

The President as an Active “Constitutional King”. The Birth of the Romanian Post-communist System of Government*

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1. *Introductory remarks*

It is not my intention to re-invent the wheel and discuss the constitution-making theories concerning post-communist Romania or other post-communist Eastern European countries. The literature is relatively full of such articles¹ and books², some of them quite fascinating and well-known.

My aims are quite simple and straightforward. On one hand, I want to explain why the most important constitutional decisions concerning the republican form of government and the directly elected President were taken so rapidly by the new power brokers of the new democratic regime. On the other hand, I want to explain the original role³ of the post-communist chief of state by (re)discovering and (re)interpreting the arguments of the drafters of the first post-communist constitutional rules⁴.

In Section 2, I shall report on how the decision to regulate a directly elected President was built step by step before being

definitively formalized by the post-communist Constitution. First, the Council of the National Salvation Front (CFSN⁵) decided to keep in place the republic as a form of government and to provide for direct election of «all political leaders for one or, at the very most, two mandates»⁶. Second, the Provisional National Unity Council (CPUN⁷) adopted the electoral law (Decree-law no. 92/1990⁸), where it was expressly provided the direct election of the President.

In Section 3, I shall present, on one hand, why the Constituent Assembly definitively opted for a semi-presidential⁹ system of government, and, on the other hand, which were the most important arguments leading to the establishment of a President with impressive popular legitimacy, yet strongly limited¹⁰ powers.

I dared to address these somehow forgotten topics of classical institutionalism because recently I had the opportunity¹¹ to enter the Archives of the Romanian Senate and to put my hands on the official records

of the Committee for drafting the Constitution from 1990 and 1991, which were never made public by researchers and scholars until this year¹². When read carefully and in conjunction with other extended records that were already published¹³, one might start to think differently¹⁴ about the original role of a key institution: the President of the Republic.

2. *In search of popular legitimacy*

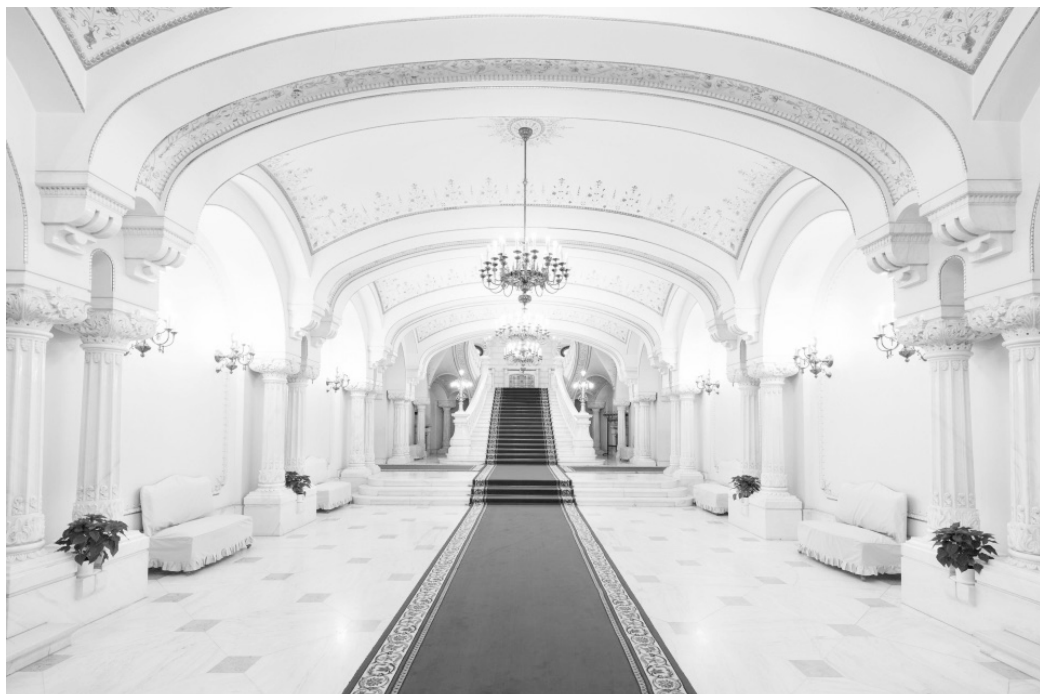
The preservation of the republican form of government was a key major decision of the post-communist decision-makers. It reflected their fundamental need to gain swiftly as much popular legitimation as possible. In democracies, the republican form of government provides for the highest level of popular legitimacy, mainly because the direct elections are the only authoritative sources for the effective exercise of political power. The decision-makers managing the Romanian Revolution understood that very well. They made everything in their powers not only to keep the republic as a form of government but also to provide for the direct election of the President, as a quintessential expression for the popular legitimacy of the new democratic regime.

2.1. *The Republic*

Indirectly, the decision to preserve the republican form of government was taken in the first hours following the arrest of Elena and Nicolae Ceaușescu¹⁵. The first offi-

cial document of the ad hoc revolutionary power structure was read by Ion Iliescu, broadcasted by the National Television and immediately published in the Official Gazette¹⁶. Directly and formally, it was established a couple of days later by Decree-law no. 2/1989¹⁷ adopted on the 27th of December by Council of the National Salvation Front (CFSN). The Constitution adopted by the Constituent Assembly on the 21st of November 1991 and approved by the national referendum on the 8th of December 1991 settled once and for all the question of the republican form of government of the Romanian post-communist regime (see Section 3.1. below). Not only that the Constitution provided in art. 1 para. (2) the republican form of government, it also provided in art. 148 para. (1)/current art. 152 para. (1) that the republican form of government cannot be changed by any other future constitutional revision process.

The Statement to the Country established, among others, that the name of the country should be Romania and that, «[F]rom now on, all power structures of the Ceaușescu clan are dissolved, the Council of State and its institutions cease all activity. The whole state power is undertaken by the Council of the National Salvation Front». The Statement also provided for «[T]he separation of legislative, executive and judicial powers and the election of all political leaders for one or, at the very most, two mandates», as well as for the immediate establishment of a Committee for drafting a new Constitution. Considering these first fundamental decisions, one can reasonably infer that the drafters of the Statement to the Country had no intention to change the republican form of government. They needed popular legitimacy through direct



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elections to formalize/institutionalize the revolutionary outcome.

