

THE DECLINING LEGAL SIGNIFICANCE OF THE INSTITUTION OF ENGAGEMENT IN THE LAW OF THE CATHOLIC CHURCH*

The institution of engagement appeared in the lives of some people in pre-Christian times. Great cultures (Jewish, Greek, Roman, German) – besides empowering an engagement with external rituals and ‘legal effects’ – had a common element: they regarded it as a temporary condition that preceded a matrimonial consent.¹

Christianity drew inspiration from the institutionalized traditions and customs of the engagement of the above-mentioned religions and cultures. However, the institution of engagement, as a promise of marriage for the future, has differed greatly throughout the history of the Catholic Church. On the one hand, the pastoral preparation as a possible way to prevent nullity of marriage has been getting more and more vital either in ecclesiastical documents² or in canon law literature³ on the other hand,

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1 Hanuy, Ferenc: *A jegyesség és a házasságkötési forma kifejtődése a Ne temere decretumig*, Stephaneum Nyomda, Budapest, 1912, 3-14

2 Benedict XVI: *Allocuzione alla Rota Romana*, 28/1/2006, AAS, 98 (2006) 135-138; Pope Francis: *Allocuzione alla Rota Romana*. 22/1/2016, L'Osservatore Romano, 23 gennaio 2016.

3 Gavin, Fintan: *Pastoral Care in Marriage Preparation (Can. 1063): Pastoral Care in Marriage Preparation (Can. 1063): History, Analysis of the Norm and Its Implementation by Some Particular Churches*. Università Gregoriana, Roma, 2004; Pocalujko, Tomasz: *La prevenzione della nullità del matrimonio nella preparazione e nell'ammissione alle nozze con una considerazione del contributo dei tribunali ecclesiastici*, Università Gregoriana, Roma, 2011; Interguglielmi, Antonio: La preparazione degli sposi al matrimonio: una panoramica pastorale-giuridica, in *Studium Theologicum Galilaeae*, 59/1 (2016) 106-118; Viladrich, Pedro-Juan: La dimensione giuridico-canonica della preparazione al matrimonio, in Ortiz, Miguel (a cura di): *Ammissione alle nozze e preparazione della nullità del matrimonio*. Giuffrè, Milano, 2005, 105-13; Bianchi Paolo: La valutazione dell'esistenza di un vero consenso nell'ammissione al matrimonio, in Ortiz, Miguel (a cura di): *Ammissione alle nozze e preparazione della nullità del matrimonio*. Giuffrè, Milano, 2005, 187-211; Aixelri Gas I Montserrat: Ammissione al matrimonio sacramentale e fede dei nubenti, in Ortiz, Miguel (a cura di): *Ammissione alle nozze e preparazione della nullità del matrimonio*. Giuffrè, Milano, 2005, 257-278; Romer, Karl Joseph: *È possibile prevenire le nullità matrimoniali per incapacità consensuale?* Prospettiva pastorale, in Ortiz, Miguel (a cura di): *Ammissione alle nozze e preparazione della nullità del matrimonio*. Giuffrè, Milano, 2005, 283-290; Cattaneo, Arturo: Gli “incontri per fidanzati”: Importanza, problem e spunti di soluzione al fine di prevenire nullità matrimoniali, in Ortiz, Miguel (a cura di): *Ammissione alle nozze e preparazione della nullità del matrimonio*. Giuffrè, Milano, 2005, 361-364; Franceschi, Héctor: Preparazione al matrimonio e prevenzione della nullità. in Ortiz, Miguel - Franceschi, Héctor (a cura di): *Verità del consenso e capacità di donazione*, EDUSC, Roma, 63-101.

the significance of classic legal regulation of engagement has disappeared. Due to changed social situation, a promise of marriage for the future, which is the institution of engagement, has lost so much of its significance, moreover its legal regulations have become formal inside the Catholic Church.⁴

In this short study, on the one hand, this formal, 'legal' background is shown, on the other hand, I would like to examine those social aspects that justified the current ecclesiastical jurisdiction becoming rather moderate in the regulation of this former legal form.

