



Commonwealth Law Reform Agencies Conference

31 March 2000

Law Reform in Australia and the Asia Pacific Region

By the Hon David K Malcolm AC
Chief Justice of Western Australia

Ballroom, Duxton Hotel
1 St Georges Terrace, Perth



My Lord, Chief Justices, Your Honours, Mr Attorney, Ladies and Gentlemen,

I am delighted to have the opportunity to speak to this gathering of law reformers this afternoon. Law reform on a global scale requires, and must necessarily have, at its core, the co-operation of law reformers of countries of differing political, social and economic paradigms in order to have any chance of coming to grips with even the most basic legal reform concepts. Law reform covers a vast area of legal issues from the complex concerns of a treaty between foreign neighbours to the seriousness of judicial corruption.

I do not think it would be an overstatement to say that we live in exciting times in the context of international relations and the rapid advances in technology. In recent times the advent of high-speed communications and the increasingly global nature of economics has meant the development of a close bond between the nations in the region. Where the Asia-Pacific region was once the arena for combat of Western powers and then Western political ideologies, it has now become one of the most politically and economically important regions in the globalisation of world trade. Many Western markets are still coming to terms with the effects of the recent economic crises in Asia and how technology it will effect them.

The rapid nature of information exchange and the increasingly porous nature of international boundaries through electronic communications and the movement of capital and labour have presented a range of new issues in the administration of justice, the Courts and the role of the Courts, particularly in newly liberalised economies. International trade has raised issues concerning both substantive and procedural aspects of the law. Foreign investment in the region and the increasing affluence of particular socio-economic groups in countries throughout the Asia Pacific has seen an enormous demand for the reform of the law and the methods of its enforcement in order to provide consistency and coherency in commercial



relationships. The International Trade has raised issues concerning both substantive and procedural aspects of the law. Foreign investment in the region and the increasing affluence of particular socio-economic groups has seen enormous demand for reform of the law, methods of enforcement, in order to provide consistency and coherency in commercial relationships. These factors have been referred to by the Chief Justice of Singapore as Trade, Technology and Tribe:

“Trade would refer to trends in international economics, the flow of goods and services and investments. Technology represents the broad implications of scientific advancement while Tribe describes how socio-economic forces can bind communities together or pull them further apart.”¹

It has now been recognised that an effective legal system administered by an independent judiciary is essential to the infrastructure of a community as the infrastructure of transport, communications, legislative, financial and administrative systems in a country. There have been some landmark developments in law reform in the Asia Pacific Region in recent years. Some of these have been the result of the efforts of the members of LAWASIA, the Law Association of Asia and the Pacific which was mentioned earlier. The *LAWASIA* Region is co-extensive with the region covered by the United Nations Economic and Social Committee for Asia and the Pacific ("*ESCAP*"), and following the collapse of the Soviet Union it now includes the Russian Federation: countries like Kazakhstan, Uzbekistan, Kyrgyz Republic, as well as former countries who were members and still are from Afganistan in the east swinging around Korea, down to New Zealand and Samoa in the Pacific Ocean, and across to Sri Lanka in the Indian Ocean.

For some years now I have been the Chair of the Judicial Section of *LAWASIA* and I have been responsible for the organisation of the bi-ennial

¹ The Hon Yong Pung How, Keynote Address to the Asia Pacific Courts Conference, Manila, the Philippines, (1998) 1 *Courts Systems Journal* 138 at p. 147



Conference of Chief Justices of Asia and the Pacific since 1989. In recent years the Conferences have been attended by the Chief Justices of some 25-30 countries in the Region.

The Conference of Chief Justices is convened on behalf of the *LAWASIA* Judicial Section and, as is now the practice, held contemporaneously with the general *LAWASIA* Conference. The *Conference* is held on a biennial basis. The First Conference took place in Penang, Malaysia 1985 and subsequent Conferences have been held in Islamabad, Pakistan 1987; Manila, Philippines 1989 and 1997; Perth, Australia 1991; Colombo, Sri Lanka 1993; Beijing, People's Republic of China 1995; and Seoul, Korea, 1999. The Chief Justices Conference was first held in conjunction with the *LAWASIA* Conference in Perth in 1991.

