

**IORG**

INTERNATIONAL  
ORGANIZATIONS  
RESEARCH GROUP

**BRIEFING PAPER**

*Number 1 April 2, 2007*

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# Six Problems with the “Yogyakarta Principles”

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The “Yogyakarta Principles,” or “Principles,” is a statement concerning the “application of international human rights law in relation to sexual orientation and gender identity” adopted by representatives from various non-governmental organizations and United Nations treaty monitoring committee members following a November 2006 conference held in Yogyakarta, Indonesia. ([http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)) The Principles have been touted as establishing a “universal guide to human rights which affirm binding international legal standards with which all States must comply.” Notwithstanding such ambitions, the Principles reflect only the views of a narrow group of self-identified “experts” and are *not* binding in international law: The Principles have not been negotiated nor agreed to by member states of the United Nations – indeed, not a single UN human rights treaty mentions sexual orientation and repeated attempts to pass resolutions promoting broad homosexual rights has been repeatedly rejected by UN member states. Insofar as they represent an attempt by activists to present an aspirational, radical social policy vision as a binding norm, however, the Principles merit closer scrutiny.

The below lists six areas of concern with the Principles. This list is not meant to be exhaustive. A second section elaborates on certain erroneous premises found throughout the Principles, and suggests (in brief) how a response to the Principles might be formulated.

The Principles are problematic for the following reasons:

## **Problem #1: The Principles undermine parental and familial authority.**

The Principles assume that “children” are capable of identifying with a particular sexual orientation or gender identity, and that this will sometimes be opposed by families, requiring the intervention of State social services. *See* Principle 15 at 20 - 21 (referencing need to establish “social programmes” to address “factors relating to sexual orientation and gender identity” among “children and young people” who may suffer “rejection by families”). *Cf.* Principle 13 at 19 (referencing non-discrimination principle based on the sexual orientation or gender identity of *children*) (emphasis added).

Principle 5 categorically states that States shall enact laws that impose “appropriate criminal penalties” for, *inter alia*, violence, threatened violence and related harassment of individuals based on sexual orientation “in all spheres of life, *including the family*.” Principle 5 at 13 (emphasis added). What it proscribes is vague, with terms like “violence” undefined; as the Principle advocates inclusion of “the family” within the ambit of criminal laws, however, it is possible to interpret it as proscribing spanking (or even threatened spanking) of a teenager experimenting with his sexuality, for example, and therefore intrudes excessively upon familial relationships.<sup>1</sup>

The right of parents to instill values and educate their children in the manner they see fit is contradicted by the Principles. Principle 16 emphasizes that the government shall “Ensure that education methods, curricula and resources serve to enhance understanding of and respect for . . . diverse sexual orientations and gender identities.” Principle 16 at 21. Elsewhere the Principles refer to the use of “programmes of education and awareness,” Principle 1 at 10, and “education and training” to alter outmoded, “discriminatory attitudes.” *See* Principle 2 at 11; *see also* Principle 28 at 31 (“Ensure training and awareness-raising programmes, including measures at teachers and students at all levels of public education, at professional bodies, and at potential violators of human rights, to promote respect for and adherence to international human rights standards in accordance with these Principles, as well as to counter discriminatory attitudes based on sexual orientation or gender identity.”). There is no parental opt-out provision, and it is assumed that (at least all public school) curricula would be uniform.

Moreover, parents of schoolchildren of any age would be unable to object to the presence of homosexual (or other sexual minority, such as transgendered) teachers in the public or private school classroom. *See* Principle 16 at 21 (advocating measures to ensure equal treatment of “staff and teachers within the educational system, without discrimination on the basis of sexual orientation or gender identity” and calling for laws and policies to protect “staff and teachers of different sexual orientations and gender identities from all forms of social exclusion . . . within the school environment”); Principle 12 at 19 (“Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment.”).

Principle 3 further avers that “No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.” *See* Principle 3 at 12. While this language is vague – does it imply that a parent may not interfere with a child’s gender identity choices, or does it mean that someone who putatively would be considered a “father” or “husband” may disavow such identification due to a subsequent realization that his gender identity has changed, given that this Principle also states that one need not undergo sex reassignment surgery in order to have his chosen gender legally recognized? – it at the very least minimizes the status of marriage and parenthood.

