

# What to do with the Yogyakarta Principles

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## ***Yogyakarta Principles as a framework***

When Arus Pelangi first heard in late 2006 about an impending meeting of international lawyers and human rights activists to discuss issues concerning sexual orientation<sup>3</sup> and gender identity<sup>4</sup>, there was a bit of a fuzz why were they were doing so secretive? It seemed as if no LGBT [Lesbian, Gay, Bisexual & Transgender] organization was to be involved. The matter died down because nothing was heard from that meeting anymore. Arus Pelangi was just getting itself established and thought it should better know its place.

But in early 2007, there was a flurry of announcements of an impending launching of an important document on the implementation of international laws in relation to sexual orientation and gender identity. The Yogyakarta Principles was launched during a UNHRC session and became an instant hot topic among LGBT communities around the world. Suddenly came the realization what that secretive meeting was all about.

Despite all the fuzz about the Yogyakarta Principles, there is no legally binding mechanism to have them enforced by the State Parties; it is not even an official UN document.

Yet its content makes sense; they outline principles that are already accepted for general circumstances since they have been incorporated in the whole set of international covenants and conventions. The Yogyakarta Principles only states what the rights are for every person, including for those with a different sexual orientation and/or gender identity.

## ***Indonesian Law in the face of the Yogyakarta Principles***

In many ways the Indonesian Law is very far from compliant to the Yogyakarta Principles. Below are just a few examples.

### PRINCIPLE 3. The Right to recognition before the law

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

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<sup>3</sup> to refer 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;

<sup>4</sup> to refer to each person's deeply felt 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 by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;

States shall:

- a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- c) Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;
- d) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- e) Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- f) Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

The Law No. 23/2006 on Civil Administration [*UU No.23 Tahun 2006 Adminduk*] was seen as an important step in easing the difficulties for many minorities in obtaining ID cards and other legal documents. However, many shortcomings are still there.

Though the process for legally changing one's name is outlined in Article 59 of the Law on Civil Administration, the process for reporting this name change is too long, if not impossible, for *warias* [transgender/transsexuals]. In order to legally change one's name, one must first apply for legal name change at the local offices of the Federal Courts, before submitting this permission to the Office of the Registrar. This may seem quite simple, but is complicated by the fact that *warias* often don't possess any form of legal documentation or identification in the first place and thus cannot even begin the process. Furthermore, many *warias* come from lower-income backgrounds and do not have the financial means to go through this legal and administrative process.

Articles 15 and 16 of the Law on Civil Administration outline the registration procedures if someone is forced or chooses to move, but these both involve long administrative processes in one's region of origin *before* moving to a new area. One must first register for a change of address at the Office of the Registrar and receive a certificate confirming one's change of address before proceeding to register in a new town, city, or region.

How are *warias* able to satisfy these requirements when they often have to flee rather than move from their hometowns? The social stigmatisation of *warias* is sometimes so severe that *warias* often become victims of discrimination and even hate crimes from which they feel the need to escape. This does not afford them the time or the opportunity to register their move first, and for reasons of self-protection many *waria* may not want to have their moving plans known in their hometowns.

As a result of this, Jakarta (and many other big cities in Indonesia) harbours a large population of *warias* who either do not possess any legal identification or documents, or, at the very least, do not possess the necessary documents to register themselves legally in Jakarta. As time goes by, most *warias* lose their ability to register at all.

In short, the Law on Civil Administration contains serious shortcomings by not recognizing the particular situation of minorities, including those with a different sexual orientation and/or gender identity. In only the law makers would pay attention to the essence of the Yogyakarta Principles, they would not have made such a flawed law.

#### PRINCIPLE 6. The Right to Privacy

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;
- b) Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- c) Ensure that criminal and other legal provisions of general application are not applied de facto to criminalise consensual sexual activity among persons of the same sex who are over the age of consent;
- d) Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;
- e) Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;
- f) Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

Although Indonesia does not have specific laws criminalizing homosexuals, there have been quite a few laws and local bylaws in the recent past targeting gays and lesbians as potential criminals. This done by means of using other criminal offenses, like prostitution and pornography, and thereby inserting articles that include homosexuals or homosexual acts as part of the main offense.

The first to appear under the new decentralization [also called 'Local Autonomy'] era since 2002 was the local bylaw of the City of Palembang on the Eradication of Prostitution [*Perda Kota Palembang No.2 Tahun 2004*]. Article 8 of this bylaw states:

- 1) Prostitution is defined as an act committed on purpose by any individual or a group with the intention to seek sexual pleasure outside legal marriage with or without receiving gratification, either in the form of money or in other forms.
- 2) The act of prostitution includes are:
  - a. Homosex
  - b. Lesbians
  - c. Sodomi
  - d. Sexual harassment and
  - e. Other porno acts.

From this explanation we can conclude that the local law makers were not aware of the difference between sexual acts, techniques and behaviors on one hand, and sexual orientation on the other hand. Not to mention that the overall definition of the prostitution is way beyond what is generally understood as prostitution. With this kind of flawed bylaws gays and lesbians instantly become potential criminal offenders.

The latest addition of discriminatory laws/bylaws is the Law on Pornography [*UU No. 44 Tahun 2008 tentang Pornografi*] where again stigmatization of gays and lesbians is the hallmark of religious-based political parties.

