The intersection between refugees and religion

The challenge of assessing religiously based asylum claims in the European legal framework

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Abstract

The present paper investigates the legal issues surrounding religiously based asylum claims and the main patterns adopted in European countries, with a special focus on Italy. It demonstrates the risks resulting from the implementation of contradictory standards across Europe and proposes how European courts could make a significant contribution by establishing common standards. European courts have recently adopted a more interventionist approach, with a view to expanding the range of cases involving religious discrimination, intolerance, and persecution that make the victim worthy of international protection. These recent actions could more effectively safeguard the essential core of religious freedom in all of Europe.

Keywords EU, freedom of religion and belief, refugee status, religious persecution, Italy.

1. Migration flows and international protection

In many parts of the world, the right to freedom of religion or belief does not receive sufficient protection and is subject to growing infringements of various forms (Annicchino 2015:55; Pew Research Center 2021; Spatti and Santini 2020:11-123). This is one reason for the inflow of refugees entering Europe. However, clashes have arisen between asylum seekers in Europe and short-sighted views of the international protections to which these refugees are entitled.

Although the European context has moved toward a broader recognition of the right to asylum, the increasing number of claims for religiously based asylum, due to the rise of new conflicts in Middle Eastern and African countries, has generated new tensions.

Since 2015, the huge increase of migration flowing into Europe has functioned as a "stress test for the European project," emphasizing the inadequacies of the Common European Asylum System to guarantee an effectively uniform level of protection, and its reductive use as a tool to control refugee flows (Heschl and Stanko-

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vic 2018:105-107). Indeed, member states' reluctance to implement a strong regime of protection is reflected in the adoption of coercive and punitive measures at the state level, and in domestic courts' emphasis on preliminary questions concerning the admissibility of asylum claims (i.e. the most appropriate interpretation of a provision or procedural grounds) (Heschl and Stankovic 2018:105).

There is a growing consensus that the universality of human rights places on states the responsibility to guarantee human rights protections, even beyond "the confines of their borders" (Pérez-Madrid 2015:77). However, the assessment of religiously based asylum claims requires public policies that can navigate between the public interest to safeguard safety, identity and financial sustainability and the implementation of the values of solidarity and tolerance toward vulnerable classes of individuals (De Oto 2016:123; Madera 2018:2).

At the European level, although Directive 2011/11/95 defines parameters for the recognition of refugee status, there is still a fragmented incorporation of international provisions, resulting in a weak implementation of the system of international protection. This legislative mismatch is intensified by the lack of effective techniques for the supervision of international provisions, which contributes to states' hesitancy to convert the obligation to support refugees into an actual duty to provide asylum (Pérez-Madrid 2021).

From my perspective, as a scholar of law and religion, refugee claims remain trapped between two competing interests. On one hand, the European system combines the implementation of the Geneva Convention's aims with the European project "of progressively establishing an area of freedom, security and justice" (Heschl and Stankovic 2018:108). On the other hand, domestic implementation of uniform standards has been scarce and states have increasingly adopted unilateral measures, aiming to reduce migration flows into their country and discourage refugees from entering. Meanwhile, refugees are becoming increasingly distrustful of European policies and seeking ways to sidestep state mechanisms of supervision, to the detriment of genuine cooperation between asylum seekers and host societies.

Starting from the notion and the scope of religious freedom and its "universal vocation" (Licastro 2022:41), the paper will investigate the notion of religious persecution and the issues related to assessing the credibility of and risk factors presented by asylum seekers. The goal is to determine how Europe and member states can best move forward in assessing religiously based asylum claims.

2. The key notion of religion

Religion is one of the elements that allow victims to obtain refugee status. This fact gives rise to an inextricable connection between international protection and the protection of freedom of religion and belief (FoRB; Madera 2018:3). The protec-

tion of FoRB is enshrined in a complex architectural framework at European and international levels, in its internal and external, individual and collective, private and public dimensions.[2] Article 1(a)(2) of the 1951 Geneva Convention (integrated by the 1967 Protocol) provides a definition of the notion of refugee, even though it is not fully exhaustive, and it enumerates religious persecution as one reason justifying the recognition of such a status.[3]

A key question concerns where interference with FoRB qualifies as religious persecution that prevents the asylum seeker from returning to his country of origin. In the European context, although there was an original intent to harmonize member states' legal frameworks and adopt common standards to define the status of refugee, the states enjoy broad discretion in implementing the relevant international provisions. As a result, the standards allowing refugees to claim persecution or fear of returning to their homeland can be subject to various interpretations, ranging from expansive to restrictive.

One related issue is how to legally define religion, an issue traditionally considered an "undertaking bound for failure" (Miller 2016:841). The Geneva Convention provides a traditional definition of religion; however, Article 10(1)(b) of European Directive 2011/95/EU (which recasts Directive 2004/83/CE) provides a broader definition of religion that encompasses "theistic, non-theistic and atheistic beliefs." The UN High Commissioner for Refugees has also clarified that religion includes not only belief but also one's identity and way of life, emphasizing the "public dimension" of religion.[4] Furthermore, comment no. 22 of the Human Rights Committee, paragraph 2, clarifies that the notion of religion cannot be restricted to "established religions" or to groups "with institutional characteristics or practices analogous to those of traditional religions."[5] In this way, syncretic or idiosyncratic religions are also assured of eligibility for international protection in case of persecution (Ferrari 2017:2).

