

AN AMERICAN

The American Bar Association ("ABA") annual meeting is a big event. The 2010 conference in San Francisco California between 5 and 10 August was no exception. The various sections, divisions and forums of the ABA offer such a broad range of seminars to discuss the contemporary and controversial legal issues in America – with the focus this year on same-sex marriage, anticipatory self-defence in international law, marijuana regulation, and Facebook – that choosing which seminars to attend and navigating through the 288 page programme to the appropriate venue is quite a task in itself. There were apparently 8,000 lawyers in attendance from the 50 States and many other countries, a host of other well organised dinners, receptions and committee meetings.

Same-sex marriage

My arrival in San Francisco on Wednesday, 4 August coincided with the judgment handed down by Chief Judge Vaughn R Walker of a 9th Circuit Federal District Court, overturning "Proposition 8" of Californian State law, on the grounds it is unconstitutional.

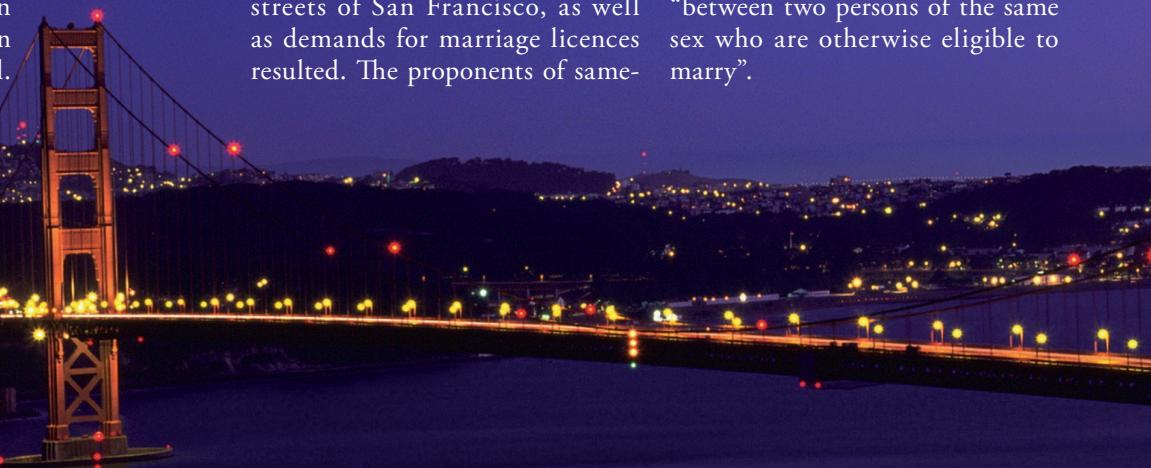


Otchie: broad range of seminars

Proposition 8 (or the California Marriage Protection Act) was a ballot proposition and constitutional amendment passed by popular vote in the November 2008 California State elections. The measure added a new provision to the California Constitution, which provides that "only marriage between a man and a woman is valid or recognized in California". However, this measure had long caused resentment among same-sex couples wishing to marry in California (as well as in other States) and has resulted in litigation. In fact, across the 50 States, a myriad of differing legislative approaches exist and the issue of same-sex marriage has for some time provided a number of complicated legal, Federal and constitutional questions.

Judge Walker's conclusion was that proposition 8 was discriminatory, as it impeded the fundamental right of willing individuals to marry and contravened the "equal protection" clause of the Fourteenth Amendment to the United States Constitution. Celebrations on the streets of San Francisco, as well as demands for marriage licences resulted. The proponents of same-

sex marriage feel that "domestic partnership" is inferior to a marriage and the judge found that the proposition "enacted a private moral view without advancing a legitimate government interest". Commentators have predicted the case (*Perry v Schwarzenegger*) is likely to be appealed all the way to the US Supreme Court, but the "defendant", Governor Schwarzenegger, declined to defend the law and the State Attorney General agreed that it was unconstitutional. That left no one to represent the State law apart from the ordinary citizens who had been its original proponents, arguing that a move away from traditional marriage was unhealthy for children and society. The question arises as to whether they have any standing to appear at the next level of appeal, although an injunction currently remains in place preventing same-sex marriages in California at this time. The ABA and many represented State Bar Associations were supportive of the civil right of same-sex couples to marry. A resolution was passed calling for the elimination of legal barriers, such as proposition 8, to be removed "between two persons of the same sex who are otherwise eligible to marry".



DREAM

A Solicitor Generals' roundtable

In the US, the Solicitor General refers to the Federal government's primary advocate when it deems it has an interest in a particular case. The incumbent is therefore tasked with a very varied brief and achieves his position by being regarded as a formidable advocate before the US Supreme Court. In a roundtable format, several former Solicitor Generals had a discussion on several legal developments and shared reflections on their time in office, including the task of supervising the position taken in court by lawyers across the country. The current incumbent, nominated by President Obama, is Neal Katyal, 40, a Hindu whose parents emigrated from India. He is a law professor who represented the Guantanamo detainees in front of the Supreme Court. His predecessor Elena Kagan (who is Jewish), is leaving to be sworn as an Associate Justice of the US Supreme Court. Kagan is the court's 112th and its fourth female justice.

It is common practice in the US to comment and speculate

on the political views held by the Supreme Court Justices. Those I spoke to see Justice Kagan, along with her female colleague and fellow Obama appointee, Sonia

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Sotomayor (recently appointed first Justice of Hispanic origin), as likely to cause the court to take an inevitable slide to left-leaning tendencies in its rulings. Of particular interest is what the court will make of Arizona's recent immi-

gration law, generally regarded as the broadest and strictest anti-illegal immigration measure in decades. It makes it a crime not to be in possession of immigration documents and allows the police to stop people whom they suspect are in the US illegally. This had led to fears that it would cause racial profiling.

International law standards

A panel composed of academics and senior government officials came together to discuss some very real issues developing in national (and international) security. Among them: is a new standard emerging for justifying pre-emptive strikes and what are the obligations under the UN Charter? It is well established that under art 51, Ch VII of the UN Charter, States may legally



engage in collective security and resort to the use of lethal force, in order to prevent an armed attack upon themselves (and others). According to the "Bush doctrine" the pre-emptive strike on Iraq could be justified as an attack from that State (or harbouring terrorists), although never having occurred, was to be regarded as "imminent" by the particular threat posed by weapons of mass destruction ("WMD"). Although that position now seems widely discredited and many leading scholars have actually deemed that the attack on Iraq could not be justified in international law, there was talk of the US making a future "preventive strike" to counter the potential threat of WMD from elsewhere (Iran). Many "Hawkish" Americans remain dissatisfied with the UN Framework and continue to argue that an attack in the future could still be justified, according to a new understanding of the law of the UN Charter.

A clash of State and Federal policy

The number of States which have enacted Marijuana control laws which conflict with Federal laws is on the increase and California has an upcoming popular ballot on allowing the full-blown legalisation of marijuana. A debate in the seminar ensued discussing the general advantages and disadvantages of marijuana legalisation, the analogies drawn with 1920's prohibition and possible economic benefits from its regulation and taxation. The commentators I spoke to predicted that an "Obama" Supreme Court would inevitably opt for a pro-liberal, yet strong Federal government approach in construing the constitutionality of the State regulations.

ing site, can an investigator pose as a "friend" and elicit a defendant to boast about alleged crimes? Is it proper for a lawyer to do so? (Many attorneys were quick to boast of their higher professional standards and unanimously agreed that the former could and the latter definitely should not.) Actually, the facebook phenomena, as well as the video-clip player site "You Tube", have indeed been used as valuable sources of evidence in criminal and civil proceedings across America. For example, judges have been ready to take judicial notice when gang members display their distinctive signs and boast of their affiliations online, and hand down hefty jail terms. Similarly, injunctions have been known to be made against those "stalking" online. ♦

Hot ethics issues for trial lawyers

There are a variety of new ethical issues that engulf young US trial lawyers, in particular the use of "Facebook". For example, in using the social network-

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