

THE FUNDAMENTAL FEATURES AND THE POLITICAL WILL OF THE 1866 CONSTITUENT ASSEMBLY (II) ¹

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Abstract

*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.*

Key Words: *sovereignty, constituent power, constitutional drafting, political reforms, constitutional development, independence, international recognition.*

1. Political reform - new projects. 1848 in Moldavia and Wallachia (revolutionary programs)

The Revolution of 1848 in Romanian was in accordance with the wave of revolutionary movements across Europe in 1848, from Paris to the center and east of the continent. In Moldova and the Romanian Country, the revolution of 1848 was primarily the work of the "forty-eighters/pașoptiști" intellectuals. They were a very homogeneous group, belonging to the middle class of nobles. They benefited from opportunities to study abroad and are distinguished by their ancestors through their direct knowledge of Western Europe, who's political and cultural model they wanted apply in the Romanian Principalities. The political elite was looking for a Romanian type of modern constitutionalism, from this point of view, we observe a tendency towards the Romanian constitutional traditions and, on the other hand, the need of taking constitutional models through constitutional transplantation². Another feature of the Romanian intellectuals from the 1848 is the total adherence to the modern concept of **nation** and the unconditional commitment to national ideals (**political independence or autonomy**).

The revolution of 1848-1849 was the crucial moment in the evolution of the Romanian society into a modern state; the moment marked a century of constitutional

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² M. Gușan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, p. 235.

mutations with the assertion of the Romanian nation. The Romanians were under the suzerainty and protection of Russia (Romanian Principalities) or under the domination of the Habsburgs (Transylvania and Bukovina), and their objective was the national political empowerment. The revolutionaries requests were: respecting the autonomy of the Principalities under the old treaties and the union of the Romanian territories; recognizing the rights of the Romanian nation. The revolutionary requests from Cernăuți and Brasov opened some issues such as: the removal of the Organic Regulations and the Russian protectorate and the union and independence of the Romanians.

The main programs detailing the revolutionary constitutional reforms of 1848 were:

1. The political program of the Moldavian revolutionaries developed in Brasov: *Principles for reforming our homeland*
2. The Constitution drafted by Kogalniceanu in August 1848 in Cernauti
3. The Constitutional Act of Islaz 9/21 June 1848 (Romanian Country)

Analyzing these acts we can group the political and constitutional reforms as follows:

A. Human rights and freedoms: civil and political equality, the abolition of noble's ranks, the elimination of class privileges, equality before the tax burden, broadening the right to vote, freedom of the printing press, freedom of expression, the right to property³.

B. Constituent power and legitimacy. The revolutionary programs have shown a special concern for the transfer of sovereignty from the ruler to the nation. We are actually speaking about a nation that was strengthening its assumption as holder of constituent power, which is collectively committed, and which showed a general and constant concern for their own organization. The idea that through its political power is obliged to establish its own form of government is born in the collective consciousness of the nation. Furthermore, the Constitution draft prepared by Kogalniceanu, states in art. 116-118 the basis for the constitutional revising according to the new social-political realities. Basically it is mentioned for the first in a Constitution draft the possibility for revising the constitution according to the will of the nation. However this moment is subject to a period of 15 years. The limits of the review are "after the Epoha spirit", with no provisions for establishing a special framework. The review procedure is described in the same general lines; the possibility of revising the texts, but only singular articles is and in ordinary Public Assemblies. The reviewing of the entire constitutional text requires a special condition, namely the consent of two-thirds "of the voting voices".

In the view of the 1848 revolution promoters, there is a reinforcement of the idea of fundamental law, of a Constitution able to defend and protect the citizens, and especially to establish a coherent institutional organization. The "romantic revolutionaries" are building the whole revolutionary propaganda on the utopia that a Constitution can "mobilize the masses and prevent fatal diminution of revolutionary

³ See *Dorințele partidei naționale în Moldova*, august 1848, punctele 2, 3, 7, 23, 26, but also Proiectul de Constituție elaborat de M. Kogalniceanu art. 6,7, 8, 89, 94, 104, 105 in C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, pp. 178-194.

desire⁴". Thus, the Constitution contains the most important legal norms, the rule and the desire of organizing and structuring the entire legal and political system. But, as we can see, this time by direct application to the revolutionary moment of 1848, constituent power is more than writing a constitution⁵; it is rather the power that establishes a regime by creating institutions and rights for its citizens and by establishing relationships between members (fundamental rights) and certain obligations for them, respecting the obligations imposed by rules of law. This revolutionary moment forces us to analyze this concept both from a legal perspective and from a sociology, psychology and politics perspective, because a constitution illustrates how to "be" and "to exist" of a people, representing the sum of traditions and social and historical experiences.

