

International Legal Protection of Refugees Persecuted for Reasons of Sexual Orientation and Gender Identity: A Critique of the Human Rights Approach

Abstract

This thesis examines the human rights approach to the interpretation of the definition of refugee by using the example of persons persecuted on the grounds of sexual orientation and/or gender identity (SOGI). The thesis focuses primarily on the European area and how a human rights approach to the interpretation of ‘persecution’ may be relevant to the practice of European Union states specifically in relation to SOGI refugees.

The first part outlines the context of persecution of persons for reasons of their SOGI. It examines the criteria by which SOGI is, and potentially can be, subsumed under the relevant grounds of persecution for refugee status. The second part outlines the different approaches to interpreting the concept of persecution and elaborates more on the so-called ‘circumstantial’ approach embodied by UNHCR. The third part is devoted to elucidating the doctrine of the human rights approach pioneered by James Hathaway and his book *The Law of Refugee Status*.

The fourth part examines the approach of human rights monitoring mechanisms to failed asylum seekers fearing persecution on the grounds of SOGI. It analyses the decisions of the Committee Against Torture, the Human Rights Committee and the European Court of Human Rights in the context of *non-refoulement* in relation to SOGI claims and the criminalisation of non-dominant sexual orientations and/or gender identities.

The fifth part examines EU law and the case law of the Court of Justice of the European Union. It focuses on the Qualification Directive, which makes extensive attempts to define the concept of persecution and conventional grounds and represents a human rights approach in ‘legislative practice’. A detailed analysis is made of the judgment of the CJEU in *X, Y and Z v Minister voor Immigratie en Asiel*, which dealt with the relationship between the criminalisation of same-sex sexual conduct in the country of origin and persecution for reasons of SOGI, and its implications. The sixth part briefly summarises Czech practice in relation to SOGI refugees.

Keywords

asylum – refugee – sexual orientation – gender identity – SOGI – human rights approach – Hathaway – non-refoulement