# REMEDIES FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW: THE CASE OF RELIGIOUS FREEDOM IN INTERNATIONAL AND EUROPEAN REGIONAL HUMAN RIGHTS COURTS

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## Abstract

*This article examines the access to remedies available to individual actors or groups in cases of violations of the freedom of religion. The emphasis of this article is on the Human Rights Courts, first at the international level and then within the European political and judicial institutions. After outlining the remedy mechanisms available to states, organisations and individuals in relation to religious human rights violations in the international courts, the article will proceed to examine a number of cases and treaties handled by the European Court of Justice, European Commission, European Parliament, Council of Europe and Parliamentary Assembly, regarding the freedom of religion. The argument put forward is that in spite of the universally recognised de jure protection of freedom of religion as a normative principle in international law, this human right is not always recognised de facto by the European regional human rights bodies. Whereas Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms clearly recognises and protects religious freedom, this author will argue that it has often been used as a way to limit religious freedom rather than offer remedies, protect and expand such freedoms, especially in relation to new and minority religions.*

## Keywords:

*Remedies for Human Rights Violations, Article 9 of the Convention, New Religious Movements, Minority Religions*

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## Religious Freedoms and Access to Remedies in International Courts

Religious human rights or religious freedom refers to the inherent right of a person in public or private to worship or not to worship according to one's own consciousness, understanding, or preferences; to profess and to propagate one's faith; to join in association with others of like faith; and to change one's religious identity – all without hindrance molestation, or discrimination. Religious human rights are part of the 'first generation' (Harris, (2004), :655-6) human rights and are considered by many to be fundamental among the other human rights (Davies, (2002), :20).

The basic rule of international law stresses that states have no right to encroach upon the preserve of other states' internal affairs. This rule stems from the principle of equality and sovereignty of states as mirrored in Article 2(7) of the UN Charter. However, as human rights are *erga omnes* (have legal obligations toward all), the state sovereignty rule has been interpreted so that states may no longer plead this rule as a bar to international concern and consideration of internal human rights situations (Shaw, (2003), :257). A state's treatment of its own nationals escaped international scrutiny, with a few exceptions, until the middle of the 20th century (Sohn, L., Buergenthal, T., (1973), :1-482). Since 1945, the UN's basic purpose is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms, which includes religious human rights. Article 55 calls on the UN to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as a race, sex, language or religion' (UN Charter, Art. 55). In Article 56, 'all members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.' No state can today credibly claim that its treatment of those within its territory or jurisdiction is a matter solely of domestic jurisdiction.

The *Universal Declaration of Human Rights* (1948) gave specific attention to a person's right to religion as a basic human right. Article 2 affirms that everyone is to be entitled to all the rights and freedoms in the *Universal Declaration* without respect to religion. Furthermore, Article 18 defines religious freedom as 'the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.' In various forms, the principles defined here have been incorporated in the national constitutions of many nations, especially in those emerging after 1948 (Wood, (2004), :742).

Before accepted international remedy mechanisms can be invoked for claims of religious human rights, parties are permitted, and in fact encouraged,



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to solve their internal problem in accordance with their own constitutional procedures. The *Universal Declaration* states in Article 8 that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' However, these provisions applied mainly in the cases of state-to-state dispute settlements, whereas non-state actors could not be parties to the relevant treaties and so they could only bound to the extent that obligations accepted by states would be applied to them by governments.

The *Universal Declaration* was followed in 1966 by the *International Covenant on Civil and Political Rights* which established a *Human Rights Committee* to supervise state compliance with the treaty by, among other things, considering individual petitions submitted pursuant to Article1 of ICCPR's first *Optional Protocol*. Like the *Universal Declaration*, the condition for petitioning by individuals, as per Article 5, is that all available domestic remedies have been exhausted in conformity with generally recognized principles of international law. The Protocol enables those claiming to be victims of a human rights violation to file communications with the *Committee* against a state party to the ICCPR and its *Optional Protocol*.

Article 18 of ICCPR is very similar to the provisions for religious freedom contained in Article 18 of the *Universal Declaration*, but differs in two important ways. Firstly, the *Committee* has construed this article to apply to non-traditional religions, including newly established religions and religions that 'may be the subject of hostility by the predominant religious community' (Birenbaum, (1998)). Secondly, the ICCPR article is a legally binding treaty, thus imposing on the state parties an obligation to ensure that the freedom to manifest religious beliefs in action would not be infringed without proportionate justification (Birenbaum, (1998)). Nonetheless, the only remedy available to claimants of human rights violations under the first *Optional Protocol* is that the *Committee*, once satisfied that a violation has occurred, will 'forward its views' to the state in question.

