

# Mandatory civil marriage according to Swiss law: Superfluous historical remnant or building block in the fight against forced religious marriages?

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*In the 19th century, the prohibition of religious weddings prior to state marriages in Switzerland had the objective of enforcing the right to marriage and preventing discriminatory practices, particularly those of the Catholic Church. While this is no longer pertinent, mandatory civil marriage has a new raison d'être in today's age of migration. The state thereby requires and ensures that marriages should be entered according to state law and its underlying principles. This also impacts how those couples living more in line with religious and cultural ideals than others view marriage. However, for mandatory civil marriage to fulfil its purpose, its scope of application must be adapted to today's diversity in marriage law. Furthermore, its enforceability by state law must be improved.*

## I. Introduction

Dutch law requires a mandatory civil marriage. According to Article 1:68 of the Dutch Civil Code, no religious marriage ceremony may take place until the parties have proved to the religious officiant that the marriage has also taken place before the civil registrar.

Switzerland has a very similar regulation, which interestingly was called into question in the political debate some years ago. In 2017, Claudio Zanetti, then member of the Swiss parliament, submitted a parliamentary initiative with the aim of abolishing mandatory civil marriage by the state as stipulated in Article 97 paragraph 3 of the Swiss Civil Code.<sup>1</sup> Under this provision, a civil marriage must take place before entering into a religious marriage. According to Zanetti, purely religious blessings should also be possible without prior state marriage ceremonies. Indeed, if a secular concubinage can be established without further ado today, why not a purely religious marriage?

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<sup>1</sup> See Claudio Zanetti's parliamentary initiative 'Keine Diskriminierung religiöser Eheschließungen' <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20170470>> accessed on 13 September 2021.

Claudio Zanetti withdrew his initiative in September 2018.<sup>2</sup> But when forms of relationship are becoming increasingly pluralistic, the question remains why the state can monopolise marriage. Long gone are the days when the state had to defend itself against the Roman Catholic Church's societal power and, subsequently, placed key areas of citizens' lives under the protection of state law. Would it not be a sign of respect for religions if they were granted regulatory autonomy in this area? Can we not trust the spouses' mature judgement and let them decide for themselves when they want to make use of the legal instrument of civil marriage with its protective effects and when they do not need them? Or are there other reasons today, for example, in the context of migration, which make it advisable to maintain mandatory civil marriage?

This paper does not intend to take a position on the future of civil marriage law in general. It aims to provide relevant context on Swiss marriage law from a legal-historical, religious and comparative perspective so that the significance of mandatory civil marriage can be better assessed. By this, it wants to contribute to the discussion on the state's role in regulating marriage. First, the paper explains the historical background of Article 97 paragraph 3 of the Swiss Civil Code (section 2), its area of application today, and how it is enforced in Switzerland compared to the Netherlands (section 3). This is followed by a brief overview of what constitutes a religious marriage (section 4). In Section 5, a comparative review of the law outlines the questions or problems that arise in countries that do not have mandatory civil marriage like the Netherlands and Switzerland. Finally, based on the insights gained, we aim to answer whether there is a need today to adhere to mandatory civil marriage (section 6).

## 2. Historical background

In Switzerland a federal mandatory civil marriage was first set out in the Federal Act of 1874 on the Certification of Civil Status and Marriage.<sup>3</sup> This law was a concretisation of Article 54, which had been introduced into the Federal Constitution in the same year and placed the right to marriage under the Confederation's protection. The reason being intense fights between the Roman Catholic church and the state in Switzerland in these years about the role of Church and religion in public life. At the height of this so-called

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<sup>2</sup> Pierre-André Page also withdrew his motion 'Aufhebung des Verbots, eine religiöse Eheschliessung vor der Ziviltrauung durchzuführen' on 09 February 2021. See P-A Page, 'Aufhebung des Verbots, eine religiöse Eheschliessung vor der Ziviltrauung durchzuführen' <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20173693>> accessed on 13 September 2021.

<sup>3</sup> See Bundesblatt der Schweizerischen Eidgenossenschaft (BBl) 1875 I 105.

*Kulturkampf*,<sup>4</sup> marriage law was removed by the state from the regulatory authority of the Church. Up to this point, in some Catholic Swiss cantons, marriage was regulated by canon law. Likewise, the revised constitution stipulated that the determination and certification of civil status should now be the civil authorities' responsibility and that ecclesiastical jurisdiction would be abolished (Article 53 of the Federal Constitution of 1874). Switzerland adopted a form of marriage introduced in France with the Code civil of 1804<sup>5</sup> and already in force in the cantons of Geneva and Neuchâtel before 1874.

The provisions at federal level were a result of conflicts relating to interreligious marriages in several Catholic cantons. The Federal Constitution of 1848 had introduced freedom of establishment for members of Christian denominations. Reformed people could now settle in Catholic cantons and Catholics in Reformed cantons. However, Catholics were prohibited by church law from entering into 'mixed marriages'.<sup>6</sup> This was to ensure that the children in these marriages would be baptised and raised Catholic. In order to implement the Catholic prohibition, various Catholic cantons had issued corresponding state laws. A majority of parliamentarians in the Federal Assembly considered this to be misplaced. A federal law on mixed marriages passed in 1850 stipulated that the cantons were neither allowed to prevent the marriage of a bridal couple of different denominations nor to make it subject to additional conditions.<sup>7</sup> This was the prelude to subsequent federal legislation on this issue, the federal law of 1874 and the mandatory marriage law of the Swiss Civil Code of 1912.

