

# The Challenges of the Romanian Constitutional Tradition<sup>1</sup>

## I. Between Ideological Transplant and Institutional Metamorphoses

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It is a platitude today to state that the Romanian modern constitutional law has been almost completely architected by way of the constitutional transplant. On the other hand, it is puzzling how poor the contemporary Romanian discourse about it is. At least in the Romanian legal literature its presence is accidental and, when approached, it is usually stereotypical. Using ideas and intellectual formulas borrowed from the philosophy of culture, ethno-psychology and history of cultures, the few concerned with the subject are the prisoners of some determinism which is far from helping the thorough understanding of the legal/constitutional transplant phenomenon. Theories like "cultural synchronism" or "artificial convergence"<sup>2</sup> are relevant for explaining the meeting between the Romanian (constitutional) culture and the Western one but are insufficient for figuring out the concrete mechanism of the constitutional transplant, its causes and effects. Moreover, these perspectives were usually explaining only the origins and mecha-

nisms of building the modern Romanian constitutionalism and constitutional law. After transplantation, ideas and institutions were considered as inner parts of the Romanian legal/constitutional system and analyzed as such, with very small references to their origins. In a very strong positivistic climate, Romanian legal scholars were and still are interested more in formal legal normativity than in acknowledging the legal-cultural context.

This kind of historical approach is, in my opinion, misleading. As long as legal positivism neglects contextualization, there is little chance to correctly understand the real challenges of the Romanian constitutional tradition. Constitutional transplant is the cornerstone of this contextualization, fully explaining the fate of the Romanian constitutional tradition over decades and its nowadays significance. Generally, detecting the peculiar causes of the constitutional transplant is decisive for discovering its prerequisites and tracing the fate of the imported legal institutions

in the importing society. Mechanisms of constitutional transplant are important for understanding the interplay between the (legal) culture of the importing society (Romania in our case) and the (legal) culture of the exporting society. Studying the effects of legal transplant is crucial for evaluating its failure or success. Last but not least, detecting the actors of constitutional transplant is important for grasping the intellectual effervescence lying behind it. The constitutional transplant is not an implacable process occurring beyond human expectations, hopes, desires, anxieties or complexes, beyond rational or irrational. Constitutional transplant either implies circulation of ideas, as Alan Watson points out<sup>3</sup>, receptivity for the information existing outside someone's legal tradition, as Patrick Glenn emphasizes<sup>4</sup> or even resistance to a foreign legal culture, as Pierre Legrand correctly highlights<sup>5</sup>.

In the Romanian case, constitutional transplant meant receptivity for external legal ideas, coupled with a strong switch of mentality in the case of the Romanian political elite which, being the main actor of the legal import, had become both the proponent of the cultural engineering through the imported institutions and the insistent irritator of the domestic Romanian (legal) culture. After all, the whole Romanian legal modernization affair was a matter of some anxious metamorphosed (Europeanized) mentalities at the elite's level who intended to produce social change through cultural engineering.

This is why the present paper will try to go beyond the "traditional" Romanian scholarship's approaches as regards Romania's social, political and legal/constitutional modernization in the 19<sup>th</sup> and 20<sup>th</sup>

centuries. The real challenges of the Romanian constitutional tradition resided less in the way the transplanted ideas and institutions have been encapsulated in the constitutional normativity but in the way they have been imported, understood, adapted, produced effects and have been re-produced in the Romanian society. Particularly, my approach will mark a special emphasis on the Romanian critical self-perception about the constitutional modernization process, excluding from the start "the danger of confusing form with substance", an intellectual tendency correctly noticed by Kenneth Jowitt when speaking about modernization in South-Eastern Europe<sup>6</sup>. Legal-cultural engineering through constitutional transplant gave birth not only to a sincere hope that the imported institutions will force the change in mentality but also to a critical reaction against it.

Bearing all these in mind, I shall approach the history of the Romanian constitutional tradition in two main units of ideas. The present part of my work will outline the inherent linkage between the imported constitutional ideas, imported constitutional institutions and the Romanian socio-political context which they were supposed to shape. Consequently, after a brief overview of the geopolitical context in which the Romanian national state has been established and evolved (Chapter 1), I will focus on the institutional and political developments of the Romanian constitutional life (Chapter 2). Due to the existence of an important discrepancy between the way Romanians assimilated through transplant the western constitutionalism and the western institutional models, different sections will analyze the ideology behind the institutions (2.1) and

the concrete way in which the more or less voluntary imported institutions have been applied (2.2). The peculiar intermingle between constitutional ideas, institutions and praxis gave birth to the Romanian modern constitutionalism and established the latitudes of the Romanian constitutional tradition, whose general characteristics will be cornered at the end (Chapter 3). A further to come second part of my work will be dedicated to the morphology of the Romanian constitutional tradition.

### 1. *Geopolitical context*

Geopolitically, the beginning of the 19<sup>th</sup> century found the Romanian Principalities – Wallachia and Moldova – under a strict political and economic control exercised by their suzerain power – the Ottoman Empire. On the Romanian thrones Turkey frequently was naming wealthy and influent Greeks, inhabitants of the Greek district of Istanbul – Phanar (hence their name – phanariots). This *statu quo* dramatically changed after the intense social turbulences that occurred in 1821 Wallachia, when a leader of the small Romanian aristocracy – Tudor Vladimirescu – took over for a few weeks the political control over the country. Although the social and administrative demands of this so-called “revolution” have been rejected, its main end – the purification of the state apparatus from the massive Greek influence – has been achieved. Turkey gave up the practice of crowning phanariots and the Romanian thrones went back to the Romanian ruling houses.

Under the European influence and, especially, under the Russian pressures, Turkey accepted to change the Romanian Principalities’ international status. Important political and commercial provisions regarding the Romanians have been stipulated in the Treaties of Akkerman (1826) and Adrianopol/Edirne (1829). The latter stipulated the urgent settlement of an Organic Regulation in each Principality, aiming to reconfigure and modernize their internal political and administrative organization. These Regulations have been enacted under the Russian occupation (1828-1834), entering into force in 1831/1832.

Suffering a small rectification in 1849, the Organic Regulations have been partially abolished after the entering into force of the 1858 Paris Convention. This one has kept the two distinct Romanian Principalities but under the reign of the Prince Alexandru Ioan Cuza (1859-1866) they got united under a unique kind of unitary national state. Being internationally recognized only for the time of Cuza’s rule, Romania had to follow a long and embarrassing diplomatic endeavor until its fully recognized independence in 1878.

The end of the 1<sup>st</sup> World War has brought the full accomplishment of the Romanians’ national political ends. The Versailles Peace Treaty (1919) consecrated the international status of a new Romanian national state which doubled its size, after annexing important territories inhabited by majoritarian Romanian communities (Transylvania, Bukovina, Bessarabia). The Ribbentrop-Molotov treaty of 1940 has broken away important Romanian territories in favor of Romania’s neighbors, which have been just partially recovered in 1945.

Accordingly, the present Romanian state is the outcome of the international *statu quo* established after the 2<sup>nd</sup> World War.

## 2. *Institutional and Political Developments*

It is worth mentioning that the Romanian modern constitutionalism has known from its beginnings a relative parallelism between the founding ideas disseminated by the political elite and the institutions currently shaping the way the Romanian political power was formally organized. The explanation simply resides in the fact that, at least until 1864, the internal political and administrative organization of the Romanian Principalities has been decided by the European powers. While achieving from Western Europe the intellectual values and principles of modern constitutionalism, the Romanian political elite was constrained to ask at the doors of Turkey, Russia, Austria, France, Prussia and Great Britain the transposition of ideas into recognized constitutional institutions. Usually and regrettably, the Romanian reform proposals have just sporadically made their way towards the acceptance of the international community. Not surprisingly, for decades one could find out two histories of the Romanian constitutionalism: one reflected in the ideology and reform proposals of the Romanian political and intellectual elite, the other reflecting principles and institutions designed by the external decision-making factors.

### 2.1. *The Intellectual Origins of the Romanian Modern Constitutionalism – the Ideas Behind the Institutions*

#### 2.1.1. 1800-1831

The birth of the Romanian modern constitutionalism grew up as an intellectual movement of political ideas among the Romanian multi-layered aristocratic class. Fortunately or not, political modernism at the beginning of the Romanian 19<sup>th</sup> century has not been brought over by the Third Estate, like in the Western Europe, but by the open-minded elements of the Romanian aristocracy. Undoubtedly, their ideas were not contingent to the inner Romanian political culture of the time but rather developed under the influence of the French Revolution of 1789. Still, they got a strong impact especially through the lower and middle Romanian nobility, who were looking for ideological guidance on their way toward fulfilling the national political agenda. Externally, the new intellectual trend was an important ideatic support for the struggle against the Ottoman domination. Living since Middle-Ages in two political entities – Wallachia (Muntenia) and Moldova – as autonomous provinces of the Ottoman Empire (they have been never organized as ottoman *paşalik*), the Romanians were now inspired by the wind of change which blew up from the Napoleonic France.

