

State of Exception, Media, Vagueness, and COVID-19: Looking at the Indeterminacy of Pandemic Law through the Italian and Hungarian Experiences

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Introduction

During the COVID-19 pandemic, which caused the loss of many lives, law was used extensively and often to suspend fundamental freedoms (Alviar et al., 2020, p. 172) with the declared aim of containing the spread of the virus. Often, also because of the unknowns associated with a virus that had never been dealt with on a large scale before, the laws adopted during this period used vague expressions. Therefore, it seems interesting to draw on the reflections on the vagueness of the expressions used during the COVID-19 pandemic and the resulting indeterminacy of the law during this emergency period. It seems particularly useful to take a look at the Italian experience since Italy was the first of the Western countries to have had to manage an absolute emergency situation linked to the virus in question, a very high number of unscheduled admissions to intensive care units and consequent overcrowding of the same, and to have had a very high number of deaths resulting from the pandemic in question.

This chapter moves from Italian legal philosophers' thoughts on the indeterminacy of Italian law during the emergency phase of the COVID-19 pandemic, in particular the considerations that uncertainty is, to some extent, part of the physiology of law and can

therefore constitute a constructive element of flexibility in times of pandemic, but it should be recognised that cases of pathological uncertainty exist and that indeterminacy leads to forms of self-control that one can also depict using the expression 'self-censorship'.

This chapter argues that an example of a provision adopted during the pandemic that seems to go beyond the physiology of law and induce forms of self-censorship is the Hungarian provision on media, whose vague expressions produce indeterminacy. This provision is also set in an indeterminate context consisting of both the legal framework within which it is enacted and the media rules adopted before the pandemic.

Without any pretension of analysing the different approaches to vagueness which have been prominent in legal theory that Timothy A.O. Endicott synthesises (Endicott, 1997, pp. 39–40), this chapter draws from his study, which defines vagueness “in terms of difficulty in applying expressions: There are cases in which it is unclear whether a vague word applies, or what a vague statutory provision requires or permits, and the unclarity arises from the meaning of the word or the provision (so that learning more about the facts of the case would not resolve the unclarity)” (Endicott, 1997, p. 38).

This chapter argues that the pandemic in Hungary provided an opportunity to exacerbate the indeterminacy of the law. It also suggests that the context of a provision influences its impact in terms of self-censorship. When a vague provision enacted in times of pandemic is set in an indeterminate context, consisting of both the legal framework within which it is enacted and the previous law, which in the case this chapter mentions is the pre-pandemic Hungarian media law, it can be assumed that the impact of the analysed provision in terms of self-censorship will increase.

Following Lawrence M. Friedman, this chapter considers that: “A legal act has an impact, when it is causally related to somebody’s conduct” (Friedman, 1978, p. 45). Impact means the effects produced by a normative source (which one could also call, like Friedman, a ‘legal act’), regardless of whether these effects fall within the declared or conceivable purposes of those who produced that normative source (legal act). The area of impact thus embraces any effect produced by the source (the act) in question, including effects opposite to those declared by those who produced the source (the act). That means that impact concerns all effects produced by a normative source (legal act) on behaviour.¹

This chapter concludes the analysis with a few considerations on indeterminacy and power in light of Max Weber’s concept of power, with reference to the coercive dimension of power and its consensualist dimension. The second section focuses on the indeterminacy of law in times of pandemic, considering physiological forms of indeterminacy analysed by the Italian legal philosophers Aldo Schiavello and Francesco Ferraro. The third section focuses on an example of indeterminacy that can be considered pathological, analysing a Hungarian provision on the media and pandemic, as well as the indeterminacy of the context in which it is set, a context consisting of both the legal framework within which the provision is adopted, i.e. that regulates the Hungarian state of emergency, and the Hungarian pre-pandemic media law; the last section concludes the analysis by making a few synthetic considerations on indeterminacy, vagueness and the coercive dimension of power.

¹ For further details on the notion of impact see Friedman (1975, pp. 45–66). I would like to thank Edoardo Fittipaldi for the terminological insights he provided in our conversation on the concepts of effectiveness and impact of law.

