THE LAW OF EVIDENCE AND THE RULE OF LAW: IS JUDICIAL DISCRETION CONSISTENT WITH THE RULE OF LAW?

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Introduction

The rule of law is a notoriously difficult concept to define. Yet to discuss any concept, it is necessary first to have at least a broad idea of what it means. This paper begins by proposing a working definition of the rule of law so that a discussion of the rule of law and its implications for evidence law is possible. It then considers the distinction between rules and standards and in particular, whether or not the presence of standards and discretion in our legal system, in addition to rules, is consistent with the rule of law.

The law of evidence contains a great deal of judicial discretion and for this reason is a very useful lens through which to examine rules and standards and consider their respective rule of law implications. This paper discusses four evidence law case-studies. These are examined with particular reference to predictability, a very important rule of law value, but the paper also considers other equally important rule of law values such as procedural due process and fairness.

The paper notes that evidence law is procedural, as opposed to substantive, in nature. This and other characteristics of evidence law might suggest at first glance that this area of law is a special case with respect to rule of law values. However, the paper argues that on closer consideration it is clear that while evidence law is an especially striking case from a rule of law perspective, it is not an exceptional or special case. Evidence law may highlight certain rule of law issues rather dramatically, but these same issues also arise in other areas of law.

The paper concludes that the rule of law can indeed accommodate standards and discretion. The rule of law, so defined, is a complex concept; but it is preferable to a narrow "rules only" definition in both theoretical and pragmatic terms.

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A: The Rule of Law

1. A Working Definition of the Rule of Law

The rule of law is a complex concept. At a basic level, it expresses the idea that everyone is subject to the law and should obey it.[1] Governments, as well as ordinary people, should be bound by the law. Furthermore, Governments should only rule according to the law. The rule of law is a procedural constraint which prevents, or is inconsistent with, arbitrary rule.[2] It concerns the relationships between parts of government, and between a government and its people. It is thus of significant constitutional importance.

However, attempts to provide a more detailed exposition of the concept of the rule of law meet with difficulties. Many features and underlying values might be attributed to the concept. There exist numerous permutations and combinations of these features and values, and no single collection of features and values is clearly identifiable as correct. The rule of law is "an essentially contested concept".[3] Still, the term is not so uncertain as to be meaningless. Its edges are vague, but within these blurry parameters there are some firm elements that most commentators could agree upon. For present purposes, it will be useful to propose a working definition comprising such firm elements. A perfect definition is certainly beyond the scope of this paper, but a working, if incomplete, definition will allow a discussion of the laws of evidence from a broad rule of law standpoint.

A significant aspect of the working definition proposed by this paper is that the rule of law requires rule by, under, or through, law, as opposed

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[1] TRS Allan, "Rule of Law (Rechtsstaat)" in Edward Craig (ed) *The Routledge Encyclopedia of Philosophy* (Routledge, London, 1998) vol 8, p. 388.

[2] See for instance FA Hayek *The Constitution of* Liberty, (Routledge & Kegan Paul, London, 1960); AV Dicey *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Indianapolis, 1982). See also Allan, supra, n. 1, p. 388.

[3] See for instance Jeremy Waldron "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) Law and Philosophy 137; Rt Hon Sir Geoffrey Palmer "The New Zealand Constitution in 2005" in Jack Hodder, Geoffrey Palmer and ILM Richardson *New Zealand's Constitutional Arrangements: Where Are We Heading?* (New Zealand Law Society, Wellington, p. 2005), para 39.

to arbitrary or unconstrained forms of authority.[4] It also requires general laws; where law is too particular, there is a risk of bias or unequal treatment. Furthermore, the rule of law holds that no person or body should be above the law and laws should be prospective and promulgated since people cannot plan their lives around secret or retrospective laws .[5]

Procedural due process and natural justice are also key underlying values, although arguably these terms themselves involve a degree of conceptual vagueness.[6] Law provides an official means of settling civil disputes and deciding criminal guilt. If it falls to the law to settle these matters, then the rule of law requires that the law must provide analytically sound processes for carrying out this task.

Simply stated, the working definition adopted in this paper holds that the rule of law is a general, impersonal, predictable and analytically sound brand of non-arbitrary governance.[7]

2. Rules, Standards and Judicial Discretion

Any aspects of the rule of law that are not assumed as part of the working definition of the rule of law remain, for present purposes, essentially contested. One such detail not yet been addressed by the working definition is the question of whether or not the presence of flexible principles, as opposed to rigid rules, is reconcilable with the rule of law. This question is of central importance to understanding the concept of the rule of law. The remainder of this paper aims to address this question.

