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APPLICABILITY OF FREEDOM OF CONTRACT PRINCIPLE IN MATRIMONIAL REGIMES UNDER RWANDAN LAW: A COMPARATIVE STUDY

This final project is presented in partial fulfillment of the requirements for the award of a Bachelor's Degree in Law (*LL.B*).

By

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DECLARATION

I, Emmanuel TURATSINZE, hereby declare that, to the best of my knowledge, the work presented hereinafter "***Applicability of freedom of contract principle in matrimonial regimes under Rwandan Law: A Comparative Study"*** is my original work. It has not been presented elsewhere as a dissertation or for any other academic purpose. For other sources that were consulted while carrying out this work, references were duly provided in footnotes and bibliography.

Date: June 24, 2014

Signature……..

Emmanuel TURATSINZE

DEDICATION

This dissertation is dedicated:

To the Lord Christ mighty God,

To my late mum MUKASINE Séraphine, my Grand Parents NIRERE Rita Marie and GATANAZI Athanase and my beloved aunt UMURERWA Appolinarie

To the rest of my family, friends and Colleagues,

To the New Generation Rwanda,

To Ingangurarugo Family.

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Beautiful Families I met at University are one of the things which will always keep my heart remember my life in campus. My sincere acknowledgment to the contribution of New Generation Rwanda, Ingangurarugo Family and so forth. Last but not least, my sincere consideration goes to my family which was always behind my everyday life success. Your Love and Compassion towards my success made it real. May God bless you All.

TURATSINZE Emmanuel

LIST OF ABBREVIATIONS AND ACRONYMS

§	: Sub-section.
ART.	: Article.
DOC.	: Document.
ED	: Edition.
ETC	: *et cetera.*
HTTP	: Hyper Text Transfer Protocol.
Ibid	: *Ibidem*.
LL.B	: *Legum Baccalaureus.*
No	: Number.
O.G	: Official Gazette.
Op.**cit**.	: *Opera Citato.*
p.	: Page.
Para	: Paragraph.
UK	: United Kingdom.
US	: United States of America.
V.	: Versus.
WWW	: World Wide Web.

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CHAPTER O: PRESENTATION OF THE TOPIC

0.1 INTRODUCTION

The freedom of contract also known as "autonomy of the will" is a key principle that is followed in all types of contracts. It implies that people are free to organize their relationships, undertakings and to conclude any contract that is suitable for them.[1] F. ZIGIRINSHUTI goes on arguing that the freedom of contract principle permits any individual to enter into any contract with the other and the law enforces those agreements.[2]

From the above definition, as many authors argue, for parties to organize their contract in a way suitable to them, there are some guarantees that must be considered. For instance, E. BUTCHER explains that the freedom of contract principle implies 3 main guarantees recognizable as influenced by Swiss Law: parties must have freedom to conclude or not conclude a contract as well as freedom to choose who to contract with, freedom to determine the content and the terms of contractual provisions and then the freedom to depart from the types of contract as presented in their Code of obligations.[3] As it appears, the later gives parties the right to make any other contract even though it might not be provided in their law regulating contracts.

However, this freedom is not unlimited, but in a way also benefitable to individuals. As the above author has mentioned, this principle can only be restricted by reasonable regulations to prohibit actions contrary to public order, policy or contrary to good morals (*contra bonus mores)*; besides as he adds, regulations must be reasonable and legal.[4] The other thing but which is the result of the principle of freedom of contract is that it can be restricted by the parties' will. This research will specifically talk about the matrimonial regimes and see the applicability of this principle under such contracts as far as Rwandan law is concerned.

[1] F. ZIGIRINSHUTI, *The Specific Private Contracts,* NUR-LLB III, reader for students, 2013-2013, p. 1.

[2] *Ibid.*

[3] E. BUCHER, *The Law of Contracts*, 3rd ed, Kluwer Law International, The Hague, 2008, p. 5.

[4] *Idem,* p. 2.

On the other side, Matrimonial regimes for the purpose of this study will refer to the contract accessory to the marriage, which prospective spouses opt for when entering into marriage, regarding the management of their properties.

This definition is not an innovation of the present research; as it is defined by different authors, the matrimonial regime it is mentioned above consists of "a body of rules governing the agreement between spouses on the management of their property."[5]

The matrimonial property regimes are also provided for under Rwandan law, as we find it in the Law no 22/99/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, especially in its article 2 which stipulates that "Upon entering marriage spouses shall choose one of the following matrimonial regimes: 1. community of property; 2. limited community of acquests; 3. separation of property. In case no provision is made, the spouses shall be deemed to be married under the regime of community of property."[6] It is obvious that it provides for 3 options of matrimonial regimes to opt for.

Both the principle of freedom of contract and matrimonial regimes are not of today's innovation, but they take roots in very traditional legal institutions. In 1888, the dissenting judge in the case *Powell vs Pennsylvania*[7] argued that the liberty protected by the due process clause saying that "the right of man to be free in the enjoyment of the faculties with which he has been endowed by the creator, subject only to such restraints as are necessary for the common welfare."[8]

5 L. RAUCENT, Les *Régimes Matrimoniaux*, 3rd ed, Bruxelles, Bruyants, 1988, p. 21, in F. KAROMBA, *Matrimonial Regimes, Liberalities and Succession,* NUR-LLB, Class notes, 2012-2013, p. 10.

6Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G*. no 22 of 15/11/1999, article 2.

7 U.S Supreme Court, "*Powell vs Pennsylvania*, 127 U.S.678, 1888 in D. E. Bernstein, "freedom of contract", *George Marson University*, p. 2," available at <<http://ssrn.com/abstract_id=1239749>, last accession on 16/04/2013.

8 U.S, Supreme Court, "*Powell vs Pennsylvania*, 127 U.S.678, 1888 in D. E. Bernstein, "freedom of contract",

From this point of view, one may retain that from long time ago this principle was considered as natural to human beings. Therefore, it evolved as the law developed especially the law of contracts.

For instance, Richard Craswell, in referring to the powerfulness of this principle as regards to the laws of contracts, argued that most of contract law consists of rules that only apply when parties fail to address a given topic or is unclear.[9]

As the above author says, in all cases parties are free to agree otherwise. This study will come to know if basing on Rwandan law parties to matrimonial property regime are free to determine otherwise as far as their properties are concerned.

0.2 PROBLEM STATEMENT

When you go through both concepts, notably, the principle of freedom of contract (contractual autonomy) and the way matrimonial regimes are provided under Rwandan law, there seem to be some divergences. On one side, the principle of freedom of contract implies that parties are free to determine the contents/provisions of the contract, to conclude a contract or not and free to choose who to contract with. On the other hand, the law on matrimonial regimes provides only for 3 options to choose while concluding matrimonial regimes, which seem to be limiting the freedom of parties, since there might appear other form of regimes, which are actually found in other legislations like the Philippines where they have 4 types of matrimonial regimes.

Besides, the above mentioned law strictly says in its article 3, orders those who chose the regime of community of property to put **all** their assets in joint ownership without any

George Marson University, p.2," available at http://ssrn.com/abstract_id=1239749>, last accession on 16/04/2013.

[9]R. CRASWELL, "Freedom of Contract", p. 3 available at <http://www.law.uchicago.edu/files/files/33.Craswell.FrdmCntrct_0.pdf>, last accession 11/06/2014.

deduction or additional clause.[10] But in reality one may wish the community of property regime but want to preserve inheritances he/she will get from his/her ascendants so as to keep it in the family. The same situation may also exist in the regime of acquests in which the law obliges those who opted for it to jointly own all their future earnings including donations, legacy and so forth[11] while one may want only to mix what they will earn except donations for instance so as to keep them personal.

All these issues are normally allowed in contracts by the principle of freedom of contract, in the sense that parties are free to determine the contents of their contract so as to conclude the one suitable to their will, as the explained above. However, they are prohibited by the law on matrimonial regimes, which does not avail the possibility of inserting or reducing anything from the provisions of that law on a given regime. If spouses choose it, they take it as it is. In this study, one will assess if the matrimonial regimes in Rwanda comply with freedom of contract that entails the freedom to conclude a contract suitable to the parties' will.

0.3 PURPOSE OF THE STUDY

This study will serve various objectives to the Rwandese society notably;

To let legislators and other people who participate in making or amending laws know some unclear issues that are in the law regulating matrimonial property regimes in Rwanda, specifically the law N^{o} 22/99/1999 Regulating Matrimonial Regimes, Liberalities and succession, so that it may seem less restricting the freedom of prospective spouses.

It will provide all readers with the wide knowledge of how matrimonial regimes are regulated

[10] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G*. n$_{o}$ 22 of 15/11/1999, article 3.

[11] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G*. n^{o} 22 of 15/11/1999, article 7.

in some other jurisdictions, and consequently this will help understand the principles on which our law is standing.

It will provide possible suggestions of solutions to research questions posed in this proposal, and others surrounding this topic.

One may not ignore that this research is also my course work that will be evaluated for my academic completion of bachelor degree.

0.4 SIGNIFICANCE OF THE STUDY

This research is of great importance in the sense that one should know the possible solutions that may be available to different insufficiencies in our laws. Specifically, in the matrimonial regime people might probably be wanting to modify some elements that they want to change in their patrimonial property and not find the way out of it, but through reading this study one will see other alternatives as used in other jurisdictions or deriving from ideas of different authors.

This research is so important also because parties to any contract, including matrimonial regimes, need adequate freedom to enable them conclude a fitting their will. If no, it will not be easy to comply with it.

0.5 RESEARCH QUESTIONS

In this study, my research will be lead by various research questions to mention but a few:

1. To what extent is the principle freedom of contract (contractual autonomy) granted under Rwandan law regulating matrimonial regimes?
2. Are parties endowed with freedom to determine the contractual provisions of their matrimonial regimes?
3. Can parties include some additional clauses in their matrimonial regime provisions other than those stipulated by the law?

4. What measures can be taken to let matrimonial property regimes meet with the will of everyone concerned?

0.6 HYPOTHESIS

The hypotheses to the research questions might probably be:

1. The principle of freedom of contract is very limited by the Rwandan law on matrimonial regimes and restrictive to the extent that parties remain with the rights to adhere to them or not, and consequently it becomes like a contract of adhesion.
2. The parties to matrimonial regime do not have right to determine the terms of their contract.
3. The law should let spouses have rights to draft their matrimonial regime provisions basing on the ones provided by the law or any other they seem suitable to them because they are the one tobe affected by it, so long as they do not act contrary to public order and good morals.

0.7 RESEARCH METHODOLOGY

The techniques that will be used in conducting this research will include analysis of different doctrines as stated by various legal scholars, through consulting books and other different publications. Besides consulting books, the research will also have to go through case laws and the provisions of different legal documents, interpretations of reports produced by different institutions concerned by the issue.

0.8 SCOPE OF THE RESEARCH

For the purpose of the present study, my research will not entail all theories underlying the freedom of contract but will only be limited to its application in the specific regimes, and not in all contracts. It should also be noted that the study will not analyze the matrimonial regimes in general but rather in the Rwandan jurisdiction context, even though the study will have a look at other different legislation's provisions, with the purpose of having the Rwandan

position's picture. This will lead this research to making a comparative study of different systems as regards to the regulation of their matrimonial regimes.

0.9 OUTLINE

This study will be structured mainly in 2 chapters notably; the first will be dealing with "General Overview on the principle of freedom of contract and the matrimonial regimes;" in which the study will elaborate on general notion on the principle of freedom of contract and its applicability under Rwandan law comparing to other jurisdictions, and elucidate general notions on matrimonial regimes, its status in Rwanda as well as in other jurisdictions.

On the other hand, the second chapter will be analyzing "the incidence that the principle of freedom of contract has on matrimonial regimes;" where the applicability of this principle in matrimonial regimes will be discussed, assessing the extent to which this principle is granted under Rwandan law regulating matrimonial regime, the scope of choice to parties as well as the freedom of spouses in determining the contents of the marital contract, in comparison with other jurisdictions.

CHAPTER I: GENERAL OVERVIEW ON THE PRINCIPLE OF FREEDOM OF CONTRACT AND MATRIMONIAL REGIMES

The first chapter aims at giving to the reader the basic understanding of the theories surrounding the research topic, thus exposing the general overview and notions on the freedom of contract and its observance under Rwandan law in comparison to other jurisdictions and then elucidate on the concept of matrimonial property regimes under Rwandan context in comparison to other jurisdiction while tackling key problematic issues encompassed in those regimes.

SECTION I: GENERAL NOTIONS ON FREEDOM OF CONTRACT PRINCIPLE

The first section of this chapter is to encompass definition of the principle in question as such, making an overview on its historical background, and furthermore discussing the freedom of

contract in Rwandan context, in comparison to other jurisdiction, paying an emphasis mainly to points of differences and few similarities if any. The section is subdivided into four paragraphs as shown in the following literature.

§1 Definition

It would not sound well for someone to define the principle of freedom of contract or autonomy of the will, without starting first on what the will is. According to Jonathan Edwards, "the will is that by which the mind chooses anything. The faculty of the will is that by which it is capable of choosing; an act of the will is an act of choice."[12]

The freedom of contract also known as "autonomy of the will" is a key principle that is followed in all types of contracts.[13] This principle implies that people are free to organize their relationships, undertakings and to conclude any contract that is suitable for them.[14]

F. ZIGIRINSHUTI goes on arguing that the freedom of contract principle permits any individual to enter into any a contract with the other and the law enforces those agreements.[15] From this definition, different authors argue that for parties to organize their contract in a way suitable to them, there are some guarantees that must be considered.

