DISCRETION AND "INDETERMINACY" IN KELSEN'S THEORY OF LEGAL INTERPRETATION

by Claudio Luzzati

1.- The problem at issue

In the *Reine Rechtslehre*, 2nd ed., 1960, chap. VIII, Hans Kelsen, expounding his view about legal interpretation, points out the "relative indeterminacy" (*relative Unbestimmtheit*) of every law-applying act (1).[1] Kelsen's opinions on this subject did not change significantly over the course of time. Indeed the chapter on interpretation is one of the chapters of the Reine Rechtslehre that were least modified in the transition from the first edition in 1934 to the second in 1960.

Furthermore, the relative indeterminacy thesis is indissolubly connected to the conception of the legal system seen as a dynamic system and to Kelsen's doctrine of hierarchical structure of legal system (or *Stufenbaulehre*). It is for this reason that the thesis does not appear to have been undermined even during the rather dramatic shift in Kelsen's views after the sixties, culminating in the reflections collected in his posthumous book *Allgemeine Theorie der Normen* .[2]

Until 1960, Kelsen admitted the possibility of an indirect application of logical principles to law by way of the alleged parallelism between legal rules in a prescriptive sense (*Soll-Normen*) and ought-statements (*Soll-Sätze*). In his later work, however, Kelsen asserts the absolute impossibility of applying logic to legal rules. This new approach, seems to depart abruptly from Kelsen's previous ideas, but it is based on the coherent development and refinement of Kelsen's theories about the structure of legal systems, theories already put forward in the first and second edition of *Reine Rechtslehre*.

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[1] H. Kelsen, *Reine Rechtslehre*, (Vienna, Deuticke, [1]1934, [2]1960).

[2] H. Kelsen, Allgemeine Theorie der Normen, ed. K. Ringhofer & R. Walter (Vienna : Manz, 1979).

Legal system is conceived as a dynamic system, namely as a chain of successive delegations from higher to lower authorities. With their acts the lower rule-making bodies apply the rules wich are issued by superior authorities and in the meantime create new law.In this way it may happen that two conflicting rules are both valid. Or it may happen that the judge does not enact the individual rule which applies the general rule concerning all the cases of a given class to a particular case. Therefore, we have to take for granted that validity, seen as the membership of a rule in the legal system, cannot function as a logical value. In addition to this there is the remarkable fact that Kelsen in his last period does not picture any more moral systems as normative static systems.

Unfortunately the German word "Unbestimmtheit" used by Kelsen in "Reine Rechtslehre" is extremely ambiguous.

On the one hand "Unbestimmtheit" is synonymous of words like "vagueness", "fuzziness", "open-texture" etc. This acceptation of the term "Unbestimmtheit" designates a purely linguistic phenomenon: the lack of precision of the meanings, the absence of sharp boundary-lines delimiting the uses of linguistic expressions.

On the other hand "Unbestimmtheit" can also be intended in the sense of "the quality of being not decided, not fixed, not settled". The German verb "bestimmen" - as well the English verb "to determine" - actually means both "to clarify, specify, say exactly" and "to decide,, resolve, settle" (e.g. Die Gesetze bestimmen, da· ...). After all, a "Bestimmung" is not only the "determination" that makes clearer the meaning of a word, but it is also the "determination" of somebody who takes a decision or gives an order.

Thus we are immediately led to ask ourselves whether Kelsen's "indeterminacy" is the same "indeterminacy" the linguists and the philosophers of language are talking about.

Of course, we cannot expect to find out a complete correspondence between these two "indeterminacies" because of Kelsen's tepidity for linguistic analysis. Nevetheless, if we were able to ascertain at least that in "Reine Rechtslehre" many different linguistic features, such as

ambiguity, generality and vagueness, are labelled as "indeterminacy", our expectations would be fulfilled.

Yet it is not possible to interpret Kelsen's works in such a way. My aim in this paper is to demonstrate that Kelsen's "Unbestimmtheit" designates a legal peculiarity, not a semantic and a linguistic one.

2 - "Indeterminacy" in a linguistic sense.

The word "Unbestimmtheit", when used as a key-word of meaning theory, could easily be translated with the English term "vagueness".