Rules and standards are often presented as mutually exclusive categories. Various generic qualities are often, apparently very plausibly, attributed to each of the two categories – in particular, rules seem hard

[4] For instance Dicey, supra, n. 2, pp. 110-115; see also Antonin Scalia *A Matter of Interpretation: Federal Courts and the Law: An Essay by Antonin Scalia With Commentary by Amy Gutman, Editor, et al* (Princeton University Press, Princeton, New Jersey, 1997) pp. 17, 25.
[5] Dicey, supra, n. 2, p. 114.
[6] Bryan Garner A *Black's Law Dictionary* (8th ed., West Publishing Co, St Paul, Minnesota, 2004), pp. 539 and 881.
[7] Kent Greenawalt *Law and Objectivity* (Oxford University Press, Oxford, 1992) p. 7.

and fast while standards seem open-ended.[8] It is often said of rules that they tend to be rigid and logical in form. For instance, many rules are of the structure "if x then y". Because of their logical structure, it is credibly claimed of rules that they operate in a very predictable manner. That is, the necessary and sufficient conditions for particular legal consequences are clearly laid out in advance so that individuals can easily forecast how and if a rule will apply to them. If it is correct that rules are predictable, then they allow individuals to make well informed decisions about how to behave.[9] It might also be plausibly suggested that the rigid logical structure of rules also means that they can be very easily and efficiently applied by officials.[10] An official can merely plug the relevant facts into a formal rule and the rule itself mechanically churns out the conclusion or result; to decide a case according to a rigid rule, an official need not exercise any discretion at all. Rules, as a category, are generally thought to be predictable and as a generalisation at least, this seems credible. All the predictability that might reasonably be supposed to come with the use of rules rather than discretion seems highly consistent with our rule of law ideal. The position regarding flexible standards is less clear.[11]

It is often plausibly said of standards that they leave a deal of discretion with the judge at the point of application.[12] As a consequence, they are often thought to operate less predictably than rules. Potentially this could be a problem when viewed from a rule of law perspective: the exercise of discretion, if abused, looks like arbitrary rule; even if not abused, by dealing with cases individually, discretion can lead to inconsistencies and inequalities across a legal system.[13] For these reasons, standards are often accused of being inconsistent with the rule of law.[14]

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[8] Cass R Sunstein "Problems with Rules" (1995) 83 Cal L Rev 953, p. 959.
[9] See Fred Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, Oxford, 1991), pp. 137–138.
[10] Schauer, supra, n. 9, p. 147.
[11] See generally Barry Hoffmaster "Understanding Judicial Discretion" (1982) 1 Law and Philosophy 21; Kenneth Henley "Abstract Principles, Mid-Level Principles, and the Rule of Law" (1993) 12 Law and Philosophy 121.
[12] Schauer, supra, n. 9, pp. 149–150; David P Leonard "Power and Responsibility in Evidence Law" (1990) 63 S Cal L Rev 937, p. 937; but see Sunstein, supra, n. 8.
[13] George C Christie "An Essay on Discretion" [1986] Duke LJ 747, p. 754.
[14] For instance Antonin Scalia "The Rule of Law as a Law of Rules" (1989) 56 U Chi L Rev 1175.

The issue then is whether or not these accusations are correct such that standards and discretion are antithetical to the rule of law. To determine this issue, we must first answer a prior question: what do we think law *is*, or *should be*?[15] If we decide that law is or should be wholly rigid and predictable, then standards may fall short. Further, even rules are unlikely to meet this test. However, if we allow that law can sometimes accommodate a degree of discretion, then standards as well as rules may be consistent with the rule of law after all.

3. Rules and Standards: Binary Terms?

Rules and standards are often viewed as polar opposites.[16] However, they are perhaps better understood not as binary terms but points on a continuum.[17] It logically possible for a rule to be entirely certain such that it decides every possible future scenario in advance – an omniscient legislator could draft rules detailed enough to cover all possible eventualities. However, in practice, legislators are not omniscient and their rules can seldom be wholly certain; to some degree, rules are "open-textured". Paradigm cases will fall within a rule's "core of certainty", but other cases not contemplated at the time of drafting may occupy a "fringe of vagueness".[18] As such, rules cannot wholly eliminate the possibility of future discretion.[19]

