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The Western Balkans during the pandemic: Democracy and rule of law in quarantine?

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Abstract

In the Western Balkans, as elsewhere around the world, governments took extraordinary measures to effectively contain the spread of COVID-19, measures that entailed serious restrictions to individual freedoms. They also introduced extra powers that upset the ordinary division and balance of governmental power. In this context, several analysts have expressed concern that the authoritarian trend observed in the region during the last decade will become further entrenched. The worst fear, that some of the Western Balkan leaderships may retain extraordinary powers indefinitely, has not been confirmed. However, constitutionally prescribed procedures were disregarded and the operation of formal and informal mechanisms of checks and balances ignored. The article argues that the ease with which the Western Balkan leaders removed any checks and controls over their rule raises the valid question of how they may deal with future circumstances which may endanger their power.

Keywords

Western Balkans, Pandemic, COVID-19, Rule of law, Democracy

Introduction

Considerable concern has been raised about whether the extraordinary measures that governments have adopted to contain the COVID-19 pandemic might reinforce the authoritarian shift in several non-consolidated democracies around the world. The six non-EU Western Balkan countries (WB-6)¹ collectively represent one of the regions where democratic backsliding has been taking place since 2009. Indeed, a series of reports concur on the assessment that all WB-6 countries are hybrid or semi-authoritarian regimes.²

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In its 2019 progress report, the European Commission itself remarked on the existence of ‘certain elements of state capture’ as well as ‘instances of widespread corruption’ in the region (European Commission 2019, 4). In a nutshell, the WB-6 feature ineffective rule of law institutions, weak parliaments that do not exercise control over the executives, politicised judicial institutions, and shrinking spaces for civil society and the independent media.

While the battle against COVID-19 has not yet been won, this article examines how the WB-6 managed the first phase of the crisis (March–June 2020), which required the imposition of very strict measures, including general lockdowns. Out of space considerations, we cannot analyse here what followed the loosening of measures (e.g. the region-wide increase in COVID-19 infections). At any rate, the purpose of this article is not to assess whether the WB-6 managed to contain the pandemic. It is rather to figure out whether and to what extent authoritarian trends have become further entrenched in the region. Like the EU27 member states, the WB-6 took severe measures that restricted individual freedoms, progressively lifting them once the spread of COVID-19 seemed to be under control. However, contrary to what happened in liberal democracies all over the world, the leaders of the WB-6 also sought to sideline parliaments and diminish the influence of the formal and informal mechanisms of checks and balances. The way they disregarded their countries’ institutional procedures and the ease with which they eliminated any counterweight to their power should alert us to what could happen in other circumstances in which their hold on power might be at stake. The article is divided into three parts. The first investigates whether executives sought timely legislative approval of all the decisions taken during the period examined. The second questions the function of the constitutional courts and whether civil society and the independent media were able to act as watchdogs. Finally, the last section draws some comparative conclusions from the preceding analysis.

Parliaments in quarantine

During the pandemic, most executive branches of government in the region took on extraordinary powers at the expense of legislatures. To some extent, the emergence of a severe disequilibrium in the balance of power among state institutions was due to the introduction of states of emergency. To illustrate, the pandemic arrived in North Macedonia during a pre-electoral period in which the parliament had been dissolved. As a result, the country’s president, Stevo Pendarovski, declared a state of emergency on 18 March that could not receive legislative approval; thus, since then North Macedonia has been ruled by decree by the caretaker government. While Pendarovski prolonged the state of emergency on four occasions, until 22 June, the National Assembly was not reconvened. With respect to what the country’s constitution prescribes for such a situation, constitutional law experts in North Macedonia have offered divergent interpretations. Despite this, Talat Xhaferi, president of the parliament, espoused the view of those who claimed that a self-dissolved parliament could not reconvene, even in the case of a state of emergency (Markovikj 2020, 66–7). Meanwhile, the caretaker government has been criticised for having overstepped its mandate, as, allegedly, only one-third of its decrees have been related to the pandemic (Markovikj 2020, 67).

In other cases, Western Balkan leaders exploited the extraordinary circumstances to purposely sideline national parliaments and avoid legislative scrutiny. For instance, although Montenegro did not declare a state of emergency, its authorities avoided seeking parliamentary approval for several economic decisions that were taken during the period examined. Despite the opposition's calls to bring the legislature into session and debate all the issues, the parliament did not convene in a plenary session from 4 March to 22 April 2020 (Uljarević et al. 2020, 12).

