

LAW AND FLEXIBILITY
- RULE OF LAW LIMITS OF A RHETORICAL SILVER BULLET -

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1. Introduction

It has often been argued that legal rules and their application have to be flexible in order to allow for just decisions in individual cases. Flexibility is sometimes even regarded as a distinguishing feature of the common law as such. Taking these claims as a starting point this article explores the significance of flexibility from the viewpoint of the rule of law doctrine. It demonstrates that flexibility is not rule of law-compatible. In order to uphold the rule of law it is therefore necessary to prove that there is no flexibility. *Vice versa*, if it turns out that the law offers flexibility then the rule of law doctrine has to be reconsidered.

A sharpened awareness of the use of words can sharpen the awareness of phenomena.¹ The word ‘flexibility’ has been and is used in many different ways and the discussion of flexibility touches upon a great variety of phenomena of very general nature. It is not within the scope of this article to contribute substantially to these debates. In particular, it cannot be the goal of this article to have the last word on the jurisprudential significance of flexibility or to discuss flexibility from the viewpoint of the empirical reality of law in action. In contrast, this article tries to draw attention to the doctrinal determination of flexibility. In particular, this article aims at emphasizing the limitations potentially imposed by the rule of law doctrine on the use of the word ‘flexibility’ for argumentative purposes.

Divided into three parts this article first narrows down the meaning of ‘flexibility’ and similar notions by exploring what this term might imply and how it has been used in practice. It goes on to analyze in its main part how flexibility fits into the framework of the rule of law doctrine, more precisely how flexibility interacts with the notion of legal certainty. The final part then summarizes the findings and draws conclusions of a more general nature.²

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¹ R.S. Summers, *The New Analytical Jurists* (1966) 41 *New York University Law Review*, 861-869, 862, with reference to J. L. Austin, *A Plea for Excuses*, (1956-57) 57 *Proceedings of the Aristotelian Society* 1-30, 8.

² This article is a result of self-reflection. Like many others I have used the term ‘flexibility’ without acknowledging its interaction with the rule of law doctrine, see *eg* L.-Ch. Wolff, “Statutory Retention of Title Structures?” (2009) 14 *Deakin L. Rev.* 1-27, 27. The criticism in (2011) *J. JURIS* 549

2. Delineating Flexibility

Any discussion of ‘flexibility’ must begin with a definition of this term. This causes some difficulties as ‘flexibility’ is not an established legal concept nor is there a commonly acknowledged definition or way in which ‘flexibility’ is used in the legal context. While it is consequently not surprising that lines of discussion that are based on or driven by the call for flexibility often appear to be somewhat unfocused, arguments mainly point in the following four different directions.

Firstly, flexibility is apparently often understood as an intrinsic feature of legal rules. For example, in the context of the discussions regarding the introduction of European conflict of laws regimes in England it has been argued that “the technique of building an element of flexibility into rules of applicable law is a notable feature of English private international law, both judge made and in statutory form”.³

Secondly, one may regard flexibility as an attribute of the application of the law. From this perspective, it would not be the law itself that is flexible, but how the law is applied in practice.⁴

Thirdly, flexibility has been regarded as a distinguishing feature of the common law. Scarman J. has made this point in *McLoughlin v O’Brien*.⁵

“By concentrating on principle the judges can keep the Common Law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve.

...

The real risk of Common Law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach. If that should happen ... there would be a

the following chapters of the sometimes rather loose use of ‘flexibility’ is therefore first and foremost addressed to me.

³ A. Dickinson, “Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?”(2007) 3 J. Priv. Int’l L. 53-88, 64; *cf.* in more detail *infra*, chapter 3.1.

⁴ *Cf.* A. Mills, “The Dimension of Public Policy in Private International Law” (2008) 4 J. Priv. Int’l L. 201-236, 336; *cf.* in more detail *infra*, chapter 3.2.

⁵ *McLoughlin v. O’Brien* [1983] 1 AC 410; *cf.* in more detail *infra*, chapter 3.3.

danger of the law becoming irrelevant to the consideration, and inept in its treatment, of modern social problems. Justice would be defeated. The Common Law has, however, avoided this catastrophe by the flexibility given it by generations of judges.”⁶

The claim that case law is more flexible than codified rules⁷ may be regarded as a variation of the argument that flexibility is one of the characteristics of the common law.⁸

Finally, flexibility has also been discussed as a potential feature of the form legal rules may take. From this viewpoint “flexible rules” have been described as rules which “grant discretion with or without standards for its exercise, or [incorporation of] vague concepts such as ‘reasonableness’”.⁹

The different applications of the term ‘flexibility’ may of course imply differences also *vis-à-vis* their respective doctrinal viability. Related issues will therefore be explored separately in the following sections.

3. Flexibility and the Law

3.1 The Flexibility of Legal Rules

3.1.1 General

As mentioned in the previous section, flexibility is often seen as an intrinsic feature of legal rules. Unfortunately, courts and commentators normally fail to elaborate further on related specifics. It appears, however, that flexible rules are meant to be rules which are open-ended thus not offering guidance as to what the law is in relation to particular issues. According to this understanding flexible rules therefore do not determine their respective application outcome.¹⁰

⁶ Also *cf.* C. Perelman, *Justice, Law, and Argument* (Dordrecht/Boston 1980), 39-40; J. Harris, “Understanding the English Response to the Europeanisation of Private International Law” (2008) 4 J. Priv. Int’l L. 347-395, 359.

⁷ Lord Wilberforce, Hansard HL col. 840 (6 December 1994).

⁸ *Cf.* in more detail *infra*, chapter 3.4.

⁹ P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford 1987) 71-88; *cf.* in more detail *infra*, chapter 3.5.

¹⁰ Dickinson (note 3), 82.

