25th IVR World Congress
LAW SCIENCE AND TECHNOLOGY
Frankfurt am Main
15–20 August 2011

Paper Series

No. 024 / 2012
Series B
Human Rights, Democracy; Internet / intellectual property, Globalization

Jordan Daci

Law and Post-Communist Countries: Case of Albania

URN: urn:nbn:de:hebis:30:3-248826

This paper series has been produced using texts submitted by authors until April 2012. No responsibility is assumed for the content of abstracts.

Conference Organizers:
Professor Dr. Dr. h.c. Ulfrid Neumann, Goethe University, Frankfurt/Main
Professor Dr. Klaus Günther, Goethe University, Frankfurt/Main; Speaker of the Cluster of Excellence "The Formation of Normative Orders"
Professor Dr. Lorenz Schulz M.A., Goethe University, Frankfurt/Main

Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

Dr. Jordan Daci, Tirana / Albania

Law and Post-Communist countries: Case of Albania[1]

Abstract: Communist regimes in general and especially the one in Albania destroyed almost every aspect of political, social, cultural and economic life, including the notion of pluralism and intellectual elite of the country. In Albania, the transition into democracy in 90' was done through extrication which means that the authoritarian government was weakened, but not as thoroughly as in a transition by defeat. As a consequence, the former Communist elite was able to negotiate crucial features of the transition and was very quickly transformed into the new pluralist political class. This position enabled the communist elite to be rehabilitated and together with the new emerged communist elite to remain a strong influential actor in new emerged democracy and de facto to run in continuance the country. The purpose of the new emerged communist elite to maintain control was favored inter alia by the absence of a new strong intellectual elite and was done merely by sharing the power among its members divided into different political parties and also by using the 'pluralist' law as a tool for social control over new emerging intellectual elites. The use of law as a tool for social control by the political class has severely damaged people's understanding and expectations on the law, its relations with the state as well as international community. Indeed, such experience of the use of law by the political class for its own narrow interests, has made people lose confidence in law and state as well as has severely weakened the law enforcement in the country. To conclude, the overall purpose of this paper would be the analysis of law in general and its understandings and development in a post-communist society such as Albania from different points of view.
Keywords: Law, Post-Communist countries, People, Social Contract, People's sovereignty, Rule of Law, Rule by Law, Albania

1. The concept of Law

The word law in English language has more than 5 meanings. According to the second edition of the famous English dictionary of law, Black's Law Dictionary, the first meaning of 'Law' "*is a solemn expression of legislative will. It orders, permits and forbids. It announces rewards and punishments. Its provisions generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs*."[2] "*This meaning answers to the Latin 'lex'; the second meaning of 'Law', without an article, properly implies a science or system of principles or rules of human conduct, answering to the Latin 'ius'; as when it is spoken of as*

[1] Paper written for the WG 17 (Democratic development in individual countries II), XXV .World Congress of Philosophy of Law and Social Philosophy, Goethe University of Frankfurt, Germany, Aug. 15-20, 2011.
[2] Black's Law Dictionary Second Edition by Henry Campbell Black, M.A. West Publishing Company. ST. Paul, Minn1910, 700-701.

a subject of study or practice".[3] In this sense, *'ius'* includes all the norms that constitute the whole body of laws in a given country as well as all other norms constituting the sub-laws and other sources of law. Also Thomas Hobbes in his famous book "the Leviathan" explained the differences between '*lex'* and '*ius'* by emphasizing that: *"For though they that speak of this subject use to confound 'ius' and 'lex', right and law, yet they ought to be distinguished, because right consisted in liberty to do, or to forbear; whereas law determinant bound to one of them: so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent"*.[4]Therefore, while the *'lex'* represents in a modern sense the act enacted by the legislative or in common law system known as the statute law, the *'ius'* represents the whole system of domestic law of a country including the statute law, judicial precedents and customs.

Certainly, the first type of laws developed in human society were not acts of legislative power and did not enact principles or a set of principles, but were produced on *ad hoc* basis by the monarch delivering justice over a particular case. When the monarch delivered justice, he did not reason whether there had been any violation of law, since the law did not exist before, but was initially introduced by the monarch who was vested also with divine power. Then this law would become a custom, by being applied by judges after the adjudication of the monarch.

