



Negation, Acknowledgement and taking forward the struggle for LGBT rights: The Third Report of the Independent Expert on Sexual Orientation and Gender Identity

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Introduction

The release of the third report of the Independent Expert on Sexual Orientation and Gender Identity (SOGI) and the first report by the current mandate holder, Victor Madrigal-Borlío, provides us another opportunity to assess the workings of the mandate.

Perhaps the most important thing accomplished by the mandate over the course of its work, has been keeping the global spotlight on human rights violations on grounds of SOGI. The latest report highlights the pervasiveness of violence on grounds of SOGI from all corners of the globe - from laws providing the death penalty in Saudi Arabia and Sudan, to extra judicial killings in Chechnya, torture and ill treatment in Azerbaijan, to killing of trans people in Central America. The extent of violence suffered by LGBT persons is a stark reminder of the significant role that the mandate of the Independent Expert on SOGI can continue to play. At the most fundamental level, the mandate combats political forces that seek to denude LGBT lives of rights and dignity.

While raising awareness is an important part of the work of the mandate, the other function, which this report of the Independent Expert in particular does, is to shed light on the nuances of how violence and discrimination affect persons differentially and examine the root causes of such violations. This Report disaggregates the acronym LGBT and explores the specific forms of violence experience by lesbians, bisexuals, trans men and trans women. To give an example from this report:

Information currently available suggests that trans men and other trans-masculine persons tend to be less visible in reports and data than lesbians, gays or trans women. Arguably, if this is a reflection of less visibility in everyday situations, this may shield them from the types of societal violence usually affecting other gender non-conforming persons; they are, however, victims of severe violence in the family, in the health sector, and of school bullying. Acts of violence include verbal, physical and sexual abuse, including so-called “corrective” rape, and forced marriage.¹

By highlighting the specific forms of violence faced by trans men, the mandate holder has demonstrated a sensitivity to nuance and a willingness to engage with the complex lived realities of marginalized groups within the LGBTI spectrum. This is an important perspective to stress because even as the issues facing trans communities in general are being taken up at the global and national level, the specificity of violence facing transmen often slips through the cracks.

By stressing the intersectionality of forms of oppression, the mandate holder has painted a picture of a human continuum along which violence and discrimination happens. Sexual orientation and gender identity are not discrete and insular categories but instead form part of the make up of persons who may also be older persons, refugees, of Afro-Asian descent, etc. Thus one cannot think of SOGI outside the actual life experiences of persons. By stressing intersectionality as an approach, the mandate holder signals his intention to produce more complex accounts of the actual forms of violence and discrimination that persons suffer on the basis of their sexual orientation or gender identity, even as they relate to other forms of marginalization based on caste, class gender, disability, etc. Intersectionality also points to how the SOGI mandate is connected to the work of other mandate holders and hence, the importance of working closely with other mandate holders.

‘Negation and acknowledgment’ as a frame of the Report

The report also makes an important theoretical contribution by stressing the importance of what the mandate holder calls ‘negation’ and ‘acknowledgement’. One of the reasons for the

¹ <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>

extreme forms of violence and discrimination faced on grounds of SOGI is the negation of the experience of one's sexual orientation or gender identity as a part of the human experience:

Negation is adopting the position that violence and discrimination based on sexual orientation or gender identity do not exist in a particular context or that, in a given social context, there are no lesbian, gay, bisexual, trans or gender non-conforming persons. It enables violence and discrimination and lies at the root of some of the heinous acts described in the present report. In a context of negation, perpetrators feel motivated and enabled to suppress or punish diversity. Invariably, any data gathered will be unreliable, unsystematic and biased; all State measures to address violence and discrimination, be it public policy, access to justice, law reform or administrative actions, will be therefore hindered by this fact.²

If 'negation' is the problem, then 'acknowledgement' is part of the solution. The report goes on to document best practices of 'acknowledgement'.