The proposition of rule-inherent flexibility is normally accompanied by the acknowledgement of a particular “tension”¹¹ between flexibility on the one hand and legal certainty on the other. Andrew Dickinson has summarized this understanding when stating that “a measure of uncertainty must be accepted as a necessary consequence of the flexibility.”¹² Others¹³ have made reference to Lord Scarman¹⁴ who had argued that “the search for certainty can obstruct the law’s pursuit of justice, and can become the enemy of the good.” Rule-inherent flexibility is therefore not seen as an inadvertent effect. In contrast, flexibility is intended and regarded as necessary to allow just decisions in individual cases.¹⁵

Legal rules with flexible contents must be distinguished from rules from which deviation is possible within the framework of other “superior legal commands”.¹⁶ This kind of deviation is rule-based and not open-ended¹⁷ and does therefore not lead to the issues addressed in this article. Flexible rules must also be distinguished from rules that change as a result of the historical development of the law within its social, economic and political setting.¹⁸ These changes take place over time and do not necessarily imply flexibility of the law at a particular moment.

3.1.2 The Problem: Legal Certainty *vs* Flexibility

The definition of rule-intrinsic flexibility in the previous section leads to two questions: Is rule-intrinsic flexibility allowable from the viewpoint of the rule of law doctrine? If the answer to this question is ‘no’, what does this mean for the claim that flexibility is required to achieve justice in individual cases? To

¹¹ Cf. Sir A. Mason, “The Use and Abuse of Precedent” (1988) 4 Australian Bar Review 93-111, 95; M. Kirby, Precedent Law, Practice & Trends in Australia, <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_dec06.pdf> accessed 30 May 2010, 14; W. Morrison, A. Geary and R. Jago, *The Politics of the Common Law* (London/New York 2008) W. Morrison, A. Geary and R. Jago, *The Politics of the Common Law* (London/New York 2008) 94.

¹² Dickinson (note 3) 82.

¹³ Morrison, Geary and Jago (note 11) 89.

¹⁴ *McLoughlin v. O’Brian* [1983] 1 AC 410, 430.

¹⁵ Dickinson (note 3) 82; also cf. Mason (note 11) 95; Morrison, Geary and Jago (note 11) 89; R. Pound, *An Introduction to the Philosophy of Law* (New Haven/London 1922) 71;

¹⁶ O. Ben-Shahar, “The Tentative Case Against Flexibility in Commercial Law”, (1999) 66 U. Chicago Law Review, 781-820, 785 (for the discussion of the US Uniform Commercial Code allowing unwritten commercial practices to vary express contractual provisions).

¹⁷ Cf. Ben-Shahar, *ibid.*, 785.

¹⁸ Cf. Perelman, (note 6), 131, 164; R. Stammler, *Wirtschaft und Recht*, 5th ed., (Leipzig 1924), 174, had pointed out that natural law inevitably has a variable content and is not fixed once and forever, cf. A. Fouillee *et al.*, *Modern French Legal Philosophy* (transl. by F.W. Scott and J.P. Chamberlain) (New York 1921 – reprinted Holmes Beach 1998), 106-111, 111.

answer these questions one must take a closer look at the described tension between flexibility on the one hand and legal certainty on the other.¹⁹

Legal certainty is a direct result of predictability.²⁰ Not just since the publication of Dicey's famous work²¹ in 1885 legal certainty is seen as one of the main pillars of the rule of law doctrine which itself is said to embody the 'absolute supremacy or predominance of regular law'.²² The rule of law and thus legal certainty are regarded as the basis of the common law.²³

Legal certainty is not regarded as simply an aesthetic requirement. The benefits of legal certainty have been discussed broadly and are commonly acknowledged. Most importantly, legal certainty is the *conditio sine qua non* for the law to be applied equally to all persons in like circumstances in a non-arbitrary manner.²⁴ Only to the extent that the law is transparent and that the outcome of its application is predictable will everybody know which behaviour is required to achieve or avoid the consequences of the law.²⁵ In contrast, access to justice

¹⁹ *Supra*, chapter 3.1.1.

²⁰ *Cf.*, however, M. A. Chibundu, *Globalizing the Rule of Law: Some Thoughts At and on the Periphery*, (1999) 7 *Indiana Journal of Global Legal Studies*, 79 – 116 (88-89).

²¹ *Cf.* A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn St. Martin's Press, New York 1959) 183-414.

²² *Ibid.* 202; *cf.* Morrison, Geary and Jago (note 11) 14; T. Bingham, Rt. Hon. Lord, House of Lords, "The Sixth Sir David Williams Lecture: The Rule of Law" [2006] <<http://www.cpl.law.com.ac.uk/Media/THE%20RULE%20F%20LAW%202006.pdf>> accessed 30 May 2010, para. 10; *Mason* (note 11) 93; R. Stein, "Rule of Law: What Does it Mean?" (2009) 18 *Minn.J.Int'l L.* 293-303, 302; T. J. Zywicki, "The Rule of Law, Freedom, And Prosperity" (2003) 10 *Sup. Ct. Econ. Rev.* 1- 26,12-13, 15; B. Z. Tamanaha, "A Concise Guide to the Rule of Law" in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford/Portland 2009) 3-15, 3; *cf.* Neil MacCormick, *Rhetoric and the Rule of Law*, in David Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford/Portland: Hart Publishing, 1999), 163-177 (163): "Values like legal certainty and legal security are much lauded in the context of praising the rule of law."

²³ Morrison, Geary and Jago (note 11) 72: "... Common Law systems ... specify that predictability and recognisability of law are features of their system."; also *cf.* Harris, (note 6) 360; N. MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005), 2; Christopher A. Whytock, "Myth or Mess? International Choice of Law in Action", (2009) 84 *New York University Law Review*, 719-790 (735-736), discussing negative impacts of the lack of predictability on global governance, global economic welfare and the transnational rule of law.

²⁴ Lord Bingham (note 22) para. 10; Stein (note 229) 302; Tamanaha 2009 (note 22) 10-11.

