VOID AND VOIDABLE MARRIAGES IN ETHIOPIAN LAW

*by Katherine O'Donovan**

I

INTRODUCTION

Is there a distinction in Ethiopian law between void and voidable marriages? The writer will argue that the Civil Code when dealing with defective marriages,[1] foresees and regulates only *voidable* marriages of different degrees, but that the concept of a *marriage void ab initio* may be profitably introduced to assist structuring thought about Ethiopian marriage law and deal with certain problem cases not specifically dealt with by the Code.

The terms "void" and "voidable" are found in the Common Law system. They have their counterparts in the laws of Continental European countries. In both legal systems the terms used lack a clearly defined meaning and the transposition of a terms from one system to another is virtually impossible. In the Amharic version of the Civil Code there is no exact term to convey the concept "void" or "voidable".[2] Nevertheless these terms will be used since they are the most apt terms available for elucidating the law, as will be shown.

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1. An objection could be made that marriages which are defective and can therefore be dissolved should be called "dissolvable". But all marriages are ultimately dissolvable, by death, by divorce or because they are defective under Civ. C., Art. 661.

2. Terminology is a problem. The French version of the Civil Code is fairly consistent in the use of languages but the English and Amharic translations are inconsistent and occasionally positively unhelpful. Where the French version declares certain acts "sans valeur au regard de la loi civile", the English translation is "of no effect under the civil law", and the Amharic is "ዋጋ ፡ የሌለው"- Civ. C., Arts. 18 and 44. In other cases where the French declares an act "nul" the English remains "of no effect" and the Amharic is "ፈራሽ ፡" in Arts. 313, 387, 639(2), 640(3) and 638.

   The word "nul" in French is translated as "null" in English and "ፈራሽ ፡" or "የማይጸና ፡" in Amharic in Art. 707.

   "La nullité" in Arts. 314(1), (2) and 369(3) is translated into English as "nullity" and into Amharic as "ፈራሽነት ፡".

   "L' annulation" in Art. 623(1), (2) and (3) is translated into English as "the annulment" and into Amharic as "መፍረስ ፡" in (1) and "መሻር ፡" in (2) and (3).

   But in connection with the law of contracts "annulé", "annulation" and "nullité" are translated as "invalidated" or 'invalidation', the Amharic being "ፈረሰ ፡" or "መፍረስ ፡" in Arts. 1698, and 1699. In Art. 1700, the translation is "ቀረ ፡" or, "መቅረት ፡", in Art. 1701, "መቅረት ፡" and "መፍረስ ፡" in Art. 1808 "ፈረሰ ፡" and "ሰረዘ ፡" in Art. 1809 it is "መርጋት ፡" and in Art. 1801 "መሰረዝ ፡" The author acknowledges the help of Ato Tadesse Tecleab with the Amharic text.

A void act is an empty act. It does not achieve what it set out to do. It does not achieve its intended legal consequences. "Quod nullum est, nullum producit effectum."[3] An act is void due to a defect therein which is so fundamental as to deprive the act of its very existence. "A defect may make a juristic act either void or voidable. If the defect is such that the act is devoid of the legal results contemplated, then the act is said to be void."[4] The conventional wisdom concerning the void act is that it has no legal effect, but this is not strictly so as the act may have effects unforeseen by the actor, such as those of criminal prosecution because of the illegality of the act. The point about the void act is that it achieves no part of its intended legal consequences and insofar as these are concerned it has no effect and can be ignored.

A voidable act is an act which, although it contains a defect, has its intended legal effect. The defect in the voidable act is not so serious as to prevent it from coming into effect.

> "An act that is incapable of taking effect according to its apparent purport is said to be void. One which may take effect but is liable to be deprived of effect at the option of some or one of the parties is said to be voidable."[5]

The defect contained in the voidable act is sufficiently serious to enable the act to be subsequently attacked by one of the parties and declared void by the courts. If, however, it is not avoided the act will take effect as a valid juristic act.[6] One learned writer has suggested that the correct way to view the voidable act is as "an act which gives rise to the intended legal consequences, but at the same time gives rise to a counteractive right which may neutralise those consequences in so far as one of the parties is concerned."[7]

A void marriage, if such exists in Ethiopian law, is one to which there is such a serious objection in law because of a grave defect that, should its existence be in question, it will be regarded as never having taken place and can be so treated by all affected or interested parties. Any court declaration made would merely have the purpose of affirming that the marriage never existed and of clarifying the status of the parties as never having been married.[8] Any person having an interest therein could petition for a declaration of non-existence of the marriage at any time, even after the death of the parties. Since the parties never had the status of husband and wife none of the normal legal consequences of marriage would follow. For

3. G. Ripert and J. Boulanger, *Traite de droit civil*, (Paris, Librairie générale de droit et de jurisprudence, 1956), vol. 1, no. 1369.

4. G. W. Patton, *Jurisprudence*, (3rd. Ed. by D. P. Derham), (Oxford University Press, 1964), p. 281.

5. F. Pollock, *Jurisprudence and Essays*, (London, Macmillan, 1961) p. 89.

6. For example, Civil Code Arts. 313 and 314 give the minor (or his representative) the right to apply for nullification of an act performed in excess of his powers. If the minor does not nullify the act it remains valid.

7. F. H. Newark, "*The Operation of Nullity Decrees*", Mod. L. Rev., vol. 8, (1945) p. 203 at p. 205.

8. Art. 724 of the Civil Code provides: "Only the court is competent to decide whether a marriage has been contracted and whether such marriage is valid." This seems to suggest that all cases even those of void marriage, must be referred to the court for clarification of the position.

instance there would be no community of property, so the surviving spouse could not claim his or her share after the death of the other spouse. Any marriage contract made prior to the void marriage would not come into effect. The wife would retain her own domicile. The children would not be the children of the marriage although they could no doubt prove their filiation as deriving from an irregular union. And the matter could be raised as a defence in other legal actions since all interested parties may concern themselves with a void marriage.

