CONTROVERSIAL LAW ISSUES IN THE ENFORCEMENT OF THE NEW LEGAL PROVISIONS IN FAMILY LAW

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Abstract

The relatively short period of the new Romainian Civil Code implementation highlights the existence of some controversial law issues regarding the legal provisions contained in Book II, entitled "About family".

Apart from the theoretical disputes, there are also court decisions that contain different solutions in the enforcement of the same legal provisions.

Controversy exists not only in relation to the newly introduced institutions in our legal landscape, but also regarding the ones taken over from the old regulation, institutions that have undergone some changes.

The examples are most varied and they do not bypass almost any matter. Thus, we signal the presence of different interpretations of regulations regarding: engagement, marriage, divorce, parentage, adoption, the legal duty to maintain, the parental authority, etc.

The present study highlights such controversy's by presenting the views expressed and the arguments invoked in their support and also some propositions of Ferenda Law.

Keywords: *Romainian Civil Code, controversial law issues, engagement, divorce, filiation.*

1. Introduction

Conducted during a relatively short time period, the considerable effort of *"modernizing"* romanian legislation and aligning with the international regulatory developments is somewhat *"shadowed"* by the existence of some legislative solutions susceptible of different interpretations or by the absence of provision.

Thus, reffering only to the provisions of the Civil Code regarding family relationships, we find that there are numerous discrepancies in the speciality literature and/or judicial practice. Their existence can be easily noticed from the critical content analysis in terms of legal logic of the various regulations. At the same time, in the process of law enforcement, in many cases, the guardianship courts have ruled differently over the same law issues. In fine, the specialized literature of almost 5 years of implementing the Civil Code revealed different views over the same law issues.

And we could say that this is just the beginning…

The present study highlights only a part of these controversies in matters, such as: engagement, nullity and dissolution of marriage, filiation and legal duty to maintain. Their presentation shows not only theoretical interest, but also significant practical consquences, because from the meaning of a legal provision depends the outcome of a specific case, or in the event of a litigation, or in any other assumptions of enforcing a legal rule.

In the contents of the material are criticaly filtered expressed opinions, arguments invoked in their support and also, solutions that we share.

Likewise, regarding certain aspects, there are formulated *law ferenda* proposals designed to lead to the elimination of gaps or, where appropriate, equivocal formulations and the adoption of some clear legislative solutions, that are able to meet the requirements imposed by the specific family relations and the principles that govern this field.

2. Content

2.1. Controversies on the legal nature of engament, engagement effects and legal nature of the liability in the event engagement breakage

Legal institution having a considerable age (being mentioned in the Old Testament – where it was designated through the Hebrew term *"aras"* – present in the Roman law, Byzantine law, etc.), in essence, engagement represents the solemn covenant of two persons of the opposite sex to marry each other in the future.

Also regulated by the old statues, but omitted by the Romanian Civil Code of 1864, engagement was reintroduced in our law through the new Civil Code, a legislative intervention that has sparked conflicting reactions among specialists in family law. The analysis of this institution also generated ample discussions in doctrine. For example, regarding its legal nature, some authors qualify engagement as a legal act[1], a convention[2], others are

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[1] E. Florian-Considerații asupra logodnei reglementată de noul Cod civil,Curierul judiciar nr.11/2009, p.632; C.C.Hageanu-Dreptul familiei și actele de stare civilă, Ed. Hamangiu,București, 2012, p.15.

[2] I.D. Romoșan-Dreptul familiei, Ed. Universul Juridic, București, 2012, p.30.

letting to believe that it would be about such an act[3], while another author believes that engagement is a *"simple legal fact"*[4].

As far as we are concerned, we maintain our opinion[5] of being in the presence of a legal act, more precisely a legal *sui generis* family law act, a qualification that results primarily from the legal definition of engagement, definition contained by art. 266 paragraph 1 Civil Code. Secondly, the membership of engagement in the category of legal acts is deducted from the implementation of the sanction of nullity in the case of failure to comply with the basis conditions. Thirdly, the fact that the legislator prohibits the insertion of a Criminal law clause leads to a *a contrario* interpretation according to which any other clauses, that are compatible with this institution, are allowed. Finally, it should be noted that engagement does not fall within the legal category of juridical deeds regulated by the Civil Code.

Another controversy was generated by the fact that the law does not indicate the effects of engagement, but confines only to regulate the patrimonial consequences of breaking the engagement. From here it leads to the conclusion that engagement does not give rise to any statute for the engaged persons, thus the analogy with the institution of marriage is not permitted, only the appearance of some *"pseudo-effects at the breaking of the engagement"*. So, basically engagement is a legal act deprived of legal effects[6], the only ones being born at the moment of her tempestuous breakage[7].