Usually an expression or a sentence are said to be vague if the limits of their meaning fluctuate. There will indeed be plain cases to which linguistic expressions are clearly applicable, but there will also be cases where it is not clear whether they apply or not. The fact that a word is claimed to be vague or open-textured presupposes that it is possible to show, or at least to conceive, the existence of "borderline cases", i.e. of situations in which every competent speaker would be at a loss for the use of the word. The definition of Peirce is most illuminating: << A proposition is vague when there are possible states of things concernig which it is intrinsically uncertain whether, had they been contemplated by the speaker, he would have regarded them as excluded or allowed by the proposition. By intrinsically uncertain we mean not uncertain in consequence of any ignorance of the interpreter, but because the speaker's habits of language were indeterminate [...] >> (3). In short, if a symbol is vague or indeterminate, its field of application presents a hard core of clear cases surrounded by a penumbra of uncertainty.

The best examples of vagueness are two well-known paradoxes ascribed to Eubulides: the "heap" (sorites) and the "bald man" (falakros). The first argument runs as follows: a grain of corn is not a heap, neither are two grains; going on adding one grain of corn to another, sooner or later we shall obtain a plain case of heap; but we cannot tell exactly when the grains of corn are enough to form a heap; on the contrary, there will be many borderline cases of the word "heap" in which we do not know whether the grains are a heap or not.

The paradox of the "bald man" is analogous. It is based on the fact that one cannot tell precisely how many hairs must be torn from the head to produce a baldhead. The concept of baldness is not sharply bounded since the doubtfull cases are quite a lot. It seems rather problematic to "draw the line".

It must be stressed, however, the fact that every linguistic expression is a good example of vagueness. In fact, vagueness is not a quality that either is actual or not actual in a given case, but it is essentially a matter of degree. Even the terms of quantity are vague because every measurement is approximate. Though not a few jurists subscribe to the opinion that there are (absolutely) clear and (absolutely) vague rules, that thesis cannot be maintained (4).

The concept of linguistic "indeterminacy" is framed in different ways depending on the semiotic theory each scholar follows. According to certain authors, the unity of the language is irreparably shattered into a plurality of individual speech acts. Therefore to state that the language is open-textured is the same as saying that the language is open to experience. In one word, the meaning cannot be freezed. On the contrary, according to the followers of the system-oriented semiotics, there is no real inconsistency betweeen vagueness and abstract structure of the language (langue).

It is a well-known fact that in Italy and abroad analytical jurisprudence strove to go back, albeit critically, to Kelsen, appreciating the soundness of his conceptual apparatus, but, sometimes, undervalueting the importance of his neo-Kantian approach (5). The latest position of Kelsen, who denied the applicability of logical principles to rules, had persuaded a large number of Kelsen's interpreters that the traditional interpretation of pure theory did not hold good any more. Nevertheless, until not long ago, analytical jurists, especially if they belonged to the positivistic and to the normativistic school, made a special effort to find out affinities between their thought and Kelsen's ideas. In particular they often yielded to the temptation to treat Kelsen's "Unbestimmtheit" as if it coincided with linguistic indeterminacy. This, indeed, at first glance, appears to be a plausible thesis. It asserts that in a dynamic system, the meaning of the lower

rules is not completely "determined" by the superior rules. The corollary of such an interpretation of Kelsen's views is the following: Kelsen's intentional indeterminacy (beabsichtigte Unbestimmtheit) is identified, at least in part, with legal standards (in German: Generalklauseln or Ventilbegriffe) like "good faith", "public policy", "due care" and so on.

I would like to depart from this opinion which, notwithstanding it is still held in high esteem, constitutes a great misrepresentation of Kelsen's theories. In next paragraphs I shall try to show why the received view is untenable.

3.- "Indeterminacy" in the sense of the lack of a determination or decision of the lower authority that ought to apply the higher rule.

