

# **The Impact of COVID-19 Measures on the Rule of Law in the Western Balkans and the Increase of Authoritarianism**

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## **Abstract**

*This article offers a comparative analysis of the COVID-19 legal measures and model of governance adopted in the Western Balkans countries (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia and Kosovo) and its impact on the state of the rule of law, and ability of parliament and civil society to scrutinise government decisions. The article assesses the governments' approaches to introducing and enforcing COVID-19 legal measures, and shows examples of how COVID-19 has exposed more openly the weaknesses in the existing system of checks and balances in the Western Balkans. The article offers new insights into how COVID-19 presented a new opportunity for leaders in the Western Balkans to implement further their authoritarian model of governance in undermining the rule of law. This article offers suggestions on how the EU could respond, through its accession conditionality instruments and civil society, to redirect this trend towards more state capture.*

## **Keywords**

Western Balkans – rule of law – authoritarianism – state capture – COVID-19 – civil society – EU accession

## 1. Introduction<sup>1</sup>

The Western Balkans<sup>2</sup> governments rapidly adopted a set of legal measures in March 2020 – within few days of the first confirmed cases of citizens having contracted the SARS-CoV-2 (COVID-19) virus – to allow state authorities to enforce restrictive measures to prevent further the outbreak of pandemic. The legal measures were introduced through government decrees by the majority of Western Balkans governments, and most of the COVID-19 measures were brought in without proper due process or transparent communication, imposing strict rules of extensive curfew, quarantine and travel restrictions. The army and police were called to enforce the lockdown and curfew rules, and some of the legal measures included prison sentences from two to seven years (Hoxhaj 2020)<sup>3</sup> Such an approach – of heavy-handed military, overt surveillance and police presence – revealed pre-existing tension and mistrust between citizens and the governments in post-communist countries (Nakrošis 2018).<sup>4</sup> This is a relationship that has been shaped by mutual suspicion between state and society; a deeply-rooted legacy of the communist era. However, none of these measures disrupted the operation of organised crime

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<sup>2</sup> The Western Balkan countries are: Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia. The European Union (EU) in 2018, noted in its Communication that it has considered these six countries as future members of the EU and all are negotiating – at different levels – their future accession to the EU. For more, see the Strategy for the Western Balkans, Retrieved 15 June 2021, [https://ec.europa.eu/commission/news/strategy-western-balkans-2018-feb-06\\_en](https://ec.europa.eu/commission/news/strategy-western-balkans-2018-feb-06_en).

<sup>3</sup> A. Hoxhaj, 2020. ‘Albania’s Response to the Coronavirus Pandemic’. *Cambridge Core blog*. May 19. Retrieved 15 June 2021, <https://www.cambridge.org/core/blog/2020/05/19/albanias-response-to-the-coronavirus-pandemic/?fbclid=IwAR2U1Px46WXB4NCrf5lc0tOyMmD6kAT8LjrKKYEentrAtNUNjhAP6h75xMk>.

<sup>4</sup> V. Nakrošis, ‘The Quantitative and Qualitative Analysis of Public Administration Reforms in Post-Communist Countries’, *Baltic Journal of Political Science* 6(6) (2018) 7-28.

(Zhilla 2020) in the Western Balkans<sup>5</sup> – on the contrary, the COVID-19 pandemic<sup>6</sup> created new opportunities for expanding such activities in the healthcare and pharmaceutical industries.<sup>7</sup>

The paper finds that the COVID-19 pandemic has created a new opportunity for the leaders of the Western Balkans to implement further their authoritarian model of governance. In this article we offer a theoretical understanding, as well as concrete examples of how governments used legal means as part of the COVID-19 measures to further capture state institutions, restrict the freedom of the media, and acquire more unaccounted powers, suspending courts and parliamentary oversight – and as a result, further erode the already weak rule of law system (Tzifakis 2020)<sup>8</sup> in the Western Balkans.

In analysing the autocratic model of governance deployed by the leaders of the Western Balkans, we make use of Ernst Fraenkel’s theory of ‘Dual State’ to explain how the states use legal tools to increase their powers, undermine the constitution and the system of checks and balances to increase the role of the state police and enact autocracy. Furthermore, we consider Florian Bieber’s theory of ‘authoritarianism in the Western Balkans’ and ‘stabilocracy’ to understand how autocratic rule in the Western Balkans has been re-inventing itself since the fall of the communism in the 1990s, and to characterise the different types of autocratic governance models more openly exhibited during the lockdown period between March and July 2020. This paper limits its analyses, examining only the legal measures and government decisions adopted in the initial period of the COVID-19 pandemic outbreak in March 2020,

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<sup>5</sup> F. Zhilla , 2020. ‘The Leviathan of Organised Crime’. *Royal United Services Institute*, May 21, Retrieved 15 June 2021, <https://shoc.rusi.org/informer/leviathon-organised-crime>.

<sup>6</sup> The International Institute for Strategic Studies, 2020. ‘The impact of COVID-19 on organised crime in the Western Balkans’, December 11, Retrieved 15 June 2021, <https://www.iiss.org/blogs/research-paper/2020/12/covid-19-organised-crime-western-balkans>.

<sup>7</sup> The International Criminal Police Organization, 2020. ‘INTERPOL warns of organized crime threat to COVID-19 vaccines’, *The INTERPOL*, December 2, Retrieved 15 June 2021, <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-warns-of-organized-crime-threat-to-COVID-19-vaccines>.

<sup>8</sup> N. Tzifakis, ‘The Western Balkans during the pandemic: Democracy and rule of law in quarantine?’, *European View*, 19(2) (2020) 197-205.

and how those measures were applied until the end of 2020. In doing so, we analyse how governments intensified their models of authoritarianism in the Western Balkans – thereby further eroding the rule of law and state of democracy.

The main aim of this article is to contribute to the literature studying the Western Balkans, and provide new insights into how the six governments of the Western Balkans states used some COVID-19-related legal measures to undermine the rule of law, and to expose the tendency for an increased police state to enact an autocratic model of governance. Our contribution will offer new understanding in the growing body of literature on EU rule of law conditionalities, the EU accession talks framework, and monitoring instruments such as the progress reports used by the EU, in evaluating the state of the rule of law in the Western Balkans,<sup>9</sup> in light of the events that occurred since the outbreak of the COVID-19 pandemic.

## **2. Authoritarian Theory: Forms of Authoritarian Regimes in the West Balkans**

The European Commission adopted a strategy called ‘*A Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans*’ in 2018,<sup>10</sup> which lays out the EU policy objectives for the future expansion of the European Union (EU) in the Western Balkans. The EU considers the Western Balkans region as a geostrategic investment – each country is at a different stage in negotiating entry to the EU.<sup>11</sup> In its 2018 strategy, the European Commission identified state capture, corruption and lack of rule of law (Hoxhaj 2020)<sup>12</sup> as a major impediment to deep reforms in the Western Balkans, claiming that ‘the countries show

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<sup>9</sup> M. Kmezić, ‘Rule of Law and Democracy in the Western Balkans: Addressing the Gap between Policies and Practice’, *Journal of Southeast European & Black Sea Studies*, 20(1) (2020) 183–198.

<sup>10</sup> European Commission, 2018. ‘Communication on a Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans’, COM (2018) 65 final.

<sup>11</sup> Albania, Montenegro, North Macedonia, and Serbia are official candidate countries for accession to the European Union. Bosnia and Herzegovina, and Kosovo are potential candidates for the EU.

<sup>12</sup> A. Hoxhaj, *The EU Anti-Corruption Report: A Reflexive Governance Approach* (Abingdon: Routledge, 2020) 204.

clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests'.<sup>13</sup>

In other words, the EU indirectly acknowledges that the Western Balkans are governed by leaders with authoritarian tendencies (Lavrič and Bieber 2020).<sup>14</sup> Through its EU conditions, the European Commission has tried to address the problem of state capture by attempting to strengthen judicial and investigative institutions capable of upholding the rule of law. However – to date – it has failed to do so effectively, due to the fact there is little political will by the leaders of the Western Balkans to establish the rule of law.<sup>15</sup> The EU, and in some cases, the US have both unintentionally contributed towards consolidating and enabling authoritarians to strengthen their grip on power, for the sake of maintaining stability in a volatile region. Bieber (2017) calls this a 'stabilocracy' – where governments claim to secure stability, pretend to embrace EU integration and EU values, but still rely on informal, clientelist structures, control of the media, and the regular production of superficial political crises to undermine the rule of law, parliamentary procedure and the country's constitutional legal order.

The COVID-19 pandemic crisis produced a golden opportunity for authoritarian forces (Wunsch 2020)<sup>16</sup> in undermining the rule of law and the state of democracy in the Western Balkans. Leaders have certainly made the most of it – silencing the media, suspending courts,

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<sup>13</sup> European Commission, 2018. 'Communication on a Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans', COM (2018) 65 final.

<sup>14</sup> M. Lavrič and F. Bieber, 'Shifts in Support for Authoritarianism and Democracy in the Western Balkans: Shifts in Support for Authoritarianism and Democracy in the Western Balkans', *Journal of Problems of Post-Communism* 68(1) (2021) 17–26.

<sup>15</sup> M. Vachudova, 'EU Enlargement and State Capture in the Western Balkans', in: J. Džankić, S. Keil and M. Kmezić (eds), *The Europeanisation of the Western Balkans: A Failure of EU Conditionality?* (Cham: Palgrave Macmillan, 2019).

<sup>16</sup> N. Wunsch, 2020. 'How Covid-19 is Deepening Democratic Backsliding and Geopolitical Competition in the Western Balkans', *London School of Economics (EUROPP) Blog*, May 20, Retrieved 15 June 2021, <https://blogs.lse.ac.uk/europpblog/2020/05/20/how-covid-19-is-deepening-democratic-backsliding-and-geopolitical-competition-in-the-western-balkans>.

and using the full power of public office in their electoral bids. Before analysing and categorising the type of authoritarian regimes in the Western Balkans, it is important to explain previous academic studies and the theories on authoritarian governance; these will later be applied in our case studies of the six Western Balkans countries, when we compare the governance models and approaches to enforcing COVID-19 lockdown rules.

### ***2.1. The Authoritarian Governance Theory***

In his seminal work on the ‘Dual State’, Ernst Fraenkel (1941) argues that the totalitarian state (or prerogative state) grows in the shadow of the normative state.<sup>17</sup> According to Fraenkel, the normative state is ‘an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies’. In contrast, the prerogative state is ‘the governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees’.<sup>18</sup> One of the indicators of the prerogative state is the existence of the dual state, in which authoritarian governance is shielded by an apparent ‘rule of law’ governance. Governance under the dual state exists ‘whenever there is organisational unification of leadership, regardless of whether there is any internal differentiation in the substantive law’.<sup>19</sup> In a dual state regime, the principles of the rule of law are at high risk, as the totalitarian governmental approach (prerogative state) of the groups that have seized power compete with the constitutional guarantees of the rule of law (normative state). The main indicator of the prerogative state is

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<sup>17</sup> Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*. Translated from the German by E.A. Shils, with Edith Lowenstein and Klaus Knorr (New York: Oxford University Press, 2017) 23.

