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THE SCOPE OF THE NOTION OF PROMISE OF MARIAGE (ENGAGEMENT) IN ROMANIAN PRIVATE INTERNATIONAL LAW

Nadia-Cerasela ANIȚEI[1]

Abstract:

The Civil Code, in Article 2585 does not define the notion of marriage promise, but Article 2585 paragraph (1) Civil Code., refers to the "substantive conditions required for concluding the promise of marriage" and paragraph (2) refers to "the effects of the promise of marriage and the consequences of breaching it" Regarding the Romanian private international law, the primary classification is performed by Romanian law, the law of the forum for any Romanian public authority. Thus, according to art.2558 of the new Civil Code "When the determination of the applicable law depends on the classification that has to be given to an institution of law or to a legal relationship, we should consider the legal classification established by the Romanian law (paragraph 1)

Two observations must be made: first, that the term "institution of law" must be interpreted lato sensu, including legal terms as well, and the second that the exceptions in paragraphs 2,3,4,5, are strictly interpretative. So, according to art 2558 paragraph 1 of the new Civil Code, the primary classification is always performed based on the Romanian law, namely in accordance with the terms used by the Romanian legal system. Also, the classification of an issue as procedural or substantive is made by the Romanian law.

So, to clarify the meaning of the conflicting rules of Article 2585 Civil Code it is necessary to make the primary qualification of the notion of the promise of marriage in Romanian law.

The institution of matrimonial engagement is regulated in the Civil Code, Chapter 1 entitled "The Matrimonial Engagement", in the 2nd Title, "Marriage" of the 2nd Book, "On Family", art. 266-270.

Art. 266, paragraph 1 of the Civil Code stipulates that the matrimonial engagement is the mutual promise to perform the marriage.

In this context we shall study the concept of engagement in Romanian private international law.

Keywords:

Romanian private international law; classification that has to be given to an institution of law; institution of matrimonial engagement is regulated in the Civil Code, concept of engagement in Romanian private international law.

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1. Article 2585 of the Civil Code is dedicated to the law applicable to the promise of marriage

Paragraph 1 states: "*The substantive conditions required for the conclusion of the promise of marriage are determined by the national law of each of the intending spouses on the date of the conclusion of promise.*"

Paragraph 2 rules: "*The effects of the promise of marriage and the consequences of breaching them are governed by one of these laws, in this order:*

• the law of common habitual residence of the intending spouses on the date of the promise of marriage;

• common national law of the intending spouses when they do not have the habitual residence in the same State;

• Romanian law, in the absence of common national law. "

2. The concept of engagement in Romanian private international law

From the provisions of Article 2585 of the Civil Code we notice that the Engagement concept is not defined by the Romanian Private International Law.

However, by studying the provisions of Article 2585 Civil Code we note that different laws apply to engagement: either the common national law of each of the intending spouses on the date of the promise of marriage promise; the common national law of the intending spouses, the law of common habitual residence of the intending spouses on the date of the promise of marriage; Romanian law, in the absence of common national law.

So, to be able to talk about the law applicable to the promise of marriage we will have to study the concept of marriage in Romanian law and what is meant by the concept of promise of marriage in different legal systems.

Next we will show what is meant by the concept of promise of marriage (engagement) in Romanian law.

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3. The concept of matrimonial engagement in the old Romanian law (NC Aniţei (2011):18-20); NC Aniţei (2013):281-285)

The matrimonial engagement was considered, in the old French Law, a contract that engendered the „obligation of doing", that is of performing the marriage. Not fulfilling this obligation brought down the responsibility upon the guilty fiancé who had to pay damages (G.C., Frenţiu, B.D., Moloman. (2008): 45).

In the first od codex written in Romanian, the marriage was preceded by the *engagement* (also named *făgăduială* [vow] or *învoială* [accord]). This preliminary legal act of the marriage came after or along with the negotiation and acceptance of the girl's dowry by the future son-in law.

In the Calimah Code the juridical norms concerning the engagement are included in the paragraphs 64-70 of the Second Chapter, „Pentru dritul căsătoriei" ("Of Marriage Law") of the 1st Part entitled „Pentru dritul persoanelor" ("Of Civil Law). According to the stipulations of the paragraph 64"the matrimonial engagement is the vow for the future union and is to be done in the complete or incomplete manner". The completed engagement performed with religious ceremony used to have the same juridical power as the wedding and could be dissolved only for the reasons stipulated in the paragraphs 120 and 142. The incomplete engagement referred only to promises and to binding a bargain and did not bring about a legal matrimony obligation but only an obligation of paying damages to the other fiancé, should the engagement be broken without a serious reason. The stipulations of the paragraph 70 show that the incomplete engagement could be closed only if the fiancés were at least 7 years old while the complete engagement could be performed only if the woman was at least 12 years old and the man was 14 years old.

Caragea Law[2], in Part III, Chapter XV, regulated the engagement[3] as "*the first speech to arrange the marriage*", the cases when engagement could be annulled and the return of the engagement gifts with or without other compensation. The engagement ended with the promise of marriage before witnesses. The engagement becomes an indissoluble bond only after reading "the holy prayers", namely after the religious ceremony.

The Civil Code of 1864 has not covered this institution, because Romanian laws from the seventeenth century to the nineteenth century have attached to it a religious colouring. Seeking to extract the institution of marriage and family from the jurisdiction of the Church the Civil Code has

[2] Adopted in Romanian Country (1818).

[3] The religious ceremony performed on this occasion conferred engagement the quality of half-committed matrimony.

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not taken over the old regulations relating to this institution prior to marriage.