At the 6th Conference of Chief Justices of Asia and the Pacific ("the Conference") held in Beijing, in August 1995 the Conference adopted the *Beijing Statement of Principles of the Independence of the Judiciary* as a statement of minimum standards to be observed in order to maintain the independence and effective functioning of the Judiciary in the Region.² This is really quite a remarkable development which was foreshadowed by the United Nations when they adopted their basic *Principles on the Independence of the Judiciary* and recommended that in the various regions of the world the judiciary get together and adopt statements which were applicable to their particular regions. The Asia Pacific Region is the first region in the world where such a set of principles has been adopted.

It is almost universally acknowledged that one of the most fundamental aspects of the protection of human rights and the rule of law is the maintenance of an independent judiciary. There are a number of definitions, which have been advanced of judicial independence. Most academic definitions centre upon the absence of

² Nicholson, RD *5th Conference of Chief Justices of Asia and the Pacific: Evaluation Report* at 24.



external influence in the administration of justice. For example, judicial independence has been defined variously as:

“... the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice free from coercion, blandishments, interference, or threats from governmental authorities or private citizens.”³

or, in the context of a parliamentary democracy:

“... the capacity of the Courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.”⁴

It has been suggested that there is an additional aspect to judicial independence that many of these definitions omit, that is, the extent to which the judiciary holds the public confidence that they are the appropriate body to determine what is right or wrong⁵.

The maintenance of public confidence in the impartiality of judges is essential to public acceptance of the law and the legal system. A loss of that confidence can lead to instability and threaten the existence of society. The link between the independence of the judiciary and judicial impartiality is not however well understood. One of the means whereby the links between independence and impartiality can be articulated is in the setting of minimum universal standards to

³ Rosenn K., “The Protection of Judicial Independence in Latin America” (1987) 19 *University of Miami Inter-American Law Review* 1

⁴ Sir Guy Green, “The Rationale and Some Aspects of Judicial Independence”, (1985) 59 *Australian Law Journal* 135

⁵ Larkins C., “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis” (1996) 44 *American Journal of Comparative Law* 605 at p. 610



protect judicial independence and thereby preserve judicial impartiality. Since the early 1980s, development of the concept of judicial independence at the international level, in particular by the enumeration of its key features, has proceeded apace through instruments such as the International Bar Association's *Minimum Standards of Judicial Independence* (1982) ("*New Delhi Standards*") and the United Nation's *Draft Principles on the Independence of the Judiciary* (1981) ("*Siracusa Principles*"), the UN *Basic Principles on the Independence of the Judiciary* (1985) ("*Basic Principles*") and *Draft Universal Declaration on the Independence of Justice* (1989) ("*Singhvi Declaration*").

The *Beijing Statement* is one that is quite comprehensive and I do not propose to give any detailed exposition of it. What it does do is provide a common definition of the judicial function that is accepted by Judges in many countries in the Asia Pacific region: some 30 countries. Article 10 of the *Beijing Principles*⁶ provides that the objectives and functions of the Judiciary include:

- (i) *to ensure that all persons are able to live securely under the Rule of Law;*⁷
- (ii) *to promote, within the proper limits of the judicial function, the observance and the attainment of human rights within its own society;*⁸ and
- (iii) *to administer the law impartially between citizen and citizen and between citizen and State.*⁹

These functions complement and overlap each other. For example, it is to the Judiciary that the power of, and responsibility for, resolving disputes according to

⁶ See also *Singhvi Declaration* Art. 1.

⁷ *Beijing Principles* Art. 11 (a).

⁸ *Beijing Principles* Art 11 (b).

⁹ *Beijing Principles* Art. 11 (c).



law is given.¹⁰ The natural consequence of this allocation of responsibility is that, the judicial power must be exercised by a consistent and unwavering application of the Rule of Law. It follows that the Judiciary must apply the Rule of Law impartially to matters brought before it. As one judge has put it:

*"The exercise of ... judicial power ... requires that judicial decisions be made 'according to law'. If the power is exercised on some other basis, and particularly as the consequence of influences whether of power, policy, private thoughts or money, it follows that an essential requirement of the judicial power is negated."*¹¹

In turn, a consistent, impartial and unwavering application of the Rule of Law tends to protect persons from the infringement of human rights, to the extent that they are recognised by the Rule of Law which applies in a particular country. There is room, within the historical and cultural context of a country, for a legitimate debate about the appropriate scope of human rights within that country. However, in so far as those rights are recognised, the Judiciary can play an important part in upholding them, whenever there is a powerful attempt to abridge them in an ad hoc or arbitrary manner. As Mr L.V. Singhvi observed in his Final Report to the United Nations Commission on Human Rights in 1985:

*"The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice."*¹²

One area in which there is a potential threat to the independence of the judiciary is the financing of the work of the Courts. In this respect it must be accepted the Courts will remain dependent, to an extent, on government for the

¹⁰ See generally Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 410-411.

