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## The Legal Value of Secret Marriages in the Times of Classical Canon Law

## Introduction

Secret marriage is a specific form of matrimony functioning under current codification (can. 1130-1133 of the CIC). Over the course of history, this institution, now practically vestigial, has undergone a lengthy evolution. The subject of this elaboration, namely the problem of the legal validity of secret marriages entered into in the era of classical canon law, is rarely addressed in canon law. The research objective thus defined has shaped the structure of this paper. First of all, attention will be drawn to the question of how secret marriages function. However, addressing this issue would lead to confusion were it without reference to the medieval doctrinal context of the nature the marriage. Therefore, this very issue shall be presented later in the article. These analyses will conclude with the central theme of this study, which is the problem of the legal validity of legal formalities in the then valid structure of marriage. The legal definition of formal requirements had a major impact on the status of secret marriages entered into in the Middle Ages.

## 1. Functioning of secret marriages

Secret marriages posed a serious existential as well as legal problem in medieval reality. Modern doctrine provides us with a variety of definitions of this type of relationship. According to Jean Gaudemet, the secrecy of the marriages in question was associated with the

exclusion of the public[1]. According to Piero Rasi, secret marriages were seen as relationships celebrated without the consent of the father, or those of no public character[2]. We see these principles reflected in the views of decretists and decretalists. Bernard of Pavia claimed that marriages were entered into circumventing any legal formalities[3]. Rufinus and Goffredus de Trano provided a more elaborate definition of secret marriages. In „Summa decretorum", Rufinus referred to marriages concluded without the presence of witnesses, ignoring both the legal formalities and the blessing[4]. Goffredus de Trano, on the other hand, wrote in „Summa super titulis Decretalium" about two forms of such marriages, which were marriages entered into without the presence of witnesses, as well as those concluded with omission of legal formalities[5].

As Gaudemet pointed out, the conclusion of such marriages should not be subject to misconception that there was no religious rite involved. When describing secret marriages, he wrote that everything had been done discreetly, not in a church nor in a priest's chapel, but some place isolated, such as a monastic chapel or the chapel of an abbey enjoying exemption. Legally, such relationships were valid. It was not possible to lodge a complaint against the jurisdiction of the authority of an exempted place; on the other hand, a person who did not marry in his/her own parish thus abandoning it, could have only been punished with a fine[6]. The literature on the subject points out that one of the main reasons for secret marriages was to overcome parents' objection[7]. That is why they were of a non-public nature[8].

[1] Cf. J. GAUDEMET, *Il matrimonio in occidente*, transl. B. PISTOCCHI, Torino 1996, p.173: „La clandestinità può essere semplicemente il rifiuto di qulasiasi pobblicità, senza per questo il matrimnio sia segreto".
[2] Cf. P. RASI, *La conclusione del matrimonio nella dottrina prima del Concilio di Trento*, Napoli 1958, p. 159.
[3] Cf. BERNARDI PAPIENSIS, *Summa decretalium*, Ed. T. Laspeyeres, Graz 1860, p. 141.
[4] Cf. RUFINUS, *Summa decretorum*, Ed. H. Singer, Paderborn 1963, p. 468: „Est autem coniugum clandestinum quo occulte sine presentia testium, sine sollemnitate traductionis, benedictionis et velaminis contrahitur".
[5] Cf. GOFFREDUS DE TRANO, *Summa super titulis Decretalium*, Aalen 1968, p. 175.
[6] Cf. J. GAUDEMET, *Il matrimonio* …, op. cit., p. 173-174: „Un'unione sifatta non rifiuta i riti religiosi (benedizione di un sacerdote, messa di matrimonio). Ma tutto viene fatto segretamente. Non nella chiesa del villaggio o del quartiere, e nemmeno in qualche cappella signorile, ma in un luogo discreto, in una cappella del convento, talvolta in una abbazia che gode dell'essenzione […] L'unione era perfettamente valida. Nessuna azione può essere intentata contra autorità del luogo essente. Può essere comminata solo una ammenda per abbandono della propria parocchia".
[7] IBID., p. 174.
[8] Cf. P. RASI, *La conclusione del matrimonio* …, op. cit., p. 159.

