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Migration of Asylum Seekers and the Freedom of Religion or Belief: The Dual Nature of Religious Freedom as a Challenge

- **ABSTRACT:** *This study examines the international and European legal frameworks that protect the rights of asylum seekers who have fled their home countries because of religious persecution. Divided into four main sections, the paper begins by delving into the sources of international law that uphold religious freedom. The second section identifies the specific conditions under which refugee status can be granted based on religious persecution. In the subsequent section of the paper, the focus shifts to scrutinising whether acts of persecution encompass both the internal and external dimensions of religious freedom, as demonstrated through the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. Notwithstanding the practice of competent asylum authorities and national courts, which reject asylum applications under the assumption that protection should be limited to the internal dimension of religious freedom, this study advocates the need for a comprehensive examination of religion-based asylum claims, considering both dimensions of religious freedom. This stance is rooted in the hypothesis that the distinction between internal and external dimensions of religious freedom should have no practical value for the assessment of the persecution based on religious or belief affiliations or worldviews of asylum seekers.*
- **KEYWORDS:** freedom of religion, migrants, refugees, asylum seekers, forum internum, forum externum

1. Introduction

The international protection of freedom of religion or belief encompasses two distinct dimensions: internal and external. Individuals' inner beliefs are accorded heightened

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protection, as they are intrinsic to human beings and remain inaccessible to external scrutiny. In this context, the justifiable limitations on this dimension of religious freedom are nonexistent. These internal beliefs find expression through various means. Religious persecution predominantly targets the external manifestation of religion or belief. Members of diverse religious groups, often belonging to minorities, face hostility and mistreatment because of their expression of dissenting beliefs or unorthodox religious practices. Consequently, asylum seekers affiliated with these groups are likely to experience a well-founded fear of persecution, thereby meeting the substantive requirements for international protection. Furthermore, the distinction between voluntary migration and migration due to persecution is often unclear.¹

Assessing religion-based asylum applications poses specific challenges.² Is the mere existence of persecuted religious beliefs confined to the internal sphere sufficient to grant refugee status? How can secular authorities accurately assess the religious affiliations of asylum seekers? Does religious persecution encompass only the internal dimensions of belief? Moreover, can competent asylum authorities base their decisions on the assumption that asylum seekers, upon returning to their country of origin, will only practice their religion in private and refrain from publicly manifesting their beliefs? These complex questions form the focal points of this study, which seeks to address them in light of relevant international law and the jurisprudence of two European courts, the European Court of Human Rights and the Court of Justice of the European Union.

This paper begins with an overview of the international protection of religious freedom and then delves into the historical interconnection between religion and migration (section 2.1). It also addresses the intricate issue of defining religion (section 2.2) and the distinction between the internal and external dimensions of religious freedom (section 2.3). Subsequently, the provisions that regulate religious persecution as a basis for obtaining refugee status are presented (section 3). The final section explores the intersection between the two dimensions of freedom of religion and the assessment of religion-based asylum-seeker claims for international protection (section 4). The conclusion synthesises the main findings of this comprehensive analysis.

2. International protection of religious freedom

■ 2.1. Brief historical background

Freedom of religion has a long history. Similarly, the claim that the entire history of humankind is a history of migration is not far from the truth.³ Even in the