²⁵ *Mason* (note 11) 93: "In order that the citizen may order his affairs and make decisions, the courts must apply uniformly rules and principles that are ascertainable in advance."; F. Schauer, "Precedent" (1986-1987) 39 *Stanford L. Rev.* 571-605, 597; MacCormick 2005 (note 22) 3, 12, 16; Tamanaha 2009 (note 22) 6; Atiyah and Summers (note 9), 73; E. Paunio, "Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order", (2009) 10 *German Law Journal* (No. 11), 1469-1493 (1469).

would be compromised if the law was not transparent and the outcome of the application of the law was not predictable. Moreover, an arbitrary application of the law can only be prevented to the extent that rules and their application are predictable, *ie* that the law is certain.²⁶ It has been said that legal certainty consequently avoids disputes, decreases expenses and increases profits.²⁷

In light of these rule of law features rule-inherent elements of flexibility do not appear to be permissible. As explained, flexible rules are open-ended in that they do not mandate a particular application outcome. Predictability is therefore unachievable by flexible rules. In other words, rule-inherent flexibility and legal certainty seem to be incompatible. Flexible rules should consequently not have a place in any rule of law-based system. Flexible rules may even be unconstitutional in countries e.g. like England where the constitution itself is based on the rule of law.²⁸ Accordingly, the claim that the law provides for flexible rules and is at the same time rule of law-based may have to be regarded as a *contradictio in adjecto*.²⁹

Conclusions along these lines can of course only be correct if the rule of law doctrine is (still) valid as outlined in the previous paragraphs. In this regard, it must be taken into account that – despite the common understanding as outlined in the previous paragraphs – the notion of legal certainty has been under attack for quite some time.³⁰ For the sake of establishing a transparent basis for the discussion of rule-intrinsic flexibility, arguments put forward in this regard have to be revisited in the following sections.³¹ While the “underlying concepts are deceptively complex and ambiguous”³², it must be emphasized again that it is not and it cannot be the goal of this article to dismantle all of such complexity and ambiguity. In contrast, it is the main goal of this article to expose the doctrinal context dependency of any flexibility claim.

3.1.3 Predictability and the (Potential) Indeterminacy of the Law

The debates around the viability of the notion of legal certainty are closely linked to the topic of ‘legal indeterminacy’, one of the main themes of the

²⁶ *Cf.* Mason (note 11) 93.

²⁷ *Cf.* C. Kee and E. Muoz, “In Defence of the CISG” (2009) 14 *Deakin L. Rev.* 99-123,102.

²⁸ *Cf.* Mills (note 4) 205.

²⁹ *Cf.* Mason (note 11) 96; Morrison, Geary and Jago (note 11) 77; Schauer (note 25) 597.

³⁰ *Cf.* MacCormick 2005 (note 22) 11, 54.

³¹ *Cf.* B.Z. Tamanaha, *On the Rule of Law* (Cambridge, 2004) 90, claiming that the related debate “has fizzled out”.

³² B. Bix, *Law, Language and Legal Determinacy* (Oxford 1993) 180.

American realist movement during the first half of the last century.³³ According to the realists rules are necessarily vague. Furthermore, as every legal system consists of competing rules judges have to make choices as to which rule(s) should be given priority. Depending on such decision judges may potentially reach contradicting outcomes.³⁴

Representatives of the critical legal studies (CLS) movement³⁵ have argued along these lines on the basis that law is a result of political determinates.³⁶ According to CLS, judges consequently make decisions which are not determined by the law but are rather based on political choice.³⁷ Furthermore, such choice is guided by contradicting principles.³⁸ Andrew Altman has pointed out that this is not necessarily a consequence of legal indeterminacy and vice versa legal indeterminacy does not automatically imply any political determination of the law. In contrast, CLS has *tried* to draw attention to the potential indeterminacy of the law to “delegitimate ... [the current legal] order by undercutting that order’s own conception of why it is legitimate.”³⁹

H.L.A. Hart acknowledged the potential uncertainty of law⁴⁰ as a result of what he called the ‘open texture’ of rules.⁴¹ According to Hart,

³³ A. Altman, “Legal Realism, Critical Studies and Dworkin” (1986) 15 *Philosophy & Public Affairs* 205-235 (*passim*), listing in note 4 of page 206, six distinct themes of the realist movement: (i) law as being driven by social purposes and policies, (ii) the meaning of law being assessed with a focus on the behavior of legal officials, (iii) legal indeterminacy, (iv) the call for a de-abstracting the law and rather focusing on a “very low level” with reference to the facts of particular cases, (v) private law to be understood as embodying state imposed regulatory policy, and – as a general theme that underpins all the other themes (vi) abolition of the distinction between law and politics; cf. G. Frankenberg, “Down by Law: Irony, Seriousness, And Reason”, (1989) 83 *Northwestern University Law Review*, 360 – 397 (384).

³⁴ K. Llewellyn, *The Bramble Bush* (New York 2008) 55-71; K. Llewellyn, “Some Realism About Realism” (1931) 44 *Harv. L. Rev.* 1222-1256, 1222, 1252-1953; F. Cohen, “The Ethical Basis of Legal Criticism” (1931) 41 *Yale L. J.* 201 – 220, 215-219.

³⁵ For the diversity of topics addressed by CLS cf. the CLS bibliography in (1984) 94 *Yale L. J.* 464 – 490; R. M. Unger, “The ‘Critical Legal Studies Movement’” (1983) 96 *Harvard L. Rev.* 561 – 675; J. Hasnas, “Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument”, (1995-96) *Duke Law Journal* 84-132; Frankenberg (note 33), 383 (“derides any attempt to develop a “unified school”).

³⁶ *Eg* Frankenberg (note 33), 362, 391; cf. Tamanaha 2004 (note 31), 86; K. Kress, “Legal Indeterminacy” (1977) 77 *California Law Review*, 283-337, 283.

³⁷ Cf. the summary by Altman (note 33) 214-222, 217.

³⁸ Cf. D. Kennedy, “The Political Significance of the Structure of the Law School Curriculum” (1983) 14 *Seton Hall L. Rev.* 1- 16, 2, 16; Unger (note 35) 571; Altman (note 33) 217.