The secularisation of marriage law and the introduction of mandatory civil marriage took place in Switzerland at about the same time as in Germany and other countries in Western Europe. In southern Europe, where the Roman Catholic Church retained a strong influence well into the 20th century, marriage law continued to have a much more ecclesiastical character, in part, as we will see for Italy until today (see below section 5.2).

4 See D Kraus, *Schweizerisches Staatskirchenrecht* (Tübingen 1995) 39 ff.

5 Napoleon considered marriage one of the 'sacrements civils'. Accordingly, the Napoleonic legislation and subsequently the French Civil Code contains a civil marriage law. Since it was already implemented in the revolutionary legislation, modern civil marriage is actually the spiritual child of the French Revolution. The theoretical basis for this development was the doctrine of the separation of two areas of marriage, the natural or civil contract and the sacrament, which was first led by the doctrine of Gallicanism, then adopted by Enlightenment philosophers and eventually found its way into the legislation of the French Revolution. See H Conrad, 'Die Grundlegung der modernen Zivilehe durch die Französische Revolution. Ein Beitrag zur neueren Geschichte des Familienrechts', 67(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* 336-372.

6 According to can. 1124 of the *Codex Iuris Canonici* of 1983, this prohibition still applies today. However, the bishop or local parish priest may grant a dispensation if the Catholic partner makes a sincere promise to do everything possible to ensure that all his children are baptised and educated in the Catholic Church.

7 Cf. BBL 1850 III 719.

### 3. Content and enforcement

Article 1:68 of the Dutch Civil Code stipulates ‘No religious ceremonies may take place before the parties have ensured that the minister of religion has established the solemnisation of the marriage before the Registrar of Births, Deaths, Marriages and Registered Partnerships has taken place.’<sup>8</sup> The similarity to Article 97 para 3 of the Swiss Civil Code is obvious: ‘No religious wedding ceremony is permitted prior to the civil ceremony.’

Thus, as in the Netherlands, religious marriages are permitted in Switzerland but must not take place before civil marriage.<sup>9</sup> By presenting a family identity card or marriage certificate, the bride and groom must prove to the religious official (priest, minister, rabbi, imam, etc.) that they are legally married. Without such a document, a religious wedding may not take place.<sup>10</sup>

An engaged couple who has grown up in Switzerland is probably aware that they have to get married before the civil registrar if they want to establish a marriage valid under state law. However, people from countries where there are no state marriages, but only religious marriages could at best be mistaken about the actual circumstances. The religious ritual, unlike in their country of origin, does not affect their civil status in Switzerland.

To put it bluntly, after a purely religious marriage the couple is still regarded as unmarried under Swiss law. The protective effects of the law do not apply. The rules of matrimonial property law are not applicable; there is no obligation to provide mutual support or post-marital alimony<sup>11</sup> and children from purely religious marriages, for example, are not subject to the presumption of marital status (Article 252 of the Swiss Civil Code); the filiation is only with the mother, not the father. Therefore, in the case of a purely religious marriage a cohabitation (*Konkubinats*) must be assumed. In Switzerland, cohabitation is not recognised as a separate legal institution with specific effects. The formation of a cohabitation does not require a formal act of establishment, because it is a reality of life and despite its relevance, there are no generally applicable legal defi-

<sup>8</sup> Translation from I Sumner and H Warendorf, *Family Law Legislation of the Netherlands: A Translation Including Book 1 of the Dutch Civil Code, Procedural and Transitional Provisions and Private International Law Legislation* (Intersentia, Antwerp/Oxford/New York 2003).

<sup>9</sup> Stefan Keller, ‘Kommentar zu Art. 97 ZGB’ in Breitschmid, Peter/Jungo, Alexandra (eds), *Handkommentar zum Schweizer Privatrecht: Personen- und Familienrecht inkl. Kindes- und Erwachsenenschutzrecht (CHK)*, 3. Auflage, Zürich 2016, N 4.

<sup>10</sup> *ibid*, see Bundesamt für Justiz, Direktionsbereich Privatrecht, Eidgenössisches Amt für as Zivilstandswesen (EAZW), Religiöse Eheschliessung durch Verantwortliche religiöser Gemeinschaften in der Schweiz, Stand 01.02.2012 <<https://www.bj.admin.ch/dam/data/bj/gesellschaft/zivilstand/merkblaetter/ehe/mb-religioeseeheschliessung-d.pdf>> accessed on 13 September 2021.

<sup>11</sup> See H Hausheer, T Geiser and R Aebi-Müller, *Das Familienrecht des Schweizerischen Zivilgesetzbuches: Eheschliessung, Scheidung, allgemeine Wirkungen der Ehe, Güterrecht, Kindesrecht, Erwachsenenschutzrecht, eingetragene Partnerschaft, Konkubinats*, (Stampfli Verlag 2014) N 3,20 ff.

nitions of cohabitation. For this reason, both the definition and the legal effects of cohabitation must always be clarified in connection with specific legal issues: Property relations are determined by property law, the rules of marital property law do not apply in cohabitation, there is no obligation to mutual support and no obligation to pay post-partnership maintenance. There is only a duty of alimony or assistance insofar as it is expressly or tacitly agreed.<sup>12</sup> Certain claims, mainly of a financial nature, may arise from the cohabitation relationship after dissolution, which can be enforced in court. In this case, however, recourse is made to the provisions on partnership by contract (*einfache Gesellschaft*). The Federal Supreme Court of Switzerland denies the marriage-like nature of the cohabitation and refuses to apply marriage law provisions by analogy in the absence of contractual agreements.<sup>13</sup> Therefore, in the opinion of the authors, cohabitation provides for barely any formal legal protection and is not a sufficient alternative to civil marriage.

