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Discrimination, Freedom, and Intentions

Tarunabh Khaitan, A Theory of Discrimination Law, Oxford: Oxford University Press, 2015, 262 pp, hb £60.00.

Kasper Lippert-Rasmussen, University of Aarhus and University of Tromsø

Key words: discrimination, discrimination law, equality, freedom, indirect discrimination, Tarunabh Khaitan.

Introduction

Recent years have seen a surge in the academic interest in basic normative questions in relation to discrimination and discrimination law. One of the most recent and very welcome contributions to this growing body of literature is Tarunabh Khaitan's excellent *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015).¹

The central ambition of Khaitan's book is 'to give a theoretical account of the legal model of regulating discrimination' (4). His favoured account is a liberal, freedom-based, group-disadvantage-focused account, which allows for asymmetric anti-discrimination norms and explains the unity of discrimination laws, where these include reasonable accommodation, affirmative action and harassment norms.

In the course of pursuing his core ambition, Khaitan intends to 'explain what the legal conception of discrimination is, and why the legal model for regulating discrimination is justified' (4). Executing this intention, he makes (at least) three

¹ Other recent contributions include: B. Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015); D. Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008); D. Hellman and S. Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013); K. Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2013). All references below not explicitly attributed to an author are to Khaitan's book.

claims that theorists working on the foundations of discrimination law will find extremely interesting. First, according to Khaitan, a concern for equality is not the basic moral foundation of discrimination law; rather, in his view, that basic concern is a concern for freedom, where ‘freedom’ refers to the secured access to certain basic goods (244).

Second, Khaitan canvasses an effects-based understanding of legal discrimination. Many legal theorists share his view that indirect discrimination should be understood in terms of the effects of the relevant discriminatory acts as opposed to whatever mental states underlie them. They think differently of direct discrimination, however. According to that which I shall refer to as the standard view, direct discrimination differs from indirect discrimination precisely because of how the (believed, perhaps sub-consciously so,) fact that the discriminatee belongs to a particular protected group is among the operative elements in the discriminator’s motivational set.² According to Khaitan, even direct discrimination should be understood in terms of the specific kind of disadvantages that it imposes on discriminatees.

Finally, Khaitan ties discrimination to relative group disadvantage. According to his account, for an individual to be subjected to discrimination he or she has to belong to a group which is disadvantaged relative to at least one other relevant group. However, the individual in question need not be disadvantaged relative to how this individual would be placed had he or she been a member of the relevant advantaged group.

In this review essay, I present the main contents of Khaitan’s book before explaining the dual nature of his project and raise some methodological concerns.

² Cf. Andrew Altman’s entry: <http://plato.stanford.edu/entries/discrimination/#IndDis>.

Next, I scrutinize Khaitan's rejection of egalitarian accounts of discrimination law.

The final main section of this article takes a critical view of the suggestion that the distinction between direct and indirect discrimination is not based on the presence or absence of certain mental states, such as intentions to exclude or disadvantage, on behalf of the discriminator.

Overview

Khaitan's book has three parts. In the first part, he defines the legal norms of discrimination law and delimits the scope thereof. Actually, he offers two different but related definitions of legal norms of discrimination. The first is a *lexical definition*, which purports to capture how a certain group of people – to wit, legislators – uses the term 'discrimination', that is, are disposed to group together a certain set of legal norms under that label:

When I speak of 'discrimination law' I will mainly be referring to norms that legislators deem fit to include in a single statutory instrument (often entitled Equality Act, Antidiscrimination/Prevention of Discrimination Act, Civil Rights Act, etc.) and to provisions in Bills of Rights that tend to guarantee the right against discrimination (frequently as a subset of or allied to the right of equality). At least legislators think that there is something distinctive about these provisions, which justified their being clubbed together (24).

The second definition is *explicative*; that is, it aims to explicate what is distinctive about those provisions, which, according to Khaitan, legislators club together under

the heading ‘discrimination law’.³ He contends that a duty-imposing legal norm is a norm of discrimination law if and only if it satisfies the following four conditions:

- 1) The Personal Grounds Condition: The duty-imposing norm in question must require some connection between the act or omission prohibited or mandated by the norm, on the one hand, and certain attributes or characteristics that persons have, called ‘grounds’, on the other.
- 2) The Cognate Groups Condition: A protected ground must be capable of classifying persons into more than one class of persons, loosely called ‘groups’ [eg, men and women: KLR].
- 3) The Relative Disadvantage Condition: Of all groups defined by a given universal order ground [eg, gender: KLR], members of at least one group must be significantly more likely to suffer abiding, pervasive and substantial disadvantage than members of at least one other cognate group.⁴
- 4) The Eccentric Distribution Condition: The duty-imposing norm must be designed such that it is likely to distribute the non-remote tangible benefits in question to some, but not all, members of the intended beneficiary group (42).

If acceptable, this explicative definition will generally classify legal norms in the same manner as Khaitan’s lexical definition. Moreover, it will explain the underlying unity of norms so classified. Khaitan offers some good reasons to think that his

³ Presumably, the explicative definition allows for legislators making errors at the margins, ie, that legislators take a few norms to be discrimination norms even if they ought not to be so classified, and even if they occasionally fail to see certain legal norms as norms of discrimination law even if they should.

