

Imploding the Mirage: The Yogyakarta Principles and the New Era of Globalization

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The aim of the article is to examine the role of the Yogyakarta Principles in the new era of globalization. The Principles could be assimilated for their modesty and multiple points of entry in the global system. However, they have not necessarily created formal protections for sexual minorities that keep being abused globally because conservative elites share goals and tactics among themselves to repress these minorities.

Keywords: Yogyakarta principles, sexual orientation, gender identity, human rights, globalization

Introduction

The 1948 Universal Declaration of Human Rights assumes a binary model of sex and gender, which reveals its patriarchal inheritance and the prevalence of a heteronormative order. Some implicit assumptions about sex, gender, and sexuality brought the possibility to address these issues in human rights agreements, as in the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women. The 1994 *Toonen vs. Australia* case in the UN Human Rights Committee indicated that nondiscrimination provisions concerning sex of the International Covenant on Civil and Political Rights could be seen as prohibiting discrimination based on sexual orientation, although the Covenant is only enforceable in states which have signed its Optional Protocol. The expansion of the LGBT movement to advocacy on behalf of sexual orientation and gender identity was a result of the increasing tendency of activists to define themselves by what they were not—heteronormative and gender-conforming. In 2003, Brazil issued a resolution with 19 supporters asking the UN Human Rights Commission to take notice of human rights violations based on sexual orientation, the first resolution of its kind. The vote was delayed until 2004 due to opposition by conservative states (Linde, 2015). Heteronormative perspectives of culture and religion indicated that, if sexual orientation were defined as a human right, the protection of children would be threatened. Transgender issues have also been absent from UN human rights debates, although claims by transgender people created the basis for the 1991 US Bill of Gender Rights, revised by the International Conference of Transgender Law and Employment Policy into the 1996 International Bill of Gender Rights. At the UN, gender has been a synonym for biological sex (Waites, 2009; Jesus & Kamlot, 2017).

The 2006 International Conference on LGBT Human Rights and the resulting Declaration of Montreal, and the launch at the UN Human Rights Council of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity have pushed sexual orientation and gender identity onto the international agenda. The 29 Yogyakarta Principles—drafted in

November 2006 by a group of international human rights law experts in Yogyakarta, Indonesia—were mainly based on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) regarding language and terminology. The ICCPR is the source of the largest number of principles. The Principles added wording explicitly noting that it applies regardless of sexual orientation or gender identity and included the rights to recognition before the law; security of the person; privacy; freedom from arbitrary detention; a fair trial; treatment with humanity in detention; freedom from torture and cruel, degrading or inhuman treatment; protection from exploitation, sale, and trafficking; freedom from non-consensual medical treatment and scientific experimentation; freedom of assembly and association; freedom of opinion and expression; freedom of thought, conscience, and religion; freedom of movement; and the right to found a family. The ICESCR is the inspiration for the principles addressing the rights to work, social security, an adequate standard of living, adequate housing, education, the highest attainable standard of health, and participation in cultural life (Brown, 2010; Jesus, 2009).

Many local, national, and international actors have invoked the Yogyakarta Principles as an authoritative document on the rights of sexual minorities worldwide, although the document is not legally binding for any state or governing body (Thoreson, 2009). The Principles have become a standard-setting document to combat sexual orientation and gender identity discrimination in international law, government policy, and domestic courts. However, the Principles sacrifice legal accuracy. Many jurists and policymakers relucted to cite them for fear of being trapped into accepting more far-reaching demands. The Principles have also met limited success among non-lawyers, including grassroots human rights activists in many countries (Brown, 2010). The aim of the article is to examine the role of the Yogyakarta Principles in the new era of globalization. I argue, in line with Thoreson (2009), that the Principles could be assimilated for their modesty and multiple points of entry in the global system. However, they have not necessarily created formal protections for sexual minorities that keep being abused globally because conservative elites share goals and tactics among themselves to repress these minorities.

The Dominant Meaning of the Yogyakarta Principles

Many states perpetrate abuses on account of sexual orientation and gender identity, and private violence and discrimination against people perceived to be non-heterosexual flourish—frequently with government acquiescence, such as the rape of lesbians to “cure” them of their sexual orientation—as well as the arrest and prosecution of people for failing to conform to legally mandated gender roles. In some countries, non-heterosexual activity may be punished with imprisonment, hard labor, corporal punishment, or death (Jesus, 2014a, 2017b). Sexual orientation and gender identity nonconformity have also been grounds for denial of access to healthcare programs, employment, and public housing, even where discrimination against people based on sexual orientation and/or gender identity is illegal (Brown, 2010; Jesus, 2020; 2021). In this context, the Declaration of Montreal uses the expressions “sexual orientation” and “gender identity” to formulate its proposals for worldwide government policies against discrimination, but medical and psychological perspectives on sexuality and transgenderism which inform and structure political debate seem to refer to fixed and given aspects of a person (Linde, 2015). Its practical impact outside of activist networks has been quite limited because it has not provided a program for policymakers (Thoreson, 2009). In the 2006 Yogyakarta meeting, many attendees worked within the UN system, and some were judges or professors in Human Rights Law (Dittrich, 2010). The Yogyakarta Principles were a statement of what international human rights law could

say on sexual orientation and gender identity issues considering the principles of universality and non-discrimination (Sanders, 2008).

