

**INTERNET INDUSTRY ASSOCIATION
ANNUAL DINNER, SYDNEY, AUSTRALIA
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FOUR PARABLES AND A REFLECTION ON REGULATING THE NET*
(Edited Transcript)

The Hon Justice Michael Kirby

Thank you very much Mr. Coroneos, Minister, my colleagues from the Federal and State arms of the government of this country, fellow citizens and good friends from overseas.

On the wonders of a peaceful political transition

It's a wonderful thing to be here amongst you all. It's especially good to be here on this early occasion in the service of the Minister.

Last week the seven Justices of the High Court of Australia were under invitation from the President of the Senate and the Speaker of the House of the Representatives. In a tradition which dates back to the British Parliament many centuries old - and which is also followed in the Congress of the United States - we assembled in the Senate chamber and heard the speech which was given by the Governor-General at the opening of the new Parliament.

* A verbatim transcript of a talk by Justice Michael Kirby at the annual dinner of the Internet Industry Association in Sydney on 21 February 2008. The record has been lightly edited.

He reminded us in his speech that in the last sixty years, Australia has changed its government six times. And that really is the number of times it has changed in my lifetime. We can be proud in this country of the way in which we pass power, the great power of running a continental nation, from one political party and its members to another. And that we do it peacefully.

There's no violence in the streets. Things run smoothly. The nation gets on with its business; but under new management. And it's a wonderful thing if you think about it. This is not a political comment, because I can't make those. But it's a wonderful thing to live in a country where you see this peaceful transition.

It's also a wonderful thing to see a new Minister coming into office, whoever they are, with new ideas that renew our democracy. They have new notions that are responsive to the people. That is how democracy works.

Another thing that we can be proud of in Australia is the independence of the judiciary. You can probably count on the fingers of two hands the number of countries that have truly independent and uncorrupted judges.

I'm now the longest serving Judge in Australia (applause). It's hardly worth a round of applause. All I have done is to keep breathing. But I always tell visitors from overseas, for example visitors from Indonesia or Africa, that this is the proudest thing I can say, as an Australian Judge having been in various offices since December 1974, before a good number of you here were born.

The proudest thing I can say is that I've never had a telephone call from a Minister telling me how to decide a case. I've never had a message from the big end of town or some powerful person. Or some powerful influence. We do occasionally see editorials in Mr Murdoch's newspapers and other media journals. But we don't have to pay too much attention to them. We just get on with our job independently. And that's something we can also be proud of in this nation.

The First Parable: Law making meets technology

I'm going to come at the issue that you have chosen as your theme in an oblique way, as it were by parables. I want to start by acknowledging the remarkable age of technology with which we live, as the Minister outlined.

To win the war the Allies had to develop a nuclear weapon and secure the remarkable power of nuclear fission. To deliver that weapon they eventually had to develop rockets. To develop the rockets and the complex mechanics and technology that they had, they had to develop micro technology which would squeeze into smaller and smaller spaces the messages and send the signals that would deliver the weaponry. That technology would soon become absolutely instrumental in the research that led to the unfolding of the human genome. We would not have had the manpower, we would not have had the time to do the analysis of the complex genetics that has gone on. It has revealed the 33,000 odd genes in the human genome.

So all the technologies, nuclear fission, informatics and biotechnology are united in this remarkable way, that brings us all together tonight.

Where you would you have been in your lives – all the people in this room - all 500 of us - where would we all have been if there hadn't been this development of the Internet? What would you be doing tonight? What would you be doing with your lives? They would have been very different. We would have had these technologies waiting for us in the future. So this is a thought for us to ponder upon: what are the technologies that lie just around the corner? If we think of the extraordinary developments that have occurred in our lifetimes, what are the amazing developments that will grow out of these? Everything is happening very quickly, exponentially. As Newton said: we stand on the shoulders of giants. We stand on the shoulders of those who went before us.

The technology that is the basis of your livelihood and your work and your fascination, is so important for our economy for our imagination, for our well being, for the “pursuit of happiness” which Jefferson in the United States Declaration of Independence said, was the proper subject, the proper pursuit of human beings.

Now, I first came into contact with your technology when I was serving in the Australian Law Reform Commission. I was its first chairman from 1975 until 1984, when I went back into the courts as President of the Court of Appeal NSW. In 1996 I became one the of the seven Justices at the High Court of Australia.

Back in those days of the Law Reform Commission, the government also changed. The incoming government (the Fraser Government) had a commitment to act on the protection of privacy. Its new Attorney General, rather like Senator Conroy was a man of intelligence, energy, imagination and gifts. He was determined to get Australians into the action on protecting privacy.