<sup>18</sup> *ibid.*

<sup>19</sup> To illustrate how this concept was interpreted by the German Courts, Fraenkel notes the decision of one of the judges in *Rex v. Richard Chambers*, who held that there was a ‘Rule of Law and a Rule of Government’, and that many things which might not be done by the ‘Rule of Law might be done by the Rule of Government’. Also see Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (n 17) 155.

‘the complete abolition of the inviolability of law’,<sup>20</sup> which means the legal accountability of the state agents will be almost inapplicable. Fraenkel notes that some of the actions of the prerogative state include the marginalisation of constitutional protection, abolition of judicial review, and an increase of the role of the state police.<sup>21</sup> These features can be observed in the Western Balkans during the COVID-19 pandemic, as we will demonstrate through the case studies.

In the dual state regime in post-communist societies, there is no separation of powers, but instead a ‘distribution of powers’, in which the constitutionalist approach of checks and balances is blurred by ‘technocratic managerialism’.<sup>22</sup> According to Karklins (2005), corrupt state agents are immune to accountability because of their political support, clothed in administrative power. In the Western Balkans, autocratic regimes are well documented,<sup>23</sup> as all countries continue to be classified as transitional or hybrid democracies since the break-up of communism in the 1990s, and the majority are classified as hybrid democracies by Freedom House.<sup>24</sup>

According to Bieber (2020),<sup>25</sup> the Western Balkan states continue to reflect patterns of authoritarianism. For example, in Montenegro, there is no substantial democratic change. Until the last political election of August 2020, the then ruling party, the Democratic Party of

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<sup>20</sup> *ibid*, 107.

<sup>21</sup> In these cases, governments usually introduced a number of new amendments to key legislations, including criminal law procedures, and administrative and civil law, to give more surveillance and decision-making powers to law enforcement agencies – thereby bypassing the due process mechanisms that are important for the function of the rule of law and democracy.

<sup>22</sup> R. Sakwa, ‘The Dual State in Russia’, *Journal of Post-Soviet Affairs*, 26 (3) (2010) 185-206.

<sup>23</sup> F. Bieber, *The Rise of Authoritarianism in the Western Balkans* (Cham: Palgrave Macmillan, 2020) 34-35.

<sup>24</sup> According to Freedom House, the definitions ‘transitional democracies’ or ‘hybrid democracies’ are typically electoral democracies that meet only minimum standards for the selection of national leaders. Democratic institutions are fragile, and substantial challenges to the protection of political rights and civil liberties exist. The potential for sustainable, liberal democracy is unclear. For more, see ‘Nations in Transit Methodology’, Retrieved 15 June 2021, <https://freedomhouse.org/reports/nations-transit/nations-transit-methodology>.

<sup>25</sup> Bieber (n 23) 31-35.

Socialists, and its key figure, Milo Djukanović, had continued to govern since 1990; here, the autocratic regime was consolidated for three decades. Serbia, on the other hand, has returned to a semi-autocratic regime since 2012 under the governance of Aleksandar Vučić, by applying similar authoritarian patterns to those of the rule of Milosevic.<sup>26</sup> In North Macedonia, Bieber considers the ‘new semi-authoritarianism’ to be due mainly to a failure in managing the deeply ethnically-polarised political system. Bosnia and Herzegovina is governed by a form of ‘ethnocratic authoritarianism’,<sup>27</sup> as the current regime has a monopoly over its ethnic constituency in different state entities. In Kosovo, the authoritarian regime is considered to be ‘leveraged by an international tutelage’, because the autocracy here is more volatile, and highly dependent on the external pressure of the international community. Bieber argues that here, ‘a pattern has emerged of undemocratic external intervention that has fed off an elite that has used external support to retain power’. In Albania, authoritarianism is reflected in the structural polarisation of two main political parties, which have successfully managed to retain power thanks to the strong leadership in both parties. The semi-autocratic regime is also visible in Albania<sup>28</sup>, built around a ‘winner-takes-all political system’;<sup>29</sup> state control by the governing party has many features akin to other authoritarian regimes.<sup>30</sup> Albania is also a classic case of

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<sup>26</sup> D. Djokić, ‘A Very Yugoslav Paradox? The Strange Afterlife of Interwar Democracy (and Authoritarianism)’, *Journal of Modern European History*, 17 (1) (2019) 28-36.

<sup>27</sup> According to Bieber, ‘Ethnocratic authoritarianism in Bosnia and Herzegovina is a paradox. This is because, while the ethno-nationalist parties claim to have a monopoly over their ethnic constituency, they are challenged in this claim and have all lost more power than in the other countries of the region, while continuing to rule at some level in the politically complex state.’ See F. Bieber, *The Rise of Authoritarianism in the Western Balkans* (n 23) 34.

<sup>28</sup> *ibid*, 34-35.

<sup>29</sup> Since the fall of communism in 1991, Albania’s political system has been considered as a hybrid between democracy and totalitarianism. Although the two biggest political parties (the Socialist and Democratic parties) have been in government on different occasions since the fall of communism, the government system is constructed in a way that the party that obtains power has almost absolute control, and always tries to expand its powers beyond the constitutional framework.

<sup>30</sup> The latest example is that the Albanian government passed an ‘anti-defamation law package’ in October 2019, which gave the Albanian media regulator agency – a government controlled body – the power to fine online media outlets accused of ‘damaging a person’s reputation or infringing on their privacy before the outlets can have the case heard in a court of law’. Experts have criticised the law, saying that it will give the government power to decide cases of defamation without a due process in a court of law. The law was referred to the Venice



‘stabilocracy’ – a term used first used by Antoinette Primatarova and Johanna Deimel in 2012, describing a country that ‘provides stability externally but domestically oscillates between democracy and autocratic tendencies’. Stabilocracy is presently in place across the Western Balkans, and the term is commonly used by observers to describe the current state of rule of law and democracy in the region.

In summary, the autocratic model of governance in the Western Balkans has been re-inventing itself since the fall of communism in the 1990s, and very little progress has been achieved in democratisation and strengthening the rule of law,<sup>31</sup> despite major external support and instruments, such as EU conditionalities.

In a dual state regime such as Fraenkel observes, do extraordinary situations such as the COVID-19 pandemic accelerate prerogative state-like patterns, which in normal political situations would remain hidden behind the façade of a democratic system? To answer this question, the following section explains the legal measures adopted by the governments of the Western Balkans, to highlight whether a shift to the prerogative state and an increase of a stabilocratic authoritarian governance model has occurred.

### ***2.1.1. The COVID-19 Emergency Laws in the Western Balkans***

There now follows an overview of the main laws and measures introduced as a result of the COVID-19 pandemic crises in each of the Western Balkan states; an analysis of how these governments have used the pandemic to overreach their powers; and the impact that these changes may have on the state of democracy and the rule of law. We have grouped the regimes in the Western Balkans into three categories, making use of Bieber’s characterisation of each

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Commission, which considered that the law provisions are ‘not ready for adoption in their current form as it suffered from vagueness and would likely to have a chilling effect in suppressing free speech for online medias’. See Council of Europe, Opinion No. 980 / 2020 ‘On Draft Amendments to Law N°97/2013 On the Audiovisual Media Service’ in Albania, Adopted by the Venice Commission on Jun. 19, 2020, p.18. Retrieved 15 June 2021, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)013-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)013-e).

<sup>31</sup> Kmezić (n 9) 183-198.

of the Western Balkans' models of autocratic governance. First, are 'the semi-autocratic regimes',<sup>32</sup> of Albania, North Macedonia, Montenegro, and Serbia. Second is Kosovo, and the 'volatile autocratic regime';<sup>33</sup> third is Bosnia and Herzegovina's 'ethnic autocracy'.<sup>34</sup>

These three categories will be used to analyse how the newly introduced COVID-19 measures reveal the extent to which these countries are autocratic regimes or stabilocracies, and how these states make use of crises to consolidate their power further, to restrict freedoms, and to limit the courts and suppress the opposition's ability to challenge the ruling parties' or established political élites' capture of state institutions. We now consider how the pandemic has been used as an opportunity by the leaders of the six Western Balkans countries to erode the rule of law, against the backdrop of the Copenhagen criteria.<sup>35</sup>

## ***2.2. Semi-Autocratic Regimes***<sup>36</sup>

### ***2.2.1. Serbia***

Serbia's President, Prime Minister and the President of Parliament jointly declared a state of emergency on 15 March 2020, without consulting members of the Serbian parliament,<sup>37</sup> thereby limiting the rights and freedom of citizens, in order to enforce the lockdown rules without passing a special law through parliament. There was no official explanation as to why

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<sup>32</sup> Indications of this category can be found in limitations of rights without law, lack of access to the courts (Albania: lack of Constitutional and High Court); amendment of the criminal law; derogation of the ECHR; abuse of power (demolition of a theatre in Albania); increase in state police power (Montenegro).

<sup>33</sup> Indications of these categories can be found in the postponement of political elections, conflicts between institutions, e.g., President v Prime Minister, violation of human rights, violation of data protection, the complexity and contradictions of the political system of Bosnia and Herzegovina, and its fragile democracy.

<sup>34</sup> Indications of this category can be found in the complexity and contradictions of the political system of Bosnia and Herzegovina, complex constitutional arrangements, etc.

<sup>35</sup> The measure by which these countries are evaluated, using the EU instruments in their annual progress report published by the European Commission.

<sup>36</sup> Consolidated semi-autocratic regimes will be regimes which are very similar to the Dual State regime. Here, the combination of democratic and totalitarian governance continues for a long time and is characterised by strong, charismatic leadership.

<sup>37</sup> OECD, 2021. 'The COVID-19 Crises in Serbia'. January 31, Retrieved 15 June 2021, <https://www.oecd.org/south-east-europe/COVID-19-Crisis-in-Serbia.pdf>.

Parliament could not be convened to declare the state of emergency itself, rather than through a statement issued by its three main leaders. Bypassing parliament was a tactical move by the government – and one which it had already used before (Vladislavljević 2020)<sup>38</sup> – in the light of the upcoming elections. The president did not want to give the opposition parties any opportunity in parliament to challenge the government’s decision and measures. Suppressing the opposition, parliamentary procedures, and the media has been a consistent feature of President Vučić’s rule (Orlović 2018).<sup>39</sup>

The government’s first decision was to postpone the elections planned for 26 April, rescheduling them for 21 June 2020.<sup>40</sup> The government’s COVID-19 regulations also included one of the longest lockdowns in the Western Balkans, limiting access to both justice and media communications. As though the suspension of human rights and democracy without proper due process were not enough, the rule of law was also seriously compromised. On 18 March, the Public Prosecutor’s Office and the High Judicial Council issued a statement announcing that priority would be given to cases related to the spreading of disinformation about COVID-19,<sup>41</sup> based upon the criminal code that had been introduced since Vučić came to power in 2014, aimed at further restricting media freedom (Kmezic 2018).<sup>42</sup>

This is an indication that the Serbian government’s main priority was not how best to deal with the pandemic, but – according to Marinković (2020)<sup>43</sup> – to re-elect the Serbian Progressive

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<sup>38</sup> N. Vladislavljević, ‘Media Discourse and the Quality of Democracy in Serbia after Milošević’, *Europe-Asia Studies*, 72 (1) (2020) 8-32.