⁴ In order to be disadvantaged in the relevant sense, a group need not be disadvantaged in terms of some overall currency (52–56). Hence, this raises the worry that almost any group can be seen as significantly disadvantaged in one sense or another.

explicative definition meets the first condition. In part, he does so by showing that it correctly classifies some norms as norms of discrimination law – for example, that landlords cannot reject potential tenants on grounds of race – and classifies others as norms other than norms of discrimination law – for example, that ‘subject to specified defences, no person shall injure another through his or her intentional, reckless, or negligent acts’ (26).⁵ In part, he defends his explicative definition by offering some more principled arguments for why it is threatened neither by objections to the effect that it is over-inclusive nor by objections to the effect that it is under-inclusive. In reply to the former objection, an objection to the effect that obese persons are not protected by discrimination law even though norms protecting such groups would seem to satisfy all of the four conditions of his explicative definition, he responds that if that were indeed the case then it is not his definition – or more precisely, the relative disadvantage condition – ‘which is over-inclusive, rather it is discrimination law which is unresponsive’ (37).⁶ In response to the latter objection, for example, that

⁵ As Khaitan explains, the relevant protected ground must ‘either be immutable’ or ‘constitute a fundamental choice’ (56). Hence, a legal norm to the effect that persons who, due to their fundamental choices – eg, to live a life as a performance artist rather than as a banker – earn less than the average person should receive a ticket in a lottery giving them a 1-in-10 chance of receiving a life-time pension implausibly satisfies all four of Khaitan’s conditions. Something similar is true about a legal norm to the effect that a certain percentage of any given company’s workers should belong to the group of the naturally untalented.

⁶ I find this response unpersuasive. In effect, it consists in claiming that, given the relevant empirical assumption, discrimination law ought, morally speaking, to protect the obese. However, one cannot defeat an objection to a certain explication of how legislators use ‘discrimination’ by claiming that they ought to use it differently, even if, indeed, they ought to do so. Or, at least, one cannot do so without showing that the ground for this ‘ought’ is somehow guiding legislators in their use of ‘discrimination’ in most other contexts. Apparently as a second line of defence against the over-inclusiveness objection, Khaitan observes that he only wants ‘to determine the set of conditions that an *existing* legal norm must satisfy in order to be characterized as a norm of discrimination law’ (37). However, this does not answer to the challenge, as far as I can tell, because the challenge is a challenge to Khaitan’s definition (cf. 42), not to the scope of his concerns. In any case, a restriction on what can count as anti-

we (or legislators?) would call legal norms forbidding the differential treatment of men and women anti-discrimination norms even if, contrary to the facts, neither group was disadvantaged relative to the other, Khaitan submits that the ‘exercise we have undertaken here is to discern necessary and sufficient conditions for the characterization of a norm by analysing existing norms of discrimination law in comparable jurisdictions’ (38).

In the second part of his book, he defends the perfectionist, freedom-based justification of discrimination law to which I referred in the introduction. In his view, ‘[t]he point of discrimination law is to promote (an aspect of) personal well-being’ (92). Or, as on the jacket cover of his book: ‘Fundamentally, the value of discrimination law is to be found in its ability to enable us all to live valuable lives’. By this he does not mean that discrimination law aims to maximize well-being or that it aims to enable all of us to live as good lives as we possibly could. Discrimination law is ‘sufficientarian’ in that its point is to enable us all to live successful lives, where a ‘successful life is one spent pursuing (through valuable means) valuable – moral, worthwhile – personal goals, nurturing valuable relationships, making valuable choices, living virtuously. For a life to be successful, the pursuit of at least some personal goals should have a positive result’ (92–93).⁷ This account of well-being is

discrimination, legal norms to the effect that such norms must be existing legal norms is problematic from the point of view of a moral enquiry (see the next section).

⁷ I agree with Khaitan that the successful pursuit of valuable aims is part of well-being. However, there are other elements in well-being that are not tied to agency, ie, the presence or absence of unpleasant mental states. I have no idea whether, on this broader view of well-being, it could be the case that the justifying aim of discrimination law is to enable us all to enjoy a sufficient level of well-being. More generally, Khaitan does not discuss whether one could still accept this view, even if one accepts one of the many available non-perfectionist views of well-being. In a book of its kind, it would have been interesting to know whether one must also disagree with him over the nature of the justifying aim of discrimination law, if one disagrees with Khaitan over perfectionism. (He does devote a few pages to showing that, as one would expect if perfectionism was true, protected groups only include

perfectionist in that only the pursuit and realization of *objectively* valuable aims makes a person better off. It is freedom-based in that it is concerned with our ability to live valuable lives, not with our actually doing so. Note, finally, that its sufficientarian character is logically independent of its perfectionism and its focus on freedom; for example, nothing precludes an egalitarian from claiming that the aim of discrimination law ensures equal abilities (or, better, possibilities) for everyone to live valuable lives.

The next step in Khaitan's justification of discrimination law takes us from his perfectionist, freedom-based view of well-being to three basic goods: secured negative freedom, a secured access to an adequate range of valuable options and secured self-respect.⁸ According to Khaitan, lacking either of these goods prevents individuals from living valuable lives. Discrimination law is justified as a means that promotes many people's access to these basic goods and, thus, their ability to live successful lives 'by reducing the abiding, pervasive, and substantial relative disadvantage faced by members of protected groups' (91). For instance, lack of (secured) self-respect will typically reduce people's well-being (109), as by making them unsuccessful in their pursuit of valuable aims.⁹ And if people lack secure access to an adequate range of valuable options because they lack access to any valuable

groups, membership of which is valuable, eg, terrorists do not form a protected group (136). However, it seems unlikely that non-perfectionists are unable to explain why terrorists do not form a protected group.) Nor does he offer any defence of his perfectionism, which is, albeit perfectly reasonable, a limitation of his argument. Not everything can be covered in one book.

⁸ Khaitan mentions a fourth basic good—a set of goods, 'which will adequately satisfy one's biological needs' (95). However, he reasonably thinks that securing this good is not the justifying aim of discrimination law.

⁹ It would be implausible to claim that secure access to enough self-respect is an aspect of a successful life in Khaitan's account, since it is conceptually possible for someone whose self-respect is insecure to successfully pursue a broad range of valuable aims. Indeed, it is conceptually possible for someone with a low and insecure level of self-respect to do so. A similar point applies secure access to negative freedom.

options whatsoever, it follows logically from Khaitan's view on well-being that they do not live successful lives.

