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INTERNATIONAL COMMISSION OF JURISTS

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

SEMINAR ON THE MEDIA AND THE JUDICIARY

MADRID, SPAIN, 18-20 JANUARY 1994

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The Hon Justice Michael Kirby AC CMG*

FROM SMOKE SIGNALS - THROUGH WIRELESS - TO CYBERSPACE

My proposition is simple. The media of communications have changed radically in recent years. The ownership of the media has also changed. The professional ethics of the media have changed as well. These changes have an impact on the actions of the media and on the messages they present. They also affect the legal system and the judiciary.

The media's messages are no longer confined to a particular village, town, city or even to a particular country. The technology now takes them, instantaneously, across jurisdictional borders. The powerful, opinionated media can thereby play an important rôle in the assertion of freedom and in undermining autocratic government. It was, to some extent, the global media which brought the concerns (originally expressed by a privileged few and in tentative language) from the docks of Gdansk, Poland remorselessly through Hungary and Czechoslovakia. It swept from there to

Bulgaria, Mongolia and Romania. It consumed the Baltic States. It eventually destroyed Federal Yugoslavia. In the space of a couple of years, it brought the Berlin Wall crashing down. Ultimately, it demolished one of the two global mega-powers: the Soviet Union.

An essential element of the movement for *Glasnost* in Russia, which stimulated these changes, was the demand for access to an open media and an accessible system of telecommunications. A largely uncontrolled media and direct access to telecommunications were themselves the by-products of the comparatively freer societies of the West, where ideas could more readily flourish. Such societies stood in stark contrast to the economic backwardness and social dislocation of the former Soviet Union and its satellites, with command economies. Broadcasts, by radio and television, crossed the Berlin Wall. Telephone communications and direct dialling leapt over even the energetic intrusions of the omnipresent censor. Satellites beamed down the messages of the extraordinary developments of other economies. The data spoke, with one voice, of the multiplier which a high measure of free expression contributed to human happiness and to economic progress. Links with the reformist movements were established by interactive computers and by telefacsimile. The growing realisation of technological backwardness provided a stimulus to the movements for change which were to become a deluge and which stopped only at the borders of China.

It is important to keep these technological developments in mind as we approach their impact upon the other important values of free societies: basic human rights, the rule of law, and the independence of judges and of lawyers.

The progress made in the last few decades has been remarkable:

"Telecommunications are a fundamental component of political, economic and personal life today. Yet, until recently, human encounter was place-dependent. Communication across distance was only possible by such technologies as talking drums or smoke signals, relatively immediate but limited to messages that were terse and susceptible to error. More detail

and accuracy could be conveyed by messengers traveling by foot, boat, horse or other beast of burden. Messages from distant locations could take weeks or years to arrive and were used to communicate affairs of state, nobility, Church and commerce. These communication forms were not interactive and not available to common people. The voyages of Marco Polo, conveying letters from the Church of Rome to the Emperor of China, took decades. Transmission of messages was very slow and expensive even up to one hundred and fifty years ago. As Arthur C Clarke noted: 'When Queen Victoria came to the throne in 1837, she had no swifter means of sending messages to the far parts of her Empire than had Julius Caesar - or, for that matter, Moses ... The galloping horse and the sailing ship remained the swiftest means of transport, as they had for five thousand years.'"

Then things started to change. In the 1840s the telegraph was introduced. In 1875, Alexander Graham Bell invented the telephone. Marconi's wireless spread quickly in the early decades of the twentieth century. A signal to an Atlantic steamer signified notified the judicial order to arrest Dr Crippen for the murder of his wife. By the 1920s, Hollywood was in full operation. Cinemas sprang up throughout the developed and developing world. The dominance of American movies, and later television and videos, has lasted into our own age to become a major controversy in the recent GATT negotiations. In 1956, the first submarine telephone cable was laid successfully. The first telecommunications satellite was launched in 1960 - a balloon. It was not until 1962 that the first efficient satellite, Telstar, was launched into orbit. Thousands have followed. Fibre optic communications were introduced in 1977.

The term "global village" was coined in the 1960s by Marshall McLuhan of the University of Toronto to describe the way in which the global media were linking humanity in all parts of the world. Professor McLuhan attributed his basic idea to something which Nathaniel Hawthorne had written, in 1851, in his book *The House of Seven Gables*:

"Is it a fact ... that, by means of electricity, the world of matter has become a great nerve, vibrating thousands of miles in a

breathless point of time? Rather, the round globe is a vast head, a brain, instinct with intelligence! Or, shall we say, it is itself a thought, nothing but thought, and no longer the substance which we deemed it."