The concept of constituent power was derived from the revolutionary movements of the Enlightenment in the 18th century and is the recognition that the source of political authority comes from the people's will; accepting this, the constitution becomes a legal instrument, and it is considered the expression of the people's constituent power to make and remake various institutional arrangements by which they are governed⁶. The idea of constituent power is used in French literature by Sieyes, he states that the powers created by the Constitution are multiple and that they perform a particular function, but within the limits conferred by the fundamental law, drafted by the will of the constituent power⁷. However, they have a common element; they represent the general will of the people, the nation. As Sieyes stated, a constitution requires, above all, a constituent power. Moreover, Sieyes emphasizes the distinction between constituent power and constituted powers, stating that the Basic Law, the constitution is not the work of the constituted powers, but of the constituent power. Realizing an analyze in opposition to these terms, Sieyes considers that the constituent power is the power to make the constitution and the constituted powers are the powers created by the Constitution. The entire conceptualization of Sieyes is based on natural law doctrine and on the contractualist theories, which were the ones that created the germs of this concept, essential in constitutional law. We cannot speak about conceptualizing the constituent power in JJ Rousseau, Thomas Hobbes and John Locke studies, because their theories on the social contract do not know the distinction between the legislative power and the constituent function of a Constituent Assembly. In Rousseau's conception there is no higher power

⁴ R. Carp, I. Stanomir, *Inventarea Constituției*, C.H. Beck Publishing House, București, 2009, p. 31: "Fraților, veniți să jurăm că vom împlini câte ne sunt astăzi făgăduite și că vom apăra Constituția și țara cu sacrificiul vieții noastre. În aceste zile se va decreta chemarea Obșteștii Adunante Constituante și în curând vor începe alegerile".

⁵ D. Dyzenhaus, *Constitutionalism in an old key: Legality and constituent power*, in *Global Constitutionalism*, Cambridge University Press, nr. 1:2, 2012, pp. 229-260.

⁶ Martin Loughlin, *op. cit.*, pp. 2.

⁷ Neither aspect of the constitution is the creation of the constituted power, but of the constituent power. No type of delegated power can in any way alter the conditions of its delegation. In this sense, and in this sense alone, are constitutional laws fundamental. Those which establish the legislative body are founded by the national will before any constitution has been established; they form the first stage of the constitution. Sieyes, *op. cit.*, pp. 22.

that is above the legislative power, the people are those who, through their jointly establish rules decide about their social coexistence⁸.

Summarizing, this is the influence that the French revolutionary ideas transmitted and that caught echo in the Romanian Revolution of 1848. Together with the assumption that the constituent power belongs to the nation, through the transfer of sovereignty from the nobles to the people, other constitutional institutions, linked with the concept of constituent power, are defined, such a concept is the Constituent Assembly. As a relevant example, we would mention the decree to convene the Constituent Assembly of the Romanian State from 14 July 1848⁹, with the sole purpose of adopting a constitution according with the will of the Romanian people. The rules for creating the Constituent Assembly are given in the Decree, stating that its role is to represent the whole country, and "senators" shall be elected one for every 10,000 voters.

As we have seen so far, the whole process of development in the Romanian constitutional law manifests a strong French influence. Prof. Paul Negulescu, promoting the idea of national sovereignty postulated by Sieyes states: "All humans that inhabit the same territory are subject to the same authorities constitute the people. But this group of people living under the same authority, has a common consciousness because its members and their descendants have lived together for a long time, in the same territory, suffering various influences and are animated by the same ideal, they are not a simple people, but a nation. In a nation there is unity of race and language, and sometimes religion¹⁰". Furthermore, speaking of the democratic principle of the Constitution Paul Negulescu states: "The nation that underpins the democratic edifice is as the texts say the one who exercise sovereignty; all power emanates from her. But how is organized a Nation, how it expresses its will? The nation, in a political point of view is represented by the electorate. But who organizes the electorate? They are organized by representatives, deputies and senators. In other words the trustees are forming their representative; they give the electorate a lower or higher content of rights, they extend or restrict the right to vote for various categories of citizens after their own will¹¹". In this regard we have a first boundary between the outlined concepts: the people as the source of constituent power and the Constituent Assembly as a power established through a special mandate to develop the fundamental act, a constitution.

