

ENGAGEMENT – AN INSTITUTION NEWLY INTRODUCED BY THE PROVISIONS OF THE CIVIL CODE

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Abstract: *The new legal realities determined by the coming into force of the Romanian Civil Code passed by Law no 287/2009 show the need for a new fathoming of the changes that have occurred. Engagement is one of the news of this new regulation of family law, which is why we must study it closely, know its theoretical and practical aspects in regard to concluding and abusively breaking an engagement, as well as the judicial nature of this institution and the effects it produces.*

Key words: *engagement, breaking an engagement, criminal clause.*

1. Introduction. About the legal acknowledgement of a certain situation

In the memorandum [10] regarding the passing of the law regarding the new Civil Code [11] engagement is mentioned as a new regulation by showing the grounds which caused the appearance of such a regulation as follows: “The reason for this regulation is given by the traditional social reality of Romania regarding engagement”.

For that matter, the provisions regarding engagement were listed by the lawmaker as a series of measures meant to protect family in its whole. Thus, we can state that these provisions force a couple to become more responsible regarding the commitment they have and their future marriage, thus stating that whoever brakes the engagement abusively can be forced to pay damages for the expenses made in

organizing the marriage.

We must also notice that the lawmaker chose to turn engagement rather than cohabitation into law, the explanation being that “turning the engagement into an institution is an honorable solution which is easier to accept even by the media which is less tolerant regarding the legalization of a union” [4].

For this new regulation, the specialized literature [6] has expressed opinions according to which such a provision was not necessary, calling it “an unjustified return in time, as this phenomenon is not so widely spread as to require the need for a whole chapter in the Civil Code, while cohabitation is merely mentioned”.

Furthermore, it was claimed [7] that legal practice has no record of a case where the liability of the fiancées for abusively breaking an engagement ever being an issue. Thus, ignoring this legal notion a legislative void has been created.

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According to other opinions [1] engagement was mentioned in older regulations – the Calimach, Caragea and Donici Codes but it was no longer introduced in the 1864 Civil Code and the Family Code “based on the wish of allowing more consistency to matrimonial freedom”.

Thus, “a person declaring themselves engaged was more a choice of tradition, the mutual will of future spouses to establish an intermediary situation between the single and the married person, without it producing any legal effect” [8].

Without a doubt, before the new Civil Code, engagement was considered to be a civil legal act and it was generally accepted [8] that it can cause one of the two actions: an action for the restitution of gifts made for the engagement and an action for awarding damages for covering expenses made for celebrating the engagement.

In the light of the new law “engagement can reveal its potential only in case the marriage fails, as it implies a obligation to return all engagement gifts as well as those made for marriage even when the breaking of an engagement is abusive and provoked by one of the parties; there is also an obligation to pay damages for expenses made for marriage as well as any other expenses caused by marriage” [4].

On a European level, the relation between fiancées is acknowledged and legally protected.

Thus, the European Court for Human Rights has ruled, in the case Wakefield versus the United Kingdom [5] that the relationship between an inmate in his fiancée is considered “private life”, thus being protected by article 8 of the European Convention for Human Rights and forcing the authorities to allow inmates to have relationships with people outside of jail in order to ease their reinsertion in society.

In the same way, in the case Johnson and others versus Ireland [5] the court ruled that the notion of „family” as mentioned in article 8 of The European Convention for Human Rights is not limited to relationships based on marriage, as it can involve other *de facto* ”family” connections, when the parties live together outside marriage.

2. Engagement – a part of the promise „to contract” [9]

Before analyzing the legal definition of engagement, we will identify the legal regulation of this matter, thus stating the provisions of articles 226-270 of the Civil Code, articles placed in the second book, called „About family”, the Second Title, „Marriage”, The First Chapter, „Engagement”.

Article 24 of Law no 71/2011 stated that „the provisions regarding engagement are to be applied only if it was concluded after the coming into force of the Civil Code”.

Thus, engagement was legally defined by article 266 first alignment of the Civil Code „*as the mutual promise to enter into marriage*”.

From this perspective, that of a pre contract phase which creates obligations, engagement was included [9] in the category of promises “to contract” having the legal regime of family law.

Hence, the scholarly literature [9] lists engagement along with other promises to conclude a legal act, like: the promise to sell or buy, the promise to rent, the promise to borrow.

It was also mentioned [9] that “to promise” means “to address another subject of law and legally commit to that person”, “to achieve an agreement meant to produce legal effects, thus, being practically a contract”.