<sup>39</sup> S. Orlović, ‘Serbia: Interest Groups in an Unconsolidated Pluralist Democracy’ *Journal of Public Affairs*, 19 (2) (2018)1-13.

<sup>40</sup> M. Stojanovic, 2020. ‘Serbian Govt Takes Control of Information Flow About Pandemic’, *Balkan Insight*, April 1, Retrieved 15 June 2021, <https://balkaninsight.com/2020/04/01/serbian-govt-takes-control-of-information-flow-about-pandemic>.

<sup>41</sup> *ibid.*

<sup>42</sup> M. Kmezic, ‘Captured Media: Limitations and Structural Hindrances to Media Freedom in Serbia’, *Review of Central and East European Law*, 43 (4) (2018) 457-482.

<sup>43</sup> T. Marinković, 2020. ‘Fight Against Covid-19 in Serbia: Saving the Nation or Securing the Re-Election?’, *VerfBlog*, May 18, Retrieved 15 June 2021, <https://verfassungsblog.de/fight-against-covid-19-in-serbia-saving->

Party and give President Vučić a stronger mandate for the upcoming negotiations with Kosovo.<sup>44</sup> Serbia held Europe's first election while under COVID-19 lockdown, which meant that the ban on gatherings remained in place during this time. This limited even further the already restricted capacity of opposition parties to engage with citizens or have access to the media (Bieber 2020).<sup>45</sup> In a last move, just before the election, the government announced a new cycle of assistance to mitigate the financial impact of the COVID-19 pandemic, which included handing out 100 euros to everyone over 18 – despite the fact that this was viewed as a pre-election bribe,<sup>46</sup> it still played well with voters, and Vučić's Progressive Party won by a landslide.

However, shortly after the election, it was announced that capital city of Belgrade would be placed under a new lockdown at the beginning of July 2020 – thereby reintroducing the state of emergency to control the spread of the COVID-19 virus. This decision led to a massive and violent demonstration against the new lockdown, and many citizens were badly injured.<sup>47</sup> Several civil society organisations brought charges against police brutality, but the Public Prosecutor's Office refused to investigate any of the charges,<sup>48</sup> citing the government's position that the police were only applying the COVID-19 rules against mass gatherings. However, the *prEUgover* report (issued by collection of civil society organisations in Serbia that monitor the

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the-nation-or-securing-the-re-election.

<sup>44</sup> A. Rettman and E. Krasniqi, 2020, 'Kosovo to Restart EU/US-led Serbia Talks', *EUobserver*, June 4, Retrieved 15 June 2021, <https://euobserver.com/enlargement/148553>.

<sup>45</sup> F. Bieber, 'Global Nationalism in Times of the COVID-19 Pandemic', *Nationalities Papers*, (2020) 1-13, Retrieved 15 June 2021, <https://www.cambridge.org/core/journals/nationalities-papers/article/global-nationalism-in-times-of-the-covid19-pandemic/3A7F44AFDD6AC117AE05160F95738ED4>.

<sup>46</sup> A. Vasovic, 2020. 'Serbia to invest 5 billion euros to cope with coronavirus impact', *Reuters*, March 30, Retrieved 15 June 2021, <https://uk.reuters.com/article/us-health-coronavirus-serbia-economy/serbia-to-invest-5-billion-euros-to-cope-with-coronavirus-impact-idUKKBN21H0T6>.

<sup>47</sup> G. Launey, 2020. 'Coronavirus: Belgrade protesters storm Serb parliament over curfew', *BBC*, July 8, Retrieved 15 June 2021, <https://www.bbc.co.uk/news/world-europe-53332225>.

<sup>48</sup> G. Fruscione. 2021, 'The Pandemic in the Balkans: Geopolitics and Democracy at Stake'. *Istituto per gli Studi di Politica Internazionale*, April 5, Retrieved 15 June 2021, [https://www.ispionline.it/it/pubblicazione/pandemic-balkans-geopolitics-and-democracy-stake-29886?fbclid=IwAR3jl79Od9PmUrbSW\\_wV3pSvixgr6SJksrJZhwiGvXv-M52v8\\_p1lgC-JvA](https://www.ispionline.it/it/pubblicazione/pandemic-balkans-geopolitics-and-democracy-stake-29886?fbclid=IwAR3jl79Od9PmUrbSW_wV3pSvixgr6SJksrJZhwiGvXv-M52v8_p1lgC-JvA).

country progress in meeting the EU chapters of the *acquis* 23 and 24<sup>49</sup>) found that the Public Prosecutor's Office failure to pursue an investigation into police brutality due to pressure from the government did, indeed, constitute the latest example of the erosion of the rule of law in Serbia. Furthermore, the handling of the protestors was another example of the government not taking police brutality seriously, but on the contrary, empowering the police to behave in such a way, and using this to suppress any protest that may threaten Vučić's power.

Bypassing parliamentary procedure to declare the state of emergency and postponing and rescheduling the elections in the short term – rather than holding elections at a point agreed by both the government and opposition, thus allowing citizens more time to challenge government decisions during the COVID-19 pandemic – are illustrative of the increasingly autocratic nature of Serbia's regime. The government's compulsion of the Public Prosecutor's Office and High Judicial Council to prioritise cases relating to 'disinformation' during the COVID-19 pandemic is another example of how independent institutions have been captured by the government (Georgiev 2019),<sup>50</sup> pursuing investigations and prosecutions without respect for the separation of the powers or the rule of law principle. As Fraenkel notes, when courts and independent law enforcement agencies are being misused and marginalised by the government, this is a clear indicator of an autocratic model of governance.<sup>51</sup>

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<sup>49</sup> J. Nikić, 2020. 'The prEUgovor Alarm Report on the Progress of Serbia in Chapters 23 and 24', *Belgrade Centre for Security Policy*, November 17, Retrieved 15 June 2021, <https://www.preugovor.org/Alarm-Reports/1611/Coalition-prEUgovor-Report-on-Progress-of-Serbia.shtml>.

<sup>50</sup> S. Georgiev, 2019. 'What We Talk About When We Talk About State Capture: Reflections from Serbia', *The Centre for the Study of Corruption at the University of Sussex*, November 4, Retrieved 15 June 2021, <https://scscsussex.wordpress.com/2019/11/04/what-we-talk-about-when-we-talk-about-state-capture-reflections-from-serbia>.

<sup>51</sup> Fraenkel (n 17) 24.

### **2.2.2. Montenegro**

In contrast to Serbia, Montenegro did not declare a state of emergency; instead, the government issued a decision on 17 March 2020 to introduce measures to respond to the COVID-19 crisis.<sup>52</sup>

These measures had significant implications for civil and political rights, and the pandemic has reinforced ongoing debates about the lack of rule of law and democracy in the country (Mijović 2019).<sup>53</sup>

The government introduced a police-controlled lockdown to implement lockdown rules, and there were harsh financial and custodial penalties for non-compliance. During the lockdown period, there were more than 1,500 lockdown-related criminal charges made against citizens, of which about 750 were arrested and taken into custody.<sup>54</sup> The opposition parties did not contest the substance of these rules. However, civil society observers have criticised the way these measures were implemented – in particular, the incarceration of citizens in the middle of the pandemic – claiming that these legal measures were unconstitutional, and requesting that the Constitutional Court scrutinise the government’s actions. The Constitutional Court issued an ambiguous decision,<sup>55</sup> which, on one hand, annulled the government decision to publish the names of citizens ordered to self-isolate, but on the other hand, stated that it did not consider this decision a violation of the rights of citizens – this uneven and unsatisfying decision is partly due to the influence of Montenegro’s president, Djukanović, who exercises a degree of control

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<sup>52</sup> OECD, 2021, ‘The COVID-19 Crises in Montenegro’, January 31, Retrieved 15 June 2021, <https://www.oecd.org/south-east-europe/COVID-19-Crisis-in-Montenegro.pdf>.

<sup>53</sup> M. Mijović, 2019. ‘Montenegro: Captured by Corruption’, *The Centre for the Study of Corruption at the University of Sussex*, October 23, Retrieved 15 June 2021, <https://scscsussex.wordpress.com/2019/10/23/montenegro-captured>.

<sup>54</sup> M. Brändle, 2020. ‘Democracy and the State of Emergency: Easing Measures and Rising Tensions in the Struggle with the Corona Crisis in the Western Balkans, Croatia and Slovenia’, *Friedrich-Ebert-Stiftung Dialogue Southeast Europe*, Retrieved 15 June 2021, <http://library.fes.de/pdf-files/bueros/belgrad/16286.pdf>.

<sup>55</sup> S. Kajosevic, 2020. ‘Montenegro Warned That ‘Imprecise’ Health Measures Endanger Human Rights’, *Balkan Insight*, November 13, Retrieved 15 June 2021, <https://balkaninsight.com/2020/11/13/montenegro-warned-that-imprecise-health-measures-endanger-human-rights/>.

of the Constitutional Court, and compromises its independence.<sup>56</sup> In other words, the Constitutional Court is not a fully independent institution.<sup>57</sup>

During the COVID-19 crisis, Montenegro's unresolved national identity issue also resulted in a high level of ethnicisation of the party system, and a further polarisation of society. This is due to the fact that Montenegrin political actors do not just represent different policies (Morrison 2018),<sup>58</sup> but rather different – and mutually exclusive – worldviews. These actors used the COVID-19 crisis as another opportunity to blame one another's ethnic groups for spreading the virus and disobeying lockdown rules.<sup>59</sup> The government, on the other hand, used the COVID-19 crises to limit the opposition parties' access to media communication. As in Serbia, the state had national elections looming, and the government used COVID-19 communications briefings as its main platform of policy promotion – policies not always related to the public health crisis – thereby receiving almost all of the available election press coverage.<sup>60</sup> Opposition parties were only able to make use of some parliamentary sessions that were related to the COVID-19 economic rescue package to criticise the government's police-controlled approach, and to promote some of its own policies for the upcoming elections.<sup>61</sup>

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<sup>56</sup> The Economist, 2019, 'The Monarch of Montenegro: Why Milo Djukanovic is Europe's Most Durable Ruler' April 11, Retrieved 15 June 2021, <https://www.economist.com/europe/2019/04/11/why-milo-djukanovic-is-europes-most-durable-ruler>.

<sup>57</sup> S. Pavlović, 2016. 'Montenegro's 'Stabilitocracy': The West's Support of Đukanović is Damaging the Prospects of Democratic Change', *London School of Economics (EUROPP) Blog*, Dec. 23, Retrieved 15 June 2021, <https://blogs.lse.ac.uk/europpblog/2016/12/23/montenegros-stabilitocracy-how-the-wests-support-of-djukanovic-is-damaging-the-prospects-of-democratic-change/>.

<sup>58</sup> K. Morrison, *Nationalism, Identity and Statehood in Post-Yugoslav Montenegro*, (London-New York: Bloomsbury Academic, 2018) 133-151.

<sup>59</sup> Brändle (n 55) 24-28.