The Representative Government was in revolutionaries' attention both in terms of establishing national sovereignty and of consolidating the democratic principle underlying representation. "In the spirit of the revolutionary visions more or less democratic, the access to quality active citizenship was based on a general register of electoral reform proposals that ranged from universal, equal and direct vote, based on a simple age census, in postulating a census stripped of connotations as wealth, class,

⁸ K. Gözler, *Le pouvoir constituant originaire*, Mémoire du D.E.A. de Droit public, Directeur de recherches: Prof. Dmitri Georges Lavroff, Université de Bordeaux I, Faculté de droit, des sciences sociales et politiques, 1992, (www.anayasa.gen.tr/memoire.htm accessed on April 4th, 2004), p. 7.

⁹ See C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, p. 201.

¹⁰ P. Negulescu, *Principiile fundamentale ale Constituțiunii din 27 februarie 1938*, Atelierele Zanet Corlateanu, București, 1939, p. 14-15.

¹¹ *Idem*, p. 22.

religion and ethnicity. Gradually, next to the census of wealth, has appeared the capacity census¹². Along with the representative Government, the idea of legitimacy comes into discussion; this idea becomes mandatory in the constitutional development stage in which the Principalities were, especially for a nation that wanted to assume sovereignty.

C. Separation of powers. The Constitutional evolution supported by the Revolutionaries of 1848 envisaged modernization and institutional coherence through the rethinking of the constituted powers. The projects focused on legislative strengthening of the unicameral Parliament according to the Organic Regulation.

After the revolutionary defeat in the 1848, through the Balta Liman Convention of 1849¹³, signed between Russia and Turkey, the Principalities returned mainly to the Organic Regulations, with some modifications. The Convention of Balta Liman was a step backward, a regression in Romania's constitutional development.

Romania's constitutional development, as a result of French influence and the revolutionary upsurge of 1848, marked the Romanian nation's desire to assert its political identity and independence from the Ottoman Empire. The process of constitutional development shows in the Principalities a desire to assimilate the values of liberal French constitutionalism, but also the need to establish viable administrative and political institutions.

2. Paris Convention

Paris Peace Treaty of March 30, 1856, confirms the end of a new war between Russia and Turkey setting out, *inter alia* a new international status of the Romanian Principalities. Under Article 23 of the Treaty of Paris was formed a special commission to analyze the Principalities situation, this report was presented to the Paris Convention of August 7/19, 1858. Being an international treaty, the Convention may not equate with a genuine Constitution of Principalities, but it is still a constitutional document which lays down certain political-administrative structures. The Paris Convention enshrines the traditional regime of separation of powers, a unicameral Parliament, and national elective reign; the two Principalities maintained their individuality. Basically the hopes for the reforms of the 1848 revolutionaries were not enshrined in the Paris Convention; however the Romanian Principalities enjoyed an internal autonomy status, under the collective guarantee of the signatory powers and were under the collective guarantee of these powers.

The separation of powers. Designed as two Confederate states¹⁴, the United Principalities were to have two rulers and two Elective Assemblies, the legislative initiative belonged to the ruler. Only the Central Commission prepared and adopted laws in the public interest, the laws validity was conditioned by the vote of the elective assemblies. The initiative belonged to the Ruler, but with the approval of the legislature.

¹² M. Guțan, *Transplantul constituțional și constituționalism în România modernă 1802-1866*, Hamangiu Publishing House, București, 2013, p. 238.

¹³ See C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, p. 259.

¹⁴ A. Stan, *Putere politică și democrație în România -1859-1918*, Albatros Publishing House, București, 1998, p. 8.