The hope for freedom has been originally expressed in the numerous petitions and reform programs which have been addressed to the emperor Napoleon and the Russian Tsar at the beginning of the 19<sup>th</sup> century<sup>7</sup>. Internally, the Romanian nobility's political agenda was rather parochial.

In the world of this peculiar constitutionalism, human rights have been rather promoted as the aristocratic rights and the limitation of power rather as the division of power between the Prince (*Domnul*) and the aristocracy. The timid political action which accompanied the petitional effervescence has ended in 1821 Wallachia with a popular movement which has been bloodily extinguished by the ottoman army. Hopefully, political results didn't miss the picture: the Greek dynasties promoted by Turks on the Romanian thrones have been thrown away and the Romanian dynasties have been reinstalled after 110 years.

Following their proponents, the reformist constitutional ideas and their institutional expression have swung between an aristocratic republicanism emancipated from its phanariot-Greek bindings and a sort of limited monarchy based on a timid representative regime, not very clearly delimited from the old feudal estates. Thus, the hardcore elements of the modern constitutionalism – postulating and guaranteeing human rights and the limitation of power – are difficult to be cornered in the numerous reform proposals of the 1820s and the beginning of the 1830s. The need to abolish the absolutism and to protect the freedom of the individuals in a constitutional written framework was just sporadically inscribed in a Moldavian reform proposal of 1807<sup>8</sup>. The generous principles of the 1789 *French Declaration of the Rights of Men and Citizen* have been partially intermingled with the old aristocratic privileges and the envisaged limitation of power was quite far from the liberal need to protect the human being. Regularly, in this period, human rights and rule of law looked like formal and artificial postulations (especially

in the famous 1822 *Constitution of the "Carvunari"*) and the fight against the phanariot princes' absolutism was architected as a fairest distribution of powers inside the Romanian aristocratic layer. Separation of powers has been residually suggested but it was still far from being a technique of setting limits for the political power. When occurred, the limitation of the Prince's powers didn't imply the effective limitation of the political power (1822)<sup>9</sup>. Alternatively, in other cases, the Prince was endowed with his traditional central political role in the state and the sovereignty of the nation (or of the people) was not yet an alternative to the full sovereignty of the monarch.

Generally, the reform proposals of the period 1800-1831 were constantly interested rather in the promotion of the aristocratic privileges, the aristocracy's access to power excluding or limiting the Prince, in having ruling Princes of Romanian origin, the internal autonomy of the Romanian Principalities and freedom of commerce, the reform of the judicial and administrative systems than in the need to install a new political order fully endowed with the liberal values. The essentials of the modern constitutionalism were only partially present, therefore one must not be tempted to confound the use of the concept of "constitution" (1<sup>st</sup> time in 1829) and the suggestion of its supremacy (1822) with the attachment to a modern constitutional regime.

#### 2.1.2. *Ideological reactions against the Organic Regulations (1831-1848)*

After the coming into force of the Organic Regulations (OR) and their application, the

political aims and strategy of the Romanian aristocracy have changed. Despite its expectations, the OR postulated an apparently modern political regime where, actually, the entire political power resided in the hand of the monarch (*gospodar*). Not only they refused the hegemonic pretensions of the aristocracy but allowed a political development toward neo-absolutism, which effectively occurred in Moldova. Consequently, the fight against the monarchical political abuse and limitation of his powers remained a constant presence in the reform proposals of the Romanian liberal aristocracy. As the revolutionary year 1848 was approaching, the projection of the modern constitutionalism took complex shapes and, in the same time, the political agenda has been completed with a national agenda: the political independence and the building of the Romanian unitary national state set the collective expectations on fire.

At the end of the 1830s, the ideological maturation of the Romanian political elite was evidenced by its reform proposals and political concepts. The influence of the West was still strong, encouraged by the increasing number of young Romanian aristocrats who graduated a law school (mainly in France or even defended their law doctorates in the same intellectual area). The ideological climate knew a radical transformation in this context, setting aside the fight for aristocratic privileges and promoting the citizen as the central element of the constitutional architecture. The Romanian political language considerably changed under this process, attesting the deep penetrations of both ideas and concepts in the Romanian political and constitutional cultures. As the intimate link between constitutionalism and the written constitution

was clearer, the concept of "constitution" (*constituție, constituțiune*) was already popular<sup>10</sup>, urging for systematical and detailed constitutional projects. In this context, the Romanian constitutional import has come naturally, Western principles and ideas being followed by their institutional arrangements.

All these are evident in the important 1838 *Constitutional project* belonging to the liberal Ioan Cîmpineanu. The strong influence of the French Constitutional *Charte* of 1830 is responsible here both for the implicit presence of some modern constitutionalism's essentials – i.e. sovereignty of nation, human rights and citizenship, representative government, the constitution as paramount law, separation of powers, responsibility and accountability of government, judicial independence – and for the chance to get an internal logic and a coherent constitutional text.

Unfortunately, a particular intermingling between the imported institutions and the Romanian understanding of the constitutional architecture promoted a rather incoherent text, where the peculiar relationships between legislative and executive were misleadingly depicted. The lack of skills in legal texts' preparation, the novelty of the approached subject or the subordination of the constitutional project to the main Romanian political project – building the national unitary state – could be pertinent explanations for its failure. Anyway, in a clumsy political and constitutional language, this project develops one of the main constitutional themes of the Romanian constitutionalism: limiting the monarchical power through a constitutional arrangement based on the mechanisms of the parliamentary regime. Imported using the

evasive and unclear formulas of the 1830 French *Charte* (where the text was far from expressly consecrating a parliamentary regime), this sort of representative regime entered the Romanian political imaginary as the most pertinent constitutional solution in the Romanian Principalities, where the neo-absolutism of the OR Princes was symptomatic. Significantly for the projection of a Romanian constitutional identity, the constitutional text stipulates a unicameral parliament, sticking to the Romanian tradition and limiting the dimension of the constitutional transplant.

### 2.1.3. 1848 Revolution

The political reaction against the abuses of the OR Princes has come to its climax during the revolutionary year 1848. Apart from the street turbulences and political movements, which took place especially in Wallachia, the Romanian 1848 Revolution knew an effervescent ideological expression. Its tension has been felt, both in Wallachia and Moldova, in the numerous petitions, proclamations, declarations and even constitutional projects published in a short period of time. Generally, they were not only a reaction against OR but also a political and constitutional blueprint for a desired-to-be modern Romanian state. On the one hand, they synthesized the attachment for the essential values of the modern constitutionalism, as it manifested in the last few decades and, on the other hand, they were trying to design a complex political and institutional architecture meant to nourish both the needs for modernization and the desire to build a constitutional

identity. Thus, beyond the already intellectual adaptation to the institutions, principles and concepts of the Western modern constitutionalism, beyond acknowledging the supreme juridical and political status of the written constitution, the reformist elite was this time in search of a peculiar Romanian modern constitutionalism. The quest for constitutional identity was clearly linked to the fight for national identity and the hope to live in an independent unitary Romanian state. Thus, the proclamation of the human rights has come as an expression of the Romanian social needs and the institutional design has been filtered through a (apparent) critical consideration of the external models. An appeal to the Romanian constitutional traditions has naturally flourished, even if it was rather a rhetorical expression of the intellectual historicism. The constitutional transplant has remained the main ideological and institutional support for building Romanian constitutionalism.

Through its ideas, the Romanian 1848 Revolution is considered to be the ultimate expression of the fight against the residual feudal institutions still present in the OR. This is why the strive for "equality" and "liberty" was backed up by numerous political and social demands, e.g. liquidation of the aristocratic privileges, land for the peasants, freedom for the gipsy slaves, freedom of expression etc. The equality before the law of the Romanians was completed by a first explicit attempt to build a Romanian nation understood as a political community (*demos*) and not as an ethnic community (*ethnos*), but no less emotionally coagulated by the feeling of "fraternity". In this context, national sovereignty naturally implied a representative regime

based either on a prudent large censitary suffrage (*Kogălniceanu constitutional project*) or on the romantic universal vote (*Islaz proclamation*). For the first time, supremacy of the constitution has been acknowledged both through the special procedure of enactment – it is relevant here the distinction made between the constitutive power and constituted power (Wallachia) – and the special procedure of amendment (*Kogălniceanu constitutional project*).

While remaining the main internal political goal of the Romanian political elite, the limitation of power was not concluding as regards the choice of the system of government. The external influences have been decisive for the existing alternatives: the French Constitution of 1848 was responsible for the strong Wallachian republicanism, while the Belgian Constitution of 1831 urged for a constitutional monarchy in Moldova. Generally, the concrete interest for a complex institutional architecture was rather low in the numerous punctual petitions and proclamations, the separation of powers usually missing this time either explicitly or implicitly. When present (*Kogălniceanu constitutional project*), it was lost in a clumsy and unclear constitutional text. Symptomatically, while massively appealing to the constitutional transplant, the Romanian elite did not succeed to make congruent their political ideas with the institutions to be imported. The constitutional project designed by Mihail Kogălniceanu, trying to combine the 1848 French quasi-presidential regime with the demands of the constitutional monarchy and parliamentary regime is an excellent example of, on the one hand, the poor knowledge of the deep structural and institutional requirements of the modern constitutional-

ism (leading to institutional cacophony), and, on the other hand, the consequences of the irrational constitutional import. Thus, this was the period that consecrated in the Romanian constitutional culture an appetite for vigorously outlining principles of constitutionalism like limited government, separation of powers, protection of human rights, judicial independence and impartiality, accompanied by a small interest or skills in institutional arrangements necessary for effectively giving them life<sup>11</sup>.