<sup>60</sup> A. Vladisavljevic, S. Kajosevic, M. Stojanovic and S. Jakov Marusic, 2020. 'Elections Return to Balkan Agenda as Pandemic Wanes', *Balkan Insight*, May 5, 2020, Retrieved 15 June 2021, <https://balkaninsight.com/2020/05/05/elections-return-to-balkan-agenda-as-pandemic-wanes>.

<sup>61</sup> M. Mijovic, (2020. 'Djukanovic Had to Fall Eventually'. *Balkan Insight*, September 4, Retrieved 15 June 2021, <https://balkaninsight.com/2020/09/04/djukanovic-had-to-fall-eventually/>.

The COVID-19 crisis provides another example of how the pre-existing ethnic divisions in Montenegrin political discourse have yet to be overcome. The COVID-19 situation also shows Djukanović's degree of state capture (Bieber 2020),<sup>62</sup> in the failure of the Constitutional Court to properly scrutinise government actions due to political pressure. And again, as with Serbia, the government attempted to use the COVID-19 crisis to suppress opposition parties and civil society activists, with a negative impact on forthcoming parliamentary elections. However, there are some glimmers of hope in Montenegro: the rule of law and the state of democracy might be improved, as the Democratic Party of Socialists – after governing Montenegro for almost 30 years – lost its first-ever electoral race on 30 August 2020 by a small margin, against a coalition of opposition parties. Since the election, the opposition parties have agreed in principle to form a government composed of experts and technocrats, to demonstrate that they are serious about reducing state capture by the government branch, and making a clear distinction from the autocratic model of governance approach deployed by Djukanović for the last three decades.<sup>63</sup>

### ***2.2.3. Albania***

After its first COVID-19 patient was confirmed on 11 March 2020, Albania adopted several measures, including new laws to allow the authorities to enforce the lockdown. The first law was a 'normative act on special administrative measures taken during the period of infection caused by COVID-19', adopted by a decision from the government in which it declared 'an extraordinary situation' (Hoxhaj 2020).<sup>64</sup> There are concerns about the side-effects that the legal measures adopted during the COVID-19 period may have on the rule of law and on

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<sup>62</sup> Bieber (n 23) 38-39.

<sup>63</sup> F. Bieber and J. Marović, 2020. 'Seizing the Democratic Opportunity in Montenegro', *London School of Economics (EUROPP) Blog*, September 8, Retrieved 15 June 2021, [https://blogs.lse.ac.uk/europpblog/2020/09/08/seizing-the-democratic-opportunity-in-montenegro/?fbclid=IwAR2VCiG\\_-o4EMzkqfjTk8KUUIWPpoYJcKMinGvVnKPLS6CUFrMabHYIG414](https://blogs.lse.ac.uk/europpblog/2020/09/08/seizing-the-democratic-opportunity-in-montenegro/?fbclid=IwAR2VCiG_-o4EMzkqfjTk8KUUIWPpoYJcKMinGvVnKPLS6CUFrMabHYIG414).

<sup>64</sup> Hoxhaj (n 3).



democracy in Albania in the future, as they were not properly scrutinised by parliament and civil society.<sup>65</sup> While the citizens' rights were limited, organised crime continued its operation, aided by both the public's attention being distraction due to COVID-19, and its related veil of legal restrictions providing cover (Zhillia 2020).<sup>66</sup>

The first concern here is that the Albanian Constitution requires that limitations to the rights and freedoms of an individual may be established only by law passed in parliament, and not by a government decision. Second, the government decision stated that the state of emergency would last until 23 July 2020 – even though under the Constitution, 'the state of emergency' may be proclaimed only after parliamentary approval, and last for only 30 days, after which it may be reviewed (Bianku 2020) by parliament, before it may be renewed for another 30 days.<sup>67</sup> Third, the government amended the 'criminal code', and introduced new sanctions for breaches of the lockdown rules<sup>68</sup> and voluntary spread of infectious diseases.<sup>69</sup> When amending the criminal code, the Albanian Constitution requires that all parties are advised and consulted before any changes can be made in line with the constitutional framework. Fourth, the government derogated from Articles 8 and 11 of the ECHR, Articles 1 and 2 of Protocol no 1 and Article 2 of Protocol no 4 to the ECHR on 1 April 2020, and did not inform parliament or

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<sup>65</sup> When imposing extraordinary measurements, it must fall within the areas foreseen within the Albanian Constitution which are stipulated in Article 170, stating that that extraordinary measures can be imposed in a 'state of war, state of emergency, state of natural disaster, and can last for as long as these conditions continue'.

<sup>66</sup> Zhillia (n 5).

<sup>67</sup> L. Bianku, 2020. 'Albania – Some Exceptional Extraordinary Measures', *VerfBlog*, May 17, Retrieved 15 June 2021, <https://verfassungsblog.de/albania-some-exceptional-extraordinary-measures>.

<sup>68</sup> The fines induced a fine of up to 5 million Albania Lekë (USD 45,000) for individual citizens, and for any trade in food or medicine that did not comply with the specified government safety regulations, citizens could be fined up to 10 million Lekë (USD 90,000). The police and army were tasked to enforce the lockdown rules, and they used drones to detect any violation of the new COVID-19 regulations.

<sup>69</sup> See Law Nr. 35/2020, 'On some additional and amendments of the Law no. 7895, Jan. 01, 1995, 'Criminal Code of the Republic of Albania'', amended, Retrieved 15 June 2021, <https://www.parlament.al/Files/Akte/20200421135459ligj%20nr.%2035,%20dt.%2016.4.2020.pdf>.

public of this derogation.<sup>70</sup> These examples indicate a government system built around an executive (prime minister) with significant control once in power.

The most eloquent example of Albania's autocratic model of governance during the COVID-19 pandemic was its demolition of the National Theatre building on 17 May 2020, at around 4:30am (a time of day when strict COVID-19 curfew rules were in place). Over 30 citizens were arrested and detained when they went to protest the demolition by local and central government authorities; these citizens were charged under the COVID-19 legal measures prohibiting mass gatherings, and for breaking curfew. The proposal to demolish the National Theatre building was first initiated in 2018, as it was deemed to be unsafe. The President of Albania filed a review request to the Constitutional Court on 24 July 2019,<sup>71</sup> and a legal decision was adopted by government to demolish the building. Due to immediate protest and civil resistance,<sup>72</sup> the government pulled back from the plan. Upcoming local elections were on the horizon; the building had been noted as endangered by the Europa Nostra, and one may conclude that its summary demolition was not considered a vote-winning move.<sup>73</sup>

The preservation of the old building / proposition to build a new National Theatre has been a contentious political topic, and the timing of its demolition raised many concerns relating to the rule of law, since there had not yet been a clear legal opinion given by the courts on the

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<sup>70</sup> Council of Europe, 2020. 'Derogation contained in a Note verbal from the Permanent Representation of Albania to the Council of Europe', March 31, Retrieved 15 June 2021, [https://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/results?\\_coconventions\\_WAR\\_coeconventionsportlet\\_formDate=1496885333809&\\_coconventions\\_WAR\\_coeconventionsportlet\\_searchBy=cets&\\_coconventi](https://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/-/conventions/declarations/results?_coconventions_WAR_coeconventionsportlet_formDate=1496885333809&_coconventions_WAR_coeconventionsportlet_searchBy=cets&_coconventi).

<sup>71</sup> See the request of the President of Republic Ilir Meta to the Constitutional Court, no. 2580 [translated], 24 July 2019, Retrieved 15 June 2021, <http://president.al/presidenti-meta-depoziton-kerkesen-per-shpalljen-antikushtetues-te-ligjit-per-shembjen-e-teatrit-kombetar-ne-gjykatene-kushtetuese/>.

<sup>72</sup> Notably by a group of artists known as the 'The Alliance for the Protection of the Theatre', which has become a civil society movement in Albania; Retrieved 15 June 2021, <https://www.balcanicaucaso.org/eng/Areas/Albania/Albania-the-civic-duty-of-protecting-the-National-Theatre-198574>.

<sup>73</sup> Europa Nostra, 2020. 'European Call to Save 7 Most Endangered Heritage Sites', April 21, Retrieved 15 June 2021, <https://www.europanostra.org/european-call-to-save-7-most-endangered-heritage-sites/>.

legality of the decision by the relevant public authorities. The Alliance for the Protection of the Theatre has filed six different claims to the Special Prosecution Office,<sup>74</sup> accusing different public officials, including the Prime Minister and the Mayor of Tirana<sup>75</sup> of the unlawful destruction of a cultural and historical site.

In summary, one of the main concerns regarding rule of law and democracy in Albania is that the government adopted legal measures that were not in line with the constitutional framework. Second, by amending the criminal code to permit the imprisonment of citizens for significant periods of time for the ‘voluntary spreading of infectious diseases’, such legal instruments are open to arbitrary interpretation, potentially violating citizens’ rights and freedoms in the courts (Hoxhaj 2020);<sup>76</sup> it is very difficult to prove scientifically how an individual can ‘voluntarily’ infect someone else with COVID-19 virus. Therefore, bypassing parliament and courts, ignoring public discourse, the misuse of powers (such as in the case of the National Theatre), and derogation from the ECHR without consulting key stakeholders are all features closely linked with an autocratic model of governance, where institutions and instruments that serve to uphold the rule of law are marginalised. During COVID-19, the Albanian government imposed new measures to expand its legal powers, state policing and surveillance, and further enhance its political agenda.

#### ***2.2.4. North Macedonia***

The President of North Macedonia declared a state of emergency on 18 March 2020, in light of the COVID-19 pandemic, after requests from both the government and parliament. Usually,

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<sup>74</sup> E. Kadriu, 2020, ‘Alliance for Theater protests for SPAK; To launch investigations into the six charges filed [translated]’, July 16, Retrieved 15 June 2021, <https://citizens-channel.com/2020/07/16/aleanca-per-teatrin-proteste-para-spak-te-nisin-hetimet-per-gjashte-kallezimet-e-depozituara/>.

<sup>75</sup> European Western Balkans, 2020. ‘Demolition of National Theatre in Tirana Triggers Protests’, May 18, Retrieved 15 June 2021, <https://europeanwesternbalkans.com/2020/05/18/demolition-of-national-theatre-in-tirana-triggers-protests/>.

<sup>76</sup> Hoxhaj (n 3).

it is the government that asks parliament to declare a state of emergency<sup>77</sup> – however, parliament had not been in session since February, due to the scheduled elections for 12 April 2020, which were subsequently postponed until 15 July 2020 (Marusic 2020).<sup>78</sup> Since the outbreak of COVID-19, the government imposed strict rules to restrict its citizens' rights, and ordered one of the longest curfews (60-66 hours, expanding from Fridays to Tuesdays), with full stay-at-home orders.

There was no opposition to the restrictive measures adopted at first, but on 14 April 2020, the police attempted to arrest three citizens in Skopje whom they believed to be in violation of the lockdown rules – later in the year, wearing masks become mandatory by law, including indoor and outdoor public spaces. One of the arrested citizens was a politician from an opposition party, and the arrest initiated a major protest. The epilogue to this incident was a further 23 indictments on account of the violation of health regulations during the pandemic.<sup>79</sup> At the same time, the government introduced a mobile phone application called 'StopKorona', which exchanges data with nearby phones to alert users to their being in close proximity with someone infected with COVID-19.<sup>80</sup> There are concerns about personal data protection and surveillance regarding this application, as a number of experts have warned about the privacy implications of such data collection, and how it might be used by the government (Stojkovski 2020)<sup>81</sup> – especially close to an election cycle.

