

A COMPARISON BETWEEN THE MAGNA CHARTA LIBERTATUM AND THE FREEDOM CHARTA FROM BUCHAREST IN 1631 AND THE PROBLEM OF A POSSIBLE FOUNDING DOCUMENT OF THE ROMANIAN MODERN CONSTITUTIONALISM

Lecturer PhD **Lucian Sorin STANESCU**
Ștefan cel Mare University of Suceava, Romania
lsstanescu@gmail.com

Abstract:

The comparison between one of the most important documents of the universal constitutionalism, the Magna Charta Libertatum, and an autochthon feudal charta, the Freedom Charta from Bucharest in 1631, in what concerns the political and historical conditions which have led to their adoption, the claiming content of rights and their solemn shape, their juridical nature, has shown us conclusions regarding the different causes for evolution of the two documents. Broadly, the different political roles of the Statutes Assemblies which generated the adoption of the before-mentioned documents and the specific traits of the two law systems from which they come, are responsible for their reception in public law. Although from the perspective of its content, the Freedom Charta from Bucharest in 1631 includes regulations with the same constitutional potential as the Magna Charta Libertatum, it has not been able to project itself in the juridical conscience of the Romanians. In this framework, the article is a first attempt to explain why the Romanian constitutionalism does not have a founding document or why does our constitutional tradition not claim itself from such a source.

Key words: Statutes Assemblies, the Freedom Charta from Bucharest in 1631, the Magna Charta Libertatum, Parliament, constitutional tradition.

JEL classification: K19.

INTRODUCTION

The parting point in this type of analysis is given by the comparison between the causes and factors which produced our constitutional evolution with regards to the one of the occidental states. In this sense, P. Negulescu and G. Alexianu notice that, while in the case of the occidental states, the western rights and freedoms have been slowly gained through a hardened fight against the central power, which justified its existence and almightiness on the considerations of divine rights, our sources of public medieval law being on an external side for the political organization and international status of the Romanian states and, therefore, reflects itself, in the first period, in the treaties directly closed with the neighbor states, and internally, they reside in the unwritten law, the customary law, which regulated public law matters, like the Lord election, limiting the lord's power and different procedural dispositions. (Negulescu, Alexianu, 1942) The genesis of the "Theory of capitulations" from the political-juridical literature and the Romanian diplomacy from the second half of the XVIIIth century and until the half of the XIXth century, validates this opinion and it is useful to us in our endeavor of explaining the construction of the retrospective political imaginary which has founding valences and which can transform itself in a tradition with enough strength to impose itself internationally and be perceived in future laws or documents with fundamental Romanian character. V. Georgescu shows that the significance of this line of action, similar to a type of external lobby in the XVIIth and XVIIIth centuries, often private, until its reception in the official documents of the Romanian Principalities and, subsequently, of the modern Romanian state in the XIXth century, consists in the affirmation of the internal will of the Principalities, which might have willingly submitted themselves to the Ottoman Porte, this will being incorporated in international diplomatic documents, called treaties or capitulations. (Georgescu V., 1987)

In comparison, talking about the genesis of the English constitutionalism, T. Drăganu

considers that it is “the result of a long historical process, during which the institutions of the English state have slowly developed in the context of some economic and social interests confrontations, usually concluded with balanced solutions.”(Drăganu, 2000, p.18) Therefore, the Constitution of England “consecrates institutions which have affirmed themselves and which have a value verified in the social practice; it does not transpose abstract ideas in the world of palpable realities, but transforms those realities in a juridical doctrine.”(Drăganu, 2000, p.18) In other words, we can affirm that in what concerns the manner of formation of the English constitutionalism, obviously respecting the particular traits of the jurisprudential law systems, - it reclaims itself from a feudal charta- like there are others similar in the European feudalism, especially in the occidental one-, which represents a pact between the sovereign and the nobles and which contains a series of principles, which have juridical nature that is, mainly, one of guarantees of penal procedural law.

The continuation of this type of pact has been mainly realized on the basis of the jurisprudential substance of the British law, founded on the juridical precedent; therefore, we may affirm that in the English constitutional law, the custom creates in a juridical way the tradition through the invocation of same judicial precedent of a contractual nature, in this case it being about the founding document through which the power of the sovereign is limited and which preserves the old rights of people on the basis of the Common Law. P. Negulescu and G. Alexianu suggestively describe the phenomenon:” And while, in practice, this initial contract starts to be ignored by the royal power, the nation reminds him of it, also in writing. Thereby, the principles from the Magna Charta are reminded in 1627, under Carol I, through the Petition of Rights, in 1679, under Carol the IIInd, through Habeas Corpus, IN February 1688, under Jacob the IIInd, through the Bill of Rights, in 1701 through the Act of settlement. Basically, all these documents contain only the principles of guaranteeing individual freedom and the way of perceiving of taxes, principles from the Magna Charta Libertatum, reminded and perfected through each document with regards to the needs of that time.”(Negulescu, Alexianu, p.108)

