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INTERNATIONAL LAW ASSOCIATION

AUSTRALIAN BRANCH, CHRISTMAS FUNCTION, UNIVERSITY CLUB, SYDNEY

THURSDAY, 9 DECEMBER 1982

HOW THE COMPUTER WILL MAKE US ALL CITIZENS OF THE WORLD?

The Hon. Mr. Justice M.D. Kirby

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THE LAW REFORM COMMISSION AND INTERNATIONAL LAW

I was delighted to receive the invitation to address this Christmas Function. I have been a member of the International Law Association for some years and have always had a general interest in its work. Lately, this interest has been stimulated to a professional concern by the appointment as a full-time member of the Commission of Dr. James Crawford, Reader in Law the University of Adelaide. Dr. Crawford is, of course, a member of the Executive of the Australian Branch of the I.A. Because of his appointment to the Commission and his special expertise in the subject, we last month received a Reference from the Acting Commonwealth Attorney-General, Mr. N.A. Brown, on the subject of foreign State (or sovereign) immunity. I have written to the Honorary Secretary of the Association informing him of the new Reference and seeking the interested participation of members. Those of you who read as assiduously as I did the 1982 Newsletter of the Branch will know that in March 1982, Dr. Crawford represented the Australian Branch at the meeting in London of the Committee of the I.A. established to review the final report on State immunity. The Law Reform Commission now has before it that report. The project on foreign State immunity will be lead by Dr. Crawford. A number of members of the Australian Branch of the Association will be proposed for appointment as consultants to assist the Commission. This is the first time that the subject of foreign State immunity has been referred to a law reform agency for examination and report. If we, in the Australian Law Reform Commission, and under the stimulus and direction of Dr. Crawford can get it right, it is likely that our report and any draft legislation proposed will be adopted elsewhere throughout the Commonwealth of Nations, and perhaps beyond. I was interested to note that an I.A. workshop may be held in 1984 to discuss the application in Australia of the Draft Convention on State immunity. It would be my hope that that workshop would have before it, as a catalyst, the Australian Law Reform Commission's report on the subject, with proposals for Australian action.

This is not the topic I propose to address tonight. My own involvement in the development of international law has been modest. But it has been in an area of rapid potential growth of harmonious international law. In 1978, I attended, as Australia's representative, a meeting of an Expert Committee of the Organisation for Economic Co-operation and Development (OECD) in Paris. I was elected Chairman of this body which subsequently produced Guidelines on privacy protection and the free flow of information throughout the OECD. In form, the Guidelines were adopted as a recommendation of the Council of the OECD to Member countries. So far all but three of the 24 Member countries have agreed to participate in the Guidelines. The three exceptions are Ireland, Canada and Australia.

In the course of the development of the Guidelines on privacy, it became clear to me that the worldwide nature of the informatics technology, the rapid penetration of Western society by computers, the linkage of telecommunications and computers in what has been called 'computications' all present a tremendous challenge and a magnificent opportunity for the development of harmonious international law. The technology is international. The problems it presents are international. The need for international solutions to address the problems is manifest. Bodies such as the OECD, the Council of Europe, the Nordic Council, UNESCO and the United Nations Organisation will, in the short term, find themselves under increasing pressure to present solutions for the legal problems presented by the advance of informatics. The International Law Association, as an expert and voluntary group of highly talented, interested and sympathetic lawyers, should ready itself to play an active part in assisting municipal government and international organisations in the development of harmonious legal principles.

In September 1982, I was invited by the OECD to return to Paris to address the first meeting of a new Committee of the Organisation - the Committee on Information, Computer and Communications Policy. Others came to talk of the impact of the technology on employment, on the economies of OECD Member countries, or on future advances in the next phase of informatics. My address was concerned with the social and legal implications of informatics and particularly of transborder flows of data between Member countries of the OECD, and beyond. I propose in this short talk to review some of the chief matters I mentioned in my talk in Paris. My basic thesis can be put shortly. It is that the new information technology will present, by its very nature, problems which need urgently to be addressed. Those problems will include the problems of legal development and adjustment. Because the technology is international, it will require international solutions, if the efficiencies of the technology are not to be destroyed or circumvented by the impediments of incompatible domestic laws. A realisation of this necessity is now

rowing in strength. I predict that the technology will hasten the development of compatible domestic laws and, ultimately of international law. Far from being the province of a few experts, it is likely that international law will develop with international technology and, in the 21st Century, be the concern of very many lawyers. We are, in a sense, at the stage of an international Runnymede. There is unlikely to be a ringing single Magna Carta. But the great technologies of nuclear fission, energy changes, biological developments and informatics present humanity with many common problems, central to human survival and life on this planet. The need for common solutions, sustained by harmonious domestic laws and international legal principles is likely to be perceived with growing clarity.