³⁹ Altman (note 33), 217, 215 note 27; Tamanaha 2004 (note 31) 86; L.B. Solum, “On the Indeterminacy Crisis: Critiquing Critical Dogma” *U. Chi. L. Rev.* (1987) 54, 462-503, 463.

⁴⁰ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford, 1994) 124-154.

“whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate ...”⁴²

Hart, however, has not regarded this as a real problem because “in the vast majority of decided cases, there is very little doubt. The headnote is usually correct enough.”⁴³ This approach may seem practical. However, it is hardly helpful for a systematic discussion of doctrinal questions as it leaves issues unexplained. Hart⁴⁴ went even further when he regarded the open texture of legal rules as an advantage rather than a disadvantage because this allowed rules to be “interpreted reasonably when they are applied to situations and to types of problems that their authors did not foresee or could not have foreseen.”⁴⁵ While according to this viewpoint rule-intrinsic flexibility is apparently an automatic consequence of any rule, it remains unclear how this corresponds with the rule of law requirement of legal certainty.

Others have pointed to the fact that “flesh-and-blood judges”⁴⁶ will not be able to meet the requirements of legal certainty. According to this viewpoint the rule of law is based on the (ideal) understanding of an impeccable judge,⁴⁷ famously called “Hercules” by Ronald Dworkin.⁴⁸ Upholding the demand for predictability as

“a regulative idea by which judges must orient themselves if they want to do justice ... would therefore only accommodate a desire to endorse legal decisions that are in fact determined by interest positions, political attitudes, ideological biases, or other external factors.”⁴⁹

⁴¹ *Ibid.* 124-125; for the roots of Hart’s ‘open texture’ approach in the works of F. Waisman and tentatively L. Wittgenstein *cf.* Bix (note 32), 7, 10-17.

⁴² Hart, *ibid.* 128.

⁴³ *Ibid.* 134.

⁴⁴ *Ibid.* 125-126; also *cf.* C.L. Kutz, “Just Disagreement: Indeterminacy and Rationality in the Rule of Law”, (1993-1994) 103 *Yale L.J.*, 997-1030, 1020.

⁴⁵ *Cf.* Bix (note 32) 8.

⁴⁶ J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (translated by W. Rehg) (New Baskerville 1996) 214

⁴⁷ *Cf.* Altman (note 33) 213, 220; Habermas (note 46) 213 ff.

⁴⁸ R. Dworkin, *Taking Rights Seriously* (Cambridge 1977) 105 ff.

⁴⁹ Habermas (note 46) 213-214.

Some commentators have added that “evaluative criteria”⁵⁰ relevant to answer a particular legal question or the available alternative answers may be incommensurable thus leading to an impossibility to make an objective decision.⁵¹ Dworkin has reportedly responded to this⁵² by stating that it is unproven that cases of incommensurability exist. It also needs to be kept in mind that the rule of law doctrine simply presupposes that (predictable) decisions can be made on the basis of “all things to be considered”.⁵³ The incommensurability claim may describe problems of the application of law in action. It can, however, not challenge the rule of law as an ideal. I will return to this point later in this section.

Jürgen Habermas has questioned the notions of legal certainty and predictability on the basis that legal norms do not contain “built-in application procedures”:⁵⁴

“(E)xcept for those norms whose “if” clauses specify application conditions in such detail that they apply only to a few highly typified and well-circumscribed standard situations (and cannot be applied elsewhere without hermeneutical difficulties), all norms are inherently indeterminate. ... Because such norms are only prima facie candidates for application, one must first enter a discourse of application to test whether they apply in a given situation.”⁵⁵

Habermas proposes to overcome related problems by way of effectively re-defining the meaning of legal certainty with reference to procedural rights.

“Procedural rights guarantee each legal person the claim to a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions.”⁵⁶

A potential weak point of the Habermasian approach could be seen in the fact that procedural certainty and certainty vis-à-vis substantive law rule application are not identical.⁵⁷ And, it appears to be the latter that stands in the centre of

⁵⁰ Bix (note 33) 104.

⁵¹ Cf. J. Finnis, “On Reason and Authority in *Law’s Empire*” (1987) 6 *Law and Philosophy* 357-380, 372-374; J. Raz, *The Morality of Freedom* (Oxford 1986), 321-366.

⁵² In lectures at Oxford University, cf. Bix (note 33), 97; also cf. Kress (note 36) 335.

⁵³ Cf. Bix, *ibid.*

⁵⁴ *Ibid.* 220.

⁵⁵ *Ibid.* 217.

⁵⁶ *Ibid.* 220.

⁵⁷ Cf. Paunio (note 25) 1475: “... procedure is not enough to guarantee legal certainty.”.

the traditional rule of law doctrine. More importantly, it is obvious that procedure itself is also based on rules. From the viewpoint of Habermas, the same predictability problems therefore arise in relation to procedural rules as in relation to substantive law rules because procedural rules do as well not provide for “built-in application procedures”.⁵⁸

Neil MacCormick in his analysis of the relationship between rhetoric and the rule of law⁵⁹ emphasizes the “arguable character” of the law:⁶⁰

“No less ancient than recognition of the Rule of Law as a political ideal is recognition of law’s domain as a locus of argumentation, a nursery of rhetoric in all its elegant and persuasive but sometimes dubious arts.

...