#### 2.1.4. *The Ad-Hoc Assemblies (1857) and the Reign of Alexandru Ioan Cuza (1859-1866)*

The intellectual and political effervescence of the revolutionary year 1848 was a preamble of the year 1857 when the Romanian modern constitutionalism has crystallized all its essentials. Summoned by the European powers, through the express provisions of the Paris Treaty of 30<sup>th</sup> of March 1856, the deputies of the Romanian social layers, elected and gathered in what has remained in history as *Ad-hoc Assemblies* of 1857, synthesized a half century of intellectual liberal positioning against the constitution, constitutionalism and state. Being seeded in the same fertile ground of the Romanian nationalism in search of one independent and unitary state, the values of constitutionalism have been officially expressed in front of Europe by the voices of ideologically mature Romanian elite, conscious of the needs of the Romanian nation and of the way it has to follow in order to be recognized as a European nation. All these called for a representative regime marked by a censitary suffrage; the separa-

tion of powers, timidly structured after the *checks and balances* mechanisms typical for the parliamentary regime, i.e. the inviolability of the monarch, the (political) responsibility of the government in front of the Assembly, the right of the monarch to dissolve the parliament; the immovability of the judges and their independence; the supposedly traditional unicameral parliament; the already obsessive limitation of monarchical power evidenced by the relative veto of the Prince; the rule of law.

Despite the institutional arrangement architected by the European powers in the Paris Convention of 1858, which was rather far from taking into consideration the firm but still purely consultative voices of the Romanians (see *infra*), the ideological and political fight for constitutionalism has been a constancy until 1866. At stake was the balance between the parliamentary regime, seen as the key political structure of the Romanian constitutionalism and the potential monarchical authoritarianism laying behind the unclear text of the Paris Convention. Uncertainty was an opportunity for the liberal political elite to perpetuate its pro-parliamentarianism convictions – even the constitutional project drawn up in 1859 by the Focșani Central Commission was strictly based on the accepted principles of the parliamentary regime – notwithstanding Prince Cuza's pretty badly masked appetite for authoritarianism. The representative government and the parliamentary regime were facing the limited (still authoritarian) monarchy. This time the ideological conflict has moved from the projects, petitions and proclamations into the modern Parliament established by the Paris Convention and did not stop when Prince Cuza installed his personal author-

itarian regime after the *coup d'état* of May 1864. In fact, the struggle against the monarchical authoritarianism was the cause of Cuza's abdication in 1866, making way for the full establishment of the parliamentary regime.

#### 2.1.5. *The years of parliamentarianism (1866-1938)*

The Romanian modern constitutionalism has gained its complete constitutional expression in the Constitution of 1866. It was the first constitutional act plenary expressing the Romanian external and internal sovereignty, although, formally, Romania was still under the Ottoman suzerainty. As pertinently remarked the Romanian scholars<sup>12</sup>, it was not the outcome of the overnight infusion of the Western liberalism but rather the result of decades of ideological sedimentation. Nonetheless, it was the outcome of the massive ideological and institutional influence of the western liberal constitutionalism.

This time, manifesting its national sovereignty, the Romanian people, through its deputies, neither asked for the understanding of the European powers any more, nor merely theoretically proclaimed its desires but it actually directly regulated its own political institutions in the frame of a constitution whose main designer it pretended to be. Anyway, the Constitution of 1866 was neither the original expression of the Romanian political culture nor of the Romanian constitutional culture. The constitutional transplant was at ease and this reality has marked the Constitution's destiny. The ideas and ideals were basically of

French origin but, spectacularly, the institutions were Belgian. Recently overcoming a regime extensively inspired by the French Second Empire's authoritarianism, the liberal and conservative political elite of 1866 was not influenced by the way the French people institutionalized their constitutionalism<sup>13</sup>. Instead, the Belgians, a small people with a relatively similar political destiny as the Romanians, with a huge appetite for freedom, have become the model to be followed. Thus, the Belgian Constitution of 1831 was the main institutional provider for the Romanian Constitution of 1866.

Designing a Constitution for the first time by itself, without being bothered by anybody, the Romanian elite has been tempted to primarily focus on the constitutional principles and values intimately expressing the Romanian constitutional identity. This is why, the large majority of the human rights imported from the Belgian constitution have been neglected in the Constitutional Assembly and the separation of powers – not inscribed in the constitutional text – was missing from the debates either<sup>14</sup>. The well prized parliamentary regime was partially institutionalized and only tangentially approached in the Assembly. Being probably satisfied by its regulation following the high Western standards of constitutionalism, the Romanian deputies forgot to question the valences of the dualist parliamentary regime transplanted from Belgium, especially the place and the role to be played by the young German Prince, Carol I. The demand of the Prince to be empowered with an absolute veto (while the initial project stipulated a relative veto) was not analyzed in the context of the historical necessity to limit the monarchical power.

Long debates have been dedicated to the unicameral structure of the Parliament, the place of the national religion – Christian orthodoxy – in the constitutional text, the freedom of expression and the ethnocentric understanding of nation and citizenship. While the unicameral Parliament was an old demand of the Romanian political elite in search of constitutional tradition and the orthodoxy a cultural value maltreated by Cuza's regime, the presence of ethnocentrism was rather puzzling. The past constitutional projects and proclamations were interested in a Romanian people not sanguinely, linguistically or religiously differentiated. Moreover, under the French revolutionary ideology influence, there had been an attempt to consecrate a political understanding of the nation. Now, the meeting of the Romanian nation with the Romanian national unitary state in the Constitution resulted in an intimate link between them, projecting the *ethnos* as the "ground zero" of the Romanian constitutionalism. In a country where the economic activities have been increasingly concentrated in the hands of a Jewish middle class, the ethnocentrism was Christian-centered, xenophobic and, symptomatically, anti-Semitic. Thus, the Romanian original constitutionalism entered into conflict with the Western constitutionalism.

Until 1938, the debates on constitutionalism were not only focused on the Romanian constitutional aspirations, but on the way the essentials of the constitutionalism, partially institutionalized, were working in the Romanian society. In this endeavor the Romanian legal-political elite was joined by the public law doctrine, as soon as law faculties began to function in Iasi (since 1864) and Bucharest (since 1859). Note-

worthy is the intellectual effervescence surrounding the way in which King Carol 1<sup>st</sup> manifested his constitutional powers. Symptomatically, at that time, there were no clear doctrinal patterns regarding the way the political elite and the public opinion would have been expected to understand the King's political attitudes. There were no clear at all the effective differences between the dualist and monist parliamentarianism or their political implications and there was not a consensus as to the kind of political regime the Constitution of 1866 has regulated. The opinions were divided, as some of them postulated an activist monarch (specific to the dualist parliamentarianism)<sup>15</sup> and others were adopting the dictum "*le roi règne mais il ne gouverne pas*" (typical to the monist parliamentarianism)<sup>16</sup>. At the end of the day, beyond any theoretical cannons, the perception of the role of the Romanian monarch was dictated by national and parochial interests. The preservation of the Romanian unitary state, the excellent image in Europe of the house of Hohenzollern-Sigmaringen and the partisan interest to get to the power pushed the Romanian political elite to sustain a moderate monarchical authoritarianism whose dimension gone beyond the accepted limits of the liberal constitutionalism and approached the Romanian monarchy to "*Deutsche Konstitutionalismus*". The central role played by the king remained a characteristic of the Romanian constitutionalism until 1938, facilitating the instauration of the royal dictatorship.

For the rest, the constitutional ethnocentrism has been ideologically perpetuated, even if the Constitution of 1923 seemed to have formally consecrated the political community (*demos*). In a new multiethnic

climate, installed after the 1<sup>st</sup> World War, the need to identify the Romanians with the ethnic Romanians was considerable. Anti-Semitism was still at stake, amplified by the European nationalist and fascist ideologies. Especially, Romanian ethnocentrism has gained particularity from the perpetual identification between ethnicity and Christian orthodoxy, aspect that gave the extremist "Iron Guard" its huge popularity in the period. Human rights, encapsulated in the substantial (not formal) ethnocentric citizenship, remained a theoretical subject, the huge illiterate majority of the Romanian peasant population being ignorant as regards its constitutional rights. The freedom of expression has sometimes heated the spirits but the main focus envisaged the political rights and the right to property. Closely linked to the quality of the Romanian democracy, the right (at the time obligation) to vote has triggered intense debates ending, in the interwar period, with the partial consecration of the universal vote (Constitution of 1923). On the other hand, the sensitive problem of the (land) property, systematically avoided even by the most fervent Romanian liberals (at their turn important landowners) made room, in the context of the 1<sup>st</sup> World War, to a more or less (forced) change in mentality. The property as a social function allowed a massive expropriation and distribution of land to the peasants after 1917.