Apostol Stan states: "It was embodied the principle of separation of powers, but with an important upward of the executive, mainly the Ruler over the legislative. At a provincial level the latter lacked initiative, gained only within the Central Committee, a mixture of executive and legislative parity - but ultimately the balance tipped in favor of the Rulers Decision¹⁵".

The Paris Convention has the merit to lay the foundations for a future constitution, to create constitutional premises of the Romanian nation. This act in light of national sovereignty, constituent power and constitutional rule is considered to be an act that contains parts of some of the wishes of the revolutionaries, but not the constituent will of the people, nor their struggle to achieve their unity. Looking at this situation from the perspective of the constituent power, and above all, considering the essence of democracy that that this term implies, we fully understand the size of this issue implied in the constitutional evolution of a state. In democracy constituent power belongs to the people, the people as constituent power has the will to organize, to provide the legal order and a certain form of government, only this form of government becomes legitimate. Yet we can regard the problem discussed by Jennings¹⁶: "The people cannot decide until someone decides who are the people", so we face a constitutional dilemma, democracy implies a certain group of members who are actively involved in the democratic process to express their opinion, make a decision. This means that setting limits of the governance takes place outside the democratic process - this is the dilemma of the demos limits in democracy that has been widely debated in the literature"¹⁷.

In terms of empirical conceptual dimension of the term demos/people assume is loosely shaped, but it is vital to establish the legitimacy of political power and the ones to whom this power is exercised. The moment of national union and especially the recognition of this union is decisive in shaping constitutional identity.

3. The personal union in 1859. Developing Statute of the Paris Convention (1864)

The accomplishment in 1859 of the national unitary state through the union of Wallachia and Moldavia under the reign of Alexandru Ioan Cuza has a special place in the historical premises of the first Constitution of Romania. This union became effective in 1862 when the two Elective Assembly of Wallachia and Moldova merged into one to form a single government and the Central Commission of Focsani was dissolved on 12 February 1862.

Conducted on 24 January 1859 under the double election of Alexandru Ioan Cuza in Bucharest, the Romanian national state known as the United Principalities of Moldavia and Wallachia restructured its domestic politics. This is the beginning of institutional and political mechanisms by which it is established for the first time the rule of law,

¹⁵ *Idem*, pp. 10.

¹⁶ I. Jennings, *The approach of Self-Gouverment*, Cambridge University Press, 1956, p. 56.

¹⁷ See A. Schertz, *The Legitimacy of the Demos: Who should be included in the Demos and on what Grounds?*, in *Living Reviews in Democracy*, Zurich, vol. 4/2013, p. 1.

liquidating the absolutist form of government imposed by agreements between the protective powers¹⁸.

Following the coup of 2nd May 1864 justified by the difficulties in implementing his reforms, Alexandru Ioan Cuza dissolved the Elective Assembly and submitted to referendum the "**Developing Statute of the Paris Convention (1864)**" known in history as "Cuza's Status" as well as the election law, referred to in Article 4 of the Statute as the "electoral institution". The Statute was complementary to the Convention, and through his text any contrary provisions were repealed.

As prof. M. Gutan stated: the Developing Statute of the Paris Convention, was done "recreating the process of introducing the French authoritarianism, according to the syllogism, coup - making of a constitution - constitutional plebiscite". The Statute represents an essential change in the Romanian constitutional evolution, due to the fact that the provisions of the Convention could not face the series of administrative and institutional reforms made by Cuza and a new legislative framework was needed, furthermore it was needed a reorganization of the separation of powers, opting for a organization bicameral parliament.

For the first time, because of the strong French influences, a constitutional act and a electoral law was followed by a plebiscite. National sovereignty is strengthened and outlines new methods by which people express their will and legitimate a form of government. Thus, on 10th May, the population has been called to express itself by plebiscite regarding these new legislative changes in the Principality. The vote was overwhelmingly in favor of adopting the constitutional laws. Prince Alexandru Ioan Cuza legislative acts were published in the "Official Gazette" no. 146 of July 3rd, 1864¹⁹. These are manifestations of democratic constitutional development in Romanian. In a democratic regime, the basic law is legitimated by the scale of citizen's participation in the process of creating a constitution. The freedom of political expression and the collective will are the basis of constitutional theories; the constituent will is a democratic fundamental principle: the people establish their own form of government to represent their interests and laws according to the social pact²⁰. It should be mentioned that the democratic regime confers the concept of constituent power a socio-political dimension that measures the legitimacy of fundamental justice or injustice; basically the people becomes holder of the constituent power, and the subject of analysis in assessing democracy²¹. Obviously these are merely the beginnings of such a constitutional construction.

