TRANSNATIONAL LAW AND COMPUTER TECHNOLOGY: SOME LEGAL PROBLEMS AND HUMANE CONSIDERATIONS

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THE CONSUMER'S VIEWPOINT

The viewpoint of this workpaper for panel discussion is less of a computer advocate and more of a humanist consumer's. That viewpoint is taken because today, whether in industrial or in developing societies, the mass of human beings belong to the category of end-users. This is true not only with regard to material commodities but also even the intangibles, including law and justice.

A lawyer who subscribes to a computer legal service or who patronizes an electronic data processing unit, however modest, is a consumer. But our reference here is broader: the common man, the man-in-the-street. For is he not, in Prof. Edmond Cahn's phrase, "the ultimate consumer"? And while human rights and duties are abstractions, the bearer of these rights and the obligor of those duties are principally concrete individuals. The one who goes to jail or the one who foots the bill is the flesh-and-blood human being. Human law, in brief, must be anthropocentric, even if it must deal with machines as now we must.

CONCERN FOR COMPUTERS

As lawyers, our professional concern is naturally focused on the immediate effects of computers on our clients, or the cases at hand. Example: will a print-out be accepted in evidence (as a regular business entry)? Will the case file at police headquarters suffice for identification of the accused? Should the complaint be for theft of company property or revelation of trade secrets contained in a magnetic tape?

But social concern over computers stretches well beyond mundane considerations. There is extant literature to show that concern for computers has ceased to be phobic but has become serious, down to earth.

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There are sociologists, philosophers, authors, academicians and even public officials who are alarmed by the "mega-machine". For instance, Erich Fromm (in the Revolution of Hope) sees the computer as the specter or the menace of our time, more dangerous than fascism because more corrosive of the individual and of the state. It seems a number could agree with Prof. Zbigniew Brzezinski, now Pres. Carter's chief adviser on national security, on the dangers of the "technotronic society."

If the industrial countries, through their leaders in thought and action, are themselves wary of these dangers brought about by computer technology, how much more the third-world countries and their leaders? If the producers and sellers of computer hardware and software are alarmed that their inventions may be abused, as they are being abused, how much more the consumers? Especially in developing countries!

Surely, there is justifiable basis to propose as we must that computers and computer technology — their invention, their uses or applications, and their proliferation — be brought under legal and social control. And, in fact, such process of control is well underway even if only on a municipal or state level.

NOT BAN BUT CONTROL

To control, however, does not mean to ban computer technology.

A truism, now a cliche in fact, is that there is no test tube for legal hyphothesis. Social theories, including law, cannot be divorced from society. Day to day events influence — and interfere with — experimental data.

Somehow, academicians do have a way of getting over humps in their disciplines. And to some, the computer is one way. Social scientists and students, including students of the law, have found "games" and simulations by the use of computers a fair substitute for actuality, with the advantage of speed as well as non-irreversibility.

Example: a computer can simulate the conditions of a city, before and after the introduction of a zoning ordinance intended to reduce pollution. Or, in a larger scale, the probable effects of 10% dollar devaluation on the world's economy. The results may or may not be true; but the procedures can always be verified for their validity. Undesirable results, on the basis of valid simulation, can be aborted or minimized. This in fact is the essence of alternatives planning or world order design.

(Since the computer is the instrument of simulation, however, it will be invalid, if not impossible, to thus simulate a world situation where computers are inexistent. There must remain one for the job. And this merely shows how the "mega-machine" has somehow insinuated its indispensability.)

TRANSNATIONAL LAW: A BASIS

There are transnational transactions, and those involving computers would amply demonstrate them. The machine is invented in California, licensed in Japan, programmed in the Philippines, for use in Indonesia, to be paid in Australia with Eurodollar check drawn on a French bank, as per contract perfected in London, under English law.

But while there are international legal transactions, and there is in fact a course of that title, one may still inquire: is there such a thing as "transnational law"? Is it not but a branch or a sphere of international law, more properly conflicts of law?

Of course the same question was made of international law before, the same doubt that it was nothing but an empty name for a non-existent entity, for the reason that there was no sovereign to provide the source and sanction of international law. But now there is no doubt that, despite the absence of a world sovereign, there is international law.

It was Prof. Jessup who, in his Storrs Lectures at Yale twenty years ago, used the term "transnantional law." But in his later lectures (Cooley, at Michigan), he was modest to characterize his terminology as "brash" and even an "extravagant" suggestion. In his view, however, "the traditional divisions" between public and private international law and some national law might be submerged in an ocean of "transnational law."

By that term, he would denominate "all law which regulates actions or events that transcend national frontiers." To him, there are "transnational situations" involving individuals, corporations, states, organizations or groups. And the rules of the law bearing on these situations — including the applicable rule, and the rule to determine the applicable or prevailing rules in case of conflict — would be part of transnational law.

Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private. There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all of these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy The choice need not be determined by territoriality, personality, nationality, domicile, jurisdiction, sovereignity, or any other rubric save as these labels are reasonable reflections of human experience with the absolute and relative convenience of the law and the forums - lex conveniens and forum conveniens.¹

The many admirers and students of Prof. Jessup justifiably claim this conceptualization of "transnational law" as one of his worthy contributions to law.

CONVENIENCE AND NECESSITY

Later, Prof. Jessup's view was enlarged to stress not only convenience but also necessity. Said Eric Stein, in a foreword to Jessup's Cooley lecturers, 1958:

There is no room for artificial distinctions between national and international law, private and public law, civil and criminal in "transnational transactions". Neither the particular character of the forum (whether a national or international tribunal or negotiating governments) — nor the particular character of the parties (whether individuals, corporations, non-governmental organizations, states, organization of national or international law to a transnational situation. Bases of states) should hamper the application of the most convenient rule jurisdiction must be determined not from premise of power but as a matter of agreed procedure motivated by the need and convenience of the members of the international community.²

Far be it from our purpose to re-examine the premises of these propositions. It would suffice to note that Prof. Jessup was undoubtedly inspired by Sigmond Thimberg who, thirty years ago, wrote on "International Combines and National Sovereigns." ³ These combines are now known as "multinationals", some of which are in the computer business in a gigantic way so that they are now regarded as almost, if not quite, sovereigns in themselves with manpower, budgets, and resources that dwarf those of many nation-states. Both Prof. Jessup and Thimberg wanted lawyers to free themselves of "rigidly compartmentalized national legal system" and even of traditional international law because of the "inadequacy of the law to cope with the immense growth of international intercourse on all levels and in all fields of human endeavor."

"Transnational law" was Prof. Jessup's response to the challenge for American lawyers to keep pace with America's global reach. To be sure, with the touchstones of convenience and necessity even in criminal and civil aspects of municipal and international law, the concept of "inter-

¹ JESSUP, TRANSNATIONAL LAW 10-107 (1956).

² JESSUP, USE OF INTERNATIONAL LAW (1959).

^{8 95} U.P L. REV. 575 (1947).

national law" almost succeeds to mold jus imperii with jus gentium of the Romans. It only remains to be seen how widespread will be its acceptance.

UNIVERSALITY OF LAWS & INVENTIONS

That acceptance will naturally be the function of *the consumers*. Nations and groups and individuals decide, with varying degress of voluntariness, whether a system of law meets their convenience and their necessities. (That much we assume as an article of faith).

Precisely the same compulsions of "need and convenience" have buoyed the computer industry. Those in the computer business have found a universal machine, not just a mathematical calculator. This "megamachine" has risen from simple block to the apex almost of rationality. In the acquisition, processing, storage and retrieval of date it has demonstrated unquestionable competence. Now it is entrusted with the delicate functions of decision and control that no one man, or even a group of men together, could perform — in terms of speed, volume and even accuracy.

Computer technology has, however, given rise to a new breed of elites The programmers, analysts, engineers who man and administer the computer system have in their hands a powerful tool, a network that can effectively translate the notion that "knowledge is power" into reality. Example: Such programs as SEARCH or FEDNET or NICC can be abused for invasions of privacy more massive than those attributed to Joseph McCarthy.

As recent computer crimes have shown, computer language can be an "open sesame" to more treasures than 40 thieves dreamed of. And computer machines can match Alladin's genie — from sweeping ocean beds to scanning stars. Welded to laser and missile technology, verily the computer now is an instrument of life and death.

The problem, then, is how to master the language and to control the genie of computer technology. Could this be done through "transnational law."? Since this concept of law and of the computer spring from the intention to serve universal needs, solve universal problems, could both be employed together to realize such universal hopes as justice and peace?

BEYOND SECRECY: SHARING

As in legal control of atomic energy, an international commission on computer utility may be in order. If so, such a commission must represent not only the industrial states that produce computer technology but also the developing states as consumers.

Its functions should include lowering the barriers of secrecy on computer art and science. Instead, a principle of sharing ought to be developed to enable the poor nations to close their gap from the rich states not only in this field but in their economies and cultures. As a beginning, property interest on computers — whether as patents, copyright, license or franchise — must be minimized. This might reduce the prohibitive cost of hardware and software now at one cent a word or more. Public awareness of computers, of their uses and abuses, should be promoted by educational, not propaganda, measures.

Production of and trade in computers may necessitate reporting on a regional or multinational basis through a public agency. Volume, destination, usage and capacity must be made of record.

Insofar as computers are utilized for warlike purpose, they should be deemed within the purview of armaments. They are, therefore, a fit subject for negotiations to limit their production and proliferation. It is to be hoped that computers will help insure no only the security of some nations but the peace, prosperity and security of all.

For our task as lawyers interested in computer technology is to see that these superior machines do not help bring about the end of humans but, rather, wisely serve humane ends.