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[2] See Article 18 of the International Covenant on Civil and Political Rights (ICCPR); Article 9 of the European Convention on Human Rights (ECHR); and Article 10 of the Charter of Fundamental Rights of the European Union.

[3] According to Article 1(a)(2) of the 1951 Geneva Convention, the status of refugee is recognized for any individual "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

[4] See UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004.

[5] Such an approach is consistent with the one adopted by the European Court of Human Rights, which extends the notion of religion irrespective of national qualifications and even to secular sets of values if endowed with a "certain level of cogency, seriousness, cohesion and importance" (Santini and Spatti 2020:113).

Although there should be a causal link between the reason (religion) and the act of persecution, religion does not have to be the only cause of persecution; it can be simply linked to other factors that have provoked persecution. On this point, there is no uniform legal approach. Some states require an express causal link, whereas in others, the causal link is investigated within a broader analysis of the claimant's request for refugee status (Pérez-Madrid 2019).

3. A well-founded fear

A key factor in decisions whether to grant refugee status is the presence of a well-founded fear of being persecuted for the reasons found in Article 1 of the Geneva Convention. Such a requirement is based on a "subjective" element (the fear) and an "objective" one (reasonable substantiation of the fear) (Abu-Salem and Fiorita 2016:2). The United Nations has provided several guidelines indicating which acts qualify as religious persecution and has stated that the fear does not necessarily have to be grounded in the personal experience of the applicant. The applicant's religious beliefs and practices and the potential risk that they could trigger religious persecution, along with the situation in the country of origin, are all factors that require careful scrutiny in the assessment of a prospective refugee's claim.

The EU Directive 2011/11/95 (Article 9(1)) provided that an action of persecution must be sufficiently serious by its nature or by its repetition as to constitute a severe violation of basic human rights, in particular of those inviolable rights under Article 15(2) of the European Convention on Human Rights (ECHR), namely the rights to life (Article 2); prohibition of torture, inhuman and degrading treatments (Article 3); prohibition of slavery (Article 4(1)); and no punishment without law (Article 7). It also provided an exhaustive list of actions that can be considered as persecutory so as to justify granting refugee status (Article 9(2)) and of the reasons underlying persecution (Article 10(1)(b)).[6] The Directive emphasizes that it is irrelevant whether the applicant "actually possesses the religious characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution" (Article 10(2)).

Persecution for religious reasons can also include prohibitions against belonging to a religious community, worshiping in public or in private, proselytizing, or giving or receiving religious education; discriminatory measures against persons practicing their religion or belonging to a religious community;[7] or forced con-

[6] The European directive provides also the "subsidiary protection" whereby a person, if returning to the country of origin, would suffer a real risk of serious harm such as death penalty, torture, inhumane or degrading treatment (Articles 2(f) and 15).

[7] See the UNHCR Handbook, paragraph 72. The 1951 Convention on the Status of Refugees, amended by the 1967 Protocol, grants non-refoulement, though it is not an unconditional right, if the country

version or other requirements to which religious practices must comply.[8] On this point, many critical issues arise from legal systems where there is no clear separation between religious and secular law and where a right to change religion is not recognized, with the result that apostasy is criminally sanctioned or implies a restriction on access to other fundamental rights (Santini and Spatti 2020:114). Moreover, religion can interact with gender, and women are exposed to a double vulnerability in certain geographic contexts. Their status as "minorities within minorities" (Eisenberg and Spinner-Haley 2009) makes them the object of severely discriminatory laws and customs, and this status should be taken into account when host societies consider their claims to refugee status (Madera 2018:11). Also, cases where generally applicable laws have a disparate impact on specific groups (e.g., LGBT communities) or where civil disobedience (e.g., conscientious objection to military service) results in a disproportionately serious penalty can be considered religious persecution.

It goes without saying that acts of religious persecution can have an impact not only on the right to FoRB but also on other fundamental rights. In any case, states carefully scrutinize the occurrence of a real risk, as a generic and abstract one is not enough to qualify the claimant for refugee status. Discrimination as such does not necessarily result in persecution if it does not provoke serious violation of human rights. The European Directive also provides for the possibility of becoming a refugee after departure from the country of origin (e.g., because of a religious conversion) or due to fears related to events that occurred after the applicant left the country of origin (Article 5).

A further key issue concerns who is the religious persecutor. Although the Geneva Convention has generically stated that a refugee "is unable … or unwilling to avail himself of the protection" of his country of origin, the UN Refugee Agency's Handbook on Procedures stresses that it is not necessary for a state actor to have performed active persecution, as there are cases where state negligence (e.g., tolerance of persecution by other sources, or denial of protection) facilitates religious

of origin engages in serious persecution (article 33). However, according to the 1984 UN Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, non-refoulement enjoys a blanket protection. In the European scenario, non-refoulement is an international law commitment member states are charged with on the basis of Article 78.1 TFEU. However, member states may refoul a refugee relying on the circumstances included in Article 21 of the EU Directive 2011/11/95. In its judgments, not only has the ECtHR banned refoulement in the case of torture or other cruel, inhuman or degrading treatment or punishment but also in the case of a risk of violation of other ECHR provisions (Articles 2, 4, 5 and 6 ECHR) in the country of origin. See European Asylum Support Office, 2018. *Judicial analysis – Asylum procedures and the principle of non-refoulement*, 26-28. EASO, Luxembourg.

