Breaking Bad all'Italiana

The EU Commission's assessment of Italy in the 2024 Annual Rule of Law Report

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The EU Commission's Annual Rule of Law Report for the year 2024 was officially published on 24 July 2024, after a controversial postponement from the previously scheduled date of 3 July. The delay was speculated to have been motivated by the need to avoid rifts with national governments ahead of the Commission president's election. In particular, it was widely reported that the main culprit was the Report's supposedly damning assessment of Italy's media landscape, at a time in which its Prime Minister Giorgia Meloni was being courted by Ursula von der Leyen to secure her not-so-certain re-election bid, elevating her to Europe's (apparent) "kingmaker".

Only a few weeks later, after momentous events including the birth of a new far-right EP group that surpassed the numbers of Meloni's European Conservatives and Reformist group and von der Leyen's confirmation without her support, the Annual Rule of Law Report (ARoLR) is finally out. So, how critical has the Commission really dared being, especially in the face of extensive and contentious reforms, *vis-à-vis* one of its oldest and largest member states? Or did it ultimately go easy on Meloni for political reasons (like it has in previous years when dealing with backsliders like Hungary and Poland)?

Should we even care about the ARoLR anymore?

A lot can and indeed has been said about the design flaws of the ARoLR and the Commission's use of euphemistic language to appease national governments that clearly fall short of their democracy and rule of law commitments under EU law. The case of Italy, however, is different compared to the likes of Hungary and Poland, which had started their autocratic turn before the ARoLR was inaugurated in 2020. In the first place, while backsliding is no longer a remote possibility in Italy unless a major trend reversal occurs, it has not fully come to pass yet, mostly thanks to the existence of more resilient checks and balances. Secondly, the EU's rule of law toolbox has been strengthened (albeit underutilised) over the years, providing mechanisms such as budget conditionality related to judicial independence and anti-corruption efforts, as well as the new Media Freedom Act and the Anti-SLAPP Directive aimed at protecting national civic spaces from attacks from their own governments. In this sense, as a periodic assessment and monitoring exercise, the ARoLR has the potential to provide an authoritative basis for prompt and comprehensive intervention on the part of the Commission – that is to say, if it is not hijacked for political purposes (which has apparently happened once again this year, as strongly denounced by the Romanian Judges' Forum Association). Considering that the 2024 ARoLR was reportedly initially "buried" for "slamming Italy", it is valuable to break down what exactly it said (and did not say) about the declining state of the rule of law in the country, and whether it can in any way contribute to its improvement.

Quo vadis, Italia?

As I documented here, the first full year and a half of the Meloni government (effectively the same timeframe evaluated by the 2024 ARoLR) saw a vast number of reforms in key areas related to the rule of law, several of which also fall under the Report's four pillars: the justice system, the anti-corruption framework, media freedom, and other checks and balances. However, most of them failed to show satisfactory progress in line with the recommendations issued by the Commission last year, including no improvements in lobbying regulation, transparency in the system of

political donations, defamation law, protection of journalists, and efforts to establish a National Human Rights Institution. The only positive notes were some further progress in the digitalisation of the criminal court system and in the adoption of conflict of interests rules.

Moreover, the Commission highlighted a series of worrying new developments across all areas covered by the report. Despite the seemingly high level of support that Giorgia Meloni enjoys, public perception over judicial independence and corruption is negative and continues to decline, in part due to the legislative amendments put forward in the past year. A draft constitutional reform to separate the careers of judges and prosecutors, which raises concerns over potential politicization of the latter, and another seeking to establish a High Disciplinary Court, reminiscent of the Polish and Romanian disciplinary regimes for judges already at the centre of CJEU and ECtHR jurisprudence, are two of the most prominent red flags with regard to the justice system, although they will have to go through a long legislative process in order to come into fruition. Moreover, the ARoLR rightfully highlighted the growing trend of public statements critical of the judiciary made by politicians, including government officials.

The anti-corruption framework, on the other hand, has already been weakened by a recently passed law to remove the offence of abuse of public office and to limit the scope of the offence of trading in influence, in a departure from international norms. This is made even worse by proposed amendments to the statute of limitations, including on corruption cases, and by the absence of comprehensive lobbying regulations. While the latter is far from a new development, the lack of progress, together with simultaneous lowering of standards in complementary areas, is highly problematic when it comes to checks and balances, especially in a country with a long history of political corruption and organised crime.