This was Bob Ellicott QC. He gave the Law Reform Commission the project on privacy protection. During the project, the OECD in Paris set up an expert group to draw on the work that had already been done on privacy protection in the Nordic Council; and in the councils in what was then called the Common Market; and the Council of Europe. And to draw on their experience for this strange new technology of automated data that was then developing. The OECD wanted to develop principles for laws on privacy which would span continents.

By spanning continents it would become effective. So I went to Paris for the meeting and was elected the chairman of that group. The group had to marry some very diverse attitudes towards privacy protection: the very strong desire for protection in the countries of Europe because they had been through the horrors of the Nazi occupation and the use that was made of just ordinary manila folders with intimate, private information that could mean life or death.

Then, on the other side of the room, were the Americans with the First Amendment: believing that there should be very little regulation. The world would get better by simply leaving things alone.

We ultimately developed privacy principles that were widely accepted by countries around the world. Countries that normally don't copy each other's laws. Countries like Japan, and the Netherlands, New Zealand, Australia. Many other countries copied the principles of the OECD.

In the work of the OECD we had formulated one principle which, we thought, was a proper principle for the protection of privacy in automated data systems. It was recommended to member countries. It was accepted in the Australian *Privacy Act 1988*. It is one of the privacy principles in that statute. The principle effectively (simplifying it a little) was that, in order to protect a person's privacy if that person gave personal data to the collector, the collector could not use that data for any other purpose than what the person had given it for, except by specific authority of law or by the approval of the data subject.

That was the principle. It was effectively a moral and ethical principle, designed to keep people's control over the use that it was made of their private information. It seemed entirely appropriate. It was recommended. It was put into law.

Then along came *Google* and *Yahoo!* The new technology came along with a massive capacity to range through vast amounts of data. The notion that you could control this penumbra of information about yourself, the zone of privacy around yourself was very quickly overtaken by technology.

Because the technology was so manifestly useful for users of automated systems, the notion of saying 'halt' was like the notion of King

Canute, who, under the instruction of his officials, went to the sea to stop the waves coming in. Canute, by the way, knew that he couldn't. The officials believed that this was the kingly power. Canute went to show the limits of the kingly power.

And so this is the first parable which I derived from my experience at the OECD group. It is a parable that you can do what you can do and you can try to do the moral and ethical thing. You will be applauded. It is right that you should do that. But in the end, with technology as vibrant, as energetic, as dynamic and as changing as the technology of informatics, there will ultimately be limits. The technology will outpace in its capacity, the imagination of even the most clever law makers. You can get the best experts, the information, the data. Yet tomorrow it can be overtaken by advances in the technology.

Of course that is not a reason to do nothing. To do nothing is to make a decision. It is very important to understand that. It is to let others go and take the technology where they will. So to do nothing, is not an option. That, then, is the first parable. Where law-making meets technology we must usually be modest in our aspirations.

The Second Parable: The democratic deficit

The second parable arises from something that I did in 2005 in the number one courtroom in Canberra. I don't know how many of you have been in the High Court in Canberra. Next time you are there, pop in and see us. It's another wonderful thing about our democracy that the Parliament and the courts operate in the open. They can be judged by the people they serve.

And I should say to you Peter [Coroneos], that you have the three branches – you have the three institutions here tonight – The Minister under our Constitution must be, and is, a Member of Parliament. We have a member of the Parliament, a member of the Cabinet and the Executive of the country and a member of the Judiciary.

So all three Branches are all here. The Minister, Senator Conroy, has got to have two hats. I know he has a third hat tonight (referring to cowboy hat presentation), I caught him on film with his hat. It will be on the Internet tomorrow. He's a good sport. He even posed for a second photograph. So he may live to regret this.

Anyway in 2005 we were sitting in the number one court, the big court in Canberra, under the portrait of Sir Samuel Griffith, the first Chief Justice and Sir Edmund Barton, who was one of the first Judges of the Court, and earlier the first Prime Minister of Australia. And Justice O'Connor.

The case involved the Sony PlayStation. This was the case in which a Mr Stevens attempted to get around a “technological protection measure” which Sony Corporation had put into their PlayStation in order to ensure a limitation which they decided should apply to the use that may be made worldwide of their PlayStation. (See (2005) 224 CLR 193; [2005] HCA 58).

The Popes of old divided the world into two, with the Pope's line. Sony, in a gesture to the future, divided the world into three. So it was that Australia, New Zealand and Europe were in one their divisions. Japan another and North America another.

