On legal things to do: external and internal legal reasons
Comments on Brian Bix’s ‘Hart, Kelsen and legal normativity’

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The normativity of law is usually discussed by reference to the concept of reasons for action. Legal philosophers frequently avoid referring to the dispute among different conceptions of reasons in moral philosophy. This paper briefly presents basic positions in this dispute (distinguishing motivating and justificatory reasons, and the dispute between internalism, counterfactual internalism, and externalism). Brian Bix appears to adopt the internalist stance. The paper argues that internalism is not able to explain the normativity of law, since legal reasons are objective and external, as they do not depend on actual knowledge and motivation of the agent. A specific problem arises with respect to the rules of recognition. If the rule of recognition is a duty-imposing rule, the reasons for the official to follow this rule must be internal. It is argued that the rule of recognition is not a legal rule and the obligation to follow it is not a legal obligation.

Keywords: reasons, externalism, internalism, normativity, rule of recognition

My comments will focus on the third section of Brian Bix’s (2018) paper, and I will deal exclusively with the problem of normativity in the context of the Hartian theory of law and, broadly conceived, contemporary Anglo-Saxon legal positivism. I will start by highlighting the points where I fully agree with Bix.

First, I agree that there is a lot of confusion in the discussion around the normativity of law. It is notoriously unclear what ‘explaining the normativity of law’ means. What sort of explanation and what the criteria of success for such an explanation is, are particularly unclear. It appears that a hermeneutic explanation aiming at an understanding of normativity, rather than a deductive explanation à la Hempel-Oppenheim model, is meant. The very notion of normativity is ambiguous, and it is frequently unclear what understanding of normativity is intended.

Second, I am generally sympathetic to Bix’s conclusion that the normativity of law is sui generis in a sense that I will try to elucidate later, and any attempts to reduce legal normativity to moral normativity as the sole ‘genuine’ normativity, fail.

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The claim that law is normative is obviously ambiguous. Two basic meanings of this claim need to be distinguished. In the weak sense, ‘being normative’ means ‘being relative to a norm’. A norm is a rule or a standard to which something does or does not conform (Finlay 2010: 332). In this sense, the proposition ‘driving with excess speed is prohibited’ means only that such driving does not conform to a valid rule of a certain legal system. Philosophically, this sense of normativity does not seem very interesting. In the strong sense, normativity is linked to reason-giving (Finlay 2010: 332). The rule ‘driving with excess speed is prohibited’ is normative in this sense if its validity generates a reason not to drive with excess speed.

Bix discusses normativity only in the strong sense, but the claim that law is normative in this sense is again ambiguous (Enoch 2011: 15). First, we need to distinguish the claim that law gives specific legal reasons (that may be different from other reasons) from the claim that law gives unqualified, genuine reasons. Famously, Hart (2012: 167) argued that legal obligations (and thus, legal reasons) are distinct from moral obligations (and thus, moral reasons). Some legal positivists (Raz, Shapiro) claim that only moral reasons are genuine reasons (Shapiro 2011: 184). Second, we must distinguish the claim that law gives (or purports to give) reasons as a matter of necessity from the claim that law sometimes gives reasons. I believe that those who define the task of legal theory as the discovery of the nature of law (and hold that normativity is a necessary feature of law and, therefore, a part of its nature), will opt for the first alternative. The claim that law sometimes gives reasons is trivial. Third, we need to distinguish between the claim that law always gives reasons and the claim that law only purports to have such capacity. In other words, it may be held that law always purports to give reasons, but it does not always succeed in proffering genuine reasons. Those legal positivists who claim that only genuine reasons are moral reasons will tend to opt for the second alternative (Joseph Raz). Those who distinguish legal reasons from moral reasons (and therefore recognise that they may conflict) will rather opt for the first alternative.

