

# Tarunabh Khaitan: Caste as Race—A Welcome First Step

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My earliest memory of my encounter with the caste system is that of a ten year old growing up in my small hometown in Bengal. Playing with the neighbourhood kids, I spotted the familiar figure of Lakkhi—squatting over the open drain in the neighbourhood, cleaning it assiduously. Her back was turned to us, and thinking it would be a good idea to surprise her, I snuck close and playfully threw my arms around her. That innocent embrace invited immediate criticism from children not yet in their teens, taunting me for having touched an ‘untouchable’. I remember feeling ashamed of myself for having failed to imbibe the nuances of caste. It would take a good few years for me to realise that the real reason to be ashamed was not thinking about what Lakkhi felt at that time.

But caste is not something that exists only in the cities and villages in the Indian subcontinent. With the diaspora, caste has travelled around the world, the United Kingdom being no exception. Despite activist and academic demands, the then Labour government decided not to prohibit caste discrimination when it enacted the Equality Act 2010. Instead, section 9(5) of the Act *permitted* a Minister to amend the Act ‘so as to provide for caste to be an aspect of race’—a power that was never exercised. Section 97 of the recently enacted Enterprise and Regulatory Reform Act 2013 now *requires* the concerned Minister to amend the definition of ‘race’ in section 9(1) of the Equality Act to include ‘caste’. The new legislation also empowers the Minister to review the operation of the amended section 9(5) of the Equality Act and repeal it if necessary. The House of Lords would have preferred a more straightforward and permanent expansion of the definition of ‘race’ by Parliament directly, but compromised to persuade a cautious Commons.

The controversy illuminates a key aspect of the *point* of discrimination law. Discrimination law does not prohibit all distinctions between classes of persons that are unreasonable, arbitrary, or even wrongful. The Equality Act will not interfere with an employer’s refusal to hire a qualified applicant named Wendy because he disapproves of people whose first names begin with the letter ‘W’. Similarly, (unless a correlation with race can be established) eye-colour is not a protected characteristic on its own right. Nor is football club fandom. In order

to be protected, the ground has to have some salience in a given society, a salience conferred upon it by its close connection with relative group disadvantage. Sex is protected because women are significantly more disadvantaged than men, and race is protected because blacks (and some other races) suffer pervasive disadvantage (it will take more than a blog post to explain why it may still be alright to protect men and whites anyway). Wendy is not protected because the letters of people's names do not define any group that suffers (or is likely to suffer) pervasive and systemic disadvantage. The employer's refusal to hire her is eccentric, arbitrary and wrong, and may even be illegal under certain circumstances—but not by virtue of discrimination law. It is unlikely that another employer will treat Wendy similarly.

The current controversy is really about whether caste is salient enough in this country to merit the protection of the Equality Act. In other words, the moot question is whether, in the UK, a *dalit* person—someone at the bottom of the caste hierarchy—is more like a woman or a black person or like Wendy. There has never been any doubt about the salience of caste in India. The first legal response in British India came early in the form of the Caste Disabilities Removal Act 1850. The Constitution of 1950 abolished untouchability, provided for *dalit* access to temples, prohibited caste discrimination and mandated affirmative action for 'lower' castes. Several statutes have been enacted after independence too. Of course, serious concerns over the design, implementation and impact of these measures remain. The point is that caste clearly satisfies the salience requirement in the Indian context, and this has been recognised by Indian law for over a century and a half. The question before the Westminster Parliament was whether it is also salient in the UK.

A government commissioned study reported in late 2010 that caste was a relevant feature in the lives of about 5% of the British population to make them potential victims or perpetrators of caste discrimination. It also found that caste was not specific to a particular religion, but affected all religious groups from the Indian subcontinent. The report identified evidence—mostly qualitative case studies—'suggesting caste discrimination and harassment of the type covered by the Equality Act 2010'. Individual cases involving allegations of caste-related harassment in schools and workplace, denial of admission to a school, discrimination in recruitment and promotions by employers, and discrimination by health and social care workers were recorded. There were also cases of discriminatory treatment which would probably not be covered by the Equality Act, including segregated places of worship, caste-based voting behaviour and attempts to prevent inter-caste marriages.

The study recognised that although '*a single case of caste discrimination or harassment proves that it exists ... legislation to address a single case is rare. Therefore, if any cases of caste discrimination or harassment were identified, the study needed to provide some indication of whether these were isolated cases or not. Within this study, this could only be done qualitatively, drawing on the evidence in the literature, from discussions with interested parties and experts and from the qualitative interviews. Quantifying the extent of caste discrimination would require a representative survey.*' (11) This methodological limitation also

meant that no evidence of indirect caste discrimination could be produced. The absence of concrete quantitative data was perhaps one reason why the government and the Commons dithered over the extension of the protection of Equality Act to caste.

Even the limited qualitative evidence unearthed by the 2010 study, along with plausible surmises based on the salience of caste in the subcontinent, caste's close connection with cultural identity and the enthusiasm with which some migrant communities seek to preserve cultural distinction, suggest that caste-based discrimination is likely to be a significant phenomenon in certain sections of the South Asian population living in the UK. Furthermore, the web of personal, social and professional interactions and relationships is likely to be denser and stronger within a minority ethnic group living in a multicultural society. Caste discrimination can have a pervasive effect on many significant aspects of the life of a 'low' caste person living in a largely South Asian neighbourhood—where the local schools, workplaces, places of worship, shops, restaurants and hotels are likely to have a substantial South Asian presence—even though only 5% of the British population is potentially caste-conscious. To such caste-burdened individuals, it is little solace that the rest of the population is indifferent to caste. The relevant experiences of a *dalit* girl from Birmingham are far more likely to resonate with that of a black man in inner city London than to that of Wendy, wherever she might be from. The issue of caste discrimination in the UK highlights the need to protect even those characteristics that are salient only within particular sub-groups in a given society.

In the absence of good quantitative evidence, Parliament has done well to be guided by the available qualitative evidence and plausible surmises and prohibit caste discrimination (even if only tentatively and temporarily)—for the cost of inaction is likely to be greater. More concrete and comprehensive data is necessary to determine whether treating caste as an aspect of race is appropriate. It may turn out that our surmises were mistaken and the qualitative data inadequate. On the other hand, future research could buttress our commitment to deal with caste discrimination in the UK and require further action.

It may turn out that caste's particular impact on the marital and religious lives of people requires a rethink of antiperfectionist liberal assumptions about the necessary distance between the state and certain areas of private life. Caste is likely to intersect with race and religion to a significant degree, and caste discrimination could be compounded by discrimination based on sex, disability and marital status. Although section 14 of the Equality Act recognises discrimination based on a combination of two grounds, it may not be adequate to capture the various ways in which caste interacts with other protected grounds. Given caste's strong connection with an unprotected ground—vegetarianism—the law may need to consider whether distinctions based on food preference amount to indirect caste discrimination.

Instead of being an outlier among grounds protected by discrimination law, caste (like disability before it) may bring new insights to our understanding of the concept of discrimination—insights that may well benefit groups carrying the burdens of other forms of discrimination too.

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