## 2. Historical background

The Church's status in the 12th century world allowed it to create its own legal system[9]. In medieval reality, it held exclusive jurisdiction over marriage[10]. This privileged status was expressed, among other things, through the fact that only the Church had legislative power regarding marriage[11]. As Luigi Nuzzo wrote, the achievements of the Church perceived at the time as revolutionary, not only in terms of marriage as a sacrament stemming from the nature of marriage itself[12], but also in terms of defining it as a consensual contract, the essence of which involved the consent of the betrothed to marry[13]. It should also be added that during the period under study, a number of additional requirements for entering into a marriage, called legal formalities (*sollemnia*), were introduced. The literature on the subject points to the following: participation of a public official, presence of a notary public, preliminary examination (*interrogationes*), giving consent using appropriate wording, annual fee (*datio annuali*), marriage blessing, presence of witnesses, as well as taking the woman to her husband's house (*traductio mulieris in domum mariti*)[14].

In considering this problem, one cannot ignore the fact that in the 12th century there was a doctrinal dispute over whether the mere expression of consensus by the parties to a contract is sufficient for a valid matrimony[15]. In the commentary regarding C. 30, q. 5 such authorities as[16], jak: Rolandus Bandinelli[17], Rufinus[18], or Bernard of Pavia discussed the prohibition of secret marriages[19]. Faced with this legal status, medieval scholars posed the fundamental question: what value did these legal requirements have? Their doubts boiled down to the question: were the legal formalities required for a marriage to be valid or not?

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[9] Cf. L. NUZZO, *Il matrimonio clandestino nella dottrina canonistica del basso medioevo*, in: *Studia et documenta historiae et iuris*, ed. F. Amarelli, Roma 1998, p. 351.
[10] IBID., p. 352.
[11] Cf. J. GAUDEMET, *Il matrimonio* …, op. cit., p. 105-106.
[12] Cf. CZ. RYCHLICKI, *Sakramentalny charakter przymierza małżeńskiego*, Płock 1997, p. 260-261.
[13] Cf. L. NUZZO, *Il matrimonio clandestino* …, op. cit., p. 351. For a broader discussion on this issue between the Bologna school and the Paris school, see I. FAHNER, *Geschichte der Ehescheidung in kanonischen Recht*, Freiburg im Breisgau 1903, p. 123-145; G. MARCHETTO, *Il divorzio imperfetto. I giuristi medievali e la separazione dei coniugi*, Bologna 2008, p. 43-106; W. PLÖCHL, *Geschichte des Kirchenrechts*, t. 2, München 1953, p. 305-306.
[14] Cf. P. RASI, *La conclusione del matrimonio* …, op. cit., p. 150-208.
[15] Cf. K. E. MOY, *Das Eherecht der Christen in der morgenländischen abendlendischen Kirche bis zur Zeit Karls des Grossen*, Regensburg 1833, p. 366.
[16] More on the role of decretists in canon studies of that time see E. CORTESE, *Il diritto nella storia medievale*, Roma 1995, p. 221-223.
[17] Cf. *Summa Magistri Rolandi*, Ed. F. Thaner, Innsbruck 1874, p. 153.
[18] Cf. RUFINUS, *Summa decretorum*, op. cit., p. 468.
[19] Cf. BERNARDI PAPIENSIS, *Summa*…, op. cit., p. 141.