In Albania, the government declared a 'state of natural disaster' on 24 March and vested an Inter-Ministerial Committee on Civil Emergencies with the authority to take all the necessary actions to manage the pandemic. This normative act should have been approved within five days by the parliament, which was at that time in regular session. However, the governmental decision was eventually voted on in the legislature on 16 April, with the intention of preventing its retroactive invalidation due to the passing of 45 days from its date of issue (Bianku 2020). While the parliament's role should have been to decide on the necessity of those measures, as well as to supervise the government's efforts to manage the pandemic, it was reduced to an institution that merely dealt with the duration of the measures' implementation. Even so, while the Albanian constitution prescribes that the legislature should give its consent every 30 days to the prolongation of a state of emergency, the government requested from the parliament, and obtained, a one-off two-month extension to the state of natural disaster from 21 April to 23 June (Bianku 2020).

Serbia, likewise, introduced a 'state of exception' on 15 March without seeking legislative approval. The Serbian authorities followed the procedure described in Article 200 of the Constitution, which stipulates that the president of the republic, the president of the National Assembly and the prime minister can themselves take the decision on the implementation of a state of emergency in cases in which the National Assembly is unable to convene. The same article dictates that any decision taken by those three persons is still subject to confirmation by the parliament within 48 hours, or as soon as possible (Marinković 2020). However, the Serbian legislature was convened on 28 April to simply give *ex post* approval to all acts taken during the previous 45 days. It is worth mentioning that, according to the Serbian constitution, the introduction of a state of emergency represents a sufficient condition for bringing parliament back into session even if it has been previously dissolved in view of national elections. There was, indeed, no legal basis to evade timely legislative endorsement of the state of emergency (Cuckić and Ivković 2020).

In Bosnia and Herzegovina's case, the two constituent entities (the Federation and Republika Srpska) declared a state of emergency on 16 March, and the state authorities followed suit and adopted a similar decision on 17 March. While the corresponding legislatures at both the state and entity levels voted on these decisions, they have been entirely sidelined since. To illustrate, the National Assembly of Republika Srpska convened only three times from early March to early June to decide on the state of emergency's onset and termination and to legislate on all measures that had already been

taken by the entity's president. Likewise, at the state level, the House of Representatives (lower house of parliament) held three sessions during the period under examination, while the House of Peoples (upper house) convened only once (Živanović 2020b, 11).

The Kosovan³ parliament was not silenced during the period examined. It was, however, seriously discredited by a dispute between the country's president and prime minister over the expediency of declaring a state of emergency. Albin Kurti, the prime minister, was against such a move, which entailed the transfer of substantial executive powers to Hasim Thaci, the country's president. Eventually, the Kurti-led government collapsed on 25 March under pressure from the US (which disapproved of Kurti's approach to conflict resolution with Serbia) and with the alleged backing of President Thaci (Hehir 2020). Hence, a dangerous political void was created in Kosovo at the height of the crisis. This void lasted until 3 June, when a new government led by Avdullah Hoti, a member of the Democratic League of Kosovo (Lidhja Demokratike e Kosovës), the second largest party in parliament, received a vote of confidence. Thaci's (acknowledged) involvement in the process of getting a majority of MPs to approve Hoti's government dealt a blow to the credibility of Kosovo's legislature (*Exit News* 2020c).

To the extent that many governmental decisions taken during the period in question entailed substantial derogations from constitutionally guaranteed freedoms and rights (e.g. decrees related to the imposition of curfews), the attempt of executives in the region to bypass or control their parliaments is very troubling. And it is all the more so in that some governments occasionally took abusive decisions that effected disproportionate and unnecessary violations of their people's rights. For instance, the state authorities of Montenegro and the cantonal/local authorities in Bosnia and Herzegovina published the names of people infected with COVID-19 'to protect the lives' of all other citizens (Kajosevic 2020b; Živanović 2020a). In other cases, countries exploited the opportunity to strive to legislate on entirely unrelated matters. The Albanian government, for instance, proposed a piece of legislation that could give the police extensive surveillance powers over citizens that, crucially, would not presuppose the issuing of a warrant by the authorities and could last for up to six months (*Exit News* 2020a). In this regard, some researchers have reasonably voiced concerns that executives in the Western Balkans could be tempted to indefinitely maintain the extraordinary powers that they implemented during the pandemic, striking a clear blow to the already weak mechanisms of checks and balances (Bieber et al. 2020, 11). Notwithstanding that the end of curfews in May/June alleviated many of these fears, the ease with which executives took a stronger grip on power should perhaps alert us to what might happen if their rule was threatened under entirely different circumstances.

