ROMANIAN PRINCIPALITIES AND EXTRAORDINARY CONSULAR JURISDICTION. THEORETICAL ASPECTS FOR THE PERIOD 1810-1880

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Abstract:*Romanian historiography and juridical literature did not dedicate enough space and time to the research of extraordinary consular jurisdiction. The few studies undertaken so far indicate, as legal origins, the capitulations granted by the Ottoman Empire to the Great Powers, and the political ones, the first attempts of generalizing their applicability by Austria. Even though the archival inventory is reach is cases that can offer an insight in the jurisprudence of that time, cannot be fully fruitful as long as theoretical aspects, to which the researcher must refer, are still unclear.*

Thus, the present paper proposes itself to recreate the evolutionary circuits of this institution, having as a starting point the principle of international law of the time. A sensitive and essential point, which will treate along the paper, refers to capitulations and their meaning. We will try to see if the initial understanding of these acts kept its essence during the C19th or if this changed. In order to fully evaluate the application and the implication of extraordinary consular jurisdiction in Romanian Principalities, we will try to present the legal opinion of the Romanian specialists during the period that is of interest to us.

Keywords:*extraordinary consular jurisdiction, Romanian Principalities, capitulations, C19th.*

The extraordinary consular jurisdiction is a not only a legal problem, but also a political one, for the Romanian Principalities in C19th, that questions their autonomy, the international Christian law of nations and, after 1862, the state itself. The matter of this special consular jurisdiction has its own chronology, thus the first phase starts in the Middle Ages, the second one with the year 1740 and the last one with the years 1839 and 1861. For Romanian Principalities the year 1774 is the year that delimites the second phase. We chosed to discuss the subject in the ellected time frame, 1810-1880, because it is the period when the consequnces of this extraordinary consular jurisdiction can be clearly and fully documented. Moreover, the Bucharest treaty from 1812 and the Berlin treaty from 1878, are the international acts that provide arguments for the continuous solicitation of Romanian Principalities for the European powers to help put an end to it.

There are, at the moment, various Romanian works dedicated to the research of this subject, yet we consider their number as insufficient. Moreover, the gap that is created by the lack of legal literature is quite significant and makes harder the understanding of the historical material. For this paper, together with the familiar works of Stela Mărieș or Constantin Giurescu and the relevant edited historical documents of the period, including memoirs and official petititons, I tried to use various materials as to encompass in my study a larger perspective on the problem, from the national one to the European and even Turkish ones. Another reason for selecting this bibliographic material arouse from the importance, I think it has, to establish if the Romanian point of view was a particular one or if it was shared by foreign officials and/or specialists.

Few main ideas can be recovered from the study of this bibliography. Almost everyone agrees that extraordinary consular jurisdiction is a direct consequence of the Ottoman capitulations granted to European powers, that they contained commercial provisions together with stipulations regarding the persona of the nationals from the European states and that they became, after the mid of the century, treaties signed by parties that find themselves on a position of equality. In particular, the researched material confirms that not only Romanian political leaders, but also foreign ones, consider the application of this tythe extraordinar consular, in the Romanian Principalities, abnormal and without clear legal motivation.

The capitulations were also called letters of privilegies or imperial diplomas containing sworn promisese. In the beginning they weren't considered as a source of recirpocal obligations, rather as concesions and favours granted by Muslims to Christians. Even though many authors, among which Pelissie du Rausus, cited by Stela Maries in *The situation of foreign protegee in Romania in C19th*, usualy affirm that the first capitulations were given to France, the report of the Americal consular clerk Van Dyck, states that the first ones are those granted to the city of Florence[1]. The most important modern capitulations date from 1740 and, from this point of view, the first and most important capitulations are those granted to France and England. They served as a model of provisions for all the other subsequent capitulations that the Ottoman Empire gave to the other powers and opened a new for the augmentation of the already given privilegies and rights[2].