On the 27th of December 1989, after two days since the trial and execution of Elena and Nicolae Ceaușescu¹⁸, CFSN members adopted Decree-law no. 2/1989, providing a first schematic administrative structure for the already functional supreme decision body of the new regime. Reading the records of that meeting, it seems that the odd question of deciding on the name of the country had a deep political meaning. Those who just gained political power by revolutionary means had to be sure that they will not lose it, not even to former exiled King of Romania, Michael I. This idea was clearly stated by one CFSN member (Ovidiu Tocaciu): «As for the name of the country – if

we say Romania, we let King Michael come back into the country»¹⁹. Ion Iliescu (President of CFSN) intervened and made it very clear for everybody that this is not a topic to be discussed too much: «we have to retain the rational point of view. Romania is a socialist country [...] Socialism was just an aspiration, not a reality. No. The country is Romania; the form of government is the republic»²⁰.

The issue of selecting a form of government for the new democratic regime reappeared during the debates concerning the adoption of Decree-law no. 92/1990 (the first post-communist electoral law) within CPUN, as well as during the debates within the Committee for the drafting of the Constitution (from now on, the Committee)

and the Constituent Assembly in late 1990 and beginning of 1991 (see Section 3.1. below). The debates among the members of CPUN reflected the political *status quo*²¹ of that period when the FSN majority led by Ion Iliescu took the major decisions concerning the new constitutional architecture of the state under fierce criticism of the historical parties' opposition.

On one hand, the representatives of the opposition argued that CPUN has no democratic legitimacy to regulate constitutional norms, such as defining the form of government or establishing the direct election of the President and his/her prerogatives (see Section 2.2. below). CPUN was nothing more than an ad hoc intermediary and an unelected body, thus undemocratic²². Consequently, a better solution would have been to organize a referendum and ask the people what kind of form of government they want²³. Consistent with this initial proposal, during the debates within the Constituent Assembly, the representatives of the opposition still argued that a decision on the form of government should be taken separately, only by the people, via a referendum which should be organized before the drafting of the Constitution²⁴.

On the other hand, the FSN majority favored the republican form of government and they eventually disregarded the arguments of the opposition. They used the argument of de facto revolutionary legitimacy to adopt constitutional provisions in the absence of a Constituent Assembly elected by the people. Marian Enache (CPUN independent member at that time and future vice-president of the Assembly of Deputies, as well as a future member of the Committee) argued that «the legal argument of the existence or inexistence of a constitution is

substituted by the existence of a historical argument, respectively the transformability of the society by revolutionary action. This is the legal basis or the principle which underlie the adoption of an Electoral Law, respectively the possibility to regulate the institution of the president of the country»²⁵.

In the end, the final decision of CPUN reflected the will of the FSN majority. The electoral law contained constitutional provisions, such as the direct election of the President and his/her prerogatives.

2.2. *The elected President*

According to the arguments provided by the drafters of the first post-communist electoral law (Decree-law no. 92/1990), the dissolution of the power structures of the communist regime by revolutionary means prompted the need to establish new power structures legitimated by the will of the people through elections. Consequently, the direct election of the President was promoted as a necessary decision for enhancing the democratic legitimacy of the new regime.

Corroborating different sources²⁶, it seems that the decision to choose a directly elected President was definitively influenced by the first important meeting concerning the adoption of a new Constitution. This meeting took place at the beginning of January 1990, between FSN leaders (including Ion Iliescu, as President of CFSN, and Petre Roman, as Prime-minister) and Robert Badinter (at that time, the President of the French Constitutional Court, and a good friend of French President, François Mitterrand). According to Ion Iliescu's

statements, Badinter suggested the most efficient strategy for the newly formed regime to deal with the process of adopting a new Constitution²⁷. It is my personal opinion²⁸ that it would have been almost impossible for the participants at that meeting not to discuss the French Vth Republic's system of government or at least not to expressly or tacitly show interest on how the French system of government is working. Eventually, the French constitutional model was invoked by the drafters of the Constitution within the Constituent Assembly²⁹ when the time came to decide the Romanian system of government (see Section 2.1. below). Even though this remains just a mere hypothesis, it seems that shortly after the meeting with Badinter, a directly elected President for the new democratic regime became an acceptable and definitive solution for Ion Iliescu³⁰. An argument for this hypothesis was that the draft electoral law (which became Decree-law no. 92/1990) provided from the very beginning³¹ a directly elected President. A version of the electoral law was written at some point during January and submitted for public debate on the 30th of January 1990³². Following closed-door debates in February 1990 between representatives of the political parties represented in CFSN, the draft electoral law was once again publicly debated at the beginning of March, during the parliamentary session of CPUN. Finally, it was adopted by CPUN on the 14th of March 1990. The direct election of the President was kept by the FSN majority despite the counter-arguments of the representatives of the historical parties.

The main debates concerning the direct election of the President were held on the 9th of March 1990 in a tense atmosphere.

According to the opposition, CPUN did not enjoy democratic legitimacy to decide on constitutional issues. Thus, a solution to this particular problem would have been for CPUN to relinquish the decision concerning the direct election of the President and leave the matter into the hands of the future democratically elected Constituent Assembly³³. In the same time, probably because he "felt" the electoral intentions of FSN majority to use the direct election of President Iliescu as a method for democratically legitimize their grip on power, Ion Diaconescu [representative of National Peasant Party – Christian Democrat (PNT-CD), an opposition party] proposed the appointment of the President by the future democratically elected Parliament³⁴. The idea of a parliamentary republic was strongly supported by the opposition parties in the future Constituent Assembly (see Section 2 below), constituted after the parliamentary and presidential elections held on the 20th of May 1990.