The idea of the arguable character of law seems to pour cold water on any idea of legal certainty or security. If there can be no legal certainty, how can the Rule of Law be of such value as is claimed?”⁶¹

MacCormick attempts to answer his question with reference to what he calls the “dynamic aspect of the law” which is “illustrated by the rights of the defence, the importance of letting everything that is arguable be argued. In this dynamic aspect, the arguable character of law is no antithesis of the Rule of Law, but one of its components.”⁶² Tamanaha has added that “(w)hen ambiguities and doubts exist in a given situation of rule application, they are resolved through reasoned analysis.”⁶³ These conclusions are convincing. They are, however, first of all concerned with legal reality and they cannot assist in

⁵⁸ Cf. Habermas (note 46) 220; Paunio, (note 25) 1473; for the fact that Habermas “seeks to defend the now classic modernist vision of law as achieving social integration, channeling political participation, and subordinating power to democratic purposes”, see J. Simon, “Between Power and Knowledge: Habermas, Foucault, and the Future of Legal Studies” (1994) 28 *Law & Society Review* (No. 4) 947-961 (1992); also cf. H. Baxter, “System and Life-World in Habermas’s ‘Theory of Communicative Action’”, (1987) 16 *Theory and Society* (No. 1) 39-86; J. B. Thomson, “Rationality and Social Rationalization: An Assessment of Habermas’s Theory of Communicative Action”, (1983) 17 *Sociology* (No. 2), 278-294; D. Abraham, “Persistent Facts and Compelling Norms: Liberal Capitalism, Democratic Socialism, and the Law”, (1994) 28 *Law & Society Review* (No. 4), 939-946; J. L. Staats, “The Threat to Democracy of Unchecked Corporate Power”, (2004) 57 *Political Research Quarterly* (No. 4) (2004) 585-594.

⁵⁹ MacCormick 1993 (note 22); also cf. N. MacCormick, “Rhetoric and the Rule of Law” in D. Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford/Portland, 1999), 163-177.

⁶⁰ MacCormick 1993 (note 22) 13; also cf. MacCormick 1999 (note 59) 163-177; J. Waldron, “The Concept and the Rule of Law” (2008) 43 *Ga. L. Rev.* 1-61.

⁶¹ MacCormick 1993 (note 22) 13.

⁶² *Ibid.* 31.

⁶³ Tamanaha 2004 (note 31) 88.

dissolving the potential contradiction between legal certainty and rule-inherent flexibility from the viewpoint of legal doctrine. In other words these conclusions are unable to answer the question if the rule of law doctrine permits flexible rules.

Many of the above-quoted authors have of course developed their positions on the basis of and in differentiating themselves from the Dworkinian point of view.⁶⁴ In his celebrated and at the same time often criticized works Ronald Dworkin has concluded that a situation, in which the law does not provide an answer to any legal question, cannot exist. He argued that the legal system consists of rules as well as of standards other than rules. According to Dworkin rules and standards always offer authoritative and predictable guidance in relation to legal questions.⁶⁵

This article is based on the traditional understanding of the rule of law doctrine⁶⁶ and will therefore not adopt the arguments and opinions of the critics of the notion of legal certainty as outlined in the previous paragraphs. The reasons for my approach are as follows:

First of all, it appears that the traditional understanding of the rule of law still represents the prevailing opinion among legal practitioners and scholars. In particular, those who argue in favour of flexibility have - as far as I can see - not indicated any deviation from such traditional understanding. Secondly, as mentioned earlier⁶⁷, legal certainty is a centre pillar of the rule of law doctrine. Dismissing the notion of legal certainty would therefore affect the rule of law doctrine at its core and nobody has convincingly explained why and how this could be justifiable. Thirdly, I believe for the following reasons that the notion of legal certainty as embodied by the traditional rule of law doctrine remains unaffected by the criticism of those who point to any potential indeterminacy of the law.

⁶⁴ Cf. Bix (note 32), 78.

⁶⁵ Cf. R. Dworkin, "Judicial Discretion" (1963) 60 *Journal of Philosophy* No. 21 624-638, 634 ff.; Dworkin 1977 (note 48) 31 ff.; R. Dworkin, "Social Rules and Legal Theory" (1971-1972) 81 *Yale L. J.* 855-890; cf. R. Sartorius, 'Social Policy and Judicial Legislation' (1971) 8 *Am Phil. Q.* (No. 2), 151-160; cf. B. Hoffmaster, *Understanding Judicial Discretion*, 1 *Law and Philosophy* (1982), 21-55 (34, 37), claiming that Dworkin "has not shown that whenever legal rules fail to provide authoritative guidance for a judge, there will always be binding legal principles to fill the void."

⁶⁶ *Supra*, 3.1.1 and 3.1.2.

⁶⁷ *Ibid.*

It is in the very nature of law that decisions must be made⁶⁸, *ie* “authority is basic to the nature of law.”⁶⁹ Moreover, it is the postulate of the law that these decisions must (ideally) be the uniquely correct ones because legal assertions are always normative in nature and it is imperative that they have to lay claim to correctness. In contrast, accepting that there can be more than one answer to a legal question would lead to arbitrariness and deceive the whole idea of the law determining what is right and what is wrong.

I believe that Dworkin was right in saying that the legal system comprises not just rules, but also other binding legal standards⁷⁰ that must be taken into account when making decisions. These rules and other standards always allow for correct answers to each legal question on the basis of all the concerned interests and relevant facts.⁷¹ It may of course not always be possible to identify the uniquely correct answer by way of logical deduction e.g. from precedents or statutory rules. In contrast, it will almost always be necessary to evaluate the different factors relevant for a decision and to balance them against each other. And, under the rule of law there can only be one correct way how such balancing is to be done. Law cannot be indeterminate.

It is, however, also important to remember that the rule of law is an ideal.⁷² As such the rule of law serves as benchmark against which legal decisions, theories and arguments must be assessed.⁷³ Many authors have pointed out that in practice things are much more complicated than any doctrine may ever be able to suggest.⁷⁴ In fact, the indeterminacy thesis focuses on practice, more

⁶⁸ MacCormick 1993 (note 22) 2; Altman (note 33) 220; *cf.* Perelman (note 6) 39; Kress (note 36), 335.

⁶⁹ Bix (note 32), 183.

⁷⁰ The term “binding legal standards” is used here to avoid the - in the context of this article unnecessary - discussion of the existence and nature of different elements and propositions of a legal system; *cf.*, however, *Dworkin* 1977 (note 45) 31; B. Simpson, “The Common Law and Legal Theory” in W. Twining (ed.), *Legal Theory and Common Law* (Oxford and New York, 1986) 8-25, 9 and *passim*.

⁷¹ *Cf.* Sartorius (note 65) 158; Stammler, (note 18), 98, 105.

