The Administrative (Authoritarian) Monarchy – a Paradigm for the Constitutional Realism in Modern Romania ?!

-The Beginnings-

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The establishment of modern constitutionalism, especially of the parliamentary regime in Romania, was achieved under the sign of a paradox. When the European Great Powers introduced in Romania (by means of the Paris Convention) a constitutional regime with an important authoritarian potential, by offering the prince extraordinary powers, the Romanian political class honestly fought for a parliamentary democracy. When there has been a chance to establish the most wanted parliamentary regime, an authoritarian regime was established by prince Cuza. The Romanian political life of the time clearly demonstrated that the principles of the parliamentary regime were difficult to apply and that the imported democratic forms were almost incompatible with the Romanian substance. The establishment and the perpetuation of the administrative/ authoritarian monarchy was an organic response of the Romanian society to the lack of interest and to the corruption of the politicians. It still remained open the problem and the challenge to find a solution within the limits of the Romanian politicianism. This is still valid today, when, in the context of a crisis created by the political corruption, the traditional solution of the authoritarian regime does not seem the appropriate one.

I. The Failure of the „Shapes without Substance" Experiment

It is troubling and at the same time inevitable the verdict given by a recent German researcher of Romanian parliamentarianism to an approach which was conferred, at a given moment, cosmogonic values: „We must underline again that in Romania, this process of recovery, to build and extend by institutional measures and social reforms those social, mental and political structures grown onto those places **has failed** (our highlight)"[1]. Expressed within the analysis of the socio-political and legal context that led to the instauration of the dictatorship of the king Carol the 2nd (1938-1940) the author's thesis announces, in other words, the failure of a mega-experiment, the lamentable failure of the "**shapes without substance**"[2] in the Romanian society. This remark must draw our attention to the fact that, at least from the point of view of a lawyer, the process of modernization of Romanian political and legal institutions by means of massive legal transplant, more or less

[1] H.-Chr. Maner, *Parlamentarismul în România 1930-1940*, Editura Enciclopedică, București, 2004, p. 403.
[2] Theory that was developed in the second half of the 19th century, by a part of the conservatory Romanian intellectuals, who considered that the imports made in the mid century , in all fields of the spiritual matters, especially in the legal field, produced only formal transformations in the Romanian society, without leading to substantial changes. At the opposite pole were the liberal intellectuals, who thought that the import of forms will inevitably lead to a positive transformation of the substance.

conscious, during the reign of prince Al.I.Cuza[3] represented a bet of the Romanian political and legal elite with the Romanian society of the time, bet which had awaited for an end. The meeting of the imported forms ("shells") with the Romanian "substance" [4] was going to be evaluated, after years, from within the political and legal life, in order to discover one of the possible reactions: the adaptation of the imported institutions to the existing input or the rejection (compromise) the transplanted institutions. Under these circumstances, what matters is less the legitimacy of the recourse to legal import or to discover its rational or irrational character[5] in the context of the reform of the Romanian State in the 19th century. From this point of view, the theory of "shapes without substance" should not be, for the legal historian, a doctrinal fortress that must be defended or destroyed, but the conceptualized expression of a natural dynamics of the legal construction, particularly constitutional, in the age of modern Romania, which should be correctly evaluated in its complex phenomenology.

Such an analysis highlights the fact that a political and legal reform based on an institutional import cannot find its final legitimation in the mere formal-constitutional consecration or in the conscience or good intentions (which are still compulsory) of the political and legal elite, but in the positive diagnosis, given by time-lapse, regarding the functionality of the imported institutions. The years 30 of the 20th century unfortunately offered a negative diagnosis on the Romanian **constitutional** reform: after decades of experiments, the intention of the Romanian political-legal elite to give the political life fundamental democratic values of the modern constitutionalism, like separation of powers, political governmental responsibility before the Parliament, free elections, fair competition for power between political parties etc, **failed.**

There must be something clear in this respect. This failure was due neither to some momentary unfavorable factors, specific to the interwar period, nor only to an abusive political will which "beheaded" a previously positive evolution.[6] On the contrary, the failure was the expression of the perpetual incapacity of the Romanian political class to confer the political-legal institutions a local content which could have directed them within the accepted limits of the democratic exercise in the period between the end of the 19th century and the beginning of the 20th. Beyond the nationalist rhetoric and the exacerbations of the legal xenophobia, present, in that period, to many Romanian intellectuals, beyond the scientific or

[3] Al I. Cuza reigned between 1859 and 1866. He established the foundations of the Romanian modern unitary State, by unifying the two historical Romanian States, Moldova and Valachia. To him we owe the modernisation of the State, of the law, of the overall Romanian society, by means of institutional imports massively made from the Western European French-speaking space.

[4] In this context, one should reevaluate the famous expression of „empty shells" (in Romanian „*forme fără fond*"). The import of Western European institutions was not accomplished by emptying the Romanian society of the 19th century of its own substance. On the contrary, these shells (forms) inevitably met the Romanian substance of the time. An expression like "**shapes with a different substance**" („**forme pe un alt fond**") would be more logical and would describe more clearly the complex processes that took place in the Romanian society.

[5] For a detailed analysis of the casuistry of the legal import, see M. Guţan, *Romanian Tradition in Legal Import: Between Necessity and Weakness,* in *Impérialisme et chauvinisme juridiques. Rapports présentés au colloque à l'occasion du 20e anniversaire de l'Institut suisse de droit comparé***,** Lausanne, 3-4 oct. 2002, vol. 48, Schulthess, Zurich, 2004, pp. 65-79.