Four major counter-arguments were given by FSN representatives led by Ion Iliescu, the President of CPUN. First, the draft electoral law providing for a directly elected President was a necessary piece of legislation, already debated with the representatives of the historical political parties in February 1990³⁵; thus, the postponement of a decision on the matter would preserve the provisional institutional *status quo*, provoking a state of uncertainty within society. Second, the direct election of the President would help to reclaim for democracy the office of the President which was perverted by the communist regime³⁶. Third, to calm down the fears of the leaders of the opposition concerning a directly elected president, it was said that the electoral law has

limited validity, concerning just the first presidential and parliamentary elections; thus, the mandate of the next directly elected President would be limited³⁷. The fourth argument was and still is an important one because it showed how the FSN majority related to law and politics. According to Marian Enache (CPUN member at that time and now³⁸ a constitutional judge), the source of CPUN's legitimacy could not have been a future Constitution adopted by a future democratically elected Constituent Assembly. The source of CPUN's legitimacy was the revolutionary act of December 1989. The Revolution itself was the only factual, undeniable reason for which a provisional electoral law could even provide constitutional provisions, such as the direct election of the President³⁹.

The final decision regarding the direct election of the President was taken by vote, with a strong FSN majority in favor⁴⁰. Once the republican form of government was provisionally established by Statement to the Country and Decree-law no. 2/1989 and once the direct election of the President was imposed by Decree-law no. 92/1992, it was time to perpetuate these fundamental decisions by adopting a new Constitution.

3. *Establishing the system of government*

Within the Constituent Assembly, the selection of a new system of government for the new post-communist regime was strongly connected with the direct election and prerogatives of the President. The FSN super-majority⁴¹ favored the semi-presidential system of government, while the small but active opposition favored a par-

liamentary system of government. However, both the FSN majority and the opposition shared the same quintessential fear, that is, in the absence of an equilibrated constitutional design, one institution/person or a group of persons might once again concentrate the whole political power in its/their hands. Thus, the drafters of the Constitution focused their attention on how to secure the checks and balances between state authorities and how to maintain a reasonable equilibrium between the three branches of government. To succeed, first, they had to settle for a Western democratic system of government to emulate. Second, they had to find the exact role and the prerogatives for the most popular institution at that time, the Romanian President.

3.1. *One out of four*

On the 13th of September 1990, during a meeting of the Committee⁴², Florin Vășilescu (constitutional expert) presented a document called «Separation of powers in contemporary political regimes – a study of comparative law»⁴³. The document presented the essential features of four major Western systems of government: a. the presidential system (USA model); b. the parliamentary system (from different European republics, as well as from different constitutional monarchies); c. the semi-presidential system (French model); d. the assembly system (Swiss model).

From the beginning, the members of the Committee eliminated the presidential and assembly systems of government as possible models for post-communist Romania. According to them, they were not

appropriate to Romanian specific political and institutional distinctiveness⁴⁴. Also, they defined the main objective of the new system of government: «The constitutional system in Romania has to avoid the possibility for the establishment of dictatorship even for a single day, has to forbid the seizure of power by Constitution»⁴⁵.

The main debate concerning the most suitable system of government for post-communist Romania reflected two options⁴⁶: either a semi-presidential republic with a directly elected President (favored by the FSN majority) or a parliamentary republic with a President appointed by the Parliament (favored by the parliamentary opposition). The question was discussed during the Committee's meeting on the 20th and 25th of September 1990⁴⁷, as well as during Constituent Assembly's meetings on the 16th and 17th of April 1991⁴⁸. It is important to note that the discussion regarding the system of government always came back to the same questions: how should the President be elected, and what should be his/her role concerning the Parliament and the Government. Thus, the debate about the adoption of a system of government for the new democratic regime was, in fact, a debate about the election, the role, and the prerogatives of the chief of state (see Section 3.2. below).

The representatives of the opposition parties constructed a two-step strategy for blocking the decision of the parliamentary majority. First, similar to their attempts during CPUN's meetings (see Section 2.1. above), they raised the question of who is legitimated in a democracy to establish the form of government. According to their views, in a democracy, the form of government is decided directly by the people by

referendum. The records of the Committee's meeting held on the 18th of September 1990 show that, despite a favorable majority opting for a republican form of government with a directly elected President, the Committee made a step back and asked the Constituent Assembly to decide if it is necessary to organize a referendum concerning the form of government before drafting a Constitution. This question was settled once and for all in the Constituent Assembly's meeting held on the 27th of February 1991. The amendment submitted by Ion Rațiu (representative of PNT-CD), stating that «The Romanian state's form of government will be decided by referendum», was rejected by the FSN majority⁴⁹. The main insidious and pragmatic argument against such a referendum was clearly stated during the debates within the Committee: basically, such a referendum would be unnecessary. According to Florin Vasilescu, «after this Constitution will be voted by the Constituent Assembly, it will be submitted to the whole people by a referendum. But we do not ask people to solve our problems»⁵⁰.

Second, having a pretty clear idea that a referendum before the adoption of the Constitution was not going to happen, the representatives of the opposition argued also in favor of a parliamentary republic. Most of their arguments were not necessarily presenting the benefits of a parliamentary republic but they were pointing out the authoritarian peril of a directly elected President. For example, one representative of the opposition [Dan Amedeo Lăzărescu – a member of the Committee and an important leader of the National Liberal Party (PNL)] used the argument of the authoritarian historical tradition:

Romanian historical tradition militates for the preeminence of the executive. We are an orthodox country and all orthodox countries which have inherited the conception of the Byzantine dominion, the oriental system, almost totalitarian, did not experience feudalism [...] we are now facing two powers, which have the benefit of eligibility by the national electorate: the executive power and the legislative power. We have to maintain the preeminence of the legislative power over the executive power and attempt a reconciliation through the High Constitutional Court – one of the innovations of our constitutional project, together with the institution of the Advocate of the People⁵¹.

