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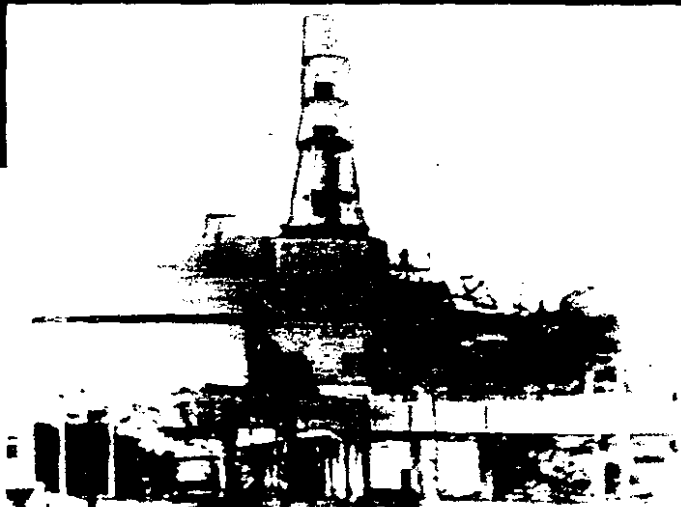
TOMORROW BELONGS TO ?

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Tomorrow belongs to . . . ?

The Commission for the Future recently held the first of a series of seminars in Melbourne looking at where law is headed. Following the seminar, the President of the N.S.W. Court of Appeal, Justice Michael Kirby, delivered an address on the global implications of the great advances of our age. In the following edited version he asks whether there is a future if international law and lawyers fail to control the development of nuclear technology.



As I look back on my time in the Law Reform Commission I can see, running through the tasks that were given to us, a number of golden threads. One of them is clearly the impact of science and technology on the law.

Jacob Bronowski, the considerable science communicator, said that to ignore the impact of science and technology on our society is to walk with eyes open to slavery. And in almost every task which was given to the Law Reform Commission over the ten years that I served on it, the impact of science and technology was there to be seen. If, for example, you look at the early projects on criminal investigation, you could see the way in which we proposed the adaptation of the old methods of criminal investigation to the use of tape recorders and video recorders; the scientific methods of conducting identity parades and so on. If you look at the project on "Privacy in the Census," we had to consider the impact of information technology on the conduct of the National Census. If you look at the project on "Human Tissue Transplantation," we had to consider the developments of biotechnology on the law. If you look at Privacy Protection we had the whole issue

of the protection of privacy in informatics: the linkage of telecommunications and computers.

Even in the reference on admiralty law, something which you would think would not be close to the impact of technology, one of the questions was whether hovercraft or aircraft should be subsumed into the rules that developed in an earlier technological age to govern ships. Those rules were admittedly developed for earlier times. But why should they not keep pace with and adapt to the new ways by which people get around? So, virtually every task in the Law Reform Commission confronted us with the impact of science and technology on the law.

In recent years, indeed in recent weeks, the Australian community has been looking at a very particular aspect of the law, namely, human rights. I was in Canada recently and I had lunch with judges of the Supreme Court of Canada, who told me that 70 per cent of their work now concerns the Charter of Rights and Freedoms. When we look at the Australian Bill of Rights legislation which is before the Senate, we should also look beyond our country to the other countries of the common law world,

and reflect upon the fact that in 1990 there will be celebrated the two hundredth anniversary of the American Bill of Rights. And, in 1989, there will be celebrated the two hundredth anniversary of the Declaration of the Rights of Man and of the Citizen, which reform was formulated in the midst of the French Revolution. Australia is coming upon a very significant international development two hundred years late. Some might say better late than never.

The technologies, the sciences which affect our generation are remarkable. Some people say that they come together in the work and are the product of the mind of Erwin Schrödinger, the great quantum physicist of the 1920s. It is said that nuclear physics, informatics and biotechnology have a common link, and though mere mortals like myself cannot quite see the details of that common link, it would be surprising if there were not a common link in the enormous scientific developments that have occurred in our generation. If you think about our generation, we are either blessed or cursed with having to come to grips with these three major streams of scientific and technological development. Most

generations have one, maybe two. It's our obligation as a society, as a world, as a planet to come to grips with the three. They have happened in our lifetime. Nuclear fission, informatics and biotech. Now, each of these has relevance for the law: each of them has relevance for the debate which is current on human rights. I thought it would be more relevant and timely to talk about that debate.