This raises the question as to how mandatory civil marriage is enforced? In the Netherlands, infringements are punishable under Article 449 of the Dutch Criminal Code:

A minister of religion who, prior to having been given evidence by the parties that their marriage has been solemnised by a civil registrar, officiates in any official religious ceremony in celebration of the marriage, shall be liable to a fine of the second category.<sup>14</sup>

Hence, only after confirming civil marriage, should the minister of religion perform a religious marriage. If said minister ignores this prerogative, they can be fined.

An earlier version of the Civil Registry Ordinance (Zivilstandsverordnung ZStV) was comparable insofar as it also imposed a fine (CHF 500) on the clergyman who celebrated a religious ceremony knowing that there had been no prior civil marriage. In the current version of Article 91 ZStV<sup>15</sup> however, the sanction under the Civil Registry Ordinance is no longer applicable.

A memorandum prepared by the Federal Office of Justice entitled 'Religious Marriage by Persons Responsible for Religious Communities in Switzerland'<sup>16</sup> states that religious officials are threatened with criminal prosecution when unlawfully concluding religious marriages; it refers here to Articles 271, 287

<sup>12</sup> *ibid* N 3.02 ff.

<sup>13</sup> See BGE 108 II 206.

<sup>14</sup> Translation from Legislationline <[https://www.legislationline.org/download/id/6415/file/Netherlands\\_CC\\_am2012\\_en.pdf](https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf)>.

<sup>15</sup> Civil Status Ordinance (Zivilstandsverordnung ZStV) of 28 April 2004, SR 211.112.2.

<sup>16</sup> See EAZW, fn 11.

and 292 of the Swiss Penal Code (StGB). However, the cited penal provisions only apply in particular constellations:

- Article 271 StGB (Unlawful activities on behalf of a foreign state) requires in paragraph 1 as a constituent element of the offence that someone ‘without authorisation performs acts for a foreign state which are the responsibility of a public office or civil servant’. The act performed by the perpetrator must, by its nature or purpose, be characterised as an official activity in the interest of a foreign state.<sup>17</sup> However, the religious official who performs a wedding ceremony usually acts for his religious community, not for a foreign state.
- Article 287 StGB (usurpation office) penalises anyone who unlawfully assumes an office or military command. The first variant of the offence, which is the only one that comes into consideration here, presupposes that the offender pretends to be the holder of an office that they do not hold. Here, the religious official would have to deliberately give the impression that it was not only a ceremony with religious effect but that he or she was also authorised to officiate a marriage valid under state law. This would be conceivable at best in migration constellations in which the bridal couple lacks the most elementary knowledge of the Swiss legal system.
- Article 292 StGB (contempt official orders) presupposes that the state has issued a concrete instruction of conduct to a specific person.<sup>18</sup> This would only come into question if a religious officeholder repeatedly performed religious marriages before or even without subsequent state marriage ceremonies and the authorities now want to put a stop to it.

In conclusion, unlike 1:68 of the Dutch Civil Code, Article 97 para 3 of the Swiss Civil Code is not a norm completely without sanction, but the applicable criminal law only offers a means of action in particular situations. If mandatory civil marriage is really to be enforceable in normal circumstances, there is a need for appropriate, adequate penal provisions. For example, a provision akin to Article 449 of the Dutch Penal Code could be reintroduced.

#### 4. Religious marriage

Clarification is then needed on the question of what constitutes a religious marriage. The Swiss Civil Code does not define this term, but rather

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<sup>17</sup> S Flachsmann, ‘Kommentar zu Art 271 StGB’ in *Donatsch, Andreas (ed.), StGB Kommentar: Schweizerisches Strafgesetzbuch und weitere einschlägige Erlasse mit Kommentar zu StGB, JSStG, den Strafbestimmungen des SVG, BetMG und AuG* (Navigator.CH 2013) N 7.

<sup>18</sup> C Riedo and B Boner, ‘Kommentar zu Art 292 StGB’ in *Niggli, Marcel Alexander/Wiprächtiger, Hans (eds), Basler Kommentar: Strafrecht II* (Basel 2019) N 60 ff and 72.

presupposes it to be common knowledge. At the time of its genesis, wedding ceremonies in Christian communities stood in the foreground: The Catholic, Anglican or Orthodox priest or the Reformed minister asks the bride and groom to say, 'I do' and blesses them. There is a prescribed liturgy for this in the various churches, and these official acts are also entered in a church register of marriage. However, the religious landscape has become much more diverse in the last decades, also within the religious communities. Here follow some examples.