By applying all those mentioned above to the provisions of engagement, we must

agree to the point of view [8] according to which „although engagement is a pre marriage stage and the rights and obligations of the fiancées are those established by their mutual will, engagement is still considered to be a duty of honor”.

3. The theoretical debate on the legal nature of engagement

We will begin by indicating the features which are not subject to debate – the legal characteristics [5] of this institution:

- engagement is a union between two people;
- engagement is concluded between a man and a woman;
- engagement is an act of free will;
- engagement is consensual;
- engagement is concluded until entering into marriage;
- engagement is based on equality of rights and obligations of the engaged persons;
- engagement is concluded with the purpose of entering into marriage.

The debate regarding the legal nature of engagement pertains to these two important theses:

- engagement as a legal act;
- engagement as a contract.

The controversy regarding the legal nature of engagement starts from the fact that „its particularities do not match the classic theory of the civil legal act in some aspects, especially since concluding an engagement produces no legal effects, as entering into marriage is not mandatory for either of the partners” [6].

Furthermore, this proves to be a controversial legal institution by implying an agreement of the participant’s will thus calling for the application of the law of contracts, on the one hand; on the other hand, it is rather difficult to accept that engagement might have the same legal

force as a contract, as it is not compatible with the matrimonial freedom of the partners [1].

The principle of matrimonial freedom determined the lawmaker to pass regulations which state that entering into marriage is not considered a moral duty as engagement provides no right to file complaints in case it is broken [...]; or, in other words, “no enforcement measures can be taken in order to execute this promise” [9].

Given all these, there are several Romanian authors[4] who state that engagement should still be considered a legal act; these authors base their opinions on the fact that „mutual promise to enter into marriage is by definition, an agreement between the partners’ will, which excludes it from the category of legal acts”, but also on a legal ground – that of article 226 second alignment of the Civil Code which states that several conditions must be met in order for the engagement to be valid; this is a specific feature of legal acts and not legal facts.

If we were to accept that engagement is a legal act, the main consequence would be that engagement will be considered void if not concluded by respecting certain conditions established for entering into marriage – according to the provisions of annulment of marriage, articles 293 and 294 of the Civil Code, the provisions regarding consent for marriage and marriage between people of opposite sex (article 271 of the Civil Code), matrimonial age (article 272 of the Civil Code), the single person’s status (article 273 of the Civil Code), the prohibition of any relations between relatives forbidden by law (article 274 of the Civil Code), the forbidding of marriage between a legal guardian and a minor placed in his care (article 275 of the Civil Code), as well as the lack of any mental disorder (article 276 of the Civil Code)” [3].

On the other hand, even these authors admit [4] that “engagement has certain specifics which makes it difficult to find any resemblance to the classic theory of the civil legal act”, thus “concluding an engagement does not provide a certain legal status, with personal or patrimonial rights and duties which can be capitalized on”.

Seeing these aspects, the authors [2] further explain their opinion by pointing out that engagement is a legal act which does not imply the mandatory obligation of entering into marriage but merely an obligation of being loyal and establishing a relationship which will end up in marriage. Nonetheless, we can discuss [6] the existence of a negative obligation for the fiancées, that of abstaining from abusively breaking the engagement.

We chose to rally behind the theory that engagement is a legal fact and we believe that the obligation to pay damages is stated for the ex fiancée who is guilty of the abusive breaking of an engagement. We feel that this is a criminal obligation rather than a contractual one based on the legal act of engagement.

4. Validity conditions for the engagement

Article 266 second alignment of the Civil Code states that: “the provisions regarding the conditions for entering into marriage are to be applied accordingly, except for the medical authorization and the authorization from the tutelage authority”.

The conditions to be met for entering into marriage are stated in Section I (articles 271-277) of Chapter II entitled “Entering into marriage”.

These conditions are: consent for marriage, matrimonial age, prohibition of bigamy, prohibition of marriage between relatives, prohibition of marriage between the guardian and the minor, prohibition of marriage for the people suffering from

any kind of mental disorder and prohibition of marriage between people of the same sex.

As a result, specialized literature [2] listed the following prerequisites to be met when entering into marriage:

- personal and freely expressed consent of two people of different gender;
- minimum age of 18 years both for men and women (article 272 first alignment of the Civil Code); we should mention that, for serious reasons, the minor, man or woman, who is at least 16 years of age can get engaged with consent from parents, legal guardian or tutelage authority, according to the provisions of article 272 alignments 2-5 of the Civil Code.