I think that the basic question that must be answered in connection with the normativity (in the strong sense) of law relates to the general conception of

1 A similar distinction is made by Enoch 2019, who distinguishes between ‘formal’ and ‘full-blooded’ normativity.
2 Toh (2008: 495) correctly notes that this view assumes a preponderance of moral considerations, in the sense that what is morally required is not something that is required merely from a point of view, but instead what is required morally is not something that is required merely from a point of view, but instead what is required from any point of view, all things considered. Toh believes that such a view is unwarranted.
3 Compare Toh 2008: 456.
4 Raz (1999) famously distinguishes the conditions of the truth of law’s claim to legitimate authority and the conditions of intelligibility of such a claim. Pursuant to Raz, the conditions of truth are evaluative, but the conditions of intelligibility are factual.
reasons. In this discussion, I can only outline a couple of fundamental points without going into excessive detail.

First, the distinction between motivating and normative (justifying) reasons should be invoked. Normative reasons are reasons that justify actions, while motivating reasons are reasons that motivate people to act. Therefore, reference to motivating reasons may help us to explain an action, but not (at least directly) to justify it. Obviously, one and the same reason can be simultaneously motivating and normative. Discriminating between motivating and normative reasons enables us to keep apart two questions: (i) what reasons motivate agents to act (a psychological question) and (ii) what reasons favour and justify agents’ actions (Alvarez 2017). As I see it, the claim that law gives (or at least sometimes gives) motivating reasons is trivial and belongs more to psychology or the sociology of law than to analytic legal theory. Therefore, I will deal solely with normative reasons. It should be stressed that even if an action is based on a normative reason, it does not per se require that such an action ought to be performed. There might be conflicting normative reasons, and the final assessment of whether an action ought to be performed or if an action is right and wrong may depend on the resolution of such a conflict. Normative reasons are frequently only pro tanto reasons.

When considering normative reasons, we need to take a position in the controversy between the externalist and internalist account of reasons and further, between various versions of the internalist account (Williams 1981). This in a fundamental dispute, and it is surprising that so little attention has been devoted to this controversy in legal theory. Limited space prevents me from providing a full picture of the externalist/internalist dispute, so I will only very briefly sketch these and will skip most of differentiations of particular positions within both the externalist and internalist camps. I would like to stress that the disputes between externalism and internalism take place mostly within moral philosophy and meta-ethics, so their effects may not be directly applicable to legal theory. Even if a version of the internalist or externalist account in moral philosophy is right, it does not necessarily require that the same position be adopted in legal theory.

Generally, internalists claim that normative reasons always bear some relation to motivation and/or desire. This is denied by externalists. Externalism explains normative reasons without reference to motivations and desires. The obvious problem for the internalists is that one may have a normative reason for action of which one is not aware. The internalists address this problem by developing various forms of counterfactual internalism claiming that if an agent has a reason to do A, then it necessarily follows that she would be motivated to some degree or desire to do A, provided that her rational deliberations are based on the possession of full information. The externalists claim that the ex-
istence of normative reasons for an action does not depend on the actual, hypothetical, or construed knowledge, motivation, or desires of an agent. Some actions are wrong for everyone, no matter what any agent is, would, or could be like, and the wrongness of such actions entails that everybody has a reason not to perform them. Space does not allow me to discuss details of the externalism/internalism dispute. I would like to stress only that externalism does not deny the existence of internal reasons that are linked to desires and motivation. It claims only that apart from internal reasons, there are also external reasons that bear no such link.

It is not clear what conception of reasons Bix adopts. He is not talking about motivating reasons, as his paper is certainly not an exercise in sociology or psychology of law. He certainly has in mind normative reasons that justify actions, not reasons explaining actions. Although he does not explicitly take any position in the externalism/internalism debate, I rather think that he assumes an internalist position, in some way linking reasons for action to motivation. However, while it is unclear whether he adopts actual or counterfactual internalism, some clauses in his paper suggest that he opts for actual internalism. For example, he asks what reasons people actually have to observe legal rules and then seems to endorse Hart’s view that there may be various reasons. I wish to argue that actual internalism fails to explain the normativity of law.

To my thinking, either the externalist or counterfactual internalist account would better explain the normativity of law. Counterfactual internalism has a certain advantage over externalism. Externalism does not link reason to deliberation. A reason may hold even if it does not play any role in the actual or potential practical deliberations of an agent. This may seem to be counterintuitive, but I believe my conclusions remain true irrespective of whether one accepts externalism or counterfactual internalism. The actual internalist claim that someone who has a reason to do A is necessarily motivated to do A seems to fail with respect to legal reasons. I believe that there are at least three arguments supporting such a stance.