In the history of the Romanian constitutionalism, paradoxically, the search for constitutional traditions cannot be satisfied only by its connection to the European ideologic syncretism – through the formulation of memoirs and constitution projects – from the end of the XVIIIth century and the beginning of the XIXth century, which materializes itself through the reception of the modern and universal constitutionalism principles. On the contrary, the approaches considered by us, it suggests the manifestation of a constant tendency to look for and judicially revalorize the old rights and freedoms of the Romanian nation, of a customary origin, sometimes comprised in the Common Law and subsequently confirmed in documents belonging to the lordly law, although our law system does not propagate but secondly the juridical power of the custom as a law source. The mentioned method has made us take further the investigation by comparing the symbolic meanings, the identification of the causes of different historical evolutions, but also their imaginary potential in the settlement as true constitutional traditions, of one of the fundamental documents of the universal constitutionalism with a similar one from the substantial and formal point of view in the political-juridical history of the Romanians.

SIMILARITIES AND DIFFERENCES IN HISTORICAL EVOLUTION BETWEEN THE MAGNA CHARTA LIBERTATUM AND THE FREEDOM CHARTA FROM BUCHAREST IN 1631

Paradoxically, although the Magna Charta Libertatum comes out very early, in the year 1215, “meaning in a time in which modern ideas were not conceived yet”, A. Maurois sees its importance “more in what it attracts that in what it is.”(Maurois, 1970, pp. 158-159). This interpretation is confirmed also by the way in which N. Iorga comprehends the constitutional idea of the time:” Let’s think that we have to deal with the XIVth century in which the idea would be looked for

hopelessly in the rest of Europe. I know that many are taken over by very wrong opinions in what concerns the English Magna Charta and what the Hungarians claim that, through the golden bubble of Andrew the IInd, they can put next to the Manga Charta. Actually, the Magna Charta and the Hungarian document, much inferior to the English one, have nothing to do to a modern Constitution: they are simply privilege insurances for the ruling class; there is something constitutional, but it represents the most selfish form, the narrowest material of a constitutional shape.” (Iorga, 191, p.29)

From this point of view, in a first phase, we have remarked a solemn procedure of a justice origin, that of the oath, which Magna Charta Libertatum will generate and which will acquire constitutional meanings in the sense of ratification or sanctioning of some pacts or conventions closed between the sovereign and the “country” through which rights have been given and the political power of the first has been limited, no matter how generous or not the representative content of this last notion has been over time. If we accept that the “country” is a concept that has progressively developed and that representativeness has been assured in the middle ages, mainly, by the overlapping social layers, which had as political expression the State Assembly for a long time, then we can affirm that this type of convention imposed by the representative authority and signed under oath by the sovereign, have the occurred democratic legitimacy endorsement. In order to understand the representation principle in the Middle Ages in England it is necessary to show that grouping based on the common interests of the knights and citizens has facilitated the formation of a Parliament composed of a superior Chamber and an inferior one: this explains why England was never found, like France was in the XVIIIth century, separated into two enemy classes. (Maurois, 1970)

Furthermore, the similarities of the reports between the sovereign and the “country” represented by the nobles of England or by the lord, like in the case of the Romanian Principalities, under the just reserve of some factors like “history’s acceleration” and the “dynamics of ideology” (Rials, 2002), which may explain, at least, the historical delays of over three centuries in manifesting some socio-economic phenomena, occur from two premises: firstly, neither did the English baron from 1215 intention to make a new law, asking for the respect of previous privileges (Maurois, 1970), neither did the Moldavian lords of 1591 or the Muntenian ones from 1631 have any intention to innovate, “to make a habit” but, on the contrary, to keep the legal and legitimate status-quo. Thus, the English barons take into account and solicit the respect of the older charta of King Henry the Ist (1100-1135), which he granted right on the day of his coronation and through which he promised to abolish “bad habits” which were introduced by his older brother, Wilhelm Rufus, to never allow ecclesiast benefits and stop perceiving irregular feudal taxes (Maurois, 1970). Approximately four centuries ago, the legitimation mechanism repeats itself, the Muntenian lords facilitating the realization of the convention with the ruler through the declaration of the attachment to the pre-established juridical framework, meaning: “regarding the laws and good customs which the old lords put together whose lives are happy and whose businesses have been known, because they were of use to the country”, like the ruler Leon Tomşa declared, under his oath in front of the National Assembly, in the Freedom Charta from Bucharest from the 15th of July 1631. (Barbu, 2000, p. 48)

