EQUALITY, LAW AND NON-DISCRIMINATION - A COMMENT

by

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Dr Sadurski has convincingly demonstrated a number of the ambiguities associated with claims about 'equality before the law', I shall therefore be brief in my observations, and content myself with one point of detail and one general point.

The point of detail concerns the alleged 'impracticability' of Hayek's double majority test. Sadurski correctly points out that a law that imposes a burden on a minority (e.g. on meat producers to ensure proper standards of hygiene) which is clearly in the public interest is unlikely to pass the 'double majority' test; i.e. to be viewed as fair by the majority within the minority to whom the provision applies, and the majority within the rest of the community. But this is an objection to Hayek's double majority test only if that test is taken as a necessary condition of a law's non-arbitrariness, or its being non-discriminatory. The passage which Sadurski quotes from Hayek presents the test not as a necessary, but as a sufficient condition for non-arbitrariness. In other words what Hayek there says is that if both majorities view the law as non-arbitrary, then it is not discriminatory. From this it does not follow that if one or other majority does view the law as arbitrary or discriminatory, then it is arbitrary or discriminatory. Yet it is just this implication which is required if the meat producers example is to demonstrate the impracticability of Hayek's double majority test.

The general point is prompted by Sadurski's objection in principle to Hayek's approach; namely that instead of answering directly

and squarely the question of what is, or is not, discriminatory, he shifts the problem to the majorities, so that "...discrimination is what is considered discrimination by the group concerned or by the rest of society". While I agree that it is in general not good enough to answer value questions in terms of the number of people who have the impression that the value in issue is or is not exemplified in a particular community, I wonder whether the position is quite the same when we are talking about whether or not something is hurtful. It is interesting to note that campaigns to reform the law by eradicating systematic discrimination (e.g. racist or sexist discrimination) are generally preceded by consciousness raising exercises. The reason is of course that endemic discrimination reinforced by education and other cultural processes often results in the majority of the victims of discrimination not feeling that their position is one of discriminatory treatment. Less than two decades ago many, possibly the majority, of Australian women did not think it discriminatory in any bad sense to pay women less than men for identical work. A consciousness raising exercise was necessary before the majority of women had the feeling of indignant hurt that led to the near universal condemnation of sex related pay scales as discriminatory.

Generalizing, I think we may distinguish three different types of discrimination:

1. Formal discrimination - a law is formally discriminatory if it applies only to those subjects who satisfy some additional condition (i.e. additional to being subjects). Most laws are formally discriminatory, and being formally discriminatory is as such neither good nor bad.
2. Advantage discrimination - a law is advantage discriminatory if those to whom it applies are advantaged/disadvantaged as a result, relative to

those to whom it does not apply. Advantage discrimination is as such neither good nor bad, but always demands justification. Whether, in a particular case, such a law is good or bad depends in the end, and here I agree entirely with Sadurski, on an evaluation (in moral terms) of the purpose which is cited in the justification.

3. Psychological discrimination - a law is psychologically discriminatory to a particular person if that person feels an indignant hurt concerning the basis on which the law is applied to him or her. Such a psychological response is justified if (a) the law is advantage discriminatory in our sense (2) above, and (b) there is as a result a disadvantage suffered by this person (and persons relevantly similar) which cannot be justified in a way which shows the law to be a good law in the manner specified under (2) above.

Hayek's double majority test provides a sufficient condition for a law's not being psychologically discriminatory in general in our sense (3) above. A law may fail to be psychologically discriminatory and yet at the same time involve advantage discrimination of an unjustified or unjustifiable sort. It is in just such cases that consciousness raising is a practically necessary prerequisite of any effective attempt at law reform.

Does discrimination matter when there is no psychological discrimination? It would seem to be an implication of Hayek's position that it does not. It is here that Sadurski's disagreement with Hayek is plainest, for in our terms it is unjustified advantage discrimination, and not the psychological hurt that may or may not flow from it, that is the social evil, or at any rate the greater evil. It is interesting that consciousness raising means causing the victims of discrimination to feel themselves the victims of discrimination (and thus increases their suffering) as a means to creating a political climate for legal change. Here I must support Sadurski. Ignorance may be bliss, but not all that is blissful is just.