MATRIMONIAL AGREEMENTS: SOLUTIONS TO THE PERENNIAL PROBLEM OF MATRIMONIAL REGIMES IN CAMEROONIAN LAW

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ABSTRACT

To date, the mystery of matrimonial regimes in Cameroonian law has not been resolved. Both legislative and case law confusion remains. Legal pluralism, different forms of marriage, discriminatory pre-torque mentalities are all obstacles that seem insurmountable in a context where uniformity in family law is a provocation and harmonisation a temptation. In addition, the fate of the property of divorced persons or of the surviving spouse is constantly subject to glaring legal insecurity. In the absence of clear legislative and jurisprudential guidelines, it is more than urgent that the power returns to the spouses through matrimonial agreements, which could be declined in marriage contract, liquidation agreement and mutability of the matrimonial regime. Thanks to these instruments, the fate of property will be better controlled and will no longer be subject to the arbitrariness of certain judges who sometimes appeal to legal pluralism or legislative vacuum to justify their decisions without real legal basis.

Keywords: Matrimonial property regimes, marriage contract, liquidation agreement, immutability, mutability, spouses.

INTRODUCTION

The complexity of the question of matrimonial regimes in the Cameroonian context has earned it the qualification of a *mystery*[i] . Indeed, the determination of the legal matrimonial regime is still a matter of debate in Cameroon. This is the regime applicable to spouses who have married without a marriage contract or whose marriage contract has been annulled. It could also refer to the matrimonial regime imposed on polygamous spouses.

If the interest of the matrimonial regime is less of a concern during the maintenance of the matrimonial bond because the spouses seem to be in a "non law" environment[ii] , the situation is quite different when the matrimonial bond is broken. When divorce or the death of one of the spouses occurs, the question of matrimonial property regimes comes back into play. However, the indeterminacy of this regime in Cameroonian law seems to call into question the whole value of matrimonial regimes. This situation causes not only legal insecurity, but also material or patrimonial harm to the spouses and even to their creditors. This relationship is quite visible when one defines matrimonial property regime, despite its plural meanings[iii] , as 'a coherent set of rules, more or less numerous and more or less complex, the purpose of which is to confer, in the property field, a particular status to the spouses in their mutual relations as well as in their relations with third parties'. [iv]

However, this importance is currently overshadowed by a number of obstacles. These are, on the one hand, legal pluralism or dualism and, on the other hand, the plurality of forms of marriage or matrimonial systems.

Legal dualism is explained by the existence of two main sources of law, all competent to govern family relations, particularly the property rights of spouses. These are written law and customary law. In written law, there is on the one hand English law and on the other hand French law[v] . Common law lays down a fundamental principle, that of the separation of property[vi] . English law ignores community of property as shown by the *Matrimonial Causes Act* 1857[vii] . The same applies to the *Married Women's Property Act* of 1882 which is the basic text in this area.[viii] The French law has as its basic text the Code civil law in its pre-1960 version. This is justified in the light of the principle of legislative succession set out respectively in Article 51 of the Constitution of 4 March 1960, Article 46 of the Constitution of 1er September 1961, Order No. 61/OF/02 and Decree No. 61/DF of 1er October 1961. It is provided that the Code Civil Code and its amending laws as promulgated in Cameroon will

continue to be applied in matters where there is no national legislation[ix] . As the Cameroonian Civil Code is still under construction, these colonial texts remain in force. Also, according to articles 1400 and following of the Code In civil law, community of movable property and acquests is the legal regime. However, this regime is likely to generate a real injustice at the time of the partition, in particular when the spouses have significant movable property before the marriage[x] .

Custom is a potential source of the legal regime. The legislator himself has provided the framework for their application[xi] . This shows that, contrary to some African legislations, Cameroon has maintained customs, and consequently, has not adhered to the idea of their radical elimination[xii] . This recognition of custom as a source of family law has been attested to by some decisions of the Supreme Court of Cameroon, notably the DAYAS decision[xiii] . In this decision, the judge laid down a principle according to which, in the absence of a convention, one can refer to the custom of the parties. Despite some disputes, custom is very close to the separation of property[xiv] ; and it can be seen that this is the preferred area for discrimination[xv] . The most important property belongs to the husband. The wife, in most cases, cannot claim anything, as long as she herself is sometimes relegated to the status of property or asset[xvi] . But as the status of married women changed, the content of the customary regime also varied[xvii] .

The form of marriage constitutes the second difficulty in determining the legal regime. This is the question of the matrimonial system and mixed marriage. The mixed marriage hypothesis refers to the marriage between an Anglophone and a Francophone. In this case, when a conflict arises or when the marriage is dissolved, the question arises as to which rule to apply. Will the conflict rules of private international law be used[xviii] ?

The matrimonial system is related to the monogamous and polygamous option[xix] . With these forms of marriage, one wonders which matrimonial regime to apply? Should community of property or separation of property be applied? Can the same regime be applied to them or can a single suppletive regime be established for polygamy and monogamy? On this subject, the doctrine remains divided[xx] . The various Cameroonian laws are not satisfactory either. Neither the law of 7 July 1966 on various provisions relating to marriage in the former East Cameroon, nor the law of 11 June 1968 on the organisation of civil status in Cameroon, nor

the Ordinance of 29 June 1981 on the organisation of civil status and various provisions relating to the status of natural persons as amended and completed by Law No. 2011/011 of 6 March 2011 amending and completing certain provisions of the aforementioned ordinance, provide a clear answer. In this situation, we are witnessing the emergence of a praetorian law which tries[xxi] to provide some solutions.

In a judgment of 10 December 1981, the Supreme Court laid down the rule that "the option of jurisdiction entails the option of legislation"[xxii] which implied, depending on the choice of jurisdiction, the application of the Code civil law in modern French-speaking jurisdictions, common law in modern in modern English-speaking jurisdictions[xxiii] and custom in traditional jurisdictions. This rule has made it possible to have a dividing line between the Common Law and the Code the Civil Code on the one hand, and between the and custom, and then between the common law and and custom. But for common law and custom, this rule was no longer necessary because the conflict of jurisdiction no longer arose with the same acuity[xxiv] . Before the French-speaking written law courts, in the absence of a marriage contract, Articles 1400 et seq. apply. These articles allow not only for the liquidation of the matrimonial regime, which is that of the community of movable property and acquests, but also for equal sharing or "half and half"[xxv] . Before the traditional law courts, the regime has changed from separation of property to community of property subject to participation, which is neither of civil nor of customary origin. This is an originality of Cameroonian judges, which takes into account the emancipation or the evolution of the status of Cameroonian women[xxvi] who are most often harmed.

In two historic judgments rendered in the space of two years, the Supreme Court of Cameroon 'partially' sounded the death knell of the rule 'option of jurisdiction entails option of legislation'. The abandonment of this rule began with the KEMAJOU ruling[xxvii] . Two years later, the same court confirmed this reversal in the KOUM judgment[xxviii] ; so that today, it appears that the sharing-remuneration[xxix] or community under condition of participation, has become the regime in force in Cameroon. However, several divergent court decisions show that we are not yet out of the woods.

Cameroonian judges can currently use legal pluralism as a pretext for not adopting a coherent jurisprudential line. Because of the lack of legislation, the liquidation of the

matrimonial property regime has become a matter for case law, especially when the spouses have not made a marriage contract.

In view of these jurisprudential procrastinations and the ambiguous legal context in Cameroon, it is useful and legitimate to wonder about the solutions that will make it possible to overcome these various problems raised. Of the above-mentioned problems, the appeal to the will of the spouses appears to be the solution par excellence. In other words, the power should return to the will of the spouses[xxx] , through the establishment of matrimonial agreements, which could be understood as the agreement of the spouses' will with regard to present and future property before the celebration of the marriage or at its dissolution. Before the celebration of the marriage, it will be referred to as a marriage contract and at the dissolution it will be referred to as a liquidation agreement.

The use of these instruments will provide better legal security for their affairs and their relations with third parties after the dissolution of the marriage. It should be noted, however, that the marriage contract which would be the solution to this problem remains ineffective in the Cameroonian context[xxxi] . Its use would therefore require revision for better effectiveness (I). The marriage contract could be reinforced by prospective post-marriage agreements, which need to be adopted (II).

THE MARRIAGE CONTRACT: A POSITIVE SOLUTION REQUIRING REVISION

In the face of glaring insecurity It is more than important for spouses to draw up a contract that will be binding on judges who, in practice, sometimes apply standards that they themselves have created. Such a situation was observed in a judgment handed down by the Supreme Court of Cameroon, which gave rise to the special regime of *community under condition of participation*. In spite of these different reasons which should encourage the drafting of a marriage contract, there is a contrasting absence or scarcity of this instrument in practice. Aware of its usefulness and necessity (A), one may wonder about the possibility of remedying this ineffectiveness (B).