While Khaitan's justification of discrimination law is ultimately concerned with the ability of individuals to live good lives, he argues at length that there is an important egalitarian element to freedom so construed. Take, for instance, the basic good of secured negative freedom. He views members of severely disadvantaged groups as being very unlikely to enjoy such a good (113). Similarly, whether we have access to an adequate range of valuable options depends on the range of valuable options available to better-off people – the greater the range of options to which they have access, the less likely it is that the range of options to which we have access is adequate. Finally, the more successful other people are in their lives, the less likely it is that we have secured access to an adequate level of self-respect. Hence, his account of discrimination is egalitarian, albeit only in a derivative sense; it is because of our concern that all individuals are able to live successful lives that – at least as a general rule – we should be concerned with equality.

In the third and final part of the book, he explores the 'distributive questions' in relation to discrimination law: '[w]hat is it that discrimination law distributes? From whom? To whom? How?' (91); for example, who are the duty bearers of discrimination law? These questions are different from, but related to, the question of what the justifying aim of discrimination law is. They are related to the latter, since they must ultimately be answered on the basis of an informed view about the purpose that discrimination law should serve. Along the way, he expounds several useful distinctions, such as between paradigmatic and collateral discrimination (145) and between direct and indirect discrimination (157). He also defends at length the view that, in general, antidiscrimination duties are justifiably asymmetric; for example, that

sex discrimination against women is forbidden in many contexts, even if the same is not true of sex discrimination against men. Similarly, he defends that anti-discrimination duties are justifiably not universally imposed, imposed only ‘on those persons who have a sufficiently public character’ (201). He sensibly argues in part 3 that any informed account of when affirmative action is morally justified must rely heavily on sociological knowledge about the effects of various kinds of affirmative action schemes. I found much to agree with in part 3 and, setting aside my discussion of his exposition of the distinction between direct and indirect discrimination, the more critical remarks below focus on Khaitan’s contribution in the first two parts of the book.

The dual nature of Khaitan’s project

This section raises some general issues in relation to the nature of the sort of project in which Khaitan engages in his book. By saying that ‘the legal conception for regulating discrimination is justified’, Khaitan means ‘morally justified’.

Accordingly, Khaitan’s project has two separate but loosely intertwined aspects: what I shall refer to as *interpretative* and *moral* aspects, respectively. The former, I shall argue, consists of two sub-projects.

The interpretative aspect concerns whether there is one or more basic moral norm or value to which legislators, judges and so forth subscribe which are such that either the fact that legislators etc. subscribe to these basic norms etc. explains the contours of discrimination law – call this the *actual interpretative account* – or which are such that *if* legislators had subscribed to them and had successfully designed discrimination law in accordance with these norms and values, they would have

designed a system of legal norms (roughly) identical to actual discrimination law – call this the *hypothetical interpretative account*.¹⁰

These two interpretative accounts are different though compatible. They are compatible because both might be true, as when legislators have actually been successfully motivated by their subscription to a norm of equality, and discrimination law is actually how it should be according to this norm and different from how it should be given any other moral foundation. They are different because one account might be true even if the other is not, as when discrimination law is as it should be according to the norm of equality, but legislators happened to be guided by other value commitments when they created discrimination law. Obviously, nothing guarantees that either of the two interpretative projects is successful; that is, it is possible that there is no underlying coherence to discrimination law, as it is even if we allow that several norms and values might underpin it. Khaitan rejects such a discouraging conclusion (9).

The moral aspect of Khaitan's project concerns whether discrimination law as defined in Section I of the book is morally justified. I take it that this aspect corresponds to what he calls the 'purpose inquiry into the general justifying aim of discrimination law' (10).¹¹ This inquiry falls within the domain of moral or political philosophy. Unlike the interpretative project, it is not tied to existing legal discrimination norms in the sense that that the existing discrimination law might be

¹⁰ These accounts come in monistic versions as well as a pluralistic version, according to which we need more than just one basic norm or value to account for discrimination law. In an important sense, Khaitan's account is monistic in that he thinks that freedom is the basic value underpinning discrimination law (but see footnote 15).

¹¹ Admittedly, Khaitan offers multiple and non-identical descriptions of the purpose inquiry – 'The purposive inquiry engages with overall systemic concerns: why do we have a system of discrimination law at all? What, indeed, is the point of this area of law?' (10) – so I might misunderstand the moral part of his project.

morally unjustified.¹² There are two ways it might turn out to be so. First, there might be acts that it should forbid but which it allows (or enjoins). Second, there might be acts that it forbids that it should permit.

As it happens, Khaitan thinks that discrimination law, as we know it from countries with Anglo-Saxon juridical traditions – to wit, Canada, India, South Africa, the United Kingdom and USA – is by and large morally justified. This optimistic conclusion does not follow from – nor does he claim that it does – his optimistic conclusion regarding the interpretative aspect of his project; that is, discrimination law might possibly be entirely explained by the fact that legislators have successfully designed discrimination law in accordance with their false moral beliefs, in which case, barring a very fortunate coincidence, discrimination law would be unjustified. The converse might also be true; that is, that discrimination law is completely morally justified but it so happens that legislators and the like have been motivated by entirely different moral beliefs (or different beliefs altogether), which just happily happen to have the same implications regarding discrimination law as do the valid moral norms.

I want to make three remarks concerning Khaitan's overall project: one about what we can expect from either of the two aspects of his project and then two remarks about whether he has lifted the argumentative burden in relation to either of the interpretative and moral aspects of his project.¹³ Starting with the first remark, I have some doubts about the possibility of identifying one or even a subset of norms and values that explain, would explain, or would justify discrimination law as it happens

¹² In a sense, the moral aspect of Khaitan's project does not need a dataset (13–17). However, I assume that a dataset is needed to define 'discrimination law'.