Secondly, in what concerns the content of the conventions between the sovereign and the “country”, it must be understood in a vassalage logic, with its Eastern version, of submission, as D. Barbu calls it. If the English barons want to show in the year of 1215 that: “There are laws of the state, rights belonging to the community. The king must respect them. If he violates them, loyalty ceases to be a duty and the subjects are allowed to revolt”(Maurois, 1970, p.159), in the case of similar documents present in the political life of the Romanian Principalities in the Middle Ages, being opposable only to a certain person, they do not represent a “constitutional pact, with a stable content and a canonic form, between the political country, the nobility and the reign candidate.” (Barbu, 2000, p.47)

This is, probably, the point in which the evolution of the two types of convention is completely different. An element with a juridical and symbolical significance which makes possible the comparison, the oath, which consecrates the assuming and adhesion to the convention between the sovereign and the country, will produce juridical consequences different in different circumstances of time and space, variable historical series, like-somehow predictable- such implications over the constitutional imaginary. More precisely, we believe that for both types of adhesion contracts, the oath functions are available, the ones that D. Barbu identifies, meaning: of an exterior form of the contract between the “country” and the sovereign, as well as the normativity catalyzer (-n.a.) with the following motivation: “The oath is what transforms the state of fact into a fact of law.” (Barbu, 2000, p.47)

We believe that two major consequences come from here: while from the signing of the Great Charta in the year of 1215 by king John without a Country and the barons on the fields of Runnmede, until the XVth century, each king must swear multiple times in the times of reign and respect this text, (Maurois, 1970) in the case of autochthonous conventions between the “country” and ruler, given the reciprocal and *intuitu personae* character of them, as D. Barbu shows: “it is not expressed on a long term a general will of some states or orders precisely defined in a constitutional way, or if they are expressed in special circumstances, like in 1456, 1633 or 1655, it cannot naturally aspire to perpetuity.” (Barbu, 2000, p.47)

This type of approach explains, in our opinion, why, for the latter development of the English constitutional law, “the most important provision of the Charta is in art. 14, on the basis of which the Great Council of the Kingdom was instituted, an organism made from archbishops, bishops, counts and barons. This council, expanded again in 1265 with representatives of cities and knights from counties, had a big organizing role in the formation of the parliament with its two chambers (the House of Commons and the House of Lords), becoming, starting with the year of 1295, a permanent institution.” (Drăganu, 2000, p. 16) while the Romanian law system has not developed a continuity similar to an institution which limits its ruler’s power or of a document with value to the convention between ruler and “country”, no matter its sense or representative amplitude.

The causes of the differences in evolution under the aspect of the juridical, symbolical force and the constitutional nature of some conventions between the sovereign and the “country”, incorporated in the shape of feudal chartas, present also in the British middle ages and in the Romanian ones, are multiple. They consist of, in our opinion at least, in the nature and functions of the Statutes Assemblies from the Romanian middle ages on one hand, and on the other hand, in the different function of the lordly “reinforcement” of the charters, in its sanctioning sense from the modern constitutional law, which would have had the function to assure the juridical perpetuation of one or more documents concerning the political organization of the state and, as a consequence, its transformation in a primary document of the Romanian constitutionalism with an identity, symbolic and legal value, similar to the one of the Great English Charta.

Therefore, according to the convocation procedure criterion, it is noticeable that the Romanian statutes assemblies can be classified in assemblies convened by the ruler from his own initiative in gatherings that he convenes under the irresistible pressure of the interested groups, lie in the case of, for example, in Wallachia with the assemblies from 1631 and 1668. (Georgescu, V. Al., 2000). On behalf of their juridical value, we consider that the purely consultative assemblies must be differentiated from the ones where the ruler had to take into account the decisions because they produce different juridical effects. Usually, the assemblies took decisions which had only the value of a bill for the ruler, and he transformed the decision taken in the assembly into a compulsory state document. There were also other situations in which the ruler had to take into account the assembly’s opinion, even if he did not agree with it, like, for example, the judicial assembly in 1694 from Wallachia, which took decisions that the leader did not approve of, which it qualified as “a country’s consideration”, and which he did not understand to ratify, which exonerated him from any liability. (Georgescu, V. Al., 2000). It is to be taken into consideration that, despite the

preponderant character of the ruler's will in the assembly's convocation and, especially, in stabilizing their social composition, they were the same or, more likely, they could become "the expression of a certain force report" (Georgescu, V. Al., 1980) between the ruler and the assembly. In other words, we may affirm that a common denominator of the medieval states assemblies, of which representative content must be understood through the feudal mentality, is the in nuce tendency to become a censorship factor for the power of the sovereign. What essentially differentiates them is the type of evolution in the framework of the unique European transformation process of the feudal assemblies in the bourgeois parliaments of the national representative type (Georgescu, V. Al., 1980): in England, the Great Council transforms itself very early in the Parliament, and the limiting of the power of the sovereign becomes subsequently the first constitutional principle, in France the Statutes Assemblies has revolutionarily transformed itself into the National Assembly since 1789, and in Wallachia they evolved slowly and sporadically, "profoundly focused on their social, economic and political realities" (Georgescu, V. Al., 1980, p. 106), until their historical exhaustion, and in the end embody everything that was retrograde in the Old Romanian Regime.