[6] In this context, it is interesting H.-Chr. Maner's idea that the instauration of the dictatorship of Carol the 2nd can only partially be explained by his power ambitions. The instauration of the authoritarian regime is due, in the author's view, to a complex of factors at the top of which stays the moral decay of the Romanian political class (corruption, bribing). See *op. cit.*, p. 403-404.

pseudo/scientific theories that denied or justified the utility of the constitutional import, the **rejection of the parliamentary/democratic system was more an organic reaction of the Romanian society, incapable to adapt to its requirements.**

It is interesting that, alongside with the claim of failure of the Romanian parliamentary democracy, the argumentative historical discourse, past or present, makes an exposure of what one could call **constitutional counter-reform** in the Romanian society of the time. This is sadly the constitutional life of modern Romania. In the centre of an approach which permanently highlights the huge discrepancy between the constitutional institutions and the way they were applied stays the appetite of the Romanian political class for authoritarianism, institutionally expressed within what prof. Paul Negulescu called "**administrative monarchy**"[7]. Under this expression can be concentrated, from my point of view, the mechanisms and the concrete control manifestations of the State institutions, belonging naturally to the prince / king in such a political regime, as well as the manifestations of some Romanian prime-ministers who, by their remarkable influence on the crown, managed to perpetuate an overwhelming control and authority of the executive over the legislative power. From this perspective, I will try to highlight, in this study, the way in which the birth of the parliamentary democracy in modern Romania was marked, under multiple forms, by the presence of an undemocratic authority of the executive over the legislative power, authority which will have turned, unfortunately, into a paradigm of the modern Romanian constitutionalism, until the instauration of the communist regime (1945).

II. The Administrative (Authoritarian) Monarchy and the Theory of Constitutional Realism in Paul Negulescu's Works

An interesting and important issue to highlight in the proposed discussion is the way in which one of the most significant Romanian public law specialists in the inter-war period explained the failure of the parliamentary regime in Romania and argued the need of an authoritarian regime. For a correct understanding of the scholarly attitude of professor Negulescu, it is necessary to underline first the undeniable constant evolution of his thinking in the line of the „realistic" critic of Romanian parliamentarianism. His ideas, traced back in the 1920s, were enriched and gradually revealed their dimensions, whether they manifested in the years of the parliamentary democracy, of the royal dictatorship or of Antonescu's regime[8].

The critical discourse of Professor Negulescu as regards the Romanian public law from the relevant period of time is circumscribed to a complex analytical approach which combines, beyond the precision of the strict legal normative approach, the interest for the mechanism of the national legal construction, the phenomenology of the application of the law, the explanatory argumentation historically and philosophically founded and culturally contextualised. The "realistic" critical analysis naturally attracts the discovery of his own solution which stands out, despite appearances, through coherence and continuity.

[7] See P. Negulescu, *Principiile fundamentale ale Constituţiei din 27 februarie 1938,* Atelierele Zanet Corlăţeanu, Bucureşti, 1939, p. 26.

[8] În aceste condiţii, nu suntem de acord cu ideea exprimată de profesorul Mihai Oroveanu conform căreia P. Negulescu ar fi fost obligat la sfârşitul carieirei sale, în epoca dictaturilor de dreapta, să scrie „unele pagini neconcordante cu spiritul său democratic". A se vedea M. Oroveanu, Paul Negulescu, în Revista română de drept, nr. 4/1967, p. 100. Dimpotrivă, analiza lucrărilor lui P. Negulescu relevă cu claritate o constanţă în critica democraţiei parlamentare româneşti.

His "realistic" perspective is not necessarily original as a method, as a philosophical, legal and cultural founding, but it is interesting to be evaluated in the "realistic" critical context effervescent in the cultural and political dimension of the Romanian identitary discourse and rather exciting as regards his conclusions.

The professor's "realism" has been definitely outlined when he clarified his position vis-à-vis the building of the national legal system. By firmly rejecting the voluntaristic legal positivism, the logic of the law as an almighty instrument of economic, political and social engineering, the Romanian scholar stands out undoubtedly as a supporter of the theory of the real (material) sources of law, theory that had acquired new meanings at the time, because of the scientific school of Francois Geny[9]. By rejecting the utility of a "law that creates the society", the author speaks in favour of a "society that creates the law", a law that "corresponds to the public opinion, to the existing situation"[10], which "takes into account the factual circumstances to which the law *is* called to be applied"[11], which acts like a "… coat, a form which must adapt itself to reality, to life…"[12] and which "to take into account the people's spirit, its state of civilisation, the existing social powers, the menaces to the State..."[13]. Everything depends, in this context, upon the fact that, beyond the intrinsic realism of the law – as a construction of ideas which is not meant to abstract lab experiments, but to be specifically applied in a given human society – the "real" application of the law can be achieved, in Negulescu's view, only where the law reflects the general culture of the society – "the nation's past, the social state, … the people's mentality"[14]. Any discrepancy between the society and the applicable law determines unwanted outcomes, a partial or distorted application of the legal rule[15]. Under these circumstances, it is obvious that the law thus created is either useless or becomes the producer of negative effects in the society where it is applied.

It is interesting to note that, for Negulescu, the realism of the applied law is primarily linked with the success of its application, success which depends on the concordance with the given society, and less on the origin of the legal institution proposed as solutions to the different problems of that society. From his argumentation it does not come out as a necessity that the legal institutions applied to the Romanian society must be the product of the Romanian legal culture and of the Romanian society's culture in general, as if this would *ab initio* ensure the success of their application. But, unlike his predecessor, professor Dissescu, or the historian Nicolae Iorga, Negulescu does not analyse the building of the modern Romanian law, based on the massive Western-european legal import, by seeing it through the lens of the legal nationalism, and his works lack the accents of aggressive legal pride. The realistic critic of the non-realism of modern Romanian law is done from functionalist positions: as long as the legal institutions, being fit with the society where they apply, are actually applied and they produce beneficial effects to that society,

[9] See Al Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex. Bucuresti, 1999, pp. 162 and foll.
[10] P. Negulescu, *Curs de drept constitutional*, Bucuresti, 1927, p. 221
[11] P. Negulescu, *Curs de drept constitutional*, p. 225.
[12] P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a*, Atelierele grafice ale Fundaţiei Culturale Voievodul Mihai, Bucureşti, 1930, p. 49.
[13] P. Negulescu, *Principiile fundamentale ale Constitutiei din 27 februarie 1938*, p. 33.
[14] P. Negulescu, *Curs de drept constitutional*, p. 227.
[15] P. Negulescu, *Curs de drept constitutional*, p. 225; P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a*, p. 51; P. Negulescu, *Principiile fundamentale ale Constituţiei din 27 februarie 1938,* p. 24 and foll.

