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WHAT DOES THE LAW HAVE TO DO WITH OUR MOTIVES? NOTES ON THE CLAIMS OF RAZIAN AUTHORITIES[1]

O que a lei tem a ver com nossos motivos? Notas sobre as reivindicações das autoridades razianas

Andrea Faggion
UEL

Resumo: A Tese da Preempção de Joseph Raz afirma que as diretrizes das autoridades criam razões para ações que devem substituir outras razões favoráveis, e não apenas ser adicionadas a elas. Isso significa que, na perspectiva de uma autoridade jurídica, segundo Raz, as normas jurídicas devem motivar os sujeitos a agir. No entanto, essa tese parece entrar em conflito com a visão de Raz de que o direito exige apenas conformidade externa com suas normas. Essa objeção é recorrente. Responderei a essa crítica argumentando que, embora o direito não sancione as violações da obrigação moral de preempção, a alegação de que tal obrigação existe ainda deve acompanhar qualquer outra obrigação que o direito imponha, devido à sua pretensão de legitimidade.

Palavras-chave: razões excludentes; autoridade; razões preemptivas; sanções

Abstract: Joseph Raz's Pre-emption Thesis asserts that directives from authorities create reasons for actions that should replace other favorable reasons, not just be added to them. This means that, from a legal authority's perspective, according to Raz, legal norms should motivate subjects to act. However, this thesis seems to conflict with Raz's own view that the law requires only external conformity to its norms. This objection is recurring. I will respond to that criticism by arguing that, despite the law not sanctioning violations of the moral obligation of pre-emption, the claim that such an obligation exists still needs to accompany any other obligation the law imposes, due to its claim to legitimacy.

Keywords: Exclusionary reasons; Pre-Emptive reasons; Authority; Sanctions.

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1. Introduction

I aim to reconcile Joseph Raz's Pre-emption Thesis with the truism that the law does not require its norms to be followed for specific reasons. I begin by presenting the truism, then introduce the Pre-emption Thesis, explaining why it seems to conflict with the truism. Next, I present some of Raz's remarks on the matter and show how the Pre-emption Thesis can be reconciled with the law accepting that its directives are followed for any reason. I argue that the truism can be interpreted in two ways, following HLA Hart's distinction between having an obligation and being obliged[2]. According to one interpretation, it is a truism. According to the other, it is a disputed claim. I show that only the disputed claim is incompatible with the Pre-emption Thesis.

2. A Truism About the Law

According to Raz, it is a truism that the law accepts conformity with legal norms for reasons other than recognizing their validity, such as convenience or prudence[3]. Immanuel Kant uses this truism to distinguish between ethics and law within the broader category of morality[4]. According to Kant, the law requires only that our actions or our condition can coexist with the freedom of everyone according to a universal law[5]. The satisfaction of this principle does not depend on adopting it as an internal principle of conduct. After all, anyone can be free even if I do not care about their freedom or even take pleasure in its obstruction, as long as I do not obstruct their freedom with my external actions[6].

Other authors do not have a principled argument like Kant's to explain the truism.[7] Their claim, like Raz's, is phenomenological. However, some argue against Kant that there could be no duty, whether ethical or legal, to act for certain reasons since we cannot choose our motives:

> It is not the case that I can by choice produce a certain motive (whether this be an ordinary desire or the sense of obligation) in myself at a moment's notice, still less that I can at a moment's notice make it effective in stimulating me to act. I can act from a certain motive only if I have the motive; if not, the most I can do is to cultivate it by suitably directing my attention or by acting in certain appropriate ways so that on some future occasion it *will be* present in me, and I shall be able to act from it. *My present* duty, therefore, cannot be to act here and now from it.[8]

If David Ross's argument is sound, then not even a principle of virtue could require us to act for the recognition of its validity. At most, a moral principle could require us to cultivate certain motives for the future. This argument is essentially repeated by Michael Moore,[9] who asserts that there are no norms that are sources of reasons for acting for certain reasons rather than others, and followed by N. P. Adams[10].