The Marriage Contract: A Useful Instrument

The marriage contract is a particularly important instrument in a context where it is no longer clear which law should govern the fate of the spouses' property[xxxii] ; in a context of legal pluralism where no real precision is provided as regards matrimonial regimes[xxxiii] .

When it is not confused with marriage, the marriage contract is often confused with the matrimonial regime[xxxiv] . In the latter case, Professor André COLOMER states that using the term marriage contract to designate the expression matrimonial regime is a reprehensible attitude[xxxv] . With a double meaning, the marriage contract "is primarily the legal act by which the future spouses fix their matrimonial regime, in principle for the entire duration of the marriage. But it is also the writing drawn up by a notary'[xxxvi] . By this definition, it is easy to understand that the marriage contract is a special contract. This specificity can be grasped through the generality of the marriage contract (1), the conditions of formation and validity (2) and the publicity of the contract (3).

Generalities of the marriage contract

The generality of the marriage contract relates to its character and content[xxxvii] . Speaking of its character, the marriage contract is first of all a synallagmatic contract[xxxviii] . It can therefore give rise to obligations, because it is an agreement of will. However, the marriage contract is not only an act that gives rise to obligations between the spouses. It is also a statutory act, because without being limited to the creation of reciprocal obligations towards the spouses, 'it predetermines the fate of the multitude of legal acts that the spouses will be called upon to enter into with third parties throughout their possibly long life together'[xxxix] . It is in this sense that the marriage contract is considered as a rule-act. For some authors, it is the act that makes the matrimonial regime a partnership, itself being the constitutive act. In addition to being a statutory act, the marriage contract is also a "family pact". This last characteristic has a double meaning. On the one hand it means that the marriage contract is a founding act of a conjugal family, on the other hand it means that the families contribute to the elaboration of the marriage contract if not to the choice of the matrimonial regime[xl] .

With regard to its content[xli] , the marriage contract is a complex document because of the variety of provisions it may contain. In addition to matrimonial agreements, the marriage contract may also contain statements of contributions and liberalities. Matrimonial agreements can be considered the core of the marriage contract. It is in fact through the matrimonial agreements that the spouses determine their matrimonial regime. They can choose from the existing prototypes or modify them by means of specific clauses, or they can directly regulate the regime that will govern their property. Gifts may consist of donations that the spouses make to each other. They may concern present or future property. Contributions are clauses that list and evaluate the property contributed by the spouses during the marriage.

The Conditions Of Formation And Validity Of The Marriage Contract

The determination or establishment of property is based on certain requirements. Therefore, the expression of the spouses' will concerning their property must be subject to a set of rules of formation which does not exclude the generality of the marriage contract.

Just as it is subject to the rules of ordinary law for its formation, the marriage contract is also subject to special rules. This applies to both the validity and enforceability regimes. In addition to the various conditions of validity to which contracts in general are subject, the marriage contract must be subject to its own conditions of validity for its formation. Moreover, the absence of these conditions inexorably gives rise to sanctions. In addition to the substantive conditions, the formation of the contract admits conditions of form. The substantive conditions are commonly consent, capacity and subject-matter as provided for in articles 1108 to 1133 of the Code civil law. However, the consent[xlii] and the capacity[xliii] differ from the common law by the admission of rules which are specific to them. Another condition which is that of time[xliv] reinforces this specificity of the marriage contract.

Consent is particularised in that the consent of the spouses alone is not sufficient. It also requires "the simultaneous consent of all persons" who are parties to the contract or their proxies[xlv] . In the case of a power of attorney, the parties must ensure that the proxy has appeared before a notary[xlvi] . This possibility of concluding the marriage contract by power of attorney or by mandate was previously established by case law[xlvii] .

The particularity of the rules of capacity comes into play in two cases: that of the minor and that of the incapable adult. With regard to minors, several OHADA legislators space enshrine the rule *Habilis ad nuptias habilis ad pacta nuptialia*[xlviii] , in the following terms, 'a minor who is capable of contracting a marriage is capable of consenting to all the agreements of which that contract is susceptible; and the agreements and donations he or she has made are valid, provided that he or she has been assisted, in the contract, by the persons whose consent is necessary for the validity of the marriage'[xlix] . This empowerment of the minor sets aside certain rules of common law.

The situation of an incapable adult is not dealt with in any particular way in most civil or personal codes. In the absence of specific provisions, the case-law sets aside the rule *Habilis ad nuptias habilis ad pacta nuptialia* and applies the rules of ordinary law to the marriage contract[l] . The majority of legislators have not taken into account the advances made by the case law in this direction, even if it should be noted that the response remains mixed and is not sufficiently satisfactory[li] . Through the reforms of 13 July 1965 and 3 January 1968, the French legislator has put an end to the debate on whether or not the habilis... rule should apply to incapable persons of full age. By the wording of Article 1399 of the Code civil[lii] , it enshrines the rule *Habilis ad nuptias habilis ad pacta nuptialia* which will from then on be applied to adults under the protection of the law[liii] . In addition to consent and capacity, the element of *time* also comes into play to distinguish the marriage contract from other contracts. According to Article 1394 of the Code civil law, the marriage contract must be drawn up before the marriage[liv] .

In addition to these various substantive requirements, the marriage contract must also comply with specific rules of form.

In the majority of African countries that have inherited the Under the French Civil Code of 1804, the marriage contract as a solemn act must be recorded by a notary. In other words, the marriage contract is drawn up in the presence of a notary. The parties must be present or they may be represented by a proxy with a special, authentic power of attorney. If the parties are present, they must be able to be present at the same time so that there are no signatures with different dates[lv] .

In the absence or failure to comply with the various conditions set out above and even with the rules governing the formation of legal acts in general, the contract will be null and void. However, this nullity has given rise to questions both as regards the nature of the nullity and the scope of the nullity.

With regard to the main defects that may be sanctioned, it may be noted that the marriage contract may be subject to either relative or absolute nullity, depending on the defect in question. If the marriage contract is vitiated by a formal defect, the sanction is absolute nullity. Despite the silence of the legislator on the subject, there is unanimity on the fact that absolute nullity is the sanction that reaches the defect of form. As Professor André COLOMER says, the absolute nullity of the contract as a sanction for a defect in form is not contestable and it is not contested[lvi] . Nevertheless, it is accepted that the spouses can proceed to the liquidation of their matrimonial regime on the basis of this null contract[lvii] . In case of lack of capacity, the marriage contract will be sanctioned by absolute nullity. In the same sense, incapacity is sanctioned by absolute nullity, which is aberrant for Professor André COLOMER. As the rules on incapacity are designed to protect the interests of the incapable person, it is inadmissible for judges to use them against the latter by giving third parties the opportunity to take advantage of them to sue the protected person. For this reason, nullity should be relative[lviii] , a view we also share. By the same logic, defects in consent would be likely to lead to the absolute nullity of the marriage contract, despite the absence of regulations in this area[lix] .

Once the sanction is pronounced, the contract will be retroactively cancelled. It is therefore deemed never to have existed. However, the annulment does not necessarily concern the entire content of the contract. The annulment may therefore be total or partial. When the marriage contract is affected by a defect of form, incapacity or consent, the entire contract is affected both in terms of the matrimonial agreements and the gifts. If the marriage contract is completely null and void, the spouses will be subject to the legal regime. If the nullity is caused by an irregularity affecting only one clause or part of a clause, the contract may be maintained. This is the case of a clause affecting parental authority. In such a case, the marriage contract will be maintained, only the unlawful clause will be annulled. Whatever the scope of the annulment, it remains enforceable against third parties.

Publicity Of The Marriage Contract

The marriage contract is an act that is of interest not only to the spouses, but also to third parties. It is therefore important that the latter be aware of the contract in order to enter into a contract with full knowledge of the facts, since the marriage contract or matrimonial agreements determine the legal conditions of the spouses' property, the respective powers of the husband and wife over this property and, finally, the extent of the pledge of creditors[lx] . This knowledge by third parties is moreover the reason for publicising the marriage contract. It is not a matter of publishing the marriage contract, but of informing third parties of the existence of a marriage contract by a mention in the marriage certificate[lxi] . Thus, the spouses will have to publicise the marriage contract in order to be able to oppose it to third parties. This requirement applies both to the first draft of the marriage contract or the initial marriage contract[lxii] and to any amendments that may be made to it before the marriage is celebrated.

Due to the specificity of their profession, traders are subject to two categories of disclosure regimes. One of these regimes is imposed on all spouses and the other is imposed specifically on traders.

In order for the marriage contract to be enforceable against third parties, certain formalities must be complied with. To reinforce the execution of these formalities, sanctions are attached to them. Article 1394 paragraph 3 of the Code The civil registrar is required to issue to the future spouses a certificate on plain paper, free of charge, indicating his or her name and place of residence, and also indicating the names, first names, capacities and residences of the future spouses as well as the date of the contract. At the time of the celebration of the marriage, the civil registrar must ask the future spouses whether there is a marriage contract. If a contract has been drawn up, its date, the name and residence of the notary are indicated in the marriage certificate[lxiii] . This publicity informs third parties of the type of matrimonial regime adopted by the spouses. This will enable them to contract with full knowledge of the facts. Third parties may request a copy of the marriage contract from the spouse with whom they intend to do business. A civil registrar or notary who fails to comply with these requirements for publicising a marriage contract may be fined and possibly ordered to pay damages.