1. THE INSTITUTION OF ENGAGEMENT IN THE CURRENT CODE OF CANON LAW

The last preliminary canon of marriage law (Can. 1062) deals with the promise of marriage for the future, with the institution of engagement.⁵ As engagements have less and less social and legal significance nowadays, Canon 1062 summarizes the legal regulations regarding engagements shortly and straightforwardly.⁶

The 1983 Code of Canon Law attaches importance to both unilateral and bilateral promise. However, a true engagement is always a bilateral promise in which, people qualified by law seriously, freely and mutually promise to marry each other in the future.⁷ In case of a unilateral promise only one party promises a future marriage.⁸ The promise which forms the state of an engagement should not be confused with a matrimonial consent.⁹ Unfortunately, the words of Canon 1062 – "*matrimonii promissio*" – do not reveal the different characters of the two promises.¹⁰

The former Code of Canon Law (Can. 1017.) spoke about the different functional aspects of a betrothal. On the whole, these functional regulations meant the validity conditions of the issue. The former Code of Canon Law specified the functional

4 For various aspects of socio-cultural changes from point of view catholic marriage see: Lanza, Sergio: L'approccio pastorale ai nubendi: possibilità e limiti della loro conoscenza da parte dei pastori e della preparazione alle nozze. in Ortiz, Miguel (a cura di): *Ammissione alle nozze e preparazione della nullità del matrimonio*. Giuffrè, Milano, 2005, 49-75.

5 Abbate, Antonio: *Il matrimonio nella nuova legislazione canonica*. Paideia Editrice, Antonio, 1985, 32-33.

6 Therefore everyday questions regarding an engagement, such as the date of the marriage, sharing the duties during the preparations, the reinforcing oath, or dowries are not regulated legally.

7 „Sunt vero sponsalia promissio vera ac mutua futuri matrimonii, deliberate ac libere facta, signoque sensibili expressa inter personas determinatas et de jure habiles.” Simon Aichner: *Compendium Juris Ecclesiastici*, Brixiinae, Typis et sumptibus Wegerianis, 1890, 554.

8 Sipos, István: *Házasságjog rendszere*, Haladás Nyomda Részvénytársaság, Pécs, 1940, 42-43.

9 Therefore a distinction is made terminologically between '*sponsalia de futuro*' and '*sponsalia de presenti*'. The former refers to a future marriage contraction, and latter to the matrimonial consent itself. Sipos, István: *Házasságjog rendszere*, cit. p. 40; Aichner, Simon: *Compendium Juris Ecclesiastici*, op. cit. 554.

10 Serrano José Ruiz: *L'ispirazione conciliare nei principi generali del matrimonio*. in Adolfo Longhiano (ed.): *Matrimonio canonico fra tradizione e rinnovamento*, Dehoniane, Bologna, 1991, 89-90

regulations in the written form,¹¹ in the signature given by specified people and in the presence of the specified people – a local ordinary or a parish.

Now, the “technical” regulations can be defined by the particular law issued by the Conference of Bishops, which takes the traditions of a particular country into consideration. Despite this possibility, it is rare that the Conference of Bishops formulate explicit technical regulations regarding engagements.¹² On the contrary, sometimes the conference directly declares that they do not wish to take this opportunity.¹³ In some countries, only the book of the engaged exists, but there are not any special forms regarding the engagement. In another case, they underline not only do not want to regulate the form of engagement, but the local and existing customs and practices of communities or tribes have to be preserved. In this case local bishops must primarily evaluate these customs.¹⁴ But the delegation of local conferences of bishops and bishops can derive from conciliar concept of subsidiarity,¹⁵ but I suppose the real reason of the delegation derives from the little canonical significance of engagement.

But the changing is understandable from other point of view as well: as the traditions tied to an engagement and its significance differ from country to country considerably.¹⁶ The legislator returned to the practice before the times of codified law

11 For the previous Code: Wrzaszczak, Chester: *The Betrothal Contract in the Code of Canon Law (Canon 1017)*, Catholic University of America, Washington, 1954. Writing did not mean that the documents were made by the parties themselves. It could be a form. Although the year, month and day had to be indicated, so that the document could reveal definitely whether it was an engagement or a future marriage promise. SC. Cons., Decl., 27/08/1908, AAS 41 (1908) 512. The place indicated only whether the competent ordinate or parish proceeded. Sipos, István: *Házasságjog rendszere*, op. cit. 42-43. In the former CIC defined qualified witnesses are the local ordinate or parish priest who could not delegate their duties. SC. Cons., Decl., 28/03/1908, AAS 41 (1908) 289.

