

*A theory of discrimination law*, by Tarunabh Khaitan, Oxford University Press, Oxford, 2015, ISBN 978-0-19-965696-7

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*A theory of discrimination law*, by Tarunabh Khaitan, is both a significant, well-crafted contribution to the field of discrimination law and a challenge to the reader. In a field so under theorised in comparison to other close fields, such as human rights law and even employment law, this book is a welcome contribution to the increasing effort to understand and conceptualise the workings and development of discrimination law. This is not, however, a particularly accessible piece of work.

Khaitan set himself a very ambitious task: to offer a general theory of discrimination law, one that could account for what discrimination law looks like currently in a few jurisdictions with historical and legal links, namely a selection of prevalently English speaking, common law jurisdictions: Canada, India, South Africa, the United Kingdom and the United States. To achieve this aim, Khaitan first offers an overview of the key features of discrimination law in these jurisdictions, discussing in particular the relevant protectorate (personal scope), duty-bearers and duties (sections 2 and 3). In Khaitan's words, '[t]he hope is that, despite inter-jurisdictional differences, a common, if relatively thin, structure can be discerned.' (p. 48) Afterwards, Khaitan dissects the 'point and purpose' of discrimination law, asserting that it is to facilitate 'a good life', which entails negative freedom, an adequate range of valuable opportunities, and self-respect (sections 4 and 5). Finally, Khaitan delves into some of the many issues raised by the duty not to discriminate, the determination of the range of duty bearers, and the delineation of affirmative action (sections 6 and 7).

In terms of style, this cannot be said to be a particularly accessible work. Perhaps partly due to the topic's and relevant literature's complex nature, the text often becomes opaque and difficult to follow, despite some care to guide the reader the best one can.<sup>1</sup> Moreover, in the light of the ambitious and broad scope of the work's aim, many explanations become cursory, rather than thoroughly justified and referenced. That is, I guess, the price to pay for attempting a general theory of such a legal field, and for ensuring the readability of the text and understanding of the key arguments. For these reasons, this work is unlikely to become of wide student use, but it can still serve well the ambitious undergraduate and postgraduate student, as well as obviously the research and academic community.

The substantive focus of the book remains attached to the selection of jurisdictions mentioned above. In the light of the considerable impact that the European Union and

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<sup>1</sup> Other reviewers, however, have been of the opinion that the book is particularly clear: Dominique Allen, 'Book review: Tarunabh Khaitan, A Theory of Discrimination Law (Oxford University Press, 2015)', *Monash University Law Review* 2015, 41(3), 785-789, available on [https://www.monash.edu/\\_data/assets/pdf\\_file/0017/446201/Vol413-Book-Review.pdf](https://www.monash.edu/_data/assets/pdf_file/0017/446201/Vol413-Book-Review.pdf), accessed 14 June 2016.

Council of Europe legal frameworks have had on UK discrimination law, it would have been interesting to weave into the book's discussion some consideration of the extent to which the book's arguments may apply to other European jurisdictions. Perhaps that can constitute a second volume in this general theory.

Generally, the book's approach leans more towards a descriptive and analytical (albeit theoretical) account of discrimination law, rather than a critical and normative discussion of the current state of affairs in this field. This gives a somewhat conservative taste to the reading, as opposed to a challenging one. This may appeal less to the combative academic, but may serve well the teaching and understanding in this field. This is particularly the case due to the use of practical examples to effectively structure the discussion and clarify the theoretical extrapolations asserted. This book thus reminds one of European continental monographs in the vein of Germanic-Romanic legal schools of thought, which attempt to conceptualise and rationalise legal practice, rather than contest it and change it. The result seems to be a hybrid of research monograph and demanding textbook (although perhaps rather cryptic for the beginner in discrimination law).

In its building of a general theory, Khaitan pre-empts a range of possible objections and counter-arguments very well. In a sort of argumentation tour-de-force, Khaitan tackles one by one the key challenges faced by discrimination law commentators and policy-makers, including the limits to the different aspects of this field's personal and objective scope. At the end, as it is his aim, Khaitan is effective in offering some 'principled criteria' – if not clear-cut solutions – to determine claims made from discrimination law, such as that the law should also prohibit discrimination on grounds of weight, physical appearance and genetic identity (p. 50).

One particular aspect of the book that one may question is the treatment of intersectionality and multiple discrimination. Although as the discussion progresses this issue is increasingly touched upon, one needs to wait until page 69 to see this mentioned for the first time, which seemed excessive in the light of the importance of intersectionality in current discrimination law debates.<sup>2</sup>

Another aspect that could have perhaps been more convincingly addressed is the vision of anti-discrimination as essentially distinct from equality more generally. Despite an increasingly (even if sometimes implicit) general view that anti-discrimination law – *stricto sensu* – is part of a broader body of equality law, Khaitan insists on clearly distinguishing the notions of discrimination and equality. For instance, the examples used in section 2 to define the scope of discrimination law clearly indicate a narrow view of what should constitute discrimination law. Although arguable, this seems to unduly narrow down the inextricable connection between discrimination law and the broader aims of equality law. This is only partially addressed in section 5 and acknowledged in the Conclusions (p. 247), but it could be more generously incorporated right from the beginning of the work.