Pandemic Measures, Uncertainty and the Physiology of Law

The fact that Italy was the first Western country where the pandemic had a major and visible outbreak was the premise for the adoption by the government and local authorities of a very large number of regulatory measures with the declared aim of containing the pandemic emergency. A large number of regulatory measures available has allowed Italian legal philosophers to elaborate on the issues in question with circumstantial and timely reflections. Aldo Schiavello reminds us that:

Indeterminacy is one of law's main characteristics in contemporary constitutional [s]tates. It challenges the objectualist conceptions of law which reduce law to a system of norms or a set of facts and confirms those conceptions which regard law as an interpretative social practice (Schiavello, 2020a, p. 19 abstract). [...] The constitutionalisation of legal systems increases the flexibility of the law to the detriment of certainty and requires everyone – legislators, judges and individuals subject to the law – to assume their responsibilities and resulting risks (Schiavello, 2022, p. 129).²

Nevertheless, “there is no doubt that the uncertainty of legal science destabilises public opinion as much as, and perhaps more than, the internal divisions within medical science” (Schiavello, 2022, p. 123), and it is precisely this aspiration for legal certainty that, according to Schiavello, has led to impatience with regulatory prescriptions that are considered unclear and indeterminate.

During the pandemic, vagueness recurred in several expressions contained in government regulatory interventions. Another legal philosopher, Francesco Ferraro, reminds us, for example, of the expression: “It is permitted to return to one's domicile, dwelling and

² In Italian see Schiavello (2020a, p. 19 abstract; 2020b, p. 171).

residence”, emphasising the term ‘abitazione (dwelling)’ which, on the one hand, is taken from ordinary language and, unlike ‘residenza (residence)’ and ‘domicilio (domicile)’, it has no specific technical meaning in the language of law (Ferraro, 2021, p. 202), and on the other hand, it is used in a vague manner even when the government seems to be trying to clarify it. Exemplary, according to the author (Ferraro, 2021, p. 202), are the answers to frequently asked questions published on the government website (<https://www.governo.it>) during the pandemic:

For the purposes of the application of the anti-Covid measures, therefore, the dwelling is to be identified as the place where one actually lives, with a certain continuity and stability (i.e. for continuous, albeit limited, periods during the year) or with habitual periodicity and frequency (e.g. on certain days of the week for work, study or other needs).

According to Ferraro, these answers do not specify either what is meant by a ‘continuous period, even if limited’, or whether ‘habitual periodicity and frequency’ can also mean just one weekend a month, nor whether the dwelling must be a single one or whether, in a couple, there can be two dwellings, i.e. those in which the two members of the couple habitually live separately (Ferraro, 2021, pp. 202–203).

Schiavello reminds us that one of the most debated provisions in Italy during the acute phase of the pandemic was Article 1, paragraph 1, letter (f) of the President of the Council of Ministers’ Decree (DPCM) of 10 April 2020, which is no longer in force, whose “indeterminacy is produced by the vagueness of the expression ‘in proximity’” (Schiavello, 2022, p. 124). The DPCM stated that: “[I]t is permitted to carry out individual motor activities in proximity to one’s own home [dwelling], provided that the distance of at least one metre from any other person is respected” (Schiavello, 2022, pp.

123-124). According to Schiavello, in order to affect human behaviour in a way that is at the same time efficient and acceptable, the law must combine certainty and flexibility, and “a certain degree of uncertainty is inherent to the law as a conflicting interpretative practice – the different actors in the legal field are often the bearers of conflicting and incompatible interests – rather than one that is cooperative” (Schiavello, 2022, p. 124).

Indeterminacy and the Pathology of Law in Italy and Hungary: COVID-19, State of Emergency, Media Law, and Vagueness

A certain degree of uncertainty is, therefore, according to Schiavello, part of the physiology of law. According to the author, however, it is “appropriate [...] to recognise that there are cases of ‘disturbing and pathological indeterminacy” (Schiavello, 2020a, p. 35). By way of example, he cites two ordinances adopted during the pandemic on 27 September and 23 September 2020 by the Presidents of two Italian regions, Sicily and Liguria, which respectively provide that

in places open to the public, the mask must be worn if in the context of the presence³ of several individuals [... and that the use of] respiratory protections [is prescribed in public places] where the physical characteristics make it easier to form gatherings, even of a spontaneous nature and/or occasional (Schiavello, 2020a, p. 35).