the respective law is realistic. According to the author, it implicitly results that **legal import is an alternative for building the national law if it is done how and when required.**

Consequently, without making of the analysis of the legal acculturation (and eventually of its support as a legal reform instrument) a fundamental pillar of his doctrine, Negulescu indirectly accepts that the legal institutions can be transplanted from a legal system to another, from a national legal culture to another, from a society to another. The Professor does not refuse the import of principles and institutions of the modern constitutionalism in modern Romania. He raises, however, the problem of the moment and of the institutions which must be imported. The legal import made without the correct and concrete evaluation of the limits and needs of the importing society is a "non-real" import or one could call it irrational[16]. The comparative presentation of the legal modernisation in the Japanese and Romanian societies clearly highlights this[17]. And the valuation of prince Cuza's Draft Constitution of 1863 – based on the French Constitution of 1852, which brought back to France the authoritarian regime – brings to discussion not only the projection proposed by the professor for a realistic Romanian constitutionalism, but also an implied example of realistic legal transplant, with great chances of success in the process of application within the importing society.

Analysed through the perspective of such a critical realism, the Romanian parliamentary democracy, founded on the principles of the 1866 Constitution, appears to Professor Negulescu as being deeply corrupted as regards its results, irreal, false, idealistic. The non-realism of the 1866 Constitution, determined by a too early, although unavoidable, import of Western political-legal institutions[18] applies to a Romanian real life, which only led to an obvious distortion of what the Romanian society expected from the legal import. The manifest, substantial, expression of this distortion is represented, in Negulescu's view, of what he calls "governmental regime"[19]. This false appearance of the parliamentary regime is the result of a (non)adaptation process of the legal transplant to the level of organization and functioning of the constitutional political and legal mechanisms. At this level, the conflict between the political realism and idealism[20] involved, among the Romanian political class, a cultural and mental heritage[21] which subdued to politicianism, in Negulescu's view, any chance to create a functional parliamentary democracy in

[16] For the mechanisms of the legal import in modern Romania, see M. Guţan, *Building the Romanian Modern Law: Why is it Based on Legal Transplant?* in Acta universitatis Lucian Blaga. Seria Jurisprudentia, supplement 2005, English version, pp. 130 and foll.

[17] See P. Negulescu, *Curs de drept constitutional,* p. 225-226.

[18] P. Negulescu, *Curs de drept constitutional,* p. 227; P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 29 and foll.

[19] See P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 93 and foll. For a presentation of the issues of the governmental regime, see also M. Guţan, *Istoria administraţiei publice româneşti, ed. a 2a,* Hamangiu, Bucureşti, 2006, p. 212.

[20] For a balanced presentation of the idealistic and realistic politics, see P. Negulescu, *Curs de politică administrativă, fascicola Ia,* Bucureşti, 1938, pp. 44-45.

[21] It is interesting that Negulescu, by criticising the lack of preoccupation of the political class for changing the mentality of the Romanian peasants in view of an unavoidable legal transplant, he oversees the need of the preparation of the very political class for importing the institutions of the parliamentary democracy. This very mentality of Romanian politicians will stay, unfortunately, behind the failure of the Romanian democracy. See P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 36.

Romania at that time. Politicianism became thus the real effect of the idealistic, non-realistic policy of the Romanian political class in the midst of the 19th century and the cause of a political system where one party's interest led to a subordination of the Parliament to an executive which earned its legitimacy by manipulation and raw force. These malfunctions at the political and legal level determined necessarily malfunctions within the whole State apparatus. Organically perpetuated by the authoritarian executive power and subjected to partinic interests, the public administration maintained its shortcomings born in the ages of the Fanariot princes and of the Organic Regulations, by politicianist insertions, far from achieving its purposes.

Expressed in a functionalist way, this state of facts induced to Negulescu the idea of general "disorganisation" of the State. The way in which the Professor raised this issue highlights the preoccupations of a specialist in Administrative law and science of the administration who is in search of success and prosperity for the Romanian society, beyond politics, and places it into a science of the rational organisation of human activity of the State and its administration[22], inspired by H. Fayol and F. W. Taylor. In this context, one can understand correctly why Negulescu's critical approach is not focused on the issue of tradition and national legal pride. The problem of the correlation of the legal institutions applicable within a given society with that society's culture is subdued to the problem of the rational, functional organisation of the respective society. In this logical line, the irrational import of Western legal institutions represented a bad preparation of the attempt of reorganisation of the Romanian society and State, which is proved also by the analysis of the disastruous results of this attempt. Within this theoretical construction, the consequence of this observation is very clear: "The organisation being a scientific one, any time that the facts show a disagreement between the purpose and the results, one must admit that there has been an error. And, if the error is confirmed by other experiments, it must be put aside and the organisation must be changed, by taking into account the observations made"[23].The bad preparation of the Romanian society's organisation explains only partially the failure of the experiment of parliamentary democracy. A necessary part of the explanatory attempt of the Romanian scholar was the issue of the negatice influence of the politicianism, of the political parties and their group interests, on the good functioning of the Romanian State and of its administration. Taking into account the real size of politicianism in the Romanian society of that time, I do not believe that professor Negulescu had, under the influence of the taylorism (where the ill-fated influences of the corrupt political class play an essential role), a reductionist approach of the Romanian organisation phenomenon. Consequently, his conclusion was a very clear one: the organisation of the Romanian State and society should be done on other foundations than the ones of the parliamentary democracy imported at 1866, and this attempt should necessarily be accompanied by solving the problem of the "plague of political parties": running out the politics from the administration[24].

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[22] See, *Tratat de drept administrativ român. Volum. II: Organizarea administrativă a României, Partea I-a,* p. 52-53; 57 and foll.

[23] P. Negulescu, *Organizarea administrativă a României,* in Revista de drept public, nr. 3-4/1928, p. 600; P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 57.

