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Defining Legal Vagueness: A Contradiction in Terms?

Abstract: Indeterminacy is an apparently unavoidable aspect of legal language and this paper aims to offer a taxonomical review of concepts related to linguistic and legal indeterminacy, with particular reference to the phenomenon of vagueness. Starting from the consideration that the notion of legal vagueness is itself intrinsically vague and extremely multifaceted, this study describes the main functions of vagueness and its connection with related phenomena such as ambiguity, contestability, and fuzziness. More specifically, the focus is on legislative texts, and illustrative examples are taken from the EU Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment. Vagueness is here seen as an inherent feature of legal language rather than a threat to the rule of law. The paper illustrates the rationales behind different forms of legal and linguistic indeterminacy and, in particular, offers considerations on how vague choices may be exploited to shape normative texts.

Keywords: legal discourse, indeterminacy, vagueness, ambiguity

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Introduction

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – nothing more nor less." "The question is," said Alice, "whether you can make words mean so many different things."
> – Lewis Carroll, *Through the Looking Glass*

This study develops from the awareness that the concept of legal vagueness is of fundamental interest in understanding the dynamics of legal language and discourse. Indeed, the intricate relation between linguistic indeterminacy and

precision which emerges in legal texts has attracted significant scholarly interest.[1] The aim of this paper is not to enter the complex debate on the implications of vagueness for the philosophy of law, but rather to illustrate why linguistic vagueness is a constitutive element of certain legal texts and why attempts to avoid it may counterproductively lead to lack of clarity.

Examples of different forms of indeterminacy are taken from a legislative act, namely the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. Legal vagueness in this type of texts has important implications for theory and praxis, and EU Directives are particularly complex in that their application lies in the hands of different Member States. Therefore, these acts may be interpreted, and consequently applied, adopting different perspectives. Thus, the need for clarity and precision seems urgent, even though vagueness cannot be avoided, in that it allows all-inclusiveness[2] and, moreover, is an intrinsic aspect of the law.

The first part of this paper tackles the complexity which lies behind the definition of Legal English, focusing on its different interpretations and classifications. Starting from the assumption that vagueness and precision are strictly inter-related in legal texts, the second section offers an overview of concepts gravitating around the idea of legal and linguistic indeterminacy. In particular, the focus is on the use of vague lexical categories and other linguistic phenomena which may in turn be seen as other forms, sources or consequences of vagueness. The final section illustrates the importance of vagueness for the economy of legal texts. I also link the recent upsurge of interest in the presence of vagueness in legal texts with a renewed interest in the epistemic and pragmatic aspects of vagueness and the role it plays in the production and the interpretation of legal texts, in particular of legislative nature.

1 See *inter alia* Sophie Cacciaguidi-Fahy and Anne Wagner eds., *Legal Language and the Search for Clarity* (Bern: Peter Lang, 2006); Timothy Endicott, "The Value of Vagueness" in *Philosophical Foundations of Language in the Law,* eds. Andrei Marmor and Scott Soames (New York: Oxford University Press: 2011), 14–29; Scott Soames, "What Vagueness and Inconsistency Tell Us About Interpretation" in *Philosophical Foundations of Language in the Law,* eds. Andrei Marmor and Scott Soames (New York: Oxford University Press, 2011), 31–52; Scott Soames, "Vagueness and the Law" in *The Routledge Companion to the Philosophy of Law*, ed. Andrei Marmor (New York: Routledge, 2012), 95–108.

2 Vijay Bhatia, *Analyzing Genre. Language Use in Professional Settings* (New York: Longman, 1993), 117.

1 The vagueness of *Legal English*

It is generally agreed that the concept of *Legal English* is particularly intricate and is in constant evolution. In 1923 Holdsworth spoke about "the language, or rather languages, of the law"[3] in order to stress the multifaceted nature of this notion. According to Mellinkoff's definition, *the language of the law* is represented by "the customary language used by lawyers in those common law jurisdictions where English is the official language."[4] Cornu[5] describes legal language as a professional type of language, as it is mainly used by people operating in the legal world, whether directly or indirectly. It is seen as the language of a series of professions rather than the language belonging to one single professional category. Therefore, it should not be intended as the language of lawyers, but as a much wider language whose use affects everybody's life.