[2] HART, H.L.A. *The Concept of Law*, 2nd ed. Oxford: Clarendon Press, 1994, p. 82.
[3] RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*, 2nd. ed. Oxford: Oxford University Press, 2009, p. 30.
[4] KANT, Immanuel. *Practical Philosophy*. Cambridge: Cambridge University Press, 1996, pp. 394–395.
[5] *Ibid.*, p. 387.
[6] *Ibid.*, p. 388.
[7] ALEXANDER, Larry. "Law and Exclusionary Reasons". In: *Philosophical Topics*, n. 1, 1990, pp. 14–15; ESSERT, Christopher. "A Dilemma for Protected Reasons". In: *Law and Philosophy*, n. 1, 2012, pp. 63–64; HERSHOVITZ, Scott. "The Role of Authority". In: *Philosophers' Imprint*, n. 7, 2011, p. 11.
[8] ROSS, W. David., *The Right and the Good*, 2 ed. Oxford: Clarendon Press, 2002, p. 5.
[9] MOORE, Michael. "Authority, Law, and Razian Reasons". In: *Southern California Law Review*, v. 62, 1989, pp. 875–876.
[10] ADAMS, N. P. "In Defense of Exclusionary Reasons". In: *Philosophical Studies*, n. 1, 2021, pp. 238–239.

3. The Pre-emption Thesis and Its Apparent Conflict with the Truism

Although Raz accepts the truism about law, the claims of Adams, Alexander, Essert, Hershovitz, and Moore, referenced in the previous section, were presented as criticisms of him. To these, similar objections from Heidi M. Hurd[11] and Margaret Martin[12] are added, arguing that Raz erred in claiming that the law requires pure intentions. What is the basis for these criticisms?

According to Raz, the law is a normative system that necessarily claims legitimate authority[13]. A legitimate authority is a justified authority, meaning there are sufficient reasons to accept it[14]. Requirements issued by legitimate authorities create obligations[15]. They are moral obligations, not merely legal ones, which would be trivial[16]. Initially, Raz employed the concept of protected reasons[17], inherent in any obligation,[18] to analyze directives from authorities. A protected reason is a first-order reason for an action, protected by an exclusionary reason to disregard opposing reasons. This suggests a conflict with the truism about law, as exclusionary reasons are reasons not to be motivated by certain reasons[19]. If, by issuing directives, legal authorities necessarily claim to create protected reasons for those to whom these directives are addressed, then legal authorities require subjects not to be motivated in certain ways, and not merely to perform the prescribed actions.

Things seem worse for Raz when he uses the concept of pre-emptive reasons to elucidate authoritative requirements. The Pre-emption Thesis states that "*the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them*".[20] Protected reasons exclude only motivation by certain reasons contrary to the action, while pre-emptive reasons also exclude favorable reasons. Raz[21] realizes that because an authoritative requirement as a first-order reason is based on pre-existing reasons also favorable to the action, if authoritative requirements were added to those favorable reasons, they would be counted twice. Therefore, authoritative requirements should take their place. Here lies the problem: Raz is arguing that the law requires its norms to be followed for the right reasons, namely, for the norms themselves, as in actions out of duty in Kantian ethics.

It is true that later, Raz revised his thesis, stating that preemption affects only reasons contrary to the directives of authorities[22]. According to this revision, we can act for the reasons that are winning in the authority's argument. However, this revision does not resolve the issue of double counting. Stephen Perry notes this point and adds another difficulty: how could we act on the winning reasons without knowing that they outweigh or are stronger than the losing reasons[23]? We would have to weigh the reasons and act based on that weighing. Thus, no reason would be excluded; we would not act on the losing reasons simply because they are outweighed. This being so, in what follows, I accept

[11] HURD, Heid. Moral Combat. Cambridge: Cambridge University Press, 1999, pp. 77–79.
[12] MARTIN, Margaret. *Judging Positivism.* Oxford: Hart Publishing, 2014, p. 13.
[13] RAZ, Joseph. *The Morality of Freedom.* Oxford: Clarendon Press, 1986, p. 27; *The Authority of Law*, p. 30; "The Problem of Authority: Revisiting the Service Conception". In: *Minnesota Law Review*, v. 90, 2006, p. 1005.
[14] RAZ, *The Morality of Freedom*, p. 26, 40.
[15] *Ibid.*, p. 37.
[16] RAZ, Joseph. "The Obligation to Obey: Revision and Tradition". In: *Notre Dame Journal of Law, Ethics & Public Policy*. n. 1, 1984.
[17] RAZ, *The Authority of Law*, p. 18.
[18] *Ibid.*, p. 235.
[19] RAZ, Joseph. "Facing Up: A Reply". In: *Southern California Law Review*, v. 62, 1989, p. 1156.
[20] RAZ, *The Morality of Freedom*, p. 46.
[21] *Ibid.*, p. 58.
[22] RAZ, "The Problem of Authority: Revisiting the Service Conception", p. 1022.
[23] PERRY, Stephen. "Political Authority and Political Obligation". In: *Oxford Studies in Philosophy of Law*, v. 2, 2013, p. 45.