[24] P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 56; 92; 105-106; P. Negulescu, *Tratat de drept administrativ, Vol. I: principiile generale,* Institutul de arte grafice E. Marvan, Bucureşti, 1934, p. 16.

The solution proposed by Negulescu for the good functioning of the Romanian State and society seemed to fit initially within the natural limits of the parliamentary democracy: a reform "which to free the Government from the tyranny of the Parliament and of political clubs, giving it the possibility to deal only with the guidance and control of the administration of general interests, and the Parliament, limited only to legislating, to be stopped from interfering with the administration"[25]. However, the author gives up the drawing of a project of rehabilitation of the parliamentary democracy, being content to propose a reorganisation of the State and society based on realising the **non-realism, inexistence and inopportunity of the parliamentary regime for Romania at that time**[26].

Bearing in mind all these aspects, the constitutional architecture proposed by Negulescu at the beginning of the 1930s would not seem very shocking. The real coordinates of the Romanian society at 1866 imposed a **personal authoritarian regime**, where the separation of powers was formally maintained, in a minimum standard of existence. The executive power should belong to an active prince who should rule together with the ministers politically responsible only before him. The legislative power would be represented by a parliament elected for none years (in order to avoid dirty electoral games), with limited attributions as regards the adoption of laws and formed by representatives of the social groups – the great landlords and the peasantry – ,of the trades and industry, of the local communities, of the universities and of the Church. The political parties would be excluded from the political stage, not being considered as constitutional law subjects.[27] Free from the menace of politicianism, the executive, the administrative and the legislative could then correctly and efficiently exercise their powers. The "undressing" of the legislative from its negative political connotations conferred by the ill-fated activity of the political parties and its subordination to an almighty executive, represented, in Negulescu's view, the "realistic" formula of success for the organisation of the Romanian State.

It was not by chance that the Romanian scholar was inspired, in presenting his solution, by Cuza's **Project of Constitution of 1863** and by **The Statute Developing the Paris Convention** (1864), as model historical landmarks for the approach of the realistic construction of the Romanian constitutional system[28]. Both models represented, as shown below, formulas of authoritarian regimes, where the primacy of the executive power over the legislative proved its effectiveness for the reform of the Romanian State and society.

[25] P. Negulescu, *Tratat de drept administrativ, Vol. I: principiile generale,* pp. 16-17.

[26] See P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 94, 152; P. Negulescu, *Tratat de drept administrativ, Vol. I: principiile generale,* Institutul de arte grafice E. Marvan, Bucureşti, 1934, p. 10. I only present hereby the professor's view from 1928-1934, as being illustrative for the topic. Starting in 1938, the critical ideas of Negulescu towards the parliamentary regime shall be more acute, the language became more violent and he questioned even the intrinsic value of the parliamentary democracy. This hasn't changed at all neither the purpose of his discourse nor the proposed solutions. See P. Negulescu, *Principiile fundamentale ale Constituţiei din 27 februarie 1938*, p. 21 şi urm.

[27] See P. Negulescu, *Tratat de drept administrativ român. Vol. II: Organizarea administrativă a României, Partea I-a,* p. 54-56.

[28] See P. Negulescu, *Principiile fundamentale ale Constituţiei din 27 februarie 1938,* p. 26-28.

III. The Paris Convention[29] – a Technical-legal Moderate Expression of the Romanian Princes' Authoritarianism under the Organic Regulations

Meant to confer to the Danube principalities a new political and administrative organization, the legal – constitutional act from 1958 was not, unfortunately, a complete redesign of the constitutional architecture under the Organic Regulations.[30] By ignoring most of the really anti-Regulations proposals of the ad-hoc Councils from 1857, the European powers revalued, by the Convention signed in Paris, a good part of the Organic regulations dispositions regarding the organization and exercise of the State power. By designing a relatively superficial revision of the institutional foundations and of the principles of the former "neo-absolutist" constitution[31], the Convention marked the Romanian constitutional space more from formal-legal positions.

Under these circumstances, the presence, in the Convention, of some principles of modern constitutionalism like: constitutional monarchy, representative governance, separation of powers (especially of the administrative of the judicial power), ministerial responsibility, stipulation of a "minimum package" of civil rights and freedoms represented a mere formal landmark, which lacked a fair functional impact, in a machinery of the relationships executive-legislative deprived of its compulsory balance mechanism. Thus, the tendency to irreversibly anchor the institutional-State building onto the specific structure of the parliamentary regime, faintly remarked in the constitutional life under the Regulations[32] and claimed firmly by the Moldavian reformists from the Iassy ad-hoc Council[33], was suffocated by the interest of the Great Powers to design a prince (*hospodar*) under the Convention alike the one under the Regulations. The recovery of a series of features of the new-absolute reign from under the Regulations determined the failure of the chance to postulate a "face to face" between the executive and the legislative powers, where the two powers should be endowed with mutual means of action to allow each of them to question the existence of the other.[34].

Consequently, the perception into the Convention's text of elements specific to the parliamentary regime, like: the right of the prince to dissolve the legislative, the obligation of

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[29] The Paris Convention was signed by the Great European Powers on 7/19 August 1858, and was meant to regulate the international status and the internal organization of the Romanian Principalities Moldova and Valachia, in the context of the new European order after the Crimean war.

[30] The Organic Regulations were elaborated by virtue of the Treaty of Adrianopol signed at 2/14 September 1829, by Russia and the Ottoman Empire, as regards the organization of the Romanian Principalities. They were drafted by committees of Romanian noblemen, one for each Principality, then modified and approved by Russia and recognized by Turkey. In the period 1831-1858, they functioned as legal acts with a constitutional nature for Moldova and Valachia.

[31] The fact that the drafters the Convention had as a starting point the texts of the Organic regulations came out from the dispositions of Article XXIII,2 of the *Directives of the Vienna Congress for the Special Committee for the Principalities*, from 2 April 1856, as well as from the discussions of the Paris Peace Conferences dedicated to the organization of the Principalities and held between 22 May and 19 August 1858. See G. Petrescu, D.A.Sturdza, D.C.Sturdza, *Acte şi documente relative la istoria renascerei României*, Lito-tipografia Carol Gobl, Bucureşti, 1892, pp. 270-271.