In explaining the notion of law, we should be able to make a distinction between different notions of law in Common Law system and in Civil Law system. While in common law system, judicial precedents are one of the main sources of law followed by other legislative acts and customs, in Civil Law System, the primary sources of law are legislative acts, and solely under special circumstances, the customs and judicial precedents are also considered as a sources of law, because they are not accepted as general rules. In addition, in the common law system, the law is derived either as a form of judicial precedents, from legislation or from custom and according to its source the law would be called, common law if it derives from judicial precedents, equity or admiralty, probate, or ecclesiastical law, according to the nature of the courts by which it was originally enforced.[5] On the other hand, classical law for Civil Law system that has derived from the legislation in common law system is known as the statute law. The law derived from custom is known in both common law and civil law system as "customary law", also known as unwritten law.

[3] Ibid.
[4] Thomas Hobbes, "*The Leviathan. Chapter XIV: Of the first and second natural law, and of contracts"*. England 1660.
[5] Supra Note 2.

Montesquieu described laws as the relation subsisting between it and different beings, and the relations of these to one another.[6] All great philosophers such as Hobbes, Locke, Rousseau, Montesquieu etc, made a distinction between the law as a divine rule and absolute true of nature or the law of nature and the law as a positive act deriving from the state. "While natural law represented the law "imposing" to human beings the principle of ideal or unlimited or perfect freedom, the positive law is imposed to human beings rules which aim to control and limit the perfect freedom, very often understood also as the natural impulse or desire which Hobbes attributes to mankind, the subduing of one another is far from being well founded."[7] Thus, man living in under the rule of the law of nature, was permanently living in a state of war where the perfect freedom of man was also its greatest enemy. Under these circumstances, man decided to go out from the state of war and enter into human society under the rule of positive law enacted by state as its own creation. This process is described in Hobbes inquiries, *"For what reason go men armed, and have locks and keys to fasten their doors, if they be not naturally in a state of war?" "But is it not obvious that he attributes to mankind before the establishment of society what can happen but in consequence of this establishment, which furnishes them with motives for hostile attacks and self-defence? For Montesquieu, as soon as man enters into a state of society he loses the sense of his weakness; equality ceases, and then commences the state of war.*"[8] Therefore, for Montesquieu *"the law in general is human reason, in as much as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied*."[9] Thus, we may define law as the product of human reason, or as Thomas Jefferson used to simply describe it as 'written reason'.[10] To conclude, the law should be understood first as *'lex'* or the act of the sovereign body that represents the People with its primary scope to regulate the relationships between individuals in one hand and between individuals and the state on the other hand. Secondly, the law should be understood as *'Ius'* or the whole body of norms including norms deriving from subordinate laws that constitute the system of domestic law in a given country. In addition, *'Ius'* can be considered also as the

[6] Charles de Montesquieu, *"The Spirit of Laws"*. Translated by Thomas Nugent, revised by J. V. Prichard, based on an public domain edition published in 1914 by G. Bell & Sons, Ltd., London. Rendered into HTML and text format by Jon Roland of the Constitution Society, 19.
[7] Ibib.
[8] Ibid.
[9] Ibid, 22.
[10] Thomas Jefferson, The Writings. Ed.Paul Leicester Fors (New York:1898),9:480; 18:1 ("The Batture at New Orleans"), 15:207. *Cited in* Donald R. Kelly, The Human Measure: Social Thought in the Westerns Legal Tradition (Cambridge, MA: Harvard University Press, Pres 190), p.186. As cited in Russell Hittinger. *"Natural law in the positive laws: A Legislative or Adjudicative Issues?"*. Review of Politics. Available at: EBSCO Database, 2001, 7.

reason of law, or nothing more or less than the will of People on how they would wish to regulate their affairs among themselves as well as between them and the State.

2. The Social Nature of Law and its relation to the State

The notion of law is essentially related with the notion of society, state and in the last century it is also related with the international community. The law itself is a product of People's interaction in the society, made by the People and for the People. As previously explained, human beings created the law as part of a social contract they formed to enter into the human society, in which human beings are tied to 'membership'[11] of each of them into the state and so they are interdependent. As Kant explained, *the human beings in order to be related in a mutual relation with each other must get out from the State of Nature where everyone has have respect only for his or her interests and their own fantasy*[12]. As such, the social nature of law cannot be questioned as long as the law itself is a product of the society. In addition, while the social contract represents the very first positive law, the human society represents the very first type of state. The later is nothing more than a "Mortal GOD" who accepts or proclaims something as just, that thing proclaimed as law[13]. For Hobbes, human beings "did as God"[14] through the art and as a result of this process they created the State as an artificial human being. Consequently, the main property of law is the principle *'Iustum quria iussum'* (everyone can do everything that doesn't do harm to others). This principle explains the difference between the human society and the state of nature or the state of war, "*a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.*"[15]