NUCLEAR PHYSICS

We start with nuclear physics. Obviously, if we don't survive we needn't trouble too much about the problems of informatics and biotech. The hundreds and thousands of people in our country and elsewhere around the world who have marched (against nuclear arms) were asserting their concern about the continuance of human life on the planet. Unless, pretty quickly, some form of international law or international control can be achieved to bring under control the great power that is potentially unleashed by nuclear physics, we need not tarry to worry too much about the other problems, because mankind will be destroyed. All the beauties of civilisation will be swept away.

If we look sensibly at our problem in this respect, the prospects of long-term survival of civilisation would seem problematical. I mean, the risk with such great power of destruction arising from accident, from folly, from mistake, from some person's vanity, is enormous. Lawyers who stop and pull themselves away from the problems of cattle trespass and the law on perpetuities and the rules of taxation and the principles of the Statute of Limitations and raise their sights will see what some would contend is the really great issue for human survival. It is an issue that straddles political parties. People have different ideas of how it should be tackled. But there is a growing concern about this. We have lived in something of a fools' paradise. We have survived. But the long-term prospect of human survival must be problematical.

It is significant that the two great achievements in arms control in the last two decades on an international level, were achieved through unilateral action, and that must not be forgotten. Unilateral action on the part of President Kennedy led ultimately to the nuclear non-proliferation treaty. Unilateral action on the part of President Nixon led ultimately to the steps which resulted in the destruction by the United States, the Soviet Union and Britain of their weapons of chemical warfare. That was why many people were disappointed when the unilateral moratorium which, for once, the Soviets recently offered, was broken by the United States of America. Unilateralism (which the Soviets suggested should lead on to a total nuclear test ban) is not necessarily a bad thing. It can lead on to the steps that are necessary for treaties at an international level to provide the security of the world in respect of this, potentially most destructive, of the technologies of our time.



Now, within the world of Bills of Rights and assertion of the rights of citizens, it is interesting if you look through the Canadian casebooks to see that citizens are beginning to assert their rights under Bills of Rights. This is little known in Australia. Those who are framing and modelling and putting forward Bills of Rights for our country should reflect upon their potential impact on technology, including the field of nuclear weaponry and nuclear fission generally.

The *Operation Dismantle* case came before the Canadian Supreme Court. It was a case by which a group of anti-nuclear people in Canada sought to apply to the Federal Courts of Canada for a declaration that the action of the Canadian Government in conducting cruise missile tests and permitting the United States of America to send its cruise missiles over Canadian territory was contrary to Article 7 of the Charter of Rights and Freedoms which guarantees Canadians life and security of the person.

The Canadian Government applied to a single judge of the Canadian Court to strike out the statement of claim, as plainly not disclosing a cause of action. That judge refused. There was then an appeal to the full Federal Court of Canada and that court upheld the Canadian Government's contention. It struck out the statement of claim as not disclosing a cause of action. The case then went to the Supreme Court of Canada, where it stood reserved for something like fifteen months, an indication of the difficulty of these issues. Ultimately the Supreme Court of Canada unanimously upheld the decision of the full Federal Court: no arguable cause of action. The

Supreme Court was careful to assert that the mere fact that this was a political question did not deprive the Supreme Court of the right to look at the application of the Charter of Rights and Freedoms to this contention; that one of the guarantees of life in the Charter was denied by reason of the operation of the cruise missile tests. As well as that, in a separate opinion, Justice Bertha Wilson said that she could conceive certain circumstances in which relief might be granted (e.g. if the tests were over populated areas or where there was a real risk to life as distinct from a general risk arising from the threat of nuclear war). She said that because the Canadian Government was guaranteed by the Constitution the right to declare war, therefore, some derogation from the guarantee of life had to be acknowledged, which the Court would, if necessary, uphold.

Recent writing in British literature about nuclear weaponry, nuclear tests and nuclear issues is laying emphasis upon other aspects of the danger of the human rights. In particular Paul Steghart, whose writing on this subject is definitely worth consideration, has said that one of the perfidious and insidious consequences of nuclear power is that because of the special risks that are attached to it, there is a need for special precautions. Those special precautions lead to a breaking down of the sort of society we have.