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<sup>77</sup>N. Markovikj, 2020. 'Democracy and the State of Emergency: Easing Measures and Rising Tensions in the Struggle with the Corona Crisis in the Western Balkans, Croatia and Slovenia', Friedrich-Ebert-Stiftung Dialogue Southeast Europe, Retrieved 15 June 2021, <http://library.fes.de/pdf-files/bueros/belgrad/16286.pdf>.

<sup>78</sup>S. Marusic, 2020. 'North Macedonia Postpones April Polls over Pandemic', *Balkan Insight*, March 17, Retrieved 15 June 2021, <https://balkaninsight.com/2020/03/17/north-macedonia-postpones-april-polls-over-pandemic>.

<sup>79</sup>Markovikj (n 78).

<sup>80</sup>StopKorona! is a mobile app developed for the prevention and control of the coronavirus. The app is intended to trace exposure to potentially infected persons, by the detection of the distance between mobile devices/applications by using bluetooth technology. The government offered assurance of its safety. Retrieved 15 June 2021, <https://stop.koronavirus.gov.mk/en>.

<sup>81</sup>B. Stojkovski, 2020. 'North Macedonia Leads Region in COVID-19 Tracing App', *Balkan Insight*, April 16, Retrieved 15 June 2021, <https://balkaninsight.com/2020/04/16/north-macedonia-leads-region-in-covid-19>

During the pandemic, new tensions arose in the already strained relationship between the government and the Constitutional Court. Parliament reconvened under constitutional provisions related to the state of emergency, after being dissolved for elections – and the Constitutional Court took some time to approve this. Additionally, as part of the COVID-19 economic rescue package,<sup>82</sup> the government decided to reduce the wages of thousands of public officials, including judges. The Constitutional Court initiated a procedure to evaluate the constitutionality of the government decision, and temporarily halted its implementation (Magleshov 2020).<sup>83</sup> The government accused the Constitutional Court of bias, as the wages of the judges sitting in the Constitutional Court were affected by these austerity measures.<sup>84</sup> Despite reducing the wages of thousands of public officials, the government offered payment cards loaded with a credit of 9,000 denars (EUR 150) to citizens in households earning less than 15,000 dinars (EUR 235) per month, to be spent on locally-made products and local services within 30 days. As in Serbia, this was viewed by civil society as a sitting-government bribe – and it would seem to have been just as effective, as again the incumbent government won its election.<sup>85</sup> Later in the year, reports from civil society, including an OECD report containing testimony from Macedonian CSOs, suggested that the government misused the COVID-19 legal measures and the resources allocated to deal with the pandemic in its favour, as part of its re-election bid.<sup>86</sup>

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tracing-app.

<sup>82</sup>OECD, 2021. ‘The COVID-19 Crisis in Northern Macedonia’, January 31, Retrieved 15 June 2021, <https://www.oecd.org/south-east-europe/COVID-19-Crisis-in-North-Macedonia.pdf>.

<sup>83</sup>V. Magleshov, 2020. ‘Court to Check North Macedonia’s Flood of Govt Decrees’, *Balkan Insight*, April 22, Retrieved 15 June 2021, <https://balkaninsight.com/2020/04/22/court-to-check-north-macedonias-flood-of-govt-decrees>.

<sup>84</sup>Markovikj (n 78).

<sup>85</sup>M. Tumanovska and A. Heil, 2020. ‘North Macedonia Has A Card Up Its Sleeve To Kick Coronavirus Economic Malaise: Keep Shoppers Home’, Radio Free Europe, July 5, Retrieved 15 June 2021, <https://www.rferl.org/a/north-macedonia-has-a-card-up-its-sleeve-to-kick-covid-economic-malaise-keep-shoppers-home-/30706847.html>.

<sup>86</sup>OECD, (n 83).

The COVID-19 crisis in North Macedonia provided the opportunity for government to strengthen its powers and improve its image before the new parliamentary elections, and to further postpone a long-awaited census, which has been a highly sensitive and disputed issue between the opposition parties and governing coalition parties due to their ethnic division.<sup>87</sup>

The decision to use the police to arrest political rivals on the premise of breaking lockdown rules demonstrate increased state-policing; and introducing austerity measures which included Constitutional Court judges and key members of the judiciary can be perceived as undermining the work of the justice system – it is reasonable to interpret the government’s underlying decision to reduce these judges’ wages was an act of revenge against an institution which had previously declared the government’s decisions to be unconstitutional.

### ***2.3. Volatile Autocratic Regimes***<sup>88</sup>

#### ***2.3.1. Kosovo***

The government of Kosovo declared a ‘public health emergency’ on 11 March 2020, and a lockdown on 23 March 2020. These measures were continually modified, reflecting the conflicting approaches from the president and prime ministerial offices, fluctuating between hard and soft restrictions/lockdown enforcement. As a result of the route taken by the government, a political battle between the Prime Minister Kurti and then President Thaçi ensued,<sup>89</sup> the latter contending that measures being used without a declaration of a ‘national state of emergency’ were unconstitutional, filing a complaint with the Constitutional Court.<sup>90</sup>

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<sup>87</sup> F. Mejdini, (2021. ‘Why is it So Difficult To Hold a Census in North Macedonia?’, *Aljazeera*, May 12, Retrieved 15 June 2021, [https://www.aljazeera.com/features/2021/5/12/why-is-it-so-difficult-to-hold-a-census-in-north-macedonia?fbclid=IwAR2ghJ\\_DCWFcbwddHQESp-q5Q-0IA9ayB5i\\_gOdohkojvJHqGGZ\\_rU1h0ng](https://www.aljazeera.com/features/2021/5/12/why-is-it-so-difficult-to-hold-a-census-in-north-macedonia?fbclid=IwAR2ghJ_DCWFcbwddHQESp-q5Q-0IA9ayB5i_gOdohkojvJHqGGZ_rU1h0ng).

<sup>88</sup> The autocratic regime here is unpredictable, and strongly reliant on the role of the international community. National factors of the quality of democracy depends on international patronage.

<sup>89</sup> S.Walker, 2020. ‘Kosovans Look on Aghast as Government Falls while Coronavirus Bites’, *The Guardian*, March 26, Retrieved 15 June 2021, <https://www.theguardian.com/world/2020/mar/26/kosovo-government-falls-in-vote-of-no-confidence>.

<sup>90</sup> Government Decision [No. 01/15], of 23 March 2020, is incompatible with Article 55 [Limitations on

The Constitutional Court ruled on 30 March 2020 that the government's lockdown decision of 23 March did not comply with Article 55 of the Constitution, 'Restrictions on Fundamental Rights and Freedoms', explaining that government could not restrict fundamental rights through a decision without declaring a state of emergency, and that 'restrictions on the fundamental rights of citizens can only be realised with the approval of parliament through a special law'.<sup>91</sup> Furthermore, the Constitutional Court also tried to clarify the wording and meaning of both 'restriction' and 'avoidance', in relation to Articles 55 and 56 of the Constitution, and suggested that 'restriction' of human rights and freedoms should also be done 'only by law' through an act of parliament, and not by government decision or presidential decree (Grazhdani 2020).<sup>92</sup>

In order to understand this conflict between the president and prime minister, it is important to note that in usual circumstances, the president has a largely ceremonial role. Once a state of emergency was announced, decision-making authority was elevated to Presidential level.<sup>93</sup> In reality, this conflict was a power struggle between Kurti<sup>94</sup> and Thaçi<sup>95</sup> over the disagreements

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Fundamental Rights and Freedoms] of the constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] and Article 2 (Freedom of Movement) of Protocol no. 4, Article 8 (Right to Respect for Private and Family Life) and Article 11 (Freedom of Assembly and Association) of the ECHR' (Constitutional Court, 2020).

<sup>91</sup> The government's decision on the COVID-19 lockdown rules did not comply with Articles 55 (restriction of fundamental rights and freedoms) Articles 35 (freedom of movement), Articles 36 (right to privacy), Articles 43 (freedom of assembly) of the Constitution and Article 2 (freedom of movement) of Protocol no. 4, Article 8 (right to respect for private and family life) and Article 11 (freedom of assembly and association) of the ECHR. The Constitutional Court of the Republic of Kosovo (2020), Judgment in Case No. KO54/20, Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020, Retrieved 15 June 2021, [https://gjk-ks.org/wp-content/uploads/2020/04/ko\\_54\\_20\\_agj\\_ang.pdf](https://gjk-ks.org/wp-content/uploads/2020/04/ko_54_20_agj_ang.pdf).

<sup>92</sup> D. Grazhdani, 2020. 'Kosovo's Constitutional Court finds COVID-19 Measures Unconstitutional', *Oxford Human Rights Hub: A Global Perspective on Human Rights Blog*, June 1, Retrieved 15 June 2021, <http://ohrh.law.ox.ac.uk/kosovos-constitutional-court-finds-covid-19-measures-unconstitutional>.

<sup>93</sup> Once the Kosovo parliament passes a national state of emergency, the President (who leads the National Security Council) has executive powers during the time of the State of National Emergency (Constitution for the Republic of Kosovo, 2020).

<sup>94</sup> Albin Kurti, the Chairman of the Self-determination Party of Kosovo (Albanian: Vetëvendosje), who came into office in February through a coalition partnership with the Kosovo Democratic League (Albanian: Lidhja Demokratike e Kosovës); this only lasted for 51 days as a government, Retrieved 15 June 2021, <https://europeanwesternbalkans.com/2020/03/26/albin-kurtis-government-falls-the-next-step-is-the-appointment-of-a-new-candidate-for-prime-minister>.

<sup>95</sup> President Hashim Thaç, whose role is largely ceremonial as president, but personally is very influential.

about who should lead the upcoming negotiations with Serbia. Kurti's government was heavily pressured by both the EU and US to lift tariffs on goods coming from Serbia to Kosovo;<sup>96</sup> the US went so far as suspending aid.<sup>97</sup> Richard Grenell, then the US special envoy for Kosovo under the Trump Administration, was in favour of President Thaçi handling negotiations, while the EU supported Prime Minister Kurti – constitutionally and legally the appropriate representative. At the time, Kurti was leading a minority government<sup>98</sup> with a coalition partner, the Kosovo Democratic League. After US government pressure and an aid-freeze, the coalition partnership collapsed, and on 25 March 2020, the members of the Kosovan parliament passed a motion of no confidence in Prime Minister Kurti; his government eventually had to resign.<sup>99</sup>

Kurti repeatedly refused to answer President Thaçi's request to provide a candidate from his party to form a new government. The president then mandated the Kosovo Democratic League to form a new government – something Kurti deemed unconstitutional, filing a complaint with the Constitutional Court. On 29 May 2020, the Constitutional Court ruled that a new government could be formed, and that the president was not in breach of the Constitution by giving a mandate to the Kosovo Democratic League – the second party, in terms of number of members of parliament.<sup>100</sup> On 3 June 2020, the parliament confirmed a new government led by

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<sup>96</sup> X, Bami, 2020. 'Kosovo PM Offers to 'Partially' Lift Serbian Import Tariff', *Balkan Insight*, February 27, Retrieved 15 June 2021, <https://balkaninsight.com/2020/02/27/kosovo-pm-offers-to-partially-lift-serbian-import-tariff>.