¹¹ Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 405.



provision of funding to operate the Courts in the same way as any other arm of Government. The provision of Court infrastructure, things as basic as office space, filing cabinets and typewriters, is an important part of the efficient and effective administration of justice. A lack of funding of Court structures, resulting in the under-staffing of judicial positions and the lack of court facilities is often the root cause of delay and congestion in Courts¹³ and a loss of confidence in the legal system as a whole. In April of 1997 the then Chief Justice of Australia, Brennan CJ, announced in the course of opening the 12th South Pacific conference in Sydney that the eight Chief Justices of Australia's States and Territories had that day released a *Declaration of Principles of Judicial Independence* relating to judicial appointments.. It contains a set of principles adopted by the Chief Justices applicable to Australian circumstances.

Coinciding with this public announcement the Chief Justices published a statement to the same effect, and in the statement the Chief Justices referred to the *Beijing Principles* indicating that the *Declaration* specifically took them into account and said:

“ . . . in any state or country, the key to public confidence in the judiciary is its manifest impartiality.

There is a crucial link between judicial impartiality and the principles of judicial independence, understood as a set of protective safeguards. This Declaration of Principles, like the Beijing Principles, has as its aim the articulation and promotion of the principles of judicial independence.”

The *Beijing Principles*, by articulating the benchmark principles of judicial impartiality and the Rule of Law, have the potential to make a substantial

¹² Singhvi, LM *Final Report* (1985) at n44.

¹³ Shihata I., *supra* n. at p. 152



contribution to both the social and economic development of the Asia-Pacific Region. As the Secretary General of the International Commission of Jurists has said:

*"Far from being a luxury for a poor state, a legal structure which is quantitatively and qualitatively sufficient to carry out the services expected of it must be considered one of the necessary components of a society and a precondition for its progress."*¹⁴

The adoption of the *Beijing Principles* represented the achievement of a remarkable consensus between the Chief Justices of a range of countries - from the two countries with the world's largest populations to some of the smallest. It was also necessary to accommodate the differences between those countries within the common law tradition and those within the continental or civil law systems. The common law tradition is reflected in a high degree of judicial independence and the absence of a career judicial service, with appointments made largely from the ranks of the private profession. The civil law system reflects both a collegiate system and a career judicial service undertaken as an alternative to private practice. There are also significant differences in the approach to procedure as between the common law adversarial system and the inquisitorial system. The authoritarian traditions of some countries mark them off from those with more democratic traditions. There are numerous variations across a wide spectrum, many of which reflect the divergent cultures of the different countries in the region. The achievement of a consensus on the principles of the independence of the Judiciary in the Asia-Pacific Region was a tribute to the determination of the Chief Justices to reach agreement on the minimum standards necessary to secure judicial independence in their respective countries.

The *Beijing Principles* were only one of the recent landmark developments in the Asia Pacific Region. The business world operates in a global village. Whilst this

¹⁴ Dieng, *A The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (1992) at 35.



has its economic rewards, disputes between parties to commercial transactions who reside in different countries create a range of problems regarding service of process, taking evidence abroad, the enforcement of judgments and the like. There are very few countries in the Region which are parties to individual agreements or treaties in the area. Recognising the need for appropriate arrangements to deal with these problems the *Seoul Statement on Mutual Judicial Assistance in the Asia Pacific Region* was adopted by the Chief Justices at the Seoul Conference in 1999. The *Statement* said:

The prompt and fair resolution of civil and commercial disputes between residents of different countries in the Asia-Pacific region requires the establishment of procedures for the efficient and effective service of process, taking of evidence and enforcement of judgments by a resident of one state in the territory of another¹⁵.

