Engagement prior to marriage – a short walk through the history of Romanian law

Sorin-Alexandru VERNEA

Judge

Slobozia Court of First Instance

Abstract

The main purpose of this paper is to point out the legal nature, purpose and effects of the engagement prior to marriage in nowadays Romania, and also in old Romanian regulations, dating from the beginning of the XIX-th century.

Equally, for a complementary perspective, the engagement prior to marriage as a religious institution will be briefly analyzed.

In the final part, a conclusion will be pointed out, regarding the social perception of the engagement and also the reasons that made it a contemporary institution in Romania, despite the fact that it is not found in most modern Civil Codes.

Key words: engagement prior to marriage, history of law, civil engagement, religious engagement.

1. Generally, to understand the purpose and nature of a legal concept, one has to read beyond the solitary text of the law, therefore a historic approach on the grounds of legal regulation and a complementary analyze of other domains that establish the limits of the same concept will offer a better suited answer for the inquiries made.

Having this as a starting point, the present paper aims at offering an analytical approach on the concept of engagement as it was regulated in most relevant Romanian Law texts in the last two centuries and as it has been regarded in Orthodox religion, due to the fact that engagement is not only a civil but also a religious institution.

Therefore, for the purpose of this paper, after a brief introduction, regarding etymological considerations, we shall search the purpose and nature of the engagement before marriage in old Romanian regulations, meaning The Legal Manual of Andronache Donici, also called The Donici Code from 1814, The

Calimach Code from 1817, and The Caragea Law from 1818 in the second part of the article. The third part will be dedicated to the regulation found in the contemporary Civil Code[1], the fourth part of the paper will approach the matter of engagement from a Christian Orthodox point of view, by reference to Canonic law, and the fifth part will offer a general conclusion on the issues and inquiries debated.

In consequence, due to the fact that this paper will analyze the engagement before marriage as a social concept, a brief etymological approach will prove useful.

The English term "*engagement*" is derived from the French noun written in the same manner, that can be contextually translated by "formal promise", having the *promise of marriage* sense from 1742[2].

The Romanian term is "*logodnă*", derived from the Slavic "lagoditi", that can be contextually translated by "to agree upon"[3].

***The French word is* "fiançailles", *derived from the old French "fiance", meaning* confidence, fidelity[4].**

The Latin term used for engagement is "*sponsalia*", and has the meaning of a *promise lawfully made between persons capable of marrying each other, that at some future time they will marry*[5].

From all four terms we can observe that the conceptual meaning of engagement is that of a *promise, based on trust*. This being the original sense, we will state that its first function was to offer confidence to an individual, based purely on the trust between parties involved.

We shall see that from a legal point of view, this *promise* is designed to provide a binding force for the parties that consented at a given time, therefore one of the parties would be entitled to demand the other to keep the promise made, or offer compensation.

In modern times, strictly from a legal point of view, the engagement is able to offer both parties involved a legal solution to separate their belongings if the engagement would cease before marriage.

2. In what concerns old Romanian Law, we will start by pointing out the provisions of ***The Donici Code from 1814***, this being the first out of the three texts, in chronological order.

The 30th Title is named "Engagement and marriage", and the first 7 paragraphs are fully dedicated to engagement.

[1] Law no.287/2009, republished in Part 1 of the Official Gazette, no.505, from the 15th of July 2011.
[2] The Online Etymology Dictionary, available at: http://www.etymonline.com/index.php?search=engagement, last visited on 15th of December 2013.
[3] I.Oprea, C.-G. Pamfil, R.Radu, V.Zăstroiu - *The new Romanian Universal Dictionary (Noul Dicţionar Universal al Limbii Române)*, 3rd edition, Litera International Publishing House, Bucharest, 2008, p.844.
[4] Available online at: http://fr.wiktionary.org/wiki/fiançailles, last visited on 15th of December 2013.
[5] Available online at: http://legal-dictionary.thefreedictionary.com/Sponsalia, last visited on 15th of December 2013.

The first two paragraphs indicate substantial circumstances in which engagement can occur: the two parties involved should be at least 7 years old, and their parents[6] must agree to the engagement[7]. Therefore, the nature of this affair is that of a convention between the parents or tutors of the two fiancés, and also between the two fiancés. Given their limitation in age, respectively 7 yeas old, we can assume that not all engagements were made out of the pure will and desire of the two involved.