¹⁸ A. Stan, *Putere politică și democrație în România - 1859-1918*, Albatros Publishing House, București, 1998, p. 12.

¹⁹ „Cu mila lui Dumnezeu și voința Națională, Domnu Principatelor Unite Române
La toți de față și viitori sănătate:
Asupra propunerii Consiliului nostru de Miniștri;
Considerând plebiscitul propus de Noi la 2/14 Maiu încetat și votat de Națiunea Română în zilele de 10/22, 14/26 Maiu 1864;

*Considerând împrejurările cuprinse în proclamațiunea noastră cu data de astăzi;
Promulgamu ce urmeză:”*

Preambulul Statutului

²⁰ A. Kalyvas, *op. cit.*, pp. 237-238.

²¹ See Antoinette Schertz, *Theory about demos*.

4. The problem regarding the Constitution after the abdication of Alexandru Ioan Cuza

In the historical conditions of the years 1865 - 1866, Alexandru Ioan Cuza was forced to abdicate in the night of February 23 / March 10 to February 24 / March 11, 1866 and leave the country. Regency was established, which prepared the throne for the arrival of a foreign prince. The establishment of the *Royal lieutenant* was not foreseen by the Paris Convention and was contrary to art. 11 therefore regency appeared as unconstitutional. It was provided, however, that in case of throne vacancy, the exercise of executive power was entrusted, until the new "hospodăr" arrival, to the Council of Ministers. We should mention that art. 11 have been repealed on 1 July 1866 when the new Constitution came into force, and the unconstitutional regency worked until that date. The new socio-political framework created no longer met the normative structure of the Statute and the Convention. A new constituent moment came and it will be exploited by the adoption in 1866 of the first Romanian Constitution. We cannot speak of constituent power manifestation only when there is a revolution, but also when fundamental changes occur, the example, the essential need for a new constitution. It is created a kind of legal vacuum when changes occur in a state that already have existing legal order, when the form of government changes, and does not correspond to social reality; through Cuza's abdication the personal union risked crumbling and the regency demanded the establishment of a foreign prince, basically the political system of the state changed and there are laid the foundations of parliamentary monarchy. **Thus, even if the original constituent power is manifested beyond the limits of legal order in force, it first destroys and then creates. From this point of view we can say that constituent power has first a repressive function, and then a productive one, the creation of a new legal system.**

5. Choosing an Elective Assembly, the Constituent Assembly. Debates on the Constitution of 1866

Describing the situation of the 1866 Constitution drafting, G. Alexianu²² stated: "After the dethronement of Cuza, Ghica's government was working with the National Assembly to elaborate a Constitution. This coincides with the enthronement of Prince Carol, later became King Carol I ". The moment of the 1866 Constitution coincides with the transfer of sovereignty from the ruler of the nation, the union of the Principalities and their independence, **practically speaking the manifestation of constituent power was assumed by the nation.**

In terms of constituent power we should say that this is outside any legal system²³, it manifests itself in a situation where there is a legal vacuum, this vacuum

²² G. Alexianu, Curs, *op. cit.*, p. 227

²³ Sieyes: „the constituent power can do everything in relationship to constitutional making. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its powers, must be, while carrying this function, free from all constrains, except the one that it deems better to adopt.”

Schmitt²⁴ calls the genuine moment of constitutional creation: „an absolute beginning, and the beginning springs out of a normative nothingness and form a concrete disorder”. In this sense we can identify two types of constitutional void: an existing one, and one that has been created. An existing legal vacuum implies the emergence of a new state. In this case the constituent power is forming a new state and has the function of creating a new legal order, so it has a positive function, it is creative, productive. The new created state is entirely new and the imposed new constitution is the first in the newly created state. In this case, the original constituent power emerges precisely that which is latent, this situation generates a constitutional order.

We cannot speak of constituent power manifestation only when there is a revolution, but also when fundamental changes occur, for example, the essential need for a new constitution, as a consequence of Cuza's abdication. The second kind of legal vacuum occurs in the circumstances of different forms of government changes in a state where there are already existing legal order. The original constituent power first destroys and then creates.