Crystal highlights the peculiarity of legal language, and its uniqueness in comparison with other varieties of language, especially in light of the social role that it plays:

> Legal language is always being pulled in different directions. Its statements have to be so phrased that we can see their general applicability, yet be specific enough to apply to individual circumstances. They have to be stable enough to stand the test of time, so that cases will be treated consistently and fairly, yet flexible enough to adapt to new social situations. Above all, they have to be expressed in such a way that people can be certain about the intention of the law respecting their rights and duties. No other *variety of language* has to carry such a responsibility.[6]

It is interesting to note that the idea of a *variety of English* is also mentioned by Tiersma,[7] in order to highlight its differentiation from the so-called ordinary language.

The expression *Legal English* is multifaceted and comprises a complex variety of possible interpretations. It cannot generally be treated as a monolithic entity, as the contexts of production and the discourse types associated with this kind of language are varied and manifold. The schematisation offered by Maley[8] suggests that different situations may lead to different discourses, and it emphasises the

3 See William S. Holdsworth, *A History of English Law*, 3rd ed. (London: Methuen, 1923), 478, quoted in David Mellinkoff, *The Language of the Law* (Boston: Little Brown & Co., 1963), 3.
4 Mellinkoff, *The Language of the Law*, 3.
5 Gérard Cornu, *Linguistique juridique* (Paris: Éditions Montchrestien, 2005), 17.
6 David Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge: Cambridge University Press, 1995), 374.
7 Peter Tiersma, *Legal Language* (Chicago: The University of Chicago Press, 1999), 49.
8 Yon Maley, "The Language of the Law" in *Language and the Law*, ed. John Gibbons (Harlow: Longman, 1994), 11–50, 15.

vastness of the discourses which constitute *Legal English*. Maley identifies four main discourse situations, namely:

- Sources of law (originating points of legal process): legislature, regulations, by-laws, precedents, wills, contracts, etc.
- Pre-trial processes: e.g. police/video interview, pleadings, consultation, subpoena, jury summons.
- Trial process: court examination, cross-examination, re-ex, intervention, rules and procedures, jury summation, proceedings, decision.
- Recording and law-making: e.g. case reports.[9]

Discourse situations and text functions play an important role also in Trosborg's attempt to define legal language. According to Trosborg[10] the term *legal language* is intended as a super-ordinate term which includes not only the language of legal documents (defined as *language of the law*), but also the language used in the courtroom, in textbooks, or by people (professionals and laymen) talking about the law. This is the perspective which will be used in this paper to refer to *legal language*.

Other terms and expressions such as *legal lingo, legal jargon* and *legalese* may be employed by certain communities of practice. However, they are more rarely used, especially because they generally seem to assume a negative connotation and tend to be associated with a sort of jargon that is incomprehensible to laymen. In this paper I will focus in particular on the area defined by Trosborg as the *language of the law*, which is generally considered the most representative of "legalese," in that its characteristics are broadly associated with legal language. As mentioned above, the focus will be on a specific type of legal document, namely an EU Directive.

2 Defining vagueness: a myth or a necessity?

As we have seen, the expression *Legal English* is itself vague and different forms of vagueness seem to emerge in different kinds of legal texts.[11]

9 Maley, "The Language of the Law," 15.

10 Anna Trosborg, *Rhetorical Strategies in Legal Language* (Tübingen: Narr, 1997).

11 See Vijay Bhatia, Jan Engberg, Maurizio Gotti and Dorothee Heller eds., *Vagueness in Normative Texts* (Bern: Peter Lang, 2005) for a discussion of vagueness focusing on normative texts; Patrizia Anesa, "Vagueness and Precision in Contracts: a Close Relationship," *Linguistica e Filologia* 24 (2007): 7–38 on contracts; Michael Faure, "Vague Notions in Environmental Criminal Law," *Environmental Liability* 4 (2010): 119–133 on Environmental Law; and Ismael Arinas, "How Vague Can Your Patent Be? Vagueness Strategies in U.S. Patents," *Hermes – Journal of Language and Communication in Business* 48 (2012): 55–74 on patents.

In this effort to come to grips with vagueness, a clear definition of this concept is not always achievable and, therefore, the notion of vagueness should be problematised. While performing such an attempt, a series of other interrelated notions have to be considered. Even though a selection is inevitably partial and non-exhaustive, I will focus on some of the phenomena which often emerge in the analysis of legal texts and whose identification is often particularly complex because these concepts are interdependent, may at times overlap and be apparently undistinguishable. The framework suggested does not analytically present all the possible interpretations of the different realizations of (linguistic) indeterminacy, but embodies some of the phenomena which should be taken into consideration in the investigation of legal texts, with vagueness being the focal point of this analysis.

