BOOK REVIEWS

The Charter of Rights and the Legalisation of Politics in Canada by Michael Mandel (Wall & Thompson, Toronto, 1989) pages i-xii, 1-368.

This is a good book. It is a book worth buying and reading. But allow me to try and put it into context.

This work is part of a now widespread, aggressive, generally well written, often impassioned Canadian anti-Charter literature. This concerted attack on the Canadian Charter of Rights and Freedoms, introduced to Canada on a *damp April day in* 1982, comes principally from the left.[1] Much of this offensive originates from within the Universities and often in the Law Schools. As might be imagined, this 'advocacy from the Academy' is controversial. It forms an important part of the highly spirited debate about constitutional politics which, for the last decade, has repeatedly dominated front pages of Newspapers across the nation (and similarly monopolized much TV and radio time) in a fashion scarcely imaginable in Australia.

A central message of this concerted critique of the Charter is the illegitimacy of judicial review as a mechanism of political decision making. Judicial review is deeply suspect in the eyes of these critics for a number of serious reasons including, its track record, the class-biased composition of the bench, its fundamental incompetence and its undemocratic quintessence. Given these grave reservations, the idea of visiting yet more power on the courts via a Charter of individual rights chills the collective blood of the principal critics of the judiciary in Canada.

So this is the tradition from which Michael Mandel, one of Canada's leading left-wing academics[2] springs. It is a tradition which predates the introduction of the Charter, though its amplitude has grown dramatically since 1982.

I have pondered over the *relative* absence of such discourse mores in Australia. Clearly the omission of a Bill of Rights partly explains this. A further part of the explication is a fundamental difference in the two political cultures, I would suggest. In Canada, the popular political party of the left is the New Democratic Party (the NDP). It is a moderate, left wing party which had, originally, a principally agrarian-cooperative basis. At the Provincial level it has been notably successful in pioneering reforms such as universal medical and hospital cover and no-fault motor accident compensation (since widely copied throughout Canada). These programs were introduced in Saskatchewen shortly after the last war well before such reforms were achieved in Australia (indeed, we are still waiting for a system of universal health care to compare with Canada's). Federally, the party also has had a profound influence on Canadian politics but it has never held power in Ottawa or, for that matter, ever looked like doing so. Unlike the two major parties[3], it has never been able to cross the ethnic/language barrier into Quebec. The NDP's predicament could be likened to trying to win a federal majority in Australia whilst taking no more than one or two seats in Victoria; no can do.

In contrast, in Australia, the principal party of the left, the Australian Labor Party, has excercised power federally for about 30% of the period since federation. Moreover, it has greatly affected, by *direct* action the socio-political map of Australia during those periods in power. The ALP thus is not cast in the role of perpetual critic. Also, although the High Court has at times been cast as anti-ALP, in my view the court's overt thwarting of federal ALP policy forms an exception to the rule. A

[1] Attacks from the political right on the Charter are not unknown but they generally are less organized and frequently arise in response to particular issues, for example, the anti-abortion movement reacted strongly against the Charter after the Supreme Court declared Canada's limited federal abortion law unconstitutional in early 1988. *Morgentaler v. Queen* (1988) 37 CCC (3rd) 449.

[2] Mandel is also an accomplished singer of opera.

[3] The somewhat oxymoronically named, Progressive Conservatives and the historically, politically dominant Liberals.

fundamental tenet of ALP policy has been to increase the power and scope of the Federal Government.[4] To a large extent (and despite rhetoric on the contrary) this ambition is shared by the federal conservative parties in Australia. Firm majorities on the court have recognized this political reality repeatedly. Major centralizing decisions have been crafted consistently now for over 70 years.

So what has been the role of the court in Canada? In the first place, until 1949, the Judicial Committee of the Privy Countil (the JCPC) was the final arbiter in constitutional matters in Canada. The JCPC adopted a strong Provincial-rights partiality. In particular, this led to judicial hostility towards and striking down of *federal* social-welfare measures during the depression. For many years after 1949, the Supreme Court of Canada lived in the shadow of the JCPC; it gained a reputation for cautious 'cut-and-paste' decisions.

Simply put, Canada presents a political culture where the mainstream party of the left is not only constantly denied power federally,[5] but where the final judicial arbiter enjoyed (indeed still enjoys[6]) a reputation for over-turning programs strongly supported by the left.[7] In Australia, in contrast, the ALP has enjoyed and robustly exercised federal power over substantial periods. And the High Court has crafted a home grown constitutional culture which, more often than not, has resonated with fundamental ALP governmental power redistribution goals.