A voidable marriage is quite different from a void marriage. The marriage will be regarded as a valid subsisting marriage unless and until it is attacked. As to the effects of a voidable marriage a distinction must be drawn between a marriage which, although voidable, is never attacked[10] and therefore never avoided, and a marriage which is avoided. In the former case the marriage will be valid and all the normal legal consequences of marriage will follow. In the latter case a further distinction must be made between those marriages which are declared void retrospectively and those marriages which are given effect up to the day of avoidance. It is here that the use of the word "voidable" may be criticised. It fails to distinguish between the act which is not void *ab initio* but is declared void retroactively by a court, and the act which is deprived of all future effect by the court but which retains such effect as it has had up to avoidance.[11]

Three categories then emerge. The marriage which is *void ab initio*, that is which never came into being or had any effect; the marriage which is *void retroactively, (ex tunc)*, that is which came into being, would have been valid had it not been found out, but is now deprived of all effect; and the marriage which is *void ex nunc*, that is which is deprived of effect for the future but which holds good for the past. The only category into which the Ethiopian marriage law clearly falls is that of *void ex nunc*.

The Ethiopian law relating to defective marriages does not use the term "nullity" in reference to such marriages.[12] Defects are classified along with death and divorce as a cause for the dissolution of marriage.[13] The words "application for dissolution" as "a sanction of the conditions of marriage"[14] are used in the Civil Code for what is traditionally called nullification. The significance of the Civil Code terminology is most important. Dissolution of defective marriages has much the same

9. Even if no marriage took place the court must be given the opportunity of clarifying the situation. See G. Ripert and J. Boulanger, cited above at note 3, vol. 1, no. 1319.

10. The right to attack a voidable marriage is generally limited to those closely involved. The question of who has the right forms the basis in French law for the distinction between nullité absolue and nullité relative. The reason is that where the defect is not serious only the parties have the right to avoid the marriage.

11. Writers on void and voidable marriages are aware of the ambiguity. See Newark cited above at note 7, and the letter it inspired by Latey, M.L.R., vol. 11, (1948) p. 70. See also the remarks by D. Lasok, D. "*Approbation of Marriage in English Law and the Doctrine of Validation*", Mod. Rev., Vol. 26 (1963) p. 249.

12. Exceptions to this are Art. 369(3) which uses the word "nullity" in reference to marriage; Art. 707 which uses the word "null"; and Art. 623 which deals with the "annulment" of a religious marriage by the religious authorities.

13. Civ. C., Art. 663.

14. *Id.*, Sub-art. (2).

consequences as divorce.[15] This has the advantage of avoiding the problems which arise in French law through the concept of nullité. According to Ripert and Boulanger:

> "When a marriage is declared null or annuled, it can no longer produce any effect; and all those which it has produced up to then disappenear, since it is reputed never to have existed. The appearance of legitimacy which the fact of celebration has given to the union of these persons is retroactively destroyed by the judicial pronouncement of nullity. Quod nullum est nullum producit effectum."[16]

The French law would seem to fit into the category of marriages void retroactively. In order to get around this difficulty a theory of putative marriage was introduced for those marriages where one or both of the spouses had acted in good faith. The effect of the theory is to render the putative marriage void *ex-nunc* vis à vis the partner in good faith. Such a theory is not necessary in Ethiopian law. A deliberate decision was taken by the draftsman to "leave out all the theory of nullity of marriage, which gives rise to many difficulties, and which in any case is rarely applied because of the exceptional effect of the theory of putative marriage. In speaking of dissolution, and not of nullity, it has been possible to avoid the theory of putative marriage."[17] Good faith is relevant to Ethiopian law not in determining when the dissolution will have effect but only in determining the consequences of dissolution.[18]

II

THE CIVIL CODE PROVISIONS ON INVALID MARRIAGES

Invalid marriages regulated by the Civil Code are those which have been celebrated despite some obstacle or impediment to the union. Such impediments were known to the *Fetha Nagast* and covered obstacles to the union arising from prior relationships, from previous marriage, or from age. Also included were defects arising from the ceremony itself.[19] Such marriages were prohibited and in some cases gave rise to penal sanctions.[20] Many of the impediments found in the *Fetha Nagast* have been retained in the Civil Code.[21] But those relating specifically only to the rules of religion have been dropped.[22]

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15. *Id.*, Art. 696(2) orders the court to be guided by the rules for divorce in dissolving a defective marriage.

16. G. Ripert and J. Boulanger, cited above at note 3, vol. 1, no. 1369.

17. R. David, *Le droit de la famille dans le code civil éthiopien.* (Milano, Guiffrè, 1967), p. 57 Translations of French texts are made by the writer.

18. Civ. C., Art. 696(3).

19. *Fetha Nagast*, (translation, Abba Paulos Tzadua, 1968), pp. 134-144. The various impediments were: relationship by consanguinity or affinity; other relationships, such as that between foster children, godparent and godchild, guardian and ward, master and slave; lack of Christian belief of one party; impotence; bigamy; disease; one party married three times previously; one party a nun; woman aged over sixty; period of widowhood; lack of consent; non-age (woman to be over twelve years, man to be over twenty); lack of form required by the church.

20. *Id.*, pp. 297 - 299.

21. It was the intention of the draftsman to conserve as far as possible the *Fetha Nagast*. See R. David, cited above at note 17, p. 5.

22. Forms of marriage under the Civil Code (Art. 577) are: civil, religious and customary. An error as to the religion of one's spouse is a ground for an application for dissolution under Art. 618.

Impediments to marriage in the Civil Code fall into three categories. Firstly there is the impediment to the celebration of the marriage which does not affect its subsequent validity; this type of impediment is merely prohibitory. Contained in this group are marriages celebrated despite opposition[23] and marriages celebrated within the period of widowhood.[24] In both of these cases the obstacle to the marriage (opposition by family, marriage dissolved less than six months previously), should prevent the marriage from taking place; if however it does take place, then the marriage will be valid, despite the impediment.[25] A criminal sanction may be applied to the authority responsible for the celebration and to the spouses and other parties involved in the marriage.[26] But the marriage cannot be avoided because of a prohibitory impediment. It is valid after celebration.