If one of the spouses is a trader or becomes one during the marriage, special publicity is required. In addition to the publicity required of all spouses or the publicity required under

ordinary law, the marriage and the matrimonial regime must be mentioned in the Trade and Personal Property Credit Register (RCCM). Article 44 of the AUDCG[lxiv] specifies in this respect that 'the application made with the form provided for in Article 39 above shall indicate: where applicable, the date and place of marriage, the matrimonial regime adopted, clauses opposable to third parties restricting the free disposal of the spouses' property or the absence of such clauses, and applications for separation of property'.

In the absence of such publicity, the marriage contract will be unenforceable against third parties who have dealt in the trade[lxv] . They may, however, avail themselves of it. On the other hand, the contract could be invoked against them if they had known about the marriage and the contract[lxvi] . If the commercial spouse provides proof of the third party's knowledge of the deed subject to registration, the latter would vainly raise the argument of non-opposability[lxvii] . This flexibility on the part of the legislator in commercial matters makes it possible to take account of the good faith of the contracting parties or their intention. It would have been desirable for the legislator to provide for this same flexibility in the context of matrimonial agreements, especially as regards their modification

In order to prevent the spouses from depriving the rules on the formation and publicity of the initial marriage contract of their meaning by subsequent amendments, the legislator also imposes conditions for the opposability of any changes that may occur. To give full meaning to this opposability, conditions of validity are imposed upstream.

Changes to the marriage contract must be recorded in a notarial deed called the counter-letter[lxviii] . This means that the counter-letter must be drawn up in the same form as the original marriage contract. In addition to this requirement, Articles 1395 and 1397 of the Code civil law impose others. Article 1395, paragraph 2, provides that 'no change or counter-letter is valid without the presence or simultaneous consent of all the persons who were parties to the marriage contract'. In other words, the persons present at the original marriage contract must also be present during the recording of the counter-letter. Article 1397 states that 'all changes and counter-letters, even if they are in the form prescribed by the preceding article, shall be without effect with regard to third parties, if they have not been drawn up following the marriage contract; and the notary may not, under penalty of damages to the parties, or under greater penalty if necessary, issue either a copy or a printout of the marriage contract without

transcribing the change or counter-letter following it. Having complied with these various conditions, the spouses must also submit the amendments to the marriage contract or the counter-letter to the same publicity as the initial marriage contract. Otherwise, as mentioned in the above-mentioned Article 1397, the modifications will have no effect on third parties. Specifically, the same article indicates that these modifications must be drawn up after the original marriage contract in order to be enforceable against third parties. Even the grosses and expéditions must be delivered to third parties with the transcription following the modifications or the counter letter.

In short, these conditions of validity and publicity will only have their full effect if the marriage is celebrated; otherwise, the marriage contract will lapse. Although it is provided for gifts made with a view to marriage, the nullity will apply to the entire marriage contract. It thus deprives matrimonial agreements and provisions directly related to these agreements of effect.

THE MARRIAGE CONTRACT: AN INEFFECTIVE INSTRUMENT[lxix] REQUIRING A PERMANENT SOLUTION

Marriage contracts drawn up per year in Cameroon are quite rare[lxx] . The married persons we interviewed on the issue of marriage contracts admitted, when they did not confuse it with the celebration of the marriage, that they were not aware of any such contract[lxxi] . Following this observation, the most legitimate questions would be to know what the causes or reasons are (1) and what the remedies might be (2).

Reasons For The Ineffectiveness Of The Marriage Contract

The reasons for the ineffectiveness of the marriage contract can be of two kinds. The first may be anthropological, and the second procedural.

Anthropology is a science that studies human behaviour in a given society. According to A. BARGÈS, anthropology is "the methodical study of the diversity and unity of man in his biological dimension and especially his social and cultural dimension thanks to the

ethnographic field, which is heuristic in all societies"[lxxii] . It allows us to understand human behaviour in relation to a given situation. It is a question of knowing, through the prism of anthropology, why people do not enter into a marriage contract. Why do they reject or neglect this important instrument?

The answer could be found not only in morals, but also and above all in feelings. As feelings are universal, it is easy to explain why, wherever the question of the marriage contract is raised, very little attention is paid to this instrument. Just as it is very rare in Europe, the marriage contract is also rare in Africa. Moreover, a survey conducted in France among certain couples[lxxiii] , showed that those who had chosen the separatist regime, i.e. who had drawn up a marriage contract, had done so for commercial, tax or other material reasons. Couples who had chosen the communal system or who had married without a marriage contract cited moral reasons, such as: justice, respect for the meaning of marriage[lxxiv] . In the same vein, a survey of French notaries showed that only about 10% of the spouses made a marriage contract[lxxv] . Different parameters may come into play, but the question of sentiment is found in Europe as well as in Africa.

In terms of morals, it is difficult in Africa to conceive of an emphasis on property or to conceive of an emphasis on property or assets before marriage. The risk is quite high for the woman to be labelled as a 'self-interested woman', which would be quite unfavourable for the outcome of her marriage. She could even be considered a future "happy widow". The woman might therefore be driven by a feeling of fear that would prevent her from seeking to establish any kind of marriage contract. She would thus be a victim of social pressure. In view of these various obstacles affecting the woman, it could be said that the drafting of the marriage contract really depends on the husband.

The second main reason, which is procedural, is at two levels. On the one hand, we have the time of the drawing up of the marriage contract or the place of drawing up the marriage contract and on the other hand the authority in charge of drawing up the said contract.

As for the moment of drawing up the marriage contract, it should be noted that the legislator places it before the celebration of the marriage. In other words, the future spouses must draw up a marriage contract before a notary before the celebration of the marriage[lxxvi] .

The contract can only take effect on the day of the celebration. This contract will then be given to the civil registrar celebrating the marriage.

The second problem is the authority entitled to establish the choice. It is required that the contract be drawn up by a notary. This reinforces the overload of the procedure which could have been lightened by entrusting it to the civil registrar who celebrates the marriage. Before the latter, the spouses could make their choice more easily.

It is rather difficult for the spouses to go to the notary before the wedding to draw up the marriage contract. This is especially true since there are costs involved in drawing up a marriage contract. The African economic context does not encourage people to draw up a marriage contract. The poverty is quite remarkable. It is already difficult for people to find money to get married[lxxvii] . Only a few individuals stand out financially. The probability of establishing a marriage contract is therefore quite low. Yet the number of marriages is increasing, as the Bible says about the last times[lxxviii] . This makes it even more important to find solutions.

Possible Remedies For The Ineffectiveness Of The Marriage Contract[lxxix]

Realistically, remedies can only be obtained for the issue of ignorance[lxxx] and procedure. But as far as love or feeling is concerned, the problem will remain permanent. Making people aware of the importance of the marriage contract will solve the problem of ignorance of the bride and groom. They should be the first targets in conferences, seminars or symposiums. They should be further educated before the signing of the marriage contract.

In the period before the marriage, the registrar could be the competent body for this instruction or awareness-raising before the signing of the marriage certificate. Or, as one author puts it, 'it would be good if all municipalities had a legal service that could provide this legal advice. In this way, the spouses will be able to benefit from the necessary advice in order to make a sound choice"[lxxxi] .

By playing this role, the civil registrar could reduce the procedure to the celebration of the marriage only. For comparative purposes, this role is effectively attributed to the civil

registrar by the legislators of Côte d'Ivoire and the Democratic Republic of Congo, respectively in Article 27 paragraph 2 of the Code[lxxxii] and 488 paragraph 2 of the Code of the family[lxxxiii]. This orientation or explanation will be made, according to the last article, at the time of publication of the banns. The spouses will thus have to draw up their marriage contract before the civil registrar or confirm it before him or her if they have already prepared themselves accordingly. This last possibility is the one adopted by the Senegalese legislator, even if it is more a matrimonial choice than a marriage contract. Article 367 of the Code The Senegalese Family Law mentions that the option or choice of matrimonial regime is exercised at the time of marriage in the form of a joint declaration collected by the civil registrar. The Gabonese legislator also adopts this position quite clearly when it states that: 'Any matrimonial regime chosen outside those provided for in this title must be established before the celebration of the marriage, in an act known as a marriage contract, drawn up before a notary or, failing that, before the civil registrar of the place of celebration...'[lxxxiv]. The procedure would thus be simplified and the task easier for the future bride and groom, who would have more options.