[1] Edward A. Van Dyck, consular clerk of the United States at Cairo, *Report on the Capitulations of the Ottoman Empire since the year 1150*, part 1, Government Printing Office, Washington, 1881, p. 12.
[2] Feroz Ahmad, *Ottoman perceptions of the capitulations 1800-1914*, in *Journal of Islami Studies*, 11, 1, 2000, p. 2.

In time, these capitulations formed a special body of rules that assured to the nationals of different stats that were on Muslim soil a unitary juridical regim that evolved and become more and more liberal. In itself, the regim of capitulations represented an exceptional situation for the Ottoman Empire that, by the middle of the C19th, find itself enslaved by its own creation, especially on administrative level. Thus, what was once a granted favour turned out to be a humiliation and a sign of incresed wickness. The era of the capitulations as unilateral acts ended in 1774, with the bilateral treaty of Kuçuk Kaynarca[3].

The consular jurisdiction that was born out of these capitulations meant the interference of consuls in the administration of justice and coinceded with the increased wickness of the Ottoman Empire. The legal basis of this special consular jurisdiction resided in a special clause from the „gracious concessions", namely the „most favoured nation" clause[4]. Thus, a national of any of the foreign powers that benefited from a capitulation was ensured in his persona, domicile and fortune. In the civil and commercial conflicts with Muslims he was to be judged my a mixt court or, in any case, to be assissted by its consul or another representative of his consulat. Also, no Muslim authority could enter his domicile unless it was in the presence of the consular or his delegate. These situations gave room to abuses because they left to the disposition of the consul to participate or not and, in the case he didn't gave his approval, the Muslim authority was paralized and found itself in the position to be unable to take any decission or to realize any legal act. As the stipulations of the capitulations became more relaxed, even the criminal offences were excepted fromt the Ottoman authority, being established such cases are of the competence of the national court of the foreigner[5].

If in all the European countries the place and importance of the consuls dicreased in time and espcially in the C19th, those that occupied these positions in the Ottoman Empire find their atributes and obligations unchanged. This was a strange and painful situation nonetheless, mainly in the circumstances of a very tenacious and willing Sublime Porte to change and put itself in accordance with the European legal principals through the reforms done in 1839 and 1856[6]. More or less, these correspond to the years used for establishing a modern chronology of the capitulation, from the year of 1838 on and, the second period, from

[3] August Benoit, *Étude sur les capitulations entre l'Empire Ottoman et la France et sur la réforme judiciare en Égypt*, Librairie Nouvelle de Droit et Jurisprudence, Paris, 1890, pp. 46-47.
[4] Umut Özsu, *The Ottoman Empire, the Origins of Extraterritoriality and International Legal Theory*, in *The Oxford Handbook of the Theory of International Law*, edited by Florian Hoffman and Anne Orford, Oxford University Press, Oxford, 2015, p. 12.
[5] Van Dyck, *Report*, p. 29.
[6] Aug Benoit, *Étude*, pp. 46-47.

1862 on[7]. After the reform called *Tanzimat*, between 1839 and 1878, the abrogation of the capitulations became a political goal for the Ottoman Empire that felt itself attacked in his sovereignity[8].

Following the same line of thinking, another argument for considering this special consular jurisdiction an oddity appeared when comparing its basic principals to those of the laws of nations and the provision of the international public law. Thus, all powers tolerated a limited and restricted foreign intervantion in the state business, in raport with their own sovereignity, understood in a territorial sense in the modern era. Or, keeping the Sublime Porte obligated to respect and apply the „gracious conseccions" meant preventing them from real evolution toward the accomplishment of the Western political and juridical ideals[9].

As said before, the purpose of this special consular jurisdiction was the protection of the citizens from the Christian states in the non-Christian territories[10]. This is one of the most important arguments for the reasoning of the oddity of applying this type of consular jurisdiciton in the Romanian Principalities. B. Boerescu, a Romanian politician and a specialist in law, wrote, at the request of Princize Cuza, a paper on the extraordinary consular jurisdiciton. He asks a pertinent question: how and why should the Christian European princes protect their subjects in countries where the Muslim laws don't apply and where Ottoman subjects aren't allowed to establish their domicile, to buy land or to build special places for religious rituals[11].

More over, starting C17th, in the system of the European nations a particular body of international rules, made up by treaties, customs and usage, came into being. In time, this body of rules evolved and enriched itself with more stipulations and principles. So is the principle stated by the London Treaty from 1826, between Great Britain, France and Russia, that says that all the rights that a nation can defend for itself, can be supported for another nation, if that nation asks for the intervention the other one's intervention[12]. This puts better into light the the reasons for which Romanian politicians constantly addressed to the European power for help and, also, provide the key to understanding the real meaning and purpose of the collective guarantee of the Great Powers beginning with 1858.

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[7] Van Dyck, *Report*, pp. 45-47.
[8] Feroz Ahmad, *Ottoman perceptions*, p. 1.
[9]Umut Özsu, *The Ottoman Empire,*, p. 8.
[10]Ibid., p. 15.
[11] B. Boéresco, *Mémoire sur la juridicition consulaire dans Les Principauts Unies Roumaines*, E. Dentu Libraire-Editeru, Paris, 1865, p. 13.
[12] B. Boéresco, *La Roumanie après le Traité de Paris du 30 Mars 1856*, avec une introduction por Boyer-Collard, E. dentu Libraire-Editeru, Paris, 1856, p. 28

The first capitulations between Romanian Principalities and the Sublime Porte date back from theend of C14th and, even though their existence was contested, nonetheless assured a legal basis for the political relationship between them. *Mefruz el-Kalem ve maku el-kadem min küllü-l-vücüh serbestiyet*[13], was the classical formula through which the autonomy of Romanian Principalities was stated. To reinforce this autonomy and „freedom in all regards" for the principalities, it was accepted that they have an official representative beside the Sublime Porte. In time these representatives were assimilated to the diplomatic personal and had as main attributions to keep the Romanian prince in good relations with the Sultan and the Ottoman officials[14]. Through the Treaty of Paris from 1856, the Romanian Principalities received the acknowledgment of their privileges and immunities, of their autonomous juridical status, from the Great Powers under their collective guarantee. The Treaty along with the Convention (1858) stated that the Sultan has no right in relation with the election and the investiture of the Romanian rulers, his consent was purely formal[15]. The many treaties signed by Romanian Principalities, after 1860, on different subjects (commerce, telegraph, extradition etc.) come to confirm the status of autonomous country.

This brings into discussion the issue of sovereignty and suzerainty and modern acceptance of these two concepts. Due to the fact that the Romanian capitulations were, in some regards, different from the other ones, the case of Romanian Principalities bares some distinctions that greatly influence the understanding of our topic. First of all, we must take into consideration that those capitulation looked more like a mutual binding treaties because they stated obligations for the Ottoman Empire. The Sublime Porte accepted the responsibility to defend the principalities is any armed conflict and their autonomous status in exchange of tribute. This theory was elaborated by N. Bălcescu around the year 1848 and after that spread out in Western intellectual medium[16].

Legal theory considered these type of international acts as "unequal alliances", while specialists in the field of law, such as Martens or Vattel, said that such alliances are not incompatible with the idea of sovereignty[17]. Moreover, from our point of view, even the

