

Protection of LGBT+ Persons in the Context of Human Rights Discourse

Abstract

The thesis analyzes the current position that issues concerning LGBT+ persons (defined as a group in opposition to heteronormative and cisnormative structures of understanding) hold within human rights discourse not through discussing specific areas in depth but as a whole, taking into account the historical developments of this position. It focuses on the case law of the European Court of Human Rights and the Constitutional Court of the Czech Republic and in part 1. it tries to answer the question: what obstacles do efforts to protect LGBT+ persons currently face in the context of human rights discourse? The thesis touches upon the use of judicial self-restraint doctrine, the ECtHR's interpretative doctrines and mechanisms, the fact that as newly recognized aspects of human existence these issues are inherently seen as „novel“ in the context of human rights discourse, the question of „human rights inflation“, and finally the importance of extra-legal factors on judicial decision-making in cases concerning sexual orientation and gender identity such as societal changes and individual judges' subjective views about LGBT+ persons. A key underdiscussed aspect of the topic according to the thesis is that due to the absence of specific provisions concerning sexual orientation and gender identity in relevant positive law, any interpretation of major binding human rights instruments must be preceded by implicitly defining what the „human“ protected by human rights should look like: that is, determining to what degree the interests of LGBT+ persons in a given specific case can be subsumed under the interests of the abstract „subject of human rights“. Part 2. of the thesis deals with the concept of „the subject of human rights“. It first focuses on distinguishing the „human“ (the subject of study in the fields of biology and social sciences) and the „subject of human rights“ (the subject of study of jurisprudence), and suggests the possibility of identifying the „subject of human rights“ through the analysis of the structure of human rights instruments and the case law of judicial bodies. It formulates through the lens of the concept of „internal aspect of norms“ the process of judicial decision-making in „hard cases“ involving sexual orientation and gender identity and finally also deals with identifying specific constructions of „LGBT+ subjects of human rights“ through the analysis of the case law of the ECHR and the Constitutional Court of the Czech Republic.