

ARE RULES EXCLUSIONARY REASONS IN LEGAL REASONING?

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Legal rules constitute not only reasons for action, but also reasons for judicial decision. What kind of reason do legal rules provide for adjudication? Do they figure as Razian exclusionary reasons in legal reasoning? In this paper I will draw on some insights from Robert Alexy's theory of principles to deal with these problems.

A. RULES, PRINCIPLES AND RAZ'S THEORY OF PRACTICAL REASONS

Let us begin with a brief summary of Joseph Raz's theory of practical reason and norms. Raz distinguishes between first-order and second-order reasons. A first-order reason is a reason for action, i.e. a reason for performing or refraining from a certain act. A second-order reason is a reason to act for a reason or to refrain from acting for a reason. According to Raz, an exclusionary reason is a negative second-order reason, i.e., a reason to refrain from acting for some reason. The core tenet of Raz's theory is that rules are both first-order reasons for action and exclusionary reasons not to act on certain conflicting reasons.¹

Although Alexy has only a few words about norms and reason in his *A Theory of Constitutional Rights*, we can discern some interesting similarities between his rules/principles distinction and Raz's theory of practical reasons. According to Alexy, principles as well as rules generate reasons for norms, particularly for individual legal norms, i.e. concrete legal ought-judgments such as judicial decisions. Principles are always prima facie reasons and rules are normally definitive reasons.² At first glance, Alexy's characterization of rules and principles as reasons for norms seems different from Raz's view of norms as reasons for action. Nevertheless, Alexy says that the difference between his and Raz's view is actually smaller than might seem because if rules and principles are reasons for norms, they are indirectly reasons for action.³ The subtle difference between reasons for norms and reasons for action shall not be explained in detail here. I will assume that both rules and principles generate reasons for a judge to reach a legal decision. In this respect they also can be formulated in Raz's canonical form of reasons for action, i.e. '...is a reason for... to ϕ '.⁴

Principles generate prima facie reasons for judicial decision. A principle by itself cannot definitively warrant what it requires in a concrete case; it has to be weighed against other reasons to determine a particular decision.⁵ Principles are quite similar to Raz's first-order reasons in the following respect: Principles, like first-order reasons, have a dimension of weight or strength. Just as with the collision of principles,

1 Joseph Raz, *Practical Reason and Norms*, 3rd edn (Oxford University Press: Oxford, 1999), 58–9, 73–84.

2 Robert Alexy, *A Theory of Constitutional Rights*, trans J. Rivers (Oxford University Press: Oxford, 2002), 59–60.

3 Alexy, *A Theory of Constitutional Rights* (n. 2), 59.

4 Raz, *Practical Reason and Norms* (n. 1), 19.

5 Alexy, *A Theory of Constitutional Rights* (n. 2), 57.

the conflicts between first-order reasons are resolved by weighing, i.e. by assessing the relative strength or weight of conflicting reasons. Considering first-order reasons only, we have to weigh all relevant reasons in order to determine what ought to be done. This is formulated by Raz in the practical maxim 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.'⁶

Nevertheless, Raz does not think that P1 holds in every conflict situation because we have to consider the role of exclusionary reasons in practical reasoning. The role of rules in legal reasoning resembles exclusionary reasons in practical reasoning. According to Alexy, rules are normally definitive reasons. A rule, if it is applied, can determine a particular decision without needing to be weighed against other reasons. Rules, as Alexy defines, contain authoritative decisions in the realm of factual and legal possibilities.⁷ The realm of legal possibilities, I suggest, can be understood as the space of reasons on which one could act. As definitive reasons, rules reduce the space of reasons that we would have if rules did not exist. If a rule is valid, the reason it generates becomes the only available one. The question is: In which way do rules reduce the space of reasons? Raz's answer is that rules are second-order exclusionary reasons. The exclusionary character of rules becomes apparent in the conflicts between rules and other first-order reasons. According to Raz, such conflicts are resolved not by weighing, but in the way that exclusionary reasons always prevail. If a principle is in conflict with a rule, so long as it falls within the scope of excluded reasons of this rule, it is always defeated by the rule, even if it is a stronger or overriding reason in the balance of first-order reasons. Raz formulates this thesis in another practical maxim P2: 'One ought not to act on the balance of reasons if the reasons tipping the balance are excluded by an exclusionary reason.'⁸

Thus reasons against a rule are not *outweighed* but rather *excluded* or *replaced* by the rule. To use Raz's phrase, exclusionary reasons exclude those conflicting reasons *by kind*, not *by weight*. As exclusionary reasons, rules may exclude very weighty reasons that would have tipped the balance. The exclusionary character prevents the first-order reasons generated by rules from being overridden by other stronger reasons. Therefore Raz calls the first-order reasons which rules generate 'protected reasons'. In Raz's words, the impact of rules is not to change the balance of reasons but to exclude action on the balance of reasons.⁹ It follows that rules may require action contrary to the balance of first-order reasons. If we assume that an act is right if it is required by the outcome of balance, then rules may provide reasons for doing wrong acts. Similarly, if we assume that a judicial decision is correct if it corresponds to the outcome of balancing principles, then legal rules also may require the judge to reach a wrong decision.

Raz does not deny that some first-order reasons falling outside the scope of excluded reasons may defeat a rule on some occasions, but he maintains that reasons that have been excluded by a rule cannot be relied upon if one is really following this rule. The same seems true for legal reasoning. If a rule is applicable to a case, the

6 Raz, *Practical Reason and Norms* (n. 1), 36.

7 Alexy, *A Theory of Constitutional Rights* (n. 2), 48.

8 Raz, *Practical Reason and Norms* (n. 1), 40.

9 Joseph Raz, *The Authority of Law* (Oxford University Press: Oxford, 1979), 22–3.

principles excluded by this rule cannot be used any more as reasons to justify a legal decision.¹⁰ Alexy's view, however, is different. According to Alexy, if a principle P conflicts with a rule R , normally, the realization of P will be limited by R , but under certain circumstances P can still defeat R . Of course, since a rule cannot be weighed, such a conflict is not resolved by weighing P against R . Rather, it is resolved by weighing the principle P against the substantive principle P_R supporting R as well as the so called formal principle P_f which requires that rules issued by an authority are to be followed. P defeats R if P is not only a stronger reason than P_R , i.e. the underlying reason which supports R substantively, but also has a greater weight than P_R together with the formal principle P_f .¹¹ Although the formal principle increases the difficulty of defeating a rule by a principle, it will not exclude the possibility that a principle can prevail over a rule under certain conditions. Therefore, in Alexy's theory of principles, rules only have a weaker exclusionary character.

The difference between Alexy and Raz sketched above raises a question: Do legal rules really have such strong exclusionary force as Raz claims? To answer this question, let us turn to Raz's argument for exclusionary reasons.

B. WHY ARE RULES EXCLUSIONARY REASONS?

In *Practical Reason and Norms* Raz has proposed two arguments to justify his contention that rules are exclusionary reasons. The first is a technical justification and can be called 'argument from efficiency', which takes rules as labor- and time-saving as well as risk-of-error reducing devices in practical reasoning.¹² The second can be called 'argument from authority', which views rules as authoritative directives. In this paper I will not consider the details of the first argument, but rather will focus only on the argument from authority, which Raz has fully developed in his later works.

According to Raz, authoritative directives are unlike ordinary first-order reasons in that they are not only reasons for action but also reasons to pre-empt and displace other reasons for action. Raz calls such reasons 'pre-emptive reasons'. As pre-emptive reasons, the directives of authority are not added to the balance of (first-order) reasons, but should exclude some of these reasons and take their place. This is the so called 'Pre-emptive Thesis'.¹³ A pre-emptive reason, of course, is an exclusionary reason. By using this term, Raz might want to stress its replacing characteristic. If a pre-emptive reason requires performing an act A , it not only excludes the conflicting reasons which require refraining from A , but also displaces those other reasons for performing A so that it becomes the only available reason for doing A .