For instance, E. BUTCHER explains that the freedom of contract principle implies 3 main guarantees recognizable as influenced by Swiss Law: "parties must have freedom to conclude or not conclude a contract, freedom to choose who to contract with, freedom to determine the content and the terms of their contractual provisions and then the freedom to depart from the

[12] J. EDWARDS, Jonathan Bennett, "Freedom of the Will", 2007, p. 1, available at <http://www.ntslibrary.com/PDF%20Books/Jonathan%20Edwards%20Freedom%20of%20the%20Will.pdf>, last accession on 27/04/2014.

[13] USLEGAL, "freedom of contract law and legal definitions", at <http://definitions.uslegal.com/f/freedom-of-contract>, last accession on 27/04/2014.

[14] F. ZIGIRINSHUTI, Op. Cit., p. 1.

[15] *Ibid.*

types of contract as presented in their Code of obligations,"[16] which on my point of view gives parties the freedom to make any contract even though it might not be provided in their law regulating contracts.

To sum up, one may retain the definition of freedom of contract as given by Stefan GRUNDMAN, who called it a *"*self-arrangement of legal relations by individuals according to their respective will*"*[17]

However, this freedom is not unlimited, but in a way also benefitable to individuals. As the above author has mentioned, this principle can only be restricted by reasonable regulations to prohibit actions contrary to public order and policy or contrary to good morals (*contra bonus mores)* and besides as he adds, regulations must be reasonable and legal.[18] The other thing but which appears as a result of the principle of freedom of contract is that it can be restricted by the parties' will.

Thus, having deepened the definition of the principle which constitutes the subject matter of the research, it would not be fair to go further without tackling the historical background of the principle. The background will elaborate on the evolution of the freedom of contract with the aim of helping understand its essence.

§2 Historical background of the principle

The principle of freedom of contract is not of today's innovation. It appears much far in the history of law of obligations. Professor David E. BERNSTEIN finds the potential foundation of this principle in the provisions of article I, section 10 of the Constitution of the USA, which as he

[16] E. BUCHER, *Op. Cit.*, p. 3.

[17] S. GRUNDMANN, *Information, Party Autonomy and Economic Agents in European Contract Law*, Kluwer Law International, The Netherlands, 2002, p .1.

[18] *Idem,* p.2.

says, prohibits the states from impairing the obligations of contracts.[19] As this writer reveals, the background of this principle is also seen in early court interpretations.

In the *Slaughter-house cases 83 U.S. 36 (1873),*[20] the USA Supreme Court through Justice Joseph Bradley and Stephen Field dissents affirmed the protection of right to pursue an occupation free from unreasonable government interference. This marked the freedom of parties, starting from unreasonable government interference.

The early court interpretations with regard to this principle went on in 1888, whereby the dissenting judge in the case *Powell vs. Pennsylvanias* argued that the liberty that was protected by the due process clause included "the right of a man to be free in the enjoyment of the faculties with which he has been endowed by the creator, subject only to such restraints as are necessary for the common welfare."[21] From this perception of the judge, one may retain that that from long time ago, this principle was considered as natural to human beings.

This calls in the naturalism view of the freedom of contract principle. Hence, it appears to have evolved as the law developed, especially the law of contracts. Professor E. BERNSTEIN affirms that by 1890s several courts had already held that liberty of contract was constitutionally mandated.[22]

For instance, in the case of *Frisbie v. United States* (1895) before the US Supreme Court, Justice David Brewer declared that "generally speaking, among the inalienable rights of citizen is that of

[19] D. E. Bernstein, "Freedom of contract*",* George Mason University School of Law, Research Paper series, p. 1, accessible at <http://www.law.gmu.edu/assets/files/publications/working_papers/08-51%20Freedom%20of%20Contract.pdf>, last accession on 24/04/2014.

[20]U.S. Supreme Court, "*Slaughterhouse Cases*, 83 U.S. 16 Wall. 36 36 (1872)," accessible at <**https://supreme.justia.com/cases/federal/us/83/36/case.html**>, last accession on 24/04/2014.

[21]The US Supreme Court, "*Powell vs Pennsylvania*, 127 U.S.678, 1888 in D. E. Bernstein, "freedom of contract", George Marson University, p. 2," available at <http://ssrn.com/abstract_id=1239749>, last accession on 12/04/2014.

[22]The US Supreme Court, "*Powell vs Pennsylvania*," 127 U.S.678, 1888 in D. E. Bernstein, "freedom of contract", George Marson University, p. 2, available at <http://ssrn.com/abstract_id=1239749>, last accession on 12/4/2014. 1212221212/0412/04/2014.

the liberty of contract.''[23] By this, one may hold that freedom of individuals to engage in contractual obligations is an inalienable human right. Hence the state should put in place laws to protect it not limiting its observance.

It is said that it was in 1897 that the Court for the first time invalidated a state law as a violation of liberty of contract, in the case of *Allgeyer v. Louisiana, 165 U.S. 578.*[24] Currently, this principle has become world widely applicable, and its implication appear in most of all countries law of contracts.

§3 Freedom of contract under Rwandan law

The current Rwandan law of obligations is provided for and regulated by the Law on No. 45/2011 of 25/11/2011 governing contracts, and the Title One of the Decree of 30/07/ 1888 relating to contracts or conventional obligations on its second part relating to non-contractual obligations, specific contracts, civil liabilities and limitations.[25]

Rwanda as until recently a pure civil law country, its law of obligations takes roots in the Romano-Germanic law of obligations and influenced by the Napoleonic Civil Code.[26] The above mentioned Decree had even some provisions identical to the ones contained in the Napoleonic Code. One would say that Rwandan law of obligations stood on similar principles as the one of Romano Germanic civil law.

As far as the Rwandan jurisdiction is concerned, the contractual obligations are primarily based on contractual agreement made up by parties with a free and informed consent. For instance, the law No. 45/2011 of 25/11/2011 governing contracts, especially in its article 64, provides that

[23]The US Supreme Court, '*Frisbie v. United States*, 157 U.S. 160 (1895) in D. E. Bernstein, "freedom of contract", George Marson University, p. 3," available at <http://ssrn.com/abstract_id=1239749>, last accession on 12/04/2014

[24]The U.S Supreme Court, *'Allgeyer v. Louisiana," 165 U.S. 578*, 1897.

[25]Law No. 45/2011 of 25/11/2011, governing contracts, *O. G.* nº 04bis of 23/01/2012, article 162.

[26] International Business Publications, *Rwanda Business Law Handbook: Strategic Information and Laws,* vol 1, Int'l Business Publications, 2012, p. 31.

"Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith."[27] This shows that the Rwandan law governing contracts observes the principle of *pacta sunt servanda*, which entails the above mentioned provision.

The above article is similar to the article 1134 of the French Civil Code, which reads that "Agreements lawfully entered into take the place of the law for those who have made them.

They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith."[28] As it is mentioned above, the law of obligations of these countries with civil law background stands on many similar principles.

For instance, the similar provision appears even in the article 1159 of the Civil Code of the Philippines, which stipulates that "obligations arising from contracts have the force of law between the contracting parties and should be complied within good faith".[29]

One may thus argue that that principle of "*pacta sunt servanda"* implied in the above legislation of different countries is an international principle. Its contents are also found under Indian Act 1872, especially in its section 10, which reads that "All agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."[30]

Thus, under Rwandan law of obligations, it is the parties to contract who give the meaning to contractual clauses held in their contract, as stipulated for under article 67 of the above mentioned la governing contracts.[31] And according to article 66, any person interpreting a clause in a contract, must be interpreted following the purpose and promise intended by parties to such

[27] Law No. 45/2011 of 25/11/2011, governing contracts, *O.G.* nº 04bis of 23/01/2012, article 24.

[28] The French Civil Code of 1804 as amended to date, Article 1134.

[29] The Civil Code of the Philippines, article 1159.

[30] Indian Contract Act, 1872, Section 10.

[31] Law No. 45/2011 of 25/11/2011, governing contracts, *O.G,* nº 04bis of 23/01/2012, article 67.

contract.[32] This shows that the parties' will is the one that guides any one attributed to contract interpretation.

It is the same as under the Philippines law, where the freedom of contract is granted by asserting that parties are free to enter into a contract, by virtue of article 1318 and 1319 of the above mentioned Philippines civil code, which both declare that free consent of both parties which is manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract, is an essential requisite a contract.[33]

As it appears, it is parties, in their freedom, who determine the content of their contract, so long as they fulfill the requirements of the law. Article 1306 of the above mentioned Philippines civil code reads that "the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided that they are not contrary to law, morals, good customs, public order or public policy"[34]

The Rwandan law governing contracts upholds the freedom to conclude or not to conclude a contract and freedom of choice of the partner. This is granted by virtue of article 8 and 9 of the above mentioned law governing contracts, which both imply the manifestation of mutual assent as a ground for validity of a contract.[35] This shows that there is no obligation to enter a contract unless a special legal provision prescribes the formation of a contract. Hence, these provisions also imply the freedom to choose the partner in a contract, because all rest on the party's free choice.

The above mentioned law of contracts also upholds the freedom to determine the content of the contract through the rules of offer and its acceptance, which must contain and manifest the terms

[32] Law No. 45/2011 of 25/11/2011, governing contracts, *O.G,* n° 04bis of 23/01/2012, article 66.

[33] The Civil Code of the Philippines, articles 1328- 1319.

[34] The Civil Code of the Philippines, article 1306.

[35] Law No. 45/2011 of 25/11/2011, governing contracts, *O.G*, n° 04bis of 23/01/2012, article 8 and 9. Article 9 reads "*For the contract formation, each party must manifest assent with reference to the assent of the other.*"

of contract as provided for under article 10 of the above mentioned law.[36] This article stipulates that "An offer must be communicated to the offeree, must manifest the intent to contract, and sufficiently define the terms of the contract."[37] This article shows that it is the parties to the contract who determine the content of their contract and define them. Therefore, any of the party, usually the offeror, may at free discretion establish the conditions of the contract.

The same applies even in common law system, though a slight difference is notable in terminology, but as a matter of substance, there is no difference. For instance, under the English law, the elements of a valid contract are not different from the ones described above.
In the case of *Atkin LJ in Balfour V Balfour (1919)* the judge asserted that "there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between hasband and wife."[38]

As the above Rwandan law on contracts provides for, parties do not only have freedom to determine their mutual obligations, but also the freedom in forecasting the consequences deriving from it. These are for instance the consequences of non-performance, agreement terminating or altering the terms of previously concluded contract by virtue of article 16, and so forth.[39]

Generally speaking, there is no difference on how the principle freedom of contract is observed in Rwanda and other countries it is mentioned above. The way it is granted in France, the

[36] Law No. 45/2011 of 25/11/2011, governing contracts, O.G, nº 04bis of 23/01/2012, article 10.

[37] Law No. 45/2011 of 25/11/2011, governing contracts, *O.G*, nº 04bis of 23/01/2012, article 10.

[38] *ATKIN LJ Balfour V Balfour*, The Court of Appeal, UK, (1919) 2KB 571 (CA), available at <http://www.duhaime.org/Portals/duhaime/PDF/CASES/Balkfour%20v%20Balfour,%20%5B1919%5D%202%20KB%20571.pdf>, last accession 11/06/2014.

[39] Law No. 45/2011 of 25/11/2011, governing contracts, *O.G*, nº 04bis of 23/01/2012, article 13 and 16.

Philippines and even the UK is substantially similar to recognized and protected under Rwandan law in general. But when it gets to its applicability in matrimonial regimes, the difference in noticed as the research will illustrate in the second chapter.

From that perspective, one may argue that, as far as Rwandan Law is concerned, parties' undertakings are their primary law governing them. And this shows the role of the above mentioned law on contracts, which is not to impose certain forms of behavior but rather to enable them; enabling parties to engage parties in contractual obligations without abuse and to ensure observance to public policy, good morals.[40]

The law provides for freedom of contract, and recognizes its basic elements, without any intense difference with other jurisdictions. But its applicability in specific contracts, such as marital agreements, is controversial under Rwandan law governing matrimonial regimes. The following section will illustrates on notion on matrimonial regimes, elucidating how they are regulated under Rwandan law, in comparison to other jurisdictions, then assess if there are any difference at all, so that it becomes easier to understand the problematic status of matrimonial regimes regulation in Rwanda.

SECTION II: GENERAL NOTIONS ON MATRIMONIAL REGIMES

Matrimonial regimes for the purpose of this study will refer to the contract accessory to the marriage, which prospective spouses opt for when entering into marriage, concerning the management of their properties. Matrimonial regimes are also known as "marriage contract, prenuptial agreements and matrimonial property regimes.*"* Whenever any of these terms appears in this study shall be having the same meaning.

§1 Definition

[40] M. E. Storme, "Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law", paper presented at the Conference European Legal Harmony: goals and milestones, 10th anniversary Juridica International, Tartu, December 6, 2005 available at <https://www.law.kuleuven.be/personal/mstorme/Storme-Juridica.pdf>, last accession on 11/06/2014.

As it is defined by authors, the matrimonial regimes in the line of this study, "consist of a body of rules governing the agreement between spouses on the management of their property."[41] In addition, Stephen E. COVELL and Lauren COVEL illustrate that "A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and towards third persons"[42]

In actual sense, there exist two types of matrimonial regimes, notably the "legal regime" and "contractual regime."[43]As the above mentioned authors mention, Matrimonial regimes are those which are governed by marriage contract while legal regimes are those prescribed in certain jurisdictions respectively, which operate auto, automatically in case no contractual regime made prior to marriage.[44] This is like a presumption, which in many systems, is the community of property regime.