Al. I. Cuza Civil Code (1865) did not regulate this institution further since the Romanian law of the 17th -19th century had not attached to it a religious meaning. Al. I. Cuza Civil Code, in an attempt to remove the institution of marriage and of the family from the jurisdiction of the Church, did not take over the old regulations concerning this preliminary institution to marriage.

As well as this, in the Family Code that came into force in 1954 (inspired from the Russian one), the institution of matrimonial engagement is not regulated either.

The institution of matrimonial engagement is regulated in the Civil Code, Chapter 1 entitled "The Matrimonial Engagement", in the 2nd Title, "Marriage" of the 2nd Book, "On Family", art. 266-270.

Art. 266, paragraph 1 of the Civil Code stipulates that the matrimonial engagement is the mutual promise to perform the marriage.

The specialty literature (D., Lupaşcu: 44-45; E., Florian:16-17) defines the engagement as the mutual promise of two people of different sex to perform the marriage in the future.

4. Church Engagement (E., Tavala (2014):25-38).

Engagement is the first act by which it is showed in public the willingness of two people to unite in marriage, some canonists presenting it as the *memory and promise of marriage*.

Church blesses this ancient tradition by a short service usually prior to the wedding. Both the religious engagement and the wedding are performed usually together but can be performed separately before marriage, in another place and at another time. The Church accepts to perform the Engagement separately from the Sacrament of Marriage, where young people want to seal their determination to live with each other forever by a blessing of the Church.

Following the decision of the Romanian Orthodox Church on October 25, 2011 which in fact reiterates an old decision of the same institution, from the pre-war period, the religious engagement may be celebrated only together with the Sacrament of Marriage. The synodal decision also states that the conclusion of the civil engagement obliges the Church to officiate this service separate from the Sacrament of Marriage, which can only be received by faithful Orthodox Christians who prove the conclusion of the civil marriage. The Roman Catholic Church has tried to limit the time between engagement and the wedding to be as short as

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possible in order to avoid "the fall into sin" of the two young people. This will be achieved by decision of the Council of Trent (1545-1563) which reduces this period, wishing actually to suppress it, a fact which however will not enjoy a unanimous positive acceptance. For example they note Corsica and the West of Pyrenees where engagement, once sanctioned by means of the conclusion of a contract and the religious ceremony is still quite distant from *the moment of the conclusion of marriage and marks the beginning of sexual life of young people* (E., Welter (2014):32). .

Engagement does not give them the right to a conjugal life to the engaged couple even though many consider that engagement replaces the Matrimony. For this reason the Church has decided not to separate the two religious services: the Engagement and the Religious matrimony.

According to research literature (C., Ghiţulescu (2004):173-175), in the *Orthodox canon law*, the engagement has religious power as the "full wedding" if it has been made by observing the following rules: exchange of rings and / or the kissing of the youth, gifts, religious ceremony and the banquet. The compliance with these steps, provided by glava 172 from *Law Straightening*[4] confers legal force to the engagement, unlike the engagement made by "bonds of letters", considered by glava 174 Law Straightening null and void.

The importance of the social act passes in front of the writing and the presence of witnesses becomes the only way of confirmation or denial of such an event, in other words, orality, what other can tell by word of mouth takes on more importance than writing.

Church engagement, unlike civil engagement, constitutes an impediment for each of the fiancés rat the religious ceremony of any of them with another person. In case the engaged couple decides to break off their church engagement to be married to another person, they must first request the dissolution of church engagement. (E., Tavala (2014):25-38).

5. Scope of the concept of promise of marriage (engagement) in Romanian private international law

So, under the provisions of Article 2585 of the Civil Code to establish the concept of engagement we will consider: what do we mean by the concept of engagement in the Romanian law for the future spouse Romanian citizen, what do we mean by the concept of engagement in foreign law for future spouse foreigner, what do we mean by the concept of

[4] Adopted in 1652.

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engagement in foreign law for prospective spouses Romanian citizens residing in that State where they are to enter into the promise of marriage.

The question we ask ourselves is: How should the Romanian authorities act with those human connections between people who despite having acquired abroad the status of promise of marriage (engagement), do not contain the fundamental features of engagement in Romanian law?

Thus, this issue was answered in the research literature by the *theory of mitigating effects of public order* which states that*:* "*We will recognize the right born abroad, even if the jurisdiction there and which was applied is contrary to a fundamental principle of Romanian private international law and even if the act was handled differently from what the Romanian law provides, for example: a marriage terminated by mutual consent or a marriage terminated by religious consent*" (M.V., Jakotă (1997):241-242. The same view is supported by another author *"... there may be some legal relations which could not have taken birth on the territory of the the local law, because public order would have opposed, but once born in the foreign country, they are recognized even within the forum law territory."* The court will decide for each case whether the right acquired abroad takes effect in the forum land, and in case the answer is affirmative it will be established to what extent these effects will be produced, namely which is the mitigating effect of invoking the public order (I.P., Filipescu, A.I., Filipescu (2006):148). This statement reconciles the theory of mitigated effects of public order of Private International Law with the ambiguous wording of Article 2567 of the new Civil Code, which states: "*The rights acquired in a foreign country are respected in Romania, unless they are contrary to public order of Romanian private international law.*"

Conclusions

Based on those studied in this article we conclude that the scope of the concept of engagement (promise of marriage) in private international law is much broader because the Romanian authorities have the discretion to recognize or not as promise of marriage (engagement) the human relations between people born abroad that do not have the fundamental features of engagement (of the promise of marriage) devoted to Romanian family law. The same conclusion is drawn by the remark that the terms used in the content of conflicting rules, become by means of primary qualification adaptations of the concepts used in internal law.

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