2.1 Indeterminacy

Indeterminacy[12] is an inherent feature of human language. For the purpose of this study, it is intended as an "umbrella term" covering a series of linguistic phenomena such as vagueness, ambiguity, contestability, fuzziness, incoherence, and generality. Following Endicott[13] "legal indeterminacy" refers to cases where a question of law, or the application of the law, does not have one single right answer. Instead, indeterminacy derived from linguistic formulations is called "linguistic indeterminacy," but the two concepts are clearly interdependent and interrelated.

On the one hand, indeterminacy may be seen as an irresolvable problem generating a series of interpretative issues, but on the other hand it may also be intended as a phenomenon playing an important synthetic function in the definition of certain legal notions. Indeed, it is through indeterminacy that a certain term or expression may include a variety of concepts and refer to different cases and situations, playing therefore an essential role in legal texts.

It is obviously not the aim of this study to condemn or rehabilitate indeterminacy in legal language, but to reflect upon its function in some specific types of legal texts. It may seem plausible to assume that a legislative act should avoid

12 Following Manfred Pinkal, *Logic and Lexicon* (Dordrecht: Kluwer, 1995), a distinction should be made between communicative underdeterminacy and semantic indeterminacy, where the former refers to situations where information is lacking or is less than expected, whereas the latter identifies situations in which it is difficult to establish the level of truth of an utterance. Ambiguity and vagueness are seen as subcategories of semantic indeterminacy.

13 Timothy Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000), 19–20.

cases of indeterminacy as much as possible, as indeterminacy may cause lack of clarity and precision and therefore be in contrast with the very idea of applying the law in a coherent and fair way. However, it is clear that the law must apply to a generality of cases (and potential future cases) and, consequently, it has to make use of indeterminacy in order to cover a vast range of possibilities. In particular, the transnational nature of EU Directives makes wide applicability a priority criterion, and from this perspective, indeterminacy seems essential in order to fulfil the need for general applicability mentioned by Crystal.[14] It may also be argued that assuming that the law could be generally applicable in different countries without any form of indeterminacy is simply unrealistic. Furthermore, indeterminacy is a source of judicial discretion, which is fundamental in the process of applying the law.

2.2 Vagueness

Traditionally, vagueness[15] can be explained from a philosophical point of view through the sorites paradox,[16] which is based on *modus ponendo ponens* arguments. This paradox is generally attributed to the logician Eubulides of Miletus and may be described as follows:

> 0 grains of sand do not make a heap, and it seems that if *n* grains of sand do not make a heap, then adding only 1 grain will not make a heap either. By induction, it should follow that for any *n*, *n* grains of sand do not make a heap, which is clearly paradoxical.[17]

Several versions of this paradox exist, such as the Bald Man paradox, according to which it cannot be stated if there is a number *n* of hair which defines whether a man is bald or not.

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14 David Crystal, *The Cambridge Encyclopedia of the English Language*, 374.

15 For an epistemic approach to vagueness see Timothy Williamson, *Vagueness* (London: Routledge, 1994) and Roy Sorensen, *Vagueness and Contradiction* (Oxford: Clarendon, 2004); for a pragmatic approach see Qiao Zhang, "Fuzziness- Vagueness- Generality- Ambiguity," *Journal of Pragmatics* 29 (1998), 13–31; and for a contextualist approach see Stewart Shapiro, *Vagueness in Context* (New York: Oxford University Press, 2006).

16 According to Keefe, susceptibility to sorites paradoxes is one of the fundamental characteristics that vague predicates generally display. The other two are: admission of borderline cases and (apparent) lack of clear boundaries; see Rosanna Keefe, *Theories of Vagueness* (Cambridge: Cambridge University Press, 2000).

17 Paul Égré and Nathan Klinedinst, "Introduction: Vagueness and Language Use" in *Vagueness and Language Use*, eds. Paul Égré and Nathan Klinedinst (Basingstoke: Palgrave, 2011), 2.