1 Mingot and de Arimatéia da Cruz, 2013, p. 175.

2 Rieder, 2022, p. 142.

3 Rystad, 1992, p. 1169.

distant past, large multi-ethnic empires tolerated different religious traditions and practices and experienced huge migration movements (Persia and Rome).⁴ In the European public order, the path to religious liberty was paved by international treaties whose primary objective was not to enshrine religious freedom but to prevent religious wars and conflicts. The Religious Peace of Augsburg (1555) established the principle of territorialism, which led to the abandonment of the generally accepted theory of the Holy Roman Empire based on one religion. The principle of *cuius regio, eius religio* was grounded in the migratory patterns of people adhering to the same religious faith, relocating to territories governed by the sovereign of their religion. The Peace of Westphalia has been considered a turning point in the process of creating the European international order. It is also a milestone in the evolution of the international protection of religious liberty. Even though the focus was ‘on the religious freedom of the state rather than that of the individual,’⁵ the protection of religious freedom was enhanced when the Protestant faiths were recognised internationally, and states were obliged to respect their beliefs. Religious questions were also settled in treaties between European powers and the Ottoman Empire during the 18th and 19th centuries. Most aimed to protect the freedom of worship of Christian populations in the Ottoman Empire.⁶ For the region of Central and Eastern Europe, the Treaty of Berlin was of extraordinary significance because the creation and recognition of the independent states of Romania, Serbia, and Montenegro were conditional on their undertaking to respect the religious equality and freedom of worship for all inhabitants on their territory.⁷ After the World War I, the Minorities Treaties provided for the ‘free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.’⁸ This was a period during which a huge compulsory population exchange between Greece and Turkey took place, based on the religious and not ethnic affiliations of their respective populations.⁹ It could be concluded that the interwar system of international protection of religious freedom was ‘designed to protect either the religious rights of minorities or the rights of religious minorities.’¹⁰

The post-World War II period holds extraordinary significance for the development of international protection of religious freedom. During this time, freedom of worship and free exercise of religion emerged as key rights, even before

4 Evans, 1997, p. 15; Gibbon, 2008, p. 48. The Bible introduces the ‘ethic of kinship for people on the move.’ Glanville, 2022, p. 23.

5 Evans, 2004, p. 5.

6 Ibid., p. 6.

7 Ibid., p. 9.

8 Polish Minority Treaty, Art. 2. Similar treaties were signed by Czechoslovakia, Yugoslavia, Romania and Greece.

9 Hirschon, 2008, pp. 23–38.

10 Evans, 2004, p. 10.

the adoption of the Universal Declaration of Human Rights.¹¹ The international community shifted its focus from simply safeguarding minority and group rights to protecting individual rights. This evolution reflected a changing paradigm in the approach to human rights considerations at the global level. The freedom of thought, conscience, and religion was protected by core universal human rights instruments, such as the 1948 Universal Declaration of Human Rights (UDHR),¹² the 1966 International Covenant on Civil and Political Rights (ICCPR),¹³ and the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief.¹⁴ Furthermore, regional instruments of human rights protection were adopted during the second half of the last century and provided for human rights protection at the regional level. The most significant are the 1951 European Convention on Human Rights (ECHR),¹⁵ the 1969 American Convention on Human Rights,¹⁶ the 1981 African Charter on Human and Peoples' Rights,¹⁷ and the 2000 Charter of Fundamental Rights of the European Union.¹⁸ This complex framework for the international protection of freedom of religion or belief (FoRB) enshrines the individual and collective (including corporative), private and public, and internal and external dimensions of this fundamental right. In terms of protecting religious freedom, the provisions outlined in these instruments largely demonstrate a consistent approach.

In the same historical context, notable developments occurred in the field of international migrant protection in the form of the adoption of multilateral treaties that specifically addressed three distinct categories of migrants. These categories included refugees,¹⁹ migrant workers,²⁰ and smuggled and trafficked

11 Lindkvist, 2017, pp. 2–3.

12 Universal Declaration of Human Rights [Online]. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (Accessed: 30 June 2023).

13 International Covenant on Civil and Political Rights [Online]. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (Accessed: 30 June 2023).

14 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief; cf. Bielefeldt and Wiener, 2021.

15 European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_eng (Accessed: 30 June 2023).

16 American Convention on Human Rights [Online]. Available at: https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf (Accessed: 30 June 2023).

17 African Charter on Human and Peoples' Rights [Online]. Available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed: 30 June 2023).

18 Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C364/1.

