*Justifying Discrimination Law*[[1]](#footnote-1)+

Colm O’Cinneide[[2]](#footnote-2)\*

**Abstract**

This review article analyses Tarunabh Khaitan’s attempt in his recent book, *A Theory of Discrimination Law*, to identify the central purpose and justification of discrimination law. Khaitan sets out to determine the key features of discrimination law through rigorous comparative analysis, and to locate a solid normative foundation for its provisions. He concludes that discrimination law is structured around an ‘obsession’ with combating group disadvantage, i.e. relative forms of disadvantage between different groups whose membership is defined by morally irrelevant or valuable personal characteristics such as gender, race, disability and so on. He goes on to make a strongly argued liberal (as distinct from an egalitarian) case as to why discrimination law is justified in seeking to minimise the negative impact on individual liberty of group disadvantage. Certain aspects of his analysis fail to capture the full complexity of discrimination law and the moral concerns which underpin its functioning. However, in general, Khaitan’s arguments make an invaluable contribution to the diffuse theoretical literature on discrimination law, and are bound to become a major point of reference in conceptual debates about this highly significant area of law.

**Keywords:** discrimination law, group disadvantage, liberty, equality.

1. *The Triumphal Progress of Discrimination Law*

Discrimination law is a legal success story. It is a comparatively new area of law, having only come into existence after the end of the Second World War. However, as noted by Tarunabh Khaitan in the first chapter of his recent book, *A Theory of Discrimination Law*, its ‘geographical spread…is matched only by the expansion of its scope of protection’.[[3]](#footnote-3) Furthermore, Khaitan does not exaggerate when he affirms that discrimination law has come to be regarded as a ‘mainstay of liberal democratic governance’ and a ‘marker of a civilised society’.[[4]](#footnote-4)

However, discrimination law is also controversial. As Khaitan notes, ‘[t]abloid headlines decrying “Political Correctness Gone Mad” or calling lustily for a return to ‘common sense’ are complaining, more often than not, about a matter somehow connected with discrimination law’.[[5]](#footnote-5) Furthermore, substantial differences of opinion exist among legal experts as to the purpose and function of discrimination law taken as a whole, and the values that should guide its interpretation and application.[[6]](#footnote-6) Key areas of discrimination law are often characterised by a high degree of normative uncertainty, with courts left to decide highly complex issues of law, policy and morality on the basis of highly indeterminate legal standards.[[7]](#footnote-7)

Given all this, one might assume that discrimination law would generate a high volume of theoretical writing: it should be a happy hunting ground for commentators eager to influence the development of such an important area of law. Specific topics such as positive action have been extensively discussed. However, in general, remarkably little commentary has been produced which focuses on more ‘macro’ issues relating to the overall purpose, function and justification of discrimination law. The theoretical writing that does exist on this subject is often rich and insightful.[[8]](#footnote-8) But it also tends to be fractured, taking the form of scattered conversations rather than a shared common dialogue. Furthermore, much of this commentary remains partial, or underdeveloped – and in particular struggles to keep pace with the fluid, dynamic and ever-expanding role played by discrimination law in contemporary society.[[9]](#footnote-9)

Khaitan’s book sets out to fill this gap. It aims to provide a comprehensive theoretical account of the content and justification of discrimination law, which faithfully reflects how it has evolved over the last few decades. It is thus an admirably ambitious exercise in what the author describes as ‘particular jurisprudence’ (i.e. theorising about a specific area of law),[[10]](#footnote-10) which is informed throughout by the author’s keen intelligence and in-depth knowledge of comparative discrimination law. As such, this book represents a major contribution to the somewhat scattered conceptual literature that exists in this field.

2. *Conceptual Dissonance:*

*The Achilles Heel of Contemporary Discrimination Law*

Khaitan begins his theoretical analysis by drawing attention to what he views as the central ‘problem’ of contemporary discrimination law – namely the striking contrast between what he describes as the ‘lay understanding’ of discrimination and the ‘legal model’ of what qualifies as discriminatory conduct.[[11]](#footnote-11) He suggests that discrimination is conventionally understood to be ‘intentional, direct, and comparative’, i.e. behaviour which subjects individuals to less favourable treatment which is directly motivated by racism, sexism and other unwarranted and/or irrational forms of prejudice.[[12]](#footnote-12) In contrast, discrimination law prohibits types of behaviour which may be ‘unintended, indirect or non-comparative’ - as for example when the law prohibits forms of direct or indirect discrimination which is not motivated by prejudicial intent, or imposes legal liability on employers who have neglected to make reasonable accommodation for the specific needs of particular persons with disabilities.[[13]](#footnote-13)

In other words, as Khaitan puts it, ‘the law treats a much wider range of conduct as discriminatory then does ordinary language’.[[14]](#footnote-14) Furthermore, at times the inverse is also the case: there are situations where the law does not prohibit behaviour which lay understanding might view as discriminatory, or at least as highly questionable.[[15]](#footnote-15) In general, to quote Khaitan again, ‘the scope of what counts as discrimination in law is both wider and narrower than what the term encompasses in the lay understanding’ of the term’.[[16]](#footnote-16) This can create a troubling disconnect between the popular view of what the law should be and what it actually is in practice.

But more is going on here than a simple difference of views between expert and non-expert opinion. What Khaitan describes as the ‘lay understanding’ of discrimination also forms the basis of some of the most prominent theoretical accounts of what constitutes the ‘central case’ of discrimination, i.e. the core or paradigm form of discriminatory behaviour, whose moral ‘wrongness’ justifies legal intervention to protect potential victims and thus constitutes the primary rationale for the system of discrimination law taken as a whole.[[17]](#footnote-17) Furthermore, many legislators and judges are also wedded to this view of what constitutes the ‘essence’ of discriminatory behaviour, as evidenced for example by the dissenting opinions in the recent US Supreme Court case of *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*.[[18]](#footnote-18)

Discrimination law thus functions in a way that that can be difficult to reconcile with the assumption - shared by many theorists, legal actors and laypeople alike - that its primary *raison d’etre* is to combat less favourable treatment of individuals which is motivated by unwarranted animus or prejudice. This discrepancy can expose discrimination law to accusations that it has lost touch with its normative underpinnings.[[19]](#footnote-19) Khaitan is thus correct to diagnose discrimination law as having a ‘problem’ - even if his framing of the issue in terms of a divide between lay and expert-legal views glosses over the existence of more fundamental conceptual dissonance relating to its purpose and functioning.