Standards seem to be located further towards the "uncertain" or "flexible" extreme of the continuum than rules are.[20] However, the judicial discretion associated with the application of standards still tends not to be untrammelled. Generally a judge does not have a wide discretion to make *whatever* decision he or she sees fit; the discretion is to decide only after having taken into account stipulated criteria or

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[15] Cass R Sunstein "Rules and Rulelessness" (working paper, University of Chicago, 1994), p. 1; David P Leonard supra, n. 12, p. 939.
[16] Sunstein, supra, n. 8, p. 961.
[17] See Sunstein, supra, n. 15, p. 4; James G Wilson "Surveying the Forms of Doctrine on the Bright-Line Balancing Test Continuum" (1995) 27 Ariz St LJ 773.
[18] HLA Hart *The Concept of Law* (Oxford University Press, London, 1961) pp. 119-120 and 125.
[19] Hart, supra, n. 18, p. 124; Sunstein, supra, n. 15, p. 4.
[20] Sunstein, supra, n. 8, p. 961.

considerations.[21] So, just as rules are not wholly certain, standards are not wholly flexible.

4. Discretion and the Rule of Law

If rules and standards are not mutually exclusive, but to some degree coextensive, then there is no prima facie reason to assume that one is consistent with the rule of law while the other is not. Since empirical observation tells us that both rules and standards involve discretion, the practical and theoretical difference between the two turns out to be one of degree rather than kind.

This observation can be interpreted in two ways, depending on how we choose to refine our working definition of the rule of law. First, we may focus on risks of arbitrariness, bias and abuse that accompany the presence of discretion and so conclude that the presence of discretion violates our rule of law ideal. According to this definition, the rule of law strictly requires rule by or through *rules* alone.

The second way to interpret the observation is to acknowledge the risks of uncertainty while also highlighting the merits of discretion and the risks of having only completely rigid rules. When applying strict rules there is a risk of ignoring relevant considerations that do not fit within the formal structure of a particular rule. Discretion allows flexibility and so abates this risk. Once the advantages of flexibility are acknowledged alongside the risks, it is clearly too simplistic to hold that discretion and standards are necessarily incompatible with the rule of law. Discretion may be compatible with the rule of law – the rule of law would just be a more complex concept than we might initially have thought.

The choice between these two definitions involves a trade-off between conceptual elegance and simplicity on the one hand, and practical relevance on the other. If we choose the first, stricter definition of the rule of law then it is fairly easy for us to understand the concept itself

[21] For more on discretion see: Maurice Rosenberg "Judicial Discretion of the Trial Court, Viewed from Above" (1971) 22 Syracuse L Rev 635; Christie, supra, n. 13, p. 747; Rosemary Pattenden *The Judge, Discretion, and the Criminal Trial* (Clarendon Press, Oxford, 1982), p. 3; KC Davis *Discretionary Justice* (Greenwood Press, Westport, 1969), p. 4; Thomas M Mengler "The Theory of Discretion in the Federal Rules of Evidence" (1989) 74 Iowa L Rev 413, p. 425; Ronald Dworkin "The Model of Rules" (1967) 35 U Chi L Rev 14, p. 32.

and to test whether or not a particular legal system adheres to the rule of law. The rule of law will be present in a legal system only if that system contains rules alone. The problem, however, is that the definition is too narrow and idealised to accommodate real legal systems. On the other hand, if we prefer the second definition then legal systems containing flexible principles as well as rigid rules may still have the rule of law – it becomes a more difficult concept to understand but it is one which real legal systems actually have a chance to have.

B. Evidence Law and the Rule of Law: Discretion in Evidence Law

Evidence law is an area that is deeply infused with judicial discretion.[22] This makes it a good lens through which to view the question of whether or not constrained discretion can be consistent with the rule of law. This part of the paper will set out several case studies involving different areas of evidence law. It will then assess whether or not discretion is consistent with the rule of law, both in the particular case of evidence law, and in general terms.

1. Case Study One: Examples of Evidentiary Privilege

While evidence law involves a lot of judicial discretion, certain evidentiary privileges serve as useful reminders that evidence law is not *solely* concerned with judicial discretion. An evidentiary privilege is the right to refuse to disclose, or to allow another person to disclose, otherwise admissible, relevant evidence.[23] That is, privileged evidence may be withheld notwithstanding its usefulness.

Marital privilege is an example of a rule of evidence that does not require, or allow for, the exercise of judicial discretion. The statutory test for the availability of marital privilege sets out that it covers only communications between a husband and a wife during their married

[22] For instance, Jon R Waltz "Judicial Discretion in the Admission of Evidence under the Federal Rules of Evidence" (1984) 79 NW U L Rev 1097; and Glen Weissenberger "The Supreme Court and the Interpretation of the Federal Rules of Evidence" (1992) 27 Ariz St LJ 1307.