The first argument relates to the relationship between reasons and obligations (duties). If an agent has a reason to do A, she ought to do A. This works in both directions. An agent who ought to do A has a reason to do A. I think this is a conceptual truth that applies to any sort of reason: legal, moral, or prudential. The internalist account claims that someone has a reason to do A only if they are actually motivated to do A; hence, someone ought to do A only if they are so motivated. This is false, not least because of the legal ‘ought’. Our legal obligations do not depend on whether we are motivated to act in a certain way (or on any other motivational facts). I ought to pay taxes, even if I am in no way motivated to do so. Obviously, the ‘ought’ triggered by having a reason is only a prima facie ought, as there may exist other reasons not to do A. Conflict
between reasons may arise within one and the same domain. For example, I may have moral reason to help my lazy brother that is in conflict with another moral reason not to facilitate the life of lazy people. Conflict may also arise across domains; a moral reason may be in conflict with a prudential reason. We need to distinguish between determination of all-things-considered obligations within a domain (for example, within the law or within morality) that requires weighting conflicting reasons pertaining to this domain and determination of all-things-considered obligations across domains that require weighting conflicting reasons pertaining to different domains.

Second, I opt for an objectivist account of reasons. That means that whether an agent has a normative reason for action depends exclusively on the facts and not on the agent’s beliefs. False beliefs do not trigger reasons, but only apparent reasons. If I am wrong in believing that my children behaved wrongly, I do not have a reason to punish them. If I am wrong with respect to any point of law, I have no legal reason to act pursuant to my (false) belief.

Third, the existence of a reason does not depend on the actual consciousness and desires of an agent; people may have reasons they are not aware of. Reasons are desire-independent. Although this is simple for an externalist, the matter becomes more complicated if we adopt counterfactual internalism. Pursuant to one of the versions of counterfactual internalism, an agent has a reason to do A on condition that she would be motivated to do A if her rational deliberations had been based on full information about all of the relevant contingencies.\(^5\) To use a simple example: John has a (moral) reason to help his sick friend Tom, even if he is not aware of the fact that Tom is sick. Of course, this does not mean that John is blameworthy or culpable for not helping Tom. Acting against moral reasons does not necessarily trigger moral responsibility, since the agent may be able to offer an excuse. This does not mean that acting against moral reasons is justifiable, but it means that such acting may be excused. The same applies to legal reasons. I have a legal reason to pay income tax, even if I am not aware of the legal fact that everybody has a duty to pay income tax. The question of whether I will be legally liable for failure to pay income tax is a separate question, not linked to the existence of a legal reason. Even if I am not liable, this does not mean that my failure to pay tax has been justified, but only that it may be excusable. I do not wish to say that actual knowledge of an agent, the agent’s motivation and desires, are irrelevant for law. I claim only that such circumstances may sometimes function as excuses, eliminating or reducing legal liability, but they can never legally justify an action (and, therefore, they do not constitute reasons for action). Further, only externalist or counterfactual internalist accounts of legal reasons are able to explain why an action conforming to a legal duty is

\(^5\) Numerous versions of counterfactual internalism exist, so this condition may be formulated in different ways. See Finlay & Schroeder 2017.
legally justified, irrespective of the actual knowledge, motivation, and desires of the agent and irrespective of whether legal reasons played any role in the agent’s actual deliberations.  