At the end, the scope of people to enter in human society was to better secure their natural rights and freedoms which were under permanent threat of other unlimited natural

[11] Tony Honore, Making the Law Binding, 1987, 129.
[12] Michelle Averchi, Il Rapporto Cittadino-Stato nel Leviathan di Hobbes. Available at: www.dialettico.it.html, accessed on 26.11.2002.
[13] Ibid.
[14] Ibid.
[15] John Locke, "*Two treaties of government"*. From the Works of John Locke. A New Edition, Corrected. In Ten Volumes. Vol. V. Printed for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co.: Also R. Griffin and Co. Glasgow; and J. Gumming, Dublin. 1823, 106.

rights and freedoms. Plato also in his book 'the Republic', *inter alia* explains that *human beings entered into society and constituted the state to secure the exchange between each-other.*[16] Hence, the law as social product embodied in itself a prevailing moral and customary rules of society. From this perspective, law is related with people's manners and customs as forms of pure and regular manners. *Law would be very simple and natural only when it expresses the prevailing forms of pure and regular manners of the People from which law is produced.* [17] This important and symbiotic relation between laws, society and state is further explained by Solon *being asked if the laws he had given to the Athenians were the best, he replied, "I have given them the best they were able to bear".*[18] This means that laws should derive from the soul of the people, only in this way, the law would be very simple to be understood and easily enforced, because such laws express the very meaning of people on their mutual relationships including their relationships with the state. This symbiotic relationship is further explained by *Plato,*[19] *"When people are not religious we should never have recourse to an oath, except he who swears is entirely disinterested, as in the case of a judge and a witness."*[20]

The relation between the law and the state is essential, since the state represents the human society and is the sole creation of people authorized by them to act for them and on their behalf as a tool to better secure people's rights and freedoms. Thus, when the state proclaims a law, it acts as the voice of people, speaking for them and on their behalf. From this perspective, the law is a law as long as it is proclaimed by a state, as the only authority empowered by people to enact legislation. No one else in human society is authorized to enact legislation. Nevertheless, today's states are mutually related with each other in the same manner as individuals are related in their respective state. In other words, while the interaction and the interdependence of people constituted the state, the interaction and the interdependence of state created the International Community. The latter, today as a result of globalization resembles more and more as a global state that produces the international law as a global law. Because of this fact, the relationship between the law, state and international

[16] Plato, The Republic, 36.
[17] Ibid. *As cited in* Charles de Montesquieu. *"The Spirit of Laws"*. Translated by Thomas Nugent, revised by J. V. Prichard, based on an public domain edition published in 1914 by G. Bell & Sons, Ltd., London. Rendered into HTML and text by Jon Roland of the Constitution Society, 163.
[18] Pliny, *Natural History*, xxxiii, art. 13. As cited in Charles de Montesquieu. *"The Spirit of Laws"*. Translated by Thomas Nugent, revised by J. V. Prichard, based on an public domain edition published in 1914 by G. Bell & Sons, Ltd., London. Rendered into HTML and text by Jon Roland of the Constitution Society, 162.
[19] *See* Father Joubert, *Science of Medals*, p. 59, Paris, 1739. Ac sited in Charles de Montesquieu. *"The Spirit of Laws"*. Translated by Thomas Nugent, revised by J. V. Prichard, based on a public domain edition published in 1914 by G. Bell & Sons, Ltd., London. Rendered into HTML and text by Jon Roland of the Constitution Society, 163.
[20] Ibid, 162, 163.

community not only exists, but is very comprehensive, since today's international law defines the content of state laws as domestic law in the same way as the content of future laws is defined by a constitution, which does not contain any constitution clauses for their review. *This means that the content of state laws as domestic law is defined by the law of international community as international law under the circumstances of alternatives*.[21] In fact, while people created the state through a social contract as a necessity to better secure their fundamental rights threatened by the State of nature as a state of permanent war, also states created the international community as a necessity to better secure their interests including fundamental rights of their citizens threatened by the insecurity outside of their territories. The need to establish international community became more evident with the advancement of globalization process which increased also the interdependence of states. Thus, the international community just like states produces its own law which has as its scope the regulation of international relations between states. From this perspective, as it was also above-mentioned, the international community as a body where all states' sovereigns are represented can be considered as supranational sovereign and this is also one of the reasons why international law prevails per virtue upon domestic law.