The other principal remedy mechanism available to individuals alleging violations of the religious freedom provisions of the *Universal Declaration* or other UN-sponsored human rights norms is the procedure established pursuant to *Resolution 1503* of the ECOSOC. The resolution established a limited petition system for the *Sub-Commission on the Prevention of Discrimination and Protection of Minorities* to consider non-state communications that 'appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.' The *Sub-Commission* may forward the information to the *Commission* which may either undertake an investigation by an ad-hoc committee with the consent of the state concerned, or take no action. However, the procedure remained confidential unless the *Commission* decided to take action and forward a recommendation to ECOSOC. Another limitation of this



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procedure is that it was not designed to afford individualized remedies to the victims but this aspect has recently been amended.[1]

Almost four decades after the Universal Declaration, the UN General Assembly adopted in 1981 the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, in which the religious human rights were reaffirmed that 'no one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or other belief.' Such discrimination, the Declaration stressed, must be regarded not only as 'affront' to human dignity, but also a 'disavowal' of the principles of the UN Charter. Religious human rights were given, at long last, explicit recognition internationally as an inviolable sacred human right. However, as noted in an extensive analysis of the Declaration, there were serious limitations with respect to the omission of certain basic religious rights (Wood, (1981), :413-22).[2]

The analysis of the *Universal Declaration* and the other UN-related treaties addressing religious human rights has pointed that there are scarce and limited remedies available to individuals claiming violation of these rights under the provisions of these international treaties. As in relation to other human rights, all UN treaties or internal bodies lack the legal competence to order compensation or other remedies (Sheldon, (2005), :10).[3] The *Human Rights Committee* or *Council* may make recommendations or express views to the state concerned. However, these international bodies limit themselves to finding facts and issuing declaratory statements or other forms of international opprobrium in the hope that violating states will mend their ways. Having established that there is at least a *de jure* recognition of the religious human rights at the international level, I shall now proceed to see how this legal juridical recognition is applied and whether victims of religious freedom violation find more effective remedies in the regional European courts.

[1] See Human Rights Council Complaint Procedure, A/HRC/4/CRP.6, 13 March 2007. Online: Available at: http://www2.ohchr.org/english/bodies/chr/complaints.htm , accessed January 2009.

[2] The omitted provisions were: the equal protection of all religions, the right of judicial review when one's religious rights are denied, the freedom to witness to one's faith in public life, the freedom to disseminate the teaching of one's faith, the freedom of religious association on a local and national basis, and the freedom to maintain, without unwarranted restrictions, a relationship with one's religious community at the international level.

[3] As Sheldon stressed, despite the fact that a *UN Compensation Commission* was established to provide remedies to victims of the Iraqi invasion in Kuwait, it has to be noted that this is an ad hoc body and has jurisdiction over more than human rights violations (environmental damage, injury to governments, nationals and corporations, etc).



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## Religious Freedom and the European Regional Courts

Let us begin and examine a number of cases and decisions of the *European Court of Human Rights*, the *European Parliament*, the *European Court of Justice*, the *Council of Europe*, and the *Parliamentary Assembly*, regarding the freedom of religion and its violation. The expectation is that in light of the universally recognised *de jure* protection of freedom of religion as a normative principle at the international level, religious human rights will receive a better *de facto* representation in the European regional judicial institutions. This assumption is based on the common understanding that the power to designate remedies which the state must afford to the victims of human rights violations rests with the regional human rights bodies, which will frequently afford compensatory damages for pecuniary and non-pecuniary injury (Sheldon, (2005), :10).

According to the *Statute* of the *Council of Europe* (1949), 'every member must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.' Membership to the *Council* is *de facto* conditioned upon adherence to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) on which the *Council*'s system for the protection of human rights is based. Therefore, Article 9 of the *Convention*, stating that 'everyone has the right to freedom of thought, conscience, and religion' is binding for all signatory members of the *Council*.