That is the case for Rwanda, France, Louisiana, and so forth. Besides, some other authors, like professor Rigby, add the third type of matrimonial regime, which is "a partly legal and partly contractual regime."[45] As the Rigby explains it, this third type of matrimonial regime occurs when spouses write a contract that addresses some things but not everything. In this case, the legal regime steps in and fills the gaps that might have been left unprovided by parties.

§2 Matrimonial Regimes under Rwandan Context

[41] L. RAUCENT, Les *régimes matrimoniaux*, 3rd ed, Bruxelles, Bruyants, 1988, p. 21, in F. KAROMBA, *Matrimonial regimes, liberalities and succession,* NUR-LLB, Class notes, 2012-2013, p. 10.

[42] S. E. COVELL, L. COVELL, *Louisiana Legal Advisor: Fifth Edition,* Pelican Publishing Company, Louisiana, 5th ed, 2012, p. 12.

[43] *Ibid*.

[44] *Idem,* p. 13.

[45] Professor RIGBY, "Matrimonial Regimes Fall," 2006, available at <https://www.google.rw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CFAQFjAG&url=http%3A%2F%2Flsulawlist.com%2Flsulawoutlines%2Findex.php%3Ffolder%3D%2FMATRIMONIAL%2520REGIMES%26download,> last accession on 10/05/2014.

The fate of matrimonial regimes, under Rwandan law is not as old as other different legal concepts because this option of choosing matrimonial regimes was brought in by the law No 22/99/1999 of 12/11/1999 which put in place three types that guide people in opting for their marriage contract.

Before the above law came into place when people married, the marriage contract was governed by customary laws.[46] As F. KAROMBA argues, during this time, there was only one common regime for all, and so parties did not have right to exercise their freedom unlike today that they now have different options depending on how they want to organize their pecuniary relationships.[47] As it is understood, this could not provide for parties or let them exercise their freedom to choose any regime, etc.

The matrimonial property regimes are provided for under Rwandan law, as it is mentioned above, we find it in the Law n$_o$ 22/99/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, especially in its article 2.[48] It is obvious that it provides for 3 options of matrimonial regimes to choose.

A. Definition and scope under Rwandan law

As far as Rwandan legislation is concerned, the term matrimonial regime is defined under article 1 of the above mentioned law regulating matrimonial regimes, liberalities and succession, which reads that "the matrimonial regime is a body of rules to be fixed by this law governing the agreement between spouses on the management of their property."[49] As it is understandable, the scope of matrimonial regime is limited only to those rules contained in the above mentioned law.

[46] F. KAROMBA, *Matrimonial regimes, liberalities and succession,* NUR-LLB, Class notes, 2012-2013, p .9

[47] Idem, p. 9.

[48] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* n$_o$ 22 of 15/11/1999, article 2.

[49] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* n^o 22 of 15/11/1999, article 1.

This article shows the exclusiveness of ancillary terms that may be determined by parties. No addition, no supplement to those rules.

B. Types of matrimonial regimes under Rwandan law

The above mentioned law has, though limitedly, offered to parties different 3 options to choose before entering marriage. By virtue of article 2 of that law, "Upon entering marriage spouses shall choose one of the following matrimonial regimes: 1. community of property; 2. limited community of acquests; 3. separation of property. In case no provision is made, the spouses shall be deemed to be married under the regime of community of property." This shows that in Rwanda, only three types of matrimonial regimes also known as marriage contracts, are provided and allowed.

I. The regime of community of property

a. Definition and scope

The regime of community of property is defined under article 3 of the law regulating matrimonial regimes, liberalities and succession stated above, whereby it reads that "the regime of community of property is a contract by which the spouses opt for a marriage settlement based on joint ownership of all their property-movable as well as immovable and their present and future charges"[50] One may deduct from this provision that in case prospective spouses choose the regime of community of property, they automatically mix up all their current and future assets as well as liabilities, without any exception.

One may wonder then, if there are no personal properties for spouses who chose the community of property regime. However, by interpretation of article 6 which the research will tackle in

[50] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, Article 3.

preceding paragraphs, one may argue that in case of partition of assets, and then personal properties can be determined. Meanwhile, if there is no partition of assets, one wonders if spouses cannot own personal properties. In paragraphs to come, the research will elucidate on this issue.

In addition, it is worth noting that, as far as Rwandan jurisdiction is concerned, the regime of community of property is the one to be presumed in case parties didn't opt for any regime.[51] That makes it to be the legal regime in Rwanda as provided for under article 1(2) of the above mentioned law.

b. The concept of personal properties in the community of property

Generally speaking, there is no such term "personal properties*"* in the regime of community of property as far as Rwandan law regulating matrimonial regimes is concerned. When you read the provisions for the regime of community of property, you may conclude that since spouses jointly own all their assets, current and future liabilities, one spouse can therefore not have personal properties, because the term *all* used in article 3, excludes personal property concept.

However, when one reads article 6 of the above mentioned law governing matrimonial regimes, liberalities and succession, you find a term "items of personal use." As it reads; "in the event of a partition of assets and liabilities in accordance with article 4 of this law, items of personal use, such as clothing, jewellery and tools, shall remain within the patrimony of the spouse they belong to."[52]

Though it is not *expressis verbis* stated that they are personal properties as exception to article 3 mentioned above, this article shows that items of personal use, such as clothing, jewellery and

[51] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G*. nº 22 of 15/11/1999, Article 1 (2).

[52] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G*. nº 22 of 15/11/1999, Article 6.

tools are attached the spouse to whom they belong. Since they are not divided among other community assets, they therefore seem to be constituting a portion of personal properties as asserted to community properties.

On the other hand, one wonders then the fate of personal liabilities under the regime of community of property. Normally, if certain items are considered as personal to the one they belong to, as a result, liabilities also resulting from those items should be kept personal to the spouse. But if one analyses well the above mentioned article 6, there is no inclusion of liabilities. The article clearly mentions that it is only "items of personal use" and not liabilities or any item.

The question still rises, because the law didn't not consider the scope of value of jewellery or other tools to be made allocated in personal property portion. Those called "personal tools" in the above mentioned law, may even be of higher value, that the rest of all properties. There should be a limited value for those called "personal items," so as to avoid any abuse.

II. The regime of limited community of acquests

a. Definition and scope

According to article 7 of the above mentioned law, "the regime of limited community of acquests is a contract by which spouses agree to pool their respective properties owned on the day of marriage celebration, to constitute the basis of the acquests as well as the property acquired during marriage by a common or separate activity, donation, legacy or succession."[53] This entails that spouses who choose this regime agree on which property to put in community and which one to be preserved to personal. Assets and liabilities that will be acquired after marriage will hence form also part of community properties.

[53] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 7.

b. The concept of personal properties in the limited community of acquests

Basing on how this regime is made up, one may assert that the issue of determining personal property among the property of spouses is not vivid. It is well elucidated under article 8 of the above mentioned law governing Matrimonial Regimes, which provides for that "the spouses who opted for the regime of limited community of acquests shall establish and submit to the civil status a signed inventory of assets and liabilities defined by each spouse to constitute the community. Any property that is not inventoried as common property shall, be presumed to be personal property."[54] This shows well the implication and scope of personal property under this matrimonial regime.

By virtue of article 10 of the above mentioned law regulating matrimonial regimes, when one of the spouses has contracted some debts whether before or after marriage, those debts are discharged from his/her personal property, unless those debts were included in the community at the time of marriage.[55] Nevertheless, one may wonder if there is a possibility of excluding some future revenues that will be acquired after marriage, or if all acquests must be jointly owned in community in case spouses opted for the regime of limited community of acquests.

III. The regime of separation of property

a. Definition and scope

The regime of separation of property is the third option provided to prospective spouses to opt for. As it is defined under article 11 of the above mentioned law, this regime consists of "a contract by which spouses agree to contribute to the expenses of the household in proportion to their-respective abilities while retaining the right of enjoyment, administration and free disposal

[54] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, O.G. nº 22 of 15/11/1999, article 8.

[55] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, O.G. nº 22 of 15/11/1999, article 10.

of their personal property"[56] According to F. KAROMBA, the regime of separation of property is not commonly known in Rwandan society and seems to be inconsistent with Rwandan conception of the family.[57]

Under this regime, as one may illustrate from this article, there is a total separation of assets and their management, as well as separation of each spouse's liabilities. Consequently, there is no concept of common property in this regime. Hence, the choice of separation of the assets implies that marriage does not affect parties' patrimonies,[58] not withstanding primary regime obligations.

b. The concept of personal properties in the separation of property regime

As it is understandable, there is not any property jointly owned by spouses, but rather, each spouse keeps his/her property personally. Under the regime of separation of property, separation is a rule and hence contribution to the expenses of the household is the exception. As the research mentioned it above, each spouse retains the right to manage, enjoy and dispose of his/her properties.

Since there is no common property in this regime, all properties belonging to respective spouses are the ones that form personal properties.

§2 Types of matrimonial regimes: A comparative study

Having discussed the fate of matrimonial regimes under Rwandan law, herebelow the research will make a comparative analysis of the matrimonial property regimes under French jurisdiction, under the Philippines and the UK with regards to Rwandan law, while emphasis will be put on relevant elements of difference among those jurisdiction.

[56] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 11.

[57] F. KAROMBA, *Op. Cit., 69,* p. 45.

[58] *Ibid.*

A. Matrimonial Regimes under the French Jurisdiction

I. The concept of matrimonial regimes under the French jurisdiction

Unlike the Rwandan law mentioned above which stated that matrimonial regime is limited to a body of rules contained in that law[59], the French Civil Code under its article 1387 stipulates that "legislation regulates conjugal association, with respect to property, only in default of special agreements, which spouses may enter into as they deem proper, provided they are not contrary to public morals and to the following provisions."[60] This means that matrimonial regimes do not only comprise of rules established by the civil code, but also of private agreement spouses may establish as they anticipate their pecuniary relationships to be.

The above rights emanate from the freedom of contract principle which implies the freedom of parties to determine the content of their contract, in a way suitable to their will.

It further shows that under French law, rule of matrimonial regimes are mostly suppletive ones which are followed in case parties did not stipulate otherwise or referred themselves to those rules, so long as they observe public policy and good morals.

As article 6 of the French Civil Code provides for, only statutes relating to public and morals may not be derogated from by private agreements.

II. Types of matrimonial Regimes under French Jurisdiction

Generally speaking, as GEORGE A. BERMANN and ETIENNE PICARD assert, French Civil Code provides for 3 options, among which prospective spouse may opt. As they say, "French Law makes available three important types of matrimonial regimes: (i) a more or less extended regime of community property (*communauté*);(ii) separation of property (*séparation des biens*)

[59] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 1.

[60] The French Civil Code, article 1387

and (iii) sharing after-acquired property (*participation aux acquêts*), the latter being a hybrid model partaking of features of the first two without becoming confused with them."[61]

However, though these are the ones expressly written in the French civil code, parties are free in conclusion of their marriage contract (matrimonial regimes), to decide otherwise.

Dr. Alexandre Boiche argues that in French Law, the choice of matrimonial regime is made in a marriage contract, as provided for under the French Civil Code, especially in its title IV concerning "marriage contract and matrimonial regime"[62] it is worth noting that the later terms mean the same in French law. As he recalls, even though there are three main types of matrimonial regime defined in the French civil code, spouses are free to agree on any other type or contract, as for instance they can choose a community contract and decide to be divided unequally.[63]

Many provisions from the French civil code stipulate for the regulation of marriage contracts.

a. The Regime of Community of Property

According to article 1400 of the above mentioned French Civil Code, the regime of community of property is established due to failure to make an agreement or by a simple declaration of being married under the community of property regime.[64] As it is stipulated under article 1401, the assets of the community comprise acquisitions made by the spouses together or separately during

[61] G. A. BERMANN, E. PICARD, *Introduction to French Law*, Kluwer Law International, The Netherlands, 2008, p. 278.

[62] A. BOICHE, "Marriage Contracts and Prenuptial Agreements in French law", p. 1 available at http://www.iaml.org/cms_media/files/iamlmaterialabfrance.pdf?static=1, last accession on 15/05/2014.

[63] A. BOICHE, "Marriage Contracts and Prenuptial Agreements in French law", p. 1 available at http://www.iaml.org/cms_media/files/iamlmaterialabfrance.pdf?static=1, last accession on 15/05/2014.

[64] The French Civil Code, article 1400.

the marriage and coming both from their personal activity and from savings made on the fruits and incomes of their personal property.[65]

Unlike the regime of community of property under Rwandan law which does not actually allow *expressis verbis* the concept of personal properties in the assets of spouses in the community, in French law spouses own personal properties even though they are married in the regime of community of property.

By virtue of article 1403, it is provided that spouses do not lose their right to personal properties *per see*, due to engaging in the regime of community of property. As it reads; "Each spouse retains full ownership of his or her separate property. The community is entitled only to fruits collected and not consumed. But a reimbursement may be due to it, at the time of the dissolution of the community, for fruits which a spouse failed to collect or has fraudulently consumed, without, however, any inquiry being admissible further than the last five years."[66]

Those items that are by nature personal are well cleared in the above mentioned French Civil Code. For instance, article 1404 provides that "constitute separate property by their nature, even where they have been acquired during the marriage, clothes and belongings for the personal use of one of the spouses, actions for compensation for bodily or moral harm, inalienable claims and pensions, and, more generally, all property which has a personal character and all rights exclusively attached to the person."[67]

One may argue that personal properties in the regime of community of property is categorized in two types. Those which are personal by nature as the above article mentions, and those subject to reimbursement if needs be.