Aldous Huxley, in 1925, painted the picture of the vast power of this media interconnection. And of the dangers it presented of cultural consolidation and, ultimately, homogenisation:

"It is comforting to think ... that modern civilisation is doing its best to re-establish the tribal régime but on an enormous, national and even international scale. Cheap print, wireless telephones, train, motorcars, gramophones and all the rest are making it possible to consolidate tribes, not of a few thousands, but of millions ... In a few generations it may be that the whole planet will be covered by one vast American-speaking tribe, composed of innumerable individuals, all thinking and acting in exactly the same way, like the characters in a novel by Sinclair Lewis..."²

The foregoing represent some only of the important media developments. Others, just as important, are happening now and will gather pace in the future. They include the phenomenon of multimedia, digitalisation compression and informatics. Cyberspace,³ a term coined in 1984 by the science-fiction writer William Gibson, connotes a future world linked by computer networks in which physical reality makes contact - mental and sensorial - with a parallel world of pure digitised information and communication: the world of modern non-physical media of communication.

It is a weakness of lawyers, including judges, that they are usually uncomfortable with the complexities of technology. In the pursuit of the familiar world of well worn legal rules, they too often recoil from the complex problems presented to human rights, the rule of law, and the independence of judges and lawyers by advances in nuclear fission, genetic engineering and informatics. To some extent, the judges and other lawyers of today have adapted, like their fellow citizens, to a rapidly changing world. They use information technology in the discharge of

their duties. But if the stereotype of the lawyer with the quill pen is hard to eradicate, it is because lawyers, and lawmakers, abhor the complexities of modern technology and the daunting variety of the problems which it throws up. It is as if their minds are in a different, verbal, gear.

CHANGING MEDIA OWNERSHIP - FROM PTT TO CNN

One such problem is the subject of this paper, relevant to a seminar on the media and the judiciary. It concerns the response of the judiciary to the changes in the nature and ownership of the media. The changes in the nature of the modern media of communication, I have sufficiently outlined. The changes in the ownership can now be briefly sketched.

First, the last decade or so has seen the large scale dismantlement of the PTT monopolies which formerly controlled much of the electronic media and were often in a position, directly or indirectly, to influence its content and assure its compliance with local law. The movement towards privatisation and diversification of the ownership of media outlets has been common, although not universal, in Western and formerly Eastern Block countries. The movement began in the United States as a change from "the New Deal's social welfare orientation to 'Chicago School' economics."⁴ It has now spread to many Western countries. In the former Eastern Block, it accompanied the moves to liberate the broadcasting media from the stultifying control of the government and its stern discipline of the media in matters of politics, economics and public morality.⁵ In some Western countries, the Government monopoly on the audio visual media has been gradually eroded by new technology, such as cable television and direct broadcasting satellite television.⁶ Necessarily, in the case of satellite transmission, the geographic boundaries of the satellite's "footprint" are such that the media cannot any longer be considered local. The capacity of local laws to control such media - and to insist upon local public policy in matters such as culture, language and morality - is reduced accordingly.

Apart from Government ownership, there is also the phenomenon of private ownership of powerful new media forces. I refer not only to media barons, like the erstwhile Australian (now United States) citizen, Rupert Murdoch who controls many media outlets (print and electronic) in several continents. I refer also to the intercontinental and transnational media corporations. The very technology which has been described above has promoted their growth. It has extended their coverage, distribution and power. The implications of this development for governments and the rule of law were touched upon by the noted English news journalist, Mr Jon Snow, at a conference of the Fundacion BBV in Madrid last year. He suggested that the new *media* of communication had begun to alter the *message* being communicated. According to Snow television, in particular, is vulnerable to superficiality and inaccuracy. Over-simplistic news presentation with film has replaced, for many, the delivery of detailed news analysis or in depth consideration of issues. Glitz has replaced information.⁷ Delay, editing and reflective expert commentary previously promoted the sharing of more thoughtful messages than tends to come with the powerful intercontinental packaging of instant information. According to Snow, we are now, on every continent, increasingly receiving simultaneous coloured pictures with banal commentary, often in the form of entertainment and quite frequently directed (at least in the case of CNN) towards its substantial American audience of origin. Even more significantly:

*"In the developing world ... CNN is frequently unchallenged. The indigenous broadcasters simply don't have the financial or physical resources to compete with an external provider bypassing national transmissions with a global operation pumped in from outer space. Certainly it would help if a more balanced service could be made available to the developing world in competition with CNN."*⁸

Snow concluded in terms relevant to this paper:

*"There is a case for real regulation of international satellite transmissions. Whilst I want to maintain the absolute unfettered freedom of the skies, I see no difficulty in regulating ownership and broadcasting standards and asking the host government, from wherever the transmission originate, to police the regulations on behalf of, and in accordance with, the demands of a body established by the international community. But more urgently than anything, national governments must move to break up monopolistic domination of the television information market. It is potentially dangerous to allow such world-wide dominance to be vested in so few hands."*⁹

It is in this last message that there lies the principal message for governments, the judiciary and the rule of law in every country. Judicial independence involves the capacity of the judges to enforce compliance with their own jurisdiction's applicable laws and to make orders which will be obeyed within their jurisdiction. The point of this paper is that, in domestic jurisdiction, the power of the judges, by their orders to control the complex intercontinental and constantly changing media which I have described is now significantly diminished. It is not diminished by any law that has been passed. It has simply diminished by the fact of the global nature, dynamic growth and enormous power of the modern media of communications. It has also been diminished by the extremely powerful, and sometimes opinionated, interests which own or control the media and which do so in places far from the courtroom of the judge. The judge can, like King Canute in early Britain, command the tide to retreat. - But such commands will often be ignored, just as the waves ignored Canute.