In what concerns the debates of the Romanian statutes assemblies, they finalize with according the "advice" (*consilium*) at the ruler's request or of the "help" (*auxilium*). The final decision belongs, usually, only to the ruler and it materializes itself under a lordly charter, not of assembly decision, with reference to the debate from the assembly. So, the document does not express the will of the assembly, but it is recognized by the ruler through the oath in the end under the sanction of the curse. As V. AL. Georgescu notices: "the procedure is pretty serious and effective because no ruler, no matter how much pressured by fiscal needs, would ever cross such a curse, before formally obtaining, with all the means he disposed of, the canonic undoing of the curse by the competent religious authority." (Georgescu, V. Al., 1980, p. 274). More important than this aspect, is the enforcement function of the ruler's oath in his name and, especially, of the future ones (-s.n.), the rule being that "the will of the ruler is a signature and it is forever." (Barbu, 2000, p. 48). The ruler's oath also appears in the especially important (also for our study) Freedom Charta from Bucharest, from the 15th of July 1631, but what characterizes the history of the Romanian law is that the activity of the law is not imposed, usually, after the ending of the emitting ruler's reign.

With regards to what is happening in England with the destiny of the Great Charta after it's signing in 1215 and its transformation into the main source of English constitutional law, this type of evolution of the Romanian public law (or better said of its medieval forms) starts, in our opinion, from three causes. Firstly, the ruler laws have during a long time an individual command character, maybe even generating generalized habits, mainly tied to the duration of that certain reign." (Georgescu, V. Al., 1980, p. 229)

Secondly, the custom is not recognized constantly as a formal law source until the year 1830. The arguments are the following:- in the opinion of D. Barbu - : "It is true that, sometimes, the ruler in function could use older charters as a probation instrument for the cause in which he would pronounce himself, offering the documents of his predecessors a certain value usually. In these cases, the respect towards the ancestor's decision was less focused on its character as the document's predecessor, but more focused on the affirmation of the synallagmaticity of the ruler's authority, seen as a connection between the <prince> and the country." (Barbu, 2000, p. 48)

Thirdly, the division of the royal charters into simple charters and public or clerical charters, the balance of installed forces, even if latent, between the prince and the Statutes Assembly and the occurrence condition of the ruler's oath with a function of strengthening the document, specifically mentioned in some of these charters, determined us to advance the observation that it is reclaimed and used, especially and mainly in cases where the meetings are held at the pressure of interested groups to limit the power of the ruler, whether they are manifested limiting- claiming the benefit of aristocratic factions from XVIIth and XVIIIth centuries, whether manifested in a revolutionary way as representative bodies with pronounced democratic character, later in the XIXth century. In other

words, we can say that in situations where the Statutes Assemblies convened on the price initiative and therefore they have an advisory role, his oath is not compulsory to strengthen the charter incorporating the decision taken after consultation or with the support of the "country". But when an Assembly is convened under pressure from interest groups or sometimes even of the "country", and its claims must be recognized by the ruler by a decree that is to be issued, the oath has the role to strengthen, sometimes under the sanction of the curse, this document and obligations of the reign.

The dichotomy of the types of lordly charters that determine the occurrence of the royal oath with a strengthening function of an executive type as a direct consequence of the nature of the Statutes Assembly that consultatively approves or claims them, is answering, we believe, to the classification of these bodies - belonging to Gheorghe I. Brătianu - depending on their mode of formation and deliberation and according to the initiatives that determine them. Thus, in the XVII century, Statutes Assemblies from Romanian countries are acting in a predominantly manner "legalistic and traditionalist (...) which grows only in certain circumstances, longing to play the role of a representative body". (Brătianu, 1995, p 180).

