

## BOOK REVIEW

### **Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015)**

Australia's discrimination laws evolved initially as a response to the continued prevalence and heightened awareness of race and sex discrimination before emerging as laws that prohibit discrimination on a range of attributes and in multiple areas of public life.<sup>1</sup> These laws have not developed with any particular pattern or goal in mind nor have they evolved with a guiding principle or a sound theoretical basis. Moreover, courts have grappled with how to apply them, which has often resulted in restrictive interpretations of these laws.<sup>2</sup> The relatively recent attempt by the Rudd-Gillard government to consolidate and streamline the federal discrimination laws was an opportunity to introduce a clear aim and purpose but unfortunately this project was shelved.<sup>3</sup> Important questions about whether discrimination laws are just about redressing a wrong between individuals or are concerned with wider social change have not yet been addressed.

Oxford academic Tarunabh Khaitan has written a thoughtful book in which he engages with these complex theoretical questions about discrimination law. In essence, Khaitan seeks to explain the legal model for regulating discrimination before justifying why it is necessary. There is not space to explore all of the issues raised in this book; rather my task is to guide readers through some of Khaitan's ideas and identify some salient points for the Australian reader.

The first chapter, entitled 'The Problem', outlines Khaitan's project. After identifying that there is great disagreement about the scope and content of discrimination law (particularly because when 'discrimination' is used by a layperson, it has a different meaning to how the law conceptualises it), Khaitan sets out to define the legal concept of discrimination and justify why discrimination should be regulated. Khaitan makes it clear that his inquiry is concerned with the practice of discrimination law; that is the rules that give discrimination law its structure.<sup>4</sup> For this project, Khaitan has chosen a broad data-set of jurisdictions — Canada, India, South Africa, the United Kingdom and the United States of America — which are all English speaking, common law, liberal democracies and, for the purpose of this project, as Khaitan notes, they have all imported or exported aspects of each other's discrimination law.<sup>5</sup> They are, he maintains, responding to the same concerns about how discrimination law is practised which makes them suitable to study.<sup>6</sup>

1 The most recent example is the *Equal Opportunity Act 2010* (Vic).

2 See further Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2<sup>nd</sup> ed, 2014) chapter 2.

3 Dominique Allen, 'Consolidate, Eradicate or Vacillate?' (2013) 38 *Alternative Law Journal* 120.

4 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 13.

5 *Ibid* 14–15.

6 *Ibid* 46.

The remainder of the book is divided into four Parts. Part I defines the practice of discrimination law in the chosen jurisdictions. Khaitan begins by defining the scope and content of discrimination law in chapter 2 which, he notes, may seem like an odd place to start but it is necessary because:

Discrimination law lies at the difficult end of [the] spectrum. It is found in constitutional Bills of Rights as well as in statutes. It applies to certain sectors (employment and health) but not others (romantic relationships). It uses a complex set of tools (direct and indirect discrimination, harassment, reasonable adjustments, affirmative action, positive duties, etc), but it is not immediately obvious how these tools are interrelated — sometimes they even seem to be in conflict with each other. To make matters worse, unlike contract, crime or trusts, discrimination is not uniquely – perhaps not even primarily – a legal concept.<sup>7</sup>

In chapter 3 Khaitan examines the structure of discrimination law in the five comparator jurisdictions to determine what is common to them. He considers three interrelated questions: who is entitled to the protection of discrimination laws; who bears a duty; and what is the nature and scope of the duties imposed by discrimination law. When examining the duties imposed by discrimination law, Khaitan considers the concepts used in each of the comparator jurisdictions (namely, direct discrimination, indirect discrimination, reasonable accommodation, discriminatory harassment and affirmative action) and identifies the shared characteristics in each jurisdiction, finding there are many commonalities.

Although Australia is not one of the jurisdictions that Khaitan considered, there is much that is familiar to us in chapter 3 and where there are differences, such as in countries with newer discrimination laws like Britain and South Africa, it serves as a reminder of how our laws could be modernised. For example, Australia has made very little use of affirmative action measures to date<sup>8</sup> and here, like in the comparator countries, the purpose of these measures is contested. The way Khaitan has chosen to class affirmative action measures would be a useful starting point for policymakers because, as he shows, there is a wide range of measures which can be classed as ‘affirmative action’ measures. Khaitan categorises them first based on whether they are remedial or non-remedial, the former being measures which benefit the persons who suffered disadvantage caused by past discrimination.<sup>9</sup> He is concerned with non-remedial measures which he further categorises into three sets depending on how they are designed: the first is based on the tools used, the second based on how sensitive the measures are to the protected grounds of discrimination and the third based on whether they are voluntary, contractual or mandatory.<sup>10</sup> Khaitan’s writing style makes this

7 Ibid 23.

8 They are predominantly ‘soft’ measures which are used in reference to women in the workplace. See the *Workplace Gender Equality Act 2012* (Cth).

9 Khaitan, above n 4, 81–2.

10 Ibid 82. He returns to affirmative action in chapter 8.

conceptual overview very accessible. It will be a useful chapter to return to for readers looking for clear, precise explanations of these fundamental concepts.

