

PC.SHDM.NGO/36/09  
13 July 2009

ENGLISH only

**Places of Worship:  
Enhancing Implementation of a Core Human Right**

Prof. W. Cole Durham, Jr.  
Director, International Center for Law and Religion Studies  
J. Reuben Clark Law School  
Brigham Young University  
Provo, Utah 84602 USA  
durhamc@lawgate.byu.edu

Introductory Remarks  
for

Session III  
of the

**SUPPLEMENTARY HUMAN DIMENSION MEETING  
ON**

**FREEDOM OF RELIGION OR BELIEF**

**9-10 July 2009**  
Hofburg, Vienna, Austria



## **Places of Worship: Enhancing Implementation of a Core Human Right**

Prof. W. Cole Durham, Jr.

With the exception of the rights to freedom of belief that are absolutely protected as part of the *forum internum*,<sup>1</sup> no aspect of freedom of religion or belief is more central than freedom of worship. Indeed, some unduly restrictive legal systems have supposed that freedom of religion could be adequately protected by protecting freedom of worship alone, thereby neglecting broader aspects of freedom of religion or belief covered by the rights to manifest beliefs in teaching, practice, observance, in guiding the upbringing of children, in autonomously structuring religious communities and in assuring protection from discrimination and other forms of violation of this fundamental right.<sup>2</sup>

Not surprisingly, in harmony with general international standards,<sup>3</sup> major OSCE commitments affirm the right to freedom of worship.<sup>4</sup> Integral to this right is the right, as recognized by Principle 16(4) of the Vienna Concluding Document, to “establish and maintain

---

<sup>1</sup> It is widely recognized that whereas “outer” manifestations of belief may be subject to limitations where the limitations are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights of others, internal forum rights are may not be subjected to state constraints. *See Guidelines for Review of Legislation Pertaining to Religion or Belief* Section II(B)(1) (Prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy Through Law (Venice Commission) (2004).

<sup>2</sup> For a concise summary of the values that constitute the normative core of freedom of religion or belief, see *Introduction*, in *Facilitating Freedom of Religion or Belief: A Deskbook* (Tore Lindholm, W. Cole Durham, Jr, and Bahia Tahzib-Lie, eds. 2004), xxxvii-xxxix.

<sup>3</sup> Universal Declaration of Human Rights, Article 18; International Covenant on Civil and Political Rights, Article 18(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9(1). Article 6 of the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (Proclaimed by United Nations General Assembly Resolution 36/55 on 25 November 1981) specifically provides that “freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes . . . .”

<sup>4</sup> *See, e.g.*, Helsinki Final Act, Principle VII: The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. . . . Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

freely accessible places of worship or assembly.” Yet honoring this most fundamental commitment remains a problem in all of our countries. The practical problem is this: while virtually everyone gives lip service to freedom of worship, there is a recurrent refrain when a religious community seeks to lease, acquire, build or occupy a place of worship: “not in my back yard.” Religious freedom is fine, but let religious organizations locate somewhere else.

A few years ago, I helped prepare a study that examined all the reported land use cases in the United States. We knew that the reported cases were just the tip of the iceberg, but the statistical results clearly showed that newer or less popular groups clearly encountered much greater difficulty being able to build or refurbish structures for worship facilities than mainline groups.<sup>5</sup> A supplementary study showed that even mainline groups had substantial difficulties, and that the problems were much more pervasive than might have been thought.<sup>6</sup> As reports at successive OSCE Human Dimensions meetings have consistently indicated, and as interventions today will no doubt confirm, such problems with places of worship are widely shared.

But addressing these problems is extraordinarily complex. This is so for all the usual historical, social, psychological, and interpersonal reasons that make intolerance hard to understand. But it is also difficult because places of worship play different roles in different

---

<sup>5</sup> Briefly, as summarized by Professor Douglas Laycock, the Brigham Young University study showed that “smaller religious groups, including Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported church zoning cases involving religious zoning matters. Religious groups accounting for only 9% of the population account for 50% of reported litigation involving location of churches, and 34% of the reported litigation involving accessory uses at existing churches. These small groups plus unaffiliated and nondenominational churches account for 69% of the reported location cases and 51% of the reported accessory use cases. . . . These small faiths are forced to litigate far more often, which means they have less ability to resolve their land use problems politically. Land use authorities are less sympathetic to their needs and react less favorably to their claims. Yet once they get to court, these small faiths win their cases at about the same rate as larger churches. It is not that small churches bring weak cases, but that small churches are more likely to be unlawfully denied land use permits.” Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 770-71 (1999).

<sup>6</sup> Id. at 772. Specifically, a survey of 11,328 Presbyterian congregations showed that 23% had needed land use permits over a five year period. Sixty to eighty congregations per year experienced “significant difficulty in getting a land use permit.” Professor Laycock noted that “the Brigham Young University study reveals only five reported cases involving Presbyterian churches. We know that reported cases are the tip of the iceberg; this comparison gives some sense of how enormous is the iceberg and how tiny is the reported tip.” Id.

religious communities. Moreover, the types of problems that arise and the contexts in which they arise are extremely varied. Sometimes land use restrictions are used to exclude particular religious groups from a city altogether. Sometimes they push religious groups to unattractive locations that are difficult for their members to reach. Sometimes they impose staggering costs. Sometimes complex problems arise because of changes in liturgy or shifts in the demography of a particular religious community. And always, there are surrounding land uses that are affected.

