

Historical context of the Albanian Constitutional Court

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Abstract

The Albanian legal tradition is based mostly on the traditional and customary laws. The Ottoman Empire ruled Albania for nearly five centuries and applied some of its translation of Sharia law together with its own rules and procedures. However, the Albanian population, especially in the north was governed by its own customary laws that were included in the Kanun of Lek Dukagjini. For a long period of time, these customary laws were unwritten and were learned generation after generation. The Kanun of Lek Dukagjini had very few rules and procedures regarding penal law. They were not arranged properly and there were some repetition for different cases. The National Court was implemented by a popular gathering of the oldest man of the village called Pleqnia. It used to decide on issues immediately, and there was no review of their issues. The rules were clear, simple and strict. There are some ideas from different Albanian researchers that the communist system although exported as an idea from abroad, based its laws and rules very much on the Albanian tradition as for example the creation also People's Court. There was no institution of judicial review. These researchers point out that it was for this reason that the communist system in Albania lasted for nearly fifty years.

Keywords: Albanian Constitutional Court, History, Analysis.

Introduction

The democratic system brought new laws and new constitutional disposition. According to Alec Stone Sweet 'new constitutional forms emerge only under extraordinary historical conditions, moments when pre-existing political, economic, and social structures have been weakened, delegitimized, or swept away by deep crisis or war. Such was the case in Germany and Italy after World War II, in France at the height of the Algerian crisis in 1958, in Greece, Portugal, and Spain with the erosion of fascist-military rule in the 1970s, and in Central and Eastern Europe with the demise of communism after 1989. A new constitution promises a new beginning, the birth of a new policy' (Stone, 2000, 38). This was the case also for Albania, when the new Constitution was seen as an important instrument of transition from the communist system to the democratic one. The old constitutional system was so harsh and undemocratic that nobody thought to preserve something from it. 'History shows that while laws change, written constitutions containing fundamental values must remain, contravening the notion that "Higher Law" is not law at all' (Gabor, 2015). The 1976 Constitution was conceived for a totalitarian society with no private property, no liberal freedoms or rights and which was missing also many other fundamental principles of a modern state.

The first changes started in December 1990, when the communist 'authorities

proclaimed that the elections to the People's Assembly would be held on 10 February 1991, and that independent political parties would be allowed to compete in the elections. [...] In the meantime, parliamentary elections were postponed until March 1991 thanks to the pressure of newly established opposition parties' (Levent, 2002, 151). However, the former communist forces won the elections by taking 169 seats out of 250. The second party was the Albanian Democratic Party with 75 seats. But even the communists were deeply convinced to change the system into a market economy, because the old system it was not advantageous any more. Thus, it was the new parliament that in April 1991 invalidated the 1976 Constitution and approved the "Major Constitutional Provisions". By means of this law the proletariat dictatorship was abolished and the parliamentary democracy installed. [...] Albania was proclaimed a parliamentary republic, a democratic state governed by the rule of law. Human rights, constitutional order, being equal before the law and political pluralism were the fundamentals of the state. The law sanctioned the division and balancing of powers, free elections, the accountability of the executive power to the Parliament, the independence of the judicial system, control of civilian authorities over the armed forces and police, clear separation of power from political parties (Luarasi, 1997, 17). The adoption of this document was, in fact, the outcome of a compromise between the two political forces. The deputies of the new emerged opposition argued that the country was too unstable to adopt a permanent constitution, thus they proposed to enact a fundamental law which would provide the legal and institutional framework for economic and political reforms. Communist deputies, on the other hand, argued that it was necessary to adopt a new constitution to solve certain problems concerning the working of the political system such as the election of the President and the formation of the new government. Finally, the parties compromised on a middle way formula (Levent, 2002, 151). But before examining the new major constitutional provisions of the democratic transition it is important to make an overview of the communist law and its constitutions.