This reluctance against a strong popularly legitimized executive was developed by the representatives of the opposition during the meetings of the Constituent Assembly. First, they argued that most of the countries which transitioned from dictatorship to democracy opted for the parliamentary republic⁵². Second, they feared that the Romanian electorate did not have the necessary democratic education to elect freely a chief of state⁵³. Third, the principle of the separation of powers would be affected because the center of gravity would drift eventually towards the presidential office⁵⁴. Forth, when the directly elected President is suspended by the Parliament, possible conflict between the people and the legislative power might occur⁵⁵.

Regardless of these arguments put forward by the opposition, the FSN majority were determined to constitutionalize the semi-presidential republic with a directly elected President. For the representatives of the parliamentary majority, the direct election of the president and, consequently, the semi-presidential system of government reflected the principle stipulating that «power which does not rest on people is nothing more than pure force»⁵⁶.

Moreover, FSN leadership regarded the semi-presidential system of government as a flexible and pragmatic method of managing the transition process from communism to democracy:

On the other hand, the advantages of leading – let's say – with a President as chief of state are point clear when one refers to the pragmatic side of things. It is a much flexible leadership, and Romania, in our opinion, needs during this transition period those features of a pragmatic leadership» (Alexandru Birlădeanu)⁵⁷.

The question was settled once and for all during the Constituent Assembly's meeting on the 17th of April 1991. The Assembly rejected with 279 votes against and 125 votes in favor of the amendment submitted by Mihai Ruva (PNL), according to which the President of Romania will be elected by the Parliament⁵⁸. Thus, Romania became a semi-presidential republic by officially excluding the parliamentary system of government.

3.2. *A limited power*

The Theses of the Constitution regarding the President of Romania were vividly debated in the meetings of the Constituent Assembly on the 16th and 17th of April 1991. From the beginning, the role and the prerogatives of the President were tailored to fit the important popular legitimacy resulting from the direct election:

Certainly, the status of the President cannot be the same as if he were not elected directly by the people, as in the case of parliamentary republics. This matter proportionally reflects itself upon his competences [...] by choosing a certain type of election for the President, we choose a certain

political regime [...] in the case of direct election of the President, implicitly of a superior legitimacy, one cannot assign secondary prerogatives, non-essential, for the executive office. Such a decision would be limiting the will of the people, expressed by direct vote (Florin Vasilescu)⁵⁹.

The drafters of the Constitution were well aware of the potential danger that a popularly legitimated President will abuse his powers. Therefore, they provided for «constitutional safeguards capable of blocking any gateway towards totalitarianism»⁶⁰. As a result, the main prerogatives of the directly elected president (e.g., the appointment of the members of the executive, initiation of the referendum, deciding the adoption of exceptional measures or signing international treaties) were submitted to the Parliament's control. The conclusion concerning the role and prerogatives of the President was very clear:

Considering its direct election by the people, the nature of its prerogatives and the control mechanisms provided for the exercise of those prerogatives, the presidential office presents itself within these theses as being both democratic and efficient, following the demands to forge a modern Romania, worthy to be part of the family of European nations (Florin Vasilescu)⁶¹.

As shown above (see Section 3.1.), during the debates within the Constituent Assembly, the representatives of the opposition were very critical towards the constitutional choice of a directly elected President. As a consequence, the representative of the Committee (Florin Vasilescu) had to take a step back and temper the fears of the opposition towards a much too powerful president. He explained that the Constitution will regulate the mandatory counter-signature of the prime-minister on most of the presidential decrees:

Most of the decrees issued by the President and, also, counter-signed by the prime-minister are individual decrees. Or, it is well known that the road towards totalitarianism passes through the normative act. There are also normative acts – those regarding the declaring the state of siege, of urgency, of necessity – but they are all under the oversight of the Parliament [...] you will see how the exercise of the presidential functions is set up: under supervision, with safeguards; for the person occupying the supreme office of the state, there are no gateways towards totalitarianism⁶².

Another important safeguard against a potential presidential dictatorship was the very constitutional role of the President. According to the Constitution, the President is a mediator between the state powers, as well as between the state and society. Such a role demands certain neutrality on behalf of the President which was provided also by the express constitutional interdiction to preserve the status of party member while in office. According to Marian Enache, considering the immense popular legitimacy held by the President, he/she should act impartially to political parties, like a true «constitutional King»⁶³.

This idea of neutrality of the presidential office was somehow overrated and not fully and correctly understood. The interdiction to remain party member while exercising the presidential office was not an invention of the Committee or the Constituent Assembly. The interdiction was already regulated by Decree-law no. 92/1990. During the debates concerning the adoption of that Decree-law, Ion Iliescu presented the reasons behind such an interdiction:

From an administrative point of view, the President should not belong to a party, should not be subordinated to a party discipline which imposes, pre-imposes, pre-establishes options, decisions, etc. [...] when he becomes the choice of the nation, he answers only in front of the na-

tion, he is not any more responsible in front of a political structure that pre-orders his political behavior [...] He is subordinated only to the state disciple and that is it⁶⁴.

Considering this original pre-constitutional meaning of the President's neutrality, I would say that it does not exclude political partisanship and political activism of the President. The original idea of the neutrality of the presidential office does not reflect the concept of neutrality as developed by Benjamin Constant, as some authors let us believe⁶⁵. If such statements were to be true, then, it would have been necessary to regulate not only an interdiction for the President to preserve party membership during the presidential mandate but also an overall presidential status implying the idea of neutrality. This was not the case. From the very beginning, the post-communist presidential office was not designed to be politically and institutionally neutral. It was forged to influence politics and institutional decision-making processes without the power to effectively rule; like a popular car with a powerful engine running always with the brakes on.

Conclusions

The fundamental question of the newly established post-communist regime was to secure the political outcome of the December 1989 Revolution. Post-communist decision-makers winning power by revolutionary means had no doubts about what they had to do: to preserve power, the new political regime needed to be legitimized by democratic elections and stabilized by a new Constitution.