[8] See UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 2004.

persecution coming from non-state third parties. In the European context, although Article 6 of the Directive 2011/11/95 includes state actors, parties or organizations that control the national territory, and non-state actors, some domestic courts are reluctant to recognize religious persecution coming from non-governmental actors.[9] On this point, Italian legislation (Article 5 of legislative decree no. 251 of 2007) provides that where religious persecution is attributable to non-state actors, the ability of accountable authorities of the state of origin (state authorities, parties or organizations charged with the task of controlling the landscape) to provide appropriate measures against the risk of religious persecution or discrimination must be investigated.

4. Case law of the European Court of Justice

In 2012, the European Court of Justice (ECJ) took a further step in defining religious persecution.[10] The applicants were two Pakistani nationals affiliated with the Ahmadiyya Muslim community who applied for refugee status in Germany, claiming that they had suffered discrimination and religious persecution in Pakistan. The court overruled the domestic decision, which restricted religious persecution only to the violation of the essential core of FoRB. The Court referred to the European Directive according to which violations of freedom of religion and belief resulting in religious persecution must be "serious enough," because of their nature and recurrence, to establish a "serious violation of fundamental human rights." However, Article 9(1) of the Directive restricts such fundamental human rights to those inviolable rights grounded on Article 15 of the ECHR. The ECJ determined that the Directive introduced a distinction not consistent with Article 10(1)(b), which covers the applicant's freedom not only to practice religion privately but also to live it out in public. According to the ECJ, the seriousness of the penalties that the state could adopt against the applicant should be the key factor in determining whether a violation of FoRB can qualify as religious persecution. Thus, the ECJ has made an innovative interpretation of the European Directive, according to which national authorities are charged with the task of assessing whether the applicant, in the light of his personal situation, would face an effective risk of religious persecution in his country of origin (i.e., criminal sanctions or degrading or inhuman treatment under Article 6 of Directive 2004/83).

Finally, responding to a question raised by the domestic court, the ECJ held that the circumstance that the founded fear of persecution would be neutralized if the applicant renounced his religious practices in the country of origin cannot be

[9] Germany – Federal Administrative Court, 20 February 2013, 10 C 23.12.

[10] ECJ, Grand Chamber, *Bundesrepublik Deutschland v. Y and Z* (C-99/11), 5 September 2012.

considered a relevant standard for judicial assessment. Therefore, an individual cannot be reasonably expected to renounce practicing his religion publicly in order to avoid the risk of persecution; rather, both the public and private dimensions of religion are essential components of a single right to FoRB and enjoy protection under international provisions.[11] Moreover, courts are not equipped to assess whether the observance of a religious practice constitutes a central element for the affected community.

According to the Court, therefore, the German authorities did not apply the Directive properly, as there cannot be room for a distinction between acts in terms of international protection that "affect the essential content of freedom of religion and belief which would not include religious activities in public" and acts that "do not affect the supposed essential content." The ECJ's expansive approach toward religious persecution has been reiterated in a more recent judgment, where the Court held that access to international protection for religious reasons cannot depend on an individual's affiliation with an organized religious community.[12]

5. Case law of the European Court of Human Rights

Initially, as a "right to asylum" has not been provided by the ECHR, the European Court of Human Rights (ECtHR) adopted a restrained approach, according to which member states can be charged with a protective duty toward asylum seekers only when their rights grounded on Article 15 of the ECHR risk being violated in their country of origin.[13] Compared to the ECJ, the Strasbourg Court, Fifth Section, adopted a more cautious approach in a similar situation. *In F.G. v. Sweden*, an Iranian applicant sought asylum in Sweden, alleging the risk of persecution for political reasons (because of the critical opinions he expressed against the Iranian government in an online publication) and due to his conversion to the Christian faith. The majority rejected the application because the risk of persecution was weakened by the circumstance that the applicant kept his conversion as a private matter.[14] Thus, according to the ECtHR, a violation of FoRB should imply also a

[11] ECJ, Grand Chamber, *Bundesrepublik Deutschland v. Y and Z* (C-99/11), 5 September 2012.

[12] ECJ, Section Second, *Bahtiyar Fathi c. Predsedatel na Darzhavna agentsia za bezhantsite* (C-56/17), 4 October 2018.

[13] ECtHR, *Z. and T. v. United Kingdom*, Fourth Section, Decision of 28 February 2006 (app. 27034/05). According to the ECtHR, a violation of religious freedom results in persecution only when the person, "as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment."

