



Detained But Equal

Human rights are universal, but human rights violations are not. Some people are at higher risk of having their rights violated. When the higher risk is associated with more or less stable personal characteristics such as race, sex, religion, disability, sexual orientation, etc., and materialises in a less favourable treatment or a particular disadvantage, the result may amount to discrimination: a violation of the fundamental right to equality.

Most situations and settings in a person's life can be the context in which discrimination occurs. However, discrimination in some contexts may be more damaging than in other. When we are sitting peacefully among our loved ones at the dinner table at home, we feel safe, and less exposed to discrimination. But when we have been detained and are sitting in an unfamiliar cell in some detention centre, we may feel that our life as we know it has ended. Indeed, anyone who has spent time in detention would agree that few life experiences make us more vulnerable.

Now, if we combine the higher risk of being a victim of discrimination due to possessing a certain personal characteristic with the higher risk arising from being in detention, the result is a risk on a different scale, and in any case much greater than its two components. For example, the *mak nyahs* in Malaysia – the transgender persons who frequently find themselves in detention – have

suffered degrading abuse while in custody. In this issue, the Testimony section reveals disgraceful conduct of law enforcement officers, such as making the *mak nyahs* remove their clothes, sexual assault, humiliating ridicule, and beatings. The *mak nyahs* in detention are more vulnerable and have a stronger protection need than other Malaysians in detention, as well as compared to trans persons outside detention.

Furthermore, there is one important sense in which, if one is discriminated against in the context of detention, one can experience more damage and despair than if they are discriminated against in other very dangerous contexts, such as being a victim of a hate crime at the hands of some vigilante group, or being a member of a disadvantaged group during armed conflict. In these latter situations, one can at least hope that the state – the duty bearer against whom we claim our rights – might step in to protect us, or deliver justice and provide remedy to us at some future point. In principle, the state is on our side. But the discrimination that occurs in the context of detention is an act done by the very agency that should be our rights protector. While there are a number of other contexts in which the state is the discriminator, e.g. in public sector workplaces, detention is a case in which the state has more control over more aspects of a person's life. Hence, the protection needs of members of disadvantaged groups in detention should be a very high priority in both

domestic judicial and international scrutiny over the enjoyment of human rights, as well as, of course, a constant preoccupation of civil society watchdogs. The interview with Mads Andenas and Wilder Tayler in this issue provides an expert stocktaking on the issue of discriminatory detention in international human rights.

Of all categories of persons who are at higher risk of discrimination in the context of detention, non-citizens should be further singled out: compared to nationals, they face additional problems arising from being an alien – poorer or non-existent support networks, language problems, xenophobia, etc. There are different types of detention – criminal, immigration, or security; however, aliens are at higher risk of discrimination in all detention settings.

Does it get any worse than that? Or rather, are all aliens equally at risk of discrimination in the context of detention? While it is difficult to make general assertions as to which countries' nationals fare worst at the hands of which other countries' detaining authorities, it is clear that there is one category of persons on behalf of whom no state would step in as a rights guarantor: the stateless. Being stateless while in detention may be the bottom of a vortex of rights denial.

At this point, some readers will object this line of thought: there is no hierarchy of human rights, there is no hierarchy of victims of human rights abuses! Really? How do we then reconcile the holistic doctrine of “no hierarchy” with the need to be pragmatic and make strategic choices? And is it even correct to interpret the universality, indivisibility and inter-connectedness of human rights as a lack of hierarchy, be that a hierarchy of rights or of rights violations? This is

in my view a somewhat academic question on which there may be legitimate differences of opinion among human rights theorists.

Nonetheless, prioritising human rights work is an inescapable task in view of the limited capabilities of the human rights movement compared with the enormity of human rights violations around the world. And in prioritising work from the point of view of the equality of rights, ERT followed a certain logical path – sketched above – in arriving at the conclusion that the detention of stateless persons should be an issue central to its thematic choices.

Here is the important question: Why is it then that after decades of functioning of an international system of human rights protection, this issue had received so little attention that when ERT published, in July 2010, its report *Unravelling Anomaly: Detention, Discrimination, and the Protection Needs of Stateless Persons*, it was greeted as the first comprehensive report on the issue? The report itself posed and answered this question: the answer was the very history of constructing the anomaly of “statelessness”, taken together with states' propensity to keep undesirable immigrants out of their borders, whereby detention has increasingly become a tool of migration management. The report confirmed – through the evidence it relied on and exposed – that the potential for discrimination which I deduced above from the basic axioms of human rights had materialised in a massive tragedy of broken lives, scattered throughout the world.

In the Special section, in a crisp and clear background article Stefanie Grant frames the more general issue of discriminatory detention in the context of international human rights law. She looks at discrimina-

tion in respect to the decision to detain, and then to discrimination in respect to a number of conditions of detention. Following this, ERT makes one more step in the search for solutions to the problems discussed in *Unravelling Anomaly*. Absent states' championship on the issue of protecting stateless persons from discrimination in the context of detention, and in view of the low awareness on this issue, ERT decided to switch to a DIY mode, and act on one of its own recommendations: undertake the drafting of guidelines on the detention of stateless persons. The purpose of the guidelines is to minimise the risk of discrimination and other human rights abuses of stateless persons in detention. As Amal de Chickera explains in his introductory comments, the guidelines mainly reflect established principles of international human rights law, while a few reflect international good practice. The guidelines are necessary as immigration regimes are getting stricter, immigration detention is becoming more common and stateless persons are disproportionately affected by arbitrary and unlawful detention.

This standard-setting exercise was not performed in isolation from critical players: on the contrary, ERT consulted UNHCR, as well as detention and statelessness (including refugee) experts and advocates from a number of organisations. To ensure that it has been exposed to as much constructive

critique as possible, ERT is intent on reaching out to a broader circle of interested persons, and publication of the draft guidelines in this issue is one way of doing so.

The messages are simple: there should be a presumption against detention of stateless persons; detention should be non-discriminatory in every respect; there should be a time limit regarding its length; alternatives to detention exist and should be applied. In her article on alternatives to detention, Alice Edwards compares several models of alternatives and shows their "workability", even if the criteria for that are not primarily concerned with human rights but with implementing governmental migration policies.

The broader theme, however, is the relationship between the right to equality and detention. The principles on equality should apply in detention settings as they do in all other areas of life regulated by law. To date, detailed equality legislation and policies have been better in addressing discrimination in other contexts: employment, provision of goods and services, education, etc. But detention has been frequently the realm of exemptions, in law or in practice, and governed by other principles, such as fighting crime, ensuring public safety and national security, or migration management. The need now is for stakeholders to take a fresh look at detention from a unified human rights framework on equality.

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