

Establishing the rule of law after communism: a comparative approach

*Gentian Elezi*¹

Abstract

Rule of law is one of the main pillars of democratic systems. The post-communist countries of Central and Eastern Europe inherited deleterious legacies regarding rule of law, which made their path to democratisation fraught with difficulties. However, it remains unclear as to how communist judicial legacies and post-communist reforms interact to affect the establishment of the rule of law. Therefore, the purpose of this article is to examine the factors determining the establishment of rule of law in post-communist countries with a particular focus on Albania. The theoretical framework used is the 'four-factor explanatory model' of post-communist trajectories, focusing on (i) pre-communist experience and cultural patterns, (ii) communist regime legacies, (iii) elite strategic choices in early transition, and (iv) external influence. By analysing the impact of these factors in the Albanian case, the article aims to clarify the mechanisms that affect the establishment of the rule of law in countries similar to Albania.

Key words: *rule of law, post-communism, democratic transition, institutionalisation, Albania*

¹ Contact at: gentian.elezi@gmail.com

‘Communism means not the victory of the socialist laws,
but the victory of socialism over any law’

The first president of the USSR Supreme Court 1927.

The rule of law: in search for a definition

The concept of the rule of law is deeply rooted in liberal democracies and has become one of the main criteria for distinguishing these regimes from others. In the context of EU enlargement it has become a fundamental priority and one of the biggest challenges for accession countries, especially the post-communist ones. Different schools of thought among lawyers, politicians, philosophers, sociologists and economists, have constantly raised discussions and debates about what can be considered rule of law, where are its origins and roots in history, what are its characteristics and ‘virtues’, and how can it be implemented. Some scholars refer to the British system as the inventor of the rule of law, others mention the French term ‘legalite consitutionelle’ or ‘Rechtsstaat’ from the German experience. However, we can say that the basis that these concepts rely on, are very similar. As Kirchheimer and Neumann (1987) argue, ‘legalite constitutionelle in the Continental constitutional language, as well as ‘rule of law’ in Anglo-Saxon legal circles, expresses the necessary correspondence of any governmental or administrative act with the laws of a particular country’ (Kirchheimer and Neumann 1987: 132). The rule of law is not a static concept and has no static meaning; like all other human institutions it changes. As the pattern of human relations change due to progressive social advancement, the rule of law also experiences an evolutionary process in accordance to the new circumstances (International Commission of Jurists 1965).

We can find interesting perspectives related to the rule of law since the Roman Age when Emperors Theodosius and Valentinian in 429 AD declared themselves to be bounded by the law (Atkinson 1965). The modern meaning of the rule of law started to gain prominence with the creation of the state as an entity. As Atkinson points out, ‘when the State came into its own, it took more precise forms, grew more complex and more extensive, appropriated and rejected various elements of Roman law and collated and reformatted various codes’ (Atkinson 1965: 11). The main theories concerning the rule of law have been analyzed and structured by Craig (1997) in two different groups: substantive and formal. The substantive approach does not limit the concept to the separation of powers, law above all, equal procedures and legal certainty. It is also concerned about the quality of the

law. One of the supporters of this view is Dworkin, who points out that ‘law rules by virtue of its ‘fit’ with a coherent set of principles about justice and fairness and procedural processes’ (Dworkin 1986: 243). Dworkin argues that we need to give law a degree of moral and practical integrity. These principles would promote faith in the legal system as a whole and will generate an obligation for citizens and officials to abide by it. People need to see law as theirs and as a public good that gives mutually beneficial cooperation. In this way, law will facilitate social interaction and will help to curb the abuse of power (Bellamy 2005).

The formal approach claims that the notion of good can be subject to political disagreement. This approach does not deal with judging the content of the law, whether it is good or bad (Craig 1997). In a strict and simplified formal sense, ‘the rule of law means any ordered structure of norms set and enforced by an authority in a given community’ (Friedmann 1971: 94). Hayek has given one clear definition of the rule of law related to this approach: ‘stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge’ (Hayek 1944: 54). Hayek argues that ‘it does not matter whether we all drive on the left or on the right-hand side of the road so long as we all do the same. The important thing is that the rule enables us to predict other people’s behaviour correctly, and this requires that it should apply to all cases – even if in a particular instance we feel it to be unjust’ (Hayek 1944: 60). He believes that ‘if the individuals are able to use their knowledge effectively in making plans, they must be able to predict actions of the state which may affect these plans. But if the actions of the state are to be predictable, they must be determined by rules fixed independently of the concrete circumstances which can neither be foreseen nor taken into account beforehand’ (Hayek 1944: 56).

Therefore, ‘where the rule of law is observed, people can have reasonable certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions. They can then have reasonable security in their expectations of the conduct of others, and in particular of those holding official positions under law’ (MacCormick 2005:16). This system generates a degree of predictability in social life by stabilizing, regulating, securing and even constituting relationships (Bellamy, 2005). Although the rule of law is not a sufficient condition for having a liberal democratic system, we can say that it is a necessary requirement. As O’Donnell (2004) points out, ‘the rule of law works intimately with other dimensions of the quality of democracy. Without a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk’ (O’Donnell 2004: 32).

The specific purpose of this article is to discuss and explain why the concept of the rule of law has encountered multiple difficulties in post-communism, with particular reference to Albania. The article adopts the formal approach of the concept, especially linked to establishing independent institutions and legal certainty. It draws from the main theories and applies them for understanding the Albanian context and its characteristics. Through an exploratory and explanatory approach, it aims to identify the factors that have determined the trajectory of the establishment of the rule of law has followed after communism.