Another solution, also drawn from comparative law, is to impose a marriage contract on spouses who opt for polygamy. Indeed, Article 230 of the Code The Central African Family Code provides that: "The polygamous option entails *de jure* the establishment of a marriage contract. It is true that the concern to distinguish the assets of the spouses in a polygamous household is important, but there is no proof that the regime chosen is made with full knowledge of the facts and allows for the distinction of assets. Like its Togolese counterpart, the Central African legislator could have specified the regime applicable in the case of polygamous marriage. This imposition of a marriage contract does not solve the problem of the choice of matrimonial regime for polygamists. Unlike monogamous spouses, polygamists have the possibility of choosing between several matrimonial regimes, since they are simply required to draw up a marriage contract. However, this contract is not required of monogamous spouses, who can ignore it and be satisfied with the suppletive regime.

It would be useful for the Cameroonian legislator to include the marriage contract among the documents constituting the marriage file that the spouses must submit to the civil registrar, if the notary is still required.

For example, there is an article which states that: The future spouses must put together a file containing the following documents

- a legalised birth certificate;
- a copy of the acts granting exemptions in the cases provided for by law;
- a pre-marital medical certificate;
- a declaration on the dowry
- a copy of the marriage contract if applicable.

This last mention will allow the spouses to ask about the marriage contract. The civil registrar, in the light of the above-mentioned proposals, will then take care to make them understand the importance of such a document, especially if they are entrepreneurs.

After the celebration of the marriage, the Cameroonian legislator should offer a second chance to spouses to review their matrimonial regime. Thus, a hope could remain for those who are already married: that of changing their matrimonial regime.

Postnuptial Agreements: Prospective Solutions Requiring Adoption

When the breakdown of the marital bond is pronounced by a judgment on a joint petition by the spouses, it is called divorce by mutual consent[lxxxv] . Existing in Cameroonian prospective law, notably in the preliminary draft of the Civil Code, this type of divorce has the advantage of allowing the spouses to establish a liquidation statement or agreement (A). This possibility of manifestation of the will of the spouses after the marriage could also intervene with the adoption of the mutability of the matrimonial regime (B).

The liquidation agreement or statement

Unlike the Cameroonian Civil Code, the Draft Civil Code introduces and regulates divorce by mutual consent through Articles 362 et seq. It provides for the conditions and the procedure relating to it. According to article 362 paragraph 1 of the said preliminary draft, the spouses jointly submit 'for the approval of the judge, an agreement settling the consequences

of the divorce as well as the provisional measures'. It is Article 391 paragraph 1 of the preliminary draft of the Civil Code that provides details on the liquidation statement contained in this agreement. According to this provision, 'The spouses may, during the divorce proceedings, enter into all agreements for the liquidation and sharing of the community. These agreements must be made by notarial act, except in the case of a joint application". According to this article, the notarial act would not be imposed or would not be part of the conditions relating to the liquidation agreement in the case of divorce by mutual consent (1). This particularity also extends to its procedure (2).

The conditions relating to the liquidation agreement

The petition for divorce, on pain of inadmissibility, must include in an annex an agreement on the complete settlement of the effects of the divorce and including in particular a liquidation statement of the matrimonial regime. This must meet certain conditions for its validity (a) and its enforceability (b).

The conditions of validity of the liquidation statement of the matrimonial property regime

For the liquidation statement of the matrimonial property regime to be valid, the divorce agreement must first be valid. This means that the conditions of validity mainly concern the agreement. Thus, the agreement must respect three major conditions. Firstly, Article 362(3) of the preliminary draft Civil Code states that the agreement must sufficiently safeguard the interests of the children. Secondly, Article 363 of the preliminary draft Civil Code requires the judge to approve the agreement and grant the divorce only if he is convinced that the will of each of the spouses is real and that their consent is free and informed.

By giving spouses the opportunity to decide the fate of their property in this way, one could speak of recognition of the autonomy of the will in matters of liquidation. For the will to play a real role, it should exist and be free of defects. The judge must therefore ensure that the will is real and free or that the consent is free and informed. To require that consent be free is to insist on the condition of absence of any defect in consent due to violence. Thus consent will

not be valid if it has been extracted under pressure from the other spouse, or even from third parties. According to Article 1111 of the Civil Code, violence concerns all behaviour that forces the parties to contract. This violence can be exercised in a physical way, for example physical blows administered by a co-wife to make her accept the divorce. Violence can also be exercised in a moral manner or in the form of threats. Consent can for example be given following harassment by the husband or close relatives, especially the in-laws, who are most often actors of domestic violence. [lxxxvi]Consent could also be given as a result of blackmail regarding alimony or child custody. As Dean CARBONNIER reminds us, "There is a great risk that the best armed of the spouses... will extort or buy the consent of the other". These hypotheses, far from being theoretical, have led one author to speak of "divorce by forced consent"[lxxxvii] .

In addition to being free, consent must be informed. With regard to this last point, fraud and error would also be likely to vitiate the consent of one of the spouses. Fraud consists of fraudulent manoeuvres intended to deceive the other spouse. One of the spouses could, for example, be fooled about the consistency of the property, or the spouse using fraud could conceal his or her property. Mistake is an inaccurate assessment of the existence or qualities of a fact, or of the existence or interpretation of a rule of law. A spouse could, for example, misunderstand the quality or value of an asset. But the role of the lawyer, which is to enlighten the spouses, will most often exclude error and fraud.[lxxxviii] Knowing that these defects of consent are not textbook hypotheses[lxxxix] , one wonders whether the final agreement could be challenged for nullity. Since the final agreement has been sealed by the court, its clauses acquire the authority of res judicata. Consequently, it is only by way of appeal that the judgment can be challenged, as provided for in Article 372 of the preliminary draft Civil Code, which makes a reference. However, Article 372 fails to specify the articles that are to govern these remedies. By way of comparison, in both France and Senegal, the remedies allowed against the final agreement are exceptional[xc] . An appeal against this agreement or judgment is inadmissible. "Indeed, one cannot call into question agreements that have been freely concluded and made immediately enforceable by law. In France, an appeal for review could have been admitted. However, the Court of Cassation has ruled that the latter is closed, "no action for nullity can be brought outside the channels of appeal"[xci] .

Generally speaking, this will appears at two levels. The first concerns the expression of the will regarding the termination of the matrimonial bond. Secondly, each of the spouses must give their consent, on the one hand, to the situation of the property and, on the other hand, to the fate of the children of the marriage. The spouses may therefore decide, through this agreement, on the means relating to the safety, health and morality of the child, to ensure his or her education and development, with due respect for his or her person. Custody of the children could be decided between the spouses subject to respect for public order and good morals.[xcii]

Finally, article 364 provides that 'Divorce by mutual consent can only be requested after five (05) completed years of marriage'. The Cameroonian legislator, by admitting divorce after five (05) years, would perhaps like to avoid 'fantasy marriages', 'trial marriages', 'marriages for fun'.[xciii] But it should be noted that this number of years is insufficient to prevent the multiplication of these forms of fantasy marriages. For some authors, it is the simplicity of the procedure that is the problem. For these critics, marriage, which can be broken by the sole consent of the spouses, constitutes a state similar to concubinage and free union. Marriage thus becomes the property of two persons or spouses, yet the constitution states that "The nation shall protect and promote the family as the natural basis of human society."[xciv] . In other words, marriage is an institution placed under the authority of the state because of its importance. To allow the spouse to break up in such a simple manner would be to "consecrate the destabilisation of marriage and the family"[xcv] and even of the nation.

In addition to these conditions of validity, there are other necessary conditions that will allow the agreement to be enforceable against creditors.

The conditions of enforceability of the liquidation statement

Publicity is the general condition for the enforceability of the liquidation statement of the matrimonial property regime, or even of the agreement. However, certain assets must in principle be subject to special publicity.

Contrary to Article 391 of the preliminary draft of the Civil Code, which says nothing about immovable property, Article 265-2 of the French Civil Code states that: 'When the

liquidation concerns property subject to land registration, the agreement must be made by notarial deed. The parallelism of form is thus abandoned by the Cameroonian legislator. The judge will thus be able to homologate the agreement settling the effects of the divorce when the liquidation statement, relating to an immovable subject to land registration is established only under private signature. But in view of the importance of land registration, it could be said that this is in fact an omission on the part of the Cameroonian legislator.

With regard to the effective date of enforceability, Article 377 of the preliminary draft Civil Code provides that 'the divorce judgment may be relied upon against third parties, with regard to the property of the spouses, from the day on which the formalities of mention in the margin prescribed by the rules of civil status have been completed'. It follows from this article that the divorce judgement is only opposable to third parties, with regard to the property of the spouses, from the day when the publicity formalities are accomplished. That is to say, entries in the margins of civil status records. Third parties will not be able to oppose this agreement as long as they have no way of knowing about it. Before this formality is completed, third parties may consider the spouses to be married and demand that the matrimonial regime be applied. Thus, for example, a pledge registered on a business before the transcription is valid even if the business has been assigned to the other spouse.

As far as the relationship between the spouses is concerned, enforceability takes effect on the date of approval of the agreement settling all the consequences of the divorce. In addition to these conditions, the agreement is subject to a procedure which is the particularity of divorce by mutual consent.

