Legal positivism represents a view about the nature of law. It states that there is no necessary or conceptual connection between law and morality and one can account for the nature of law without reference to morality. Exponents of this view argue that law represents the existence of certain authoritative rules of conduct in society. These rules, they argue, are different from morality regarding how people ought to behave. This idea has been expressed in the dictum that there is a difference between “what the law is” and “what the law ought to be.” This implies that we can account for the existence of law without reference to how law may be evaluated with respect to what the law ought to be. This idea about the nature of law is sometimes not clear and it raises a number of issues about what legal positivism stands for regarding the nature of law. However, in order to appreciate what legal positivism stands for, we need to understand the view of positivism. Positivism generally is the view about methodology or criteria used to determine what is meaningful. It holds that a statement is meaningful if and only if its truth can be verified, if not in reality at least in principle. In other words, there must be a criterion that can be used to try to verify the truth of a meaningful statement. If such truth cannot be verified, at least in principle, then the statement cannot be meaningful.

This idea has influenced the development of the view of legal positivism. This is so because positivism says that moral statements or principles are meaningless because their truth cannot be verified. To put it mildly, people disagree about the truth and meaning of moral principles because they have different conceptions about how people ought to behave. The truth and meaning of moral principles are very controversial. By insisting on the separation of morality and law, legal positivism seeks to establish the nature of law as a set of rules whose legal truth can be verified at least in principle. The meaning and truth of legal rules should not be controversial, at least for the most part. Legal positivists argue that for any precept to be considered a
law, it must be substantive in the sense that it is meaningful and its truth can be verified. They do not want law to be something like moral principles whose truth and meaning people disagree about without any means to verify who is correct. One of the tenets of positivism in general, and legal positivism in particular, is to establish that clarity and the verification of truth are a substantive nature of meaningful statements in general and legal statements in particular. So, the point now is to address how legal positivism has tried to establish the nature of law as clear statements whose truth is capable of being verified by a clear method or criterion.

Legal positivists claim to be involved in a conceptual issue about the nature and existence of law or legal system. They claim that their approach is conceptually descriptive, in that they are trying to define what it means to say that “X is a law” or “X is a legal system,” which is to say that X exists as a law or as a legal system. Legal positivists have sought to distinguish between a descriptive account of the nature of law and a normative account. A normative account of law, as a conceptual enterprise, seeks to specify certain standards that must be met in order for a law to be considered good or acceptable. This approach is different from what the legal positivists are interested in. They want to establish when one can meaningfully say that a law exists before the normative issue of whether such a law is good or acceptable should arise. Without knowing what the law is and whether it exists, the issue of whether it is good or acceptable does not arise. So, legal positivists insist that their enterprise is logically prior to, and conceptual different from, the issue of whether a law is good or bad. With respect to the enterprise of legal positivism, they understand their account of the nature of law to involve two mutually supportive issues. These issues are also related to the idea that law may mean law as a statute or as a valid rule that is authoritative in accordance with a specified criterion, or law as a system of rules, including rules by which we determine whether a statute or rule is valid, the scope of the power and function of officials, and how they apply law to substantive situations.

The legal positivist account of law involves a way of indicating that law exists in the first sense, which implies the second sense. In other words, a law can exist in the first sense of a valid rule only if there is a system that specifies a criterion by which we can determine when we can say that a law exists. So, the more pertinent issue is to account for when we can say meaningfully that a legal system exists. Many legal positivists have provided necessary or sufficient conditions that must be satisfied in order to say that a
legal system exists. Such conditions seem to give an account of the nature of particular laws, a legal system, legal obligation, and adjudication, in terms of how laws are applied to substantives cases for regulating conduct. Some argue that a legal system exists just in case there is an absolute sovereign whose pronouncements, dictates, and commands are considered authoritative and as having the force of law. In which case, being a pronouncement or command of a sovereign now becomes the criterion for determining whether a law exists and whether a law is valid. If such a criterion exists, which means that there is an absolute sovereign, according to some legal positivists, then a legal system exists. In some sense, the pronouncements of the sovereign and the fact they have been made are clear statements whose meaning and truth can be verified. At least one can go to the sovereign to find out what he commanded and whether he commanded it. These are uncontroversial in the sense that they can be verified in principle. This account, as we can see, makes no reference to morality and whether a pronouncement is good or bad.

The existence of a legal system and a valid law, according to this view, demands general obedience and legal obligation on the part of people. So, legal obligation derives from the mere fact that there is a valid law or a criterion for validity that implies the existence of a legal system. This fact also implies that there is, in the system of rules, some authoritative coercion, sanction, threat, or force behind the pronouncement that is considered a valid law. The embedded threat or sanction is in part what makes the pronouncement have the force of law and authority. This idea of legal obligation is particularly relevant to the appreciation of legal positivism in the attempt to conceptually separate law from morality. In a legal positivist view, legal obligation does not derive from the moral goodness of the law. Many legal positivists want to distinguish between moral and legal obligation, and they insist on the idea that one does not imply the other. In which case, we cannot claim not to have legal obligation regarding a valid law simply because we consider the law to be morally bad and evil. The idea that it is bad implies only that we do not have a moral obligation to obey it. Legal positivism insists that we can morally criticize a valid law as bad or evil, but it is still a valid law nonetheless. Any attempt to found legal obligation on moral obligation involves a conceptual confusion about “what the law is” which requires legal obligation, and “what the law ought to be” which involves moral obligation.
This idea that a law exists if there is an imperative deriving from a sovereign was the prevailing view of legal positivism before H. L. A. Hart’s book *The Concept of Law*, published in 1961. Hart’s theory has had tremendous influence on legal theory or jurisprudence, and the view of legal positivism espoused in this book has become the “ruling view” regarding the nature of law. Hart disagrees with the prevailing view of law, legal system, and legal obligation, which he calls the simple imperative theory of law. He agrees with the basic motivations and tenets of this traditional view of legal positivism but disagrees with some of their details. He argues that this account of the nature of law does not jibe with the modern view of law and legal system. He identifies problems with locating the foundation of a legal system, legal obligation, and the criterion of legal validity in an absolute sovereign. This idea, he argues, will have implications that a legal system will be static, inefficient, and uncertain. A legal system will be static because there will be no adequate process of adapting laws to changes in society in terms of eliminating old rules and bringing forth new ones. Because the people have to rely on the dictates of a sovereign, when there is doubt regarding what precisely the law is, it will be difficult to verify. This means that there are problems of uncertainty regarding the rules. Moreover, the system will also be inefficient because there are no courts to resolve disputes among people, that act as the final authoritative body in these disputes.