The rule of law and communism

Although communist regimes embodied different patterns that made them distinguishable between each other, the general characteristics were similar. They had suffered almost from the same kind of non-democratic power, lack of freedoms and rights, and economic disaster. As Ekiert argues, 'the simultaneity of the breakdown, despite varied political and economic conditions in each country, reinforced a notion that these regimes were basically similar' (Ekiert 1996: 321). At the beginning of the transition to a democratic system, these countries were experiencing difficulties due to their communist legacies. It is interesting to notice that in terms of institution building and establishing the rule of law, these countries had much more in common than in other areas. Under Stalinism, the conception of law and of the rule of law was quite particular. As Linz and Stepan (1996) remind us, the first president of the USSR Supreme Court wrote in 1927 that 'communism means not the victory of the socialist laws, but the victory of socialism over any law' (Linz and Stepan 1996: 248). Thereby, the concept 'law above all' that characterizes liberal democracies was replaced by 'socialism above all.' In this way there was no space for a legal system to constrain or bind the leader. 'A system in which the leader rules with undefined limits is the conceptual opposite of modern democratic constitutionalism, which entails that elected political leaders, the state, and even the sovereign citizenry have agreed to a complex series of self-binding mechanism' (Linz and Stepan 1996: 248). Many decades under this kind of rule left deep scars and legacies which, as we will see, have influenced the transition more than any other factor.

As Jowitt (1992) claims, 'the new institutional patterns will be shaped by the inheritance and legacy of forty years of Leninist rule' (Jowitt 1992: 285). The nature and the choices of the elite in the early transition are important too, but 'the creativity of the actors is also constrained by the experiences of the past and the patterns of economic and political resource distribution under the old regime' (Kistchelt 1999:19). Thereby, because of path-dependency, both communist legacies

and strategic choices of the elite are crucial in creating the new institutions and the new politics. As Johnson argues, 'path contingency has its origins in historical institutionalist theory. Historical institutionalists argue that institutions are legacies of political struggles and that they can shape preferences as well as reflect them. Thus, institutions are usually treated as forces of stability in maintaining routine, predictable political and social outcomes' (Johnson 2003: 292). Putnam (1993) also argued about the importance of path dependency: 'where you can get to depends on where you're coming from, and some destinations you simply cannot get to from here. Path dependency can produce durable differences in performance between two societies, even when the formal institutions, resources, relative prices, and individual preferences in two are similar' (Putnam 1993: 179)

Similarly Holmes (1997) has pointed out the importance of a common heritage among post-communist countries in relation to the rule of law. The absence of a culture of compromise is one of them. Overall, at varying degrees, the comprehension and incorporation of the notions of consensus and compromise was really weak in post-communism. This is a clear and direct legacy from the patterns of the communist period when conflicting views were never tolerated and considered a major threat. As Crawford (1996) argues, 'many of the people replacing the communists are just as much products of the old system, in that they are just as dogmatic, authoritarian and unskilled in compromise, whether in ministries, the new parliaments, universities or schools.' (Crawford 1996: 102). Kitschelt (1999) argues that the most important thing regarding elites and institutional choices are the legacies of the past. Specifically, he argues that 'the legacy explanations claim that resource endowments and institutions that precede the choice of democratic institutions have a distinct impact on the observable political process under the new democratic regime. Moreover, such explanations claim that democratic institutions themselves depend on legacies, because they are endogenously chosen by the political actors emerging from the old pre-democratic system' (Kitschelt 1999: 11).

This last point introduces us to another important aspect that Holmes includes in his consideration. It is the cynicism towards and mistrust of political institutions that characterizes all post-communist countries. In the surveys that Rose and Haerpfer (1994) have done to collect some evidence regarding trust in institutions, we can notice that there is still a big lack of trust, especially in parliaments, political parties and public authorities. Holmes (1996) argues this is a result of the fact that 'during the communist era, many citizens had a marked sense of 'them' and 'us', and often turned to private relations as a way of coping with the fact that they had little impact on their incompetent and often corrupt institutions. Thus, in addition to actually establishing new institutions, post-communist politicians have to nurture a communal faith in the very notion of state institutions, the rule of law, and constitutionalism.'

(Holmes 1996: 17). For these reasons, the development of trust in institutions has been slow in post-communism. As Brown (1994) points out, this ‘them’ and ‘us’ syndrome in post-communist Europe will persist. It will begin to disappear only when democratic institutions and practices become more representative of society as a whole, thus more legitimated in order to establish the rule of law.

All the problems and the patterns described above have been characteristics of the transition, in different levels, in all post-communist countries and in Albania as well. Although we notice a common experience and common legacies, the trajectories that these countries followed after communism in establishing the rule of law were different. Their performances vary from the relatively successful Baltic states or Poland to the less successful cases of Albania or Macedonia. How can these differences be explained? Expressing it in Gati’s terms, why there are ‘winners, laggards and losers’ among the post-communist countries?

Explaining the Albanian case

Building the new system

Since Albania started its path toward the establishment of a democratic system, the rule of law has always represented one of its weak points. Two were the main problems concerning the establishment of the rule of law. The first was the continuous intervention of the executive in the judiciary; thus issues related to the separation of powers. The second was legal (un)certainty and the efficiency of the judiciary, linked to high corruption and (lack of) professionalism. Legal certainty was very weak in the early years of transition and the considerable weakness of the institutions furthered this uncertainty.

The Albanian Party of Labour (APL) was the last communist party to respond to the wave of change that had already swept the communist countries in Europe. The communist leader of Albania, Ramiz Alia, who was the successor of the long-time dictator Enver Hoxha since 1985, embraced a more moderate approach in order to calm down the protests that were growing in the country. Alia tried a moderate reform from above, changing the personnel of some institutions and administration, and bringing in the state more reformist figures (Gill 2002). In spite of these light reforms, mass protests continued to increase until the first pluralistic elections in 1991. The communist party won and after the elections parliament adopted an interim constitution, ‘Law on Major Constitutional Provisions’, which introduced a president figure with executive powers and elected by parliament.