12 Beal, John: Comment on Canon 1062, in Beal, John – Coriden, James – Green, Thomas (eds.): *New Commentary on the Code of Canon Law*, Paulist Press, New York, 2000, 1259; Italian Episcopal Conference, *Notiziario CEI* 9 (1983) 210.

13 Like in case of United States Conferences of Catholic Bishops. „Complementary Norm: The National Conference of Catholic Bishops intends to issue no norms regarding the promise of marriage as mentioned in canon 1062, §1, without prejudice, however, to the prescriptions of canon 1062, §2 regarding an action for reparation of damages.” United States Conferences of Catholic Bishops: <http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/complementary-norms/canon-1062-1-engagement.cfm> (Downloaded: 16/04/2020).

14 Like in case of Conference of Catholic Bishops of India. „The C.C.B.I. does not enact any particular law for engagement before marriage, but leaves the matter of engagement to the existing practices or to the local customs of the community or tribe, provided, in the judgement of the diocesan Bishop of the Regional Episcopal Conference, these are acceptable to the Church.” Conference of Catholic Bishops of India: *Complementary Legislations to the Code of Canon Law*. CCBI, Centre, Bombay, 1995, 8.

15 Cattaneo, Arturo: *Fondamenti ecclesologici del Diritto Canonico*, Marcianum Press, Venezia, 2011, 168.

16 Concerning the technical elements, old authors emphasized, as in case of a marriage, there was the possibility to proceed through a representative on behalf of the parties. Ferreres, Juan: *Los Esponsales y el Matrimonio*, Administración de Razón y Fe, Madrid, 1909, 203. They also added that in this case, contrary to the assistance in a marriage, the assignment had no technical requirements. Today, the regulation of this question seems to have become under the competency of the particular law.

when an engagement was not regulated technically for the whole universal Church. Today, the viewpoints of validity are minimal: a promise made decidedly and clearly either in writing or orally.

The current regulation refers to taking into account not only local traditions but also the secular legislation of a country. This fits the views of the Second Vatican Council and the general approach of CIC according to which secular laws must be taken into account if it is possible. Today, however, we can say that, as regards the secular legal systems, an engagement has no or hardly any legal relevance.¹⁷ The current CIC - similarly to the former Code of Canon Law - does not take a position on the issue concerning 'the couple getting engaged'. It does not show if there are any disqualifying laws concerning the legal capacity of the couple, which could make them unable to establish 'the state of engagement'. It is obvious that those general principles that are needed to execute a legal act, are also the conditions of giving a future promise of marriage.¹⁸ That is to say, legal capacity, the sufficient use of reason, reaching the age of seven, (Can. 11.)¹⁹ which is needed to all legal acts, as well as needed to engagement.

Apart from the general principles, an engagement has special conditions of validity. Namely, the one who for some matrimonial impediments cannot marry validly, cannot make a promise for the same marriage to be contracted in the future either.

However, provided there is an impediment of marriage between the parties - according to certain viewpoints -, a future matrimonial promise is invalid if a dispensation cannot be granted from the impediment itself. As, according to the view of the Church, if the diriment impediment exists on the basis of 'divine' or 'natural' law (antecedent and perpetual impotence to have sexual intercourse, (can. 1084, §1) a current and valid marriage bond (can. 1085), a consanguinity regulated according to canon 1091), the ecclesiastical authorities cannot grant dispense.²⁰ In this case a future promise cannot be made either, because it will not be possible to contract the marriage. At the same time, some authors express that the promise or the engagement is valid when the church authority can dispense from the impediment or the impedi-

17 In 1986, the Conference of Bishops in Spain decided to adopt - as in case of each contract - the secular regulations regarding the future marriage promise. Bañares Juan Ignacio: Comment on Canon 1062, in Marzoa, Ángel - Jorge, Miras - Rodríguez-Ocana, Rafael (eds.): *Exegetical Commentary on the Code of Canon Law*, Wilson and Lafleur, Montreal, 2004, Vol. III/2, 1109.