The judiciary, civil society and the independent media

The exceptional procedures linked to the state of emergency (e.g. fast-track procurement) created a very favourable environment for wrongdoings and abuses of public authority in a region where corruption has been endemic. In Bosnia and Herzegovina, for instance, the authorities of the Federation granted a \$5.8 million contract to a

raspberry producer to import 100 ventilators from China. Not surprisingly, the selected contractor supplied ventilators that were overpriced and totally inadequate for their designated purpose (Djugum et al. 2000). Likewise, in Republika Srpska, the authorities disregarded public procurement procedures and purchased a mobile hospital from a company that was not registered as a supplier of medical equipment. As could be expected, the supplier failed to fulfil its contractual commitment in a timely manner (Marković 2020). And in Serbia, the president himself revealed that he had purchased ventilators on the grey market without disclosing any other information concerning this procurement (Maksimović 2020).

With the legislatures neutralised, the judiciary should have emerged as the main formal institution in charge of checking the executive's work. However, the judiciary's track record in the region has been mixed at best. While constitutional courts performed their role in Bosnia and Herzegovina, Kosovo and North Macedonia, the corresponding institutions in Albania, Montenegro and Serbia did not rise to the occasion. In Bosnia and Herzegovina, the constitutional court ruled that the decision of the Federation's government to impose a complete curfew on people aged under 18 and over 65 years old was unconstitutional (Živanović 2020a). In Kosovo, the constitutional court ruled against the legality of the government's measures as well as in favour of the president's decision to bypass the parliamentary party holding the largest number seats and give a mandate to form a government to a member of the second-largest party. Notwithstanding that both of these decisions allowed Kosovo to move forward, their fierce domestic contestation indicated the people's low level of trust in the judiciary's independence. And the constitutional court of North Macedonia ruled in favour of the constitutionality of the president's declaration (and prolongation) of the state of emergency and against the government's decision to reduce salaries. In contrast, in the cases of Montenegro and Serbia, it was not until after a lengthy delay that the constitutional courts examined the legality of government measures (i.e. when they were no longer applicable), while the Albanian constitutional court has not been operational at all as it has no quorum due to several unfilled posts.

In a context marked by the disempowerment of formal mechanisms of checks and balances, the responsibility for acting as watchdogs fell on the shoulders of civil society and the independent media. On a positive note, investigative journalists revealed the aforementioned wrongdoings, while civil society organisations struggled against abuses of power. The lockdown, however, critically reduced the space for civil society activism. Some executives strove to exploit the opportunity provided by the curfew to implement decisions that might otherwise have met with massive popular resistance. To illustrate this, while the state of emergency was in place in Albania, in the early hours of 17 May (at 4.30 am) the government proceeded, using force to remove the few protesters present, to demolish the National Theatre in Tirana. Not only was the National Theatre listed by Europa Nostra as one of the seven most endangered cultural heritage sites in Europe, but the constitutionality of the law on the theatre's demolition and the legality of the government's decision to transfer the ownership of the land on which it stood to the municipality of Tirana were at that moment under review by the Albanian constitutional court.

What is more, the building's destruction was approved in secret by the Tirana Municipal Council, while the matter was additionally under investigation by the Office of the Special Anti-Corruption Prosecutor (Rüttershoff 2020).

Another example is the toppling of the Kurti government in Kosovo, which was perceived by many of its supporters to be part of a plan orchestrated by the country's president to push forward a deal with Serbia that would entail some sort of border change. Thaci had on several occasions pronounced himself in favour of such a deal and it was widely speculated that he had already reached an agreement with President Vucic of Serbia. Knowing that a land-swap solution would be very unpopular in Kosovo, Kurti's supporters believed that Thaci (backed by the US) aimed to bring down the government (formed less than two months prior) in order to quickly seal an agreement while people were confined to their homes and could not protest. Although these fears have not materialised, they are telling of the people's low level of trust in their country's institutions. In any case, the creation of conditions of political uncertainty during the pandemic provoked the anger of many people in Kosovo (not just Kurti voters), who could find no other way to manifest their discontent than by banging pans and pots every night from their balconies (Travers 2020).