[13] "Romanian Principalities are separated from the Chancellery, it is forbidden their stepping with the foot, they enjoy freedom in all regards", from *Documente turcești privind istoria României*, întocmit de Mustafa A. Mehmed, volum I, 1455-1774,Ed. A. R. S. R., București, 1976, p. XXVIII.
[14] Aurel H. Golimas, *Despre capuchehăile Moldovei și poruncile Porții către Moldova până la 1829*, Tipografia Ligii Cultural, Iași, 1943, pp. 30-58.
[15] J. C. Bratiano, *Mémoire sur la situation de la Moldo-Valachie depuis le Traité de Paris*, A. Frank, Paris, 1857, pp. 16-18.
[16] Stela Mărieș, *Abolirea jurisdicției consulare în România – parte integrantă a luptei pentru independență națională*, in *Revista de Istorie*, tome 30, nr. 1, Bucharest, 1977, p. 3.
[17] Boeresco, *La Roumanie*, pp. 34-35.

request made by the Sublime Porte for the principalities to not enter into treaties or alliances against its interests, is not affecting in any way their sovereignty. We consider this rather an act of self-preservation and of political logic.

As for the suzerainty of the Ottoman Empire, this must be understood more in the light of its given meaning by the Sublime Porte itself. Boyer-Collard sais that it must be understood rather in the sense given by the translation of an ancient word, "supremacy", that appeared to be reserved to the Porte through the first capitulations[18]. As for C19th suzerainty, it must be understood rather in term of territorial suzerainty than in the sense that European gave it in feudal era, a fact that is confirmed by the legal doctrine and its theory about extraterritoriality that represents the basis of the consular jurisdiction, in general. In this light, the arguments related to autonomy are once again confirmed if we think that the old capitulation, containing the immunities and privileges of Romanian Principalities, stipulate their territorial inviolability[19].

This extraordinary consular jurisdiction gave place to many abuses, especially from the states that had an interest in maintaining the principalities under strict foreign control and in preventing the growth of national ideas. Such countries were Austria and Russia, both feared the new political ideas of time and the impact that more politically evolved Romanian Principalities would nurture the same ideas in the their subjects, especially Polish and, respectively, Italian[20].

These abuses were created by using the gaps in the international body of rules and extensive interpretation of its stipulations. By the power granted to consuls through the interpretation of capitulations, they could defend and protect all their nationals, in any matter, be it civil, commercial or criminal[21]. A clarification is asked here, all these powers that European consuls enjoyed were due to the capitulations granted by the Ottoman Empire to their states and were of application only in non-Christian territories; in all others, the their attributions were restricted. Nonetheless, great powers like Austria or Prussia constantly tried to implement the provisions of those capitulations on Romanian juridical system by the

[18]Boeresco, *Juridiction*, p. 32.
[19]*The memoirs and the observations of Prince of Moldavia, Grigorie Alexandru Ghica, on the Protocol of the Constantinopole Conference from February 11th 1856, sent to Paris Congres at February the 28th and March the 8th 1856,* in *Actes et documentes relatifs a l'histoire de la régénération de la Roumanie,* éditè par Genadius Petrescu, Dimitrie Sturdza, Dimitrie A. Sturdza, tome III, Imprimerie Charles Göbl, Bucharest, 1889, p. 970. Further citing Ghica, *Memoire.*
[20]Bratiano, *Mémoire*, p. 13.
[21] Van Dyck , *Report,* pp. 27-29.

misinterpretations of those stipulations[22]. Even the Sublime Porte wanted and tried to impose to Romanian Principalities the practice of capitulations as an exercise of her power and authority. For example, at the request of an Austrian representative, it issued a number of firmans to ask of the Romanian Principalities to respect the conditions of a commercial treaty with Austria in regard to Austrian subjects[23].

There are many cases recorded in Romanian archives[24] that can serve as proof for how much this jurisdiction aggravated the system of justice, the process of settlement. For example, one aspect, that had damaging economical and financial consequences, was the impossibility of local Romanian tribunals to declare the bankruptcy of a foreign subject, or to start this procedure, as we can see in some files from the Minister of Internal Affairs[25]. Another devastating effect was the increased number of "foreign subjects" in our countries, meaning of nationals that chose to become subjects of foreign powers for the sole purpose as to benefit from the privileges and of the tax exemptions that were granted to them[26]. This is a large topic and can become the subject of another paper, thus we will not further interrogate its depths.