#### 4.1. Christianity

Today, certain churches allow the priest or minister to marry a (by state law) unmarried couple and bless non-marital relationships. This is the case, for example, when an older couple does not want to marry but wants to place their relationship under God's blessing ('pensioners' concubinage'). There is also a church liturgy for such acts of blessing, which are different from the conclusion of a marriage. This is not covered by Article 97 para 3 of the Swiss Civil Code and does not have to be, since the couple does not want the protective effects of state marriage.

#### 4.2. Islam

In Islam, marriage (*nikah*) is understood not primarily as a religious act, but as a private legal act.<sup>19</sup> Husband and wife declare their willingness to enter into marriage before witnesses. Witnesses are usually two men or one man and two women.<sup>20</sup> Husband and wife also agree to the terms of a previously negotiated marriage contract. This contract regulates, among other things, the bride's gift (*mahr*), a share of the wealth that traditionally serves the woman as material support in case of a subsequent dissolution of the marriage. The marriage can take place in a mosque and in front of an imam, but this is not mandatory as according to Islamic law, Muslim marriages can take place without an imam being involved at all. The aforementioned threats of punishment of the Swiss Criminal Code, which are directed at religious officials, therefore do not apply. Religious acts such as quoting Koranic texts may be part of the tradition, but do not have to be. Since extramarital sex is disapproved of in Islam, marriage is supposed to legitimise sexual relations. It therefore often takes place at a comparatively young age, which is one reason among others for marriages of minors.

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<sup>19</sup> J Schacht, *An Introduction to Islamic Law* (Clarendon Oxford 1964) 161.

<sup>20</sup> P Bleisch, 'Islamisches Recht' in R Pahud de Mortanges, P Bleisch Bouzar, D Bollag, C Tapenbeck, *Religionsrecht* (Schutless Zürich 2017) 212 ff.

Whether and to what extent Muslim marriages occur in Switzerland without prior or subsequent civil marriage ceremonies has not yet been empirically established.<sup>21</sup> As shown below for England, this practice is not uncommon in other European countries. One can assume that in Switzerland, as elsewhere, there are marriages entered only into under Muslim law, not under state law. It can also be assumed that this is not a phenomenon limited to Islam.

#### 4.3. Other Religions

In Muslim and Hindu countries, the primacy of religious marriage law has been preserved in many places. The same applies to Israel, where everyone marries according to the norms of the religious community to which they belong.<sup>22</sup> In Lebanon, civil marriage is legal, but it is rendered inactive by the power of religious groups.<sup>23</sup> The Ottoman Empire, which covered large parts of the Middle East until the First World War, had the *Millet system*, which guaranteed members of the various religious communities the application of their religious marriage law.<sup>24</sup> In some places, this was adopted by the subsequent colonial powers in the form of the *personal law system*.<sup>25</sup> The nation-states that emerged in the Middle East after the Second World War also continued to do so. In many countries, additional state norms were enacted to improve women and children's position in marriage law. Furthermore, registration requirements were introduced. Privately contracted marriage must be reported to state authority to ensure legal certainty.<sup>26</sup> In principle, however, marriage is still understood to be a private act. In India, marriage and dissolution are purely private acts; the state does not have the resources to register marriages. When people from these countries come to Western Europe, they are confronted with a very different understanding of marriage. Problems of adaptation may arise as a result.

Islam and Hinduism emerged in a pre-state context and therefore contain their own rules for marriage.<sup>27</sup> In Buddhism, the situation is different. Only

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<sup>21</sup> In the course of the research for this article, the authors asked members and representatives of various religious communities whether they knew of any cases in which persons had been religiously married beforehand. All interviewees answered this question in the negative. However, the survey was not representative and a more in-depth recording of the current situation would be desirable.

<sup>22</sup> A Günzel, *Religionsgemeinschaften in Israel* (Mohr Siebeck[return]2006) 78 ff.

<sup>23</sup> See C Weisflog, 'Neue Zürcher Zeitung (NZZ), Wo die Liebe zur Lüge zwingt – ein Paar kämpft um Gleichberechtigung in Libanon' <<https://www.nzz.ch/international/das-bakterium-der-zivilen-heirat-ld.1472939>> accessed on 13 September 2021.

<sup>24</sup> M Rohe, *Das Islamische Recht: Geschichte und Gegenwart* (Beck CH 2011) 186.

<sup>25</sup> See W Ende and U Steinbach, *Der Islam in der Gegenwart* (Beck CH 2005) 214 ff.

<sup>26</sup> M Rohe, fn 22, 212 ff.

<sup>27</sup> On Hindu marriage law see W Menski, *Hindu Law* (OUP 2003) 273 ff.



for the Buddhist communities of monks and nuns is there a detailed set of norms and rules.<sup>28</sup> In contrast, Buddhism hardly knows any legal norms for the everyday life of laypeople. In particular, there is no Buddhist marriage law. There is neither a procedure for a marriage ceremony suggested by the historical Buddha nor specific provisions on married life. Buddhists can arrange a ceremony in which Buddhist teachings and symbols play a role or in which a monk gives the blessing. In a Western context, however, this cannot be seen as evidence for marriage. But is such a celebration then covered by the state's mandatory civil marriage?

*Conclusion:* In a time of substantial diversity in lifestyles and relationships in addition to a variety of religions, the state's mandatory civil marriage is confronted with a multitude of varying constellations. What once seemed to be straightforward is no longer so today. Not only the enforcement of mandatory civil marriage requires reform, but also its scope of application. However, appropriate legal changes require in-depth discussions on which arrangements should be covered by mandatory civil marriage and why.