<sup>97</sup> A. Mackinnon, 2020. 'Why the United States is Stoking a Crisis in Kosovo', *Foreign Policy*, April 17, Retrieved 15 June 2021, <https://foreignpolicy.com/2020/04/17/united-states-stoking-crisis-kosovo-serbia-peace-deal-trump-grenell>.

<sup>98</sup> The Economist, 2020. 'Albin Kurti's New Start in Kosovo: Can the New Prime Minister End the Stand-off with Serbia?', February 13, Retrieved 15 June 2021, <https://www.economist.com/europe/2020/02/13/albin-kurtis-new-start-in-kosovo>.

<sup>99</sup> Disputes between the parties in office mostly deteriorated in the face of a drastic split on how to handle the tariffs imposed on Serbia and the subsequent dialogue, amidst US pressure to move forward, and an obvious diversion between US and EU foreign policy. This eventually led to Kurti's Self-Determination Party presenting an unyielding front against lifting the tariffs all at once, and the Kosovo Democratic League Party, on the other side, insisting on a more flexible attitude in the matter, especially in a situation aided by a strategic partner such as the US.

<sup>100</sup> X. Bami, 2020. 'Kosovo Court Says Govt can be Formed without Elections', *Balkan Insight*, May 26, Retrieved 15 June 2021, <https://balkaninsight.com/2020/05/29/new-kosovo-govt-can-be-formed-without-elections-court>



the Democratic League of Kosovo and headed by the new Prime Minister Hoti. Shortly afterwards, the Hoti government agreed to lift tariffs on goods coming from Serbia,<sup>101</sup> and the US government<sup>102</sup> released the withheld aid to Kosovo. Thaçi was indicted for war crimes by the International Criminal Court<sup>103</sup> a few days before the scheduled Kosovo / Serbia summit on 27 June 2020, arranged by the Trump administration at the White House; Thaçi delegated Hoti to lead the negotiations on his behalf.

The summit was duly postponed until the autumn, and on 4 September 2020, Hoti and Vučić signed separate agreements under the US government observation at the White House. The US government was not a signatory, but made use of the opportunity to attempt to improve the Trump administration's weak foreign policy record, close to the US Presidential election in November; President Trump also received a nomination for the Nobel Peace Prize as a facilitator of the Serbia-Kosovo deal. The separate agreements are mostly political commitments to increase more economic cooperation; their legal bases are weak and unclear, and are mostly voluntary, without any legal enforcement mechanisms. However, the most critical part of agreements was over the sharing and management of the Gazivode/Ujmani lake between Kosovo and Serbia.<sup>104</sup> The agreement was opposed by opposition parties led by Kurti,

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rules.

<sup>101</sup> D. Emini, 2020. 'A Weak Prime Minister and a Powerful President', *Prishtina Insight*, June 5, Retrieved 15 June 2021, [https://prishtinainsight.com/a-weak-prime-minister-and-a-powerful-president/?fbclid=IwAR0pDEdzctwwCE5ZCHUOI\\_caAJldIwyZ51aqH-jcD4qfnfd4oxUgYORxMHo](https://prishtinainsight.com/a-weak-prime-minister-and-a-powerful-president/?fbclid=IwAR0pDEdzctwwCE5ZCHUOI_caAJldIwyZ51aqH-jcD4qfnfd4oxUgYORxMHo).

<sup>102</sup> After the new Kosovo government lifted the tariffs on Serbian imports, both the presidents of Kosovo and Serbia were invited to a White House Balkan summit scheduled for 27 June 2020, with the aim of making a peace accord that might open the path for mutual recognition between the two states, and give the Trump administration a foreign policy achievement before heading into the November 2020 presidential election. See Bojan Pancevski, Laurence Norman and Gordon Lubold (2020), 'White House to Host Balkan Peace Talks: Serbia, Kosovo Leaders Invited to White House on June 27; Trump Hopes for Pre-election Deal', *Wall Street Journal*, June 15, 2020, Retrieved 15 June 2021, <https://www.wsj.com/articles/trump-to-host-balkan-peace-talks-11592241165>.

<sup>103</sup> Human Rights Watch, 2020. 'Kosovo: War Crimes Indictment Advances Justice'. June 25, Retrieved 15 June 2021, <https://www.hrw.org/news/2020/06/25/kosovo-war-crimes-indictment-advances-justice>.

<sup>104</sup> The US Department of Energy was assigned to undertake a study on how to share the lake resources and management between the two countries, with US assistance. U. Hajdari, 2020. 'In Kosovo, 'Lake Trump' Lands with a Bump', *Politico*, October 6, Retrieved 15 June 2021, <https://www.politico.eu/article/kosovo-lake-donald-trump-gazivode-ujman/>.

who had already rejected the US approach when still in government in February 2020. They claimed there was nothing substantial achieved in legal terms between Kosovo and Serbia; the efforts appeared to be more of a publicity stunt for the Trump administration within the US presidential election cycle. Civil society has been calling for more transparency to scrutinise the legality of the agreement signed at the White House (in which both parties made a separate – not joint – agreement) before it is implemented.<sup>105</sup> However, the deal agreed under the Trump administration is questionable if it will be fully implemented as Kurti came back to power as Prime Minister of Kosovo in a snap election held on 14 February 2021 and the Biden administration have since expressed that the US position will be aligned with EU foreign policy in regards to Kosovo and Serbia.<sup>106</sup>

The COVID-19 crisis in Kosovo demonstrates Fraenkel's argument that the principles of the rule of law are at high risk when a group or individual has seized powers competing with constitutional limitations. This is especially the case in the example of Kosovo: a president occupying a largely ceremonial role under the Constitution topples a government elected by its citizens with the support of international powers – as Bieber (2020) puts it, an 'undemocratic external intervention fed off elites'.<sup>107</sup> The Kosovan president used external support from the US government under the Trump administration to retain power and control exceeding the constitutional arrangement,<sup>108</sup> a clear threat to the rule of law.

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<sup>105</sup> Dutche Welle, 2020. 'Reactions in Pristina, the region and the EU to the Kosovo-Serbia economic agreement [translated]', September 5, Retrieved 15 June 2021, <https://www.dw.com/sq/reagime-n%C3%AB-prishtin%C3%AB-rajon-dhe-be-p%C3%ABr-marr%C3%ABveshjen-ekonomike-kosov%C3%AB-serbi/a-54823830>.

<sup>106</sup> Euro News, 2021. 'President Joe Biden says 'Mutual Recognition' Key to Kosovo, Serbia talks', April 20, Retrieved 15 June 2021, <https://www.euronews.com/2021/04/20/president-joe-biden-says-mutual-recognition-key-to-kosovo-serbia-talks>.

<sup>107</sup> Bieber (n 23) 34.

<sup>108</sup> D. Emini, 2020. 'For Kosovo, Democracy Remains Elusive: How the Recent Constitutional Court Decision has Derailed Democratic Progress', *Kosovo 2.0*, June 12, Retrieved 15 June 2021, [https://kosovotwopointzero.com/en/for-kosovo-democracy-remains-elusive/?fbclid=IwAR0rvTei5e3\\_umtnzSyzBNeKyIMOIZBvvXjy08sZFLJIZCKOQIO0yH0C1ns](https://kosovotwopointzero.com/en/for-kosovo-democracy-remains-elusive/?fbclid=IwAR0rvTei5e3_umtnzSyzBNeKyIMOIZBvvXjy08sZFLJIZCKOQIO0yH0C1ns).

## **2.4. Ethnic Autocracies**<sup>109</sup>

### **2.4.1. Bosnia and Herzegovina**

Bosnia and Herzegovina declared a state of emergency on 17 March 2020,<sup>110</sup> and thereafter, a number of legal measures were adopted in response to the COVID-19 crisis. According to the decision on the state of emergency aimed at preventing the spread of COVID-19, ‘the governments of the entities and the Brčko District of Bosnia and Herzegovina could apply individual measures in accordance with the laws within their competence’, although the coordination body for the entities’ governments would be informed of the adopted measures.<sup>111</sup> Restrictions on citizens were imposed, and a mandatory stay-at-home order at all times was enforced by the police for everybody under 18 and over 65.<sup>112</sup> Shortly afterwards, on 20 March 2020, the Federation of Bosnia and Herzegovina<sup>113</sup> took a similar decision in adopting a state of emergency order to prevent the spread of COVID-19; it was later followed by Republika Srpska on 6 April 2020.<sup>114</sup> The legal measures proposed by the government were adopted in parliament, but exceeded constitutional provisions. There was a violation of human rights, later

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<sup>109</sup> Autocracy is exercised along ethnic lines, rather than conventional factors such as charismatic leader or use of law and institutions for autocratic leaders.

<sup>110</sup> Official Gazette of Bosnia and Herzegovina, 2020. ‘Document Number 18/20’, the Government decision on the legal measures to prevent the spread of COVID-19 [translated], March 17, Retrieved 15 June 2021, <http://www.sluzbenilist.ba/page/akt/bTsBUE4N5GM=>.

<sup>111</sup> *ibid.*

<sup>112</sup> M. Zivanovic, 2020. ‘Democracy and the State of Emergency: Easing Measures and Rising Tensions in the Struggle with the Corona Crisis in the Western Balkans, Croatia and Slovenia’, *Friedrich-Ebert-Stiftung Dialogue Southeast Europe*, Retrieved 15 June 2021, <http://library.fes.de/pdf-files/bueros/belgrad/16286.pdf>.

<sup>113</sup> The Federation of Bosnia and Herzegovina, 2020. ‘New orders, recommendations and decisions adopted at today’s fourth extraordinary session of the Federal Civil Protection Staff [translated]’, March 20, Retrieved 15 June 2021, <http://www.fucz.gov.ba/na-danasnoj-cetvrtoj-vanrednoj-sjednici-federalnog-staba-civilne-zastite-usvojene-nove-naredbe-preporuke-i-odluke/>.