This is not a tale of unalloyed gloom or judicial despair. Overwhelmingly, as I have demonstrated, the international media, propelled by the new technology, has been an instrument of liberation. Often its journalists aspire to high personal standards, sometimes taking considerable risks to bring immediate news to living rooms around the world. But the international media also bring problems for the rule of law in particular jurisdictions. In the balance of this paper, I wish to give a number of illustrations of how this has come about.

JURISDICTIONAL LAW: EXTRA JURISDICTIONAL MEDIA

Transborder Data Flows: A number of activities of my professional life have demonstrated to me the impact upon the law, and on judicial and legal authority, of the changing media of communications. In 1978, I was elected to chair a working group of the Organisation for Economic Cooperation and Development (OECD). It was concerned with developing Guidelines on the protection of privacy in the context of transborder data flows. The Guidelines were duly developed.¹⁰ They have influenced, and in some cases precipitated, domestic legislation in a number of countries, including my own.¹¹

The reason for the interest of the OECD, an economic body, in what might otherwise be regarded as the human rights concern of privacy, was essentially two-fold. The first, was a recognition that the proliferation of numerous incompatible national laws operating upon a single indivisible data flow could only lead to inconvenience, disharmony, ineffective law and, in the end, the dominance of the laws of the most economically powerful jurisdictions. Secondly, the common feature of OECD countries was an adherence to the rule of law and democratic government. It was realised that, with the advent of the new media of communications, a special challenge was presented to the governments of OECD countries to provide effective lawmaking by ensuring against a cacophony of disharmonious laws which would give rise to legal uncertainty and confusion in which lawlessness and anarchy would breed.

-It may not be true that there emerged in the OECD group evidence of the "basic philosophical dichotomy between the United States and the rest of the world over the ownership and control of communication systems" of which some authors have written.¹² But it certainly was true that serious differences emerged between the perspectives of privacy held by European countries (with the memories of the *Gestapo* and of authoritarian governments fresh in mind) and the "liberation" free-flow and free speech philosophy which is inculcated in United States citizens from their earliest childhood and upheld in the law by the *First Amendment* to the *Constitution* of their

country. Economic advantage sometimes reinforced these respective advocates of privacy protection and free-flow of data. But the important point for present purposes is that consensus was ultimately achieved, basic rules were laid down, a common approach to assure individual control (the right of personal access to data) was established and this régime influenced domestic laws in a way promoting respect for the law, the authority of local judges and individual human rights.

I believe that this is a model which should be utilised in international responses to problems of the modern media which are larger than the typical power of domestic jurisdiction to control. In 1991-2, I chaired a further working party of the OECD. This time it was concerned with the related problem of the security of information systems. As the media of communications have become more complex, and as more reliance is daily placed upon them, there is a need in some instances to assure the security (confidentiality, integrity and accessibility) of data. This working group, in turn, produced Guidelines on Security of Information Systems. One of the major proponents of action in this area was Japan. Japan is very concerned about the vulnerability of data: dependent as it is upon interlinked international information systems, not always subject to the level of security and assurance felt necessary.

One of the common problems presented by transborder data flows is the difficulty of assigning to a particular jurisdiction and individual the authority and responsibility to deal with the antisocial conduct in question. Jurisdiction, particularly in criminal law, has tended by international convention and domestic practice to be confined to the jurisdiction where the criminal act occurred. But in something as ephemeral as satellite broadcasts, wireless signals, telecommunications messages and interactive data systems, it is often difficult to pinpoint with certainty the jurisdiction with legal responsibility and to determine beyond doubt the forum of the judge with the necessary legal authority to act upon a complaint.¹³ Perhaps a more practical problem is present at a level long before a judge becomes involved. At one conference which I attended in Canada, we were told of many cases where prosecutors declined to initiate proceedings in Michigan in the United States because

of the difficulty of pursuing a data criminal across the lake in Toronto. The rule of law is challenged by such loopholes in the legal system and uncertainties about the authority of the judges and law enforcement officials.

Initiatives such as those taken within Europe by the Commission of the European Union, and by the Council of Europe, and the initiatives taken on an intercontinental basis by the OECD, point the way to the future. The rule of law, in the future, will increasingly be international in its content. This is merely a reflection, in the law, of the problems presented to society by international technology and the powerful interests which control or direct it.