19 See the 1951 Geneva Refugee Convention, supplemented by its 1967 Protocol.

20 See Migration for Employment Convention (1949), Convention (No. 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers (1975) and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

migrants.²¹ The multilateral instruments which protect these three categories of migrants provide exceptionally detailed legal frameworks constituting central specialised sources of law within the domain of international migration law.²²

■ 2.2. *Towards the definition of religion*

As religion or belief can be a key factor in recognising refugee status, it is essential to examine the definition of religion or belief according to the norms of international law and international refugee law. Many scholars conclude that international law does not offer a specific definition of religion or belief,²³ and that the ‘search for a single, discrete definition of religion is an undertaking bound for failure.’²⁴ Some suggest that the term religion should be abandoned and replaced with other phrases which will not ‘fall into the same definitional pitfalls of the original term,’²⁵ while the others are committed to a so-called ‘methodological atheism’ or negative real definition of religion.²⁶ General Comment 22 on Article 18 of the ICCPR provides that the terms ‘religion’ and ‘belief’ should be interpreted in a broad sense and clarifies that Article 18 protects not only theistic beliefs and established or traditional religions but also non-theistic and atheistic beliefs.²⁷ However, if religious freedom is to be protected, it is necessary to define exactly what is being protected.

The jurisprudence of the European Court of Human Rights (ECtHR) has shaped the international understanding of the protection of religious freedom. Although the ECtHR has refrained from providing an abstract definition of religion,²⁸ certain principles can be inferred from its case law. The ECtHR has established a distinction between what is protected and what is not based on two key criteria: the beliefs ‘should attain a certain level of cogency, seriousness, cohesion and importance,’ and they should be deemed ‘worthy of respect in a democratic society’ and compatible with human dignity.²⁹ Therefore, communism,³⁰

21 See Protocol Against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000).

22 Chetail, 2019, p. 166.

23 Santini and Spatti, 2020, p. 112.

24 Miller, 2016, p. 841.

25 Stinnet, 2005, p. 429.

26 Berger, 1990, p. 100. More on various definitions of religion: Wilson, 1998, pp. 141–162.

27 UN Human Rights Committee (HRC), CCPR General Comment No. 22. Art. 18 (Freedom of Thought, Conscience, or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4.

28 ECtHR, *Kimlya and others v. Russia* (Applications Nos. 76836/01 and 32782/03), Judgment, 1 October 2009, para. 79.

29 ECtHR, *Campbell and Cosans v. the United Kingdom* (Application Nos. 7511/76 and 7743/76), Judgment, 25 February 1982, para. 36.

30 ECtHR, *Hazar, Hazar and Acik v. Turkey* (Applications Nos. 16311/90, 16312/90 and 16313/90), Judgment, 11 October 1991.

pacifism,³¹ Druidism,³² atheism,³³ and even veganism³⁴ have been accepted by the Court as beliefs that fall within the scope of the protection of freedom of thought, conscience, and religion. However, there are some limitations to the broad construction of the terms religion and belief, as not every kind of thought, opinion, or idea falls within the scope of the protection of religious freedom. The ECtHR has determined that Article 9 of the ECHR, safeguarding freedom of conscience, thought, and religion, does not extend to a person's 'conscience' of belonging to a minority group,³⁵ language preferences,³⁶ or beliefs regarding the disposal of bodies after death.³⁷ Although the ECtHR has established criteria to identify beliefs that fall under the protection of Article 9 of the ECHR, in concrete cases, it has recognised beliefs based on conscience and thought about the aspects of human conscience without assessing whether they meet the aforementioned criteria. Therefore, international law lacks a universally accepted definition of 'religion' and 'belief'. The prevailing approach suggests interpreting those terms broadly, and considering each borderline case separately.

Furthermore, international refugee law does not define religion precisely. According to the Geneva Convention, a refugee is an individual who, owing to legitimate fear based on various factors, including religion, is unable or unwilling to return to their country of origin.³⁸ Nonetheless, the Convention refrains from specifying the exact meaning of the term 'religion' and omits any explicit reference to beliefs. According to the UNHCR's 2004 Guidelines on Religion-Based Refugee Claims, beliefs should be interpreted broadly, encompassing theistic, non-theistic, and atheistic beliefs. It should be underlined that the Guidelines provide for an over-inclusive definition of beliefs, which are forms 'of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind.' This broad interpretation of beliefs has been expanded by including dissident groups, such as heretics, apostates, schismatics, and pagans.³⁹ The so-called Qualification Directive (QD)—Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011—adopts the wider conception of religion that encompasses

31 ECHR, *Arrowsmith v. the United Kingdom* (Application No. 7050/75), Decision, 12 October 1978, p. 126.

32 ECtHR, *Chappell v. the United Kingdom* (Application No. 10461/83), Judgment, 30 March 1989.

33 ECHR, *Angelini v. Sweden* (Application No. 10491/83), Decision, 3 December 1986.

34 ECHR, *C.W. v. the United Kingdom* (Application No. 18187/91), Decision, 10 February 1993.

35 ECtHR, *Sidiropoulos and others v. Greece* (Application No. 26695/95), Judgment, 10 July 1998, para. 41.

36 ECtHR, *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium* (Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64), Judgment, 23 July 1968, para. 6.

37 ECHR, *X v. Germany* (Application No. 8741/79), Decision, 10 March 1981, p. 137.

38 Art. 1 of the Convention and Protocol Relating to the Status of Refugees.

39 Guidelines on International Protection: Religion-Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, paras. 5 and 6.

‘theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.’⁴⁰ Over the past few years, the number of atheist asylum seekers granted asylum for religious reasons has noticeably increased.⁴¹ Therefore, the international refugee law comports with the global tendency to expand the protection of religious freedom to cover even secular worldviews. However, this approach is not limitless and should be applied with scrutiny as excessive inclusiveness may affect the quality of the protection provided. If the criteria for defining religion are excessively inclusive and encompass every idea or worldview, the distinctive significance of religion may be diluted. Consequently, the unique protection granted to religious freedom, which is prevalent globally in nearly every state, may come under scrutiny.

■ 2.3. *Freedom to believe and freedom to act*⁴²

This section examines the extent of the international protection of religious freedom and the limits of permissible and non-permissible interference with the right to religious freedom. The provisions of international law that shape the framework for the international protection of religious freedom have a dual structure. The first element pertains to the definition of the scope of the freedom subject to protection. Despite the UDHR being a nonbinding document, it is generally regarded as a force of customary international law. Article 18 of the UDHR, which upholds the right to freedom of thought, conscience, and religion, has served as the foundation for the creation of legally binding covenants and has significantly influenced the development of FoRB protection at both universal and regional levels. According to Article 18 of the UDHR, freedom of thought, conscience, and religion encompass the right to change one’s religion or belief, as well as the freedom to manifest religion in private and public. International human rights instruments provide examples of the potential manifestations of religion, such as worship, teaching, practice, and observance.⁴³

40 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of the European Union, L337/9. The same approach is adopted by the European Court of Justice, CJEU, Grand Chamber, *Bundesrepublik Deutschland v. Y and Z* (Joined cases C-71/11 and C-99/11), fn. 38, para. 63.

41 Bowcott, 2014.

42 As per the United States Supreme Court, the freedom to exercise religion ‘embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.’ *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940).