The procedure followed by the agreement settling the effects of the divorce

The judge is not obliged to homologate the agreement settling the effects of the divorce. This opportunity is offered to him precisely because the spouses might not respect the required conditions (a). If the spouses have not complied with them, he will take the appropriate measures (b).

The control exercised by the judge

The judge must ensure that all the required conditions have been met by the spouses. Thus the judge must ensure that the spouses' consent is free and informed. Make sure that the spouses, by their agreement, do not undermine public order and good morals, and that the interests of the children are preserved.

If all the conditions are met, the judge, as provided for in Article 366 of the preliminary draft Civil Code, "homologates the agreement settling the consequences of the divorce and, by the same decision, pronounces it". In other words, the liquidation is made simultaneously with the pronouncement of the divorce. This is where the particularity of divorce by mutual consent comes in. For in other forms of divorce, the pronouncement of the divorce and the liquidation are in principle successive and not simultaneous. The control exercised by the judge is not without deviation. It has been argued that it is difficult for the judge to control the integrity of the consent in a precise and rigorous manner. This is why some authors have developed the idea that 'the judge in the procedure of divorce by mutual consent plays an essentially passive role'.[xcvi]

If these conditions are not met, the judge will refuse probate and take certain measures.

The measures taken by the judge in case of refusal of homologation of the agreement

Article 367 paragraph 1 of the preliminary draft Civil Code provides that: "In the event of refusal to homologate the agreement, the judge may, however, homologate the provisional measures within the meaning of Articles 254 and 255 that the parties agree to take until the date on which the divorce judgment becomes res judicata, provided that they are in accordance with the interests of the child or children.

If the judge refuses to approve the agreement, he or she may, however, approve the provisional measures. These provisional measures concern, among other things, the attribution to one of the spouses of the enjoyment of the family home and household furniture or the sharing between them of this enjoyment; the handing over of clothing and personal effects; the designation of the spouse or spouses who will have to ensure the provisional settlement of all

or part of the debts; the granting to one of the spouses of provisions to be claimed on his or her rights in the liquidation of the matrimonial property regime if the situation makes it necessary; the appointment of any qualified professional with a view to drawing up an estimated inventory or making proposals for the settlement of the pecuniary interests of the spouses; the appointment of a notary with a view to drawing up a draft liquidation of the matrimonial property regime and the formation of the lots to be shared. These measures are enforceable by law as soon as they are pronounced. Thus, a spouse cannot be refused the preferential allocation of the dwelling house on the grounds that he or she is not occupying it on the date of the writ of summons, whereas this non-residence is only the consequence of the non-conciliation order, a provisional measure that cannot prejudge the preferential allocation of this house. [xcvii]

The spouses have a maximum of six months to submit a new agreement. Otherwise, they can only file a counterclaim for acceptance of the principle of the marriage breakdown, for definitive alteration of the marital bond or for fault. At this stage the spouses would no longer be in the field of contentious divorce. It would be possible for them in this context to benefit instead from the mutability of the matrimonial regime.

THE MUTABILITY OF THE MATRIMONIAL REGIME

If positive law, with regard to certain reasons put forward such as the legal security of contracts and fraud by the spouses, has deemed it appropriate that the change of matrimonial regime be framed by the principle of immutability of the matrimonial regime, prospective law opts rather for the mutability of the matrimonial regime. It is in this sense that article 789 of the preliminary draft of the Cameroonian Civil Code specifies in its paragraph 1 that: "After two (2) years of application of the matrimonial regime, whether conventional or legal, the spouses may agree, in the interest of the family, to modify it, or even to change it entirely, by a notarial act which is submitted for homologation to the competent court of their place of domicile. Thus, the principle of absolute immutability will disappear (1) to give way to a supervised mutability (2).

The Disappearance Of The Principle Of Absolute Immutability Of The Matrimonial Regime

With regard to the principle of the immutability of matrimonial agreements considered as a dogma, one author stresses that: "One should never underestimate the weight of tradition and spiritual values in a society.[xcviii] This assertion, in relation to the maintenance of this principle of the immutability of matrimonial agreements, is quite visible in the legislations of African countries with a "legal link" with France[xcix] . Inherited from France, the principle of the immutability of matrimonial agreements has a content that varies according to the legislative follow-up. In fact, some legislators have maintained the principle as enacted in 1804 in France, while other legislators have taken into account the modifications that were made by the French legislator afterwards. In general, the principle means that any direct[c] or indirect[ci] modification of the matrimonial regime is prohibited. Specifically, the principle can be defined according to the Code French Civil Code prior to 1960 and according to the reforms of 1965. According to the said CodeThe principle means that matrimonial agreements must in principle govern the spouses for as long as their marriage lasts. Since the reform, the principle means that the spouses are not free to change the matrimonial property regime by their joint will alone[cii] .

The defence of this principle was based on two reasons. The first was the prohibition of gifts between spouses. The second was based on the character of the marriage contract as a family pact. But the drafters of the Code civil law will abandon the first reason. For them, two reasons determine the maintenance of the principle of the immutability of the matrimonial regime. These are: the interest of the spouses and the interest of third parties[ciii] . The protection of third parties means that the spouses should not, through a concealed change of matrimonial property regime, compromise the interests of third parties. This prohibition will also make it possible to avoid changes made in fraud of their rights. As far as the spouses are concerned, the principle prevents one spouse from using his or her influence to induce the other spouse to accept changes that could be unjust or unfavourable to the latter[civ] .

Several countries in French-speaking Africa, including Cameroon, which have provided for matrimonial regimes as bequeathed by France, have maintained this principle. However, the content is not the same in these different legislations. Some legislators have opted

for the principle of absolute immutability[cv] , others have opted for a principle of attenuated immutability[cvi] . The adjectives "absolute" and "attenuated" actually reflect the scope for exceptions with regard to the change of matrimonial property regime or matrimonial agreements.

Admission Of A Controlled Mutability

The framework of the principle of mutability can be seen from two angles. On the one hand, it concerns the conditions for change and, on the other, the scope of application of the principle

With regard to the first angle, Article 789 of the preliminary draft of the Cameroonian Civil Code specifies that the spouses may agree to modify the matrimonial regime or even change it entirely, but this change must be subject to a number of conditions. Firstly, the consent of both spouses is required and 'the interest of the family' which must justify the change of matrimonial regime[cvii] . Secondly, this change is subject to a condition of duration. Indeed, it is in principle admitted after a period of two years[cviii] . Thirdly, this change must be made by a notarial deed[cix] which will be submitted to the civil court of the spouses' domicile for approval. It goes without saying that the interests of third parties will also have to be taken into consideration for such a change, which could affect their rights.

With regard to the interests of the family, Article 738 paragraph 1 of the preliminary draft of the Civil Code provides that: "After two years of application of the matrimonial regime, whether conventional or legal, the spouses may agree, in the *interests of the family,* to modify it, or even to change it entirely, by a notarial deed which will be submitted to the homologation of the competent court of their place of residence. According to Article 391 paragraph 2 "The judge, after having verified that the interests of each of the spouses and the children are preserved, shall homologate the agreements by pronouncing the divorce". If the interest of the family is not easy to determine, some authors recall that the family is not limited only to the couple. According to a restrictive view, the satisfaction of the family's interest would suppose that the change of regime does not entail any disadvantage for the spouses and for the children.

According to a contrary view, the interest of the family would exist through the fact that the change is subject to the will of the spouses[cx] .

As regards the interests of third parties, these are still assured by the two principles mentioned above. Third parties may intervene in the homologation procedure. The control that the judge will have to exercise to ensure that the required conditions are met, will make it possible to control the infringement of the right of third parties. The latter must be aware of the regime of the spouses with whom they are dealing[cxi] . This is why the spouses are sometimes required to comply with certain formalities in order to make the agreement or change effective against third parties. This publicity ensures that the interests of third parties are protected even if a new rule governing the pecuniary relations of spouses is introduced.

In relation to the second angle of framing, the preliminary draft of the Civil Code determines a scope of application of the mutability of the matrimonial regime. It applies during the marriage and before the dissolution of the marriage. At the dissolution of the marriage, the principle of mutability no longer has any effect[cxii] . Rather, Articles 265-2 of the preliminary draft Civil Code and 1451 of the Civil Code are applicable to these agreements as provided for in Article 739 of the preliminary draft Cameroonian Civil Code. The spouses or ex-spouses have the possibility of maintaining or modifying the provisions of the normally applicable matrimonial regime. When proceeding to liquidation or partition, the spouses may, by agreement, proceed with these operations on bases other than those resulting from the matrimonial regime. For example, liquidation may be carried out on the basis of a void contract. However, this freedom is not absolute. For there are restrictions, similar to those of the principle of immutability.