3. *The Search for the ‘Holy Grail’ – A Coherent Normative Foundation for Discrimination Law*

What then is to done about this problem? Khaitan sets out his stall within the first few pages of his book. He argues that it is problematic to assume that the lay understanding should necessarily form the basis of discrimination law. When it initially took shape, the legal model clearly reflected the assumption that discrimination was intrinsically ‘intentional, direct and comparative’ in nature.[[20]](#footnote-20) However, it has subsequently evolved in a manner that reflects practical experience of the application of the law to contested cases, the need to respond to the lived experience of disadvantaged groups, and the inconsistencies and problematic gaps in protection that are generated by excessive fidelity to the ‘lay understanding’ of discrimination.[[21]](#footnote-21) In other words, praxis has been key to its development, and the lessons of this experience should not be discounted: as Khaitan argues (citing Bernard Williams), the operation of law often helps to refine unexamined moral beliefs and challenge embedded assumptions about the ‘real’ nature of concepts such as discrimination.[[22]](#footnote-22)

Furthermore, as Khaitan notes, the contemporary legal model of discrimination that has emerged out of this evolutionary process - including those ‘irregular’ features which can be difficult to reconcile with lay understanding - attracts wide support among law-makers, academic commentators and many of the interested parties most closely affected by its functioning.[[23]](#footnote-23) Even theorists whose views closely reflect the ‘lay understanding’ of discrimination are in general willing to accept that the key features of the contemporary legal model of discrimination law may be normatively justified – albeit perhaps on less compelling grounds than what they regard as its ‘central case’.[[24]](#footnote-24) Furthermore, although Khaitan does not discuss this in any detail, it is striking that when aspects of the legal model which do not correspond to the lay understanding have come under political or legal attack, legislators and judges have regularly endorsed the legal *status quo*.[[25]](#footnote-25)

Khaitan is nevertheless unwilling to rely solely on the argument from praxis to justify the current model of discrimination law. Instead, he suggests that there is an ‘urgent’ need to return to grand theorizing, and to identify a sound normative foundation for discrimination law as a self-contained area of legal regulation. As he puts it:

‘[T]he Holy Grail…is a coherent normative foundation upon which discrimination law can securely rest. Dismissing this search as the fetishization of coherence will be unfair…The battle of ideas has important real-world implications.’[[26]](#footnote-26)

Of course, Khaitan is not the first to embark on this quest for this ‘Holy Grail’. However, he argues that previous attempts to identify an adequate set of normative foundations for discrimination law have failed – or at best have only succeeded in shedding light on specific aspects of the law. He suggests that these ‘candidate theories’ can be roughly classified into three categories, egalitarian, liberal and dignaritarian. Egalitarian theories regard discrimination law as giving expression to an underlying commitment to the equality of status of all individuals, although they often differ as to what this principle entails in substance. Liberal theorists in Khaitan’s words think that ‘the job of providing a normative foundation to discrimination law is best performed by some (capacious) conception of liberty, autonomy or freedom’.[[27]](#footnote-27) Dignaritarians regard discrimination law as justified on the basis that it helps to secure personal dignity. However, in Khaitan’s view, all three sets of theories are vulnerable to similar criticism: namely that they lead to ‘normatively unpalatable outcomes’ and linked problems of fit.[[28]](#footnote-28)

More specifically, Khaitan notes that the principle of equality has been accused of lacking much in the way of meaningful substance, and also of failing to provide any real justificatory force to the provisions of discrimination law.[[29]](#footnote-29) Furthermore, both liberal and dignitarian theories have been criticised for being under-inclusive, in the sense that they struggle to justify why certain aspects of discrimination law curtail individual freedom in any meaningful way.[[30]](#footnote-30)

Khaitan’s critique in this regard is a little thin, and could have benefited from more detailed elaboration.[[31]](#footnote-31) But his shorthand account of the limitations of the egalitarian, liberal, and dignatarian normative theories nevertheless hits home. In response to these deficiencies, as Khaitan notes, ‘pluralist’ theories have emerged which view discrimination law as resting on ‘multiple normative foundations’. [[32]](#footnote-32) A pessimist strain of thought has also emerged, which regards the law in this context as lacking any real coherent normative foundation.[[33]](#footnote-33) Khaitan is sympathetic to the former, but not to the latter. In his view, the pessimists have ‘hung up their boots all too soon’.[[34]](#footnote-34) Instead, he argues that the existing candidate theories, for all their limitations, nevertheless are capable of yielding up raw materials which can be combined into the building blocks of a new, better developed theoretical approach. However, such an approach cannot be based solely on vague appeals to abstract ideals such as ‘equality’, ’autonomy’ or ‘dignity’: ‘appeals to at least some of these values cannot be avoided…but they need to be concretized somewhat into a conception that we are able to grasp’.[[35]](#footnote-35)

In other words, Khaitan sets out to develop a sophisticated theoretical framework rooted in value pluralism that can provide the type of comprehensive normative foundation that discrimination law requires. In articulating this ambition, he emphasises that his aim is to generate a theory of *discrimination law* – not to set out a sociological or moral account of the ‘wrongness’ of *discrimination* as such.[[36]](#footnote-36) Furthermore, he states that any such theory needs to recognise that different normative principles may be relevant at different levels of inquiry: in particular, he cites Hart in emphasising the need to distinguish between a *purposive* inquiry into the general justifying aim(s) of discrimination law (i.e. what is the purpose of his legal framework) and a more intermediate level of inquiry into a set of *distributive* sub-questions ‘internal to law’ relating to the allocation of rights and duties between different social actors.[[37]](#footnote-37) Khaitan acknowledges that these two levels of inquiry are linked, but again emphasises the need to maintain a distinction between them – which he implies that much of the existing theorising about discrimination law has failed to do.[[38]](#footnote-38)

Khaitan also argues that any such theoretical account must take close account of the actual legal content of discrimination law, as well as defining its characteristics as a distinct mode of legal regulation in order to justify its specific design and functioning. [[39]](#footnote-39) In doing this, the theoretical inquiry needs to avoid ‘getting caught in the specificities of a particular legal system’ and take account of how discrimination law has developed as a ‘transborder phenomenon’, as discussed above.[[40]](#footnote-40) Khaitan thus develops his theoretical account by reference to a comparative dataset made up of five common law jurisdictions – Canada, the US, India, South Africa and the UK (whose legal system also incorporates EU and ECHR non-discrimination norms) - whose discrimination law frameworks are based round a common set of core legal concepts.[[41]](#footnote-41) This comparative data in turn fuels Khaitan’s search for the ‘Holy Grail’ of a sound normative foundation for discrimination law, by providing a basis for a descriptive account of its actual scope and substance.

4. *The Perils of Grail Questing*

Before following Khaitan further on his quest, it is worth noting that the way in which he frames his theoretical inquiry has much to commend it. To start with, he is justified in emphasising the desirability of identifying a solid normative basis for discrimination law, given the extent of its impact on daily life and the contested and uncertain nature of many of its provisions. Khaitan also makes a very important point when he argues that it is problematic to assume that the ‘lay understanding’ of discrimination should be taken as constituting the central case of discrimination law. Such an assumption risks obscuring the possibility that this specific understanding of discrimination is flawed or under-inclusive – as the evolving understanding of how discriminatory treatment impacts upon individuals and groups, as reflected in the development of the law in this regard, suggests is indeed the case. Furthermore, the normative integrity of a structure of legal norms such as discrimination law does not necessarily depend on the degree to which a one-to-one correspondence exists between it and a specific form of moral wrongdoing: Khaitan is entirely justified in focusing on analysing discrimination law as a distinct body of regulatory norms, as distinct from the concept of discrimination as such. Furthermore, Khaitan’s comparative approach is sound: discrimination law has evolved on a transborder basis, and needs to be understood and analysed as such.