As reported at the eve of the publication, the ARoLR was especially critical of the deteriorating state of media pluralism and media freedom in Italy. The first issue highlighted here was the government's attempts at capturing the public broadcaster, RAI, by reorganising top management positions, reducing its financial autonomy through budget cuts, and changing the rules on equal airtime to effectively grant the government a larger platform in times of elections, like the recent EP and local elections. Although this is already a pretty negative assessment, it is but the tip of the iceberg: censorship of political speech (like the last minute cancellation of a monologue criticising Meloni's party for not repudiating its "post-Fascist past" on the occasion of Italy's liberation day on 25 April), the RAI journalists' union strike in response to proposals to remove fact-checking of government representatives and to air political rallies without journalistic mediation, and attempts by a member of the ruling coalition to acquire the second biggest news agency in the country (AGI), are some of the other notable problems that have dropped Italy five points in the 2024 World Press Freedom Index by Reporters Without Borders (itself relegated to a footnote on the ARoLR, pg. 23), which the Commission failed to acknowledge. Moreover, although the Report flags a general lack of improvements in the defamation regime and the prevalence of SLAPPs (Strategic Lawsuits Against Public Participation), it falls short of providing helpful context to correctly represent just how much of a chilling effect these issues have on freedom of expression. Indeed, a 2023 EP study on SLAPPs shows that Italy has the highest number of cases recorded in the EU (25.5% of the total cases), and members of the government, including Prime Minister Meloni herself, regularly use defamation lawsuits – which do not abide by European standards –as an intimidation tool against the press.

In the final pillar of the ARoLR, "other institutional issues related to checks and balances", concerns were raised over attacks to the civic space and violence against demonstrators, the excessive use of governmental decrees that erode the power balance between the executive and legislative branch, and the draft constitutional reform of the government, which would allow for a direct election of the Prime Minister and a shift away from a parliamentary system. Although the Commission pointed out that "stakeholders expressed

concerns at the proposed changes to the current system of institutional checks-and-balances, as well as doubts that as to whether it would bring more stability", the analysis could have expanded further on critical issues such as discussion of a new electoral law and the amendments to the election process and role of the President of the Republic (for further discussion on this reform, see previous contributions to this blog here, here, here). Moreover, it fails to make it unequivocally understood that any departure from the rule of law and democracy achieved through this constitutional amendment would constitute a breach of EU law, as per the CJEU's judgment in *Repubblika*.

The paper tiger strikes again

While the 2024 ARoLR may seem surprisingly critical of Italy, that is mostly due to the extremely low expectations associated with this instrument by now. The fact that the Commission did not show deference to one of the founding member states (in contrast to excessive optimism *vis-à-vis* France, for example), does not mean that the ARoLR did not suffer from the pitfalls that have characterised it so far.

The analysis provided by the Report has several blind spots. Ongoing procrastination in the election of Constitutional Court judges, which may lead to court packing (see Caruso and Faraguna), and the rise of neo-fascist movements putting the Italian Constitution's militant democracy clauses to the test, were entirely swept under the rug. Moreover, the exclusion of any mention of respect for human rights with the exception of short paragraphs on the need for a National Human Rights Institution and pending implementation of judgments of the European Court of Human Rights, effectively shielded the Italian government from any scrutiny of its problematic initiatives related to migration and threats to LGBTQI+ rights.

One may argue that the ARoLR is not the time and place to address these issues, but that is only another indictment of its dubious purpose and rigour. And while other monitoring mechanisms are now attached to enforcement mechanisms (like the European Semester being used to freeze funds under the Recovery and Resilience Facility), the ARoLR continues to occupy an awkward position within the EU's growing toolbox. One could only hope that the Commission would use its own findings to seek enforcement through (systemic) infringement proceedings, and arguably, the work done on Italy this year provides a good basis to build a case, before the autocratic consolidation phase kicks in (although Commissioner Jourová's statement that the EU is powerless against abuses to media freedom until the Media Freedom Act comes into force next year suggests that procrastination is going to be the chosen *modus operandi* yet again).

On the other hand, it is hard to imagine Giorgia Meloni will be persuaded to change her ways by the ARoLR's at times critical, at times more conciliatory assessment, which mostly avoided directly pointing the finger at the ruling coalition's responsibility in worsening the state of the rule of law. On the bright side, checks and balances are still strong in Italy – for instance, the proposal to enshrine an extremely questionable "majority prize" into the constitutional reform of the government system was scrapped following parliamentary debate, and the ruling coalition does not hold a large enough majority to amend the Constitution on its own. But if one was to abide by Italian wisdom, whereby *"prevenire è meglio che curare"* ("preventing is better than curing"), the Commission should take this overall sobering evaluation as a wakeup call to consider serious intervention against Italy as soon as possible, at least with regards to media freedom as the most troublesome pillar so far, while standing ready for action should other problematic (read: autocratic) reforms materialise in the near future. And while the ARoLR is unlikely to beat toothlessness allegations anytime soon, the much talked about Italy chapter might at the very least raise awareness of the fact that all is not so well in Rome.

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