3. A Contemporary Concept of Law

Law is not a phenomenon with a nature wholly independent of our beliefs about it, but it is one that is constituted by our understandings and expectations.[22] This statement explains also the relation between law and our conduct towards the respect and enforcement of law. This is also the reason why a law that introduces to a particular society more advanced standards than those of the society itself will not be likely respected nor supported by people, simply because what this law foresees it is not compatible with their views and understandings of social relations that this law is presumed to regulate. Even Solon used to underline this issue as a very important one which needs to be taken under consideration before the making of a law.[23] In order to be *"laws, human arrangements must consist of general standards rather than particular decisions, the standards must be capable of governing conduct, and they must govern conduct with a degree of 'necessity.' We might profitably view the practices that compose the phenomena of juridical law as an attempt to introduce a domain of universality and necessity into human affairs."*[24] From this perspective, is widely accepted that laws in

[21] Hanno Kaiser, *"Notes on Hans Kelsen's Pure Theory of Law (1st Ed.). 2004"*. Professor's Hanno Kaiser webpage. Available at: www.hfkdocs.com/files/Kelsen_Pure_Theory.pdf.
[22] N.E. Simmonds, "Law as a moral ide". *University of Toronto, Law Journal 2005*, 68.
[23] Supra Note 19.
[24] Charles de Montesquieu, *"The Spirit of Laws"*. Translated by Thomas Nugent, revised by J. V. Prichard,

order to be laws should reflect the people's understanding and expectations, which change with the time. This means also that laws and our understanding of them changes along with our social, economic and political development of humankind. Nevertheless, what have never changed are the scope and the function of law as a regulatory act of human society.

Although, the concept of law is a paradigm concept of a non-natural kind that is intrinsically related to natural kinds[25], the humankind perception of law and how it should reflect people's understanding and expectation remains an ongoing discussion among scholars. While at the beginning of the development of law under nation states, the social, economic and political impact of law on society was taken less into account now more than ever. The process of making a law is foregone with a lot of research and analysis on its impacts. The development of jurisprudence as a science has been followed by the raise of many theories and schools of law among which the first one was the school of Natural Law, followed by Legal Positivism, Legal Realism, Critical legal studies, Utilitarianism, Marxism, legal egalitarianism, etc. The existence of all these theories and schools shows the difficulty of having universally accepted the notion of law. In legal theory, the debate on the concept of law has focused on the interrelation that holds among three elements to one another: authoritativeness, social efficacy, and material correctness.[26] According to the first theory of law, the Natural Law Theory, the law can be considered as such only if it complies with the law of nature, as pure and divine law where injustice has no place. In other words, according to this theory, the law must comply with moral values. Other theories especially such as Legal Positivism, Legal Realism, Critical legal studies, Utilitarianism, Marxism, legal egalitarianism are also distinguished from each other based on their approach towards issues such as morality of law, the role of people and the role of rulers in making the law, the role of social understandings and expectations etc.

To conclude a legal definition of law widely accepted by lawyers would consider the law to be a set of norms enacted by the legislative power with the scope to regulate the social relationships between individuals in one hand and between individuals and state in another hand, the enforcement of which is guaranteed by the sanction imposed to people via the force mechanism of state. Certainly, the law as a product of society made by people through the state and for the people must reflect people's understandings and expectations that are nothing

---

based on a public domain edition published in 1914 by G. Bell & Sons, Ltd., London. Rendered into HTML and text by Jon Roland of the Constitution Society, 68.

[25] Robert Alexy, "On the Concept and the Nature of Law". *Ratio Juris*. Blackwell Publishing Ltd.Vol. 21, No. 3., USA 2008, 284.

[26] See R. Alexy, *The Argument from Injustice* (1992), Oxford, Clarendon, 2002, 13. *As cited by* Stefano Bertea in *"The Concept of Law".* From IVR Encyclopedie
Available at: http://ivr-enc.info/index.php?title=The_Concept_of_Law. Accessed on: 30.10.2010.

more or less than the prevailing moral values of a particular society. Therefore, there cannot be any division between the law and moral, because such laws would be considered as vain. Even Latin people used the expression '*Leges sine moribus vanae'* (laws without moral are vain).