The second group of impediments contains those which ought to prevent the marriage from taking place and which render it voidable[27] if it does. These are relative impediments. The distinguishing aspect of this group is that the marriage, although voidable after celebration and thus open to dissolution, can be subsequently validated. This means that the marriage which is voidable after its celebration due to a defect therein can subsequently become valid through the *ex post facto* removal of the impediment or by the passage of time. This process is known as validation.

Those marriages which are initially voidable but capable of validation are those invalid for non-age,[28] bigamous marriages,[29] marriages of incapacitated persons,[30] marriages contracted under duress,[31] and marriages contracted in error.[32]

The concept of validation comes from Canon law.[33] Where a marriage contained a defect but the defect was later cured by cessation or dispensation, if the parties renewed their consent to the marriage it became valid. In practical terms the continuance of the couple in living together was often sufficient to cure the defect if the impediment was not publicly known. The reason for permitting validation was the desire to give stability to marriage where the parties had shown their constancy. In secular law one can observe validation in operation in European countries and in Ethiopia.[34]

The Civil Code provides that a marriage which is voidable for non-age[35] can be dissolved on the application of any interested person or the public prosecutor.[36]

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23. Civ. C., Art. 592. See R. David, cited above at note 17, p. 57.
24. *Id.*, Art. 596.
25. *Id.*, Arts. 619(3) and 620 (3). See F.C. epoux B. (Cour d'appel de Douai, Fra., Dec. 28, 1908) *Dalloz*, 1909, pt. 2, p. 102, for an example from French law.
26. *Id.*, Arts. 619(1) and (2); 620(1) and (2).
27. "Voidable" is used here in the sense of "capable of being dissolved" at the option of certain persons.
28. Civ. C., Art. 581.
29. *Id.*, Art. 585.
30. *Id.*, Arts. 587 and 588.
31. *Id.*, Art. 589.
32. *Id.*, Art. 590.
33. F. J. Sheed, *The Nullity of Marriage* (New York, Sheed and Ward, 1959) p. 30. D. Lasok cited above at note 11, p. 257.
34. For example France, Poland and Switzerland. The doctrines of approbation and sincerity in Common Law have partially the same effect.
35. Under Article 581 the age of marriage is eighteen for a man and fifteen for a woman.
36. Civ. C., Art. 608(1).

But this application can no longer be brought once the defect has been removed by the passage of time.[37] The marriage is validated by the removal of the defect.

Similarly in the case of an incapacitated person who is married without the appropriate consent,[38] once the disability has terminated the incapacitated person has the right to apply for dissolution for six months after the termination only.[39] The person who should have consented to the marriage[40] may apply for dissolution within six months of learning of it only, and in no case after the disability has ceased.[41]

In the case of duress[42] and error[43] the right to apply for dissolution is limited to the victim, and he or she has a two year maximum period in which to make the application which must be made within six months of the cessation of the violence[44] or the discovery of the error.[45] The limitation of time recognises that the marriage has lasted despite the impediments and suggests that the defect is cured or accepted over time.

The bigamous[46] marriage is voidable at the instance of the consorts of the bigamous spouse or the public prosecutor.[47] It is validated on the day when the former spouse dies.[48]

In these cases of voidable yet validatable marriages criminal sanctions are applicable to these persons who knowingly celebrated or took part in a marriage cere-

37. *Id.*, Art. 608(2).

38. A minor needs the consent of his guardian to be married as provided in Art. 309. This requirement would seem to apply only to female minors as a male minor (under the age of eighteen) cannot be married except in the very unusual case of a dispensation under Art. 581(2). A judicially interdicted person is required by Art. 369(1) to have the consent of the court.

39. Civ. C., Art. 615(1) and (2).

40. *Id.*, Art. 615(1) and (3).

41. *Id.*, Art. 615(1) and (3). There is a complete discrepancy here between Art. 615 and Art. 369(3) on the invalidation of the marriage of a person who is judicially interedicted. Art. 369(3) provides that any interested person may apply for a declaration of nullity of the marriage at any time. Art. 615 seems to be the correct version as it is in line with the other provisions in the section on invalid marriage.

42. Duress invalidates consent, and is deemed to exist, where consent is given in order to protect the victim or his immediate family "from a menace of a grave and imminent evil" under Art. 589(1) and (2). For an example in French law see the decision in Pietroni Mathilde c. Serpaggi (Cour d'appel de Bastia, Fra., June 27, 1949) *Dalloz*, 1949, p. 417.

43. Error invalidates consent where an error of substance as to the person of the other spouse is made. Art. 591 limits these errors to mistakes as to identity, religion, health and "bodily conformation". It is not clear what is covered and what is not. French law which is similar has been interpreted to cover cases of mistakes as to nationality and past history, impotence and genuine mistakes of identity. See the note by P. Esmein, *Dalloz*, 1955 p. 242.

44. Civ. C., Art. 617(1) and (2).

45. *Id.*, Art. 618(1) and (2).

46. "Bigamous" in the Civil Code is undoubtedly intended to include "polygamous". However there is room for the objection that polygamy has not been foreseen in the drafting of Arts. 612 and 613.

47. Civ. C., Art. 612(1).

48. *Id.*, Art. 613.

mony to which there was an impediment.[49] Despite the criminal sanction the marriages can be validated for the sake of ensuring their stability by enabling them to become valid when the defect has disappeared or is no longer significant.