The 1976 Constitution of the People's Socialist Republic of Albania

Albania was coming out from a system based on a totalitarian constitution and which was grounded on the dictatorship of proletariat and the principle of democratic centralization. During the communist period two constitutions (1946, 1976) were approved and both of them proclaimed that all three powers: executive, legislative and judiciary were part of a united system of government and that there was no checks and balances mechanism. It is important to mention some facts from the communist constitution in order to understand all difficulties of the political transition and the creation of a new democratic and civic law culture. The 1976 Constitution it was approved when the communist ideology in Albania had reached its peak. Thus in the preamble of the constitution it was written that 'Albania has entered the stage of the complete construction of socialist society. The great historic changes had created new conditions for the continuous development of the revolution and socialist construction [...] The Albanian people had found constant inspiration in the great doctrine of Marxism-Leninism, under the banner of which, united round the Party of Labour and under its leadership, they were carrying forward the construction

of socialist society to pass over, later, gradually to communist society. Article 1 proclaimed that Albania was a People's Socialist Republic. The People's Socialist Republic of Albania was a state of the dictatorship of the proletariat, which expresses and defends the interests of all the working people. The People's Socialist Republic of Albania was based on the unity of the people round the Party of Labour of Albania and it had as its foundation the alliance of the working class with the cooperativist peasantry under the leadership of the working class (Article 2). Article 11 stated that 'the organization of the state and state activity, all the political and economic life in the- People's Socialist Republic of Albania were based on the principle of democratic centralism and develop according to it, combining the centralized direction with the creative initiative of local organs and the masses of the working people, in struggle against bureaucracy and liberalism'.

Chapter V described the regulation of the People's Courts in the Socialist Republic of Albania. (It is important to mention that ten years earlier before the approval of 1976 Constitution, in 1966, the communist regime in Albania had abolished the Ministry of Justice with a special law). Article 101 stated that 'the people's courts were the organs which administer justice. The people's courts protected the socialist juridical order, fought for prevention of crimes, educated the masses of working people to respect and implement the socialist law, relying on their active participation. At the head of the organs of justice is the Supreme Court which directs and controls the activity of the courts. The Supreme Court is elected at the first session of the People's Assembly. The other people's courts were elected by the people, according to the method defined by law. Court organization and trial procedure were defined by law. In this chapter of the 1976 Constitution, there were two other articles regarding courts. According to Article 102 'the courts judge penal and civil cases and other cases which are within their competence according to the law. Judgment was done with the participation of assistant judges and in public sittings, with the exception of cases when it has been decided otherwise by law. During the trial the Albanian language is used. Persons who did not know Albanian could use their own language and speak through an interpreter. The accused enjoyed the right of defense'. However, Austin & Ellison (2009) comment in their article regarding the communist period in Albania, this period from 1944 to 1990 'offered an extreme form of Stalinism. In fact, there was no legacy whatsoever of participation in political life. As to dissidents, elsewhere, especially in Poland or Czechoslovakia, dissidents were able to draw on support networks not just within the communist bloc but from the West as well. As a closed society, there were few avenues to influence Albanian society. Finally, the middle and wealthier class along with the Roman Catholic Church leadership in northern Albania was completely decimated after the Second World War. In power since 1944, the communist government had been extremely successful in thwarting opposition both from within its own ranks and outside. Albanian communism was extremely centralized and the communists dominated all aspects of life. Albania went further than any other communist state in the collectivization of farms. Moreover, in an effort to destroy competing centers of loyalty, in the 1960s Albania embarked on its own version of the Chinese Cultural Revolution. The Albanian variant witnessed the complete abolition of Albania's three religions (Roman Catholicism, Eastern

Orthodoxy and Islam) and the subsequent declaration that Albania was the world's first atheist state' (Austin, Ellison, 2009, 177). Some of these rights were denied even in the constitution with the article 55 Article 55 that proclaimed that 'the creation of any type of organization of a fascist, anti-democratic, religious, and anti-socialist character is prohibited. Fascist, anti-democratic, religious, war-mongering, and anti-socialist activities and propaganda, as well as the incitement of national and racial hatred are prohibited'. Many people that wanted to create democratic unions were jailed based on this article of the 1976 Constitution.