Mandel writes with humour and energy. The book is brisk and busy, rarely stodgy even when dealing with complex detail. It is peppered with often funny always provocative asides and broadsides against the legal profession which is depicted as a largely self-serving, mainstream political actor. Some examples: 'Has this [the Charter] transferred power to the people? To the people in the legal profession it has.'[8]; 'As a profession, lawyers are a variation on the mercenary soldier or the professional mourner, espousing causes for pay "affecting warmth when you have no warmth and appearing to be of one opinion when you are in reality of another opinion" (Boswell 1791)'[9]; Naturally lawyers feel the system [no-fault insurance] is an outrage'[10]; and 'The Chief Justice was delivering a speech to newly ordained lawyers.'[11]

Mandel characterizes the Charter as '. . . mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding judges in their application to everyday life'[12] And, quoting Petter, as '. . . a 19th century Liberal document set loose on a 20th century welfare state.'[13]

In its application, he sees several consistent patterns. In the first place, the Charter serves up empty individual rights as a deflecting device. It distracts and flusters the quest for meaningful political power; it acts as a fatal magnet for political energy, a magnet which not only attracts but dissipates that energy, especially energy seeking change on behalf of the power-bereft. Secondly, the Charter, at very best, has been neutral in its effect on progressive causes[14] and often has been antipathetic. Thirdly, it has been used by commercial business, and especially big business as a sword with which

[4] From the close of World War I until the early 1970s, ALP policy explicitly supported moving towards the creation of a unitary state in Australia. See Cullen, R., *Federalism in Action: The Australian and Canadian off shore Disputes* (1990) 213.

[5] It has, however, just achieved government in Ontario, Canada's largest and most prosperous Province for the first time ever. This victory was so unexpected it seems to have taken even the NDP by surprise. The previous Liberal Government fell for a range of reasons but a fundamental one was a repetition of the mistake made by the Corcoran ALP Government in South Australia several years ago; it called an early election because it was well ahead in the opinion polls and it had no substitute topics to prevent its own opportunism becoming a principal issue of the campaign.

[6] *Commission de la sante et de la securite dur travail v. Bell Canada* (1988) 51 D.L.R. (4th) 161.

[7] As the Ontario Federation of Labour President put it in 1986, 'The courts have seldom been the worker's friend' Mandel, M., *The Charter of Rights and the Legalization of Politics in Canada* (1989) 186.

[8] Mandel, *op. cit.* 3.

[9] *Ibid.*

[10] *Ibid.* 245.

[11] *Ibid.* 167.

[12] *Ibid.* 39.

[13] *Ibid.* 60.

[14] That is, causes concerned with balancing the political and economic disadvantages of the the poorer, exploited, vulnerable and power-denied segments of society.

to cut back government regulation and union power.[15] Indeed, the value of the Charter to big business was accurately predicted during February 1982 by one of the enthusiastic supporters, Roy McMurtry, the Ontario Attorney-General of the time.[16]

Then there are other patterns concerning several of the actors including judges, politicians, advocates and commentators, who have been more intimately connected with proselytizing and applying the Charter. Mandel names names. He is direct and, indeed, scathing, at times, in his depiction of the role played by these various persons. Doubtless all of those criticized as openly or covertly pushing, usually reactionary, and, at least, highly manipulative or personally self-serving, political objectives are acutely vexed by these assessments. The depictions are highly pointed but, generally, they occur within the context of explaining the Charter's development and implementation. Chapter 3, *Legalizing the Politics of Language*, is particularly notable for its person-directed, trenchant style; and its arguments, to me, appear more compelling for it. The combination of political and judicial manipulation of the French/English question in Canada set out in Chapter 3 makes chilling reading. It is like applying shock-treatment to one's naivete about the political operation of a modern welfare-capitalist state. In the case of some ardent Charter advocates, the attacks contain a lick of personal disgust. But, even more, Mandel is able, largely, to let the words and actions of the individuals speak for themselves.[17] Mandel's depiction of prominent lawyer Morris Manning as the quintessential Charter-Gun-for-Hire takes one's breath away. And it does so simply by regaling us with the contradictory causes he has taken on. Suffice it to say, the Ontario Federation of Labour found itself, in the *Morgentaler case*,[18] part paying, from union dues, the fees of Manning to argue successfully the pro-abortion point of view when *he* had, equally successfully, in a previous case, challenged the use of union dues to support such causes as abortion rights![19]