¹³ In saying so I am neutral on the prospect of a monistic account of the wrongness of discrimination.

to be; or for that matter any other form of law.¹⁴ As I see it, any legal norm is generally and should be adopted or not in the light of all of the values upon which the relevant legal norm has bearing (cf. Cohen 2008). As Khaitan notes, then, legal discrimination norms tend to be silent on differential treatment in the private sphere, such as racist bias in one's selection of partners, even if the very same values that inform legal anti-discrimination norms apply to the public sphere. To explain this difference, it would seem as though one must appeal to norms that have nothing to do with discrimination in particular, such as a right to privacy or to not have legal duties imposed on citizens that impose disproportionate 'costs' upon them (67). More generally, one might expect that all valid norms or values – including pragmatic concerns such as the need to avoid imposing 'unnecessary procedural burdens on' complainants and courts (160) – bear on what, morally speaking, the shape of discrimination law ought to be. To the extent that legislators are guided by all of the valid norms and values, one would expect discrimination law to be shaped by the legislators' entire set of norm and value commitments.¹⁵ And even setting that aside, legislators are often guided by concerns different from their moral commitments.

Second, let us return to Khaitan's lexical definition of discrimination law. Khaitan is very alert to the fact that discrimination law is dynamic and evolves over time (and differs across space even within Khaitan's dataset). Part of this variation is presumably explained by the fact that legislators do not legislate in a void; that they

¹⁴ This is true even if we focus only on the purposive question regarding discrimination law.

¹⁵ Khaitan describes his freedom-based account as embodying a form of value pluralism in that it allows that different and apparently incompatible theoretical explanations of discrimination law appealing to different values – for instance, 'equality, autonomy, dignity, and even rationality' – really are compatible because they answer different questions in relation to discrimination law (10). Also, his freedom-based account can explain why some of things that are considered desirable on some of the alternative, eg. egalitarian and dignitarian, accounts are valuable though for reasons other than those suggested by these accounts.

must instead take into account the fact that discrimination laws must work in an imperfect world.¹⁶ Accordingly, the mere fact that a certain legal norm is not part of discrimination law need not reflect the fact that legislators would not consider it as such were it an actual legal norm. It might simply reflect that they believe time is not ripe for introducing the relevant legislative norm (cf. his acknowledgement of how sheer ‘political expediency’ (173) has shaped discrimination law). Or for purely opportunistic reasons, they might refrain from introducing it. Indeed, they might also possibly introduce a legal norm as part of some Equality Act or the like, not because they think it is like existing anti-discrimination norms but because they think it is more likely to be accepted and complied with if so introduced. I am not suggesting that Khaitan disagrees with any of the claims in the four preceding sentences, but I think that, in relation to the interpretative aspect of Khaitan’s project, they imply that one should not expect discrimination law, as defined by Khaitan, to form a unified field in the manner suggested by his explicative definition. Obviously, this is not to deny that it might do so nevertheless.

My third remark concerns whether Khaitan actually lifts the argumentative burden that needs lifting in relation to the moral aspect of his project. As I see it, discrimination law is morally justified only if, given how the world is, discrimination law is preferable to any alternative, including the complete absence of discrimination law, from the point of view of valid, basic moral norms and values.¹⁷ Hence, to lift the relevant argumentative burden, one would have to consider all of the relevant

¹⁶ Indeed, they will have to take into account the fact that they do not legislate in a perfect world and, accordingly, some of them will refrain from proposing what they conceive as an item of discrimination law, because they believe that it stands no chance of being adopted and, thus, is not worth using resources to promote.

¹⁷ Presumably, one fact about the world to be taken as given in pursuing the moral aspect of Khaitan’s project is that many people act wrongly irrespective of what the law enjoins them to do in the light of the value of freedom or for that matter in the light of other values.

alternatives to discrimination law as defined by Khaitan; identify the valid, basic moral norms and values; and show that discrimination law is preferable to any relevant alternative in the light of these norms and values. It would be unreasonable to expect anyone to lift such a heavy argumentative burden, which includes resolving most, if not all, of the basic issues of normative theory, and, clearly, Khaitan lifts whatever part of it could be expected in a book of its kind. Still, doing so leaves much lifting to be done. For instance, even if discrimination law is preferable from the point of view of freedom – the basic value to which Khaitan appeals – there might be other values from the point of view of which it is not preferable. Hence, Khaitan’s argument can at best provide a *pro tanto* justification for discrimination law—not *an all things considered* justification. The former kind of justification is definitely not nothing, but even a justification of this more modest kind requires further argument than Khaitan provides. For to show that freedom provides a *pro tanto* justification for discrimination law, one must show that there are no alternatives – such as a set of legal norms which do not satisfy Khaitan’s four conditions, but perhaps slightly modified versions of these conditions, or different conditions altogether – that are preferable from the moral point of view. As far as I can see, Khaitan does not consider such alternatives in his book and, accordingly, his defence of discrimination law is incomplete.¹⁸ To avoid misunderstanding, I should stress that the present point is intended as a critique of Khaitan’s argument – it points to its limits – and not as a criticism of Khaitan’s book. As I noted, it would be unreasonable to expect anyone to lift the full argumentative burden of that project and other treatments of Khaitan’s topic are limited in similar ways.

¹⁸ Clearly, he says things that are relevant to this question. My point is that the book does not offer anything like a systematic comparison of present discrimination law and alternative legal regimes from the point of view of freedom.

Equality: levelling-down and being treated worse than an appropriate comparator

Many have sought to ground discrimination law on a concern for equality. Indeed, as Khaitan notes, discrimination law is often labelled ‘equality law’. However, he rejects such grounding: ‘our concern for relative group advantage springs not from the ideal of equality but from the desirability of a state of affairs where each person is free to pursue a good life’ (130). On what grounds does Khaitan reject such grounding?