It was recommended to the Government of countries in the Region that “ *the formation of a strong network of arrangements on the service of process, taking of evidence and enforcement of judgments between countries*” was necessary in order to achieve this objective. Annexed to the Statement was a proposed *Treaty on Judicial Assistance in Civil and Commercial Matters between Australia and the Republic of Korea*. That treaty was signed shortly after the Seoul Conference. It is hoped that this treaty will be used as a model and will encourage other countries in the region to adopt similar treaties. For example, notwithstanding the interchange of trade and people as between Korea and Japan, Korea and the People’s Republic of China and other areas, no treaties exist between those countries. In fact, there are only one or two agreements that currently exist. I suppose the most important of them from Australia’s point of view is the agreement between Australia and New Zealand which has, in practical terms, the effect that while separate jurisdictions are maintained the

¹⁵ *Seoul Statement on Mutual Judicial Assistance in the Asia Pacific Region*



jurisdiction can be exercised by judges of New Zealand in Australia and Australian judges in New Zealand as if they were in their own jurisdictions.

At the 7th Conference in Manila in 1997 the Chief Justices debated a paper on judicial corruption. The paper contained the results of a survey conducted, prior to the conference, of 21 countries in the LAWASIA region on the issue of judicial corruption.

At the same Conference there was a session which focussed on accessing world wide information networks through the Internet, presented by Dr Greenleaf, who is the architect of the AUSTLI program in Australia, whereby the judgments of participating courts in the scheme are available on the Internet very shortly after publication. We have a system in place in Western Australia whereby our judgments are put on AUSTLI on the Internet within 24 hours of publication. I think we currently hold the record, which is 45 minutes after the publication in Court.

Since 1996 there has been a strategic relationship between Western Australian Courts and the Singapore Courts and in particular at the Subordinate and District Court level. The relationship was originally proposed by the Chief Justice of Singapore. The Courts in both Singapore and Western Australia had a common interest in the use and development of Court technology in case management.

The most recent development from this relationship is the development by the Singapore Courts of the eJustice Judges' Corridor. This is a multi-jurisdictional judicial cluster established and organised by the Subordinate Courts. Its purpose is *to brainstorm court governance and jurisprudential issues and provide an opportunity for the diffusion of ideas*¹⁶.

¹⁶ Keynote Address of the Hon the Chief Justice Yung Pung How, Republic of Singapore, 8th Workplan Seminar 1999/2000.



The eJustice Corridor, is an e-mail network of a multi-jurisdictional character which has been organised by the Singapore Courts to brainstorm court governance and jurisprudential issues and provide an opportunity for the diffusion of ideas. The next topic listed for discussion on the e-Justice corridor, which has been subscribed by judges in the region, is judicial reform.

In 1978 the international Commission of Jurists established the Centre for the Independence of Judges and Lawyers (CIJL) in 1978 “*with the global mission of promoting and protecting judicial and legal independence*”. The protection of judges and lawyers from persecution is a difficult task and one that requires constant vigilance and intervention by way of fact-finding missions or at the level of observing trials of the persecuted jurists.

The protection of judges and lawyers from persecution is a difficult task and one that requires constant vigilance and intervention by way of fact-finding missions or at a level of observing trials of persecuted jurists, and it was as a result of that work that the position of the United Nations Rapporteur was established. The centre has recently held a seminar just in February this year on *Combating Judicial Corruption*. The Conference adopted a policy framework for preventing and eliminating corruption and ensuring the impartiality of the judicial system. The framework has six aims that focus on the prevention, exposure and elimination of judicial corruption for the purpose of creating an increasing public confidence in the judicial system.

The Chief Justice of Singapore, whom I referred to earlier, has said that the emerging economy and society is one which is premised upon, and shaped by, knowledge and knowledge workers. Knowledge, as embodied in human beings as “human capital” and in technology, has always been central to economic development”. The advent of high speed communications and electronic commerce has the potential to change the face of business dramatically. The law in respect of



one of the most fundamental aspects of real estate law, indeed all business, namely the communication of offer and acceptance in contract, faces significant change. Electronic signatures and the instantaneous communication of both offer and acceptance means that many of the traditional methods of business may need to be reconsidered. On a more personal level, the courteous exchange of carefully worded correspondence has been replaced by the curt, short-hand nature of e-mail communications.

There can be little doubt that electronic mail, or e-mail, and electronic commerce have achieved a staggering level of popularity in a short space of time. Although in development by the United States Department of Defence since the 1960's, the Internet was only opened to commercial traffic in 1991. The World Wide Web is an even more recent development having been publicly launched in 1993¹⁷. It was estimated that there would be at least 200 million users of the Internet in 1999¹⁸.

One of the potential uses of the Internet, which is quickly being realised by the private sector, is to attract customers. With the potential number of users being in the millions, the World Wide Web represents an inexpensive method of advertising a product and identifying buyers from all over the world. With the potential numbers of users being in the millions the worldwide web represents an inexpensive method of advertising a product and identifying buyers from all over the world. The United States Department of Commerce has estimated that by 2002 the Internet will be used for business worth more than US\$300 billion annually¹⁹. In his address to the Australian Information Industry Association in December last year, the Commonwealth Attorney General, the Hon Darryl Williams QC MP said:

¹⁷ Adams M., Kuras R. And Law J., Putting Australia on the New Silk Road: The Role of Trade Policy in Advancing Electronic Commerce, (1997) at p. 12

¹⁸ Brown, "Obscenity, Anonymity and Database Protection: Emerging Internet Issues", 14 *The Computer Lawyer* 1 at 1

¹⁹ United States Department of Commerce, *The Emerging Digital Economy*, (1998) at p. 43



“The Government believes that electronic commerce is a key factor in ensuring Australia’s future prosperity... [T]he current growth in the Australian Internet consumer market has been unprecedented. The latest figures from the bureau of Statistics show that Internet usage has increased 30% in the last six months, and is up almost 50% from the levels recorded in February this year.”²⁰

The latest figures from the Bureau of Statistics show that Internet usage has increased 30 per cent in the last six months and it is up almost 50 per cent from the levels recorded in February this year.

The use of electronic communications will have a significant impact on the law and, in particular, the law of contract. At an international level, work is currently underway on reaching uniform standards on electronic commerce in a number of fora including the United Nations Commission on International Trade Law, the World Intellectual Property Organisation, the OECD, the World Trade Organisation and APEC. A great deal of work has already been undertaken at a Commonwealth level.

Despite the potential for commercial growth, which is offered by electronic commerce, Western Australia remains largely unprepared to do business on the Internet. Take, for example, the formation of a contract for the sale of goods or land. As you know, a contract for the sale of any item requires the communication by the buyer of his or her acceptance of the offer to the seller. This is not a problem where the buyer and seller are face to face; communication occurs when the seller receives the message. Unless some other law has been stipulated, the law which applies to the contract is the law of the jurisdiction in which the bargain was struck.

²⁰ The Darryl Williams QC MP, Speech to the Australian Information Industry Association, 14 December 1998; Available on <http://law.gov.au/ministers/attorney-general/Articles/AusInfInd.html>



The ability to conduct business via the Internet means however that the parties need not be face to face. When then is communication of acceptance take to have been received? Where has the contract been made? The Supreme Court of New South Wales in *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd*²¹ and the Supreme Court of Queensland in *Express Airways v Port Augusta Air Services*²² have applied the rule which applies to face to face negotiations to forms of communication which are effectively instantaneous. These issues have already come before the Courts in NSW, Queensland and Western Australia. That is, communication of acceptance occurs, and the contract is made, when and where the seller receives that communication. In both cases, the Court dealt with telex communications. Both Courts held that the communication of acceptance was effective when the telex was received. The New South Wales Court of Appeal has applied the same rule in relation to facsimile transmissions²³.

One assumes that, applied to e-mail communications, communication of acceptance would be effective when the electronic message comes to the attention of the seller. There has been a tendency to apply the law as it applied to telex communications. In Western Australia the rule in relation to telex communications has not been rigidly applied. In *Leach Nominees Pty Ltd v W Wright Pty Ltd*²⁴, one case before us recently the buyer did not own a telex machine and could only respond to the seller's telex message through the public telex exchange. Master Seaman, as he then was, referred to the speech of Lord Wilberforce of the House of Lords in *Brinkibon Pty Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH*²⁵ in which His Lordship said:

21 [1981] 1 NSWLR 366

22 [1980] Qd R 543

23 *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 97-325 (NSW CA)

24 [1986] WAR 244

25 [1982] 1 All ER 293



“No universal rule can cover all ... cases; they must be resolved by reference to the intentions of all parties, by sound business practice and in some cases by a judgment where the risks should lie.”²⁶

Looking to the intention of the parties, Master Seaman held that, given that the seller knew the buyer only had access to a public telex office, and that the buyer would never know whether his acceptance had been successfully received by the seller, the communication of the acceptance was effective when the buyer gave the message to the public telex office to be sent²⁷. Although the decisions in the Supreme Courts of New South Wales and Queensland are persuasive, the position remains undecided in Western Australia and, taking into account the decision of Master Seaman, may remain to be determined on a case by case basis.