It is interesting to ask why legal rules, taken as authoritative directives, constitute pre-emptive reasons. Raz's answer to this question can be found in his service conception of authority, which regards authorities as mediating between people and the right reasons which apply to them. According to the service conception, the distinc-

10 Raz, *Practical Reason and Norms* (n. 1), 142–5.

11 Alexy, *A Theory of Constitutional Rights* (n. 2), 48, 58.

12 Raz, *Practical Reason and Norms* (n. 1), 59–62.

13 Joseph Raz, *The Morality of Freedom* (Oxford University Press: Oxford, 1986), 46.

tive task of practical authority such as political or legal authority is to consider the first-order reasons applicable to its subjects and to issue directives that will enable them to conform to the balance of reasons. In other words, following authoritative directives will help us to do what we already have reason to do or to refrain from doing what we in fact have no reason to do. The core tenet of Raz's service conception of authority is the Normal Justification Thesis:

'The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.'¹⁴

Raz calls the reasons that apply to the subjects independently of the existence of authoritative directives 'dependent reasons'. In other words, dependent reasons are those first-order reasons which would have been applied if rules did not exist. The Normal Justification Thesis maintains that an authority is legitimate when its subjects are more likely to conform to the balance of dependent reasons if they comply with its directives than if they attempted to conform to that balance directly. By following directives issued by authority, they are more likely to do what they have reason to do, namely what they really ought to do, than if they tried to act on their own judgment about what the balance of dependent reasons requires.

According to Raz's service conception, the role of rules in practical reasoning is to provide intermediate-level reasons between deep-level reasons, i.e. the dependent reasons, and concrete decisions. When the need for a concrete decision arises, we can immediately apply the rule without recourse to the deep-level reasons. In order to fulfill this role, the rule must be able to be justified by reference to the deep reasons on which they are based.¹⁵ Raz presents this requirement in his Dependence Thesis:

'[A]ll authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directives.'¹⁶

To put it in a more comprehensible way, the Dependence Thesis says that all authoritative directives should be based, in the main, on dependent reasons. According to Raz, the Pre-emptive Thesis follows from the Dependence Thesis as well as the Normal Justification Thesis. According to the Dependence Thesis, authoritative directives are meant to reflect the balance of dependent reasons. Since these reasons have been weighed by the authority and replaced by its directives, one ought not in addition to attempt to take direct account of them if one accepts a directive. To do so would amount to double-counting some of the dependent reasons. If authoritative directives do not pre-empt the dependent reasons, then it will be rational for a subject to weigh such reasons when deciding how to act. If so, he will have to rely upon his own judgment about what the balance of reasons requires rather than the authoritative directives themselves. This contradicts the Normal Justification Thesis. Therefore, if the Normal Justification Thesis holds, so does the Pre-emptive Thesis.

14 Raz, *The Morality of Freedom* (n. 13), 53.

15 Raz, *The Morality of Freedom* (n. 13), 58–9.

16 Raz, *The Morality of Freedom* (n. 13), 47.

In the previous section, I have argued that the role of principles in legal reasoning is similar to first-order reasons in practical reasoning. If this is correct, we can employ some insights from Alexy's theory of principles to reconstruct and examine Raz's argument. In Alexy's theory, the collision of principles, just like the conflict of first-order reasons, is resolved by weighing. The task of weighing is to establish a conditional relation of precedence between the competing principles in the light of the circumstances of the case.¹⁷ To put it in another way, the task of weighing is to fix the space of reasons, or in Alexy's words, the scope of legal possibilities of principles' realization. The outcome of weighing determines which principle should prevail over another, thereby becoming the overriding reason which decides what is definitively required in a concrete case. The overridden reasons, i.e. the reasons provided by the outweighed principles, cannot be relied upon to justify a particular decision. Consequently, the result of balancing principles generates not only a reason for a particular legal decision but also an exclusionary reason for disregarding some reasons against it. The outcome of balancing the competing principles will give rise to a rule whose application-condition is the circumstances under which one principle prevails over another, and whose legal consequence is what the prevailing principle requires under this condition. Alexy has precisely formulated this connection in the Law of Competing Principles:

'If principle P_1 takes precedence over principle P_2 in circumstances C : $(P_1 \mathbf{P} P_2)C$, and if P_1 gives rise to legal consequences Q in circumstances C , then a valid rule applies which has C as its protasis and Q as its apodosis: $C \rightarrow Q$.'¹⁸

The Law of Competing Principles helps account for Raz's claim that rules mediate between dependent reasons and concrete decisions. Having the rule $C \rightarrow Q$, if the fact of a case can be subsumed under the condition C , we can immediately apply this rule to justify a legal decision without the necessity of weighing the underlying principles. Hence the Law of Competing Principles explains the point of the service conception of authority: The function of authoritative rules is to simplify practical or legal reasoning by isolating the rule from its underlying principles. The Law of Competing Principles also provides a starting point for reconstructing and criticizing Raz's argument. I will assume that the principle P_1 supporting the rule $C \rightarrow Q$ together with the counter-principle P_2 can be regarded as Raz's dependent reasons, because, if the rule $C \rightarrow Q$ did not exist, we would have to weigh these two principles in order to decide what is legally required in the circumstances C . While Alexy's Law of Competing Principles says that the outcome of balancing principles generates a rule, Raz's Dependence Thesis maintains that rules should be based on dependent reasons and are meant to reflect the balance of such reasons. To capture this idea, I will invert the Law of Competing Principles in its generalized form as follows:

'A valid rule $C \rightarrow Q$ can be reconstructed as the outcome of balancing principles in circumstances C : $(P_1, \dots, P_i \mathbf{P} P_j, \dots, P_n)C$, wherein the prevailing principles P_1, \dots, P_i pleading for the legal consequence Q in these circumstances.'

I will call the inverted Law of Competing Principles 'the Reconstruction Thesis'. The Reconstruction Thesis maintains that a rule can be reconstructed as the outcome of

17 Alexy, *A Theory of Constitutional Rights* (n. 2), 50–4.

18 Alexy, *A Theory of Constitutional Rights* (n. 2), 54.

balancing relevant principles under its application-conditions and thus be justified on the base of dependent reasons.

Let us now turn back to Raz's service conception of authority. Its core tenet, the Normal Justification Thesis, contends that the subjects are more likely to do what they ought to do according to *right reason* by following authoritative directives. However, it is not very clear what Raz means by 'right reason'. A natural understanding is that the correct balance of dependent reasons constitutes what he calls the demands of right reason¹⁹, because without authoritative directives one would have to determine what ought to be done by weighing dependent reasons. If this were true, the justification of legitimate authority would require not only that its directives should be based on dependent reasons, but also that they should *correctly* reflect the balance of reasons on which they depend. I will call this idea 'the Correct Balance Thesis'. Translating into the terms of Alexy's theory of principles, the Correct Balance Thesis says:

'A rule, if it can be justified, should reflect the correct balancing of principles under its application-conditions.'

The Correct Balance Thesis is a strong reading of the Reconstruction Thesis, namely the principle-theoretical version of Raz's Dependence Thesis. According to this reading, if following an authority's directives will indeed enable its subjects to do what they ought to do according to right reason, the authority must not only take relevant dependent reasons into account but also balance these reasons correctly in its decision. This reading, however, seems too strong for Raz's theory. The requirement Raz imposes on the legitimate authority is much weaker. Raz has used the example of arbitrator's decision on some matters between two persons to illustrate the point of the service conception of authority.²⁰ Before the arbitrator settles the dispute, there may have been dependent reasons which can apply to the case. Yet the arbitrator's decision creates a new reason which pre-empts or excludes those dependent reasons. The arbitrator's decision is a reason for action and has pre-emptive force only because it itself is based on the balance of (first-order) dependent reasons. Nevertheless, it is not, as Raz carefully points out, that the arbitrator's decision is a pre-emptive reason for the parties only if he achieves the correct balance of dependent reasons in his decision. Rather, his decision is dependent on the balance of dependent reasons only in the weaker sense that it must be based on those reasons, however wrongly his judgment about what the balance of reasons requires. To state it concisely, the authority has only to attempt to balance the dependent reasons, but he needs not to get the correct balance of them. This is a weak reading of Raz's Dependence Thesis, but this reading, in my view, is what Raz has in mind.