The word "vague" has been considered as being itself vague.[18] Vagueness may cause controversies because it generally refers to "borderline cases"[19] and, in particular, linguistic vagueness refers to situations where it is difficult to attribute a specific meaning to a certain word. Waldron defines the concept of vagueness as follows:

> A predicate P is vague if there are objects or instances x1 or x2, etc. within the domain of the normal application of terms of this kind such that users are characteristically undecided about the truth or falsity of "x1 is P" or "x2 is P," and they understand that indecision to be a fact about the meaning of P rather about the extent of their knowledge of x1, x2, etc.[20]

In other words, on certain occasions it is not possible to immediately decide what meaning can be assigned to a term, and whether a term belongs to a certain category or not. In particular, colours are often used to explain this concept. For example, *red* refers to a specific colour, but it may sometimes be difficult to establish whether certain nuances, for example fuchsia or crimson, may be defined as *red* or not; such a problem does not arise from lack of knowledge or information, but from issues related to discretional and arbitrary interpretation. Gradable adjectives are often seen as representative of vagueness, but, as will be shown, other lexical categories are also susceptible to vagueness.

As far as legal language is concerned, the importance of vagueness is self-evident and a sort of necessary trade-off exists between the need for general applicability on the one hand and the search for precision on the other hand. It is often argued that vagueness can be eliminated thanks to the use of more specific terms. However, in many cases specific terms may reduce the room for vagueness, but cannot eliminate all interpretative issues. The oft-quoted example provided by Endicott is particularly revealing to explain the tension between generality and specificity in operative legal texts:

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18 John L. Austin, *Sense and Sensibilia*, ed. Geoffrey J. Warnock (Oxford: Oxford University Press, 1962), 125–136. For a further discussion of the vagueness of the term "vagueness" see inter alia William P. Alston, *Philosophy of Language* (Englewood Cliffs, N.J.: Prentice-Hall, 1964); Roy Sorensen, "An Argument for the Vagueness of 'Vague'," *Analysis* 45 (1985): 134–137; Roy Sorensen, *Blindspot* (Oxford: Clarendon Press, 1988).

19 Lawrence Solan, "Vagueness and Ambiguity in Legal Interpretation" in *Vagueness in Normative Texts*, eds. Bhatia, Engberg, Gotti and Heller, 73–96, 79.

20 Jeremy Waldron, "Vagueness in Law and Language: Some Philosophical Issues," *California Law Review* 82 (1994): 509–540, 513.

> No person shall take or possess, in the Country of Lanark or the Regional Municipality of Ottawa-Carleton, any bullfrog unless the tibia thereof is five centimetres or more in length. (Regulation under the Ontario Game and Fish Act, O. Reg 694/81)[21]

As regards this example, Endicott wonders: "What if a bullfrog has one tibia longer than 5 cm and one shorter? What if the length of a tibia is pushed over 5 cm by a rare growth? What of a bullfrog with a curved tibia that is 4 cm long when laid beside a ruler, but measures 6 cm with a tape?"[22] Similarly, in the following example taken from Annex 1 of the EU Directive under investigation the types of installations contemplated are, *prima facie*, clearly defined and described:

> PROJECTS REFERRED TO IN ARTICLE 4(1) [. . .]
> 17. Installations for the intensive rearing of poultry or pigs with more than:
> (a) 85 000 places for broilers, 60 000 places for hens;
> (b) 3 000 places for production pigs (over 30 kg); or
> (c) 900 places for sows. [Annex I]

However, elements of vagueness may be found even in apparently clear definitions. For example: What if the weight of pigs changes from one day to another? When, where, how and by whom should the pigs be weighed? The example shows an attempt on the part of the legislator to define the case in the clearest and most precise possible way, identifying the specific cases to which the law may apply; nevertheless, even in this case, interpretative issues cannot be completely eradicated.

Vagueness is often given by the use of "weasel words,"[23] which have a particularly flexible meaning, and evaluative adjectives are the most recurrent type of weasel words.[24] The text under investigation tends to limit the use of evaluative adjectives, but some terms of this type, such as *appropriate*, *adequate*, or *fair*, are present:

> Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is *adequate* for personal health and well-being. [Article 19]

> Any such procedure shall be *fair, equitable, timely and not prohibitively expensive*. [Article 10.4]

21 Endicott, *Vagueness in Law,* 7.
22 Endicott, *Vagueness in Law,* 7.
23 Mellinkoff, *The Language of the Law,* 21.
24 Ruth Fjeld, "The Lexical Semantics of Vague Adjectives in Normative Texts" in *Vagueness in Normative Texts*, eds. Bhatia, Engberg, Gotti and Heller, 157–172.

As will be shown, weasel words are also a source of contestability (see Section 2.4).