[14] Furthermore, referring to the European Court of Justice's ruling, the dissenting judges argued that "national authorities cannot reasonably expect from the applicant that he or she abstain from the exercise of the fundamental right to religious freedom and conscience in order to avoid treatment prohibited under Article 3."

violation of Article 3 of the ECHR to constitute religious persecution. The Court has upheld a disparate treatment between the "core" and the "fringe" of FoRB in order to narrow "the scope of persecution" (Lehmann 2014:65). Such a reading would undermine Article 9 of the ECHR as an autonomous source of protection of FoRB: only the establishment of a risk of inhuman or degrading treatment would result in a violation of religious freedom that would justify a claim for international protection, as member states cannot be charged with the duty of being "indirect guarantors" of FoRB beyond the European landscape (Licastro 2022:42).

The Great Chamber held that when an asylum seeker bases his claim on individual risk, which does not reflect a general well-known risk, he is charged with the duty to substantiate the risk alleged.[15] In the case under examination, the domestic authorities were aware that the applicant was a member of a group at risk of ill treatment.[16] Also, the majority of judges held that the respondent state's assumption that the applicant would not be persecuted in Iran because "he could engage in a low-profile, discreet or even secret practice of his religious beliefs" was not reasonably acceptable. Thus, altering the Fifth Section's earlier ruling, the ECtHR has growingly adopted an interventionist approach that takes into account the status of religious minorities in certain geographical contexts, requires member states to consider situations of doubt to the benefit of an asylum seeker and not to his detriment, and urges a full implementation of international guarantees (Hervieu 2013: 13).[17]

The ECtHR affirmed the reasoning adopted in *F.G. v. Sweden* in a more recent ruling, *A.A. v. Switzerland*.[18] Here the Court ruled that, taking into account the penalties provided for apostasy from Islam in Afghanistan, the return to his country of origin of an Afghan who had converted to Christianity would expose him to a high risk of inhuman and degrading treatment. Thus, an expulsion would result

[15] However, "considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States Parties under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned." See ECtHR, Grand Chamber, 23 March 2016 (App. No. 43611/11), *F.G. v. Sweden* § 127.

[16] Thus, they had been charged with a stricter "obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran." Id., § 156.

[17] ECtHR, Fifth Section, 6 June 2013 (app. 50094/10), *M.E. c. France*.

[18] ECtHR, Second Section, 5 November 2017 (App. No. 32218/17), *A.A. v. Switzerland*.

in an infringement of Article 3 of the ECHR. The Court also reiterated that the applicant cannot be asked "to modify his social behavior so as to confine his faith to the strictly private domain" after returning to Afghanistan; instead, it reaffirmed the protection of the "social dimension" of religion grounded in the European legal framework (Bauer 2019).

Finally, in a 2022 judgment, *M.A.M. v. Switzerland*, the Court reiterated the reasoning that the expulsion to Pakistan of a Christian convert would infringe against Articles 2 and 3 of the ECHR. The national authorities analyzed the general status of Christians in Pakistan, without seriously assessing the situation of Christian converts and the personal situation of the applicant. Therefore, in the light of a joint interpretation of Articles 2 and 3 and of the "refugee sur place" principle, and giving salient relevance to the information on the country of origin, the Court upheld the asylum claim. The Court held that Swiss authorities did not scrutinize in sufficient detail the risks to which the applicant would be exposed if returned to Pakistan. Indeed, his manner of manifesting his religious affiliation in Switzerland, his intent to exercise his religion in Pakistan, and his family's knowledge of his conversion could result in accusations of blasphemy and serious persecution in his country of origin. The new approach seems promising, and analogous reasoning should be applied in any case of a refugee under duress due to religious conversion, regardless of the faith that refugee has converted from and to. However, the court failed to analyze the question of a violation of Article 9 (Tsevas 2022).

6. The analysis of the credibility of the claimant's conversion

In case of claims for international protection, European judges carefully scrutinize the specific circumstances of the case, taking into account the claimant's personal situation. However, relevant weight is also given to the credibility of the claimant, even though credibility is not always connected with clear evidence (Abu Salem and Fiorita 2016:7-14). The analysis of credibility or sincerity is extremely complex. On one hand, there should not be state interference in church matters; on the other hand, authorities aim at preventing the risk of fraudulent claims (Licastro 2022:49). In some cases, even a delay in making the request has been considered as a sufficient ground to reject the application. Many cases have concerned conversion to Christianity. A comparative analysis of the case law of state members shows that a formal act of adherence is not considered sufficient evidence; "familiarity with the basic elements of new religion," considering "individual history, personality, level of education, and intellectual disposition and religious practice in his country of origin," will be investigated (Berlit et al. 2015:654).

Factors that can give rise to skepticism about the claim include insufficient knowledge of the religion to which an individual claims to be converted, the fact that an individual

does not attend religious services consistently, or the lack of documents declaring one's adherence to a faith. Situations in which the individual changed his faith commitment after leaving the country of origin can add further difficulties to the analysis.