The argument that Mr Stevens advanced was that he was entitled to manipulate the CD-ROM in order to ensure that he could exercise his rights of ownership over an object that he had purchased. He argued that the law enacted by the Federal Parliament had not, by its provisions, allowed a body like Sony to prevent him from doing so.

We took out magnifying glasses. We looked very closely at the legislation of the Federal Parliament. We remembered the very great importance of people's rights to use their own property as they see fit, unless Parliament takes those rights away.

Ultimately the High Court, unanimously, decided that the Sony claim could not be upheld. Mr Stevens was perfectly entitled to burn his CD-ROM and to get around the technological measure that Sony had placed in its system.

Very soon after this decision the USA called up the *US-Australia Free Trade Agreement* and said it is our understanding that you in Australia will give full protection to "technological protection measures". If you don't already give legal protection under Australian law, you've got to do it. And pronto! Parliament quickly amended the *Copyright Act* in order to do just that.

The moral of this story is that first, people have rights. Those rights ordinarily include using their property as they see fit. This includes rights of fair usage of property, which is the subject of copyright protection. Independent courts exist in countries like Australia to uphold those rights.

They will not derogate from them unless Parliament makes its law very clear, as ultimately it is said that it did.

Now it hasn't come back to the High Court since the law was amended. So I'm not making any predictions, one way or another, as to whether Parliament got it right on the second attempt.

But there is an issue as to the extent to which people can take copies and use copies in fair usage of copyrighted material. It's a very important issue. It affects the balance between the protection of copyright and the protection of free speech: fair usage and the use of your own property.

The second moral of the story is that it is an instance about which Professor Lawrence Lessig constantly teaches. We are moving to the point in the world where more and more law will be effectively expressed, not in terms of statutes, solemnly enacted by the Parliament and sent to the Governor-General for the royal assent – but in the technology itself. What Lessig calls, "Code". Embedded in the Code, on a multinational basis and effective across borders in a way that could not have been dreamt of in the past, will be effective regulation, expressed in the technology itself.

This is a very important and new development. It's a development that is not initially in the hands of democratic legislators. They don't set the balances and adjust the competition between free usage and fair usage, free expression and protection for copyright. This is not going to be done in that way. It's going to be done in big corporations, protecting their own interests.

So this is the second parable I lay before the Minister. It teaches the lesson that however much we are proud of our democracy and even concerned about the “democratic deficit”, it is inherent in the development of Code, imposed on us from outside by the technology developers, that we have to face the reality of the limitations of what we – a country like Australia – can actually do in controlling the use of the technology – and specifically the use of the Internet.

France, as you know, discovered this in the case of the online advertisement of the sale of Nazi memorabilia. That was a most painful thing in France. France had laws which were designed to forbid glorification of Nazis or sale of Nazi memorabilia. But securing the effective implementation of those laws in a technology which is no longer simply home grown in France, but is global, really demonstrates, the borders at which powers of the single state (except perhaps the USA) to control and regulate the use of the Internet is limited.

In the United States there is the great principle of the First Amendment: Congress shall pass no laws to abridge freedom of speech and freedom of the press – it is a very absolute principle.

It's not a principle that we in Australia have adopted. We have a more measured, more nuanced principles in our law that often compete with freedom of expression - values such as freedom to secure protection of your reputation, of your privacy, your honour, of your family. It's a more nuanced balance in our country.

But the important point for us is to never forget, in the context of the Internet, that asserting our values, like France asserting its values in the

matter of the Nazi memorabilia, is one thing. But it is often quite difficult to enforce: technically and in reality in a world of a global technology. That technology does not always answer to the democratic voice of individual countries.

We have to be modest in our appreciation of what we can do.

The Third Parable: Human values and exceptional cases

The third parable was brought home to me in a conference I attended in London in 2007. The conference was to establish TELOS – a new group in the University of London concerned with technology and the law.

It's a little late to be forming such bodies. But they are now being formed. TELOS came together with the most amazing group of people. It was concerned with all technologies; but very much focusing on information technology.

One of the points made in the conference was connected with Lawrence Lessig's notion of Code. It was illustrated in a very practical way that rang a bell for me. The illustration was given by one of the professors of the University of London. She described how the London Underground got rid of all their cheery ticket sellers and ticket clippers and substituted machines with machine readable tickets – rather like those that have been giving so much trouble to the NSW Transport Department in recent times.

You put the ticket through and the barrier opens. Occasionally in London, I've had to search around and I've found a cheery ticket person.

I've said "I need to take this ticket back to prove I spent 4 pounds to go from Heathrow to the City". They'll let you pass through and keep your ticket. A human being has the last word.