We do not share this opinion and we also consider that it is unacceptable that the legislator should be concerned by an institution that lacks any legal effects. If some effects were not expressly provided then it does not mean that they are nonexisting. Also, sanctioning the abusive breaking of engagement or of the culpable determination of the other fiancé to break the engagement presupposes personal relationships conducted in good faith and loyalty between the two fiancés. Even though it does not give rise to a marital action – in order not to affect the matrimonial freedom – engagement generates the juridical condition of engaged persons, thus arising moral as well as legal consequences.

The relations between fiancés fall within the definition of private life, and they are enjoying the legal protection offered, a fact also confirmed by a decision of the former European Commission[8]. From the circumstance that the law penalizes improper conduct of breakage or the determination of the engagement breakage, it is inferred that between the fiancés there are a number of personal rights and duties, similar in principle to those of marriage. Without equalizing the two legal institutions, we can not ignore that both of them are based on the friendship and affection between a man and a woman. That's why we believe that it is not exaggerated to support the existence of some mutual obligations (respect, loyalty, moral support). At the same time, fiancés may agree to live and eventually to take care of the household together, a situation in which engagement can overlap over the state of concubinage.

If children were born from the relationship of the engaged couple, then the couple cohabitation in the legal time period of the conception makes the presumption of filiation against the alleged father applicable. Fiances can choose the matrimonial regime (such an agreement shall take effect from the date of marriage), they can exchange gifts or they can receive them from third parties, they may agree to provide material support for each other, they can aquire assets under common ownership etc.

Reaching a conclusion over these issues, we support that engagement produces both patrimonial and non-property effects, whose legal consequences extent is determined by taking into consideration of the actual content of the agreement between the sides.

In order to remove any doubt about the effects of engagement, we propose the completion of the statutory provisions as specified above.

The legal nature of the liability in the event of a breakage of engagement is not safe from criticism either, under debate being the contractual liability and the tort liability. Under the empire of the current Civil Code, the dominant view is the incidence of liability in tort[9]. In our case, we will remind that in the case of contractual liability, the breached obligation is a concrete one, from those established through contract. So, as we mentioned above, engagement is not a contract, in the common law meaning of the term, but a *suis generis* family law juridical act.

The promise of marriage can not be executed in kind, through the coercive force of the state. Therefore, the contractual nature of the liability is excluded. In the case of tort liability, the breached obligation is a legal obligation, with a general nature that we all share, consisting in the violation of a conduct rule which the law or the local custom imposes or by an infringement brought to the legitimate rights and interests of others. In the matters of engagement we can not speak of a

[3] M. Avram-Drept civil.Familia, Ed. Hamangiu, București, 2013, p.31-32.
[4] A.Gherghe-Noul Cod civil, Studii și comentarii, colectiv coordonat de Marilena Uliescu, vol.I, Ed.Universul Juridic, București, 2012, p.609.
[5] Dan Lupașcu,Cristiana Mihaela Crăciunescu-Dreptul familiei, Ed. Universul Juridic, București, 2012, p.47.
[6] Emese Florian, Considerații..., op.cit., p.633.
[7] S. P. Gavrilă-Instituții de dreptul familiei în reglementarea noului Cod civil, Ed. Hamangiu, 2012, p.12.
[8] C.J.C.E,Cauza Wakefield contra Regatului Unit, 1 octombrie 1990 (Jurnalul Oficial al Uniunii Europene, C189/27).
[9] E. Florian-Dreptul familiei, Ediția 5, Ed. C.H.Beck, 2016, p.29.

violation of a general obligation or a rights infringement or also legitimate interests in the sense mentioned above. Moreover, the person has the right to break off her engagement, without being obliged to marry. The pecuniary sanction only intervenes under the assumption of the abusive exercise of this right, which draws incidence in article 15 conjuncted with art.1353 Civil Code.

Therefore, we are reluctant to qualify as pure tort such a liability, thus sustaining the thesis of liability for the abusive exercise of a recognized legal right.

2.2. Controversies concerning nullity and dissolution of marriage

Towards the fact that the provisions of art.13 para.1 in the Civil Code were not taken over from the Family Code it has been sustained that the failing to display the marriage statement is no longer sanctioned with nullity[10]. It is true that breaching the provisions of art.283 Civil Code is not mentioned among the cases of absolute or relative nullity of marriage, however it must not be ignored that these cases relate to the express nullities, and , outside them, there are virtual non entities, the provisions of the art.1253 Civil Code being applied by analogy.