## 5. Comparative legal analysis

So far, we have tried to show the scope and enforceability of Article 97 para 3 of the Civil Code should be updated. However, we can only call for legislative action if there are good reasons to prevent purely religious marriages in Switzerland. That would be the case if these religious marriages produce relationships that are not acceptable from the point of view of fundamental rights, ie, if they create the risk of infringements on the legal position on the more vulnerable part of a couple. A look at other countries that do not have the requirement of mandatory civil marriage provides illustrative insights.

### 5.1. Germany

Like in Switzerland, the 1870s saw a political struggle between the state and the Roman Catholic Church in Germany. As a consequence, mandatory civil marriage was introduced in 1875. This is reflected in the German Civil Code (BGB). According to § 1310.1 sentence 1 of the BGB, marriage is entered into by the couple declaring before the registrar that they wish to marry each other. The state's involvement through the registrar is intended to serve legal certainty and publicity and to ensure the examination of the conditions and obstacles to marriage. According to § 67 of the Law of Personal Status (Perso-

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<sup>28</sup> P Kieffer-Pülz, 'What the Vinayas can tell us about law' in R Redwood French, M A Nathan (eds), *Buddhism and Law* (CUP 2014) 46-62.

nenstandgesetz), it was an administrative offence if someone performed a church wedding without the fiancés having previously declared at the registry office that they wanted to enter into marriage with each other. At the beginning of 2009, this provision was scrapped. The intention was to remove a relic from the time of the *Kulturkampf*. Since then, the Catholic Church performs church weddings without a civil registration beforehand, for example for widowed Catholics dependent on a widow's pension from their first marriage.<sup>29</sup> The Protestant Church, however, rejects this.

Following the influx of many refugees in 2015/16, German authorities were confronted with a completely different problem, namely the marriages of minors. In the Middle East, depending on the country of origin, marriage is possible at a much earlier age than in Germany. There, as in Switzerland, the age of adulthood is 18 years. What, however, about minors who are already married? How can religious marriages of minors in Germany be prevented in future?<sup>30</sup>

In mid-2017, the German parliament (the *Bundestag*) passed a law to combat and to prevent marriages of minors (Gesetz zur Bekämpfung von Kinderehen<sup>31</sup>), which provides for various changes, including in the law on marriage and marriage annulment. For example, it became possible for a court to annul a marriage if one of the spouses had reached the age of 16, but not yet 18 at the time of marriage. For marriages involving children under the age of 16, such judicial annulment proceedings are not required; under German law, these are *ex lege* invalid. This also applies to marriages of minors concluded under foreign law.

In order to prevent marriages with minors in the future, a correspondent provision was added to § 11 para 2 of the Law of Personal Status.<sup>32</sup>

In conclusion, having previously abolished mandatory civil marriage, Germany, in view of underage marriages, had to build in new legal safeguards in the interest of those in need of protection. The internal law of non-Christian religious communities usually also stipulates a minimum age for marriage, but this differs from state regulations. Moreover, Islam does not have a uniform law, but many interpretations of the basic rules laid down in the Koran and the

<sup>29</sup> Deutsche Presse-Agentur, Focus Online, Nur vor Gott: Wann die Trauung ohne Amt lohnt <[https://www.focus.de/reisen/service/recht-nur-vor-gott-wann-die-trauung-ohne-amt-lohnt\\_aid\\_744022.html](https://www.focus.de/reisen/service/recht-nur-vor-gott-wann-die-trauung-ohne-amt-lohnt_aid_744022.html)> accessed on 13 September 2021.

<sup>30</sup> In 2016 there were 1,475 married minors, mostly girls, 994 of whom were aged between 16 and 18, 120 between 14 and 16 and 361 even under 14. Cf. FamRZ – Zeitschrift für das gesamte Familienrecht, Redaktionsmeldung, FamRZ-Artikel zum ‘Gesetz zur Bekämpfung von Kinderehen’ <<https://www.famrz.de/redaktionsmeldungen/famrz-artikel-zum-gesetz-zur-bekaempfung-von-kinderehen.html>> accessed on 13 September 2021.

<sup>31</sup> Gesetz zur Bekämpfung von Kinderehen vom 17. Juli 2017, Bundesgesetzblatt (BGBl.) I 2017, 2429.

<sup>32</sup> According to § 70 of the Law of Personal Status, an offence is punishable by a fine of up to 5,000 euros.

Hadiths, especially concerning the minimum age for marriage. For adults, a purely religious marriage continues to be permissible, and it remains to be seen to what extent and with what result it will be used in Germany.

## 5.2. Italy

### 5.2.1. Forms of marriage

In Southern Europe, the Catholic Church held significant political power for a long time and remains of great social importance. The Catholic Church vehemently opposed the introduction of mandatory civil marriage through the Codice Civile of 1865. The Lateran Treaty of 1929 and the Concordat of Villa Madama of 1984, which it concluded with the Italian state, legally established the validity of ecclesiastical marriage for Catholics also in the state sphere. Prerequisite was, after all, that certain formalities were observed in the marriage. Since then, various other religious communities have concluded similar agreements with the state. However, the state exerted its influence with the introduction of civil divorce in 1970. Even if it is concluded in a religious rite, every marriage can at least be divorced according to state law. State jurisdiction also attempts to correct the consequences of the religious dissolution of marriage deemed intolerable from a fundamental rights perspective.