The examination of credibility should be context sensitive as well as narrowly tailored. Social, economic, and educational circumstances, the level of religious repression against a religious community in a specific geographic context, and the importance of religious adherence in the individual's life are all factors that should be taken into account (Pérez-Madrid 2021). The examiners should distinguish carefully between investigations allowed by law and interference in strictly theological or doctrinal matters.[19] In some cases, state authorities have resorted to religious experts. However, this option seems to discriminate against idiosyncratic religions and does not properly consider the hybridization of religious practices due to a community's adaptation to the host society. According to some scholars, the assessment should focus on the effectiveness and severity of the persecution that an asylum seeker would be exposed to if returned to his country of origin, rather than on an intrusive investigation of the applicant's sincerity and knowledge of religious doctrines (Pérez-Madrid 2015:85). However, a higher level of religious knowledge could be expected where religious leaders are concerned.[20]

7. Italian case law

The Italian constitutional framework reconciles the principles of religious neutrality, equality, and church-state cooperation, resulting in the protection of the negative and positive dimensions of FoRB, and expressly recognizes the right to asylum of all foreigners whose country of origin prevents them from effectively exercising the democratic liberties guaranteed by the Italian Constitution (Article 10.3).

The status of refugee is regulated through legislative decrees no. 257/2007 and no. 25/2008 (which transposed Directive 2004/83/CE), covering also the situation of the "refugee sur place" (Bonetti 2020: 270). Mirroring European provisions, Italian law has adopted a broad definition of religion that includes the components of a belief, an identity and a lifestyle. Furthermore, it is irrelevant whether a person actually possesses the religious characteristic that attracts persecution, provided that such a characteristic is attributed to the applicant by the persecutors (Article 8 of decree 257/2007).[21]

[19] On this point, see the Italian Court of Civil Cassation, First Section, 26 February 2020, no. 5225. The Court held that the assessment of the credibility of the asylum seeker's conversion should not involve an assessment of the individual's path of conversion or his level of knowledge of the rituals and practices of the faith to which he converted.

[20] UNCHR, Guidelines on International Protection, 28 April 2014, § 32.

[21] Court of Turin, decree no. 741, 3 February 2020.

Italian authorities assess whether a foreigner should be granted refugee status by combining an analysis of credibility with documentation provided by government and non-government organizations.[22]

Credibility can be assessed by resorting to the elements listed in Article 3 of decree 257/2008, which specifically includes not only the effective situation in the country of origin but also the individual situation of the claimant (Madera 2018:3-4).[23] Thus, courts are required to analyze the political-religious scenario of the petitioner's country of origin (including the relationships between religious groups) and to carefully scrutinize the "subjective dimension" of the claimant (Abu Salem and Fiorita 2016:10-11).[24]

However, the credibility of the claimant's statement remains a pivotal element justifying the opening of the judicial inquiry.[25] The weakening of the burden of proof upon the applicant justifies a pervasive judicial scrutiny of the applicant's credibility (Licastro 2022:49-53).[26] Claims for asylum are more likely to be successful if individual statements are supported by papers provided by the petitioners.

In any case, the analysis of credibility, where clear evidence is lacking, is mitigated by Article 3(5), which states that authorities should place significant weight on the thoroughness of the claimant's effort to substantiate his claim, specify the essential elements of the specific situation, and provide all the information at his disposal. Other relevant factors are the coherence of the applicant's assertions and whether he submitted his application as early as possible (Abu Salem and Fiorita 2016:7-14; Madera 2018:3-4).[27]

In some cases, courts have given priority to the high risk of violation of the individual's fundamental rights should he be sent back to the country of origin.[28] Following this perspective, an examination of the constitutional and legal framework of the country concerned is not sufficient to deny the status of refugee (or at least the

[22] Court of Cassation I, no. 26056, 1 December 2010.

[23] Court of Venice, decree no. 6198 of 2016.

[24] Courts have to assess "whether the situation of exposure to danger for physical safety indicated by the appellant … actually exists in the country to which the repatriation should be ordered, on the basis of an assessment that must be updated at the time of decision." See Court of Cassation, 28 June 2018, no. 17075; Court of Cassation, 12 November 2018, no. 28990. Furthermore, "in order to deem this obligation fulfilled, the judge is required to specifically indicate the sources on the basis of which he carried out the requested assessment" (Court of Cassation, 26 April 2019, no. 11312), clearly specifying the international sources used in the motivation which courts aim to provide continuity (Court of Cassation no. 11312/2019; Court of Cassation no. 5026, 26 February 2020).

[25] Court of Cassation, no. 5224/2013; Court of Cassation, no. 16925 of 2018; no. 28862 of 2018; 30 November 2021, no. 37657.

[26] Court of Cassation, First Section, 30 November 2021, no. 37657.

[27] Court of Cassation, 16 July 2015, no. 14998; Court of Cassation, 21 July 2015, no. 15275.

[28] Court of Milan, decree no. 64207 of 2015.

subsidiary protection) where the effective dynamics between mainstream religions and minorities show a scenario of pervasive religious intolerance, discrimination, repression, and persecution of minorities. The judicial analysis focuses on the key issue of whether the asylum seeker, given his affiliation with a faith community subject to oppression, would face a real threat to his life, or a risk of inhuman and degrading treatment or serious harm (Article 14 of decree 251/2007) in the country of origin. If so, the fact that the threat does not come from the state is irrelevant and emphasis is placed instead on the fact that the state cannot adopt effective preventive measures against the prospective impact of religious conflicts (Bonetti 2020: 279). Well-founded fear can be linked to the objective status of a faith in a certain context, regardless of the asylum seeker's personal experience (Bonetti 2020:285). Claims of well-founded fear have to be carefully scrutinized, taking into account the legislation of the country of origin and the severity and risk of criminal penalties meted out to adherents of non-recognized religions.[29]