The third paragraph has a dual nature, legal and religious, because it states that an engagement made according to religious tradition[8], by "hierourgy"[9], is considered to be a marriage. This provision will be regarded mainly for its religious outcome, because it does not establish a legal status equivalent to marriage for the two fiancés, but it justifies that from a religious perspective they are considered married, and the religious service made for them was complete. We shall also observe that in The Donici Code there is no mention of religious marriages without the afferent civil service, and if only a religious ceremony would have been performed, then the two people involved would be fiancés and not husband and wife. Therefore, a religious marriage, without a civil marriage represents nothing more than an engagement.

The effects of the engagement are highlighted in the fifth paragraph, and they can be summed as the restitution of gifts made considering the upcoming marriage.

Briefly, when celebrating the engagement, each of the fiancés and their extended families make gifts to the other fiancé and its family. It is essential to point out that those gifts are caused by the engagement itself, as a prelude to marriage. As a result, the gifts are offered as a proof of trust, considering that a marriage between the two fiancés will take place. If it will not take place due to the conduct of one fiancé, that would lead to the termination of the engagement, then, that person will have to compensate the others harmed by its conduct.

These effects have the nature of civil liability owed by the part that bears the guilt for ceasing the engagement, and only that part will be forced to return the gifts received from the other fiancé and its family. Consequently, the innocent part will not have to give back any of the gifts received. If the engagement will cease by mutual agreement, gifts will be returned by both parties.

This is a reason for which contemporary literature[10] defines the engagement regulated in old Romanian law as a civil contract. Considering this qualification, we will accept that if a contract is legally binding, then one of the fiancés may force the other to proceed to marriage. This conclusion can also be supported by the fact that the engagement can cease only for important and justified reasons.

[6] In one's parents are not alive at the time of the consent, the agreement will be granted by a close relative of the newly fiancé, or by its tutor.
[7] If the consent of the parents/tutors was not properly given, the engagement will cease to exist.
[8] The proceedings implied that the priest would read the engagement, offer a blessing, and symbolically connect the two fiancés by a cross.
[9] Contextually, it can be translated by "an act or rite of worship", according to Merriam-Webster dictionary, available online at: http://www.merriam-webster.com/dictionary/hierurgy, last visited on 15th of December 2013.
[10] I.Albu – *Marriage in Romanian Law (Căsătoria în Dreptul Român)*, Dacia Publishing House, Cluj-Napoca, 1988, pag.28; M.Avram – *Civil Law. The Family (Drept civil. Familia)*, Hamangiu Publishing House, Bucharest, 2013, p.31

Those reasons are stipulated in the seventh paragraph of Title XXX of the Donici Code and mainly consist in mutual agreements to cease the engagement, or deceptive representations of reality by one fiancé to the other[11]. A criminal punishment imposed on one of the parties would terminate the engagement. Also, the arrangement will cease when it would have been made without the knowledge of parents or tutors and one of the parties does not wish to carry on. Slaves were forbidden to engage, and if one of the fiancés would become a slave, the engagement would end. A person would be released from obligations if he would choose and be received for a monastic life.

In what concerns ***the Calimach Code from 1817***, we will observe that the engagement is regulated by sections 64-70 of the title called "Law of Marriage"[12].

Section no.64 offers a definition of the engagement, as a promise for later marriage and divides it into two types: complete[13] and incomplete[14]. The complete engagement, according to section no.65 is made by hierourgy[15], has the same binding force as marriage, and can only be undone for important and justified reasons. Incomplete engagement can be achieved by a simple agreement, mostly in oral form, followed by an offer of gifts, or money. If this arrangement will cease, then the part that was harmed in its expectations would be entitled only to compensation.

Sections no.67 and no.68 establish the manner in which compensation would be set if one of the two fiancés, without a justified reason, would cease the engagement. Briefly, that manner consists in returning the gifts and sums of money received by the part that bears the responsibility for the termination of the arrangement. Also, all the expenses made for organizing the wedding by the other part will be compensated.

A exonerating cause can be found in section no.69, according to which, the fiancé who did not know about the legal impediment to marriage that existed in his case, would not be forced to compensate the other part. This is a form of protecting the good faith of the fiancé, that has no judicial guilt for not being able to proceed to marriage.

Section no.120, establishes the important and justified reasons for which a complete engagement can be terminated: the lack of age for one of the fiancés, if the fiancé would be pregnant with another person, for difference of religious beliefs, for criminal punishment, for acceding to monastic life, for heavy debts, for a sudden change of welfare[16] and for engagements made contrary to the will of the fiancés.

