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Married but not too much: an extreme case of late transcription of a concordat marriage

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A woman married with a concordat marriage on March 19, 2009, the following year decided to separate from her husband, but discovered that the parish priest had omitted the transcription within five days of the celebration pursuant to Article 8 of Law 121/1985; therefore she asks her husband to proceed with the late transcription to then undertake the separation process, but he refuses. The woman, who complains of having incurred huge expenses for the marriage that she believed to be civilly recognized, then sues her husband, arguing that the refusal to register late was a source of civil liability or, at least, that he was required to compensate her in accordance with the rules on the promise of marriage (Article 81 of the Italian Civil Code), as well as jointly and severally the parish priest and the Archbishop's Curia for the failure to register.

After a first instance that rejected the woman's claims, the appeal sentence was finally pronounced, which – with regard to the first claim – decided that the conduct of the defendant spouse was not legally unlawful (although, the judges wrote, it was morally questionable), since "*it is hardly necessary to reiterate the autonomy and the ontological difference between the two moments that inspired the neo-concordat legislation, constituted, the first, by the expression of the will of the spouses* [*rectius*: nubendi, ed.] *to contract marriage, and, the second, from the choice to attribute civil relevance to the religious marriage; therefore, after a period of time has elapsed from the celebration of the latter that no longer allows the presumption of such a will, the supervening change of mind of the spouse must be admitted*". The wife appealed against this judgment to the Court of Cassation, which on 8 July 2025 issued order 24409 (Third Section, pres. Scrima, rel. Iannello).

The cardinal argument of the plaintiff is the maxim of Cass. civ. 555/1977, according to which the refusal to the late transcription of the canonical marriage would be "*an illicit act detrimental to the right of the other spouse to the completion of a case already carried out*", such as the consent given before the minister of Catholic worship. The Supreme Court, however, no longer agrees with the previous maxim, since it maintains that this *decisum* has been superseded by the current regime of Article 8 L. 121/1985, according to which late transcription "*can also be carried out after at the request of the two contracting parties, or even of one of them, with the knowledge and without the opposition of the other*", whereas Article 14 of Law 847/1929, in force, provided that the transcription could be requested "*at any time by anyone who has an interest in it*", provided that the legal conditions originally existed, and had not ceased in the meantime. Therefore, the Court argues, the unlawfulness of the act of refusal carried out by the husband and, therefore, the right to compensation for damages would not be recognized.

Similarly – and, *absit iniuria*, in a very unconvincing way – the Court liquidates the possibility that the organization of the concordat marriage not registered can be valid at least for a promise of marriage pursuant to Article 81 of the Italian Civil Code: one would naively observe that, if the parish priest had fulfilled his duty, the marriage would have had civil effects without a doubt, therefore certainly if the nuptial consent was at least sufficient to achieve the civil effects of the marriage, all the more reason to be valid as an abstract promise, a hypothesis still provided for by our Code and, therefore, concretely configurable; however, the Court decided, on the basis of the same reasoning as above, that this was not the case.

As for the other defendants, it seems at least curious that the Court decided not to condemn the "forgetful" parish priest to pay at least part of the damages, extraordinarily with the argument that there would be no direct link between the expenses incurred by the plaintiff, among other things, to purchase the furnishings for future married life, and the lack of registration. Even apart from the convoluted civil law reconstructions of causality that have spread over the last forty years, on another occasion it was the Court itself that held that "*an event is to be considered caused by another if, without prejudice to the other conditions, the first would not have occurred in the absence of the second (the so-called theory of the "condicio sine qua non") as well as by the criterion of the so-called adequate causality, on the basis of which, within the causal series, it is necessary to give prominence only* [and therefore at least, ed.] *to those events that do not appear – to an "ex ante" assessment – completely implausible*" (Cass. civ. 10607/2010)[1]: do we perhaps want to argue that it is unlikely that a bride incurs expenses for a marriage that she believes is civilly valid, and do we want to affirm that the priest could believe that the transcription that communicates the civil effects to the concordat marriage is a trivial work, even omitted? It seems reasonable, therefore, that such an obvious fault of the priest, in his capacity as a public official, deserved recognition in court.