An agent who has reason \( R \) to do \( A \) and actually does \( A \) is (at least prima facie) justifiable in doing \( A \) (even if \( R \) did not play any role in the agent’s actual motivation or deliberation to do \( A \)). Justification is always relative to a domain. That a given action \( M \) is morally justified means that there is a moral reason to do \( M \). That a given action \( L \) is legally justified means that there is a legal reason to do \( L \). Each normative system (morality, religion, law, etiquette) may provide different reasons for action. Reasons provided by one of those systems may be in conflict with reasons provided by other systems. It is not the task of legal philosophy to say how such a conflict is to be resolved. Most normative systems (law, morality, religion) claim that their reasons for action should prevail over reasons for action provided by other systems. I do not think that it is a specific feature of law that it claims to trump other normative systems, in particular, morality. The same may be said of most other normative systems. I follow Bix (2018: 36) in endorsing Tim Scanlon’s claim that reasons tend to have force within particular normative domains, and reasons within one domain (for example legal) are not reducible to reasons in another domain (for example morality). Of course, one may argue that reasons in one domain are the most important, so they always prevail over reasons in other domains. It is frequently claimed that the only ‘genuine’ reasons are moral reasons. If this claim means that moral reasons always prevail over other reasons, it may be right, but it is not a claim of descriptive legal theory, but rather a claim of normative moral theory.

The objectivist and externalist account of legal reasons presented above does not explain why people usually obey the law. Bix is right in underlying the importance of Hart’s claim that a citizen may obey the law for variety of reasons. It is, however, unclear whether Hart had in mind motivating reasons or normative reasons. The problem of reasons actually motivating people to obey the law is more of an empirical problem for legal sociology or psychology, but not of analytical legal theory. Thus, I assume that Hart meant normative reasons and his question regarded the types of normative reasons playing a role in the practical deliberations of agents aiming to justify their actions.

Of course, some people may have additional, non-legal normative reasons to obey the law. In their eyes, such normative reasons justify their conformity to the law. They may think that conforming to law is generally morally good or

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6 Let me recall in this context the principle adopted by nearly all legal systems ignorantia iuris non excusat and ingorantia iuris nocet.

7 This view is defended by Spaak (2005: 412). Joseph Raz’s idea that legal reasons are exclusionary, in the sense that they eliminate (or claim to eliminate) all other reasons from the process of deliberation of an agent, seems to be even stronger.
that it is prudent. This is, however, irrelevant to legal theory. Justification of a
certain action by reference to moral, prudential, or other reasons is legally irre-
levant. From the legal perspective, the only relevant question is whether a given
action is justifiable by reference to legal reasons, which, as I claim above, are
external in the sense that they do not depend on an agent's actual motivation or
desires.

And here I come to the point where I disagree with Bix. He maintains (Bix
2018: 39) that the claim that law provides us with special reasons for actions, rea-
sons that we would not have if the norm were not a 'legal' one, is false.8 I think
Bix's stance is right, but only as far as it relates to motivating reasons. Certainly,
it may be argued that law does not generate any additional sort of motivating
reasons. People are motivated to obey the law for a variety of reasons, for exam-
ple, for prudential reasons (fear of sanction), purely for reasons of conformity
(other people obey the law), or for moral reasons (they may believe that it is
their moral duty or that the law is generally morally good). Those motivating
reasons explain why people obey the law. It appears that law does not generate
any specific motivating reasons that are not reducible to moral, prudential or
other reasons. Even if we assume that those reasons are also normative reasons
(which means that they also justify actions), they do the justificatory job from
the perspective of non-legal domains (such as morality or prudence) and not
from the perspective of law. Bix is right in saying that the role of law is to trigger
pre-existing reasons rather than to generate new reasons. That is true if we look
at law from the perspective of other normative domains such as prudence or
morality. However, if we adopt a purely legal perspective and ask for the justi-
fication of an action from that perspective, we must conclude that the only and
sufficient justification of an action is that such action conforms to a legal 'ought',
as generated by a valid legal rule.9 The fact that reasons from other domains are
triggered seems irrelevant from the legal perspective.

In addition, Bix's stance seems to be inconsistent with his claim that reasons
have force within particular normative domains. If law is a normative domain,
it must have the ability to generate specific normative reasons that are irredu-
cible to reasons from other domains. In practical deliberations (either actual or
hypothetical), such legal reasons may concur with reasons pertaining to other
domains.

