine constituent power during the existence of theocratic theories or monarchies, when princes and monarchs were giving constitutions to their subjects, octroiate constitutions, pacts, and, in certain cases and status⁴⁹. Constituent power should be considered the manifestation of the will of the majority of individuals who form a community. Constituent power must not be imposed by force, but by authority, by acceptance, and only such legitimacy is granted⁵⁰. We must mention that legitimacy does not necessarily mean legality, in the case of the original constituent power we speak of legitimacy, since, as Maurice Duverger said, "the constitution is the one that resides from the authority of the constituent power, and not

⁴⁶ See C. Ionescu, *Tratat de drept constituțional contemporan*, 2nd Edition, C.H. Beck Publishing House, București, 2008, p. 555, and for a opposite opinion, M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, pp. 221.

⁴⁷ M. Djuvara, *Teoria generală a dreptului*, Restitutio, All Beck Publishing House, 1999, p. 90.

⁴⁸ D.C. Dănișor, *op. cit.*, p. 361.

⁴⁹ See E.W. Böckenförde, *op. cit.*, p. 209: „noțiunea de putere constituantă nu poate fi acordată monarhului”, *apud* D.C. Dănișor, p. 363.

⁵⁰ See, P. Negulescu, *Principiile fundamentale ale Constituțiunei din 27 februarie 1938*, Atelierele Zanet Corlăteanu, București, 1939, pp. 49: "Când, într-o țară, un grup de oameni, o clasă socială reușește prin forță să pună mâna pe putere, el trebuie să-și mențină tot prin forță această stăpânire. Guvernanții însă caută să transforme această guvernare de fapt, bazată numai pe forță, într-o guvernare de drept acceptată de bunăvoie de către guvernanți. Aceasta e mare problemă a legitimității sau justificării puterii, care are o considerabilă importanță în dreptul public și în politică. Pentru ca legitimitatea puterii să pătrundă în popor trebuie ca poporul să creadă în legalitatea, în legitimitatea guvernării. Este interesant de constatat că această operațiune de convingere a maselor nu se face pe cale de raționament, nici pe bază de știință, ci pe considerațiuni de credibilitate, pe o pasiune a sufletului, pe o devoțiune profundă; ea este un act de credință, întemeiat de multe ori pe prejudecăți colective, pe afirmațiuni nedovedite, care, toate la un loc, construiesc o mistică politică."

the constituent power that resides from the authority of the constitution⁵¹, legitimacy implies accepting the authority of the majority. The Organic Regulations situation is a particular one, these are considered works of national legislation⁵², are prepared under foreign supervision are discussed and approved in an extraordinary National Assembly, composed of representatives of the nobility, and not the people / nation, then recognized by Turkey. These include, in part, the claims of the boyars during the previous period, and the national traditions regarding the election of the ruler, but one can observe a strong influence of Western European constitutionalism⁵³. From the point of view of the principle of representativeness, we must make an observation, although the Public Assembly was composed only of representatives of the noble houses of nobility⁵⁴, it did not express the interests of the peasantry, however, one can notice a trend in increasing the representativeness participation in the democratic governance.

B. The principle of separation of powers. The Organic Regulations are considered in the national legal literature as the first constitutional acts that have established the constitutional principle of separation of powers⁵⁵. The legislative power belongs to the ruler and to the Public Assembly and the executive power belongs to the ruler and the judiciary courts, but recognizing some of the prerogative of the ruler and to the Justice Minister.

C. The modernization of political institutions. Constitutional progress. Balcescu said about the Organic Regulation: „Regulamentul cu toate relele sale, aduse însă oarecare principuri folositoare și se făcu instrument de progres. El recunosc în drept principiul libertății comerciale, despărțirea puterilor judecătorești, administrative și legiuitoare și introduse regimul parlamentar⁵⁶”.