The persecuted conduct is not required to have a strictly religious nature. In certain cases, the element of religion is inextricably connected with gender or sexual orientation. For instance, in Islamic countries, where personal status laws are in force, women are subject to discrimination and even persecution if they do not comply with gender expectations deriving from customary, religious and cultural norms (Madera 2018:1-17). One case initiated a judicial trend according to which family matters or domestic violence against women (pursuant to Article 3 of the Istanbul Convention) can be considered factors justifying international protection when they give rise to the violation of fundamental rights.[30] Also, in Islamic countries, gender identity or sexual orientation can expose individuals to serious threats against their life.[31]

The Italian Court of Cassation has recently adopted an increasingly interventionist approach with a view to guaranteeing effective international protection of refugees. It held that courts cannot base their assessment only on the credibility of the claimant and excessively burden the asylum seeker, as the most vulnerable party, with the need to provide evidence of his assumptions; rather, they are charged with

[29] Civil Court of Cassation, First Section, 4 August 2021, no. 22275. Recently, courts have stated that "verification of the existence of the so-called intrinsic (or subjective) condition of credibility must be carried out with reference to (and in the context of) the so-called extrinsic (or objective) condition of the same, constituted by the actual existence of a persecution against the belief of faith manifested by the applicant, by ascertaining, also by resorting to the duty of preliminary cooperation, the actual treatment of the religion professed by the central and provincial authorities of the country of origin." See Civil Court of Cassation, First Section, 20 August 2021, no. 23197.

[30] Court of Cassation, First Section, 24 November 2017, no. 28152; see also Court of Cassation, Sixth Section, no. 12333/2017, Rv. 644272-01.

[31] Court of Catanzaro, decrees of 2 July and 7 December 2015.

a duty of active cooperation in the acquisition of the available evidence.[32] Courts must also investigate the conduct of authorities in the country of origin, to assess whether they tolerated or opposed religious persecution[33] and to verify whether, in the political context concerned, there are religious-ethnic conflicts that could directly affect the claimant or his specific relationships (e.g., in the workplace). They must also receive reliable external information and collect all the documentation available.[34] Therefore, courts should actively investigate religious tensions in the country of origin, whether the persecution is founded on both real or apparent reasons, and whether it could lead to serious harm. Harm cannot be excluded from consideration when the threat comes from private parties, if state authorities are unable to provide effective protection.[35] Moreover, the persecution could come not only from the state as a legal system but also from elsewhere in the government structure, such as from policy boards.[36]

However, the recent approval of a list of presumptive "safe countries" by the Minister of Foreign Affairs and Cooperation and the Minister of Domestic Affairs and Justice (Article 2 bis of decree 25/2008, added in 2018) could seriously undermine the complex framework of international protection, resulting in an increase in unsuccessful applications (Bonetti 2020:286).

The analysis of Italian case law still indicates a partial inability among domestic courts to implement fully international and European standards and to distance themselves from a securitization approach. Courts' scrutiny often focuses on procedural grounds, to the detriment of full protection of FoRB in its internal and external dimensions. The focus on the claimant's credibility and the variability of the standards used to assess this credibility could give rise to a dangerous "negotiation of the truth," which underestimates the impact of the power dynamics in the court setting (Rose and Given-Wilson 2021:221).

8. The need for stricter scrutiny at the European level

Although the notion of religious refugees has given rise to a fruitful interaction between international, supranational and domestic models (Ferrari 2017:28), actually the right to international protection seems trapped between the broad scope of international provisions and their restrictive forms of implementation at the national level. Here, there is a gap between the protection officially granted and its

[32] Court of Cassation, no. 26056/2010.
[33] Court of Cassation, decree no. 563 of 2013.
[34] Court of Cassation, decree no. 8281 of 2013; ordinance no. 24064 of 2013.
[35] Civil Court of Cassation, Employment Section, 10 January 2022, no. 441; Court of Cassation, no. 26056/2010.
[36] Court of Cassation, no. 24250/2020.

concrete realization, where the recognition of refugee status is still an "exception" (Kagan 2010:1233). Furthermore, a kind of judicial reluctance to take advantage of international standards can still be perceived at the state level.[37]

The European courts could be powerful game changers in the implementation of international and European standards with a view to guaranteeing a basic level of protection of FoRB across the continent. Instead, a minimalist judicial approach has often been adopted, in contradiction with the broad definition of the notion of religion and the judicial standards provided not only at the international level (UN High Commissioner of Refugees) but also at the European level.[38]

For this reason, the European courts should be more strongly committed to rectifying the inadequacies of state legislation and strongly encouraging the adoption of uniform standards of protection at the Europe-wide level. Instead, the recent "deferential" judicial approach (Heschl and Stankovic 2018:112) toward domestic policies risks exacerbating the variety of national policies to the detriment of the implementation of a basic level of protection of human rights in the European landscape as a whole.