Perry's criticism of Raz's revision and maintain the original formulation of the Pre-emption Thesis as the consistent one.

4. Some Observations by Raz

Other considerations by Raz addressing this problem appear in his response to Moore's claim that we cannot act for exclusionary reasons because we cannot choose the reasons for which we act[24]. Raz states that he tends to agree that we cannot choose to make a belief in a reason for an action the cause of that action[25]. This aligns with an often-overlooked observation by Kant:

> In fact, it is absolutely impossible by means of experience to make out with complete certainty a single case in which the maxim of an action otherwise in conformity with duty rested simply on moral grounds and on the representation of one's duty. It is indeed sometimes the case that with the keenest self-examination we find nothing besides the moral ground of duty that could have been powerful enough to move us to this or that good action and to so great a sacrifice; but from this it cannot be inferred with certainty that no covert impulse of self-love, under the mere pretence of that idea, was not actually the real determining cause of the will; for we like to flatter ourselves by falsely attributing to ourselves a nobler motive, whereas in fact we can never, even by the most strenuous self-examination, get entirely behind our covert incentives, since, when moral worth is at issue, what counts is not actions, which one sees, but those inner principles of actions that one does not see.[26]

That is, according to Kant, the original target of this type of criticism, not only can we not simply make certain beliefs our motives, but we also cannot be certain of what truly motivated us. Thus, we should not confuse having reasons to act for certain reasons with choosing our motives. That is why Raz distinguishes between not being able to choose motives and not being able to control motives.

Drawing an analogy with reasons for beliefs, we cannot choose what we believe, but we can control our beliefs by checking evidence, investigating further, paying attention to criticism, etc. In other words, just because we cannot choose our beliefs does not mean we are merely afflicted by them. Thus, our partial control over what causes our actions is our control over our beliefs.[27] Raz aligns with Kant, treating this notion of control as a form of submission of the active part of the self to the laws of rationality, rather than as the absence of constraints[28]. In short, if we are capable of acting for reasons, the motives for our actions are not compulsions that simply occur to us and necessitate our actions as their effects. Consequently, the ability to act for reasons already involves the ability not to act for certain reasons if there is a reason not to.

However, Raz's reply to a specific argument that the law does not require conformity with its norms for certain reasons, the argument based on our inability to choose our motives, while crucial for the viability of the Pre-emption Thesis, is not enough to avoid the conflict between that thesis and the truism about the law. After all, even if it is not due to our inability to choose what motivates us that the law accepts any reason for conformity, it still accepts any reason. Therefore, the problem of reconciling the Pre-emption Thesis and the truism remains.

5. Reconciling the Pre-emption Thesis with the Truism

[24] RAZ, "Facing Up", pp. 1174–1178.
[25] *Ibid.*, p. 1175.
[26] KANT, *Practical Philosophy*, pp. 61–62.
[27] RAZ, "Facing Up", pp. 1175–1177.
[28] *Ibid.*, pp. 1177–1178.

Let us consider examples of purported *mala per se*, where the prohibition of conduct in the law claims to replicate a moral prohibition. In these examples, either abortion is morally permitted or prohibited. When the law prohibits it, it assumes morality also prohibits it. Maria has been trying to conceive for 10 years. After many treatments, she succeeds and fears a miscarriage. Maria lives in a country where abortion is legally prohibited. Her conduct in maintaining the pregnancy is in accordance with the law but not motivated by it. From the perspective of the legal authority, there is nothing to contest in Maria's case. The reason why Maria complied with the legal norm is acceptable. This conclusion derives from our truism. Sonia, on the other hand, secures a job she has dreamed of and discovers she is pregnant. Fearing the pregnancy will hinder her career, she considers an abortion. However, her country is strict with abortion practitioners, so she decides to carry the pregnancy to term due to the threat of sanction. From the perspective of the legal authority, the reason why Sonia complied with the legal norm is also acceptable. This conclusion also derives from our truism.

Now, given Maria's and Sonia's cases, how can we accept the Pre-emption Thesis, which requires us to replace our judgment with that of the authority? We cannot answer this if we start with Maria's case, where there is no reasoning preceding the agent's omission of the action. In most cases of *mala per se*, there is no deliberation. The ideal situation is precisely this: a well-formed moral person, under ordinary life circumstances and minimally favorable social and material conditions, does not seriously consider the possibility of committing a *malum per se*. There is no reason for an authority to want it to be different; that is, to want a person to consider their reasons for practicing or refraining from the evil they are not inclined to practice. The answer arises from analyzing cases like Sonia's, where there is deliberation.