Having said that, Khaitan’s methodology has some weak points. For example, in separating out the purposive and distributive levels of inquiry, he seems to assume that it will be possible to isolate a distinct *raison d’etre* for discrimination law taken as a whole, which will be analytically distinct from the distributive balance struck by its various component parts. This must be open to question: discrimination law may have multiple purposes that are channelled and given effect by different legal norms within its overall structure, meaning that questions about its overall purpose may not necessarily be clearly distinguishable from distributive sub-questions relating to each of its component parts. Furthermore, the assumption that there is a ‘Holy Grail’ to be found - namely a single ‘normative foundation’ for discrimination law - risks generating a built-in bias towards coherence, i.e. a preference for ‘pure’ theoretical explanations which are monolithic, clear-cut and sharply etched in black-and-white. However, it may be the case that discrimination law is best viewed as sketched in shades of grey, and that no single normative basis can justify the various constraints it imposes on social actors.

As discussed in the remainder of this review, Khaitan’s search for his Holy Grail suffers from some of these methodological blind spots. However, while his quest at times leads him astray, he finds plenty of wisdom on the way – which makes his journey well worth following.

5. *The Scope and Substance of Discrimination Law*

Khaitan begins his substantive analysis by attempting to delineate the scope and substance of discrimination law. He notes that discrimination law has a ‘crisis of identity’: it has emerged out and remains linked to different fields of law, such as labour law or constitutional law, and has only recently come to be recognised as a distinct sub-set of legal norms in its own right.[[42]](#footnote-42) He therefore sets out to identify the essence of discrimination law, i.e. the ‘necessary and sufficient conditions’ that distinguish duty-imposing legal norms as norms of *discrimination law* as such, as distinct from other branches of legal regulation such as for example social welfare law or tort law.[[43]](#footnote-43)

To do this, Khaitan utilises a thought experiment designed to identify the common features of norms that form part of discrimination law in the states contained within his dataset. This thought experiment involves listing a number of legal norms, including for example a prohibition on refusing to let accommodation to persons based on their race; a requirement to pay a minimum wage; and a provision that all persons with severe mobility difficulties shall receive a monthly allowance from the local council. By reference to how hypothetical lawyers within all five states of the dataset might classify these norms, he extrapolates the existence of four necessary conditions for a legal norm to be regarded as part of discrimination law - namely ‘personal grounds’; ‘cognate groups’; ‘relative disadvantage’; and ‘eccentric distribution’.

The first condition - ‘personal grounds’ - is that the legal norm in question requires some connection between the prohibited act or omission at issue and certain attributes or characteristics that persons have. In other words, as Khaitan puts it, discrimination law shows ‘sensitivity’ to particular characteristics possessed by individuals, such as their race, sex, religion and so on.[[44]](#footnote-44) However, as he discusses in detail later in the book, it does not necessarily require that a direct causal link exists between these personal characteristics and the prohibited acts or omissions in question: it can be enough if a *correlation* exists between the disadvantage generated by the prohibited conduct in question and the relevant personal characteristic at issue.[[45]](#footnote-45)

Moving on, Khaitan notes that this concept of a ‘personal ground’ can exist in two distinct ‘orders’ – a universal order, which applies to all persons, and cognate ‘particular’ instances of that universal order which attach to different groups of people.[[46]](#footnote-46) Gender is an example of a universal order, while men and women are ‘cognates groups’ of that universal order. In all the legal systems contained in Khaitan’s dataset, personal grounds are generally protected in their universal order. This is why discrimination law tends to be ‘symmetrical’, i.e. discrimination on the basis of gender (a universal ground) is prohibited, but not discrimination on the grounds of being a women alone (a cognate ground). However, established practice across the dataset suggests personal ground must be capable of classifying persons into one or more cognate groups before it will be protected by discrimination law – which Khaitan classifies as the ‘cognate groups condition’, the second necessary qualifying condition in his classificatory scheme.[[47]](#footnote-47)

The third condition is ‘relative disadvantage’, whereby members of one cognate group (e.g. women, disabled persons, or members of certain ethnic minorities) ‘must be significantly more likely to suffer abiding, persuasive and substantial disadvantage’ than members of another cognate group associated with a particular personal ground (e.g. men, persons without a disability, and members of a majority ethnic group).[[48]](#footnote-48) This third condition is a key element of Khaitan’s analysis. It requires that the cognate groups protected by discrimination law be identified by relative disadvantage, not by sharing a particular identity as such, or by whether the personal ground in question can ever be ‘relevant’ to rational decision-making processes.[[49]](#footnote-49) Khaitan suggests that the question of which groups should be treated by discrimination law as subject to ‘relative group disadvantage’ has to be determined by ‘practical judgment’ within a given state context.[[50]](#footnote-50) However, he maintains that this condition, however satisfied, is a defining characteristic of any legal norms classified as being part of discrimination law within his dataset of national legal systems.

So too is his fourth and final condition – namely that the legal norm in question is likely to distribute the ‘non-remote and tangible benefits in question to some, but not all, members of the relatively disadvantaged group’.[[51]](#footnote-51) In other words, legal norms which satisfy this ‘eccentric distribution condition’ will be designed to re-distribute benefits to at least some of the members of a disadvantaged cognate group, as long as their claim to access these benefits is not too remote. However, legal norms which distribute benefits to all members of a disadvantaged group – including social welfare legislation, such as the above-mentioned example of the payment of allowances to persons with severe mobility difficulties – will not qualify.[[52]](#footnote-52)

Khaitan argues that all four of these conditions must be satisfied before a legal norm will qualify as part of discrimination law. As a consequence, he views them as lending ‘identity and a degree of internal coherence’ to discrimination.[[53]](#footnote-53) Within this classificatory scheme, he highlights the importance of the relative group disadvantage condition, which he views as being ‘at the heart of discrimination law’.[[54]](#footnote-54) For him, sensitivity to group disadvantage is unique to discrimination law, and addressing this is its major *raison d’etre*.

At this stage, the alert reader will already have detected that Khaitan’s account of the essential features of discrimination law does not tally with the ‘lay understanding’ of its functions, or with many of the standard conceptual accounts of its distinguishing features. Khaitan’s analysis does not define the essence of discrimination law as relating to the protection of individuals against particular forms of behaviour motivated by contempt or prejudice, in contrast to the ‘lay understanding’; nor does he frame it in terms of combating stereotyping or other forms of irrational decision-making, as some commentators have argued.[[55]](#footnote-55) Instead, he argues that its key defining characteristic is this concern with combating relative group disadvantage – a view which constitutes a radical departure from much of the theoretical accounts of discrimination law that exist, but which chimes with some recent critical analysis of its scope and substance.[[56]](#footnote-56)

To back up this analysis, Khaitan then turns his focus onto the key features of discrimination law in all five states that make up his dataset, with a view to demonstrating that they reflect the four essential features of discrimination law as he defines them - in particular, the focus on combating relative group disadvantage.