[23] Donald L Mathieson (ed) *Cross on Evidence* (7ed, Butterworths, Wellington, 2001) (original edition, Sir Rupert Cross, 1963) ch 10.1, p. 291.

relationship.[24] It does not extend to de facto relationships and is only available during the relationship itself. For instance, a widow cannot claim the privilege, because her marriage has ceased.[25] The privilege is a creation of statute and is designed to protect the marital relationship rather than the communication itself.[26]

The rule as it stands leaves no room for judicial discretion. A Judge uses a wholly mechanical process of rigid rule application in order to determine whether or not marital privilege is available with respect to a particular piece of evidence.[27] The example of marital privilege demonstrates that evidence law at least partially comprises rigid rules; that is, while there may be much discretion in evidence law, this is not because evidence law is per se, or entirely, incompatible with rigid rules.

Consider now a second class of evidentiary privilege. Section 35 of the Evidence Amendment Act (no 2) 1980 (EAA) provides that in circumstances where a communication was made in the context of a special relationship, and that relationship is in need of protection, the Court has discretion to excuse a witness from answering any question, or producing any document, relating to that communication. This discretion is not unconstrained – in reaching its decision, the Court is required to balance the public interest in disclosure of the evidence against the interest in encouraging the confidence.[28] But the parameters imposed by the statutory balancing test cannot disguise that the section confers a judicial discretion rather than imposing a rigid rule. It is not possible on the basis of section 35 to draw up a reliable or exhaustive list of qualifying special relationships since a relationship will only be covered if it is not outweighed by various other countervailing interests. The process of deciding whether the privilege is available is far from mechanical; the enquiry must be conducted on the individual facts of each particular case.[29]

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[24] Evidence Amendment Act (No 2) 1980, section 29.
[25] *Shenton v Tyler* [1939] Ch 620 (CA).
[26] See *Rumping v Director of Public Prosecutions* [1964] AC 814 (HL).
[27] Note, this would change if the Evidence Bill 2005 is enacted in its current proposed form as there will no longer be a specific marital privilege. Marriage, de facto and same-sex relationships would all have the same status and would be assessed on a case by case basis, vesting discretion in judges in respect of marital and other personal relationship privileges.
[28] Evidence Amendment Act (No 2) 1980, section 35(1).
[29] For instance, see *R v Secord* [1992] 3 NZLR 570; *R v Howse* [1983] NZLR 246.

Some privileges then, like marital privilege, are governed by strict, predictable rules; others, like the section 35 discretion are discretionary. It is certain and predictable that marital privilege will be available to particular witness. For instance, a de facto wife knows in advance, and with certainty, that she will not be covered by marital privilege in respect of any communication that her de facto husband has made to her in the course of her relationship. It is not predictable with such certainty whether, for instance, a probation officer who wishes to protect confidences made to her by an inmate will be excused from giving evidence of these confidences under section 35.[30]

The observation that one privilege is predictable while the other is not has some bearing on rule of law considerations. Yet, the observation does not on its own lead to a conclusion as to whether or not any particular privilege, whether rigid rule or discretion based, is consistent with the rule of law. Besides predictability, other rule of law values need to be considered. For instance, the marital privilege rule may be certain, but arguably it is arbitrary. If its purpose is to protect marital relationships because these are socially valuable, it is hard to see why the privilege should not also extend to de facto or same-sex relationships or to other familial relationships such as that between a parent and a child. A more discretionary test, like under section 35, is better able to adapt to specific facts. This may be in the interest of fairness and also the pursuit of truth.

2. Case Study Two: Relevance Enquiry

Relevance is not directly a question of law but rather a concept arrived at inductively from experience.[31] However, relevance is a necessary precondition for admissibility; the relevance enquiry is a Judge's first step in any broader admissibility enquiry.

Relevance is a relational concept; it is not meaningful to assert that a fact is relevant unless one articulates what it is relevant *to*.[32] Evidence

[30] *R v Secord*, supra, n. 29.

[31] Mathieson, supra, n. 23, ch 1.56, p. 42.