Absolute impediments form the third category. These obstacles are so grave that they can never be cured and therefore the marriage can never be validated. Only one impediment is absolute; that which prevents the marriage of those who are related by consanguinity or affinity.[50] If a couple are married despite this impediment their marriage remains voidable. It is open to an application for dissolution by any interested person or the public prosecutor.[51] Since the impediment can never be removed,[52] it is impossible for the marriage to be validated. Here too there is a criminal sanction for those who knew or should have known of the impediment and who assisted at the marriage.[53]

Both the marriage to which there is a relative impediment and that to which there is an absolute impediment are voidable under Ethiopian law. The former is voidable until validated, the latter is always voidable. If a marriage in either of these categories is dissolved its prior effects are retained and it is void only *ex-nunc*. The consequences of dissolution for invalidity are very similar to those of divorce. The regulation of the matter is left to the courts who are exhorted to regulate the dissolution according to equity, to be guided by the rules for divorce, and to take into account the good or bad faith of the parties, whether the marriage has been consummated, the interest of the children and of third parties in good faith.[54] Since the voidable marriage is treated as valid until it is dissolved and since the effects are similar to divorce the dissolution is purely prospective. Even in the case of a bigamous or incestuous union the marriage retains its prior presumption of validity after dissolution. There is no example that we could discover of a marriage which is voidable and if dissolved retrospectively void. The policy seems a simple and sensible one, since questions of prior status are avoided.

III

THE STATUS OF THE BIGAMOUS MARRIAGE

The bigamous marriage, as previously discussed, falls into the category of marriages which are voidable yet validatable. To these marriages a presumption of

49. *Id.*, Arts. 607, 611, 614, 616. The case of error is an exception since this is a personal matter. The criminal sanctions referred to in the Civil Code are those laid down in Pen. C., Arts. 614 and 615. But the Penal Code does not provide for all cases foreseen in the Civil Code. It is possible that in some cases where the Civil Code says that a penal sanction will be applied that the Penal Code makes no provision for such sanction. The policy of providing such sanctions is a curious one as it will deter the parties involved from bringing an application for dissolution.

50. *Id.*, Arts. 582, 583 and 584. Compare the three versions of the Civil Code. The English and the Amharic give effect to the bond of consanguinity to the seventh generation whereas the French version says "degree". The bond of affinity has effect to the third degree.

51. *Id.*, *Art.* 609.

52. The original draft of the Civil Code contained a provision whereby the relationship by affinity would cease upon the dissolution of a marriage. This provision was changed in Parliament resulting in Art. 555. See R. David, cited above at note, 17, p. 51, f. n. 1 and G. Krzeczunowicz, *Twenty-four Problems in Family Law*, (1970, unpublished. Library, Faculty of Law, Haile Sellassie I University), problem 2, and "Quizzes", *J. Eth. L.*, vol. VIII, (1972) p. 203

53. Civ., C., Art. 610.

54. *Id.*, Art. 696(1), (2) and (3). In Swiss law, the consequences of nullity are those of divorce; code civile suisse, Art. 134.

validity is attached until avoided by dissolution. Nevertheless the bigamous marriage is unique in that its validation does not come about automatically after a lapse of time; its validation occurs upon the death of the first spouse. Certain problems are raised by this peculiarity. They turn on the question: What is the status of the bigamous marriage in Ethiopian law? Does it also benefit from the presumption of validity?

Article 585 states: "A person may not contract marriage so long as he is bound by the bonds of a preceding marriage." Nevertheless some persons already married go through a ceremony of marriage while still bound to another spouse. If this happens it is an offence under the Penal Code for one who "being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annuled."[55] Both parties to the bigamous union are punishable. An exception to this rule in the Penal Code is "cases where polygamy is recognised under civil law in conformity with tradition or moral usage."[56] Since no such exception was made in the Civil Code Article 585 holds sway. It was the intention of the drafter to make such an exception for the Muslim population in Title XXII but due to the overwork of the translators the draft of this title was never translated, never discussed and never proposed to Parliament.[57] Thus the law of Ethiopia recognises only monogamous marriage.[58]

If a couple are married bigamously either of the consorts of the bigamist or the public prosecutor may apply for dissolution of the marriage.[59] The burden of proof is on the applicant to show that the first consort was alive on the day of celebration of the second marriage.[60] The language of the Civil Code is very imprecise here. Firstly the proof required on an application for dissolution should be that the former spouse is alive at the time of application for dissolution, not at the time of the bigamous marriage. This is because Article 613 provides: "The marriage contracted by the bigamous spouse shall become valid on the day when the former spouse dies." Thus the former spouse could be alive at the time of celebration of the bigamous marriage, yet dead at the time of application for dissolution and the marriage would have become valid in the interval. If dissolution of the second marriage then takes place, it is by divorce. Secondly the wording of Article 613, although quite clear, raises the question of what happens when the former marriage is dissolved not by the death of the former spouse as foreseen by Article 613 but by divorce or as a sanction of the conditions of marriage. Will this have the effect of validating the bigamous marriage? The logical answer would

55. Pen. C., Art. 616.

56. *Id.*, Art. 617.

57. R. David, cited above at note 17, p. 8. The proposed Article on bigamy read as follows: "Art. 3487. *Bigamy.* (1) where the husband is of the Muslim religion the dissolution of the marriage may be pronounced only at the request of the public prosecutor.
(2) The public prosecutor may not make an application until the date fixed by law, except where the Minister for Justice has made a special request."

58. But since the Muslim population continues to be governed in personal matters by the Kadis and Shari'a Courts under the Kadis and Naibas Councils Proclamation, 1944, Proc. No. 62, *Neg. Gaz.*, Year 3, no. 9, monogamy is not entirely the rule, in fact, despite the repeal of Muslim Law implied by the general repeals provision of in Art. 3347.

59. Civ. C., Art. 612(1). The bigamist is left in the awkward position of having no right to apply for dissolution of the bigamous marriage. He could bring the matter to the attention of the public prosecutor and risk a criminal prosecution.