Here, due to its ecclesiastical relevance, we will dwell only on the main *thema decidendum*, on which the Court did not go beyond the majority orientation[2], which for some time has intended to voluntarily distinguish the two moments of marital consent and transcription, which alone, pursuant to Article 8 of Law 121/1985, attributes civil value to the concordat union. While taking for granted the consensus of the jurisprudence on the subject in question[3], the "*ars boni et æqui*" requires that legal theories be measured according to justice: in the case of the concordat marriage, in the silence of the law, it seems ulterior to

[1] Cf., with precise theoretical reconstruction, MARIO BARCELLONA, *La responsabilità extracontrattuale: danno ingiusto e danno non patrimoniale*, UTET, Torino, 2011, pp. 127-145 and, in particular, p. 130.

[2] Originating at least from GAETANO CATALANO, *Sovranità dello Stato e autonomia della Chiesa nella Costituzione repubblicana*, Giuffrè, Milano 1974, pp. 123 e ss.; it should be noted that Author, following the theory of the "double will" (to marriage and transcription) concluded that the two remained "indistinguishable" outside of "pathological cases" (cf. for the whole comment in SALVATORE BORDONALI, ANTONIO PALAZZO (a cura di), *Concordato e legge matrimoniale*, Jovene, Napoli 1990, pp. 49-50).

[3] Cf. RAFFAELE SANTORO, *La trascrizione tardiva del matrimonio canonico*, G. Giappichelli, Torino, 2010, pp. 119 et seq.

want to distinguish the transcription made *ex officio* by the priest within five days, from that made by mere negligence after the fifth day, maintaining that the simple passage of time, hypothetically even a single hour, would justify the emergence of a right, on the part of one of the two parties, and to the detriment of the other, not to recognize the civil effects of a juridical act *rite cœlebratum* according to the norm of both the laws of the State and those of the Church, on the assumption – as is held – that after the five days a further will is needed to obtain the civil effects of the marriage through its transcription (the so-called theory of the "double will"). From this dogmatic approach, however, the Court derived the lawfulness of the defendant spouse's conduct, avoiding the payment of sums that, in all likelihood, at least in part would have been imputed to him or her in separation or divorce proceedings.

To the writer, it seems evident that the precise desire to establish a union pursuant to the Concordat, which involves a procedural and ritual process that is significantly different from the sacramental one, by its nature must end with the transcription, in the sense that the engaged expressly ask the priest for the concordat form because *they want* the transcription, and certainly not because *they do not want* it. The opinion of the cited maxim Cass. 555/1977, according to which, among other things, "*the transmission to the civil registrar and the transcription of the marriage certificate, celebrated before the Catholic minister of worship according to the norms of the concordat rite, constitute necessary and due obligations, with respect to which any manifestation of the will of the parties, subsequent to the marriage itself*, remains irrelevant" remains absolutely consistent with the new concordat, nor is a different discipline of late transcription sufficient to change the nature of the concordat marriage, which is such precisely because it is transcribed, while the simple canonical marriage, that is, devoid of the requisites and civil obligations, does not have this capacity.

There are several cases, in Italian law, in which the application of a reasoning similar to that proposed by the aforementioned doctrine would cause paradoxical results and evidently not desired by the legislator because they are inconsistent with the logic of the system: thus, once a mortgage concession has been signed, it cannot be believed that the grantor can independently withdraw the mandate to the notary to proceed with its registration, because this would nullify the contract to the detriment of the other party (art, 2839 of the Italian Civil Code); and again, once a joint stock company contract has been signed, it is certain that none of the parties can oppose its registration in the register of companies to make it acquire legal personality (Article 2331 of the Italian Civil Code); There could be many further examples, more or less fitting.