The Principles also call for a change in inheritance laws, presumably so that same sex partners may inherit in a manner similar to a spouse as traditionally understood, thereby by implication disadvantaging blood relations, including progeny, given that intestacy statutes generally favor the spouse of the deceased. *See* Principle 3 at 12 (referencing inheritance rights). Likewise, the Principles call for allowing same-sex partners to usurp the position of family members (traditionally understood) with respect to health-care decision making. Principle 17 at 22 (“Ensure that all health service providers treat clients and their partners without discrimination on the basis of sexual orientation or gender identity, including with regard to recognition as next of kin.”).

Finally, by interfering with parental authority and the familial bond, the Principles contradict and undermine relevant provisions in the Universal Declaration of Human Rights (UDHR), which declare unambiguously that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” UDHR art. 16(3). *See also* UDHR art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home . . .”).

**Problem #2: The Principles undermine freedom of speech.**

In tandem with affirming the right of individuals “regardless of sexual orientation or gender identity” to engage in freedom of opinion and expression, the Principles call upon States to “Ensure that

the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities.” Statement 19 at 24. This is capable of being used to suppress dissenting opinion that, for example, questions the morality of homosexual conduct.

This concern is not merely theoretical. For example, in Sweden, there was a well-publicized prosecution of a Pentecostal minister charged with engaging in hate speech for discussing biblical proscription of homosexual conduct.<sup>2</sup> Likewise, the Canadian Human Rights Commission has commenced an investigation against a small religious publication, Catholic Insight, and its editor following a complaint by homosexual activists that the magazine’s writings with respect to the moral illicitness of homosexual acts constituted hate speech.

Thus the Yogyakarta Principles undermine free speech rights, as articulated in numerous national constitutions as well as the Universal Declaration of Human Rights, which declares that “Everyone has the right to freedom of opinion and expression.” UDHR art. 19.

### **Problem #3: The Principles undermine religious freedom.**

Under the guise of affirming “the right to freedom of thought, conscience and religion” without regard to sexual orientation or gender identity, the Principles undermine religious liberty. Principle 21 explicitly states that such rights “may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.” Principle 21 at 26. What would be the practical application of such a Principle, for example, with respect to a church, mosque or synagogue whose “practice” was to refuse to perform same-sex weddings or commitment ceremonies?

The explanatory text goes on to declare that the State must “Ensure that the expression, practice and promotion of different opinions, convictions and beliefs with regard to issues of sexual orientation or gender identity is not undertaken in a manner incompatible with human rights.” Principle 21 at 26. *Cf.* Introduction at 6 (equating such rights with the right to determine and act in accord with one’s sexual orientation and gender identity). Principle 21 thus advocates governmental action that would suppress the free exercise of religion.

Likewise, the same concerns set forth above with respect to denying speech rights to dissenting voices are also implicated in the religious liberty context, given that religious speech is susceptible to being targeted. (*See* point 2 *supra*.) Again, the positing of rights set forth in the Yogyakarta Principles conflict directly with those articulated without qualification in the Universal Declaration of Human Rights. *See* UDHR art 18 (“Everyone has the right to freedom of thought, conscience and religion.”).

### **Problem #4: The Principles undermine national sovereignty/national democratic institutions.**

The Principles obliquely call for a supra national authority to “vigorously” investigate, prosecute, try and duly punish government officials who engage in “State-sponsored” or “State-condoned” attacks on persons based on sexual orientation or gender identity, though it does not state what that authority might be or how it might obtain jurisdiction over such government officials. Principle 4 at 13.

Beyond calling upon States to amend constitutions and enact legislation favorable to sexual minorities, in instances where the law has not been so changed, the Principles explicitly invite those charged

with interpreting the law – presumably in the judiciary or administrative agencies – to engage in “interpretation” that would “ensure the effective realisation of these principles.” Principle 2 at 11. This essentially is a call to bypass democratic, republican institutions in favor of government by judges and bureaucrats.

The Principles also call for affirmative action programs for persons of “diverse sexual orientations,” thereby arbitrarily arguing in favor of unequal and discriminatory treatment of certain disfavored classes of citizens. Principle 2 at 11 (calling upon States to “[t]ake appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities,” and adding that “[s]uch measures shall not be deemed to be discriminatory”).