My first comment is that Mandel's dread of the *process* of judicial review drives his analysis of substantive judgments. Where the courts clearly have given a decision which is of benefit to the disempowered this results in a tendency (if not a need) to undermine the significance of that decision. The *Morgentaler* case is such an example. Here the Supreme Court of Canada struck down Canada's Criminal Code abortion provisions which allowed *hospital* sanctioned therapeutic abortions. In practice the law operated capriciously and harshly. Women of limited means were hardest hit by its vagaries. The Supreme Court decision did help them. Mandel attacks the decision for its incompleteness both doctrinally and from a policy perspective. He even suggests that the Charter has gotten in the way of abortion law reform in Canada; it would have occurred sooner, he argues, without the Charter.[20]

I think Mandel expects too much from the court. He berates the court, correctly, for its equivocation in *Morgentaler*. Ultimately, however, he seems to be seeking a complete solution to one of the most vexing policy questions of our time from the court. Who could meet such a challenge? And if the Charter has slowed abortion law reform, one has to ask why nothing changed when there was no Charter between 1969 (when the Criminal Code provision was introduced) and 1982? He is wrong too, at least in part, in his claim that abortion law reform was achieved in Australia without benefit of litigation.[21] This was not the case in Victoria.

My next criticism relates to context. Mandel observes that real income in Canada has doubled since World War Two.[22] Even more recently Shirley Carr, President of the Canadian Labor Congress, observed that one of the tasks of the Canadian Labor Movement is to preserve the relatively high standard of living most Canadians have achieved.[23] Mandel rightly points out that Canada is a country of great social [and economic] inequality. He supports this observation with damning

15 See, especially, the discussion in Mandel, *op. cit.* Chapter 5.
16 Mandel, *op. cit.* 168.
17 See, for example, the quotes from Professor Beatty (and Panitch) *ibid.* 199-203.
18 *Morgentaler v. Queen* (1988) 37 CCC (3r) 449.
19 *Re Lavigne and Ontario Public Service Employees Union* (1987) 41 D.L.R. (4th) 86. (Court of Appeal, Ontario — currently on appeal to the Supreme Court of Canada).
20 Mandel, *op. cit.* 294.
21 *Ibid.* 294.
22 *Ibid.* 239.
23 Carr, S., *Labor Day Goals in a Changing World* (1990) B4.

statistics. My problem with this portrayal of Canadian inequality is that it fails to take account of socio-economic development in the post-war western world away from absolute inequality to relative inequality. By absolute inequality I mean that inequality which is exemplified by widespread wretched poverty at one end of the spectrum. By relative inequality I mean that inequality which is exemplified by distortions in wealth *above* a better than mere survival threshold for most of a given population. The concerns associated with and the strategies for tackling absolute inequality are, in my view, different to those for tackling the level of relative inequality which exists today in Canada and Australia. As a Marxist, Mandel may well regard such distinction drawing as false and misleading. To me, the reality of everyday existence is that *most* of the population in each country enjoys relatively adequate food and shelter and most, again, share some optimism (perhaps falsely grounded) that, over time, their lot will improve; that they too might strike it rich! We are not dealing with large numbers of people whose political consciousness is being informed and driven by chronic, fundamental, material deprivation.

In my view, Mandel's (implied) stern and simple view of Canadian inequality deprives his portrayal of the equality provisions in the Charter (as a sad deception) of some of its power. His depiction of Section 15 (the equality provision) is still thoroughly unnerving, however.

My final principal criticism also relates to context. For a *legal* book, written by a lawyer, this work is far more wide-ranging than any conventional legal text. But, at the end of the day, it seems to me to be lawyer's political science; still disembodied.

We lawyers have elevated a conceptual tool (reductionism) to a way of looking at the entire world. We are the most spectacular reductionists ever. All problems, shorn of bothersome real-life impedimentia, can be reduced to a legal question capable of a legal solution. The pretence that the grave socio-economic inequalities in society can be resolved virtually completely by the enactment of a Bill of Rights shows this tendency in extremis.[24]

The trouble is that in its own way, this book too is disembodied; it declines to deal with what to me is a critical material reality. This is both an analytical and strategic drawback of the book. What we look at is the judiciary and the Charter, but we do not do so in the wider political context of the operation of the judiciary vis a vis the legislature in particular. Indeed Mandel concludes the book at this very interface when he says:

> We have to deepen and strengthen the democracy of our politics so that we have something to bring into court, something to compete with legalized politics, to make it seem absurd and irrelevant, like the Monarchy or the Senate. Legalized politics cannot simply be abolished. It must be made to wither away.

This is about as far as the comparative project goes, apart from some ideas about the ineffectiveness of the mainstream political process.

By looking almost exclusively at judicial politics Mandel undermines his own project in my view. This is because the judiciary in Australia and in Canada enjoy not so much any absolute legitimacy but a *relative* legitimacy. In both cases, our views of the judiciary are coloured by participation in what Mandel piquantly calls our 'spectator democracies'[25] The mainstream political process, is

[24] Mandel provides a splendid example of lawyer's other-worldliness in his explication of the admin-law-migration law Charter cases. The Supreme Court conceded that the system of review it proposed for immigration hearings might result in some 'administrative inconvenience' but that could not override principle. In fact, the Supreme Court decision precipitated an explosion of extra refugee claims, a towering backlog of claims, a near totally jammed system and extra costs estimated just for processing existing claimants of $50 million. Mandel, *op. cit.* 174-183. In the Australian context, one has cause to ponder the heavy costs of the High Court's recent decision on s. 51(20) (*New South Wales v. Commonwealth* (1990) 64 A.L.J.R. 157). The meter must nearly be overheating on that one.

[25] Mandel, *op. cit.* 73. This phenomenon was recently demonstrated in the Ontario Provincial election. The NDP victory, universally described as 'stunning' by the media was achieved in the course of a *record* turnout of voters of about 66 per cent of those eligible to vote. With the first-past-the-post voting system which applied (and which applies throughout Canada) and an essentially three cornered contest, this meant that the NDP were able take about 60 per cent of the seats with 37.6 per cent of the vote. In fact, given the turn-out, they won a very comfortable majority with less than 25 per cent support from those eligible to vote!

venal, opportunistic, short term, manipulative and increasingly cynical. The courts, appear to be relatively serene and the process they oversee apparently less rancorous, partial and constantly squeezed by faithless vested interests.

The book does a good job of demystifying the courts and the judicial process and calling into complete question the extent of the power being visited on them, especially by an instrument like the Charter. It does not deal with the day to day reality of the court's relative legitimacy, however. This leaves an interval in the analysis. It also undermines the book's attack on the Charter. I believe that the courts' *relative* legitimacy has been the life blood of the growth in judicial power in Australia and Canada. (In Canada, with the Charter, there is the additional complication, indeed, irony, that the very legislative process which underpins the criticism of judicial review (by being favourably contrasted with it[26]) was, itself, the means by this additional power was conferred on the courts.)

I don't underestimate the task involved in addressing this criticism. Moreover, I do not know how *I* would tackle such a daunting chore. I do know that this issue has been a continuing problem for me with much anti-Charter writing.

A noticeable trait of this book is the comprehensiveness of Mandel's research. He reads and uses material from across the political spectrum; this is not a book smugly based on the writings of kindred political spirits. Moreover, he uses words well. He uses them with passion and humour. Sometimes he uses too many but generally the book is highly readable.

From a Canadian perspective, the book is an unabashed rebuke of the Charter and all it (in Mandel's eyes) stands for: deceptive, deflecting, entrenched legal rights whose main purpose is to facilitate and legitimate the imposition of reactionary, self-serving, elite values on society. At root, though, it is more an incineration of the camouflage than a call to arms. In this regard, perhaps Mandel subscribes to the Margaret Atwood view that 'books can't change the world', though somehow I doubt it; there is too much sensibility and fervour here.

For Australia, it is a cautionary tale. Most drives for a Bill of Rights in Australia have come from the left and, commonly, from within the ALP.[27] Most opposition has been from the right and it often has been of the knee-jerk variety. The political-dynamics have thus far forestalled the development of support across the political spectrum (as occurred in Canada[28]) for the introduction of a Bill. There is reason to believe that that position may be gradually changing. The High Court has been showing increasing sympathy for the idea.[29] One suspects that Australian business must be developing some awareness of the Charter successes enjoyed by business in Canada. And support within the ALP remains strong.[30] Certainly, if the Liberal and National Parties were to adopt a stance in favour of a Bill of Rights, events could move quite quickly indeed.

Accordingly, Mandel's book deserves to be widely read for practical political reasons as well as for intellectual stimulation. As is clear from this review, I don't find myself in accord with all that he has argued. I have come, more and more, to believe that most public policy choices (and life choices for that matter) are rarely between the ideal and the flawed or even good and bad. Generally one is left to choose between bad and worse. This is not a pretext for avoiding choice. It is an exhortation to recognize the immense call on powers of discrimination that such proximate alternatives impose. I think that Mandel's book suggests a more clear choice than precisely exists; it presents a dichotomous profile of the Charter. But even if, as I suspect, the actuality is more complex, his commentary and assessment remain deeply worrying.

It is likely that, before the turn of the century, we will be confronted with the real possibility of the

26 In its wholesome (unexamined) state.

27 This experience finds some resonance in Canada. The NDP, in fact, were strongly supportive (and remain so) of the Charter during its drafting. (Mandel, *op. cit.* 184-186.) Many Academics on the left (often with connections to the Labour Movement) were hostile to the project from its inception, however.

28 Pierre Trudeau's Liberal Government introduced the Charter and it was, ultimately, supported by all three principal political parties, federally and by all Provinces apart from Quebec.

29 The High Court recently put a blow torch to the deeply confining case law which for decades had shackled s. 117, one of the several individual rights provisions already in the Australian Constitution. *Street v. Queensland Bar Association* (1989) 63 A.L.J.R. 715.

30 The demise of Australia's last (hopefully) overt, anti-civil liberty State Government in Queensland in late 1989 has removed one powerful pretext for Bill of Rights advocates, though.

introduction of some sort of Bill of Rights in Australia. We have to recognize that we currently are uncommonly naive about the hazards of such an adventure. Could we avoid the distress of the Canadian Charter ordeal? In facing that question, it is true that the Canadian experience cannot be lifted into Australia without qualification. In the introduction I sketched out some fundamental differences in the operation of the two political cultures. But, at the end of the day, there is much in this book that is directly concerning for Australia. With fluency, thoroughness and passion it sounds the loudest warning bells.

RICHARD CULLEN*

* L.L.B.(Hons)(Melb), D.Jur.(Osgoode), Senior Lecturer in Law, Monash University.

Human Rights: Australia in an International Context by Peter Bailey. (Butterworths 1990) pages v-xiii; 1-378. Price $55.00 (soft cover). ISBN 0 409 30057 8

International relations have been the traditional domain of international law. The second half of the twentieth century has witnessed however the dramatic development of the international law of human rights. Human rights law prescribes standards for conduct *within* nation states: it regulates how a government can treat those within its jurisdiction and to some extent the way that individuals treat one another. The international law of human rights has been more significant in Australia than in some other countries because domestic Australian law has offered very little protection to individuals. Our Constitution contains no formal catalogue of individual rights and the legislature and common law have operated haphazardly in this area.

Peter Bailey's recent book is the first monograph to offer a detailed analysis of Australian human rights law with a significant international perspective. As a former adviser to the Australian government on the ratification of the International Covenant on Civil and Political Rights and the Deputy Chairman of the now superseded Human Rights Commission, Bailey is a well-qualified author. His experience of the often fickle and short-sighted world of federal politics gives this excellent introduction to Australian human rights law a lively, and sometimes passionate, edge.

Human Rights has four major sections. The first is titled 'Fundamentals' and contains discussion of theories and debates about the concepts of human rights and an analysis of the Australian Bill of Rights debate. One of the few criticisms I would make of this admirable book concerns Chapter 1 ('What are Human Rights?'). It is too brief and too broad. Many Australian readers will need a deeper understanding of the basis of human rights. Although Bailey states in his preface that he does not aim to write a philosophical book (page xi), the justification for human rights advocacy is inevitably philosophical and, especially in an introductory work, needs to be argued in some detail. For example, Rawls' theory of justice[1] is too quickly endorsed as an appropriate foundation for human rights ('because of its emphasis on rational discussion' (page 4)) without discussion of any of the objections raised to it. For example, Bailey might have considered the challenges to the language of human rights from both feminist scholars and the Critical Legal Studies movement.

Chapter 2 ('Some Questions About Human Rights') deals skilfully and succinctly with five issues concerning human rights, including the controversial question of the status of economic, social and cultural rights. One important debate about human rights in the international arena has concerned cultural relativism: should rights be given the same priority in all societies? Western jurists tend to stress the universality of a particular human rights canon while non-western scholars have expressed ambivalence about the wholesale adoption of western notions of rights. Bailey argues that human rights are universal (pages 1-5). While he is clearly sensitive to the non-western view, a fuller analysis of the debate would have been useful. For example, the discussion of Islam in the section on 'How Do Human Rights Relate to Religion?' might have mentioned the problems caused by the asserted incompatibility of the teachings of that religion with women's right to non-discrimination on the ground of sex.

The third chapter of Part One is devoted to the Australian bill of rights debate. Although it may be wishful thinking to assert that this debate 'continues to rage in Australia' (page 46), Peter Bailey's account of the bill of rights controversy is most valuable. He sets out the history of proposals to amend the Constitution to insert a bill of rights and the later, more modest, legislative proposals. An acute observer of the modern attempts to obtain a bill of rights, Bailey manages to both summarize the central issues lucidly and give a keen sense of the intensity of the debate.

The whole book is written in a clear and lively style, the latter quality particularly evident whenever Bailey writes about events in which he participated. For example, Chapter 5 in Part II ('Existing Australian Legislation on Human Rights') deals at some length with the life of the Human Rights Commission (H.R.C.) (1981-1985), and more briefly with that of its successor, the Human Rights and Equal Opportunities Commission (1986). The Chapter contains a measured but fascinat-

[1] Rawls, J., *A Theory of Justice* (1972).

ing account of the controversy the work of the H.R.C. created. Other chapters in this part cover rights in the Australian Constitution (Chapter 4), where Bailey argues that a large number of existing constitutional provisions have human rights implications, the Sex Discrimination Act and Affirmative Action (Chapter 6), the Racial Discrimination Act (Chapter 7) and human rights legislation in action (Chapter 8). They all provide helpful introductions to these areas of human rights law, but what is most distinctive and helpful is the perspective of a person who has actually worked with human rights legislation. Bailey stresses the importance of education and research in the protection of human rights and does not present the law as a quick solution.

The third and fourth parts of *Human Rights* discuss selected civil and political rights and economic, social and cultural rights respectively. Bailey rejects arguments that the latter category are of a lesser order than the former and presents a very useful comparative analysis of the asserted right to an adequate standard of living (Chapter 12). These parts of the book, although sometimes brief, are impressive in the range of international and comparative material canvassed in them. They certainly live up to the book's sub-title. A short but interesting section argues for the recognition of a human right to protection of the environment (pages 368-373).

Any book on human rights law in Australia must deal with the effect of federalism on the protection of human rights. Federalism is discussed at various points in the book but readers may have profited from a fuller consideration of the problems for human rights caused by the division of legislative powers between federal and State governments. Bailey's tantalizing final reference to the possibility of a clause in any future Australian bill of rights similar to that of section 33 of the Canadian Charter of Rights and Freedoms of 1982[2] (page 377) suggests that he believes that the States should have the possibility of opting out of constitutional guarantees of rights. This controversial view may well be justifiable, but needs considerable argument. I look forward to Bailey's autobiography for a full account of his experience negotiating the Australian ratification of the Civil and Political Covenant with the States!

Another significant issue for Australians concerned with the protection of human rights, the treatment of the Aboriginal people, is emphasized in the book. Bailey is particularly interested in the formation of international standards for the treatment of indigenous peoples and provides a good overview of the international developments. He believes that the recognition of the rights of indigenous peoples and national minorities may become a dominant concern during the 1990s (page 376).

The overall tenor of *Human Rights* is optimistic. Bailey sees Australia's human rights record as sound by and large, with the exception of the treatment of the Aboriginal people. He identifies other areas of human rights which could be improved, such as the right to life, to privacy and to freedom from discrimination. While some observers would not share Bailey's general optimism about the protection of human rights in Australia, they could not fail to be impressed by his imaginative and well-organized book. It will be of great value to lay persons and legal practitioners in introducing them to this new area of Australian law. It also allows those with some knowledge of the field to deepen their understanding of human rights law.

HILARY CHARLESWORTH*

[2] Section 33 allows any Canadian legislature to exclude legislation from most of the Charter's operation by express declaration for (renewable) five year periods.

* S.J.D.(Harv.), B.A., LL.B. Barrister and Solicitor.

Feminism and the Power of Law by Carol Smart (Routledge, London) pages 1-168, bibliography 169-176, index 177-180. ISBN 0 415 02671 7.

Carol Smart's most recent contribution to feminist legal theory is an incisive and lucid text which attempts to push feminist literature beyond the confines of a 'women and . . .' formulation. This book is an investigation into why the law is so resistant to the challenge of feminist knowledge and critique. Conversely, Smart challenges the predisposition of feminist jurisprudence to accept the parameters laid down by the law.

While Smart's book is, as is reflected in its title, concerned with the inevitable power of law, it is the author's ultimate aim 'to challenge the law's over-inflated view of itself'.

Smart argues throughout the text that feminism as a form of knowledge has been continuously disqualified by mainstream legal discourse. While some may find Smart's arguments to be of radical import, no reader could fail to be impressed by the rational and intelligent manner in which her arguments are expressed.

Smart outlines how feminist scholarship has formerly become enmeshed in debates about the merits of the law in relation to the emancipation of women or the extent to which the law reflects patriarchal hegemony. While not denying the necessity of such arguments, this work declares that such debates are based on premises which, essentially grant to the law the very power which the legal system may then utilize, through the court process, to marginalize women's claims. The author's contentions rest on the principle that in accepting law's terms in order to challenge the legal system, feminism always concedes too much.

Smart's work also has as its focus the idea that feminists should in the future consider ways of avoiding the creeping hegemony of the legal order. Two means the author suggests are to decentralize the law or resort to non-legal strategies where feasible.

Ironically in order to discuss attempts to bolster feminist discourse in order that it survives recent challenges to its legitimacy, it is necessary to cover familiar areas where women and the law must inevitably meet.

Smart has divided her work into six substantive chapters, an introduction on the 'power' feminist discourse has previously given to law and a conclusion in which she warns feminism to avoid the 'siren call' of law.

The six chapters deal with familiar terrain such as rape, the disqualification of women's sexuality, child sexual abuse, feminist jurisprudence, the law and women's bodies and the problem of pornography in a manner which is simultaneously analytical and provocative. Smart's arguments are presented in a coherent and persuasive manner. She relies heavily on previous feminist jurisprudence to establish a point and then utilizes the weight of former learning as a platform from which to launch a new argument or take the prior debate one step further.

In chapter two Smart develops the theme, of how those with legal knowledge tend to disqualify other forms of knowledge and in particular feminist learning, through the area of rape.

In light of recent public criticism of the Crimes (Sexual Offences) Bill in Victoria, chapter two deserves close attention as a reminder that there is an unfortunate congruence between the law in relation to rape and phallocentric culture. Such a congruence in areas of sexual offences, where the victim is usually a woman, results in the needs of the victim being largely overlooked.

The author reveals through her discussion of the pathogenesis of female sexuality within a phallocentric culture, the mechanism by which the legal system fails to understand accounts of rape which do not fit with the narrowly constructed legal definition of rape. As the law sets and revises the parameters within which rape is dealt with in society, denial of women's accounts in the process of a rape trial is a serious barrier to the law protecting those it allegedly exists to serve — the victim.

Smart's discussion of the rape trial, the debate of 'violence versus sex' in rape and of strategies to be considered when reforms to rape law are demanded is a useful summary and analysis of previous feminist work in this area. The author concludes the chapter with the timely warning that while the

law on rape must be challenged most fundamentally: 'we should not make the mistake that law can provide the solution to the oppression it celebrates and sustains'.

Smart's *Feminism and the Power of Law* represents a worthy and learned attempt to acknowledge the power of feminism to construct an alternative reality to mainstream legal discourse. This is an important and provocative book which should be read by those unafraid of differing views of jurisprudence and students of feminist legal theory.

HILARY BONNEY*

* B.A., L.L.B.(Hons)(Melb)

Documentary History of the Uniform Law for International Sales: The studies, deliberations, and decisions that led to the 1980 United Nations Convention with introductions and explanations by John Honnold. (Kluwer Law and Tax Publishers, Deventer, 1989) pages xii-881. Price $273.25 (Aust.) £105 U.K., $150 U.S.A. (hardback). ISBN 906 544 3738.

The Australian implementation of the United Nations Convention on the International Sale of Goods 1980 (The Vienna Convention) has introduced a new legal regime for international sales into Australian law. Unless the Vienna Convention is excluded by the parties, gone are the familiar nineteenth century rubrics of Chalmers' Sale of Goods Act. Instead, the challenge comes of learning new law, new concepts, and mastering a different legal methodology. For those lawyers who are constantly involved in international sales transactions, that is not a novel experience. It is a common place to deal with the problems of understanding new law. But this time, it is not a foreign law that is so novel, but our own law. It is not an alien methodology that must be tackled. This is not the first piece of uniform international law that has transformed basic transactions, but it is the first that makes such sweeping changes.

The objects of the draftsmen of the Convention were diverse. They sought to produce a uniform law on the rights and obligations of buyers and sellers that was fair and balanced between buyers' law and sellers' law; and which sought to bring together the different legal traditions of the world. It took fifty years to produce the final result. The first proponent of an international sales law was Ernst Rabel in the 1930s. But international events came together to delay the work, and the lot finally fell on the United Nations Commission on International Trade Law (UNCITRAL) as one of its first major tasks in the late 1960s. The drafters of the Convention tried to base its provisions on commercial facts and events, rather than by the creation of new concepts. But the Convention contains procedures that are new to us, such as the *nachfrist*; and new rights of repair and replacement, and of price reduction. More importantly, it also uses familiar terms in an unfamiliar way with differing consequences, such as fundamental breach. This calls for considerable comparatist skills in the understanding and the application of the Convention.

Judges are directed by the terms of the Convention to bear in mind the international and uniform nature of the law. To help them, and the many practitioners and scholars concerned with the Vienna Convention, John Honnold has made two great contributions. John Honnold has long been recognized as one of the most important of American sales lawyers. He is now an emeritus Professor of the University of Pennsylvania Law School. But it is the long period that he spent as the foundation Secretary-General of UNCITRAL that is his primary qualification for the production of these major works. In that role, he oversaw the evolution of the Vienna Convention within UNCITRAL from its first considerations to the Diplomatic Conference in 1980 that finally settled the draft.

Shortly after he returned to law teaching, Professor Honnold produced a commentary on the Vienna Convention. That work, *Uniform Law for International Sales Under the 1980 Convention*,[1] was reviewed in an earlier issue of the Law Review. It has been an invaluable text and commentary on the Convention. It has now been translated into Spanish; other translations are in train; and it has now been joined by a growing number of other works. Professor Honnold's commentary takes each section of the Convention, analyses it, looks at examples of its application, considers a number of hypotheses, and puts up some of the problem areas that will have to be resolved by future practice and judicial decision. In the course of that work, he has made reference to many of the working papers that had been produced over the decade of debate and analysis that led to the final text of the Convention.

The second great contribution is this work, *Documentary History of the Uniform Law for International Sales*. This book was designed to meet a need that the Commentary revealed — easy access to much of the full text of the *travaux preparatoires* of the Convention. Its objective is summed up by the author.

[1] Honnold, J. O., *Uniform Law for International Sales Under the 1980 Convention* (1982).

> The half century of work that culminated in the 1980 Convention was sustained by the need to free international commerce from a Babel of diverse domestic legal systems. This book is designed to contribute to the Convention's ultimate goal — uniform *application* of the uniform rules.

The text contains the material published on the Convention in the annual UNCITRAL Yearbooks, and an extract from the Official Records of the U.N. dealing with the final act of the Convention. It is not, however, the full legislative history of the Convention. That still remains to be published.

The work is well set out to assist the enquirer. There is an explanation of the system of the book built around the three stages in which the work was made: the Working Group 1970-7; the Review of their work by the full body of UNCITRAL; and the Diplomatic Conference in 1980, when the final text was agreed. There is a full index of topics as dealt with through these stages; a table of the Articles of the Convention in numerical order, with full and descriptive headings; and a Concordance of all the preparatory work before the Convention back to the 1950s by article number of the Convention.

What use will be made by Australian courts, arbitrators, practitioners, and scholars of this monumental work? The relevance of such texts to the task of interpretation of legislation is well established in Australian law, and resort is increasingly had to *travaux preparatoires*, the most notable recent example being *The Commonwealth v. Tasmania*.[2] The importance of decisions and other writings in interpretation is also demonstrated in the judgment of Kirby P., in *Brown Boveri v. Baltic Shipping Co.*,[3] in relation to the Hague Rules and their 60 years of international application. These writings are not the arcane trappings of scholarship, but sturdy tools for those who have to work within this part of the legal system.

What tasks remain to complete the set of tools? The publication of a complete legislative history of the Vienna Convention is needed at some time in the future. But more urgently, what is needed now to complete the task is an international serial publication setting out all the newly decided cases and other relevant writing on the working of the Convention, so that the reservoir of thinking exemplified by this book is replenished. UNIDROIT[4] partly meets this need through the *Uniform Law Review*. But it is not always easy to have direct access to the full text, and there are delays in publication. Easier international communications and a sense of the importance of the uniform development of the law should give a good environment for such a venture.

MARY E. HISCOCK*

2 (1983) 158 C.L.R. 1 (The Dams Case).
3 (1990) 93 A.L.R. 171, 174-7.
4 International Institute for the Unification of Private Law.
* LL.B.(Hons)(Melb), J.D.(Chicago). Reader in Law, University of Melbourne.