[32] See T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar, volum. I,* Lumina Lex, Bucureşti, 1998, p. 360.

[33] See M. Guţan, *Convenţia de la Paris din 1958 şi debuturile executivului modern în România, în* Acta Universitatis Lucian Blaga. Seria Jurisprudentia, nr. 1-2/2004, p. 106-108.

[34] L. Favoreu, P. Gaia, R. Ghevontian, J.-L. Mestre, O. Pfersmann, A. Roux, G. Scoffoni, *Droit constitutionnel,* Dalloz, Paris, 1999, p. 362-365.

ministers to countersign the prince's acts, the possibility that the ministers be recruited from the members of the Parliament, the legal ministerial responsibility cannot shadow the evidence of the constitutional perpetuation of an authoritarian regime of the prince. And this, because the Convention omitted to regulate the prince's inviolability / irresponsibility. The idea of the monarch's inviolability implied, according to the doctrine of the time[35], his withdrawal from under the legal and political responsibility, which meant, according to the adage "the king reigns but governs not", his withdrawal from the actual sphere of governance. Making the prince inviolable meant, within the logic of the same doctrine[36], making the Government legally and politically responsible before the legislative. The absence of this fundamental principle from the perfectly balanced equation of the parliamentary regime inevitably brought the prince in the centre of the political and State construction envisaged by the Convention, being endowed with exorbitant attributions compared to the legislative and the executive powers.

Being co-holder of the legislative power, the prince kept **the single right to legislative initiative** as regards laws of special interest, **the right to sanction laws** (absolute veto) / a reminiscence of the absolute monarchic power[37] - revisited from a doctrinal point of view[38] but regulated against the Moldavian ad-hoc Council to confer the monarch only a limited right of veto - as well as the **right to dissolve the unicameral parliament**.

As sole holder of the executive power, the prince remained an active element in the governance and administration of the Principality. The single-headed executive allowed him to manifest as the essential element in the determination of the internal and external policy. Appointed by the prince, without the approval of the Elective Assembly (the parliament), but compatible with the status of members of the legislative, the ministers were selected on criteria proper to the sovereign and therefore politically responsible before him. In the absence of the prince's inviolability / irresponsibility, it was obvious that the ministers' obligation to countersign the monarch's acts had a mere technical-legal function, of authentication of these acts[39], without implying any joint political responsibility before the legislative. However, as a result of insistent demands of the ad-hoc Councils, the ministers were supposed to engage, following their countersign, an individual legal ministerial responsibility for lawfulness reasons – violation of laws – and for some opportunity reasons – like waste of public money.

The Convention did not properly regulate a ministerial organ of a collective nature, similar to the one consecrated by the Organic Regulations, neither was there a reason to such an organ, as long as, with a prince actively involved in the governing process, in the absence of the political governmental solidarity and of the political responsibility before the legislative, the Council of ministers, mentioned fugitively, had the same role of mere auxiliary to the holder of the executive power.

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[35] See M. Bluntschli, *Le droit public général*, Librairie Guillaumin et Cie, Paris, 1885, pp. 133-141

[36] See C. G. Dissescu, *Cursul de drept public român*, Vol. 2 Drept constituţional, Stabilimentul grafic I. V. Socec, Bucureşti, 1890, pp. 733-746; See also Th. Ducrocq, *Cours de droit administratif*, Tome premier, A. Fontemoing Editeur, Paris, 1897, p. 72

[37] See P. Negulescu, *Curs de drept constituţional,* Bucureşti, 1927, p. 395

[38] In the doctrine of the time, the right of veto of the monarch, expressed by the right to sanction or not the laws adopted by the legislative was seen as a means of balancing the powers, hindering the abuses of the legislative and allowing the monarch to stop the application of laws he did not agree with. See M. Bluntschli, *op.cit.*, pp. 75-76; Th. Ducroq, *op.cit.*, pp. 19-20

[39] See *Dictionaire de la culture juridique*, PUF, Paris, 2003, entry Contreseing**,** p. 285

From all these, it resulted the monarch's still very important power. As the sole holder of the legislative initiative in the field of special legislation, he could promote any bill he wanted. The bills voted by the Assembly were sanctioned or not, at his own will, depriving them of legal force in the case of non-sanctioning. When the Assembly opposed the policy of the prince, he could dissolve it, and the call for a new Assembly was compulsory only after three months. Even the newly-created Central Committee's control activity was subordinated to the prince's right of veto. [40] As the sole and active holder of the executive power, the prince was the chief of the executive as well as of the administrative apparatus. As chief of executive, the prince had under his political control only the ministers and as chief of the administration he could control the entire apparatus of public officers. Although he was a central and active element of governance, the prince was subjected neither to the political responsibility, nor to the legal one[41]. That is why the attitude of the Great Powers towards the problem of princehood was quite odd. Despite the fact that they were conscious about the considerable abuses of the neo-absolutism under the Regulations[42], the European diplomats did not appeal neither to the possibility of making the prince inviolable and thus removing him from the scene of the executive, nor to the postulation of a responsibility of the prince, like the 1848 revolutionaries claimed.[43] beyond possible interpretations and under the circumstances of a terminology, institutional and structural confusion, the Convention reintroduced, formally, into the Romanian constitutional life, a prince with considerable powers, and who, depending on the socio-political and ideological context of the Principalities at 1859, could transform or not into an authoritarian monarch.