Considering ***the Caragea Law from 1818***, we will observe provisions regarding engagement can be found in Chapter 15, entitled "For Engagement", consisting in 4 paragraphs.

[11] Like hiding the existence of a disease or another fact that was believed otherwise by the other fiancé, and determined the latter to commit by engagement.
[12] The Romanian old term is „Dritul Căsătoriei".
[13] Can be made only if the man exceeds the age of 14 and the women the age of 12, according to section no.70.
[14] This type of engagement can be used for any person older than 7 years, according to section no.70.
[15] Religious act and rit performed by a Christian Priest.
[16] This provision regards the situation in which one of the fiancés loses the possessions he had when the engagement was made.

The first paragraph offers a definition of the engagement as a consent prior to wedding. The second paragraph states that those that are free to marry are also free to engage, imposing, therefore, the same conditions as for marriage in what concerns the parties involved.

Causes for ceasing the engagement are established in paragraph no.3, reason for which we will take into account that the engagement will be terminated if it would be made breaking the provisions for marriage[17]. More than that, the fiancés are free from their engagement if one or both choose to accede to monastic life, or one of them develops an incurable disease. For these situations, the gifts offered would be returned, but without any penalty because no legal guilt can be imposed upon either of the fiancés.

If the engagement ceases in a way imputable to one of the parties, for example, one of the fiancés show ingratitude regarding the other, or although they can get married, one of them avoids without a reason, or when without any reason, one denounces the engagement, they will be bound to return the gifts received, but also alongside a penalty, intended to compensate the damages caused to the innocent part, or its family.

The Romanian ***Civil Code from 1864***[18] din not regulate the engagement, because its nature was that of a liberal law, and the legal value of marriage promises was not accepted as serious. More than that, the Civil Code from 1864 aimed at offering consistence to the principle of matrimony liberty[19].

In a way, the same argument justified the fact that the Romanian ***Family Code from 1953*** shared this position, and more than that, it was seen a progressive[20] legislation, that will not regulate a traditional institution such as the engagement.

3. In this section of the paper, we shall briefly point out the nature of engagement from ***a canonic point of view***.

According to theological literature[21], the engagement is a solemn act of mutual promise for marriage between the two that engage. Usually, the engagement, as a religious service was made before the service of marriage[22], but in contemporary times it is especially made during the same service.

Nowadays, due to a Decision of The Holy Synod of the Romanian Orthodox Church[23], engagement cannot be performed outside the Holy Service for Matrimony, making it an accessory part to the latter, without

[17] Actually, this provision is intended as a reverse to the provision in paragraph no.2 that states the same rules for marriage in the case of engagement. To make it clear, if, for example, a person does not have the right age requested for marriage, if he will engage, the engagement will be terminated because one of the conditions regarding the person involved is not achieved.
[18] The Code was adopted in 1864, and its entry into force was in December 1865.
[19] M.Avram – *op.cit.*, p.31
[20] I.Albu – *op.cit.*, p.29
[21] I.Floca – *Orthodox Canonic Law (Drept canonic ortodox)*, Biblic and Missionary Institute of the Romanian Orthodox Church Publishing House, Bucharest, 1990, p.71
[22] Sometimes the engagement preceded marriage by over a few years, and its purpose was to offer the fiancés a guarantee that the wedding will occur at a given moment.

a separate existence. This was a result of the reluctance of people that have done a religious service for engagement once to return to church for another religious service, this time concerning marriage.

The Romanian Orthodox Church accepted to perform engagements for those that accomplished the conditions imposed for the religious service of marriage[24].

Regarding its effects, a valid engagement between two people represents an impediment for marriage, from a religious point of view, if either of the two would want to marry someone else. In this case, the person engaged that wants to marry another person than its fiancé, would need to undo its religious engagement before taking part in the religious service of matrimony.

Of course, if the fiancés would to marry each other, then the engagement would be perfectly valid and would reach its goal.

In this regard we should observe the fact that the religious service of engagement is not a sacrament[25], but a hierourgy, therefore a service that can be performed on various occasions. Although in the last century the engagement used to have a separate identity from marriage as a religious service, today it has become more like an administrative step on the way to the sacrament of matrimony.

4. Analyzing the provisions of the ***New Civil Code***, respectively law no.287/2009, we shall observe that engagement as a legal institution is once again enforced. This way, we will find the regulation in Title II, Chapter I, articles 266-270.