According to law, there are three forms of marriage in Italy:

- a. Marriage of a purely religious nature
  - b. Religious marriage with state recognition
  - c. Civil marriage
- a. There is no obligation on the part of the state to register religiously entered marriages. One can, therefore, also enter into a marriage purely on religious grounds. This is understood as an expression of the freedom of marriage and religion. For example, the Jewish community has concluded an agreement (*intesa*) with the state in which it is explicitly permitted to enter into and dissolve religious marriages without effect for the state, in accordance with Jewish law and tradition.<sup>33</sup> However, the omission of state registration does not remove the marriage effects under state law, such as alimony obligations for children from these relationships or for partners who have lived together for a long time. Marriages of a purely religious nature are found today primarily among migrants. The substantial and often illegal immigration from the Middle East and Africa has led to a considerably increased number of such marriages (see below).

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<sup>33</sup> M Ventura, *Religion and Law in Italy* (Wolters Kluwer 2013) 211.

- b. Many Catholics conclude a *matrimonio concordatario*.<sup>34</sup> Marriage is celebrated before the Catholic priest and according to the provisions of canon law. The priest is obliged by the law of concordat to observe various formalities. After the blessing, the priest must read to the couple the provisions of the Italian Civil Code concerning the rights and obligations of the spouses and, within five days, apply for the registration of the marriage by the competent civil registrar.<sup>35</sup> Registration is only possible if the marriage requirements of the state marriage law are fulfilled. If a Catholic marriage is to be dissolved, there is, as mentioned, since 1970, the possibility of state divorce. However, the spouses can initiate proceedings to have their marriage declared null and void by a court of the Catholic Church, the result of which is then recognised by the state court of appeal. The same procedure – religious marriage with state registration – is accessible to members of various other non-Catholic churches and religious communities based on *intesa* which they have entered into with the Italian state. Unlike Catholics, however, non-Catholics have no choice in dissolving their marriage but are dependent on the state divorce proceedings.<sup>36</sup>
- c. In particular, in Northern and Central Italy, the number of people who marry before the civil registrar is increasing (*matrimonio civile*).

### 5.2.2. Questionable practices

Many migrants in Italy come from Muslim countries. However, the Italian state has not concluded an *intesa* with the Muslim communities so far. Unlike the other religious communities, it is therefore officially impossible for Muslims to marry according to religious rite and then be registered by the state. However, if – for whatever reason – they do not want to marry before the Italian civil registrar, they often choose an indirect route. This includes, for example, marriage in their home country and the subsequent recognition of the marriage by the Italian authorities via private international law. Another way is marriage in the diplomatic mission of the home country in Italy. Finally, the indirect way is practised in several steps: first, the religious marriage before the Iman in Italy, then the embassy's recognition and finally the recognition by the Italian civil registry office. As the detailed field research of *Federica Sona*

<sup>34</sup> Also known as *matrimonio canonico-civile*.

<sup>35</sup> 'La trascrizione dell'atto di matrimonio nei registri dello stato civile', see R Botta, 'Il matrimonio concordatario' in G Bonolini and G Cattaneo (eds), *Il diritto di famiglia, Vol 1 : Famiglia e matrimonio* (UTET 1997) 197-292; P Re, 'Il matrimonio concordatario' in A Cagnozzo et al (eds), *Il nuovo diritto di famiglia, Vol. II* (Giuffr  Editore 2015) 399 ff.

<sup>36</sup> S Ferrari and A Ferrari, 'Italy' in G Robbers and C /Durham (eds), *Encyclopedia of Law and Religion* (vol 4, Brill 2016) 195-211.

shows, there are several ways to live in Italy de facto according to Islamic marriage law. Similarly, this enables Muslims to live in different countries according to different marital status. As a result, the Italian state is also largely powerless to prevent marriages of minors, forced marriages, the compulsion to convert the non-Muslim spouse, the unilateral informal dissolution of marriage by the man or polygamy.<sup>37</sup>

In conclusion, with the Lateran Treaties of 1929, the Catholic Church in Italy has, so to speak, reclaimed its place in marriage law. However, state legislation and case law, which is aligned with fundamental rights, increasingly imposes limits on the Catholic Church within this dual system. Purely religious marriages appear to be primarily problematic when migrants combine them with an active practice of forum shopping to only apply religious marriage law. These marriage practices largely evade state intervention.

### 5.3. England

In England, as in Italy, there are forms of religious marriage in addition to state marriage, resulting in state recognition. Like in Italy, this is due to the strong position of a church, here the Church of England, which is the state church of the country. In addition, the state-recognised religious marriage is – under certain formal conditions – also accessible to other religious communities. There is also no obligation to register a marriage or a mandatory civil marriage. This leads to a high number of purely religious marriages, particularly among Muslims (see below).

Similar to Italy one must therefore distinguish:

- Civil marriages,
- State-approved religious marriages according to the rites of the Church of England,
- State-recognised religious marriages according to the rites of other churches and religious communities,
- Purely religious marriages.

