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## Charles Handbook on Assessment of Damages in Personal Injury Cases

Roger Harris  
*Paterson MacDougall*

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# Book Reviews

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Leon E. Trakman, *Reasoning With the Charter*. Toronto: Butterworths Canada Ltd., 1991. 219 pp. \$55.00 (cloth).

*Reasoning with the Charter* by Leon Trakman is a timely and useful book. It is “timely” because in this the tenth anniversary of the *Charter* it is appropriate to review its impact, which Prof. Trakman finds wanting and unduly circumscribing. It is also useful, although “useful” is not a term usually associated with a theoretical book such as this. Certainly this is not a “how-to” book about *Charter* application. It does, however, outline a different approach to *Charter* interpretation and it may be that the neglect by our judges of this approach is a mistake. Perhaps not; but there are at present uncommon pressures some judges can feel, societal expectations that are felt rather than articulated, and this leaves a nagging feeling of inadequacy on the part of judges sensitive to these unfulfilled expectations.

The unhappy experiences of aboriginal peoples and females cannot at this point be considered unique one-time issues. They perhaps reflect only two specific results of a more fundamental inadequacy in our justice system. The critique offered in this book provokes thought on that question and for that reason alone is worth considering. And of course the stronger reason to consider these arguments is that Professor Trakman could be right – and if he is, we should change; or if we do not, judges should at least be prepared for growing pressure from this direction.

Professor Trakman sets out to do two things: “. . . to extend judicial discourse beyond individual rights; and to highlight the relationship between social action and judicial decisions that impact upon that action.”<sup>1</sup>

His view would involve more judicial activism and the *Charter* would become a means to a social goal, to an end not determined by the literal words of the *Charter* but by the judge listening to the community. “In effect,” he writes, “the text of the *Charter* itself does not constitute law in action; it is only an instrument of those who embark upon social action.”<sup>2</sup>

His basic criticism of *Charter* interpretation to date is that:

“In protecting the rights of the self-directed individual who holds herself out against a single foe, the State, *Charter* interpreters bypass the identity crises of groups within the Canadian polity. They concentrate upon conflicts between individuals and government. They pass over social issues that transcend both.”<sup>3</sup>

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1. L.E. Trakman, *Reasoning With the Charter* (Toronto, Vancouver: Butterworths, 1991), p. 199.

2. *Ibid.*, p. 3.

3. *Ibid.*, p. 1.

What is the alternative?

“The alternative is to appreciate that, beyond governmental interests and individual rights, are the collective interests of francophone Canadians, Seventh Day Adventists, women, Jews, blacks and anti-nuclear activists. Each group has a distinctive role to play within a participatory democracy. Each transcends the formal hierarchy of government and individual; and each is constituted as much in its own distinctive image as in terms of stereotyped rights that are ascribed uniformly to it.”<sup>4</sup>

Is Professor Trakman suggesting that different groups within Canadian society could have different rights and that the courts will decide this and that these rights can change according to time and circumstance? I think he is, when he states such things as:

“My goal is to ensure that, through such social dialogue, diverse peoples can be ‘socially situated’ within the polity without being ‘socially saturated’ by it. Within this framework, *Charter* rights represent unfolding thoughts that affect social action . . . No one right or cultural identity is naturally or logically determinative . . . it is to treat [*the Charter’s*] text as open-ended, without one fixed meaning or predetermined application.”<sup>5</sup>

And elsewhere he writes:

“To engage in discourse is to incorporate an on-going state of difference into decision-making. For law to change as society changes is for judges to house both in continually changing opinion. It is to recognize that both express themselves through diverse conceptions of life, personhood, and community practice. It is never to be satisfied with a past opinion, but always to look to the effect of on-going discourse upon present and future decisions.”<sup>6</sup>

He argues that the power for judges to engage in such activism comes from sections in the *Charter* – section 1 (*free and democratic society*), section 23 (*bilingualism*), section 27 (*multiculturalism*), section 25 (*aboriginal rights*), and section 15(2) (*affirmative action programs permitted*) – and also from “the realization that *Charter* rights are expressions of communal interests, however privately they are framed.”<sup>7</sup> That is, judges are not only “guardians of the constitution”<sup>8</sup> but also “protectors of a more elusive welfare of a civilized people.”<sup>9</sup> For example, judges who seek to silence Keegstra or Zundel do more than

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4. *Ibid.*, p. 4.

5. *Ibid.*, p. 3-4.

6. *Ibid.*, p. 172.

7. *Ibid.*, p. 200.

8. *Ibid.*, p. 48.

9. *Ibid.*, p. 48-49.

constrain the right of free speech. "They carve out the boundaries of good neighbourliness itself."<sup>10</sup>

To be such an increasingly positive force in society, judges would have to move beyond interpretation "to more creative methods of allocating *Charter* rights and freedoms."<sup>11</sup> As an example, Professor Trakman suggests a positive right to security of the person might entail welfare benefits, a right to housing and a defence against trespassing.<sup>12</sup>

How would this actually occur in a court system? By "dialogic."

"Within a dialogic community, decisions are the product of observation, discussion and explanation, not clear and convincing proof . . . This method of decision-making is normative, contextual and prospective throughout."<sup>13</sup>

Such a method would arrive at "mediated solutions."<sup>14</sup> It is dialectic<sup>15</sup> and interactive.<sup>16</sup>

"Thus, judges decide upon the legal significance of social behaviour, not abstractly, but in light of the observations and comments of others who inform them and whom they, in turn, inform. No matter how formal their judicial proceedings, they draw upon the substance of social debate, both within and outside the courtroom. They observe discrimination at work; they comment upon it; and they decide cases in light of their and other's comments upon it<sup>17</sup> . . . As a judge, she constructs a creative legal remedy to a social malady."<sup>18</sup>

Judges would justify their decisions according to changing social norms.

"Each decision is determinative, not because it leads to a correct decision à la Dworkin, but because it is considered to be a satisfactory product of discourse into social values. It is satisfactory, too, when it is perceived to contribute towards social ends that include, but are not limited to, the specific parties."<sup>19</sup>

These ideas may not sit well with Canadian jurists and lawyers, as Professor Trakman acknowledges. "*Charter* interpreters might still be unwilling to acknowledge this collective spirit in deference to legal

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10. *Ibid.*, p. 48.

11. *Ibid.*, p. 35.

12. *Ibid.*, p. 15.

13. *Ibid.*, p. 92-93.

14. *Ibid.*, p. 201.

15. *Ibid.*, p. 94.

16. *Ibid.*, p. 92.

17. *Ibid.*, p. 93.

18. *Ibid.*, p. 95.

19. *Ibid.*, p. 168.

tradition itself. After all, Canadian lawyers are schooled in analytical legal positivism, not in moral and social theory.”<sup>20</sup>

And he knows such an approach would be criticized “for introducing too much politics into law, for failing to articulate a unified vision of communicative discourse, and for subjugating individual rights in favour of social action.”<sup>21</sup> Also, there are dangers in judicial activism, whereby “injudicious law-making by judges may well regress into selective thumb sucking.”<sup>22</sup> And at any rate, is this even practical, or is it unduly idealistic to expect the *Charter* to be a “monitor of social action and a focal point for communal dialogue?”<sup>23</sup> That is one of my main questions.

There is obviously a great deal more of substance in this book than the above, brief outline encompasses. The contingency of truth, the need to contextualise decision-making, the nature of judicial reasoning, the illusory distinction between public and private realms and other such significant topics are addressed at length. Footnotes refer the reader to the fullest range of thinkers, from Aristotle and Plato to the most contemporary of feminist or CLS writers.

Although I learn from and am provoked to thought by this book, I am not able to assess its validity. I am not sure what to think of it all. I do agree that “judges who earnestly deny that they engage in social conversation about *Charter* rights merely disguise their sentiment as principled reason.”<sup>24</sup> But it is not clear to me how we move from that to “construct those principles within an open conversation.”<sup>25</sup> I am awkward at that, because I am not trained for it. As Chief Justice Lamer said in a related discussion about the *Charter*, “It is like being right handed and suddenly being told that you are going to have to use your left hand.”<sup>26</sup>

I am also certain that more pressure for judicial activism will be met with more opposition. Already the courts are criticized for this, and that is under the existing state of *Charter* interpretation that Professor Trakman finds a half-means at best. For example, two University of Calgary political science professors (F.C. (Ted) Morton and Rainer Knopff) have criticized what they call the “Court Party” (made up of judges, bureaucrats, lawyers, academics, media personalities and social activists) for having

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20. *Ibid.*, p. 5.

21. *Ibid.*, p. 4.

22. *Ibid.*, p. 200.

23. *Ibid.*, p. 5.

24. *Ibid.*, p. 201.

25. *Ibid.*, p. 201.

26. G. Sturgess and P. Chubb, *Judging the World*, (Sydney: Butterworths, 1988), p. 389.

assumed an executive power over the democratically elected representatives.<sup>27</sup>

But I do have a sense that these expectations outlined in this book will be placed before Canadian courts, especially if we fail as a polity to adequately address these communal issues by other means or forums. It is conceivable that while other forums debate the issue, a court somewhere in Canada could make a decision premised on the requirement of Quebec's distinctness. Already in the criminal justice system, judges are engaged in a dialogue with Indian people and listening to learn whether that community's values can be incorporated into the justice system. Recently a Minnesota court dismissed charges against five black men, ruling that their right to equal protection of the law was violated by legislation requiring heavier penalties for Crack, used primarily by blacks, than for powder cocaine, used primarily by whites. Significantly, the court examined and rejected the data, the community discussion, used by the legislature in setting the law.<sup>28</sup> And in the recent case of *R v. Keegstra*, Prof. Trakman sees signs of the Supreme Court of Canada employing many of the methods that he advocates in this book.<sup>29</sup>

It is only appropriate that judges should listen and observe, noting how these ideas are received and developed into arguments. Important segments of society, not least of which are the courtroom lawyers, would have to support and apply these ideas before judicial activism could be effective.

If the ideas in this book would provide otherwise silenced voices a fair hearing, and if all legitimate parties to the issues are fairly heard, then I believe that these ideas are within a tradition that has proven itself over time, a tradition that Alfred North Whitehead described as "the victory of persuasion over force."<sup>30</sup> In this sense, Whitehead sees the long course of history patiently disclosing the solution to a complex problem of freedom: —how the "variously coordinated groups should contribute to the complex pattern of community life, each in virtue of its own peculiarity [so that] individuality gains the effectiveness which issues from coordination, and freedom obtains power necessary for its perfection."<sup>31</sup>

If I am correct, and it is I and not Professor Trakman who makes such a claim for the objectives he advocates, then it is not so much a question

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27. A. Strachan, "The Charter Revolution — The Hidden Opposition", *The Globe and Mail* (11 January, 1992), p. D3.

28. G. Will, "Judicial Activism in U.S. Advances", *The (Saskatoon) Star Phoenix*, (26 December, 1991), Forum.

29. *Supra*, note 1, p. 203.

30. A. North Whitehead, *Adventures of Ideas* (New York: Mentor Books, 1955), p. 33.

31. *Ibid.* at 75.

of whether the justice system should move in this direction but rather whether now is the time.

Judge Gerald T.G. Seniuk  
Provincial Court of Saskatchewan

Vukas, Budislav (ed.), *The Legal Regime of Enclosed or Semi-Enclosed Seas: The Particular Case of the Mediterranean*. Zagreb: Birotehnika (Faculty of Law, University of Zagreb, Institute of International Law and International Relations), No. 22, Contributions to the Study of Comparative and International Law (1988), vi + 515 pp.

The 1982 United Nations *Law of the Sea Convention*<sup>1</sup> has not only codified the relatively scant corpus of international law relating to the rubrics of enclosed semi-enclosed seas, but it has also given some guidance toward the future evolution of this unique body of sea law.<sup>2</sup> Accordingly the underlying thesis advanced by a number of distinguished authors at a conference – convened by the Inter-University Center in Dubrovnik – is that the Law of the Sea Convention does not represent a definitive or complete corpus of law; rather the general articles<sup>3</sup> will acquire substance from state practice, bilateral agreements between border and adjacent states, and multilateral conventions that apply to such areas as the Mediterranean Sea, the Black Sea, the Aegean Sea, the Adriatic Sea, Ionian Sea, the Bosphorus, the Sea of Marmara and the Dardanelles. Precise rules of law are emerging from such general concepts as the continental shelf, the exclusive economic zone, and conservation of natural resources, along with the rights of bordering states to exploit their off-shore areas without damaging the delicate ecosystems. In reality, the attempt is made to detect rules of law that are evolving from the convention's general-type articles that seek future co-operation. Hence, it is valid to conceive of this large volume as a search for emerging law within the scope of semi-enclosed seas. Within this context, the contributors are especially conscious of continental shelf regions, because of the delicate chain of life and the fishery resources they support against competing interests, primarily oil and gas drilling. Thus, it is accurate to conclude that all of the authors are dedicated to the preservation of the environment within the semi-enclosed seas around the Mediterranean Basin. As such, a number of unique, though closely

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1. United Nations Convention on the Law of the Sea (adopted 30 April 1982), U.N. Doc. A/CONF. 62/122 (7 October 1982) (hereinafter cited as LOS Conv.).

2. Id. Part IX, arts 122 & 123, Enclosed and Semi-Enclosed Seas. Art. 122 sets for a preliminary definition and 123 contains the main elements of co-operation.

3. B. Vukas, *infra*, note 6. He contends, and quite properly: "Therefore, it has to be concluded that Article 123 contains an obligation *sui generis*: ... there is indeed a legal, and not only a moral obligation to co-ordinate activities ..." Id. at 59. See generally R. Woffum, "The Emerging Customary Law of Marine Zones: State Practice and the Law of the Sea" (1987), 18 Netherlands Y.B. Int'l L. 121-44; S. Vasciannie, "Landlocked and Geographically Disadvantaged States and the Question of the Outer Limit of the Continental Shelf" (1987), 58 Brit. Y.B. Int'l L. 271-302 (and the sources cited); and V. Degan, "Internal Waters" (1987), 17 Netherlands Y.B. Int'l L. 3-44.



related, legal problems confront these bordering states. Because of the limited areas of enclosed seas, it is impossible for states to adopt a complete two hundred mile exclusive economic zone or to claim the full extent of a continental shelf, which involves the rights of adjacent states.

Here, then, are legal ramifications, which hopefully will not become conflicts, as states seek to utilize the renewable and non-renewable resources within their restricted regions of jurisdiction. Of course, the main legal issue will be the limits of overlapping claims simply because of the limited size of the bodies of water in question, as for example two opposite states that are separated by less than four hundred miles, or similarly of opposite shelves. An example of the use of equitable principles (though not necessarily applying "equitable results") can be seen in the judgment of the International Court of Justice in the Gulf of Maine Case.<sup>4</sup> Other authors<sup>5</sup> have examined this judgment at length in order to isolate those legal principles that may be applied toward the resolution of future disputes in the Mediterranean, Aegean, Adriatic and Ionian Seas – an approach favored by this reviewer. At this point, the law of the sea will be given effect by practical application, at such time as highly controversial disputes are resolved by diplomatic and judicial proceedings.

In attempting to evaluate this book as a total entity, several underlying themes (albeit theses) become evident. The protection of delicate ecologies, the safeguard of the environment from pollution, the preservation of non-renewable resources, and the impact of the Law of the Sea Convention have been mentioned. Indeed, the majority of the contributors devote some attention to these basic topics. However, this reviewer believes that the fundamental message advanced by the authors<sup>6</sup> and by the editor is the need for increased co-operation on the part of all states concerned.<sup>7</sup> However, to achieve this result, steps that move beyond co-operation, such as co-ordination, even leaning toward joint ventures, must be explored.<sup>8</sup>

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4. Delimitation of the Maritime Boundary in the Gulf of Maine Area (United States/Canada) (Judgment), 1984 I.C.J. 246.

5. Other authors examine this judgment, e.g. M. Škark, *infra*, note 32, & P. Mengozzi, *infra* note 56.

6. B. Vukas, ed., *The Legal Regime of Enclosed or Semi-Enclosed Seas: The Particular Case of the Mediterranean*. (1988) (hereinafter cited as *Semi-Enclosed Seas*). No. 22 Contributions to the Study of International and Comparative Law. See, e.g., *id.* at 245, 273-75, in connection with art 1, LOS Conv, *supra*, note 1.

7. For example, the reviewer has indicated this fundamental obligation in the sub-title of *Human Rights and Environment: The Need for International Co-operation* (1976). See also *infra*, note 9.

8. Accord, *Semi-Enclosed Seas*, *supra*, note 6, p. 245 & 275.

Yet, may this reviewer express somewhat of a disappointment. Co-operation is based on the observance of "good faith," whereas the implementation of the Law of the Sea Convention will depend on the observance of the fundamental norm of *pacta sunt servanda*.<sup>9</sup> Possibly, it was felt that these norms from classical international law were so obvious as to not require elaboration, or for that matter even recognition. In fact, this reviewer detects that in the search for "new solutions," arising from scientific evidence, there tends to be a rejection of some portions of classical sea law and even a bit of hesitation toward the application of the Law of the Sea Convention.<sup>10</sup> Regional and even sub-regional solutions that are based on bilateral treaties are favored. The prime example of multilateral conventions, and the topic of several papers, is the 1976 Barcelona Convention for the Protection of the Mediterranean.<sup>11</sup> In fact, one of the main purposes of the volume is to indicate the importance of this convention as the first stage in the development of a specialized corpus of regional jurisprudence.

Once again, this reviewer favors the position defended in the book, on the ground that greater success can be achieved among a number of homogeneous states than at the world-wide level, or within the heterogeneous United Nations.<sup>12</sup> While favoring the objectives sought by those states ratifying the Law of the Sea Convention, a higher degree of co-

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9. W. P. Gormley, "The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith" (1970), 14 St. Louis U. L.J. 367 (and the sources cited).

10. For example, *Semi-Enclosed Seas*, *supra*, note 6, p. 172.

11. Convention for the Protection of the Mediterranean Sea Against Pollution (done at Barcelona, February 16, 1976) (entered into force, February 28, 1978), Eur. Comm. O.J. No. L 240, at 3 (September 19, 1977); reprinted (1976), 15 I.L.M. 290. In conjunction with Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (done at Barcelona, February 16, 1976) (entered into force, February 28, 1978), Eur. Comm. O.J. No. L 240, at 12 (September 19, 1977); reprinted (1976), 15 I.L.M. 300, Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources (Done at Athens, May 17, 1980) (entered into force, July 17, 1983); reprinted (1980) 19 I.L.M. 869; and Protocol Concerning Co-operation in Combating Pollution of, by Oil and Other Harmful Substances (done at Barcelona, February 16, 1976); reprinted (1976) 15 I.L.M. 306.

12. Accord generally, W. P. Gormley, *supra*, note 7, in conjunction with W. P. Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (1966). The clear exception to the superiority of regional solutions is to be found in the law of outer space, since global conventions are required to protect the space environment, the moon and celestial bodies. W.P. Gormley, "The Protection of the Earth-Space Environment" (1986), 19 Indian Y.B. Int'l Aff. 106-168. An additional example of the need for international action can be seen in efforts to safeguard the earth's air quality and, moreover, to protect the remaining ozone layer, cited in note 58 *infra*.

Regional plans can aid the global effort, as for example by reducing acid rain; however, global action is mandatory. The most effective means of implementation of pollution control measures is the use of remote sensing satellites, which necessarily involves global sensing.

operation and co-ordination can be realized at the regional level, in this instance as defined by the geographical areas bordering semi-enclosed seas.

In order, however, to grasp the full impact of this specialized volume, it should be viewed in connection with earlier collections that centered on global efforts, especially the 1985 volume entitled, *Essays on the New Law of the Sea*,<sup>13</sup> which anticipated the adoption of the Law of the Sea Convention.<sup>14</sup> In effect, this specialized topic of semi-enclosed seas relates to the larger issue of global utilization and protection of ocean areas. Indeed, the relationship between specialized fields—as for instance the rights of land-locked and disadvantaged countries—and the global use of ocean resources is never minimized in any of Professor Vukas' three volumes.<sup>15</sup>

This latest volume under review is divided into three parts. Part One, which constitutes almost three quarters of the book,<sup>16</sup> is devoted to an examination of the emerging legal regime for the Mediterranean, as broadly defined, whereas Part II<sup>17</sup> deals with other semi-enclosed seas, such as the Gulf of Maine, the North Sea and the Persian Gulf, whereas the third part presents two papers discussing the Law of the Sea Convention and pollution control. This general organization was well chosen because of the fact that even though the main thrust of the text is placed on the Mediterranean and adjacent bodies of water, namely the Adriatic, Aegean, Marmara, Ionian, and the Black Sea, it is helpful to learn of the solutions perfected in other regions and the positive impact of national legislation. Accordingly, Mediterranean states may obtain some guidance from the precedent created by North Sea states, in addition to regional institutions. Nonetheless, this reviewer wonders why the Baltic Sea was not included within this analysis, owing to the fact that Sweden is taking very enlightened steps to restore the marine environment and prevent nuclear contamination.

In examining the individual contributions, it is clear that each of the authors has selected a special subject-matter area that he investigates in

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13. B. Vukas, *Essays on the New Law of the Sea* (1985); W.P. Gormley, Book Review, to be published by the *Indian J. Int'l L.* (1988). See especially, Vukas, *The LOS Convention and Sea Boundary Delimitation*, id. at 147-85, and Part VIII, *Regional Approaches to the Law of the Sea*, id. at 407-76, & D. Mazilu, *Peace and Security and Some Problems Regarding the Enclosed and Semi-Enclosed Seas*, id. at 429-40.

14. See also his earlier volume, B. Vukas, *Prinosi za Poredbeno Pročavanje Pravai Medunarodno Pravo* (1982) (in Serbo-Croatian, with summaries in English and French).

15. *Supra*, note 13 and 14. See especially, B. Vukas, "The Protection of the Mediterranean Sea from Pollution" (1988), 28 *Indian J. Int'l L.* 104. The book under review lacks a concluding chapter. It would, therefore, have been appropriate to treat this article as the concluding segment of the volume.

16. *Semi-Enclosed Seas*, *supra*, note 6, at 1-345.

17. *Ibid.*, p. 347-479.

depth. Moreover, in some instances, as will be shown below, the beginnings of a book (i.e., pilot study) has been completed. Thus, the opening essay by Dr. Pavic, "Geopolitics, International Law and "Interior Closed Seas" in the Mediterranean,"<sup>18</sup> is both challenging and highly controversial in that a basis of political geography is applied, namely, the Mediterranean and Black Sea basins are considered to constitute a single semi-enclosed sea, a position not followed by all of the other participants. He argues that "the Black Sea basin is an integral part of the Mediterranean basin."<sup>19</sup> Dr. Pavic concludes: "The artificial division of Mediterraneas (not found in reality) into two sectors—one 'Mediterranean' and the other which is 'not Mediterranean'—reflects the interests which aim to deny the USSR the status of a Mediterranean country which lead to very far-reaching political and military-strategic consequences."<sup>20</sup> Secondly, the political and military conclusions drawn from this premise are troublesome, in view of the fact that its outcome favors the right of the Soviet high seas fleet to maneuver in the Mediterranean, whereas those of Britain and the United States are held to be intruders within this semi-enclosed body of water and should be removed. Actually, such far-reaching proposals are not consistent with classical international law<sup>21</sup> or the right of passage, as codified into the law of the sea conventions.<sup>22</sup> Of course, we can all appreciate the goals sought, such as the removal of NATO's nuclear arms. Regrettably, the counterpart step, the removal of Warsaw Pact weapons has not been mentioned. In particular, concern is shown toward the waging of ecological warfare in the area, in addition to the destruction of living resources in Europe's southern flank. The proposed solution is worthy of serious consideration: namely, "To solve the problems of the Mediterranean which is a closed sea ... and which contains several interior closed seas, it should be *necessary to formulate* a supplementary convention to the UN Convention on the Law of the Sea (1982)."<sup>23</sup>

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18. *Ibid.*, p. 1-48.

19. *Ibid.*, p. 23.

20. *Ibid.* (Italics in original).

21. But see W.P. Gormley, *The Development and Subsequent Influence of the Roman Legal Norm of "Freedom of the Seas"* (1963), 40 U. Detroit L.J. 617; W. P. Gormley, "The Development of the Rhodian-Roman Law to 1681, With Special Emphasis on the Problem of Collision" (1961), 3 *Inter-American L. Rev.* 317.

22. LOS Conv., *supra*, note 1; in conjunction with Convention on the High Seas (done at Geneva, 29 April 1958), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force, 30 September 1962); and Convention on the Continental Shelf (done at Geneva, 29 April 1958), 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force, 10 June 1964). W.P. Gormley, "The Unilateral Extension of Territorial Waters: The Failure of the United Nations to Protect Freedom of the Seas" (1966), 43 U. Detroit L.J. 695.

23. *Semi-Enclosed Seas*, *supra*, note 6, p. 34 (Italics in original).

This reviewer is a strong supporter of regional efforts, largely as the result of success by European organizations. However, the primary issue will become the desirability to adopt regional conventions that may be at variance with U.N. treaty obligations. Although the reviewer does not object to the enactment of regional standards (and also specialized criteria, such as those designed to combat oil and nuclear pollution), there will be an outcry from internationalists, who support uniform legal norms. Consequently, potential problems must not be minimized.

One of the book's outstanding contributions is advanced by Professor Vukas, the editor of the volume, who seeks to determine if the Mediterranean is in fact an enclosed or semi-enclosed sea.<sup>24</sup> In seeking an answer to this question, traditional law is deemed to "belong to the past,"<sup>25</sup> for the reason that the rights of coastal states must be protected. Nonetheless, he fully recognizes the rights of third states to utilize these regions, including freedom of navigation and the rights of disadvantaged states. As such, his position becomes one of the book's underlying propositions.

Professor Vukas also feels that there is a need to adopt special rules for the purpose of protecting the Mediterranean from pollution, including land-based pollution, oil drilling, conservation of living resources, and simultaneously, the realistic utilization of the available area, despite its limited size. That is to say, the lack of outlets to the oceans, its restricted area (as is true of the North Sea and Adriatic,<sup>26</sup>) reduces the flow and interchange of waters from adjacent oceans.

There is, however, the availability of Part IX of the Convention on the Law of the Sea, which imposes general-type obligations for the benefit of bordering states, but which encompasses the rights and interests of all states, including land-locked countries. As is true of historic straits through which sizeable numbers of vessels must pass,<sup>27</sup> special measures of protection are frequently desirable, because "... small seas are susceptible of being vulnerable to pollution and over-exploitation of their natural resources."<sup>28</sup> Indeed, this basic concept is reiterated throughout

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24. B. Vukas, "The Mediterranean: An Enclosed or Semi-Enclosed Sea?," *ibid.*, p. 49-66. Accord generally Resolution 659 (1977) on the Conservation of Living Resources in the Mediterranean, Parliamentary Assembly, Council of Europe, 29th Sess. (8 July 1977), recognizes problems "... related to overfishing, but also the special situation of the Mediterranean as a closed sea [sic] with only a few affluent rivers, and with a continuous net loss of nutrients and an increasing salinity, merit examination ..."

25. *Ibid.*, p. 50.

26. See the discussion of the North Sea experience, *infra*, notes 34, 51 & 53.

27. *Ibid.*, p. 53. Accord generally K. Koh, *Straits in International Navigation: Contemporary Issues* (1982); W.P. Gormley, Book Review (1984), 9 *Ocean Management* 317 (1984).

28. *Semi-Enclosed Seas*, *supra*, note 6, p. 54.

the remaining essays. However, it needs to be stressed that no attempt is being made to interfere with free transit or overflights, since innocent passage is recognized as a legal right.<sup>29</sup> However, concern is shown toward the possible over exploitation, or even destruction, of living resources from pollution.

By way of concluding thoughts, Professor Vukas advances the book's fundamental premise, specifically, co-operation between all involved states (and affected multinational organizations). This concept recognizes the interests of third and disadvantaged states. Beginning from the restrictive language contained in article 123 of the convention, which he argues only deals with three subjects of co-operation,<sup>30</sup> he anticipates the development of further international rules.<sup>31</sup> And, as indicated earlier in this review, much of the convention is held to be promotional, for instance those provisions designed to protect the marine environment and assure scientific research. Consequently, co-operation and state practice will perfect new law.

From these two broadly stated essays, the remaining authors direct their attention toward precise aspects of evolving jurisprudence, such as the "Exclusive Economic Zones in Enclosed or Semi-Enclosed Seas."<sup>32</sup> Thus, Professor Škark evaluates Part IX of the convention. Yet, this concept is far from precise, because of overlapping and competing claims. As mentioned above, the unique issues to be resolved involve restricted areas that preclude claims of two hundred miles from the baselines, the point at which the breadth of the territorial sea is measured. Indeed, here is a "pilot study" that could well be expanded into a full length book, owing to the numerous ramifications that might well be dealt with at greater length.

It needs to be stressed that the interests of disadvantaged states are considered and strongly supported by the authors. The legal basis of Professor Škark's position is to be found in the notion of "special circumstances" (that becomes another underlying theme of the book), for the reason that "... special circumstances can be found in almost every EEZ delimitation situation in enclosed or semi-enclosed seas."<sup>33</sup> Examples can be seen from ship based pollution and off-shore drilling.

29. *Ibid.*, p. 57.

30. Art. 123, LOS Conv., *supra* note 2. It is argued that article 123(2) indicates only three subjects of co-operation and co-ordination over the activities of coastal states: 1) the management, conservation, and exploration of the living resources of the sea; 2) preservation of the marine environment; and 3) co-operation in research projects, including joint ventures.

31. *Ibid.*, p. 64.

32. *Ibid.*, p. 159-83; citing V. Ibler, "The Importance of the Exclusive Economic Zone as a Non-Resource Zone," in: *Essays on the New Law of the Sea*, *supra*, note 13, p. 118-40. See also J. Symonides, "Geographically Disadvantaged States under the 1982 Convention on the Law of the Sea," (1988), 208 *Recueil des Cours* 283-406 I.

33. *Semi-Enclosed Seas*, *supra*, note 6 at 179.

Several authors seek guidance from a number of judgments delivered by the International Court of Justice, beginning with the *North Sea Continental Shelf Case*,<sup>34</sup> because of the importance of customary international law, until such time as the Law of the Sea Convention enters into force and, further, as a means of interpreting this convention and of filling gaps in the text when disputes must be resolved either by the International Court of Justice or the Law of the Sea Tribunal. The continued importance of customary law is recognized throughout the book, for the reason that significant portions of the treaty articles merely codify (and clarify) existing law. The full impact of customary law can only be clarified by diplomatic and judicial action.<sup>35</sup>

Yet, from the standpoint of the topic under investigation, the leading judgment arises from the North Sea continental shelf litigation.<sup>36</sup> A full analysis of the proceedings is presented by Professor Josip Metelko,<sup>37</sup> in an attempt to obtain some insight into the rules of law governing delimitation of continental shelves, including equitable principles. He, therefore, directs his attention toward the court's application of customary international law.<sup>38</sup> It needs to be mentioned that some criticism is directed toward the court's judgment: the ground of this rationale for the application of the "equidistant method" and a supposedly equitable result is set forth.<sup>39</sup> Obviously, additional analyses of the ICJ's jurisprudence will be required.<sup>40</sup>

34. North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands), 1969 I.C.J. 3. See *Semi-Enclosed Seas*, *supra*, note 6, p. 177-80.

35. This significant topic of the application of customary law, along with treaty norms, can only be dealt with summarily in this review. See, for example, the application of customary law by the International Court of Justice after being unable to decide the case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) Merits (Judgment), 1986 I.C.J. 14, on the basis of treaty norms.

36. Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment), 1982 I.C.J. 18, pursuant to special agreement of 10 June 1977. One troublesome aspect was the ICJ's refusal to permit Italy to intervene, largely on the ground that the special agreement did not give the Court jurisdiction to adjudicate the rights of third states. Sadly, the entire dispute could not be finally resolved. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene (Judgment), I.C.J. 3 (1984).

37. J. Metelko, "Equity and Maritime Delimitation Problems of the Mediterranean," in: *Semi-Enclosed Seas*, *supra*, note 6, p. 185-222.

38. *Ibid.*, p. 196-97 and *passim*.

39. With regard to the case of *Libya v. Malta*, *supra*, note 36, Dr. Metelko concludes that "... the Court has failed to explain why just this delimitation line should be considered the line achieving an equitable result." *Ibid.*, p. 215. He concludes: "Every case of maritime delimitation is different and only a clear body of equitable principles can permit such circumstances to be properly weighed and an equitable result to be attained." *Ibid.*, at 217. See *Ibid.*, pp. 217-19.

40. Earlier attempts have been made to detect principles of environmental law from pleadings, oral arguments and judgments of the International Court. E.g., W. P. Gormley, Ch. 6, "The Human Right of All Peoples, and of All States, to be Free From the Effects Nuclear Fall-Out," *supra*, note 7, pp. 146-85; and Ch. 7, "The Need for International and Regional Co-operation to Conserve the Earth's Living Resources: The Fisheries Cases," *supra*, note 7, pp. 186-212.

Dr. Velimir Pravdic examines the preservation of the marine environment, which is a particularly sensitive phase of environmental law, owing to the delicate ecosystems of marine areas.<sup>41</sup> As might be expected, pollution from ships and especially land based sources has become the most pressing issue.<sup>42</sup> Interestingly, a link is drawn between natural sciences (such as the food chain) along with ethical and legal ramifications. Sad to say, a full review of environmental aspects cannot be presented within the scope of this limited review. Nonetheless, this reviewer might offer a proposal to the distinguished editor as the topic for his next book. That is to say, the protection of the ecology within semi-enclosed seas is the most significant topic raised throughout the volume. Possibly the most important sub-topic, *International Organizations In Marine Affairs*,<sup>43</sup> is raised. It must be conceded that national solutions and methods of enforcement are valuable, and may even help to guide multinational efforts; nevertheless, the ultimate solutions must be perfected by sovereign states acting together, preferably within a United Nations framework.<sup>44</sup> Here, then, the impact of science and technology, with law, must be brought together for the purpose of safeguarding sensitive marine eco-systems and their living resources.

This theme is further advanced by an examination of the Barcelona Convention,<sup>45</sup> and the approach taken is that it can serve as an inspiration for future action plans to help resolve those problems discussed earlier in the book. Accordingly, Dr. Vukasović provides the type of serious analysis that is required, when new solutions are sought by states parties and multinational organizations. An illustration can be seen from the law being perfected by the European Communities, which is one of the contracting parties.

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41. V. Pravdic, "The Link Between Natural Sciences and the Legal Regime of the Seas," in: *Semi-Enclosed Seas*, *supra*, note 6, pp. 245-64.

42. *Ibid.*, p. 249.

43. *Ibid.*, p. 251-54.

44. Accord, W.P. Gormley, "The Right to a Safe and Decent Environment" (1988), 28 *Indian J. Int'l L.* 1.

45. Barcelona Convention and protocols, *supra*, note 11. Discussed by V. Vukasović, Barcelona Convention as an Important Component of the Mediterranean Action Plan, in: *Semi-Enclosed Seas*, *supra*, note 6, pp. 265-78. In this context, the role of the European Communities becomes highly significant. *Ibid.*, p. 275, in connection with D. Morvan, L'Action des Communautés Europeennes en matière de protection de la Mer Méditerranée, *ibid.*, pp. 313-45. The force of community law will increase when the European Single Act becomes applicable in 1992, because of Title 7, Eur. Comm. O.J. No. L 169, at 1 (June 1987) (entered into force 1 July 1987); (1987), 26 *I.L.M.* 149. Krämer, "The Single European Act and Environmental Protection," (1987), 24 *C.M.L. Rev.* 659; and Vandermeersch, "The Single European Act and the Environmental Policy of the European Economic Community," (1987), 6 *European L. Rev.* 407 (1987). See *infra.*, note 52.



An ideal counterpart to the several preceding essays is Dr. Sersić's study of the degree of pollution that necessarily results from the exploitation of the seabed; it continues the analysis of the Barcelona Convention.<sup>46</sup> In particular, the limitations inherent in the protocols are evaluated, with the intention of laying the foundation for the adoption of a Mediterranean protocol, along with supporting instruments.<sup>47</sup> Of such importance is his plan to combat pollution that this reviewer hopes a full length book can be produced, or, at the very least, a major portion of the book dealing with environmental law, recommended above. The objective sought by adding such a specialized protocol to the Barcelona Convention would be to "ensure a fair balance between development and environment."<sup>48</sup> Aspects examined by Dr. Sersić include seabed activities and installations, environmental impact assessment, safety standards, monitoring and surveillance, emergency measures, and assistance to developing countries. Beyond question, such additional treaty instruments are required if the environment is to be protected against pollution and, simultaneously, maximum utilization is to be permitted of scarce resources.

The counterpart study deals with the role of the European Communities in protecting the Mediterranean.<sup>49</sup> Not only are treaty texts required, but there must be implementing structures and enforcement measures. Although the supranational nature, and even federal-type structures, of the EC must be conceded, the lessons to be learned from the EC experience can serve as valuable precedent for other legal criteria.

Part II, *Other Enclosed or Semi-Enclosed Seas*,<sup>50</sup> deal with the topics discussed above but from a differing perspective. Accordingly, the lessons to be learned from the prior North Sea experience are examined with a view toward assisting the future experiments of Mediterranean states.<sup>51</sup> Hence, a detailed chapter by Dr. Ijlstra parallels the studies concerning the Mediterranean basin (as broadly defined), for instance the contributions of maritime institutions (e.g., IMO). Significantly, the role of the European Communities by promoting maritime safety is included.<sup>52</sup> The aim of Dr. Ijlstra is to examine international and regional

46. M. Sersić, "Protection of the Mediterranean Sea Against Pollution Resulting From Exploration and Exploitation of the Seabed and Its Subsoil," *supra*, note 6, pp. 279-311.

47. *Scope of Future Protocol*, *supra*, note 6, pp. 297-307.

48. "[T]he future protocol should ensure a fair balance between development and environment," *supra*, note 6, p. at 308.

49. D. Morvan, *supra*, note 45.

50. *Supra*, note 6, pp. 347-479. Part III consists of two papers that deal with the LOS Conv. *supra*, note 11. S. Verheyden, "Fishery Development and the Surplus Concept of the 1982 Law of the Sea Convention," *supra*, note 6, pp. 481-500.

51. T. Ijlstra, *Regional Cooperation in the North Sea*, *supra*, note 6, pp. 347-404.

52. *Ibid.*, p. 364-66.

decision making, as shown by the series of North Sea Conferences. He believes that they represent the most important regional steps that have been taken thus far. By way of concluding recommendations, it is proposed that a Standing Committee of North Sea States be established, which would have jurisdiction over such subjects as preservation of fisheries, conservation and management of seabed resources, control and elimination of pollution, plus some regulation over sea and air transport. Included would be the safeguard of the North Sea ecology. Precisely, fora must be made available that can promote meaningful regional co-operation and co-ordination.

Dr. de Rouw, a Dutch scholar, redirects the thrust of the book's content by adopting the approach of applying national legislation, which brings a comparative law analysis to the future protection of the North Sea.<sup>53</sup> Fundamental to his analysis is the reality of the factual situation, i.e. greater use is made of the North Sea than of any other semi-enclosed body of water in Europe. Consequently, there is the ever present danger of oil spills caused by major collisions, contamination resulting from oil drilling, and the destruction of marine life (which is already seriously contaminated). As a result, the Dutch Government has taken the lead in sea use planning and in the harmonization of North Sea policy with regard to those areas subject to its jurisdiction. In seeking effective environmental protection, a plan of harmonization to muster the resources of the numerous Dutch organizations toward the common goal is examined. The objective sought, and the basic thesis of this chapter, is the harmonization of North Sea policy, which is merely one aspect of Dutch concern for the sea – and water resources – in general. Consistent with international maritime law and the rights of other states, the concern of the Netherlands Government goes beyond its territorial sea, and the waters directly above its continental shelf, and those areas adjacent to its coastline.<sup>54</sup> Obviously, a survey of the twelve ministries involved in North Sea management cannot be dealt with in this review, but the message is clear: a total effort is required to protect the remaining resources in the face of increased usage.

The reason for this comparative law analysis is to demonstrate the steps that may be taken by a single state. In turn, such national experience may serve as precedent and inspiration for subsequent multinational solutions. In fact, the author goes so far as to project the unique Dutch competence in "water law" on to the global (and regional) levels, in order

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53. A. De Rouw, "Harmonization of Sea Policy in the Netherlands," *supra*, note 6, pp. 405-26.

54. *Ibid.*, pp. 411 ff.

to benefit other intensively used maritime regions. And, as is often the experience with environmental protection, domestic solutions can frequently stimulate subsequent experiments at the international level.

The concluding studies are devoted to the Persian Gulf<sup>55</sup> and an additional discussion of the Gulf of Maine case.<sup>56</sup> The final papers<sup>57</sup> deal with some global aspects of the Law of the Sea Convention, such as protection of fisheries and land-based pollution.

In evaluating the book as a total entity, devoted to a specialized topic that otherwise might not have been chosen as the subject for an in-depth analysis, it becomes clear that unique problems will arise in the future, particularly in the North Sea and the Mediterranean basin if bordering states did not begin to take immediate action, first, within their own domestic legislation and simultaneously at the regional level, as has been recommended by the distinguished contributors. The main consideration is that timely steps – preferably by the enactment of regional conventions designed to supplement the United Nations Law of the Sea Convention – are required. For instance, the preservation of remaining fish stocks, prevention of oil spills, and regulation of off-shore drilling are of immediate and pressing concern. It is unrealistic to even think of an additional eight year conference to draw up guidelines or treaty texts. As is true of other rubrics of environmental protection, such as the preservation of the remaining ozone layer,<sup>58</sup> the luxury of time is no longer available at either the regional or global levels.

The underlying themes supported in the book provide the solutions – or at the very least – the first steps: co-operation in the first instance must lead to co-ordination and finally to harmonization on the part of all interested states (i.e., bordering states and third parties), with the support of international institutions. As the authors have demonstrated, a huge corpus of treaty texts apply, and a large number of international organizations exercise jurisdiction in dealing with specific aspects of maritime and environmental law. Although preliminary steps are being taken, realistic protection of semi-enclosed seas has yet to be achieved. Conse-

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55. D. Momtaz, "Le statut juridique du Golfe Persique," *supra*, note 6, pp. 427-59.

56. *Supra*, note 4; discussed by P. Mengozzi, La funzione ei caratteri dell'acquiescenza ... la camera speciale della Corte Internazionale ... nel caso del Golfo del Maine, *supra*, note 6, pp. 461-79.

57. S. Verheyden & E. van Dijk, *supra*, note 50.

58. For example, W. P. Gormley, *Utilization of Remote Sensing Satellites to Guarantee the Protection of the Earth's Atmosphere, the Outer Space Environment, and the Human Rights of Mankind* [in preparation].

quently, the need for harmonization of municipal, regional and international solutions – in conjunction with experiments to preserve the global environment – must become the objective sought by statesmen and jurisconsults for the purpose of giving effect to the provisions set forth in the Law of the Sea Convention.

W. Paul Gormley\*

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\*W. Paul Gormley, J.D., LL.M., M.Ent. & Comp. L., D.Jur., LL.D. Member of the District of Columbia and United States Supreme Court bars.

Regina Graycar and Jenny Morgan, *The Hidden Gender of Law*. (Leichhardt, New South Wales: The Federation Press, 1990). 464xxxii pp.<sup>1</sup>

Two legal academics<sup>2</sup> who set out to produce a book of materials with such a title could weave many components into it. They could explore feminist methodology, and show how much feminist legal scholarship has in common with feminist scholarship generally. They could illustrate the influence of feminist academic work on actual legal decisions and legislation. They could discuss feminist scholarship and legal education, including the dramatic developments over the last twenty years. Questions about fundamental values – equality, liberty, security, fairness – could be addressed. Materials could be included from the field of law often called Women and the Law, that is, those substantive areas of particular interest to women, such as the laws relating to equal pay for work of equal value, sexual assault, custody, welfare, human rights, the International Convention on the Elimination of all Forms of Discrimination against Women, domestic workers, and the impact of incitement to racial hatred on women.

An ambitious book would include analysis of the emerging threads of feminist jurisprudence, or legal theory, questions such as whether the concept woman is essentialist and the implications of postmodernism. It could address the implications of feminist scholarship and activism for legal doctrine, for instance, criminal defences, or damages for injured homemakers.

This Australian book, *The Hidden Gender of Law*,<sup>3</sup> provides more than a taste of all of these things, drawing on an impressive range of international sources in the process. A reader could see it as a kind of snapshot of the world of feminist legal scholarship at a particular time and from a particular perspective. I would like to do with it what people normally do

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1. The original version of this review was presented as a lecture on Feminist Legal Scholarship during Legal Scholarship Week at Dalhousie University in October, 1991. It will aim to give impressions of the book rather than describe it in a comprehensive manner. However, I would like to note that this book is beautifully produced, without a single printing error as far as I can tell. The authors and publisher are to be congratulated. Justice Elizabeth Evatt AO, President of the Australian Law Reform Commission, wrote a Foreword expressing the need to “remake our political, legal and social institutions in a way which gives full human value to women.” In my view, this book is a *tour-de-force* – an astounding contribution to that project.

2. When the book was published Regina Graycar was an Associate Professor of Law at the University of New South Wales and Jenny Morgan was a Senior Lecturer in Law at the University of Melbourne.

3. There are other books that have been published recently which could be used to gain a sense of the feminist work that is being done in law, – T. Brettel Dawson, *Women, Law and Social Change*, (North York: Captus Press, 1990), and Carol Smart, *Feminism and the Power of Law*, (London and New York: Routledge, 1989).

with snapshots – look at the whole picture it conveys and then look for ourselves (as Canadians) in it. What is the world of feminist legal scholarship, as seen by two academics in Australia? How does Canada look from there? Does what we do here matter to anyone but ourselves?

### 1. *What is the world of feminist legal scholarship?*

First of all I think it is fair to say that the world reflected in this book is, while certainly not a white, a largely English-speaking, ‘western’ world. The picture painted and the materials quoted come from countries such as Australia, New Zealand, the United States, Canada, and Europe. This is consistent with my own experience, on the whole. When I want to do feminist research, the materials I can draw on in the library, and the people I meet at conferences, are largely from these countries. Occasionally, there are more truly international feminist conferences, such as the International Feminist Conference on Women, Law and Social Control, held in Mont-Gabriel, Quebec, in July, 1991. This point should not be overstated. The graduate programme at Dalhousie Law School is probably typical and draws students from all over the world, and as well Dalhousie has significant connections with African women. However, feminist, like other scholars, obviously work with serious barriers in terms of language, the resources to communicate across cultural boundaries, the amount that our libraries are able and willing to buy, and the human limitations inherent in academic and activist work.

One barrier that is disappearing is the invisibility of feminist work in the way knowledge is organised for retrieval purposes. It is very hard to do the kind of work done by Graycar and Morgan if you are unable to do a basic literature survey because the work that other feminists have done cannot be found. The discipline of law may be lagging behind other disciplines in this context, but there are some improvements. This book starts with a reference to the work of Professor Kathleen Lahey of Queen’s University Kingston. She said in 1985 that “feminist legal scholarship is an uncatalogued item, a yet-to-be-recognized enterprise”.<sup>4</sup> A great deal has happened since then, including, in Canada, the publication of the *Canadian Journal of Women and the Law*. As well, the Index to Legal Periodicals now has a heading, Feminist jurisprudence, which would have been unthinkable a few years ago.

What else has been happening? There is a rapidly growing body of feminist literature, ranging from the highly theoretical to the very practical analysis of an enormous range of issues. A useful introduction

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4. “Until Women Themselves Have Told All That They Have To Tell . . .” (1985), 23 Osgoode Hall L.J. 519, quoted in Graycar and Morgan, p. 2.

is provided in Chapter 3, Recurring Themes. This chapter illustrates some of the major preoccupations in feminist legal, and other, scholarship: the suspicion of the public/private distinction (the concept of privacy, for instance, can be used to ground a claim to reproductive control only to leave poor women alone to be able not to afford an abortion in private); the extensive debates about the meaning of equality (is a feminist claim to equality a claim to be treated like men or, as Catharine MacKinnon has argued, a claim not to be subordinated as women);<sup>5</sup> and the tension between those who see women as speaking in a different voice, significantly influenced by Carol Gilligan's work on moral development, and those who fear that this approach celebrates oppression;<sup>6</sup> and lastly, feminist epistemology – how is it that we know what we know, what ground are we standing on if we claim to be able to add to knowledge of the “truth”. I am just touching on these themes lightly, as my main point is that this book is available for anyone who wants to get a sense of such feminist preoccupations without reading all the literature themselves.

In Chapter 2, called *Feminism Comes to Law School*, the authors discuss the impact of applying the insights of feminism to the legal academy. The chapter discusses the feminist critique of law books, e.g. in Mary Joe Frug's analysis of a contracts casebook,<sup>7</sup> the impact on the law curriculum, which has developed optional courses and as well become increasingly open to feminist concerns in mainstream courses;<sup>8</sup> and issues of feminist pedagogy.

Legal education provides a link to the remainder of the book, which, as the authors say, “uses a structure relevant to women's lives”,<sup>9</sup> rather

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5. See, e.g. C. MacKinnon, “Reflections on Sex Equality Under the Law” (1991), 100 *Yale L.J.* 1281.

6. See, e.g. Richard F. Devlin, “Nomos and Thanatos (Part B). Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation?” (1990), 13 *Dal. L. J.* 123.

7. M.J. Frug, “Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook” (1985), 34 *American University L. R.* 1065.

8. Perhaps I should say that the faculty have become increasingly open – I don't know about students. I suspect that individual women students pay a significant price for the inclusion of feminist issues in the curriculum. Specialised courses offer an alternative to “mainstreaming” feminist content in the curriculum as a whole. While a visitor at the Faculty of Law at the University of British Columbia, I have taught a compulsory first year section on *Feminist Perspectives on Law*, as part of a course called *Perspectives on Law*. The students seem tolerant and polite to me, although I think they may not always be with each other. Quite a few show significant interest. Resistance seems to come through in ways which focus on methods of evaluation, for instance, rather than substance. I am ambivalent about whether it is a good idea. On the whole I would prefer it if feminist and other issues were raised in substantive courses, as specialised courses seem to be marginalised to a certain extent, but I know that is only likely to happen on a spasmodic individual level, and individual teachers, as well as courses, can be marginalised.

9. Graycar and Morgan, p. 61.

than adopting more traditional categories. For pedagogical and expository purposes, legal education is usually packaged in conventional categories like contracts, torts, the law of crimes, corporate law. While these pigeon holes have much less significance in the world of the practice of law, they have a great deal of power in the law school. Thus a course called the law of property may be much more acceptable to most students than a course called say legal process, or statutory interpretation. The conventional categories, while pervasive, have arguably more to do with male than with female experience. There are different ways of organising legal knowledge. One alternative model can be found in Norway and is described by Tove Stang Dahl in an article called "Taking Women as a Starting Point: Building Women's Law".<sup>10</sup>

The University of Oslo established women's law as an academic discipline within the Faculty of Law in 1975. Drawing on the work of the legal aid clinic and research studies, the faculty determined that there were mainly three areas where women experienced injustice and these were the unequal distribution of money, time, and work. This provided the basis for organising three areas of study, money law, dealing with women's sources of money, marriage, work and social insurance, housewives' law dealing with rules for care of house and family, and waged labour law dealing with women in the market. Birth law was also being developed. I mention this not to suggest that these particular categories should be adopted at Canadian law schools, but simply to illustrate the rather obvious point that we could organise the curriculum in very different ways.

Graycar and Morgan also adopt a structure relevant to women's lives. After Part I, A Framework, they deal with issues relating to women and money, work, dependence on men, and dependence on the state, under the heading Women and Economic (In)dependence, in Part 2. Part 3, Women and Connection: A Motherhood Issue, deals with women, law, and relationships, reproductive choices, and losing children. Injuries to Women, in Part 4, covers gendered harms, invading women's bodies, and the fact that sexual harassment, pornography and the media vilification of women leaves us with no safe place. The conclusion deals with feminist jurisprudence. All the old familiar areas of law are there, e.g. tort law, (in assault, dangerous contraceptives, and wrongful birth cases), criminal law, (in rape, family law, human rights), and administrative law. But *women* are central to the organisation, rather than abstract categories of law.

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10. (1986), 14 *International Journal of the Sociology of Law* 239.



I'll use examples from the book to provide a taste of the range of things that feminists pay attention to in law. One example is reproduction, and pregnancy in particular. The book reflects the basic feminist insight that the world is not just made up of people engaged in production, say in the production of knowledge about law, but also of people engaged in reproduction. A further step is that this biological fact should not be turned into disadvantage for women. While it is more usual to find discussions of disadvantage in the legal rules premised on the assumption of the worker as male, Graycar and Morgan describe an amazing case in which a Melbourne solicitor applied for judicial review of a planning decision on the ground that "the tribunal was pregnant".<sup>11</sup> The grounds of appeal included the allegation that when the member of the Administrative Appeals Tribunal heard the case and gave her decision, she "suffered from the well-known medical condition ('placidity') which detracts significantly from the intellectual competence of all mothers-to-be". The appellant said in an affidavit, "Had I become aware of Ms. Smith's pregnancy during the course of the hearing, I would have immediately suspected a likelihood of bias or incompetence on the part of the tribunal." The application was subsequently withdrawn.

The world that is reflected in this book has pregnant women in it, and what is more, it is clear that pregnancy is not seen as a natural hook on which to hang disadvantage. Reference is made to the fact that in Canada, the Supreme Court has adopted a similar perspective, in its recent decision that women are entitled to be free from discrimination on the basis of pregnancy. A unanimous Court in *Brooks v. Canada Safeway*<sup>12</sup> stated:

That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious . . . it is unfair to impose all of the costs of pregnancy upon one half of the population . . ."<sup>13</sup>

Cases like *Brooks* and indeed the publication of this book itself are illustrations of the fact that there have been profound changes in the intellectual and political atmosphere, which make it difficult (though still not impossible) to construct the normal worker as non-pregnant, the pregnant worker as other, and thus banish her to the private sphere.

The other example is sexuality, the focus of so much feminist scholarship and activism, and specifically the meaning of consent in sexual assault. Two chapters are relevant to this. Chapter 11 deals with Gendered Harms,

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11. Pp. 188-190. See Bronwyn Naylor, "Pregnant Tribunals" (1989), 14 *Legal Service Bulletin* 41.

12. [1989] 1 S.C.R. 1219.

13. *Ibid.*, p. 1243.

an array of injuries that happen overwhelmingly to women, and which may not always be visible to law. Thus there is a vast amount of feminist scholarship on such harms as sexual assault, domestic assault, sexual harassment in the street and at work, pornography, medical abuses, etc. Chapter 12 is called *Invading Women's Bodies*, where the question of the perspective shaping the legal meaning of sexual assault is raised, as well as the possibility of civil remedies. The book covers civil actions against the police for failure to protect women, for instance. Such actions can be successful in the States, and Graycar and Morgan use the Canadian case of *Jane Doe v. Police Board of Commissioners (Metropolitan Toronto)*<sup>14</sup> as an example as well. Here the Women's Legal Education and Action Fund is helping a rape victim sue the Toronto police for failure to warn the public about a rapist in her neighbourhood. This illustrates how useful the book is as a source of information about developing jurisprudence in the areas of law of particular significance to women.

## 2. *What about Canada?*

Numerous English-speaking Canadian academics appear in the book, so it seems safe to conclude that feminist legal scholarship has some international significance. We, in the shape of such people as Diana Majury, Kathleen Mahoney, Sheilah Martin, Constance Backhouse, Shelley Gavigan, Susan Boyd, Mary-Jane Mossman, Elizabeth Sheehy, Sanda Rodgers, Brenda Cossman and others, are joining in the international debate about the kinds of issues I have mentioned above. As well as academics the work of activists such as Susan Cole, and the Women's Legal Education and Action Fund is also obvious. The snapshot shows that there is a large number of people doing work on law in Canada, and while the research in the book is very thorough, there are still others left out of the picture.

One of the nice, but embarrassing, things about this book, from my perspective, is that it includes extracts from things I have written which attracted quite a lot of criticism, that is, part of *A Feminist Review of Criminal Law*<sup>15</sup> and a book review of two remedies books.<sup>16</sup> This has encouraged me to return to a theme I touched on before in the book review.

*Injunctions and Specific Performance* is a very good book (though if you are going to criticize something it is very hard to be complimentary

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14. (1989), 48 C.C.L.T. 105, extracted at pp 348-349.

15. Co-authored with Marie-Andree Bertrand, Celine Lamontagne, and Rebecca Shamai, *Status of Women Canada*, 1986.

16. Robert James Sharpe, *Injunctions and Specific Performance* and S.M. Waddams, "The Law of Damages" (1985), 63 Can. Bar Rev. 427.

as well – it never sounds sincere somehow). The pronouns were male and I asked the question whether the coverage was as male as the pronouns. Did the book neglect legal problems of particular concern to women? Now this is a very hard question to answer because feminists have worked very hard to persuade people that gender is not an efficient proxy for some other, functional, classification. Reality is not neatly divided into gender classifications, in spite of our efforts to construct and reinforce gender roles. However, always bearing that in mind, it is possible to make some generalizations. The book, *Injunctions and Specific Performance*, concentrated on commercial and property interests to the almost complete exclusion of security interests. This can even be quantified. Family law injunctions got one paragraph, compared to 68 paragraphs on injunctions to protect property. There was no chapter called Injunctions to Protect Physical Safety. One can see that this issue is gendered when one asks oneself who owns most of the property in the world and who is most likely to seek an injunction to prevent violence.

The Graycar and Morgan book can be used as a contrast. A much less specialized book, it has five pages on injunctions to protect women. The Australian courts have at least considered the possibility of granting injunctions to protect physical safety although they have been reluctant to actually do so. One leading text notes:

In recent times, the courts have been innovative, even adventurous, in extending injunctive relief to protect financial interests . . . but they have been very timid about extending injunctive relief to those in imminent peril of physical abuse or harassment. What reasons might there be for this uneven development?<sup>17</sup>

I want to use this contrast to make two points. The first relates to my earlier point about legal classifications. The conventional classification, injunctions and specific performance, was less likely to generate thoughts of practical relevance to the safety of women than a classification such as women and the law. Think about what this means in practice. If you want to know about commercial injunctions, you look up an injunctions book. If you want to know something about safety injunctions you look in a book called *The Hidden Gender of Law*, a book you are much less likely to have by the way, and which is less likely to come to your attention.

The second point is a link between scholarship and the practical development of legal doctrine. I think that if a general book on injunctions had a discussion of injunctions to protect physical safety, then lawyers are more likely to make arguments and legal doctrine is more likely to

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17. M. Tilbury, M. Noone and B Kercher, *Remedies*, (Sydney: Law Book Co. 1988), at 436, quoted at 291.

respond in some fashion. I see feminist legal scholarship as playing an increasing role in the development of law, with books such as this, which assist with the international exchange of ideas, playing an important part. Feminist articles are now frequently cited in judgments, even though they do not have nearly as much influence as I would like them to have.

What overall impressions do I get from this snapshot of feminist legal activities? Firstly, there is a lot going on, ranging from the analysis of legal theories and methods, through research from many disciplines which provides a basis for the questioning of taken-for-granted assumptions about reality, to practical legal argument. Here in Canada, we form part of a world-wide movement engaged in questioning and reconstructing the fundamental assumptions and values of law.

Christine Boyle

Dalhousie Law School

Walter S. Owen Visiting Professor, University of British Columbia

W.H.R. Charles, *Charles Handbook on Assessment of Damages in Personal Injury Cases (2nd ed.)*. Toronto: Carswell, 1990. xi + 111 + 41 pp. appendix. \$45.00 (cloth).

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal . . . (but) until such time as the legislature acts, the courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.<sup>1</sup>

This is the second edition of Professor Charles' aptly titled *Handbook*. The first edition<sup>2</sup> was a simple reprint of a thirty-three page article that was originally published in the *Canadian Cases on the Law of Torts*,<sup>3</sup> together with the 1978 Supreme Court "Trilogy" judgements themselves.<sup>4</sup> While it provided a convenient capsulization of the issues, it clearly lacked the depth necessary to deal fully with many of the complexities involved, and the rationale for its publication was questionable (no matter how eminent its author or handsome its presentation, can any case comment really be worth \$40.00?). Happily, the second edition has developed into a succinct and accurate enunciation of the "established principles" of common-law accident compensation in Canada.

Following a conventional "problem" approach, the book considers various issues facing the Courts as they attempt to fairly assess general and special damages. Included are chapters on discount rates, management fees, and taxation implications. New in this edition is a consideration of lump sum versus periodic payments.<sup>5</sup> Consistent with his intention to produce a handy "review and appraisal of the new guidelines", Professor Charles has restricted himself to summarizing case law and has avoided lengthy commentary.

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1. *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at 234, 235, per Dickson J. (as he then was), for the Court.

2. Published 1982; reviewed by J.D. Kovacs (1985), 8 Can. Comm. L.J. 1983.

3. (1981), 18 C.C.L.T. 1. The article itself was an update of an earlier annotation by Professor Charles: "A New Handbook on the Assessment of Damages in Personal Injury Cases From the Supreme Court of Canada" (1978), 3 C.C.L.T. 344.

4. *Andrews v. Grand and Toy Alberta Ltd.*, *supra*, note 1; *Thornton v. Bd. of School Trustees of School Dist. No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*; *J.B. Jackson Ltd. v. Teno*; *Teno v. Arnold*, [1978] 2 S.C.R. 287.

5. For a more detailed and speculative treatment of this very contemporary subject, see L. Todd, "Structured Settlements and Structured Judgements: Do They Work and Do We Want Them?" (1989), 12 Dalhousie L.J. 445.

Considering the abundance of articles and papers that followed the Trilogy,<sup>6</sup> it is unfortunate that the author did not include a bibliography. Another minor criticism pertains to the inclusion of the *Watkins v. Olafson*<sup>7</sup> decision as an appendix. It seems rather excessive to include the eighteen page French translation in an otherwise unilingually English book.

The *Handbook* is easy to read, coherent and easily comprehended. At just over one hundred pages it may be digested in a matter of hours, affording the reader a thorough grasp of the mechanics of the judiciary's assessment of personal injury damages. Within its defined limits, the book will also be a useful starting point for researchers; it is well documented throughout (with few exceptions, the citations are of a very high standard), and there is a table of cases and an adequate index.

All in all, *Charles Handbook* is a worthwhile read which will be a valued addition to the library of any tort lawyer. *Multum in parvo*.

Roger Harris  
Student-at-Law  
Paterson, MacDougall  
Toronto

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6. See, for example, B. McLachlin, "What Price Disability? A Perspective on the Law of Damages for Personal Injuries" (1981), 59 Can. Bar Rev. 1; S.M. Waddams, "Compensation for Non-Pecuniary Loss: Is There a Cause for Legislative Intervention?" (1985), 63 Can. Bar Rev. 734; D. Reaume, "Rethinking Personal Injury Damages: Compensation for Lost Capacities" (1988), 67 Can. Bar Rev. 82.

7. [1989] 2 S.C.R. 750. This case dealt with the power of Courts to order structured periodic payments.