However, before effectively organizing democratic elections and debating the state's constitutional architecture within a Constituent Assembly, the revolutionary power holders needed to establish the provisional institutional framework for the immediate preservation of state power. First, from the very beginning, the decisional body of the Revolution (CFSN) opted for the preservation of the republican form of government. On one hand, the Republic was the necessary premise for blocking any potential future attempts of King Michael I to reclaim the throne of the former Kingdom of Romania. On the other hand, it was the necessary premise for achieving the highest level of electoral legitimation and efficiency for the new political regime. Second, once the republican form of government was established, the question of the direct election of the President became quintessential. Choosing or not choosing the direct election of the President meant, in the end, choosing a certain system of government. The major options were point-clear: either a semi-presidential system of government with a directly elected President with relevant but limited prerogatives (the choice of Ion Iliescu and FSN majority), either a President elected by the Parliament with symbolic prerogatives (the choice of the opposition).

The direct election of the President prevailed with the support of the FSN majority, first in CPUN (which adopted the Decree-law 92/1990) and, second, in the Constituent Assembly (which adopted the Constitution of 1991). In the end, for FSN leadership and parliamentary majority, the semi-presidential system of government with a directly elected President reflected a more flexible and pragmatic method for

managing the transition process to democracy, as well as an important mechanism to produce more electoral legitimacy for the post-communist power structures.

The content of the constitutional rules regulating the power structures of the new political regime reflected a fundamental fear equally shared by all post-communist decision-makers, regardless of their political affiliation. It was the fear of returning to dictatorship. Following their classical understanding of the democratic principle of the separation of powers and under the influence of vivid memory of the former communist regime, the drafters of the new Constitution viewed dictatorship as the concentration of state power in the hands of one institution, one person, or a group of persons. Thus, to avoid the return to dictatorship, the post-communist constitutional architecture (inclusively the role and prerogatives of the President included) had to guarantee the effective balance of powers by providing institutional safeguards against the concentration of power. The

1991 Constitution was a Constitution of fear and because of that, it was a good Constitution. Power was limited by constitutional design.

Following the logic of the constitutional drafters, the presidential office was constructed as a key institution of the new regime. Because it was directly elected by the people, the President enjoyed a massive popular legitimacy and quite important prerogatives. Nevertheless, because the Constitution aimed at a balanced exercised of power, the presidential prerogatives were limited by serious institutional safeguards against the temptation to abuse them. In a very subtle and intelligent manner, the drafters of the post-communist Constitution have successfully defined both the premises of the future political activism of the Romanian post-communist presidents and the institutional checks against their inherent authoritarian drifts.

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** This article synthesizes the main ideas presented at large in a book chapter, published in Romanian in 2020 (B. Dima, *Dacă nu ne lăsăm să ne organizăm, nici control nu vom avea, nici organizare*, in M.

Cuțan, O. Rizoiu, B. Iancu, C. Cercel, B. Dima, *Șefii de stat: dinamica autoritară a puterii politice în istoria constituțională românească*, București, Universul Juridic, 2020, pp. 428-496).

*** This article presents at large passages from different transcripts of the meetings which took place between post-communist decision-makers within the Council of National Salvation Front (CFSN), Provisional Council for National Unity (CPUN), Committee for drafting the Constitution (The Committee), Constituent Assembly, as well as from a re-

search interview I had on the 26th of January 2011 with former President Ion Iliescu. It was quite a challenge to reasonably translate in English these transcripts. Even though at some point the translation from Romanian to English does not completely follow the wording of the spoken phrase, there should be no doubt that the fundamental meaning of what was said has been kept and not lost in translation.

¹ S. Holmes, *The Postcommunist Presidency*, in «East European Constitutional Review», 2, n. 4 and 3, n. 1, 1993/1994, pp. 36-40;