In our opinion the breach of advertising marriage, regardless of whether it takes the form of denying public access at the celebration of the marriage or not displaying the marriage declaration, attracts the absolute nullity sanction of that clandestine marriage. In support of this opinion we invoke, firstly, the provisions of Article 1, paragraph 1 of the Convention relating consent to marriage, minimum age for marriage and registration of marriages, ratified by Romania by Law no. 116 / 1992, according to which: *"No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."* Secondly, the mandatory wording of the provisions of Civil Code art. 283 maintains the solution of applying the absolute nullity so that the purpose of the violated legal provision to be achieved.

De lege ferenda we propose the completion with this nullity case of the provisions in Article 293, paragraph 1 Civil Code.

Regarding the possibility of granting compensation pursuant to Article 388 Civil Code, in the case of putative marriage, there are two orientations shaped in the specialty literature. Thus, some authors[11] consider that both spouses are subject to the provisions of divorce in regards of patrimonial relations, including the right to damages, regardless of whether both or only one of them was of good faith at the conclusion of marriage. In what concerns us, we share the view that *"both compensatory benefit or the right to damages are specific effects of divorce"*[12], a situation where you can not apply the provisions of art. 388 Civil Code. The husband of good faith can only claim damages under the common law (of civil liability under tort)[13].

In the matter of culpable divorce for solid grounds, if the claimant spouse dies during the process, art.380 para. 1 Civil Code provides for the possibility of the spouses heirs to continue divorce proceedings. The meaning of the *"heirs"* notion in this law text is the subject of a doctrinal dispute. Specifically, an opinion[14] claims that, in the event of vacant succession, the divorce proceedings can be continued by the village, town or, where appropriate, the municipality on whose territorial area the goods were located at the opening date of the inheritance. We do not share this point of view, believing that the territorial administrative unit is not entitled as the legal heir and can not continue the divorce proceedings[15]. We base our view on a text argument. Thus, art. 963 para. (1) and (2) Civil Code limitingly mentions the categories of legal heirs and the next paragraph provides that, in the absence of legal or testamentary heirs, patrimony of the deceased is transmitted to the administrative-territorial unit.

Given the special practical consequences, we believe that legislative intervention is required in this regard.

2.3. Controversy regarding filiation

The fact that the condition in the contents of Article 53 paragraph 2 of the Family Code has not been taken over in the Civil Code – respectively child birth which took place before the mother remarried, has led to different interpretations concerning the solution of the paternity dispute. Opinions are to the effect that art. 414 para 1 Civil Code is unclear, allowing different interpretations[16], for example that it should enforce *"the priority presumption established by the law or by court"*[17], *"that the problem of double paternity will be settled through legal action in the denying paternity*

[10] M. Avram-Drept civil.Familia, op.cit., p.91-92; C.C.Hageanu-Dreptul familiei..., op.cit., p.39.
[11] T.Bodoașcă, A.Drăghici, I.Puie-Dreptul familiei, Ed.Universul Juridic, 2012, p.163.
[12] M.Avram - Drept civil.Familia, op.cit., p.105.
[13] This solution is also sustained in the french doctrine. See, for example: F.Debove,R.Salomon,T.Janville-Droit de la famille,8 e edition, Ed.Vuibert,Paris, 2012, p.153.
[14] M.Avram-Drept civil.Familia, op.cit., p.133.
[15] In the same meaning: M.Tăbârcă, Drept procesual civil, vol.II, Ed.Universul Juridic, 2012, p.669.
[16] S.Guțan-Reproducerea umană asistată medical și filiația, Ed.Hamangiu,2011, p.69.
[17] C.C.Hageanu-Dreptul familiei..., op.cit., p.193.

action"[18], endeavor whereof has been observed, with good reason, that *"it can be foiled by invoking the lack of interest exception*". Case in which, the court or adversary can appreciate that not the attacked presumption is operant, but the other one"[19]. By comparing the provisions of art. 53 para. 1 Family Code (according to: *"A child born during the marriage has as a father the husband of his mother"*) with those of the art. 414 para. 1 Civil Code (according to*:"A child born or conceived during the marriage has as a father the husband of his mother"*), we remark the content difference, namely that the new regulation aims also on conception, not only child birth. Furthermore the conception is placed in the text after birth, which means, in our opinion, on the one hand that it has been desired to also cover the hypothesis of the child's conception before marriage, and on the other hand to enforce an order of preference thus consecrating the solution for the paternity conflict. Therefore, we are not in the presence of a evolutionary legislative change.