First, he notes that equality law is not designed to eliminate all forms of inequality, but only ‘significant relative disadvantage’ and only inequality between groups as opposed to individuals (130). One might agree with Khaitan on this interpretative claim: it would be hard to explain the contours of discrimination law for the reason Khaitan points to if the sole underlying concern was equality. However, this argument leaves open that discrimination law is justified as a means of promoting equality; that is, that equality is non-instrumentally valuable and that given the world as it happens to be, present discrimination law is among the optimal set of instruments for promoting it even if full compliance with discrimination law would still leave us far from the full realization of the ideal of equality.

Khaitan does address this suggestion but rejects it on the grounds, roughly, that he has ‘shown that the general justifying goal of discrimination law is ... to make sure that we have enough to make us free’ (132). The fact that discrimination law promotes equality as a side-effect does not show that equality is its justifying aim.

However, this reply is unconvincing. Presumably, egalitarians who point to the fact that discrimination is one important instrument in our toolbox for promoting equality would dispute that Khaitan has shown that the justifying aim of discrimination law is to make sure that we are all free, since, in their view, there is an

alternative justification that fits well with the contours of discrimination law. Thus, appealing to what Khaitan believes he has shown at this point in the dialectic begs the question against egalitarians. More generally, I do not see why the same challenge, *mutatis mutandis*, that Khaitan presses against egalitarians cannot be pressed against himself. That is, even if everyone complied perfectly with discrimination law, some might still not live successful lives due to matters such as individual disadvantages, so securing everyone's freedom is presumably not the (justifying) aim of discrimination law. To Khaitan's credit, he does indeed press this challenge onto himself (167). In response, he sensibly appears to retort that the aim of discrimination law is only to eliminate *certain* sources of unfreedom. But if something like this reply is available to him, then I fail to see why a similar reply – that the aim of discrimination law is only to eliminate *certain* sources of inequality, to wit, inequality rooted in differences in terms of membership of groups suffering from significant disadvantages – is unavailable to egalitarians.

Khaitan might think that the source of this unavailability lies in the fact that equality is non-instrumentally valuable. To defend this view, he appears to appeal to a different argument than the one addressed above, namely the influential levelling-down objection:

The objection accuses egalitarians of preferring a reduction in the well-being of those already advantaged to an unequal status quo, and (less charitably) of being indifferent between raising the well-being of the disadvantaged and reducing that of the advantaged (133).

While I share Khaitan's view that a concern for equality cannot justify anything like the legal discrimination norms with which we are familiar, I have some worries about his use of the levelling-down objection.¹⁹ First, as he formulates it, egalitarians can reasonably reject it. They might say that it is open to egalitarians to be pluralists; that is, to think that there are values other than equality. For instance, they might think that well-being is also valuable and, thus, that in the situations Khaitan imagines, inequality is preferable to equality, all things considered.²⁰ Many friends of the levelling-down objection accept that egalitarians can respond in this manner but retort that egalitarians remain committed to saying that, in one respect at least, there is something bad about an unequal distribution in the scenarios Khaitan imagines, and that *this* claim is implausible. How can a state of affairs be bad in any way if there is no one for whom it is in any way bad, they ask?

Second, as it is normally construed the levelling-down objection is an objection to so-called telic egalitarianism, roughly, the view that there is some good – be it welfare, overall resources or capabilities – which is such that is unjust (or simply bad) if people do not have equal amounts of it. As Parfit notes, however, there is another form of egalitarianism: deontic egalitarianism.²¹ According to this view, the pertinent injustice is not a matter of an outcome having a certain distributive profile but rather a matter of people treating one another unequally. Hence, from a deontic

¹⁹ Khaitan does not explicitly endorse the levelling down objection. However, he does refer to proponents of the levelling down objection as having 'ably made' the 'theoretical case against the intrinsic value of equality' (114). Moreover, he mentions 'the worrying possibility of levelling down to meet egalitarian demands' (7-8). Finally, his preferred account of discrimination law is designed to avoid the levelling down objection. Hence, I was left with the impression that he does ascribe some role to the objection in his overall case in favour of a freedom- as opposed to equality-based account of the foundation of discrimination law.

²⁰ D. Parfit, 'Equality and Priority' in A. Mason (ed.), *Ideals of Equality* (Oxford: Basil Blackwell, 1998), 4.

²¹ Parfit, 'Equality', 6–7.

perspective, it would be unjust if a group of racists from different races treated each other unequally even if their doing so leads to a perfectly equal outcome. Since the levelling-down objection involves comparing an unequal outcome with an equal outcome and contending that telic egalitarians are committed to an implausible assessment of the comparative merits of these two outcomes and since deontic egalitarianism is not committed to any assessment of outcomes *per se*, many friends of the levelling-down objection believe that, unlike telic egalitarianism, deontic egalitarianism is not vulnerable to the levelling-down objection. The latter claim is debatable, of course, but it shows that Khaitan has not defeated all of the versions of the ideal of equality. In fact, because it seems pretty obvious that perfect equality in terms of outcome might coexist together with unjust discrimination, deontic egalitarianism appears to be the more plausible contender of telic and deontic egalitarianism when it comes to giving an egalitarian account of the wrongness of discrimination.²²

Finally, while the levelling-down objection is often discussed as an objection to egalitarianism, it is in fact an objection to any view that holds that it is somehow bad if a particular kind of distributive relation between people does not obtain. Another such relational view is Khaitan's own, according to which 'those who are most unfree deserve special attention' (132), provided that by 'most unfree' he is referring to those who, in comparison with others, are most unfree. To see why this