Regarding the role and functions of the court system, article 103 states that 'the court was independent in its judgment of a case, it takes its decision on the basis of the law alone, and it pronounces its verdict in the name of the people. The verdict may be annulled or amended only by the competent higher court. By reading these acts of the 1976 Constitution it is important to remember their implementation in a dictatorship and how the political decision affected mostly of the decisions taken by the people's courts in every level.

However, Marxism proclaimed in theory more materialism than idealism, more economy than politics. This was explained from Kelsen in his book about 'The communist theory of law'. It is based on the assumption that the economic production and the social relationship constituted by it determine the coming into existence as well as the disappearance of state and law (Kelsen, 1955, 1). As Austin & Ellison (2009) point out regarding the Albanian experience during communism 'the state was not just perceived to be strong – it was strong, and it took very little for someone to end up in jail. That said the prisons were not filled with potential opposition, but people who had merely complained about the quality of bread. Moreover, Human Rights Watch noted that one in four Albanians collaborated with the communist secret police. Figures on jailed or internally exiled individuals range from lows of 12–15 thousand to highs of 50–60 thousand. Party membership reached a peak of 122,000, or roughly between 3 and 4 per cent of the total population. Of that membership, only some 1,200 people really mattered.

Thus, law according to Marx was seen as an 'expression' of the relations of production as the ideology. This way of thinking was somehow similar to that of Carl Schmitt when he was declaring that 'the constitution is the state, because the state is treated as something genuinely imperative that corresponds to norms, and one sees in the state only a system of norms, a "legal" order, which does not actually exist, though it is valid in normative terms. The legal order, nonetheless, establishes an absolute concept of the constitution because a closed, systematic unity of norms is implemented and rendered equivalent to the state. Therefore, it is also possible to designate the constitution as "sovereign" in this sense, although that is in itself an unclear form of expression. For only something existing in concrete terms can properly be sovereign. A merely valid norm cannot be sovereign (Schmitt, 2008, 60). During communism in Albania there was really the feeling that the law was the state. Thus, the communist regime, as a totalitarian regime, needed no Constitutional Court or judicial review. The progress was presented in a linear manner, where the law could not be reviewed, but only substituted by a later advanced stage of communist revolution.

According to Kelsen, Marx and Engels made very few statements regarding the

future of the law in the ideal advanced communist society. 'They were probably of the opinion that what they said about the state applied also to the law, which they considered to be a coercive order issued by the state (Kelsen, 1955, 33). However, the relationship between state and law was not clearly described. As Kelsen points out 'it may be assumed that according to the Marx - Engels doctrine of the state, the law as a coercive order and specific instrument of the state exists only in a society divided into two classes, a dominant exploiting and a dominated exploited class. In one of his most frequently quoted statements, Marx says according to Kelsen that in the phase of transition from the proletarian revolution to the establishment of perfect communism, that is to say, during the period of the dictatorship of the proletariat, there will be still a law, but that this law, in spite of its progress as compared with the bourgeois law, will still be 'infected with a bourgeois barrier'.

In the last years of communism in Albania, as expressed in the 1976 Constitution, the law was used to govern a society divided into two classes, a dominant exploiting and a dominated exploited class. This was a real violation of the human rights and other civil and economic freedoms related with it. Sadurski (2014) points out 'the post communist countries of Central and Eastern Europe (CEE), at the outset of the transition to democracy, had to face not only the difficult problems posed by the present and the future, but also those stemming from the past: how to handle the widespread violations of human rights, the travesty of legality, the pervasiveness of collaboration with the secret police, and the often blatant crimes conducted for political reasons that characterized the immediate past. In the mid 1980s the former communist leadership in Albania had two paths or models to follow regarding internal law reformation: that of Soviet Union or of China. Glinavos (2010) gives two arguments regarding the models of reformation followed by these two countries. 'Firstly, Law reform in Russia anticipated market outcomes and, sought to cater for market needs before they were expressed. Law reform in China does not anticipate but responds to market needs and social pressures. This is why Chinese law reform proceeds in an uncoordinated/incremental way and also why the creation of a stable framework of clearly defined property rights did not take place, and still is far from complete, despite the advanced pace of economic transformation. Second, Russia has continued the tradition of the communist regime in using law to lend legitimacy to reforms, to encourage the acceptance of reforms and promote their internalization by the population. On the contrary, in China, after the destruction of legal institutions and the denigration of law that followed Mao's 'cultural revolution', law did not serve such a legitimating role and the legitimation of state institutions remained solely political rather than legal. Albania followed the former Soviet Union model of transformation, which was followed also by other former Eastern Communist countries. Although in the 1960s Albania also had followed some practices of Mao's 'cultural revolution' but which later were suspended.