[32] Jeremy Bentham *Rationale of Judicial Evidence* (Hunt & Clarke, London, 1827) in Peter Murphy (ed) *Evidence, Proof, And Facts: A Book of Sources* (Oxford University Press, Oxford, 2003), p. 166.

will be relevant if it has a tendency to prove a fact or conclusion at issue.[33] So, in order to determine whether or not a piece of evidence is relevant, the judge must first identify the purpose for which any item of evidence is sought to be admitted. In other words, the judge must identify the material fact at issue.[34] The judge then must engage in the factual enquiry of whether or not the item of evidence has a tendency to prove that fact.

Because the relevance enquiry is a factual enquiry, it is often overlooked as an example of judicial discretion. However, like most factual enquiries, it is not wholly mechanical and involves a considerable degree of flexibility.[35] The Judge must identify the dividing line between facts which are, and are not, too remote from the issue to be relevant. Inevitably, the Judge's own experiences and beliefs may influence his or her decision about relevance.

Consider the question of whether or not evidence about a complainant's sexual history is relevant in a sexual violation case. Section 23A of the Evidence Act 1908 imposes a heightened relevance standard in such situation – evidence must be of "such direct relevance" to a fact in issue that to exclude it would be contrary to the interests of justice.[36] With a little reflection it is clear however that even a heightened relevance test is far short of a rigid rule. Judges must exercise judgment and discretion in applying such a test.

Consider the following rape case. In *R v Taria*, the male accused put up the defence that the female complainant had consented to sexual intercourse.[37] In support of this argument, defence counsel sought to cross-examine the complainant about "love bites" she had received and shown to her friends a week before the alleged rape. The Judge granted

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[33] Definition of relevance, Evidence Bill 2005, cl. 7. See also Sir James Fitzjames Stephen *Digest of the Law of Evidence* (12ed by Sir Harry Stephen and Lewis Sturge (MacMillan & Co, London, 1948) in Peter Murphy (ed) *Evidence, Proof, And Facts: A Book of Sources* (Oxford University Press, Oxford, 2003) p. 165.

[34] John Sopinka, Sidney N Lederman and Alan W Bryant *The Law of Evidence in Canada* (Butterworths, Toronto, 1992) p. 1.

[35] Jenny McEwan *Evidence and the Adversarial Process* (2ed, Hart Publishing, Oxford, 1998) p. 87.

[36] Evidence Act 1908, s 23A(3). See also New Zealand Law Commission *Evidence Law Character and Credibility – A Discussion Paper* (NZLC PP 27, Wellington, 1997), p. 105.

[37] *R v Taria* (1993) 10 CRNZ 14 (HC).

leave to cross-examine on the ground that the evidence was directly relevant to the facts in issue. Certainly, the Judge's reasoning is couched in the language of section 23A. But although he rigidly adhered to the test, the test itself is not rigid. Here, the Judge's decision surely reflected his own views about the complainant's behaviour and the issue of consent. Presumably, he considered that a complainant who had received love bites and shown them off to others one week earlier was likely to have consented to sex one week later. But if his decision is open to criticism, this is not because he has failed to apply the section 23A heightened relevance standard but rather because some people would disagree with the factual assumptions that must have factored into his decision-making under the standard. Some might find it hard to see how the fact that some person other than the accused, or even the accused himself, gave the complainant love bites one week prior to the alleged rape could be directly relevant to the consent at that later time. Other judges might have reached the opposite conclusion. But, if some other judges would have found differently in this case, it is not because they would apply section 23A and the Judge in *Taria* would not. Discretion is inherent in any relevance enquiry. In practice, the ways in which individual judges have applied the section 23A heightened relevance standard has seen wide variation.[38]

3. Case Study Three: Hearsay Evidence

Generally stated, the rule against hearsay evidence is as follows: an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted.*[39]

The rationale for the hearsay rule is broadly that hearsay evidence can be unreliable and so is of less probative value than evidence given directly as oral evidence in proceedings. Unlike oral evidence that is given directly, a reported hearsay statement cannot be subjected to cross-examination.[40]

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[38] See Aileen McColgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16 Oxford J Legal Stud 276.
[39] Mathieson, supra, n. 23, ch 1.16, p. 18.
[40] AAS Zuckerman *The Principles of Criminal Evidence* (Clarendon, Oxford, 1989), p. 180.