²² One version of egalitarianism that I think is left unscathed by Khaitan's arguments is social relational egalitarianism, cf. E. Anderson, 'What is the point of equality?' (1999) 109 *Ethics*; S. Scheffler, 'What Is Egalitarianism?' (2003) 31 *Philosophy & Public Affairs* 1. I suspect, however, that some of the main tenets thereof are compatible with Khaitan's freedom-based account. Elsewhere, I have argued that the deontic version of egalitarianism is vulnerable to the levelling-down objection if the telic version is vulnerable (K. Lippert-Rasmussen, *Luck Egalitarianism* (London: Bloomsbury Academic, 2015)). I also list several egalitarian replies to the levelling-down objection, however, which seem convincing to me.

view is vulnerable to the levelling-down objection, compare the following two scenarios. In the first scenario, we have a population of two groups, one of which enjoys more freedom than the other. In the second scenario, only the less-free group exists, enjoying the same amount of freedom as in the first scenario – members of the first group in the first scenario never come into existence. In Khaitan’s view, as I understand it, the lack of freedom of the second group is worse in the first scenario than in the second, since in the first scenario they are more unfree than others, whereas no such relation (of inequality?) exists in the second scenario (cf. 105). To the friends of the levelling-down objection, however, it seems implausible that we should be more concerned with the lack of freedom of the second group (relative to how much freedom they could have) in the first scenario than we should be in the second given that it is not in any way worse for the members of this group to lack freedom in the first scenario than in the second.²³

Admittedly, the present objection is not perfectly identical to the levelling-down objection, but it is very similar. Indeed, Khaitan concedes that, in ‘a qualified sense that should not trouble us too much’ (133), his own view is vulnerable to the

²³ Khaitan might respond as follows: either it is the case that in my two-groups scenario the relative disadvantage of the worse off group is constitutive of an additional, non-comparative unfreedom relative to the one-group scenario, or it is not. Regarding the first disjunct, my comparison is misleading, because the group, which exists in both scenarios, really *is* worse off, non-comparatively speaking, in the first scenario. In that case, one can compatibly with the levelling down objection claim that the situation of the group that exists in both scenarios is worse in the first than in the second scenario. Regarding the latter disjunct, Khaitan might deny that it is conceptually possible. I reply to this claim below in footnote 25. Alternatively, he might concede that it is conceptually possible, but add that, given the unrealistic assumption that relative disadvantage does not constitute additional non-comparative unfreedom, then, from the point of view of his theory of discrimination law, the unfreedom of the group that exists in both scenarios really is no worse in the two-groups than in the one-group scenario. This reply is the most plausible one. However, it requires that Khaitan revise his views such he claims that only as a (perhaps almost perfectly) general rule it is the case ‘that those who are most unfree deserve special attention’ (132).

levelling-down objection. However, I am puzzled by Khaitan's explanation of why we should not be too troubled by this objection to his view. He observes that discrimination law:

opts for an ad hoc allocation of certain tangible benefits to certain members of protected groups and, in the process, seeks to refashion structures and processes which contribute to their disadvantage. Assuming that certain material benefits are limited in a given society, any allocation of benefits to those who did not have them will inevitably reduce the share of those who used to have them. At this broad societal level, it is an unavoidable price we must pay to optimize the range of opportunities to which members of protected groups have access to. This is, of course, always subject to the caveat that the opportunities of the members of the dominant group should not fall below the adequacy threshold either. This indirect and gradual levelling down achieved at the societal level is an acceptable and necessary price to pay to secure freedom for all (133).

My puzzlement in relation to this reply is that, as far as I can see, the situation Khaitan describes is not a levelling-down situation. It is not a levelling-down situation as I think of it, at least, that being one in which equality is achieved by making some – perhaps all – people worse off in some respect and no one better off in any respect. True, some people are made worse off as a result of discrimination law, but it is not true, according to Khaitan, and I fully agree, that no one is made better off in any respect. As Khaitan describes the situation, discrimination law involves 'an ad hoc allocation of certain tangible benefits to certain members of protected groups', and

some people whose freedom was not secured otherwise are secured. But having one's freedom secured is benefiting in one important respect, as Khaitan certainly must agree.²⁴ Hence, the situation he describes does not involve levelling-down and, thus, its features, however attractive they might be, cannot form the basis of a response to the levelling-down objection.

Khaitan might suggest another response. In his account (suitably reconstructed), discrimination law seeks to 'reduce (and ultimately remove) any significant advantage gap between a protected group and its cognate group' (121) only to the extent that the elimination of such advantage gaps implies that members of some groups have insufficient freedom, where 'insufficient' is understood as not involving a comparison to the freedom enjoyed by the members of other groups, but as a low degree on some absolute measure of freedom. However, I suspect that such a move would cause problems for the interpretative part of Khaitan's project. While almost all significant advantage gaps – that is, gaps in terms of disadvantages that are 'substantial, abiding, and pervasive' (121) – result in members of some groups having insufficient freedom, Khaitan has not shown that it is not possible for some such gaps to coexist with everyone enjoying a sufficient level of freedom on some absolute measure thereof.²⁵ If so, discrimination law would be indifferent to such advantage

²⁴ A similar point applies to his example of 'levelling down' (154), where he imagines that different-sex and same-sex couples alike are denied the legal status of being a married couple in order to eliminate discrimination against homosexuals. In that scenario, homosexuals benefit in one way in that the expressive harm of being denied the state recognition of their romantic relationship that is offered to heterosexuals, even if they may also suffer expressive harm if the sole motivation for withholding marital status to everyone regardless of sex is to avoid having to grant it to homosexuals.

²⁵ An 'substantial, abiding, and pervasive disadvantage' is one that is 'likely to be more than an inconvenience', not 'limited to a single, discrete sphere of human activity', and 'likely to manifest itself over a certain length of time' (36). There is nothing conceptually impossible about members of a group experiencing a gap in terms of disadvantages so defined relative to members of another group, and yet

gaps. However, Khaitan has not shown in his book that discrimination law would be indifferent to, say, men enjoying significant advantages over women on account of their gender in a hypothetical situation in which all women enjoy sufficient freedom, absolutely speaking.