By way of illustration of these propositions, I propose to refer, in the field of information technology (computers linked by telecommunications) to a number of legal developments that are already occurring or which may be just around the corner. I will address the developments of:

- \* privacy protection
- \* freedom of information
- \* vulnerability, unemployment and crime
- \* conflicts, sovereignty and protection
- \* intellectual property, business law, liability and insurance
- \* evidence law and the legal profession.

All of these require domestic and international attention. All of them are worthy of the attention of members of the International Law Association.

#### PRIVACY PROTECTION

OECD Guidelines. It is convenient to begin the consideration of substantive legal concerns with privacy protection. This has been a sustained interest of the OECD, the Council of Europe and other international organisations for more than a decade. The Privacy Guidelines were adopted by the Council of the OECD in October 1980. So far, as I have said, only three Members have not signed them, namely Australia, Canada and Ireland. Australia's federal constitution, under which privacy (though not telecommunications) is basically a State matter, chiefly explains the delay there. But I can say without hesitation that the development of Australia's privacy and freedom of information laws has already been strongly influenced by the OECD Guidelines. In Canada, too, there have been important developments. In July 1982 a Bill enacting the Access to Information Act and the Privacy Act became law. The latter adopts, as the Australian Freedom of Information Act 1982 does, the key 'individual participation principle' of the OECD Guidelines. In the

ase of Ireland, it has been suggested that changes of administration may have delayed endorsement of the OECD Guidelines. These Guidelines fulfil the useful task of stating the guiding principles. Furthermore, let it be candidly said, they provide an impetus to municipal law action by the power of persuasion of good international opinion.

Towards enforceable rules. During the preparation of the Guidelines, and in particular when the attention of the OECD Expert Group was turned to the principles of international application, the point was frequently made, particularly by France, that guidelines, however beneficial as an educative and persuasive force, will not have self-executing authority in a court of law. We are still a long way short of unilateral or mutually enforceable international principles, let alone an international neutral tribunal to which parties with a transborder dispute about automated personal data can have access. The development of such international remedies will, if enforceability, actionability and justiciability are to be contemplated, depend upon a further step in the movement towards enforceable international law.

Future Privacy Issues. The literature on privacy shows that certain matters stand out as issues for future consideration in the privacy protection debate:

- \* Legal Persons: The extent to which privacy protection should extend to legal, as distinct from natural persons. To what extent is it apt to talk of the human rights of a statutory creation, such as a corporation, or of an association, club, partnership or small business? Obviously, this issue has political, economic and other implications.
- \* Code of Ethics: A significant development reported by the Secretariat is the decision of the Council of Europe at a recent meeting to initiate work on the development of a clear code of ethics for computer professionals.
- \* Privatisation: In a number of countries consideration is being given to the privatisation of telecommunications and a relaxation of the former government monopoly. In the past, the government monopoly and domestic secrecy laws may have contributed, in practice, to the protection of the privacy and confidentiality of information passing through the telecommunications system. Will this change with growing private involvement? What implications will privatisation have for the International Telecommunications Union and its conventions?

- \* Model Contracts: In order to define legal rights and duties in the event of a dispute, there is likely to be an increasingly urgent move towards the inclusion of standard contractual terms in informatics dealings with an international element.
  
- \* Enhancing access: The right to handle terminals and other technical equipment is now being dealt with, as is the anonymity of the citizen when asserting his right to access public documents. Will international access be permitted on-line aid, if so, with what reciprocity?

#### FREEDOM OF INFORMATION

Currency of democracy. A second substantive issue is freedom of access to government information. Information has been described as the currency of democracy. The sword of democracy, it is said, is blunted by the indifferent voter who is ignorant about what is going on in his country. Translating these fine principles into enforceable legal rights is not always easy; but much progress has been made in a number of countries in the past decade. In the past weeks, the Australian Federal FOI law has come into force. Progress in other countries seems slower.