However, the *European Union* and the *Council* seem very wary of interfering directly into the way religion is dealt with by the Member States. As I will show later, the issue of religion formally addressed by the EP using vehicle of concern about new religious movements (also known as NRM, sects, or cults) has caused considerable controversy. Whereas Article 9 of the Convention clearly recognises and protects religious freedom, it has often been used as a way to limit religious freedom rather than offer remedies, protect and expand such freedoms, especially in relation to new and minority faiths.

The human rights complaints were dealt with by the *European Commission of Human Rights* (disbanded in 1998) which had jurisdiction to receive inter-state or individual complaints if the state in question had declared that it accepts the right of individual petition (Article 25 of the *Convention*), if all domestic procedures have been exhausted (*Convention*, Article 26) and other certain conditions of admissibility were fulfilled (*Convention*, Article 27). Unsettled cases were the subject of a report drawn by the *Commission* which gave the facts and its opinion on whether the state had breached its obligations under the *Convention*. Although damages and other remedies could be recommended when a violation was found, the report was not a judgment and it was up to the *Committee of Ministers* or the *European Court of Justice* to make the final decision. If the state concerned had accepted the jurisdiction of the *Court*, then the *Commission*, the individual or the state had three months to refer the case to the *Court*.



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When a claim of breach of religious human rights was submitted to the *Commission* under Article 9, paragraph 1, the *Commission* first sought to determine if Article 9 is applicable and if in fact a violation of the freedom of thought, conscience, or religion, has occurred. It then moved to paragraph 2 to determine if the limitation is 'prescribed by law' or is 'necessary in a democratic society'. If the staff of the *Commission* found that the complainant had a basis in fact, it appointed a Commissioner and presented the case to the *Commission*, which acted as a mediating body seeking to insure a resolution on the basis of human rights considerations. If the case was not deemed that serious as to be referred to the *Court*, the *Committee of Ministers* could take action on the Report, if it decided a violation of the *Convention* has occurred. If the matter was deemed serious and referred to the *Court*, a trial was scheduled and the judgment reached by the *Court* was then referred to the *Committee of Ministers* for enforcement.

Armed with such a procedural mechanism, the *Convention* could *de jure* offer considerable protection to new and minority religious groups. However, from 40 decisions taken by the *Court* until 1998 regarding the freedom of religion, it has been ruled that only in one instance there has been a violation of Article 9 (Richardson, (2000), :16), (Briard, (1998), :2ff). From a large number of additional decisions of the *Commission* which didn't make it to the *Court*, two other violations of Article 9 have been found. These finding have prompted scholars to argue that Article 9 has been used as a way to limit religious freedom, not to expand or protect such freedoms (Ibid).

One of the ways in which this limitation occurs is by focusing on the matters raised in paragraph 2 to disallow coverage of the broad concerns of paragraph 1. To underline one of the cases noted by Richardson and van Driel, the West German government relied on provisions of paragraph 2 to warn against and disseminate information about 'youth religions' that the state deemed harmful to person's health or environment (Richardson, J., T., van Driel, Barend, (1994), :137ff). Richardson and van Driel note that the focus of Article 9 is on individualised and privatised religion, which is not necessarily viewed as a value for society as a whole (Ibid). Indeed, such a conceptualisation of religion can be turned against minority religions, in the interest of the greater society. A majoritarian approach to religion is easily justified under Article 9, using this logic (Ibid).

Where individuals have attempted to use Article 9 in a positive sense by relying on it to seek remedy for alleged limitations on freedom of religion, the *Commission* has deferred Article 9 claims to considerations under other *Convention* articles. For example, if allegations of violations of one's freedom of religion are made along with allegations of a violation of freedom of expression (Article 10), then the case is almost always classed under freedom of expression considerations. In other words, when violations of Article 9 are alleged, the *Commission* and the *Court* would choose to limit the review to alleged violation of other articles.



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In the *Darby v. Sweden* case, for the first time a violation of the religion clause of Article 9 was found by the *Commission* in its Report, but the *Court* eventually overruled it on the ground that there is no obligation that a state allow a religious sect to choose its own method of legal incorporation. The case concerned a citizen of Finland who was working in Sweden and was being forced to pay taxes to support the Lutheran Church of Sweden, even though Swedes could apply for exemption from this tax. He claimed violation of freedom of religion (Article 9), his right to peaceful enjoyment of his property (Article 1), and discrimination under Article 14 which precludes various forms of discrimination, including on the basis of religion, national or social origin. The Court found a violation of Articles 1 and 14 but concluded it was unnecessary to examine the Article 9 claim.