The authority needs to offer reasons to dissuade those who deliberate. After all, the conduct is not optional from the authority's perspective. The crucial point is whether the threat of sanction, an acceptable reason for the conformity of conduct with the legal prescription, can be the only reason offered by the legal authority. If it were, it would be impossible to attribute legitimacy to the authority. The authority would be on par with a mobster who offers, as the only reason for an action, the unique opportunity for the agent to keep their legs intact by performing it. Thus, what are the options? The correctness of the norm's content, i.e., its justification, is the first alternative that comes to mind. The threat of sanction would be necessary only to dissuade the wicked.

The problem is that Sonia disagrees. Sonia does not simply think it is worth committing an immorality for her career. Sonia believes that having an abortion is morally permitted. And now? It is not up to the authority to prove her wrong or persuade her of her moral error. If that were the case, it would not be a relationship of authority. The supposed authority would be on equal footing with Sonia. Claiming legitimate authority means claiming the moral privilege of having the final say in cases of disagreement about the existence and configuration of *mala per se*. This means an authority can only claim legitimacy if it asserts that its deliberation should prevail over ours. That is why the Pre-emption Thesis states that we have an obligation to replace our own deliberation with that of the authority, making the legal norm a reason for action that takes the place of some other reasons.

Note that, even without the high probability that the threat of sanction would materialize in her case, Sonia could have concluded that, after all, the pregnancy would not hinder her career. Thus, she would comply with the legal norm, but only because that is what she, *coincidentally*, thinks she should do. From the perspective of an authority that claims to be morally legitimate, Sonia's behavior would be morally illegitimate due to her indifference to its right to decide. This indifference is not demonstrated by Maria. Because the possibility of having an abortion does not even occur to her, in the terms of the Pre-emption Thesis, Maria is not "*assessing what to do*". Therefore, it is only Sonia's indifferent behavior that violates an obligation contained in the self-image of the law. It would make no sense for an entity to consider itself to have the authority to have the final say in moral decisions, even imposing sanctions on those who disagree, all in a morally

legitimate manner, while considering indifference to its decisions morally acceptable. The fact that this indifference is not sanctionable does not suggest otherwise. Hart has shown that we can have obligations without being obliged to fulfill them[29]. An obligation depends on the existence of a norm prescribing an action or omission, rather than on the threat of negative consequences for deviating from that norm. Such an action prescribed by a norm can be internal, like the act of replacing one's own deliberation with that of another prescribed by the Pre-emption Thesis. Thus, our truism about the law only tells us that the law does not oblige us to act for the right reasons. In other words, the law does not enforce motives. It does not follow that the law cannot claim that we have an obligation to act for the legal norm governing the matter when considering what to do.[30]

6. Conclusion

The law accepts any reason for the external conformity of conduct to its prescriptions. This truism means that the law does not sanction those who conform to its decisions for the wrong reasons. This implies only the absence of enforcement of a presumed moral obligation in every legal obligation. Because the law imposes itself, claiming legitimacy means asserting that the citizen has an obligation to replace their own deliberation with that of the authority when there is a mandatory norm. Therefore, the law offers this obligation as a reason for conformity with its norms, not just the threat of sanctions. One way to challenge this conclusion is to argue that the law does not claim moral legitimacy at all. In this essay, I have not provided enough evidence to support this premise. My argument has been that a given truism about the law is not enough to dismiss the Pre-emption Thesis implied by the notion that the law necessarily claims legitimacy. The truism and the thesis can be reconciled.

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[29] HART, *The Concept of Law*, p. 82.

[30] I have dealt with a disputable case of *mala per se* because examples of *mala prohibita* are more favorable to my argument. In them, the authority is the source of the prohibition or obligation because the matter requiring a decision is left indeterminate by morality. Even if the citizen would have made a different decision, if the authority claims to be legitimate, it must claim that the citizen recognizes that they are not in the authority's place and the decision does not belong to them.

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Doutora em Filosofia (UNICAMP, 2007)
Professora do Departamento/Curso Filosofia (UEL)
Professora do PPG Filosofia (PPG em Filosofia/UEL
Pesquisadora PQ2 CNPq
E-mail: andreafaggion@gmail.com