There is another line of argument in Khaitan's book, which might, despite Khaitan's explicit disavowal of the relevant inference, be thought to support his rejection of an egalitarian interpretation of discrimination law (cf. 7).²⁶ According to Khaitan, the law no longer requires that discriminatees show that they have been treated worse than they would have been treated had they instead been members of their cognate groups. This coheres with Khaitan's account of discrimination norms:

the relative disadvantage condition does not require any comparative disadvantage to have been inflicted by a particular act or omission before that act or omission can be characterized as discriminatory. In other words, [the relative disadvantage condition] does not imply that the claimant needs to prove that she has suffered disadvantage relative to an appropriate comparator in any specific case. It is entirely consistent with a practice which does not insist upon proof of disadvantage in relation to an appropriate comparator in order to establish discrimination in particular cases (35).

enjoying freedom in Khaitan's sense that they have secure access to certain basic goods necessary for living a good life.

²⁶ As noted, Khaitan distinguishes between the purposive and distributive questions in discrimination law. He explicitly omits any appeal to the fact 'that the role of comparators for establishing direct discrimination is increasingly unnecessary' (132) in his argument for why the best answer to the distributive question is not that provided by egalitarians, i.e. that the general justifying aim of discrimination law is equality.

By way of illustration of this contention: in a discrimination court case, a pregnant woman need not show that she would have been treated better had she been a man in a comparable situation (whatever that might be) in order to show that she has been subjected to discrimination (71–72).²⁷

I am in no position to dispute Khaitan’s empirical claims about the requirements in discrimination court cases. However, despite the fact that my background is in philosophy, not law, I think it is possible for me to formulate some reasonable doubts about his interpretation of the empirical facts.²⁸ The putative fact

²⁷ Khaitan notes that cases of intersectional discrimination also give rise to problems of identifying a relevant comparator. In this case, however, there seems to be a straightforward solution whether courts have adopted it or not. Take the class of black women. Simplifying somewhat this group refers to two grounds, each associated with a cognate group, whites and men, respectively. This gives us three cognate groups: 1) black men, 2) white men and 3) white women. Black women are discriminated against if and only if they are being treated worse than members of one or more of these three cognate groups; discriminated in favour of if they are treated better than one or more of these three cognate groups; and neither discriminated against, nor in favour of, if they are treated in the same way as members of all of the three cognate groups. There is nothing problematic about saying that relative to one (intersectionally defined) group, a certain (intersectionally defined) group is discriminated against, while relative to another it is discriminated in favour of. Setting aside appeals to counterfactuals, the case of pregnant women is harder. While saying that the relevant comparator for pregnant women is men who are sick and whose sickness affects their ability to work in the same way pregnancy does might seem inappropriate – to be pregnant is not to be sick – but I think looking for conditions that affect the ability to work in similar ways is the correct approach. The fact that courts will often find it difficult to identify such cases and, thus, for pragmatic reasons do not require relevant comparators does not show that they do not think that differential treatment is not necessary for discrimination. For instance, in all of the cases where relevant comparators *are* identified and it turns out that they are treated alike (or even worse), I suspect courts will typically reject complaints about discrimination.

²⁸ Khaitan also submits that the South African Equality Act ‘gives an entirely non-comparative definition of discrimination’ quoting the following passage: “‘discrimination’ means any act or omission ... which directly or indirectly – (a) imposes burdens obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more prohibited grounds’ (72 n 111). I fail to see how this definition is non-comparative. As I read it, ‘on one or more prohibited grounds’ completes both (a) and (b) and is presumably never satisfied if the same duties are imposed and the same benefits etc are withheld on non-prohibited grounds. If the very same impositions are imposed etc *on* prohibited

that courts do not *always* insist on the discriminatee establishing group comparison disadvantage but refrains from doing so in cases such as that of a pregnant woman where there is no obvious comparator might not reflect that they do not think that group comparison disadvantage is not necessary for the individual to have been subjected to discrimination. Instead, courts might think that in many cases of discrimination it is unreasonably difficult to lift the epistemic burden, and insisting on it being lifted would mean that discriminators would often get off the hook. Accordingly, we would end up further away from our ideal of a discrimination-free social world than if we rely on a somewhat coarse-grained proxy; that is, that the discriminatee belongs to a group whose members in general are disadvantaged relative to members of its cognate group.

What would count against this interpretation would be if Khaitan could point to court cases where it was shown that the putative discriminatee was not treated worse than an appropriate comparator would have been treated, and *yet* the court found that the discriminatee had been subjected to discrimination. Khaitan offers no evidence to this effect, however, thereby leaving it open that relative disadvantage and, thus, considerations about equality, play a greater role than he is willing to allow. I conclude that neither Khaitan's appeal to the levelling-down objection nor the considerations about how it is not the case that the law insist on worse treatment relative to an appropriate comparator, defeats an egalitarian view about the wrongness of discrimination.

Direct discrimination without intention

grounds as well *on* non-prohibited grounds, does it not follow that, strictly speaking, the imposition is not made on *any* of these grounds? If so, Section 1 in The South African Equality Act contains an implicit comparison in its definition of discrimination.

As noted above, Khaitan argues that courts no longer find intention or any other mental states, such as bias or negligence, necessary for direct discrimination: ‘Although courts no longer insist that sex discrimination is “on the ground of” sex, they do still require (at least) a correlation between the adverse effect of the challenged act and the victim’s membership of a protected group’ (166). He accepts that on what he calls the lay conception of discrimination, direct discrimination—which is the kind of discrimination that, according to Khaitan, the lay conception focuses on—requires that the discriminator discriminates against the discriminatee on grounds of her group membership. However, he thinks that the lay conception diverges in very important ways from the legal conception of discrimination, this difference being one of the ways that it does so:

We can therefore say that discrimination is direct when the adversely affected set V is constituted *entirely* by members of a protected (or cognate) group.