It is possible to use the word "indeterminacy" also in another sense that must be clearly distinguished from the former. Using the term in this new meaning one could say that in a dynamic normative system the validity (conceived as the existence or/and the membership in the system) of the lower rule is not completely determined by the superior. In fact the validity of the higher rule is a necessary, but not sufficient condition of the lower rule's validity. In order that a lower rule may come validly into existence, it must be issued through a "determination", that is through an act of decision, of the lower authority in compliance with the higher rule. For instance, it is not sufficient that a general rule inflict a punishment on everybody behaving in a certain way. Such a rule must be continuously put into practice by means of the uninterrupted and virtually endless sequence of the decisions taken by the lower bodies of the Stufenbau. In other words there must also be the individual rules issued by the judges that apply the general rule to the single cases. It often happens that there are rules of a normative dynamic system which have not, as yet, been put into practice by the lower authorities and perhaps never will. For instance one can also consider the frequent case where the Parliament does not enact the rules it ought to enact according to the Constitution. In fact one of the main characteristics of law is its lack of complete determination. An unceased continuum of new acts of "determination" (or decisions) is needed to apply law to concrete cases (6).

This meaning of "indeterminacy" is perfectly fitting to describe

Kelsen's view of legal system, though it may sound rather unusual due to its extreme technicality. In any case I do not think that in the chapter of "Reine Rechtslehre" concerning interpretation the word"Unbestimmtheit" is employed in this sense.

4.- Kelsen's notion of "indeterminacy": Unbestimmtheit as discretion.

Now I would like to bring some textual arguments demonstrating that Kelsen does not use the term "Unbestimmtheit" in its linguistic sense, but in a quite different manner.

Kelsen's "Unbestimmtheit" is not a linguistic phenomenon but, essentially, a legal one. Let us see why.

Had Kelsen characterized linguistically the "indeterminacy" he was dealing with, he would have considered it as a quality of rules and not as a quality of law-applying acts. On the contrary Kelsen always employs the expression << Unbestimmtheit des rechtsanwendenden Aktes >>. We must stress, therefore, the fact that for him an act is relatively indeterminate with reference to the higher norm it complies with and not vice versa.

Kelsen writes: << Das VerhÑltnis zwischen einer hîheren und einer niederen Stufe der Rechtsordnung, wie zwischen Verfassung und Gesetz oder Gesetz und richterlichem Urteil, IST EINE RELATION DER BESTIMMUNG ODER BINDUNG [...] >> (Engl. transl.: << The relation between a superior and an inferior level of the legal system, as between the Constitution and statutes or as between statutes and court's judgments, IS A RELATION OF DETERMINATION OR A BINDING RELATION >> (7).

From this passage it is obvious that for Kelsen the terms "Bestimmung" and "Bindung" are synonymous; evidently the disjunction "oder" does not express contrapposition between the two concepts. Besides, the higher rule regulates (regelt), determines (bestimmt), not only the procedure (nicht nur das Verfahren) that must be followed in enacting the lower rule, but also part of its content (Inhalt). Now, an activity carried out either by judges or by officers, when it is not regulated and determined by a higher rule, actually is a discretionary activity. In fact Kelsen

explains a few lines below that "Un-bestimmtheit" (in-determinacy) is nothing else than a more or less extended << Spielraum freien Ermessens>> (margin of discretion). If in Kelsen, as we have seen, "determination" (Bestimmung) is equivalent to something that binds the lower law-making bodies (Bindung), in the sense that it restricts their freedom of choice, then "indeterminacy" (Unbestimmtheit) is equivalent to the opposite of this bond, in other words to the sphere of discretion left to lower bodies (Ermessen).

We can therefore assert that the "Reine Rechtslehre"'s "Unbestimmtheit" cannot be identified with the typically semantic phenomenon of vagueness, although it could be a consequence of this phenomenon. Its nature is basically juridical. Kelsen's indeterminacy may be summarized as follows: the lower authority's act is never completely bound by the superior rule; therefore a partial delegation of the power of choosing to this authority is fatal. Thus, to avoid disappointing misunderstandings which Kelsen could not have foreseen, it is advisable to translate the German term "Unbestimmtheit" into English with the word "discretion", even if this may result in a slightly forced translation.

5.-"Indeterminacy" in the sense of discretion from the standpoint of Kelsen's gradualistic conception.