Acknowledgment of responsibility — the opposite of negation — is an essential element in the establishment of historical truth, the process of reparation and the reconstitution of the social fabric.....On 17 April 2018, the Prime Minister of the United Kingdom expressed deep regret for the fact that discriminatory legislation had been introduced across the Commonwealth, and the resulting “legacy of discrimination, violence and even death that persists today. The Independent Expert values these statements highly, in that they include both acknowledgment of the facts and acceptance of responsibility; he is persuaded that they will be valuable building blocks in the process of eradication of violence and discrimination on the basis of sexual orientation and gender identity.”³

The Independent Expert is right to identify one of the key problems being that of 'negation'. If the very existence of a grouping is denied, then the violence and discrimination to which the grouping is subjected to remains an invisible crime, committed on invisible bodies. To

² <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>

³ <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx>

visibilize the grouping, to document the violence and to demand acknowledgement remains an ongoing task.

By documenting these forms of ‘acknowledgment’, the report opens out important pathways to combatting violence and discrimination on grounds of SOGI. By noting the ‘deep regret’ expressed by the Prime Minister of UK for the introduction of anti sodomy laws in the Commonwealth, the Independent Expert points to a form of acknowledgement which can alter the existing frames of reference. Activists throughout the Commonwealth have been contesting the frame of reference which sees same sex conduct as alien to local cultures, traditions and religions. The acknowledgement by the British Prime Minister, provides LGBT activists in all parts of the Commonwealth a tool to argue that, it is in fact these laws which are an ‘alien legacy’.

This Report has, inter alia, initiated new thinking about the right to truth as embodied in Principle 37 of the Yogyakarta Principles plus 10, with its stress on countering ‘negation with ‘acknowledgment’.⁴The right to truth, with its emphasis on public apology, expungement of relevant criminal convictions and records, rehabilitation and recovery services, adequate compensation and guarantees of non-recurrence remains an important goal for much of LGBTI activism, even as it confronts new challenges.

The dialectic between ‘negation’ and ‘acknowledgement’, can be a frame to analyse the state responses to the Communications issued jointly by the Independent Expert along with other Special Procedures to Russia, Indonesia and the Republic of Korea.

Using ‘Negation and acknowledgment’ to analyze Communications issued by the mandate

In the Communication issued to Russia⁵ regarding the extra judicial killings in Chechnya of homosexual persons it was observed that:

⁴ Principle 37: Every victim of a human rights violation on the basis of sexual orientation, gender identity, gender expression or sex characteristics has the right to know the truth about the facts, circumstances and reasons why the violation occurred. The right to truth includes effective, independent and impartial investigation to establish the facts, and includes all forms of reparation recognised by international law. The right to truth is not subject to statute of limitations and its application must bear in mind its dual nature as an individual right and the right of the society at large to know the truth about past events.

⁵ Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial,

Mr. Alvi Karimov, spokesperson of Mr. Ramzan Kadyrov, the head of the Chechen Republic, responded to reports of arrests of gay and bisexual men to Interfax news agency with the following statement: “It is impossible to detain and persecute people who simply do not exist in the Republic. If there were such people in Chechnya, the law-enforcement agencies wouldn’t need to have anything to do with them because their relatives would send them somewhere from which there is no returning”. Similarly, Ms. Kheda Saratova, a member of the human rights council of Chechnya, told a Russian radio station: “I didn’t receive a single appeal, but in case of any I would not even consider it. (...) In our Chechen society, any person who respects himself, our traditions and culture will hunt down this kind of person without any help from the authorities and do everything to make sure that they do not exist in our society.”⁶

While the statements denying the existence and humanity of LGBT persons may well have elicited an outraged response if it was applied to religious/ethnic minorities, in the case of the LGBT persons it was deemed entirely acceptable. Even if the statements could be passed off as those of local authorities, what was telling was Russia’s non-response to the joint communication which reinforced the negation of the existence of LGBT persons in Chechnya and the ‘non-issue’ that violence suffered by LGBT persons was for the Russian state. In responding to another joint Communication regarding alleged administrative proceedings against Ms. Evdokia Romanova for “promotion of non-traditional sexual relations to minors through social networks and Internet”, the Russian Federation indicated the reason for its non-reply:

The Russian Federation does not intend to respond to individual or joint submissions from the special procedures of the Human Rights Council when the author or co-author is the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. We wish to recall that, at the Council’s thirty-

summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

⁶ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23080>

second session, Russia formally stated that it would not recognize the mandate of or cooperate with this special procedures mechanism.⁷

In sum, what stands reinforced is how ‘negation’ operates to deny the existence of LGBTI persons, leave alone the possibility that LGBT persons have rights. The challenge in a swath of countries across the world is to assert the existence of LGBT persons and the fact that the framework of universal human rights applies to all persons, including LGBT persons. The gravity of this challenge can be seen in the fact that even when grave violations of human rights occur, and the violations are brought to the attention of states such as Egypt, Russia and Tunisia, the states have chosen not to respond.

In this context, one must note a few inroads into this overwhelming negation. Indonesia, which is a part of the OIC, could very well have adopted the OIC position of non-cooperation with the mandate. However in response to a joint communication⁸ concerning the alleged arbitrary arrests, detention and ill-treatment of twelve waria, or transgender women, in Aceh province, the Indonesian government choose to respond.⁹

The Indonesian government in its response chose to highlight the fact that Aceh province had a special autonomy which meant it could frame by-laws to complement existing criminal laws. The response also highlighted that in Indonesia, there are ‘divergent views on LGBT/SOGI’ and that ‘the national philosophy emphasizes the primacy of religious values in daily life’. The response went on to assert ‘Indonesia’s commitment to respect human rights in parallel with social norms that exist in Indonesia’. The response also noted that ‘there should be no discrimination against minorities in Indonesia’ and stressed the responsibility of the Indonesian police to ‘protect’, anyone ‘who feels threatened due to his or her sexuality’.¹⁰

⁷ <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=81857>

⁸ Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of internally displaced persons; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

⁹ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23635>

¹⁰ <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=81990>

While the response does raise many questions including the legality of placing ‘respecting social norms’ and the ‘commitment to respect human rights’ on the same plane¹¹ what is important to note is that the Government is not ‘negating’ LGBT existence but rather moving towards acknowledging LGBT persons rights to non-discrimination as a part of universal human rights. This form of response by Indonesia demands a different kind of engagement by civil society in the bid to ensure respect for LGBT rights in Indonesia.

While the response of Indonesia can be seen as offering a limited acknowledgment of the suffering imposed upon LGBT persons, the response by the government of Korea can be characterized as a more robust acknowledgment. In the joint communication to the government of Korea, the Independent Expert along with other mandate holders, drew attention to ‘recent cases of arrests, interrogations, detentions and prosecutions of soldiers and military personnel perceived to be gay, under the Republic of Korea’s Military Criminal Act.’¹² Details regarding 16 cases of gay military personnel who were identified by the Cyber Investigation Team were brought to the attention of the Government.

The Government in its response justified the arrests as necessitated by Articles 92-6 of the Military Criminal Act under which the arrests of serving military personnel perceived to be gay was not to ‘impose criminal punishment by reason of one’s sexual orientation’, but in order to ‘uphold military order and discipline, taking into account the nature of communal living in the barracks’.

The response went on to note that, ‘an amendment bill to abolish the provision has been submitted to the National Assembly, so the Ministry of National Defense is considering the necessity of the amendment.’ The response also reiterated that, ‘the rights of homosexuals within the military are protected by a separate regulation. The regulation stipulates prohibition of discrimination based on sexual orientation; prohibition of any acts to identify homosexuals through questionnaires and the like; confidentiality of personal secrets so that even when one’s sexual orientation is revealed, such fact or record thereof will not be disclosed.’¹³

¹¹ See Vienna Declaration and Platform for Action which states that, ‘While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’