Schiavello rhetorically poses the question of whether the objective of ordinances such as those cited is actually to deal with emergencies, suggesting that instead the real objective is “to reinvigorate and underpin the authority – charismatic power, as Weber would say – [of the President of the region, in the given examples] and, at the

³ Even the Italian expression is not fluid: “*nel contesto di presenze di più soggetti*”.

same time, and as a corollary, to spread a feeling of efficiency and readiness in tackling and solving problems. If this is true the obscurity and linguistic contortions that characterise these ordinances (but also many DPCMs) are not only minor flaws but actually favour the achievement of the stated objectives" (Schiavello 2020a, p. 36). Although in the context of an analysis of the symbolic use of the law, i.e. of a symbolic pandemic law, Ferraro also emphasises, in relation to the aforementioned Article 1, paragraph 1, letter (f) of the DPCM of 10 April 2020, that the citizen

in doubt as to whether a certain distance still falls within the proximity of her/his dwelling, will prefer not to take any risk and to keep to the shorter distance, also because she/he does not know how, in the event of a check by the police, the latter will interpret the provision (Ferraro, 2021, p. 201).

The recipients of the provision will therefore try to self-limit their behaviour by staying closer to what they imagine to be the minimum authorised threshold. According to the author, similar reasoning can be made for Article 40, paragraph 1 of the DPCM 2 March 2021, in force until 6 March 2021: "Any movement in and out of red zone territories as well as within the same territories is forbidden, except for movements motivated by proven work needs or situations of necessity or for health reasons."

The reflections on the provisions adopted in Italy help us to reason on the fact that indeterminacy, which has constituted the evident characteristic of law even in this country during the emergency phase of the COVID-19 pandemic, does not in itself entail negative consequences; there are, however, extents in which uncertainty goes beyond physiology and must be regarded as pathology. In these cases, uncertainty risks producing effects other than that of pandemic containment. The containment objective may become the "manifest function" of the provisions, which also may imply a

“latent function.”⁴ In addition, indeterminacy produces a form of a priori self-limitation, of limiting one’s own behaviour below the permissible threshold, which one can depict using the expression ‘self-censorship’.

A measure adopted during the pandemic that seems manifestly going beyond the physiology of law is the Hungarian measure providing that anyone who “distorts” or publishes “false” information on the pandemic can be punished with five years in jail (Editorial du “Monde”, 2020; Walker, 2020a; Walker and Rankin, 2020). To echo Schiavello’s reasoning, one can observe that its vagueness is produced by the vagueness of the expressions “distorts” and “false”. This measure provides an example of how the manifest function of containing the pandemic is likely to justify further control over the media, particularly independent journalism, and encourage self-censorship.

This section will show that vagueness characterises the context of this measure, which can be considered both as its legal framework and as the media law adopted before the pandemic. This measure was introduced by a law aiming to protect against coronavirus that, since 30 March 2020, extended the government’s emergency powers, suspending the elections and providing the possibility for the government to rule by decree without being bound by the existing laws (International Center for Not For Profit Law (ICNL, no date); Kelemen, 2020. On this topic see also Bellucci 2021a, pp. 159–161; Bellucci, 2021b, pp. 162–163), during the emergency period. This period is not linked to a precise date; it potentially covers an indefinite amount of time. To counter the consequences of the pandemic, the government declared a ‘state of danger’: a special state of emergency, which was introduced on 11 March 2020 (for the

⁴ For details about the concepts ‘manifest function’ and ‘latent function’ see Merton (1968, pp. 114–126).

chronology of the government decision and measures adopted during the pandemic, see ICNL, no date; Kelemen, 2020) and is regulated by Article 53 of the Hungarian Constitution.

The Hungarian Parliament has then adopted a law that, since 18 June 2020, requires the government to terminate the state of danger and provides for the revocation of the extraordinary powers granted by the law aimed at protecting against coronavirus (ICNL, no date; Walker, 2020b). However, the Parliament has also introduced, since June 17, through a law that provided rules on the revocation of the state of danger, a 'state of medical crisis' (ICNL, no date), which is another possible state of emergency which can be declared unilaterally by the government for a period of six months, renewable by decree: it authorises the government to suspend existing laws and fundamental rights and to decide by decrees, excluding the Parliament (ICNL, no date; Thorp, 2020).

Although Article 53 of the Hungarian Constitution provides in paragraph 4 that upon the termination of the state of danger, the decrees adopted by the government during that state shall cease to have an effect, the concern had been expressed that even after the revocation of government powers related to the health emergency, all the decrees adopted during the pandemic (or part of them), some of which do not seem to be related to the fight against COVID-19, would remain in force (Walker, 2020b). The provisions introduced in the Hungarian legal system since June 17 reinforced this concern. It was noted that the legislative intervention of the Hungarian Parliament did not intend to reinstate the legal framework existing before the coronavirus pandemic but, on the contrary, "to create a legal basis for the use of more new [and..] extraordinary [...] governmental powers" (Novak, 2020).