#### 2.1.6. *The Fall of the Romanian Modern Constitutionalism (1938-1947)*

The modern liberal constitutionalism does not have a very long history in Romania.

Practically, it has never had a real consistency. Ideologically, it started to fall at the beginning of the 1930s.

The core of this process resided in the huge political magnitude conferred to the monarchical power. It is worth mentioning in this sense the important ideological turns occurred in the academic legal doctrine. It is relevant the opinion of a leading scholar, Paul Negulescu, who, while constantly preaching the inadequacy between the Romanian political culture and the constitutional values stipulated in the 1866 Constitution, proposed a political regime capable to fairly entrust the political control to an authoritarian king<sup>17</sup>. Due to their corrupt political mentality, it has been said, the Romanians are not made for constitutionalism and parliamentary regime, but for a strong centralized government in the framework of an administrative or authoritarian monarchy<sup>18</sup>. In a European political context dominated by authoritarianism and extremism, the "royal Constitution" of 1938 was meant to consecrate the weak capacity of the Romanian political class to cope with the demands of modern constitutionalism and parliamentary regime. The passage from constitutionalism to authoritarianism would have been nothing more than to sincerely undress the unfitting values and institutions of the western constitutionalism, borrowed from France and Belgium, and wear constitutional clothes appropriate for the Romanian needs and spirit. This attitude made way for all the intellectual frustrations which, since 1860s, condemned the Constitution of 1866 as being too large a cloth for the Romanian political mentality (see *infra*).

This perspective was largely embraced by the public opinion and became an offi-

cial dogma. Associated with the multiparty system, the parliamentary regime has been condemned. Infested with the "plague of the party politics" and dependent on the corrupt multiparty system, the Romanian parliamentary regime had to disappear. Programmatically, the legal banishment of the political parties (except the official one) has been accompanied with a strong appetite for political centralism. The separation of powers has been dissolved in the supremacy of the monarchical power and the parliamentary regime, as if it has ever existed, was replaced with the authoritarian (administrative) monarchy. The representative regime, based on the corporatist ideology, was only a juridical framework for a formal democracy where the state was prepared to confiscate the public space in favor of a unique political party (The National Rebirth Front) and its official ideology. In this context, the manipulated plebiscitary system, utilized after 1938, has legitimated the falsity of the electoral process and the appearance of democracy of the previous period.

Step by step, the core themes of the Romanian anti-constitutionalism, which has dominated the Romanian political life until 1989, have been ideologically installed: the confusion of powers, the suppression of the judicial independence and impartiality, the supreme role of the head of state, the refusal of multiparty system or the domination of the party-state (The National Rebirth Front, The Iron Guard), the cult of personality and the myth of the providential leader. Political monism, political centralism (going to extreme militarization in the years of the 2<sup>nd</sup> World War), the gathering of the nation around its leader, the aggressive ethnocentrism and even the suppression of the

constitution (1940), all these have been officially dedicated to the myth of the national state, to whose building has been in fact devoted the entire process of the Romanian political and social modernization<sup>19</sup>. Running away from constitutionalism meant “to give back” Romania to the Romanians and the properly organized state to the nation. The “state of siege” was the juridical argument formally invoked to justify this constitutional depression, thus manifesting the shortcomings of a constitutionalism which couldn’t manage to arrange its surviving in the case of extreme necessity. The short constitutional restoration between 1944 and 1947, before the long communist era, has done nothing more than to highlight the dramatic moments of the fall of the Romanian constitutionalism.

The theme of national salvation was redundantly coupled with the emblematic figure of the “savior” of the state and the cult of his personality. The theme of the savior was not quite brand new. Back in 1864, Cuza was “saving” the nation and the state threatened by dissolution. At his turn, Carol 1<sup>st</sup> has sincerely “saved” the nation and the state despite the internal political instability and external dangers. Nonetheless, 1938 and the following years have added to this trend a completely new magnitude of the phenomenon, harshly mediated and institutionalized. Carol 2<sup>nd</sup> was an official savior, Marshall Ion Antonescu proclaimed himself “The Leader (*Conducatorul*) of the State”<sup>20</sup> and Nicolae Ceaușescu will soon turn into a “new Messiah”.

Interestingly, all of them have in common a more or less explicit and ideologically elaborated distrust or contempt of the constitutionalism and mechanisms of parliamentary regime. Cuza invoked the un-

willingness and incapacity of the Romanian political elite of 1864 to follow the mechanisms of the parliamentary regime and appealed to a personal regime to modernize the state. Carol 1<sup>st</sup> was not an ideological fan of the parliamentary regime. On the contrary, the main solution he discovered to impose the political order in the Romanian society, marked by political instability and corruption, was the soft institutionalization of the authoritarian model of his predecessor. In the absence of the political possibilities to do that, he underpinned a political regime which was pretty far from the parliamentary regime’s parameters. The appearance of a parliamentary regime was the curtain behind which the modernization of the Romanian society could be realized and the state could function. For Carol 2<sup>nd</sup> and his intellectual entourage the failure of the Romanian multiparty system to cope with the parliamentary regime was the cause of all evils in the Romanian society<sup>21</sup>. It was common sense to eradicate the historical political parties, politicianism and political corruption for helping the Romanian state to be functional. Antonescu had at least the excuse of the war. As to the communists, they’d have ideological resources to condemn all the above.

As long as the state and its savior have been prized in the period 1938-1944, the citizen was de-individualized and mixed in an abstract professional solidarity devoted to the state’s reproduction and based on the traditional ethnocentrism and anti-Semitism. Article 27 of the 1938 Constitution is more than relevant:

Only the Romanian citizens are admissible in the public offices, civil and military, *taking into consideration the majoritarian and state-creator character of the Romanian nation.*

In this context, extreme ethnocentrism and nationalism led to extreme political attitudes, as the Romanian government of the years 1940-1944 joined Nazi Germany in undertaking the Holocaust. At their turn, far from being spoiled, ethnic Romanians knew an important restriction of their constitutional liberties justified by the same "state of emergency"<sup>22</sup>.

### 2.1.7. *Communist Anti-constitutionalism (1948-1989)*

Massively influenced by the Soviet constitutional ideology, the communist constitutions of 1948, 1952 and 1965 left behind the values of the liberal constitutionalism. Being far from organically assimilating the essentials of the liberal constitutionalism yet, the Romanian society was forced to face the ones of the Soviet constitutionalism. The Western constitutional models, freely chosen by the Romanian political elite, were replaced by the Soviet constitutional model, imposed by the conqueror. Thus, the sovereignty of the nation was replaced with the "real popular sovereignty", the representative mandate with the imperative one and the separation of powers by the unity of the state power; political pluralism made room for the leading role of the Communist Party; the administrative decentralization was substituted by "democratic centralism" and the rule of law by the "popular legality"; finally, the formal consecration of the human rights was replaced by the "material guaranteeing" of them. In both cases, the Romanians faced an inorganically elaborated constitutional ideology. Yet, the values of the Western

liberal constitutionalism have been intellectually assimilated over decades by the large part of the Romanian political elite. In contrast, the Soviet constitutionalism leaked into the underground ideological world of the Romanian communism only in the interwar period. However puzzling and foreign the liberal constitutionalism would have been for the Romanian society, it was barely comparable with the shock the overnight established Soviet constitutional order provoked in the Romanian society. Backed by the Soviet army tanks, Soviet constitutionalism was as aggressive as necessary to conquer ideological positions in a country with poor intellectual appetite for the political left.

However, as strange as it was for the Romanian society, the Soviet constitutionalism was no less ideologically displayed as perfectly fitting its necessities and peculiarities. Interestingly, the anti-bourgeoisie discourse, claiming the falsity of the liberal constitutionalism, was backed in the Romanian case by a real falsity of the parliamentary regime. In fact, being imported and ideologically handled by the Romanian political elite of the moment, it couldn't have been something else than a foreign corpus meant to irritate the Romanian culture. An important cultural engineering was expected but this time it was done with the instruments of terror.

Accordingly, the modern Constitution, a written juridical space originally meant to limit the political power and protect the citizen from its abuses, had been reconfigured as a formal juridical act endowed with supremacy meant to legitimate the new social and political order based on: the building of the "socialist society", liquidation of "man by man exploitation", the policy

of “peace and friendship” with the Soviet Union, the leading role of the Communist Party (1952). The omnipresence and omnipotence of the Communist Party rendered obsolete the multiparty system and the separation of powers. In the same time, the national sovereignty was replaced by a restrained popular sovereignty and, thus, changing the mechanisms of political representation.

All these ideologically preceded the long totalitarian communist period, when the same effective disregard of human rights was covered by the generous philosophy of “popular democracy” as a “form of “proletariat’s dictatorship”. Under the mask of “class fight”, the communist state practiced the same expurgation of its citizens, the bourgeois liberal space being replaced with the ideologically standardized one of Marxism-Leninism. The class solidarity or “collaboration between workers and peasants” postulated more the principle of equality than of liberty. The “new communist citizen” was supposed to be more equal than free. Not accidentally, the negative rights were overshadowed by an extended package of social (positive) rights. Private property, the core of the liberal human rights, was compelled to make room for the socialist collective property.