The *Commission* and the *Court* have reviewed a number of cases in which allegations of breaches of Article 9's freedom of religion clause were made, yet only a few of these involved a so-called 'new' or minority religion or NRM. A definition of a NRM refers to any new organisation that has become visible in its present form since WWII (Barker, (1999), :16). However, some governments group among NRMs a wide number of minority religions, such as the Jehovah's Witnesses, that do not fit this criteria. In the case *X and Church of Scientology v. Sweden* involving one such 'new' religious movement, the Church of Scientology filled a claim that Sweden was violating its freedom of religion and freedom of expression by prohibiting its advertisements (Articles 9 and 10). The *Commission* found that such advertisements did not rise to the level of a violation of freedom of religion but that they could be considered under Article 10. However, they then defined the advertisements as 'commercial speech' which afforded less protection than did 'political speech', and decided that Sweden had acted within its rights in restricting certain types of commercial speech.

A similar case was *Hoffman v. Austria*, when a Jehovah's Witness applied for relief of an Austrian Supreme Court decision awarding her two children to their Catholic father. The couple had the children while married as Catholics, and the children were Catholic. Mrs. Hoffman claimed violations of Article 8 (right to respect for her family life), Article 9 (religion) and Article 14 (discrimination). After seven years of efforts to resolve the case, the *Commission* ruled that there has been a violation of Article 8 in conjunction with Article 14 of the *Convention*, stating that 'the applicant has been discriminated against, on the ground of her religion, in the enjoyment of her right to respect for her family life.' The *Commission*, however, voted 12-2 that there has been no violation of Article 9 taken separately or in conjunction with Article 14.

The first time the *Court* found that there has been a violation of Article 9 and assumed any apparent supremacy over Article 10 and Article 14 was in the *Kokkinakis v. Greece* case. The importance of the decisions taken in this case concerns the limitations on religious pluralism and proselytising allowed by the *Convention*. In May 1993, two members of the Jehovah's Witness church tried to



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convert the wife of a local Greek Orthodox cantor, who reported them to police. They were arrested and charged severely by the Greek Criminal Court with the offense of proselytising under a 1938 Greek law. Mr. Kokkinakis filed a claim with the *Commission*, claiming violation of Articles 7, 9, and 10 of the *Convention*. The *Commission* declared the case admissible, stating that there has been a violation of Article 9. After a public hearing, the *Court* voted 6-3 that there has been a violation of Article 9, and ordered the Greek state to pay Mr. Kokkinakis his considerable costs and expenses, plus non-pecuniary damages, thus demonstrating that there is at least a minimal application of this article in cases where a person is sentenced to prison and fined for proselytising.[1]

While it is possible that this positive decision has been forced upon the *Court* by the applicant, it is nonetheless important to stress the two contributions made by the *Court's* application of the *Convention* on religious human rights.[2] First is the emphasis on religious pluralism for all religions not just two or three, as the ground of any democratic society. Secondly, the *Court* declared that religious freedom is not a matter internal to the person, a *forum internum* matter and therefore the right to try to convert people, i.e. to proselytise, is part of the right to change one's religion. A distinction was made by the *Court* between acceptable and non-acceptable forms of proselytism (where it goes beyond mere moral persuasion) (Briard, (1998), :2).

However, given the long record of no findings concerning Article 9 violations, overall it can be argued that the Court affords little access to remedies to those who claim their religious freedom has been violated. This interpretation seems to be in line with a research which contrasted the interpretation of Article 18 in the ICCPR as made by the UN institutions and Article 9 of the *European Convention* (Taylor, (2005)). The research argues that the *UN Human Rights Committee* and the UN Special Rapporteurs have provided better reasoned, more justifiable, and more expansive interpretations of the rights of religion or belief than have the organs of the *Council of Europe* (Ibid, :203ff).[3] Although the study clearly identifies the *European Court*'s repeated undervalue of the importance of matters of religious conscience and

[1] The Court also voted unanimously that there has been no violation under Articles 10 or 14 in conjunction with Article 9. Ibid.

[2] The applicant supplied to the Court unrefuted statistics showing that between 1975 and 1992 there were 4,400 Jehovah's Witnesses arrested in Greece, with 1,233 committed for trial and 208 convicted. J. Richardson, 'Minority Religions', p. 20.