For example, he argues that comparative experience shows that personal grounds will be protected by discrimination law if they (i) classify persons into groups with a significant relative advantage gap between them, which can take political, socio-cultural or purely material form, and (ii) are also ‘normatively irrelevant’, i.e. that they involve personal characteristics which are immutable in nature or shaped by fundamental personal choices that have normative value and deserve to be respected accordingly, such as being pregnant, being of a particular marital status, or being of a particular religion or belief.[[57]](#footnote-57) In other words, Khaitan suggests that the shape of the ‘protectorate’ of discrimination law reflects a desire to combat specific forms of relative group disadvantage, rather than targeting irrational decision-making or treatment directly motivated by prejudice.

Khaitan also draws particular attention to manner in which direct discrimination is now regarded by courts in three out of three of five states in his dataset – the UK, Canada and South Africa - as an ‘action-regarding norm’ based on an ‘objective determination of the implication of a protected ground’ (i.e. the existence of a causal connection between a protected ground and the treatment in question).[[58]](#footnote-58) This does away with any formal legal requirement that subjective prejudicial intent be present, thereby moving closer to establishing a ‘correlation’ requirement (as discussed above) between the conduct at issue and the protected ground at issue: as Khaitan notes, ‘this development is the primary driver’ of the divergence that has opened up between the lay and legal understanding of discrimination across all the legal systems surveyed as part of his dataset.[[59]](#footnote-59) He suggests a similar dynamic is in play in relation to the gradual dilution of the requirement to point to a comparator to establish the existence of direct discrimination, and in the evolution of comparative legal doctrine relating to indirect discrimination.[[60]](#footnote-60) Taken together, he again argues that all these comparative developments are best explained as reflecting a desire to minimise the negative impact of relative group disadvantage on individuals, which he views as the central structuring *leitmotif* of contemporary discrimination law.

6. *The Strengths and Limits of Khaitan’s Descriptive Analysis*

Certain aspects of Khaitan’s comparative analysis are a little shaky. For example, he suggests that legal requirements to make reasonable accommodation are best viewed as a secondary right, which is ancillary to and dependent upon a breach of the primary legal obligation not to engage in indirect discrimination against the individuals and groups concerned.[[61]](#footnote-61) This is a questionable claim. In the context of disability, the main area where reasonable accommodation requirements take effect, an obligation to accommodate a particular individual is capable of arising in a situation where the element of group disadvantage required to establish a claim of indirect discrimination cannot be made out.[[62]](#footnote-62)

However, in general, Khaitan’s descriptive analysis of the scope and substance of contemporary discrimination law is impressive. Anyone with even a passing interest in this area of law will benefit from reading Khaitan’s masterly (and succinct) comparative overview. He demonstrates that a ‘remarkable degree of consensus’ exists as to the core elements of discrimination law across all of the legal systems that form part of his dataset. He also succeeds in establishing that combating group disadvantage is a central concern of contemporary discrimination law. As Khaitan argues, many of its key component parts are best viewed as directed towards achieving this objective - in particular the prohibition on indirect discrimination and the other elements of the ‘legal model’ of discrimination that depart from the ‘lay understanding’ of this concept.[[63]](#footnote-63)

Having said that, Khaitan is vulnerable to the accusation that he overlooks important elements of discrimination law which do not fit neatly into his analytical framework. To start with, not every element of discrimination law in the countries surveyed appear to adhere to his four conditions. For example, age discrimination is prohibited in Canada, the US, the UK and South Africa – but while different ‘cognate’ age groups may face particular disadvantages in specific contexts, their relationship is not characterised by any consistent or stable pattern of relative group disadvantage. In other words, the legal prohibition on age discrimination, which form an important element of contemporary discrimination law, does not satisfy Khaitan’s third qualifying condition as outlined above: instead of targeting relative group disadvantage, it is directed at preventing irrational decision-making motivated by crude, age-related stereotyping. Similarly, courts reviewing state action for compliance with non-discrimination provisions of national constitutions or international human rights instruments have overturned decisions which differentiate between individuals or groups on irrational or improperly motivated grounds, even if no embedded forms of ‘relative group disadvantage’ are at issue.[[64]](#footnote-64) It is also worth noting that legislative prohibitions on religious discrimination have often been interpreted by reference to the individual right to religious freedom, rather than to notions of relative group disadvantage.[[65]](#footnote-65)

Furthermore, Khaitan’s account underplays the extent to which the lay understanding of discrimination still exerts considerable influence over how the inchoate norms of discrimination law are fleshed out and given effect in law, reflecting the existence of persisting normative uncertainty about its purpose and function.[[66]](#footnote-66) He also overstates the degree to which discrimination law across the legal systems making up his dataset are converging upon a shared approach centred upon combating group disadvantage. For example, Khaitan suggests that reasonable accommodation requirements are being extended beyond disability to cover other grounds such as religion or belief, which he views as reflecting discrimination law’s focus on combating the negative fall-out of embedded disadvantage: however, this trend is really confined to Canada and South Africa, and has yet to take substantive form in the other jurisdictions he discusses.[[67]](#footnote-67)

In general, Khaitan is too quick to gloss over the complex, contested and multi-faceted nature of contemporary discrimination law. It has been shaped by various political processes, and is deployed to help achieve a variety of different policy ends.[[68]](#footnote-68) As a result, its provisions are probably best understood as directed towards combating an assortment of different albeit overlapping forms of harmful behaviour, which extend beyond acts which perpetuate relative group disadvantage to include improperly motivated decision-making and other morally questionable types of differential treatment. Khaitan’s third qualifying condition – the requirement that the ‘cognate groups’ protected by discrimination law be identified by relative group disadvantage – thus appears to be too reductive.

That said, Khaitan is correct to emphasise the importance of the concept of relative group disadvantage. It plays a key role in shaping important elements of contemporary discrimination law, and he is right to argue that any serious theoretical analysis of the existing state of the law in this regard has to engage with the question of whether this focus on relative group disadvantage is normatively justified. But justifying the salience of relative group disadvantage in this context can only provide a partial normative foundation for discrimination law: a much more complex, multi-faceted account of the legitimacy of discrimination law is required, which as discussed below Khaitan only partially provides.

7. *The Point and Purpose of Discrimination Law*

In the second part of his book, pithily entitled ‘Point and Purpose’, Khaitan turns to consider the normative issues relating to the justification of discrimination law. From the beginning, he nails his colours to a liberal perfectionist mast. He sets out a theoretical account of the necessary conditions required to ‘live a good life’ that gives primacy to the value of human freedom, and uses this as a basis to identify and justify the normative basis of the contemporary ‘legal model’ of discrimination and its particular focus on combating group disadvantage.