Legal publicity is, by its nature, a "*means of acquiring knowledge in civil law* [...] [adjusted] *in view of the relevance that knowledge acquires from a legal point of view, and the modalities of such relevance*"[4]: in the transcription of marriage (any type of civilly recognized marriage) the object of knowledge is, *in ipsa rerum natura*, the

[4] SALVATORE PUGLIATTI, SIRO LOMBARDINI, *Pubblicità*, in *Enciclopedia Italiana*, III, *Appendice* (1961), ad vocem.

validly given marital consent, and certainly not an autonomous will to transcribe it, since if the first were not there, and only the second remained, the latter would be null and void or even totally simulated, with the consequent effects. It should be noted that the general principles of the legal system must always be preserved because they are representative of the intrinsic logic of the system, and not because they may be referred to by this or that law: in the present case, to support the need for a further will for the *ultra terminum transcription* means to say that the transcription is valid as a substitute for the matrimonial will and in place of the latter, and therefore it would not be understood how it can logically retroact to the era of the different canonical consensus.

To this reconstruction it can easily be objected that late transcription, whatever the *mens* of the legislator, is an exceptional institution of concordat marriage, while for marriages celebrated within the other cults that have signed agreements with the Italian State, the term of five days punctually reiterated in the agreements is mandatory[5]. The objection does not convince the writer: the legislator can well provide for a very short term within which to register the marriage, and this is not at all debatable, since what is criticized here is the claim that late transcription requires a *voluntas* other than that of marriage, not the fact that the legislator can, as it certainly can, deny *a posteriori* the civil effect to a consent already given.

For the marriage celebrated by non-Catholics, in any case, the analogous problem of damages arises, on which the case in question focuses, left concretely unresolved by the Supreme Court, which has denied any responsibility now on the part of the husband who refuses the late registration, and now on the part of the priest who did not carry it out in time: given that for the "forgetful" priest the responsibility for damages (certainly to be quantified) seems absolutely obvious to us, With regard to the husband, it is evident that the situation of the marriage accidentally devoid of civil effects is, at least in fact, superimposable on that of putative marriage (Article 128 of the Italian Civil Code), nor is the doctrinal invention of a further will for the mere transcription sufficient to cancel the damages that the unsuspecting party has suffered by trusting in the civil effects of the religious marriage. In the case in question, the bride has established a series of patrimonial situations around a marriage that does not suffer from any nullity, nor has it been dissolved, but simply lacks an advertising fulfillment, albeit substantial (but exactly as the mortgage registration is substantial), the realization of which, as is evident, derives solely from the sole will expressed by the bride and groom at the time of the wedding. The effect of the *Supreme Court's decisum* is therefore concretely unfair, because it deliberately allows one of the two parties to withdraw its consent to the detriment of the other, without any civil consequences, and it cannot be argued, under the general principles of our legal system, that such a situation can be lawful.

[5] Cf. PAOLO DI MARZIO, *Il matrimonio concordatario e gli altri matrimoni religiosi con effetti civili*, CEDAM, Padova, 2008, pp. 252-255.

This should not lead, however, to denying the coherence of the rules on late transcription, which, if correctly interpreted, offer the possibility of a different and more reasonable interpretation: in particular, it must be considered that the discipline of late transcription deals with a single non-contentious hypothesis, i.e. in which both parties agree on the concordat nature of the rite celebrated by the priest, and therefore they want to proceed with the transcription without delay, whatever the reason for its original omission. It should be noted that the most reasonable hypotheses of late transcription, beyond the extreme circumstance in question, are those in which the bride and groom have deliberately omitted the transcription, for the thousand cases of life, and want to obtain it later. At this juncture it is obvious, for consistency with the peaceful logic of the institution, that there must be agreement between the parties in order to proceed with the transcription, but not in the sense that the transcription is a transaction governed by an autonomous will to negotiate with respect to the marriage celebrated, but in the sense that both parties recognize without opposition that the marriage was celebrated in the concordat form, which by its nature serves to give civil effects to canonical marriage, and therefore they recognize that their original will was to obtain civil recognition alongside religious recognition, even if – as the law allows them – they have postponed the formal act of civil recognition.