The weak reading results in incoherence in Raz's argument. To illustrate this, I will reconstruct the main line of Raz's argument for the exclusionary character of rules as follows:

19 Jules Coleman holds a similar view, see Jules Coleman, *The Practice of Principle* (Oxford University Press: Oxford, 2001), 122.

20 Raz, *The Morality of Freedom* (n. 13), 41–2.

- (1) Rules should reflect the outcome of balancing principles, i.e., the dependent reasons on which rules are based.
- (2) An agent is more likely to conform to the demands of right reason if he follows the rule than if he acts on his own judgment about the balance of dependent reasons.
- (3) Therefore, an agent should take the rules as the only reason for his action rather than act on his own balance of dependent reasons.

Raz admits that sometimes an authoritative directive will lack pre-emptive force in situations where the authority was mistaken about the balance of reasons, but he does not think that all such mistakes will deprive the rule of its pre-emptive character. Raz distinguishes between a clear mistake and a great mistake.²¹ A clear mistake is a mistake which can be detected without going through the underlying reasoning, namely the balancing of reasons. A clear mistake may not deviate substantially from the correct outcome of balance. For example, if the authority ignored a relevant reason when he decided a case or enacted a rule, he has made a clear mistake; the outcome of balance might remain the same even if he had considered the ignored reason in advance. Raz does not deny that such an ignored reason can defeat the rule if it will tip the balance, but this is because it does not belong to those reasons that the authority has considered and thus intended to exclude; in other words, an authoritative directive might fail to pre-empt a reason that does not fall into its scope of excluded reasons.

A clear mistake is to be distinguished from a great mistake, which does indeed deviate greatly from the correct balance of reasons and can be detected only through examining and weighing the pro- and contra underlying reasons. Raz denies that a great mistake will hinder the pre-emptive force of rules. According to Raz, if an authoritative directive could be overridden or defeated just because it deviates much from the balance of reasons which it is meant to reflect, we would always have to go back to the deep-level reasons and to consider their strength or weight before we decide to follow this directive. This, as stated above, will make the mediating role of authority unobtainable. Hence, in Raz's view, a rule is still binding and constitutes a pre-emptive reason even if it does not correctly reflect the balance of reasons.²² A dependent reason, as far as it has been considered by the authority, is excluded and replaced by the authority's directive despite the fact that the authority did not correctly assess its relative strength in balancing. However, this gives rise to a serious problem: If the demand of right reason is to be understood as the correct balance of dependent reasons, how can we ensure that following authoritative directives will indeed enable us to do what ought to be done according to right reason if the authority has not correctly weighed the dependent reasons on which its directives are based? Why does a rule still have pre-emptive force even if it does not correctly reflect the outcome of balancing principles? To avoid this problem, we seem to have to accept the strong reading of the Dependence Thesis, namely the Correct Balance Thesis. But the strong reading yields another problem.

21 See, on this distinction, Raz, *The Morality of Freedom* (n. 13), 62.

22 Raz, *The Morality of Freedom* (n. 13), 60–1.

According to the strong reading, a rule constitutes an exclusionary or pre-emptive reason only if it correctly reflects the balance of dependent reasons. If so, the exclusionary force of rules will be trivialized, because what they exclude are no more than those reasons outweighed by the overriding principles in the process of balancing. In other words, the reasons excluded by a rule, whether this rule exists or not, can never be relied upon to justify an action or a decision. This trivialized exclusionary character results in a dilemma: On the one hand, if the prerequisite for the exclusionary force is that the rule must represent the correct outcome of balance, then by enacting the rule the authority will merely reconfirm what we ought to do on the balance of first-order reasons. Rules will become redundant because in fact they neither create new reasons for actions nor change the existing structure of reasons.²³ On the other hand, if the content of a rule deviates from the correct outcome of balance, then following the rule will not enable us to conform to the balance of reasons; in other words, it will not help us do what we ought to do according to right reason. To put it concisely, if we want to carry out the claim of the Normal Justification Thesis, we seem have to accept the Correct Balance Thesis, but the Correct Balance Thesis implies a very weak, trivialized exclusionary force of rules, which Alexy's theory of principles would not have accepted either. Alexy himself, admitting the existence of formal principles, denies that in every case rules can be defeated once they require an action contrary to the balance of principles. This dilemma brings us back to the initial question: why and under what conditions do the authoritative directives still constitute exclusionary or pre-emptive reasons, even though they do not always coincide with what the correct balance of dependent reasons requires?