## 3. The value of legal formalities

Only a few researchers, such as Brandilone and Bizzari, studied the Italian notarial archives and concluded that the fulfilment of „sollemnitates" was required for the validity of the marriage. They claimed that marriages were concluded at the time in the presence of a notary public[20]. This thesis was challenged by Rasi, who indicated that such solutions applied merely to a small percentage of marriages[21]. In support of his claim, the Italian researcher pointed out that Brandilone and Bizzari had analysed only one category of sources, but had not studied another source base related to oral proceedings for nullity of marriage, and had not considered the canonistic doctrine of the time[22]. Furthermore, Rasi writes that in the available civilistic sources no position was taken on this issue[23]; however, such a standpoint was adopted by the canonists claiming that legal formalities were not required for the substance of celebrating marriage. For, according to the doctrine of the day, such a weighty component as the sacramental nature of marriage materialised through the mutual expression of marriage consensus by the betrothed[24].

When presenting the issue of the legal value of formal requirements, it is also necessary to analyse the views of medieval canon law experts on this issue.

Thus, Master Gratian insisted that secret marriages should not be entered into[25]. In the opinion of this eminent representative of the Bologna school, it was not the compliance with legal formalities that determined the validity of the union, but the sexual activity of the parties[26]. Gratian and the Bologna school were of the opinion that a marriage that was not consummated was merely „matrimonium initiatum"[27]. According to Joseph Freisen, Master Gratian's view was in line with the solution adopted in Jewish law[28]. Gratian's approach also fits organically into the current represented by Hincmar of Rheims and the Laon school, where it was claimed that consummation is an essential element of the marriage-sacrament[29].

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[20] Cf. P. RASI, *La conclusione del matrimonio* …, op. cit., p. 153.
[21] IBID.
[22] IBID., p. 154.
[23] IBID., p. 155.
[24] IBID., p. 156.
[25] Cf. C. 30, q. 5, c. 1-3.
[26] Cf. C. 30, q. 5, c. 17; C. 27, q. 2, c. 34; C. 28, q. 1, c. 17; J. FREISEN, *Geschichte des kanonischen Ehrerecht bis zum Verfall der Glossenliteratur, Reprint*, Aalen 1963, p. 172.
[27] Cf. A. BUCCI, *Dispensa super rato e non consumato. Evoluzione storica e problematica giuridica*, Napoli 2011, p. 17.
[28] Cf. J. FREISEN, *Geschichte* …, op. cit., p. 173.
[29] Cf. F. SCHULTE, *Handbuch des katholischen Eherecht nach dem gemeinem katholischen Kirchenrecht und dem österreichischen, preussischen, französischen: Partikularrechte mit Rücksichtname und noch andere Civilgesetzgebungen*, Gieβen 1855, p. 87. In footnote 13 which is a commentary to C. 27, q. 2, c. 29, we read:

The theological rationale that the image of such a relationship was the mystical relation between Christ and his Church served as the doctrinal basis for this approach[30].

The prohibition of such relationships was also mentioned by decretists in their comments on C. 30, q. 5. Rolandus Bandinelli emphasised in „Summa" that the omission of sollemnitates did not result in invalidity of marriage[31]. Whereas in „Summa decretorum" Rufinus expressed the view that secret marriages were prohibited „propter cautelam"[32]. Finally, Bernard of Pavia pointed out that legal formalities are necessary for the dignity of the marriage, not for its validity[33].

Peter Lombard also contributed to this issue in Chapter II of Book IV „Liber Sententiarum", by stating that „In the exercise [...] of this sacrament, as is the case for others, there is something that belongs to the substance of marriage, like marriage consent, which alone is sufficient for marriage"[34]. Referring to the value of legal formalities in secret marriages he added: „Without them, therefore, not as legitimate spouses, but as if the adulterers they get together, like those who secretly vow and would indeed be immoral if it were not for their will, as expressed at present, which renders a legitimate marriage between them. Indeed, the hidden consent for now, expressed in words, makes a marriage, even though there is no honest agreement there"[35].

The doctrine of the time stipulated that secret marriages were important in the internal sphere. They were considered to be „res spirituals"[36]. According to Gaudemet, one of the consequences of such an approach was related, among other things, to the fact that it was not possible to lodge a complaint in this case against the authority enjoying the exemption[37].