The history series that we understand to invoke in our theory support begins with the Charter of Leon Prince Tomșa in Bucharest on the 15th of July 1631. "At the meeting attended, as it is said in the document, "the whole country" - in reality large and small landowners, the relegates (nobles of the country removed from their jobs), the Red (body of cavalry) and royal servants." (Economu, 1986, p 9). The document is very complex and regulates the foreign regime, how to determine the taxes, duties and tax exemptions, the judicial system, criminal and civil law issues, regulation of the church organization and it deserves a review of its legal and symbolic importance for many reasons. R. Economu holds some aspects of the importance of this principality charter "so the way it was drawn up, with the participation of all social statuses (of course, the states considered able, according to the mentality of the time, to participate in the political life), and its content (confining some abuses of the principality and regulate a number of legal issues)", which is why, says the same author, "it can be put on the same footing with the other Chartae Libertatum in other countries, which highlights, in this plan too, the integration of the Romanian Principalities in the general progress of the European society." (Economu, 1986, p. 9). That document was called the "Charter of Romanian Liberties" (Georgescu, 1976) and, in the spirit of the above mentioned European syncretism, "freedom" can be understood only in the sense defined by F. Braudel: "It is significant that the Middle Ages speak about libertates much more than libertas. Put in the plural, the word does not differ at all from privilegia or jura. In reality, freedoms are sets of franchises, privileges, behind which a collective of people and interests is placed, and then, strengthened by this protection, it rushes over others, often bluntly." (Braudel, 1994, p. 18)

The political context in which Leon Tomșa issued the Decree of the 15th of July, 1631, determine new milestones for comparison with the main ideological source of universal constitutionalism, which can be described succinctly "of internal discontent and under pressure from rebellious abroad nobles hostility." (Economu, 1986, p 9). Two major themes have antagonistic position, the nobility and the government, but finding a solution could only be shared. On the one hand, the avail of boyars in the state, and on the other, assessing the acceptance of the Ottoman rules in exchange for peace. Simultaneously, political action to assert the boyars are combined with sequential affirmation of a traditional authoritarian reign of a Byzantine origin, now rested on services rendered to the Porte by clientele rulers. (Georgescu V. Al., 1977). This political context is helpful to us in order to determine the nature of the Assembly convened by the ruler (i.e. at the demand and pressure of the dissatisfied groups and castle) and, consequently, the legal nature of the decision taken by the Assembly, which will be incorporated in the royal charter that will be issued, according to the importance and complexity of the document, with the advice of the community ("we have sought - says Leon Tomșa - "the whole council"). Protesters and the vindictive nature of the meeting reflected the "controlled" phraseology of the charter "debate on ... bad habits that have been added by foreign people in the country." The price claims he "raised all

country to be consulted according to his own will." (Georgescu, V. Al., 1976, 1019). In reality, the ruler had no choice but to accept the claims of nobility, as in the case of the English Charta, revised in 1217, where the King attributed himself the free initiative of the act, although the civil war from his predecessor was cornered and alive in the memory of everyone. (Maurois, 1980). Not incidentally, we believe that this type of charter, issued on demand and pressure of such type claiming Assembly, asked for the strengthening rule by oath. Fiscal and legal regulations contained by the royal charter, likely to limit the powers of the prince, have other similarities with the Magna Charta Libertatum content. As provided in Articles 12 and 14, other charges imposed without notice and approval of the Grand Council cannot be imposed, which today could be interpreted in the light of the principle of „no taxation without representation". "In reality, the barons demanded only that the king, if he wanted to charge extraordinary "aid" unforeseen in the customary feudal contract, cannot ask for it without the approval of the Grand Council, composed by the barons and the great vassals." (Maurois, 1980, p 158). Determined remedies, presented in the charter as coming from the prince, are, in fact, claims that the Assembly managed to impose on him, aimed at two types of measures.

The first category consists of the fiscal, successional and ecclesiastical freedoms combined with reactive measures against the Greeks in the country, and the ruler elected by the "country and council" would only be blessed by the patriarch, "as it was the part century." The second category, the most important for our comparative study, includes measures of judicial safeguards of individual liberty. The measures of the judicial that it provides are "the county should no longer forcibly throw itself to the lords"; the judgments will be followed with justice, after Christian rules, not "with duplicity" or "according to the lords wishes"; no one will be sentenced to death without being held in prevention to be investigated, instructed and no one will be condemned without trial to the Divan. In the future, only the penalty provided by the law "how the law will reach for his fault." (Georgescu, V. Al., 1976, p. 1020). The Charta from Bucharest, the 15th of July, 1631, issued by Ruler Leon Tomsa, as in the formulation: "no man without trial and without Divan will die, but will be firstly held, then to be presented to the Divan, and his guilt will be known by all. Then he will come to the ground, according to the law and his guilt" strongly resemble to the proto-procedural versions of the Ordinances Habeas Corpus based on Article 39 of the Magna Charta Libertatum which was applied in the British jurisprudence since the adoption by the English Parliament of Habeas Corpus Act in 1679 and that involves essentially mere temporary removal of the prisoner at his request or at a tribunal request in order to notify the allegations made against him in public court proceedings without involving other procedural laws.