The apparent ethnic-free ideology preaching the friendship between the “exploited classes” – workers and peasants – has finally failed, during the dictatorship of Ceausescu, when the theme of nationalism was dramatically recurrent and the communist ethnocentrism resumed the tradition of the past ethnocentric constitutionalism.

#### 2.1.8. Preliminary ideological “balance sheet”

Ideologically, the Romanian modern constitutionalism has been marked by:

- A continuous programmatic attitude against the monarchical authoritarianism;
- Limitation of the (monarchical) power was supposed to be realized, declaratively, through the postulation of human rights and the separation of powers, without any clear interest for the constitutional mechanisms of human rights protection and the mechanisms of *checks and balances*;
- Representative government was poorly endowed with democratic value, the censitary suffrage being appreciated for decades as the most efficient solution for a significantly illiterate and politically immature society;
- The parliamentary regime was largely considered as the ideal expression of a representative government;
- The Romanian nation has constantly been identified with the Romanian ethnicity, as an expression of the Romanian people’s fight for liberty, independence and identity.

On the other hand, ideological attitudes against the principles of modern constitutionalism had been manifest:

- A rhetoric which put the building and protection of the national unitary state above all other political values and, moreover, above the citizen;
- The parliamentary regime had to be erased if it endangered the well-functioning and modernization of the state;
- The corrupt Romanian political men-

tality and the eternal partisan conflict between the political factions have been invoked in favor of a centralized authoritarian regime more suitable to assure the functionality of the Romanian state.

## 2.2. *From Constitutional Text to Constitutional Life*

The Romanian constitutional architecting process was an awkward endeavor both institutionally and practically. On the one hand, the constitutional modernization has not always been an internal Romanian affair in the 19<sup>th</sup> and 20<sup>th</sup> centuries. The first half of the 19<sup>th</sup> century has been dominated by the ongoing design of a Romanian constitutional agenda by some of the main European powers, e.g. Ottoman and Russian empires. The Organic Regulations of 1831/1832 (written under the Russian occupation) and the Paris Convention of 1858 are the most relevant constitutional acts of the period, allowing the political passage from the two distinct Romanian principalities – Wallachia and Moldova – to the Romanian unitary state of 1862. In the 20<sup>th</sup> century, the communist constitutions of 1948 and 1952 mark a new episode of constitutional imperialism, this time under the pressure of the Soviet Union. On the other hand, the Romanian-origin constitutionalism has been overshadowed by the important discrepancy between the institutional constitutional architecture and the effective constitutional life.

Basically, this situation was due not only to the massive constitutional import but also to the inner peculiar cultural context of the Romanian society. Regularly, the

constitutional principles and values ideologically acquired have not been followed by constitutional practices. Constitutionally and politically, the Romanian balance sheet was rather negative. Generally, from 1830 to 1989, the Romanian constitutional life has been dominated by more or less aggressive and negative authoritarian or dictatorial regimes.

### 2.2.1. *The Organic Regulations (1831/1832 - 1858)*

The two Organic Regulations have come into force in each of the Romanian Principalities – 1831 in Wallachia and 1832 in Moldova – following an international compromise between Russia and Turkey, settled down in the Treaty of Adrianopol/Edirne (1829), as regards their statute and internal political organization. Despite being drafted by two aristocratic Romanian commissions, OR were rather the work of the Russians, imposing their peculiar vision over the institutional arrangements in the Romanian Principalities. Paying limited attention to the numerous Romanian aristocratic reform proposals of the period, they gained no less limited legitimation in the eyes of the Romanian political elite. This is why, over decades they haven't been considered genuine Romanian constitutional acts. Nonetheless, for a relatively long period of time (until 1858) they played a regulatory role for the organization of the political power and for how it was expected to be exercised in the Romanian society<sup>23</sup>.

What would surprise any analyst of the Regulations would be the strange intermingle between the principles of the mod-

ern constitutionalism and the conservative-feudal ones. The reformatory vision of the Romanian aristocracy, configured by the Russian interests, had finally lead to a political structure of the state which not only was sketching some of the general coordinates of the modern constitutionalism (still, human rights were missing from the picture) but also has perpetuated monarchical powers pretty close to the ones belonging, in the past, to the phanariot princes. The very first constitutional regulation of the separation of powers was rather formal as, due to his effective powers, the Prince (*Domnul*) had become the central organ of the state. The unicameral Assembly (*Obișnuita Adunare Obștească*) elected on aristocratic bases, was rather a consultative organ of the Prince than a modern Parliament. The aristocratic attempt to limit the monarchical power has thus failed, in a constitutional design fairly accused for its neo-absolutism.

Notwithstanding, the preservation of the oriental type of monarchical absolutism, despite the façade of the separation of powers<sup>24</sup>, even if they didn't replace the old feudal society with a liberal one, only touching up the existing organization, giving privileges without creating liberties<sup>25</sup>, although they have completely enslaved the Romanian Principalities to Russia, practically transforming them in Russian provinces, even if they were a despotic, authoritarian, aristocratic, anti-French and fully a Russian work<sup>26</sup>, OR represented a first step toward a rationally organized state activity<sup>27</sup>. In the same time, the interest of the Russian Empire for a balanced political life in the Romanian Principalities led, paradoxically, to the manifestation of some weak features of the parliamentary

regime. Being endowed with considerable power and permanently oscillating between an enlightened and a despotic absolutism, the Romanian princes was not allowed by the Russians to abuse their power to dissolve the Assembly. Moreover, for keeping the political equilibrium, the Prince himself sometimes appointed ministers among the aristocrats agreed by the Assembly. In the same time, even if the ministers were only completely politically irresponsible officers of the prince, there have been cases where the Assembly directly rendered them liable and cases where they took political and legislative initiatives before the Assembly without the consent of the Prince. Thus, there had been timidly delineated a two-headed executive (executive and prince), typical to the dualist parliamentary regime<sup>28</sup>. Despite these evolutions, the political life in the Romanian Principalities was pretty far from the coordinates of modern constitutionalism and the parliamentary regime had to follow a long and difficult road in the next decades before somehow working its way into the Romanian society.

#### 2.2.2. *The Paris Convention of 1858 and its Additional Statute of 1864*

The Paris Convention of 1858 created a constitutional architecture of the Romanian Principalities as a strange intermingles between the principles of modern constitutionalism and the neo-absolutism disguised in the Organic Regulations. It consecrated a European perspective over the internal organization of the Romanian Principalities taking sporadically into con-

sideration the Romanian wishes expressed in the Ad-Hoc Assemblies, as long as they fitted with the political interests of the European powers. The appetite for constitutionalism of the Romanians gathered in the Ad-Hoc Assemblies had no chance to be materialized as the text of the Paris Convention has been bargained by the not very addicted to liberal constitutionalism European powers. Turkey, Russia and Austria were sticking to the authoritarian Organic Regulations. Significantly, the considerable French impact over the Convention was also responsible for the authoritarian flavor of the constitutional act, as the influence of the French Constitution of 1852 may be detected in many aspects.

In this context, the presence in the Paris Convention of some modern constitutionalism's essentials i.e. constitutional monarchy, representative government, separation of powers, (juridical) responsibility of the ministers, immovability of the judiciary, stipulation of a minimal package of human rights, represents more a façade, without any functional impact, in a constitutional architecture devoid of the compulsory mechanisms of *checks and balances* between the executive and legislative. Thus, any appearance of a parliamentary regime timidly developed in the years of OR and the intense demands for parliamentarianism expressed by the Romanians had been suppressed by the interests of the European powers to design a Romanian monarch after the image and likeness of the Organic Regulations. The recovery of some important features of the neo-absolutist monarchy designed by the OR has theoretically hampered the chance for a "face-to-face" between executive and legislative, where the two powers to be endowed with effi-

cient constitutional means of reciprocal action allowing each one to determine the existence of the other. Instead, a monarch (elected for life and) endowed with the legislative initiative, actively leading the governmental activity – being neither irresponsible nor juridically or politically responsible –, helped by ministers politically responsible exclusively towards him, endowed with the power to dissolve the Assembly and with an absolute veto was facing a unicameral legislative (*Adunarea electivă*) devoid of legislative initiative and the power to render the ministers politically liable<sup>29</sup>. The Central Commission of Focsani, a common institution of the (still) two Romanian Principalities was too weak – due to its way of recruitment and its constitutional powers – to set the balance between the executive and legislative<sup>30</sup>.

Fortunately, the European powers were too sensitive in keeping the fragile political balance between them as to obsessively stick to the text of the Paris Convention. Consequently, the Romanians had the enormous chance to acquire their national expectations, by gradually building, between 1859 and 1862, the Romanian national unitary state. In the same time, the considerable ideological popularity of the parliamentary regime pushed the Romanian political life towards these political coordinates, despite the authoritarian character of the Paris Convention. Prince Cuza himself had to cope with this intellectual trend at the beginning of his reign, despite his appetite for a strong monarchy. Therefore, until 1864, Prince Cuza preferred to leave the heavy burden of governance on the ministers' shoulders, fueling the hope that the principle "*le roi règne mais il ne gouverne pas*" could become a political reality

in Romania. In this context, public voices have been heard preaching the correlated principle of the prince's irresponsibility (totally ignored by the Convention's text).