To start with, Khaitan identifies three ‘basic goods’ which if secured to all persons will help to ensure their ‘freedom to pursue a good life unhindered by certain unjustified constraints which affect our well-being adversely’.[[69]](#footnote-69) These basic goods are ‘negative freedom, an adequate range of valuable opportunities, and self-respect’. For a person to enjoy access to these goods in a meaningful manner, he suggests that such access must be ‘secured’, ‘adequate’, ‘relational’ (i.e. reflect our shared social existence) and be ‘evaluated holistically’ across the context of a person’s life taken as a whole.[[70]](#footnote-70) Khaitan then goes on to argue that such secured access must inevitably have a relative dimension: ‘the freedom we are entitled to also depends on the freedom that others enjoy’, while ‘efforts to facilitate or improve access to these goods must give priority to the least free’.[[71]](#footnote-71)

Khaitan’s argument in this regard - which interestingly echoes some of the sociological claims made by Pickett and Wilkinson in their influential book *The Spirit Level*[[72]](#footnote-72)- is necessarily more of a sketch than a fully-fledged philosophical analysis. However, in general, he generates a rich discussion of how our freedom is invariably ‘conditioned by social forms’[[73]](#footnote-73) and dependant on others also enjoying a certain level of secured access to these basic goods – and also outlines the importance of the role of the state as a co-ordinating actor in this regard.[[74]](#footnote-74)

In making these arguments, Khaitan insists that his account of freedom is comparative, but not necessarily egalitarian – and cross-refers to the scepticism about strong egalitarian principles expressed by Raz and others.[[75]](#footnote-75) He nevertheless acknowledges the potent rhetorical appeal of the language of equality. He therefore affirms that he is presenting a ‘liberal demand’ for the state to take action to better secure sufficient liberty for all persons, but suggests that the textured and contextual understanding of liberty he presents will cater for ‘some egalitarian and dignitarian concerns’.[[76]](#footnote-76) (Having said that, Khaitan’s liberal perfectionist analysis reads at times like an elaborate attempt to arrive at an egalitarian end-point without having to rely on egalitarian premises. Furthermore, his disavowal of egalitarianism may ultimately weaken his argument – but this point will be returned to below.)

Khaitan then turns to the question of what constitutes the ‘point’ of discrimination law, i.e. what it ‘seeks to do’.[[77]](#footnote-77) As an initial step, he rejects the conventional understanding that its core function is to protect individuals against discrimination on protected grounds, as the ‘lay understanding’ assumes. He argues that this view of the purpose of discrimination law cannot account for the salience of group disadvantage within its structure and functioning.[[78]](#footnote-78) He also argues that the central purpose of discrimination law cannot be to combat irrational decision-making, given that it prohibits forms of behaviour which could readily be described as ‘rational’.[[79]](#footnote-79)

Instead, Khaitan puts forward an alternative *raison d’etre*, namely that discrimination law ‘seeks to reduce (and ultimately remove) any significant advantage gap between a protected group and its cognate groups’.[[80]](#footnote-80) In other words, he argues that its general purpose is to secure an important aspect of individual well-being by ‘reducing the persuasive, abiding and substantial relative disadvantage faced by members of protected groups’.[[81]](#footnote-81) Particular rules of discrimination law may have at best a loose relationship to this general justifying aim: but Khaitan argues that discrimination law is *‘as a whole* [author’s italics] is geared towards achieving this goal’.[[82]](#footnote-82)

Khaitan then refers back to his liberal perfectionist analysis of the constituent elements of individual well-being, and suggests that discrimination law is justified in pursuing this general aim because relative group disadvantage negatively affects the secured access of members of affected groups to the basic goods of negative freedom, an adequate range of valuable opportunities, and self-respect. In an admirably succinct few pages, Khaitan supports this argument by outlining how relative group disadvantage not only manifests itself in forms of behaviour which impact directly upon individuals but also generates a ‘stigmatising effect’ which can have a negative impact on disadvantaged groups taken as a whole.[[83]](#footnote-83) He goes on to argue that discrimination law provides a mechanism for combating these adverse consequences of group disadvantage, and is thus justified because it helps to secure individual freedom.

In developing this argument, Khaitan suggests that the various specific duties imposed by discrimination law – the prohibition on direct and indirect discrimination, the requirement not to victimise individuals who bring a discrimination claim, and so on - are all instances of a single, comprehensive duty which requires the persons to whom it applies to refrain from engaging in ‘wrongful and unjustified exacerbation of relative group disadvantage’.[[84]](#footnote-84)A breach of this duty need not necessarily involve ‘fault’, in the sense of requiring a ‘bad’ state of mind – as the ‘lay understanding’ of discrimination generally assumes.[[85]](#footnote-85) Instead, the duty is underpinned by a wider concept of wrongfulness, framed around an ‘effect-based’ understanding of discrimination: duty bearers will be in breach of their obligations if they act in a manner that exacerbates group disadvantage without adequate justification or excusing circumstances.

Khaitan justifies the manner in which this general non-discrimination duty is built around an ‘effects-based’ rather than a fault-based understanding of discrimination by reference to the need to combat relative group disadvantage. He furthermore suggests the possibility of justifying indirect discrimination, along with other statutory limitations on the reach of the prohibition on exacerbating group disadvantage, takes account of other potentially competing interests and ensures this non-discrimination duty is ‘not too demanding’.[[86]](#footnote-86) He also notes that this duty is ‘selectively’ imposed on duty-bearers defined by reference to their ‘significant ability to affect…access to basic needs’ and the ‘public character’ of their activity,[[87]](#footnote-87) and argues that this careful delineation of who qualifies as a duty bearer again helps to dilute ‘the demandingness of the duty’.[[88]](#footnote-88)

Khaitan then suggests that the justificatory logic underpinning this general non-discrimination duty also supports its extension to cover intersectional forms of discrimination, on the basis that it would enhance the capacity of discrimination law to combat group disadvantage.[[89]](#footnote-89) As he argues in the final substantive chapter of this book, this logic also supports the use of positive action measures designed to benefit members of one or more disadvantaged groups - if such measures are appropriately designed, regularly reviewed and suitably limited in scope.

8. *The Strengths and Limits of Khaitan’s Normative Analysis*

There is much to admire in Khaitan’s normative argument. He makes a compelling case as to why ‘disadvantage acquires a special character when it attaches itself to groups rather than when it is distributed randomly to individuals across all groups’,[[90]](#footnote-90) and why a strong moral case exists as to why law should protect the interests of individuals not to be subject to disadvantage on account of their membership of groups defined by ‘normatively irrelevant’ criteria.

Khaitan is by no means the first commentator to make the case as to why group disadvantage should be viewed as a core concern of discrimination law: indeed, his analysis might have benefited from more discussion as to how it relates to the work of other authors who have put forward a similar analysis (albeit predominantly from an egalitarian perspective).[[91]](#footnote-91) However, he makes an original contribution by developing a detailed argument as to how combating group disadvantage enhances individual freedom - and thereby fills a gap in much of the existing conceptual literature written from a liberal perspective, which has by and large neglected or downplayed this group dimension.[[92]](#footnote-92)

Khaitan also does a comprehensive job in demonstrating the limitations of alternative attempts to identify the normative foundations of discrimination law. His analysis of the shortcomings of theories that cling to the ‘lay understanding’ of what constitutes discrimination, thereby locking themselves into a cripplingly narrow conceptual approach, is particularly on point.[[93]](#footnote-93) He convincingly argues that the ‘lay understanding’ cannot be assumed to constitute the central case of discrimination law, either in a descriptive or a normative sense.