'Given the extent to which both the Communist Party and its secret police controlled the lives of citizens in Eastern Europe and the former Soviet Union, it is not surprising that the collapse of these regimes in 1989 and 1991, respectively, prompted heated public debate over what should happen to secret police officers, informers, and communist officials, as well as their files. Some demanded that officials and secret

informers be banned from politics and prosecuted for human rights trespasses, and that the secret police archives should be opened to the public. They argued that communist decision-makers should not be allowed access to state positions they could use to destroy the archives and with them the proof of their past injustices. Many warned that democratization itself required not only accountable and representative political institutions, but also an honest attempt to deal with the undemocratic past that would bring some justice to its victims and lay the groundwork for greater respect for the rule of law. Others, including not only former communists but also some former dissidents, argued that the files were not only full of lies and false accusations, but also that their integrity was in doubt, as interested parties removed, altered, and destroyed portions of them during the upheavals of the 1989 revolution' (Lavinia, 2009, 7). This and other topics will be discussed below by making also a discussion of Albanian first lustration laws and their interpretation by the Constitutional Court.

Democratic transition and Major Constitutional Provisions of 1991

Generally speaking researchers list three types of democratic transitions in the Eastern and Central European countries relating to the concept of transitional justice, as it was explained in the first part of this thesis, as the processes of trials, purges, and reparations that take place after the transition from one political regime to another. Sadurski (2014) categorizes the 1) Radical Model, represented by the Czech Republic, 2) the Intermediate Model: Albania and the Baltic States, 3) the Lenient Model: Poland, Hungary, Bulgaria and Macedonia. In the radical model represented by the Czech Republic example 'the strongest position on decommunisation and lustration has been adopted. Not only do the laws, but they also ban such persons from a fairly wide range of posts. Therefore, in terms of all three criteria suggested above, the Czech approach to lustration can be seen as the harshest. The Intermediate Model of Albania and the Baltic States started as the Czech model at the beginning of 1990s but after some time the lustration laws were not approved in Parliament or even in the case that they were approved they were reviewed by the Albanian Constitutional Court. It is important to mention that 'there has been no serious or sustained attempt by Albania's leaders to deal effectively with the communist past. Having experienced possibly the harshest forms of communism in Europe, one would think that Albania had the most compelling reasons to undergo sustained transitional justice' (Austin, Ellison, 2009, 176). According to Austin & Ellison 'what Albania offered was simply political vengeance that is in keeping with its traditions. Albania's post-communist justice was about the selective destruction of the past not an attempt to deal with it. In fact, like much of Albania's attempts at serious transition, whether economic or political, the process of transitional justice was fraught with mistakes and was largely botched. From 1991 to 1997, when a few attempts were made, the process was disorganized, politicized and unsuccessful. More importantly, the process also failed to become relevant to the wider population who largely saw the whole business for what it was". Although parliamentary democracy was established in Albania following the March 1991 elections and the Law on Major Constitutional Provisions was perceived as an interim constitution and laid the foundation for the modern democratic state.

