Are Rules Exclusionary Reasons in Legal Reasoning?
—Some Considerations on Rules, Principles, and Razian Reasons

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The Problem

Raz’s main thesis:
“ A rule is not only a first-order reason for performing the required act, but also an exclusionary reason not to act for certain conflicting reasons.”

Are rules exclusionary reasons in legal reasoning?
1. Rules, Principles and Razian Reasons

2. Why Are Rules Exclusionary Reasons? - A Principle-Theoretical Reconstruction and Criticism of Raz’s Argument

3. The Problem of Formal Principles and Content-Independent Justification of Rules
Raz’s Distinction between First-Order and Second-Order Reasons

- **First-order reason**: reason for action
- **Second-order reason**: reason to act for a reason or to refrain from acting for a reason.
- An *exclusionary reason* is a reason to refrain from acting for some reason.
Some Similarities between Principles and Razian First-Order Reasons

- Reasons have the dimension of weight or strength.
- The conflicts between first-order reasons are resolved by weighing, i.e., assessing the relative strength or weight of the conflicting reasons.
- Raz’s practical principle P1: “It is always the case that one ought, all things considered, to do whatever one ought to do on the balance of [first-order] reasons.”
Rules as Exclusionary Reasons (I)

- A rule, if it is applied, can determine a particular decision without needing to be weighed against other reasons.
- Alexy’s definition of rules:
  Rules contain authoritative decisions in the realm of legal and factual possibilities.
- The realm of legal possibilities
  = the space of reasons (the set of reasons we should act on.)
  → Rules reduce the space of reasons.
Rules as Exclusionary Reasons (II)

- Conflicts between exclusionary reasons and first-order reasons → Exclusionary reasons always prevail.

- The conflicting reasons (i.e. first-order reasons against a rule) are *not* outweighed, but rather excluded or replaced by the rule. (excluded by kind, not defeated by weight)
Two Views of the Exclusionary Character of Rules (1)

- Raz’s practical principle P2:
  “One ought not to act on the balance of reasons if the reasons tipping the balance are excluded by an exclusionary reason.”

- Raz: the strong exclusionary character of rules:
  (1) As exclusionary reasons, rules may require action contrary to the balance of (first-order) reasons.
  (2) The impact of rules is not to change the balance of reasons but to exclude action on the balance of reasons.
Alexy: the weak exclusionary character

- The conflict between a principle $P$ and a rule $R$:
- Normally, the realization of $P$ is limited by $R$, but $P$ can defeat $R$ under certain circumstances if
  - (1) $P$ is a stronger reason than the substantive principle $P_R$ (the underlying reason of $R$)
  - (2) $P$ has a greater weight than $P_R$ together with the formal principle $P_f$
Raz’s Pre-emptive Thesis

The Pre-emptive Thesis:
“Rules (authoritative directives) are not added to the balance of (first-order) reasons, but rather exclude and replace some of these reasons”

Authoritative directives are “pre-emptive reasons” i.e. reasons for action + exclusionary reasons
Why Are Rules Pre-emptive or Exclusionary Reasons?

- Raz’s service conception of authority:
  The role of authority is to consider the first-order reasons that apply to their subjects and to issue directives that will enable their subject to conform to the *demand of right reason* (the balance of reasons).

- Rules as an intermediate level of reasons between deep level considerations (dependent reasons, such as principles, values, etc.) and concrete decisions.
Raz’s Dependence and Normal Justification Thesis

- The Dependence Thesis:
  All authoritative directives should be based, in the main, on dependent reasons, i.e. first-order reasons that independently apply to the subjects of the directives.

- The Normal Justification Thesis:
  Authorities are legitimate when their subjects are more likely to conform to the balance of dependent reasons if they comply with the authorities’ directives than if they attempted to weigh the dependent reasons directly.
Alexy’s Law of Competing Principles

- The conditions under which one principle takes priority over another constitute the operative facts of a rule giving legal effect to the principle deemed prior.

- If principle $P_1$ takes priority over principle $P_2$ under conditions $C$: $(P_1 \Rightarrow P_2) \land C$, and if $P_1$ under conditions $C$ implies legal effect $R$, then a rule is valid that comprises $C$ as the operative facts and $R$ as legal effect: $C \rightarrow R$. 
Dependence Thesis as the Inversion of the Law of Competing Principles

- The underlying principles of a rule and the relevant conflicting principles can be regarded as Raz’s dependent reasons.

- The Reconstruction Thesis:
  “A rule $C \rightarrow R$, if it is justified, can be reconstructed as the result of balancing principles under the circumstances $C$: $(P_1, \ldots, P_i \ P \ P_j, \ldots, P_n)$ $C$ wherein the principles taking precedence, i.e. $P_1, \ldots, P_i$, support the legal effect $R$ in these circumstances.”
Justifying the Pre-emptive Thesis

The Dependence Thesis + the Normal Justification Thesis → The Pre-emptive Thesis:

(1) The authority had deliberated on the dependent reasons on which rules are based

(2) The authority’s decisions (rules) are meant to reflect the balance of these reasons.

Therefore, We need not to rely upon the dependent reasons to justify an action or a decision because they have been considered by the authority and are replaced by its directives.
The Ambiguity in Raz’s Argument

- Following authoritative directives will enable us to conform to “the demand of right reason” = “what one ought to do according to the balance of reasons”

- The balance of reasons can be correct or incorrect → The ambiguity of Raz’s “the demand of right reason”.

- Two readings of the dependence thesis: what does it mean “the authoritative directives should be based on the dependent reasons”? 
Two Readings of the Dependence Thesis (1)

- The weak reading (Raz):
  The authority must attempt to weigh the relevant dependent reasons, but he needs not to get the correct balance of these reasons.

- The incoherence of weak reading:
  How can we guarantee that by following the authority's directives we are more likely to conform to the demand of right reason, if he had not correctly weighed the dependent reasons on which his directives are based?
Two Readings of the Dependence Thesis (2)

- The strong reading:
  If the authority’s directives will indeed enable us to conform to the demand of right reason, then he must no only consider the relevant dependent reasons but also weigh them up correctly.

- The Correctness Thesis:
  A rule, if it is justified, should reflect the correct balance of principles under its application-conditions.
The Underlying Assumption of Rules’ Exclusionary Character

- The assumption: the authority had correctly weighed all relevant principles when he settled a rule.
- If this assumption is correct, then following the rule will enable us to conform to the demand of right reason because it represents the outcome of the correct balancing of principles.
- Therefore, we need not to rely on the principles nor to weigh them again to decide what we ought to do.
The Reconstruction & the Correctness Thesis allow the possibility of reweighing: If the underlying assumption is reasonably challenged, the judge has recourse to the level of dependent reasons to ascertain whether the rule really represents the outcome of the correct balancing of principles.

Trivialization of rules’ exclusionary character: Rules exclude the balancing of principles only in easy cases, not in hard cases.
Formal Principles as Content-Independent Justification of Rules

- Alexy: Rules have only “strong prima-facie character” (= the weak exclusionary character)

- “Formal Principles” as
  - (1) reasons to strengthen the exclusionary character of rules
  - (2) content-independent justification of rules - justification not based on the value or the correctness of the required action (the content of rules), but on the formal sources of rules

- The exclusionary character of rules is founded on the possibility of content-independent justification rather than on the substantive assumption (eg. the reconstruction & correctness thesis)?
END

Thank you for your attention!