However, there are some gaps in Khaitan’s theoretical account of the point and purpose of discrimination law. His focus on group disadvantage means that he does not provide a justificatory explanation for those elements of the law, such as the prohibition on age and religious discrimination, which do not fit well within his group disadvantage template. As discussed above, these aspects of discrimination law appear to be designed to combat irrational decision-making and other forms of improperly motivated behaviour, and/or to protect certain individual identitarian choices which are deemed to be valuable and worthy of protection. Their purpose and justification cannot be credibly framed in terms of countering established patterns of relative group disadvantage, unless one dilutes this concept to the point of meaninglessness.

Khaitan also arguably attempts to shoehorn too much into his group disadvantage rubric. For example, he argues that the protection that discrimination law affords to cognate groups which are not generally subject to stable and sustained patterns of social disadvantage - such as men, or members of ethnic majorities – is justified on the basis of ‘expressive salience’, i.e. that it gives expression to the need for the law to be seen to be ‘even-handed’ in its treatment of different group identities, and prevents groups engaging in a process of competitive debasement’.[[94]](#footnote-94) However, this is a relatively thin justificatory basis for the largely symmetrical approach adopted by all the national legal systems coming within Khaitan’s dataset. It provides a reason why such an approach may be reconcilable with a strong focus on combating group disadvantage, but does not establish a compelling basis as to why the full rigour of, for example, the prohibition on direct discrimination should be applied to such ‘collateral’ cases, as Khaitan describes them.

In general, the moral imperative to combat group disadvantage can only provide a partial normative foundation for discrimination law. It cannot provide a comprehensive justification for the different elements of the law in this regard, which would appear to be directed towards achieving a variety of different purposes rather than the single, overarching objective outlined by Khaitan. While he claims to provide a pluralist account of the values underpinning discrimination law, in reality he focuses too much on the group disadvantage dimension – reflecting his preference for normative ‘purity’ distinctions as discussed above.

A more complex, multi-faceted analysis of the legitimacy of discrimination law is required, which would explore how its role in combating group disadvantage is one element of what Shin has described as the ‘messy plurality’ of moral concerns that it is expected to address.[[95]](#footnote-95) Such a genuinely pluralist approach might plug some of the gaps in Khaitan’s justificatory account.[[96]](#footnote-96) It will also have to engage closely with the specific distributive issues that arise in respect of each of the different protected grounds, which arguably play a key role in both shaping and justifying how discrimination law norms are applied within the particular context of each of these different grounds.[[97]](#footnote-97)

Khaitan’s analysis has another weak spot, namely his justification of why individual duty-bearers should be required to comply with the onerous requirements of the non-discrimination duty. He argues that duty-bearers are subject to an ‘effects-based’ obligation to refrain from unjustifiably exacerbating group disadvantage, which provides the normative underpinning for this wide-ranging and demanding duty. In Khaitan’s account, this obligation is derived from the manner in which group disadvantage impacts negatively upon individual freedom, and in particular on how it restricts access to an ‘adequate range of valuable opportunities’ and a healthy sense of ‘self-respect’. But it is open to question whether these liberty-based interests are sufficiently concrete to provide an adequate foundation for this claim, in particular the inherently uncertain notion of ‘self-respect’. In addition, it is debatable whether such an obligation to respect individual freedom is sufficiently compelling to justify the imposition of a general duty to refrain from discriminating in relation to the ‘eccentric distribution’ of benefits, as distinct from a duty to respect the entitlement of all individuals to a minimum degree of autonomy – especially in situations where discriminators may not obviously have behaved in a morally questionable manner.[[98]](#footnote-98) Khaitan suggests that such a duty can be viewed as having a prioritarian dimension, on the basis that securing equal treatment in the eccentric distribution of benefits will ensure the worst-off members of disadvantaged groups will gain better secured access to the basic goods necessary to enjoy meaningful liberty:[[99]](#footnote-99) but this could be viewed as constituting a relatively slender basis on which to construct a wide-ranging non-discrimination duty.

In this respect, it can be argued that Khaitan’s reluctance to rely on egalitarian arguments – even in a supplementary capacity – makes his job harder. A concern to secure individual liberty can lay the foundations for a justificatory account of discrimination law, but equality may be needed to provide cross-bracing for its walls. In particular, a solid case can be made that the concept of ‘basic equality’, to use Waldron’s formulation,[[100]](#footnote-100) must form part of any justificatory framework in this regard. It supplies a rationale as to why access to the basic goods necessary to secure individual freedom needs to be secured on a non-discriminatory (as distinct from a sufficientarian) basis, which ‘pure’ autonomy-based arguments may struggle to match.[[101]](#footnote-101)

However Khaitan denies himself the use of equality. Despite his avowed commitment to developing a pluralist account of discrimination law, he actively steers clear of invoking any egalitarian principles – reflecting his commitment to liberal perfectionism, as well as his inclination towards theoretical purity. But it is open to question whether some parts of his autonomy-based normative framework can bear the load he wishes them to carry.[[102]](#footnote-102) He might have done better to relax his preference for bright-line solutions, and open the door to more substantive engagement with egalitarian principles. Having said that, Khaitan makes effective use of his chosen building materials, and succeeds in constructing a credible and thought-provoking liberal case as to why discrimination law is justified in targeting group disadvantage – even if he perhaps is too ambitious in his architectural undertaking.

9. *Conclusion*

Khaitan embarks in this book on a quest for his ‘Holy Grail’, namely a sound normative foundation for contemporary discrimination law. He concludes that this Grail takes the form of the need to combat group disadvantage in the interests of enhancing individual freedom. Others will conclude that this moral concern represents only a part of the ultimate truth. However, Khaitan’s quest shows up the inadequacies of previous attempts to track down this Holy Grail, and the path he has laid down will encourage others to follow in his footsteps. In general, this book is a significant achievement: it represents a major addition to the theoretical literature on discrimination law.