<sup>114</sup> Republika Srpska, 2020. ‘New orders to combat the COVID-19 pandemic [translated],’ April 6, Retrieved 15 June 2021, <https://vladars.net/sr-SP-Cyrl/Documents/Zakljucak%20o%20organicenju%20i%20zabrani%20kretanja%20na%20ter%20RS.pdf>.

confirmed by the Constitutional Court, with regard to the ‘prohibition of movement of persons less than 18 years of age and over 65’.<sup>115</sup>

Bosnia and Herzegovina was also preparing for local elections – subsequently postponed until 15 November 2020. The fragile democracy and complexity of the political system of Bosnia and Herzegovina,<sup>116</sup> and the function of the rule of law have been seriously challenged by the COVID-19 crisis. These challenges were later witnessed more openly, in the special local elections that were held on 20 December 2020 after 12 years of deadlock, following a dispute of more than a decade between parties representing the city’s two main ethnic. However, it must be noted that holding the election of Mostar after 12 years of absence was in itself an achievement, despite the fact that it was held in the middle of a pandemic and all parties attempted to make use of the COVID-19 crises to their advantage. The elections were only called after a ruling by European Court of Human Rights in 2019,<sup>117</sup> instigated by a Philosophy teacher from Mostar, Irma Baralija, who sued the Bosnia and Herzegovina for failing to hold elections for more than 10 years.<sup>118</sup>

The internal structure of the Bosnia and Herzegovina state consists of two entities: the Federation of Bosnia and Herzegovina, and Republika Srpska – governed together by Bosniacs, Croats, and Serbs (Keil and Perry 2016).<sup>119</sup> The composition and decision-making of several

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<sup>115</sup> In its decision on 22 April 2020, the Constitutional Court concluded that there had been a violation of the freedom of movement of citizens under ‘Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms’, as well as on age discrimination. *Sarajevo Times* (2020), ‘Constitutional Court: Ban on the Movement of Persons under the Age of 18 and over 65 is Violation of Human Rights’, Retrieved 15 June 2021, <https://www.sarajevotimes.com/constitutional-court-ban-on-the-movement-of-persons-under-the-age-of-18-and-over-65-is-violation-of-human-rights>.

<sup>116</sup> R. Hayden, *From Yugoslavia to the Western Balkans Studies of a European Disunion, 1991-2011* (London: Brill, 2013) 289-319.

<sup>117</sup> *Baralija v. Bosnia and Herzegovina* [2019] 369 ECHR.

<sup>118</sup> European Court of Human Rights Press Release, 2019. *Baralija v. Bosnia and Herzegovina* (application no. 30100/18), 29.10.2019, Retrieved 15 June 2021, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22003-6548548-8659614%22%7D>).

<sup>119</sup> S. and V. Perry, *State-Building and Democratization in Bosnia and Herzegovina*, (Abingdon: Routledge, 2016) 1-15.

administrative bodies are based upon ethnic criteria, which significantly affected some important issues raised by the pandemic. For example, there was a failure to reach an agreement on the distribution of USD 361 million financial assistance from the IMF,<sup>120</sup> over the issue of how much money should be assigned to each entity. However, under pressure from the EU and US Ambassadors in Bosnia and Herzegovina, an agreement was eventually reached on how the funds may be distributed. The Republika Srpska received about 38 percent; the Federation of Bosnia and Herzegovina received about 62 percent.<sup>121</sup>

The ethnic lines of political discourse (Jansen, Brković and Čelebičić 2017)<sup>122</sup> prevented a unified coordination of COVID-19 crisis-management measures. Initially, state entities showed willingness to work together, but the country could not establish a functional coordination mechanism to implement legal measures equally; the Federation of Bosnia and Herzegovina and Republika Srpska applied different measures, with no clear joint plan to mitigate the pandemic crisis outcomes.<sup>123</sup> The complex institutional set-up, and ethnicity-based decision-making in Bosnia and Herzegovina seriously undermines its overall institutional capacity to respond swiftly to crises. Although authorities attempt to present themselves as committed to managing the COVID-19 pandemic and its economic impact, their strategy is based upon dismissing opposition voices, especially from the opposing ethnic group.<sup>124</sup>

Bosnia and Herzegovina is an authoritarian regime split along ethnic lines, as characterised by Bieber: an ‘ethnic autocracy’. Elements of this were clearly demonstrated during the pandemic,

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<sup>120</sup> IMF, 2020. ‘IMF Executive Board Approves US\$361 Million in Emergency Support to Bosnia and Herzegovina to Address the COVID-19 Pandemic’, Press Release No 20/176, Retrieved 15 June 2021, <https://www.imf.org/en/News/Articles/2020/04/20/pr20176-bosnia-and-herzegovina-imf-executive-board-approves-usd361-million-in-emergency-support>.

<sup>121</sup> *ibid.*

<sup>122</sup> S. Jansen, Č. Brković and V. Čelebičić, *Negotiating Social Relations in Bosnia and Herzegovina: Semiperipheral Enlargement* (Abingdon: Routledge, 2017) 1-29.

<sup>123</sup> Zivanovic (n 113) 9-15.

<sup>124</sup> *ibid.*

as both state entities have a monopoly over their ethnic constituency, and are unwilling to work together to deal with the crisis, which is also an issue when it comes to upholding the rule of law (as each side can apply different rules). This was exhibited in the way that authorities governing each entity introduced measures without prior consultation or agreeing to coordinate with each other, despite the fact that the state's death toll ranked Bosnia and Herzegovina among the five countries in the world per number of COVID-19 virus-related deaths per million inhabitants.<sup>125</sup> Furthermore, the COVID-19 crises was used during the local elections to fuel new ethnic tensions, each one blaming the other side for spreading the virus. Fraenkel highlights that such a threat, and the marginalisation of the Constitution by the government, are key features of an authoritarian regime.<sup>126</sup>

### **3. The Legacy of Covid-19: Increased Autocratic Models of Governance**

The country case studies demonstrate an increased shift towards an autocratic governance model, especially prevalent during the first wave of COVID-19 and lockdown period in 2020. The notion that the COVID-19 pandemic provided a new opportunity for almost all of the six countries of the Western Balkans to increase their powers, without any due process or regard for the rule of law and constitutional constraints, has been confirmed by examples in all states. Our conclusion from the findings above is that Western Balkans governance during COVID-19 not only resulted in the expansion of an authoritarian approach, but went further, by exploiting the pandemic as an opportunity to advance political agendas away from public scrutiny.

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<sup>125</sup> E. Bajrović, 2021. 'BiH: Death From the Crown Or Within the Crown?' [translated]. *Radio Slobodna Evropa*. April 8, Retrieved 15 June 2021, <https://www.slobodnaevropa.org/a/bih-smrt-od-korone-ili-s-koronom-/31193674.html>.

<sup>126</sup> Fraenkel (n 17) 14.

Furthermore, as our findings show, most of the emergency legalisations and measures were brought into force through a set of decrees and decisions from governments leaders – without parliamentary procedures, consultations, or scrutiny from the usual participants in a healthy democracy, such as the media, civil society, academia and the courts. When key stakeholders that help to uphold the rule of law and facilitate the function of the checks and balances system are prevented and marginalised through legal means, there is a high risk for deployment of an autocratic governance model – Fraenkel’s ‘dual state’.

Furthermore, while Western Balkans governments are enshrined in modern liberal democratic constitutional settings, they can further neutralise the institutional role of the checks and balances that uphold the rule of law. Observers of the Western Balkans are accustomed to these kinds of government practices, but the examples we present in our case study were conducted more openly and freely within the COVID-19 crisis. This should be a major point of concern, as this encroachment of autocracy has further weakened the rule of law, and damaged citizens’ trust in the strength of functional legal institutions.

When conceptualising our examples in each individual country, we applied Frantz’s (2016) idea that modern autocrats respond to crises by using political parties, legislatures, elections, and other institutions typically associated with democracies to strengthen their grip on power, and to exploit any crisis in order to weaken the checks and balances that might challenge their authority; the state and government become more individualised around the leader of the state or government.

During lockdown, the leaders of the Western Balkans were able to further monopolise and capture institutions by passing new laws to control the division of power, and ensure their leadership dominance. In some cases, this became individualised to a sole leader – clearly the case in Serbia, Montenegro and Albania, where the president or prime minister was fully in

control of all government apparatus, introducing measures via simple government decrees or normative laws, easily adopted by the council of ministers or through a presidential decree.

In closing, we observe that the COVID-19 pandemic has been the latest example of how a crisis has been used as an opportunity by most governments and leaders in the Western Balkans to exacerbate further the already weak rule of law and norms of a liberal democracy – all the elements that Fraenkel, Frantz, and Bieber associate with an autocratic governance model – tendencies which have been on the rise in this region for years. We suggest, therefore, that civil society and international NGOs, the European Commission, World Bank, International Monetary Fund and European Bank for Reconstruction and Development use more of their leverage and leadership to promote the rule of law, transparency and accountability wherever possible in their COVID-19 loan packages – especially the EU, through its EU accession conditionalities, in response to the latest backsliding of the rule of law in the Western Balkans. The EU's conditionality in regard to the rule of law standards must be reinforced, in the light of legal measures introduced by the governments of the Western Balkans in responding to the COVID-19 crisis; when the pandemic abates, the EU should no longer tolerate 'stabilocracy' in the region.

#### **4. A New EU Approach for the Western Balkans after COVID-19**

Since the collapse of communism in the early 1990s, the six Western Balkans countries have re-ordinated their foreign and domestic policy towards EU accession. At present, they are at different stages in negotiating their accession: Albania, Montenegro, North Macedonia, and Serbia are official candidate countries, whereas Kosovo, Bosnia and Herzegovina are potential candidates. So far, only Montenegro and Serbia are considered frontrunners for joining the EU, according to the European Commission strategy 'A Credible Enlargement Perspective for an



Enhanced EU Engagement with the Western Balkans’,<sup>127</sup> which suggested that both countries could enter the Union by 2025. However, this would now seem unrealistic, given that both have failed to show any true commitment to upholding the rule of law during the COVID-19 crisis, and exhibit worrying signs of an increasing use of autocratic governance.

The erosion of the rule of law and state capture (Pešić 2007)<sup>128</sup> have been ongoing for some time in Serbia; the pandemic is simply exposing it more clearly. The EU has taken some notice of the challenges to the rule of law, and has not opened any EU accession chapters<sup>129</sup> for a while, as according to the European Parliament Rapporteur for Serbia, there was no tangible improvement in the rule of law, the fight against corruption, and other related good-governance reforms.<sup>130</sup> Similarly, in Montenegro, there are clear signs that the independent institutions such as the judiciary and law enforcement agencies are not capable of upholding the rule of law (Perry and Keil 2018)<sup>131</sup> in accordance with the EU liberal democracy standard, due to political interference from Djukanović; the formation of a new coalition government from October 2020 may present real opportunities for progress here.<sup>132</sup>

In the last few years, North Macedonia and Albania were blocked from opening accession talks with the EU, mainly attributed to both countries having a weak record against fighting

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<sup>127</sup> European Commission (2018), Communication on a Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans, COM (2018) 65 final.

<sup>128</sup> V. Pešić, ‘State Capture and Widespread Corruption in Serbia’ Brussels: Centre for European Policy Studies Working (2007) Document No. 26.

<sup>129</sup> Serbia, so far, has opened 17 out of 35 chapters since 2014, when it began accession talks with the Union; only 2 chapters are temporarily closed.

<sup>130</sup> A. Ivković, 2020. ‘European Parliament Increasingly Focused on Serbia – How Many MEPs are Critical of the Government?’, *European Western Balkans*, June 28, Retrieved 15 June 2021, <https://europeanwesternbalkans.com/2020/06/28/european-parliament-increasingly-focused-on-serbia-how-many-meps-are-critical-of-the-government/>.

<sup>131</sup> V. Perry and S. Keil, ‘The Business of State Capture in the Western Balkans’, *Southeastern Europe* 42(1) (2018) 1-14.