¹² <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23282>

¹³ <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=81820>

The three responses by Russia, Indonesia and the Republic of Korea indicate the range of possibilities between complete negation, limited acknowledgement and a robust acknowledgement. The robust response of the Republic of Korea lies in its promise of action to rectify the situation by committing to reforming the relevant laws. This provides an opening for civil society groups to advocate that Korea must fulfil its commitment and repeal the offending criminal provisions. With respect to Indonesia, while the acknowledgment of LGBTI persons as persons entitled to the enjoyment of universal human rights is an important starting point, the ‘solution’ of an internal investigation by the North Aceh chief of police is less than reassuring. With respect to Russia and Egypt the struggle is to assert that LGBTI persons are human beings. The strategy will have to be a continuous assertion of the humanity of LGBTI and hence the entitlement to full human rights, till such time as this fundamental premise is conceded. The strategy of ensuring that communications are filed by the other special procedures and not the Independent Expert on SOGI, may be another way to deny an opportunity to states which refuse to cooperate with the mandate to deny the humanity of LGBT persons.

State Responses to the Report in the 38th Session of the Human Rights Council

Coming to the response to the report when presented to the UN Human Rights Council on June 18, 2018, one must note that it was overwhelmingly positive. Argentina took the floor to indicate that it was honoured to be the first country to welcome the mandate holder and is working to implement some of the recommendations to them. Both Canada and the Netherlands referenced the Yogyakarta Principles +10 allowing an opportunity for the mandate holder to respond during his remarks and highlight his involvement in the drafting process and his belief that the YP+10 represent an accurate portrayal of the current state of international law with respect to SOGIESC.

The mandate holder also indicated that there are limits to the dialogue, for instance, the discussion of whether SOGI has a place in international human rights law is inappropriate. This is particularly strong and clear language and a good indication of what we can expect from this mandate holder. It could also, however, contribute to deepening geopolitical divides in the Human Rights Council and attempts need to be made to bridge those. In that light it might also

not be surprising that the mandate holder noted that there were no substantive replies from countries in which communications were sent from his office. All stakeholders need to work to support engagement from countries that remain silent in their dealings with this mandate.

During the interactive dialogue in the Council, there was notable silence from most African countries, with the exception of South Africa, which welcomed the report and spoke out against violence and discrimination on the basis of SOGI. The OIC also remained mostly silent, with the exception of Albania, which affirmed the mandate and indicated its willingness to work with the Independent Expert. This silence is in stark contrast to the visible efforts to oppose the mandate creation in the Human Rights Council in 2016 and attempts to roll back that decision in the General Assembly the same year. The Independent Expert did note that he has an upcoming country visit to Mozambique this year, and at one point, Mozambique was on the speaker's list for the interactive dialogue around the report, but then withdrew.

There was also considerable silence from the Asian region. Thailand did take the floor and thank the Independent Expert for his report and affirmed their willingness to work with the mandate, and interestingly China took the floor to welcome the report indicating that it opposes all forms of discrimination, including on the basis of SOGI. It did however, add conditionality to its statement adding that “we must pay respect to cultural values.”

In his other remarks to the Council during the interactive dialogue, the Independent Expert indicated that he intends to continue with the thematic underpinnings put forward by the previous Independent Expert, Vitit Muntarbhorn. He also noted that there is a lot to be learned with regards to data collection and he will organise an expert meeting on safe data collection. He thanked for the set of states and civil society who fought deeply for the mandate indicating it has a ‘global heritage’.

Conclusion

The positive response by both sympathetic states as well as civil society to this Report indicates that the report has struck a chord among those committed to seeing LGBTI persons as part of what the previous mandate holder called, ‘diversity in humanity’. Since the rights of LGBTI persons are now a matter of institutionalized concern, its important that we continue to use the mechanisms of the mandate be it the ‘communications procedure’, the global publicity

generated by the presentation of the Report in the General Assembly and Human Rights Council to take forward the struggle for equal rights for LGBTI persons. One also hopes that continuous engagement with this mandate will enable the production of qualitative reports which can play a role in transforming the status quo of ‘negation’ of the existence of LGBTI persons to ‘acknowledgement’ of the humanity of LGBTI persons and entitlement to all human rights.