For lack of codification, the applicable marriage law must be derived from several in part antiquated laws and precedents. In 1753, Lord Hardwicke's Marriage Act introduced a mandatory form and registration of marriage to combat clandestine marriages. According to the official church liturgy and ce-

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<sup>37</sup> See F Sona, 'Defending the Family Treasure Chest: Navigating Muslim Families and Secured Positivist Islands of European Legal Systems' in P-K Shah, M-C Foblet, and M Rohe (eds), *Family, Religion and Law* (Routledge 2014) 115-141. For example, different documents with different dates of birth of the bride are presented in the home country and in Italy, or the first wife is married under state law, whereas the marriage with the second wife is concluded only on religious grounds.

celebrated by the responsible clergyman, the marriage was to take place in a public religious ceremony in a parish church of the Church of England. This also applied to members of other churches, eg, Catholics, except Jews and Quakers, who were allowed to marry according to their religious rite.<sup>38</sup> The Marriage Act of 1836 extended the range of acceptable forms of marriage. Civil marriage was introduced: the marriage could now also be concluded in a state registry office, before the registrar and two witnesses. In addition, state-recognised religious marriages could now take place in Anglican churches and other religious buildings, provided that these were registered accordingly, and an authorised person performed the wedding. At that time, the aim was to make marriage ceremonies in the Catholic Church possible, but this system has since been extended to non-Christian religious communities (Hindu, Sikh, Muslims).<sup>39</sup> Nevertheless, the religious building must always be registered accordingly, and a religious official (priest, rabbi, imam) must be authorised. Not all religious buildings in England are registered, and not all religious officials are authorised. The Marriage Act of 1949 forms the basis of the applicable marriage law, which specifies registration conditions.<sup>40</sup>

Like in Italy, this dual marriage system raises the question of divorce. Since the Matrimonial Causes Act of 1973, marriages are exclusively dissolved by the respective state court's decision.<sup>41</sup> Religious divorce proceedings (eg, through Catholic declaration of nullity, Jewish *get* or Islamic *talaq*<sup>42</sup>) are, if carried out domestically, irrelevant for the state. Here exists a difference to the Catholic annulment proceedings in Italy. Although it is also possible to terminate a marriage under religious law in England, this has no effect under state law.<sup>43</sup>

Notably, in 2018, the English Home Office proposed introducing a penal provision in the Marriage Act that would make it a punishable offence for reli-

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<sup>38</sup> M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Wolters Kluwer 2014) 198; D McClean, 'Marriage in England' in European Consortium for Church-State research (ed), *Marriage and Religion in Europe* (Milano 1993) 187-198.

<sup>39</sup> S M Cretney et al, *Principles of Family Law* (Sweet and Maxwell 2002) 26, footnote 22 mentions 594 mosques registered for the year 1999, 180 Sikh temples and 385 'other' buildings.

<sup>40</sup> On the formalities for entering into marriage in the Church of England, see Cretney, 19 ff; M Welstead and S Edwards, *Family Law* (OUP 2006) 15.

<sup>41</sup> Priests of the Church of England are not obliged under the Matrimonial Causes Act 1965 to give a church wedding to a person whose previous marriage was legally divorced.

<sup>42</sup> State recognition of a religious divorce via *talaq* is explicitly excluded if one of the parties has lived in England for a year or more.

<sup>43</sup> The additional termination of marriage according to religious rite can be important in Jewish and Islamic communities for social reasons. If the marriage has failed and one of the spouses wants to enter into a new marriage, it is expected within the religious community that the first marriage has been terminated in accordance with the religious rite. But what if a Jewish husband denies his wife the *get*? The Divorce (Religious Marriage) Act of 2002 stipulates that the state court issues the divorce decree only after the renegade husband has given the *get*. See D McClean, 'United Kingdom' in G Robbers and C /Durham (eds), *Encyclopedia of Law and Religion* (vol 4, Brill 2016) 446.

gious officials not to report religious marriages to the state civil registry office for registration<sup>44</sup>. The interdepartmental state Forced Marriage Unit has also intensified its efforts to combat forced marriages in recent years.<sup>45</sup> Forced marriages have been criminalised since the Anti-social Behaviour, Crime and Policing Act of 2014.

In conclusion even the comparatively religion-friendly English system cannot do without legislative corrections.

## 6. Conclusion: legitimacy and limits of mandatory civil marriage in the age of migration

It is wrong to place religious marriage law as such under general suspicion. The state and the (majority of) society must accept that some people want to govern their relationship according to traditional, religiously shaped ideas. Instead, the experiences of the three countries described above do not speak in favour of abolishing mandatory civil marriage in Switzerland. In countries like Italy and England, where the state, for historical reasons, has a marriage system that gives a prominent role to religious communities, it is confronted today, due to migration from non-European countries, with forms of non-Western marriage law. That must not necessarily, but can be accompanied by pre-conceived gender roles, a distribution of rights and duties in marriage that is often not based on equality, and sometimes practices that violate fundamental rights. The popular demand to make purely religious marriages possible in Switzerland risks to be not a progress, but a step back into the past of patriarchal, inequalitarian marriage law. Hardly anyone would want that.

In the age of migration, mandatory civil marriage has a new *raison d'être*. It is not a miracle cure that can solve all the related problems of marriage law within a migration context. Especially not if, as has been seen, its enforceability is limited to particular constellations and when there are also possibilities in Switzerland, via International Private Law (IPR), to circumvent it.<sup>46</sup>

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<sup>44</sup> J Herring, *Family Law* (Pearson 2019) 86.