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<sup>2</sup> See, for example, Sandra Fredman, 'Double trouble: multiple discrimination and EU law', *European Anti-discrimination Law Review* 2005 (2), 13-18; Iyiola Solanke, 'Infusing the Silos in the Equality Act 2010 with Synergy', *Industrial Law Journal* (2011) 40 (4), 336.

A final –related – aspect of the book that one may take issue with is the assertion in sections 4 and 5 that the aim and purpose of discrimination law is to facilitate ‘a good life’, thus requiring negative freedom, an adequate range of valuable opportunities, and self-respect. These sections offer a long and sometimes hard-to-follow discussion. Although sometimes resembling aspects of a capabilities approach à la Sen and Nussbaum,<sup>3</sup> the analysis offered by Khaitan purports that ‘a good life’ can be an objective notion. Yet, Khaitan also believes (perhaps sarcastically – and worryingly) that ‘[t]he reference point for everyone has moved up to Steve Jobs’ and that [t]he achievement of others is the parameter by which we have all come to evaluate our lives’ (p. 109). Both the ‘objective’ notion of ‘a good life’ and the idea that we define our achievements using others’ as parameters seem excessive, constraining and contradictory. Admittedly, I did not feel entirely comfortable with this approach to what constitutes ‘success in our lives’ (p. 95).<sup>4</sup> Although Khaitan is cautious to warn against judgmental views of people’s lives, one is still left with a ‘judgmental’ overtone. I wonder whether notions of stigma and dignity should not feature more prominently in any account of the aims and purposes of discrimination law.<sup>5</sup> Furthermore, the use of the notion of self-respect in this analysis would have also benefited from psychological evidence.<sup>6</sup> Finally, the idea that freedom (and libertarians), rather than equality (and egalitarians), offer the best foundation for discrimination law (p. 113) seems to require more cogent arguments.<sup>7</sup> Section 5 does not seem to go far enough in doing this. It is true that ‘[d]iscrimination law is not going to make everyone equal, whatever the currency of equality’, but, by the same token, discrimination law will not make everyone have a ‘good life’ (p. 130), no matter the currency of a ‘good life’. The efficacy of discrimination law remains limited and a ‘work-in-progress’, no matter whether it is justified on libertarian or egalitarian grounds. Fully shifting the focus from ‘ground-irrelevance’ to ‘group-disadvantage’ – as argued for in section 5 (p. 134) – also seems excessive, as ground-irrelevance is what offers group-disadvantage a (normatively) immoral character, thus requiring the intervention of discrimination law. Both ground-irrelevance and group-disadvantage remain crucial to understand discrimination law, and should thus be considered simultaneously. Sections 4 and 5 of this book thus remain the part of this book that I found the least convincing.

A few other aspects of the book are worth a mention. The book makes good use of seminal cases to illustrate the key characteristics of discrimination law. These could,

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<sup>3</sup> See, for example, Amartya Sen, *Inequality Reexamined*, Oxford, OUP, 1992; Amartya Sen, *Development as Freedom*, New York, Anchor Books, 2000; Martha Nussbaum, *Frontiers of Justice*, Cambridge, Mass. and London, Belknap, 2006.

<sup>4</sup> Similarly expressing some concern with this aspect of the book, see Alice Belcher, ‘Review: Tarunabh Khaitan, A Theory of Discrimination Law’ *Edinburgh Law Review* 2016, 20(2), 254-255.

<sup>5</sup> See, for example, R. Allen and G. Moon, ‘Dignity Discourse in Discrimination Law: a Better Route to Equality’, *EHRLR* 2006 (6), 610-649; Iyiola Solanke, ‘Putting race and gender together: A new approach to intersectionality’, *Modern Law Review* 2009 (72(5)), 723-749

<sup>6</sup> For example, Doron Shultziner and Itai Rabinovici, ‘Human dignity, self-worth, and humiliation: A comparative legal–psychological approach’, *Psychology, Public Policy, and Law* 2012, 18(1), 105-143.

<sup>7</sup> For another take on this contentious proposition, see Hugh Collins, *Review of A Theory of Discrimination Law by Tarunabh Khaitan*, 19 October 2015, available on <https://www.law.ox.ac.uk/content/labour-law-0/blog/2015/10/review-theory-discrimination-law-tarunabh-khaitan-0>, accessed 14 June 2016.

however, occasionally be supported by more recent case law that confirmed or built upon those seminal cases. Crucially, the book offers an interesting treatment of the position of duty-bearers and affirmative action. Also positively, the book is peppered with interesting and insightful thoughts. For example, Khaitan rightly points out that '[t]he tragedy is that we have come to believe we are free to make of our lives what we will, when in fact our ability to do so remains seriously constrained.' (p. 127)

Overall, it is undeniable that this work constitutes a noteworthy theorising effort in a notoriously fragmented legal field. Khaitan offers an intelligent, well thought out account of discrimination law in the context of the jurisdictions selected. The next step would, perhaps, be to test this general theory in a European context. The work Khaitan has done so far will, at any rate, already contribute to the quality of future research and teaching in discrimination law. Khaitan's 'conceptual restatement' (p. 145) and 'principled justification' (p. 173) of discrimination law may not be revolutionary, but its incremental conceptual clarity is invaluable. This book is a praiseworthy legal and technical effort. Khaitan's ambitious project has definitely paid off.