However, there were some reports produced from the parliament of the time. The most important one was the report produced by the deputy of the Democratic Party Ruli. He was also the Minister of Finance in the coalition government, in July 1991. According to Austin & Ellison 'this document became the principal piece of evidence in the first trials against the former ruling families. [...] It subsequently became the basis of the charges against members of the old regime. The report was essentially an audit of the often luxurious spending of the communist elite. It made clear that the communists were to be held to account not for their political actions but instead for economic crimes. Ruli's report led to the arrests of all members of the former Politburo. Hoxha's widow, Nexhmije, was arrested in December 1991 and was one of the first to face charges in January 1993. She received special attention in the report. She was ultimately jailed for minor offences related to her family's consumption. [...] The decision to make economic crimes the center piece of post communist justice was based on the simple fact that it was easy and was more or less all the new leaders had on them. With the benefit of hindsight, one can say with certainty that the decision to move against the old elite based on economic crimes was a catastrophic blunder for two reasons: first, it alienated ordinary people who expected that communists would face justice and second it became nearly impossible after that to engage people when serious political charges were finally laid later. Four years later were approved the first lustration laws which putted also many constitutional dilemmas that were addressed at the Constitutional Court. This will be described and analyzed in more details below.

Evolution of Albanian Constitutional Court

Regarding the position of the Constitutional Court it is important to mention that its role it was conceived from the beginning as 'centralized' constitutional review institution, based on Kelsen's model and which was diffused also in other Eastern European countries, although with certain local variations. According to Sadurski 'centralised and concentrated is understood here as an arrangement according to which only one institution in a given country has the right to authoritatively examine laws in terms of their constitutionality. The task of constitutional review is conferred upon a special body established outside of the regular judicial system. The only, and minor, exception is Estonia, where the constitutional court is known as the "Constitutional Review Chamber" and is structurally a part of the National Court (the equivalent of the Supreme Court). This Chamber is elevated above the other chambers of the National Court (criminal, administrative and civil) in that its chairman must always be the chief justice of the entire Court. This special design, however, does not importantly affect the position of the Constitutional Review Chamber in the overall constitutional system and, for all practical purposes; the Estonian Chamber can be viewed as a separate constitutional court, like any other in the region.

But in the Albanian court system (1991 – 1998) appeared also another institution, the Court of Cassation. Its role and competences produced heated discussions between different political forces. Its functions were similar to that of the American Supreme Court: it dealt mostly with the interpretation of the law and it was not possible to

apply for every kind or issue. The ordinary issues were scrutinized by the other levels of the judiciary. The law on the Major Constitutional Provisions the People's Assembly of the Republic of Albania as approved in 21st May 1991 provided in Chapter IIIA the organization of justice and the Constitutional Court. According to the Article 5 'the judicial system consists of the Court of Cassation, the appellate court, the courts of the first level and the military courts. The creation of extraordinary courts is forbidden. The organization and competencies of the courts are regulated by law'. Article 6 stated that 'the court of Cassation is the highest judicial authority. Only Albanian citizens with a degree in law, distinguished for their professional ability and who have at least seven years experience in the organs of justice or as pedagogues in the Faculty of Law may be members of it. The chairman and the vice chairmen of the Court of Cassation are elected by the People's Assembly on the proposal of the President of the Republic. Its judges are elected by the People's Assembly. The chairman and the members of the Court of Cassation are elected to office one time for seven years, with the right of reelection. They may not be impeded, arrested or punished for acts connected with the fulfillment of their duties. A judge of the Court of Cassation may be removed from office only on the basis of a reasoned decision of the People's Assembly when it is verified that he has committed one of the serious criminal acts specifically provided by law or when he is mentally incompetent.