4. Moral Law

Moral law is a body of moral norms that exist in a society. Moral is the ensemble of moral rules that consists of people's understanding on what is right and what is wrong in a given society, very often referred also to natural law norms that represent the universal moral principles.[27] On the other hand, moral norms being the very essence of a society understandings and expectations, are also the essential foundation of positive laws' norms. Indeed, the majority of norms of positive laws are also moral norms. For example, it is unmoral and illegal to steal, murder etc. Without this relation, positive laws would not be moral and consequently they would be considered as vain since they do not meet the society's understandings and expectations. Thus, unmoral positive laws would not serve to common interests of society embodied within moral values of society. However, living in democracy means also respect for minority rights and minority itself represents also the minority of understandings, expectations and values. Thus, sometimes positive laws in modern times might be unmoral for the majority of the society and moral for the rest of the society. This certainly, doesn't necessarily mean that these unmoral positive laws are also vain, because they purpose is to respect and guarantee the rights of the minority within a democratic society as a social and legal tool to maintain the equilibrium within the whole society. At the end, unfortunately the majority in a democracy is never the majority of the society. To illustrate this situation, we may take as an example a country where in the elections at the best occasion participate 50 % + 1 voter of the society and at the end of this election process at the best occasion, the country will be run by the party or the coalition of parties who shall win 50 % + 1 vote of 50 % + 1 of total number of voters. This means that at best this country will be run by 25 % + 1 of the total number of voters. Consequently, what we have here is nothing more than a country governed by a minority considered as a majority. Indeed, due to the corruption of today's democratic system, what we consider minority in fact is the true majority of a country. This approach would certainly change our understanding about the relationship between moral norms and today's positive laws.

[27]*Steven Brust*, Ancient and modern: natural law and universal moral principles. *The Catholic Social Science Review* 14 (2009): 65-74, 65. Available at EBSCO Academic Search Premier Database.

5. Legitimacy of State Power and Civil Disobedience

The state as a sovereign political entity[28] is a creation of the community from which it is composed. As such, the state power derives from the members of its community and is nothing more or less than the overall or at worse the will of the majority of people on how to regulate their social relations. As previously mentioned, Hobbes considered state as an artificial Mortal "GOD" created by people to better protect their rights. Therefore, *"the source of state life and power are the people themselves which are the original bearers of the sovereignty that give to the state the monopoly of force to be used as an enforcement tool for the justice as a principle of fairness".*[29] The justice itself is what a state community considers to be right and wrong based on some universal presumptions such as equality of human beings, human reason, natural reason, God's words etc. The notion of justice itself provides for the state the monopoly of the justice delivery function that excludes the rights of individuals to deliver justice on individual basis because such thing is considered to be much more risky for the common interest of state community.[30] This state monopoly of collective justice delivery is justified for the protection of the common interest of state community of the society. From this point of view, the notion of state power legitimacy might seem to be clear. Nevertheless, in arguing upon this issue, we can raise several questions which would help us to provide some ideas on state power legitimacy such as: does the state monopoly of justice provide to all individuals a fair justice? Does the state as dominant political structure avoid the violation of any individual rights? Does the state always act for the benefit of the governed and not governors? Can all the acts of rule be enacted by state considered presumptively right?[31] Certainly, not all the answers would be yes, since the common interests of society do not represent the common interest of its entire members, but mostly of its majority of members. However, we should not misunderstand the notion of justice as an universal and perpetual value with the notion of legitimacy that gives to the state the legal and social right to deliver justice. While justice is universal and presumptively fair, the legitimacy of state power might not always be true, especially when state governors do not act to protect the interest of people, by rather protecting their own interest or the interest of a small group of people. In such case, the state has violated the so-called social contract which defines the rights and duties of man and the state, and therefore, its power is delegitimized. This means that its actions are neither social nor morally binding to people. This situation inevitably leads

[28] Fausto Cuocolo*, "Lezioni di diritto pubblico"*. Giuffre Editore. Milano 2002, 47.
[29] Idea of Hebbert Hart following the idea of John Rawls. *As cited by* Robert Bozick in *"Anarchy, State and Utopia"*. Basic Books, Inc. USA, 1974, 90.
[30] Robert Bozick,*"Anarchy, State and Utopia"*. Basic Books, Inc. USA, 1974, 90-113.
[31] Ibid, 133.

to civil disobedience that can be described as people's resistance towards states' non legitimized actions which go behind their authorization and certainly also do not serve for the protection of common interest. In other words, civil disobedience can be considered as people's movement to enforce the original social contract that has been violated by the state. Hence, the civil disobedience aims to return to state's power its lost legitimacy and reestablish the rule of people, because the state power is nothing more than the rule of people as the original bearers of state sovereign power.