Defamation law reform: A second field of activity where I was required to confront the changing nature and ownership of the media arose in the work of the Australian Law Reform Commission in 1979. I was then the Chairman of that Commission. The Commission was investigating the perennial problem of reform of the law of defamation. Australia has basically followed the English law of defamation. Persons defamed may sue to recover money damages that are provided as a sanction against wrongful hurt to reputation. As in England, the law provides no protection to privacy as such in the context of publications. Recommendations were made for significant reforms of the remedies available. The Commission drew upon the remedies available in the civil law systems which permit rights of correction and rights of reply, in lieu of money damages.¹⁴

A particular problem arose in this context within the Australian Federation. Until now, defamation law has been regulated at a State level in Australia. The sources of power for Federal regulation of such activity are limited, aside from the broadcasting media which are Federally regulated. The Law Reform Commission drew attention to the problem presented by this disparate regulation of the law of defamation in different ways, with different defences in each of the different jurisdictions of the one country, Australia. It also drew attention to the concentration of media ownership in Australia.

I only refer to these domestic concerns of my own country because, in microcosm, they present many of the same issues as are seen at work on the global level. Local laws, which worked quite well when defamation was local, work less well now that the same defamation can be spread across many borders. Local jurisdictions depended upon human decency and good manners to protect and respect individual privacy. They must now consider the legal protection of privacy in the context of the media which, for entertainment, delights in prying upon the famous or notable and in revealing the tragedies and scandals of their private lives.

The concentration of media ownership in relatively few hands has produced a tendency towards centralised control resting, ultimately, in media owners (who sometimes boast that there would be no point in owning such a corporation if they could not influence editorial policy and publication standards). Since the Australian Law Reform Commission report was written, the powerful and opinionated interests of the media have effectively delayed the implementation of the proposed reforms. The concentration of media ownership, noted by the Australian Commission¹⁵, has not changed very much in the past 15 years. The major change has been the entry into the Australian media of the Canadian media interests controlled by Mr Conrad Black. He now wishes to increase his holding in one of the major media outlets. Perhaps he is North American's answer to Mr Rupert Murdoch whose media empire began in Adelaide, South Australia and now embraces much of the world.

In dealing with the power and effectiveness of the judicial branch of government to respond to the defamations, contempts of court, invasions of privacy, misuse of personality etc, it is necessary to remember the way in which media technology has so radically changed since such laws were first fashioned in every jurisdiction. It is also essential to remember the transborder character of modern media and to reflect upon the multinational corporations which now tend to own them and to spread their messages beyond the jurisdictional power of domestic judges to provide protection to those who are harmed.

The Spycatcher litigation: The third context in which the foregoing *Realpolitik* was brought home to me, in a dramatic, way concerns the *Spycatcher* litigation. In 1988, in my capacity as a judge, I had to sit on one of the cases which concerned the attempt of the British Government to prohibit the publication of the memoirs of a former officer of the British Security Service, Mr Peter Wright. The Government succeeded in Britain in stopping the publication of a major extract from the book in British newspapers.¹⁶ Interim injunctions were also granted in Hong Kong. The book was withdrawn from circulation in Singapore. But then seventy thousand copies of it were printed in Australia. It was also proposed to publish extracts of it in the Murdoch newspaper, *The Australian*. To prevent this happening, urgent applications were made for injunctions out of the Supreme Court of New South Wales. These succeeded until Justice Powell¹⁷ concluded that the injunction should be lifted. He rested his conclusion upon the fact that much of the information in the book was already available to the public. The British Government appealed to my Court. By majority, the Court dismissed the application.¹⁸ The reasons varied. My own view was that it was not the function of Australian law to enforce the penal legislation of the United Kingdom in Australia. We would not enforce South Africa's *Official Secrets Act* or assist Libya to suppress the *memoires* of one of its spies. We should therefore not do so in the case of any other foreign nation. This was the view which ultimately prevailed in the High Court of Australia.¹⁹ It was held that Australian law would not vindicate the government interests of a foreign state, including the United Kingdom.

In New Zealand, the Court of Appeal came to a similar result. But upon a somewhat different basis. Relevant to its determination was the global reticulation of the information in Mr Wright's book and the undesirability of the courts offering their aid in a struggle so futile as the endeavour to suppress the book in the particular jurisdiction of New Zealand. Sir Robin Cooke (now a Member of the International Commission of Jurists) said in his judgment:²⁰

"The dominating factor leading us to refuse the injunction is the extent to which the contents of Spycatcher have already been published in the world. The book is a best seller in the United States. Similarly, it is freely available in Canada. Since the refusals of the interim injunctions by the High Court of Australia it has also become freely available throughout Australia. ... We were informed from the Bar that proceedings to prevent the publication in Ireland failed and that the book is available in both Northern Ireland and the Republic of Ireland. The temporary injunction upheld by the majority of the House of Lords did not extend to Scotland. In England itself there was the major publication already mentioned in the Sunday Times ... Many copies have been brought into England by travellers or otherwise imported, there being no restriction on doing so. Counsel also told us that the book is freely available in Europe and has been published beyond what were described as the iron and Bamboo Curtains. ... There have been importations of the book by individual citizens who have purchased it when overseas or who have ordered it from overseas, the right to do so being in no way restricted. Copies of overseas newspapers ... are regularly on sale in New Zealand. ... Quite apart from the ability to order from overseas, there is no reason to suppose that a member of the public, minded to acquire or borrow a copy, would have any real difficulty. We think it can be said without exaggeration that the general nature of the main allegations in Spycatcher is known all over the world. ... We do not overlook that there is a difference between mass and more limited circulation. Even bearing that in mind, the stage has been reached when, looking at the case from a New Zealand point of view, we have to describe the contents of Spycatcher as being in the international domain."

This was an eminently sensible and practical answer to the application facing the Court of Appeal of New Zealand at the time the judges had the claim for the injunction before them. But it does illustrate the limits of the power of the judiciary when faced by determined publishers, and international media having outlets in many jurisdictions, taking advantage of disparity between the laws of those differing jurisdictions and the limited effectiveness of an order made in one jurisdiction, to control what happens in others.

This is not a case for simply hanging up the judicial robe and abandoning the attempt to enforce the rule of law in the jurisdiction in which the judge has a responsibility. But it is an illustration of the practical limits which are placed upon the judiciary when seeking to discipline the modern media: motivated not unreasonably by financial gain, opinionated and sometimes even self-righteous in the espousal of free flow, with numerous outlets in many jurisdictions and backed up by instantaneous communications in the global broadcasting media with its symbiotic relationship to the global print media.

The judge in Wellington, New Zealand, Sydney in Australia, Seville in Spain or New Delhi in India will continue to issue orders. The limitations imposed by the growth of international multi-media interests cannot be ignored in any discussion of the effectiveness of such orders and thus of the interaction between the judiciary and the media today.

TERRORISTS, PORNOGRAPHY, ROYALTY AND SHEER POWER

Terrorists: Every country which has a threat from terrorists faces particular challenges to the rule of law and the independence of its judges. In Britain, the Home Secretary issued directives to the British Broadcasting Corporation, under its licence and agreement, and to the Independent Broadcasting Authority under the *Broadcasting Act* 1981, forbidding them to "support or solicit or invite support for such an organisation" ie the Irish Republican Army. The lawfulness of the directive was unsuccessfully challenged in the courts of England.²¹ It was argued that English courts should interpret the exercise of delegated and discretionary power under statute as being subject to the implied limitation that it would always comply with the *European Convention on Human Rights and Fundamental Freedoms*. The English Court of Appeal "unhesitatingly and unreservedly" rejected the idea.

The attempts to censor (and by censoring to distort) the news broadcasts of the BBC and of other British media has produced a great deal of heartburning in Britain and much popular and academic writing.²² My present purpose is not to canvas the

justifiability of the British Government's directives or the responses of the British courts to them. Terrorism, like war, puts very great pressures upon the courts to act with courage and neutrality in defence of the rule of law.²³ Sometimes the courts succumb to their perception of the urgent national predicament. Judges are citizens too; but citizens with great power and trust.

My purpose in mentioning this issue (which has its reflections in many other countries) is to draw attention to the obvious. If, as is increasingly the case, international news broadcasts are regularly received on multiple channels in every jurisdiction, it will be difficult, in a society of the developed world at least, effectively to enforce the kind of ban described above. The BBC may be forced to comply. It will pay a price in its hard-won and generally well deserved international reputation. The local law may have a local and national utility which will be enforced by local judges. But the directive will have limited practical effect upon international media conglomerates, such as CNN or the international print and electronic media that now flood into Britain. This is simply to point to the difficulty of the judiciary enforcing terrorism law, when the responses impinge upon a global media.

Pornography: Another illustration of this truth can be seen in the difficulties of enforcing laws which help define the peculiar cultural features of particular jurisdictions. Take the case of "Red Hot Television" (formerly known as "Red Hot Dutch"). This service, which started broadcasting in July 1992, sells a brand of hardcore electronic pornography to subscribers in possession of the necessary decoding equipment. The programmes are beamed, via a satellite linkup, from Denmark. In England, complaints were made by the Independent Television Commission (ITC) and the Broadcasting Standards Council. Nothing was done until March 1993. The responsible Minister (Mr Peter Brooke) then made an order proscribing Red Hot Television under the *Broadcasting Act* 1990 (UK) s 177. As a result of his order, any person who supplies decoding equipment or publishes programme details in respect of the service in Britain will be guilty of a criminal

offence under s 178 of the *Broadcasting Act*. Such a person will be liable to a fine, or to a term of imprisonment not exceeding two years.