CONCLUSION

In short, the matrimonial agreement is currently the solution par excellence to the problem of matrimonial regimes in Cameroonian law. However, it is important that a revision be carried out in order to give spouses the latitude to better use this legal instrument not only before marriage, but also after the celebration of the marriage. Although future spouses can currently draw up a contract in this way, they still need to be educated about this legal

instrument. Indeed, ignorance of this instrument or its optional nature contributes to its misunderstanding by individuals, more specifically Cameroonians. In other words, the effectiveness of the marriage contract will depend on the orientation that the Cameroonian legislator will give it.

In addition to the marriage contract, it would be useful if the liquidation statement were also adopted as a matter of urgency. It could either reinforce the marriage contract or be used independently. In addition to these measures, the legislator could allow the marriage contract to be modified by enshrining the principle of mutability of the matrimonial regime. It is therefore clear that the legislator has a decisive role to play in the use of matrimonial agreements by future spouses, spouses and ex-spouses. Better still, it will be the actor of the contractualisation of marriage in Cameroonian law.

ENDNOTES

[i] N. -C. NDOKO, "Les mystères du régime matrimonial en droit camerounais", *Mélanges en l'honneur de Philippe JESTAZ, Dalloz*, 2006 pp. 396-416.
[ii] J. CARBONNIER, *Flexible droit: pour une sociologie du droit sans rigueur*, 10ème éd., L.G.D.J. 2001, p. 34.
[iii] S. MELONE, "Régimes matrimoniaux et droits fonciers et Afrique", *Penant,* n° 732, 1971, p. 152; from the same author, "Le Code civil contre la coutume : la fin d'une suprématie : à propos des effets patrimoniaux du mariage", *R.C.D.,* n° 1, 1972, p. 12; "Les effets du mariage dans l'ordre des rapports patrimoniaux*", Encyclopédie Juridique de l'Afrique, Droits des personnes et de la famille*, Vol. 6, chap. XIV, N.E.A., 1982, p. 225; A. FOKO, "Plaidoyer pour la consécration de la mutabilité du régime matrimonial au Cameroun*", Juridis Périodique* n° 44, 2000, p. 53; PLANIOL, RIPERT ET BOULANGER, *Traité de droit civil*, T. 4, 1948, p. 1; MARTY ET RAYNAUD, *Droit civil : les régimes matrimoniaux*, Paris, Sirey, n° 1, 1978; G CORNU, *Les régimes matrimoniaux*, Paris, P.U.F., 1977, p. 6; J. C. RENAULD, Rapport introductif aux 2èmes journées d'études juridiques Dabin jean, 6 -7 mai 1966, consacrées aux régimes matrimoniaux, Bruxelles.
[iv] A. COLOMER*, Law civil, Régimes matrimoniaux,* Litec, 12ème éd., 2004, p. 5 et seq.
[v] MBENG TATA ZOUEU, *L'unification du droit de la famille au Cameroun*, Édition l'Harmattan, 2010, p. 34.
[vi] Pettitt *v.* Pettitu *[1969] 2 All E.R. 385, H.L cited by J. N. TEMNGAH, 'Customary Law, Women's Rights and Traditional Courts in Cameroon', Revue générale de droit, 27(3), 1996, p. 352.*
[vii] Or *Matrimonial Causes Act* 1973, the one in force according to section 15 of the *Southern Cameroons High Court Law 1955,* which states that: *'The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceeding may, subject to the provisions of this law and in particular Section 27, and to rules of court, be exercised in conformity with the law and practice for the time being in force in England.*
[viii] MOUNTAPMBEME ADAMOU, *Les effets du divorce en droit camerounais, étude comparative des systèmes anglophone et francophone,* Master's thesis in private law, University of Yaoundé, 1989-1990, pp. 88-89.
[ix] S. MELONE, "Les juridictions mixtes de droit écrit et de droit coutumier dans les pays en voie de développement. Du bon usage du pluralisme judiciaire en Afrique: l'exemple du Cameroun", in *Revue internationale de droit comparé*, n° 2, vol. 38, April-June 1986, pp. 327-346.
[x] E.g.: The business.
[xi] S. MELONE, op. cit; Ch. MEKE-MEZE né BAHIYA, *La problématique des biens de la femme mariée dans le droit positif camerounais*, thèse de 3ème cycle, droit privé, Université de Yaoundé, 1972, p. 8.
[xii] S. MELONE, "Les effets du mariage dans l'ordre des rapports patrimoniaux" in *Encyclopédie juridique de l'Afrique Nouvelles Éditions Africaines (NEA)*, 1982, t. 6, pp. 227-276.

[xiii] CS/COR, No. 86/L of 12 January 1971, Tendances jurisprudentielles du droit des personnes et de la famille de l'ex-Cameroun oriental, pp.134 et seq. Ch. MEKE-MEZE né BAHIYA, op. cit, pp. 103-106 Y. B. GOUDJOU LEUSSA, *Le régime matrimonial légal entre son passé et son et son avenir*, DEA thesis, University of Yaoundé II Soa, 2004-2005, pp. 15-16.
[xiv] Y. B. GOUDJOU LEUSSA, *op. cit.*
[xv] Ch. MEKE-MEZE born BAHIYA, *op. cit.* p. 8.
[xvi] P. TALLA, *Le sort des biens des époux après le divorce au Cameroun Oriental*, dissertation for a degree in private law, University of Yaoundé, 1972, pp. 6-8; Y. S. MELINGUI, *Droit et contentieux des régimes matrimoniaux polygamiques*, DEA thesis, University of Yaoundé II, 2002-2003, pp. 62-63.
[xvii] H. G. EHGNANG, *L'évolution du statut matrimonial de la femme en droit positif camerounais*, Master's thesis in private law, University of Yaoundé, 1989-1990, pp. 27-28; N.-C. NDOKO, 'Les mystères du régime matrimonial en droit camerounais', *Mélanges en l'honneur de Philippe JESTAZ, Dalloz*, 2006, pp. 396-416.
[xviii] BRIGITTE DJUIDJE, *Pluralisme législatif camerounais et droit international privé*, Preface by IBRAHIM FADLALLAH, Éditions l'Harmattan, 2000, 438 p.
[xix] P. NKOLO, "L'option matrimoniale au Cameroun", *RCD n° 31-32*, 1986, pp. 69-100.
[xx] Y. S. MELINGUI, *Law et contentieux des régimes matrimoniaux polygamiques,* dissertation for the Diplôme d'études Approfondies en droit privé, University of Yaoundé II, 2002-2003, pp. 8 et seq.
[xxi] Ch. MEKE-MEZE born BAHIYA, *op cit,* p. 8.
[xxii] S.C. judgment No. 28/CC of 10 December 1981, ANGOA Parfait case. Tendances jurisprudentielles du droit des personnes et de la famille de l'ex-Cameroun oriental, pp. 134 et seq; *R.C.D.*, n° 21-22, p. 301.
[xxiii] CHEMAABO Joseph case, judgment n° 108/CC of 03 April 2000 cited by Y. B GOUDJOU LEUSSA, *op.cit.,* p. 19.
[xxiv] Y. B. GOUDJOU LEUSSA, op. cit. pp. 21-22.
[xxv] S.C. judgment n° 120 /CC of 15 September 1982, case ASSO'O Benoît c/ MOUTIKOUE Jacqueline. Trends, p. 90.
[xxvi] P. TALLA, op. cit. pp. 8-11
[xxvii] C.S, 18 July 1985, Tendances in Tendances jurisprudentielles et doctrinales du droit des personnes et de la famille de l'ex-Cameroun oriental, p. 97
[xxviii] C.S, 16 July 1987, Tendances P in Tendances jurisprudentielles et doctrinales du droit des personnes et de la famille de l'ex-Cameroun oriental, p. 99.
[xxix] J. NGUEBOU TOUKAM: "Notions et Originalités du partage rémunérations dans la construction du droit camerounais des régimes matrimoniaux", *Juridis périodique*, n° 30, 1997, pp. 57-65.
[xxx] E. MBANDJI MBENA, "La contractualisation des rapports pécuniaires entre époux en droit camerounais", *Juridical Tribune*,Volume 6, Issue 1, June 2016, pp 84-99, http://www.tribunajuridica.eu. Accessed on 27 December 2021.
[xxxi] According to information gathered from a notary's office in Yaoundé, the political capital, marriage contracts are rarely drawn up. Over 11 years (2004 to 2015), approximately 56 marriage contracts (19 of which were drawn up by Cameroonians) were established.
[xxxii] N. -C. NDOKO, "Les mystères du régime matrimonial en droit camerounais", *Mélanges en l'honneur de Philippe JESTAZ,* Dalloz, 2006, pp. 396-416.
[xxxiii] This question of uncertainty as to the law to be applied is not specific to matrimonial property regimes. It is a difficulty experienced by all family law (N. -C. NDOKO "Les manquements au droit de la famille en Afrique Noire", in *Revue internationale de droit comparé*, vol. 43 n° 1, January-March 1991, pp. 87-104). For some it is the place of non law. It is not always necessary to legislate. According to MALAURIE, "The law would be wasting its time and exposing itself to ridicule if it wanted to carefully regulate family relationships and set out in detail the rights and duties of each person" (MALAURIE and AYNÈS, *Droit civil, t. I, La Famille*, by MALAURIE, Ed. Cujas, 1987, p. 23). Dean CARBONNIER states that "to each his family, to each his right" (J. CARBONNIER, "À chacun sa famille. À chacun son droit. Essais sur les lois", *Defrénois,* 1979, p. 167 et seq.)
[xxxiv] A. COLOMER, *Law civil, Régimes matrimoniaux,* Litec, 12ème ed., 2005, p. 137. In a small-scale oral survey that we had to carry out with certain married persons on the question of the marriage contract, it emerged that they had not made a marriage contract. Some of them were even surprised by the existence of such a contract, which they confused with the celebration of the marriage.
[xxxv] A. COLOMER, *Law civil, Régimes matrimoniaux, op. cit.*
[xxxvi] *Op. cit.*
[xxxvii] A. TIENTCHEU NJIAKO*, Cours de régimes matrimoniaux*, taught in Master I, University of Ngaoundéré, 2008, unpublished.