Art.266, in its first paragraph offers the definition of engagement: a mutual promise to commit to matrimony. We can see that this does not pose much difference from the other definitions previously mentioned.

The conditions imposed on parties are the same with those imposed for civil marriage, except the medical notification and the approval of the guardianship court. The engagement is not subjected to formalities and is not compulsory before marriage.

Concerning its effects, the fiancé that denounces the engagement cannot be forced to proceed to marriage and no penalty can be stipulated to prevent him from denouncing the engagement, according to art.267, paragraphs 1 and 2.

[23] Decision no.9027/25.10.2011 of The Holy Synod of the Romanian Orthodox Church, available online at: http://www.patriarhia.ro/_layouts/images/File/CSF/9027-Comunicare Codul civil.pdf, last visited on the 15th of December 2013
[24] I.Floca – *op.cit.*, p.72
[25] The sacraments in the Orthodox Church are officially called the "holy mysteries". The seven sacraments are: baptism, chrismation, holy eucharist, penance, matrimony, holy orders and the unction of the sick.

Regarding the legal nature of the engagement, contemporary literature qualifies it as a legal fact[26], a legal act[27], or a *sui generis* institution of hybrid nature[28].

Briefly, we should underline that the idea of engagement as a legal fact has its basis on the effects of the engagement in what concerns a unilateral and abusive denunciation. The effect is the right of the innocent to obtain a compensation for the harm suffered. For this reason, the engagement was qualified as a simple legal fact, that may justify reparations in case o unpredicted termination.

Regarding the idea of engagement as a legal act, or a contract, we should bear in mind that it bases itself on the consensus existing between the two fiancés to commit, making it different from a simple legal fact. Nevertheless, a legal act, in case of non-execution, would entitle one of the parts to demand the contracted action from the other part. In case of an engagement this demand is expressly prohibited.

If we are looking at the engagement as a *sui generis* institution of hybrid nature, we should observe that the conditions for engaging are similar to those requested by a contract, but the effects of that act are only those resulting from civil liability for an illicit fact.

As previously shown, the ceasing of the engagement is able to offer the innocent part a right to obtain a compensation for the harm suffered. Subsequently, the part that denounces the engagement cannot be forced to proceed to marriage, because that would be a limitation of its right to a free marriage[29].

Art.268, in paragraph 1 states that in case the engagement is terminated the gifts that the fiancés received considering the engagement or the perspective of marriage would be returned, except for usual gifts. This is the first patrimonial dimension of the ceasing of engagement.

To determine whether a gift is usual or not, we should refer to its importance for the part that received it and for the part that offered it, and also the material welfare of the donor, to understand the dimension of its effort to offer the gift. A precise delimitation is not completely possible and will surely be depending on each case.

There is no obligation of returning gifts if one of the fiancés dies. In this case there is no guilt for the other part, therefore there is no reason for which it may be subjected to this type of sanction.

The second patrimonial effect when an engagement ceases is the obligation for the fiancé that in an abusive manner caused the termination to compensate all expenses made or contracted considering marriage to the extend they were suited with the circumstances, alongside other damage caused. This obligation derives from art.269, paragraph 1 of the Civil Code.

[26] M.Avram – *op.cit.*, p.31
[27] E.Florian – *Considerations regarding the engagement in the New Romanian Civil Code (Consideraţii asupra logodnei reglementate de Noul Cod civil român)*, Curierul Judiciar Magazine, nr.11/2009, C.H.Beck Publishing House, Bucharest, p.632
[28] C.Hageanu – *Engagement in the New Civil Code (Logodna în Noul Cod civil)*, Curierul Judiciar Magazine, nr.10/2011, C.H.Beck Publishing House, Bucharest, p.530
[29] Granted by art.48, paragraph 1 of the Romanian Constitution and art.16 of the Universal Declaration of Human Rights

Paragraph 2 of the same article provides that the fiancé that by guilty misconduct determined the other fiancé to terminate the engagement will be liable for compensation in terms of paragraph 1.

As we could see, the new regulation of engagement primarily focuses on the patrimonial dimension of this institution, and this way, its true effects come to light each time the engagement ceases by fault of one of the fiancés. The effects of the termination can only determine a restitution of gifts and also a financial settlement for the expenses made by the fiancé considering the forthcoming marriage. Also there is no doubt there are no provisions of personal nature.

5. In the final part of this paper, we shall try to point out, as a conclusion, the way the social perception of the engagement transformed itself over the last two centuries.