Nicolae Iorga said that the drafting of the Organic Regulation had to remove some constitutional concerns: „Acest Regulament organic se dezvoltă încet, dar metodic; trebuia să cuprindă nu numai Constituția, ci și tot ce era necesar pentru administrație. Această Constituție impusă în cea mai mare parte de Rusia e o copie armonică și practică a dispozițiilor care se încetățeniseră în toată Europa în noul veac, după modelul francez. Așa-numitele *pouvoirs* fură și aici bine despărțite”. The innovations grounded on the principles of the French Revolution and on the Russian initiative are actually the two main sources of the Organic Statute, as well as the Constitutional Charter. Vlad Georgescu⁵⁷ in his work "History of Romanians from its

⁵¹ M. Duverger, *Légitimité des gouvernements de fait*, Revue du Droit Publique 1948, p. 78.

⁵² N. Iorga: „Regulamentul Organic nu este un așezământ impus de ruși: Rușii n-au schimbat decât unele puncte. Cei mai cuminți boieri ai noștri au lucrat la acest regulament: pentru Moldavia, Conachi, poetul, pentru Muntenia, Barbu Știrbei. Nici nu ar fi putut Rușii să cunoască împrejurările țării atât de bine, încât să stabilească în Regulamentul Organic clauze care se aplică atât de potrivit vieții noastre în ambele țări.”

⁵³ For further details regarding the constitutional transplant, see, M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, pp. 189-203.

⁵⁴ P. Negulescu, G. Alexianu, *Regulamentele Organice*, pp. XXVII.

⁵⁵ See, for further details: M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, pp. 204-210.

⁵⁶ N. Bălcescu, *Drepturile românilor către Înalta Poartă*, 1848.

⁵⁷ V. Georgescu, *Istoria românilor de la origini până în zilele noastre*, Humanitas Publishing House, București, 1995, pp. 149-15.

origins until today" states that the Organic Regulations are "a curious and eclectic first Romanian constitution".

IV. Constitutional drafting - Ion Câmpineanu's Constitution (1838)

Under the strong influence of the French Constitutional Charter of 1830, and justified by the disruption caused by the Organic Regulations, the liberal Ion Câmpineanu initiated in 1838 a constitutional draft which listed the essential elements of constitutionalism: the idea of national sovereignty⁵⁸, human rights and freedoms, representative Government „q. *Reprezentăția națională. Toți rumâni fără osebite sunt reprezentați...*⁵⁹”, supremacy of the Constitution, separation of powers and government accountability. **It can be seen in this Constitution draft the mention of the transfer of sovereignty from the monarch to the nation.** The status of the Ruler as the representative of the nation is in accordance with modern constitutionalism ideas, based on a contract between the monarch and the nation. The democratic principle of representative government enshrines the universal voting right⁶⁰.

Conclusion

In the constitutional evolution of the Principalities we cannot fail to notice the constant tendency of obtaining political union, sovereignty and independence. Basically, the constitutional evolution is an expression in the institutional identity of the Romanian nation. Focused on national emancipation and union, the representatives of nobility and politicians involved in the modernization of state institutions chose to join the revolutionary current that went about Europe and import various models of governance by constitutional transplant. Thus, Cărvunarilor Constitution and the Organic Regulations were inspired by the 1791 Constitution and Charter of 1814. The Proclamation of Islaz and Câmpineanu's Constitution were inspired by the French Constitution of 1848, the Paris Convention, the Developing Statute in 1852 and the 1866 Constitution were inspired by the Belgian Constitution, the most liberal of the time.

Early 19th century coincides with the beginning of the national revival. Around the evolving development of constitutional institutions we ought to observe that **sovereignty** characterizes the existence of the state. *Independence and international recognition* coincides with the union and shaping of the Romanian nation. The transfer of sovereignty from the Ruler to the nation is in accordance with the revolutionary liberal current and it is an expression of the people's will to choose their own form of government and to choose their own representatives for drafting a Constitution.

⁵⁸ See C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, p. 174.

⁵⁹ *Idem*, p. 175.

⁶⁰ M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, pp. 225, but also R. Carp și I. Stanomir, *Inventarea Constituției*, C.H. Beck Publishing House, București, 2009, pp. 13-25.