Nevertheless, the right of people to civil disobedience as a natural right is significantly jeopardized throughout the history by the disloyalty of governors who have been betraying people's confidence and the principle of justice. After the creation of nation states, the right of people to civil disobedience has not been recognized, and in contrary, it has been strongly opposed by states through their governors who have transformed the state into their oligopoly. Even, the development of human rights law doctrine has not succeeded so far in guaranteeing to all People the right to civil disobedience regardless of many attempts. As a result, the state dissolutions and the state destruction can be considered to be a result of state lack of legitimacy. The only constitution in the world that explicitly recognizes the right of People to civil disobedience is the Estonian Constitution who in the Article 54 provides:

1. An Estonian citizen has a duty to be loyal to the constitutional order and to defend the independence of Estonia.
2. If no other means are available, every Estonian citizen has the right to initiate resistance against a forcible change of the constitutional order.

This article is the only constitutional article in the world that recognizes the right of People to civil disobedience which includes also the use of force against state institutions who violate the constitutional order as the modern form of social contract of Estonian People after exhausting other democratic remedies to reset the constitutional order. Undoubtedly this is the strongest statement that provides the very basic of state power legitimacy.

6. Law and its development in post-communist countries: case of Albania

Communist regimes in general and especially the one in Albania destroyed almost every aspect of political, social, cultural and economic life, including the notion of pluralism and

intellectual elite of the country. Albania was the only country where the communist system political elite succeeded to completely eliminate any form of opposition elite, simply by eliminating all the pre-existing forms of social, economic and political elites. The impact of communist regime system into the Albanian society was devastating for the preservation of values such as rule of law, human rights and democracy. Indeed, these three interrelated notions were deleted in the collective memory of the Albanian society for more than 45 years. In addition, Albania was the most isolated European communist country as well as the poorest one. As a consequence, the introduction of democracy in Albania needed to be preceded by the establishment of a market economy which according to the Claus Offe is the foregoing stage of the modernization before the democracy. According to him "*there are five stages of modernization: nation, state, market economy, democracy and welfare state".*[32] Nevertheless, the beginning of the existence of a new emerged democracy regime in Albania dates back in 90' with the establishment of the Democratic Party in December 1990 following massive protests of students and peoples. One of the main characteristics of the transition into democracy in Albania was done through extrication which means that authoritarian government was weakened, but not as thoroughly as in a transition by defeat.[33]

As a result, the communist government was able to negotiate crucial features of the transition and further, was able to define the future political elite of the country which even two decades later is composed mainly by former communist parties members and officials or their descendants. This position enabled the communist elite to be rehabilitated and together with the new emerged communist elite to remain a strong influential actor in the new emerged democracy and *de facto* to run in continuance the country. The purpose of new emerged communist elite to maintain control was favored *inter alia* by the absence of anew strong intellectual elite and was done merely by sharing the power among its members, separated

[32] Ibid, 129.

[33] Mainwaring classifies (Mainwaring, "Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues,") three paths from liberalization to democratization:

- a transition through transaction;
- a transition through extrication; and
- a transition through regime defeat.

A transition through transaction means that "the authoritarian government initiates the process of liberalization and remains a decisive actor throughout the transition. This does not imply that the opposition plays an insignificant role in the process or that the government controls the entire process."

A transition through extrication means that "an authoritarian government is weakened, but not as thoroughly as in a transition by defeat. It is able to negotiate crucial features of the transition, though in a position of less strength than in cases of transition through transaction."

A transition through regime defeat means that "a transition takes place when a major defeat of an authoritarian regime leads to the collapse of authoritarianism and the inauguration of a democratic government."

into different political parties and also by using the 'pluralist' law as a tool for social control over new emerging intellectual elite.