⁷² Stein (note 22) 303; also *cf.* N. Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, in Keith Hawkins (ed.) *The Uses of Discretion* (Clarendon Press, Oxford, 1992) 361-388, 369; MacCormick 2005 (note 23) 3, 23, 27; H.L.A Hart, “American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream” (1977) 11 *Ga L. Rev.* 969-989 978 ff.; Habermas 1996 (note 46) 213, referring to Dworkin (“postulated theory of this sort in the grip of strong idealization”); Simpson (note 70) 24.

⁷³ MacCormick 2005 (note 23) 12: “The Rule of Law is a signal virtue in civilized societies.”

⁷⁴ *Cf.* T. D. Perry, “Judicial Method and the Concept of Reasoning” (1969) 80 *Ethics* 1-20, 6: “... there can be no way to identify the uniquely correct or best decision, and ... there is very little point in even speaking of such a decision in such case.”; Bix (note 32), 119; the criticism of K. Greenawalt, “Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind

precisely on court practice.⁷⁵ The discrepancies between law and legal reality must, however, be regarded as shortfalls of legal practice which fails to meet the ideal requirements of the rule of law doctrine.⁷⁶ The rule of law cannot be affected by this as it is the rule of law which sets the standards for legal practice and not the other way round.⁷⁷

3.1.4 Consolidating Legal Certainty and Flexibility?

The discussion in the previous chapter was necessary to reconfirm that legal certainty as required under the rule of law doctrine still needs to be considered when exploring the legal significance of flexibility. The question to be answered in the following therefore is whether there is any room for flexible rules in a rule of law-based system. In other words, one must contemplate whether legal certainty and flexibility can co-exist.

As already mentioned, unfortunately, calls for flexibility and arguments that are based on flexibility claims are normally not supported by comprehensive explanations regarding the relationship between flexibility and the rule of law. The existence of any contradiction between the rule of law on the hand and flexibility on the other hand is often not even acknowledged. On the contrary, it seems that flexibility claims are made whenever this seems to help a certain cause without deeper reflection.⁷⁸ Attempts to overcome the dichotomy between the rule of law and flexibility are rare and - at the most - tacit. Many authors have e.g. tried to bypass the problem by emphasizing varying degrees of legal certainty and flexibility. For example, it has been said that “some degree

Judges”, (1975) 75 Columbia Law Review, pp. 360-399 (386), that “(d)iscretion exists so long as not practical procedure exists for determining if a result is correct, informed lawyers disagree about the proper result, and a judge’s decision either way will not widely be considered a failure to perform his judicial responsibilities”, is therefore only correct to the extent that discretion is understood as a description of judicial decision making in practice rather than in the context of legal doctrine.

⁷⁵ Tamanaha 2004 (note 31) 86.

⁷⁶ Sartorius (note 65) 159: “The theoretical possibility of the law being indeterminate with regard to what it requires, in other words, does not imply any corresponding indeterminacy with regard to what is required from a judge.”; *cf.* Hart 1977 (note 72), reporting on Dworkin’s theory at 983: “... the judge ... is never to determine what the law shall be; he is confined to saying what he believes *is* the law before his decision, though of course he may be mistaken. ... He must not suppose that the law is ever incomplete, inconsistent, or indeterminate; if it appears so, the fault is not in *it*, but in the judge’s limited human powers of discernment, so there is no space of a judge to make law by choosing between alternatives as to what shall be the law.”

⁷⁷ *Cf.* Hart 1977 (note 72) 981, discussing R. Pound’s position (“a regulative ideal for judges to pursue”).

⁷⁸ *Cf.* Harris (note 6) 381.

of certainty, predictability, and ... 'fairness' are required, within even a flexible regime of substantive rules."⁷⁹

The reference to degrees of flexibility is, however, misleading. This is because the relationship between legal certainty and flexibility is a mutually exclusive one. Either there is legal certainty or there is rule-inherent flexibility. It is logically impossible to allow both at the same time,⁸⁰ as legal certainty will necessarily disappear with the introduction of the tiniest element of flexibility. Moreover, allowing degrees of flexibility would in practice require the quantification of those degrees of flexibility that are allowable. And such quantification would be practically impossible. It also follows that the often-quoted tension between flexibility and legal certainty⁸¹ does simply not exist. In fact, it cannot exist. Legal rules are either flexible or they provide for legal certainty. Rule-inherent flexibility is nothing else but an oxymoron.

3.1.5 Can only Flexibility Lead to Justice in Individual Cases?

It was the conclusion of the previous chapters that rules which contain elements of flexibility are not permissible within a rule of law-based system. What needs to be considered now is how these findings correspond with the claim⁸² that only flexibility can lead to justice in individual cases.⁸³

This claim is of course necessarily based on the implied assumption that justice cannot be achieved within a system that mandates predictability. In light of the

⁷⁹ Chibundu, (note 20), 88-89; cf. J D Heydon, "How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?" (2009) 9 Oxford University Commonwealth Law Journal 1-46, 10: "The courts accept that while certainty is not always attainable, a measure of predictability is."; Lord Bingham (note 22) para. 16; Atiyah and Summers (note 9), 410; W Twining/D Miers, *How To Do Things with Rules*, 4th ed. (London/Edinburgh/Dublin: Butterworths, 1999), 180: "... some choice, but the range of possible or plausible or otherwise appropriate interpretations is in practice subject to constraints."; Mason, (note 11) 95: "The tension between the desire for consistency and predictability on the one hand and the desire for adaptability and justice in the particular case presents a problem for precedent. It calls for a doctrine sufficiently flexible and elastic to enable the courts to share the best of these inconsistent worlds."; Harris (note 6) 355 ("element of flexibility"); MacCormick 2005 (note 23) 12 ("reasonable predictability").

⁸⁰ Critical Kirby (note 11) 23: "... the principles work well, taken as a whole. They give measure of stability and predictability to the law without imposing hidebound inflexibility."; also cf. from the viewpoint of indeterminacy of the law Tamanaha 31 (note 31) 87, 89; Kress (note 36), 295-336.