43 Art. 18(1) and (2) of the ICCPR; Art. 9(1) of the European Convention on Human Rights.

The second element pertains to the limitations on the right to religious freedom. These limitations apply only to the manifestation of religion. Similar to a few other human rights, these limitations must be prescribed by law, be necessary in a democratic society, and pursue legitimate aims, such as safeguarding public safety, protecting public order, health, morals, or the rights and freedoms of others.⁴⁴ Therefore, every limitation on the freedom of religion does not constitute a violation of the international protection of religious freedom. Consequently, every interference with the freedom of religion cannot qualify as religious persecution, which enables victims to obtain refugee status.⁴⁵

The differentiation between mere beliefs and their expression is typically determined by the extent of protection afforded to each. The former, often referred to as *forum internum*, is absolutely and unconditionally protected. This refers to ‘the inner nucleus of a person’s convictions,’ which theoretically remains beyond the reach of the law or any external coercion.⁴⁶ On the contrary, the manifestations of internal beliefs, referred to in the jurisprudence of the ECtHR as *forum externum*, may be subject to limitations under the conditions outlined in the ICCPR and other universal or regional human rights protection instruments. Regarding the distinction between the internal and external dimensions of religious freedom from the perspective of dealing with religious persecution, two significant points merit consideration. First, although the boundaries of the absolutely protected internal dimension of religious freedom are not always clearly delineated, any form of coercive intrusion into internal beliefs must be deemed unjustified interference with the right to religious freedom. Second, the distinction between the internal and external dimensions of religious freedom should not be equated to the distinction between the private and public manifestations of religious beliefs.⁴⁷ The external dimension encompasses both private and public manifestations, and certain public actions may significantly impact an individual’s deep internal beliefs (e.g. disclosure of someone’s beliefs due to oath-taking procedures).

3. Religious persecution

Religious persecution is not a recent phenomenon but has historical roots. Throughout history, examples of religious persecution can be found, including the persecution of Christians in the Roman Empire, the persecution of religious

44 Art. 9(2) of the European Convention on Human Rights.

45 Madera, 2022, p. 123.

46 Bielefeldt, Ghanea and Wiener, 2016, p. 64. General Comment of the Human Rights Committee No. 22 summarises: ‘Art. 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally.’

47 For the opposite opinion: Nowak, 2005, p. 410.

dissidents in various faiths, and the targeting of traditional religious organisations as the predominant political approach in communist states worldwide. Even today, religious persecution is prevalent in many regions worldwide. Belonging to a specific religious group or expressing divergent religious views that deviate from the orthodox teachings of a religious organisation can lead not only to the denial of religious freedom but also to the derogation of other fundamental human rights.⁴⁸ The right to freedom of religion or belief is inherent to all human beings, irrespective of any official authorisation or permission.⁴⁹ The UN Human Rights Committee stated in their General Comment No. 15 that ‘the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.’⁵⁰ Therefore, freedom of religion is a right that belongs to refugees, migrants, and asylum seekers regardless of their status. This is particularly important because among migrants, refugees, and asylum seekers, there are individuals who may have faced persecution in their countries of origin based on their religious or belief affiliations or worldviews.

Article 1 of the Geneva Convention establishes that one of the conditions for acquiring refugee status is the existence of a ‘well-founded fear’ of being subjected to persecution for various reasons, including religion. Religion is acknowledged as a protected category for asylum-seeking, recognising the significant role that religious persecution plays in initiating the mass influx of asylum seekers and refugees.⁵¹ Critical enquiry involves identifying the conditions under which refugee status can be granted based on religious persecution. First, it is essential to highlight the distinction between religious persecution and the justifiable limitations on religious freedom. The ECtHR evaluates whether interferences with freedom of religion or belief are ‘prescribed by law,’ serving one of a defined set of legitimate aims (such as public safety and order, health, morals, or the rights and freedoms of others), and, finally, whether such interferences are ‘necessary in a democratic society’ to achieve legitimate aims. The ‘necessity’ test requires the states to prove that interfering with human rights was a ‘pressing social need’ that was ‘proportionate to the legitimate aim pursued.’⁵² Numerous limitations on the manifestation of religion may not be justifiable, such as the prohibition of worship or various forms of discriminatory practices targeting specific religious groups. Not every limitation on religious freedom constitutes persecution; every act of religious persecution constitutes an unjustifiable limitation on religious freedom. In their guidelines, the UNHCR recommends that the authority which delivers decisions on asylum applications ‘must not only take into account international

48 Madera, 2022, p. 125.

49 OSCE ODIHR, 2014.

50 UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986.

51 McDonald, 2022, p. 43.

52 Durham and Scharffs, 2019, p. 230.

human rights standards, including lawful limitations on the exercise of religious freedom, but also evaluate the breadth of the restriction and the severity of any punishment for noncompliance.⁵³ Hence, justifiable limitations on religious freedom that do not impose severe punishments as consequences of noncompliance do not constitute persecution and therefore do not provide grounds for obtaining refugee status.