1. + A review of T Khaitan, *A Theory of Discrimination Law* (OUP, 2015). [↑](#footnote-ref-1)
2. \* Professor of Human Rights Law, UCL. I am grateful to Tarunabh Khaitan for comments on an earlier draft, and to Julie Dickson for her patience. [↑](#footnote-ref-2)
3. T Khaitan, *A Theory of Discrimination Law* (OUP, 2015) 3. [↑](#footnote-ref-3)
4. ibid 2. [↑](#footnote-ref-4)
5. ibid 1. [↑](#footnote-ref-5)
6. ibid 4-9. [↑](#footnote-ref-6)
7. C O’Cinneide, ‘The Uncertain Foundations of Contemporary Anti-discrimination Law’ (2011) 11(2) *International Journal of Discrimination and the Law* 7. [↑](#footnote-ref-7)
8. See for example the essays collected in C McCrudden (ed), *Anti-Discrimination Law* (2nd edn, Ashgate 2004) and D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2011). [↑](#footnote-ref-8)
9. For example, much of the existing theoretical literature does not engage in any depth with the law relating to disability or age discrimination. The influential work of Sandra Fredman merits honourable mention as an exception in this regard: see S Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011). [↑](#footnote-ref-9)
10. Khaitan (n 1) 248. [↑](#footnote-ref-10)
11. ibid 1-2. Khaitan acknowledges that these terms – ‘lay understanding’ and ‘legal model’ – are relatively ‘coarse’ archetypes: however, as he notes, they serve the ‘heuristically useful’ function of shedding light on a set of conceptual tensions running through normative debates about discrimination law. [↑](#footnote-ref-11)
12. ibid 1-2. [↑](#footnote-ref-12)
13. ibid 2. [↑](#footnote-ref-13)
14. ibid. 2. [↑](#footnote-ref-14)
15. For example, discrimination law permits employers in certain situations to give preferential treatment to certain disadvantaged groups through positive action programmes, which popular discourse often views as an inherently suspect form of ‘positive discrimination’. [↑](#footnote-ref-15)
16. ibid, 2. [↑](#footnote-ref-16)
17. See e.g. the views of John Gardner, set out in particular in J. Gardner, ‘Liberals and Unlawful Discrimination’ (1989) 9 *OJLS* 1; J. Gardner, ‘Discrimination as Injustice’ (1996) 16 *OJLS* 367, and J. Gardner, ‘On the Grounds of her Sex(uality)’ (1998) 18 *OJLS* 167. See also L. Alexander, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies’ (1992) 141 *U. Pa. L. Rev.* 149. [↑](#footnote-ref-17)
18. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project Inc*., 135 S. Ct. 2507 (2015). [↑](#footnote-ref-18)
19. Various commentators have expressed strong scepticism as to whether the existing scope of discrimination law can be justified by reference to conceptual accounts of discrimination analogous to the ‘lay understanding’ of the concept: see Alexander (n 15) 213, 219; R. Arneson, ‘What is Wrongful Discrimination?’ (2006) 43 *San Diego Law Review* 775; M. Cavanagh, *Against Equality of Opportunity* (Clarendon, 2002); N. Smith, *Basic Equality and Discrimination* (Ashgate, 2011), 139-214. [↑](#footnote-ref-19)
20. See in general A. Lester, ‘Discrimination: What Can Lawyers Learn From History’ (1994) *Public Law* 224. [↑](#footnote-ref-20)
21. Doyle has noted that the harm inflicted by indirect discrimination may restrict individual autonomy to an equivalent or even greater degree than behaviour coming within the ‘central case’ of discrimination as defined above: see O. Doyle, ‘Direct Discrimination, Indirect discrimination and Autonomy’ (2007) 27(3) *OJLS* 537, 546-551.Disability rights theorists have similarly been highly critical of the limitations of the ‘lay understanding’ of discrimination: see e.g. S. Bagenstos, ‘”Rational Discrimination”, Accommodation, and the Politics of (Disability) Civil Rights’ (2003) 89 *Virginia L. Rev.* 825. [↑](#footnote-ref-21)
22. Khaitan (n 1) 5-6. [↑](#footnote-ref-22)
23. ibid 8. [↑](#footnote-ref-23)
24. See e.g. Gardner, ‘On the Grounds of her Sex(uality)’ (n 22) 182-3. [↑](#footnote-ref-24)
25. See for example the judgment of the UK Supreme Court in *R (E) v Governing Body of the Jewish Free School* [2009] UKSC 15, which affirmed that motive was not required to establish the existence of direct discrimination. [↑](#footnote-ref-25)
26. Khaitan (n 1) 6. [↑](#footnote-ref-26)
27. ibid 5-6. [↑](#footnote-ref-27)
28. ibid 7. [↑](#footnote-ref-28)
29. This line of criticism is well-established in the theoretical literature: see P. Westen, ‘The Empty Idea of Equality’ (1985) 95 *Harv. L. R.* 537; J. Raz, *The Morality of Freedom* (Clarendon, 1986), Ch. 9; E. Holmes, ‘Anti-Discrimination Rights Without Equality’ (2005) 68(2) *MLR* 175. [↑](#footnote-ref-29)
30. ibid 7-8. [↑](#footnote-ref-30)
31. For example, Khaitan suggests that egalitarian theories are vulnerable to the ‘levelling down’ objection, i.e. that they provide no normative basis for objecting to a reduction of the standard of treatment accorded to some to ensure a level playing field for all. Even leaving aside the issue of whether this objection has merit (which Khaitan assumes without argument), it cannot be readily directed at some of the more developed egalitarian theories that are invoked to explain and justify discrimination law: see e.g. E. Anderson, ‘What Is the Point of Equality?’ (1999) 109(2) *Ethics* 287; Fredman (n 7). [↑](#footnote-ref-31)
32. Khaitan (n 1) 9. [↑](#footnote-ref-32)
33. Khaitan cites the views of George Rutherglen as exemplifying this ‘pessimist’ strain of thought: see in particular G. Rutherglen, ‘Concrete or Abstract Conceptions of Discrimination’, in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2011), 115. [↑](#footnote-ref-33)
34. Khaitan (n 1) 9. [↑](#footnote-ref-34)
35. ibid 9. [↑](#footnote-ref-35)
36. Khaitan acknowledges that how discrimination is conceptualised will inevitably impact on normative questions relating to the justification of the applicable legal norms in this regard, but emphasises that a distinction nevertheless exists between these two lines of analysis: ibid 5-6. [↑](#footnote-ref-36)
37. ibid 10. [↑](#footnote-ref-37)
38. Khaitan does not develop this point in further detail, reflecting a general tendency in this book for him to steer clear of overt criticism of existing theoretical writing in this field. This diplomatic approach is a little unsatisfactory, as it often leaves the reader unsure as to whom exactly such critical remarks are directed towards. [↑](#footnote-ref-38)
39. Khaitan clarifies that the focus of the book is on the ‘normative rules’ of the system, as distinct from its practical enforcement: his ambition is to evaluate discrimination law ‘in terms of its stated aspirations’. ibid 13. [↑](#footnote-ref-39)
40. ibid. 12. [↑](#footnote-ref-40)
41. ibid 13-17. [↑](#footnote-ref-41)
42. Khaitan (n 1), 24. [↑](#footnote-ref-42)
43. ibid 26. [↑](#footnote-ref-43)
44. ibid 28. [↑](#footnote-ref-44)
45. Thus, for example, under the definition of indirect discrimination applied within all the legal systems that form part of Khaitan’s dataset, it is not necessary for the particular disadvantage at issue to be ‘caused’ by possession of the relevant characteristic as long as adequate correlation exists between the prohibited act and a pattern of relative disadvantage associated with the ‘personal ground’ in question. [↑](#footnote-ref-45)
46. ibid 29-30. [↑](#footnote-ref-46)