As a result, the political and institutional situation seemed to get calmer, but less than two months later political stability was weaker than before. The opposition

party, the Democratic Party of Albania (DPA) decided not to cooperate anymore with the government and pushed for new elections. In 1992, the DPA won by a large majority and its leader, Sali Berisha, became the new President of the Republic. Since the beginning, although he claimed inspiration from the Western models, Berisha had problematic relations with independent institutions and the judiciary in particular. Conflicts increased until when, in 1994, Berisha decided to start working for a new constitution without the participation of the opposition. Whatever the quality of the resulting draft would have been, keeping in mind the delicate situation of legality in Albania, it would have raised serious questions about its legitimacy. The new constitutional project embodied a strong presidency that would guaranty Berisha that most of the institutions would be under his influence. As Kitschelt points out, 'dominant forces in the transition try to lock in their initial advantages through institutions that improve their expected chance to pursue important objectives, such as winning and maintaining political office' (Kitchel 1999: 32).

The result of those first years of transition was the high personalization of politics and of independent institutions which undermined any attempt for the creation of a basis for the rule of law. As Henderson and Robinson have observed, 'what was most alarming, was Berisha's inclinations to change the rules of the political game when they did not suit him' (Henderson and Robinson 1997: 349). The initial mistrust of the population toward institutions, due to the past experience, was furthered and the perception index of corruption increased. As importantly, the intervention of politics in the judiciary undermined the credibility of the courts. This situation influenced the deepening the pattern of 'them' and 'us' which was a legacy from communism. Incompetent and corrupt judges came to symbolise the image of new institutions. As the OSCE Report on Albania argued, 'a number of new judges were assigned to the courts in 1994 after taking a controversial six-month special course and then completing the 'correspondence' system at the Law Faculty in Tirana on an accelerated basis (six more months)' (OSCE 2004: 18). According also to the *Nations in Transit Report* of Freedom House, 'besides corruption, the Albanian judiciary is beset with operational shortcomings and a debilitated capacity for enforcing decisions.' (Freedom House 2004: 13). All these dysfunctional patterns in the legal and institutional system created basic problems to the economic and social life in Albania. The nature of the early transition influenced and shaped the legal and institutional situation even in the second decade of post-communist Albania.

To explain the trajectory of the rule of law reforms in Albania, I will use the theoretical model that Ekiert (2003) has built for post communist countries. This model is based on four main factors that determine the path of the rule of law after the collapse of communism, which are: pre-communist institutional and

cultural legacies, the type of the communist regime and its impact, the choices of the transition elite, and the geostrategic factors. What follows is an exploration of the Albanian case and the impact of these factors in establishing the rule of law.

Pre-communist legacies

To understand the different institutional developments and democratisation trajectories between countries, it is not sufficient to refer to the communist legacies without analysing the cultural and historical background of the country in the pre-communist period. This analysis is important for undertaking the levels of social trust in these societies because, as Huntington (1996) observes, rule of law is also about trust. An independent judiciary can work only in environments where people can trust each other and in his opinion this is the case only in the West. As Hernando De Soto (2000) shows from the polls that he made in the Liberal Democratic Institute, it is true that people trust each other more in the West. Empirical data from polls show that in the West trust levels range from 40% (USA) to 65% (Sweden). It also showed that developing countries have levels of trust around 5-10 %. Despite this, De Soto does not agree with the connection that Huntington identifies between trust and the rule of law. In a 'chicken-egg dilemma', he thinks that trust is a by-product of the rule of law and consolidated institutions. Even in the West people do not trust each other as individuals, but as parts of a common legal framework that guaranties and protects them from each other.

In De Soto's opinion as an economist, this mechanism of achieving trust and certainty through the rule of law and the efficiency of institutions is fundamental in democracy, but especially in the market economy and institutions (De Soto 2000). The point stressed by De Soto is further supported by Rose (1998) who claims that changing and building institutions can produce changes in the behaviour and values of individuals. New institutions alter the incentives, rules and constraints that individuals use to calculate their behaviour (Rose 1998). Thereby, institutions have the power to shape and build new mentalities and new values. Mandelbaum (1996) also argues that once institutions and a market economy are established efficiently, people will adapt themselves and their behaviour to the rules and they will operate successfully.

Another set of arguments concerning the importance of the pre-communist experience is related to the historical approach. Gardner (2000) supports the argument that it is crucial to identify under which empire the post-communist transitioning country operated. The Ottoman and the Romanov empires dominated and destroyed the societies they ruled more so than the Habsburgs. The latter, even though with authoritarian character, left more space to civil

organizations and embraced the Enlightenment. The previous two disintegrated civil freedoms and inculcated habits and cultural aspects which still dominate in Gardner's opinion. This theory has been developed further also by Rupnik (1999) in his work on post-communism. Focusing on the rule of law and different performances in implementing it among post-communist countries, Rupnik (1999) introduced what he called the *Habsburg factor*. In trying to argue about the reasons that might explain the relative success in establishing rule of law in Central Eastern Europe, compared to the other post-communist states, Rupnik (1999: 60) states:

There is another factor, however, that warrants mention in this connection: the legacy of the Austrian as opposed to the Ottoman Empire. It may be going too far to call the Habsburg Empire liberal, but neither was it an autocracy like Czarist Russia. It was a *Rechtsstaat*, that is, a state run by the rule of law. Indeed Austrian turn-of-the-century literature (from Musil and Roth to Broch and Kafka) is dominated by the question of the law, the tension between legitimacy and legality. That Habsburg legacy of the rule of law has influenced several of its Central European successor states, as reflected in their legal scholarship, public administration, and political culture more generally. It was already being rediscovered in the last phase of communism, as the rulers began to accept some limitations on their powers and the opposition began to challenge their rule in the name of accepted domestic and international legal commitments. The 1990s have confirmed the trend.