The traditional jurists make use of many sophisticated distinctions between various types of discretion and think that in many cases the term "discretion" itself turns out to be uncorrect. For instance Emilio Betti draws up the following list: << a) the lawgiver's sovereign discretion (or absolute discretion) which can be delegated to courts only in exceptional cases, namely when judges are allowed to take their decisions according to equity (cod.civ.912); b) pure discretion about which the scholars of administrative law have been debating for a long time; c) technical discretion; d) finally there is an additional "discretion" used to specify the rules, adapting them to social changes; by means of this kind of discretion it is possible to apply the laws to particular cases (e.g. cod.pen. 132-133); e) somebody thinks that there are similarities between the last discretion, which is typical of adjudication, and the judgments conforming to the "elastic" and "value concepts" from common sense; these standards, although they are not juridical, exert their influence on the enforcement of legal rules when they are referred to by

the laws that must be interpreted and enforced. The only thing that all these cases have in common>> Betti adds <<is the name discretion: a thorough examination shows that they are completely different cases >> (8).

Kelsen reacts against this traditional approach. He builds up an unitarian conception of discretion (indeterminacy, Unbestimmtheit). From the point of view of his theory, each passage from a higher level of the Stufenbau to a lower one is characterized by a margin of discretion. What varies is only the extension of the sphere left to discretion. As the level of the authority taken into account lowers, such a sphere gets narrower and narrower.

As a matter of fact, the old theories which distinguish between many fundamentally different kinds of discretion could be accepted as sound only if we refused to acknowledge the fact that judges often make discretional choices in pursuance of social welfare like public administrators do.

But according to Kelsen, and I agree with him, most times courts cannot reach an exact solution of the case. On the contrary, not seldom, for instance when a borderline case occurs, judges settle a question at stake by choosing between the competing interests in the way that best satisfies them.

Also the argument that courts, but not the Parliament and public officers when acting discretionally, have to justify their decisions is not conclusive. Even leaving out the fact that during Illuminism judge's motivation was not considered an essential feature of sentences, this argument demonstrates the following two points at the most: that in our society control over judicial action is much stronger than over administrative action and that relevant restricitions limit court's discretion, although they do not annihilate it. The lawgiver's freedom of choice itself is not as absolute as it may seem since he cannot exceed the boundaries fixed by the Constitution. On the other hand sometimes the lawmaker offers a rough justification of laws, through a preamble.

Secondly, traditional theories about discretion are very often inconsistent. Sooner or later they cannot help talking of a << rule-bound

discretion>> (sic!) in spite of the fact that such a statement is an oxymoron, a real contradictio in adiecto (9). That is just what happens when the unity of the concept of discretion is torn to pieces.

Of course Kelsen's ideas, as he puts them forward, constitute an over-semplification of legal notions and for this reason jurists may rise serious objections. However, in my opinion, differences between the various kinds of legal discretion could be used not to split the unity of this phenomenon, but they could be reconstructed within Kelsen's unitarian notion.

6.- Kelsen's intentional and unintentional indeterminacy.

It is well-known that Kelsen distinguishes between "intentional indeterminacy" (beabsichtigte Unbestimmtheit) and "unintentional indeterminacy" (unbeabsichtigte Unbestimmtheit).

This distinction may be used as a test to verify the thesis here supported according to which Kelsen's Unbestimmtheit must be interpreted in the sense of discretion and not in the sense of vagueness or open-texture.

As above-mentioned, intentional indeterminacy is often erroneously identified with legal standards.

This confusion is the ultimate cause of several misunderstandings and has inspired the widespread theory for which legal standards are nothing else than a voluntary delegation from the lawmaker to courts of a discretional power to issue new rules.

Also Kelsen's unhappy terminology affected by psychologism certainly does not help to dissipate misunderstandings. How can an intention be attributed to an assembly (like Parliament)?

In actual fact Kelsen frames two kinds of discretion (that is the way I translate the word "Unbestimmtheit"). On the one hand there is a discretion which by no means is the consequence of the structure of legal language. This is expressely provided for in the rules and exercised

with awareness by subjects entitled to this power. On the other hand there is a purely factual discretion which is an indirect consequence of the structure of legal language.