The political regime of liberal nature, established in 1866, was part of the most advanced regimes in Europe in the second half of the 19th century. Considered one of the most advanced of the time, the Constitution of 1866 established the core principles of progress, a major requirement of achieving the national ideal.

The Constitution draft was drawn up by a committee of the State Council which processed an old project of the Central Commission at Focsani. After the draft was completed by the State Council and approved by the government, it was presented to the new Elective Assembly on behalf of the Royal Lieutenant established after the abdication of Prince Al. I. Cuza. The constitutional moment of 1866, after Cuza's abdication, enshrined as a principle the fundamental political act of Unification of 24 January 1859 confirming the sovereign will of the nation's representatives and the unitary character of the state.

Analyzing the constitution of the Constituent Assembly G. Alexianu observed a procedural malfunction: „*Constituția, votată de Parlament – numai de Adunarea Națională, care își ia denumirea și rolul de Constituantă, căci Senatul prevăzut de Statutul lui Cuza n-a fost instituit și convocat – este promulgată de Domnitor. Într-adevăr proiectul de Constituție este supus în prealabil aprobării Domnitorului, care propune mai multe modificări încât proiectul, care la început avea 13 articole, este votat cu 133 de articole. Noua Constituție este sancționată la 30 iunie 1866 și este publicată la 1 Iulie 1866.*”²⁵

The problem displayed by prof. Alexianu links to the issue of establishing the Senate. The Senate was set up first by the Developing Statue of the Paris Convention of 2 July 1864. After Cuza's abdication regency was established. The regency took over until a new Ruler would have been named, although this didn't have constitutional grounds because it would have been called a hospodăř, according to art. 11 of the Paris

²⁴ C. Schmitt, *Verfassungslehre*, Verlag von Duncker und Humblot, Munchen und Leipzig, 1928, pp. 9 „In Wahrheit gilt eine Verfassung, weil sie von einer verfassunggebenden Gewalt (d.h. Macht oder Autorität) ausgeht und durch deren Willen gesetzt ist. Ads Wort „Wille” bezeichnet im Gegensatz zu Blossen Normen eine seinsmässige Grösse als den Ursprung seines Sollens.

²⁵ *Ibidem*.

Convention. Interesting is the fact that remained in force the Elective Assembly and the Senate. However, the regency hasn't dissolved the Senate, to name one in favor, because this wasn't possible according to its ability, but it did dissolved the Elective Assembly and elected a new one, ignoring the Senate. Following this attitude, it was raised the issue of legitimacy and constitutionality of laws voted without the approval of the Senate²⁶. The same situation repeated in 1866 with the Constituent Assembly election, when the Elective Assembly turned into Constituent Assembly and the Senate wasn't called due to a malfunction of the form of government following the coup.

The Constituent Assembly election in 1866 reflects a problem of legitimacy²⁷, considering that it was adopted by an unconstitutional Convention, lacking the solemnity and the representativeness of adoption of a fundamental act. Analyzing the 1866 moment from the perspective of the constituent power concept we should make some remarks: In Carre Malberg's vision the constituent power and the constitution is represented as a vicious circle, he believes that constituent power is manifested in an unauthorized manner, and it only requires legitimacy to make a new constitutional order, this legitimacy is confirmed subsequently by retroactively public acceptance of the new constitutional provisions. Practically the entire constitutional foundation is based on a majority group that has the strength to impose their will, overturns the existing constitutional order and elects a Constituent Assembly that creates a new constitution.

Although a constitutional form of government lays the foundations of legality in a country, it has a dual nature: political and legal. As an act of expressing the political will of the community, the Constitution establishes normative order, one that allows state authorities to exercise the functions through a legitimate form of coercive power over a territory and on its inhabitants; through the establishment of normative order these constitutional norms "build" a state. The Constitution, paradoxically, expresses the collective will of the community / people, and at the same time, reflects the concept of **the people**. This is an important aspect, since in 1866 when through a constitutional act it was enshrined **the union**. In other words, the constitutional act is a hybrid between free expression of political will and the capacity to provide collective legal rules²⁸.