[65] The French Civil Code, article 1401.

[66] The French Civil Code, article 1403

[67] The French Civil Code, article 1404.

For instance the above article further argues that "constitute also separate property by nature, but subject to a reimbursement if there is occasion; implements necessary to the occupation of one of the spouses, unless they are accessory to business assets or to an enterprise forming part of the community."[68] It also worth noting that properties owned or possessed by spouses on the day of the marriage celebration from gift, succession or legacy, they remain personal. In all these provisions, parties have freedom to stipulate otherwise. This emanates from the principle of freedom of contract it is mentioned above.

b. The regime of separate property

The regime of separate property is provided for by the French Civil Code, from article 1536 up to 1544. As it is stipulated, "where spouses have stipulated in their ante-nuptial agreement that their property will be separate, each of them keeps the administration, enjoyment and free disposal of his or her personal property."[69] As article 1536 adds, in this regime each spouse remains alone liable for the debts arising in his or herself, before or during marriage, except in the cases provided under article 220.

The later article reads that "each one of the spouses has the power to make alone contracts which relate to the support of the household or the education of children: any debt thus contracted by one binds the other jointly and severally."[70] It is therefore only under this situation that a spouse in separate property can be liable for debts contracted by his/her partner.

Comparing it to the separation of property under Rwandan law, there is no much difference, except the fact that it is well detailed in the French civil code. For instance, there is no such provision stated above on the presumption of joint liability for such debts.

[68] The French Civil Code, article 1404.

[69] The French Civil Code, article 1536.

[70] The French Civil Code, article 220.

c. The regime of Separation in Acquisition

Separation in Acquisition is the third regime provided from under French Civil Code, in its articles 1569 up to 1581. Looking on how it is structured, it is comparable to the regime of limited community of acquests, though a notable difference remains clear.

As article 1569 elucidates it, "where spouses have declared that they married under the regime of participation in acquisitions, each of them keeps the administration, enjoyment and free disposal of his or her personal property, without distinguishing between that which belonged to him or her on the day of the marriage or which has come to him or her after by succession or gratuitous transfer and that which he/she acquired for value during the marriage…."[71]

Unlike to Rwandan law, where in the regime of limited community of aquests matrimonial property is divided into; personal property of each spouse on one hand and property put together in the community on the other hand, under French law there is no community property in this regime. Each one keeps his her personal property and its acquisitions as stipulated by the above mentioned article.

The above article itself reads in part that "during the marriage, that regime operates as it the spouses were married under the regime of separation of property. At the dissolution of the regime, each spouse is entitled to participate by halves in value in the net acquisitions found in the patrimony of the other. .. the right to participate in the acquisitions may not be assigned as long as the matrimonial regime is not dissolved.."[72] That marks the difference between this regime and the regime of limited community of acquests under Rwandan law.

[71] The French Civil Code, article 1569.

[72] The French Civil Code, article 1569.

A. Matrimonial Regimes under the Philippines jurisdiction

Under the Philippines jurisdiction, the Family Code and the Civil Code of the Philippines provides for three matrimonial regimes for parties to opt, which have only some slight differences from the French. The research will only emphasize on those slight differences with the regimes it is described above, without necessarily repeating similar things as we have in jurisdictions mentioned above.

I. The concept of matrimonial regimes under the Philippines' jurisdiction

In the Philippines, the property relations between husband and wife are not solely governed by the provisions of the law, but rather, by marriage settlements (marriage contracts) executed before the marriage, the provisions of the Philippines Family Code and by local customs as well.[73] This is different from Rwanda where matrimonial regimes are limited to the provisions of the law on matrimonial regimes, liberalities and succession.[74]

When one looks at the provisions of article 74 of the Family Code of the Philippines, one may conclude that under the Philippines there are also three options of matrimonial regimes spouses may choose from, notably; the regime of absolute community, conjugal partnership of gains, complete separation property or any other regime.[75]

As it is understandable, there is no limited number of matrimonial regimes Philippines' spouses are allowed to engage in. They may follow the ones provided for in the civil code or create their own, provided that it is not void. This marks a notable difference between the applicability of

[73] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 74. (It is the same article 118 of the Civil Code of the Philippines)

[74] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 1.

[75] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 75.

freedom of contract in the Philippines comparing to Rwandan jurisdiction as the research will mention in the second chapter.

II. The Types of Matrimonial Regimes under the Philippines' Jurisdiction

By virtue of article 75 of the Family Code of the Philippines it is mentioned above and article 119 of the Civil Code of the Philippines, future spouses may choose among following regimes in their marriage settlements; the regime of absolute community, conjugal partnership of gains, complete separation of property or any other regime they choose.[76]

However, when one reads the provisions of the civil code of the Philippines, it seems to distinguish the community of property regime into two: absolute community of property and the relative community of property.[77] As it reads, "The future spouses may in the marriage settlements agree upon absolute or relative community of property, or upon complete separation of property, or upon any other regime. In the absence of marriage settlements, or when the same are void, the system of relative community or conjugal partnership of gains as established in this Code, shall govern the property relations between husband and wife."[78]

The difference with other jurisdiction stated above, in this regime, is the mentioned option of choosing relative community or absolute community. This strengthens scope of parties to exercise their freedom to provide for their future patrimonial relationships.

[76] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 75.

[77] The Civil Code of the Philippines, article 119.

[78] The Civil Code of the Philippines, article 119.

a. The system of Absolute Community

The Family Code of the Philippines, in its article 91, denotes that the community property shall consist of all the property owned by the spouses at the time of the celebration of the marriage or acquired thereafter, unless otherwise provided by parties in marriage settlements or by the law.[79]

As it is stipulated under article 88 of the above mentioned Family Code, the absolute community of property between spouses shall commence at the precise moment that the marriage is celebrated, and this provision is not subject to derogation whatsoever.[80] Though parties are allowed to add their own stipulations in their marriage settlements or create a new one, if they have chosen this regime, they are not allowed any waiver of rights, interests, shares and effects of the absolute community property during the marriage, except in case of judicial separation.[81]

The other thing provided under this regime, is that in all matters not provided by the family code, ordinary provisions of co-ownership apply.[82] Therefore, property acquired during the marriage is presumed to belong to the community, except things of personal used or other personal properties in accordance with their family code as we will see later.

b. Conjugal partnership of Gains

By virtue of article 106 of the above mentioned Family Code, under the regime of conjugal partnership of gains,[83] is almost similar to Rwandan regime of limited community of acquests, except when parties provided otherwise, since they have that freedom, which spouses don't have in Rwanda.

[79] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 91.

[80] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 88.

[81] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, Article 89.

[82] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, Article 89.

[83] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 106.

c. Regime of separation of property

Article 144 reads that "separation of property may refer to present or future property or both. It may be total or partial. In the latter case, the property not agreed upon as separate shall pertain to the absolute community."[84] This regime is almost similar to the regime of separation of property under Rwandan law. The considerable difference is that the Philippines Family Code provides for 2 types of separation of property; the total separation and the partial separation. As the above article recalls, if separation is only partial, things not declared as personal constitute the community property.

As provided for under article 145 of the above mentioned family code, under this regime, each spouse has the right to own, dispose of, possess, administer and enjoy his or her separate estate, without need of the consent of the other. Hence, "to each spouse shall belong all earnings from his or her profession, business or industry and all fruits, natural industrial or civil, due or received during the marriage from his or her separate property.[85] In all cases, household expenses and liabilities from them are shouldered by both spouses.

§.3 The concept of personal properties under the Philippines jurisdiction

Article 92 of the above mentioned Family Code of the Philippines, denotes that certain items are excluded from the community. That means that they remain personal to the respective spouse though they are married under the regime of absolute community of property. As it illustrates; property acquired during the marriage by gratuitous title by either spouse, and the fruits as well as the income thereof, if any, unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property.

[84] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 144.

[85] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 145.

The above article adds moreover, the property for personal and exclusive use of either spouse, except jewelry.[86] This may be resulting from the fact that jewery has been object of treasury, which may hold higher values than the remaining properties of the family. This marks a notable difference to how it is provided under Rwandan law, where parties are obliged to co-own all donations they receive.

The other items that are exempted from the property of the community appear under article 93 of the above mentioned family code, which asserts that property acquired before marriage by either spouse who has legitimate descendants by a former marriage and the fruits as well as the income of such property do not form part of the community.[87]

As far as the regime of conjugal partnership of gains is concerned, the Family Code also demonstrates items that form personal properties. Article 109 asserts that personal property is formed by "(1) that which is brought to the marriage as his or her own; (2) that which each acquires during the marriage by gratuitous title; (3) that which is acquired by right of redemption, by barter or by exchange with property belonging to only one of the spouses and (4) that which is purchased with exclusive money of the wife or of the husband."[88]

A. Matrimonial Regimes under the UK Jurisdiction

Actually there is no matrimonial property under the UK jurisdiction, because marriage does not produce any effect on property of spouses. Below here, the research will illustrate how pecuniary relationships that are normally dealt with in other jurisdiction by matrimonial regimes, are regulated, and see how spouses' property are generally regulated.

[86] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 92 (2).

[87] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 93.

[88] The Family Code of the Philippines of 6 July 1987, entered into force on 04 August 1988, article 109.

I. The concept of Matrimonial Regimes under the UK Jurisdiction

As it is argued by different authors, the matrimonial property regime is a strange concept or an unknown institution to English Law.[89] There is no such law providing any financial consequences pertaining to the marriage.

In the document named "Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition", the European Commission defines matrimonial property regimes as sets of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular creditors.[90] In this paper, with regard to the above given definition, one realizes that the European commission presumes that the status of marriage *per see* bears an impact on the spouses' financial relationships between each other as well as with third parties.

However, as it is later mentioned, "Unlike most of continental Europe, there is no primary and secondary matrimonial property regime. Indeed there is no "matrimonial property regime" as understood in Continental Europe. There are no proprietary consequences flowing from the fact of marriage at all."[91] Therefore, as mentioned, the marriage produces no pecuniary consequences to spouses, since each one remains with their rights not infringed.

This situation of not having any legal text on matrimonial regimes, results even in the Common Law culture. As it is argued, "in Anglo- Saxon countries, it is the case-law of courts and tribunals

[89] CRETNEY, S., MASSON, J.M and BAILEY-HARIS, *Principles of Family Law*, Sweet&Maxwell, London, 2003, p. 89.

[90] Commission of The European Communities, "Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition," Brussels, COM 2006 400 final of 17 July 2006, p. 2, available at <http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_2_green_papers/com2006_green_paper_on_conflict_of_laws.pdf,> last accession on 18/05/2014.

[91] Bar Council of England and Wales, "Response of The Bar Council of England and Wales to the Green Paper, Brussels," 2006, p. 3, available at <http://ec.europa.eu/justice/news/consulting_public/matrimonial_property/contributions/others/bar_council_england_wales_en.pdf,> last accession on 19/05/2014.

(in particular, decisions as well as customary rules, which plays the primary role in creating legal norm in this field."[92]

Most provisions that one may apply in resolution of cases pertaining to matrimonial properties, are discretionary powered judges who give out their decisions especially in cases of liquidation of property in divorce or legal separation. But normally in their usual marital life, this issue does not raise. As it is said, on the dissolution of marriage, all proprietary questions between the spouses are decided by the court on a discretionary basis as provided under the "Matrimonial Causes Act 1973"[93]

II. Management of matrimonial property under the UK jurisdiction

When one argues that there is no matrimonial property regime under the UK Jurisdiction, one wonders how the matrimonial property is managed then. Normally the English Law covers some of the topics relating to family relationships issues; such as pension rights, maintenance obligations, etc. But basing on the above mentioned definition of what matrimonial regime is, it is clear that those provisions do not amount to matrimonial regime as such.[94]

The worse of all is that apart from the English to lack matrimonial regimes law, even when spouse have entered into an ordinary contract intending to regulate their financial relationships;

[92] Bar Council of England and Wales, "Response of The Bar Council of England and Wales to the Green Paper, Brussels," 2006, p. 2, available at <http://ec.europa.eu/justice/news/consulting_public/matrimonial_property/contributions/others/bar_council_england_wales_en.pdf,> last accession on 19/05/2014.

[93] Bar Council of England and Wales, "Response of The Bar Council of England and Wales to the Green Paper, Brussels," 2006, p. 2, available at <http://ec.europa.eu/justice/news/consulting_public/matrimonial_property/contributions/others/bar_council_england_wales_en.pdf,> last accession on 19/05/2014.

[94] Bar Council of England and Wales, "Response of The Bar Council of England and Wales to the Green Paper, Brussels," 2006, paragraph 14., available at <http://ec.europa.eu/justice/news/consulting_public/matrimonial_property/contributions/others/bar_council_england_wales_en.pdf,> last accession on 19/05/2014.

rights and obligations on divorce, which could at least play a certain role in matrimonial regime prescription, still English court are not bound to give effect to this.[95] They may or not.

III. The concept of common properties under the UK Jurisdiction

Since there is no such law providing for matrimonial regimes, due to the fact that marriage does not automatically affect the pecuniary relationships of spouses, one may argue that there is no common property among the spouses under the UK jurisdiction. Nevertheless, they can only have joint ownership over a certain object according to ordinary law governing co-ownership.