Future Issues. It is likely that a number of future developments in this area will need to be watched:

- \* Documents and data: The rapid transfer of information to computerised format will increase the urgency and importance of considering 'the principle of granting the public a right sometimes to use the equipment'. This consideration will give rise to new needs:
  - \*\* to prevent unreasonable or excessively expensive access;
  - \*\* to prevent access to data which is legitimately secret, confidential, private or otherwise not accessible.
  
- \* FOI interaction: Then there is the issue of the interrelationship of differing FOI laws in different countries. A Norwegian social researcher who published certain findings on NATO defence arrangements which were contained in documents restricted under Norwegian law was convicted of espionage in Norway. The documents had been retrieved on-line pursuant to the United States Freedom of Information Act. The moral is that the new information technology is likely to hasten the influence of openness of administration under FOI laws, for the simple reason that it is rendered so much more difficult to contain the haemorrhage of freely available information once its disclosure is permitted in one place.

- \* Data ownership: Questions have arisen concerning a proposed legal principle of ownership of information or 'data ownership'. Proponents of data ownership assert that to enforce effective control over the flow of information which now proliferates about all corporations and individuals, ultimate legal control over that information may be necessary. But whether legal 'ownership' as such is attributed to the data subject may be less important than that enforceable legal rights should be defined which effectively protect the interests of the data subject in information circulating about himself.
  
- \* Private sector: So far, FOI has been overwhelmingly a public sector debate. It seems probable to me that the principles of accountability will in time go further, into the private sector corporation, encouraged by the dynamic of the new information technology itself.

#### VULNERABILITY, UNEMPLOYMENT AND CRIME

Vulnerability. Just as Sweden led the way with FOI and privacy (data protection and data security) laws, now it is providing a stimulus to other countries and to international organisations with its detailed consideration of the greater vulnerability of the 'wired society'. In part, the problems are of such a nature that new laws will be required. The special balance struck in municipal law between law enforcement and individual liberties will come under challenge as a result of the perceived risks that will arise from the dependence on the new technology.

Unemployment. A linked concern is the effect of persistent unemployment or dislocation on law observance, domestic tranquility and peaceful government. There is no doubt that the advent of new information technology has promoted fears of loss of employment in aggregate and loss of employment to 'data rich' countries in particular. In virtually every Member country there is a realisation of the erosion of respect for institutions, including the law, that could attend endemic high levels of unemployment, unless these could in turn be addressed in a constructive way. The increase in petty crime that accompanies high levels of unemployment, the despair of people, especially young people, surrounded by wealth they cannot hope to attain, and the special problems of dealing with more people dependent on social security benefits are just some of the features that accompany serious and prolonged economic downturn. When the downturn is accompanied by structural change and rapid technological change displacing employment, the potential for widespread unlawfulness and erosion of authority is very considerable indeed.

Computer crime and fraud. One aspect of the greater vulnerability of the wired society is its greater susceptibility to damaging anti-social conduct, such as computer terrorism and computer crime. There are many issues here for the law and its personnel.

- \*\* Crime is strictly defined: The manipulation of information technology to steal money from a bank or property from an owner may not come within the present definition of 'theft' contained in domestic law. 'Theft' normally involves taking away goods. But now no goods need be taken.
  
- \*\* Crime is local: A complication that emerges from a ubiquitous and international technology in its application to crime is the general principle, recognised in international law, that crime is local. Domestic courts are normally confined to punishing criminal offences which occur in their own territorial boundaries or which have some other relevant connection with that territory. Where crimes are constituted of a number of elements, some of which may take place outside domestic jurisdiction by reason of access to international data communications, reform may be needed to ensure that the legitimate jurisdiction of local courts is not improperly frustrated.
  
- \*\* New crimes/personnel are needed: Jan Freese (Sweden) has proposed such a new concept in the notion of punishable 'data trespass'. But even assuming that the definition of new crimes and the complication of the international elements of information crimes could be satisfactorily overcome, it is clear that serious problems exist in recognising, detecting, proving and punishing such crimes. Some initiatives are being taken by Interpol to train police in the new problems of policing the world information society. But the potential of the computer criminal to evade detection and capture, let alone trial and conviction, is enhanced by the ubiquity and universality of some of the more vulnerable information systems, such as those dealing with banking, insurance and credit information. If effective and highly skilled policing is to be developed, it seems likely that international co-operation in policing will have to be strengthened and enhanced, if only to reflect the international character of the vulnerable object of new international crime.