47. Khaitan notes that general regulatory measures – such as the requirement to pay all employees a minimum wage – are not viewed in any of the states surveyed as forming part of discrimination law. He suggests this is because they do not satisfy this ‘cognate group condition’: ibid 30. [↑](#footnote-ref-47)
48. ibid 31. [↑](#footnote-ref-48)
49. ibid 32-39. [↑](#footnote-ref-49)
50. ibid 37. Khaitan thus suggests that a prohibition on weight discrimination would satisfy the ‘relative disadvantage’ condition, but notes that the states making up his dataset have chosen not to use discrimination law to respond to this specific social problem. [↑](#footnote-ref-50)
51. ibid 38-41. [↑](#footnote-ref-51)
52. ibid 39. [↑](#footnote-ref-52)
53. ibid 42. [↑](#footnote-ref-53)
54. ibid 41. [↑](#footnote-ref-54)
55. See e.g. B Hale, ‘The Quest for Equal Treatment’ [2005] *Public Law* 571 (discrimination law designed to combat irrational stereotyping based on protected characteristics). [↑](#footnote-ref-55)
56. See in particular A McColgan, *Discrimination, Equality and the Law* (Hart, 2014). [↑](#footnote-ref-56)
57. Khaitan (n 1) 49-60. [↑](#footnote-ref-57)
58. ibid 69-73. [↑](#footnote-ref-58)
59. As Khaitan acknowledges, the US is a not insignificant exception to this trend: ibid 70-71. [↑](#footnote-ref-59)
60. ibid 71-73. [↑](#footnote-ref-60)
61. ibid 77-79. [↑](#footnote-ref-61)
62. See in general L Waddington and A Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (2002) 18(4) *International Journal of Comparative Labour Law and Industrial Relations* 403–428. [↑](#footnote-ref-62)
63. Khaitan (n 1) 51. [↑](#footnote-ref-63)
64. See e.g. *Clift v UK*, App. No. 7205/07, decision of 13 July 2010, ECHR. In general, Khaitan assumes that fundamental rights jurisprudence relating to discrimination issues is now ‘irrevocably tied’ to the scope and substance of national anti-discrimination legislation: ibid 69. However, this assumption glosses over the existence of some significant variations between these two inter-related but distinct sets of legal standards. [↑](#footnote-ref-64)
65. See for example the approach adopted by the European Court of Human Rights in *Eweida v UK* (2013) 57 EHRR 8, and by the English Court of Appeal in *Mba v London Borough of Merton* [2013] EWCA Civ 1562. [↑](#footnote-ref-65)
66. See for example *Home Office v Essop* [2015] EWCA Civ 609, which has been (rightfully) criticised by Khaitan: see T. Khaitan, ‘Indirect Discrimination Law: Causation, Explanation and Coat-Tailers’ (2016) 135 *LQR* 35. [↑](#footnote-ref-66)
67. See for example *R (Begum) v Denbigh High School* [2006] UKHL 15. [↑](#footnote-ref-67)
68. See in this respect C McCrudden, ‘Theorising European Equality Law’, in C Costello and E Barry (eds) *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003), 1-38. [↑](#footnote-ref-68)
69. Khaitan (n 1) 92. [↑](#footnote-ref-69)
70. ibid 92-98. [↑](#footnote-ref-70)
71. ibid 113. [↑](#footnote-ref-71)
72. K Pickett and R Wilkinson, *The Spirit Level: Why Equality is Better for Everyone* (Allen Lane, 2009). [↑](#footnote-ref-72)
73. Khaitan (n 1) 103. [↑](#footnote-ref-73)
74. ibid 103-113. [↑](#footnote-ref-74)
75. Khaitan (n 1) 114-15 [↑](#footnote-ref-75)
76. ibid 115. [↑](#footnote-ref-76)
77. ibid 117. [↑](#footnote-ref-77)
78. ibid 120. [↑](#footnote-ref-78)
79. ibid 134. [↑](#footnote-ref-79)
80. ibid 121. [↑](#footnote-ref-80)
81. ibid 18. [↑](#footnote-ref-81)
82. ibid 121. [↑](#footnote-ref-82)
83. ibid 127-8. [↑](#footnote-ref-83)
84. A breach of this duty is made out when individuals experience harm, which can take expressive form – see Khaitan (n 1) 151. [↑](#footnote-ref-84)
85. ibid 144. [↑](#footnote-ref-85)
86. ibid 194. [↑](#footnote-ref-86)
87. ibid 212. [↑](#footnote-ref-87)
88. ibid 199-200. [↑](#footnote-ref-88)
89. ibid 162-3. [↑](#footnote-ref-89)
90. ibid 41. [↑](#footnote-ref-90)
91. See O Fiss,‘Groups and the Equal Protection Clause’ (1976) 5(2) *Philosophy and Public Affairs* 107; C Sunstein, ‘The Anticaste Principle’ (1994) 92(8) *Michigan Law Review* 2410; R Post, ‘Prejudicial Appearances: The Logic of American Anti-Discrimination Law’ (2000) 88 *California Law Review* 1; Fredman (n 14); McColgan (n 61). [↑](#footnote-ref-91)
92. Contrast for example Alexander’s account of the moral wrongfulness of discrimination: Alexander (n 15). [↑](#footnote-ref-92)
93. Again, contrast the limited explanatory reach of Alexander’s analysis: ibid. [↑](#footnote-ref-93)
94. Khaitan (n 1) 179-180. [↑](#footnote-ref-94)
95. P Shin, ‘Is There a Unitary Concept of Discrimination?’, in Hellman and Moreau (n 6), 172-3. The moral concerns underlying the ‘lay understanding’ of discrimination form part of this plurality: as such, this particular view of the purpose and justification of discrimination law is not incorrect as such, just radically under-inclusive. [↑](#footnote-ref-95)
96. For example, it could provide a justification for the clear distinction that national legal systems maintain between the prohibition on direct and indirect discrimination, despite Khaitan’s insistence that they share a common purpose and justification: direct discrimination provides an important corrective remedy against certain improperly motivated forms of decision-making that doubles up with its role in addressing group disadvantage, whereas the prohibition on indirect discrimination is primarily focused on the latter function. [↑](#footnote-ref-96)
97. See Arneson (n 17). [↑](#footnote-ref-97)
98. In Khaitan’s account of the normative underpinning of the non-discrimination duty, issues of fault are subsumed within the scope and functioning of the justification defence to discrimination claims: he suggests that duty-bearers who breach the legal prohibition on direct discrimination are likely at least to have acted with ‘reckless disregard’ for the risk that their victim would suffer because of their membership of a protected group, while duty-bearers who breach the prohibition on indirect discrimination (and thus have been unable to invoke the objective justification defence that applies in this context) will at the least have acted in a negligent manner: Khaitan (n 1) 184-5. [↑](#footnote-ref-98)
99. ibid 128-9. [↑](#footnote-ref-99)
100. J Waldron, ‘Basic Equality’ (2008) *New York University Public Law and Legal Theory Working Papers*, No 107, available at <http://lsr.nellco.org/nyu_plltwp/107> (last accessed 1 February 2016). [↑](#footnote-ref-100)
101. Space prevents detailed elaboration of this argument. However the reader is directed to Shin’s contention that an obligation exists to act in a manner that expresses equal respect for the moral status of all individuals, which may be relevant to an adequate evaluation of the justifiability of a particular form of behaviour: see P Shin, ‘The Substantive Principle of Equal Treatment’ (2009) 15 *Legal Theory* 149. [↑](#footnote-ref-101)
102. Khaitan suggests that discrimination law’s focus on combating group disadvantage is not readily compatible with a commitment to strong egalitarian principles, on the basis that any benefits that accrue to disadvantaged groups through the operation of the law in this regard fall far short of the normative demands of strong egalitarianism: Khaitan (n 1) 130-133. However, a similar objection can arguably be made in respect of the normative demands of a strong commitment to a liberal perfectionist understanding of liberty. [↑](#footnote-ref-102)