60. *Id.*, Art. 616(2).

seem to be yes, since the impediment having been removed there is no obstacle in the way of the marriage. The Polish law which is closest to the Ethiopian law on the matter of validation of bigamous marriages permits validation regardless of the cause of termination of the previous marriage.[61] It may be that the Ethiopian law does not go the whole way with the Polish law because of the criticism which followed the latter. Validation where the previous marriage had ended in divorce was regarded by Polish critics as particularly repugnant because it was thought to encourage divorce.[62]

Looking at the law on voidable marriages as a whole the validation of the bigamous union fits into the picture very well. Yet the law is fairly revolutionary. Bigamy is a crime and the bigamous marriage is a nullity in most countries. The policy reasons for validation of stability and reward for constancy are less obviously present when there is not even a requirement of good faith. Swiss law will permit validation, where the non-bigamous party acted in good faith.[63] In French law a bigamous marriage can never be validated,[64] although the marriage may be putative as regards the party in good faith. Neither Polish nor Ethiopian law look to *bona fides* before validating the marriage.

It is the bigamous marriage which is neither fish nor flesh, not having been validated, nor yet annuled which raises problems of personal status. If the second spouse of the bigamist leaves him and marries again, will the second marriage be also bigamous? Other countries with similar laws generally allow the invalidity of the first marriage as a defence to a charge of bigamy.[65] If the bigamous spouse dies while the bigamous marriage still subsists can the marriage be subsequently attacked or will both surviving spouses be legitimate? Fortunately there is no problem concerning the status of the children of the second marriage who can prove their filiation without difficulty.[66]

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61. The Polish Family and Guardianship Code (translation J. Gorecki, in D. Lasok, *Polish Family Law*, Leyden, A.W Sijthoff, 1968), p. 266, Art. 13 provides; "S. 3. A marriage cannot be annulled on the ground that one of the spouses is a party to a subsisting marriage if the previous union has come to an end or has been annulled, unless the previous union has come to an end by the death of the person who had contracted the bigamous marriage."

62. D. Lasok, cited above at note 61, p. 262.

63. Code civil suisse, Art. 122, provides:
"There is no nullity in the case of bigamy, where the preceding marriage has been dissolved in the meantime and where the consort of the bigamist acted in good faith."

64. An application for nullity can be made after the dissolution of the first marriage. There is no analogy with the validation of other defective marriages: bigamy is considered too serious a defect to allow the situation to be regularised. M. Planiol et G. Ripert, *Traité pratique de droit civil*, (2nd ed. 1962, by A. Rouast, Paris, Librairie générale de droit et de jurisprudence) vol. 2, no. 266.

65. In French law the bigamist can raise the nullity of the first marriage as a defence under Art. 189 of the French Civil Code which provides: "If the new spouses oppose the nullity of the first marriage, the validity or the nullity of this marriage must first be decided". Art. 124 of the Italian Civil Code is similar.

66. The children can claim to be the children of a marriage under Civ. C., Art. 740. Alternatively they can claim to be the children of an irregular union under Civ. C., Art. 708 *cum* Art. 745(1). The writer favours the former solution because even if the bigamous marriage is attacked it will be valid as regards the past, and because Civ. C., Art. 708 defines an irregular union as "the state of fact created when a man and a woman live together as husband and wife without having contracted marriage". The bigamous marriage is a case where marriage has been contracted.

In the original draft of the Civil Code there was no doubt as to the status of the bigamous union. It was to have the status of an irregular union.[67] If the article so providing had been retained there would be an easy answer to questions concerning the rights of the second consort. As it is the question is left open.

A recent case brought a typical problem to light.[68] The facts were as follows: A probate file having been opened in the Awraja court two parties appeared claiming to be the wife of the deceased. The plaintiff produced two documents of which one was a marriage certificate dated 1940 (Eth. Cal.) in support of her claim. The defendant also claimed to be the wife of the deceased with her five children as heirs. The venue having been changed to the High Court,[69] the Court held that the plaintiff was the legal wife of the deceased on the basis of the marriage record and the evidence of witnesses. The Court discounted evidence that the plaintiff had declared herself a divorce to the Ministry of Foreign Affairs when applying for a passport to go to Ghana with another man, that it was alleged that the plaintiff had married in Ghana and the fact that the plaintiff had run a bar in Jimma.

None of these facts in itself was held to constitute a divorce. The Court said:[70]

> "As can be gathered from the Civil Code Arts 666 et seq., an act of divorce, like that of marriage must follow certain legal procedures. Art. 665(3) states that divorce would take place unless it is done in accordance with the rules laid down by the Code. If the plaintiff entered into a marriage with another person before having dissolved her first marriage with the deceased, then she would be held liable for bigamy; the second marriage, however, cannot invalidate the first one. Moreover, Civil Code Art. 585 provides that no marriage can be entered into as long as the bonds of a preceding marriage are intact. The fact that the plaintiff had owned and was engaged in running a bar cannot be deemed either a procedure for or evidence of a divorce, although it is admittedly a disreputable and anti-social trade.
>
> What the plaintiff wrote to the Ministry of Foreign Affairs (declaring herself a divorcee) cannot by itself constitute a divorce either, since under the law the unilaterial repudiation of the husband by the wife or the wife by the husband is of no effect. In fact, under Art. 665(1) of the Civil Code, even divorce by mutual consent is not permitted. For all these reasons, the plaintiff's marriage was valid until the death fo her husband; there was no legal divorce at all."

The Court then declared the plaintiff the legitimate wife of the deceased, and gave her permission to bring an action to claim her share of common property.

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67. R. David cited above at note 17, p. 57, f.n.37. The article was: "The marriage contracted by the bigamous spouse produces the effects of irregular union. On the termination of the union the judges will award damages to the new spouse, if he was in good faith, for the material hardship he has suffered." See also G. Krzeczunowicz, cited above at note 52, problem 6 and "Quizzes", *J. Eth. L.*, vol. VIII, (1972) p. 204.

68. *Beletshachew Benti v. Wolde Aregay Megenie*, (Addis Ababa, High Court, Civil Case No. 1584/60) (unpublished).