The financial issues that may arise in the family are regulated under section 21 of the Matrimonial Causes Act of 1973, as amended to date, where they stipulate primary obligation of spouses as regards to contribution to household, to maintenance and education of the child, and so forth.[96]

Therefore, the important note from the English law is that during marriage the property rights of spouses vis-à-vis each other and third parties are the same as those of unmarried people.[97] One may say that the freedom of contract is more than provided, because they live in a way they deem convenient to them. However, this is not a suggestion one may choose for a country like Rwanda, where the community has a meaningful impact in everyday's life.

[95] Bar Council of England and Wales, "Response of The Bar Council of England and Wales to the Green Paper, Brussels," 2006, paragraph 14., available at <http://ec.europa.eu/justice/news/consulting_public/matrimonial_property/contributions/others/bar_council_england_wales_en.pdf,> last accession on 19/05/2014.

[96] Matrimonial Causes Act of the United Kingdom, 1973, Section 21.

[97]Bar Council of England and Wales, "Response of The Bar Council of England and Wales to the Green Paper, Brussels," 2006, paragraph 9, available at <http://ec.europa.eu/justice/news/consulting_public/matrimonial_property/contributions/others/bar_council_england_wales_en.pdf,> last accession on 19/05/2014.

D. Matrimonial Regimes under the USA Jurisdiction

I. The concept of Matrimonial Regimes under the USA Jurisdiction

The United States of America as a federal state, the law making power on certain issues remain under the power of each respective state. Some issues are ceded to federal state government to decide, others are not.

As explained by several writers, generally speaking there are two types of matrimonial regimes in the United States, to note; "**the regime of equitable distribution;"** which necessitates a fair but not necessarily equal division of between the spouses and the regime of community of property;**"** which generally entails the equal division of marital property between the spouses.[98]

MARGARET RYZNAR argues that the regime of Community of property is the default marital property regime only in a minority of states which include; Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.[99] As she adds, the assets and debts acquired during the marriage belong to both spouses equally in most of the time.[100]

One may compare this as the regime of limited community of acquests in Rwanda. As it is said, in the above mentioned states, it is statutorily required to make equal division of property

[98] MARGARET RYZNAR, "All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases," 86 N.D. L. REV. 115 (2010), in M. RYZNAR, A. STEPIEN-SPOREK, "A Tale of Two Federal Systems," p. 591, available at <http://www.cjicl.com/uploads/2/9/5/9/2959791/21.3_ryznar_article.pdf,> last accession on 23/05/2014.

[99] MARGARET RYZNAR, "All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases," 86 N.D. L. REV. 115 (2010), in M. RYZNARA, A. STEPIEN-SPOREK, *A "*Tale of Two Federal Systems," p. 591, available at http://www.cjicl.com/uploads/2/9/5/9/2959791/21.3_ryznar_article.pdf,> last accession on 23/05/2014.

[100] MARGARET RYZNAR, "All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases," 86 N.D. L. REV. 115 (2010), in M. RYZNARA, A. STEPIEN-SPOREK, "A Tale of Two Federal Systems," p. 591, available at <http://www.cjicl.com/uploads/2/9/5/9/2959791/21.3_ryznar_article.pdf,> last accession on 23/05/2014.

between spouses upon divorce, while in the remaining states, they use equitable distribution and spouses might hold their property separate during marriage.[101]

The above author further mentions that equitable distribution requires the courts to divide property between the parties (spouses) not equally but equitably. She illustrates that in determining a particular division under the equitable distribution approach, courts consider several legislated factors such as; the length of the marriage, the causes for the dissolution of the marriage, the age and health of the parties, amount and sources of income, as well as liabilities and needs of each party.[102] This shows that the discretionary power of courts in property division is more considerable.

All those stated above govern spouses who did not make what is commonly known "premarital agreement" prior to their marriage. In case they have entered into those agreements, they are less governed by state laws. The following paragraphs briefly mention the standing of premarital agreements, in relation to matrimonial regimes.

II. The prenuptial Agreements

The prenuptial agreements in the USA, comparable to matrimonial agreements or regimes we have been seeing in other jurisdiction, are provided and regulated by the Uniform Premarital Agreement Act (UPAA). The later refers to a Uniform Act governing prenuptial agreements that

[101] M. RYZNAR, "All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases," 86 N.D. L. REV. 115 (2010), in M. RYZNARA, A. STEPIEN-SPOREK, "A Tale of Two Federal Systems," p. 591, available at <http://www.cjicl.com/uploads/2/9/5/9/2959791/21.3_ryznar_article.pdf,> last accession on 23/05/2014.

[102] M. RYZNAR, "All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases," 86 N.D. L. REV. 115 (2010), in M. RYZNARA, A. STEPIEN-SPOREK, "A Tale of Two Federal Systems", p. 593, available at <http://www.cjicl.com/uploads/2/9/5/9/2959791/21.3_ryznar_article.pdf,> last accession on 23/05/2014.

was drafted by the National Conference of Commissioners of Uniform State Laws in 1983 and per now, 27 states have adopted it.[103]

Under its section 2 (5), the UPAA defines the premarital agreement as "an agreement between individuals who intend to marry 23 which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event.

The term includes an amendment, signed before the individuals marry, of a premarital agreement."[104] Therefore, it is the choice of parties to choose to be regulated by the statutory laws (laws of the state) or conclude premarital agreements that will govern them. Typically, the agreement will address financial issues of spousal support and proprietary division, but it may also address nonfinancial matters related to the parties' expectations.[105]

In the USA, parties are not only free to enter into a premarital agreements, but also can conclude at any time they wish a "Marital Agreement," which is defined by the UPAA as "an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement"[106]

[103] National Conference of Commissioners on Uniform State Laws, "Uniform Premarital and Marital Agreements Act with prefatory note and comments," July 2012, prefatory note p. 1, available at <http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012am_pmaa_draft.pdf,> last accession on 23/05/2014.

[104] National Conference of Commissioners on Uniform State Laws, "Uniform Premarital and Marital Agreements Act with prefatory note and comments," July 2012, Section 2 (5).

[105] X, "Premarital Agreements," available at <http://www.prenhall.com/divisions/ect/app/wilsonlaw/M02_WILS3688_01_SE_C02.pdf,> last accession on 23/05/2014.

[106]The Uniform Premarital Agreement Act (UPAA) of 1983 as amended to date Section 2 (2).

The marital agreement is also called by some authors "post-marital agreement," to mean such agreement made by two people already married to each other who want to continue their marriage and also redefine their respective rights upon separation, divorce or death of one of the spouses.[107]

This can be comparable to the modification of matrimonial regime in our legal system. All these agreements spouses are engage into, is because their law does not limit the freedom of contract, and hence its applicability gives birth to all those types of marital, pre-nuptial and even post marital agreements, while in Rwanda parties are imposed to be regulated by the provisions of the law without any right to conclude an agreement stipulating otherwise.

The other strange thing under the USA, is that spouses can make an agreement anticipating their divorce or legal separation concerning the terms of the divorce or separation and any continuing obligations of the parties to each other, and that is referred to as "Separation Agreement."[108] It is understandable that they also provide for their financial fate.

The above comparative study shows in general that there is no great difference in the institutions of marriage in those compared jurisdiction, especially in the part of matrimonial property regimes, with the exception of the UK. In most of these jurisdictions, their laws provide for a 3 matrimonial regimes which parties may opt for before entering into marriage. The common thing in them is that the matrimonial regimes (others call them "marriage contracts)" produce effect upon marriage celebration.

However, with exception to Rwandan jurisdiction, in other family laws, the options provided in their laws regulating matrimonial regimes are not exhaustive. Parties may refer to them or create

[107] X, "Premarital Agreements," available at <http://www.prenhall.com/divisions/ect/app/wilsonlaw/M02_WILS3688_01_SE_C02.pdf,> last accession on 23/05/2014.

[108] X, "Premarital Agreements," available at <http://www.prenhall.com/divisions/ect/app/wilsonlaw/M02_WILS3688_01_SE_C02.pdf,> last accession on 23/05/2014.

any other one as they deem appropriate to them, so long as they do not contravene public order, good morals and public policy.

Conclusively therefore, one should not that the freedom of contract is a principle which basically implies that the contract derives from parties will. By virtue of this will, parties are free to engage into contractual obligations or not, free to choose the partner in contract, free to determine the contents of their contracts and free to alter and terminate their contract. This principle is consequently applicable to in marital agreements or matrimonial property regimes that prospective spouses conclude during their marriage, because they are also pure contractual undertakings

CHAPTER II: INCIDENCE OF FREEDOM OF THE CONTRACT ON MATRIMONIAL REGIMES

The matrimonial property regimes as any other contract, are to be abided by normal general principles governing contracts. As it s understood, the principle of freedom of contract comes before others, since, as it is demonstrated it above, it is the basis on which contractual obligations derive from. Consequently, it also has some impact on matrimonial regimes, as contracts, in one way or the other. In this second chapter of my research, the research will demonstrate the incidence that the principle of freedom of contract produces upon matrimonial properties regimes and their implications as whole.

SECTION I: THE SUPPLETIVE CHARACTER OF THE LAW ON MATRIMONIAL REGIMES

In addressing the issue of incidence of the principle of freedom of contract on matrimonial regimes, one has to assess the function of the law regulating matrimonial regimes with regards to the contents of matrimonial regime agreement.

In other words, it is the comparison of law of contracts vis-à-vis the contents of a certain contract. Is it the law that stipulates what the contract provisions will be? In this perspective, Professor MATHIAS E. STORM argues that "the very first function of contract law is not to impose certain forms of behaviour but, rather, to enable certain forms of behaviour."[109]In the same way, the law regulating matrimonial regimes should not come to restrict the freedom of contract of spouses but rather to create that freedom as we will see it in other jurisdictions, like France and the Philippines.

§1 The concept of suppletive character

In tempting to define what suppletive character, one will first trace definition of the word suppletive itself, then assess its legal standing and implication. Thefreedictionary defines the term "suppletive" as "supplementary or supplying deficiencies"[110]

[109] M. E. STORME, *Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law*, (Paper was presented at the Conference European legal harmony: goals and milestones, 10th anniversary Juridica international, in Tartu on December 6, 2005), p. 6.

[110] X, "Thefreedictionary," available at <www.thefreedictioary.com/suppletive,> last accession 29/05/2014.

The Civil Law Dictionary defines suppletive law as "a general background law that fills in gaps where for example, a contract does not provide for a certain situation."[111] Hence, one may say that a legal provision which is suppletive, it is that one whose stipulations can be derogated from, which acts as filling the vaccum in case parties did not provide otherwise. In other words, its implications are not imperative.

In this situation, parties have a wide range to stipulate as they deem convenient, and suppletive provisions are there in case parties did not provide otherwise. In the laws governing contracts, as the research will demonstrate below, suppletive provisions are to be observed in case parties did not provide otherwise. However, it is worth noting that, a law can have both suppletive and imperative provisions.

Thus, these suppletive rules also referred to as default rules in a contract law, are of great importance. As demonstrated by Professor E. STORME cited above, default rules play a very important role, even if they are not imperative or mandatory and hence can be overridden by contractual clauses. As he says, "Default rules are very useful, as they enable parties to make contracts without spelling out all the terms of a contractual relationship that are not yet determined by mandatory law, whereas the absence of default rules would oblige them to do so in every single"[112]

§2 The relationship between the law of contract and the will of parties

[111] X, "Online Civil Law Dictionary," available at <civillawdictionary.pbworks.com/w/PAGE/15934874/S%20Civil%20Law> last accession on 29/05/2014.

[112]M. E. STORME, *Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law,* (Paper was presented at the Conference European legal harmony: goals and milestones, 10th anniversary Juridica international, in Tartu on December 6, 2005), p. 5.

As it is mentioned in earlier paragraphs of this research, it is argued by different scholars that the role of the law on contracts is not to restrict their relationships, but rather to enable them. As it is mentioned it above in different civil codes, normally the formation of contractual obligations base on the will of parties.

Thus, the research will demonstrate the ideal suppletive provisions of the matrimonial regimes and imperative ones. This gives to this law a double character; it has some rules of imperative character which aim at protect the public policy and good morals, and on the other hand some rules of suppletive character, which parties can derogate from. The later are those of contractual nature, which do not cause any threat to public order.

In relation to the above issue, Richard CRASWELL asserts that most of contract law consists of default rules; which implies rules that apply when parties fail to address a certain topic in their contract.[113] This applies even in matrimonial property regimes as contracts, its rules are supposed to apply in case parties did not provide otherwise in their marital agreements, except for the rules public policy and good morals. For instance, the Quebec Civil Code in its article 431, states that "Any kind of stipulation may be made in a marriage contract, subject to the imperative provisions of law and public order."[114]

The above author adds that it is very rare to find where these default rules will affect at all the autonomy of the will. Therefore, one may conclude that the non-applicability of default rules of the law of contract is a direct incidence of the principle of freedom of contract.

§3 The role of the Law regulating matrimonial regimes

Generally speaking, the law regulating matrimonial regimes, mostly found in family codes provisions, plays the role of establishing rules that will be referred to in pecuniary relationships

[113] R. CRASWELL, "Freedom of Contract", p. 3 available at <http://www.law.uchicago.edu/files/files/33.Craswell.FrdmCntrct_0.pdf,> last accession 11/06/2014.

[114] The Civil Code of Québec, article 431.

between spouses. In different jurisdictions, one finds that the law regulating matrimonial regimes is part of underlying legal framework surrounding this institution. This means that it is one of the sources of rules applicable to matrimonial property relationships among spouses, but it rarely becomes the sole instrument to exhaustively regulate the property relationships of spouses.