Similarly, Crawford (1996) reminds us that some of these countries had some bad common experiences and characteristics more than others in the pre-communist period, such as acceptance of foreign intervention in wide areas of life, a habituation to arbitrary methods, a messianic concept of political change, etc. Schopflin (1993) and Kitschelt (1999) give other arguments in order to support the importance of the cultural and historical background of a country in the pre-communist period. To explain patterns of transition, Schopflin (1993) focuses on the role of bureaucracy before communism. The level of professionalization of the public sector is a major factor in explaining the character of institutions and rule of law during and after communism. Kitschelt (1999) continues on this cultural administrative approach when he argues that in order to explain the performance of institutions in post-communism 'the key variable is the pre-communist and communist legacies of bureaucratic rectitude. State with traditions of the rule of law in the pre-communist period (Czechoslovakia and East Germany) carried on this tradition into the communist period and were thus left with a better chance of setting up liberal states that could respect and defend all kinds of rights in the post-communist era.' (Kitschelt in Kopstein & Reilly 2003:122). These factors

have played an important role in the early democratic transition and therefore provide considerable evidence for explaining differences between countries.

The type of communist regime and its legacies

For this article, the different experiences under communism are a crucial explanatory framework to understand why Albania was less effective in overcoming its legacies compared to other post-communist countries. As Fowkes observes, 'on the eve of the transition from communism Albania was in many ways unique in Europe. It was completely isolated internationally. Its people were so poor that their per capita GDP in the 1990s placed them firmly in the Asian or African category of low-income countries. There was also very little dissent within the country, and no inclination on the part of the ruling communist party to follow the example of Gorbachev reforms in the Soviet Union.' (Fowkes 1999:72). Albania was the last European country where communism collapsed. There are several reasons for this all connected to the particular path that communism followed. The country experienced isolation under the personalized leadership of Hoxha and for almost forty years was subjected to one of the harshest communist regimes. Closing trade channels and exchanges with the rest of the world, Albania claimed self-sufficiency as a new ideology linked to communism. Obviously this took the country in an even deeper underdevelopment making it the poorest country of Europe. Hoxha's isolationist communism penetrated in every area of Albanians' social and private life, undermining the very possibility of independent thought other than Party dogmatism.

Isolationism is not the only characteristic that distinguishes the Albanian regime from the others in the communist bloc. Linz and Stepan (1996) help us in observing differences between these regimes through their categorization. Specifically to the communist regimes, three kinds of categorisations can be applied: authoritarianism, totalitarianism and sultanism. Quite all post-communist countries could fit, at least partially, in one of these categories. According to Linz and Stepan's (1996) classification, the closest description of the Albanian regime would be totalitarianism since it was characterized by a total absence of pluralism, a strong ideology, extensive mobilization and powerful leadership with undefined limits of rule. But it also was affected by a highly personalized system and regime, no rule of law and low institutionalization. That's why many refer to this regime as *Enverism*, due to its ruler Enver Hoxha. His staff was mainly composed by his family members and friends. From this point of view it goes closer to a sultanistic regime. But as long as sultanism had an absence of ideology we can say that this was not the case for Albania. Therefore, it is difficult to include the Albanian case in one of these categories.

The more appropriate definition for Albanian regime is made by Kitschelt who makes a different categorization of communist regimes: patrimonial communism, national-accommodative communism, and bureaucratic-authoritarian communism. The first type, patrimonial communism is most suited to describe Albanian communism. This kind of regime:

Relies on vertical chains of personal dependence between leaders in the state and party apparatus and their entourage, buttressed by extensive patronage and clientelist networks. At the apex of patrimonial regimes, political power is concentrated in around a small clique or an individual ruler worshiped by a personality cult. The level of rational-bureaucratic institutionalization in state and party remains low because the ruling clique penetrates the apparatus through nepotistic appointments (Kitschelt 1999: 24).

Because of its extremely harsh and closed character, 'on the eve of the communist collapse, patrimonial regimes faced no significant internal opposition movements, except dispersed, isolated dissident intellectuals, unable to produce a sustained discourse or organize a professional cadre advancing a new vision of political-economic modernity (Kitschelt 1999: 24). The political institutions during this type of communist regime are crucial in explaining the different paths countries took during the last years of communism and the first years of transition (Kitschelt 1999).

Kitschelt (1999) points out the two main dimensions through which to explain differences between countries in the post-communist transition. The first dimension 'concerns the extent to which communist regimes rely on a formal-rational bureaucratic state apparatus that rules out corruption and clientelism, as opposed to a patrimonial administration based on personal networks of loyalty and mutual exchange, combined with patronage, corruption and nepotism' (Kitschelt 1999: 21). In Albania, the regime was based on personal networks of loyalty and mutual exchange, corruption and nepotism that characterize the patrimonial regime. The general level of efficiency of the civil service and administration was lower than in other countries. Albania faced the transition with a very low quality and professionalism of public administration. A well-functioning bureaucracy would have influenced probably in limiting the damage caused by the uncertainty of the transition. To that point, we agreed with Schumpeter (1945) who argued that bureaucracy can be the answer to governments of amateurs.

Another dimension Kitschelt (1999) identifies as crucial in understanding different trajectories in post-communism is the extent to which communist rulers after Stalin's death tolerated a certain degree of economic or political pluralism. Except for Albania, all other East European communist countries experienced a slow

de-stalinization after the death of the Soviet dictator. Thereby, in other communist countries there were significant or at least weak oppositions organized in movements. There were different pressuring organizations in several countries such as, Solidarity in Poland, Civic Forum in Czechoslovakia, popular fronts in the Baltic States, the Union of Democratic forces in Bulgaria, etc. Some of these movements were created as early as the early 1980s. There were no such developments in Albania. As Gill (2002) argues in a comparative key, 'the Albanian regime was particularly harsh, using widespread police control actively to both destroy and discourage independent activity' (Gill 2002: 96). So while other communist countries were moving toward a kind of moderation, Albania was still experiencing political purges even among the higher echelons of the communist leadership.

