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Mr. Victor Madrigal-Borloz UN Independent Expert on sexual orientation and gender identity

OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneve 10, Switzerland

Re: Report to be presented to the 78th session of General Assembly in October 2023

1- PROTECTION TO SEXUAL ORIENTATION AND GENDER IDENTITY IN MERCOSUR

After understanding the OSIG, this item aims to examine the sexual orientation and gender identity protection in MERCOSUR (Brazil, Argentina, Uruguay, Paraguay), and for this purpose it is necessary to initially understand MERCOSUR and then, how MERCOSUR protects OSIG through its acts regulations, and other action spheres.

In this way, what Foucault calls “power pure form” will be verified, considering that “The pure power form would be found in the legislator function; and its action mode with respect to sex would be juridical-discursive¹.

The Southern Common Market (MERCOSUR) is geographically located within the space American system protection, which is countries made up on the American continent and has mechanisms to act as its own court, regulations and resolutions, whose will discipline, guide and determine the treatments means from the most diverse institutes in this field.

However, although these systems exist, “regional integration processes are implemented through bilateral or multilateral agreements that, in most cases, are materialized in International Organizations”², as these organizations are intended to cooperation in common interest areas among its member countries. Thus, in the regional integration context in Latin America, there is MERCOSUR, an organization composed of Argentina, Brazil, Uruguay and Paraguay as Member

¹ FOUCAULT, Michael. **A história da Sexualidade I: A vontade de saber**, p. 91.

² NICOLAU, Paola Cristina. **Harmonização de normas e procedimentos de refúgio no Mercosul** / Paola Cristina Nicolau. –2018. 169 f. Orientador: Prof. Dr. César Augusto Silva da Silva. Dissertação (Mestrado em Fronteiras e Direitos Humanos) – Universidade Federal da Grande Dourados, 2018, p.51.

States Parties, and Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Suriname as Associate States³.

Created from the Asunción Treaty in 1991 after a redemocratization context in South America of its founding member countries⁴, its art. 1 disciplined as the deadline for its establishment in the States Parties the date of December 31, 1994, having adopted in this transition period a Origin General Regime provided for in the Treaty itself.

In its origin, it has an exclusively economic purpose. However, during the integration process "...due to the initial economic-trade integration success, the MERCOSUR agenda was expanded to include political, human, social and citizenship issues" (MERCOSUR. 2022) .

The recognition process of LGBTI+ rights in MERCOSUR was simpler than compared to the process at the international level by the UN, which recognized LGBTI+ rights as human rights only in June 2011 through Resolution in the Human Rights Council, No. HRC/17/L.9/56.

One of the factors that contributed to the aforementioned simplicity in MERCOSUR is that the region encompasses fewer countries than the international human rights system, and therefore, have fewer conflicting cultural views, thus facilitating debates in this area. .

The LGBTI+ rights recognition as human rights in MERCOSUR has as its main historical milestone the the RAADH (High Authorities on Human Rights Meeting)⁵ creation in 2004 to promote Human Rights and Fundamental Freedoms, since from that moment on, the themes integration related to human rights were inserted and integrated in this international organization, which holds its meetings every six months. So:

The specialized body creation with the objective of promoting and protecting the LGBTI people rights began in 2007, during the IX RAADH, when the Seminar on Sexual Diversity, Identity and Gender was held, in which the urgent need for to work hard to eradicate discrimination based on sexual orientation and gender identity in region's countries, recognizing sexual diversity as a normal fact of societies and an indispensable element for the realization of human rights for all. As of 2008, these debates were transferred

³It is noteworthy that Venezuela was a member country, having been suspended for not respecting democratic dictates.

⁴Argentina, Brazil, Paraguay and Uruguay;

⁵"A space for intergovernmental coordination on public human rights policies, which brings together the main authorities of the competent institutions in the matter. It functions as a specialized body under the Common Market Council, whose monitoring is carried out by the Forum for Consultation and Political Conciliation for the analysis and definition of public policies on human rights (MERCOSUR/CMC/DEC No. 40/04). The RAADDHH is integrated by the holders of the Ministries, Secretariats, Departments and governmental areas equivalent to the main competence in the matter of human rights and by the holders of the human rights departments or equivalent of the chancelleries of the Parties and Associated States" (MERCOSUR, 2022).

to the specific Working Group, which was then consolidated by the 2015 RAADH into a new Permanent Commission⁶.

It is worth noting that this initiative was influenced by the Brazilian government and activist groups, which is why it is possible to verify the the LGBTI+ movement importance through its activists for these rights recognition. And again, Brazil appears as a protagonist in this struggle, and it is also necessary to consider that within the regional system scope the for the human rights protection, through the OAS (Organization of American States), in the inter-American system, the approval of a Declaration to protect this social group also occurred due to a project presented by Brazil.

However, despite Brazil having distinguished itself before MERCOSUR in the introduction of actions aimed at protecting LGBTI+ rights in the bloc, in 2020 it vetoed Mercosur's human rights action plan because it contained terms such as "hate crimes" against LGBT and "gender identity".