18 For the general principles: García Martín, Julio: *Le norme generali del Codex Iuris Canonici*, Roma, Ediurcla, 2002, 92-98.

19 Some authors expressly doubted the validity of the engagements between partners who reached the age of seven but did not reach the age of being able to enter into a valid marriage. Sipos, István: *Házasságjog rendszere*, Cit. p. 42. At the same time, it contradicts the principle which says that a valid engagement needs the same conditions as a matrimonial consent. See also Dossetti, Giuseppe: *La formazione progressiva del negozio matrimoniale canonico. Contributo alla dottrina degli sponsali e del matrimonio condizionato*, Facoltà di Giurisprudenza della Università di Modena, Bologna, 1954.

20 D'Auria Angelo: *Gli impedimenti matrimoniali*. Lateran University Press, Roma, 2002, 64-85; 93-98; 178-186.

ment may pass by time, but the promise must be conditional. So, the marriage can be contracted only when the impediments have passed.²¹

Others think that a future marital promise is always invalid if there is a marriage impediment between the parties, as they promise a legal act which they are not able to carry out at the time of the promise.²² The former ecclesiastical practice supported the latter view, as when the ecclesiastical authority granted the exemption from the impediment, it asked for the renewal of the marriage promise at the same time.²³

A future promise of marriage – either unilateral or bilateral – must address a defined person. A promise given in general or to more parties at the same time is not valid. As the future promise is a personal decision too, the parties with legal capacities do not need a third party's – not even the parents' – agreement. But the underage, who belong to the family and are under the parents' control, must be warned that they cannot contract a marriage legally when the parents are unaware or reasonably opposed. (Can. 1071, 6°).

Naturally, today the significance of the above mentioned is less important than in case of a real matrimonial consent. On one hand, the parties can be dispensed from the dispensable impediments until the marriage, so they can contract a marriage validly. It is irrelevant whether they were legally competent during the engagement to give the consent of marriage. On the other hand, it is not the matrimonial consent yet, which is a qualified legal act that establishes the complete community of life and love, a bond that radically changes the legal status of the parties to one another.

2. THE LEGAL CONSEQUENCES OF A FUTURE PROMISE OF MARRIAGE

The future promise of marriage had different legal and moral consequences throughout history. Today an engagement has no legal but rather moral consequences. It means that the engaged cannot have an affair with a third person, which disturbs the relation.²⁴

Legal consequences regarding the engagement were the most significant in the Middle Ages. Unlike Roman and codified Canon Law, a legal action could be brought to contract a marriage.²⁵ Obviously, it was problematic, because the free consent could not be superseded by any power, so not even by a judicial decree ordering the contraction of the marriage. Therefore, in most cases, the jury decree ordered other kinds of compensation in the Middle Ages.

21 Sipos, István: *Házasságjog rendszere*, op. cit. 42.

22 Not every author agreed with the validity of the conditional promise "if the exemption is given". Aichner, Simon: *Compendium Juris Ecclesiastici*, op. cit. 555.

23 Aichner, Simon: *Compendium Juris Ecclesiastici*, op. cit. 556-557.

24 Gasparri, Pietro: *Tractatus Canonice de Matrimonio*, Paris, Vol. II., 1892, 40-42.

25 Szeredy, József: *Egyházjog*, Madarász Viktor Könyvnyomdája, Pécs, 1883, Vol. II, 1214.

The future promise of marriage, or engagement had another significant consequence: a double marriage impediment. The first one was a prohibitive impediment that prohibited the parties to get married to a third person. The second one was a diriment impediment that was in connection with public propriety. According to this neither parties could marry the partner's next of kin. The range of the impediment, namely to which degree relative it was extended to, changed several times. In the first times it was extended to fourth-degree relatives, but the decision of the Council of Trent extended it to only first-degree relatives.²⁶

Today, these impediments do not exist. As the list of marriage impediments is quite comprehensive in the Code of Canon Law (can. 1075. par. 2. §, Can. 1076), there is no reason to suppose that an engagement has any effect on the validity of a marriage with a third person. So, when an engaged partner marries a third person, which is morally questionable, their marriage – if there are no other impediments – will be valid. The above mentioned second marriage impediment, when an engaged partner marries the other partner's relative, does not exist in the codified law.