6.1 The law as a tool for gaining social advantages in favor of the new emerged communist elite

The law as a tool for social control over country's new born emerging intellectual elite who had no connections with the past communist regime, or for strengthening the political position of the leading political forces, has been successfully used in Albania for more than 20 years. At the beginning, new laws were drafted in such manner *inter alia* as to allow the privatization of state owned properties by the exponents of former communist elite who were the only ones that had money and knowledge as well as other people affiliated with the new democratic system running forces. Other legal acts were adopted on the purpose to advance the social, political and even academic status of the new emerged political class members. A meaningful example is the adoption of subordinate legal acts that made Albania the only country in the World that awarded the academic degree "Doctor of Sciences" and academic titles such as Prof. Dr. and Prof. Assoc., to several people not through universities or by writing a dissertation, but through a Council of Ministers' Decision and by writing a request to the Commission of the Scientific Qualification.[34] With the same purpose, the current political class through some amendments of the Law on Higher Education introduced with the Law No. 10 307, dated 22.07.2010 made possible for several high state officials and Parliament Members to be registered in Doctoral Programmes for the academic degree "Doctor of Sciences" without completing any post-graduate studies, but by just possessing a four - year university diploma.

6.2 The law as a tool for gaining political control through electoral reforms

For years, Albania has been suffering by the incapability of the political class to organize free and fair democratic elections. Most of electoral reforms introduced so far in any pre-election period have had no real purpose to secure free and fair elections, but rather to monopolize the political life in two main political parties and secure unfair advantages vis-à-vis other smaller political forces. The misuse of law by political parties for gaining political control was proved in the elections of 2005 where from a single electoral zone, were produced more than 10

[34] *See*. The decision of the Council of Ministers of the Republic of Albania No177, date 25.04.1994 for some amendment to the Council of Ministers Decision No.351, dated 30.06.1993 "On the Postgraduate Scientific Qualification and the classification of the pedagogical and research employees".

deputies through the so-called “Dushk” phenomenon that was named after the electoral zone name and which consisted on the traffic of votes from major political parties to small political parties at the same time their allies by using the system rule on the distribution of votes among political parties for 40 mandates via proportional system out of 140 mandates from which 100 mandates, were distributed among candidates via the majority system. Furthermore, even the most recent Electoral Code of the Republic of Albania, adopted with the Law No.10 019, dated 29.12.2008 has been designed in such way as to eliminate the pluralist system by eliminating all the small political parties and bipolarizing the political class into two main political parties: Socialist Party and Democratic Party. In addition, this electoral code de facto eliminated the possibility for individuals to run for the Parliamentary election without the support of one of these two parties.

6.3 The law as tool for gaining personal advantages

In Albania many laws and subordinate legal acts are designed and approved by the Parliament members on purpose to gain personal advantages. Examples of laws such as the Law No.8550, dated 18.11.1999 on “The Status of Deputies”, and other legal acts on the salaries as well as the law for the transportation of senior officials, allowed the state senior officials to have high salaries and other personal benefits as well as other benefits such as the right to privatize cars that have been in their use for symbolic amounts of money. It is important to emphasize that those personal benefits and advantages that the lawmakers of the Republic of Albania have guaranteed to themselves are not comparable with any other case of civilized nations and constitute huge non reasonable differences with the other citizens of the country. There are also a lot of other examples that prove the fact that the law has been used by the political class for its own interest and not for the interest of people.

6.4 The post-communist law as copy and paste of foreign laws

Post-communist Albanian laws are mostly copy and paste of foreign laws especially of Italy, Germany, France, and Switzerland and in few cases of the United States of America. Very often, these laws are solely a translated version of the original source and they have not been adapted with the specifics of the Republic of Albania. Even more, in many cases even the translation lacks quality. This phenomenon of copy and pasting foreign laws has made more difficult their enforcement *inter alia* because very often these laws do not properly reflect peoples’ understandings and personal circumstances or are more advanced than the society itself. The phenomenon of copy and pasting foreign laws by former communist countries, in

attempt to complete their legal framework, is not known only in Albania, but in the case of the latter, this phenomenon due to the lack of professionalism of the lawmakers and law drafters has caused more problems than in other countries.

6.5 Law-Governed and rule of law states: case of Albania

Law and state are unseparately related since none of them can exist without the existence of the other. In fact, the law and the state especially for the normative theory of law are essentially the same thing. Hence, the state should be governed only by law, since the law defines the content, the role and everything else of a state. On the other hand, the law itself is made by the state. Certainly the content of this symbiotic relationship is used by the theory to make the distinction between the so-called law-governed states or legal states as known in a civil law perspective as well as rule of law state or the state of right in terms of justice of fair state. While law governed states can be also authoritarian states, since they are governed by law, law itself in this states is not a tool to ensure justice as a concept of fairness, but rather to serve as a tool for the governor to unjustly rule the People. In contrary with the law-governed states, the rule of Law States or the state of right as a fair state is also a law-governed state, but the law that governs these states is fair and legitimate, since it serves for the common interest of the society. In case of Albania very often, many people would think that they live in a law-governed state, rather than in a rule of law state. The main reason for this partially true perception is a significant lack of rule of law that consists mostly in relatively low rates of law enforcement, low percentage of judicial judgments enforcement, interferences in the separation of power by both the legislator and the executive, as well as people's significantly low degree of awareness on the importance of the rule of law.

7. Conclusions

The development of post-communist law in the Republic of Albania does not properly address the contemporary concept of law or its social nature. The rule of the communist regime for one half of the century destroyed very important social values of the Albanian society including the respect for the state and the law. Many Albanians who suffered from the communist regime were used to see the state and the law as their primary enemies rather than their own creation. On the other hand, state itself with its incapability to properly address people's issues and properly perform its fundamental functions contributed in the cultivation of a kind of anarchist culture among Albanian society members. The rest of the work was done by the corruption and lack of significant economic progress for the majority of

population. In addition, the new emerged political class composed primarily by former communist elite and their descendents did not contribute to the rule of law, but in contrary, used the law for its own narrow interests by causing also a significant incompliance between the law and the legitimacy of state power, enforced through the force of law as well as people's understandings and expectations on social purpose and function of the law. The misuse of law by the political class has made the people lose their confidence in law and the state as has severely weakened the law enforcement in the country.

8. Bibliography

1. Black's Law Dictionary, Second Edition by Henry Campbell Black, M.A. West Publishing Company. ST. Paul, Minn1910.
2. Charles de Montesquieu, *"The Spirit of Laws"*. Translated by Thomas Nugent, revised by J. V. Prichard, based on a public domain edition published in 1914 by G. Bell & Sons, Ltd., London. Rendered into HTML and text by Jon Roland of the Constitution Society.
3. Fausto Cuocolo*, "Lezioni di diritto pubblico"*. Giuffre Editore. Milano 2002.
4. Hanno Kaiser, *"Notes on Hans Kelsen's Pure Theory of Law (1st Ed.). 2004"*. Professor's Hanno Kaiser webpage. Available at: www.hfkdocs.com/files/Kelsen_Pure_Theory.pdf.
5. John Locke, "*Two treaties of government"*. From the Works of John Locke. A New Edition, Corrected. In Ten Volumes. Vol. V. Printed for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co.: Also R. Griffin and Co. Glasgow; and J. Gumming, Dublin. 1823.
6. Mainwaring, "Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues".
7. Michelle Averchi, Il Rapporto Cittadino - Stato nel Leviathan di Hobbes. Available at www.dialettico.it.html, accessed on 26.11.2002.
8. N.E. Simmonds, "Law as a moral idea". *University of Toronto Law Journal 2005*.
9. Plato, The Republic.
10. Robert Alexy, "On the Concept and the Nature of Law". *Ratio Juris*. Blackwell Publishing Ltd.Vol. 21, No. 3., USA 2008.
11. Robert Bozick, *"Anarchy, State and Utopia"*. Basic Books, Inc. USA, 1974.

12. Russell Hittinger. *"Natural law in the positive laws: A Legislative or Adjudicative Issues?"*, The Review of Politics. Available at EBSCO Database, 2001.
13. Stefano Bertea,*"The Concept of Law".* From IVR Encyclopedie. Available at http://ivr-enc.info/index.php?title=The_Concept_of_Law. Accessed on 30.10.2010.
14. *Steven Brust,* Ancient and modern: natural law and universal moral principles. *The Catholic Social Science Review* 14 (2009): 65-74, pp.65. Available at EBSCO Academic Search Premier Database.
15. Tony Honore*, "Making the Law Bind".* 1987.
16. The Decision of the Council of Ministers of the Republic of Albania No177, date 25.04.1994 for some amendment to the Council of Ministers Decision No.351, dated 30.06.1993 "On the Postgraduate Scientific Qualification and the classification of the pedagogical and research employees".
17. Thomas Hobbes, "*The Leviathan. Chapter XIV: Of the first and second natural law, and of contracts"*. England 1660.

Address:
Jordan Daci
Rruga Viktor Eftemiu, Pal 9/1, Nd.5, Ap 11,
Tirana, Albania
E-mail: jordan.daci@gmail.com