69. Under Civ. Pro. C., Art. 31.

70. Translation by Ato Ayanew Wassie.

On appeal to the Supreme Court,[71] the Court held that since the plaintiff (now respondent) had[72]

> "abandoned her conjugal residence and lived like a prostitute, applied for a passport saying she was divorced, said she was divorced to members of her community in edirs and mourning houses, never objected to the bigamous marriage of her husband",

she could not be considered the legal wife of the deceased. In dealing with the judgment of the High Court, the Surpreme Court said that the plaintiff's evidence

> "does not in any way tend to prove that she was not divorced and that she had lived with the deceased until the time of his death ... It is obvious that marriage and divorce have legal procedures. But, it must be known that, in accordance with the law, in the absence of the instrument pronouncing the divorce, it may well be proved by introducing circumstantial evidence. In view of the fact of respondent's way of life, conduct, and actions we have not found the statement of the High Court that there was no divorce according to legal procedure, to be appropriate."

The Supreme Court was satisfied that the defendant (now appellant) had been married to the deceased in 1957 (Eth. Cal.) and declared her the legal wife.

It is submitted with due respect that both courts were wrong. Both took the view that there could be only one legal wife. But if the view of the High Court that the first marriage was not dissolved is taken, then the second marriage, benefiting from the presumption of validity since it was never attacked, is also valid. There are three modes of dissolution of marriage, of which dissolution for invalidity is one.[73] Both marriages now having been dissolved by death, both wives have an equal claim to the common property.[74] Even if the first wife could attack the second marriage after the death of the bigamist the effect of dissolution for invalidity would be an award of common property to the second wife.[75] In any case it is extremely doubtful that an application for dissolution for invalidity can be brought after the death of one of the spouses. If the first consort dies the second marriage is validated under Article 613; if the bigamist or the second consort dies the second marriage is dissolved by death. Polish law makes a specific exception in allowing nullification where the bigamist has died.[76] No such exception is made in Ethiopian law where the causes of dissolution are treated equally.

The criticism of the Supreme Court decision is that the burden of proof has shifted to the plaintiff to prove that she was not divorced a virtually impossible task under the circumstances.[77] This is a discordant with Article 707 which provides:

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71. Wolete Aregay Megente v. Beletshacew Benti, (Supreme Imperial Court, Civil Appeal No. 62-62) (unpublished).
72. Translation by Ato Asfaw Seife.
73. Civ., C., Art. 663.
74. *Id.*, Art. 689.
75. *Id.*, Art. 696.
76. The Polish Family and Guardianship Code, cited above at note 68, Art. 13, 3. s.
77. Although it is intended to require registration of marriage at some time in the future this will be of limited usefulness unless homologation of divorce is also required. See R. David, cited above at note 24, p. 53.

"The person who alleges that a marriage is null or has been dissolved shall prove such allegation."

What is being suggested here is probably startling. Two or even more consorts can claim to be the legal spouses of a bigamist. Two or more spouses can claim a share of common property. Why not? Ethiopian law takes a liberal attitude to the rights of children regardless of whether they are born to the wife or the concubine of the father,[78] children of a marriage have to share with children outside marriage. Why should this not also be true of spouses? The objection may be made that a bigamous marriage is an irregular union, as intended by the draftsman. A glance at the provisions on the dissolution of invalid marriage should be sufficient to answer that objection and the suggestion that the bigamous marriage has no legal status. Dissolution for invalidity is much the same as divorce and the effects are purely prospective.[79] The marriage, such as it was, is valid for as long as it lasted. Termination of irregular union is quite a different matter. No common property was created[80] and the highest expectation is maintenance for the woman for six months.[81]

Two serious objections may be made to this conclusion. In practical terms it ma be difficult to allocate common property between two spouses of a bigamist or to apportion a pension between them. Community of property starts from the day of marriage[82] and so the common property would have to be apportioned according to length of marriage. Numerous difficulties and arguments would follow from this. One can imagine only too well the claims that would be made concerning the time of acquisition of the more valuable property, the allegations that would be made concerning personal property. It is also doubtful whether the section on pecuniary effects of marriage had such a situation in view when drafted. The second objection is that the policy of the Civil Code as laid down in Article 585 is against bigamy. Although the draftsman recognised that there was frequent bigamy in Ethiopia and attempted to deal with the situation by giving it the status of an irregular union,[83] this solution was rejected or dropped by the Codification Commission probably because there was a desire not to recognise bigamy at all. If this is so then the last situation is worse than the first.[84]

78. However the author does not agree with the view often expressed that there is no illegitimacy in Ethiopian law. Article 721(3) is quite clear that children born outside relationships provided for by the law such as marriage or irregular union and who have not been acknowledged or adopted have a juridical bond only with their mother. It is possible under Civ. C., Art. 770 for a child to prove his filiation by possession of status. On proof of filiation see G. Krzeczunowicz, *"The Law of Filiation under the Civil Code"*, J. Eth. L., vol. III, (1966) p. 511.

79. See p. 14 above.

80. Civ. C., Art. 712.

81. *Id.*, Art. 717(1). The Amharic version of the Civil Code says "three months."

83. R. David, cited above at note 17, p. 57.

84. There is a curious reluctance on the part of Ethiopian courts to deal with the problem of bigamy. In three cases of criminal prosecution in the Awraja Court in Addis Ababa none resulted in conviction. In crim. case 453/61 (unpublished) the court held that there was no evidence that the first marriage ever took place. In crim. case 30/62 (unpublished) the first wife dropped the case. In crim. case 218/61 unpublished it was erroneously held by the court that Pen. C., Art. 220 barred the complaint with its three month period of limitation. But in Prosecutor v. Haile T/Medhin, (Supreme Imperial Court, Criminal Appeal No. 179/52) (unpublished) a sentence of three months imprisonment for bigamy was confirmed.

