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COMMENTS

A Fresh Look at Void Marriage

Gereis v *Yagoub*[1]

THE decision of the High Court of England in *Gereis* v *Yagoub*[2] allows a new opportunity to raise the questions of what we mean by 'void marriage' and what distinguishes it from a union that does not even qualify as void marriage.[3] While the concept of void marriage is as old as the requirements of formation of marriage, it is somewhat startling that family lawyers have not yet formed a clear understanding of the minimum that must be completed by two parties to come within 'void marriage'. Nor have we rationalised the relationship between these terms and the requirements of the law of marriage regarding the formalities of solemnization and capacity to marry.

In *Gereis* v *Yagoub*, the suggestion by the male party that his relationship with the female party was not even that of parties to a void marriage was easily dismissed. They had participated in a solemn marriage ceremony conducted by a Coptic Orthodox priest in a Coptic Orthodox Christian Church in London. Although the priest was not a licensed marriage official, the marriage ceremony was well attended and, on its conclusion, the priest issued a certificate in Arabic confirming that in the presence of witnesses he had completed the religious procedure of marriage. The 'spouses' cohabited for several months after the ceremony until their relationship broke down, they engaged in sexual intercourse and the male party applied for a married man's tax relief. Justice Aglionby of the High Court of England rightly rejected the male party's allegation that "there was no marriage in law" observing "this ceremony … bore the hallmarks of an ordinary Christian marriage and that both parties treated it as such" before he pronounced a decree nisi of nullity of marriage.

1 [1997] 1 FLR 854.

2 *Ibid*. For comment, see Bailey-Harris [1997] Fam Law at 475-476.

3 The author has raised this before; see Leong, "Solemnization of marriage: Conceptualization and statutory interpretation" [1995] SJLS 283.

It is submitted that the issue could have been more clearly framed by the judge. It is whether the solemnization in question, deviating as it did from that required by law, nevertheless formed a marriage *albeit* one that is void in solemnization. If the issue were thus framed, the decision could have been clearer. The parties had clearly effected their mutual intention to marry each other and, therefore, they have formed a marriage. As the formation failed to meet the English requirements of the formalities of solemnization,[4] they have a marriage but it is a void marriage. No deviation from the requirements of law, however gross in extent, disqualifies a marriage that has been formed from being a marriage void in its solemnization. It is only where there has been no formation that there would not even be a marriage void in its solemnization.

The difference between a marriage void in its solemnization and a nonentity (family lawyers use the term 'non-marriage') can only be appreciated from the concept behind these terms. A void marriage is a marriage formed but which formation is gravely flawed either in its formalities of solemnization or the parties' lack of capacity to marry. A non-marriage is where no marriage whatsoever has been formed. Since marriage is formed by contract, it is formed if there is any credible evidence of the parties effecting their mutual intention to marry each other. In *Gereis* v *Yagoub* there was ample evidence of the parties effecting their mutual intention to marry each other. They had no doubt become married. As the parties' becoming married fell short of the requirements of law,[5] their marriage was void because its solemnization was flawed.

Two persons should only be regarded not even to be parties to a marriage void in its solemnization if there is no evidence of the parties effecting mutual intention to marry each other. The paradigm is parties who choose to cohabit outside marriage. Two parties who follow a solemn Muslim ceremony, for example in *R* v *Bham*,[6] became married but their marriage is, under English law, void in solemnization. While one can think of more difficult cases, for example, two people who naively think they can marry by just signing a document of marriage they have drawn up themselves, the issue remains the same and should be resolved similarly. Is there sufficient evidence of the parties effecting mutual intention to marry each other?

If follows from this suggested view that, where the parties have effected mutual intention to marry each other, lack of capacity to marry by either or both does not hinder a conclusion that they have become married *albeit* it is void for lack of capacity to marry. There is, however, a venerable

4 See s 49, the (English) Marriage Act 1949.
5 *Ibid.*
6 [1966] 1 QB 159.

view that some breaches of capacity to marry are so offensive that they should be condemned to non-marriage instead of void marriage.[7] In the previous edition of his text, Professor Cretney had elaborated,[8]

> "it remains true that 'marriage' in English law means the 'union of one man and one woman'. If the parties are clearly, demonstrably, and known by each other not to be male and female it is difficult to see how a court could hold that there was a marriage, even a void one."

With respect, this suggestion that the parties' knowing breach of a requirement of capacity to marry disqualifies them from being parties to a void marriage is not sound. Why should the knowing breach of this requirement of capacity to marry be different from an unknowing breach? The couple who formed their void marriage knowingly is, from the proper description of their relationship, not to be preferred or condemned over another couple who did so in ignorance. No one requirement of capacity to marry is superior to another and no one mental state of the parties deserves added condemnation. Professor Cretney had also queried whether two immigrants who *bona fide* believed that they could contract a marriage in Muslim form in England without complying with the formalities required by English law could claim to have a void solemnisation.[9] It is submitted the answer depends on whether an English court is prepared to accept that Muslim ceremony as evidence of parties effecting mutual intention to marry each other.