Often there are countervailing values that need to be taken into account. The right to worship comes into tension with complex land use, building, safety, traffic and other codes that have legitimate objectives. Officials administering these systems are charged with protecting significant community values, and have both broad discretion and complex rule structures to administer. This gives them the flexibility and power to make reasonable adaptations, but it also means they are open to behind-the-scenes pressures and sources of discrimination that can be all too easily masked. The result can be that the rules are administered in ways that make it difficult or impossible to establish places of worship that meet the needs of religious communities. To add to the complexity, these problems arise inevitably at the local level, which means that they arise in literally hundreds of thousands of municipalities across the region.

Resolving these problems is particularly important, because failure to do so can create deep sources of tension and flashpoints for violence. Even more importantly, failure to solve these problems means that many of the residents of our countries suffer infringement of their right to worship.

With this in mind, the Advisory Council on Freedom of Religion or Belief believes that these issues should be studied in greater depth, with the hope that sensitive and practical recommendations can emerge. We have developed a list of representative questions we believe

need to be addressed. These are attached to the written version of my remarks. But we recognize that these are merely a starting point. We hope this session today can help us get a better handle on the scope of the problems and the forms the problems take. We need to know more about how these problems affect differing religious groups with their differing beliefs and practices. Most importantly, we need to learn from each other and identify good practices that can be shared. We need to find ever better ways to protect the right to establish and maintain places of worship within the larger context of the regulatory matrices of our societies. May our meeting today contribute to this end.

## **Freedom of Religion or Belief and Places of Worship: Representative Issues**

The following constitute preliminary set of issues that have been identified by the OSCE/ODIHR Advisory Panel on Freedom of Religion or Belief as part of a larger effort to study issues arising in connection with places of worship in the legal systems of the various OSCE participating States:

1. *Definition.* Does the legal system provide a definition of place of worship<sup>7</sup> and/or burial ground?
2. *Freedom to assembly for religious purposes.* Are individuals free to gather for religious purposes outside places of worship (for example in public spaces, in private homes, etc.)? Do they need an authorization to do so? Is this authorization subject to objective criteria or do the relevant authorities decide on the base of discretionary criteria?
3. *Right to have a place of worship and a burial ground.* Can a place of worship and a burial ground be established, maintained, and used by any religious group? Is this right reserved to some religious groups only (for example, registered, recognized, traditional, etc., religious groups)? In case a burial ground for the members of a particular religion cannot be established, can they be granted a separate parcel within the municipal burial ground?
4. *Authorization.* Is the right to establish, maintain, and use a place of worship and a burial ground subject to authorization on the part of the State or its institutions? If this is the case, what is the procedure to obtain the authorization? At what level or levels in the state organization are such authorizations granted? What requirements must the applicant group meet? What are the stages that define the land use process (for example, zoning, building permit, occupancy license, etc.)?
5. *Equal treatment.* Are there provisions to guarantee the equal treatment of religious groups seeking to establish, preserve, maintain or administer a place of worship or a burial ground? Are there specific provisions aimed at granting access for minority religions to their own places of worship and burial grounds? Are there provisions protecting religious groups against excessive discretion of local authorities in the applications of land use and building regulations? Are places of worship or burial grounds included in public policies aimed at eliminating indirect discrimination?
6. *Registration.* Are places of worship and burial grounds subject to registration or licensing? If so, which are the requirements for being registered or obtaining a license? On which ground can registration/license be refused? When and how can a registration be cancelled and a license revoked? Which are the remedies in case of unlawful refusal or cancellation of registration/license? Which are the legal consequences of registration/license (for example, legal personality, access to public economic benefits, etc.)? What are the legal consequences of running unregistered/unlicensed places of

---

<sup>7</sup> In this document “place of worship” means not only a building (for example churches, mosques, synagogues, temples, etc.) but also a site (for example gardens, shrines located in an open space, etc.) where a group of people regularly come to perform acts of religious worship or devotion.

worship and burial grounds (for example, is the relevant religious group held liable, or are those places closed?)

7. *Permissible limitations.* Which are the permissible restrictions to the freedom to establish, preserve, maintain, administer and use places of worship and burial grounds? Besides the restrictions aimed at protecting public safety, order, health, morals, and the fundamental rights and freedoms of others, are there restrictions on the ground of zoning and planning requirements? Are there restrictions concerning the external appearance of a place of worship or a burial ground (for example, prohibition of minarets)? Are there any restrictions or requirements concerning the dimension of places of worship or burial grounds (for example, a certain proportion between the size of the place and the number of faithful of a religious community in a given area)? Are there limitations concerning the source of funding for the establishment of a place of worship (for instance, when the money come from a foreign country)?
8. *Permissible limitations.* Which are the permissible restrictions to the activities taking place in places of worship and burial grounds (for example, noise produced by bells or call to prayer)? Are there limitations based on security policies that affect the activities taking place in a place of worship (for example, recording of sermons, obligation to preach in the country language, identification of persons attending religious ceremonies, etc.)? Are there restrictions affecting the treatment and the burial of corpses (for example, for sanitary and health reasons)?
9. *Protection.* Are there specific provisions aimed at protecting places of worship and burial grounds against desecration, vandalism, destruction? Are there provisions regarding confiscation, demolition, compulsory re-location, change of destination of a place of worship or a burial ground?
10. *Protection.* Are there provisions protecting the area surrounding a place of worship or a burial ground (for example, limitations on offensive advertising or commerce, sale of alcohol, etc.)?
11. *Redundant/dismissed places of worship and burial grounds.* Are there provisions protecting places of worship and burial grounds that have been declared redundant or are not used any more as place of worship or burial grounds?
12. *Restoration of religious property.* Are there properties previously owned by religious institutions that have been expropriated that religious communities claim should be restored?
13. *Best practices.* What can be recommended as “best practices” with respect to places of worship and burial grounds that can be shared with those dealing with these issues in other countries?