Unfortunately, practicing the parliamentarianism meant the obstruction of the modernization schedule envisaged by the Prince and his liberal-reformist cabinets, due to a Parliament dominated by conservative aristocrats, mainly landowners, elected through a very high wealth census. Having entered the era of modernization and partial democratization, the Romanian political life started to discover the disadvantages of the multiparty system, early manifesting itself rather as a game of interest groups than as a political fight for the national interest. Political instability has grown as a consequence of Cuza's preference for moderate liberal cabinets which were far from reflecting the important conservative majority. Instead, Cuza regularly accepted the dismissal of his cabinets by the Parliament, consolidating the principle of the cabinet's solidary political responsibility towards the legislative. In the same time, even if the Prince repeatedly appealed to his constitutional absolute veto, he refrained himself from dissolving the conservative Parliament, throwing the executive and legislative into a continuously negative functional parallelism. On the other hand, he wouldn't have had a real alternative, as the high wealth census would have brought on the Parliament's benches the same conservative deputies. Political crisis couldn't last forever, it needed to be extirpated from its constitutional roots. This should have been done, in Cuza's vision, not only through the electoral reform, allowing a large liberal middle class to enter the Parliament, but also through

a radical constitutional revision meant to increase Prince's powers and turning the Parliament in a humble annex of him. This meant authoritarianism. For this end, he gave the *coup d'état* of 1864<sup>31</sup>.

At this point, we come to the reason of this pretty detailed outline of the Convention's life. This political moment was crucial for the fate of Romanian constitutionalism. The Paris Convention of 1858 imposed the existence of two Romanian Principalities each having a different monarch. Romanians succeeded in electing the same Prince for both of them and finally in obtaining the international recognition of one national unitary state named Romania, in 1862. The Paris Convention did not encourage the parliamentary regime but the Romanians have tried to practice it, as an expression of their belief in the chance to limit the monarchical power. Unfortunately, a totally disadvantageous electoral system has promoted a conservative Parliament full of self-interested landowners and the necessary liberal reforms couldn't be done. Why Prince Cuza has chosen the monarchical authoritarianism to cope with this crisis? Nobody from abroad was pushing the Romanian political life in this direction. Having agreed that the *coup d'état* was a necessity, one could ask whether the Romanian constitutionalism would have benefited more from it by reinforcing the mechanisms of the parliamentary regime. All the Prince should have done was to widen the access to the Parliament. The posterity has absolved Cuza by invoking the urgency of consolidating and modernizing the young Romanian unitary state. But this perspective did legitimate the idea that the national interest is more important than the means to protect it. If the first attempt

to seriously practice the imported parliamentary regime was a failure, it was superfluous to spend time in order to fix it. It was more efficient to eliminate it from the political equation and replace it with a more adequate political mechanism.

On the other hand, one must not forget Cuza's personal appetite for authoritarianism. As a constant and faithful admirer of Napoleon III, he was not an admirer of the parliamentary regime. Not surprisingly, the foreign constitutional model for his Additional Statute of the Paris Convention was the French Constitution of 1852. Consequently, the new constitutional architecture was residually keeping the separation of powers but considerably consolidating the control of the Prince over the Parliament. Inaugurating the Romanian bicameralism, the newborn Senate (*Corpul ponderator*) has become, following its French model, the "Trojan horse" of the Prince inside the Parliament, due to the essential role played by the head of state in the recruitment of its members. The Senate's main use was to check the activity of the Elective Assembly by means of an *a priori* "constitutional review" of its adopted legislative acts. In the same time, the French-origin State Council, through its important legislative powers has become, under Cuza's control, the main legislative drafter of the state. Thus, the monarch had the power to initiate any legislative project he wanted, as president of the State Council he could supervise the drafting process, he had the power to block the legislative project in the Senate, if necessary, on the grounds of unconstitutionality, and finally, to refuse the sanctioning by using his veto. In this context, the consolidation of democracy, underpinned by a more flex-

ible censitary vote was undermined by the mechanism of the manipulated plebiscite.

Worriedly, the reign of the Prince Cuza has proven that the modernization of the Romanian state and society could be done not in the context but only against the constitutionalism and the parliamentary regime. The history must somehow give him justice: like Napoleon I, Cuza has succeeded to endow, after 1864, the Romanian state and society with modern reforms, in all fields of activity. Nonetheless, his political gestures have given a strong blow to the parliamentary regime.

### 2.2.3. *The Democratic Constitutions (1866 and 1923)*

The year 1866 brought into the Romanian constitutional life the first Romanian Constitution. Drafted in a really delicate international climate, menacing to end the existence of the young Romanian unitary state – recognized only during the reign of the Prince Cuza – the Constitution of 1866 was the expression of a people eager to become free from its undesired international bounds and capable of constitutional self-expression. Being designed by Romanian liberals, it was a manifestation of sovereignty (the constitutional text is silent about the ottoman suzerainty) and wanted to be a manifestation of Romanian constitutional identity. After decades when the Romanian constitutional order has been established from abroad, the Romanian political elite was ready to inscribe in the constitution the national constitutional values and principles. Many of them were already discussed and programmatical-

ly postulated in different reform projects, waiting for their formal-juridical consecration.

Since the constitutional values and principles were imported, assimilated and domesticated during decades, constitutional institutions and architecture have been regularly found in the most popular constitutional models of the day. Expectedly, the Romanian Constitution of 1866 was the result of a massive constitutional transplant. Intensively used by the Focșani Central Commission for its constitutional draft of 1859, the text of the Belgian Constitution of 1831 was the main inspirer of the 1866 Romanian Constitution. Having the prestige of the foreign constitutional model as the main cause of the constitutional transplant and the necessity to urgently consolidate the young Romanian unitary national state as the ultimate reason, the Constitution of 1866 was meant to meet the expectation of independence, freedom and constitutionalism of the Romanian political elite.

The outcome was a constitutional text which was trying to combine, on the one side, institutional tradition with institutional innovation and, on the other side, a peculiar Romanian angle of understanding constitutionalism with the (already) quasi-universally recognized values of modern constitutionalism. The regulation of the foreign (German origin) dynasty successfully consecrated the wishes of the Romanian political elite and the first-born right to inherit the throne essentially contributed to the clarification of the succession line to the Romanian crown. The constitutional, foreign and hereditary monarchy was far from being traditional but was voluntary and rationally accepted as an inevitable

necessity for constitutional and political modernization. On the other hand, prestige was a cause of irrationally giving up to some other traditional institutions: the bicameral Parliament has been regulated despite its compromising by Cuza's authoritarian regime and the Romanian unicameral tradition.

The Constitution consecrated the values of the modern constitutionalism cherished by the Romanian political elite: sovereignty of the nation, representative government, human rights, the constitution as a paramount law, separation of powers, limited government, juridical responsibility and accountability of government, judicial independence and impartiality and the amending power of the people (through its deputies). Instead, it was containing nothing clear about the parliamentary regime and its peculiar mechanisms of *checks and balances*. By importing from the Belgian Constitution without improving, the Romanians gained the same evasive constitutional provisions about the political regime. The monarch was irresponsible but the text was silent on the political responsibility of the cabinet against the Parliament; the monarch had the power to dissolve the Parliament but the text said nothing about the power of the Parliament to dismiss the cabinet. Moreover, the institution of the cabinet was not expressly regulated. The attention was thus concentrated on the monarch: what would be his constitutional position and his effective power?!

The constitutional text was pretty confusing, as some of its provisions would have perfectly fitted also into a Constitution or Charter regulating the limited monarchy. The principle "*le roi règne mais il ne gouverne pas*" (consecrating the monist parliamen-

tary regime) was an implicitly possible key to understanding the constitutional text but, in the same time, the same text could have been rightfully understood in the still widespread terms of the dualist parliamentary regime. The difference was quite important: on the one hand the king would have been a passive member of the executive, letting the burden of governing on the cabinet's shoulders, on the other hand the king would have been an active member of the executive, sharing the burden of governing with the cabinet. The important constitutional powers of the Romanian monarch would give more justification to the last alternative. Thus, the clarification of the political regime to be followed has been left to the constitutional practice.

The effective constitutional life during the long reign (1866-1914) of Prince Carol 1<sup>st</sup> (King from 1881) was far from evolving in the direction of a monist parliamentary regime but, in the same time, was also pretty far from manifesting as a dualist parliamentary regime. Being intensively active in the field of the foreign and military policies and taking a permanent political control over his cabinets, using or menacing to use his absolute veto in order to control the legislative production of the parliament, King Carol 1<sup>st</sup> has become "the master of the [state] institutions". Far from becoming the neutral power cherished by Benjamin Constant, the King took the central place in the constitutional architecture and acted as the conductor of the Romanian political life. Educated in Germany, he was not a supporter of the parliamentary regime and even less a fighter for the human rights. On the contrary, he was an adept of an authoritarian way of governing, as he let to be understood in his first years of reign<sup>32</sup>.