For instance, when one looks at the Civil Code of the Philippines, in its article 118, it clearly reads that "the property relations between husband and wife shall be governed in the following order: (1) by contract executed before marriage, (2) By the provisions of this code and by customs."[115]

From this article, one may retain that the property relationships are not solely regulated by the law governing matrimonial regimes (the Civil Codes in civil law countries), but rather they are governed by the agreement made up by parties (marital agreements or contractual matrimonial regimes) and then the law comes to supplement or to fill in the gaps in case parties failed to address certain issue. The same does the culture as the above article elucidates.

The other important role played by the law governing matrimonial property regimes, is to put in place, some imperative rules of public order and good morals, from which parties cannot derogate or agree otherwise. This derives from general limitations to the principle of freedom of contract, which is implied in the above mentioned article 1306, which recalls that "the contracting parties may establish such stipulations, clauses, terms and conditions as they deem convenient, provided they are not contrary to law, morals, good customs or public policy."[116]

Among those rules, one may say those relating to the primary regime and imperative obligations of each spouse, such as duty of maintenance, assistance and help, etc. though in these countries, matrimonial property regime rules are based on the will of parties, those provisions of imperative character to ensure the public policy, must be safeguarded by parties. Otherwise, those agreements will be void.

[115]Republic Act no. 386 to Ordain and Institute the Civil Code of the Philippines, article 118.

[116] Republic Act no. 386 to Ordain and Institute the Civil Code of the Philippines, article 1306.

When one looks at the French Civil Code mentioned above, they realize that it contains default rules, that will apply in case parties did not make special agreements concerning the their financial relationships.[117] It is also there to provide for the limits to freedom of contract for spouses, in order to preserve the primary duties that flow from marriage. In the above mentioned French Civil Code, especially in its article 1386, it is prohibited to parties to derogate from primary duties and rights resulting from as marriage, as the research will elucidate in following paragraphs in my comparative study.

§4 The Rwandan Context

In the Rwandan context, the study will discuss the scope of freedom of parties (spouses) in relation to determination of rules to govern them during their marriage. The research will specifically focus on the scope that the above mentioned Law regulating Matrimonial Regimes, Liberalities and Succession gives to prospective spouses in the exercise of their freedom of contract. The research will assess their freedom to determine the contents of their contract (matrimonial regime), as then check on the role this law plays in providing rules that apply in matrimonial property regimes.

A. The scope of parties' choice

Among the implications of the principle of freedom of contract or principle of autonomy of the will, notably; freedom to contract or not, freedom to choose who to contract with and then freedom to determine the contents of their contract, we see that the Law No 22/99/1999 regarding Matrimonial Regimes, Liberalities and Succession provides only a very limited freedom to parties, as the research will explain it later.

According to article 1 of the above mentioned law regulating Matrimonial Regimes, Liberalities and Succession, which stipulates that "the matrimonial regime is a body of rules to **be fixed by**

117 The French Civil Code (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), article 1387.

this law governing the agreement between spouses on the management of their property[118] this means that everything that is related to the management of the property of spouses will be solely extracted from that law. One then wonders where the freedom of parties is exercised and what their choice is like. It shows that, while in other countries, the patrimonial relationships are first of all the matter to be resolved by agreements concluded by parties, the default provisions of the law regulating matrimonial regimes (imperative rules of good orders and public policy) and laws that are there to fill the vaccum in case parties were silent on it.

Therefore, parties can only choose among three options established by the law, whose rules apply ipso facto without any modification or addition by parties. The above law recalls "… they are only rules to be fixed by the above law."

B. The freedom of choice of properties to be in community

The issue of the choice of properties to be included in the community in Rwanda raise only in two regimes, notably; the regime of community of property and the regime of limited community of acquests, because it is the only regimes whereby spouses have some properties in community. By virtue of the principle of freedom of contract, parties should be endowed with the right to determine the contents of their marital settlements (also known as matrimonial regime under Rwandan law) in a way that is suitable to them, provided that they do not derogate from the public policy and good morals.

I. The regime of community of property

The way in which this choice is made, is provided for by the law in a strict and limiting way as it is explained below. For instance, in the regime of community of property, article 3 of the above mentioned law regulating matrimonial regimes, liberalities and successions specifies that whenever parties have chosen the regime of community of property, they therefore agree to have

[118] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* n° 22 of 15/11/1999, article 1.

a joint ownership of all their property, movable or immovable as well as their present and future charges.[119]

Reading the provisions of this article, one may conclude that there is no personal properties in this regime, since those categories said above include all property they may own. But for an interpretative view some personal properties can be identified by virtue of article 6 of the above mentioned law regulating matrimonial regimes.

This law does not allow them to make any addition or modifications or at least to agree otherwise, in case they find it so convenient to them. According to the principle of freedom of contract, all the default rules (other than those of public order and good morals) apply in case parties did not provide otherwise. This was shown in most of all legal texts provided so, to guarantee the freedom of contract.

All in all, one may brief that there is actually no choice of properties to be in community as such, once parties have chosen community of property, but rather, parties choose only a regime. Once you chose the regime of community of property, you automatically go with all its stipulations provided for under the law regulating matrimonial regimes, liberalities and succession.

II. The regime of limited community of acquests

To determine the standing of the freedom to determine the contents of the agreement in matrimonial regimes, for instance once parties have chosen the regime of limited community of acquests, article 7 stipulates that "parties agree to pool their respective properties owned on the

[119]Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, Article 3.

day of marriage celebration, to constitute the basis of the acquests as well as the property acquired during marriage by a common or separate activity, donation, legacy or succession."[120]

This implies that by the mere fact of choosing the regime of limited community of acquests, spouses will automatically own all the revenues, assets and liabilities that they will acquire during the marriage, without any derogation.

The little freedom of choice they will have, concerns only on determining which properties among the ones they have been owning on the day of marriage, that will be in the community or be kept personal, as elucidated in article 8 of the above mentioned law on matrimonial regimes, liberalities and succession, which reads that "At the marriage celebration, the spouses who opted for the regime of limited community of acquests shall establish and submit to the officer of civil status a signed inventory of assets and liabilities defined by each spouse to constitute the community. Any property that is not inventoried as common property shall, be presumed to be personal property."[121]

At least in this regime, spouses exercise their freedom to determine the content of the contract by choosing which property to be put in the community and those ones to be kept as personal properties.

However, still this freedom is very limited only on the properties brought on the day of marriage. This means that they have no choice as regards to the properties that will be acquired during the marriage. By virtue of the principle of freedom of contract, parties should be endowed with the right to determine even the fate of properties that will be acquired after marriage. They might not necessarily co-own all of them.

[120] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, Article 7.

[121] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 8.

For instance, some are likely to keep the inheritances and donations personal. But basing on the above provisions, they are not allowed to make any additional clauses to the provisions of the law. They will therefore be obliged to co-own all their future incomes and liabilities born after marriage.

III. The regime of separation of properties

As it is mentioned above, actually there is no problem concerning the right to choose the contents of contract in the regime of separation of property, especially the property to be included in the community, because there is an absolute separation of property under this regime, thus there is no property considered to be in the community. Each spouse keeps their properties as personal and regulated by ordinary laws governing properties in Rwanda.

Nevertheless, it is worth noting that obligations rising from marriage continue to apply, such as duty of maintenance, contribution to the household charges, raising and educating children, and so forth. Hence, there is no matter concerning the choice of properties in this regime.

C. The choice of personal Properties

Similar to what is mentioned in preceding paragraphs, the choice of properties that will be considered as personal will mostly concern spouses who opted for the regime of community of property and limited community of properties, and less arise in the regime of separation of property.

In the regime of community of property, there is no direct properties designated to be personal, nor do parties have choice to exclude some of their properties from the community, because it is total community of property. However, article 6 of the above mentioned law on matrimonial regimes, liberalities and succession, provides that during the partition of assets and liabilities, items of personal use mentioned above remain with the patrimony of the spouse they belong to.

It is only by interpretation that one can assume that the legislator intended them to be items considered as personal though parties are in the regime of community of property. The issues surrounding this assumption were discussed in the first chapter.

As far as the regime of limited community of acquests is concerned, the assets and liabilities that form personal properties are the ones designated as so in the inventory made by prospective spouses by virtue of article 8.

In the regime of separation of properties, all assets and liabilities are personal to the spouse, unless things co-owned by virtue of ordinary property laws governing joint ownership.

A. Additional Clauses

I. The concept of additional clause

Generally speaking, the term "additional" is defined by the online dictionary as "additive or complementing."[122]Therefore, additional clauses in this context of matrimonial regimes, will be understood as clauses that prospective spouses may add to the provisions provided for under the law regulating matrimonial regimes, liberalities and succession, in order to fit better their will as they find it convenient to them. They are considered as "subordinate or aiding" to what was provided for by the law.[123]

Normally, when one looks at the law mentioned above regulating matrimonial regimes, liberalities and succession, it does not allow parties to make any additional clauses to what it provided concerning the any matrimonial regimes. Once parties have chosen a regime, they take it all with all its provisions, without any modification or addition made to it.

[122] X, "Thefreedictionary," available at <http://legal-dictionary.thefreedictionary.com/additional,> last accession on 04/06/2014.

[123] X, "The freedictionary," available at <http://legal-dictionary.thefreedictionary.com/additional,> last accession on 04/06/2014.

II. The scope of additional clauses

The scope of additional clauses means the limitations of additional clauses that parties are allowed to put in their contracts, especially matrimonial regimes, to supplement or complement what the law did not provided for.

They can also substitute some provisions of the law, to stipulate more advantageous provisions in their contract, withstanding the limits of freedom of the will as discussed above. In the USA, it is less advised that spouses make additional clauses which do not deal with finances and property.[124]

III. Effects of additional clauses

As it is mentioned, above, additional clauses play a role of allowing prospective spouses to add some clauses of their own to the provisions provided for by a matrimonial regime they have chosen. This helps cover any issue that the matrimonial regime provisions did not cover.[125] Once they are added, they form part of their marriage settlement (matrimonial regime contract) and they are binding as any other contract. These clauses may even make some modifications on what was provided by the law, so long as it abides by public policy and good morals.

§5 Comparative study

This short comparative study aims at illustrating the incidence of the principle of freedom of contract in other different jurisdictions, notably in France and the Philippines, and how their laws give effect to this principle in allowing the will of parties to be the primary determinant of their patrimonial relationships.

[124] LAWDEPOT, "Pre-nuptial agreement, United States," available at <http://wiki.lawdepot.com/wiki/Prenuptial_Agreement_FAQ-United_States#Additional_Clauses,> last accession on 06/06/2014.

[125] LAWDEPOT, "Pre-nuptial agreement, United States," available at <http://wiki.lawdepot.com/wiki/Prenuptial_Agreement_FAQ-United_States#Additional_Clauses,> last accession on 06/06/2014.

A. French Jurisdiction

Under the French Jurisdiction, their law governing matrimonial regimes; which the French Civil Code, provides for a wide room for parties to exercise their freedom in determining the contents of their matrimonial regimes, referred to as "contrat de marriage" so that they may organize their relationships in way more suitable to them. Here, the law stands not to limit their will, but rather to allow it, as it is mentioned it above.

Therefore, the research will not go to all details of how the French law observes the freedom of contract for parties in determining the fate of their marriage contract compared to the Rwandan Law, rather, it will mention some key principles found in the French civil code, which gives a clear picture on how the law regulating matrimonial regimes should be understood. Unlike the Rwandan law, in France the French civil code provisions relating to matrimonial regimes are not imperative, thus parties can derogate from them, as it will be clarified below.

I. The suppletive character of the French law regulating matrimonial regimes

The suppletive character of the French Civil Code provisions regulating matrimonial regimes appear at the very first article of the part concerning matrimonial regimes entitled "*Titre V: Du Contrat de mariage et des régimes matrimoniaux",* (Of ant-nuptial agreements and of matrimonial regimes) its article 1387, which clearly reads *« La loi ne régit l' association conjugale, quant aux biens, qu'* ***à défaut de conventions spéciales*** *que les époux peuvent faire comme ils le jugent à propos, pourvu qu'elles ne soient pas contraires aux* ***bonnes moeurs*** *ni aux dispositions qui suivent.»*[126]

This means that « legislation regulates conjugal association, with respect to property, only **in default of special agreements**, which the spouses may enter into as they deem proper, provided

[126] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English) article 1387.

they are **not contrary to public morals** and to the following provisions"[127] without repeating things talked above, it is clear that the French civil code is there, in matters concerning financial relationships, to act in case parties did not provide otherwise. That is what is referred to as suppletive character.

II. The scope of parties choice

The fact that the parties are free to determine the contents of their matrimonial agreements, due to the suppletive character of the matrimonial regime, does not mean that the parties' freedom is unlimited under French Jurisdiction. The Civil Code stands also to protect the marriage institution, ensuring that family members; especially children are protected and hence not abused by spouses freedom. That's the reason why the French Civil code has also provided for some imperative rules; of public policy from which parties cannot derogate.

For instance, under article 1388 of the French Civil Code, which reads that "Spouses may derogate neither to the duties and rights which result for them from marriage, nor to the rules of parental authority, statutory administration and guardianship"[128] Spouses choice and stipulations are limited to those rules mentioned above, and therefore cannot derogate against them.

Another limitation of parties' choice recognized under the French Civil Code, is under article 1389 which prohibits spouses from making any agreement or waiver whose object would be to change the statutory order of successions.[129] One may deduct from this article that its provisions aim at protecting the rights of heirs in case of the death of one of spouses.