A rigidly applied hearsay rule has the advantage of certainty. However, it has disadvantages also, including a risk that the rule might operate to exclude reliable as well as unreliable evidence.[41] In practice, the rigid effect of the hearsay exclusionary rule has been mitigated through the development of exceptions. The EAA contains a number of narrow exceptions to the hearsay rule.[42] For instance, a hearsay statement about an assertion made by a person shortly before his or her death can be admissible in spite of the general rule against hearsay.[43] The maker of the original statement is now dead and so is unavailable as a witness. The rationale for admitting a hearsay report of the original statement is that it is of probative value, and it is thought unlikely that a dying person would be motivated make a false statement. Without this exception, even if highly relevant and probative, such hearsay statements would simply be unavailable to the Court.

4. General Residual Exception to the Hearsay Rule

The case of *R v Baker* marked the beginning of the development in New Zealand of a common law general residual exception to the hearsay rule, as an addition to the narrow exceptions in the EAA.[44] In the case, the prosecution sought to admit hearsay evidence for the purpose of discrediting the accused's account of the night of the killing. Cooke P acknowledged that the statements were hearsay and that as such they could only be admitted via some exception to the hearsay exclusionary rule. No existing exception applied. However, Cooke P, with whom Ellis J specifically agreed, considered that:

> "At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards."[45]

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[41] Zuckerman, supra, n. 40, p. 182.
[42] Evidence Amendment Act (no 2) 1980, sections 3 and 8-14.
[43] Codified in Evidence Amendment Act (No 2) 1980, section 14.
[44] *R v Baker* [1989] 1 NZLR 738 (CA).
[45] *R v Baker*, supra, n. 44, p. 741 Cooke P.

Cooke P suggested that this enquiry was essentially "a question of degree".[46] Effectively, he was suggesting that a judge has a discretion to admit hearsay evidence when he or she considers it to be sufficiently cogent and decides it is "reasonably safe" in all the circumstances to admit it. He said that in such instances, a judge should issue a warning to the jury, alerting them to the dangers associated with hearsay evidence.[47]

This discretion was further developed in *R v Bain*.[48] The evidence in that case was of statements made by a third party to a witness which were said to raise an inference that someone other than the accused had a motive for the killings. Thomas J delivered the judgment of the Court. He considered that *Baker* had decided that evidence that is sufficiently reliable and relevant may be admissible, despite being hearsay, because it is not associated with high risks of "the perceived dangers of hearsay evidence".[49] Whether or not to admit hearsay evidence "is necessarily a matter of degree, and will almost invariably be decided by the application of the trial judge's discretion having regard to the overall interests of justice".[50] Thomas J considered that, although the EAA imposes certain narrow legislative exceptions to the hearsay rule, it does not follow that "any judicial development of the rule to meet changing circumstances and ensure that the rules of evidence serve the ends of justice is precluded".[51]

The case of *R v Manase* later provided a unanimous, bench of five, canonical statement of the general residual discretion to admit hearsay evidence.[52] The discretion turns on three elements: relevance, inability and reliability.[53] In addition, as with any evidence, hearsay evidence should not be admitted where its probative value is outweighed by its illegitimate prejudicial effect.[54] Exercise of the discretion is a balancing

[46] *R v Baker*, supra, n. 44, p. 741 Cooke P.
[47] *R v Baker*, supra, n. 44, p. 741 Cooke P; Mathieson, supra, n. 19, ch 16.28A, p. 59.
[48] *R v Bain* [1996] 1 NZLR 129 (CA).
[49] *R v Bain*, supra, n. 48, p. 132 Thomas J.
[50] *R v Bain*, supra, n. 48, p. 133 Thomas J.
[51] *R v Bain*, supra, n. 48, p. 134 Thomas J.
[52] *R v Manase* [2001] 2 NZLR 197 (CA).
[53] *R v Manase*, supra, n. 52, para. 30 Tipping J.
[54] *R v Manase*, supra, n. 52, para. 31 Tipping J.

exercise then; it is not purely mechanical and thus not necessarily predictable.

The development of the general residual discretion was motivated by the problems associated with a too rigid hearsay rule. If the best or only available evidence happens to be hearsay evidence, then to necessarily exclude that evidence because it is hearsay seems too high a price to pay for certainty. The application of a rigid hearsay rule may be predictable, but it does not further other evidence law values such as the aim to discover truth and to apply the law to the facts. The rule of law requires a degree of certainty and predictability, but it also requires procedural due process and fairness. It is worth remembering that the rule against hearsay can operate to exclude not just hearsay evidence sought to be admitted by the prosecution or stronger party; it could equally operate to exclude an accused's best defence, if that happens to be based on a hearsay statement.