Special precautions include the need for special constables, armed with automatic weaponry, given additional powers over and beyond those of the police. The contention is that inherent in nuclear technology is such an enormity of a risk that society will impose

protections which are exceptional, both at a national and international level, and which will derogate from the relaxed kind of society we have enjoyed and the human rights we have enjoyed under that society. It is beyond argument that unless we can find international solutions to the dangerous risks of nuclear fission, mere national protections will not suffice to protect mankind. So that in respect of the first technology it is plain that the world must develop international solutions because otherwise mankind's survival must be doubtful.

INFORMATICS

The second technology, informatics, is the one I know most about. It was in the Law Reform Commission's work on privacy that I became associated with a Committee of the O.E.C.D. which was developing guidelines for the trans-border flow of data in the protection of privacy. That Committee ultimately developed guidelines. It did so in a rather interesting way.

When the computer came upon the world a number of people began to see problems for the future. A committee of the International Commission of Jurors in Sweden said that there were going to be dangers for individual privacy in this remarkable development: we must seize the advantage of the development, but we must

look to the problems and endeavour to build society's defences to privacy so that we gain the benefits but do not lose the kind of society we have. That led in turn to certain Swedish legislation.

That led in turn, as happens in Scandinavia, to the discussion of the matter by the Nordic Council. That led with the export of the ideas developed in the Nordic Council, to the Council of Europe and to the proliferation of European legislation on data protection. What we call privacy protection, what they call data protection and data security, led in turn to initiatives on the wider world stage of U.N.E.S.C.O. and in the O.E.C.D.

The O.E.C.D., you will remember, is the rich countries' club, the 24 developed countries, Western Europe, Canada, the United States, Japan, Australia and New Zealand. And it was to a Committee of the O.E.C.D. that I was sent, because the Law Reform Commission of Australia was developing principles on privacy protection. For the first time in my life, for someone who had been educated at law school to think of international law as an esoteric subject for a few lawyers dealing with great macro issues of public law, I began to perceive that the technology was forcing the pace of the development of international principles simply because the technology was at once international and instantaneous.

You could not develop principles in France and Switzerland side by side or in France and the Federal Republic of Germany side by side or in Britain and Sweden which were significantly different, because they would impact on a technology which was instantaneous and which was whizzing its information with computers linked and chattering away, across a border, across the world. The O.E.C.D., which is a fairly hard-nosed international body gathering information and exchanging ideas, soon perceived that a reconciliation had to be made between two rather different approaches to the problem. But it had to be made for a reason that was acknowledged by both combatants.

The combatants were, in a nutshell, the Europeans, led by France, who did not have a big computer industry and were very concerned in the light of their recent history with the misuse of personal information — they remembered what the occupying forces had done and they were determined and rather more conscious of the problem and anxious to ensure that it did not happen again — and, on the other hand, the United States, with a big computer industry, armed to the teeth with the First Amendment — the free flow of information (a philosophy which happened to coincide with its business advantages). The two camps could see that in this international setting there

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was a need for a reconciliation of these two points of view for the simple reasons of efficiency. If there was to be a modicum of free flow and at the same time a modicum of protection of individual privacy, incompatible laws would lead to such gross inefficiency and confusion as to be intolerable, and a resolution had to be found. Secondly, those who sought the protection of privacy across borders and the avoidance of data havens in which information could be stored, saw the need if there was to be true protection to have compatible interlocking laws.

So that international law, from being simply a matter of esoteric interest of an intellectual, scholarly kind, suddenly, under the impetus of the technology, becomes potentially a matter of day-to-day legal practice and importance. How do you enforce the law? Whose criminal law applies if somebody in Jamaica taps out a message which leads to anti-social consequences in Zimbabwe or Kampuchea or in Australia? Criminal laws typically have been local. But whose law will apply to such a case?

The O.E.C.D. guidelines were adopted by its Council. We carried over their adoption in Australia, though we had taken the leading role in their formulation. We ultimately agreed to them, and Attorney-General Bowen has said that the privacy legislation which will be introduced this year in Federal Parliament will be based on the report of the Law Reform Commission. In turn this report has as its fundamental core of principles the O.E.C.D. guidelines, which, in their turn, can trace their generic route through the Council of Europe, the Nordic Council, the Swedish Legislation, the Committee of the I.C.J. in Sweden.

I tell you this so that you will take heart, because these steps, under the impetus of technology and science, have to begin somewhere. They have to begin with people who are peering into the future and who are endeavouring to see the problems of tomorrow and to lay down the framework. And he or she who begins the laying down of the framework will, if their effort is good enough, often seize the main ground and provide the intellectual framework which in international organisations will become the basis of domestic laws. Technology forces the pace of international law developments.