A month later, on 26 April, people in Serbia adopted exactly the same protest method of hitting pots and pans from their balconies to express their frustration with the very harsh curfew measures taken by their government, and to denounce the greater authoritarian shift of their country with its alarming concentration of powers in the executive. Supporters (and members) of the regime responded a few days later, on 29 April, with counter-protests that included the lighting of torches on building rooftops. Although the large flames on inhabited buildings were dangerous and in violation of the curfew, the police did not intervene (Dragojlo and Stojanovic 2020). The existence of double standards towards protests was also observed in Montenegro, where the authorities reacted differently to the services carried out by the Serbian Orthodox Church and to the celebration of Montenegrin Statehood Day.

The shrinkage of civic space was matched by the exercise in parallel of pressure on media freedom in several countries in the region. The pandemic-related extraordinary measures presented an opportunity for some Western Balkan leaders to increase their control over the generation of information. At the beginning of the crisis, all Albanian mobile phone users received a direct voice message from Prime Minister Edi Rama that said, 'protect yourself from the media' (Erebara 2020). Moreover, Albania's National Health Inspectorate demanded the shutting down of a media outlet (ORA Radio and TV) for having violated the measure of not hosting more than one guest per broadcast show. The problem with this decision was not only its disproportionate penalty. It was also obviously discriminatory as similar punitive actions were not taken against pro-government media outlets (*Exit News* 2020b).

Both Serbia and Republika Srpska attempted to fully control the generation of information about the spread of COVID-19, allegedly in order to combat disinformation that could incite fear and anxiety (OSCE 2020).⁴ The Serbian authorities also proceeded to

detain journalists, in one case because the reporter's investigation into a medical facility's poor conditions 'could cause panic and unrest' (European Federation of Journalists 2020). And in Montenegro, several people were prosecuted and placed in custody for allegedly spreading fake news through their social media posts (Kajosevic 2020a).

Overall, we can see in the Western Balkans (though with some variations from one country to another) that the scope for freedom of expression and civic activism was reduced during the period under examination.

Conclusions

The COVID-19 pandemic upset normal political procedures in the Western Balkans as it did elsewhere in the world. For instance, North Macedonia and Serbia were compelled to postpone national elections that were originally planned for 12 and 26 April respectively. Also, all executives took exceptional measures to contain the pandemic, which entailed the imposition of curfews and serious restrictions to constitutionally guaranteed individual freedoms. Nevertheless, in sharp contrast to what happened in consolidated democracies (where similar measures were also adopted), the leaders of the WB-6 countries disregarded domestic institutional procedures and ignored the operation of formal and informal mechanisms of checks and balances. In particular, legislatures were sidelined, allowing little room for opposition parties to scrutinise governmental decisions; constitutional courts (which lack genuine independence in any case) were not operational; and freedom of expression was severely restricted. The end should not justify the means, and liberal democracies all over the world demonstrated that the temporary adoption of absolutely necessary extraordinary measures against the pandemic was not tantamount to *carte blanche* for abuses of power.

Crucial differences were certainly noticed from one country to another. The fewest abuses of power were observed in North Macedonia, which was, nevertheless, being ruled by a caretaker government at the time. On the other hand, the greatest problems were noticed in Albania and Serbia. Interestingly, no correlation can be seen between the track records of the WB-6 countries on the rule of law and their progress along the EU accession path. Justice and the rule of law seem to have functioned better in Bosnia and Herzegovina and Kosovo, the two laggard countries that are only at the stage of 'potential candidate' EU members, than in Serbia and Montenegro, the two EU accession front-runners. This troubling discrepancy should not go unnoticed by the EU institutions, which regularly monitor and assess the progress of each Western Balkan country towards EU membership.

The WB-6 leaders loosened their lockdowns in May and June and lifted restrictions on the exercise of fundamental rights and freedoms. Still, the ease with which they eliminated any checks and controls on their rule generates reasonable fears about how they may deal with any future circumstances in which their very hold on power might be at stake. To guard against such a predicament, the Commission should not hesitate to look beyond the expediency of most of the adopted measures and to criticise the abuses of power that took place during the period examined. The pandemic has, after all, presented an opportunity to test the resilience of rule of law institutions in the region.

Notes

1. Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia.
2. See, for instance, Freedom House 2020.
3. This designation is without prejudice to positions on status, and is in line with UN Security Council Resolution 1244/99 and the International Court of Justice Opinion on the Kosovo declaration of independence.
4. The Serbian government passed the decree on 28 March and revoked it on 2 April in response to strong international reactions (European Federation of Journalists 2020).

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