From a more general perspective, vagueness may be reduced by the use of specifying definitions or intra-textual references (pointing, for instance, to other articles within the same act):

> For the purposes of this Directive, the following definitions shall apply:
> (a) *'project' means*:
> – the execution of construction works or of other installations or schemes,
> – other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources; [Article 1.2]

> Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. *Those projects are defined in Article 4.* [Article 2.1]

Terms and expressions whose interpretation may be problematic and controversial are generally clarified. However, definitions and references for clarifying purposes cannot be overused, or else they might lead to an illogical and incoherent text. Indeed, legislators often experience a tension between the need for high specification and vagueness. Specifying the cases and the behaviours contemplated by the law in great details may lead to the risk of excluding other related situations which may not fit the legislative definition. Vague expressions are often in line with the principle of all-inclusiveness, but rely on the judiciary for their interpretation.

2.3 Ambiguity

Ambiguity is generally more easily identifiable than vagueness and may be intended as a phenomenon in which a term or an expression has two or more meanings which are perfectly clear.[25] Pinkal compares vagueness and ambiguity as follows:

25 See Waldron, "Vagueness in Law and Language" and Solan, "Vagueness and Ambiguity in Legal Interpretation", 73.

> Disambiguation of ambiguous expressions requires the choice among alternative readings, which mutually exclude each other. Precisification of vague expressions takes place by reduction of the borderline area of indefiniteness in more or less arbitrary ways.[26]

Following this definition, it is clear that ambiguities are unavoidable in human language and also in legal texts, but their interpretation does not seem problematic. Clarification takes place thanks to the contextualisation of the controversial expression, and this process is often sufficient to determine which interpretation should be followed, at least in the legal world. Endicott points out that ambiguity is often related to cases of homography and homophony:

> Ambiguity is closer kin to homography (lead-lead) and homophony (hart-heart) than it is to vagueness. Ambiguity, homography, and homophony are all incidental features of language that, unlike vagueness, are only occasionally important (although they are occasionally very important) in law.[27]

In other words, it is clear that ambiguity and vagueness are closely interrelated.[28] However, it may be argued that, as Adams aptly states, "vagueness derives from imprecision," whereas ambiguity "derives from alternative inconsistent meanings."[29]

In cases of ambiguity, therefore, the process of clarification is relatively simple, because the potential meanings which may be attributed to a term are quite divergent and only one seems plausible in that particular situation. Indeed, the analysis of the syntax or the mere observation of the context generally resolve cases of ambiguities. For example, in Annex II the Directive states:

> PROJECTS REFERRED TO IN ARTICLE 4(2)
> [. . .]
> 5. MINERAL INDUSTRY:
> (a) Coke ovens (dry coal distillation).

26 Manfred Pinkal, "Vagueness, Ambiguity and Underspecification" in *Proceedings from the Conference on Semantics and Linguistic Theory, Rutgers University (SALT)*, eds. Teresa Galloway and Justin Spence (Ithaca: Cornell University, 1996), 185–201, 196.
27 Endicott, *Vagueness in Law*, 54.
28 Kees Van Deemter, *Not Exactly: in Praise of Vagueness* (Oxford: Oxford University Press, 2010), 8.
29 Kenneth Adams, *A Manual of Style for Contract Drafting* (Chicago: American Bar Association, 2004), 85.

The term *Coke* may technically be seen as ambiguous. However, it is clear that a process of contextualization based for example on the analysis of the situational and cultural context and the cotext may disambiguate the term very intuitively.

This example calls for a reflection of the concept of *polysemy*. Polysemy is an oft-discussed concept in linguistic analysis and research.[30] It has even been argued that polysemy simply does not exist and it is an artificial creation of linguistic analysis.[31] However, the presence of polysemy is of fundamental importance in texts whose nature is inevitably determined by an interpretative process, which may have important consequences.

In lexical semantics the difference between polysemy, homonymy and lexical ambiguity is often unclear. However, some solutions have been offered. Even though complex and misleading cases are often present, polysemy generally refers to cases where the same lemma may be assigned different meanings. Conversely, homonymous terms are generally treated by lexicographers under separate lemmata. To a certain extent, it may also be argued that "every word is more or less polysemous, with senses linked to a prototype by a set of relational semantic principles which incorporate a greater or lesser amount of flexibility."[32]