Finally, though again vaguely written, the Principles apparently would prohibit citizens from organizing or taking action to campaign against advocates of liberalized sexual rights. *See* Principle 27 at 30 (“Take all appropriate measures to combat actions or campaigns targeting human rights defenders working on issues of sexual orientation and gender identity, as well as those targeting human rights defenders of diverse sexual orientations and gender identities.”).

Ironically, under the guise of promoting soft-law principles as universally binding without the consent of sovereign nations, the Yogyakarta Principles undermine a proper understanding of international law and legitimate international legal regimes, which are premised on the existence of sovereign states and those states’ willingness to enter into conventions and treaties but otherwise free to govern their internal affairs in the manner that they see fit. *See, e.g.*, Charter of the United Nations art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”).

**Problem #5: The Principles encourage (physically, psychologically and morally) unhealthy choices.**

Throughout the Principles, behavior is advocated as being a “good” when in fact it is more likely a “bad” for individuals who engage in such behavior. For example, the Principles posit surgical modification of “bodily appearance or function” as a good. Introduction at 6, note 2. This cannot be assumed, however, and is contradicted by studies showing that sex reassignment is harmful.<sup>3</sup>

Similarly, the Principles advocate a change in adoption laws, allowing same sex couples to adopt children and positing that doing so would be consistent with a “best interest of the child” standard, which nevertheless shall not be the sole criteria in adoption placement. Principle 24 at 27, 28 (“[T]he best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests.”) (Emphasis added.) Research free from biases, however, indicates that placement of children in same sex households is *not* in the best interests of children.<sup>4</sup>

**Problem #6: The Principles fail to provide objective standards for evaluating conduct.**

The Principles, by their own terms, are intended to be evolving and not grounded in currently accepted societal norms. They explicitly acknowledge that their “articulation must rely on the current state of international human rights law and *will require revision on a regular basis* in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse

sexual orientations and gender identities over time.” (Preamble at 9)(emphasis added). Without overstating the gradation of the slippery slope, this not only fails to state whether sexual practices currently considered beyond the pale, such as bestiality, polygamy, pedophilia, necrophilia, etc. are *per se* impermissible, but also leaves open the possibility that laws proscribing such conduct may one day be subject to challenge as violative of the aspirational norms set forth in the Principles.<sup>5</sup> Indeed, the Principles appear to invite advocacy of such positions, though the language is studiously ambiguous: everyone has “the freedom to seek, receive and impart information and ideas *of all kinds*, including with regard to human rights, sexual orientation and gender identity, through any medium and *regardless of frontiers*.” Principle 19 at 24 (emphasis added). Query whether this refers to unrestricted transmission of material and information across international borders, *compare with* UDHR art. 19, or the ability to impart “information” on subjects traditionally perceived as taboo – or both. Moreover, this Principle would proscribe “notions of public order, public morality, public health and public security” from restricting the ability to exercise “freedom of opinion and expression that affirms diverse sexual orientations or gender identities.” *Id.*

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Because the Principles partially incorporate language or concepts that appear inoffensive or self-evident (*e.g.*, everyone has a right to life), and characterize opposition as being violative of individuals’ autonomy rights, they have a superficial appeal which can be difficult to counteract, particularly in circles that are sympathetic to the Principles’ underlying rights-emphasizing presuppositions.

The Principles, however, assume a number of premises which are false, or stated more cautiously, should not be assumed to be true without proof. To begin with, the working group declares itself, *ipse dixit*, to be “*The International Panel of Experts in International Human Rights Law and Sexual Orientation and Gender Identity*,” presuming that it possess authority to opine on the issues before it. From its roster, appears to be a self-selecting group, comprised primarily of activists. *See* Principles Annex at 34-35. Dissenting voices among, for example, psychologists are not evident, and they do exist.<sup>6</sup> These voices, however, are not to be heard, and indeed any assertion that sexual orientation or gender identification is capable of being treated or cured is considered a form of “medical abuse” which must be proscribed. Principle 18 at 23 (calling upon governments to “Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed”).