Firstly we need to justify why was the engagement carefully regulated in the first half of the XIXth century, why it lacked regulation in the XXth century and why did it reappear in the XXIth century.

The answer comes from the traditions of the Romanian people and from the religious norms existing over the last centuries. In this sense, the three old legislations analyzed were enacted in a time when most traditions in family matters were based on religious customs[30]. By that time, the religious service of engagement was highly common and many people resorted to it to obtain a guarantee that they will marry their chosen partner at a given time, and also benefit from its possessions from that moment on.

When the Civil Code of 1864 was enacted, the institution of engagement disappeared mainly because the new legislation was inspired by the French Civil Code of 1804, which was elaborated on quite liberal basis, therefore, old customs and traditions specific to old Romanian law were left outside the legal area of regulation.

This did not prevent people from resorting to engagements, but this time, they were strictly religious.

The same issue, with quite a similar answer will explain why the Romanian Family Code from 1953 made no mention of engagement. In 1953, Romania was under Soviet influence, which continuously promoted the idea of progress in every domain, including legislation. This quest for progress in the legal field prevented the return to an old institution that was left outside the legal area of regulation for almost one century at that time.

On these premises we come to some questions: Is the reappearance of the engagement in the New Civil Code appropriate by reference to other contemporary legislations? More than that, is it useful in nowadays Romania? Is the engagement a tempered manner to give cohabitation a legal regulation? And finally, what is the legal nature of the engagement in the New Civil Code?

[30] This conclusion is also sustained by the fact that the Donici Code, for example, has a special provision regarding religious engagement, as shown in part 2 of this paper. Also, the Calimach Code refers to "hierourgy" which is essentially a religious term.

In what concerns the first question, we believe that the simple existence of this institution in the Civil Code is a benefit, and if we refer to the Italian Civil Code, for example, we will find a similar regulation in art.79-81. The same model will be discovered in the Civil Code of Switzerland, art.90-93. In these coordinates, we can assume that the idea of introducing a regulation of this manner in the Romanian Civil Code was justified.

In what concerns its utility, answering to the second question, we believe that this institution emerged *only* from the need to regulate patrimonial relations between the fiancés in the moment the engagement was terminated. For this reason, private law literature named the engagement a *posthumous*[31] institution, mainly because it reaches its potential only after it comes to an end.

Practically, by reference to the Civil Code, the regulation covers only the patrimonial dimension, leaving outside the human-personal dimension of the relations between fiancés.

From a religious perspective, the engagement is forbidden to be made in a separate manner from the sacrament of matrimony, mainly to prevent it from turning into a form of cohabitation already tolerated by the state, followed by the blessing of the church.

From a retrospective analyze, we can observe that the engagement was a useful and justified institution in all of its dimensions almost 2 centuries ago. Starting from 1865 it has become a free and unorganized institution from a legal perspective, but it developed into a well accepted institution, without many restrictions, by the practice of the Church.

Starting from 2011, the engagement is again an actual institution, but only in what concerns its patrimonial dimension, and was intentionally left unregulated in what concerns its personal dimension. From a religious point of view, the engagement is valid only alongside matrimony, as previously shown.

To answer the third question, the engagement cannot be seen as a tempered manner to give cohabitation a legal regulation, mainly because it does not offer a regulation for people that live together. It only gives a legal regime to gifts and expenses, nothing more.

Regarding as a whole, to answer the forth question, the engagement in the New Civil Code is a legal act, more precisely a contract regarding the separation of common belongings, obtained by fiances from gifts considering their engagement or their forthcoming marriage. Also it establishes a special form of civil liability, in case of abusive unilateral denunciation.

It is true that a contract may be subjected to enforcement, but in this case, an express provision stipulates that the obligations cannot be executed directly, therefore, this is a contract that gives birth to the right to compensation.

[31] E.Florian – *op.cit.*, p.630

The engagement will not be regarded as a legal fact because it can only appear on the basis of a mutual agreement that gives birth to rights and obligations for both parties. More than that, it cannot be a *sui generis* hybrid institution, as long as there are enough elements to place it in the category of legal acts.

Its theoretical utility is not under a question mark, because its provisions are justified by its purpose, but nonetheless, its real effects are lacking appreciation because a regime for separating belongings can also be reached by a private manner, and usually it is reached that way. The special civil liability can also be valued by using common provisions, therefore the present regulation is not precisely effective.

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