

The Frontiers of Marital Pluralism

Anglican Archbishop Rowan Williams set off an international firestorm this month by suggesting that some accommodation of Muslim family law was “unavoidable” in England. His suggestion, though tentative, has already prompted more than 250 articles in the world press, the vast majority denouncing it. England will be beset by “licensed polygamy,” “barbaric procedures,” and “brutal violence” against women and children, his critics argued, all administered by “legally ghettoized” Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan, and other former English colonies that have sought to balance Muslim Shari’a with the common law, other critics added. The horrific excesses of their religious courts -- even calling the faithful to stone innocent rape victims for dishonoring their families -- prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won’t stay closed for long, however. The Archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Shari’a law by state courts. He, instead, wanted his nation to have a full and frank debate about the reach and the limits of marital pluralism in its growing multicultural society. What forms of marriage should citizens be able to choose, and what forms of religious marriage law should government be required to respect? These are “unavoidable” questions for any modern society dedicated to protecting both the civil and religious liberties of all its citizens.

These are quickly becoming “unavoidable” questions for America, too. We already have a lot more marital pluralism than a generation ago – driven not only by our multiculturalism, but even more by our constitutional norms of liberty, privacy, and equality. Massachusetts now offers traditional marriage and same-sex marriage to their citizens. Several more states will likely follow suit. Vermont offers straight couples marriage, gay couples civil union, with comparable rules governing each form. Twenty-two more states have this two-tier system under discussion. Louisiana, Arkansas, and Arizona offer couples either a simple contract marriage or a covenant marriage with more traditional and rigorous rules of entrance and exit. Twenty-six more states might add covenant marriage to their menu.

While these marital options remain firmly under state law, other options now draw in religious law, too, implicitly or explicitly. Utah and surrounding states, for example, house some 30,000 polygamous families. These families and the fundamentalist Mormon churches that govern them are openly breaking state criminal laws against bigamy, but the states will not prosecute unless minors are forced into marriage. In New York, Orthodox Jewish couples cannot get a state divorce without first obtaining a rabbinic divorce. This privileges Jewish family law over all other religious laws, and it forces some of New York citizens to discharge a religious duty in order to gain a civil right to divorce. In

more than twenty states, marriages arranged by Hindu, Muslim, and Unification Church officials have been upheld, with divorce the only option left for parties who claim coercion or surprise. A number of religious couples now choose to arbitrate their marital and family disputes before religious courts and tribunals rather than litigate them in state courts. Courts uphold the judgments of Jewish and Christian tribunals in these cases. Muslims, Hindus, and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes.

Granting Muslims and others equal treatment in these cases does seem “unavoidable” if all parties have freely consented to this method of dispute resolution. To deny Muslim divorce arbitration while granting it to Jews and Christians is patently discriminatory. But the bigger question is whether state recognition of any religious marriage tribunals and laws puts us on a slippery slope that ends with parallel state and religious legal systems of marriage, and no control over the latter if they become abusive. What if religious parties want freedom to “covenant” out of the state’s marriage laws and into the marriage laws maintained by their own voluntary religious communities? Which religious laws deserve deference from the state: just those governing husband and wife, or those on parent and child, property and inheritance, education and maintenance as well? Which religious communities have religious laws that deserve state deference – Christians? Jews? Muslims? Mormons? Hindus? What about the 1200 other religions now in place in America, a few with very different marriage and family norms? May a state recognize only some religious laws but not others consistent with the non-discrimination rules of the First Amendment free exercise clause? May a state cede any of its authority over marriage consistent with the non-delegation rules of the First Amendment establishment clause? These are the frontier questions of religion and marriage that will soon face American courts and legislatures, and we don’t have much constitutional guidance yet.

We do have some guidance from the law of religion and education. A century ago, states wanted a monopoly on education in public schools. Churches and parents claimed a right to educate their children in religious schools. In the landmark case of *Pierce v. Society of Sisters* (1925), the Supreme Court held for the churches, and ordered states to maintain parallel public and private education options for their citizens. But later courts also made clear that states could set basic educational requirements for all schools – mandatory courses, texts, and tests, minimal standards for teachers, students, and facilities, common requirements for laboratories, libraries, and the like. Religious schools could add to the state’s threshold requirements, but they could not subtract from them. Those religious schools that sought exemptions from these requirements found little sympathy from the courts. These schools had to bring themselves into conformity with general standards, or lose their license to teach.

This compromise on religion and education, forged painfully over a half century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly. Religious parties have always had the right to marry in a religious sanctuary or before a state official. Religious officials have long had the right to participate in the weddings, annulments, divorces, and custody battles of their voluntary members. But the state has also long set the threshold requirements of what marriage is and who may participate. Religious officials may add to these state law requirements, but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state will throw him in jail. A priest may encourage a bickering couple to repent and reconcile, but she cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals get more involved in marriage and family law, states will need to build on these precedents and set threshold requirements in the form of a license. No polygamy, child marriages, or other forms of marital union not recognized by the state. No threat or violations of life and limb, or provocations of the same. No discrimination against women or children. No violation of basic rules of procedural fairness, and many more such requirements. Religious tribunals may add to these requirements, but not subtract from them. Those who fail to confirm will lose their licenses, and will find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools to transform themselves from sectarian isolationists into cultural leaders. Such an arrangement holds comparable promise for questions of religion and marriage. It not only prevents the descent to "licensed polygamy," "barbaric procedures," and "brutal violence" that the Archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer.