

***Nullity of Marriage in Canada: With a Sideways Glance at Concubinage and Its Legal Consequences*, H. R. Hahlo, Toronto: Butterworths, 1979. Pp. xi, 67. \$13.50 (paperback).**

Legal principles concerning the problem of nullity of marriage constitute, to say the least, a confusing and complex body of law. As noted by H. R. Hahlo in *Nullity of Marriage in Canada*, nullity is a conceptual creation of medieval ecclesiastical courts which, although refusing to recognize the dissolution of the marital state by divorce, nevertheless were compelled to acknowledge the existence of a defect of capacity either in consent or form which entitled the affected parties to an annulment. Therefore, the difficulties characteristic of the legal rules regarding nullity are an inevitable reflection of this historical fact. At the same time, the gradual relaxation of restrictions upon the availability of divorce and the enactment of more liberal divorce laws has meant in practical terms that the development and clarification of the law of nullity has progressed little beyond the date of its origin. In truth, some traditional grounds of nullity (for example, impotence) have been subsumed under grounds for divorce through the enactment of various legislatures.

It is evident that there will be an obvious inverse relationship between the frequency of applications for divorce and nullity suits. When a divorce is attainable with relative ease, actions in nullity will be correspondingly few. Conversely, more stringent divorce laws will result in an increased number of nullity actions. Yet, while a legislature may enjoy the competence to incorporate grounds of nullity with grounds for divorce, such action does not imply that the two mechanisms of dissolution are identical. Although the consequences of a decree of nullity and a decree of divorce may appear indistinguishable, as Hahlo indicates:

[T]he fact remains that, although the same remedy may provide adequate relief in both situations, the distinction between an initially defective marriage and a valid marriage which has broken up is fundamental and exists even if the legislature chooses to call the judicial remedies by the same name.

Therefore, while nullity actions are few in comparison with divorce suits, the conceptual basis of the differentiation between the two actions persists. Nullity is an important aspect of family law and its complex character demands a study which can elucidate difficult principles with clarity and coherence without sacrificing complexity.

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<sup>1</sup>Hahlo, at 5.

The purpose of Hahlo's work appears to be an effort toward a restatement of principles of nullity as distinguished from those of divorce. As indicated by the title, the material in support of this analysis is drawn primarily from the judicial decisions of Canadian common law jurisdictions, although the relevant provisions of the Quebec civil code are cited and briefly discussed for comparative purposes. In addition, reference is made to British and American case law, when necessary, in order to clarify substantive issues or to illuminate those aspects of nullity law in need of reform.

The structure of the study is organized along fairly predictable lines. Recognizing the undeniable historical influence, Hahlo commences his examination with a succinct discussion of Canon law, summarizing the conceptual premises upon which nullity is founded and listing the traditional dirimentary impediments permitting the initiation of a nullity action. It is at this early stage that Hahlo, perhaps unfortunately, briefly raises the distinction between void and voidable marriages. While an understanding of these classifications is fundamental to a full comprehension of the consequences of nullity, one might question the wisdom of touching upon this point and dismissing it as briefly as Hahlo does. The implications of a characterization of a marriage as either void or voidable are not more fully elaborated until the latter part of his discussion concerning the consequences of a finding of nullity. It might be argued, however, that greater logic and coherence could have been achieved had more attention been devoted to this issue initially. Hahlo then briefly examines the constitutional basis of legislature and judicial competence with regard to nullity.

The remainder of the study concentrates upon the grounds of nullity and the remedies available to the parties and issue of a marriage which has been dissolved upon a determination of nullity.

The former component focuses upon eight grounds of nullity: identity of sex; prior existing marriage; relationship within prohibited degrees; failure to comply with prescribed formalities; non-age; insanity at the time of marriage; lack of consent; and impotence. The presence of such defects affecting either the capacity of the parties or the form of the marriage are discussed in a rather cursory fashion which, while contributing to an impression of simplicity and clarity, does little to impress upon the reader the subtleties which lead to a more complete understanding of the concepts under consideration.

The latter component of the study deals with the consequences of a determination of nullity, the implications of a designation of a marriage as either void or voidable upon the type of relief available, defences to an action of nullity and a discussion of the granting of corollary relief upon a finding of nullity. A brief comment concerning the future of nullity actions constitutes Hahlo's conclusion.

Since the study comprises only sixty-four pages of text accompanied by a table of cases and an index, it is clear that it can serve only a limited purpose. This is not to say that Hahlo's analysis is without worth. He is to be commended for the accuracy and currency of his research. Over three hundred leading cases are cited in support of his arguments. In addition, he also includes references to provincial and federal legislation which have impact upon nullity actions.

The extensive research which is surprising in a work of such minimal length is used not only to state the law in a simple, descriptive manner but also to reinforce Hahlo's critical comments concerning ambiguities or inconsistencies in the law. One of the more admirable features of his study lies in his efforts to illuminate controversial areas such as the distinction between marriageable age and marriage majority, his analysis of the issue of impotence and his discussion of the relief afforded by fairly novel judicial creations such as *quantum meruit* and unjust enrichment in a fairly insightful way. Underlying his descriptive examination are implicit proposals for reform of the more archaic elements of nullity law. Continuous interjurisdictional comparisons of conflicting judicial interpretations are interesting and informative. In short, Hahlo must be congratulated for his effort to subject substantive law to constant critical analysis in order to present a difficult body of law in a lucid and stimulating fashion.

However the format adopted by Hahlo militates against the value of his inquiry. There are defects inherent in the nature of the commentary which severely restrict its usefulness.

Owing to the reductionist character of the discussion in which principles and concepts are restated as rules, his discussion is often overly simplified. Much of the complexity and intricacy characteristic of this field is sacrificed unnecessarily in pursuit of the dubious virtue of verbal economy. But the selectivity exercised by Hahlo and his refusal to analyze more intensively major aspects of controversy, in fact, often contributes to confusion on the part of the reader. Hahlo, in this regard, appears to presume at least some degree of knowledge in his audience concerning both the concepts and the particular terminology in which the law of nullity is formulated. Many important terms are never clearly defined. Consequently, his discussion (for example, of the burden of proof) has a marked tendency to be elliptical and often obscure. While there is undoubted merit in his effort to refine the principles into a skeletal outline, unless the reader has some prior familiarity with the law, his degree of knowledge is not likely to be substantially increased. As an illustration of this deficiency in analysis, one may note again the discussion of the distinction between void and voidable marriages. While Hahlo has thoughtfully provided an accompanying table of impediments and consequences ensuing from these defects, most readers would no doubt derive greater profit from a more detailed conceptual analysis prior to an examination of substantive law as reflected in judicial

decisions. Such problems arising from over simplification of material are further exacerbated by the awkward analogies and convoluted sentence structure employed by Hahlo. A statement such as "the institution of the putative marriage tempered the chill wind of nullity to the innocent lamb"<sup>2</sup> does little, if anything to increase comprehensibility.

However while Hahlo's analysis is premised upon a certain degree of understanding on the part of his audience, making it an inadequate introductory tool for the student, it is also unsatisfactory as a text for the reader who wishes to explore the area of nullity of marriage more deeply. The simplistic tone adopted by Hahlo, the relatively superficial and shallow analysis, and the refusal to examine problematic features in other than a summary fashion prohibit the study from having much value for the academic or practitioner.

Hahlo's book does fulfill a limited purpose: it canvasses most of the leading cases and indicates the impact of provincial and federal legislation upon the grounds of nullity and the type of relief available in a straightforward and concise manner. Such a restatement serves to outline the basic structure and content of nullity law in a way which is informative and to a limited degree, enlightening. However, the absence of a more developed and substantial argument which would contribute to greater coherence in analysis, when coupled with certain problems in the articulation and explanation of basic concepts, prevents Hahlo's work from attaining any status beyond that of an annotated digest.

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\*Hahlo, at 3.

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***A Current Bibliography of International Law*, J. G. Merrills, London: Butterworths, 1978. Pp. xx, 277. \$50.50 (cloth).**

In compiling *A Current Bibliography of International Law*, J. G. Merrills has provided students of that subject with a valuable tool for study and research. As work on the text was completed in early 1978 and as it is composed of references to publications that were produced between 1960 and the end of 1977, the Merrills book is not only the most recent general bibliography of international law to appear, but it is also one which cannot but reflect the most current views and attitudes.