Brazil, Argentina, Uruguay, Paraguay, Bolivia, Colombia, Ecuador, Peru, Venezuela and Chile participated in the meeting at the RAADH, as well as four gay activists representing the ABGLT (Brazilian Association of Gays, Lesbians and Transgenders), which shows the international organization role in the struggle for the human rights recognition and integration, because “not being recognized means being socially subordinated. That is, the individual who suffers from the injustice of false recognition is institutionally rendered invisible, classified as object and prevented from participating in life on a par with others”⁷.

Almeida, highlights the importance of having recognition within MERCOSUR:

Bearing in mind that the same sovereign entities decided to establish a Common Market, the harmonization of the respective internal legal systems must meet the intrinsic needs of that form of integration, that is, ensure that the great freedoms of movement of production factors are effectively achieved. In this sense, the internationalization of everyday private life means that marriages and/or partnerships between people of the same sex increasingly come closer to other legal systems through the various connecting elements

6 MERCOSUL. **O que é a RAADH?** Disponível em: <https://www.raadh.mercosur.int/pt-br/que-es-la-raadh/#:~:text=A%20Reuni%C3%A3o%20de%20Altas%20Autoridades,das%20institui%C3%A7%C3%B5es%20competentes%20na%20mat%C3%A9ria.> Acesso em: 07.Abr.2022;

7 GALIL, Gabriel Coutinho; LELIS, Rafael Carrano. **Direito Internacional Monocromático: previsão e aplicação dos direitos LGBTI na ordem internacional.** Revista de Direito Internacional, Brasília, v. 15, n. 1, 2018, p. 11.

(nationality or domicile of the spouses or partners, place of the situation of the real estate, place of celebration of the act, etc.)⁸.

In this way, in 2018, the LGBTI+ Permanent Commission formulated the LGBTI report: Regional good practices compendium for guaranteeing and protecting rights, an important document for the bloc to guide its actions in this area, given the data obtained, a report that will be of paramount importance for later analyzing the rights formulation within the MERCOSUR scope member countries.

2. RECOMENDATIONS

Reparatory justice for the lasting consequences of colonialism in Brazil should definitely include measures to address discrimination and violence based on gender, gender identity, and sexual orientation. Brazil, like many other countries, has a history deeply influenced by colonialism, which has had significant impacts on gender relations and the treatment of marginalized groups, including the LGBTQ+ community. Here are some specific considerations for addressing these issues within the context of Brazil:

The first step in the process of reparatory justice is to acknowledge and apologize for the historical and ongoing harm caused by colonialism towards individuals based on their gender, gender identity, and sexual orientation. This can involve public acknowledgments by government officials, institutions, and public figures, recognizing the violence, discrimination, and marginalization experienced by these communities.

Implementing legal reforms is crucial to ensure comprehensive protections and equal rights for individuals regardless of their gender, gender identity, or sexual orientation. Brazil should work towards enacting anti-discrimination laws that explicitly include gender identity and sexual orientation as protected characteristics. These laws should encompass all aspects of life, including employment, housing, healthcare, education, and public services. Additionally, hate crime legislation should be enacted to address violence based on gender and sexual orientation, and ensure that perpetrators are held accountable.

Comprehensive education and awareness programs should be implemented to challenge societal attitudes and beliefs that perpetuate discrimination and violence. This can include inclusive curricula in schools that teach respect, acceptance, and understanding of diverse gender identities and sexual orientations. Training programs should also be provided to teachers, healthcare

8 ALMEIDA, Bruno Rodrigues de. **O Direito Internacional Privado acerca dos Casamentos e Parcerias entre Pessoas do Mesmo Sexo no Contexto do Mercosul**. RSTPR, Ano 2, Nº 3; Marzo 2014, p. 249. Disponível em: <http://www.revistastpr.com/index.php/rstpr/article/view/89>. Acesso em: 15. Jan. 2022.

professionals, law enforcement, and other relevant sectors to promote sensitivity and cultural competency.

Reparatory justice should involve providing resources and support to LGBTQ+ organizations and initiatives. These organizations play a crucial role in advocating for the rights and well-being of LGBTQ+ individuals, providing support services, and raising awareness about the issues they face. Financial assistance, capacity-building programs, and collaboration with government institutions can help strengthen the efforts of these organizations.

Economic empowerment programs targeted towards marginalized communities, including LGBTQ+ individuals, can help address the systemic disadvantages they face. This can involve providing access to education, vocational training, job opportunities, and entrepreneurship support. Financial assistance and grants can also be provided to LGBTQ+ individuals who have been disproportionately affected by discrimination and exclusion.

Meaningful participation and consultation with affected communities is crucial in the development and implementation of reparatory justice measures. Brazil should ensure that LGBTQ+ individuals and organizations are actively involved in decision-making processes, policy formulation, and evaluation of programs. Creating spaces for dialogue, fostering inclusivity, and amplifying marginalized voices are essential steps toward a more just and equitable society.

It's important to note that the specific measures for reparatory justice may vary based on the unique social, cultural, and legal context of Brazil. Therefore, it is crucial to involve and prioritize the perspectives and needs of LGBTQ+ individuals and organizations within Brazil while formulating and implementing these measures.