So far so good. However, the account of legal reasons sketched above as spe-
cific and objective reasons encounters a fundamental problem. This problem is
linked to the normativity of the rule of recognition as a social rule. Pursuant to
Hart's practice theory, the existence of a social rule is a matter of brute social

8 He attributes this claim to Brian Leiter and Jules Coleman.
9 For the sake of space, I deal here only with duty imposing rules and I do not discuss here the
problem of normativity of power conferring rules.
fact, in particular, of the behaviour and attitudes of legal officials. According to Hart, the existence of a rule of recognition is a universal feature of law. Each legal system must have at its foundation a rule of recognition as a matter of necessity. The function of the rule of recognition is to set out the criteria for the validity of legal rules. To perform its function, a rule of recognition must be a duty-imposing rule in the sense that it must generate the duty of the officials to apply certain criteria of validity. And here a problem arises with the account of legal normativity presented above.

Pursuant to this account, legal reasons for action are objective and external. This means that the agent need not be aware of the reasons, and the reasons need not play any role in the actual motivational process of an agent (although, if one accepts counterfactual internalism, they must be able to play a role solely in a hypothetical practical deliberation). This, however, does not allow for an explanation of the normativity of the rule of recognition as a duty-imposing rule. Hart emphasises that the existence of the rule of recognition cannot be reduced to a mere regularity of the behaviour of the legal system’s officials. In addition, they must adopt the internal point of view towards the rule of recognition, which means that they accept the rule and agree to take it as a guide to their behaviour, and in particular, to their recognition of other rules as satisfying the criteria set out in the rule of recognition, and therefore, as valid legal rules (Spaak 2005: 408).

The adoption of the internal point of view towards a rule presupposes that the agent is aware of that rule. To say that there are reasons to follow the rule of recognition that do not depend on the actual awareness and motivation of the officials would imply that there exists another more fundamental source that generates such reasons, independent of the awareness of officials. This is, of course, unacceptable to legal positivists who endorse the social fact thesis (the thesis that legal facts are ultimately determined solely by social facts). Therefore, the reasons for following the rule of recognition must be actual internal reasons, of which legal officials must be aware and which play a certain role in their motivation. Hart’s explanation is that a rule of recognition is a conventional rule, and therefore the fact that other officials follow the rule is at least a part of the reasons for following the rule. This means that officials must be aware of the practice of other officials and the knowledge of such practice at least partially motivates them to follow the same practice. Hart explicitly rejected the claim that the reasons for following the rule of recognition must be moral reasons. It is beyond the scope of this paper to answer the question of whether Hart’s conventionality thesis is properly justified and allows for full explanation of the normativity of the rule of recognition. In any case, it appears that the

10 For my views on what ‘being a matter of’ in this context means see Gizbert-Studnicki 2016.
11 For the discussion see Dyrda 2015a.
objectivist, externalist, and counterfactual internalist accounts of legal reasons do not allow for an explanation of the normativity of the rule of recognition. Such an explanation requires an internalist account of reasons (Dyrda 2015b). Therefore, at first sight, the claim that the normativity of law can only be explained by the sole application of either the externalist or counterfactual account of reasons fails.

But this conclusion would be too quick. Although the rule of recognition is the foundation of every legal system, according to Hart’s theory it is not a legal rule, or at least the question of the legal validity of the rule of recognition does not arise:

No such question [of validity] can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way (Hart 2012: 108-9).

If the question of the legal validity of rule of recognition does not arise, the reasons for its observance do not have to be legal reasons. Therefore, the explanation of the normativity of the rule of recognition as a social rule does not have to be designed in the same way as the explanation of the normativity of valid legal rules (which do not have to be social rules in the meaning of Hart’s practice theory of rules).

This raises several difficult questions. The first question is how to explain the normativity of the rule of recognition as a duty-imposing rule, and in particular, whether recourse to the conventionality thesis is a sufficient explanation. Second, if this rule is not a valid legal rule, then the duty of legal officials to apply the rule of recognition is not a legal duty. This seems paradoxical. Third, if the normativity of the rule of recognition is not a legal normativity, how it is able to generate the ability of legal rules to produce legal reasons for action?12 I must leave my attempt to answer those questions to another occasion.

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12 Spaak (2005: 412) notices that the normative force of the rule of recognition cannot be transmitted down to the lower levels of Stufenbau.
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