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A Foreword

Jordan Shay, Editor-in-Chief

I along with the entire staff would like to welcome you to read the inaugural edition of The Gavel. The Gavel is an annual publication, produced by the City University Students' Union Law Society that gives students and professionals alike the opportunity to publish jurisprudential pieces of interest. This publication was conceived with the belief that students should have access to a medium of sharing academic work that circumvents a curriculum or a grading rubric.

The Gavel deviates from any standardized compartmentalization or intrinsic theme but rather embraces eclecticism and diversity. The sole criteria we bestowed upon our writers was that their pieces provide an inquiry into a contemporary or historical legal issue. The subject matter of our pieces was left exclusively to the discretion of our authors and as a result, our selection process focused entirely on the caliber and intrigue that each piece presented. Our articles vary considerably in terms of genre, locality, and even functionality.

As would be expected with any inaugural edition, our ambitions are forced to extend beyond the realm of our readership and additionally encompass our desire to create a catalyst for future publications. The Gavel strives to be a resource for both development and academic inquiry and it is my earnest hope that it becomes an entrenched cornerstone of the Law Society.

Finally I would like to thank our unpaid, devoted and extremely hard working staff for persevering and more importantly for having the same belief in this publication as I do. Creating an unprecedented publication absent any blue prints, is undeniably an onerous task, but one that was certainly mitigated by the exceptional work of our editors and committee members. I am pleased to bring you a product that we at the Gavel are all deeply proud of. I sincerely hope you enjoy it.

Yours Truly,

Jordan Shay
Editor-in-Chief
The Gavel

Marital Coercion: Obsolete in the 21st Century?

by Christoper Vallis

Following the recent trial of Vicky Pryce, the criminal defence of marital coercion has found itself in the public spotlight. The defence, prima facie, allows a female to escape conviction of any offence, save for treason and murder, if it was committed under the coercion of her husband. The ex-wife of the former Member of Parliament, Chris Huhne, attempted and failed to use it to counter a charge of perverting the course of justice, after she took responsibility for speeding when it was in fact Mr Huhne at the wheel. The previously little known - and rarely invoked - component of English law has been subject to attacks from numerous articles questioning the validity of the defence which was originally designed 'to protect women who were unable to own property'[1] in the Middle Ages. Its being available exclusively to married women, suggest some critiques, is enough to warrant its outright abolition. Further, repeated references are made to a 1977 Law Commission report, which asks 'whether the defence is appropriate to modern conditions'[2]. Legal journalist Rozenberg seems to think that the defence of duress is a much more appropriate one, citing *DPP v Bell*[3] as justification for this[4], and that therefore there is no need for a marital coercion defence in today's legal landscape.

It is worth questioning, however, whether the defence is indeed only available to married women. *Section 3* of the *Human Rights Act 1998*, enacted over twenty years after the Law Commission report, decrees that all legislation, so far as it is possible to do so, shall be interpreted in such a way which is compatible with the *European Convention on Human Rights*[5]. One such right is found under *Article 14*, which prohibits discrimination (examples provided by the treaty include, but are not limited to, sex, race, colour and language). An example of the application of *section 3* can be found in *Ghaidan v Godin-Mendoza*[6] which concerns a flat where a homosexual couple lived, one of whom was the tenant. After the death of the tenant, his partner sought to rely on *Schedule 1* to the *Rent Act 1977*, which allows the 'surviving spouse of the original tenant' to become the statutory tenant himself. *Schedule 2* provided that for these purposes, 'a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.' As Lord Nicholls points out, this language 'draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house'.[7] Their lordships held therefore that this definition of spouse was not compatible with *Article 14* and should henceforth be read in such a way as to encompass homosexual couples in order to make it compatible. *Section 3* of the *Human Rights Act* is, after all, obligatory.

