1 Rules, Principles and Conduct

1.1 RULES

1.1.1 Both morality and law are guides to conduct but there is an obvious difference between them. If I am caught breaking the law, I shall be brought before a court, sentenced and punished. But, if I am discovered acting immorally but not illegally – for instance, lying or betraying a confidence – there is no court which can sentence me. I shall incur blame, disapproval and perhaps hostility, but that is all. Law is backed by official sanctions imposed and carried out by judicial and penal authorities. Morality is backed only by the informal sanction of public opinion. But, although distinct, the two overlap. Actions which are prohibited by the criminal law are for the most part morally wrong whether or not they are illegal. Obvious examples are killing for private gain, rape, theft and unprovoked violence. The relation between law and morality is worth exploring further. But first something must be said about rules and principles and about rule-governed and principle-governed action. It is through the rules and principles which they contain that morality and law are guides to conduct. In this section I shall be concerned with rules, in the next with principles, before returning in the final section of the chapter to morality and law.

A rule is stated in the imperative mood. So is a command. A command tells a person or a number of persons to do something on a particular occasion. ‘Shut the door!’ ‘Stand up!’ ‘Stop talking!’ The simplest kind of rule is a generalised command. It tells people to do something or not to do something, not merely on a particular occasion but on all occasions of a specified kind, or sometimes on all occasions without qualification. ‘Always shut the door when you leave the room!’ ‘Always stand up when a lady enters!’ ‘Never talk in the library!’ ‘Always tell the truth!’ ‘Never commit adultery!’ A rule in the form of a generalised command is applied to a situation of the kind which it covers by giving the appropriate command: that is, by telling people to do an action of the kind it prescribes or not to do one of the kind it forbids.

1.1.2 Rules in the form of generalised commands are first-order or primary rules. They are directly concerned with what is to be done and must be distinguished from rules of another kind. These are second-order or secondary rules. They are directly concerned not with what is to be done but with who decides. They confer authority to make rules and give commands, and specify who is subject to this authority. Thus, while they contain generalised
commands, they also contain something more. They tell people subject to authority always to comply with its prescriptions. But they also confer the authority to make the prescriptions.\(^1\) Constitutional law, which is concerned with legislative, executive and judicial authority, largely consists of secondary rules. Criminal law, which is directly concerned with what should be done and, more especially, what should not be done, largely consists of primary rules. In morality it is primary rules which are most conspicuous and familiar: for instance, rules about keeping agreements, telling the truth and refraining from bullying. But there are also secondary moral rules: for instance, those conferring parental authority. It is because they contain generalised commands that secondary rules can be applied to particular situations. This is done by telling people on a particular occasion to do what the authority to which they are subject has ordained: to carry out the order of a court, to obey police directives, to comply with parents' decisions.

There is another distinction which, while it may appear similar to, must not be confused with, that between primary and secondary rules. This is the distinction between regulative and constitutive rules.\(^2\) Regulative rules, as their name implies, regulate action. Their defining characteristic is that the actions which they cover, are logically independent of them. An example is the rule limiting the speed of vehicles in built-up areas to 30 miles per hour. This presupposes that vehicles can be driven in built-up areas irrespective of any rule regulating their speed. The rule then regulates it by setting a limit to it. In the case of constitutive rules, the opposite is true. The actions they cover are logically dependent upon them. The rules of games are examples. The game of chess is constituted by rules specifying what the pieces are, how they can be moved and what the purpose of the game is. Without the rules, there could be no such game and no chess moves. Not only games but all institutions exist in virtue of constitutive rules. Take the most ubiquitous of all institutions, that of language. Without lexical, grammatical and syntactical rules, there could be no speech because no possibility of formulating sentences. Individual speech acts such as statements, questions, requests, appeals and commands must observe more or less correctly the constitutive rules of the language in which they are uttered.

A simple example of constitutive rules in the field of law is provided by the legal institution of property. Legal rules about acquisition, use and transference are necessary to constitute it. Theft is a breach of these rules and without them there could be no such offence. Bentham understood this: 'Legislation must first determine what things are to be regarded as each man's property before the general rule of ethics on this head can have any particular application.'\(^3\) But Proudhon did not. His aphorism 'Property is theft' betrays a failure to understand that the prohibition of theft is a constitutive rule of the institution of