<sup>132</sup> S. Pavlovic, 2020. ‘Electoral Glimpse of Hope in Montenegro’, *Open Democracy*, September 8, Retrieved 15 June 2021, <https://www.opendemocracy.net/en/can-europe-make-it/electoral-glimpse-hope-montenegro/>.

corruption and organised crime, and upholding the rule of law (Kmezić 2020).<sup>133</sup> The EU may have learned from its experience with Serbia and Montenegro, noting that its EU accession conditionalities require improvement (Richter and Wunsch 2019)<sup>134</sup> to reduce the autocratic governance model through its ‘accession talk framework’, thereby also strengthening the rule of law. In March 2020, after the COVID-19 pandemic outbreak, the EU adopted a new accession talk framework. The new framework is organised into six thematic clusters, with a central focus on candidate states both meeting the rule of law benchmark on paper – as laid out in the Copenhagen criteria (Janse 2019)<sup>135</sup> – and showing a clear track record for upholding the rule of law.<sup>136</sup> On this basis, the 27 Member States have agreed to open accession negotiations talks with North Macedonia and Albania.

The new accession talk framework is yet to be tested – there have been indications that the first intergovernmental conference to officially launch accession talks with North Macedonia and Albania will take place sometime in 2021 – so it is too early to draw any conclusions on whether this new approach may foster more tangible results in strengthening the rule of law, or whether the EU conditionalities can transform autocratic governance into more liberal democracy. The new accession talk framework adopted for North Macedonia and Albania in 2020 was also recommended for Montenegro and Serbia by the European Commission, and on 11 May 2021,

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<sup>133</sup> M. Kmezić, ‘Recalibrating the EU’s Approach to the Western Balkans’, *European View* 2020, 19(1) (2020) 54–6.

<sup>134</sup> S. Richter and N. Wunsch, ‘Money, Power, Glory: The Linkages between EU Conditionality and State Capture in the Western Balkans’, *Journal of European Public Policy* 27 (1) (2019) 41–62.

<sup>135</sup> R. Janse ‘Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement’, *International Journal of Constitutional Law* 17 (1) (2019) 43–65.

<sup>136</sup> The European Union, at the request of the Member States, presented changes to the EU enlargement policy towards the Western Balkans. The main changes were that there must be more of a focus on fundamental reforms to the rule of law, fighting corruption, the economy, and properly functioning democratic institutions. As a result, the European Commission suggested that the process post-2020 should be that an EU candidate country would not open negotiations on 35 chapters individually, but they would be organised into six thematic clusters; (i) Fundamentals; (ii) Internal market; (iii) Competitiveness and Inclusive Growth; (iv) Green Agenda and Sustainable Connectivity; (v) Resources, Agriculture, and Cohesion; and (vi) External Relations. Retrieved 15 June 2021, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf).

the European Council decided that the new framework should also apply to Montenegro and Serbia, so that there is a stronger focus on fundamental rights, the functioning of democratic institutions and the rule of law in all countries of the Western Balkans that are pursuing accession talks with the EU.<sup>137</sup> A successful, functional framework that promotes rights, democracy and the law is needed now more than ever, given that within the EU, there are Member States such as Hungary and Poland (Sadurski 2020)<sup>138</sup> currently heading in the opposite – autocratic – direction. However, the fact that the EU has changed the accession-talks framework for North Macedonia and Albania is an indication that it has acknowledged that EU conditionalities applied so far for Serbia and Montenegro (Richter and Wunsch 2019)<sup>139</sup> have been insufficient in this regard. The COVID-19 pandemic has shone a light on current inadequacies, and lessons must be learned as to why conditionalities haven't succeeded. These evaluative improvements must come before any major changes, such as the new accession framework, are deployed in the Western Balkans (Hoxhaj 2021).<sup>140</sup>

The EU conditionality approach might have not been as successful (Kmezić 2020)<sup>141</sup> because it is based mostly on a top-down approach – engagement between the EU and Member States officials with government leaders. There is little empowerment of civil society or engagement with the media in formulating coherent and comprehensive conditions. In the current EU conditionality framework, the civil society, media, academia and opposition parties are largely set aside when it comes to the negotiations process, with scant ability to challenge governments

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<sup>137</sup> From the European Council, 'Enlargement: New Enlargement Methodology will be Applied to Montenegro and Serbia'. Press Release, 11 May, Retrieved 15 June 2021, <https://www.consilium.europa.eu/en/press/press-releases/2021/05/11/enlargement-new-enlargement-methodology-will-be-applied-to-montenegro-and-serbia/>.

<sup>138</sup> W. Sadurski, 'Constitutional Democracy in the Time of Elected Authoritarians', *International Journal of Constitutional Law*, 18 (2) (2020) 324–333.

<sup>139</sup> R. Solveig and N. Wunsch (n 135) 41-62.

<sup>140</sup> A. Hoxhaj, 'The EU Rule of Law Initiative Towards the Western Balkans'. *Hague Journal on the Rule of Law*, 13(1) (2021) 143–172.

<sup>141</sup> Kmezić (n 9) 183-198.

or hold them accountable if they have not sufficiently fulfilled those conditions. As long as these stakeholders are not viewed as equal partners in the accession process, and not provided with resources adequate and a safe space<sup>142</sup> to challenge the governments on their actions in further eroding the rule of law, involvement in corruption, and links with organised crime, the state capture will continue.

Over the past several years, the EU has remained noticeably silent on the rise of autocratic governance, and the continued erosion of the rule of law by Western Balkans' leaders, partially due to that very trade-off for stability (Mirel 2018)<sup>143</sup> offered by those leaders. For example, the EU's annual enlargement progress report – the main instrument by which the EU assesses Western Balkans states' progress towards meeting the EU conditionalities – does not always include the main examples of such erosion. This was also the case for the latest EU enlargement reports published by the Commission on 6 October 2020,<sup>144</sup> where examples of backsliding of the rule of law after the outbreak of the COVID-19 pandemic were either excluded or minimised.<sup>145</sup> For instance, EU's enlargement report for Albania failed to note how the government use the COVID-19 lockdown rule to arrest journalists and civil society activists who protested over the demolition of the National Theatre.<sup>146</sup> Such omissions may also be observed in other Western Balkans countries, such as the wiretapping scandal in North

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<sup>142</sup> In the Western Balkans, there are about 102,600 registered NGOs in 2020 – but only 205 civil society organisations (about one percent) deal with issues concerning with organised crime and corruption, according to the Global Initiative report 'Stronger Together: Bolstering Resilience Among Civil Society in the Western Balkans', 8 March 2021, Retrieved 15 June 2021, <https://globalinitiative.net/analysis/resilient-balkans/>.

<sup>143</sup> P. Mirel, 2018. 'The Western Balkans: Between Stabilisation and Integration in the European Union', *Robert Schuman Foundation*, Policy Paper, European issues n.459, 23 January 2018, Retrieved 15 June 2021, <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-459-en.pdf>.

<sup>144</sup> European Commission (2020) '2020 Communication on EU Enlargement Policy'. Brussels, 6.10.2020 COM (2020) 660 final.

<sup>145</sup> F. Bieber, 2020. 'Why the EU's Enlargement Process is Running Out of Steam', *London School of Economics (EUROPP) Blog*, October 12, Retrieved 15 June 2021, <https://blogs.lse.ac.uk/europpblog/2020/10/12/49895/>.

<sup>146</sup> European Commission (2020) '2020 Albania 2020 Report' Brussels, 6.10.2020, SWD(2020) 354 final.

Macedonia (Ceka 2018),<sup>147</sup> and the Savamala incident in Serbia, where several sites on the Belgrade riverbank were illegally demolished to pave the way for the controversial Belgrade Waterfront project.<sup>148</sup> This gives the impression that the EU is willing to provide support to autocratic governance in the Western Balkans for the sake of the promise of stability. At the same time, the conditions to establish the rule of law (Kmezić 2020)<sup>149</sup> become more challenging. In this context, the EU's silence, or at the very least, its incomplete recognition of autocratic governance has led to the semi-autocratic political system of 'stabilocracy' – one that commits to EU integration and the establishment of the rule of law on paper, but in practice governs through informal rules and autocracy.

This arrangement offers a measure of stability to the EU and the Member States in a volatile region such as the Western Balkans. However, in the long term, it is harmful for establishing the rule of law, and minimises the opportunity to foster real liberal democracy as envisaged in the Copenhagen criteria (Hoxhaj 2020).<sup>150</sup> If the EU truly wishes to support democratic transformation and establishment of the rule of law in accession states, it should explore revisions to its approach (Tzifakis 2020).<sup>151</sup>

EU conditionality can be transformed by including more important stakeholders, such as national parliaments, local governments, members from civil society, and actors from the media, academia, NGOs, civil rights activists, and the business community as a counterweight to the dominant governments of the Western Balkans.<sup>152</sup> Changing the current top-down

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<sup>147</sup> B. Ceka, 'Macedonia: A New Beginning?', *Journal of Democracy* 29 (2) (2018) 143-157.

<sup>148</sup> F. Rudic, M. Zivanovic and I. Jeremic, 2019. 'Serbians Protest as Controversial Demolitions Remain' *Balkan Insight*, April 24, 2019, Retrieved 15 June 2021, <https://balkaninsight.com/2019/04/24/serbians-protest-as-controversial-demolitions-remain-unexplained/>.

<sup>149</sup> Kmezić (n134) 54–61.

<sup>150</sup> Hoxhaj (n141) 143–172.

<sup>151</sup> Tzifakis (n8) 197-205.

<sup>152</sup> M. Pankovski, 2021. 'Governance versus Authoritarian Influence in the Western Balkans', The German Marshall Fund of the United States, Retrieved 15 June 2021, <https://www.gmfus.org/publications/governance->

approach to a multi-level and bottom-up approach, including more non-governmental stakeholders, will empower societies to challenge autocratic governance, and produce a more inclusive and effective EU enlargement report, that can identify every effort to undermine the rule of law.

## **5. Conclusion**

This article's analysis, based on the examples of the action taken by government of the Western Balkans, suggest that the legacy of COVID-19 is an increased use of an autocratic governance model, as described by Fraenkel, Frantz, and Bieber. Most new legal measures were introduced through a set of government decrees and decisions, without consultation or scrutiny from the stakeholders that would be expected in a healthy democracy. The government, enshrined in modern liberal democratic constitutional settings, made open and successful efforts to neutralise and capture more independent institutions, and made full use of the COVID-19 crises to undermine and marginalise the judiciary. Therefore, our findings suggest that COVID-19 is the latest example of how a crisis has been used by autocrats to exacerbate further the already weak rule of law and democracy in the Western Balkans. In light of the examples in our case studies, where there are clear signs of the backsliding of the rule of law, we suggest that civil society and international organisations such as the European Commission, World Bank, International Monetary Fund, and European Bank for Reconstruction and Development can make greater use of their instruments to promote the rule of law, and transparency and accountability in the countries of the Western Balkans. The EU, in particular, must take into account the increased erosion of the rule of law in the region during the COVID-19 pandemic;

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the EU must make greater effort through its conditionality instruments to help empower civil society, media and other non-state actors to transform the Western Balkans's stabiliocracies.