5. Case Study Four: Probative Value and Prejudicial Effect

The law of evidence contains many specific admissibility rules and exceptions such as those illustrated by the above case studies. It is important to remember, however, that these specific rules and exceptions are subject to a final, general judicial discretion: a judge can reject otherwise admissible evidence on the ground that the prejudicial effect of its admission would outweigh its probative value.[55]

Balancing the probative value of a piece of evidence against its prejudicial effect involves weighing a number of factors. A dominant factor is whether or not the piece of evidence is likely to induce jurors to reason emotionally or irrationally or to overvalue the evidence to the exclusion of other relevant evidence in the case.[56] It has been said that the focus of this enquiry is misguided because, if by prejudicial effect we mean *illegitimate* or *unfair* prejudicial effect on the accused, then, from the point of view of procedural due process and natural justice, it is not clear that probative value should ever be allowed to outweigh

[55] Evidence Amendment Act (No 2) 1980, section 18. Note, Evidence Bill 2005, cl 8(a), if enacted, would preserve this discretion. Note also, there is no converse discretion to admit otherwise *in*admissible evidence on the grounds that its probative value outweighs its prejudicial effect: *Myers v DPP* [1965] AC 1001, p. 1024 (HL) Lord Reid.
[56] Mengler, supra, n. 22, p. 442.

prejudice.[57] A separate criticism is that the complex weighing of probative value and prejudicial effect accords judges too much flexibility and discretion at the risk of inconsistent decisions.[58]

Both criticisms are serious from a rule of law perspective. However, the consequences of the first may be more readily contained. If the balancing exercise fails to protect an accused's right to a fair trial, it is at least logically possible to recast the test such that its focus is whether or not admission of certain evidence is fair. The second criticism, that the enquiry vests too much discretion in judges cannot be avoided in this way. If all rules are open textured and rules and principles are different in degree, not kind, then discretion and uncertainty will always be present in evidence law, no matter how we reformulate its details.

C: Evidence Law and the Rule of Law: Is Evidence Law a Special Case?

The case studies discussed above illustrate that evidence law not only allows but actually requires the exercise of a great deal of judicial discretion. Evidence law contains some rigid rules, such as those governing the availability of marital privilege; such rules are certain at least, but they can sometimes fall short in terms of fairness. For this reason, rigid rules, like the one against admitting hearsay evidence, often spawn exceptions. These exceptions are designed to accommodate specific circumstances which mean that a bare prohibition of hearsay statements is unfair. Aside from exceptions to specific admissibility rules, as we have seen, judges have an ultimate discretion to refuse to admit otherwise admissible evidence if its prejudicial effect is likely to be higher than its probative value.

Two questions arise from the observation that evidence law contains constrained judicial discretion: first, the question of whether or not judicial discretion is consistent with the rule of law in the particular case of evidence law; secondly, the question of whether or not the two are consistent in general terms.

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[57] See Don Mathias "Probative Value, Illegitimate Prejudice and the Accused's Right to a Fair Trial" (2005) 29 Crim LJ 8.
[58] See Mathias, supra, n. 57, p. 8.

Evidence law either is, or is not, a special case from a rule of law perspective. Evidence law is a procedural or "adjective", rather than a substantive, form of law.[59] Substantive law declares the rights and duties of those who are subject to the law; adjective law relates to the remedial agencies and procedure through which those rights are maintained.[60]

To say that evidence is not a special case would also be to say that considerations of consistency and predictability are equally as important in relation to procedural law as they are to substantive law.[61] However, one could instead assert that the distinction between procedure and substance is important from a rule of law perspective. Conceivably then, even if lack of predictability is problematic for substantive areas of law, the position might be different with regard to procedural evidence law.

There is something to be said for the claim that evidence law is just such a special case. It makes some sense to say that individuals should know their substantive rights and obligations in advance so that they can plan their conduct – even if most criminals do not in fact perform a conscious cost/benefit analysis before deciding to break the law, the idea of planning one's life around substantive legal obligations is not absurd. The claim, however, that individuals need to be able to predict, with certainty, what forms of evidence might be admitted as proof of their wrongdoing, should they choose to break a substantive law, seems more tenuous. This type of informed decision-making seems, at once, much less likely to ever be attempted by an individual, and also less strikingly important. If we need to know in advance know how a procedural law will operate, this is only because it impacts on the predictability of the substantive law.[62]

1. The Breadth of Evidence Law

Another possible reason for suggesting that evidence law is a special case from a rule of law perspective is that it is incredibly broad in

[59] L Jonathan Cohen "Freedom of Proof" in William Twining (ed) *Facts in Law* (Franz Steiner Verlag GMBH, Wiesbaden, 1983), p. 3.
[60] Garner, supra, n. 6, pp. 44, 1244, 1470.
[61] Cohen, supra, n. 56, p. 2.
[62] See Mengler, supra, n. 18, p. 461.

scope. Its scope is broad because evidence law is a major part of the procedural underpinnings according to which substantive legal issues are litigated, decided and enforced. This paper has focussed on evidence law case studies from a criminal law context, but of course admissibility questions arise in relation to any area of law that come before the Court. Evidence law covers the whole range of areas of law: criminal, family, public, tort, environmental, tax law, and so on.

