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HOW PROFESSOR DURHAM BUILT LAW AND RELIGION—ONE CLASS AT A TIME

By Renáta Uitz

Central European University's Budapest campus had been a regular stop on Professor W. Cole Durham, Jr.'s annual academic calendar for two decades. He started teaching a course on comparative freedom of religion in the early 1990s for a pioneering LLM program in comparative constitutional law—tailored to the interests of students who were ready to support or lead constitutional change during the third wave of democratization in Central Europe and the former Soviet Union.

Over the years the student body at CEU became truly global and served as the proving ground for a leading textbook on comparative law and religion. While some students continued to be interested in transitions to democracy (often following violent conflict), others became more concerned about sustaining it in the face of challenges such as religiously motivated terrorism, a global migration crisis, and—more recently—the rise of populist, illiberal, and authoritarian governments. During this time religious freedom became recognized as a key element of the international human rights canon, with particularly robust legal protection in the European system. In other words, the canon was just settling as its underpinnings came under increasing political and legal pressure.

I first met Professor Durham in this classroom full of ambitious young lawyers who were eager to change the world and saw legal knowledge as a force for good. He served as an examiner for my doctoral dissertation in 2001. We eventually became colleagues, co-taught on BYU's International Center for Law and Religion Studies' religion and rule of law curriculum around the world, and co-organized several academic conferences on a wide range of

Abstract: The essay elaborates on W. Cole Durham, Jr.'s academic work in the context of the democratization in Central and Eastern Europe countries started (and yet not finished) after the collapse of the Soviet system. Durham's deep interest in ambiguous interplays of religion, constitutional identity, and politics in the region provided an important part of the empirical basis of his "loop" concept—a powerful theoretical explanation of links between religious freedom and religious identification of the state. Beyond that Durham's tireless efforts to educate on and advocate for religious freedom have helped to build law and religion as an academic field in the region.

Keywords: law and religion, freedom of religion, state-religion relations, transition to democracy, religion and democracy, Eastern Europe, Central Europe

topics in the law and religion space. Cole did not cease to teach and mentor, while always seeking new insight on issues that keep him occupied. Through conversations I learned that his generosity is only matched by his curiosity and openness to new ideas, whether those emerge from conversations with established academics or student contributions. His contemplative style is a reflection of a modus operandi, of how he processes the changing landscape of law and religion while listening to its inhabitants.

Freedom of religion was an odd subject to include as a self-standing course in the law curriculum in the early 1990s. The business of democratic transition was very much a secular affair in Central Europe and the former Soviet Union. Getting there was meant to take healthy political competition, safeguards supporting a free media and free press, more or less well-organized (peaceful and fair) elections, and robust civil society watching over professional players (politicians and bureaucrats alike). Newly established constitutional courts were meant to support the transition to democracy (and a market economy, as if building a ship on the open sea). The prospect of joining NATO and ultimately "Europe" and the "West" sounded both positive and doable. The Communist past was everywhere. It was in plain sight, with crimes and injustices shrouded in secrets. For lack of a better alternative, memory work—supported by specialized institutions and meticulously designed procedures of access to (partial, compromised) records of the Communist regimes—had become the central trope of the transitional justice discourse. The past was too present to be forgotten, and too personal and painful to be forgiven.

Religion—and what we call today law and religion—was an odd fit in this landscape and it had to be handled with care. For Polish students, religion was a source of pride: Pope John Paul II (the Polish Pope) was keen to see the end of Communism and supported the arrival of democracy. For most of the other students from Central Europe it was largely a non-issue or an issue of no immediate practical significance: it fit in the broader frame of "opening up" the space of freedom, without raising special alarms. Constitutional provisions on church-state relations were seen as part symbolic, part archaic (historic artifacts), and mostly irrelevant for the fate of these emerging new democracies. Russia replacing its most permissive 1990 law on religious associations with a much stricter regime in 1997 was an outlier that was best explained by the general shock and chaos of the falling apart of the Soviet Union.

