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THE REGULATION OF THE INSTITUTION OF MATRIMONIAL ENGAGEMENT IN THE NEW ROMANIAN CIVIL CODE

Nadia Cerasela ANIȚEI [1]

Abstract

The paper aims at analysing the institution of matrimonial engagement both in the Old Romanian Law and in the new Civil Code- that came into force by law no. 287 of July 17th, 2009. The 2nd Book of the new Civil Code, entitled "On Family" dedicates its 2nd title to marriage, and in Chapter I, art. 266-270, it deals with the institution of matrimonial engagement.

The paper will show how the institution of matrimonial engagement is defined, the basic conditions of content and form needed to perform the matrimonial engagement, and we shall make proposals of lex ferenda should we consider that the regulations in the field are defective.

Keywords:

engagement; performance of engagement; content conditions for the performance of the engagement; form conditions for the performance of the engagement.

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1. The concept of matrimonial engagement in the old Romanian law

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. The Caragea Law, in the 3rd Part, Chapter XV regulates the engagement[2] as „the first agreement with respect to the wedding", the cases one may brake an engagement as well as the return of the wedding gifts accompanied or not by other compensation.

The engagement was closed with the wedding promise in front of the witnesses.

Both the parents and the fiancés' consents were needed to perform the engagement. In case the parents of one of the fiancés did not agree upon the engagement, the man's opinion prevailed.

Nevertheless, the wedding is never performed alone, a third character, named either conciliator, or matchmaker, being involved. This conciliator is usually a relative, a friend or one of the families' neighbours, who used their influence with the parents, proposed the performance of the alliance, took part at the negotiation of the dowry, and introduced the two young people to each

[2] The religious ceremony performed on this occasion confered to the engagement the quality of a weding performed by halves.

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other. As well as this, a matchmaker plays also the part of a guarantor both in performing the alliance, and with respect to the fiancés' good faith. He/ She takes responsibility for this relationship, the children-in law and the parents-in-law being eager to call him to account when misunderstandings appear. Thus, for example, Hagi Avram brings his own reputation into play when he recommends Ancuţa to his business partner, Gheorghe Bimbaşa. This is why when Gheorghe appears on the threshold and calls him to account for the girl's lack of purity, Avram is simply taken aback. As conciliator, Avram was equally responsible for the girl's dishonour, his intervention in settling down the conflict becoming very active, trying to obtain compromises from both sides (C. Ghiţulescu (2004): 171-172).

According to the specialty literature (C. Ghiţulescu (2004): 173-175) in the orthodox canonical law, the engagement has religious power as well as the "completed wedding", if it was performed observing the following regulations: the exchange of the rings and/or the kiss, the gifts, the religious ceremony and the feast. The observance of these stages, stipulated in Chapter 172 from the *Îndreptarea legii*[3] *(The Amendment of the Law)*, gives legal value to the engagement unlike the engagement performed by "letter exchange", considered in Chapter 174 of the *Îndreptarea legii* nul and worthless. The importance of the social act prevails in front of **the** written document, while the presence of the witnesses become the only way to confirm or infirm such an event, in other words, its spoken character, that is what others may tell by word of mouth, receives more significance than the writing.

The ring remains, over time, the ritual symbol by excellence of the performed engagement and is often mentioned in the dowry inventory, while its value increases or decrease according to the young couple's social status. It used to be called: "diamond ring for exchange", "gold ring for the engagement exchange", "gold rings with diamonds in the noble class, of silver, of jasper or common metal". The gesture of exchanging the rings is mutual, the fiancés exchanging the rings on the day they had agreed to get married.

The act of sending a ring is always seen and perceived by those around as the sealing of a matrimony commitment. When Constandin sends to his beloved "his jasper ring", she believes they are already engaged. Even if the young man alleges, in front of the assembly, that he had made a joke, nobody believes him because his gesture has symbolic marital importance and is perceived as a commitment of matrimony. The young man ended by marring the girl since there were no real reasons to break such an engagement (C. Ghiţulescu (2004): 176).

The kiss as an important wedding ritual in the engagement ritual appears in Pravilă, but it is less met in practice. As well as this, the kissing of the hands, is met only once and is associated with the exchange of rings. The kiss alone

[3] Adopted in 1652.

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appears when the engagement is done in a hurry and the families did not have enough time to get the rings to be exchanged.