First, the notion of religion incorporates not only sets of beliefs but also identities and lifestyles. Following this perspective, not only the intimate sphere of the individual is concerned, but also his practices, traditions, the social-cultural context where he lives, and his family life, emphasizing the public dimension of religion and the complex dynamics between the individual, the religious community he is affiliated with, and the government. Thus, the European courts should promote a broad notion of religion, inclusive of theistic, non-theistic, and atheistic beliefs and convictions.

If the ECtHR also considered Articles 9 and 14, it would adopt a more consistent approach, aligning international guidelines and the European legal approach, with a view to expanding the notion of religious persecution to cases of discrimination, intolerance, and hatred and opening a constructive channel of communication with ECJ case law (Tsevas 2022). A synergistic connection between the two courts' approaches would be crucial to enable coherent protection of the rights of refugee seekers and their legitimate expectations in the European scenario, with a view to guaranteeing them legal certainty (De Coninck 2018).

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[37] Germany – Federal Administrative Court, 20 February 2013, 10 C 23.12. The case demonstrates that a higher level of hesitancy can be perceived where persecutory acts are carried out or threatened by non-state actors, if state authorities tolerate them or are unable to prevent them and grant effective protection.

[38] In 2016, the Commission proposed revising the Directive 2011/11/95, in the pursuit of a harmonization of standards to qualify for international protection and a codification of European courts' precedents.

Second, European courts have emphasized that FoRB is a key factor in determining entitlement to refugee status. However, they should more strongly urge the extension of protection against religious persecution, paying more attention to the attitude of the persecutor rather than that of the persecuted. Such an approach would avoid intrusive scrutiny of knowledge of the tenets and practices of the alleged religious community to which a refugee seeker claims to adhere (Šoritė 2018).

For this reason, the religious element should not be relevant only in cases of extreme persecution, but also deserves consideration where the "forum externum" is seriously affected, with a view to taking in due consideration the full potential of Article 9 of the ECHR (Gomarasca 2020:71).

In some cases, even generally applicable laws that appear to be religiously neutral can have a disparate impact on certain religious groups. Some states criminalize particular religiously based behaviors, claiming that they are not persecuting religious beliefs but penalizing conduct that constitutes a criminal offense. Such cases should be carefully scrutinized to balance the evidence of an effective crime against the risk of unjustly accusing members of religious minorities of extremism because of their religious tenets and practices (Šoritė 2018).

Following this perspective, the status of refugee should not be connected mainly with a pervasive analysis of the sincerity and credibility of the claimant's conversion, which risks interfering with church matters. Furthermore, authorities should cooperate more actively in collecting all the available information on the circumstances of the case, with a view to fully implementing the fundamental right to freedom of religion and belief.

Third, a dangerous securitization of FoRB that would affect faith communities abstractly perceived as a threat should be avoided (Ferrari 2017:230). Every form of disparate treatment between "good migrants" and "bad migrants," depending on religious, political, economic, or cultural factors, is indeed in contradiction with the main principle of the dignity of every human being and the European standards of responsibility and solidarity grounded on the Lisbon Treaty (Folliero 2016:191). In my view, this issue plays a negative role in influencing the attitude of public authorities toward religious converts and their asylum claims. However, this topic requires more research and could be considered in a future article.

European courts are charged with the task of guaranteeing the fundamental rights of all persons, including the most vulnerable classes of individuals, such as refugees and asylum seekers. If European courts followed the above-mentioned standards more seriously, they would promote the incorporation of such a broad notion of freedom of religion and belief at a domestic level (Licastro 2022). Thereby, if they subject alleged infringement cases to strict scrutiny, they could make a significant contribution toward rectifying the inadequacies of refugee protection

at the domestic level and guaranteeing asylum seekers equal treatment in each member state.

Following this perspective, European courts should counterbalance the states' margin of appreciation through a stricter proportionality analysis, which requires that state measures should pursue a legitimate aim, that the intensity of state measures is consistent with the state's intended aims, that such measures do not go beyond what is necessary to achieve the intended purpose, and that there is proportionality between the advantages gained from state measures and their impact on other rights (Cartabia 2016). A proportionality test requires striking balances between the state's interest in preventing the abuse of religiously motivated asylum requests and the consequences of the denial of international protection for the asylum seeker. Such a proportionality analysis should consider that the ability to mask religious affiliation, should the applicant be returned to the country of origin, cannot be considered as a factor. Indeed, forcing the asylum seeker to make a "tragic choice" (Calabresi and Bobbitt 1978) between camouflaging his religious identity and suffering religious persecution is not in alignment with European guarantees of FoRB. Therefore, persecution should be understood as a broad notion, and the protection of FoRB cannot be limited to its internal dimension.

On the contrary, European courts' self-restraint could result in emptying religiously based protections of refugees of their content and in the failure of the European project of freedom, security, and justice.

In any case, if European courts adopt a more interventionist approach, policies regarding asylum seekers would move away from a "protectionist" perception in which refugees become saddled with a "negative identity" (Mancuso 2021). Moreover, a pervasive European supervision would promote refugees' trust in European policies and reduce attempts to circumvent state control, thereby establishing a more fruitful partnership between asylum seekers and host societies. Indeed, the implementation of clear, uniform standards would facilitate countries' efforts to distinguish between real asylum seekers and economic migrants, with the goal of making the European asylum system more sustainable for individual member states (Heschl and Stankovic 2018:107). This topic is another one deserving further research.