Even the regulatory framework within which the provision in question is adopted is characterised by indeterminacy. The

indeterminacy of the media provision adopted during the pandemic is thus reinforced by that of the legal framework within which the measure is enacted. This is, in particular, produced by the vagueness of the association between the end of the pandemic and the end of the state of emergency, that is, by the absence of reference to a precise date and by the indeterminacy of Hungarian media law, which introduced rules, adopted before the pandemic, consisting of vague expressions.

To cite a few examples, one can mention that the Press Freedom Act (Press Freedom Act, 2010) (as more generally, the other regulations affecting Hungarian media) does not contain precise definitions. Article 6 of the Press Freedom Act originally provided that:

[In] exceptionally justified cases, courts or authorities may – in the interest of protecting national security and public order or uncovering or preventing criminal acts – require the media service provider and any person employed by or engaged, in any other legal relationship intended for the performance of work, with the media content provider to reveal the identity of the informant (para. 3).

Given its lack of precise definitions, this Article puts the protection of sources at risk. The protection of sources is at the root of investigative journalism, and its lack could lead to self-censorship. As evidenced in the case of *Roemen and Schmit v. Luxembourg* of 25 February 2003 (ECtHR, 2003), the European Court of Human Rights has recognised a journalist's right not to disclose his or her sources.

Protecting sources is one of the issues considered by the Constitutional Court's decision of 19 December 2011 (n. 165/2011. (XII. 20.) AB, for its summary, see Hungarian Civil Liberties Union (HCLU-TASZ), year not mentioned but presumably 2011b;

Kelemen, 2012; Koltay, 2012; Mérték Médiaelemző Műhely, 2012): the Court “annulled the provisions that would have obliged journalists to reveal their sources in legal proceedings” (Council of Europe, 2013, para. 137). It mentioned two omissions by the legislator with regard to sources of information: the lack of procedural guarantees for the protection of the sources of information in legal proceedings as well as of proper respect for the sources of information and the duty of confidentiality of lawyers with regard to the duty of the media service providers to furnish data to the National Media and Infocommunications Authority/NMHH (Media Authority) (Media Authority, 2010; Kelemen, 2012). Article 6 was therefore amended. Paragraph 2 of this Article introduced the goal of investigating a crime without referring to the national security and the public order. Nevertheless, even though the possibility of ordering source disclosure related to criminal investigation has been limited, Hungarian law still lacks precise definitions. This, and, more generally, the vagueness of the language used in Hungarian media laws, may have a “chilling effect” on investigative journalism (Bellucci, 2018, pp. 102–104).

Another example of vagueness in Hungarian pre-pandemic media law is the unusual and broad definition of a “press product”, which includes not only the printed press, but also online news portals and professional blogs that are managed by commercial enterprises (Article 1(6) of the Press Freedom Act). Furthermore, Article 17, para. 2 of the Press Freedom Act, which has been changed several times, has been criticised for its lack of clarity. By prohibiting content that may offend a “minority” or “any majority,” it could limit critical coverage of all groups, undermining the watchdog role of the media in a democracy (Bellucci, 2018, pp. 67–68; The Hungarian Civil Liberties Union (HCLU-TASZ), 2011a). It is also worth mentioning that within the broad regulatory powers of the Media Authority, the law bans broadcasters that have been sanctioned for a “serious breach of obligations” (Article 55(1)(c) of the Media Act, 2010) from

participating in future tender offers for a period of five years. The Media Council defines the content of the vague quoted expression.

Conclusion

This chapter has been inspired by the reflections made by Italian legal philosophers on the indeterminacy of Italian law during the emergency phase of the COVID-19 pandemic, in particular by the considerations that uncertainty is, to some extent, part of the physiology of law, but it is appropriate to recognise that there are cases of pathological indeterminacy and that indeterminacy may lead to forms of self-restraint, which one can depict using the expression 'self-censorship'.

As an example of a provision adopted during the pandemic that goes beyond the physiology of law and induces forms of self-censorship, this chapter analysed the Hungarian measure providing that anyone who "distorts" or publishes "false" information on the pandemic can be punished with five years in jail. The indeterminacy of this measure is reinforced by the indeterminacy of the context in which it was adopted, the context being the legal framework within which it was adopted and the pre-pandemic Hungarian media law.