Section 47 of the *Criminal Justice Act 1925* provides that 'on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.' With *Ghaidan v Godin-Mendoza* in mind, it becomes apparent why one might argue that this section could also be subject to an obligatory application of Human Rights favourable interpretation; the wording of the act clearly allows a defence to women when coerced by men and not to men when coerced by women. If the courts were to interpret this section so as

1 F. Gibb & F. Hamilton, *"Call for Pryce's "medieval defence" of marital coercion to be scrapped"*, The Times, 7 March 2013, http://www.thetimes.co.uk.
2 T. Dyke, *"Is marital coercion defence an anachronism?"*, The Times, 7 March 2013, http://www.thetimes.co.uk.
3 [1992] Crim. LR 176
4 Rozenberg, J 2013, 'The Vicky Pryce case highlights why "marital coercion" should be thrown out', The Guardian, 7 March. <www.guardian.co.uk>
5 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf
6 [2004] UKHL 30.
7 Ibid, at 5.

"A law whose foundations are riddled with inequality cannot undergo a twenty first century equality paint job and become relevant again."

to render it compatible with *Article 14* of the *Convention*, any person would have a good defence to any offence other than treason or murder if it was committed in the presence of, and under the coercion of, his or her heterosexual or homosexual partner.

That this defence arises from a time of gender inequality, some might argue, is enough to void the above reasoning; saying that a law whose foundations are riddled with inequality cannot undergo a twenty first century equality paint job and become relevant again. If this be the case, reference must be made once more to the 1977 Law Commission report and parliament's omission to react to it. Rozenberg blames this on a 'habit…to ignore calls for law reform unless there is some political capital to be gained.'[8] Whether or not this be the case, the courts are bound by parliament and until a law is repealed it remains good law, and may be invoked in appropriate circumstances. That its not having been repealed stems from a lack of potential of political capital is irrelevant conjecture so far as the courts should be concerned.

It might also be of interest to point out that, although the defence of duress on the face of it appears to resemble that of marital coercion, the situations covered by duress are of an entirely different nature to those covered by the *section 47* defence. In order to rely on the defence of duress the defendant must fear death or serious harm. In *DPP v Bell*, the case mentioned by Rozenberg to order to explain his preference for duress over marital coercion, the defendant escaped liability for driving with excess alcohol as he drove away to escape serious physical harm. Duress specifically seeks to find a balance between forcing individuals to take responsibility for their own actions, and avoid grievous physical harm. Therefore, for married couples and civil partners, marital coercion can fill an important legal lacuna. In 2000, a defendant Ashley Fitton, was on trial for the same offence. After a meal in a restaurant with her family, during which she had consumed a quantity of alcohol which put her over the legal limit, the defendant had been ordered by an increasingly 'worked up'[9] husband to drive the car. Here, the defence of duress would not apply. The defendant was, however, able to rely marital coercion. It might not be such an unreasonable claim that the availability of a valid defence to such a defendant is in the interest of justice. If anything, this defence serves as a shield against criminal liability for innocent victims of domestic aggression and violence, and as journalist Topping points out in her article on the 'disturbingly high' levels of domestic violence, 20% of victims are men[10],who, in a modern world, are equally susceptible to bullying, pressurisation and coercion.

It is the purpose of this article to suggest that, although it may well be the case that the defence of marital coercion is built around concepts which society has left behind, the people to whom the defence offers protection remain. The complete and utter eradication of prejudice and bullying is not a corollary of the departure of male dominance and chauvinism. Prejudice and bullying still exist, whether they be directed towards/issued from men or women. The possibility, created by the *Human Rights Act*, to avail the defence to everyone (so long as they are married or in a civil partnership) can only be a positive thing.

8 [2004] UKHL, Rozenberg.
9 P. Foster, *"B-test wife cleared after being forced to take wheel"*, The Telegraph, 23 December 2000, http://www.telegraph.co.uk.
10 A. Topping, *"Domestic violence figures are disturbingly high, says charity"*, The Guardian, 7 March 2013, http://www.guardian.co.uk

Sexual Assault in the Military: why is the Law so Ineffective?

by Eshver Soor

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On January 24th 2013, the Secretary of Defence for the United States of America moved to lift the ban that previously prevented female servicewomen from participating in combat roles and assignments in the military.[1] It attracted considerable media attention and commentators were keen to express their support or opposition. It seems almost strange that such a move had attracted so much attention. Without doubt it is a big step forward and will allow women to serve their country how they see fit. However, when one considers that there are over 200,000 women on active duty, making up roughly 14.5% of the armed forces[2], this step shouldn't have come as such a surprise. Partaking in roles ranging from engineering to operating mounted turrets; women already play a massive role in the armed forces.