It was not possible for the Court of Cassation during the years (1991- 1998) to investigate any question at the first level, while at the second level it judged only questions contemplated by law. It investigated only the legal basis of judicial decisions that were presented by way of objection or to which it, itself, drew attention (Article 7). Article 8, second paragraph proclaimed that 'when during their investigation of a question, the court reaches the conclusion that the normative act does not comply with the law "On the Principal Constitutional Provisions" and with the laws, it suspends the judging and sends the materials on the question to the Constitutional Court'. The Constitutional Court it was conceived as 'the highest authority that protects and guarantees respect for the Constitution and the legislation, as well as making definitive interpretation of the Constitution. In the carrying out of its functions, it is independent and subject only to the Constitution (Article 17). It consisted of nine members, five of which were elected by the People's Assembly and four by the President of the Republic. It was stated that the members of the Constitutional Court shall be elected, by secret vote. The head of the Constitutional Court serves in this office for three years with the right to be re-elected (Article 18). Also it was foreseen an official oath of the selected members before the President of the Republic (Article 19) with a prescribed formula: 'I solemnly swear that during the performance of my duties I shall at all times be faithful to the constitution of the Republic of Albania'. It was not prohibited for a constitutional judge to be a deputy, a member of the Council of Ministers, a judge, an investigator or a prosecutor, a member of a party or other political organization or a union, nor may he conduct other public and private activity that may compromise his independence or impartiality (Article 21). At the same time, a constitutional judge was not responsible for decisions and for opinions given in the conduct of his functions. He may not be proceeded against, impeded, arrested or punished without the authorization of the Constitutional Court (Article 22). The

functions of the constitutional judge ended when: a) he did not perform his functions for more than six months without justifiable cause; b) he hands in his resignation; c) when he is designated for a position that is incompatible with his function; d) [c in Albanian] the term for which he was elected ends (Article 23).

Article 24 stated the main competencies of the Constitutional Court such as the interpretation of the Constitution and constitutional laws; judgments whether laws and acts that have the force of law are compatible with the Constitution; judgments whether acts and regulatory provisions were compatible with the Constitution and with the law; judgments on the compatibility with the Constitution of international agreements that are concluded in the name of the Republic of Albania before their ratification, as well as on the compliance of the laws with generally accepted norms of international law and with agreements to which the Republic of Albania is a party; resolutions of the disagreements of competency between the [executive, legislative and judicial] powers as well as those between local authorities and the central power; decisions on issues connected with the constitutionality of parties and other political and social organizations and can prohibit their activity; resolutions of issues regarding the legality of the election of the President of the Republic, the deputies and also popular referenda, promulgating the conclusive results; investigation of penal accusations raised against the President of the Republic; resolution of complaints of persons presented by way of constitutional control for violation of their basic rights by illegal acts; decisions on the suspension of the implementation of a law when it observes that it is not compatible with the law "On the Principal Constitutional Provisions" and on the suspension or repeal of acts and other provisions, when it observes that they are not compatible with the law "On the Principal Constitutional Provisions" or with law, as well as taking measures that it deems appropriate for the question that it is adjudicating. When the court observes that one of the rights protected by the constitutional law has been violated, it declares its recognition and guarantee and, when it is the case, the repairing of the consequences and due compensation for the damage incurred. The Constitutional Court, also, may decide that every state organ, every social organization or juridical person shall annul, repeal or amend an individual decision by which the constitutional rights of a person have been infringed. The law on the Major Constitutional Provisions had foreseen that the Constitutional Court could start action on a complaint or on its own initiative. For the initiation of the procedure, the President of the Republic, a parliamentary group, one-fifth of the deputies, the Council of Ministers, the judges, local organs of power, as well as every person whose freedoms and rights provided in the Constitution have been violated, had the right to bring a complaint (Article 25). The Constitutional Court took its decisions by majority vote. A judge in the minority had the right to join to the decision his own written opinion. Decisions of the court were conclusive and final. They must be reasoned. In case of doubt or disagreement as to the meaning of a decision, the court had the right to interpret it, on its own initiative or on the request of interested parties within 30 days from the date of notification of the request. In other cases the decisions of the constitutional Court were effective at the time specified by it (Article 26). Article 27 stated that the 'acts of the Constitutional Court expressed the constitutionality and legality of the questions that it resolves'.

According to the former head of the Albanian Constitutional Court Dedja (2011) at its beginning the 'constitutional law and the Constitutional Court were built based on European model (mainly Italian and less German), under which constitutional control is confined to a single body, the Constitutional Court'. It is important also to mention that in the Major Constitutional Provisions of 1991 the Constitutional Court was thought as part of the ordinary justice system and belonged to the Chapter IIIA 'The organization of justice and the constitutional court'. As I will show in other parts of this thesis with the adoption of the 1998 Constitution, the Constitutional Court occupies a separate chapter, outside the chapter that discusses the ordinary justice system (courts). It has an exclusive jurisdiction to interpret the Constitution, the constitutionality of control laws and other normative acts as well as their declaration of incompatibility with Constitution and international agreements.