BIOTECH

The third technology of biology (biotech) is in many ways the most puzzling. Because it touches the definitions of life and the way in which we treat human beings and human life, it is obviously of high controversy and great international concern. Some efforts have been made at an international approach to this issue.

After the horrors of the Second World War and the discovery of the way in which the distinguished German medical profession had been seduced to conduct experiments on human life without due

regard to respect for the humanity of the subjects, the International Military Tribunal in Nuremberg formulated certain basic rules — the Nuremberg Code. That code was subsequently confirmed in Helsinki and has more recently been affirmed in Venice. The Code lays down certain basic rules to the treatment of the whole human being and the need for integrity and respect.

Now more puzzling questions are arising (by reason of experimentation) which affect basic forms of life. We see these problems arising in such tasks before the Law Reform Commission as that on human tissue transplants. We see it arising in tasks such as were pursued in this State by the Waller Committee in its reports on *in vitro* fertilisation.

Driving in tonight, I heard that the British journal *Lancet* has published a denunciation of recent British legislation forbidding surrogate birth arrangements. There is similar legislation in Victoria, though not, as I recall it, actually forbidding the arrangements, but simply making it difficult for the arrangements to be carried out by procedures which ban publicity and the other steps that some people may need in order to get access to surrogacy. The importance of this kind of issue in the future human rights debate has already surfaced.

When article 18 of the Australian Bill of Rights Bill was first introduced, it guaranteed to any "person" the right to life. The Australian Catholic bishops reacted with a protest that this might be defined as guaranteeing the right only to a born person. They said there should be a right to life as from the moment of conception. The Government protested that its only desire had been to avoid any debates about the rights of corporations and accordingly the Bill has been amended somewhat to make it plain.

There have been a number of international attacks on issues of bioethics. One of them which came to my notice recently related to the unlikely subject of breast milk substitutes. I went to Zimbabwe for a conference on such substitutes and I realised, in the course of preparing for that conference, that really this was a macro-ethical issue of the greatest importance. Here were the companies selling breast milk substitute products where people did not need them, did not have the clean water to mix with them, and could not boil the water for the purpose of sterilisation, and who, by reason of the fact that they were using this presumably "better" western material, were not securing those benefits of contraception that come from breastfeeding.

The products were being pushed upon the African States, in particular, as western women turned away from the use of breast milk substitutes, as with cigarettes and the Dalkon shield and other products of western society discarded by us, new markets were suddenly found in the developing world, particularly Africa.

This was an international problem of bioethics and the World Health Organisation got in on the act, and it developed a code which it endeavoured to persuade companies to adopt. At first companies were less than enthusiastic but, ultimately, under the stimulus of certain legal proceedings, public outcry and Senate Committee hearings, particularly in the United States, the companies began to toe the line, and the result today is that the great danger from at least this international macro-bioethical problem has receded. The problem of cigarettes and the pressing of the tobacco industry and the sale of cigarettes and tobacco products in the developing world remains.

CONCLUSION

I have reviewed the three great scientific developments of our time. I have said in respect of the first that unless we can find effective international law to control it, we need not worry about the second and third, and there is an element of urgency in this. It is not surprising that people get into great demonstrations and express their concern about this issue.

We have lived in a fools' paradise for thirty years. We have put off consideration of this problem because of its enormity. The people of the world are beginning to insist that the problem be addressed.

Secondly, I have spoken of informatics and I have given an illustration in one little field in which I have been concerned of the way in which what was an exotica of law schools is becoming a matter of practical and potentially day-to-day importance because the technology itself is interactive, instantaneous, international, intercontinental, universal. I have mentioned bioethical questions, though superficially, and the way in which they touch upon fundamental questions of human life such as whether we want to have cloned examples of the species; whether we want to permit experimentation with the human form in its essence; whether at an international level, we want to have the sale of organs from one country to the other.

These are matters that will require international attention. Accordingly, the short and simple message that I bring is one of global dimensions. The matters of science and technology, which appear on the authority Gribbins' book on Schrödinger to be all the products of a remarkable mind and which are the jewels of civilisation in our time, lead to the necessity to develop world perspectives of the problems which we have to address. So when I read that people talking at the bicentenary want to take some parochial Australian attribute to the issue, I am afraid I cannot get excited. The days of petty parochialism have gone; they went with Hiroshima. The obligation of all of us looking into the future is to think internationally and to attack our problems in that spirit. ■