Explanatory Notes: Article 4 on Prohibition & Restriction

Paragraph (1) point a:

The term "deviant sexual intercourse" includes among others intercourse or other sexual activities with corpses [necrophilia] and animals [bestiality], oral sex, anal sex, lesbian, homosex.

Again, there is a clear attempt to stigmatize LGBT by linking their sexual acts to pornography and calling them deviant; this despite the fact that there is no scientific basis whatsoever to prove the case. In contrary, the Indonesian Guidelines for Categorization and Diagnosis of Psychological Disorders already scrapped homosexuality from the list of mental disorders in 1983. Therefore, medical arguments to combat homosexuality are simply invalid.

The main barrier to acceptance of people with a different sexual orientation and/or gender identity is of a socio-religious nature. It cannot be denied that the majority of the common people are still strongly guided by religious teachings in the formation of their norms and values. As long as the mainstream of religious leaders remain conservative, homosexuality will also remain unacceptable for most people. Yet, this assumption is wrong because morality is not uniform across the diverse Indonesian society; many local cultures practice different sets of moral values. None is better than the other. Besides, religious dogmas are not the only source for moral values, neither are moral values eternal and unchangeable.

The discriminatory laws and local bylaws from the recent past originated from another wrong paradigm, i.e. that morality can be enforced legally. Numerous cases from other countries have proven that legally enforcing moral issues often lead to human rights abuses. Martin Luther King once said: "Morality cannot be legislated but behavior can be regulated." When morality has to be regulated by laws, then religion as an institution for moral guidance should be considered bankrupt.

With this kind of contradictory laws in Indonesia, LGBT people are in limbo; they are not prosecuted, but on the other hand they suffer from numerous forms of stigma, discrimination, and even violence. Most LGBT have to hide their sexual orientation and gender identity. In contrast to other discriminated minorities which still can find consolation and support from their family and friends, LGBT have to fear the most from family and friends. In other words, there is a systematic lack of protection from the state to a sizeable portion of its population.

Ironically, while attempts to criminalize homosexuality are rife, no law maker has paid attention to accord a level of protection to people with a different sexual orientation and/or gender identity. After all, they are citizens too. Criminalization and protection should go hand in hand; they are two sides of the same coin of any modern justice system.

### ***International efforts to promote YP***

Despite all those discriminatory laws and bylaws, Indonesia may still look favorably compared to other countries; for instance, it has no laws on gross indecency against the order of nature, or better known as the Section 377A of the Penal Code. This applies to almost all former British colonies. We know what can happen with such laws; misuse for political reasons like what befalls Anwar Ibrahim in Malaysia. While Singapore has promised not to enforce its version of Section 377A anymore, the police, nonetheless, still use it mainly as a tool to force certain confessions from gay persons. However, these differences among countries are only superficial; Indonesian LGBT still suffer from numerous forms of stigma, discrimination and abuses.

We, therefore, should encourage the government to acknowledge the intention of the Yogyakarta Principles to ensure that equality before the law is upheld, even if it would not

mean that the government is obliged to incorporate all the principles at once in the existing Indonesian Law.

At the international level, there has been an increasing awareness of the detrimental effects of this lack of recognition of the rights of persons with a different sexual orientation and gender identity. The latest initiative to address this injustice came from the governments of France and the Netherlands; they came with a joint declaration issued at the 63<sup>rd</sup> session of the General Assembly (agenda item 64b) which reaffirms the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity. It took place on December 18, 2008, and the joint statement was signed by 66 countries of which only four (4) were Asian countries. The Indonesian government so far has declined to sign it, arguing that it could not take a different stand from the OIC [Organization of Islamic Countries] which flatly rejected it. But the Indonesian rejection is not that firm after all. With the growing self-confidence as an emerging democratic country, Indonesians have become increasingly uneasy with the all-out obedience to the OIC which is dominated by Arab countries. As the largest Muslim country in the world, why should Indonesia not be the one to set the tone, for once?

Arus Pelangi strongly believes that, for once, the Indonesian government could make an impact to the world by signing to the joint statement issued at the 63<sup>rd</sup> session of the General Assembly (agenda item 64b) which reaffirms the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity. Other Southeast Asian countries should then also follow this example; it is still possible to sign to this declaration as what the government of the USA recently demonstrated; it declared that it would sign the declaration after an initial refusal by the previous administration.

Governments of ASEAN countries should listen more to their respective civil society where there are more and more NGOs representing LGBT communities. ILGA<sup>5</sup>-Asia is an emerging network of LGBT organizations in Asia which is promoting the rights of LGBT persons. At least, in the past years more and more LGBT people, organizations and networks have come forward to claim their rights as responsible citizens and as human beings. Governments can no longer pretend they do not have to deal with them as have been in the past, simply because they were still in hiding. Various National Human Rights Commissions can together draw strategies how to convince their respective legislative bodies to adopt the principles as laid down in the Yogyakarta Principles into laws.

Finally, Indonesia should be proud of the fact the Yogyakarta Principles originated within its territory; from a prestigious center of learning and a city famous for its culture of tolerance and harmony. Therefore, Indonesia should start to implement those principles within its laws and set an example for other countries, especially those that admire and look up to Indonesia as a respected member of the international community. Nothing would prove this better than by showing that in Indonesia the government and its civil society can work together to protect, promote and fulfill the rights of all its citizens, including those with a different sexual orientation and/or gender identity.

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<sup>5</sup> The International Lesbian, Gay, Bisexual, Transgender and Intersexual Association.