The summoning ways of the Assembly, the nature of the regulations adopted, some of which related to the political organization of the country and the mechanism limiting the principality power, the type of representation that they incur on behalf of the claimed freedoms, appeal to preserve the good old customs, not only to produce many similarities with Magna Charta Libertatum or other feudal charters of rights, but, as in the case of the latter, determine the legal nature of such an "agreement" between the prince and country, which "recognizes the individuals than the adhesion, expressed in the form of the oath, which is enforceable once given their consent." (Barbu, 2000, p.47). In the present case, we consider that, in reality, we are dealing with the great assembly of the country because the core subject of its claims is practically a charter of liberties, which, together with the election of the ruler and other important policy issues and general recognition of suzerainty, paying tribute, war or peace, settlement or closing the tax, status of the peasantry, the power lies in the great assembly of the country. (Georgescu, V. Al., 1980).

The design of the oath in the above presented case is likely to support the argument that strengthening the rule by judicial process, it is claimed and it occurs only when the charter contains provisions equivalent to "liberties" with potential constitutional future. They are part of the provisions that are required by an Assembly exercising one of its episodic and representative roles and calls royal power to respect the old rights, customs, organizational rules in different fields or

even introduce such provisions to limit central power, meaning that their assigned strength to be a true capitulation of the price in the front of the lords. (Georgescu , V. al . , 1976). In this context, the oath of Leon Tomşa Voda on Freedom Charta from 1631 can be enlightening in terms of its legal and symbolic effects " These wishes of the country and of the Assembly, all above mentioned, I swear with great oath, to keep all of them. And if I will break one of them, then this swear to befall with punishment on my Reign and on my sons ... " . (Barbu , 2000, p 86). It is noted that the oath formula chosen by this ruler manifests all characteristics of the lordly laws, namely: his followers were conjured not to transgress royal laws, thus increasing the chances of customary pattern; terrible curses, as an expression of legislative techniques with magical overtones, were intended to deter potential whistle blowers in the convention; invoking the old rules and "old princes" was intended to "guarantee of rationality and truth actually ideological descendants take into account that the mystics of all that was old and immemorial. " (Georgescu , V. al. page 228). However, no "old law" or " habit of forever" or "parable of old kings" were not able to ensure the continuity of the provisions of a royal charter, either, or even less, giving freedom and "Assembly statutes" and thus to defeat " Incontestable principles of general lifelong validity of the current normative acts." (Georgescu , V. Al. , 1980 , p 229).

RECEPTION OF THE TWO DOCUMENTS IN PUBLIC LAW AND THE PROBLEM OF THEIR POTENTIAL FOUNDER IN MODERN CONSTITUTIONALISM

What historian V. Al. Georgescu studied as „history career " of the charter with the same comparative method as Magna Charta Libertatum in 1215, is what caused us to try to answer the question of why Romanian constitutionalism does not have a primary document, similar to the Great English Charta despite similarities in content and form. History career represents for a great historian "the fact which truly individualizes each charter of freedom, i.e. its role in the history of the society, or even in other people." (Georgescu V. Al., 1976, 1022)

While Magna Charta Libertatum was successively reconfirmed by every king in hand, sometimes several times during the same reign, the Freedom Charta from Bucharest in 1631, is not assumed and continued by any of the following rulers. Ruler Leon Vodă is the first who violated this charter during the Battle of Targu-Jiu, and it was reported by the Cantacuzin Chronicle (Georgescu V. Al., 1976), but the same happens with Magna Charta too. Causes of discontinuity of the Romanian charter in the collective consciousness are systemic and are derived from royal law features, which has a primarily life contingency nature. For this reason, the lordly oath that formally employ his successors, under the penalty of the curse, does not have the force to entrench the obligations for the ruler and his followers, and even less so for whoever will receive the royal investiture on elective role from the ruler council.

As shown, V. Al. Georgescu did not assign the procedure to strengthen the lordly charters with a sanctioning community function, which can be identified as the predecessor for the procedure of sanctioning acts of the legislative body of the parliamentary regime of the XIXth century. However, although the next ruler, Matei Basarab, completely ignores it for obvious reasons, the charter of Leon Tomşa will see a procedure of reinforcing in 1668, even with the amendment that it is carried on by his son, Radu Leon, most likely in memory of his father and not due to faith in any principle of legality. For V. Al. Georgescu this reinforcement seems to be "anecdotal" against repeated and extended formulation known over time. The fact is that the charter is in the collective memory even after 37 years after its issuance, and if we assign its legal and symbolic force and judicial measures, collected by the same historian, taken by the ruler Constantin Brâncoveanu during his reign (long but harshly investigating lords, judging them in the Divan , punishing them by searching through law the applicable text in the case and often magnanimously forgive, sparing the lord class of political calculation) it is present in political and legal consciousness and away about three quarters of a century (Georgescu V. Al. , 1976). We do not

have, unfortunately, evidence that the great ruler would apply judicial proceedings arising from the provisions of the Leon Tomşa Prince lordly charter from 1631.