[xxxviii] According to Article 1102 of the Code For more details on this issue, see R. HOUIN, La distinction des contrats synallagmatiques et des contrats unilatéraux, PhD thesis, University of Paris, 1937. For further development of the issue, see R. HOUIN, *La distinction des contrats synallagmatiques et des contrats unilatéraux,* PhD thesis, University of Paris, 1937. For Professors A. WEILL and F. TERRÉ, the statement in article 1102 should not be taken literally, since "a contract in which both parties enter into obligations is synallagmatic, but so is one in which one of the parties creates or transfers a real right to the other party entering into obligations": Civ. 3e , 8 May 1974, 305, note LARROUMET. See A. WEILL and F. TERRÉ, *Droit civil, Les obligations*, 4ème ed., Dalloz, 1986, pp. 36 et seq.

[xxxix] A. COLOMER*, Law civil, Régimes matrimoniaux, op. cit.* p. 137.

[xl] In AfricaIn Africa, the family is considered to be large and not nuclear as is the case in Europe. This favours the intervention of other family members in determining the fate of marital property. The parents or parents-in-law thus have a sort of control over the spouses' assets. This situation is also encouraged by the financial or material contribution made by the family to the union of the future spouses.

[xli] A. TIENTCHEU NJIAKO*,* op. cit.

[xlii] P. DUPONT DELESTRAINT, *Contrat de mariage et régimes matrimoniaux, successions, libéralités*, Paris, Mémentos Dalloz, 1986, p. 16.

[xliii] *Op. cit.*

[xliv] A. COLOMER*, Law civil, Régimes matrimoniaux, op. cit.* p. 137.

[xlv] P. DUPONT DELESTRAINT, *op. cit.*

[xlvi] *Op. cit.*

[xlvii] F. TERRÉ and Ph. SIMLER, *Law civil: Les régimes matrimoniaux*, Dalloz, 2ème ed., 1994, p. 122.

[xlviii] The adage means, "the capacity to marry applies to the marriage contract". Because of the marriage contract, the capacity to conclude has been aligned with the capacity to marry. This alignment is in line with what Professors F. TERRÉ and Ph. SIMLER, *op. cit.*

[xlix] Article 1398 of the Code Niger Civil Code, Article 171 paragraph 1 of the Code of persons and the family, Article 317 of the Code of persons and the family in Burkina Faso, 1398 of the Code of 1804, Article 316 of the Code civil society.

[l] A. TIENTCHEU NJIAKO*, Cours de régimes matrimoniaux*, op. cit.

[li] A. COLOMER*, op. cit.*

[lii] Article 1399 reads as follows: "A person of full age under tutorship or guardianship may not enter into matrimonial agreements without being assisted in the contract by those who must consent to his marriage"; "In the absence of such assistance, the annulment of the agreements may be pursued within one year of the marriage either by the incapable person himself, or by those whose consent was required, or by the tutor or guardian.

[liii] A. COLOMER*, op. cit.*

[liv] Article 353 of the Code of the R.C.A., Article 390 of the Code of the Malian family.

[lv] Cass. civ 30 February 1957 JCP, IIe part n° 1051, or revue trimestrielle de droit civil p. 68. In this case, a marriage contract was deemed null and void for having been signed on different dates by the two spouses who did not appear at the same time.

[lvi] A. COLOMER*, op. cit.* p. 140.

[lvii] C.A. of Caen of 3 May 1844, in Revue Sirey 1845, IIe part p. 76.

[lviii] A. COLOMER*, op. cit.* p. 140.

[lix] *Op. cit.*

[lx] P. DUPONT DELESTRAINT, *Contrat de mariage et régimes matrimoniaux, successions, libéralités*, Paris, Mémentos Dalloz, 1986, p. 19.

[lxi] According to P. DUPONT DELESTRAINT, publicity will enable third parties who propose to deal with spouses to know whether a contract has been made. They will know this by obtaining an extract of the marriage record. If there is no mention in the record, there is no marriage contract. The spouses will be deemed to have married under the legal regime. In the event that they have a marriage contract, third parties will be able to have it communicated by the spouses and, in the event of refusal, they will be free to abstain. Cf. P. DUPONT DELESTRAINT, *op. cit.* p. 19, footnote n° 2.

[lxii] A. COLOMER*, op. cit,* p. 142.

[lxiii] Article 49 of the 1981 Cameroonian Ordinance and Article 76 of the Code civil.

[lxiv] Article 44 AUDCG OHADA in its point 6.

[lxv] These are the provisions of paragraph 1 of Article 61 which states that: "Any person subject to registration in the Trade and Personal Property Credit Register Any person subject to registration in the Trade and Personal Property Credit Register may not, in the exercise of his activities, invoke against third parties and public

administrations, who may, however, avail themselves of the facts and acts subject to transcription or mention, unless the latter have been published in the Trade and Personal Property Credit Register.

[lxvi] P. DUPONT DELESTRAINT, *op. cit*, p. 20.

[lxvii] In this sense, paragraph 2 of Article 61 provides that the penalty imposed on a trader who is not subject to this registration publicity will not be applicable if the taxable person establishes that at the time he dealt with the third parties or administrations in question had knowledge of the facts and acts in question. See also A. COLOMER, *op. cit.* p. 144.

[lxviii] The counter-letter does not refer to a secret act that would modify the original marriage contract and thus be unenforceable against third parties. It simply refers to modifications or changes made to the matrimonial agreements before the marriage.

[lxix] Despite the fact that ineffectiveness is the antonym of effectiveness, which sociologically means "the ability of a legal act to produce legal effects (e.g. the enforceability of a notarial act), the ability of a legal rule to be applied or enforced, and to be respected in practice", ineffectiveness is not just the total absence of effectiveness. According to Dean CARBONNIER, ineffectiveness can be total or partial. Ineffectiveness can be total in two hypotheses. The first is where "the rule of law has remained constantly unapplied *ab initio*". The second hypothesis is that in which the rule of law "has ceased to be applied after having been applied for a more or less long time". In the first hypothesis we speak of *the impotence of laws* (For the popularisation of this expression see J. CRUET, *La vie du droit et l'impuissance des lois*, 1908.) and in the second hypothesis we speak of *disuse*. Ineffectiveness will be said to be partial in two cases as well. Ineffectiveness can be statistical or individual. While the first form is considered in relation to society or a group of individuals, the second is considered in relation to the individual who is obliged to consider his conduct in relation to the rule of law. For more details on the question of effectiveness and ineffectiveness, see J. CARBONNIER, *Flexible droit: pour une sociologie du droit sans rigueur*, op.cit. For a more substantiated definition of effectivity, see J. PICOTTE, *Juridictionnaire, recueil des difficultés et ressources du français juridique,* Université de Moncton, 2010, p. 1563, www. Ettj.ca., see also on the application of the rule of law, A. WEIL and F. TERRE, *Droit civil: Introduction générale,* Dalloz, 4ème ed., 1979, p. 18.

[lxx] Ch. MEKE-MEZE né BAHIYA, *La problématique des biens de la femme mariée dans le droit positif camerounais*, op. cit, pp. 7-8; LOE EYIKE, *Essai sur la recherche d'un régime patrimonial au Cameroun,* dissertation, University of Yaoundé 1976, p. 3.

[lxxi] These questions were asked orally.

[lxxii] A. BARGÈS, "Anthropology / sociology", in *Abécédaire des sciences humaines en médecine (collective), Paris, Ed Ellipses*, 2004, halshs.archives-ouvertes.fr.

[lxxiii] J. POISSON, "Actes notariés et démographie", *Journal de la société statistique de Paris*, t. 92, 1951, p. 141.

[lxxiv] Op. cit.

[lxxv] Ph. SIMLER, "Presentation of French matrimonial regimes and the regime of participation aux acquêts in France", Franco-German Forum 9-10/12/2008, www.fondation-droitcontinental.org.