In the context we have described, one of the spouses can certainly refuse his signature, but not *ad nutum*, that is, because – to quote the appeal judgment cited by the Supreme Court – he has "changed his mind", but because he believes that he has not *given his* consent ab origine to the concordat form, which occurs if, for example, the party claims to have celebrated a marriage that was only religious, whose civil effects it intended to exclude a priori: the textual data of the law in force, beyond the interpretations, confirms this reading where it specifies *not* that the contracting party must give his positive "consent" to the late transcription, but that he, if he does not act in concert with the other, must be informed of it and must not oppose ("*with the knowledge and without the opposition of the other*", Article 8 of Law 121/1985), which is certainly different from the point of view of law, because it confirms that, in the concordat marriage, the transcription is a normal effect of the rite, so that the "*knowledge*" of the other spouse is sufficient for the other spouse to carry it out independently, the opposition remaining an extreme case justified by equally extreme reasons that must, of course, be proven in court. In short, the spouse is only asked not to *oppose*, and if he does so, he cannot it in a merely potestative way, an option always contrary to the logical principles of the legal system (1355 of the Italian Civil Code), nor in this regard can one speak of the exercise of the very personal right to conjugation, since this right has already been exercised, ritually, with the concordat marriage, and consequently now one can oppose its civil effects only if that consent originally did not exist or was only apparent because it was different.

To speak of a "double will" to canonical marriage and its transcription therefore means to say that in Article 8 of Law 121/1985 the legislator repeated itself verbatim, providing first that the contracting

parties can act by mutual agreement ("*at the request of the two contracting parties*"), and then that only one can act with the tacit agreement of the other ("*with the knowledge and without the opposition of the other*»), which means the same thing – and is therefore a manifestly incorrect interpretation. On the other hand, it is much more logical, and consistent with the same letter of the law, to maintain that the contracting party can oppose the recognition of the civil effects of the only will give to the altar, only because he did not originally want them nor, consequently, does he want them now: it is therefore not a manifestation of a negative will, but a positive one, since the contracting party declares now by then that, At the time of the celebration, he did not intend to celebrate a marriage with civil effects, and in doing so he assumes all the responsibilities that derive from his opposition.

It should be noted that the same consideration regarding damages should have been reached also with the current interpretation of the rule, adopted by the Supreme Court. In fact, even if we want to maintain that the spouse is free to refuse the late transcription *ad nutum*, we cannot deny the violation of the legitimate expectations of the other spouse, who had confided in that expression of will with every support of the law: these are precisely the hypotheses referred to in Article 81 Italian Civil Code (promise of marriage), 1337 Italian Civil Code (pre-contractual liability), *ex plurimis*, which confirm the logic of our legal system according to which one cannot force someone to exercise his right in a certain way, but nevertheless he is liable for the effects of his choices if his behavior (i.e. the social manifestation of a will not yet clothed with the necessary forms of law) may have rationally pushed the neighbor to trust in the achievement of certain legal results. The judge, in the procedural matter we are dealing with, would like to relegate the question to the "*moral*" level, as the appeal sentence already writes, overriding the fact that all manifestations of will, including the bare agreement (*exceptio pacti conventi*, cf. GAI 4.116), become juridical when they involve at least the economic interests of the other party.

The interpretation of the law that seems correct to us, in short, is that no one should be put in a position to find himself civilly married without knowing it, and therefore, as a logical consequence, if the contracting parties do not act together and only one shows up to transcribe, it is clear that the other must at least be informed and, therefore, does not oppose, as long as he has the reasons to do so and therefore assumes all risk. How the doctrine could have argued from the "lack of opposition" the invention of a new and different "will to transcribe" is a question of *legal policy*, as they say, which it is up to other specialties to deepen and study.