IV

VOID MARRIAGE

Many legal systems contain a concept of void marriage generally referred to as inexistent. An inexistent marriage like a void marriage is empty of effect. Both, in theory, have no need of a court decision to render them completely ineffective. They are themselves void *ab initio*. However, as has been said, there is always a title or an appearance to be destroyed by the court in confirming the inexistence of the act.[85] Not all writers would agree that the act void *ab initio* is the same as the inexistent act. Many writers consider that the distinction between void and voidable marriage is the same as the distinction between nullité absolue and nullité relative in French or Swiss law or that between nichtige Ehe and aufhebbare Ehe in German law.[86] But in its true and original sense a marriage void *ab initio* is no marriage at all.[87]

In French law there is a concept of "marriage inexistant"; in German law "Nichtehe" is *ipso jure* void and produces no legal consequences; in Polish law, in Italian law and in Swiss law "non-marriage" can be observed.

The French were obliged to introduce the notion of marriage inexistant to deal with cases "where the law does not declare a marriage to be null, and where on the other hand it is logically impossible to admit that it is productive of effect."[88] The theory comes to the rescue in cases of identity of sex and want of form.[89] Planiol, while critical of some applications of the theory, finds that it is justified in those cases "where there is not even the appearance of marriage."[90] Cases of inexistent marriage are not regulated in the French Civil Code, and the theory is the product of *jurisprudence*.

Polish law, which is similar to Ethiopian law, makes a distinction between voidable marriage and non-marriage, the latter being reserved for marriages "absolutely void for lack of a civil ceremony, that is a marriage celebrated solely according to religious rites or in the absence of a registrar. Also a civil ceremony in which

85. Tronchet, in the discussions of the French Civil Code before its enactment said: "Jamais un marriage n'est nul de plein droit; il y a toujours un titre et une apparence qu'il faut détruire". Fenet, IX, p. 53, cited in M. Planiol et G. Ripert, cited above at note 64, vol. 1 No. 256.

86. D. Lasok, cited above at note 61, p. 53. E.J. Cohn, "*The Nullity of marriage*", L. Quart Rev., vol 64, (1948) p. 324. The distinction between nullité absolue and nullité relative is based on the right to petition for nullity. The distinction between nictige Ehe and aufhebbare Ehe is that in the former case the effects of nullity can be retroactive, whereas in the latter the effects are *ex nunc* and the same as divorce. W. Muller-Freinfels, "*Family Law and the Law of Succession in Germany*", Int'l and Comp. L. Quart., vol. 16, (1967) p. 409 at 432.

87. English law and Continental European law has got itself into difficulties with the various categories due to the influence of ecclesiastical law and the realities of life. Ethiopian Law having had the benefit of these experiences has simplified the matter admirably by having only one category; that of voidable marriage, in the Civil Code. The recognition that a marriage can also be void *ab initio* is a purely logical addition.

88. M. Planiol and G. Ripert, *Treatise on the Civil Law* (12th ed. 1939) (translation, Louisiana State L. Inst., 1959), vol. 1 pt. 1, no 1004.

89. *Ibid.*

90. *Ibid.*

persons of the same sex masqueraded as man and woman would presumably be a non-marriage."[91]

In most of the systems that recognise a concept of non-marriage, lack of a civil ceremony or of proper legal formalities is a case of non-marriage.[92] This would not be the case in Ethiopia where formalities for marriage have a very minor place in the law. If the officer of civil status responsible for a civil marriage does not follow the legal formalities required, he will be liable to a criminal sanction but the marriage will be valid.[93] If a religious marriage is annuled by the religious authorities for lack of form or due to some impediment this will constitute a serious cause for divorce but the marriage will be valid in the eyes of the law.[94] No legal effect will be given to an annulment of a customary marriage by the customary authorities.[95]

It seems likely that a marriage where both parties were of the same sex would be considered void by the Ethiopian courts. Although this may be considered a purely academic proposition cases of this kind have arisen in other countries. Planiol says:

> "But judicial records show that the difficulty could arise in practice ... It is indisputable that marriage assumes that there is a difference of sex between the two persons joined in wedlock. It is radically null when a mistake has been made regarding the sex of one of them, or, what amounts to the same thing, when one of them is not of a specific sex. If there be incontestible identity of sex there is not even the appearance of marriage."[96]

In France a marriage has been declared null because it did not unite a man and a woman,[97] but care must be taken not to confuse this with impotence or error on the person.[98]

While it is true that the case of identity of sex would seem to be covered by the Civil Code, an examination of the relevant article will show that this is not so

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91. D. Lasok, cited above at note 61, p. 53.

92. In France, Germany, Switzerland, Poland.

93. Civil C., Arts. 621 and 622, provided that the definitional requirements of Civ. C., Art. 578 are satisfied.

94. *Id.*, Art. 623(1) and (2). The word "some" in Civ. C., Art. 623, is intended to include "any" in the sense of inobservance of any religious condition or formality.

95. *Id.*, Art. 623(3).

96. M. Planiol et G. Ripert, cited above at note 64, vol. 2 no. 1005.

97. Darbousse c. Darbousse (Cour d'appel, Montpelier, Fra., May 8, 1872), *Dalloz*, 1872 pt. 2, p. 48. In this case the wife had no internal sex organs and was said by the court to be more like a man than a woman. The court said that since marriage is a union of a man and a woman it cannot be valid where the wife is not a woman. But see, *per contra*, Dame G. c., G. (Cour de cassation, Fra., April 6, 1903), *Dalloz*, *lo*(4, pt. 1, p. 395, which held the absence of certain sex organs in the wife to be a case of impotence. The court admitted that marriage can be contracted only between two persons of the opposite sex, but held that in this case the wife was recognisably a woman.

98. The French authorities seem to agree that a mere absence of sex organs of one sex does not make a person a member of the other sex. Something more positive is required.