What followed after the exchange of the rings was the moment of the fiancé's gift offering to his fiancée. The kind of gifts is not mentioned. For example: "on exchanging the rings" Ilie Tabac offers the following to his fiancée, Ghena: "some golden coins, a mirror, two scarves and a ring"; Asanache gives to Ilinca, Mitu's daughter, the captain of the court guards in the Serdarului neighbourhood, on the engagement day and the days to come: "a silver plate with its own measuring spoon, a gold ring and two head-cloths, and two pairs of red embroidered shoes." Therefore, except for the ring, everyone offers what they have and what they can. (C. Ghițulescu: 179)

Other gifts named gifts before the wedding used to be offered later, until the wedding day. The difference between the engagement gifts and the gifts before the wedding also results from the following case: the girl who is guilty of having broken the engagement must return the ring she was given, "the gifts from the engagement day", as well as "the gifts that were sent to her the day after".

The next stage is the religious ceremony by the celebration of a divine service by the priest. It can be celebrated either in the village or the parish church, either in the couple's house being followed by the feast. The Church believes that the celebration of the divine service is only half of the wedding ceremony, the other half being the religious ceremony itself.

The engagement feast is the last stage of the engagement ritual. It is organized by the girl's parents, the friends, the neighbours, and the relatives being invited to take part.

The engagement becomes an unbreakable bond however, only after the reading of the "holy ritual prayer", that is after the religious ceremony. Therefore, only the Church had the power to break an engagement.

The engagement can be broken for certain reasons stipulated by the codex such as: the girl carries someone else's child, the age is below the admissible one, one of the fiancés' madness, or one of the fiancés' desire to enter a monastery. In practice, many of the engagements were broken because one of the fiancés' opposed to it or because of their parents. When breaking the engagement, the guilty had to return everything he had got from the other fiancé and they often had to pay damages, too. (C. Ghițulescu: 175-181).

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.

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2. The regulation of the institution of matrimonial engagement in the Civil Code (art. 266-270)

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.

According to art. 266 paragraph 2 of the Civil Code, the same **content conditions** as in the case of a marriage must be fulfilled to perform an engagement, except for the medical certificate and of the approval of the competent administrative body. Hence, to perform an engagement on should fulfil the following content conditions: **the matrimonial age, the consent of the future spouses and the difference of gender.**

1. **The difference of gender** is a virtual and diriment content condition. Thus, art. 266 paragraph. 5 of the Civil Code stipulates „The engagement may be performed between a man and a woman." The proof of its accomplishment results from the birth certificates of the future spouses which also certify the person's sex.

2. **The matrimonial age** is an express and diriment condition**.** The interpretation of the stipulations in art 272 of the Civil Code shows that 18 is the minimum age to perform a matrimonial engagement. Still, as an exception, for serious reasons (for example: a woman's pregnancy) the minor who is 16 can be engaged on grounds of a medical certificate, with his parents' approval, or, if this is the case, of the tutor. Likewise, in this situation one needs the approval of the tutelage instance which decides upon this divergence too, having in view the child's superior interest, and if one of the parents is deceased or unable to manifest his/her will, the other parent's approval is enough.

If there are neither parents, nor tutor to approve with the engagement, it is required the approval of the person or of the authority that was qualified to exercise the parental rights.

If the matrimonial engagement is performed between Romanian citizens on board of a Romanian ship, but outside the borders of the country, the waiving of age limit is given by the ship-master.

A maximum limit to perform an engagement has not been set, which means that it may be performed up to an advanced age. Similarly, the law does not set any maximum difference of age between the fiancées, wherefrom the conclusion that the performance of the matrimonial engagement may take place regardless of the age difference between them.

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3. **The consent of the future spouses** is an express and diriment condition. The interpretation of the stipulations of the article 271 of the Civil Code shows that the matrimonial engagement can be performed with the free consent of the future fiancées.

In terms of legal documents, the concept of consent has double meaning, generally, designing both the manifestation of one's will with the purpose of producing legal effects, and the concordant meeting of the wills, the agreement of the wills to create a legal report between them. (Gh., Beleiu: (1998): 142) As well as this, the existence of the consent when performing the engagement is the fundamental requirement, essential to the engagement, but not enough, since it has to be free, that is undisturbed in its manifestation, and also recent.

To be validly expressed, the consent has to fulfil certain conditions: (T., Bodoaşcă (2005): 59-70; A., Bacaci. V., C., Dumitrache. C., C., Hageanu (2009): 20-22; E., Florian (2008): 23-27; G., C., Frenţiu. B. D. Moloman (2008): 53-55; I., Apetrei. Raluca –Oana, Andone (2005): 13-14; I., P., Filipecu . A., I., Filipescu (2002): p. 132).