With regard to the legal framework, indeterminacy is produced by the vagueness of the association between the end of the pandemic and the end of the state of emergency, that is, the absence of reference to an exact date. In addition to being made up of vague expressions, this provision is also included in an indeterminate regulatory framework drawn up during the pandemic, which provided for rules whose duration was not tied to precise dates but only to the end of the emergency itself, meaning that they could therefore be provided for indefinitely. The Hungarian Parliament enacted a law aimed at countering the ongoing pandemic, which introduced regulations that, based on the 'state of danger' declared

by the government and mentioned in the Hungarian Constitution, allowed the government to suspend elections and decide by decrees. The Hungarian Parliament subsequently adopted a law requiring the government to terminate the 'state' in question and providing for the revocation of the extraordinary powers granted to it by the law to protect against the coronavirus. It did, however, provide for another possible state of emergency, i.e. a 'state of medical crisis', which can be declared by the government unilaterally for a duration of six months, renewable by decree, and which allows Parliament to be excluded from legislative activity, as it authorises the government to suspend existing laws and fundamental rights and to decide by decrees. Although Article 53 of the Hungarian Constitution stipulates in para. 4 that upon the termination of the 'state of danger', government decrees adopted during this state shall cease to have an effect, many worry that this will not happen.

The provisions adopted in Hungary thus constitute examples of pathological, in a sense meant by Schiavello of non-physiological, indeterminacy, leading to forms of self-restraint as highlighted by Ferraro, which this chapter has described using the expression 'self-censorship'. If the uncertainty of the law can guarantee, in times of pandemic, certain useful flexibility, it can also provide a strong impulse to self-censorship and indirectly increase the power of the government and the institutions that have ties to it.

The vagueness of Hungarian rules is not an exclusive feature of the pandemic phase. For instance, Hungarian media law was already characterised by vague rules before the COVID-19 pandemic. It seems possible to speculate that the vagueness of pre-pandemic legal expressions (on the topic, see also Cendic and Gosztonyi, 2020, p. 20) reinforces the impact in terms of self-censorship of the indeterminacy of emergency measures.

Nevertheless, the pandemic has found a political power that was already extremely centralised (for further details, see Bellucci, 2021a, pp. 154–155; Bellucci, 2018, pp. 61–66), representative of which is the Hungarian media regulatory system based upon the duopoly of the Media Authority and the Media Council, placed under the leadership of a single person, the President of the Authority (appointed by the President of Hungary upon the proposal of the prime minister),⁵ and “constituted the *élément déclencheur* to make the momentary exceptionality rise to a potentially perennial situation” (Bellucci, 2021b, p. 169).

In light of the considerations developed by Schiavello and Ferraro and following the analysis of the Hungarian experience, it is possible to point out that an emergency, such as that of the COVID-19 pandemic, may constitute the occasion that fosters, by justifying it, a pathological indeterminacy of law, produced by the vagueness of the rules adopted. It can be assumed that the impact of such indeterminacy in terms of self-censorship is increased by the indeterminacy of the regulatory framework within which it is adopted and of pre-existing rules governing the same field. One can suggest that the pathological indeterminacy favours a coercive component, characteristic of what Weber indicated with the expression ‘*Macht*’, power, at the expense of a consensualistic⁶ form of authority, characteristic of the *Herrschaft* that the author analysed.⁷ If it is true that we are likely to face new pandemics in the

⁵ In 2013, amendments to the Media Act were adopted (Council of Europe, 2013, paras. 146 and 148; Article 111 A(1) and (3) of the Media Act, consolidated version, 2015). Under these amendments, the President of the Media Authority is appointed by the President of Hungary upon proposal of the prime minister, and his or her appointment is limited to a non-renewable, nine-year term (Council of Europe, 2013, paras. 144 and 148).

⁶ The expression ‘consensualistic’ is used here in an extremely concise manner, as it is not possible to develop the insights that the expression deserves.

⁷ By the concept of *Macht* (translated here as ‘power’) Weber means: “any possibility of asserting one’s own will within a social relationship, even in the face of opposition, whatever the basis of this possibility may be.” By the concept of *Herrschaft* (translated here as ‘authority’) he means instead: “the possibility of finding obedience, among

future, it will be important to reflect on all of this in order to avoid normalising a pathological indeterminacy of law by considering it as physiological.

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certain persons, to a command that has a certain content" (Weber, 1974, pp. 51–52). Although Weber also uses the word '*Autorität*', this chapter translates '*Herrschaft*' as 'authority' and '*Macht*' as 'power', inspired by the translations widespread in English. For further details see Ferrari (1997, p. 136, note 70).

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