Furthermore, our laws of evidence allow primarily circumstantial evidence to be admitted as proof. Ever since we abandoned trial by ordeal, in which God was in a sense assumed to be permanently available as a compellable witness, we have taken it upon ourselves to decide legal questions of guilt and innocence.[63] We employ inductive rather than deductive methods of proof. Arguably the procedural rules governing the admissibility of this inductive evidence are a very special case indeed.

2. A Special Case or Merely Striking?

Evidence law's breadth and incorporation of circumstantial proof means that it is a field in which it is impossible to map out completely using fixed, predetermined rules. There are simply too many possible combinations of evidential facts, arising in legal contexts too numerous, for us to ever cover every possible admissibility eventuality in rule form in advance. It is not merely a contingent fact that evidence law involves so much judicial discretion; from a practical point of view, this is a necessary fact.

The extraordinary breadth of evidence law and its incorporation of circumstantial proof are alone insufficient to make evidence law a special case from a rule of law perspective, however. As discussed earlier, rules and standards are not polar opposites but range across the same continuum. Rules are necessarily open-textured, and discretion is constrained to some degree.[64] The certainty with which the results of rules and principles can be predicted in advance may vary, but this is a difference of degree rather than of kind. Despite initial appearances then, evidence law is not a special, but rather a striking, case. Evidence

[63] Cohen, supra, n. 59, p. 6.
[64] Sustein, supra, n. 8, p. 960.

law is remarkably full of discretion, and as such it provides case-studies which are particularly striking from the point of view of certain rule of law principles. However, examples of discretion can also be found in almost any area of substantive or procedural law.

Since evidence law is not a special case from a rule of law perspective, we again return to our definitional question: is the rule of law the strict notion of rule by legal rules only; or, is the rule of law a wider and more complicated concept which can accommodate principles and discretion as well as rules?

3. The Rule of Law as a Useful and Accurate Theory

The rule of law can be viewed as a principle or an ideal. Sometimes, ideals cannot be given literal effect in practice; we aspire to the ideal but in practice accept some variation from it. If we choose a strict rule of law definition that accommodates only rigid rules and not judicial discretion, then the concept is an aspirational ideal: in practice, no legal system can be utterly predictable and free from discretion. Thus, under a strict definition, no legal system, in practice, will actually have the rule of law.

Yet, this does not seem to be how we employ the concept in our discourse. Not all countries have the rule of law, but we do seem to think that some do. Indeed, New Zealand is a fairly respectable candidate for generally adhering to the rule of law. Yet, as we have seen, New Zealand evidence law, as well as the rest of its laws, are more or less open-textured; there is considerable uncertainty in New Zealand law because of this.

The role of theories and theoretical discourse is to help us make sense of things or phenomena in the world. While it would beg the question to assume that our ordinary usages and understandings of a concept like the rule of law are correct and accurate, it is reasonable for us to be suspicious of a theory which defines the concept in a way that is radically divergent from our ordinary understanding. A definition of the rule of law that is completely different from what we think we mean when we utter the phrase looks suspiciously like a definition of something different altogether.

This is the theoretical problem with the strict, "rules only" definition of the rule of law. A broader, even if more complex, definition better accords with what we seem to mean by the rule of law, and so is better on theoretical grounds. Such a definition is also preferable on pragmatic grounds. An aspirational ideal which can never be achieved in practice is likely to be less of a motivation to strive for a good legal system than an ideal which is attainable with some hard work.

Conclusion

Rules and principles are not polar opposites; in practice, they are different in degree only. While the prevalence of discretion in evidence law is striking, no area of law can escape some degree of discretion and uncertainty. This paper began by proposing a very general working definition of the rule of law. Building on that initial definition, this paper has argued for a broad definition of the rule of law which can accommodate and account for judicial discretion. Such a definition is preferable to a narrow, "rules only" definition from both a theoretical and pragmatic perspective.