Thereby, even in its last years of life, Enverism did not allow the creation of any basis of opposition. Even the post-communist political leaders born after the protests of 1990-1991, were a handful of timid professors and students many with connections to the regime. This was because persons who were not part of the regime intellectuals had no idea or capacity to address such a massive need for change and the creation of an opposition. The lack of opportunities for the early growing of voices against the regime led to the rushed creation of an unprepared opposition.

Differently from the other countries which experienced transition after authoritarian regimes (Central Europe), the collapse of Albanian totalitarianism presented many inhibiting legacies concerning the rule of law. As Linz and Stepan (1996) argue, the rule of law did not exist in totalitarian communism. 'There was no space for semi-opposition, no space for regime moderates who might negotiate with democratic moderates, and no sphere of the economic or civil society that is not subject to the despotic exercise of the sultan's will' (Linz and Stepan, 1996: 53). The legal code was highly politicised and instrumental for the party state and its purposes but incompatible with democracy. The legacy of the fusion of public and private and the extreme personalization of power, made the establishment of the rule of law one of the most difficult tasks in Albania. 'The clientelistic penetration and corruption of bureaucratic institutions limit their efficiency and legitimacy and put extensive reform on the agenda. Even democratically elected leaders may perpetuate clientelistic practises rather than rational administration' (Linz and Stepan 1996: 62)

The regimes in Central Europe were different from the Hoxha regime according to Linz and Stepan's classification because they are considered authoritarian not totalitarian. Central European countries:

Maintained closer ties with the West in many formal and informal ways during the communist period. Some countries experienced crisis-generated emigration waves (during the post-World War II communist takeover and in 1956, 1968,

and 1981) that produced large political diasporas living in Western Europe and the United States. In addition, countries like Poland, Hungary, or Slovenia had more-open political regimes that imposed fewer travel restrictions. The presence of large emigrant communities opened many informal channels facilitating diffusion processes.' (Ekiert and Hanson 2003: 39).

These countries allowed a certain level of openness and opposition, which affected the early democratic transition in terms of establishing independent institutions and the rule of law. The different type of communist regime in Albania and its approach to institutions and legal certainty has had a crucial impact in the new regime.

Political choices of the post-communist elite

Among the factors that explain the rule of law performance, Ekiert and Hanson (2003) include strategic choices of the new political elite. They argue that:

The diversity of outcomes has its source not only in the legacies of the past, but also in choices made by strategically located actors in various critical moments of the unfolding processes of change, as well as in the modalities of transitional politics and institutional characteristics of the post-communist period.' (Ekiert & Hanson 2003: 2).

Overall the authors contend that political crafting, the agency of political actors, is at the heart of the transition to democracy, and successful democratizations are more a product of political will who are not mere pawns of structural constraints.

Therefore, in the early transition period elite choices are crucial for subsequent developments. Among the numerous difficult tasks that elite faced, one of the most important was the establishment of a legal framework and independent institutions. Considering the political elite as the main actor in shaping institutions by the strategic choices they make, Ekiert (2003) reminds us, quoting Valerie Bunce (1995), that 'in postcommunism, political institutions seem to be more a consequence than a cause of political developments' (Ekiert 2003: 94).

As this part is about choices, one of the choices that President Berisha made in the 1990s was to pursuit de-communization and lustration. It is not a purpose of this study to analyze the content and the normative aspects of this issue, but the way in which this events took place in Albania undermined the principles of the rule of law. As Mendez argues, 'a realistic assessment of the possibilities of pursuing justice would also give full regard to the institutional limitations established by the politics of transition in each case. These institutional limitations may in fact

tie the hands of a democratic government seeking to redress past wrongs, but they do so only within the rule of law.' (Mendez 1997: 23). In 1993, Nexhmije Hoxha, Enver Hoxha's widow was sentenced to nine years imprisonment. In the same year, the former Prime Minister Fatos Nano was arrested on charges of corruption and sentenced in 1994 to twelve years for misappropriating public funds. In August, former President Ramiz Alia was arrested for abuse of power and sentenced to nine years for corruption and human rights abuses. All these trials were highly criticized by international organizations of human rights due to fundamental irregularities and non-competent judicial personnel and judges. The trials were transformed in symbolic demonstrations of power as the outcome was already known.

Berisha achieved his political goals in terms of perceived historical retribution and distraction from the major problems the population was experiencing due to the transition. But the high price was the undermining of the rule of law and the credibility of the institutions. Watching the trials being conducted by young and unqualified judges, who were trying to humiliate the defendants outside of legal bounds, furthered mistrust in the judiciary. Emphasizing the wider importance of the trials of the former communist leaders Brown stated that

De-communization [was a] crucial test for the rule of law in Eastern Europe. For decades, laws were framed, interpreted, and implemented in the service of communist ideology. Even good laws often lost their value because of the ends to which they were put. Now the post-communist East European states are genuinely trying to replace this perversion of law by the rule of law – law that protects rather than controls citizens, that regulates their relations with each other and with their freely elected governments, that preserves individual rights while guaranteeing social order (Brown 1994: 3).

Albania failed the test of de-communization within the rule of law. The reason was the lack of professional judges but also mainly because of the political elite's choice to politicise the trials and instrumentalise the judiciary. In post-communist Albania institutions were a direct result of politics. President Berisha was not the only post-communist leader who made bad choices. As Ekiert reminds us, 'Slovakia, which was initially part of the group of leading reformers, fell behind in the mid-1990s. Economic transformations slowed down, political liberties were seriously curtailed, and the rule of law was frequently subverted by the Meciar government.' (Ekiert 2003: 96).

Applying Ekiert general theory on transition trajectories, we can say that 'the design of electoral systems and institutional relations are considered to be the most critical institutional choices' (Ekiert 2003: 108). The years of the transition

in terms of rule of law and executive-legislative relations were marked by the way that the 'rules of the game' were decided and how the constitution was modified. Ackerman (1992) theorized the importance of the so-called 'constitutional moment.' 'The immediate aftermath of revolution provides liberal democrats with a unique opportunity, what he calls the constitutional moment, where circumstances are optimal for laying the legal foundations for a democratic order and mobilizing the requisite broad popular support for constitutional initiative. Timing in tackling major constitutional controversies is critical, for the opposition to authoritarian rule will remain united only for a finite amount of time after it has come clear that a new order is in the making. If the constitutional moment passes in vain, therefore, it is very difficult to recreate it.' (Stanger, 2003: p.183). But as Holmes has argued, 'if successful constitutionalism is to be judged by the speed at which a country hammers a definitive constitution into place, then Bulgaria and Romania would be the most legally advanced countries in Europe' (Holmes 1993: 22).

Thereby, a link between Ackerman's Constitutional moment and the success of the institutional design is not based on sufficient arguments or data. The important element is rather the way in which institutional transition was negotiated. The crucial point in understanding the basis of institutional arrangements was the debate on the legal framework and the Constitution. As Gill (2002) argues, 'post-communist democratic regimes saw it as necessary to reject the legacy of the past by replacing the former set of rules of the political game by a new set untainted by communist associations and openly linked to the new avowedly democratic regime. But of course what is important is not just the introduction of a new constitution, but the structure of institutions which it creates' (Gill 2002: 16).

Countries like Hungary, Poland and the Czech Republic, were characterized by civil society forces that:

Emerge and become sufficiently strong that, when the perception of crisis takes hold within the regime and the regime splits, the more liberal side of the regime elite sees those society-based forces as appropriate partners for meaningful negotiations. Early negotiations occurs, leading to elections, which remove the old regime from power and ensure that the subsequent negotiations about the form the regime will take are dominated by civil society forces. It is those forces which overwhelmingly shape the political outcome, a stable democracy. The former ruling communist party transforms itself into a social democratic party as part of this process (Gill 2002: 24).

Although civil society was weaker in Hungary than in Poland, the reformist wing of the communist regime was stronger and the new elite was organized.

The situation was different in Albania. As Gill (2002) pointed out:

When the old regime elite perceives the onset of the crisis, civil society forces are not sufficiently developed to be a powerful negotiating partner and are not immediately able to displace that elite. The old regime elite is able to transform itself, and in the new guise as a successor regime, engages in negotiation with society-based forces and wins the first election. In Bulgaria the political actors accepted the initial agreements and set in place a democratic system. In Albania the society forces refused to accept the institutional structure established at the outset of the post-communist period. Open oligarchy was the result (Gill 2002: 31).

In that regard, Stanger (2003) claims that post-communist countries had three possible choices about the new constitution: to restore the old communist constitution, to have a radical continuity approach by keeping most of the old constitution, or to draft a new one. In all three countries of Central Europe, 'aspiring democrats used the constitutions they inherited from the outgoing order as a point of departure for institutionalizing democracy' (Stanger 2003:184). All institutions started internal reforms by keeping the old structures and not trying to shock the whole system. As Stanger points out about Hungary, 'the freely elected Hungarian parliament continued on the same road to democracy through constitutional reform as had their less than democratic predecessor, rather than changing course and pursuing a radical break with the legality of the communist system.' (Stanger 2003:192). The new legal and institutional framework was decided through negotiations and round tables. As Elster (1993) points out, 'in Poland, Hungary and the former Czechoslovakia, the transition to democracy was negotiated through Round Table Talks between the outgoing communist order and the democratic opposition. In each country, the transfer of power transpired in complete legality – that is, through a negotiated settlement consistent with existing law, rather than radical renunciation of the ancient regime and its legal apparatus' (Elster 1993:190). Round tables with the regime in Hungary were conducted from June to September 1989 and produced the basic rules for the new political system.

In Albania on the other hand, in the first pluralist elections of 1991, the communist party won and allowed for the creation of a government composed by reformists. This was the crucial moment for starting the negotiation of the Constitution and institutional design. But Berisha and his party decided not to participate. 'The opposition claimed electoral fraud (claims not supported by international observers), refused to cooperate with the government, and objected to a draft constitution presented to parliament in April 1991. Instead parliament adopted interim constitutional amendments, which introduced an executive presidency elected by a two-thirds majority of the parliament.' (Gill 2002: 34).

The consensual approach is the missing part in the Albanian transition and it is a pattern that characterizes the Albanian system still. The Constitutional amendments of 1991 were made without the participation of the opposition, after Berisha's decision to abandon the table and cooperation with the government. The first wrong choice was made by the reformers and communist elite, who despite the rejection of the opposition continued the constitutional drafting process.

The way this process was conducted spread a sense of cynicism among the masses and a strong lack of legitimacy. This created the basis for what Holmes and Sunstein (1995) define as a major problem for the establishment of the rule of law. They argue that this situation 'leaves political actors with no choice but to accept the drawbacks of a highly politicized, and that means parliamentarized process, where everyday politics is part of an ongoing constitutional crisis, this reality also results in a host of unintended consequences, many of them at odds with the establishment of the rule of law (Holmes and Sunstein 1995: 288). Thereby, the key point was legitimacy of the process through consensus. As Mandelbaum argues about institutional arrangement in transitional countries, 'what distinguishes successful from failed transitions is not the effectiveness of the state but rather its legitimacy' (Mandelbaum 1996: 15).

