7 Hayek’s Theory of Justice

1. THE PROBLEM OF JUSTICE

The concept of justice has always been a key word in the vocabulary of political philosophy. No systematic account of political ideas can omit a discussion of this concept whether the interests of the author are in the field of value-free conceptual analysis or in that of the appraisal and recommendation of laws, policies and institutions. Moreover, it has been the practice in traditional political theorising to combine both activities. The earliest and most famous systematic treatise on political philosophy, Plato’s Republic was significantly both an enquiry into the ‘true nature’ of justice and a construction of an ideally ‘just’ state against which existing empirical states could be evaluated.

Yet despite more than two thousand years of subsequent political theorising the concept still has no settled meaning. It is not simply that there are fundamental disputes at the normative level, it is only to be expected that individuals will disagree as to the justice or injustice of particular laws, policies and institutions; it is the fact that there is so little agreement as to what the concept means that causes such serious problems.

The confusion as to the meaning of the concept has been exacerbated in recent years by the dominance of social justice as a moral and political value. Since the last war progressive social thinkers, alienated from Marxism both by the practical examples of tyrannical communist regimes and by more fruitful intellectual advances in the social sciences, have justified radical social and economic policies by an appeal to social justice within the general framework of western liberal democratic regimes. As a consequence the concept of justice has been perhaps irredeemably associated with problems of the appropriate distribution of wealth and income. The proponents of social justice have therefore been concerned to
demonstrate the criteria by which ‘social justice’ sanctions certain distributive policies. The criteria are usually desert, merit and need, or sometimes merely more equality for its own sake. The emphasis placed on these different, and often conflicting, criteria may vary but the members of the ‘school of social justice’ are united in their belief in a forward-looking reformist concept of justice. That this view is more than just a declaration of policy or the justification of a substantive set of values but involves the appropriation of the meaning of justice to the radical view can be seen in a comment by one of its leading proponents, Brian Barry. In criticising the views of David Hume, the eighteenth-century conservative philosopher who refuted radical and reformist views of justice in defending a traditional rule-based view, Barry said: ‘although Hume uses the expression “rules of justice” to cover such things as property rules, “justice” is now analytically tied to “desert” and “need”, so that one could quite properly say that some of what Hume calls “rules of justice” were unjust’.1

However, traditionally most users of the word justice were not necessarily radical, and nor is the contemporary usage necessarily tied to a reformist moral and political outlook. Those who are sceptical of ‘social justice’ do not regard themselves as antithetical to what they would regard as a properly articulated conception of justice. In ordinary speech generally we talk of justice and injustice where the words do not refer to the desirability or otherwise of states of affairs or particular income and wealth distributions but to the rules and procedures that characterise social practices and which are applied to the actions of individuals that participate in those practices. In this narrower conception justice is normally seen to be a property of individuals. When in the context of the common law we speak of a breach of the rules of ‘natural justice’ we are referring to an arbitrariness suffered by an individual in a rule-governed process.

This latter concept has undoubtedly legalistic overtones but it should be sharply distinguished from a purely legalistic concept of justice. Justice is not merely conformity to law and it is certainly permissible to consider a law to be unjust without committing ourselves to the radical view. Hayek is indeed the major exponent of this rule-based view yet we know from his analysis of law that many legal expressions are inconsistent with the ideal of the rule of law while being perfectly valid law in the technical sense.2 To determine the properties of this concept of justice upon which law