According to the 2004 UNHCR Guidelines on International Protection No. 6, claims based on religion may involve religion as a belief (including a non-belief), identity, or way of life.⁵⁴ Persecution for religious reasons can take various forms, such as limiting or prohibiting the expression of religious beliefs, discriminating against individuals based on their religious affiliation, and imposing forced conversions or adherence to the practices of another religion.⁵⁵ The mere fact that persecution has taken place is not sufficient to fulfil the requirements for refugee status. In the EU, the QD has set standards in this area. Thus, there must be a 'causal link' between an individual's religion and the act of persecution. The persecution must be 'sufficiently serious' by its nature or repetition as to constitute a severe violation of basic human rights,⁵⁶ or 'be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner.'⁵⁷ The Directive enumerates specific acts of persecution that render individuals eligible for refugee status or subsidiary protection.⁵⁸ It also prescribes that during the assessment of whether an applicant has a well-founded fear of persecution, it is irrelevant if the applicant does not possess a religious characteristic that attracts persecution. What is significant is that the persecutor attributes this characteristic to the applicant.⁵⁹ Furthermore, the fear of persecution does not have to be based on personal experiences. Therefore, in

53 See UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 2004, para. 16.

54 *Ibid.*, para. 5.

55 More examples of different forms of religious persecution could be found in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 72.

56 The inalienable rights according to Art. 15(2) of the ECHR: the right to life, the prohibition of torture, inhuman and degrading treatments, the prohibition of slavery and servitude, and the rule of 'no punishment without law.' Derogation in time of emergency.

57 Art. 9 of the EU Directive 2011/11/9.

58 Those are: '(a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Art. 12(2); (f) acts of a gender-specific or child-specific nature.' Art. 9(2) of the EU Directive 2011/11/9.

59 Art. 10 of the EU Directive 2011/11/9.

cases of asylum claims based on religious persecution, the decision-maker must carefully examine the specific circumstances, individual situation of the claimant, and the legal framework for the protection of religious freedom in their country of origin.

The provisions of international law that regulate religious persecution do not seem to differentiate between internal and external religious freedom. However, states enjoy wide margin of appreciation in implementing international provisions and standards regarding the status of refugees.⁶⁰ Two European courts, the ECtHR and the European Court of Justice (CJEU), have set specific standards that appear to incline in favour of expanding the breadth of protection afforded to individuals commonly referred to as ‘religious refugees.’ The subsequent section of this paper will scrutinise the jurisprudence of mentioned courts in which the differentiation between the ‘core’ of FoRB (*forum internum*) and the fringes of FoRB (*forum externum*) could affect the status of asylum seekers.

4. Forum externum of religious freedom and religious persecution

In the past ten years, courts in Europe, both national and supranational, have played a significant role in defining religious persecution. European states have a margin of appreciation that permits them to implement international norms in a more restricted or narrower manner. These courts’ decisions are of particular importance because they have been viewed as a link that can bridge the gap between international legal norms that provide protection for asylum seekers and their implementation at the national level.