Consistent with this perspective, EU courts should seek to strengthen their dialogue with domestic courts, urging the lower courts to play a key role in compensating for the structural inadequacies of legal systems.

9. Conclusion

The assessment of the claims of asylum seekers still aims frequently at erecting barriers rather than at building a "culture of unity." On this point, Pope Francis has complained many times about a "shipwreck of civilization," which he considers a

failure of democracy. Instead, states should interpret legal provisions with a view to reconciling "humanity" and "justice" (Abu Salem and Fiorita 2016:5).

Although member states enjoy a certain margin of appreciation, a fair balance between the adoption of common standards (unity) and the maintenance of national identities (diversity) is far from attained. National legislations have not fully grasped the opportunities offered by international protection, and there is no uniform approach to defining a refugee. However, nowadays perspectives based on the national dimension of human rights should be revisited within a broader framework, with a view to harmonizing their protection. In various domestic settings, indeed, the status of asylee or refugee for religious reasons has been granted only in very serious cases of hostility in the country of origin. The problem results from a restrictive notion of religious persecution, which is entangled with a shortsighted view of "well-founded fear" and of "religious persecutor," and with the tendency to place great importance on a controversial assessment of the credibility of asylum seekers. Such approaches risk reducing the protection of religious freedom to its internal dimension and undermining aspects of religious freedom the essential nature of which is grounded in the Geneva Convention and in the ECHR.

Although European courts have maintained their respectful attitude toward national identities, they have recently provided more clear guidelines to member states, for the purpose of expanding the range of cases of religious discrimination, intolerance, and persecution that are worthy of international protection and guaranteeing the essential core of religious freedom in the European landscape as a whole. Following this perspective, European courts should take further steps to revert to their role of "standard setters" (Ferrari 2012:52-53) with a view to harmonizing the protection of religious freedom at the European level and reconciling international protection with national perspectives.

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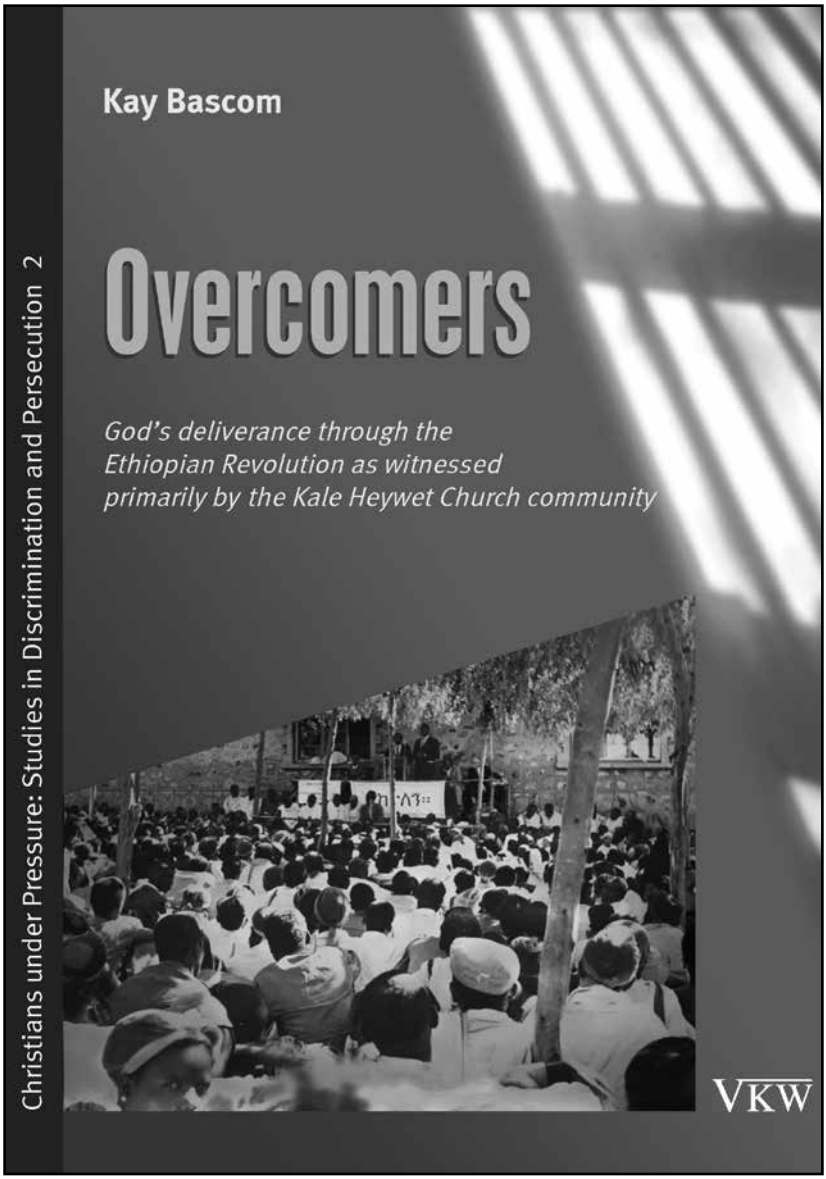

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