In France they did the same thing, irritated beyond measure by the large number of people that would jump over the turnstiles. Eventually, they didn't take the course followed in London - if you have been to Paris you will know what I'm talking of. They did not simply have those friendly little bars as they have in London, which are an ever present temptation for turnstile jumpers.

No, they now have steel metal barriers which close completely. When you walk through the barrier the whole thing opens. There is no jumping. There is no getting through. Finish. End of story.

As the Professor was telling this tale at the TELOS meeting in London, I thought of an instance a few years earlier. It happened after a very long flight from Australia. We Australians really know how far you have to fly to get anywhere. I mean Americans go on complaining endlessly about flying six hours – six hours! Yet when we have to get anywhere, except Antarctica or New Zealand, we have to go forever. At least it seems like forever.

When I got to Paris and I bought my ticket at the airport to go into the Place de la Republique, where my hotel and bed were waiting. This was for a meeting of UNESCO. But I found I had put the ticket in the machine – and had not taken it out.

I'm innocent! That is what you can do when you are very tired.

So I turned up at the Gare du Nord, to transfer to the Metro from the RER train system - and I didn't have my ticket. There were no friendly human beings in sight. I had no cash. Looming up in front were the friendly barriers in the Metro. Fortunately, at that stage I could jump over the barrier from RER. The metal cages had not yet been installed. I had to ponder. Would it be a good look? Would there perhaps be a photographer from *The Australian* – who might just be there at that moment?

I thought, hang it. I am completely morally innocent. I didn't ask their machine to gobble up my ticket. So I jumped over the barrier, gathering all my dignity and I proceeded on my journey. (Applause)

The applause I just received was from that section of the audience whose ancestors were convicts. (Laughter)

The moral of the third parable for the Minister is: There are values that we have to ensure somehow that we defend.

Values of discretion. Values of fair dealing. Values of review. Values of challenge. Values of reconsideration and thinking again. Human judgment. That's just the nature of a civilized society. You have to allow for the unusual and the exceptional case.

The Fourth Parable: Everything is global now

The fourth parable and last, arises out of a journey I took last week to Cambridge University in England for a meeting there of the Hague Institute for the Internationalisation of Law.

The meeting was called with experts from England, the Netherlands, the US and Australia. We had to look at the great concern that is existing in many countries about the loss of national control over law because of the way in which people are increasingly look at the law other than by reference to the law made by their own Parliaments.

The point that was made at this meeting was that whether we liked it or not, this just happens to be an aspect of the world we are living in at the moment. It is fed by, stimulated by, the Internet and the supply of so much data about law and what other people are doing. How other people are tackling very similar problems. Because of that, it is just impossible to put up your hand up and say like Canute “We don’t want any of that. We don’t want to hear about it. We’ll just deal with this problem in our own special ‘democratic’ way.”

In the great courts like the Supreme Court of the US and our own High Court of Australia, you get divisions about this issue. It’s a serious issue about which I immediately concede there are points of view on both sides. But pure legal nationalism is, I think, on the way out.

We saw such a division just a few months back in the High Court of Australia. It was in a case which concerned the rights of prisoners to vote in the late Federal election. The case concerned an amendment to the *Commonwealth Electoral Act*, enacted by the Federal Parliament with the full power of the Federal Parliament. I’m not sure whether the amendment was opposed at the time by the Opposition or not. But it was enacted.

The amendment moved the barrier. Before the amendment, under a law which had effectively existed for the most part of the Federation – a hundred or more years – a prisoner could vote in our elections, because the prisoner was still a human being and if it was so, a citizen. The prisoner could still vote unless the prisoner was in prison for more than three years, which is the ordinary federal electoral cycle.

The right to vote for such prisoners was presumably on the basis that one infers that such a prisoner will be released during the sentence and be part of the civic polity, regulated by the Government, elected in the election. In one of the measures in the last Parliament, that voting right was taken away. Anyone in prison was deprived of the right to vote. No exceptions.

That amendment was challenged in the High Court. It was challenged by being measured against the Constitution. Our Constitution has no great ringing Bill of Rights. It has no clear specific provision on this topic. The Founders did not specifically turn their attention to this issue. And so the question was presented to the Court – to the only power in our polity that had the power to decide whether prisoners of less than three years could vote. This was the High Court of Australia.

That's the way we do things. That's the way the Americans do these things. It is the way of the Rule of Law. In the Court, we divided. Four of the Justices reached the view that Parliament did not have the power to deprive such prisoners of the vote if otherwise entitled. Two of the Justices reached the view that Parliament did have the power.

We all expressed our point of view. And then the order was made which restored those prisoners to the electoral list. And they voted in the last election.

That's the way we do things in constitutional matters. But the point of my last parable is this: In reasoning to our various conclusions, each and every one of us, called attention to the reasoning of courts in other countries, under other constitutions, according to other provisions dealing with the same matter.

Legislatures in several countries had imposed big or short or long or no restrictions on prisoner's voting in the general elections. The questions arose as to whether the amending law was compatible with the theme of the Australian Constitution and its guarantees of political freedom. In Chief Justice Gleeson's reasons, he referred to matters of history. He raised the question: Could Parliament now restore the restriction in force before the *Roman Catholic Emancipation Act*? Would it be possible, in this day and age, to disqualify all Roman Catholics from voting? – as had been the position in Britain until the 19th century.

Would it be possible to exclude all Aboriginals from voting? – which was the case under the Constitution at the beginning of the Federation?

In the reasons of Justice Gummow, Crennan and myself, we like Chief Justice Gleeson, referred to the decisions of the European Court of Human Rights, which had declared how important it was that restrictions on the right to vote should be strictly proportional to a demonstrated need to limit the entitlement of a citizen to take part in the political life of their country.

Justices Hayne and Heydon were fiercely critical of the opinions of the majority. They said that it was impermissible to look at what other courts in other countries, with different constitutions and different circumstances say on such a matter – and that it was immaterial to study what they had held.

But the difficulty of today for judges of the minority view (which Justice Scalia and Justice Thomas and those of similar views in the US have to face up to) is this: By this technology, by the Net, you are constantly bombarding us with information about what is happening elsewhere. Constantly supplying us instantaneously, in a way that was undreamable in earlier times, with information about how other very clever people address, consider and solve analogous questions.

If there are differences, you have to take the differences into account. But for judges to blind their eyes and close their ears to the messages of the Internet today is something that is just not going to happen.

It is very important for all of us in this room, to appreciate that in every nook and cranny of our economic, social, legal and political life, the technology that is represented in this room is going to permeate and is going to play a part in the world of tomorrow – mostly constructive.

We have to be careful in regulation that we don't impose rules or principles which favour particular or sectional interests and don't necessarily favour interests that speak up for their rights and for their

interests in the use of the Internet. But none of us now can be immune from the global dynamic of the Internet.

A Final Reflection: Technology is not enough

One of the little pleasures I allowed myself at Cambridge last week was to visit the College where Alan Turing worked before he went to Bletchley Park. Turing, as you know, was the great physicist, a truly great scientist, who in England, before the War began the process that led to the building of the first big computer. That computer was the so-called "Bombe", which they created at Bletchley Park. I commend the place to you as worth a visit, if you are in England. It is where the Allies cracked the *Enigma* code used by the German military.

Turing, it turned out, was probably partly autistic. Because he was autistic he had this capacity to see combinations in peculiar ways. Turing had the capacity to see hidden patterns. He was very good at crosswords. He could see combinations that ordinary people could look at and not really see.

During the War Turing would get the signals of the German navy so vital for the supply lines. He would always look at five minutes to twelve at night and five minute past twelve, because sometimes, he realised, the signaller on the German ship would wonder, "Did I send the signal?" – and would send it again in the new code which changed at midnight.

He just had this capacity to see these patterns and to see differences.

The people who built the Internet were likewise people who have had this extra dimension. I asked tonight when I can in here and saw you all: why is this such a male dominated audience? Why are there so few women?

If I were to go to a Law function tonight, about half the audience would be women – and the same in most professions. But here, this is overwhelmingly a male domain.

My conversationalist said, it all goes back to the fact that to be good in this type of technology, you have got to have that very strange mental quirk. And that's a male phenomenon. It's on the Y chromosome, in the male genes. That's probably why they are mostly men here.

I don't know that I accept that.

It may be a power thing. You may be just a little bit behind the rest of us in society. But it's a thing for you to look to. Women are the great networkers. And toilers in the Internet are in the business of the greatest network of them all.

By the way, Turing was a gay man. He got a few rewards after War. But when a companion tried to steal money from him, he went to the police. Instead of pursuing the thief, the police pursued Turing for his sexuality. They hounded him and drove him to prison, to despair, to eating an apple, laced with cyanide which killed this great War hero, scientist and engineer.

We have, I hope, made some progress. It is not good enough to have a great technology. Technology itself is not enough. We have to build a good society – a society with good values.

That's where the Minister comes in. That's where you come in - as citizens. That's where I come in upholding rights in courts – including rights for the unpopular.

So I am very glad I was asked to come out here tonight. I've told you my four parables. Think about them. I will be watching you and you will be watching us.

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