After this first choice in a democratic consolidation moment, Albanian politics was shaped by a non-consensual pattern. Since then, whenever the government (both Socialist and Democrat) needs to make important reforms on institutional arrangements, the opposition party refuses to participate. There is lingering prejudice and mistrust on the other part that influences the negotiation process as the opposition considers itself weak in entering negotiations where the governments has most of the power. Thereby, knowing that in the bargaining game it will be necessary to give more than receive, it decides to pull out, depriving the whole process of legitimacy. Berisha, after winning the elections in 1992, continued in the same path of de-legitimacy and tried to create institutions that would be on his side. In 1994 he drafted a new constitution whose main purpose was to strengthen his power. The draft aimed to create a strong presidency, by-pass Parliament, and consolidate power into his hands. Other chapters of the draft redesigned also the hierarchical relations of the President with other institutions, always increasing the role of the President, especially regarding the judiciary. The president would have the power to propose judges of the Supreme and Constitutional Court.

'Interference with the judiciary was particularly contentious, as Berisha was involved in a protracted battle with the judge who headed the Supreme Court soon after the referendum defeat' (Henderson and Robinson 1997: 349). The rule of law was undermined with this new constitutional draft as it deformed the balance of power and placed the judiciary under political control. Fowkes also agrees with this analysis when he says: 'Sali Berisha in Albania is an example of

anti-communist who came to power but continued to use the methods of the former communist regime' (Fowkes 1999: 60). The drafting of the constitution was done by few external experts and members of Berisha's party while the opposition did not participate. Since Berisha did not have the required two thirds majority in parliament to approve the constitution, he organized a referendum in November of 1994 where the constitutional draft went down to defeat. Similarly to 1991, the failed 1994 constitutional referendum was another attempt of reforming institutions that lacked legitimacy. All attempts to restructure the rules in the beginning of democratization were made by governing political actors to increase their advantage, while the opposing party refused to participate.

During the early years of transition, another important factor that inhibited democratisation and facilitated the politicisation of nominally independent institutions was the weakness of civil society. As Pridham argues, 'in Hungary there has always been a strong emphasis on both the checks and balances system and on participatory democracy, including the involvement of organised civil society in decision making in relation to its constitutional design' (Pridham 2001:176). This is very important for democratisation because 'when complementary organizational forms arise to stabilize political and social life, fledgling democracies may be able to initiate their self-transformations even absent long-awaited new constitutions' (Stanger 2003: 204). In Albania the necessary system of check and balances between institutions was missing 'The system as it emerged in Albania was openly oligarchic rather than democratic with the failure to agree on the rules of the democratic political game moulding elite political struggle into an oligarchic rather than a democratic form' (Gill 2002: 35).

Geographic strategic factors and Western influence

If we have a look at the annual report of EBRD on economic, political and social indicators in post-communist countries, we will notice a clear pattern of geographic distribution. The countries which are closer to the Western part of Europe have higher scores and ranks in most indexes that measure political and economic performances. The more we go east in the map the greater is the difference in terms of efforts to consolidate democracy, build adequate institutions and create a market economy (Ekiert and Hanson 2003). As Ekiert (2003) quotes from Whitehead (1999), 'geopolitical constraint and crosscurrents can powerfully affect the interstate distribution of democratization, the scope of democracy within the states affected and the viability of the resulting democratic regimes.' (Ekiert and Hanson 2003: 14). As Lane argues about this point, 'two observations might be made about the character of those states that have successfully consolidated capitalist revolutions: first is their level of income per capita and, second, is their proximity to Western

Europe. Data show quite conclusively that the richest countries are the ones that have taken the greatest strides to capitalism and pluralism' (Lane 2002: 24). Analyzing the institution patterns, Lane concludes that 'geographical proximity to the West enabled institutional diffusion to spread more rapidly to the central and eastern European countries' (Lane 2002: 25). As a result, for such countries transition was relatively successful and their institutional consolidation proceeded quickly.

If we take a look at the countries that surrounded Hungary for example, we can clearly see that they are all part of what Gati calls 'winners'. Hungary's proximity to Western countries affected its approach to institutional reforms and to the other countries of Central or West Europe. Its openness accommodated the penetration of Western experience and practises in terms of political and institutional framework. As importantly, a healthy sense of competition started to increase between the policy-makers and political actors between the countries in Central Europe. Having in mind their goals and working together, these countries undermined quickly the heavy legacies that communism had left.

In the case of Albania, the country found itself isolated in a very unstable region. With the neighbours at war, the main concern was state survival and keeping an eye to the borders. This produced a missed opportunity for the country's openness. Differently from Central Europe that exploited the opportunities that stability and openness offered, the Western Balkans – fraught by instability – retrenched further. As a result, even after the fall of communism Albania found itself isolated again. The West could not open its borders because of regional instability and the fear of uncontrolled immigration. In a sense for most Albanians the Berlin Wall was still palpable as they could still not access Western Europe. Consequently, Western influence could not penetrate easily and the new unprepared elite found itself alone and without direction for creating a constitutional and democratic system. Ekiert points this out by stating:

Poland, Czechoslovakia, and Hungary, for example, received more attention from the international community at the start of the transition not only for being among the first to reject communism, but also for their past experiences of political struggle and economic reforms and their openness and historical links to the West. In contrast to other countries of the region, they had vocal and well-known cultural and political counterelites, and in two of these three countries communist elites were pragmatic, reform-minded, and liberal. The advantage of being first familiar as well as these past experiences not only provided intellectual capital and skills but also led to a faster and more extensive cooperation with the West and greater inflows of foreign expertise and capital. This in turn had a growing impact on the policies of newly democratized regimes, the normative orientations of political actors, and

their economic preferences, expectations, and behaviours. Better-developed market institutions, improved economic performance, and stronger democracy in turn invited more cooperation, assistance, and investment (Ekiert 2003: 116).