The explanation of the continuity of the monarchic authoritarianism in the Convention can be found, eventually, in a simple way, in the inspiring source of the constitutional text. Bearing in mind that in the European drafting committee the representatives of France had a decisive role, the constitutional act meant for the Romanians reminds, almost faithfully, the

[40] The Convention's text provided that the monarch had the right to refuse the sanctioning of the laws without any condition (art. 14, al. 1). The right of the Central committee to decide on the constitutionality of the laws adopted by the Assembly (art. 37) was merely a compulsory phase, prior to the sanction, but which had no relevance for the prince's act. the prince was not bound to sanction a law according the Committee's diagnosis. Corroborated, the two articles can lead to the idea that the Committee's act was a mere **advisory opinion** for the prince. The wording of article 37 par. 1 was quite ambiguous. Comparatively, the *Statute Developing the Paris Convention*, which conferred the "Moderating Body" the power of judicial review, made a clear distinction between the procedure of the constitutional review and the discretionary right of absolute veto of the prince, resulting that there were to be subjected to the prince's sanction only the laws which the Moderating Body considered to be constitutional. Even in this case, the prince was not compelled to sanction a law, even constitutional.

[41] I consider obvious the distinction between the irresponsibility of the monarch as active holder of an absolute or quasi-absolute power and the irresponsibility of an inactive constitutional monarch, withdrawn from the actual sphere of government.

[42] As a member of the European Commission for the Principalities, the baron de Talleyrand-Périgord explained to Count Walewski, through a telegram from 19 April 1858, the negative role played in the political evolution of the Principalities by the excessive power which the Organic Regulations gave to the prince. From his point of view, the prince's powers had to be reduced and balancecd by a strong legislative. See G. Petrescu, D. A Sturdza, D. C Sturdza, *op.cit.*, pp.139-141; 147-148

[43] In *Proclamaţia de la Islaz* [The Islaz Declaration] of June 1848 , pt. 5, as well as in *Adresa Locotenenţei Domneşti către Sultan privind prezentarea Constituţiei* [Address of the Princes Lieutenancy to the Sultan about Presenting the constitution] of August 1848, pt. 5, the Valachian revolutionaries were for a politically and legally responsible head of State (prince). See C. Ionescu, *Dezvoltarea constituţională a României. Acte şi documente* 1741-1991, Lumina Lex, Bucureşti, 1998, p. 158; 167

principles of the French Constitution of 14 January 1852[44]**,** in the field of the relationships between the executive and the legislative powers. Inevitably, the constitutional structure meant to legitimize, afterwards, the authoritarianism of the Second French Empire, found an almost faithful mirror in the Paris Convention. Most of the excessive authority of the Prince finds, as a consequence, its correspondent in the French Constitution: holding the entire executive function and the active role in the governing process; the lack of the inviolability of the head of State; the lack of governmental solidarity and of the political responsibility of the Government before the legislative; the existence of a mere legal ministerial responsibility; the dependence of the ministers exclusively of the head of State, as simple instruments; the right to make all public offices' appointments and to make administrative regulations; the (almost) exclusive right to legislative initiative; the right of absolute veto; the right to dissolve the legislative[45]. The possible authoritarianism of the Romanian prince was alleviated, in the text of the Convention, by the fact that it conferred to the Central Commission of Focşani (created on the model of the French Senate), as well as to the Assembly, a greater independence towards the monarch, as regards the recruiting of their members and presidents. As it was observed in the constitutional life, the elections law adopted under the Convention limited the possibility of refreshing, legally, the parliamentary body in the interest of the prince, hence the inutility of dissolving the legislative.

Overall, the Paris Convention was thus a **moderate transposition** of the French Constitution of 1852, apparently adapted not to Romanian realities and needs, but to a particular context of international politics. It rearranged the ingredients of a "forte" recipe of the French authoritarian regime into an institutional group meant to guide the Romanian constitutional life to direction imposed from abroad. Was this "temptation" of the Romanian leaders with an authoritarian regime (very similar to the one which they had just gat rid of, the Regulations' regime) and who ardently wished to free themselves, a mere exercise of legal imperialism? Or was it the manifestation of a Western realism which considered that a recovery of an authoritarian regime in the Principalities was the best solution for the internal development at al levels?

IV. *The Statute Developing the Paris Convention* – A Constitutional Recipe of the Prince's Authoritarianism, Necessary to the Building of the National Unitary State

In the abovementioned institutional context, it appears extraordinary the fact that Al. I. Cuza tried, during most of his reign (1859-1864), to guide the constitutional life of the two Romanian Principalities and then of the Romanian unitary State (from 1862) on the

[44] Al. Tilman-Timon, by taking the ideas of A. Rădulescu, was fundamentally wrong when he established as a fundamental source of inspiration for the Convention, the Belgian Constitution of 1831. Browsing the pages dedicated to the Convention (295-301) from the book *Les influences etrangeres sur le droit constitutionel roumain*, Librarie du Recueil Sirey, Paris, 1946, one who also has at hand the text of the Belgian Constitution is under the impression that the author has read neither of them. Besides the fact that he erroneously establishes the correspondent of the Convention's articles in the Belgian constitution, the cited author did not notice that the Belgian constitutional text consecrates the inviolability of the monarch (which gives the Belgian constitutional architecture a completely different shape)and the Convention doesn't. At the confused remark of Tilman-Timon that, although the representatives of France had a major influence, the text of the Convention is fundamentally Belgian (p. 301), the answer is very simple: the **influence of the Belgian Constitution did not exist, except for a very small part.**

[45] See M. Morabito, *Histoire constitutionnelle de la France (1789-1958)*, Montchrestien, Paris, 2006, p. 253-257

coordinates of the parliamentary regime. The personal political vision of the prince but also a strong ideological movement in favor of this political regime, cultivated, starting with 1848, within the Romanian political elite, avoided a solution of perpetuation, even in more alleviated shapes, of the neo-absolutist regime from under the Regulations. Important politicians like M. Kogălniceanu[46], V. Boerescu[47], I. C. Brătianu[48] interpreted the Convention's dispositions in the light of the parliamentary regime, ignoring, unlike others, the authoritarian dimensions of the constitutional text. The appearance of the double-headed executive (prince and government), with an irresponsible prince (but not inactive) and Governments that assumed the political responsibility before the legislative – constant elements of the Romanian constitutional life between 1859 and 1864 – was, as a consequence, the result of stating an ideological continuity at the level of the thinking of the Romanian political class and the application of the completed fact also as regards the relationship between the executive and the legislative powers.