- J. Elster, *The Role of Institutional Interest in East European Constitution-Making*, in «East European Constitutional Review», 5, n. 6, 1996, pp. 63-65; T. Frye, *A Politics of Institutional Choice. Post-communist Presidencies*, in «Comparative Political Studies», 30 n. 5, 1997, pp. 523-552.
- ² A. Przeworski, *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge, Cambridge University Press, 1991; K. von Beyme, *Institutional Engineering and Transition to Democracy*, in Zielonka, Jan (ed.), *Democratic Consolidation in Eastern Europe. Institutional Engineering*, vol. I, New York, Oxford University Press, 2001, pp. 3-25; J.M. Colomer, *Comparative Constitutions*, in R.A.W. Rhodes, S.A. Binder, B.A. Rockman (eds.), *The Oxford Handbook of Political Institutions*, New York, Oxford University Press, 2006, pp. 217-239; F. Frison-Roche, *Semi-presidentialism in a post-communist context*, in R. Elgie, S. Moestrup (eds.), *Semi-Presidentialism outside Europe. A Comparative Study*, New York, Routledge, 2007, pp. 56-78; T. Sedelius, *The Tug-of-War between Presidents and Prime Ministers: Semi-Presidentialism in Central and Eastern Europe*, Saarbrücken, VDM Verlag, 2008.
- ³ This article is not a constitutional work defending the textualist interpretation of the Constitution. However, even the "King of textualism" (former Justice Antonin Scalia) recommended the lecture of the founding fathers' arguments, not because they are mandatory, but because they give us a hint about the original meaning of the constitutional text. See Antonin Scalia, *A Matter of Interpretation. Federal Courts and the Law*, Princeton (NJ), Princeton University Press, 1997, p. 38.
- ⁴ For a quite well-documented analysis of the political context of those first moment after the December Revolution, published in English, see the Chapter dedicated to Romania in R. Elgie, *Political Leadership A Pragmatic Institutionalist Approach*, London, Palgrave Macmillan, 2018, pp. 215-251.
- ⁵ It was officially recognized as sole holder of state power on the 22 of December 1989, by State-ment to the Country, published in the Official Gazette no. 1 from 22.10.1989.
- ⁶ See the content of the Statement to the Country.
- ⁷ CPUN was officially set up by Decree-law no. 81/1990, published in the Official Gazette no. 27 from 10.02.1990. Its structure and composition were regulated by Decree-law no. 82/1990, published in the Official Gazette no. 28 from 14.02.1990.
- ⁸ Published in the Official Gazette no. 35 from 18.03.1989.
- ⁹ The terms "semi-presidential" or "semi-presidentialism" were used by the constitutional drafters when describing the French Vth Republic system of government. The experts which were charged with the drafting of the Constitution used the term coined by leading French scholar, Maurice Duverger.
- ¹⁰ See also the classical opinion of Romanian constitutionalists according to which the Romanian system of government is a tempered (limited) semi-presidential regime or a semi-parliamentary regime - A. Iorgovan, *Tratat de drept administrativ*, vol. 1, 4th ed., București, All Beck, 2005, pp. 295-298.
- ¹¹ In the summer of 2018, I retrieved from the Archives of the Parliament many records of the close-doors meetings that took place between the representatives of the political parties in CPUN and the Committee for the drafting of the Constitution, organized within the Constituent Assembly from 1990-1991. Some important transcripts from the records of the meetings of the Committee for drafting of the Constitution were published by Antonie Iorgovan in 1998. See A. Iorgovan, *Odiseea elaborării Constituției*, Târgu Mureș, Ed. Vatra Luminoasă, 1998. See also the records of the public debates within the Constituent Assembly published in D. Ionică (ed.), *Geneza Constituției României 1991. Lucrările Adunării Constituante*, București, Ed. Regia Autonomă „Monitorul Oficial”, 1998.
- ¹² See Dima, *Dacă nu ne lăsați să ne organizăm, nici control nu vom avea, nici organizare*, cit. There are also some other books and articles which focused on saving or interpreting the documents of that tumultuous period. See, for example, T. Stănescu-Stanciu, G. Neacșu (eds.), *Prima Constituție a României postdecembriste - Documente - vol. 1*, Ploiești, Editura Karta-Graphic, 2011; T. Stănescu-Stanciu, A. Oșca, G. Neacșu, *Documente privind Revoluția română din Decembrie 1989. Activitatea Consiliului Provizoriu de Uniune Națională* vol. I: 1 februarie - 11 mai 1990, Cluj-Napoca, Mega, 2009; T. Stănescu-Stanciu, A. Oșca, G. Neacșu, *Documente privind Revoluția română din Decembrie 1989. Activitatea Consiliului Provizoriu de Uniune Națională* vol. II: 9 februarie - 10 martie 1990, Cluj-Napoca, Mega, 2009; M. Cuțan, *Romanian Semi-Presidentialism in Historical Context*, in «Romanian Journal of Comparative Law» n. 2, 2012, pp. 275-303; C. Ionescu, *Raporturile Parlamentului cu Guvernul și Președintele României. Comentarii constituționale*, București, Universul Juridic, 2013.
- ¹³ See Records of the CFSN meeting on the 27th of December 1989, published in I. Iliescu, *După 20 de ani. 1989 - an de cotitură în istoria națională și în viața internațională*, București, Editura Semne, 2010, pp. 267-185, records of the CPUN meetings where the draft electoral law was debated, published in the Official Gazette, records published in A. Iorgovan, *Odiseea elaborării* cit. and Dumitru Ionică

(ed.), *Geneza Constituției* cit.

- ¹⁴ For two different opinions about the role of the Romanian President see E. S. Tănăsescu, *The President of Romania. Or: The Slippery Slope of a Political System*, in «European Constitutional Law Review», vol. 4, 2008, n. 1, pp. 54-97 and D. C. Dănișor, *Șeful statului ca putere neutră*, in *Dreptul* n. 6, 2018, pp. 115-128. For a more analytical opinion, see also T. Drăganu, *Drept constituțional și instituții politice* vol II, București, Lumina Lex, 1998, pp. 234-235.
- ¹⁵ Elena and Nicolae Ceaușescu were arrested on the 22 of December 1989, in the afternoon, at around 18.00 p.m.
- ¹⁶ See Statement to the Country read by Ion Iliescu at the Romanian Television at 11.30 p.m. late in the night and published in the Official Gazette no. 1 from the 22.12.1989.
- ¹⁷ Published in the Official Gazette no. 4 from 27.12.1989. This Decree-law was called the "revolutionary mini-constitution" by Tudor Drăganu. See T. Drăganu, *Drept constituțional și instituții politice* vol. I, București, Lumina Lex, 1998, p. 392.
- ¹⁸ The trial of Elena and Nicolae Ceaușescu, the sentence to death and the execution of the sentence took place on the 25th of December 1989.
- ¹⁹ See Records of the CFSN meeting on the 27th of December 1989 in I. Iliescu, *După 20 de ani* cit., p. 271.
- ²⁰ Ivi p. 272.
- ²¹ The political *status quo* was the result of a game-changing decision announced by FSN via a press release issued on the 23rd of January 1990. It referred to the intention of transforming FSN into a political party in order to participate in the following democratic elections. The electoral intentions of FSN led by Ion Iliescu were seen by the representatives of the historical parties as an act of treachery perpetuated by the FSN leadership which, basically, hijacked the values of the Revolution and

used the catch-all revolutionary movement for personal electoral gains. As a consequence of this profound political split within CFSN, massive protests started in Romania which led eventually to the first post-communist "Mine-riad" (28th-29th of January 1990) and laid the ground for further violent conflicts within society in the next decade. After negotiations on the 1st of February 1990 between Ion Iliescu and FSN leaders with the representatives of the opposition parties, a decision was reached, that is to change the representation formula within CFSN so to give more representation for the opposition parties. Also, the name was changed. CFSN became Provisional Council of National Unity (CPUN). Its main mandate was to adopt the electoral law which would set the basis for the first democratically elected state institutions.