⁸¹ Cf. Mason (note 11) 96; Morrison, Geary and Jago (note 11) 77.

⁸² *Supra*, chapter 2.

⁸³ C. E. Schneider, "Discretion and Rules – A Lawyer's View" in *Hawkins* (n 53) 47-88, 56, 63; cf. Mason (note 11) 94.

discussion in the previous chapters it is obvious that this assumption is unjustified. Within the realm of the rule of law ideal the law always provides for the uniquely correct answer to a particular legal question⁸⁴ and such answer must be the answer that achieves justice in the sense that all concerned interests and facts are taken into account and be given the appropriate weight.⁸⁵ Consequently, flexibility is not at all required to achieve justice in a system that mandates predictability. On the contrary, it is rule-inherent flexibility that must be regarded as an obstacle to justice because rule-inherent flexibility would necessarily make more than one solution available, thus rendering legal certainty unachievable.

3.2 The Flexible Application of the Law

Some authors have directly or indirectly drawn attention to the fact that flexibility may be a feature of judicial practice, *ie* of the application of the law.⁸⁶ This article is not meant to analyze the empirical reality of court practice with the goal to explore if rules are applied in a flexible manner.⁸⁷ What is important, however, is to consider if the flexible application of the law can be justifiable from the viewpoint of the rule of law. The above conclusions pave the way for a straight forward answer.

If, as demonstrated⁸⁸, there cannot be a proper rule that allows for flexibility, then there can as well not be a flexible application of the law that is proper. This is because the flexible application of any legal rule would necessarily imply a deviation from such rule because the rule itself does not provide for the way in which it is applied. Courts which apply rules in a flexible manner therefore fail to apply rules as they are set, in other words they fail to abide by the law.

⁸⁴ *Supra*, chapters 3.1.3 and 3.1.4.

⁸⁵ *Cf.* Hart 1977 (note 72) 979; R. Pound, "The Theory of Judicial Decision" (1923) 36 *Harvard L. Rev.* 641-662.

⁸⁶ *Cf. supra*, chapter 2; Donaldson J. in *Corocraft Ltd v Pan American Airways Inc.* [1969] 1 Q.B. 622 at 638: "... the judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. ...".

⁸⁷ *Cf. eg.* C. Manchester and D. Salter, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation*, 3rd ed. (London 2006) 48; Lord Reid in *Maunsell v Olins* [1975] A.C. 373 at 382; I. McLeod, *Legal Method* 7th ed. (Hampshire/New York: Palgrave Macmillan, 2009), 282: "... whether it is sensible to speak of 'rules' of interpretation at all. You may well conclude that the word 'rules' implies a degree of rigidity and precision, and therefore a predictability of outcome, which is simply not present in practice."; Whytock (note 23), 735-736.

⁸⁸ *Supra*, chapter 3.1.3.

The flexible application of the law would therefore be illegal in the best sense of the word.

3.3 The Flexibility of the Common Law

It has been claimed that flexibility is a special attribute of the common law. Scarman J.'s statement in this regard in *McLoughlin v O'Brien*⁸⁹ was already quoted above.⁹⁰ In *Dietrich v R*⁹¹ Justice Brennan added that the "Common Law has been created by the Courts and the genius of the Common Law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society."

Schneider⁹² has argued along these lines when emphasizing that "despite the doctrine of stare decisis ... judges often have real discretion in shaping and reshaping legal doctrines. Common-law decision-making seems not just designed to secure doctrinal flexibility. It also conduces to allowing judges to 'do justice' in a particular case where a rule seems not to."

Under the model developed in the previous chapters these conclusions are not sustainable. As long as the common law is rule of law-based flexible rules should not be allowable.⁹³ The flexible application of common law rules is not possible either.⁹⁴ Flexibility can therefore only be a common law feature if one is willing to accept that the common law is not rule of law-based or that the rule of law concept does not require legal certainty.⁹⁵ The latter would strip the rule of law concept of one of its core contents.

3.4 The Flexibility of Case Law

Case law⁹⁶ has sometimes been regarded as more flexible than statutory law.⁹⁷ Again, the conclusions of the previous chapters cast doubt on the correctness

⁸⁹ *McLoughlin v. O'Brien* [1983] 1 AC 410.

⁹⁰ *Supra*, chapter 2.

⁹¹ [1992] 109 ALR 385, 402 f.

⁹² Schneider (note 83) 56-57.

⁹³ *Supra*, chapters 3.1.3 and 3.1.4.

⁹⁴ *Supra*, chapter 3.2.

⁹⁵ For the potential flexibility of case law *cf. infra*, chapter 3.4.

⁹⁶ For the fact that according to modern comparative law theory the source(s) of the law can only to a limited extent be a distinguishing feature of a legal system, *cf.* K. Zweigert/H. Kötz, *An Introduction to Comparative Law*, 3rd ed. – translated by Tony Weir (Oxford: Clarendon Press, 1998), 71.

of this assumption, at least as far as existing law is concerned. The rule of law doctrine requires judges to identify and apply the law in its uniquely correct form. There is no room for flexibility and it does not make any difference whether the law to be applied is case-based or not.

Interestingly, flexibility can, however, be an issue in relation to case law insofar as case law is to be regarded as the creation of new law⁹⁸ rather than just a formulation of what already exists.⁹⁹ Law making activities of judges are not free-standing, but have to be conducted within specific frameworks. Judges have to follow procedural rules when making decisions.¹⁰⁰ In this regard judge-made law is predictable and thus not flexible. As for the substance of case law, judges are bound by the broader framework of the constitution.¹⁰¹ To the extent that case law cannot be unconstitutional, law making activities of judges would therefore again be in line with the understanding developed in the previous chapters, *ie* there cannot be any flexibility.