The vague formulation “Sexual orientation and gender identity are integral to every person’s dignity and humanity” is simply asserted, with the notion that people are free moral agents capable of choosing to behave in a certain way or adopt certain lifestyles – which can either be morally good, neutral or bad choices – and that society can seek to limit behavior deemed to be harmful, rejected. *See* Introduction at 6. “Gender identity” is posited as a fluid construct not grounded in one’s biological nature; it is an ambiguous term open to interpretation that is not equated with the two sexes. *See id.* note 2 (“Gender identity is understood 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 . . .”); *see also* Preamble at 8 (asserting that gender “may or may not correspond with the sex assigned at birth” and discussing “sexual relations with individuals of a different gender or the same gender or more than one gender” – the latter phrase not being presumptively synonymous with “two sexes” or “two genders” and implying a multiplicity of identities).

In formulating a response to the Principles, one needs not only to criticize, however, but also extol positive goods that are superior, appealing to “rights language” such as exists in the Universal Declaration of Human Rights. For example, one needs to restate the importance of the traditional family, how the rights of the child and its best interests are preserved when a child is raised in a family with a father and mother (as traditionally defined), and how essential this is to human flourishing. *See* UDHR 16(3).

One also needs to recapture the language of the “common good.” What the common good is, simply, “that good which is common to all.” It is thus not to be equated with a majoritarian good (such as the “greatest good”) or a minority good (such as one identified with the predilections of autonomous individuals), but rather one that ensures flourishing of society as a whole *and* its constituent members. To this end, it should be shown how the agenda advocated in the Principles harms the individuals whose interests it ostensibly seeks to advance, as well as undermines societal wellbeing generally. It needs to be emphasized that societal reproduction and advancement cannot be assumed; where sterility is effectively extolled as an aspirational good (such as via promotion of contraception, abortion, homosexual conduct or euthanasia), such societies will not be able to sustain themselves. This is borne out, for example, by negative demographic trends in Europe, where the birth rate is well below the 2.1 children per family that is generally regarded as necessary to simply replenish itself. In this regard, use of Kantian constructs – in particular the categorical imperative – that are not grounded in a particular religious tradition and thus more capable of approximating universal assent, can be useful. As with suicide, neither contraception, abortion, homosexual acts nor euthanasia can be universally willed, for to do so would mean the end of the human species, which self-evidently is not compatible with anyone’s conception of the “common good.”

Thus contrary to the presuppositions of the Principles, laws limiting the ability to marry to members of the opposite sex, or restricting benefits to married couples traditionally understood, are not arbitrary, but designed to promote the future flourishing of the human species, and not its diminishment and disappearance. This is to the benefit of all members of society, even those who struggle with issues of sexual orientation and gender identity.

(Revised May 2008)

**Notes:**

<sup>1</sup> Lest such a concern be deemed alarmist, it should be recalled that outgoing United Nations High Commissioner for Human Rights Louise Arbour – a strong proponent of the Yogyakarta Principles, who issued a Statement of support at the time of the Principles’ launching – in her previous position as Canadian Supreme Court Justice had insisted in dissent on criminalizing the spanking of children by parents. See *Foundation for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76 (Arbour, J., *dissenting*).

<sup>2</sup> See <http://www.becketfund.org/index.php/case/93.html?PHPSESSID=c1324d0ad95ef409ea3f010819e060cf>.

<sup>3</sup> See, e.g., the observations of Paul McHugh of the Psychiatry Department at Johns Hopkins University, referenced at [http://www.firstthings.com/article.php3?id\\_article=398](http://www.firstthings.com/article.php3?id_article=398).

<sup>4</sup> See Don Browning & Elizabeth Marquardt, What About the Children? Liberal Cautions on Same-Sex Marriage, in *The Meaning of Marriage: Family, State, Market, and Morals* (Robert P. George & Jean Bethke Elshtain eds., 2006); Paul Cameron & Kirk Cameron, Homosexual Parents, 31 *Adolescence* 757 (1996), available at [http://findarticles.com/p/articles/mi\\_m2248/is\\_n124\\_v31/ai\\_19226135](http://findarticles.com/p/articles/mi_m2248/is_n124_v31/ai_19226135); George Reckers and Mark Kilgus, “Studies of Homosexual Parenting: A Critical Review,” 14 *Regent University Law Review* 343 (2002) (analyzing the literature on adoption of children by same sex couples and noting methodological shortcomings of certain studies).

<sup>5</sup> Compare concerns expressed by the dissent in the United States Supreme Court case *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., *dissenting*) with subsequent discussion of polygamy and polyamory in popular and academic literature.

<sup>6</sup> See, for example, the National Association for the Research & Therapy of Homosexuality. <http://www.narth.com>.



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