Some consideration has already been given to accepting computer records as “writing” in the context of their admission in evidence pursuant to the provisions of the *Evidence Act 1906*. The *Evidence Act* was amended in 1966 to simplify the process of admission of documentary evidence. “Documents” are defined in s. 73A of the Act to include:

“[A]ny book, plan, paper, parchment or other material or part thereof on which is any writing or printing or which is marked with any letters or marks denoting words or any other signs capable of carrying a definite meaning to persons conversant with them;

In the recent decision by the Court of Criminal Appeal in *Markovina v R*²⁸ the Court was called upon to consider whether a printout of the contents of two electronic diaries could be admitted as “documents” pursuant to the provisions of the *Evidence Act*. The printouts themselves could not be considered to be the documents

²⁶ [1982] 1 All ER 293 at 296

²⁷ Ibid at 251

²⁸ (1996) 16 WAR 354



as they were merely reproductions. The “documents” for the purpose of the Act were electronically stored. In the course of my reasons I said:

“There can be no question in the present case that the material in the printout truly reproduced the material stored in the computer, so that no question of it being inexpedient to admit the reproduction named arises in the context of s73F of the Act. In my opinion, the advent of the computer screen should be regarded as creating a new class of document insofar as it comprises a screen which constitutes material on which there is writing or printing within the meaning of the definition of ‘document’ in s73A. Further, I am of the opinion that a printout of computer output is a ‘reproduction’.”²⁹

More recently in *R v Hobby & Anor*³⁰, the Hon Justice Scott assumed for the purposes of the Act that a computer record, reproduced in a printed form, constituted a “document” for the purposes of the *Evidence Act*.

The ability to access, retrieve and send information from remote sites via e-mail also has the potential to change our concept of work. It is now possible for an employee to work from his or her own computer at home. This is simply one aspect of the potential for a general decentralisation in almost all aspects of our community. Improvements in technology increase the potential for all forms of social interaction to be undertaken via the internet in areas as diverse as schooling, aspects of health care or shopping for everyday items. There is, however, little research on the effects of losing opportunities for social interaction with others.

The use of e-mail also raises a number of issues in terms of the freedom of personal expression. The international nature of electronic communications raises some difficult international legal and political questions. There are some important questions of morally objectionable or indecent material which might be regarded as

²⁹ Ibid at 384



being of a kind which would foment difficulties. The issue which immediately comes to mind is the exchange of child pornography by internet users. That is clearly objectionable and there would be little debate over the general nature of the material. What, however, of messages, images or literary works which we do not consider subversive or objectionable or which are simply banned in the country in which they are being viewed, having been transmitted from Western Australia? Unlike electronic communications and digitised information, definitions of “objectionable” are not common to all peoples. This is the point at which single State regulation of internet use is often clumsy. What if a local electronic publisher were to digitise Salman Rushdie’s work, *Satanic Verses* and published it internationally on the Internet. The work is fairly innocuous to Western readers but I am sure you are all aware of the level of government and public sentiment in middle eastern countries. What if a local author were to release on the Internet a short story on human rights abuses in Tibet and what parties would have any power or jurisdiction in relation to those methods? Could Iran or the Peoples’ Republic of China apply for extradition of the publisher and author to their respective jurisdictions or, alternatively, try the respective parties *in absentia* for violation of local regulations and restrictions on literature?

The difficulty of regulating Internet use has resulted in some Draconian methods of control in other jurisdictions. In the Peoples’ Republic of China, Internet users are required to register with their local police stations. In Vietnam, Internet access is restricted to universities and government agencies. In Saudi Arabia, access is limited to companies, hospitals and universities³¹. The total prohibition of electronic communication is however unrealistic and I suspect impossible to enforce.

Even the partial prohibition of certain terms or subjects creates difficulties. For example, the filtering and restriction of messages by a carrier or service provider that

³⁰ unrep; Scott J; 15/4/1998; Library No. 980280



contain the word 'sex' would also exclude access to material on safe sex or even the English county of Sussex³².

It has been reported that in late 1995, the German Government attempted to exert pressure on service providers rather than users to restrict access by Bavarian users to material, which was deemed 'explicit'. As a result of the international nature of the communications, the effect was that 4 million users around the world were prevented from accessing the same sites as well as sites as varied as Vatican pronouncements on sex and an academic commentary on pornography in China³³ dropped out of the Internet as a result of what Germany did. Single State regulation has far-reaching and potentially unforeseen effects on users all over the world. What might once have been seen as draconian internal battles over the restriction of access to subversive political literature could mean the proliferation of extradition applications or alternatively the imposition of the same internal restrictions on international users of the Internet.

The private commercial interests that are involved in the internet network is also an obstacle to regulation by the State. The point is made by a number of commentators that internet users often consider that the internet is a 'law-free' zone and a great deal of effort is put into steps to circumvent or subvert state regulatory practices³⁴. Private service providers are reluctant to enter into authoritative statements on content regulation as they infringe on the ability of users to use what is essentially a commercial service.

While it may be suggested that multilateral treaties on the use and access of internet resources is a possible approach, one is immediately presented with the same difficulties that I have outlined above in regard to internationally applicable standards

³¹ Grabosky P. & Smith R., *Crime in the Digital Age*, (1989) at p.125

³² Ibid at 130

³³ Ibid at 133

³⁴ Ibid at 123



of ‘objectionable’, ‘indecent’ or ‘subversive’. For example, the United State Supreme Court has maintained a strong commitment to the First Amendment and the protection given to freedom of expression. Two recent examples provide an indication of the scope of electronic communications permitted and the reluctance of the Supreme Court to place any restrictions on the nature of those communications.

In 1996, the United States Government enacted the *Communications Decency Act* as part of the *Telecommunications Reform Act*. The Act prohibited the “patently offensive display of indecent material to minors”. Neither indecent” nor “patently offensive” were defined. In its decision in *Reno v American Civil Liberties Union*³⁵, the Supreme Court found that the *Communications Decency Act*, while protecting minors from offensive material, interfered with the freedom of speech guaranteed by the First Amendment. The Court was concerned with the vague nature of the terms employed by the Act and the criminal sanctions which attached to a breach of its provisions. The Court noted that its role was not to “limit the level of discourse reaching a mailbox to that which would be suitable for a sandbox” and affirmed the right of adults to exchange and view material such as that struck at by the Act³⁶. In its judgment, the Court said;

*“The growth of the internet has been and continues to be phenomenal. We presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship”.*³⁷

In a matter which came before the United States Supreme Court earlier the same year, an injunction was issued preventing the enforcement of Georgia

³⁵ unrep; 26 June 1997; United States Supreme Court; 96-511

³⁶ Kirkland, E. “US Supreme Court Sends the White House Home to Think Again” 8 *Computers & Law* (1997) 19 at 19

³⁷ Ibid at 39



legislation that prohibited the use of a user name which “falsely identified the person”. The application for the injunction was brought by a number of civil liberties organisations, arguing that the use of false names allowed individuals to participate in discussions on sensitive topics or to express disapproval of government without fear of retribution. In granting the injunction, Judge Shoob said;

“On its face, the act prohibits such protected speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment and to protect privacy.”³⁸

Such an approach would of course have considerable benefits for authors wishing to publish works which may criticise or satirise government action or may be objectionable to others. The double edged nature of the protection, as I mentioned earlier, creates a number of concerns. A *laissez-faire* approach to the content of communications also raises the spectre of constitutionally sanctioned ‘hate-speech’.

As I have said, electric communications and commerce offer opportunities for both personal and commercial growth. All of these important developments may not have been possible without the assistance of technology. Law Reform on a global scale takes a concentrated effort over a long period of time. I think it was Michael Kirby who said, “law reform is for long distance runners”. Years can pass while decisions and agreements are made. Human rights continue to be violated, but this does not dull our spirits domestically or internationally. Each step we take is a step closer to achieving our goals of justice and fairness through the co-operation of countries particularly in the Asia Pacific region.

Notwithstanding the fact that it is now some 34 years since I embarked upon a career in the law, and some quarter of a century since I was the Deputy-General Consul of the Asia Development Bank based in Manila in its very early days, I have

³⁸ *American Civil Liberties Union & Ors v Miller* reported in Brown, above, n. 4, p. 4



to say that my enthusiasm for the law and for law reform remains totally undiminished.