Cole thought about the 1997 Russian law in different terms. He recognized that the 1997 law openly protected the interests of the Russian Orthodox Church from competition by other Christian faiths and protecting the nation from the abuse of religious freedom (like totalitarian sects exposing their believers to psychological and physical harm), curbing the rights of religious minorities (Durham and Homer 1998). This prompted him to place the Russian law in a broader comparative context and explain its significance in comparative terms. In an effort to capture—and explain—the impact of state interference with religious freedom he started to build an expository tool and explanatory model that accounted for both the protection of individual religious freedom and the dynamics of church-state relations.

The product of this process is what we know today as the "loop," a multi-dimensional model (complete with visualization) that was way ahead of the reigning methodologies of comparative law (Durham 1996). The loop captures a counterintuitive observation distilled from comparative work: "lack of religious freedom correlates with a high degree of either positive or negative identification of the state with religion" (Durham and Scharffs 2019, 123).

The loop has become a building block of the emerging field of law and religion, as more and more countries were added to the model, and as religion-state relations and protections for freedom of religion changed in the shadow of terror attacks and acts of violence inspired by religion, the emergence of unwelcome religious practices (labeled as brainwashing or psycho sects), and the arrival of unwelcome immigrants and asylum seekers. Through conversations with Cole at and on the sides of conferences and

teaching, I came to witness how he seeks out and absorbs information about the state of religious freedom. Cole's work is a most labor-intensive and intellectually exhausting process, where he engages in long conversations with multiple stakeholders, in a genuine effort to understand their actions and motivations, their ambitions and fears. How these fears and anxieties inspire legal restrictions and animate governmental responses is at the heart of his inquiry. I have been privileged to witness many such conversations, participate in some, and interpret in others.

I came to learn that Cole's inquisitive approach can be testy (to the point of being tedious at times) yet is certainly most respectful. He makes a conscious effort to keep an open mind, to avoid the temptation of confirmation bias —the gravitational force of *plus ça change*/"same old, same old." While explaining the most intricate legal points in genuinely knotty cases (consider the U.S. Supreme Court's *Employment Division v. Smith* or the European Court of Human Rights' *Kokkinakis v. Greece*), he never misses an opportunity to remind students that such cases getting to court (and all the way to an apex court) is the exception. Most conflicts about religion are usually resolved amicably, through mutual concessions (keeping an open mind, respect, and forgiveness) and without the need for escalation via litigation. While Cole's starting point is meticulous legal research, he is most interested to see findings in the many disciplines and perspectives that contribute to the field of law and religion—a field that he has worked relentlessly to settle and nurture.

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It is due to Cole's continued engagement with diverse stakeholders across continents that the loop has become more comprehensive, covering a wider range of models and experiences across the globe. What did not change is that the "good place" from religious freedom on the loop is toward the bend—away from the far edges of theocracy/positive identification regimes and abolitionist/non-identification regimes. As we move away from the edges, we see religious freedom increase and discrimination decrease. This "good place" on the loop appears to overlap with the realm of constitutional democracies, as freedom of religion (especially the freedom of believers of minority, non-traditional, and new religions as well as agnostics and atheists) is best respected in conditions of democratic self-rule.

This observation would have sounded trivial in the third wave of democratization. Today, when populist, illiberal, and authoritarian actors openly question the point and purpose of constitutional democracy, this observation is a most prescient reminder for believers, non-believers, and seekers alike. It is equally consequential for academics studying the transformation of church-state relations and religious freedom as a legally protected human right, and for practitioners who seek to define finer legal points through litigation. The relationship between government and religion is negotiated through a diverse range of human interactions. The rise of illiberal Christian democracy in Europe and Christian nationalism in the U.S. is seeking to extinguish (rather than bridge) the distance between religion and state. For as long as I have known him, Professor Durham has worked tirelessly to safeguard intellectual space and institutional distance, so that the parties of the day are able to retain (and regain) perspective for making concessions that protect individual freedom while the relationship between government and religion are being resettled. ❖

About the Author

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