From our point of view, the precarious continuity of the application of the Freedom Charta from Bucharest is mostly due to the role, function and evolution of the Statutes Assembly as the representative body of the medieval Romanian countries. In fact, the charter is actually an emanation of the Statute Assembly of the claiming type, whose "whishes" are constrains (Georgescu V. Al., 1976) and has the character of remedies for a range of serious problems considered basic, and the regulation would be sustainable and fundamental. Also, the claim category of *restitutio in integrum*, and *reformatio* are characteristic for the Magna Charta Libertatum and the Golden Bull. (Georgescu V. al. , 1976). Again, we do not know any document proving that a new Assembly convened for the same reason and the same claiming character would ever be invoked for reconfirming the charter of ancient liberties and, in this way, being in the ruler law, by reinforcing it by another ruler.

So, two plans are outlined in order to pursue conscious effects of the Freedom Charta from Bucharest in 1631, of which spoke the historian V. Al. Georgescu. The first plan is determined by the nature of the Assembly that require such a charter from the ruler, and aristocratic class consciousness to constitute a censorship factor for the royal power. The charter is clearly a contract of adhesion between the ruler and the country, with reciprocal obligations - such as has rightly mentioned D. Barbu - and contains important measures for the political organization of the country, and especially, rights and guarantees trial referring to the claims of individual liberty, even democratic dissemination (drafting of the ninth provisions has an open universal applicability, the law does not talk about its validity in relation to a certain social status only). However, it is not invoked in a new Assembly during another reign as it happens with the "ducal promise" of Venice or the well-known *pacta conventa* which the Polish Sejm shows to the new king on the occasion of his election, despite the effort of the great historian N. Iorga to give it continuity of pattern in Moldova of the XVIth century (Brătianu, 1995), and the derivative obligations are constrains, as shown above.

We do not subscribe to the opinion of Professor V. Al. Georgescu about the "closed" character of the charta, which would be "locked in its evolution from the throne and from the people that had promoted it, and so without a historical open career" (Georgescu, V. Al., 1976, 1029), but only to the extent in which what majorly distinguishes it from its famous English model is the lack of *ius resistendi*, item that we put on the evolution of different assemblies of statutes in relation with the royal authority until they have exhausted their historical role to transform the Grand English Council in the Parliament into a censorship factor for the power of monarch.

We believe that the promotion of the charter on the way of the ruler's law would be likely to achieve those "conscious effect" mentioned by the same V. Al. Georgescu and we do rely on royal right features. Different by the custom and local law, the lordly law was a new one (*ius novum*), which may change more and more the custom or local law. It is the "written law system corresponding to the historical development and, by reducing the multiplicity of legal systems, will become a historic premise of the bourgeois law, uniform and national in the sense of its legal positivism." (Georgescu, V. al. 1980, p 229)

Rather, we believe that it is an important difference for the collective legal consciousness of the aristocratic class and, subsequently, of society for guarantees of individual freedom and hence they fall into disuse for a while. In this analytical register there must be validated the option of M.T. Oroveanu for the land ownership and social relations, economic, political and legal institution set around it in the Romanian society as a configuration factor for the Romanian constitutionalism (Oroveanu, 1992) at the expense of the struggle for individual rights, given that the European legal systems tend to favor formation and concentration of authority from top to bottom (and of the collective authority, community), while the Anglo-Saxon law tends to facilitate individual freedoms. (Robertson, <http://habeascorpus.net/asp/>). While the Leon Tomşa charter is not promoted,

at least consistently, the lordly law, although it contains, in our opinion, the most important measures and remedies form the fund of ideas later claimed of universal constitutionalism, the Liaison or Establishment of Mihai Viteazul (1595) on the status of peasants bound to the land is one of the first acts of a prince having started a general normative character, implicitly adopted by the descendants. (Georgescu V. Al., 1976; Oroveanu, 1992b).

