



EMORY
LAW

Emory International Law Review

Volume 25

Issue 2 *Sharia, Family, and Democracy: Religious Norms and Family Law in Pluralistic Democratic States*

2011

Frontiers of Juridical Pluralism: Law, Religion, and the Family

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Recommended Citation

John Witte Jr., *Frontiers of Juridical Pluralism: Law, Religion, and the Family*, 25 Emory Int'l L. Rev. 779 (2011).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol25/iss2/1>

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FOREWORD

FRONTIERS OF JURIDICAL PLURALISM: LAW, RELIGION, AND THE FAMILY

Anglican Archbishop Rowan Williams set off an international firestorm on February 7, 2008, by suggesting that some accommodation of Muslim family law was “unavoidable” in England. His suggestion, though tentative and qualified, prompted more than 250 articles in the world press within a month, the vast majority denouncing it. England, his critics charged, will be beset by “licensed polygamy,” “barbaric procedures,” and “brutal violence” against women encased in suffocating burqas. Muslim citizens of a Western democracy will be subject to “legally ghettoized” Muslim courts immune from civil appeal or constitutional challenge.¹ The horrific excesses and chronic human rights violations of their religious courts elsewhere in the modern world prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won’t stay closed long, however. The Archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Sharia by English courts. He was raising a whole series of hard but “unavoidable” questions about marital, cultural, and religious identity and practice in modern pluralistic societies that are committed to human rights and religious freedom for all.

What forms of marriage should citizens be able to choose, and what forums of religious marriage law should state governments be required to respect?

How should Muslims and other religious minorities with distinct family norms and cultural practices be accommodated in a society dedicated to religious liberty and self-determination, and to religious equality and nondiscrimination?

¹ Rowan Williams, Archbishop of Canterbury, Church of England, Archbishop’s Lecture—Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), <http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>; Catherine Bennett, *It’s One Sharia Law for Men and Quite Another for Women*, OBSERVER (Feb. 9, 2008), <http://www.guardian.co.uk/commentisfree/2008/feb/10/religion.law> (“licensed polygamy”). See further reactions in SHARIA IN THE WEST (Rex Ahdar & Nicholas Aroney eds., 2011) and MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols ed., 2012).

Is legal or normative pluralism necessary to protect Muslims and other religious believers who are conscientiously opposed to the values that inform modern state laws on sex, marriage, and family?

Doesn't state accommodation or implementation of a faith-based family law system run the risk of higher gender discrimination, child abuse, coerced marriage, unchecked patriarchy, or worse, and how can these social tragedies be avoided?

Won't the addition of a religious legal system governing marriage and family life complicate already complex issues of conflict of laws and interstate and international comity? And won't it encourage even more forum shopping and legal manipulation by crafty litigants involved in domestic disputes, often pitting religious and state norms of family against each other?

Does the very state recognition, accommodation, or implementation of a religious legal system erode the authority and compromise the integrity of those religious norms? Isn't strict separation of religious norms and state laws the best way to deal with the intimate questions of sex, marriage, and family life?

In many Western nations, including the United States, these hard questions are at the edge of the legal frontier, as religious advocates challenge the modern state's monopolization and liberalization of family law. A number of Muslim scholars—along with some Jewish, Hindu, Christian, and other groups—want to contract out of the state's family laws into their own religious family law systems. They want their faith-based family law systems to be respected if not supported by the state. And they want their voluntary faithful to have the right to choose which law—state or religious—governs their legal issues of marriage and family life, child care and custody, trusts and inheritance, and more.

Advocates for this faith-based family law system describe it variously as an extension of the concepts of federalism and pluralism to include private group federalism and private legal pluralism for religious communities. They describe it as a natural next step in the corporate free exercise rights of religious groups that already have power to arbitrate and mediate family disputes and to educate children in private religious schools. They describe it as a natural extension of the domestic and international rights of private association and religious self-determination. And, specifically for America, they describe it as the natural next step in the pluralization of marriage. After

all, American states now have options of contract versus covenant marriage, straight versus gay marriage, and traditional marriage versus civil unions or domestic partnerships. These are all off-the-rack models of marriage and intimate unions that the state offers from which parties can choose. Why can't parties create and choose their own religious marriage and family law system as well?

While these challenges are part of the "brave new world" of Western family law, they have long been familiar issues in many non-Western communities. The most notable examples are in Africa, the Middle East, Eurasia, and the Indian subcontinent, where various types of Muslim family norms govern a range of issues—marriage formation, maintenance, and dissolution; child case, custody, and control; marital property, inheritance, and contracts; and more. Sometimes these religious or customary family law systems operate as part of the state, sometimes on behalf of the state, sometimes in lieu of the state, and sometimes in competition with the state. Some of these are jurisdictional arrangements that follow ancient traditions, while others follow colonial divisions of legal labor or are products of modern constitutional reforms. Whatever their provenance or province, these religious family law norms are an integral part of the daily domestic lives of hundreds of millions of people.