Article 591(c)[99] deals with the case where an error has been made by one of the spouses on "the bodily conformation" of the other "who does not have the requisite organs for the consummation of the marriage". Although the effect of marriage is in no way dependent on consummation,[100] the person who was married under the influence of such error can apply for dissolution on the theory that his consent was vitiated in that he would not have married had he known the truth.[101] But if the parties are of the same sex there is obviously no marriage, whether a mistake has been made or not, and the so-called marriage is void.[102]

German law considers it a case of Nichtehe or *matrimonium non existens* where no agreement takes place at all.[103] It seems probable that such a marriage would be considered void in Ethiopia. Article 586(1) requires that "each of the spouses shall personally consent to the marriage at the time of celebration." Marriage by proxy is not permitted.[104] Related to the question of consent are the cases of voidable marriage which we have seen earlier, namely marriage of incapacitated persons, duress and error. But in all of these cases specific provision is made for application for dissolution of the marriage. No provision is made for the case where a person had absolutely no intention whatsoever of being married, as for instance where one of the parties did not understand the nature of the ceremony.[105] The lack of understanding might be due to lack of acquaintance with the ceremony or to a befuddled state induced by drink or drugs. Also included in a case of complete absence of consent would be cases where one of the parties answered 'no' at the ceremony or did not answer at all. It was the intention of the draftsman to deal with this question by including a provision making invalid a consent to marriage given by a person ignorant of its meaning, however this provision disappeared.[106]

The consequences of a void marriage have been outlined above. Since there is no marriage there are no effects.

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99. Article 591 makes a restrictive enumeration of errors. 591(c) covers "error on the state of health or bodily conformation of the spouse, who is affected by leprosy or who does not have the requisite organs for consummation of the marriage." This does not cover wilful refusal to consummate. But the Amharic text use the words "or is unable to consummate the marriage", which words cover cases of impotence and possibly, wilful refusal to consummat.

100. Civ. C., Art. 626 provides: "The effects of marriage shall in no way depend on the real or presumed consummation of the marriage."

101. Id., Arts. 590 and 618. In X.c.X, (Tribunal civil de Grenoble Fra., March 13 and Nov. 20, 1958) *Dalloz*, 1959, p. 495, impotence was held to constitute an error as to the person vitiating consent.

102. The marriage will be void because it does not have the appearance of marriage. If the appearance of marriage is present, i.e., the parties seem to be of opposite sexs, then the marriage will not be void.

103. E.J. Chn, *Manual of German Law*, (2nd Ed. London, British Inst. of Intl. and Comp. Law, 1968) vol. 1. no 488. W. Muller-Freienfels, cited above at note 82, p., 431.

104. Civ. C., Art. 586(2). Dispensation can be given for good cause.

105. See Kelly (orse. Hyman) v. Kelly (High Court, Eng., 1932), *T.L.R.* vol. 149, p. 99, where the bride thought the wedding ceremony was a betrothal ceremony. The marriage was held void ab initio by an English court. Valier v. Valier (orse. Davis) High Court, Eng., 1925), *L.T.* vol. 133, p 830, was a case where the bridegroom, a foreigner did not realise that a ceremony of marriage was being performed. This marriage was also held void *ab Initio* by an English court.

106. R. R. David cited above at note 17, p. 54, f. n. 21. See also G. Krzeczunowicz, cited above at note 52, problem 4, and "Quizzes" *J. Eth. L.*, Vol. VIII, (1972) p. 204

Void marriage was known in Ethiopia prior to the coming into force of the Civil Code. In a case decided by the Addis Ababa High Court[107] a marriage was held void *ab initio*. The facts were these: a civil marriage was celebrated between the parties at the Municipality of Addis Ababa. The parties, who were non-Ethiopians had met abroad and had subsequently agreed by letter to marry. The respondent arrived in Addis Ababa to be married to the petitioner who was working in Ethiopia. From the moment of her arrival the respondent was nervous and, at first, refused to go through with the marriage as arranged. However due to the situation in which she found herself and the pressure of friends she did get married to the petitioner. On the honeymoon she refused to consummate the marriage which was never consummated thereafter. Three weeks later she left Ethiopia having sent a letter of "declaration of divorce" to her embassy.

The High Court held the marriage void *ab initio* saying: "the respondent did not have the intention to consummate the marriage at the time of celebration. This being so one of the essential elements of marriage was lacking."

If this case were to occur today the court would have to look to the Civil Code in order to deal with it. Since consummation has no bearing on the effects of marriage[108] and this is not a case of inability to consummate but of wilful refusal[109] the provisions of the Civil Code would not provide an answer, except possibly to hold the marriage valid for lack of a text declaring it defective. In that case the marriage would have to be dissolved by divorce. It is also possible that the marriage could be held void *ab initio* for lack of intention to marry, which, however, would have to amount to complete lack of consent.

V

CONCLUSION

Only *voidable* marriages are provided for in the Civil Code of Ethiopia. Where a marriage contains a defect and it can be dissolved on these grounds, it is voidable. But unless and until it is avoided such a marriage is valid. If it is avoided the marriage will cease to have effect on the day it is declared void. But it will retain all the effects it previously had. The court declaration will be purely prospective.

Void marriages are not directly alluded to in the Civil Code. It is logical to introduce the concept to deal with cases where there is no marriage because of a fundamental defect in the union. The concept must be limited to cases where the

107. Thorson v. Grayson, (High Court, Addi Ababa, Civil Case No. 151/51, Commercial Division) (unpublished).

108. Civ. C., Art. 626, text given above at note 100.

109. Inability to consummate due to a lack of sexual organs is covered by Civ C., Art. 591 (c) where an error has been made text given above at note 99. The case where a spouse could consummate the marriage but refuses to do so is not directly covered. However, since the Amharic text refers to inability to consummate, refusal might be held to constitute inability, cf. G. Krzeczunowicz, cited above at note 52, problem 8, and "Quizzes", *J. Eth. L.*, vol. VIII, (1972) p. 230

nature and purpose of marriage are frustrated, for example where there is no consent to marry or no appearance of marriage. The void marriage has no effect since it never came into being.

The law, in regulating defective marriages, must limit itself to these two cases. There is no reason to introduce the notion of voidable marriages which can be retroactively declared void. Such a concept puts personal rights in jeopardy and is undesirable for this reason.