Having completed the considerable task of defining the norms of discrimination law and examining how such laws are structured, in Part II Khaitan considers the point and purpose of discrimination law. In chapter 4, Khaitan identifies the four basic goods that all humans need and which they require access to in order to have 'a good life' (which is the title of the chapter), namely:

- goods to adequately satisfy a person's biological needs;
- the freedom from unjustified interference by others;
- a range of valuable opportunities to choose from; and
- self-respect.<sup>11</sup>

In the following chapter, Khaitan writes that the justifying aim of discrimination law 'is to further the well-being of persons by securing access to the basic goods [as identified in chapter 4] to those who lack such access because of their affiliation to protected groups'.<sup>12</sup> Put another way, the point of discrimination law is to eliminate relative group disadvantage. In this chapter Khaitan considers what discrimination law *seeks* to do, not what discrimination law *actually* does, which many others have concerned themselves with. His question is an important theoretical one — what is the point of discrimination law and is this purpose justified?

Part III is concerned with the design of discrimination laws and Khaitan contends that they need to be designed to realise the purpose he identified in chapter 5. Khaitan begins by presenting a general definition of what he terms 'the antidiscrimination duty' in chapter 6, which is intended to achieve the purpose of discrimination law. I found this to be one of the most thought-provoking chapters in the book yet it is also one of the most complex and thus difficult to compress. What I found particularly useful was Khaitan's categorisation of discrimination duties. In chapter 3 he determined that discrimination laws are either 'rights-generating' (duties that give a person a reflex right to a claim if those duties are breached) and 'non-rights generating' (such as affirmative action duties which do not give *specific* members of a disadvantaged group a right to an affirmative action measure).<sup>13</sup> In chapter 6 Khaitan states that the duties may also be classed as either 'action-regarding' because they are activated once the duty-bearer does something, such as engages in direct discrimination, and 'non-action-regarding'.<sup>14</sup> He writes that there are two sets of duties — action-regarding duties which are also rights-generating, and non-action-regarding duties and non-rights-generating duties. Khaitan continues classifying the duties and shows that a breach of the action-regarding and rights-generating duties is always harmful and contains an element of wrongfulness by the duty-bearer, while breaches of the non-action-

11 Ibid 92–112.

12 Ibid 138.

13 Ibid 86–7.

14 Ibid 143–4.

regarding duties and non-rights-generating duties does not entail prior wrong or fault on behalf of the duty-bearer.<sup>15</sup> The heart of Khaitan's inquiry in chapter 6 is to classify discrimination into what he terms its 'paradigm and collateral forms'. The former is discrimination against members of relatively disadvantaged groups, while the latter is against relatively advantaged or dominant groups.<sup>16</sup>

Chapter 7 is concerned with who should bear the antidiscrimination duty, namely the state, employers, landlords and providers of goods and services. Khaitan's rationale for why these actors should be responsible for bearing the antidiscrimination duty is first, they all have a sufficiently public character and a weak claim for why they should be allowed to discriminate; and second, they have the most control over who has access to the basic goods identified in chapter 4.

In the final substantive chapter of the book, Khaitan returns to affirmative action but he is only concerned with non-remedial affirmative action measures, namely those that are wrong-*insensitive* in that the person taking the measure does not need to have done something wrong and so there are no victims. Such measures are regarded as non-rights-generating.<sup>17</sup> Khaitan defines affirmative action measures before he unpacks this definition. He writes:

An affirmative action measure is *a measure designed to benefit any members of one or more protected group(s) qua such membership*.<sup>18</sup>

Khaitan then explains how his definition clarifies and incorporates the main features of affirmative action and this explanation shows what a well crafted definition he has produced. Compare it to the more detailed language used by the legislature, such as s 12 of the *Equal Opportunity Act 2010* (Vic). Section 12 requires a special measure<sup>19</sup> to be taken in good faith for the purpose of promoting or realising substantive equality for members of a group and that it must be reasonably likely and a proportionate means of achieving that purpose and justified because members of the group in question have a need for advancement. The measures described in s 12 are intended to do what Khaitan argues that an affirmative action measure should do but the introduction of statutory language shows us how the goal can often become lost or it can be burdened with additional requirements. In the remainder of the chapter, Khaitan defends the legitimacy of affirmative action measures based on the four interests involved — the beneficiaries, the person who undertakes the measure, members of the dominant group who are adversely affected by the measure and the public interest.<sup>20</sup>

15 Ibid 144.

16 Ibid 145.

17 Ibid 215.

18 Ibid 217 (emphasis in original).

19 Australian legislatures have rarely used the term 'affirmative action' for such measures. One exception is the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) but when the Act was amended in 1999, 'affirmative action' was removed from its name. The international law term 'special measures' has been the preferred term. See, eg, s 8 of the *Racial Discrimination Act 1975* (Cth) which incorporates the definition in Article 1.4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

20 Khaitan, above n 4, 222–38.

There is much that academics, lawyers and policymakers can take from this book and use when practising discrimination law or reforming and developing the law. Those unfamiliar to discrimination law will also find it useful as a critical analysis of how these laws could work. One of the things readers will find so enjoyable about this book is the clarity with which Khaitan expresses his ideas and in doing so, he makes complex theoretical ideas accessible.

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