2.4 Other forms, sources, and consequences of vagueness

Vagueness is strictly connected to the notion of *contestability,* especially with reference to the legal world. It seems that contestable elements bear a similarity to vague concepts, and Waldron remarks that the first condition in the definition of contestability is: "it is not implausible to regard both *something is P if it is A* and *something is P if it is B*," and such a condition "depends on vagueness also."[33] However, the definition of contestability is also linked to the idea of ambiguity, as "[c]ontestability will behave like ambiguity in certain contexts, and ambiguity can become contestability when something oral or political seems at stake in a discussion about the proper meaning of a term."[34] Adopting a different stance, Dworking affirms that there is a right answer to any legal dispute and certain

30 See, among others, Brigitte Nerlich, Zazie Todd, Vimala Herman and David D. Clarke eds., *Polysemy: Flexible Patterns of Meaning in Mind and Language* (Berlin: Mouton de Gruyter, 2003).
31 Georges Kleiber, *Problèmes de sémantiques: La polisémie en question* (Villeneuce d'Ascq: Septentrion, 1999).
32 Brigitte Nerlich and David D. Clarke, "Polysemy and Flexibility: introduction and overview" in *Polysemy: Flexible Patterns of Meaning in Mind and Language,* eds. Brigitte Nerlich et al. (Berlin: Mouton de Gruyter, 2003), 3–30, 8.
33 Waldron, "Vagueness in Law and Language," 13.
34 Waldron, "Vagueness in Law and Language," 13.

concepts may be "contested" in the sense that they "admit of different conceptions,"[35] but are not vague. Therefore, vagueness is not a necessary precondition for contestability.

Contestability may be seen as a source, but also as "a form (or a feature)" of vagueness and in Endicott's words "[t]he application of an expression is 'contestable' if people who know all the facts can reasonably disagree about whether the expression applies to something."[36] Moreover, contestability may also be intended as consequence of vagueness, which allows legal professionals to exploit vague words or expressions in order to contest disadvantageous interpretations. Consequently, from a legal perspective, contestability is highly problematic and apparently unavoidable. As has been mentioned in Section 2.2, weasel words may often be the source of contestability. For example, Article 6.6 of the Directive states:

> *Reasonable time-frames* for the different phases shall be provided, allowing *sufficient time* for informing the public and for the public concerned to prepare and participate *effectively* in environmental decision-making subject to the provisions of this Article. [Article 6.6]

Concepts such as *reasonable time-frames*, *sufficient time*, *effective participation* are contestable according to Waldron's definition as they may be explained in considerably different ways according to several factors and in particular according to the socio-cultural and legal context. They may, indeed, be interpreted differently and may even be used to support opposite principles. For example, the requirement for *reasonable* is not specified and therefore may not be univocally interpreted. Specifying definitions which are typical of legal language may be useful in providing further specification, but their use could potentially be infinite and has to be limited in order to maintain a certain level of readability.

Another concept related to linguistic vagueness is represented by *linguistic fuzziness*,[37] which expresses an idea of indefiniteness and uncertainty. A sense of linguistic fuzziness may be conveyed, among others, by the use of indefinite adjectives, pronouns and adverbs. The definition of the word *fuzzy* suggested by Crystal is particularly interesting and seems to include a vast array of options:

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35 Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 103.

36 Endicott, *Vagueness in Law*, 47.

37 From a pragmatic point of view, this phenomenon may be described as displaying "referential opacity" (Zhang, "Fuzziness- Vagueness- Generality- Ambiguity," 15). For example, if a text included the expression *approximately ten countries*, the adverb would give the text a fuzzy nature because it would be impossible to quantify exactly how many countries we are referring to. While numbers immediately preceding or following *ten* would intuitively be included, other cases would fall in a penumbra area and be subject to interpretation.

> A term derived from mathematics and used by some LINGUISTS to refer to INDETERMINACY involved in the analysis of a linguistic UNIT OR PATTERN. For example, several LEXICAL ITEMS, it is argued are best regarded as representing a semantic category which has an invariant core with a variable (or 'fuzzy') boundary, this allowing for flexibility of APPLICATION to a wide range of entities, given the appropriate CONTEXT. The difficulty of defining the boundaries of *cup* and *glass* has seen a well-studied example of this indeterminacy. Other items which lend fuzziness to language include *sort of, rather, quite, etc.* (original emphasis).[38]

As fuzziness may be particularly problematic from a legal perspective, the use of fuzzy words tends to be limited. The following excerpt shows, for example, the presence of the term *several*,[39] which may be seen as fuzzy in that it does not specify a precise quantity:

> Integrated chemical installations, i.e. those installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which *several* units are juxtaposed and are functionally linked to one another and which are [. . .] [Annex I, Section 6]

This case, however, shows that an over-specification of the number of parts to be contemplated would not have been beneficial, but rather counterproductive, in that it may have caused lack of general applicability.