Furthermore, this state of affairs had practical repercussions. Namely, those who entered into such marriages and subsequently formed a public union committed a grave sin by

„Ecce impossibilitas coeundi, si post carnalem copulam inventa fuerit in aliquo solvit conjugum"; G. MARCHETTO, *Il divorzio imperfetto* …, op. cit., p. 47-48.

[30] Cf. A. Bucci, *Dispensa* …, op. cit., p. 13.

[31] Cf. *Summa Magistri Rolandi*s. 153: „In hoc capitulo demonstartur, quae sint observanda in matrimonio contrahendo, quae licet omnia non interveniat, non minus tamen inter eos erit matrimonium".

[32] Cf. RUFINUS, *Summa decretorum*, p. 468: „Coniugia itaque clandestina prohibita sunt, non quin sint coniugia occulte contracta-cum solus consensus faciat matrimonium, ut supra dictum est, sed propter cautelam. […] Clandestina ergo coniugia contrahi non debent; si vero contra facta fuerint, non separabuntur".

[33] Cf. BERNARDI PAPIENSIS *Summa decretalium*, op. cit., p. 141: „[…] clandestina, quae sollemnitatibus caret, quod ille sollemnitates de honestate sunt potius, quam de necessitate […]".

[34] See P. LOMBARD, *Cztery Księgi Sentencji*, t. 2, transl. J. WOJTKOWSKI, Olsztyn 2015, p. 474.

[35] IBID.

[36] Cf. L. NUZZO, *Il matrimonio clandestino …,* op. cit., p. 353 i p. 363: „Le unioni celebrate occultamente erano, di conseguenza, proibite e ritenuto pro infectis ma in ogni caso, in virtú del principio per cui le formalità non attenevano alla sostanza del sacramento del e che la loro osservanza era solo consigliata ma non imposta, una volta contratte, non era possibile scioglierle".

[37] Cf. J. GAUDEMET, *Il matrimonio* …, op. cit., p.174.

living in permanent adultery[38]. Referring to this issue and citing the Pseudo-Isidore, Freisen indicated that in the Middle Ages there were rules according to which only parties to an incestuous marriage should be separated, as such unions were illegal; however, this rule did not apply to marriages entered into with disregard for legal formalities[39].

Nuzzo in turn stated that this systemic solution was adopted for two reasons: theological and political. Theologically, if the marriage was an instrument for conferring grace on a human being, its validity was based solely on the consent of the betrothed[40]. From a political point of view, however, the Church pursued a certain programme involving depriving the secular authorities of their competence over marriage[41].

The fulfilment of legal formalities was relevant only from the evidentiary point of view. Their conclusion was proven by way of declarations from the parties and testimonies from witnesses. However, entering into secret marriages was perceived to be a wicked act only from a legal point of view[42]. In Freisen's opinion, argument that the formalities were not relevant to the conclusion of a marriage was supported by another fact, namely that the omission of „sollemnitates" never entailed the imposition of penalties[43].

## Conclusion

The analyses carried out lead to the conclusion that secret marriages were valid in medieval reality. Ignoring legal formalities did not result in the invalidity of a legal act performed by the betrothed. Although „Sollemnitates" were components introduced into the

[38] Cf. L. NUZZO, *Il matrimonio clandestino* …, op. cit., p. 353.

[39] Cf. J. FREISEN, *Geschichte* …, op. cit., p. 74: „Nur die incestuosen Ehen müssen nach Ps. Isidor getrennt werden, nich aber die ohne Formalitäten eingegangene Ehe".

[40] Cf. L. NUZZO, *Il matrimonio clandestino* …, op. cit., p. 352.