The main challenge in evaluating asylum claims based on religious persecution is establishing whether the infringement of religious freedom amounts to an act of persecution. This is the exact question that the Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) referred to the Court of Justice of the European Union in the case of *Bundesrepublik Deutschland v. Y and Z*.⁶¹ The case involved two Pakistani nationals who sought refugee status in Germany because they faced religious persecution owing to their membership in the Ahmadiyya Muslim community. They claimed that they had been repeatedly harassed due to their religious convictions. The Pakistani Penal Code stipulates that Ahmadis can be punished with up to three years of imprisonment or a fine if they ‘describe their faith as Islam, preach or propagate their faith or invite others to accept it.’⁶² German courts had set the standard of the ‘religious subsistence level’ (*religiöses Existenzminimum*), which corresponded to the *forum internum* of the right to

60 Madera, 2022, p. 123.

61 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber.

62 *Ibid.*, para. 31.

religious freedom, including private worship.⁶³ Therefore, the prohibition that affects the “religious subsistence level” solely could constitute persecution. In this regard, the CJEU had to determine whether the persecution or unjustified limitations on the manifestation of religious beliefs (of the *forum externum*) constituted religious persecution.

According to the Court, religious persecution is a severe violation of religious freedom that has a significant effect on the applicant.⁶⁴ However, the Court did not specify what constitutes a severe or significant violation. European Directive 2011/11/9 states that violations must be serious enough,⁶⁵ but this standard is also vague and prone to subjective interpretation. From the victims’ point of view, any violation or infringement of their rights may be severe or serious. Therefore, objective criteria are deemed to be necessary. The CJEU provided general instructions for competent asylum authorities on how to assess applications based on alleged religious persecution. They must examine the personal circumstances of the applicant and whether he or she faces a genuine risk of prosecution, inhuman, or degrading treatment or punishment as a result of exercising religious freedom in his or her country of origin.⁶⁶ However, these instructions do not provide a precise definition of religious persecution, which could help identify the dimensions of religious freedom that can be affected.

The two dimensions of freedom of religion or belief (internal and external) are interrelated and difficult for secular authorities to distinguish. Moreover, recent developments in the field of religious freedom have challenged the notion of absolute and prioritised protection of the internal dimension of religious freedom.⁶⁷ The main issue that the case *Bundesrepublik Deutschland v. Y and Z* addressed was whether religious persecution only occurred when the core or essential aspects of religious freedom (i.e. its internal dimension) were violated. The CJEU based its assessment on the concept of “religion” provided in the already mentioned Article 10(1)(b) of the QD, which includes participation in public worship alone or in a community with others. Therefore, the prohibition of such participation may be a “sufficiently serious act” according to the meaning of Article 9 of the QD that constitutes persecution if in the country of origin ‘it gives rise to a genuine risk that the applicant will, inter alia, be prosecuted or subject to inhuman or degrading punishment by one of the actors referred to in Article 6 of the Directive.’ The CJEU emphasises that the key factor is not whether public religious practices constitute the ‘core’ of religion or faith, but the significance that they hold for

63 Lehmann, 2014, p. 67.

64 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber, para. 59.

65 Madera, 2022, p. 126.

66 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber, para. 72.

67 Durham and Scharffs, 2019, p. 179.

the applicant and for the maintenance of his religious identity. The CJEU asserts that the protection granted on the grounds of religious persecution encompasses either personal or communal actions that the believer deems necessary and those mandated by religious doctrine. The CJEU concludes that interference with the external expression of freedom may amount to an act of persecution. This court assessment aligns with the international protection of religious freedom, which covers both aspects of the right.

The ECtHR reached the same verdict, but through different reasoning. In *F.G. v. Sweden*, the Iranian applicant applied for asylum based on fear of persecution due to his political activities and his conversion to Christianity.⁶⁸ The Chamber ruled that the execution of the expulsion order against the applicant would not entail a violation of Articles 2 or 3 of the ECHR because Iranian authorities were unaware of his conversion that took place after his arrival in Sweden (a *sur place* conversion) and because he kept his faith as a private matter. The Grand Chamber dismissed the argument of the respondent state that the applicant could neutralise the risk of persecution because ‘he could engage in a low-profile, discreet, or even secret practice of his religious beliefs.’ The Grand Chamber determined that the external manifestation of religion is a vital component of religious freedom and

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.