Law making activities of judges are, however, not subject to a requirement of absolute predictability. In contrast, judges are not “legally required to approve one kind of legislation rather than another, at least in the absence of constitutional restraints.”¹⁰² In other words, the rule of law doctrine does not extend the requirement of predictability to law yet to be enacted. In this regard, judges do therefore seem to have flexibility when making new law. This kind of flexibility is, however, not a feature that distinguishes case law from statutory law. In contrast, judge-made law and the law enacted by other law-making bodies should be exactly the same from this point of view.¹⁰³ Moreover, it must be remembered that all this is based on the proposition that judges do in fact

⁹⁷ *Lord Wilberforce* (note 7); *cf.* Morrison/Geary/Jago (note 11) 72 stating that codification has not become the solution to “the problem of a perceived chaos of competing cases and seemingly ad hoc, if not retrospective judicial ‘law making’”.

⁹⁸ *Cf.* Lord Reid, “The Judge as Law Maker” (1972) 12 *Journal of the Society of Public Teachers* 22-29; M.H. McHugh, “The Judicial Method” http://www.hcourt.gov.au/speeches/mchughj/mchughj_london1.htm > accessed 30 May 2010.

⁹⁹ *Cf.* Dworkin 1963 (note 65), 638; Dworkin 1977 (note 48), 84; *Kleinwort Benson v. Lincoln City* [1998] 3 WLR 1095.

¹⁰⁰ *Cf.* R.S. Summers, “How Law is Formal and Why it Matters” (1997) 82 *Cornell Law Review* 1156-1229, 1212 (reprinted in R.S. Summers, *The Jurisprudence of Law’s Form and Substance* (Aldershot 2000), 37-101).

¹⁰¹ See *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 per Lord Scarman; *Lord Bingham* (note 22), from the viewpoint of *nulla poena, sine legem*.

¹⁰² Greenawalt (note 74) 372.

¹⁰³ One difference between judge-made law and law created via parliamentary acts would, however, be the fact that judges create law for immediate application.

create new law. The declaratory theory, although no longer *en vogue*, dismisses this idea altogether.

3.5 The Flexible Form of Rules

Finally, flexibility has been identified as a feature of the form that legal rules can take.¹⁰⁴ As already mentioned¹⁰⁵, Robert S. Summers and P.S. Atiyah have described “flexible rules” as rules which “grant discretion with or without standards for its exercise, or [incorporation of] vague concepts such as ‘reasonableness’”.¹⁰⁶ Summers and Atiyah distinguish this type of rules from what they have called “hard and fast rules” with high authoritative formality, high content formality, total mandatory formality and strict interpretive formality.¹⁰⁷

To the extent that this characterization only relates to the form¹⁰⁸ of rules the term “flexible rules” differs from what has been discussed in the previous sections of this article. This is because the open form of a rule does not necessarily imply openness also in terms of substance.¹⁰⁹ As suggested by Summers’ and Atiyah’s above definition of “flexible rules”, the form of a rule which itself does not provide for standards for the exercise of discretion may be described as open. These standards may, however, be available outside such rule, e.g. on the basis of general principles. Similarly, methodological tools may be available to interpret any vague concepts of a rule. In both cases the respective rule itself may take an open form while at the same time the contents of such rule would be determinable. The rule would therefore not be open-ended in terms of contents and the problem of legal certainty as discussed in the previous sections of this article would not arise.

Summers has, however, demonstrated how form and substance of rules are interrelated.¹¹⁰ In fact, a rule could grant discretion without any standards for its exercise being available at all. And, a rule could incorporate vague concepts without access to any methodological tools for the interpretation of such

¹⁰⁴ Summers 1997 (note 100), 1176; also *cf.* R.S. Summers, “The Formal Character of Law” (1992) 51 Cambridge L.J. 242-262.

¹⁰⁵ *Supra*, chapter 2.

¹⁰⁶ Atiyah and Summers (note 9), 71-88; also *cf.* Summers 1992 (note 104), 245-246.

¹⁰⁷ *Ibid.*

¹⁰⁸ Note that according to Summers 1992 (note 104), 1169, note 6, the typology of form used by him differs from the one used in the book he has published together with Atiyah (note 9).

¹⁰⁹ *Cf.* Summers 1992 (note 104), 242.

¹¹⁰ Summers 1992 (note 104), 88-89, 94, 97, 246, 259.

concepts. In both scenarios, not only the form of the respective rules would be open, but also their contents. An example provided by Summers makes this point clearer: “A 65mph rule shapes form and content differently than a ‘drive reasonably’ rule.”¹¹¹ The form of the latter is not definite and could be called “flexible”. The question whether the ‘drive reasonably’ rule carries rule-intrinsic flexibility depends, however, on the availability of a definite interpretation of the word ‘reasonable’. Where such a definite interpretation is not available the substance of the rule would be open-ended and the respective rule would in fact carry intrinsic flexibility with all the rule of law-implications discussed in the previous sections.

4. Summary and Final Remarks

While often used in legal discourse, no common definition of the term ‘flexibility’ exists. In contrast, reference to ‘flexibility’ is made in a variety of ways and in relation to different aspects, usually without the provision of evidence of its existence and often perhaps without much reflection. It was the main goal of this article to draw attention to the limits of flexibility imposed by the rule of law.

In the legal context flexibility entails uncertainty. Based on the acknowledgement that this is not in line with the (traditional) rule of law doctrine one has to conclude that flexibility should not be an inherent element of any legal rule, it should not be a predicate of the application of legal rules and it cannot be a distinguishing feature of the Common Law compared with other legal traditions unless one is prepared to reconsider the rule of law doctrine altogether.

Many aspects of the traditional rule of law model have been subject to sometimes fierce criticism. As far as the legal (in)significance of flexibility is concerned, such criticism could indeed lead to conclusions which differ substantially from those developed in this article. However, to achieve argumentative sustainability any deviation from the traditional understanding of the rule of law doctrine would require a thoroughly established and explained doctrinal basis. In contrast, any flexibility claim without a clear definition of this term and without an explanation of related reference systems is no more than a rhetorical silver bullet which is as useless as a projectile that gets stuck in the gun barrel for good.

¹¹¹ *Ibid.*