Western countries, especially members of the EU, had different behaviour toward the new post-communist regimes. The countries which were at the borders of the EU in Central Europe received much more attention. This is explained through different reasons. The first is a long cultural and historical relation the West had with them. This proximity to the borders 'forced' the EU to think about a concrete democratisation path for them and had a fundamental influence on Central Europe by improving their institutional, economic and financial performance. Another important reason is that these countries were the first to start fighting communism by organizing opposition and protests. After 1989, Poland, Czech Republic and Hungary 'became the recipient of a significant amount of foreign investment as a result of the publicity of being among the first to exit from communism and its close proximity to Western markets' (Kopstein and Reilly 2003: 140). But most importantly, this assistance was crucial in designing new institutions and furthering democratic consolidation. As Grabbe argues, 'the EU promoted both the strengthening of existing institutions (such as ministries and central banks) and the establishment of new ones' (Grabbe 2006: 77). The EU directly helped policy-makers create the basis for the establishment of the rule of law. As Kopstein and Reilly observe on the beginning of the transition:

The effects were not only political but also, perhaps more importantly, legislative and institutional. As an observer and advisor the European Commission helped to usher in a flood of new institutional legislation and organization reforms, as Hungarian ministries and successive governments rushed, in a competition with other prospective states, to alter their own legislation and institutions to conform with the 88,000-page *acquis communautaire* with its more than 10,000 directives. EU monitors regularly evaluated Hungary's progress in institutional change and issued reports about lacunae in legislation and offered a checklists and blueprints to follow (Kopstein and Reilly 2003: 142).

Of course as Vachudova (2005) reminds us, passive leverage was functioning only as a source of attractiveness of EU membership which was highly desired in most of the post-communist countries. But as we explained above, in Central Europe, the EU had a direct impact through penetration in the economic, institutional and social areas. The lack of such degree of penetration in the Balkans, pushed the unprepared elite to try to establish a 'home-made' system that in appearance copied Western practise. Albania is the best example for this point. From the very

beginning Albania exhibited many inefficiencies and was far behind compared to Central European countries. In addition, its elite remained ambivalent towards the EU and its leverage. Berisha did not like Western interference and used the European dream mainly as a rhetorical argument. As Fowkes noticed, ‘many ruling politicians of both ‘right’ and ‘left’ in the post-communist world feel able to ignore Western advice and defy Western pressure: one thinks of Sali Berisha in Albania, Vladimir Meciar in Slovakia and Ion Iliescu in Romania until they lost their power’ (Fowkes 1999: 7).

The instability that characterized the Balkans, pushed the West to focus on stability at the expense of democratic consolidation and institutional reform. As Pridham observes about Albania, ‘western backing of Sali Berisha in Albania – including by EU representatives – involved turning a blind eye to his autocratic ways and election rigging’ (Pridham 2005: 59). The contrast between internal institutional developments in Albania and EU’s optimistic expression of support is expressed by Vickers who describes the situation as an impressive ‘contradiction between international political support and domestic unpopularity which continued to dominate political life’ (Vickers 1997: 270). As Albania prepares to open accession negotiations, the EU should not lose sight of the major goal: institutional and democratic consolidation. Anything else would represent, at best, short-time gain with unforeseeable long-term repercussions.

Conclusions

The purpose of this article was to analyze and explain the factors that determined the trajectory of the establishment of the rule of law in post-communist Albania. After explaining the main characteristics of the rule of law in post-communism, through an exploratory and explanatory model of four factors, I analyzed the different configurations of the Albanian case. Cultural and historical legacies from pre-communist period have played an important role in accounting for Albania’s difficulties, especially in terms of the lack of institutional tradition. Overall, the article found that the legacy of Albania’s totalitarian and isolated communist regime determined considerably the outcome of early transition, undermining efforts to establish the rule of law. Secondly, strategic choices made by the new elite can also explain the particular trajectory rule of law reforms took in Albania. The elite’s tendency of maximising and preserving personal power prevailed inhibiting them from finding consensus. This in turn undermined the legitimacy of the new structures and institutions that were created, furthering political instability.

Albania’s geographic location also played a negative role. Compared to Central European countries, Albania found itself in a war-torn region where stability was

valued more than democratisation by EU structures. Thereby, the possibilities for openness and exchange were limited and the Western influence was weak in affecting post-communist reforms. Overall, the EU was a relatively passive player in Albania compared to the other countries at its borders because Albania lacked strong historical connections to influential EU member states. Secondly, aiming at stability in the region, the EU and USA supported the new regime despite several authoritarian patterns shown, especially in terms of establishing rule of law and upholding the separation of powers. It was different in Central Europe, where the strategy of leverage and ingrained interest helped foster institutional consolidation mainly through experience exchange and financial flows.

Many questions can be raised at the end of this article about Albania's past trajectory and, as importantly, the future it faces on the eve of implementing the sweeping judicial reforms it approved in 2016. At present, the gap between Albania and Central European countries in terms of rule of law has increased further. Now that EU's borders have come closer to Albania, one can only hope that EU's pressure and interest will increase to serve as a conditioning mechanism to affect positive change in the field of the rule of law.

About the author

Gentian Elezi is a lecturer at the University of Tirana, Albania and the Executive Director of Agenda Institute. He obtained his PhD at the University of Sussex, United Kingdom, where he also did his Master studies in European Politics. Dr Elezi has a wide experience in public policy analysis, both as an academic and practitioner. From 2013 to 2016 he served as Deputy Minister for European Integration in the Albanian government and during 2009-2013 he directed the Albanian Centre for Competitiveness and International Trade; one of the most reputable think-tanks in the field of economic policies.

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