#### CONFLICTS, SOVEREIGNTY AND PROTECTIONISM

Private international law. The sudden development of a new technology with the features of the new information technology presents novel challenges to private international law. The problems identified in connection with personal



are perhaps more acute in relation to the rapidly growing numbers of information transactions of a commercial character having nothing to do with personal data but perhaps more likely to give rise to legal disputes. The doubts and uncertainties about the forum, applicable law and remedies available are potentially multiplied many times over where a transaction has an international component. This is because of the diffusion and coincidence of the potential international components in a transaction utilising the new information technology. When an electronic message is generated in country A, switched in countries B and C, transits countries E, F, G and H, processed in countries I and J, stored in country K and involves entities residing in yet other countries, it is clear that present rules on choice of and conflict of law are inadequate.

How is a regime to be developed for the technology which is so rapidly penetrating all advanced countries? How will we authoritatively and finally determine the problems of forum? Until binding conventions are developed, there is a distinct danger that municipal courts will go off in their different directions.

Sovereignty. The issue of sovereignty and informatics is complex and, from the legal point of view, has a number of aspects. One aspect, is linked to the issue of vulnerability and may raise issues of sovereign immunity. It is raised by recent freezing of Iranian and Argentinian assets. In the past, seizure of enemy assets was a personal tragedy and a national inconvenience. But it did not hold the same potential for widespread disruption that would arise if a country had effective control over the storage, processing or transit of data vital to an enemy. Concern about this potential for political or economic 'leverage' is not entirely theoretical. For example, Brazil, perhaps more than any other country, has designed a full set of policies to control TBDF.

#### INTELLECTUAL PROPERTY, BUSINESS LAW, LIABILITY AND INSURANCE

Intellectual property law. I turn briefly to the impact of informatics on business law. Traditionally, intellectual property law developed around protections which attached to the medium rather than the content. It was not possible to patent or copyright an abstract idea. The problem posed by informatics technology is that data (and therefore information) have now been 'liberated' from physical objects representing the data. Because intellectual property law has traditionally attached itself to physical objects, representing information, the information itself has only been indirectly regulated. This approach is no longer apt for the new 'liberated' world of informatics. The difficulties are aggravated by the phenomenon of TBDF, by

which information produced in one country may be reproduced, in ephemeral form, in another. Unless some new arrangements can be made, recompense to the original author may be readily and entirely avoided.

Business law. Of special relevance to business law will be the developments in telecommunications by which business contracts are effected. Already international transmission of contracts, bills of exchange, bills of lading, airway bills, letters of credit are occurring. Today's merchants work in a world of complex statutory laws governing anti-trust, taxation obligations, banking and foreign exchange regulation, rules governing relations with administrative authorities, foreign investment limitations and so on. Instantaneous contracts may not always permit adequate time for advice on the complex range of laws that affect and may even destroy the contract, once made.

Liability for loss and error. The occurrence of computer error is not great when compared to the enormous dependence on information technology nowadays. Yet potentially error might be catastrophic and could affect very large numbers of users. Errors can arise out of human factors (such as defective programming, inattentive keying of data, wilful inclusion (or deletion) of data. It can also be the result of defects in computer hardware (a failed valve, loss of power, etc.) or loss or interference during transmission. These problems, difficult enough within a single jurisdiction with a single system of laws, become almost intolerable, where, by reason of TBDF, multiple jurisdictions with their differing legal rules may become involved.

Insurance against computer loss. To some extent, current insurance policies will already provide indemnity for errors arising out of information technology and TBDF. For example, an airline disaster caused by incorrect plotting of a flight path using a computer and TBDF may give rise to claims against the airline which is indemnified under its accident liability policy. But the need for the development of liability insurance specific to worldwide computer systems is yet to be fully explored. It does seem likely, on the analogy of airline insurance, that something will be needed. The losses when they occur are likely to be large and sometimes disastrous. The provision of a common insurance fund may be fairer to all who are using the system. It may be desirable because of the prohibitive costs and uncertainties in legal disputes having an international component, because of the use of TBDF.