C. THE PRESUMPTION MODEL AND THE REASON-CHARACTER OF FORMAL PRINCIPLES

Obviously, Raz does not think that rules as exclusionary reasons must be justified on the basis of the Correct Balance Thesis. On the contrary, Raz emphasizes that rules, even though they do not correctly reflect the balance of dependent reasons, can still exclude and replace such reasons. Realizing this claim depends upon the understanding of Raz's Normal Justification Thesis. The real concern of the Normal Justification Thesis is the legitimacy of authority rather than the justification of a single authoritative directive. According to Raz, a practical authority is legitimate as long as by following its directives, in general, the agent will increase his chances of acting in accordance with the balance of dependent reasons. An authority, although it might err in some cases, is justified if it is more likely than its subjects to act correctly for the right reason. Here I will not go into details about Raz's justification of authority. Let us assume that Raz is right, an authority is legitimate if following its directives will increase the agent's chances of doing what he ought to do according

23 Hence, if we accept the Correct Balance Thesis, rules, as the argument from efficiency suggests, will be no more than a device to reduce the costs of time and effort in the process of balancing.

to right reason. But how can this entail that an authoritative directive constitutes an exclusionary or pre-emptive reason anyway?

Let us consider the problem: How can I ensure that following rules or authoritative directives will increase my chances of acting in accordance with the demand of right reason? One way is as follows: Every time I consider the merits of the case, weigh the relevant dependent reasons, then, assuming that I can always get the correct balance, compare what the rule requires with the outcome of balance. If in most cases they coincide with each other, I can ascertain that following the authoritative directives will indeed enable me to do what I ought to do according to the right reason. This way, however, has at least two problems: If we have to go through the dependent reasons on which a rule is based in order to ascertain whether this rule correctly reflects the balance, thereby deciding whether to follow or apply this rule, we have to give up the service conception, because the mediating role of authority, as Raz pointed out, will be totally refuted. The other problem is that this way presupposes that in every case we can know what the correct outcome of balance requires. But if we could know what the right reason requires in every case, we would not have to accept any authority's directives to guide our action. The very reason for taking an authority as the guide of our action or decision lies in the fact that we are not always able to know what the correct balance of reasons requires in a certain type of situation. This kind of uncertainty may be called 'epistemic uncertainty'.²⁴ The epistemic uncertainty is a familiar phenomenon in judicial reasoning. The judicial reasoning, as is well known, proceeds always under constraints such as limited time, resources, and incomplete knowledge. Under such limitations, even we presuppose that there is a unique correct answer in every case involving the balance of reasons, we cannot guarantee or expect that the judge can always recognize what the correct balancing requires. As Alexy points out, it is precisely at this point the formal principle comes into play.²⁵ In the following I will attempt to show that rules, if we take the role of formal principles into account, can be regarded as a kind of exclusionary reason even though they do not have such strong exclusionary force as Raz claims.

The formal principle requires that the judge, if he cannot ascertain what the correct outcome of balance requires, should respect the binding force of authoritative directives such as the rules enacted by legislation. In my view, Alexy's formal principle can be understood as a kind of directive on the burden of argumentation: 'Unless one is certain beyond doubt that the authority has made a mistake²⁶, it should be assumed that the authoritative rule represents the correct outcome of balance'. According to this, unless the judge can propose a good enough argument to doubt the reliability of the presumption, he should take the rule instead of his own judgment about what the balance requires as the only available reason for his decision. This way of taking the authoritative directives as the form of presumption can be

24 Alexy distinguishes two kinds of epistemic uncertainty: empirical uncertainty due to the incomplete empirical or scientific knowledge and normative uncertainty, which arises when it is not clear what the best weighing of relevant principles is. See Alexy, *A Theory of Constitutional Rights* (n. 2), 414–5. Here I will only concern the second kind, i.e. the normative epistemic uncertainty.