The question whether the extraordinary consular jurisdiction should be applied to Romanian Principalities was never unanimously answered with yes or no by the foreign powers. The simple of act answering to this question was almost impossible if we think of the many interests and the constant changes in the international game of power. Some foreign officials shared this view, as for example general Coronini that, in a memoire from 1855, stated that abolition of this type of jurisdiction is something "to be wanted" in Romanian Principalities. Even the Sublime Porte was interested in its abolition and presented its proposal at the Paris Congress from 1856[27]. Many more such official, including French ones, did not agreed with the idea, even though they understood the justification and delayed the decision concerning it.

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[22] Mărieș, *Abolirea,* pp. 7-11.
[23] *Documente turcești privind istoria României*, întocmit de Mustafa A. Mehmed, volum III, 1791-1812, Ed. A. R. S. R., București, 1986, pp. 51-53 and 109-112.
[24] SJAN Iași, MIA (B) Departement of Interior Affairs, inventory no. 1080, files: no. 222/1863, general Iorgu Ghicu and Ottoman Bank; no. 70/1864, Dimitries Mavrocordat and Mr. Guenault; no. 92/1864, Chevorc Popov and Enghilar Popovici; no. 102/1864, Ms. Casandra Fillaretu and Scarlat Bicardot, French subject; no. 133/1864, Nicu Vârnavu and French subjects Hette and Galy.
[25] SJAN Iași, MIA (B) Departement of Interior Affairs, inventory no. 1080, files: no. 190/1863, Codrescu and Petrini owe money to the Hungler Brothers's House of Commerce from Paris; no. 13/1864, the litigating parties are David Herzon and George Meți.
[26] Stela Mărieș, *Situația protejaților străini în România în secolul al XIX-lea*, în *Anuarul Institutului de Istorie și Arheologie*, pp. 194-207.
[27] Mărieș, *Abolirea*, pp. 3-5.

By the natural evolution of things, Romanians enjoyed the liberation from the unjust system of this special consular jurisdiction only after 1878, namely after it gained its independence. It took a few years until the practice of an extraordinary consular jurisdiction was completed, mainly due to the fact that the Berlin Treaty left this issue at the disposition and negotiation of Romania with all the other states. The first steps were made by the signing of different consular treaties and with the establishment, later on, of Romanian consulates in most of the countries.

What is interesting to observe is that the main purpose of extraterritoriality and consular jurisdiction was the protection of state's subjects, yet the institution of citizenship played a particular small part, especially when talking about the Ottoman Empire. In 1869, a law was passed to create the Ottoman citizenship, law that made illegal to seek citizenship and/or protection from another state[28]. The purpose of this law was to minimize the increasingly number of "transgressions" to other states where subject could benefit from the special privileges and rights that the nationals of a European state enjoyed in Muslim territories. To some degree we are surprised to see that the same political strategy, the use of the citizenship as a legal institution through which social order and a form of national security can be enforced, was more fruitful in Romanian Principalities. The restrictions imposed with the help of citizenship, namely the those regarding rural property[29], the access to a function or position in the bureaucratic system and, most important, granting the possibility of acquiring Romanian citizenship only to those of Christian ritual, did have a certain impact on the future of the country and kept it protected, to some degree, against foreign intrusion.

Many of the aspects that the extraordinary consular jurisdiction raises are still not fully uncovered and they could bring new insights into the political reasoning of the time and into the international politics behind its curtains. Nonetheless, few conclusions can be drawn: it was an instrument of political and economic gain for the European powers, its origins are in the Ottoman capitulations (unlike the ordinary consular jurisdiction that has its origins in the ancient Rome), the Romanian Principalities suffered an unfair treatment as long they were obligated to respect it.

[28] Feroz Ahmad, *Ottoman perceptions*, p. 7.
[29] Ghica, *Memoire*, p. 971.