- To be uncorrupted;
- To be recent;
- To be given simultaneously and personally by the future spouses;
- To be directly recorded by the Civil Registrar

To be uncorrupted means that the consent should be freely expressed (meaning that the cast, racial, religious and legal restrictions have been removed with respect to the free consent between the future spouses) when performing the marriage while its creation refers to the lack of consent vices: error, fraud and violence.

The error is a false representation of the reality concerning the essential circumstances and constitutes a consent vice when performing a marriage only if it refers to the physical identity of the other spouse (which is possible only in the case of twin brothers or sisters who substitute one for another at the wedding) the relative nullity being the applicable punishment. The error upon the husband's civil identity does not constitute a consent vice/ for example the fact that one of the spouses did not knew that the other was divorced, or that he was born out of wedlock, or believed he belonged to a different family) and does not damage the validity of the marriage. Similarly, the error upon the other spouse's qualities or features does not constitute consent vice either (for example: the subsequent discovery of the fact that the husband is violent).

The Fraud supposes the use of devious means or deceptive means by one of the spouses with the purpose of determining the other to perform the marriage. The legal practice mentions the vitiation of the consent by fraud, when the pregnancy state resulted from the intimate relations before the marriage was concealed; a serious illness, incompatible with the well development of the family life was concealed, when the woman's pathological

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incapacity of having children was concealed or when the man's pathological incapacity of performing the sexual act was concealed. The fraud must be associated with essential qualities of the future husband, which if he had known, he wouldn't have performed the marriage. However, these qualities must be necessary to perform the marriage (for example, the health condition is a necessary quality for the performance of a marriage while the material condition is not).

Violence supposes the physical or psychical constraint exercised upon one of the spouses with the purpose of performing the marriage. Decision has been made that if on the moment of performing the marriage one of the spouse's consent was vitiated by the violence exercised by his/her father, the marriage will be declared null if the action was introduced in the legal term.

To be recent. What we understand by that is the need of expressing the consent on the moment of the public performance of the marriage, in front of the Civil Registrar.

To be given personally and simultaneously by the future spouses. The consent is expressed personally by each husband the possibility of performing a marriage by representation being excluded. Similarly, the consent is expressed simultaneously, that is the future husbands must be present together in front of the mandatory to give their consent for the marriage.

To be directly recorded by the Civil Registrar. The Civil Registrar will be able to declare a marriage performed only after he/she has directly seen that the future spouses have freely expressed their consent in front of him, or in the location stipulated by the special law.

With respect to the **form** conditions, article 266, paragraph 3 of the Civil Code stipulates that "The performance of an engagement is not submitted to any formality and may be proved with any probation means."

In the absence of some legal regulations, we believe that the social norms recommend as possible formalities to perform an engagement, the old customs practiced in the old Romanian law, meaning: the engagement ends with the promise of marriage in front of the witnesses, which might be followed, most frequently, by the exchange of rings, by the exchange of engagement gifts, a religious service and a feast. The religious ceremony used to give to the union between the two young people the value of a wedding completed by halves. These formalities have the great advantage to provide enough evidence of the matrimonial engagement act.

The performnce of the engagement may be proved by any means for example: witnesses, the engagement ring, the gifts offered on this occasion to each other by the fiancées, the engagement paper issued by the priest, the pictures, the feast given on this occasion.

According to article 267, paragraph 1 of the Civil Code "The fiancé who breaks the engagement may not be determined to perform the marriage".

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Per a contrario, the fiancé who does not break the engagement must close the promised marriage.

The proof of the engagement break may be done by any means.

According to article 268, paragraph 1 of the Civil Code "If the engagement is broken, the gifts that the fiancées have received on account of the engagement, or throughout the engagement, and in view of the marriage, are supposed to be returned, exception making the common gifts."

So, breaking the engagement produces as legal effect the return of the gifts that the fiancés have received on account of the engagement, or, throughout the engagement, in view of the marriage. The gifts shall be returned in nature, or if this is no longer possible, according to one's wealth.

As an exception the fiancées do not have to return the common gifts. We may take as common gifts, the gifts offered on various occasions such as: birthday, the completion of the secondary or university education, the celebration of a certain number of months since they have met, winter holidays, etc.

According to article 268, line 3 of the Civil Code the obligation to return the gifts is no longer in force if the engagement ended with the death of one of the fiancées.