[127] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English) article 1387.

[128] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), Article 1388.

[129] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), article 1389.

III. Additional clauses

The fate of additional clauses under French jurisdiction is clear and above mentioned provisions efficiently give its picture on its own. If parties can derogate at all from relying on what is provided under the law governing matrimonial property, they can also make additional clauses to what is provided in their law; the French Civil Code. This is eventuated especially from the provisions of the above mentioned article 1387, only in default of parties' special agreements. Therefore, any financial matter addressed in the ante-nuptial agreement, the law does not apply. The limitation to this is the same as provided above under article 1388 and 1389.

In brief, one may assert that upon entering into marriage in France, parties choose either to conclude a special matrimonial property agreement convenient to their will, or choose to be governed by one of matrimonial regimes provided by the law. They are also free to insert additional clauses to supplement or modify some default provisions provided that they are not of public order.

B. The Philippines Jurisdiction

As it is mentioned above, the matrimonial property relationships are governed by the Family Code of the Philippines, whose provisions are also contained in the Civil Code of the Philippines.

In actual sense, there is no such big difference as to the role played by both the French Civil Code and Family Code of the Philippines with regards to the French Civil Code mentioned above. They both play double role, notably; to establish imperative rules which protect the family as a unity protected for by the law and to put in place provisions that will apply in case default by parties. Therefore, one may say that most part of its rules are suppletive as itwill be mentioned below.

I. The suppletive character of the Philippines law regulating matrimonial regimes

As it is mentioned it above, the rules contained in the law governing matrimonial regimes in the Philippines are not all imperatives. The research will recall the article 74 of the above mentioned Family Code of the Philippines which clearly declares that property relations between husband and wife are not only governed by that Code, but rather adds "marriage settlements executed before the marriage" as well as local customs.[130]

Under the Philippines law, it is through marriage settlements (marriage agreements) that parties make before entering marriage, where they choose the matrimonial regime they chose among the three provided by the law, or may come up with any other regime[131] organized in the way fitting their will. Thus, by observance of freedom of contract, prospective spouses may agree to rely on matrimonial regime rules or agree otherwise.

All in all, one may say that the Philippines Family Code has given its rules concerning the property relationships a suppletive character, because they apply in case parties did not conclude marriage settlements or referred to them in their marriage settlements. However, this freedom is not unlimited, since the rules of public order always apply without any derogation.

These rules are there to protect the family as an institution which has to be conserved by the law, by virtue of article 149 of the above mentioned Family Code, which reads that "The family, being the foundation of the nation, is a basic institution which public policy cherishes and protects. Consequently, family relations are governed by the law and no custom, practice or agreement destructive of the family shall be recognized or given effect."[132]

From the above article one may retain that therefore, in concluding their marriage agreement spouses are prohibited to include any provisions that seem to be destructive to the family, since

[130]Executive Order no. 209, The Family Code of the Philippines, article 74.

[131] Executive Order no. 209, The Family Code of the Philippines, article 75.

[132] Executive Order no. 209, The Family Code of the Philippines, article 149.

once it is therein, this agreement will not take effect as the above law mentions. This implies that primary obligations from marriage, as provided from articles 68 up to article 73 cannot be waived. Those include for instance the obligation to live together, observe mutual love, respect and fidelity, mutual help as well as support.[133] Thus, on matters concerning public policy, the law continues applying.

II. The scope of parties' choice

As it is mentioned above, in the Philippines spouses have a wide range of choices in determining the fate of their matrimonial property relationships, through opting one of the regimes provided by the law or any other regime whether provided for in the law or not.[134] The limitations are the same as mentioned above.

What appears clearly is that there is not limited number of regimes spouses may opt for, they may even create their own. What matters in my research is only to see how the freedom of contract is observed, through giving parties the right to determine the contents of the provisions governing their relationships, since matrimonial regime is a pure contractual engagement. No one should be imposed to follow certain prescribed rules on how his/her pecuniary relationships are going to be dealt with.

III. Additional Clauses

Going back to explain how parties in the Philippines are allowed to conclude additional clauses to complement the provisions of the law if they think something was not covered or want to make any modifications that they want to be applicable, will be repeating things mentioned above. It is therefore clear that spouses through entering into marriage settlements may refer themselves to a certain matrimonial regime as it is or with additional clauses, by virtue of article 74 mentioned above.

[133] Executive Order no. 209, The Family Code of the Philippines, article 68

[134] Executive Order no. 209, The Family Code of the Philippines, article 74.

To conclude on this suppletive character of the law regulating matrimonial regimes, liberalities and succession, one may recall that this character gives the law regulating matrimonial property relationships, it is clear that because of the principle of freedom of contract, parties are allowed to derogated from the default rules of the law and conclude an agreement more suitable to them, as we saw for instance in France and the Philippines.

Conclusively thus, the law on matrimonial regimes does not only contain mandatory rules to guide parties, but also the default rules which will apply in default of parties stipulations. The following section will illustrate on those rules which have to be observed as mandatory, to protect the family as a basic unity, the public order and good morals.

SECTION II: THE IMPERATIVE PROVISIONS OF THE LAW REGULATING MATRIMONIAL REGIMES

As it is mentioned in preceding chapters, one of the key role of the law on matrimonial regimes in all jurisdictions, is to put in place mandatory rules which will regulate the parties' undertakings in the way they agree on matrimonial regimes. Thus the law on matrimonial regimes establishes rules of public order, which parties cannot derogate from. This acts as a justified limitation to the freedom of contact as the research will elucidate in this section.

§1 The concept of imperative provisions

Etymologically, the term "imperative" originates from latin "*imperatus"* a past participle of *"imperare"* which means "to command", whose first known use was in 15th century.

Imperative provisions as explained above, are those rules which have to be observed by parties in concluding a contract, without any derogation. The research will not go to much detail on all theories surrounding the concept of "imperative provisions". They are those mandatory rules established by the law to preserve the public order and good moral.

As a consequence, any contractual provision that contravenes the public policy or good moral does not produce any effect, since it is void. The concept of public policy itself is defined as "an idea or principle that is considered right and fair and in the best interest of the general public."[135]

§2 Rwandan context

Under Rwandan law, the above mentioned law governing matrimonial regimes, liberalities and succession, contains also some rules which are of public order *per see.* Those rules emanate from constitutional conservation of the family as a natural foundation of Rwandan society.

This is provided under article 27 of the Constitution of the Republic of Rwanda, which stipulates that "The family, which is the natural foundation of Rwandan society, is protected by the State. Both parents have the right and duty to bring up their children. The State shall put in place appropriate legislation and institutions for the protection of the family and the mother and child in particular in order to ensure that the family flourishes."[136] It is from this provision that one may assert that the family was designated by the Constitution itself as something of great concern to the state, and therefore has to put in place rules that ensure its preservation.

Those rules do not only concern the formation of family, notably marriage fate, but also extend even at its consequences, matrimonial property relationships inclusive. Consequently, since those rules are mandatory and cannot be derogated from, they hence apply to all matrimonial regimes

[135] X, "Premarital Agreement," Available at <http://www.prenhall.com/divisions/ect/app/wilsonlaw/M02_WILS3688_01_SE_C02.pdf,> p. 32, last accession on 07/06/2014.

[136] The Constitution of the Republic of Rwanda of 04 June 2003, as amended to date, *O.G.* n° special of 4 June 2003, article 27.

without any distinction. Those are rules for instance concerning primary regime, disposal of family patrimony, and so forth.

A. Primary regime

The concept of primary regime is defined as "a sum of rules that ensure the functioning of the marriage, including the case the spouse get along, but especially designed to ensure the organization of the marriage in case of disagreement arises between spouses. These rules are also referred as 'the primary imperative regime.'"[137]

As several authors mention, the primary regime is considered as the foundation on which other specific matrimonial regimes are based, since it contains the basic statutes applicable to all matrimonial regimes.[138] With regards to the principle in question; applicability of the principle of freedom of contract, it is clear that the primary regime acts as a fair restriction to it, and hence arties cannot enter into a marital agreement or make an additional clause waiving the obligations endowed by virtue of primary imperative regime.

IRINA APETEI argues that the primary regime and the matrimonial regime together form 'the patrimonial charter of marriage.'[139] According to this author, some of the features that distinguish the primary regime from matrimonial regimes in general, include:

- The fact that the primary regime is unique and includes only mandatory legal provisions, while the matrimonial regime may be chosen or concluded by the spouses, under the law;
- The fact that the primary regime applies to any marriage, along with the matrimonial regime chosen by the spouses;

[137] I. APETREI, "The primary imperative regime as regulated by the new Romanian civil code," available at <http://www.umk.ro/images/documente/publicatii/Buletin22/apetrei_irina.pdf,> last accession on 07/06/2014.

[138] G. MARTY et P. RAYNAUD, *Droit civil, les régimes matrimoniaux,* 2ème éd, Paris, Sirey, 1986, p. 28, in F. KAROMBA, *Matrimonial regimes, liberalities and succession,* NUR-LLB, Class notes, 2012-2013, p. 10.

[139] I. APETREI, "The primary imperative regime as regulated by the new Romanian civil code," available at <http://www.umk.ro/images/documente/publicatii/Buletin22/apetrei_irina.pdf,> last accession on 07/06/2014.

- The primary regime only covers provisions designed to ensure a minimal operation of the marriage, while the matrimonial regime includes rules that refer to the spouses' property, to their debts and also to their management.[140]

Since one cannot exhaust all provisions implied by the concept of primary regime in the law regulating matrimonial regimes mentioned above and generally in the family law in Rwanda, the research will only mention the main ones. Those are for instance;

a) The obligation to contribute to the household expenses, which makes up the pecuniary basis of daily life of the household members.[141] This obligation is provided under article 11 of the above mentioned law relating to matrimonial regimes, liberalities and succession.
b) The duty of assistance, which refers to moral support towards each other.
c) The maintenance obligation, which implies the obligation of support or alimony, by virtue of article 198 of the Civil Code Book I.

All these obligations are direct results of marriage and thus cannot be derogated from by the will of parties. They are presumed to imperative rules intended to secure the preservation and protection of the family, as envisaged by the above mentioned constitutional provisions.

According to article 14 of the above mentioned law No. 22/99 of 12/11/1999 Regarding the matrimonial regimes, liberalities and succession, "Spouses are to abide by the rights and duties resulting from their marriage as well as the rides of parental authority, legal administration and tutorship."[142]

[140] I. APETREI, "The primary imperative regime as regulated by the new Romanian civil code," available at <http://www.umk.ro/images/documente/publicatii/Buletin22/apetrei_irina.pdf,> last accession on 07/06/2014.

[141] F. KAROMBA, *Matrimonial regimes, liberalities and succession,* NUR-LLB, Class notes, 2012-2013, p. 11.

[142]Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* nº 22 of 15/11/1999, article 14.

B. Transferable quota

As far as Rwandan law is concerned, the transferable quota is defined as a "portion of property that a person can dispose of as he/she thinks fit."[143] This provision should also not be derogated from parties, because it aims at protecting the family patrimony, against unnecessary waste of property. It is there to protect the heirs and surviving spouses who benefit from the reserve of succession, by virtue of article 78. This portion is also not subject to parties' choice since it has a public policy character.

This entails that even though parties should be give their freedom to determine the contents of their marital agreement, they are not allowed to derogate from these imperative provisions of public order, emanating from primary consequences of marriage as provided for under the Civil Code Book I and the above mentioned on Matrimonial Regimes, Liberalities and Successions.

C. Other rules of public order

Generally speaking, rules of family law that have a public order character are the ones that fit in the definition given above of what public policy is. To note; "An idea or principle that is considered right and fair and in the best interest of general public."[144] Therefore, other rules in the law that fall in the perspective of public order or good morals of Rwandan society act as a limitation to freedom of contract as it is explained above.

Among them one can mention for instance rules aiming at protecting third parties, especially creditors of either spouse, against abuse that can emanate from the transactions they held in the interest of the household. That's the rational of for example article 10, article 16, article 21, and article 13 of the above mentioned law on matrimonial regimes, liberalities and succession. The

[143] F. KAROMBA, *Matrimonial regimes, liberalities and succession,* NUR-LLB, Class notes, 2012-2013, p. 139.

[144] X, "Premarital Agreement," Available at <http://www.prenhall.com/divisions/ect/app/wilsonlaw/M02_WILS3688_01_SE_C02.pdf,> p. 32, last accession on 07/06/2014.

provisions of those articles aim at protecting the outsiders, such as in cases of donations, or in business transactions in case one of the spouses is a businessperson.

Another important provision which is and should continue to be imperative for preservation of family interest, is article 12 of the above mentioned law on matrimonial regimes, liberalities and succession, "Upon request by one of the spouse or any interested third party, the spouse who imperils the interest of the household by, depreciating or dissipating his or her property may be divested of the right of administration and enjoyment in accordance with article 11 of the present law."[145]

All in all, one can sum up by saying that the above mentioned provisions which are of the public order and other rules of good morals should be the only ones limiting the freedom of parties in determining the fate of their patrimonial relationships during the marriage. The law should give them a wide range of choices in relations that do not concern the public order as we saw it in other jurisdictions mentioned above.

§3. Comparative study

As the research mentioned it above, it would be abusive, if the Rwandan law continues stipulating that all the rules contained in the matrimonial regimes are of public order, thus do not allow parties to stipulate otherwise in cases which concern their private patrimonial relationships. In other jurisdictions, they also have rules of public order which parties cannot derogate from. Below here the comparative analysis aims at illustrating the basis of those imperative rules, in order to finally have a clear picture of how Rwandan law on matrimonial regimes would be looking like it respects the principle in question.