In case consent from the parents or the guardian can't be provided, it is thought [8] that the tutelage authority from the minor's residence can decide on this matter, considering, of course, the best interest of the minor, according to the provisions of article 272, second alignment, second thesis. We must also state that in case the minor gets engaged, no medical or tutelage authorization is required.

The lack of any impediments such as: bigamy (article 273 Civil Code), marriage between relatives (article 274 Civil Code), marriage between a guardian and a minor (article 275 Civil Code), mental disorder (article 276 Civil Code), the assimilation of any form of cohabitation with marriage (article 277 Civil Code).

In regard to formal conditions, article 266 third alignment of the Civil Code states that “entering an engagement has no specific required form” thus it can be proved with any means of probation.

It is a consensual act in comparison to the solemn act of marriage.

Other opinions were expressed [6] claiming that nothing prevents the

engagement to be made in an authenticated form, if the parties wish to do so.

If engagement is concluded in a written form, the judicial doctrine [8] notes that it can contain clauses regarding the date and place of marriage, the material contribution of each party to the marriage, clauses regarding the breaking of the engagement, the restitution of goods, damages requested by the party who suffers a sudden and abusive breaking of the engagement.

5. The effects of engagement. Practical issues emerging from the breaking of an engagement

When discussing the effects of engagement, Romanian legal advisors [4] refer to the “postum” character of these effects and the liability in case of an abusive breaking of an engagement.

An interesting description of the effects caused by the breaking of the engagement is expressed in the specialized literature [7] which states that in certain conditions, the engagement can be proof that there was cohabitation between the two parties, thus a solid ground for the paternity assumption for the child born outside of marriage.

First of all, the examination of the effects of marriage must start from the provisions of article 266 fourth alignment: „entering into marriage is not conditioned by the conclusion of an engagement”, thus engagement is a choice of the parties, not an obligation.

Given the principle of the matrimonial freedom of both parties, the lawmaker stated in article 267 first alignment of the Civil Code that: „the fiancée who breaks the engagement can’t be forced to enter into marriage”; the second alignment states that a criminal clause for breaking the engagement is considered to be unwritten”, the legal meaning being that at the time of engagement, awards or damages can’t be

established in advance for the person who breaks the engagement.

Also, there is no special form required for breaking an engagement, thus it can be proved by any means of probation available (article 267 third alignment of the Civil Code).

Romanian scholarly literature seems to support this line of thinking [2] by mentioning that “breaking an engagement is not illegal, it is an expression of the person’s fundamental right and freedom to enter into marriage, expressed in its negative form: the right of not entering into marriage. But even this right can’t be exercised abusively as it will entitle the other party to receive damages”.

We are about to distinguish [4] between the consensual breaking of a marriage, a consensual breaking of an engagement, the unilateral breaking by causes which are not to blame on the party who breaks the engagement, the breaking of an engagement by one of the parties or the abusive breaking of an engagement, as it is regulated by law.

The classification listed above is useful in distinguishing the effects produced by each specific case. We must mention that these effects are of patrimonial nature and consist of returning gifts received for the engagement and damages paid for the abusive breaking of an engagement.

In regard to the first patrimonial effect – that of returning gifts, article 268 first alignment of the Civil Code states that „all gifts the parties received for their engagement, for marriage or during the engagement, except for ordinary gifts, are to be returned”

By interpreting this text, the doctrine [5] shows that returning gifts is conditioned by the following requirements:

- the engagement must cease as a result of both parties or just one party expressing their will, thus caused by reasons which depend on the fiancée’s will;

- the fiancées received gifts on the occasion of celebrating the engagement, or during the engagement, but for their marriage;
- these gifts are not considered ordinary gifts.

We must note, that in accordance with the above listed provision, the lawmaker does not state that there should be an abuse in order for the gifts to be returned; thus the restitution will occur regardless of what the reason was for the breaking of the engagement and regardless of the party who initiated the breaking of the engagement [6].

The previous regulation also stated that [8] „if the engagement is broken, the gifts of reduced value were considered ordinary gifts and were not to be returned, but if there were gifts of significant value, made to celebrate the engagement and future marriage, these were subject to restitution according to the provision of article 1017 of the old Civil Code, as marriage was assimilated to a suspensive condition, upon which the validity of the gifts made during the engagement depended”.

According to the provisions of article 268 second alignment „gifts are returned in nature of if this is no longer possible, they will be returned by considering the amount of enrichment that they had produced”.