This Symposium offers the first-of-its-kind comparative analysis of these pluralistic family law developments in the West and in Africa. These essays are both theoretical and practical, viewing both the law on the books and the law in action in local communities. Most of the essays are focused on Nigeria and the United States—two countries that share a common law heritage and are wrestling with how to structure a legal system for an intensely pluralistic society constitutionally committed to human rights, religious freedom, and rule of law. The essays also offer compelling examples from other African countries, and provide detailed maps of the broader human rights, religious freedom, and cultural identity issues that are at stake in this new, contested terrain of law, religion, and the family.

This Symposium issue is part and product of a joint venture between the Center for International and Comparative Law and the Center for the Study of Law and Religion, both at Emory University. On behalf of my colleagues, I want to offer a special word of commendation and appreciation to Dr. M. Christian Green who masterminded this Symposium and took the lead in devising the methodology, selecting the authors, and screening the essays in

addition to contributing her own fine essay. Dr. Green is a prize alumna of the Center for the Study of Law and Religion, where she now serves as a Senior Fellow. She has published several path-breaking studies on law and religion, feminism and the family, human rights, comparative religious ethics, and religion and international affairs. Her forthcoming monographs on *Religion, Rights, and Recognition of Identities: Religion and Human Rights in the Post-Secular Age* and *Fatherhood and Feminism: Justice, Care, and Gender in the Family* all hold the high promise of being standard citations.

I also wish to thank the project co-director, and Symposium co-editor, Professor Abdullahi Ahmed An-Na'im, Charles Howard Candler Professor of Law, Director of the Center for International and Comparative Law, and Senior Fellow in the Center for the Study of Law and Religion. Professor An-Na'im is a world authority on international human rights, Islamic law, African constitutionalism, and comparative family law. He has taken courageous and brilliant stands in defending Muslim-based understandings and applications of human rights and religious freedom for all. His early monograph, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, and his recent monograph, *Islam and the Secular State: Negotiating the Future of Shari'a*, will long endure as classics. Some of the insights in this latter book are on vivid display in his powerful essay that opens and frames this Symposium.

With my colleagues, I wish to thank Ms. Eadie Bridges of the Center for International and Comparative Law together with Ms. Anita Mann and Ms. Amy Wheeler of the Center for the Study of Law and Religion for sharing their refined administrative skills; and Mr. Silas W. Allard, Ms. Jennifer Kidwell, and Ms. Jennifer Williams for their excellent research assistance.

With my colleagues, I also wish to thank Dr. Thomas Asher and his colleagues at the Social Science Research Council for their generosity in supporting the project that gave rise to this Symposium issue, the public lectures, and the website that continues the exciting conversation generated on these pages. The Social Science Research Council has long been a catalyst for all manner of creative interdisciplinary work on some of the fundamentals of public and private life. We are deeply grateful for this opportunity for collaboration.

Finally, it has been a pleasure and privilege to collaborate anew with our colleagues at the *Emory International Law Review*.² I want to say a special word of thanks to Mr. Benjamin R. Farley, former editor-in-chief of the *Review*, and his successor, Mr. Daniel Englander, for taking on this special issue and working on it with such efficiency. I also wish to thank Emory Law students, Ms. Sarah Austin, Mr. Tyler Banks, Mr. Lance Hochhauser, Ms. Ji Na Hwang, Ms. Heather Greenfield, Ms. Marissa Smith, and Ms. Alexandra Vasquez who were kind enough to take on the added burden of editing this special Symposium atop their regular editorial duties.

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² Our Center for the Study of Law and Religion has had the privilege of collaborating with the *Emory International Law Review* on several earlier special issues. Symposium, *International Conference on Christianity and Democracy*, 6 EMORY INT'L L. REV. 19 (1992); Symposium, *Religious Human Rights in the World Today: A Report on the 1994 Atlanta Conference*, 10 EMORY INT'L L. REV. 53 (1996); Symposium, *Soul Wars: The Problem and Promise of Proselytism in Russia*, 12 EMORY INT'L L. REV. 1 (1998); Symposium, *What's Right for Children*, 20 EMORY INT'L L. REV. 1 (2006); *The Foundations and Frontiers of Religious Liberty Symposium*, 21 EMORY INT'L L. REV. 1 (2007); *Symposium in Miniature: Religious Symbols on Government Property*, 25 EMORY INT'L L. REV. 5 (2011).

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