Both Alexianu G. and Paul Negulescu exhibit an attitude of disapproval in relation to the Constitution of 1866, sanctioning the Belgian influence²⁹. G. Alexianu

²⁶ See C. Ionescu, *Organizarea bicamerală a Parlamentului între tradiție istorică și oportunitate politică*, în *Pandectele Române* 2014.

²⁷ See I. Ceterchi, *Istoria dreptului românesc, vol. II*, Academiei Publishing House, București, 1987.

²⁸ Ulrich K. Preuss, *Feature: Constitution Making and nation Building: Reflections on Political Transformations in East and Western Europe*, în *European Journal of Philosophie*, vol. 1, no. 1/1993, pp. 81-92.

²⁹ See N. Iorga: *Explicațiile d-lui Gusti îmi definesc conferința, pe de o parte, și pe de alta, îmi ușurează sarcina. Dacă titlul conferinței istoricul Constituției românești ar fi să se înțeleagă în sensul Constituției dela 1866, având să arat cum s'a alcătuit acea Constituție, în cazul acesta mi-aș declina competența. Mai mult decât atâta: aș nega existența însăși a obiectului conferinței, căci Constituția dela 1866 este izvorâtă dintr'o simplă operă de traducere a unei Constituții apusene; ea n'are absolut niciun fel de legătură cu trecutul nostru propriu și nu reprezintă nicio elaborațiune particulară nouă. Si voiui adaogi încă ceva ceea ce se va arata ceva mai pe larg pe urma ea s'a făcut fără participarea factorului politic care era Kogălniceanu, singurul în legătură cu dezvoltarea noastră constituțională din trecut. Împrejurările au făcut ca, la 1866, Kogălniceanu, socotit ca autorul loviturii de Stat, din 1864, să fi fost înlăturat din Constituanta, dar, chiar dacă ar fi fost acolo, influența lui nu era suficientă pentru a face să se fiină seama de acel factor*

analyzing art. 128 para. 3 and art. 90 states: "This Constitution, as the Belgian one from 1831, is a pact between the Ruler and the nation, these results not only in how it was made, but also from number of specific provisions included in its text".

Respecting the constructions of the modern constitutions³⁰, the 1866 Constitution contains provisions that establish³¹:

1. The principle of national sovereignty, the legitimate holder of power³²;
2. The principle of representativeness, according to which the people exercise their sovereignty prerogatives³³;
3. Separation of powers and the organization and functioning of the institutions and relations between them³⁴;
4. The fundamental values and historical traditions that define national identity and spiritual physiognomy of the people;
5. The form of government, the political regime³⁵;
6. The rights and fundamental freedoms of citizens³⁶.

istoric care ar fi reprezentat aportul nostru național în opera ce trebuia să se alcătuiască. Evident, odată ce a făcut o haină împrumutată străinăității, fără să se fi luat măsura corpului nostru, am primit-o așa cum ni s'a trimis, făcută de altfel de un excelent croitor, dar deprins să fabrice haine pentru alte corpuri, și am trăit cu trupul nostru deoparte și cu haina străină fălfăind deasupra lui, fără niciun efect aproape asupra vieții noastre politice decât acela de a introduce o ipocrizie mai mult. Încă o dată, dacă ar fi vorba de Constituția din 1866, n'aș vorbi de loc, întâiu pentru că o elaborare din partea noastră nu a existat și, al doilea, pentru că ar fi trebuit să fi fost martor al lucrurilor de atunci, ca să pot scuză lipsa unei pregătiri care, după părerea mea, este absolut necesară azi, dacă nu voim să se dea, din nou, poporului nostru o formă zadarnică pe lângă altele împrumutate tot așa de ușor și menținute cu tot atât de puțin folos. (Constituția din 1923 în dezbaterile vintemporanilor, Humanitas Publishing House, București, 1990, pp. 25-26).

³⁰ C. Ionescu, *Tratat de drept constituțional contemporan, second edition*, C.H. Beck Publishing House, București, 2008, pp. 208-209.

³¹ P. Negulescu, *Curs de drept constituțional român*, București, 1927.