25 Alexy, *A Theory of Constitutional Rights* (n. 2), 416–22.

26 Here the mistake includes both clear and great mistakes in Raz's sense.

called 'the Presumption Model'.²⁷ It should be noted that the Presumption Model is different from the Correct Balance Thesis. According to the latter, a rule constitutes an exclusionary reason if, and only if, it really coincides with the correct outcome of balance. For the Presumption Model, a rule that does not correctly reflect the balance of dependent reasons can nonetheless have exclusionary force. If a judge cannot ascertain what the correct balance requires in a concrete case, he can only assume that the rule which is to be applied reflects the correct outcome of balance and takes it as the exclusionary reason for his decision, i.e. a reason to defer to the judgment of the legislative authority. Under the conditions of epistemic uncertainty, he had no better way to maximize conformity to the balance of dependent reasons. Of course, if afterwards he has more time and information to re-examine the underlying reasoning, he might come to discover that his decision deviates from the correct balance of dependent reasons and think that he has made a mistake. But he had indeed a reason to reach such a wrong decision at the very moment he had to decide the case. In the Presumption Model, those who rely or act on authoritative directives only presume that the content of the directives are justified on the balance of reasons, but the possibility that this presumption can be rebutted in certain circumstances, no matter before or after the decision is made, is never excluded.

The entrenchment of exclusionary force through the support of formal principles gives rise to at least two problems: The first, by which way does the formal principle reinforce the exclusionary force of rules? The second, under what conditions can the presumption be rebutted? Both problems are concerned with the reason-character of formal principles. According to the above analysis, accepting rules as exclusionary reasons represents a rational strategy to deal with the uncertainty about the demands of right reason. If an agent or a judge realizes that he himself might not know what the correct balance of reasons requires in a given situation, it is rational for him to defer to the authority's judgment. Thus an exclusionary reason is a reason not to act on one's judgment of what the balance of dependent reasons requires if there exists another person whose practical judgment is more dependable. In judicial reasoning, the formal principle determines that the legislative authority's judgments should prevail when epistemic uncertainty arises in a case. The presumption in favor of the authority's judgments is, in turn, to be justified by the Normal Justification Thesis, namely that the role of authority is to bring about a greater degree of compliance with the balance of reasons. But how can we guarantee that the authority will meet the demand of the Normal Justification Thesis? Under the conditions of epistemic uncertainty, because one cannot know what the correct balance of reasons requires in advance, it is impossible to compare the demand of right reason with the authority's judgment in order to check whether the latter is trustworthy. We must notice that the formal principle, unlike the Dependence or Reconstruction Thesis, provides a *content-independent* justification of rules. The formal principle justifies a rule not by directly proving that its content is based on the dependent reasons, but rather by pointing out that it is enacted by a legitimate authority whose judgments are more reliable. From the perspective of content-independent justification,

27 The idea of the Presumption Model comes from Stephen Perry's criticism of exclusionary reason. See Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 *South California Law Review* 944-5.

the reliability is based on some formal features which an authority needs to possess. For example, the authority is wiser or has more expert knowledge, is in a superior position to solve the coordination problems, is less likely to be influenced by irrelevant considerations such as bias or emotional factors, or its organization and decision-making procedure is more efficient or competent to achieve a correct or acceptable result, and so on. It should be noted that all these features that count in favor of deferring to authority's judgments are 'non-substantive' or 'formal' in the sense that they are not directly related to the content of directives but only concerned with the capability and qualification of legitimate authority. This explains why formal principles provide content-independent reasons for accepting the presumption in favor of authority's judgments. A full account of the nature and function of formal principles is beyond the scope of this paper; in the following I will briefly discuss the reason-character of formal principles.