Vagueness may also be generated by *incoherence*. It is plausible to assume that elements of incoherence should be avoided in legal texts, as citizens should have a clear understanding of their rights and their duties. A text is generally considered incoherent when it lacks logical coherence and displays contradictions. Charnock remarks that we can talk about an incoherent text when "different meanings suggest themselves, but are excluded because they lead to contradiction."[40] When dealing with legal texts, cases characterised by incoherent linguistic formulation are generally explained through what appear to be the most natural and logical hermeneutic processes. Moreover, it must be noticed that incoherence may also lead to inapplicability of a law (for instance when the same law includes two requirements which are incompatible).

The term *generality* may also assume a wide variety of definitions. It may be explained following Zhang's statement that "the meaning of an expression is

38 David Crystal, *A Dictionary of Linguistics and Phonetics* (Oxford: Blackwell, 1991), 148.

39 Approximators such as *several* do not express quantities in absolute terms and may be defined as non-numerical quantifiers; see Joanna Channell, *Vague Language* (Oxford: Oxford University Press, 1994), 95.

40 Ross Charnock, "Clear Ambiguity" in *Legal Language and the Search for Clarity,* eds. Sophie Cacciaguidi-Fahy and Anne Wagner (Bern: Peter Lang, 2006), 65–103, 69.

general in the sense that it does not specify certain details; i.e. generality is a matter of unspecification."[41] Among the examples offered by Zhang, we may find the sentence *Mary saw John*, which is general because "it does not specify whether or not Mary saw John in a shop, or in a school, or in any other place."[42] However, according to this example, it seems that all sentences, even highly specific ones, present elements of (potential) generality, as they could infinitely be further specified. Such an approach, however, may be deleterious in terms of the economy of the text.

Strictly linked to the notion of generality is, therefore, the separate class of linguistic phenomena which may be classified as *underspecificity*. For example, an utterance including indefinite pronouns such as "somebody bought something" lacks the necessary level of specificity to be seen as informative. In this case, from a pragmatic perspective, the cooperative principle is not observed, especially as regards the maxim of quantity. Cases of manifest underspecifity, which are given, for instance, by the use of indefinite adjectives and pronouns such as *some, somebody, someone*, or *something* are not present in the Directive. Even though underspecific sentences may apparently be vague, technically they do not display traits of vagueness, such as the susceptibility to sorites paradoxes.[43] They should therefore be considered as a separate class rather than a particular form of vagueness.

A particular realization of indeterminacy is *incompleteness*,[44] which may be intended as a source of vagueness. Incompleteness may emerge, for example, due to the use of defining lists which do not include all potential options. For instance, Article 3 states:

> The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:
> (a) human beings, fauna and flora; [Article 3]

This list (*human beings, fauna and flora*) is apparently all-inclusive. However, one may argue that, from a biological point of view, borderline cases are inevitably present. For instance, bacteria are taxonomically neither fauna nor flora. One may therefore wonder whether this exclusion was intentional, or the extra cate-

41 Zhang, "Fuzziness- Vagueness- Generality- Ambiguity," 16.
42 Zhang, "Fuzziness- Vagueness- Generality- Ambiguity," 16.
43 See Keefe, *Theories of Vagueness*, and Nicholas J. J. Smith, *Vagueness and Degrees of Truth* (Oxford: Oxford University Press, 2008).
44 It should also be noticed that, from a legal viewpoint, incompleteness may also be intended as a source of contestability.

gory was not contemplated simply because of its marginal importance. However, it is clear that in this case over-specification would lead to futile complexity and, consequently, undesirable lack of comprehensibility.

The ones presented in this section are only some of the concepts which are somehow related to the idea of indeterminacy and may be intended as forms, sources or consequences of vagueness. As has been shown, their definition may be particularly controversial and, for example, Scheffler[45] highlights that even ambiguity may sometimes be included under the label "vagueness." Indeed, it has often been stated that terms such as indeterminacy, vagueness and ambiguity may be the object of controversial interpretations and are themselves indeterminate, vague and ambiguous. Therefore, rather than focusing on the description of the panoply of forms that indeterminacy may assume, it is deemed important to identify the most recurrent and problematic phenomena in specific types of texts and to show their interrelatedness.