[lxxvi] Article 1394 of the Civil Code applicable in Cameroon.

[lxxvii] In Cameroon in particular, marriage has become a real business. As a result, few people commit themselves to marriage in the absence of huge sums of money for a very large celebration that usually takes place in three phases. The first is customary, the second civil and the third, sometimes optional, is religious. It is during the customary phase, particularly at the time of the dowry, that the future husband is sometimes 'stolen'. Exorbitant sums are often demanded despite the penal sanction against those who demand an excessive dowry. The expenses are more pronounced during the civil celebration of the marriage. The extent of the phenomenon is such that some companies involved in the organisation of weddings offer not only drinks, hostesses, vehicles, clothes and red carpets, but also *bodyguards*. One could, in this sense, cite the case of the BM structure in Cameroon where the costs of these services start at one million. This is a phenomenon that encourages the multiplication of concubinage. For more details on the lavish organisation of weddings, see S. MEZING, 'Les mariés sont rois', Alter ECO n° 063. Fortnight from 14 to 27 May 2013, p. 9.

[lxxviii] EFFA TAMBE NCHAMUKONG, "Lucrative but Seasonal", Alter ECO No. 063. Fortnight 14-27 May 2013, p. 9. See in this sense Matthew 24: 37 (Bible: New Testament).

[lxxix] It should be noted that an ineffective or unenforced law "is not necessarily a useless law, because it provides individuals with a technique, which they may use later. Moreover, it is contrary to the essence of the legal order to think that an ineffective rule must necessarily be abolished". (A. WEIL and F. TERRE, *Droit civil: Introduction générale,* Dalloz, 4ème ed., 1979, pp. 18-19).

[lxxx] Ignorance can be seen in two ways: total ignorance and partial ignorance. By total ignorance we mean the fact that the future spouses or the spouses do not even know that a marriage contract can be or must be drawn up before marriage. The second category of ignorance is the fact that some people are aware of this institution without

weighing its importance. As a result, they "deliberately" refuse to draw up a marriage contract. This latter attitude could be likened to "circumventing laws (taken from the gallery of the National Assembly)" (Ch. VLÉÏ-YOROBA, "Droit de la famille et réalités familiales : le cas de la Côte d'Ivoire depuis l'indépendance ", *Clio. Histoire, femme et sociétés,* number 6-1997, [On line], on-line since 01 January 2005, Accessed on 27 December 2021. URL : http://journals.openedition.org/clio/383.html.)

[lxxxi] A. H. KOUASSI, *Le statut de la femme mariée en Côte d'Ivoire*, PhD thesis, University of Montpellier I, 1985, p. 21.

[lxxxii] Art. 27 paragraph 2 of the Code The civil registrar 'calls upon the future spouses and, if they are minors, their ascendants present at the celebration and authorising the marriage, to declare whether or not they opt for the regime of separation of property and, if so, to give them notice of this as provided for in Article 70 of Law No. 64-374 on civil status'.

[lxxxiii] Article 488 paragraph 2: "In order to allow the spouses or future spouses to reflect on the regime to be chosen, the civil registrar will explain the matrimonial regimes at the time of publication of the banns as provided for and organised, for the case of the registration of a marriage celebrated in the family, in Article 370 and for the case of a marriage celebrated by the civil registrar, in Article 381.

[lxxxiv] Article 306 of the Code civil society.

[lxxxv] Although there are advantages to this form of divorce, it should be noted that it causes the marriage to lose not only its seriousness, but also its stability.

[lxxxvi] Y. A. CHOUALA, "La 'belle famille' et 'la famille élargie' : Acteurs des violences conjugales et domestiques dans les foyers camerounais", *Le bulletin de l'APAD*, n° 27-28, *Violences sociales et exclusions. Le développement social de l'Afrique en question,* online 19 June 2008, Accessed 27 December 2021. URL: http://journals.openedition.org/apad/3063.

[lxxxvii] YOUSSOUFA NDIAYE, "Le divorce", in *Encyclopédie juridique de l'Afrique, les nouvelles éditions africaines (NEA)*, 1982, Tome 6, p. 282.

[lxxxviii] A. BENABENT, *Droit civil: La famille*, 11e éd, Édition du Juris-classeur, 2003, pp 198 et seq.

[lxxxix] Cass. 2e civ, 13 Nov. 1991: bull civ II n° 303.

[xc] YOUSSOUFA NDIAYE, op cit, pp. 285-286.

[xci] A. BENABENT, op cit p. 217.

[xcii] YOUSSOUFA NDIAYE, op cit, pp. 282 et seq.

[xciii] Op. cit.

[xciv] Cameroonian Constitution of 2 June 1972 (revised on 18 January 1996).

[xcv] YOUSSOUFA NDIAYE, op cit, pp. 229-313

[xcvi] YOUSSOUFA NDIAYE, op cit, p. 282.

[xcvii] Civ 1re , 10 May 2006: Bull.civ, n° 228.

[xcviii] N. PETRONI-MAUDIÈRE, *Le déclin du principe de l'immutabilité des régimes matrimoniaux*, Presse Universitaire de Limoges, 2004, p. 12.

[xcix] The author of this quote is referring to French society. But because of legislative mimicry, one might think that there is a cultural, spiritual attachment to this principle in Africa. Indeed, African legislators in general and those of the OHADA area in particular show that history binds us and that the Code French civil law remains the legislative standard.

[c] The direct change can be made by a complete change of the matrimonial property regime. For example, the spouses could decide to opt for the regime of community of property while they were married under the regime of separation of property. Direct modification can also be seen through the modification of the legal effects of the regime adopted on a particular point relating to: the legal condition of the property especially the composition of the three masses in a community regime; the powers of the spouses over the property as provided for by the law; the liquidation of the regime. See P. DUPONT DELESTRAINT, op. cit. p. 22.

[ci] Indirect modification could come from a contract that would indirectly prevent the normal application of the chosen or applicable regime. According to the formula of AUBRY and RAU, it is a question of "... acts which would have the result of altering or neutralising the regular and legal effects of the matrimonial regime" (N. PETRONI-MAUDIÈRE, Le déclin du principe de l'immutabilité des régimes matrimonial). (N. PETRONI-MAUDIÈRE, *Le déclin du principe de l'immutabilité des régimes matrimoniaux*, Presse Universitaire de Limoges, 2004, p. 17.) The Court of Cassation, drawing on this formula of AUBRY and RAU, has been able to hold that "there is a change ... only if a legal rule or a clause of the marriage contract has been directly modified or set aside, and more generally, whenever the maintenance of past agreements or arrangements concluded during the marriage

would have the result of altering or neutralising the regular or legal effects that the clauses of the marriage contract or the provisions of the law were intended to have. (Cass. civ. 1er , 5 November 1985, Bull. civ. I, n. 285, p. 253, D.S., 1986, I.R., 205, J.C.P. éd. N, 1986, II, 247, note Ph. SIMLER.)

[cii] MAZEAUD, by M. de JUGLART, *Les régimes matrimoniaux*, 4ème éd., 1977, n° 40, quoted by N. PETRONI-MAUDIÈRE, *Le déclin du principe de l'immutabilité des régimes matrimoniaux*, Presse Universitaire de Limoges, 2004, p. 17.

[ciii] F. TERRE and Ph. SIMLER, *Law civil: Les régimes matrimoniaux*, Dalloz, 2ème ed., 1994, pp. 175 et seq.

[civ] Op. cit. p. 21.

[cv] This group includes all countries that still apply the Code French civil law of 1804, this is notably the case in Cameroon. Article 1395 of the Code The civil law applicable in Cameroon, speaking of matrimonial agreements, states for example that: "They may not be changed after the celebration of the marriage. We can also cite Senegal, despite the fact that it has reformed its family law. Article 370 of the Family Code provides that the choice of matrimonial regime is irrevocable and the spouses cannot voluntarily change the regime during the marriage.

[cvi] In this second case, we can cite the legislators of Benin, Burkina Faso, Gabon, Côte d'Ivoire, Mali and Togo. Despite some differences in wording, these legislators allow a modification or change of the matrimonial regime subject to certain conditions.

[cvii] Article 74 of the Ivorian Civil Code.

[cviii] Article 392 of the Code of persons and family, art. 110 (Law n° 83-800 of 2 August 1983) of the Code civil Ivorian.

[cix] Article 311(4) of the Code of Persons and the Family of the Democratic Republic of Congo specifies that the draft act for the change of matrimonial regime is drawn up either by a notary or by a legal adviser.

[cx] F. TERRE and P. SIMLER, *Droit civil : Les régimes matrimoniaux* 2ème éd., Dalloz 1994, pp. 175 et seq.

[cxi] P. DUPONT DELESTRAINT, *Contrat de mariage et régimes matrimoniaux, successions, libéralités* Mémentos Dalloz 1986, pp. 40-50.

[cxii] F. TERRE and P. SIMLER, op cit p. 184-185.