In *Bundesrepublik Deutschland v. Y and Z*, the national court’s final query concerned the interpretation of Article 2c of the QD, which defines a refugee as a person with a well-founded fear of being persecuted for religious reasons, among others. The Court ruled that the competent authorities should not expect applicants to refrain from their religious practices to avoid persecution in their country of origin and that the possibility of such avoidance is generally irrelevant for assessing whether their fear is well founded.⁶⁹ Hence, the CJEU and ECtHR have extended the scope of protection afforded on the basis of persecution on religious grounds to both dimensions of religious freedom: internal and external.

68 ECtHR, *F.G. v. Sweden* (Application No. 43611/11), Judgment, 23 March 2016, paras. 86–89.

69 CJEU, joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Grand Chamber, para. 80.

5. Conclusion

Religion and migration are two phenomena with deep historical roots that have been interconnected several times throughout history. Protection of religious freedom and the international protection of refugees emerged in the same historical context as in the aftermath of World War II. Therefore, general rules for the protection of religious freedom should be extended to migrants, refugees, and asylum seekers. Furthermore, the provisions of the international migration law regarding religion and religious persecution should be interpreted in light of the standards for the general protection of religious freedom.

International law, including migration law, does not provide a universally accepted definition of religion. It is commonly accepted that the terms 'religion' and 'belief' should be interpreted in a broad sense so that they include secular worldviews. Such a broad approach generates the danger of ultra-inclusiveness, which can decrease the level of protection of religious freedom overall. Be that as it may, there are no general rules or tests that may be applied to distinguish religion from other worldviews that do not fall under the protection of religious freedom. Therefore, each borderline case should be scrutinised separately.

The existence of a well-founded fear of persecution on religious grounds is a key requirement for achieving refugee status. Since religious freedom has two dimensions—external and internal—a violation of either of the two constitutes religious persecution and should be taken into account in the assessment of an application for refugee status. Had the religious affiliation of asylum seekers been limited only to the internal sphere, then all asylum claims would have needed to be approved. The inner beliefs of each person are not accessible to others, and it is difficult for secular asylum authorities to objectively examine them. This would lead to the necessity of granting asylum to everyone claiming to be a member of a persecuted group without any further assessment. This is exactly what the New Zealand Refugee Status Appeals Authority noticed: 'in the absence of any truly independent evidence, it would be easy to manufacture a claim based on personal religious belief.'⁷⁰ That is the reason why competent authorities have to examine the existence of external manifestations of religious affiliations of the applicant.

Conversely, the competent asylum authority should not base the denial of refugee status on the expectation that the applicant, upon his return to the country of origin, will refrain from the public expression of religious beliefs. Using this reasoning, no application based on religious persecution would be accepted, as most applicants may escape persecution by renouncing their religion or publicly conforming to permitted religions or beliefs. However, applicants' motivation to

70 Kagan, 2010, p. 1182.

leave their country of origin is to preserve and practice their beliefs, irrespective of whether such a practice is public or private. Hence, supporting the possibility of public renunciations of religion or beliefs as the basis for denying asylum would support violations of religious freedom worldwide.

The evaluation of asylum claims based on religious grounds should encompass a comprehensive analysis of both the dimensions of religious freedom. The objective is to impartially examine whether an applicant belongs to a persecuted religious group. The underlying aim is to extend enhanced international protection to genuinely persecuted individuals, while safeguarding against the misuse of religion as a means to secure refugee status. The prevention of such abuse is crucial, as it mitigates the potential risk of the integrity of the asylum system being undermined by the misuse of religion, which could lead to legitimate cases of persecution being inadequately protected in the future. Striking a balance between granting proper protection to the genuinely persecuted and preventing the exploitation of religious grounds to obtain asylum is vital for upholding the principles of fairness and integrity in assessing the right to asylum.

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