The Yogyakarta Principles refer to “sexual orientation” and “gender identity”, which ensures their applicability over potential objections that diversity in sexual orientation and gender identity are imported or associated with foreignness and help further their universality to fight impunity and bring protection regarding the violence and discrimination based on sexual orientation and gender identity. According to the Principles, “sexual orientation” refers to each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. It encompasses both subjectivity and behavior/action, in a manner which could implicitly include bisexuality. However, the homosexual/heterosexual binary in Western societies seems to exclude bisexuality in human rights conventions and dominant international discourses. The concept of “gender identity” refers to each person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function) and other expressions of gender, including dress, speech, and mannerisms. Nevertheless, it tends to privilege notions of a dualist model of gender identity over conceptions of blurred identifications. Besides, the principles indicate that sexual orientation and gender identity are integral to every person’s dignity and humanity, which can be questioned by asexual people. Even though the concepts of sexual orientation and gender identity have entered human rights discourses, they are not necessarily open to reinterpretation and the assignation of new meanings in the light of essentialist understandings in mainstream scientific and public discourses (Brown, 2010; Linde, 2015; Waites, 2009).

The Critique of the Dominant Meaning of the Yogyakarta Principles

Although the Yogyakarta Principles have been supported by multiple actors, there have been some critical commentaries by religious NGOs and silence from some African and Asian states (Sanders, 2008). The Yogyakarta Principles do not have notes and comments with the explanation of the legal underpinnings of each principle. They also do not have citations to any kind of authority, which means that no support, beyond the drafters’ reputations as jurists and the text of the document itself, is offered to bolster the Principles’ accuracy. Some of them simply restate binding law, but most are only binding on some states, depending on the nature of the interpretative body within the treaty regime the state belongs to, and the commitments a state may have made within that regime. States may also choose to accept such interpretations as binding and not to comply significantly with these treaty body decisions. They can also see interpretations as purely advisory. Many assertions—such as the right to freedom from arbitrary deprivation of liberty—conflict with the laws or practices of some states, and some are protected by international law only in states party to treaties with such protections. The Principles also omit the concept of progressive realization from their discussion of economic, social, and cultural rights. Regarding the “right to family” principle, the dominant view among courts and tribunals is that “family” in international law typically refers to a heterosexual couple and its children (Brown, 2010).

LGBT, queer, and allied NGOs and activists contest the dominant meanings of “sexual orientation” and “gender identity” in the Yogyakarta Principles, because they still privilege a binary model of gender, and sexual behaviors, identities, and desires defined by this model. Sexuality and gender elude Western categories, and the Western gender/sexuality distinction can be questioned (Waites, 2009). The concept of sexual orientation,

assigning people an identity based on the gender of their object-choice, is not typical of all non-Western societies, which means that defining people as having a sexual orientation integral to their humanity constitutes an exportation of the Western model of sexual orientation. According to queer theorists, the binary hierarchical categories of gender and sexuality are parts of the problem as these categories mandate that every person must have a gender or sexual orientation. The Yogyakarta Principles are an attempt at offering freedom of, but not freedom from, sexual orientation and gender identity. They do not create the basis for an emancipatory project to transcend this framework. For example, same-sex marriage is conceived as the ultimate form of sex rights in human relationships and family, and the potential in rethinking kinship detached from descent or marriage does not occur (Gross, 2013; Jesus, 2010; 2014b). The Principles do not provide a legal guarantee, which protect elites that use the language of savagery, perversion, and degeneracy to differentiate sexual minorities from those who they consider to be protected by human rights. The authors of the Principles have also maximized the ability of NGOs and governments to work together to translate this global framework into localized changes in multiple arenas (Thoreson, 2009).

Conclusion

The employment of “sexual orientation” and “gender identity” in the Yogyakarta Principles is adopted from biomedical and psychological understandings, but broad definitions open possibilities for transcending these perspectives (Waites, 2009). In its 2011 report into discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, the UN High Commissioner for Human Rights stated that governments and inter-governmental bodies have often overlooked violence and discrimination based on sexual orientation and gender identity, such as murder, rape, criminalization of same-sex sexual relations, torture, and the application of the death penalty, in addition to multiple types of discrimination (United Nations High Commissioner for Human Rights, 2011). However, there is no binding international law that protects individuals based on their sexual orientation or gender identity, nor are there any UN organs or agencies specifically committed to their protection. The 2012 statements by the UN General Secretary proclaiming LGBT rights as human rights and the global condemnation of Uganda, Cameroon, and Nigeria for their enactment of punishments for homosexuals were promising developments, but initiatives to include sexual orientation and gender identity as protected categories under international law have largely failed (Jesus, 2011; 2012; 2014c; 2018). There is also the lack of LGBT NGOs with consultative status with the UN’s Economic and Social Council (ECOSOC), which would allow them to participate in debates and proceedings through access to diplomats and the opportunity to provide expertise on issues (Jesus, 2017a; Linde, 2015). Beyond the UN, sexuality and gender identity expose the parameters of a rights-based approach and shed light on its limitations, because they are the least popular or most controversial in the global arena that draw attention to the biases, oversights, unenforceability, and hypocrisies of international human rights regimes (Thoreson, 2009).

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