An intervention from the legislator would be welcomed to end this dispute in the sense of the full takeover of the old reglementation.

2.4. Controversy regarding the legal duty to maintain

The Article 527 para.2 Civil Code, in accordance with the expressed oppinions found in the specialty literature and with the judicial solutions pronounced in the application of the Family Code, foresaw that the determination of the debtors means of maintenance will be taken into account not only by his income and assets, but also by the possibilities of achieving them.

Therefore, the one who has no income or assets, but it is able to work, can be compelled to the legal duty to maintain, the connecting factor being the minimum wage of the national economy. In the hypothesis in which the debtor resides abroad and has no income even though he is fit to work (in practice were different solutions pronounced). Thereby some courts have established the alimony by taking into account the national minimum wage in the country concerned[20], while others have taken into account the minimum wage of the national economy of Romania[21]. At the first glance, it could be argued that the superior interest of the child demands the alimony that would ensure a higher amount of mainteinance, thus implying a comparison of official data set by the laws in those respective states. Only that this higher interest has a complex content, a content that involves the child should have parents who are enjoying a good reputation in terms of criminal law.

That is why we believe that the solution must be determined concretely, on a case by case basis, also taking into consideration all the relevant elements (the nature of the abroad stay, the time period, the concrete possibilities for earning legal incomes in that country, etc.).

A legislative clarification of this law issue or utilising a unification mechanism of judicial practice from the ones stated in the Civil Procedure Code would also be welcomed in this case.

3. Conclusions

The present material captures some of the doctrinal and jurisprudential divergences that are appearing from the application of the new legal provisions in the family law field.

The approach is complex, being made not only from a theoretical perspective, but also from a largely applicative one. As consequence, the purpose pursued and the result obtained are not only about fully and correctly discerning the complete meaning of the analyzed legislation, but also to avoid the wrong solutions in the process of applying them.

The diversity and polyvalence of regulations, the unique character of the legal rules, the problem of adherence to the national realities of legal provisions inspired by other legal systems, but mostly the question of the adequacy of the current law to the rapidly transforming social needs undoubtedly requires broadening and deepening scientific research.

References:

- M. Avram-Drept civil.Familia,Ed. Hamangiu, București, 2013;
- T.Bodoașcă, A.Drăghici, I.Puie-Dreptul familiei, Ed.Universul Juridic, 2012;
- F.Debove, R.Salomon, T.Janville-Droit de la famille,8 e edition, Ed.Vuibert, Paris, 2012;
- E. Florian-Dreptul familiei, Ediția 5, Ed. C.H.Beck, 2016;
- E. Florian-Considerații asupra logodnei reglementată de noul Cod civil, Curierul judiciar nr.11/2009;
- S. P. Gavrilă-Instituții de dreptul familiei în reglementarea noului Cod civil, Ed. Hamangiu, 2012;

[18] M.Avram-Drept civil. Familia, op.cit., p.376.

[19] E.Florian-Dreptul familiei, op. cit., p.394.

[20] Tribunalul Dolj, s.civ. ,decizia nr. 4/21.01.2010, www.EuroAvocatura.ro; Tribunalul Hunedoara,s.1 civ.,decizia nr.1258/04.12.2015, citată de F.Radu-Pensie de întreținere stabilită în funcție de venitul minim din țara de reședință a pârâtului-cetățean român și care nu realizează venituri, www.juridice.ro, 15 aprilie 2016.

[21] Curtea de Apel Galați- s.minori și familie, decizia nr. 544/09.11.2011, www.EuroAvocatura.ro

- A.Gherghe-Noul Cod civil, Studii și comentarii, colectiv coordonat de Marilena Uliescu,vol.I, Ed.Universul Juridic, București, 2012;
- S.Guțan-Reproducerea umană asistată medical și filiația, Ed.Hamangiu, 2011;
- C.C.Hageanu-Dreptul familiei și actele de stare civilă, Ed. Hamangiu,București, 2012;
- Dan Lupașcu, Cristiana Mihaela Crăciunescu-Dreptul familiei, Ed. Universul Juridic, București, 2012;
- I. D. Romoșan-Dreptul familiei, Ed. Universul Juridic, București, 2012;
- M.Tăbârcă-Drept procesual civil, vol.II, Ed.Universul Juridic, 2012.