The configuration of other powers was different from what it was conceived in the 1998 constitution. The Major Constitutional Provisions of 1991 empowered the president with 'special instances' to call, attend and chair meetings of the Council of Ministers and to set the agenda. The president also might propose to the legislature the holding of the referendums; with the proposal of the prime ministers, might appoint or discharge by decree ministers and 'other individual members of government' (Biberaj, 1998, 167). According to Biberaj 'the delineation of presidential and legislative powers was accompanied by checks and balances to prevent the president from taking actions that infringe on citizens civil and political rights. Presidential decrees required the countersignature of the prime minister or of a cabinet member and must be approved by the legislature. Parliament can override a presidential veto with a simple majority [...] Also the 1991 Law on the Main Constitutional Provisions vested substantial powers in the parliament. The document provides that parliament elect the president for a five – year term by secret ballot and by a two – third majority of votes. If no candidate obtains a two – thirds majority in the first ballot, then in the second, final round, an absolute majority is sufficient for the president's election.

Regarding to the judiciary the 1991 provisional constitution did not regulate in details the role of the judiciary, nor did it contain provisions for judicial review or for judicial invalidation of legislative enactments. According to Biberaj 'despite the proclaimed principle of full separation of powers and judicial independence, the regular court system was organizationally and logistically dependent on the Ministry of Justice. The judiciary was also denied the power and mechanism of self-governance. The Law on the Organization of the Judiciary and the Constitutional Court empowered the legislature to remove members of the Court of Cassation from the bench. Such control over the court by the parliament, whose laws could be an issue before the Court of Cassation, seem to violate the principle of the separation of powers. Equally troubling was the provision granting the High Council of Justice, headed by the president and consisting of the chairman of the Court of Cassation, the minister of justice, the general prosecutor, and nine lawyers, an administrative role. The council enjoyed the sole authority to appoint, transfer, and take disciplinary action against judges and prosecutors.

The political crises and adversities between political parties were frequent at the beginning of 1990s, although the government showed stability of numbers in the first

democratic parliament. There was an official attempt from the Albanian government of the time to formulate and approve a real Constitution different from the Major Constitutional Provisions. According to Biberaj (1998) 'the draft Constitution, was in the mainstream of post communist constitutions that had appeared in other Eastern European countries and generally adhered to international norms and standards, provided for the separation of powers and broad protection of human rights. The draft represented a hybrid of a presidential and a parliamentary system. There was nothing glaring about the allocation of powers to the president and the legislature that suggested that one side would dictate to the other. However, the draft contained weaker provisions for the judiciary, and gave the president more power in selecting judges for the Constitutional Court than did existing constitutional laws. In addition, the draft contained two articles that were widely interpreted as limitations on democracy and not in conformity with international norms and standards. Article 6 (3) prohibited the creation of political parties based on religion or ethnicity. Article 7(4) stipulated that heads of the large religious communities 'must be Albanian citizens born in Albania and permanently resident there for the past 20 years. Had the draft constitution been approved, Archbishop Yannoulatos, a Greek citizen who was named temporary head of the Albanian Orthodox Church in 1992, would have been forced to step down (Biberaj, 1998, 174). The referendum, held on 6 November 1994, failed to break the constitutional deadlock: Albanian voters rejected Berisha's draft. With a turnout of 84.43 percent, 53.9 percent voted against and 41.7 percent in favor. As Uitz (2005) writes in her book about 'Constitutions, Courts and History' '[...] the relationship between the constitutional text and historical narratives is symbiotic: historical reasoning supplements the constitutional text. Between these two poles constitutional review fora rely on historical narratives as a supplement to the text of the constitution: historical analysis is applied as an interpretive aid in a contextual analysis when it is called for in a test established by the court, or when references to the past give rise to deviations from an otherwise applicable rule (exception). Confronting the past responds to genuine needs for justice, truth, and atonement, but it can also easily lend itself to political manipulation, and it can lead to new injustices if the rule of law is disregarded in favor of political expediency (Lavinia, 2009, 4). This was the general panorama in the Albanian politics turmoil of 1997. Without entering the details of the economic crisis, the constitutional debate between the political forces in power represented by Berisha and the opposition represented by Nano was based mostly on political, economic and social freedoms. These freedoms were missing in the Albanian society of that time; some of them were mentioned in the Major Constitutional Provision and once again were violated. Some other rights, according to the opposition were prohibited. According to Lavinia (2009) 'the list of cases that could serve as models for post-communist Eastern Europe is impressive, testifying to the wealth of innovative solutions different countries have employed in order to conduct the politics of memory, prevent future abuse, and establish state-society relationships based on functioning and fair institutions'. She was referring mostly to the cases of transitional justice but in the Albanian case, transitional justice was applied but without success. She explains 'in certain cases courts do resort to explaining the history behind a constitutional provision with the aim of situating