- ²² See statements of Dan Apostol (CPUN member): «It is not the case for such a less representative body as it is our Council to decide on the form of government, thus anticipating some pure constitutional options». See Records of the CPUN meeting from the 9th of March 1990, published in the Official Gazette no. 8-9 from 16.03.1990, p. 38.
- ²³ Mihai Constantinescu (CPUN member, future member of the Committee for drafting the Constitution within the Constituent Assembly and adviser to the prime-minister) was also in favour of the selection of the form of government by referendum. See *Ibidem*.
- ²⁴ An important argument was presented by Vasile Gionea (CPUN member and important leader of PNT-CD). According to him, at international level there were some concerns regarding the selection of the form of government, and the most suitable solution to dismiss these concerns would have been to organize a referendum on the matter, so that

the people could decide between republic or monarchy, before the adoption of the Fundamental Law by the Constituent Assembly. See Records of the meeting of the Committee for drafting the Constitution, held on the 18th of September 1990. Archives of the Romanian Senate, File 25, inventory no. 128, p. 26.

- ²⁵ See Records of the CPUN meeting from the 9th of March 1990, published in the Official Gazette no. 8-9 from 16.03.1990, p. 39.
- ²⁶ While gathering information for my Ph.D. Thesis, on the 26th of January 2011, I met with former President Ion Iliescu for a research interview. I used some of those transcripts of that meeting for this article, as well as records of different meetings of CFSN, CPUN, and Committee for the drafting of the Constitution and Constituent Assembly.
- ²⁷ During the research interview with Ion Iliescu, the former President explained what happened in the first months of 1990: «[...] during the month of January I had different consultations and, among others, Mr. Badinter, the President of the Constitutional Court or how it is called in France, visited Romania. And, in a dialogue with him concerning the functioning of CFSN (we were still during CFSN times) and the idea of a constitutional committee, he said: "Do not hurry. Drafting a Constitution is a serious matter. This cannot be done with an improvised committee". He said: "I advise you to proceed like the French Revolution did. First, elect a Constituent Assembly, and the Constituent Assembly will draft the Constitution". This is why I renounced to the Constitutional Committee, and transformed it into a legal committee of CFSN and, afterwards, of CPUN, because from the 1st of February there was an extension of CFSN to all the parties that came into being until that time, around 30».

²⁸ I do not have any clear direct or circumstantial proof. In fact, during the last 10 years, I have tried to find out if there are some records of that meeting, but nobody seems to know or remember anything.

²⁹ For the idea of a strong influence of the French model on the drafting of the Constitution, see V. Perju, *The Romanian Double Executive and the 2012 Constitutional Crisis*, in «International Journal of Constitutional Law» 13 n. 1, 2015, pp. 246-278. However, see also A. Iorgovan, *Tratat de drept administrativ* cit., p. 32, note 2. The former president of the Committee for drafting the Constitution confessed that the idea according to which French Constitution was the main source of inspiration for the drafters of the Constitution was false. There were more European constitutional models taken into consideration but the final result was a Romanian solution, essentially different from the 1958 French Constitution.

³⁰ Ion Iliescu referred to the meeting with Badinter during the meeting of CPUN, held on the 9th of March 1990: «Mr. Badinter (sic!) visited us in January and told us that April is too late for the election of a Constituent Assembly [...] According to French experience, in two months from the Revolution the first Constituent Assembly was convened. It was our duty to quickly organize elections for a Constituent Assembly, so to enter into an organized framework from where to start the organization of the political life of the country [...] I urge you to judge the matter with the utmost responsibility». It is interesting to note that, as opposed to his statements made during the research interview with me (see note 27 above), when he said that Badinter suggested not to hurry the process of drafting a new Constitution, during the CPUN meeting, Ion Iliescu said that Badinter

suggested to urge the process of adopting a new Constitution. It is true that the passage of time might be conducive to unforgiving oblivion. However, equally true is the fact that politics operate with "different" truths, depending on different circumstances.

³¹ See the Memorandum of the Committee on constitutionality, legality and human rights (CPUN) from 26th of February 1990. This Memorandum presented all the changes brought to the first draft of the electoral law, following the seven debates which took place between the representatives of the political parties between 27th of January 1990 and 21st of February 1990. Among many other changes, the Memorandum noted that the limitation to maximum two mandates referred only to the Romanian President, and not to parliamentarians, as it was in the original version of the electoral law. Therefore, it follows that the direct election of the President was already regulated in the first draft of the electoral law, which was written sometime during the month of January. See File no. 9, Archives of the Romanian Revolution Institute (I.R.R.D.), Fund I, Record no. 102 in T. Stănescu-Stanciu, A. Oșca, G. Neacșu, *Documente privind Revoluția română din Decembrie 1989* cit. vol. I, pp. 92-96.

³² Ivi p. 92.

³³ See Monica Dumitriu's intervention (CPUN member) - the Records of the CPUN meeting from the 9th of March 1990, p. 31.

³⁴ See Ion Diaconescu's intervention (CPUN member and important PNT-CD leader): «As for the election of the President, it is not the case now for a referendum, nor to function without a President, but I believe that the proper solution is for this future elected constituent assembly to choose the president. It selects the President and it provides for his/hers prerogatives». Ivi p. 39.

³⁵ See Ion Iliescu's intervention. Ivi

p. 35.

³⁶ See Dan Mărtian's intervention (CPUN member): «The institution of President was seriously smeared by the way in which it was conceived and especially in which it was exercised this state supreme magistracy. Now the question is to elect the president by universal vote. Why don't we trust the people, their capacity to understand, to elect? Why not provide the country with an institution that, truly, would bring an advantage for the fabric of the democracy we want to build?». Ivi p.

40.

³⁷ See Mihai Constantinescu's intervention. *Ibidem*.

³⁸ Appointed by Resolution of the Senate no. 80/2016, published in the Official Gazette no. 431 from 8.06.2016.

³⁹ See Marian Enache's intervention in the Records of the CPUN meeting from the 9th of March 1990, p. 39.

⁴⁰ Ivi p. 40.

⁴¹ Following the presidential and parliamentary elections held in the same day, on the 20th of May 1990, Ion Iliescu (FSN) won 12.232.498 votes out of 14.378.693 valid casted votes, while FSN won 9.089.659 votes out of 13.707.159 valid casted votes (for the Assembly of Deputies) and 9.353.006 votes out of 13.956.180 valid casted votes (for the Romanian Senate). Data is available at Permanent Electoral Authority, <http://www.roaep.ro/alegeri_1990/index.html>, August 2020.