In our case, in the presence of an unjustified opposition and, moreover, of the ascertained fault of the minister of worship for the failure to register, the plaintiff, in order to obtain the ultra *terminum transcription*, had the right to take legal action so that the will expressed before the priest would be ascertained, and once the concordat nature of the marriage celebrated had been recognized by the judge, the transcription would also have been imposed by the latter (Article 132 Italian Civil Code: "*When there*

are indications that due to malice or negligence of the public official or due to a case of force majeure the marriage certificate has not been included in the registers intended for it, proof of the existence of the marriage is admitted, provided that there is no doubt that there is a compliant possession of the state")[6]. As for the damages, which are dealt with in the order in question, it goes without saying that any act of opposition to the registration that is not based on original defects of marital consent, but even – as can be seen from the procedural plot – is expressly aimed at defrauding the other spouse, preventing him from attributing the expenses naturally incurred for the marriage to the equally natural venue of the separation proceedings must be considered unlawful pursuant to Article 2043 of the Italian Civil Code. divorce.

In the specific case, therefore, the Court should have overturned the appellate judgment, among other things, in the part in which, abusively invoking the theory of "double will" (to marriage and registration) it excluded the civil liability of the defendant, asserting that he could refuse *ad nutum* to transcribe, since – as is argued in this note – the opposition to the transcription can only be advanced for original defects of the will and in particular for the specific case in which, at the time of the marriage, the bride and groom believed that he was celebrating a marriage without civil effects, nor, consequently, could he believe that he would acquire them later. This argument of the party must be demonstrated in court, because it clearly gives rise to the unlawfulness of the conduct with respect to the opposition to the registration: if the defendant husband, as appears in the present case, had prepared the entire concordat rite aware of its (also) civil effects, nor was a different intention intuited on the part of the other spouse, his opposition is clearly in bad faith, whatever the hidden reason (nor is the internal will relevant for the purposes of civil law), and he must certainly answer for the damage caused to the other party by the failure to achieve the natural civil effect of the concordat marriage.

I must add, because it is probably relevant for the purposes of the assessment made by the judge on the merits, the fact that both the referring court and the Supreme Court make confused reference to certain "procedures" through which the plaintiff could have obtained "*at his sole request*" the "*late registration*" (thus the appeal judgment), and it is cited "*for example*» the chamber procedure referred to in art. 95 and 96 of Presidential Decree 396/2000, but not Article 132 of the Italian Civil Code to which we referred: regardless of the concrete feasibility of these alternative ways, on which not even the Supreme Court has ruled, the interpreter may legitimately suspect that the judge has perceived the unfairness of the situation created by the choice to evoke the theory of "double will" in the present case, thus ending up accusing the plaintiff of not having adequately set up the lawsuit for its (just) claim to be accepted. It is relevant in any case that the judges on the merits take it for granted that it must be possible to obtain,

[6] Cf. Trib. Udine, 16 febbraio 1970 (with a comment by SILVIO PIETRO CERRI, *La trascrizione tardiva del matrimonio*, in *Rassegna giuridica umbra*, 1, 2013, p. 184, n. 25).

in some unclear way, the late transcription of the canonical marriage at the sole request of the party, totally contradicting the approach they have given to the problem.

In conclusion, the result of the doctrinal choices made by the Supreme Court seems to have produced a Solomonic sentence, based on the mechanical application of rules that should be framed in a broader systematic framework[7], which has allowed the respondent spouse not to go through a divorce or matrimonial nullity judgment, with obvious economic and social advantages, leaving mocked the other party who, to all intents and purposes, had obtained and given valid marriage consent in accordance with our laws.

Luigi Gennaro

[7] Cfr. MANLIO BELLOMO, *Ius e Lex*, in *Bulletin of Medieval Canon Law*, 38, 2021, p. 425.