Nonetheless, he was an honest man. This is why, at the beginning, he tried to stick to the parliamentary regime's mechanisms, thus meeting the expectations of the majority of the Romanian political elite. But the frequent dismissal of the cabinets by the Parliament and the extreme political instability lead the monarch to tolerate and even to encourage the appearance of some constitutional practices which, while giving a strong blow to the Romanian constitutionalism and parliamentary regime, have brought political stability. Failing to revise the 1866 Constitution in order to formally consecrate the authoritarian regime, the King has appealed to informal mechanisms to gain political control. Carol 1<sup>st</sup> has started to alternate to the power, more or less arbitrarily, the main political parties of the period – Conservative and Liberal –, trying to artificially recreate in Romania the British two-party system. When the king considered properly, he was dismissing the cabinet and was offering the power to the political party in opposition. In the same time, in order to ensure a parliamentary majority to the new cabinet, he was dissolving the bicameral Parliament dominated by deputies supporting the former cabinet. By an extreme control of the local administrative apparatus and manipulation of the elections, the new cabinet was always succeeded in sending in the Parliament an important majority. Thereafter, by a strict control over the parliament, the cabinet was applying its own or the King's political agenda<sup>33</sup>.

This political process overshadowed and finally compromised the birth of the Romanian modern constitutionalism in the 19<sup>th</sup> century and at the beginning of the 20<sup>th</sup> century. The concrete mechanisms

of *checks and balances* were missing, failing their mission to limit the monarchical power, the executive has become omnipotent and the Parliament – despite the continuous democratic input – has become an instrument in the hands of the cabinet. Above all, the King actively manipulated the strings of the political power. The political regime distanced from the coordinates of the parliamentarianism and manifested rather at the latitude of a limited monarchy endowed with an (moderate) authoritarian monarch<sup>34</sup>. Moreover, all these happened in a country where, despite some timid positive evolutions, human rights were far from the minds of the huge illiterate mass of peasants.

Nonetheless, at least at the formal-judicial level, the positive constitutional evolution didn't miss the picture. The electoral reform of 1884, through the lowering of the electoral census, announced the universal (masculine only) vote consecrated in 1917 and in the new Constitution of 1923. The important peasants' uprising of 1907 determined the constitutional reform of 1917, allowing huge land expropriations. The famous Tramways trial of 1912 has organically gave birth to an *a posteriori* constitutional review exercised that time by a county court and formally entrusted to the High Court by the Constitution of 1923.

Unfortunately, the Constitution of the Great Romania (1923), despite the mythical approach of its text and practices by the generations of historians after 1989, was not an incentive for a fully democratic life. Practically, it has remained just a splendid constitutional text fully endowed with the last acquisitions of the modern constitutionalism in a political and constitutional context stigmatized by the insufficiencies

of the reign of Carol 1<sup>st</sup>. Although the constitutional provisions were clear this time about the institution of the Cabinet (*Consiliul de miniștri*), they were still silent about its solidary political responsibility against the parliament. The monarch was as formally powerful as the Constitution of 1866 made him in the past and the mechanisms of the parliamentary regime, doctrinally and rhetorically still at stake, were to be find out in the Romanian constitutional tradition.

But the constitutional traditions coming from the Old Romanian Kingdom (1866-1918) were far from being favorable to the parliamentary regime. Old negative constitutional and political habits survived the 1<sup>st</sup> World War and the building of the Great Romania in 1918 irrefutably marked the interwar Romanian constitutional life. The core of the political life was centered on the chiefs of the political parties, getting usually the position of the prime minister and, after 1930, on the authoritarian monarch Carol 2<sup>nd</sup>. The appearance of a parliamentary democratic regime was underpinned by the universal (masculine) vote, the intense debates in the Parliament and the necessary support of the parliamentary majority for the cabinet. But the reality was different. The explosion of the multiparty system after the 1<sup>st</sup> World War left behind the obsession for the two-party system but the mechanisms of getting to the power were the same: the King regularly had the central role in calling a political party to the power, the dissolution of the Parliament followed immediately and the new cabinet gained a huge majority in the new parliament. Despite the increasing number of the electorate and the numerous political parties, the elections were always (except in

1937) manipulated. To the strong pressures exercised by the government through the public administration have been constantly added the high rate of analphabetism, the important mass of the people always voting with the government's candidates ("governmental dowry"<sup>35</sup>) and an electoral law of 1926 allowing a bonus of 50% of the parliament's seats to the political party having gained 40% of the votes. It was easy to obtain by force and moral pressures 40% in order to obtain the absolute majority in the parliament.

As a consequence, the preeminence of the Executive over the Parliament was still considerable and on an ascendant trend<sup>36</sup>. The governmental agenda was fulfilled usually ignoring the Parliament by avoiding the debates in the legislative or constantly appealing to the emergency ordinances. A Parliament continuously preoccupied by the conflicts between the political fractions inside the majority or the minority, a weak opposition, empty rhetoric and personal interests was not very hard to control. In the same time, in order to maintain its authority, the Executive frequently declared the "state of siege", which allowed it not only to pass exceptional legislation but also to restrain human rights. Above all, the King Carol II was making and unmaking cabinets, he authoritatively influenced the governmental agenda and was doing pressures over the Parliament. In an internal context marked by the corruption and instability of the political life, falsity of the political elite, increasing extremist manifestations on the right and an external context where the democracy and parliamentarianism were condemned, the authoritarian attitude of the monarch was prized and ideologically exploited as the only alternative for Romania.

As a conclusion, it is not necessary worth to say that the Romanian parliamentary regime and fight against the monarchical power failed in the above discussed period. The parliamentary regime apparently existed (*see infra*) and the kings have constantly been the center of the political life. Instead it is very important to bear in mind the cause of this failure: both the kings Carol 1<sup>st</sup> and Carol 2<sup>nd</sup> considered, in different contexts and manners, that the Romanian political culture and societal specificity was not favorable to the economic and social modernization in the presence of the parliamentary regime. Carol 1<sup>st</sup> has given it a façade existence and Carol 2<sup>nd</sup> formally extirpated it from the constitution.

#### 2.2.4. *The Right-Hand Dictatorial Regimes (1938-1944)*

The royal "*coup d'état*" of February 1938 brought to an end the 72 years of Romanian pseudo-parliamentary democracy. The "new era" of the Romanians freshly started, was to be achieved through a new constitutional architecture meant to fix the political mistakes of the past, identified with the parliamentary regime and the dirty electoral arrangements of the political parties. Consequently, these ones should have been forbidden. The new political regime was ideologically based on the "salvation" of the Romanian nation, accordingly the new Romanian Constitution should have regulated a Savior empowered with necessary powers to fulfill the work of regeneration and promotion of "the country's permanent interests".

The new plebiscitary Constitution of 1938 proclaimed the "constitutional mon-

archy” as form of government but it was setting apart the values of the liberal constitutionalism. The concept “constitutional” was related to the constitutional powers of the monarch and their constitutional limits. But the constitutional text was far from intending to limit the monarchical power. Furthermore, by eliminating the *checks and balances* between the executive and legislative, the constitutional powers of the King were considerably enhanced. Thus, by giving up the separation of powers principle, the Constitution was concentrating all the political power in the hands of the monarch – formally entitled “*the head of the state*”-, recreating an institutional design akin to the limited monarchy regulated through the Paris Convention of 1858 and its Developing Statute.

Interestingly, the Constitution of 1938 was meant to be the first Romanian constitution to meet the real needs and the true peculiarities of the Romanian culture. As the parliamentary regime and democracy were merely appearances, manifesting a complete incongruence between the imported constitutional ideology and institutions and the constitutional life, the authoritarian monarchy was supposed to be the only system of government fitting the Romanian expectations for modernity. Consequently, the Constitution consecrated the sovereignty of the nation but the King became the holder of both executive power (exercised through a cabinet politically responsible only before the King) and legislative power (exercised through the bicameral Parliament). The political parties being dissolved, the parliamentary regime became history. Even if the principle of king’s irresponsibility and inviolability was consecrated, the principle “*le roi regne*

*mais il ne gouverne pas*” disappeared. Getting the power to designate the Cabinet and getting it politically responsible, the King has become actively involved in the governmental agenda, confirming rather the principle “*the king both reigns and governs*”.

The political regime swung between monarchical authoritarianism, as public ideology, and its implied totalitarian consequences. Legislating by decrees-law was highlighting the concentration of power in the hands of the monarch and his cabinet and the consecration of the National Rebirth Front as the only political party has confiscated the state and intended to control the individual’s minds. The perpetual “state of siege” has given to the strong and militarized executive the constitutional instruments against constitutionalism. Human rights, especially freedom of association and freedom of expression, have been seriously affected. Moreover, by continuing the 19<sup>th</sup> century tendency to subdue the human individual to the superior interests of the community he/she belongs, the Constitution of 1938 made the love for the country and the sacrifice for its existence the ultimate duty for all Romanian citizens, generally, and for the Romanian ethnic group, especially. The terror was imposed by a new incriminatory system getting the freshly reactivated death penalty as its core.