⁴² The Committee had 28 members appointed according to political configuration of the Constituent Assembly. 5 out of the 28 members were constitutional experts. See A. Iorgovan, *Odiseea elaborării* cit., pp. 743-745. The Committee was led by an independent senator, Antonie Iorgovan. The Committee was very important in the whole process of adopting a new Constitution. First, it drafted the Thesis of the Constitution and,

second, following the decision of the Constituent Assembly regarding those Thesis, it drafted the Constitution. This draft Constitution would then be submitted to debates and final vote within the Constituent Assembly.

⁴³ See Documents presented in the Constituent Assembly and the Committee for drafting the Constitution July – December 1990, Archives of the Senate, File 2, inventory no. 128, pp. 37–47. From the very beginning (see p. 38), the author of the study showed that the «[T]ripertite division between the three powers of the state should not be considered as being absolute, rigid, in that the activity of each of them is isolated, completely separated from others, without any contact or even collaboration, which not only implies but it imperatively requires a rational organisation of these powers». Ivi p. 38.

⁴⁴ Antonie Iorgovan, as president, submitted for debate only two models out of the four which were initially presented: «[...] So, we drafted this file – two alternatives and I would ask you to decide, to present your points of view – how do we exactly think about it; how shall we get to that type of republic. What kind of republic? We have kept the arguments, you have the documents in your portfolio. Without entering to many details: semi-presidential – French style, or parliamentary – German Federal Republic or Italy?» See Records of the meeting of the Committee for drafting the Constitution, held on the 20th of September 1990, Archives of the Romanian Senate, File 25, inventory no. 128, pp. 43–44.

⁴⁵ See Mihai Constantinescu's intervention. Ivi p. 16.

⁴⁶ See File C in A. Iorgovan, *Odişeele elaborării* cit., p. 751. The File was forwarded on the 18th of September 1990 to the members of the Committee so to prepare the debates. The first three topics which were discussed referred

to the fundamental constitutional architecture of the state: 1. Form of government: republic or monarchy, 2. Type of republic: semi-presidential or parliamentary, 3. Structure of the Parliament: unicameral or bicameral.

⁴⁷ See Records of the meetings of the Committee for drafting the Constitution, held on the 20th and 25th of September 1990, Archives of the Romanian Senate, File 25, inventory no. 128, pp. 43–106.

⁴⁸ See D. Ionică, *Geneza Constituției* cit., pp. 488–523.

⁴⁹ Ivi p. 74.

⁵⁰ Records of the meeting of the Committee for drafting the Constitution, held on the 18th of September 1990, Archives of the Romanian Senate, File 25, inventory no. 128, p. 30. See also, Antonie Iorgovan: «[...] by adopting the Electoral law (Decree-law no. 92/1990 – my note, B.D.), as well as by electing the Romanian President it seems to me that the Romanian people had clearly expressed the choice for the Republic». Ivi p. 24. See also Mihăiță Postolache (FSN member of the Committee for drafting the Constitution): «It is not now the time for referendum. The question regarding the referendum is raised after the Constitution is adopted by the Parliament. If the Constitution will not be accepted by the people, it means that we did not correctly represented them, we perverted their thoughts and expectations». Ivi p. 34.

⁵¹ See Records of the meeting of the Standing Bureaus analysing the Thesis of the Constitution, held on the 7th of December 1990, Archives of the Romanian Senate, File 28, inventory no. 128, p. 48.

⁵² See Ion Diaconescu's intervention: «Only those countries with a long standing democratic tradition and a great political stability can afford the luxury of a presidential republic. All countries which have passed through the sad experience of the harsh years of dictatorship have started their

road to liberty through a parliamentary republic. The example – the Germans and the Italians, after the Nazi, respectively the fascist dictatorships – is conclusive in this sense. One can block the way to this new dictatorship either by choosing the monarchic solution, or by choosing the parliamentary republic». See D. Ionică (ed.), *Geneza Constituției* cit., p. 491.

⁵³ See Sergiu Cunescu's intervention (representative of the historical Romanian Social Democrat Party – PDSR). Ivi p. 494.

⁵⁴ See Mihai Ruva's intervention. *Ibidem*, p. 502.

⁵⁵ See Dan Lăzărescu's and Sergiu Cunescu's interventions. They asked rhetorically what should happen if the people, by referendum, do not agree with the dismissal of the President suspended from office by the legislature. It would be a fundamental contradiction. *Ibidem*, pp. 495–496.

⁵⁶ See Florin Vasilescu's intervention in D. Ionică, *Geneza Constituției* cit., p. 488.

⁵⁷ See Alexandru Bărlădeanu's intervention, ivi p. 504. Alexandru Bărlădeanu was FSN member and the President of the Romanian Senate at that time.

⁵⁸ See A. Iorgovan, *Odişeele elaborării* cit., p. 229, see D. Ionică (ed.), *Geneza Constituției* cit., p. 515.

⁵⁹ D. Ionică (ed.), *Geneza Constituției* cit., p. 489.

⁶⁰ See Florin Vasilescu's intervention, *Ibidem*.

⁶¹ Ivi p. 490.

⁶² Ivi p. 511.

⁶³ See Marian Enache's intervention: «The force and vitality of this political-legal structure (the President – my note, B.D.) are a result, on one hand, of the original source of its legitimacy, which is the universal suffrage, and, on the other hand, of the neutral position in relation to political parties and other social forces; thus, the presidential office is becoming a true guarantor of compliance with the democratic princi-

ples, as well as with fundamental rights of the citizens established by constitutions. By his status of impartiality, the President of the country has to be a true constitutional king». Ivi p. 491.

⁶⁴ See Records of the CPUN meeting from the 14th of March 1990, published in the Official Gazette no. 12-13 from 20.03.1990, p. 38.

⁶⁵ D. C. Dănișor, *Șeful statului ca putere neutră* cit., p. 122. See also A. Iorgovan, *Odiseea elaborării* cit., p. 230.