Why we need a philosophical analysis of the concept of law

The analysis of the concept of law: what is there about the concept of law that makes its analysis sufficiently difficult and important that it must precede all other issues in the philosophy of law?

Hart noted certain features about law that made its analysis puzzling:

- What is the relation of law, morality, and force?
- The concept of law may be used ambiguously (descriptive versus prescriptive) and may thus cause serious moral and intellectual confusion (consider, for instance, so-called laws of nature).
- The concept of law strikes up against certain puzzling but important borderline cases—cases of practices or institutions that have enough features in common with clear cases of law to tempt us to regard them as law but enough dissimilar features to tempt us in the other direction as all (i.e., international law, primitive law).
- At least some laws seem to involve or depend upon or even be rules. But what is a rule and what does it mean to say of a rule that it exists?

Defining law

There have been two main types of definition of the word law.

1. Natural Law Theory: Law is, by its very nature, an ordinance of reason for the promotion of the common good promulgated by him who has the care of the community, either by the whole people acting collectively or by an agent of the whole people, some one or some group delegated to act in their name.

2. Legal Positivism: A valid law is a command that is (1) an expression of a general desire that others act or forbear in certain ways (2) together with a threat of evil no noncompliance, (3) together with the power to enforce compliance, (4) emanating from a person who alone is habitually obeyed by the bulk of the society and who habitually obey no one else.

There are important differences in these two definitions of law.

The natural law definitions are normative. They do not attempt to eliminate such terms as rational, common good, and properly possessing authority. The natural law theory denies that a conceptual analysis of law can be neutral, since some minimal principles of morality and justice are built into the very concept of law. The natural law theorists’ definition is avowedly of the kind called functional or teleological.

The positivists think of themselves as more scientific. They are sympathetic to efforts to eliminate normative terms of by defining them in turn in non-normative terms. The positivists’ key terms are words like command, threat, power, habit, and obedience, which they regard as empirical notions. The positivists’ account of law is intended to be entirely neutral in respect to moral-political controversies. Positivists reject the natural law theorists’ claim that reference to morality is an essential part of any account of what law is.

The basic issue over which they disagree: Is reference to critical, rational, or true morality—as opposed to merely conventional morality—an essential part of any adequate account of what law is?
Natural law theorists argue that morality is not simply a desirable feature to import into law but rather an essential part of law as it really is. Natural law theories maintain that there is an essential (conceptual, logical, necessary) connection between law and morality. The demands of law and the demands of morality do not just happen to overlap sometimes as a matter of fact; their overlap is not just a contingent matter for empirical discovery. Rather, it is part of the very meaning of “law” that it passes a moral test. No rule can count as a law unless what it requires is at least morally permissible. Moral validity is a logically necessary condition for legal validity. Satisfying certain demands of morality is part of the very definition of “law.”

Legal positivism holds that law is one thing and morality another, and that neither can be reduced to the other. Positivists happily concede that it is a good idea for law to conform to morality—that is, to be fair and humane—but an unfair rule is still a valid law provided only that it is made in accordance with the accepted lawmaking rules of an existing legal system. The validity of a particular rule is determined by its pedigree, not by its content.

**Three basic features of Natural Law theory**

1. A NL view of morality holds that there are certain fundamental principles of right and wrong that bind human beings of every nationality. An example might be the principle that it is wrong to destroy innocent human life.
2. A NL view of morality holds that these fundamental principles are based on our human nature: we human beings are made in such a way that we cannot help but value the goods these principles protect.
3. A NL view of morality holds that all human beings are aware of these fundamental moral principles because all normal adults come to know them through the use of their natural reasoning abilities.

**Two examples of Natural Law theory**

**Cicero: Republic**

True law is right reason in agreement with nature; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly called punishment . . .
Martin Luther King: “Letter from Birmingham Jail”
You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may wonder: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the Brat to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all"

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. … Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.

Criticisms of natural law theory
1. Rejection of the teleological view of nature for a mechanistic, post-Darwinian view
2. Suppose that I do have a purpose set by God or nature. By what logic does it follow that I am ethically required to act in accord with that purpose?
3. The notion that human beings have a function is a degrading view: is our moral status simply to be a matter of our having functions or purposes in the way that hammers and other instruments do?
4. It is always an open question what morally ought to be done given any statement of what is naturally done or factually the case. To think otherwise is to commit the naturalistic fallacy.
5. Principles of natural law are often useless: Aquinas’ example of “Do good and avoid evil.”
6. Ought we to question the connection between law and morality?

Contemporary natural law theory
Contemporary natural law theories gain considerable advances in sophistication and plausibility over the classical versions in three ways:

1. They do not appear to depend on controversial metaphysical or theological theories.
2. Some contemporary natural law theorists (Fuller’s Procedural Naturalism) argue that the connection between law and morality is necessary only at the level of an entire system—that legal systems may, of course, contain particular laws that are unjust or immoral in some other way, but that the system as a whole must satisfy certain moral demands in order to count as legal.
3. Other contemporary theories (Dworkin’s Interpretivist) argue that too sharp a conceptual separation of law from morality will force us to miss the essential nature of certain features of judicial deliberation—e.g., deliberation about constitutional rights.