This government response led to an application to the English courts for judicial review. Amongst the matters raised was the operation of EEC law. The Minister urged that the programme might "seriously impair the physical, mental or moral development of minors." The courts refused to intervene. It is expected that an appeal will be taken to the European Court of Justice.²⁴

Within Europe, both inside the European Union and in the wider context of the Council of European countries, there has been a great deal of attention to the development of common solutions to face up to the reality that technology will not conveniently stop at jurisdictional boundaries out of respect for the cultural and linguistic features of the communities there.²⁵

For every proponent of censorship, to uphold moral standards, there will be other advocates urging the right of adults to receive explicit sexual material and media "celebrating human sexuality".²⁶ Certainly, within the print media, such materials undoubtedly help to sell the media product. This is recognised by the large media houses in English-speaking countries which, in popular newspapers, regularly resort to the page 3 pin-up. Furthermore, the flood of popular international magazines such as *Penthouse* and *Playboy*, to say nothing of the X rated books, videotapes and other media readily obtainable in developed countries, attest to the changing social *mores*. They reflect a recognition of the demand of adult citizens to have access to media of their choice.

The market-driven availability of this material has undoubtedly changed the milieu in which judges operate in today's world. In November 1993 it was reported from Washington in the United States that the Federal Communications Commission (FCC) policy on sex on television had been overturned by the Court of Appeals²⁷ of the District of Columbia. The court decided that the US FCC policy which bans transmissions of sex and violence in television programmes between 6 a.m. and midnight was unconstitutional. The judges held that the *First Amendment* to the

United States *Constitution*, which guarantees freedom of speech, extended to this material. It is beyond question that the *First Amendment*, and the decisions of the United States Supreme Court and other courts upon it, together with the sheer power of the American media, revolutionised the practice, if not the law, on pornography throughout the Western world (and beyond) in the past twenty years. But it should not be thought that, even in the United States, this media and market-driven change has passed without controversy. There is a sizeable movement of feminists in the United States which urges effective legal prohibitions on pornography, although not always in a coherent or persuasive manner.²⁸ The courts in Canada have also had to face similar controversies.²⁹

It should not be thought that the issue of cultural values in a global media is one easy of resolution. In recent days, newspapers have recorded the protests of the Government of China to the United Kingdom concerning a BBC documentary, broadcast on 21 December 1993, suggesting that the former Chinese leader Mao Zedong had an insatiable sexual appetite for young women. The programme, *Chairman Mao, the Last Emperor*, was made to mark the 100th anniversary of Mao's birth. The BBC defended the programme, which it aired, stating that it was "a comprehensive portrayal of his rule that does record his contribution to the life of modern China". China sees such a programme as an affront to its cultural, political and moral standards. Britain sees it as an attribute of an uncontrolled media, not forced into the straight-jacket of political orthodoxy and hero worship. But with the programme being beamed to millions from satellite, copied onto video, summarised in news broadcasts and reticulated in newspapers and magazines, it will be as impossible for China to suppress the details as it was for Britain to suppress *Spycatcher*.

This is a salutary warning of the limits, not only of the power of judges but of the power of governments, democratic and autocratic. Often those limits will be seen as appropriate and even desirable. But if the end product is the destruction of cultural differences and the imposition of a single standard across the "American speaking tribe", the precious diversity of human cultures will have been mortally damaged.

Earnest endeavours of one government, with the aid of its media, to promote notions of equal opportunity, anti-discrimination and racial and religious tolerance may also be undermined by extra-jurisdictional media which carry quite different messages.

Presidential and royal privacy: Another aspect of the international media is the determined and persistent invasion of the privacy of the leaders of every nation. Mao is not alone. Nor is this phenomenon confined to the dead.

There seems now to be a concerted effort, of at least some media interests, to destroy the respect for public figures and, in the process, to invade mercilessly their privacy. President Clinton's alleged trysts are spoken of openly where President Kennedy's were discreetly unrevealed. The private telephone conversations of Prince Charles of England are broadcast and printed around the world where decency and respect for individuals and institutions restrained the media invasions into the life of his great great grandfather. Nor is the British Royal House alone in these invasions of privacy. It would now be difficult for Michael Jackson to secure a trial before a jury uninfluenced by the media circus which has surrounded the sensational accusations made against him. The trial of Mr Kennedy Smith was watched by millions, possibly billions, around the world on CNN. I saw it in Lesotho in Southern Africa! What was so special about that trial? It was a rather ordinary case of sexual assault. All that was special was that the event happened in the Kennedy compound at Palm Beach, that Senator Kennedy was there and that the accused was related to the famous family. These are the ingredients of entertainment. The legal process in an actual trial is reduced to glitz, glamour and spectacle. The accused is offered up upon a global altar, as the star of this week's soap opera.³¹ The judiciary which becomes caught up in such entertainment, by the public televising of its process, will struggle (sometimes successfully, sometimes not) to maintain the dignity and justice that is the accused's due. But these are not the media's concerns. Jurists should be in no doubt that the media's concerns are entertainment, money-making and, ultimately, the assertion of the media's power.