Indirect discrimination occurs when members of P [ie, the relevant protected group] constitute V *disproportionately* (157; cf, 160).²⁹

I have some worries about drawing the distinction in this manner. First, it seems counterintuitive in a way that, for what it is worth, I doubt Khaitan succeeds in showing is mirrored in law (cf, 185).³⁰ Suppose a misogynist employer wants to fire

²⁹ The first sentence in the indented quote entails that direct discrimination does not require intention or, indeed, any other mental state, e.g., hostility, since the adversely affected set might be constituted *entirely* by members of a protected (or cognate) group independently of any intention on part of the discriminator.

³⁰ Here, Khaitan relies considerably on *James v Eastleigh Borough Council* [1990] 2 AC 751. This was a case in which the court found that a decision to link a certain benefit was linked to pensionable age, which was higher for men than women, therefore amounting to direct discrimination against men despite the absence of any intention to disadvantage them. However, there could be many cases in which the

all of his female employees. Out of sheer incompetence, everyone he fires is a male employee. Here, the employer would engage in (possibly legally and morally permissible) direct discrimination against men. Suppose alternatively that the employer manages to fire some women but that men are disproportionately represented among those fired. In Khaitan's account, the employer would, counterintuitively I think, be engaged in indirect discrimination against men.

Second, I am not certain what it means for there to be a correlation between a token act and group membership (or anything else for that matter) (see the quotation from his book in the first sentence of this section). Presumably, what Khaitan has in mind is not the token adverse effect of the challenged act but rather the relevant type of adverse effect of the (type of) challenged act. More generally, (statistical) correlations exist between types, not between a token and a type, or, for that matter, between one token and another token.

Third, in principle, a correlation between a certain type of harmful act, on the one hand, and membership of a certain protected social group, on the other, might exist even if no causal relation underpins this correlation. It seems as though Khaitan wants to insist that, even in such cases, the members of protected groups suffer disadvantages *because* of their membership of the relevant groups:

we ought not to suffer adverse consequences because of our membership of [groups of which we are members where our membership is either immutable or fundamentally valuable]. But this is precisely what happens when the correlation clause is satisfied. We suffer adverse effects which have some correlation with our group membership – whether it is prejudice against our

distinction between direct and indirect discrimination is drawn on mental-state based grounds. In fact, Khaitan seems to concede that this is true of US courts.

group, stereotypical assumptions about our abilities, or statistically accurate but nevertheless essentializing features of our groups or even correlations where the chain of causation between the act and the effect is not obvious ... When a graduation requirement disproportionately excludes blacks, a black victim suffers because she belongs to a group with low university enrollment (167–168).

I find this account problematic. Suppose that a certain protected group is generally more advantaged than others in terms of a certain good, such as university enrolment. However, universities also use a certain test in order to exclude the members of the group in question, as in the old days, where some Ivy League universities used the vague criterion of being a ‘well-rounded person’ in order to reduce the numerical overrepresentation of Jews among freshmen. I would say that this might constitute a case of racial discrimination, even in the absence of the relevant correlation, and Khaitan does not refer to any court cases showing that complaints about such devices would be rejected as complaints about discrimination. Moreover, suppose we know that despite the existence of the relevant correlation, the disadvantage in question exists, causally speaking, *despite* membership in the relevant protected group. In such a case, Khaitan’s account implies that it is *because* of membership in the protected group that one suffers the relevant disadvantage. But it is very unclear what sort of relation ‘because’ signifies. The last sentence in the long quote from Khaitan’s book presented in this paragraph suggests that we might say that people have suffered a certain disadvantage because of their membership of a certain protected group, even though ‘the chain of causation between the act and the effect is not obvious’ (167). But this is neither here nor there. Such an ascription presupposes that there is such a

causal chain; we just happen to be unaware of its nature. However, the issue at stake is not cases where we know or have some reason to believe that membership of the relevant protected group somehow causes the relevant disadvantage, but we have no justified beliefs about the nature of this causal relation. The issue at stake is cases in which we have good reason to believe that the correlation between group membership and disadvantage is just that; that is, the correlation exists despite absence of causal relations between the correlate, or it exists despite the fact that membership in the relevant protected group is actually a cause of a reduction in the disadvantage in question. As far as I can see, Khaitan contends that discrimination law treats such cases as cases of discrimination because of membership of the relevant protected group; however, I missed what is the basis for this claim.

Conclusion

In this review, I have briefly described the main content of Khaitan's book and expressed some worries about a few of the main claims in it. I think the book is very rich and interesting, however, and it offers a number of excellent challenges to the views of people like myself who are inclined to think of discrimination as having something to do with equality and that the distinction between direct and indirect discrimination is to be drawn on the basis of the presence or absence of certain mental states of the discriminator.³¹ More specifically, I find Khaitan's focus on group disadvantage – a defining feature of his approach – spot on and very fruitful, although I would probably flesh it out differently. I also find his defence of asymmetric discrimination norms very enlightening, and while I myself do not subscribe to a

³¹ As Khaitan (7 n 26) observes, I do believe that, conceptually speaking, discrimination requires treating people unequally. However, this is not the same as claiming that discrimination is wrong because of the unequal treatment involved.

sufficientarian, freedom-focused account of the normative foundation of discrimination law, Khaitan's account thereof is sophisticated, extensive and among the very best normative accounts of discrimination law available. All in all, I strongly recommend *A Theory of Discrimination Law* to anyone interested in legal and moral theories about discrimination.