#### EVIDENCE LAW AND LEGAL PROFESSION

Evidence law. Changes in information technology directly impact the law of evidence in many countries and will influence the development of the legal profession in all of them. The acceptance into evidence in courts of law of

puter and computer generated testimony creates new problems which need to be addressed, whatever the legal system. These matters are identified in my full paper. How should we respond to all these legal problems? Especially in systems of law which adhere to the common law tradition, there is a need significantly to modify the laws of evidence to permit more readily the admissibility in court of computer evidence and computer generated evidence without proof in every case of its original creation.

Lawyers and the judiciary. The new information technology brings good and bad news for the legal profession itself across national boundaries. The good news involves the improvement in access to legal data, including the potential of readier access to overseas legal material by TBDF. One New Zealand commentator has suggested that an urgent obligation of lawyers is to simplify old precedents before they are immortalised and mass produced through word processor technology and transmitted widely through telecommunications. The bad news may not be universal. But it certainly affects a number of countries including Australia where the staple activity of the domestic legal profession is concerned with land title transfers. The implications of the technological development for the loss of this activity and so for the widespread distribution and reasonable prosperity of the legal profession needs to be watched.

#### INSTITUTIONAL RESPONSES

National and international. The need for the allocation of adequate resources to allow a comprehensive and vigorous attack by home governments on the multitude of issues posed by informatics and TBDF is manifest. At the international level, the OECD and the Council of Europe especially can provide the kind of assistance they have already offered in respect of privacy laws. International Guidelines can help to:

- \* harmonise rules as they are developed at home;
- \* inform countries of the standards being adopted elsewhere; and
- \* avoid the conflicts of laws that will all too readily otherwise spring up, through ignorance of, or indifference to the desirability of harmonious and compatible legislation.

A realisation of this adds legitimacy to the increasing interest being shown by the international organisations to legal concerns. I can see this as a growth activity. But obligations also lie elsewhere.

Industry response: A proposal. There should also be a greater realisation on the part of the informatics industry of the responsibility it must share for the solution of the social and legal problems that attend its technological

esses. It is in the industry's self interest to help our societies and governments to absorb and cope with the social and legal implications of the technology it is so successfully introducing throughout the world. The modesty of the present investment which this prosperous, adventurous and fast developing industry makes for the study of the social, economic and political concerns of world wide dimension is such as fairly to attract criticism or even derision! The multiplication of the problems of the new information order impose obligations, if only in self defence, upon the informatics industry. It is presenting the problems, many of them common, to governments and societies around the world. An international centre for the study of the legal and social implications of informatics should be created, isolated from the industry sources of its funds, yet guaranteed of a flow of funds for a sufficient period of time to assure stability and to attract suitable appointments of the highest calibre. It should not be unrealistic to expect such a prosperous industry to provide funds for such an Institute of Informatics and Society. The investment would be miniscule by comparison with the income and profits of the industry. It could be seen as a minor cost, a kind of insurance premium, to guarantee that those who present the problems play a more active part than they have in the past, in helping our societies to provide the solutions.

#### TO CITIZENS OF THE WORLD

I repeat my belief that we are at an historic moment in the world legal order. A dynamic international technology is pressing forward the urgent need for the development of an effective, new international legal regime. It is important that the new legal regime should be developed in a coherent way and one which does not unduly impede the economies and efficiencies of the technology. International organisations clearly have a central role to play in these developments. The legal concerns which I have mentioned should not be lost in the headier and more familiar consideration of economic, social and technological concerns. What will it profit our societies if they advance remorselessly down the road of technology but lose respect for the law and their institutions and adherence to the rule of law?

The new technology links us together, in commerce, in personal communications, in credit information, in defence and national government data and in so many other ways. It renders us in one sense more vulnerable to irrational interference by other countries and in another sense makes it more unthinkable that there should be interruption in the free-flow of information.

History, including recent world history, teaches that we cannot rely upon rationality and good sense. It is necessary to work towards the international rule of law. There are some who are pessimistic about the new technology. They see it chiefly in terms of heightened vulnerability and greater and more puzzling dangers. But members of this Association, with its long history and distinguished service, are, almost by definition, optimists. One thing is clear, technology, including information technology, presents our countries and the international order, with difficult problems which can only be solved by international consensus. Information technology is expanding, developing and penetrating this world space. Let us hope that the law, including international law can keep pace and that the mind of man will adapt quickly enough to the new order being forged by the technologists.