[145] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* n° 22 of 15/11/1999, article 12.

A. The French jurisdiction

As it is mentioned above, under French jurisdiction spouses are free to organize their conjugal relations in respect of property, as it is mentioned it above. The law only applies in case of default of their special agreements.

However, the freedom of parties in determining the fate of spouses in concluding ante-nuptial agreements, is not unlimited. The provisions considered being of public order or good morals stand as limitations in the applicability of freedom of contract in this area. For instance, article 1388 of the French Civil Code as it is mentioned above, reads that "Spouses may derogate neither to the duties and rights which result for them from marriage, nor to the rules parental authority, statutory administration and guardianship."[146]

Another similar limitation to parties freedom in concluding ant-nuptial agreements, appears in article 1389, which reads that in part that "… spouses may not make any agreement or waiver whose object would be to change the statutory order of successions"[147] this shows that only provisions relating to protection of family subsistence are imperative and cannot be derogated from by spouses in their ante-nuptial agreements. As the above article mentioned, duties resulting from marriage cannot be waived by marital agreement.

B. The Philippines Jurisdiction

Under the Philippines jurisdiction, the property relations between spouses have different aspects. Some are under exclusive obedience to the law, others left to be settled by marriage settlements concluded by spouses and even the local customs.[148] Those which parties cannot derogate from thus constitute imperative rules of public order. Among provisions the family code of the

[146] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), Article 1388.

[147] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), article 1389.

[148] Executive Order no. 209, The Family Code of the Philippines, article 74.

Philippines intended to stand as a limitation to freedom of parties in concluding the marriage settlements, one may the denote the following below;

- By virtue of article 149 of the Family Code of the Philippines, parties are prohibited to insert in their marriage settlements, any provision which seems to be destructive of the family, since the family is protected by the law as being the foundation of the nation as well as basic social institution.
- Article one of the Family Code of the Philippines also makes imperative all aspects concerning the nature, consequences and incidents of marriage. Thus, as it stipulates, those aspects are not subject to stipulation, except that marriage settlements may fix the property relations during marriage.[149]
- Other provisions related to primary regime as envisaged by articles 68 to 73.

§4. Comparison to the Rwandan Jurisdiction

As one may deduct from the provisions of the laws of those countries mentioned above, notably, France and the Philippines, we talk about rules which have imperative and suppletive character because at least in their countries spouses are allowed to derogate from the default rules provided by the law and conclude an marital agreement that is more suitable to their will.

Under Rwandan law, as article 1 of the above mentioned law on matrimonial regimes recalls, "matrimonial regimes is a body of rules to be fixed by this law…"[150] This means that matrimonial regimes is exclusively limited to what the has provided. Parties are not allowed to stipulate otherwise. We have a unique source of matrimonial property relationships between spouses in Rwanda.

[149]Executive Order no. 209, The Family Code of the Philippines, article 1.

[150] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* n° 22 of 15/11/1999, article 1.

While for instance under the Philippines, article 74 of their Family Code mentioned above, reads that "The property relations between husband and wife shall be governed in the following order: (1) By marriage settlements executed before the marriage; (2) By the provisions of this code; and by the local customs." This shows that the rules to regulate the matrimonial property relationships have 3 sources.

In comparison to French law, article 1387 of the French Civil Code stipulates that "Legislation regulates conjugal association, with respect to property, only in default of special agreements, which spouses may enter into as they deem proper, provided they are not contrary to public morals and to the following provisions." Unlike in Rwanda, this article also indicates that the source of matrimonial property relations is not only the law. the law provides for 'default rules' to be applicable just in case parties did not provide otherwise, and to limit to indicate rules of public order which parties are obliged to abide by in concluding their marital agreement.

To conclude, it is clear that under Rwandan law all rules of the law regulating matrimonial regimes were all made 'imperative' by the legislator, including those of public order as it is discussed above and even those which are not of public order or good morals. This is a serious violation of the principle of freedom of contract, which implies that parties have freedom to determine the terms of their contract in a way suitable to their will, and only be limited by provisions of public policy and good morals. Since a matrimonial regime is also pure contractual engagement, this freedom should be granted.

The Rwandan law itself recognizes the contractual status of the matrimonial regimes. For instance, article 3 of the above mentioned law on matrimonial regimes, liberalities and succession reads in part that "The regime of community of property **is a contract** by which the spouses …,"[151] and article 7 which also reads in part that "The regime of limited community of

[151] Law no. 22/99 of 12/11/1999 To Supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession, *O.G.* n° 22 of 15/11/1999, article 3.

acquests **is a contract** by which…." as well as in article 11 which also reads in part that "The regime of separation of property **is a contract** by which spouses…"

All those provisions show that the legislator recognized the fate of contractual nature of matrimonial regimes. As a consequences, they must also abide by essential conditions of a valid contract and respect basic principles of contract, notably, 'the principle of freedom of contract' and 'the principle of sanctity of contract also known as 'pacta sunt servanda'.

As we saw, in Rwanda, the freedom of spouses in choosing the matrimonial regime that will regulate their pecuniary relationships, is only limited to choosing the regime. And once one has chosen it, they have to take it with all its provisions without any addition, without any modification. In other words, it does not have default rules. This is a serious limitation to the principle of freedom of contract, which normally implies that parties are free to determine the content of their contract, in a way suitable to their will.

In granting this freedom in a full way, other jurisdiction the research mentioned, allow prospective parties to choose either to be regulated by the rules of the matrimonial regimes provided in their respective law on matrimonial regimes, or conclude their own marital agreement, so long as they do not contravene the mandatory rules mentioned in this section.

The following section illustrates possible and available remedies Rwandan legislators may draw from compared jurisdiction in this research, so that the principle of freedom of contract, generally respected in Rwanda, should be observed and applicable even in matrimonial regimes, since the later consists of contractual engagements.

SECTION III: AVAILABLE POSSIBLE SOLUTIONS TO ENSURE THE FULL OBSERVANCE OF FREEDOM OF THE WILL IN MATRIMONIAL REGIMES' RULES UNDER RWANDAN LAW.

Having seen how the freedom of contract should be ideally observed with its implication on all contractual engagements and how it is applicable in other jurisdictions where they have similar matrimonial regimes, and having seen how the Rwandan law regulating matrimonial regimes seriously undermines the applicability of this principle on the determination of the contents of the contract.

In the following section, the research will show possible solutions that may be drawn from the jurisdiction compared above, so that we may ensure the observance of this principle in matrimonial regimes. The study will discuss the scope of freedom of parties, the admission of additional clause as well as the non- limitation of the types of matrimonial regimes that are optative.

§1 The scope of freedom of parties

Basing on article 2 of the above mentioned law regulating matrimonial regimes in Rwanda, which says that "Upon entering marriage spouses shall choose one of the following matrimonial regimes; 1. Community of property; 2. Limited community of acquests; 3. Separation of property. In case no provision is made, the spouses shall be deemed to be married under the regime of community of property." It appears that currently, the freedom of spouses in

concluding the matrimonial regime that will govern their matrimonial relationships is limited to choosing a type of matrimonial regime, and nothing else.

However, as F. ZIGIRINSHUTI argues, "the principle guiding the conclusion of particular contracts is not the application of legal norms, but "Pacta sunt servanda", which reflects the principle of'"sanctity of contracts.'[152] The law should not play a role of imposing certain conduct, but rather to regulate their freedom.

This is what is meant by article 75 of the Philippines Family Code, where it reads in part that "the future spouses **may**, in the marriage settlements, agree upon the regime of absolute community, conjugal partnership of gains, complete separation of property **or any other regime."**[153] Therefore, 'spouses may' implies the freedom to opt, while 'spouses shall' implies the obligation to abide by what is stipulated therei.

In comparison again to French law again, the article 1388, which indicates that parties are free to determine the contents of their matrimonial property regime suitable to their will, and the law shall apply in case of default by parties and to regulate public policy,[154] we find that in Rwanda the scope of parties freedom is very unjustifiably narrowed by the law.

This may lead to parties to conclude a matrimonial regime which is not fully suitable to their will. For example, the researcher himself, does not see any among the three provided by the law, a matrimonial regime that is arranged in a way he deems convenient to him. On the researcher's view, he would choose a regime of community of property but agree with his spouse to exclude inheritances and donations that are personal. How can it be possible? No way by abiding to the above mentioned law.

[152] F. ZIGIRINSHUTI, *Op. Cit. note 1,* p. 2.

[153] Executive Order no. 209, The Family Code of the Philippines, article 75.

[154] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), article 1389.

§2 Admission of additional clause

One of the clear solutions to the problem the research has been deepening, which is the restriction the freedom of contract in the matrimonial property regimes in Rwanda, should be allowing parties to include additional clauses to what is provided for by the law. As it is explained above, additional clauses might be modifying what is provided for by certain default provisions or complementing what they did not clarify.

Apart from provisions of public policy character and good morals, the law should regulate the relationships of spouses just in case parties did not stipulate otherwise, so long as it is a contractual engagement. That is what was meant by the article 1388 of the French civil Code I mentioned in the preceding paragraph, that "Legislation regulates conjugal association, with respect to property, **only in default of special agreements,** which spouses may enter…"[155]

§3 Non-limitation of matrimonial regimes types

It is not justifiable to set a certain limited number of matrimonial regimes that will fit the will of all people of the country who will enter into marriage. Just like the legislator cannot predict all types of contract that will be needed by parties in everyday life because it is based on autonomy of the will, one can also not predict all types and forms of matrimonial regimes that will be suitable to all prospective spouses that engage in marriage.

On my point of view, that is the reason why the law of contracts provides for the main contracts that most of all people are likely to always conclude, such sale contract, lease, loan and so forth. But this does not hinder the *'sui generis'* contract to exist and take effect.

The Philippines have realized this issue and thus its family code named three main matrimonial regimes among which parties may opt for, but the article added the clause '*or any other*

[155] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), article 1388.

agreement' to show that those are not exhaustive. The same did the French Civil Code as it is mentioned above.

CONCLUSION AND PERSONAL RECOMMENDATIONS

Conclusively therefore, it should be noted that, the principle of freedom of contract is one of the vital principles that govern contracts, matrimonial regimes inclusive. Without this principle there would not be any contract, because a contract by definition is an "agreement by which one or several parties bind themselves, towards one or several others, to transfer, to do or not do

something"[156] Dr. Tina Purtschert denotes that "the conclusion of a contract requires a mutual expression of intent by the parties"[157]

Therefore, without their will a contract cannot be made and without an autonomy of the will, a contract cannot be suitable to will of parties. As a consequence, its observance or execution is very hardily effective.

In my conclusion, it is worth noting the main aspects of the principle of freedom of contract, which give implication to all contracts as it is mentioned in the beginning of this research, notably; 'the freedom to conclude or not conclude a contract', 'the freedom to choose the contractual partner', 'the freedom to establish the contents of the contract', 'the freedom of formality' 'the freedom to terminate and alter the contract' as well as the freedom to conclude any kind of contract regardless of whether it is among individual types included in the law of contracts.[158]

The applicability of this principle under Rwandan is as effective as in other countries whose jurisdiction compared in this research, especially in France and the Philippines. However, when it comes to matrimonial property regimes, its applicability becomes very crucial because it was much restricted by the legislator, comparing to those other compared jurisdiction.

People who conclude their marriage under Rwandan law are under obligation to choose one among one of three regimes provided for by the Law no. 22/99 of 12/11/1999 To Supplement

[156] The French Civil Code of 1804 as amended to date, (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Dr Anne ROUHETTE-BERTON, Assistant Professor of English), article 1101.

[157] T. PURTSCHERT, "Introduction to Swiss Law", p. 13 at available at <http://www.rwi.uzh.ch/lehreforschung/alphabetisch/huguenin/vorlesungen/or-at-1/2013IntroductiontoSwissLaw.pdf,> last accession on 11/06/2014.

[158] T. PURTSCHERT, "Introduction to Swiss Law", p. 19 at available at <http://www.rwi.uzh.ch/lehreforschung/alphabetisch/huguenin/vorlesungen/or-at-1/2013IntroductiontoSwissLaw.pdf,> last accession on 11/06/2014.

Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Succession.

The freedom of spouses to determine the content of their matrimonial property regime is limited to choosing a regime not its contents. Parties are not allowed to stipulate otherwise, unlike it is in France and in the Philippines. Another important feature that is cut off by the above mentioned law on matrimonial regimes, liberalities and succession, is the freedom to add some additional clauses to what is stipulated in the law, modifying or complementing a certain clause in a way they think it is more suitable to their will.

As recommendations, the Rwanda law should not impose prospective spouses, all the contents of the contract. The law should have a provision allowing parties to stipulate otherwise, if deem so convenient to their will, so long as they do not contravene the public policy and good morals. Thus, the law regulating matrimonial regimes should contain default rules that apply just in case parties did not stipulate otherwise. That is for example aspects that concern which properties to be included in the community, and which ones to be kept in personal properties, and other pure contractual based issues.

The other important thing is that the law should not limit parties to choosing among the three solely provided. That is limiting the freedom of contract and the right of parties to choose. Parties might probably come up with another unknown regime or a *sui generis* one. For example, parties may wish a regime of community of properties they have at the day of marriage, while keeping the acquests in personal patrimony of the respective spouse.

The French Civil Code and The Family Code of the Philippines are contributive examples, in seeing how the freedom of contract should be observed while keeping the essential constitutional protection of the family, the public policy and good morals.

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