According to article 269, paragraph 1 of the Civil Code "The part who abusively broke the engagement could be forced to pay damages for the expenses done or contracted in view of the marriage, to the extent they were suitable to the occasions, as well as for any other prejudices. The paragraph 2 of the same article stipulates that, "The part that in a culpable way determined the other to break the engagement, may be forced to pay damages as stipulated in paragraph (1)". We can notice that the name of the article 269 of the Civil Code "The Responsibility for Breaking the Engagement" is wrong since it refers to the reinstatement of the parts in the situation that preceded the conclusion of the engagement and not a civil sanction which is forbidden by article 267, paragraph 2 of the Civil Code that places absolute nullity on the penal clause.[4] Therefore, this article may be the object of two interpretations. The first interpretation deals with the change of the restrictive name "The Responsibility for Breaking the Engagement" of the article 269 of the Civil Code since it constitutes an effect of having broken the engagement not a penalty, the idea of penalty being removed by the author by banning the penal clause. In the second interpretation, the article 269 may be a solution offered to the old dispute by the legislator with reference to the nature of breaking the engagement (offence or breach of contract). Banning the penal clause which is specific to the contractual civil responsibility, the legislator seems to accept the fact that breaking the engagement constitutes an offence. In this case the restrictive name and the

[4] Potrivit art. 1538 alin. 1 din Codul civil „Clauza penală este aceea prin care părţile stipulează că debitorul se obligă la o anumită prestaţie în cazul neexecutării obligaţiei principale."

definition of the article are correct. Should this interpretation be accepted, we suggest of lex ferenda the insertion within the text of the article of a sentence that should explicitly qualify as a crime the break of the engagement. This qualification will be also important at the level of international private law.

According to article 270 of the Civil Code the prescription term of the right to legal action built on the stipulations of the article 268 of the Civil Code (it refers to the responsibility for having broken the engagement) is one year from the moment of the engagement break.

Conclusions

By matrimonial engagement we understand, as it is mentioned in the specialty literature, the mutual promise made by two people of different sex to get married in the future.

We believe that the engagement has to be performed as it is stipulated in art. 266, paragraph 2 of the Civil Code with the achievement of the following content conditions: *matrimonial age and the consent of the future spouses and difference of gender*.

With respect to the form conditions, we suggest of lex ferenda the abrogation of the 3rd paragraph of the article 266 of the Civil Code and the introduction of the following form conditions concerning the matrimonial engagement in the 3rd paragraph of the article 266 of the Civil Code: the conclusion of the matrimonial engagement by the promise of marriage in front of the witnesses which could be followed, by the exchange of rings, by the exchange of wedding rings, by the religious ceremony and a feast. The religious ceremony would give to the relation between the two young people the value of a ceremony completed by halves. These formalities have the great advantage to provide enough evidence of the matrimonial engagement act.

As well as this, we suggest of lex ferenda that the article 269 of the Civil Code be modified by the acceptance of one of the two interpretations we have offered. Hence, according to the first interpretation one should change the restrictive name "The responsibility for breaking the engagement" of the article 269 while in the second interpretation, the article 269 may be a solution offered by the legislator to the old dispute regarding the reason for breaking the engagement (offence or the breach of contract).

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References

Selective bibliography
Treaties, courses and monographies

Apetrei, I., Andone, R. O. (2005) *Dreptul familiei.* Student book, Venus Publishing House, Iasi.

Bacaci, A., Dumitrache, V., C.. Hageanu, C., C.. (2009) *Dreptul familiei*, 6th Edition, C. H. Beck Publishing House, Bucuresti.

Beleiu, Gh. (1998) *Drept civil roman. Introducere în dreptul civil si subiectele dreptului civil, 5th edition revised and completed,* „Sansa" S.R.L. Press and Publishing House, Bucuresti.

Bodoască, T. (2005) *Dreptul familiei*, All Beck Publishing House, Bucuresti.

Dariescu, N., C.. Dariescu, C. Petraru, A., R.. (2009) *Dreptul familiei,* Edition Lumen, Iasi.

Filipecu, I., P., Filipescu, A., I.. (2002) *Tratat de dreptul familiei,* 7th Edition, All Beck Publishiing House, Bucuresti.

Florian, E.. (2003) *Dreptul familiei,* Editura Limes, Cluj Napoca.

Frentiu, G., C. Moloman, B., D. (2008) *Elemente de dreptul familiei şi de procedură civilă,* Hamangiu Publishing House, Bucuresti.

Ghitulescu, C. (2004) I*n salvari si cu islic. Biserica, sexualitate, casatorie si divort in Tara Romaneasca in secolul al XVIII-lea,* Humanitas Publishing House, Bucuresti.

Lupascu, D. (2007) *Dreptul familiei,* Editia a II-a amendata si actualizata, Editura Universul Juridic, Bucuresti.

Legislation

Law nr. 287 from July the 17th 2009 regarding the Civil Code published in the Official Gazette, no.511 on July 24th 2009.

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