3 Vagueness and the law: discussion and conclusions

Vagueness is an intrinsic feature of human language, and different languages, contexts of production and communities of practice may adopt considerably different perspectives in the application of this concept. Given the constitutive role that vagueness plays in language, it is plausible to affirm that elements of vagueness cannot be completely eradicated. Indeed, as Williamson remarks, "[a]lthough we can make our language less vague, we cannot make it perfectly precise."[46] Vagueness also permeates specialised languages, even though they might be expected to display a higher level of precision, determinacy and clarity. For instance, lexical choices should be characterised by technicality and avoid cases of vagueness and contestability. However, even legal language, which should state incontrovertible principles and notions, is highly vague.

The concept of legal certainty has traditionally been recognised as a key principle of European Union law since the 1960s[47] and the use of vague notions hence seems at odds with such a fundamental principle. However, conventions play a

45 Israel Scheffler, *Beyond the Letter: A Philosophical Inquiry into Ambiguity, Vagueness and Metaphor in Language* (London: Routledge and Kegan Paul, 1979), 38.

46 Williamson, *Vagueness*, 1.

47 See Damian Chalmers, *European Union Law: Text and Materials* (Cambridge: Cambridge University Press, 2006).

crucial role in the linguistic realisation of the law and, although apparently paradoxical, vagueness may be seen as one of these conventions. Indeed, as Frade remarks, "the conventional use of vague language has been tacitly agreed on by legal drafters and interpreters"[48] and the use of linguistic vagueness in the formulation of legal principles is pervasive. I am not here arguing that all laws are vague, but that vagueness is an intrinsic element of law. Vagueness is often unavoidable and its use complies with a series of linguistic conventions and routines which are the core of the legal field.

Different interpretations of the term "vagueness" may be used to justify the omnipresent use of syntactic, lexical or stylistic choices which convey an idea of vagueness, or, conversely, to condemn it as the main reason for the complexity which is often attributed to legal language. Beyond the limits typical of any definition, attempting to define the concept of vagueness, and in particular legal vagueness, represents an intricate task from an epistemic and a pragmatic point of view and it calls for a reflection upon the multifaceted nature of this concept and its complexity. In other words, vagueness is in turn considered as a unique tool to ensure a vast applicability of the law or as a strategy used by legal experts to make the law complex and inaccessible to laypeople.

In the EU directive analysed vagueness is the most pervasive form of indeterminacy. Although vagueness may seem in contraction with the need for precision, these two apparently irreconcilable aspects can instead be seen as "two sides of the same coin."[49] Indeed, it has often been stated that legal texts must fulfil a double requirement. On the one hand, they must be clear and precise, and, on the other hand, they must have a wide applicability and be all-inclusive. Vagueness is ubiquitous in legal language, and the hypothesis to eliminate it may appear fascinating, but it is in stark contrast with the need to describe general and generalisable concepts, ideas, cases and situations. For example, the use of weasel words may be extremely vague and contestable, but it is also necessary in order to ensure a wide spate of applicability. As a consequence, vague language may be seen as one of the tools which allow the law to fulfil its functions and be applicable to different contexts.

Starting from the consideration that vagueness is pervasive and obdurate in language, I attempted to describe the concept of vagueness as a form of linguistic indeterminacy. Vagueness does not necessarily represent a threat to the rule of law and to a just application of the law; conversely, an excessive level of precision

48 Celina Frade, "Legal Multinomials: Recovering Possible Meanings form Vague Tags" in *Vagueness in Normative Texts*, eds. Bhatia, Engberg, Gotti and Heller, 133–156, 133.
49 Vijay Bhatia, "Specificity and Generality in Legislative Expression: Two Sides of the Coin" in *Vagueness in Normative Texts*, eds. Bhatia, Engberg, Gotti and Heller, 337–356, 337.

and specificity may be seen as problematic, because it may limit the general applicability of the law. Therefore, vagueness may be interpreted as an inherent feature of language, without necessarily attributing to such concept a positive or a negative connotation. Drafters of legal documents are constantly faced with the dilemma of reconciling precision and generality, and it is not possible to clearly affirm to what extent vagueness could or should be avoided, or whether interpretation could always eradicate vagueness or not. Thus, vagueness may appear detrimental to the clarity and the precision that a legal text should possess, but on the other hand it may be seen as necessary to convey the versatility, the flexibility and the adaptability of human language.