Non-marriage should be reserved for lack of credible evidence of formation of marriage.[10] Persons who did not marry have, if you like, a non-marriage. The term 'non-marriage' helps us separate parties who have never married from those who did but whose solemnisation the law strikes down as void. If we equate some breaches or some manner of breach of capacity to marry to not having married, we are either picking from the requirements of capacity to marry those which we regard extra-important or we are reacting to the manner of breach to pick out the more gross failures. There are several weaknesses in so doing. First, it makes the concept of non-marriage serve more than one purpose. The concept is difficult enough when restricted to identifying parties who have not married. It would be even more perplexing

7 See Cretney and Masson, *Principles of Family Law* (6th ed, 1997), at 41 and 53-54, adopted by Rebecca Bailey-Harris in her comment, *supra*, note 2.

8 Cretney and Masson, *Principles of Family Law* (5th ed, 1990), at 70.

9 *Ibid.*

10 See discussion in Leong, *Principles of Family Law in Singapore* (1997), at 180-187.

if used to include those who have married but whose conduct we wish to condemn more than others. Married persons should not be condemned any more than to have their marriage struck down as void. Second, the soundness of the suggestion that some requirements of capacity to marry are more important than others or that some manner of breach are more gross, is questionable. Third, however poor the conduct of the parties, the fact remains they have become married. They cannot be disqualified from having become married without undermining the concept of what it is to become married.

It may be natural to recoil from some conduct and seek to regard the parties as not deserving even of the status of parties to a void marriage. In Singapore as well there has been two decisions to this effect. The High Court and the Court of Appeal in *In re the estate of Liu Sinn Min, decd.*[11] suggested that the marriage in breach of the requirement of monogamy was not even a void marriage for the purpose of conferring the privilege of legitimate status on children born of the parties. The importance the Legislative Assembly attached to the requirement of monogamy when it enacted the Women's Charter[12] as Ordinance 18 of 1961 has been noted.[13] It was the importance of compliance with this requirement that *inter alia* persuaded the courts that the two parties were not even parties to a void marriage. More recently, the High Court in *Soniya Chataram Aswani (mw)* v *Haresh Jaikishin Buxani*[14] cited *In re the estate of Liu Sinn Min, decd* in coming to its decision that it had no matrimonial jurisdiction to hear the female party's petition for a decree of nullity to declare her marriage void. The failure of matrimonial jurisdiction was *inter alia* because, although the parties underwent a solemn ceremony before their Hindu priest and cohabited in their matrimonial home for two years, they were not regarded by the Women's Charter as, even, parties to a void marriage. This, in turn, because they breached both requirements the Women's Charter makes of the formalities of solemnization in its section 22(1). Their Hindu priest was not a licensed marriage official, as required by section 22(1)(a), and he officiated at the solemnization without the proper authorisation by marriage licence, as required by section 22(1)(b).

For the reasons given above, it is submitted that both these decisions may be disagreed with. Parties who married in breach of the requirement

[11] [1974] 2 MLJ 9 and [1975] 1 MLJ 145.
[12] Cap 353, 1997 Ed.
[13] See Leong, *Principles of Family law in Singapore*, *supra*, note 10, at 38-44.
[14] [1995] 3 SLR 627; for analysis, see Leong Wai Kum, "Solemnization of marriage: Conceptualization and statutory interpretation", *supra*, note 3.

of monogamy have nevertheless married. Similarly, parties who underwent a solemn temple ceremony and cohabited for two years have effected their mutual intention to marry although this is a marriage void in its solemnisation. The lack of clarity by the High Court of England in *Gereis* v *Yagoub* and these decisions of our courts suggest that a fresh discussion of the questions posed at the beginning of this article is sorely needed. We need a fresh look at the concept of becoming married and the role the law of formation of marriage plays within it.

It is hoped that the idea of non-marriage as conferring a status lower than that of void marriage becomes reserved to where a marriage has not been formed because there is no credible evidence of the parties effecting mutual intention to marry each other. A non-marriage should not be confused with a marriage which has been formed but which, for breach of the most important requirements of formality or for lack of the parties' capacity to marry each other, is a void marriage. To understand these terms requires us to go to the fundamentals, that is, that a marriage is formed by contract. A 'void marriage' is a marriage that has been formed by contract but which, for failure of either formalities required of solemnization or capacity to marry, formation is invalid. A non-marriage, on the other hand, describes a failure to form the marriage altogether, that is, the failure to fulfil the minimum required of the contract behind the formation of marriage. The relationship between these terms and the requirements of the Women's Charter,[15] is that the failure to come within the definition of solemnization, namely the contracting of a marriage or effecting a marriage, leads to a non-marriage while the failure to meet the requirements of formality of solemnization or capacity to marry, leads to a void marriage.

Until family lawyers and judges form a clear understanding of these terms, the High Court of England's decision in *Gereis* v *Yagoub* is a correct decision *albeit* not as well reasoned as it could be. It is of a marriage where the contract behind it had been clearly formed but which is void in its solemnization. It is not surprising the High Court of England could easily dismiss the male party's spurious claim that there was no formation of marriage.

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[15] *Supra*, note 12, see ss 2, on definition of solemnization, and 22(1) (on formalities of solemnization) and ss 3(4), 5, 9, 10 and 12 (on capacity to marry).

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