<sup>45</sup> See <[www.gov.uk](https://www.gov.uk/guidance/forced-marriage)>, Guidance: Forced marriage, <https://www.gov.uk/guidance/forced-marriage>, accessed on 13 September 2021. Statistics for the year 2018 show that 93% of the cases took place abroad, 44% of the foreign cases took place in Pakistan and 33% of the cases involved women under 18 years of age.

<sup>46</sup> A marriage legally concluded abroad is always recognised in Switzerland (Art 45 para 1 IPRG). As a result, the bride and groom have the possibility of forum shopping under marriage law. The IPRG only provides an exception in Art 45 para 2 if the bride or the groom is a Swiss citizen, or both are domiciled in Switzerland and the marriage was moved abroad with the obvious intention of circumventing the provisions of Swiss law on the validity of marriage. Yet, dozens of marriages are recognised every year where one of the spouses was a minor.

However, this does not diminish the fact that mandatory civil marriage has an important *appeal and safeguarding effect*: The state maintains that marriages in Switzerland are lived out according to state law and the principles on which it is based. This, together with other social factors,<sup>47</sup> also can shape the perception of the marriage of those couples who live according to religious and cultural ideas, whether they are Catholics, Orthodox Jews, pious Muslims, Tamils or others.

The state ensures the enforcement of state marriage law, if necessary, with state authorities' involvement, which is particularly important concerning protecting the weaker party's interests in marital relationships. The fact that state law is binding and takes precedence should therefore not be dismissed.

Finally, what does mandatory civil marriage do to combat forced religious marriages? The latter is currently the most discussed topic in Switzerland regarding marriages in a migration context. The law against forced marriages enacted in 2012 introduced several amendments to individual laws, providing the authorities with monitoring instruments and sanctions.<sup>48</sup> Besides, various projects have been carried out aimed at the prevention and the support of affected persons. Although it is difficult for methodological reasons<sup>49</sup> to precisely quantify the number of forced marriages in Switzerland,<sup>50</sup> the federal surveys show that the phenomenon of 'forced marriage'<sup>51</sup> should not be underestimated in Switzerland. As part of the federal programme to combat forced marriages, 905 cases were reported between the beginning of 2015 and the end of August 2017.<sup>52</sup> Many of those affected had a B residence permit or C settlement

<sup>47</sup> The time spent together in public schools, the integrating effect of the workplace, the period of military service, the reputation, and the good functioning of state authorities – these are all factors that help to ensure that, despite all the cultural heterogeneity of today's Swiss resident population, there seem to be no significant segregated milieus.

<sup>48</sup> Swiss Federal Law on Measures against Forced Marriages of 15 June 2012 (Bundesgesetz über Massnahmen gegen Zwangsheiraten vom 15. Juni 2012).

<sup>49</sup> Subjective assessments of coercion, persons affected as a 'hidden population', problem of the number of unreported cases, lack of a population and thus no statistical representativeness with regard to the institutions surveyed, etc. See A Neubauer and J Dahinden, *Zwangsheiraten in der Schweiz: Ursachen, Formen, Ausmass* (Bern-Wabern 2012) 32 ff.

<sup>50</sup> A survey commissioned by the Foundation Surgir found a total of 17,104 cases of forced marriage in Switzerland. However, this estimate is significantly higher than that in the study by Neubauer and Dahinden, fn 47.

<sup>51</sup> Neubauer and Dahinden's study (fn 47) defines the following three types of situations as 'forced marriage': [return] *Type A*: A person is under duress or pressure to accept a marriage he or she does not want. *Type B*: A person comes under pressure to renounce a love affair of his or her choice. *Type C*: A person is put under duress or pressure to refrain from filing for divorce. The marriage may have been entered into voluntarily or involuntarily.

<sup>52</sup> These data should not be considered as equivalent to the current extent of the phenomenon of forced marriages. Firstly, because there are gaps in the geographical coverage of activities under the federal programme; secondly, because it cannot be verified whether all cases have been reported by the various institutions; thirdly, because the number of unreported cases is likely to be high. Schweizerische Eidgenossenschaft, *Bundesprogramm Bekämpfung Zwangsheiraten 2013-2017: Bericht des Bundesrats* (Bern 2017) 16.



permit and originally come from Kosovo, Sri Lanka, Turkey, Albania, and Macedonia.<sup>53</sup> The proportion of people with Swiss citizenship should also not be neglected. 83% of the persons in question are female, and a high percentage (28.4%) are minors.<sup>54</sup> These figures show that the existence of a mandatory state marriage law alone does not prevent forced marriages. At its best, it is a component of a broader set of instruments with which the state acts against unacceptable practices.

For mandatory civil marriage to fulfil its purpose, its scope of application must be adapted to today's diversity in marriage law, and its enforceability must be improved. The Federal authorities should address this issue within the framework of the current reform of marriage law.

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<sup>53</sup> Since 2012, the number of cases involving people from Afghanistan and Syria has increased, with the most recent increase in cases coming from Kosovo, due to the increased influence of fundamentalist Islam there.

<sup>54</sup> The case survey revealed 257 cases of persons under 18 years of age. Schweizerische Eidgenossenschaft (fn 50), 16.