This practice was encouraged also by a series of dispositions of the Convention which drew a part of the political-legal equation of the parliamentary regime: the fact that the ministers could be parliamentarians, their legal responsibility before the legislative, as well as the right to interpellate the government, which the Assembly assumed by its own internal set of rules.

Consequently, Cuza was less involved in the concrete internal administration act, preferring to leave this task to his governments. The customary application of the principle "the prince reigns but does not rule", the loss of the government's quality of mere agent of the prince's orders and its attraction in the sphere of the political decision, gave birth, in the political-administrative life of the State to a distinction between governance and administration. The ministers and the government, generally, are now factors of political decision and of arrangement of the internal policies which the actual administration was supposed to apply in practice.

Unfortunately, the respect of some of the principles of the parliamentary regime led to the blockage of the liberal reforms by an Assembly permanently dominated by the conservative aristocrats. Into the era of modernization and democratization, the political life of Romania started to know the "delights" of a multiparty political game, but which started very early to go on the coordinates of the political *clique* and less on those of the fight for the national interest. The political instability created in this context was also due to the fact that the prince, ignoring the principle according to which the government should be (also) an reflection of the parliament, very rarely elected his ministers from the parliamentary majority. A natural result of such an attitude was the repeated fall of minority governments, because of parliamentary political pressures.[49] One must still notice that, far from becoming a solid constitutional custom, the political responsibility of the government before the legislative was engaged only when Cuza wanted it to. In the same time, although it manifested discretionary, based on his right of absolute veto, not sanctioning the bills

[46] See Collective work, *Istoria parlamentului şi a vieţii parlamentare din România până la 1918,* Editura Academiei RSR, Bucureşti, 1983, p. 105

[47] See the study of V. Boerescu entitled *Convenţiunea relativă la organizarea Principatelor,* in G. Petrescu, D. A Sturdza, D. C Sturdza, *op.cit.*, pp 421-424

[48] See I. Stanomir, *Naşterea Constituţiei. Limbaj şi drept în Principate până la 1866,* Nemira, Bucureşti, 2004, p. 312

[49] See G. Chiriţă, *Organizarea instituţiilor moderne ale statului român (1856-1866), Editura Academiei române,* Bucureşti, 1999, p. 79.

adopted by the Assembly against his views, the Conventional dispositions hindered him from actively control the legislative decision. As Cuza had hardly appealed to the right to dissolve the parliament, this threw the executive and the legislative in a functional parallelism. The crisis could not continue and it had to be "extirpated" from its constitutional roots, by a radical reform of the Convention's dispositions, in order to allow the prince to limit and effectively control the Assembly.

The alternative was discovered by Cuza in the instauration of an authoritarian regime which allowed him to take over the full control of power. The correct evaluation of the needs of the Romanian State and society from the perspective of the emergency of the modernization, irrevocably led to the uselessness and the lack of realism of a dry exercise of the parliamentary regime, however democratic would have been its perspective. In this context, it gained place in the Romanian political discourse, a logic of the purpose that excuses the means, which subordinated the long-awaited parliamentary monarchy to the idea of national interest. If the reform could be done only in the circumstances of an authoritarian monarchy, it was senseless to perpetuate and eventually to await the correction of the parliamentary regime.

In order to give his project a constitutional legitimation, Cuza did not keep the limits of the Convention, although this conferred him, as we have seen, enough mechanisms to launch a personal regime. Yet, the constitutional life had shown that the constitutional act from 1858 conferred the legislative a too high autonomy (if not authority) for Cuza's new political views. Hence, the Convention's text had to be left aside. However, Cuza did not use his own constitutional construction. The solution was discovered in an authoritarianism institutionally taken from the Second French Empire. Eventually, from the technical-legal point of view, this approach was the easiest: inspired by the French Constitution of 1852, the Convention could be changed, in the sense of highlighting the prince's authority, by a complete transplant of the dispositions of the French fundamental act. What had already bees previewed in Cuza's Project of Constitution from 1863[50], eventually happened. By recreating the process of instauration of the French authoritarianism: coup d'Etat – conferring a constitution – plebiscite for the constitution, Cuza launched, in spring 1864, his authoritarian personal regime.

The relationships between the executive and legislative powers were now established by the ***Statute Developing the Paris Convention***, which, formally and substantially, was a mere modification of the Convention, the latter keeping its quality of "fundamental law of Romania". As an additional act for the Convention, the Statute abrogated, impliedly, its articles contrary to its provisions. By keeping, as a consequence, from the Convention's original text, only the provisions that already conferred to the single-headed executive an important ascendant over the legislative, the Statute perfected the prince's authoritarianism by a complete limitation of the role of the legislative in the State. From the substantial point of view, this resulted from the fact that the Statute dealt only with the legislative and the legislative power, avoiding to come back to the organization of the executive. Technically,

[50] The project drew an institutional structure more faithful to the French model than the Statute. On the other hand, in comparison to the reformatory intentions declared in June 1863 to the Ottoman Empire, where he proposed the replacement, for 5 years, of the Elective Assembly established by the Convention with an Administrative Council appointed by the prince, the provisions of the Constitutional project and of the Statute seemed to be truly democratic. See C-tin C. Giurescu, *Viaţa şi opera lui Cuza Vodă,* Curtea Veche, Bucureşti, 2000, p. 149

the same limitation was achieved by an "institutional surgery" which faithfully transplanted the institutions of the French Constitution of 1852 instead of the Convention's ones, more moderate as regards the powers and little modified as regards the form of organization.

In the framework of this constitutional architecture which kept, residually, the purely formal separation of powers, the authority of the prince by over the parliament was at its peak. In this context, the arbitrariness of the prince could be manifest at any time and in any form, in ordedr to protect his personal power.[51] The mechanisms of control and pressure over the legislative were ensured by a true institutional apparatus faithfully taken from the French Constitution. The **State Council**, successor of the former Central Commission, was constitutionally consecrated only by the dimension of its powers in the legislative process. After its French model, the institution became the main and privileged laboratory for bills, even to the detriment of the elective Assembly, which had to send it for restudy the bills in dispute with the Moderating Body. The institution was completely under the prince's control by his power to preside the Council, to appoint and recall its members (according to its organization law), hence the active and important role of Cuza in the process of drafting the bills he also had the exclusive right to initiate.

Inaugurating the Romanian bicameralism, the **Moderating Body** became, after the French model, the "Trojan horse" of the prince inside the legislative. By this legislative chamber, completely under the prince's control by means of recruiting mechanisms, it was envisaged a limitation / moderation from the inside, of the elective Assembly.[52] The moderation was done through an *a priori* constitutional review. To conclude: the prince could exclusively initiate any bill he wanted, he closely followed its drafting as the president of the State Council, could block the bill in the legislative, on unconstitutionality grounds, and, if needed, could refuse its sanctioning by virtue of his absolute right of veto.

The final blow given to the legislative was the right assumed by the government to adopt decree-laws until the new Assembly was called, as well as the right to adopt laws in case of emergency, when the parliament's chambers were not in session.

By fully reaching his goals, Cuza's authoritarian regime can be described as an endeavor of rational legal import, by correctly combining the process of awareness of a political-legal internal need with the recourse to legal transplant achieved in such a way as to efficiently meet this need. In other words, it is an example of realistic and effective combining of the substance with the shape.

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[51] This arbitrariness manifested in the episode of determining the resignation of the Kogalniceanu government, in 1865. "upset" by the raising authority of the prime-minister, the prince took advantage of an incident from the Assembly in order to determine the resignation of his former collaborator. One must notice here that Kogalniceanu's resignation was not due to a political responsibility before the legislative, but to the political responsibility before the prince. As a consequence, there was no issue of customarily perpetuating the parliamentary regime. See C-tin C. Giurescu, *op. cit.*, p. 266-271

[52] As regards the members of the Moderating Body, appointed by the prince from the Departmental Counsellors, recruited at the level of the departments, and even as regards the members of the Assembly, Cuza's governments used the political pressures exercised, by means of the prefects, over the electorate, in order to ensure to the prince Cuza a crushing parliamentary majority. This was, actually, the age when it was inaugurated, in Romania, the custom of election control by the government, with a view to obtain a parliamentary majority. See M. Guțan, *Istoria administrației publice locale în statul român modern,* All Beck, București, 2005, p. 126-127

V. Conclusions

It is important to bear in mind that the establishment of modern constitutionalism, especially of the parliamentary regime in Romania, was achieved under the sign of a **paradox.** When the European Great Powers introduced in Romania (by means of the Paris Convention) a constitutional regime with an important authoritarian potential, by offering the prince extraordinary powers, the Romanian political class honestly fought for a parliamentary democracy. When there has been a chance to establish the most wanted parliamentary regime, an authoritarian regime was established by prince Cuza. In 1864, the interest of the national construction was considered as endangered by the parliamentary democracy and the only chance of Romania was seen the prince's authoritarianism. What matters here is less that this organic political development was institutionalised by legal import. What matters is that the **authoritarian monarchy** revealed itself as an effective solution for the socio-political and economical construction in an underdeveloped Romania, which lacked a real political class and still threatened by the external danger. It was not by chance that the admirers and the denigrators of Cuza altogether state that the most important reforms in the 19th century Romania were achieved under his reign.

Unfortunately, this view was far from corresponding to European democratic standards as regards political State construction. The awareness of this fact led to the renewal of the agenda of the Romanian parliamentary democracy starting from 1866 and expressed by the Constitution voted in the same year. Obviously, in the absence of national traditions, the democratic constitutionalism was achieved, again, by legal import. This time, however, the authoritarian French experiments have been replaced with the liberal institutions of the Belgian constitution of 1831. This irrational import, one of the important sources of the ....formelor fara fond.... revealed that adapting the imported form to the importing substance can become an acute form of inadaptation.

The evolution of the Romanian constitutional life after 1866 highlights that the **"Cuza model" of authoritarian government was not an accident, but a necessity for the Romanian society.** Carol I of Hohenzollern-Sigmaringen, prince and then king of Romania (1866-1917), as well as his heir Carol II, governed Romania, in more or less aggressive ways and depending on his own personality, after the same realistic principle of the monarchic authoritarianism launched by Cuza, in the context of a *de facto* subordination of the legislative to the executive power. Even in the moments of weakness of the monarchy, the continuity of the authoritarian regime and the primacy of the executive over the legislative power were supported by active prime ministers.[53] The Romanian political life of the time clearly demonstrated that **the principles of the parliamentary regime were difficult to apply and that the imported democratic forms were almost incompatible with the Romanian substance.**

Should we believe the arguments of Negulescu, guilty of all this evolution was the Romanian political class, all the political parties, which did not have the features and the interest necessary to promote the mechanisms of the parliamentary regime. **The establishment and the perpetuation of the administrative/ authoritarian monarchy was**

[53] See, e.g., H.-Chr. Maner. *Op.cit.,* p. 392. See also M. Bărbulescu, D. Deletant, K. Hitchins, S. Papacostea, P. Teodor, *Istoria României*, Corint, Bucureşti, 2003, pp. 352-353; P. P. Negulescu, *Partidele politice*, Editura Garamond, Bucureşti, 199..., p. 328

an organic response of the Romanian society to the lack of interest and to the corruption of the politicians. The political regimes of Cuza, Carol I, Carol II, were all part of the same paradigm[54]. From the scientific perspective of Negulescu and in the context of the establishment of the royal dictatorship in 1940, the elimination of the political parties from the political stage was a logical and viable solution, and giving up the parliamentary regime was seen as an opportunity in a Europe marked by right-wing authoritarian regimes. It still remained open the problem and the challenge to find a solution within the limits of the Romanian politicianism. This is still valid today, when, in the context of a crisis created by the political corruption, the traditional solution of the authoritarian regime does not seem the appropriate one.

[54] Ibidem, pp. 390 and foll.