Sheer power: As a by-product of the media's own realisation of its great power we have seen that power wielded in recent times against the rule of law and the independence of judges and lawyers.

An appreciation of the extreme difficulty which the law has in controlling the global media, enhances the belief in some quarters that some, at least, of the organs of the media are now effectively beyond legal control and judicial orders. This was the warning given by Jon Snow to which I referred at the outset of this paper.

If the global media can invade the privacy of Royal Families of several countries and the personal lives of Presidents, if it can effectively override local laws established for local cultural, linguistic or moral objectives, if it can set the agenda of national and international concerns for its viewers and listeners, promote its own causes and turn issues on an off at will, we have on our hands an important challenge to the rule of law. The very instrument which is potentially such a defender of human rights, and the vehicle for one of the most important and precious of those rights, the media, can become a threat to other basic rights and interests - to reputation, to privacy, to fair trial, to effective democracy.

It is natural enough that the media should tend to favour change. Change is news. More of the same is no news and will be perceived as boring. An inclination to change is probably quite healthy. But some judicial commentators are now asserting that the media often promote particular kinds of persons for appointment to the judiciary and attack those who do not fall into their pre-conceived mould. In the United States, Federal Court of Appeals Judge Laurence Silberman of the District of Columbia told the Federalist Society that the media was actually manipulating judicial appointments, by campaigns of political correctness designed to diminish vigilant independence and fidelity to the law:

"Who wants martyrdom for upholding the constitution's separation of powers or long-headed principles of interpretation that are denigrated as 'esoteric' or 'archaic' by reporters intoxicated with results? Who wants to risk a media beating a la

Judge Bork in a Senate Confirmation Hearing? Only a diminishing number display the intellectual incorruptability of Socrates and, thus, ... unflinchingly risk media obloquy and a seat on the Supreme Court to safeguard constitutional truths. This is healthy neither for enlightened law nor the public weal. Constitutional principles, by definition, stand above media kudos or public opinion polls. To paraphrase Justice Robert Jackson, their vitality should not turn on the vicissitudes of political controversy or journalistic passions."³²

In Australia in the past two years there has been unprecedented media criticism of the judiciary. Much of it has been focussed on alleged gender bias, conservatism and the need for change. Like any institution, the judiciary is probably improved by such criticism. The old days when such critics were suppressed by the law of contempt of court and of scandalising the court have gone. But more lately, the attacks on the judiciary in my country have turned feral. Judges, who cannot easily engage in public controversy, are attacked for their decisions. They are followed along public streets by television cameras and interviewing media harassment. A strident campaign is mounted against particular judges, with little attention to their faithful service to the community or the justifiability of the attack.³³ Informed and thoughtful criticism of the judiciary is a positive blessing in a free society. But personalised media campaigns, generalised opprobrium, inaccurate stereotyping and dismissive attacks on vital institutions all threaten judicial independence. And if public confidence in the judiciary is destroyed, what will be left? Evidence has it that politicians in all Western democracies are no longer generally trusted and respected as a group. The Church has lost most of its influence. The academics have retreated into their ivory towers. Royal Families and Presidents are denigrated and pulled down. The bureaucracy is derided. What, then, is left to defend our liberties? The investigative journalist! Alas, with a short attention span. Usually with a ferocious requirement for entertainment. And often with the insistent need to bring in the big bucks.

There are of course honourable exceptions to this melancholy picture of the global media. But one of the central challenges to democratic societies in the decades ahead will be to respond to the dangers presented to the rule of law by these features of media technology and multi-national ownership. The answers will not lie in oppressive local legislation, most of which would be ineffective, or partly so. Nor will they lie in international agreements for licensing journalists or for requiring "balanced" coverage, as UNESCO once proposed. They will lie in seizing the great potential of the modern media to provide a multitude of voices and to advance freedom, imagination and the quality of life, whilst at the same time lifting standards, respecting diversity of opinion and curbing excesses. The excesses involve the diminution of the rights of others: depriving those accused of a fair trial, destroying the reputations of those who cannot quickly and effectively answer back, invading the privacy of other human beings, high and low, manipulating public debate and reducing our diverse world to a dull custard of uniformity and homogeneity.