the claim within the context of the constitution, where layers of prior practices, fears, and understandings are considered to amount to context (Uitz, 2005, 115). Rather, accounts of the past (historical narratives) are the outcome of processes of interpretation. Similar to historical narratives, accounts of continuity are themselves constructions by the narrator—in our case the court or justices in constitutional cases. According to Carl Schmitt ‘a consequence of the manner of speaking typical of political conflict is that every struggling party recognizes as a true constitution only the constitution corresponding to their political demands. If the principle political and social oppositions are very strong, it follows closely that a party denies the name of constitution in general to any constitution that does not satisfy its demands’ (Schmitt, 2008, 89). This is what happened in Albania and the way the 1998 Constitution was perceived by different political parties and the fragmentarized society.

In my understanding it is impossible for a constitution to be accepted and welcomed by every citizen, especially in the new democracies. As Sunstein (2001) writes in his book about the role of constitution in the new democracies ‘democracy’s constitution is not tradition’s constitution. A central purpose of a constitution, and of a deliberative democracy, is to subject long-standing practices to critical scrutiny. Good constitutions have a mixture of preservative and transformative elements. They seek to entrench long-standing practices that seem, on reflection, to deserve special status. At the same time, they set out ideals and aspirations that are understood to eliminate long-standing practices and to point the way toward changes, both small and large. The constitutional commitment to reason-giving is inconsistent with respect for tradition as such. In the end traditionalism is much too timorous, and self-defeating to boot, because the traditions of constitutional democracies include criticism of traditions, not blind deference to them’. On the other hand Ginsburg argues that ‘the establishment of constitutional review in new democracies is largely a function of politics and interests, not a reflection of macro-cultural or societal factors. Specifically, judicial review provides “insurance” for self-interested, risk-averse politicians, who are negotiating the terms of new constitutional arrangements under conditions of political deadlock or systemic uncertainty. At times of political transition, greater degrees of political deadlock and/or more diffused or decentralized political power increase the probability that uncertainty will be embedded in a polity’s constitution-making process and subsequent electoral market. This in turn leads to a greater likelihood that a relatively powerful and independent constitutional court will be adopted by risk-averse participants as insurance in the constitutional negotiation game’ (Hirschl, 2014).

Conclusions

Albania was an exceptional case in Eastern Europe. Transition to democracy has been very painful, uncertain and lengthy. Naturally, the constitution-making process was affected negatively by unfavorable conditions created by such a painful transition. More importantly, although a great deal of time and resources had been spent in adopting a new constitution, successive attempts dramatically failed. The adopted document, on the other hand, was far from being satisfactory for the major political

forces in the country. The new constitution was adopted after a period of chaos and anarchy. 'After a period of chaos and anarchy owing to the collapse of pyramid investment schemes, the process of constitution-making resumed in Albania with the formation of the new government in Summer 1997. It is important to note that international actors played a positive role in the progress of the working on the new constitution.

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