[3] Taylor questions the standard statement of international law that the right to holding conscientious beliefs (*forum internum*) is absolute and fundamental and that the state must not interfere with this right. Contrasting this with the right to 'manifest' one's religion (*forum externum*) which includes the expression of beliefs to others, i.e. proselytism, Taylor argues that the scope of *forum internum* has been unduly limited and that matters of conscience have been improperly analysed as external 'manifestations' of religion, when in fact they were matters of conscience. The reason for this is in author's opinion the fear that were such matters labelled matters of conscientious objection, they would be exempt from state's control.



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manifestations and overly defers to the interests of the states in limiting the latter, it fails to see that the UN institutions are freer to adhere to human rights norms because the states feel *de facto* less bound to comply with its judgments (Gunn, (2007-8),:101-3). The *European Court*'s *de jure* greater power over Member States makes it more reluctant to exercise its authority in the delicate and controversial area of religion.

The *European Parliament* (EP) has been involved in efforts to regulate NRMs quite directly. In the case of the Unification Church (UC) the EP appointed a rapporteur to investigate the activities of this movement. The Cottrell Report caused controversy and underwent various modifications after reactions from a committee of the *Second Chamber of the Dutch Parliament*, the *Council of the Protestant Federation in France* and the *British Council of Churches* (Cottrell, (1984)). The final resolution which was passed in 1984 remained controversial because of the implications for religious freedom and the place of minorities in the EU. It urged Member States to take actions such as the exchange of information about new religious groups; it recommended to NRMs to avoid recruiting minors, to avoid interrupting courses for recruits, etc.; finally it called for a 'common approach within the context of the *Council of Europe*' in order for the governments to press for agreements with the *Council* which will guarantee the individual protection from possible machinations of these organisations (West, (1989), :176). The Cottrell report was eventually withdrawn in July 1998.

The 'Hunt Report' (1992), later to become *Recommendation 1178* of the *Parliamentary Assembly*, attempted to respond to the 'Cottrell Report' with a more balanced tone, and includes a number of recommendations which emphasise a willingness to take action to control activities of sects in the Member States, it mentioned the obligation for NRMs to register (provision later withdrawn), and to appoint independent bodies to disseminate information about sects (Report on Sects and New Religious Movements,). The report made a specific remark that Article 9 of the *Convention* makes passage of major legislation prohibiting sects undesirable.

The *Council of Europe* appointed Adrian Năstase, the former Romanian PM, to prepare a report entitled 'Illegal Activities of Sects', which, after amendment, was adopted by the *Parliamentary Assembly* in June 1999 (Năstase, (1998)). The ensuing *Recommendation 1412* (1999) is seen as a compromise report but does recommend Member States 'to encourage an approach to new religious groups which will bring about understanding, tolerance, dialogue and resolution of conflicts'. The report recommends the formation of national and European observatories, but clearly states that they should be independent. Despite the fact that it reiterates, in its conclusion, the remark of *Recommendation 1178* concerning the undesirability of major legislation on sects, the report has prompted criticism from the CSCE Chairman Christopher Smith, who stressed



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that parts of the report are inconsistent with international human rights standards (CSCE Press Release).

## Conclusion

In this article I have argued that in spite of the universally recognised *de jure* protection of freedom of religion as a normative principle in international law, this human right is not always recognised *de facto* by the European regional human rights bodies. As I have shown, the treatment of new and minority religions by the EP, the *Council of Europe* and the *Parliamentary Assembly* seems designed to allow control and management by the Member States rather than to allow remedies to religious human rights. The Cottrell Report, despite being controversial and finally withdrawn, shows the extent to which EP can push pan-European norms to both Member States and NRMs concerning how religions are supposed to act in Europe.

Whereas the protection of religious freedom is clearly inscribed in Article 9 of the *Convention*, there seems to be major limits at least as pertains to the access of new religious groups. The fact that the *Parliamentary Assembly* is able to adopt norms limiting religious freedom in spite of the existence of Article 9, illustrates best this limitation. Without effective access and remedies to violations of freedom of religion, freedom of speech, freedom of press, freedom of assembly and freedom of association are all endangered. As former Chief Justice of the US Supreme Court has stated, 'when we lose the right to be different, we lose the right to be free' (Stokes, (1950), :462).



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