The authoritarian regime succeeded, more or less declaratively, to be the opposite of what the parliamentary regime was: the corrupt multiparty system has been replaced with the unique party totalitarian system; politicianism and the fight for personal interests were replaced with the centralized «love» for national interests; the selfish individual never-accomplished-to-be citizen has been replaced

with the fully-dedicated-to-the-nation-cause and ready-to-be-sacrificed-citizen; the falsity and wildness of the elections in the multiparty system was replaced by the «correctness and civilized recruitment» in the corporatist system; the futile political rhetoric in the Parliament was replaced with the «dedicated sobriety» of the non-politically enrolled deputies.

After the abdication of King Carol 2<sup>nd</sup> (September 1940), the dictatorial regime of Marshall Ion Antonescu removed any trace of liberal constitutionalism which the Constitution of 1938 would have kept. Freshly a victim of the territorial demands of its neighbors and threatened by the German occupation, Romania resumed the philosophy of the “country’s savior” – a providential man, authoritarian and endowed with sufficient will and power to sacrifice himself in order to regain the Romanians’ dignity. This one has been discovered in the person of Ion Antonescu. Assuming the philosophy of *Fuehrerprinzip*, the dictatorship was, as Antonescu declared, a “new regime”<sup>37</sup>. This time, the novelty resided in the hardened fight against the constitution and constitutionalism: the Constitution of 1938 was suspended (5<sup>th</sup> of September 1940), the Parliament was dissolved, the pro-fascist «Iron Guard» was recognized as the only political force (until 1941); the monarchy was formally maintained but the young King Mihai 1<sup>st</sup> (crowned in 1940) was completely shadowed by the providential leader Antonescu. By way of decrees-law, Antonescu was fully empowered to govern whereas the King’s powers were dramatically reduced, as he was supposed to play a more decorative role. The King no more passively or actively controlled the govern-

ment. This time, “*the King neither reigns nor governs*”. Cumulating the title of “State’s leader” and the function of Prime Minister, Antonescu was, until his arrest in 1944, the supreme legislator and executive in the state.

The political regime of Antonescu was officially dictatorial, anti-liberal, against the political parties (after giving up the collaboration with the Iron Guard), anti-individualist, anti-Semitic, corporatist, plebiscitarian and nationalist. Looking for legitimacy, it was considered as perfectly fitting the Romanian standards of constitutional life during the 2<sup>nd</sup> World War and, in the same time, as perfectly compatible with the authoritarian regimes dominating Europe. But this wasn’t just a suspension of liberal constitutionalism. It was the end of it.

As a conclusion, it must be retained the important role played by this period in the fall of the Romanian constitutionalism. This one was not extirpated by the Soviet troupes and ideology in 1945 as many would be tempted to believe. It was already finished from within when the communists have gained the power. Communists have not annihilated a glorious and well-functioning parliamentary regime but rather gave the deathly blow to a completely sick political regime. They did nothing else than to build on its ruins.

#### 2.2.5. *The Communist Constitutions (1948, 1952, 1965)*

The arrest of Marshal Antonescu of August 23<sup>rd</sup> 1944 brought to an end the right-hand dictatorships and gave hope to those believ-

ing in the restoration of the constitutional monarchy. By the decree-law no. 1626 from 31<sup>st</sup> of August 1944, the main pillars of the modern constitutionalism were rebuilt: human rights, as they have been regulated by the 1866 Constitution, and the separation of powers, as it was regulated by the 1923 Constitution. The mentioned decree was reinstating the constitutional monarchy and was creating the constitutional premises to recovering the mechanisms of the parliamentary regime. Unfortunately, the presence of the Soviet army on the Romanian territory and the massive political support provided by Moscow to the Romanian Communist Party led the political life towards the instauration of the communist dictatorship. The communist cabinet of Petru Groza, brought in power with the Soviet support, created the premises for the effective extinguishment of the parliamentary democracy in Romania. After the fabricated elections of November 1946, the communists won an important majority in the parliament, the "historical" political parties have been dissolved in the summer of 1947, the King Mihai 1<sup>st</sup> has been obliged to abdicate and, finally, the Republic has been proclaimed on December 30<sup>th</sup> 1947.

The political work being done, the constitutional work was expected to follow. Basically, the Belgian constitutional model of 1831 has been replaced by the Soviet constitutional model of 1936. The communist Romanian Constitutions of 1948 and 1952 were designed respecting the institutional coordinates of the Soviet's one. The separation of powers and the system of *checks and balances* becoming obsolete, the architecture of the unique state power included a hierarchy of organs having on top the Great National Assembly (*Marea Adunare*

*Natională*). Being endowed with important powers, the GNA was supposed to act as a unicameral Parliament headed by a collective Presidium. Following the increasing importance of the later, it was transformed in the Council of State in 1961. Technically, the distinction between the legislative and executive was not suppressed but, this time, there was a strict political subordination of the executive (*Consiliul de Miniștri*) towards the legislative, the latter being politically responsible only directly to the people. Beyond self-dissolution (1948), no other constitutional instrument or organ existed in order to limit the power of this super-organ. A careful distribution of competences between the legislative and executive/administrative was completed by a detailed distinction between the central and local organs of the state's power: the popular councils. In the very spirit of totalitarianism, the institutional structure of the state was doubled with one of the Communist Party and ideologically coagulated by the official political dogma.

The 1965 Constitution, designed in the context of Nicolae Ceaușescu's ascension to the power, marked the passage from the Popular Republic to the Socialist Republic. The ideological bounce, trying to reflect a change in the quality of the Romanian communism, was followed by a new constitutional architecture. Beyond appearances, the new state structure was meant to express Ceaușescu's strong political influence, as Secretary General of the Romanian Communist Party. The institution of the President was created, by a constitutional revision, in 1974, in order to constitutionally reflect the personalization of the power. Being indirectly elected by the GNA and endowed with important powers, tak-

ing also the presidency of the State Council, Ceaușescu has become the head of a factual absolute monarchy. Any constitutional attempt to assure the supremacy of the constitution – like the *a priori* constitutional review – or to limit the presidential power – like presidential political responsibility against the GNA – have remained mere words in the constitutional text.

Lacking the limiting mechanisms of the power, it didn't take very long for the abuse to show up. Practically, the proletariat's dictatorship has turned the Romanian political regime into a totalitarian space, gradually endowed with the extreme cult of personality dedicated to the communist leaders Gheorghiu-Dej and, especially, Nicolae Ceaușescu. Political persecution through arbitrary arrest, deportations, expurgation, mass releases, fabricated trials, ideological re-education in prison, collaboration with the political police created an atmosphere of terror, fear, distrust and frustration. The frustration of the population has inevitably increased in a society endowed with constitutions promising economical miracles through the socialist property, forced agricultural cooperation and nationalized planned economy but which has arrived to experience just huge lines for food. Corruption, an old friend of the Romanian society, has gained an impressive magnitude in this context. At the end of the communist regime, during Ceaușescu's presidency, the communist constitutional values and principles, as formal and illusory they already were, have become mere decorations for the megalomaniac personal dictatorship of Ceaușescu. Encouraged by the formal provisions of the 1965 Constitution and by the interference between state and Communist Party, the President has come to politically

subordinate both the executive (Consiliul de Miniștri) and the legislative (GNA).

From afar, the most striking gap between the constitutional texts and the constitutional and political practices regarded human rights. The "new communist man" was far from becoming the communist citizen or, simply, a citizen. The principle of equality before the law was harshly broken by the effectively hierarchized Romanian society, getting on top the privileged communist party's nomenclature; women's rights were largely consecrated but they were born too late to get a chance to be seriously applied; the right to learn was compromised by the Marxist-Leninist ideological dictate or by the extreme cult of personality dedicated to communist leaders Gheorghiu-Dej and Ceaușescu; the universal right to vote was annulled by the total manipulation of the elections; the right to property has been dissolved in the collective property; the right to association was determined by the existence of the party-state and different forms of institutionalized associations aimed to official propaganda; the freedom of expression was annihilated by the propaganda, official fight against religion and by the terror installed through political police (*Securitatea*) and censorship; the intangible rights were inexistent due to political oppression (ending until 1960s with political prison) and total lack of judiciary's independence.

### *Conclusions*

After all the above considerations, the balance sheet of the Romanian constitutionalism is rather negative:

- Constantly, a huge gap between the constitutional text and constitutional life dominated the period;
- Regretfully, any attempt to practically introduce the parliamentary regime has failed, being replaced with a more or less authoritarian regime. The strong or even extreme personalization of power was a central characteristic of the Romanian constitutionalism;
- Paradoxically and practically, the parliamentarianism has constantly been proven to be a danger for the existence of the Romanian national unitary state and for its political stability;
- The Romanians never seriously practiced the principles of the modern constitutionalism: they didn't succeed either to limit the monarchical power or to balance the relation between executive and legislative;
- Human rights were only formally consecrated; they never succeeded to become a true state of mind in the Romanian society;
- The Parliament was perpetually overwhelmed and controlled by a strong executive. It has never played an important role as in other parliamentary systems;
- The bicameral Parliament got pretty deep roots in the Romanian constitutional culture despite the traditional unicameral legislative before 1864;
- Democracy never actually existed. The elections were constantly manipulated and fabricated. The parliaments, before or after installing of the communism, lacked the democratic legitimacy.

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