Although, the impediment of public propriety can appear if the engaged live in “public concubinage” (Can. 1093). Concubinage is a permanent, non-marital sexual intercourse between people of different sex. If it is public, so it can be proven in an objective forum, the engaged cannot marry the other partner's first-degree relatives (Can. 1093).

In the current law the legal consequences of a future promise of marriage are very little. No obligation derives from a future promise for the engaged to contract the marriage. The approach of the CIC is logical, because if the legislator ordered any obligations regarding the marriage contraction, they would be contradictory both with the right of choosing your life state freely (Can. 219) and the right to the marriage, with *ius connubii* (Can. 1058).²⁷ So a future promise of marriage does not obligate the partners legally to contract the marriage.²⁸

The legislator only obligates the partner that causes damage with breaking the future promise of marriage to compensate for the other's losses. The compensation relates to both malice and negligence. (Can. 128). The method of the compensation is not discussed either in the general norms (Can. 128) or in the section about the promise of marriage (Can. 1062). However the general view is that if the damage was material, the compensation should be material as well. If the damage is moral, the compensation should be moral as well. Another general principle is that the compen-

26 Vermeersch, Arthur – Creusen Joseph: *Iuris Canonici cum Commentariis*, Dessain, Romae, 1927, vol. II, 175.

27 Certain authors state that this way the Church tries to avoid a bad marriage being contracted. Cp. Jone Heribert: Comment on Canon 1017 of 1917 CIC in id., *Gesetzbuch des kanonischen Rechtes Erklärung der Kanones*, F. Schöningh, Wien-Zürich, 1940, 211.

28 Therefore some authors call the engagement “alternative obligation”. Cp. Bañares Juan Ignacio: *Comment on Canon 1062*, op. cit.1106.

sation should be the same amount as the damage.²⁹ But today, usually in any serious case the offended party turns to civil court to require compensation. So, this reference of the Code of Canon Law is highly theoretical as well.³⁰

3. DISSOLUTION OF AN ENGAGEMENT

Because of few legal effects, it can be clearly seen that neither the current law nor its academic literature do not deal with the dissolution of engagement. On the contrary, the old literature discussed the possible dissolution of the engagement thoroughly because of its greater significance.³¹ As a future promise of marriage does not have the stability of a marriage consent, it can be dissolved unilaterally or with common agreement. The dissolution has no formal norms.³² CIC does not mention what should be done if under the engagement if one partner becomes incompetent – for any reason - to make a valid marriage consent. It seems logical that the engagement dissolves *ipso iure*, as one or both of them cannot fulfil their promise and the goal to which the engagement serves as a preparation.³³

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29 Thériault, Michel: Comment on Canon 128, in Marzoa, Àngel – Miras, Jorge – Rodríguez-Ocana Rafael (eds.): *Exegetical Commentary on the Code of Canon Law, Wilson and Lafleur*, Montreal, 2004, Vol. I, 813-814; Chalmers, Margaret: The Remedy of Harm in accord with Canon 128, *Studia Canonica* 38 (2004) 111-154; Hendriks, Jan: Canone 128: Riparazione del danno. Obblighi e responsabilità del Vescovo Diocesano, *Ius Ecclesiae*, 15 (2003) 447.

30 D'Auria, Angelo: *Il matrimonio nel diritto della Chiesa*, Lateran University Press, Roma, 2007, 66.

31 Szeredy, József: *Egyházjog*, op. cit. 1215-1220; Sipos, István: Házasságjog rendszere, op. cit. 52-53; Gasparri, Pietro *Tractatus Canonici de Matrimonio*, op. cit. 45-66; Wernz Franz Xaver –Vidal, Petrus: *Ius canonicum, ius matrimoniale*, Apud Aedes Universitatis Gregoriana, Romae, 1925, 131-139; Vermeersch, Arthur – Creusen, Joseph: *Iuris Canonici cum Commentariis*, op. cit. 175-176; August Knecht: *Handbuch des Katholischen Eherechts*, Herder, Freiburg, 1928, 156-162.

32 Knecht August: *Handbuch des Katholischen Eherechts*, op. cit. 156-157.

33 This category includes when one of the partners enters a consecrated community, or the man picks up the sacred order. Sipos, István: Házasságjog rendszere, op. cit. 52.