This regulation listed the following comment [7] according to which “restitution in equal amount must not be limited to the extent of the enrichment of the patrimony of one of the parties as it would have been equitable to return the full value of the goods which is impossible to return.

This is based on the fact that in both situations (losing or selling) the responsible fiancée will be guilty of neglect and ingratitude for selling a gift received from the other party”.

According to the provisions of article 268 third alignment of the Civil Code “the

obligation for restitution does not exist if the engagement stopped because of the death of one of the parties” – a normal solution given that the engagement becomes void.

By absorbing those stated by the French jurisprudence, an interesting opinion found in the Romanian specialized literature [7] mentions that “if death was provoked by a third party, accidental or intentional, the living fiancée is entitled to material damages consisting of the expenses made for marriage and moral damages for losing the chance he might have had after marriage, that of benefitting from the obligation to provide which would have been in the duty of his spouse”.

For the abusive breaking of the engagement, the provisions of article 269-270 of the Civil Code are relevant:

1) The party who breaks the engagement in an abusive manner can be forced to pay damages for the expenses made for marriage and for any other prejudices caused by the breaking of the engagement.

2) The party who intentionally determined the other party to break the engagement can be forced to pay damages under the conditions stated in the previous paragraph”.

The criticism brought to this text of law [8] is that it does not provide objective references in order to help the judge to better understand what qualifies as abusive breaking of an engagement. Although there is not a rich judicial precedent in this area, doctrine makes up for this so called „legislative void”.

Hence, in the opinion of some authors [8], the abusive breaking is “an unconformable behavior, sudden and illicit, based on a serious, reasonable and justified reason. These so-called reasons are abusive, because they do not show a real intention of one of the fiancées to get married and such a behavior should be sanctioned”.

As an example, we will mention the breaking of the engagement shortly after concluding it as this situation raises questions regarding the reliability of the person who breaks his commitment so soon after concluding it.

Also, we can qualify as abusive the breaking of an engagement shortly before the date established for marriage, after a cohabitation of the parties for an extensive amount of time, after all necessary preparations for the marriage had taken place and all the expenses had been made for the wedding and after all the necessary documents had been filed [5].

We consider that, in general, establishing the abusive character of an unilateral breaking of an engagement is a matter of fact [1] on which the court will rule, keeping in mind the specifics of each case.

The court can rule on repairing both the moral and material prejudice.

In regard to the expenses, doctrine [8] listed some of them as an example: booking the event location, printing out invitations, ordering the menu and so on.

It is very important to keep in mind that, according to the provisions of article 270 of the Civil Code, the motion for the restitution of the gifts that the fiancées received for the engagement or during it or for their marriage, must be filed within a year from the date the engagement was broken.

This date can be proved with any means of probation available.

The reason [6] for such a short term for filing the motion is that the lawmaker considered a year to be the reasonable amount of time for the facts to still be „fresh” in the minds of those involved, who can testify to the brutal, sudden and abusive breaking of an engagement.

6. Conclusions

Engagement is part of the traditional realities of the Romanian people and, although the old Family Code did not regulate this matter, any litigation was solved by interpreting and applying provisions regarding the legal act and criminal liability.

The new lawmaker wanted to clarify these aspects, and introduced solutions suggested by scholarly literature and confirmed by jurisprudence regarding the practical issues of engagement.

To synthesize, the new regulation refers to:

- background conditions for entering into marriage which are to be applied in case of engagement, except for the medical and tutelage authority authorization; in regard to the formal conditions, there is no specific formality, as engagement can be proved by any means available;

- it is important to keep in mind the fact that entering into marriage is not conditioned by the conclusion of an engagement, as engagement can't force the parties to enter into marriage; thus, engagement is discretionary;

- at the same time, breaking an engagement requires no formality and can be proven by any means available; if the engagement is broken, the gifts received by the fiancées for celebrating the engagement or during it or for celebrating their marriage will be returned, except for ordinary gifts;

- the party who abusively breaks the engagement can be forced to pay damages for the expenses made for the marriage. Also, the party who had intently determined the other party to break the engagement, can be forced to pay damages;

- the legal nature of liability in this case is that of civil liability and the right to file a complaint for repairing the prejudice caused by breaking the

engagement becomes void within a year from the date the engagement had been broken.

In light of the European provisions, we feel that this matter is not to be neglected, as the lawmaker's work benefits us all since the judicial practice is bound to develop new techniques and solutions in this area.

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