³² Art. 31. *Toate puterile Statului emană dela națiune, care nu le poate exercita decât numai prin delegațiune și după principiile și regulile așezate în constituțiunea de față.*

³³ *Idem.*

³⁴ Art. 32. *Puterea legislativă se exercită colectiv de către Rege și Reprezentatiunea națională. Reprezențațiunea națională se împarte în două Adunări: Senatul și Adunarea deputaților. Orice lege cere învoirea a câtor trele ramuri ale puterei legiuitoare. Nici o lege nu poate fi supusă sancțiunei regale, decât după ce se va fi discutat și votat liber de majoritatea ambelor Adunări.*

Art. 35. *Puterea executivă este încredințată Regelui, care o exercită în modul regulat prin Constituțiune.*

Art. 36. *Puterea judecătorească se exercită de Curți și tribunale. Hotărârile și sentințele lor se pronunță în virtutea legeri și se exercită în numele Regelui.*

³⁵ *Secțiunea I Despre Rege*

Art. 82. *Puterile constituționale ale Regelului sunt ereditare, în linie coborâtoare directă și legitimă a Majestății Sale Regelui Carol I de Hohenzollern Sigmaringen, din bărbat în bărbat, prin ordinul de primogenitură și rămâne cu excluziunea perpetuă a femeilor și coborâtorilor lor.*

Coborătorii Majestății Sale vor fi crescuți în religiunea ortodoxă a Răsăritului.

Art. 83. *în lipsă de coborători în linie bărbătească a Majestății Sale Carol I de Hohenzollern Sigmaringen, succesiunea Tronului se va conveni celui mai în vârstă dintre frații săi sau coborâtorilor acestora, după regulile statornice în articolul precedent.*

Dacă nici unul dintre frații, sau coborătorii lor nu s-ar găsi în viață, sau ar declara mai dinainte că nu primesc Tronul, atunci Regele va putea numi succesorul său dintr-o Dinastie suverană din Europa, cu primirea Reprezențațiunei naționale, dată în forma prescrisă în art. 84.

Dacă nici una, nici alta nu va avea loc, Tronul este vacant.

In terms of actual constitutional drafting the legislators from 1866 considered that the Belgian constitution of 1831 is in the most appropriate model, even if it was also extremely blame³⁷. The French revolutionary ideology of 1789, viewed through the filter of Belgian constitutional reformism whose model - state organization and leadership – was the ultimately prevailing constitutional source³⁸.

Precisely because the Belgian constitution of 1831 was seen as the embodiment of the broadest aspirations for freedom and democracy, in 1859, the Central Commission at Focsani took it as a model for drafting the first Romanian Constitution.

The Romanian political thinking in terms of constitutional sources, was familiar with the various sources since the time of the 1848 revolution, therefore in 1866 the constitutional transplant was according to the national political ideology. The governance models of the most politically advanced countries in the world were known to some legislators of 1866, not only generally but also through the constitutional mechanism of action, yet, many theorists consider it a failure³⁹. The constitution draft brought the nation a whole range of rights and freedoms by which class differences were erased, and the society was emancipated under the authority of institutions at the service of the executive power. Consequently, it was desired: the equality of all Romanians before the law, taxes, and conscription and employment opportunities for civil servants. Privileges, exemptions and class monopolies were abolished. Property of any kind became inviolable. Individual freedoms were strengthened by the provision that no one could be pursued and arrested or withheld only in cases provided by law, as well as forms prescribed by it⁴⁰.

6. Conclusion

The entire study dealt 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 building of the nation, 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.

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, Cărvunariilor Constitution and the Organic Regulations were inspired by the 1791 Constitution and Charter of 1814. The Proclamation of Izlaz

³⁶ The IInd title of the Constitution. See, C. Ionescu *Dezvoltarea constituțională a României. Acte și documente. 1741-1891*, Regia Autonomă Monitorul Oficial, București, 2000, p. 414.

³⁷ See *supra*.

³⁸ A. Stan, *op. cit.*, pp. 40

³⁹ M. Guțan, *Transplantul, op. cit.*, p. 356.

⁴⁰ Al. Pencovici, *Desbaterile Adunării Constituante din anul 1866 asupra Constituțiunii și Legii electorale*, Tipografia Statului Publishing House, București, 1883.

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.

At the end of this research, we should consider that the state formation and the establishment of the first Constitution following the will of the people is the result of the historical evolution driven by the imperative need of liberation from feudal restrictions.