[41] IBID.: „La natura sacramentale e consensualistica, riconosciuta dalla dottrina teologica e canonica all'unione tra un uomo e una donna, comportò necessariamente il principio dell'aformalità del matrimonio o meglio della non necessarietà nella materia matrimoniale di formalità *ad substantiam*. A favore di questa scelta militavano due diversi ordini di motivazioni, uno di carattere teologico, l'altro politico. Se infatti, il matrimonio era uno strumento che Christo aveva dato agli uomini per permettere loro di ottenere la grazia unificante e se per il suo perfezionamento era sufficiente il solo consenso dei nubenti liberamente manifestato, non appariva ammissibile subordinare la sua validità all'osservanza di prescrizioni vincolanti. D'altra parte non ritenere necessaria alcuna formalità nella celebrazione di un matrimonio compratava anche delle conseguanze di natura politica. Si può sostenere, infatti, che la spiritualizzazione del vincolo coniugale e il rifiuto di *sollemnitas ad substantiam* furono gli strumenti attraverso i quali la Chiesa persequi la realizzazione di un program ma, volto a sottrare alla legislazione civile la competenza in materia matrimoniale".

[42] IBID., p. 364.

[43] Cf. J. FREISEN, *Geschichte* …, op. cit., p. 148: „Der beste Beweis dafür, daβ die Kirche niemals die Sollemnitäten deart betonte, daβ ihr Fehlen das Verhältnis zu einem auβerehelichen machte, liegt in der Tatsache, daβ się fast nirgends Strafen für die Nichtbeachtung dieser Sollemnitäten finden".

legal structure of a marriage, they were not required for the validity of the act. Compliance with such requirements was only relevant for evidentiary purposes.

Nevertheless, entering into such unions in the reality of the time posed a number of challenges. On the one hand, there were numerous bigamous and polygamous unions in the Middle Ages[44], and on the other hand, it was very difficult to prove existence of a secret marriage in a court of law[45].

That is why the Church began to oppose the formation of such unions. This was expressed in the decisions of the Fourth Council of the Lateran (1215). For in the Constitution 51, 2 it was stated: „... we prohibit secret marriages completely and forbid any priest to dare to assist in them"[46].

The Council of Trent put an end to such unions by introducing regulations on canonical form[47]. At the same time, it should be noted that the debate on the issue was a challenging one. In his monograph entitled „Die Diskusion über die klandestinen Ehen und die Einführung einer zur Gültighkeit verpfilichtenden Eheschliessungsform auf dem Konzil von Trient" devoted to the Council's deliberations on the subject, Reinhard Lettmann pointed out that a serious problem faced by the Council fathers concerned the question of whether the Church could, through its interference in the legal structure of marriage, impede a valid sacramental marriage[48].

To sum up the considerations presented above, attention should be drawn to the fact that the functioning of secret marriages under current codification (can. 1130-1133 of the CIC) differs significantly from the institution functioning in the Middle Ages. Nowadays, the essence of this institution is connected with maintaining secrecy at various stages of the process of entering into a marriage[49]; in the era of classical canon law, however, it was considered in the context of marriages entered into disregarding legal formalities.

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[44] Cf. L. NUZZO, *Il matrimonio clandestino* …, op. cit., p. 353.
[45] Cf. R. RASI, *La conclusione* …, op. cit., p. 159-160.
[46] Cf. *Sobór Laterański IV-1215, Konstytucja 51,2*, in: A. BARON, H. PIETRAS (ed.), *Dokumenty Soborów powszechnych*, t. 2, Kraków 2003, p. 293; J. GAUDEMET, *Il matrimonio* …, op. cit., p. 174; J. UMIŃSKI, *Historia Kościoła*, t. 1., Opole 1959, p. 399.
[47] Cf. *Sobór Trydencki (1545-1563). Kanony o reformie małżeństwa*, in: A. BARON, H. PIETRAS (ed.) *Dokumenty Soborów powszechnych*, t. 4, Kraków 2005, p. 723.
[48] Cf. R. LETTMANN, *Die Diskusion über die klandestinen Ehen und die Einführung einer zur Gültighkeit verpfilichtenden Eheschliessungsform auf dem Konzil von Trient*, Münster 1966, p. 30-117.
[49] Cf. G. DZIERŻON, *Zawieranie małżeństw tajnych*, Ius Matrimoniale 11 (2006) n. 17, p. 110.