To avoid these possible problems, Hart argues that a legal system must be founded on a set of social rules which he calls primary and secondary rules. The primary rules of obligation specify what is acceptable social conduct. The secondary rules tell us clearly and definitely the scope of the powers of officials, what is to be considered a valid law, how a valid law may be applied to substantive situations in adjudication, and how changes may be made in the legal system. Hart’s view of the rule of recognition as the criterion for validity is said to follow the tradition of Hans Kelsen’s idea of a basic norm. According to Hart’s account, legal obligation does not derive solely from the fear or threat of sanctions, but also from the fact that there are rules which specify acceptable social ways of behaving. A legal system cannot be sustained solely on the basis of force; the laws of the system must be generally obeyed. Legal obligation derives from generally accepted social rules that provide a basis for society to put pressure on people to behave in a certain way, such that not behaving that way may necessitate the use of force. Thus, a violation of a social rule is deemed worthy of sanctions because the people, as participating members of the society, accept the social
rules as a way of regulating conduct. This account of legal obligation, Hart argues, has an advantage over the imperative view, which says that people obey laws simply because there is force behind them and people are afraid of punishment. He argues that we must understand obligation from the view of insiders. So, questions have been raised about what Hart means by the idea of being a participating insider in a society in terms of having an “internal point of view” and how this idea can help us to understand the notion of legal obligation.

Hart argues that the imperative view of legal positivism which he disagree with does not distinguish between “being obliged” which is what is involved in a coercive situation when force is used to extract property from someone, and “having an obligation,” which is what is involved in the case where there is a social rule that people as participating members of a society generally accept as a way of regulating conduct. This account of law and legal system indicates that morality and law are not conceptually connected, and that the concept of legal obligation is separate from moral obligation. Another aspect of law in which legal positivists want to establish lack of conceptual connection between law and morality involves the issue of adjudication; that is, the substantive application of law to situations. Some legal positivists argue that because rules are different from moral principles and are clear and easily verifiable, in that they point to hard facts of life, they can be applied to cases in adjudication without controversy; laws therefore do not require interpretation. In this regard, legal positivism is said to imply formalism or mechanical jurisprudence. This is the view that laws are considered clear and that every fact of the case to which a law is applied fits the specifications and provisions of the law. The law has a specific form into which the facts of a case are made to fit; hence the term formalism, in that the judge simply applies the form of a law mechanically to a set of facts. For instance, legal positivism is viewed as presenting the application of law to have the following form: the law says that “anyone who drives ten miles per hour or more over the speed limit should be fined fifty dollars.” The facts indicate that “John drove forty five miles per hour in a thirty-miles-per-hour-zone.” Therefore, John should be fined fifty dollars.

According to this law, it is clear that there is no provision for plausible exculpatory explanations or excuses. So, the judge is not allowed to consider whether John drove at forty five miles per hour because he was rushing his son to the hospital. In this case, the judge is not allowed to interpret the law to suit the circumstance. He is not allowed to incorporate moral considera-
tions into his interpretation and application of laws to specific circumstances. This interpretation of legal positivism regarding adjudication has being criticized as implausible. Some legal positivists, such as Hart, among others, argue that legal positivism does not necessarily imply formalism. They argue that the thesis which says that moral principles are not part of what it takes for a law to be valid does not necessarily imply that judges may not consider moral factors in adjudication and the application of law. They therefore argue that legal positivism is a theory about the existence of a legal system and validity of law and not a theory about the adjudication of cases. They claim that a theory of validity does not involve a theory of adjudication. The theory of adjudication is a theory about the nature of legal reasoning which may not have anything to do with the nature of law. Thus, it is argued that legal positivists can maintain the separation of law and morality with respect to the theory of validity and also maintain that a judge may consider moral principles in the adjudication of cases.

Hart’s legal positivism has been criticized for founding a legal system solely on a pedigree that consists of social rules and for not paying attention to principles and policies regarding the nature of a legal system and their role in adjudication. As such, he is said not to have provided an adequate account of the nature of law. It is argued that an adequate legal theory of validity, which is what legal positivism claims to be, ought to account for how judges identify all the legal standards they apply, especially in hard cases. These are cases where the social rules on which the legal system is founded and by which valid laws are determined offer no help regarding adequate resolution. Questions have therefore been raised about the adequacy of the legal positivist criterion of validity on the basis of which valid laws are identified, and whether indeed such criterion can identify valid laws in hard cases. Not accounting for the role of policies and principles implies that legal positivism cannot account for how judges adjudicate hard cases when they apply principles. Policies and principles are said to be precepts that indicate the political morality of a society that are included in the social rules and legal practices of a society. Some legal positivists have been grappling with the issue of whether the legal positivist account of the nature of a legal system and valid law can capture the nature of policies and principles and how they are used in adjudication, especially in hard cases.

**Suggested Further Reading**