What kind of reason do formal principles generate? According to Alexy, the formal principles can be weighed against the substantive principles. On this view, a formal principle appears to be a kind of first-order reason. However, the formal principles are different from the substantive principles in that they are not concerned with the moral merit of an action or decision. From the perspective of formal principle, the fact that an action is required by an authoritative directive is in itself a reason for performing this action. Similarly, the fact that a rule is enacted by legislative authority also constitutes a complete reason for a judge to apply this rule in his adjudication. In this regard, formal principles provide content-independent reasons to follow an authoritative rule. But this gives rise to a problem: As a content-independent reason, how can a formal principle be weighed against a substantive principle, which is a content-dependent reason? This is the so called 'incommensurability' criticism of Alexy's theory of principles.²⁸ Here I will put aside the problem arising from content-independence and only suggest an approach to avoid this criticism. The formal principle, as a directive on the burden of argumentation, can be regarded as a special kind of second-order reason. As mentioned above, rules are in themselves also first-order reasons for action. Since formal principles are reasons to act on rules (or reasons for applying a rule in adjudication) when epistemic uncertainty arises, they are positive second-order reasons, i.e. reasons to act for some first-order reason. If formal principles are a kind of second-order reason, the problem of weighing formal principles against substantive principles will disappear.

However, even if the criticism from incommensurability can be avoided in this way, another problem remains: In which way do formal principles increase the difficulty of deviating from a rule and thus reinforce its exclusionary force? In my view, a formal principle is not only a second-order reason to act on some first-order reason, but also a kind of second-order reason which affects the strength of certain first-order reasons. Formal principles can be viewed as reasons to enhance the first-order strength of rules or to strengthen the weight of those dependent reasons supporting the content of rules. In so far as the strength-affecting function is concerned, a formal principle is very similar to what Stephen Perry calls 'reweighting reason'.²⁹

28 For a detailed discussion about the incommensurability and formal principles, see Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume* (Nomos: Baden-Baden, 2003), 170–85.

29 Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (n. 27), 932–3.

A reweighting reason is a reason to act ‘as if’ another reason had a certain weight. As with reweighting reasons, a formal principle requires us to treat the first-order reason generated by the rule or the substantive principle justifying the rule as having a great weight than one would judge it without considering the formal principle. Or, to put it the other way round, the formal principle requires us to treat the conflicting reasons against the rule as having lesser or zero weight and thus transforms the reasons provided by the rule to an exclusionary reason. Since a formal principle is a reason to treat the reasons supporting the rule as having a greater weight or the reasons against it as having a lesser weight, it increases the difficulty in defeating the rule by the latter. In some cases a certain principle against the rule might have a greater weight than other competing principles; however, considering the strength-affecting effect of formal principles, it will not be able to override the principles supporting the rule and thus the binding force of the rule will be preserved. Thereby we can modify Alexy’s view about how to defeat a rule by a substantive principle. According to Alexy, if one wants to restrict the application of a rule R by a principle P , one must show that P does not only override the substantive principle P_R supporting R but also has a greater weight than the formal principle P_f together with P_R . If the formal principle is to be regarded as a second-order reason increasing the weight of P_R , then Alexy’s thesis can be modified as follows: ‘If one wants to restrict the application of a rule R by a principle P , one must show that P has a greater weight than P_R , whose weight has been increased by P_f ’. In other words, even though P_R is reinforced by the support of the formal principle, P can still override P_R .

To sum up, the formal principle as a positive and strength-affecting second-order reason maintains the exclusionary force of rules to a certain extent, but it is still possible to defeat a rule by some conflicting first-order reason if one is certain beyond doubt that the weight of this reason is so great that the formal principle cannot prevent the underlying reasons supporting the rule from being overridden by it. If so, the exclusionary reason will require a person or a judge to defer to another’s practical judgments only up to a certain level, which, to use Perry’s phrase, can be called the epistemic threshold.³⁰ How to determine the epistemic threshold in practical and judicial reasoning, however, is the subject of another study.

30 Perry, ‘Second-Order Reasons, Uncertainty and Legal Theory’ (n. 27), 934–6.