This division of "indeterminacy-discretion", in a certain sense, is the counterpart, within Kelsen's gradualistic theory, of the too sharp distinction between (absolutely) discretional acts and (absolutely) rule-bound acts drawn by traditional doctrines. There is no denying, in fact, that for Kelsen discretion is a matter of degree and that every law-applying activity is in part norm-creating or discretional.

Intentional indeterminacy is exemplified by Kelsen through cases in which the superior authority openly delegates an inferior authority to specify its own general rule by means of other rules in order to adapt it to the singularities of particular cases. This is the case of a law concerning public health empowering the prefect and the mayor to take <<all the suitable measures>> apt to avoid the spreading of an epidemy. Such measures shall differ depending on the desease threatening the health of persons and animals. Or we may consider the criminal law systems which leave courts free to vary the punishement between a minimum and a maximum in the light of circumstances and of the guilty's personality.

These examples brought by Kelsen have nothing in common with the legal standards. In the afore-mentioned hypothesis, namely when discretion is expressely conferred by law, there is no need for the rule empowering the public officers or the courts to decide discretionally to be formulated in a very vague language. In fact it may occurr, and in my opinion it should occurr more often, that the lawgiver makes an effort to determine very accurately the cases and the limits for discretionary powers. This is what happens, for instance, when the law lists all the possible cases in which an equitable evaluation is permitted or when in criminal law the minimum and maximum penality is determined by means of numerical terms.

On the contrary, legal standards do not expressely delegate the courts to decide freely the cases that are submitted to them, but recall social and ethical rules. Moreover, vague rules confer a merely implicit and factual discretion, not a discretion explicitly recognized by law.

As for Kelsen's "unintentional indeterminacy" (unbeabsichtigte Unbestimmtheit) is concerned, though it is true that this indeterminacy depends mainly on legal language, it is however untrue that everything which depends on language has a linguistic nature.

In any case the causes of this tacitly, and generally unwillingly, attributed discretion are many more than simple vagueness (or meaning indetermination). Kelsen enumerates three of them:

1) ambiguity (Mehrdeutigkeit), which is a paradigmatic example of a semantic and pragmatic problem.

2) the possible discrepancy (actual or supposed) between the letter and the spirit of the laws.

3) and finally the antinomies, which could be framed as syntactical problems.

NOTES

(2) H.Kelsen,"Allgemeine Theorie der Normen", Im Auftrag des Hans-Kelsen-Instituts aus dem Nachla· herausgegeben von K.Ringhofer und R.Walter, Manzsche Verlags- und UniversitÑtbuchhandlung, Wien 1979.

(3) C.S.Peirce,"Vague",in Baldwin,"Dictionary of Philosophy and Psychology", vol.2, London 1902, p.748.

(4) See for instance K.Engisch,"EinfÅrung in das juristische Denken", W.Kohlhammer, 4th ed., Stuttgart 1968 (4) and R.Dworkin"Is There Really No Right Answer in Hard Cases?", in R.Dworkin,"A Matter of Principle",Harvard University Press, Cambridge (Mass.) - London 1985, p.131.

(5) See U.Scarpelli,"Filosofia analitica e giurisprudenza", Nuvoletti, Milano 1953. p.57 ff. and U.Scarpelli,"La critica analitica a Kelsen", in C.Roehrssen(ed.), Hans Kelsen nella cultura filosofico-giuridica del

novecento", Istituto della Enciclopedia Italiana, Roma 1981, p.69 ff.

(6) See A.G.Conte," Saggio sulla completezza degli ordinamenti giuridici", Giappichelli, Torino 1962, p.48 and A.G.Conte,"Ordinamento giuridico",in"Novissimo Digesto Italiano",XII, UTET, Torino 1968, p.45 ff.

(7) H.Kelsen,"Reine Rechtslehre",2nd ed. cit., p.346-7.

(8) E.Betti,"Interpretazione della legge e degli atti giuridici", 2nd ed. supervised by G.Crifi, Giuffrä, Milano 1971, p.149-150.

(9) E.Betti, op.cit., p.152-3. See also P.Nuvolone," Il sistema del diritto penale", CEDAM, Padova 1982 (2) and F.Mantovani,"Diritto penale. Parte generale",CEDAM, Padova 1983, p.705.

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