CONCLUSIONS AND RESEARCH OPENINGS

e problem of the reception of real or ideological sources in our positive and modern law is a more complex one, if we put into equation the fact that neither principles of Islaz Proclamation failed to obtain the consecration, which is why Titu Maiorescu considered them "without practical value." (Carp, Stanomir, Vlad, p.166). If we start from the premise of V. Al. Georgescu and we can set up a conscious effects projected into legislation, in a way, the ideological continuity problem in terms of collective legal consciousness is transferred from this point into a plan of "unconscious" effects of such a Middle Ages document with a democratic constitutional potential. We have to confirm what A. Maurois mentioned: "the English Parliaments did not consciously build the future "and" if the kings of England would have thought that barons, knights and townspeople called being part of two assemblies will become a force, that gradually have to grab all royal powers, they would have been completely different politics."(Maurois,1980). It wasn't the historical oblivion to be the bottleneck for the transmission of legal and symbolic force of the Charter and, therefore, the formation of tradition or to identify its primary ideological source, because do not forget that Magna Charta Libertatum was a less popular document so that neither was translated into English before the XVI century (Maurois, 1980). In terms of its importance in the era in which it was issued, it is necessary to report the special attention paid by the issuer to the image of the charter: the original (currently in the State Archives) is written on parchment (57 x 31 cm) and wears a ruler seal of ten centimeters in diameter, which has been preserved intact. The seal is bound with the parchment with multicolored silk ribbon (red, yellow, blue, white and green). (Economu, 1986).

In our opinion, there is no impediment in the establishment of the parentage of guarantee of Habeas Corpus in the Romanian pre-modern political and legal literature for the Charter of Leon Tomşa issued in 1631, because we cannot speak of a continuous nature of a law beyond the end of the issuer, nor in 1631 nor in 1780, the year of issue of Pravilniceştii Codicil whereas the lordly right has life contingency absolute character until the first third of the XIX century. A problem that still remains unsolved and open to debate by researchers is the anteriority of this Romanian political document with comparison to the Habeas Corpus Act adopted by the English Parliament in 1679, taking into consideration that the synchronicity explanation of circulation of ideas in Europe is not sufficient, since in England the guarantee was implemented by courts judicially and a special law was not in force until that year.

On the other hand, it is necessary to follow why, after 1859, none of the old public documents with founder potential from a constitutional point of view could not manage to get enough in the collective consciousness of Romanians and to play the role of "old tractats" of Romanians, whose systematic recurrence in political and constitutional documents of the period 1772-1858 allow us to advance the idea that they were the founding documents of the early Romanian constitutionalism.

REFERENCES

- 1.Barbu D., *O arheologie constituţională românească*, Ed. Universităţii, Bucureşti, 2000
2. Brătianu Gh. I., *Sfatul domnesc şi Adunarea stărilor în Principatele Române*, Ed. Enciclopedică, Bucureşti, 1995
3. R. Carp, Stanomir I., Vlad L., *De la „pravilă” la „constituţie”. O istorie a începuturilor constituţionale româneşti*, Nemira, Bucureşti, 2002

4. Drăganu T., *Drept constituțional și instituții politice - Tratat elementar -*, Volumul I, Ed. Lumina Lex, 2000,
5. Economu R., 1631 - *O chartă a libertăților*, în „Magazin istoric”, nr. 10/1986
6. Georgescu V. Al., *Trăsăturile stilistice ale dreptului feudal românesc*, în, I. Ceterchi, et al, (coord.), *Istoria dreptului românesc*, Ed. Academiei R.S.R., București, 1980, vol. I.
7. Georgescu V. Al., *Natura și rolul adunărilor de stări*, I. Ceterchi, et al, (coord.), *Istoria dreptului românesc*, Ed. Academiei R.S.R., București, 1980, vol. I,
8. Georgescu V. Al., *Hrisovul din 15 iulie 1631 al lui Leon Vodă Tomșa în Țara Românească și problema „Cărților de libertăți”* în *Revista de Istorie*, Tom 29, 1976, nr.7,
9. Georgescu V. Al., *Formele, alcătuirea și modul de funcționare al adunărilor de stări*, în, I. Ceterchi, et al, (coord.), *Istoria dreptului românesc*, Ed. Academiei R.S.R., București, 1980,
10. Georgescu V. Al., *Marea adunare a țării*, în, I. Ceterchi, et al, (coord.), *Istoria dreptului românesc*, Ed. Academiei R.S.R., București, 1980, vol. II, partea a I-a.
11. Georgescu V., *Istoria ideilor politice românești (1369-1878)*, Jon Dumitru Verlag, Munchen, 1987
12. Maurois A., *Istoria Angliei*, vol. I, Ed. Politică, București, 1970,
13. Negulescu P., G. Alexianu, *Tratat de drept public*, Tomul I, Casa Școalelor, București. 1942
14. Oroveanu M. T., *Istoria dreptului românesc și evoluția instituțiilor constituționale*, Ed. Cerma, București, 1992
15. Rials St., *Declarația drepturilor omului și ale cetățeanului*, Ed. Polirom, Iași, 2002