Some will say that the law, national and international, cannot stand up against the powerful combination of new technology and the opinionated ownership of the media. That the judges are neutered in defending basic human rights against such potent global forces. But if the rule of law is to survive this challenge, we must find the answers which will render the global media accountable to the government of laws, nor of men. No consideration of the media and the judiciary today can overlook this basic paradox. The media technology, which is such a potential liberator, can, in the hands of a powerful few, bestride the narrow world like a Colossus. It can do irretrievable wrongs to individuals. It can diminish cultural and linguistic diversity. It can reduce large issues to froth and bubble. And it can challenge the rule of law itself.

FOOTNOTES

- * Chairman of the Executive Committee of the International Commission of Jurists. President of the New South Wales Court of Appeal, Australia. One-time Chairman of the Australian Law Reform Commission and former Judge of the Federal Court of Australia.
1. L M Harasam, *Global Networks*, MIT Press, Cambridge, Mass, 1993, 4f.
 2. Huxley quoted *ibid*, 8.
 3. W Gibson quoted *ibid* 9.
 4. E G Krasnow and M Botein "Deregulation of Broadcasting in the United States: Quo Vadimus?" (1986) 7 *J Media Law and Practice*, 56.
 5. G L Peiris, "Media Law" [1993] *New Zealand Law Journal*, 388.
 6. I C de Baillon, "The Legal Framework of French Television" (1987) 8 *J Media Law and Practice* 150.
 7. J Snow, "The Role of Communication and Information in Contemporary Society", unpublished paper for a preliminary meeting of the Cross-Cultural Debate, sponsored by the Fundacion BBV, Madrid, 1992, 6.
 8. *Ibid*, 10.
 9. *Id*, 11.
 10. Organisation for Economic Cooperation and Development, *Guidelines on the Protection of Privacy and Transborder Data Barriers*, Paris, 1980.
 11. *Privacy Act* 1988 (Aust).
 12. A W Branscomb (ed) *Toward a Law of Global Communications Networks*, Longmans, New York, ix.
 13. See eg L O Smiddy, "Choosing the Law and Forum for the Litigation of Disputes", in Branscomb, above, 299.

14. Australia, The Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Aust Govt Publishing Service, Canberra, 1979.
15. *Ibid*, 23.
16. *Attorney-General v Guardian Newspapers Limited* [1987] 1 WLR 1248 (HL); *ibid* [No 2] (1988) 2 WLR 805 (CA).
17. *Attorney-General (UK) v Heinemann Australia Pty Ltd* (1987) 8 NSWLR 341 (SC). See also Discussion M Blakeney, "Protecting the secrets of a foreign government: 'Spycatcher' in Australia" (1988) 9 *J Media Law & Practice*, 13.
18. *Attorney-General (UK) v Heinemann Australia Limited* (1987) 10 NSWLR 86 (CA).
19. (*Ibid*) (1988) 165 CLR 30.
20. *Attorney-General for the United Kingdom v Wellington Newspapers Limited* [1988] 1 NZLR 161 (CA), 183.
21. *R v Secretary of State for the Home Department; Ex parte Brind* [1990] 1 All ER 469.
22. "At the Edge of the Union - censorship and constitutional crisis at the BBC" (1985) 6 *J Media Law and Practice* 277.
23. Cf *Liversidge v Anderson* (1942) AC 206 (HL), 227; *Inland Revenue Commissioner v Rossminster Ltd* [1980] AC 952 (HL) 1000; *George v Rockett* (1990) 170 CLR 104, 112.
24. A Coulthard, "Dutch Television - Too Red Hot for UK!" (1993) 14 *J Media Law and Practice* 116.
25. H Olsson, "Council of Europe and Mass Media Law" (1986) 7 *J Media Law and Practice* 64.
26. R Walsh, "Celebrating Human Sexuality in Print" (1993) 1 *Free Speech* 1 (Aust).
27. See report, *The Times*, (London) 25 November 1993, 13.
28. See eg R A Posner "Obsession" - a book review of *Only Words* by Catharine A MacKinnon in *The New Republic*, 18 October 1993, 31.

29. J McLaren, "New puritans: O - free speech united: O - the great Canadian pornography shootoff" (1988) 9 *J Media Law and Practice*, 128.
30. Reported *Sydney Morning Herald*, 20 December 1993, 3.
31. See "Media Coverage of the Courts, Judicial Decisions and the Judiciary" (1992) 140 *Federal Rules Decisions* 512, 517.
32. B Fein, "First Amendment - Yes: the Press Loves Activists" *ABA Journal*, October 1992, 48.
33. Sir Anthony Mason, Chief Justice of Australia, "The State of the Judicature" - an Address to the 28th Australian Legal Convention, Hobart, Tasmania, 30 September 1993, 18. See also R D Nicholson, "Judicial Independence and the Conduct of Media Relations by the Courts", (1993) 2 *J Judicial Administration* (Aust) 207 and M D Kirby, "Government, Media, Judiciary" (1993) 2 *J Judicial Admin* (Aust).