What seemingly got overlooked, or at the very least given less media attention was the *National Defence Authorization Act*[3] for fiscal year 2013, signed by President Obama just a few weeks before. The Act is on the surface just a federal law, which outlines the budget for the Department of Defence in 2013. However, it introduced

1 *Info memo from General Martin Dempsey, CJCS to Secretary of Defence*, http://s3.documentcloud.org/documents/561382/letter-from-gen-martin-e-dempsey.pdf

2 Department of Defence and Department of Veterans Affairs, *Women in Military Statistics*, http://www.statisticbrain.com/women-in-the-military-statistics/

3 *H.R. 4310*, http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt479/pdf/CRPT-112hrpt479.pdf

"Roughly 1 female veteran out of 5 has been victim to some sort of sexual abuse during their time in service. The Department of Defence found that in the fiscal year 2009, there were around 3,230 cases of assault that year alone."

several important changes that could have just as significant effect on servicewomen as finally allowing them to participate in combat roles.

The law introduces changes in the way sexual assault cases are investigated and handled within the military. It was in part influenced by the recent documentary *The Invisible War* that brings to light a dark and often overlooked side to the armed forces. It focuses on victims of "*Military Sexual Trauma*" (MST); a term used by the Department of Veterans Affairs referring to rape, sexual assault and harassment whilst in service. While the victims (not all of who are women) come from all areas of the military, they were all subjected to a flawed reporting process and received inadequate protection from the law.

It is estimated that roughly 20% of all female veterans have been victim to some sort of sexual abuse during their time in service.[4] The Department of Defence (DOD) found that in the fiscal year 2009, there were around 3,230 cases of assault that year alone. Alarmingly, they estimate that over 80% of cases fail to get reported either because the victim had no one to turn to or out of fear that they would face personal or professional retaliation.[5]

Military personnel are not able to report via the same system of justice civilians have access to. They can't report to the police who will then conduct an impartial investigation on their behalf. According to Susan Burke of Burke PLLC, victims instead must report to their commanders who oversee the case. These are individuals who not only lack any formal legal training or knowledge; they operate despite several conflicts of interest.

Government figures suggest that 33% of victims of MST do not report the attack because the person they report to are friends with the offender. A further 25% won't because the person they report to is the offender.[6] Fundamentally, it should be asked why the law has been so ineffective so far. It comes down to those that are given the power to enforce it. Abuse of power is all too easy when there is no accountability. Military commanders with such discretionary power are a cause of concern, which should have been highlighted long ago. In this, the United States is behind its NATO allies who long ago relieved commanders of this power. It was only in 2012, that the Secretary of Defence finally issued a directive ordering all sexual assault cases to be handled by senior officers

4 A. Suris and L. Lind, *"Military Sexual Trauma: A Review of Prevalence and Associated Health Consequences in Veterans"*, Trauma Violence Abuse Vol. 9, No. 4 (October 2008), 250-269.
5 Department of Defense, *"Fiscal Year 2009 Annual Report on Sexual Assault in the Military"*, available: www.sapr.mil; Erin Mulhall. 2009. *"Women Warriors: Supporting She 'Who Has Borne the Battle.'"* Iraq and Afghanistan Veterans of America.
6 Nancy Gibbs, *"Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell"*, Time Magazine, 2010.
7 Lisa Daniel, *"Panetta, Dempsey Announce Initiatives to Stop Sexual Assault"*, http://www.defense.gov/news/newsarticle.aspx?id=67954.

at the rank of colonel or higher.[7]

If an investigation does take place, they are often closed due to a lack of evidence, which is incredulous in cases where the victim has visible and often serious injuries as a result off an assault. There have been accounts of interrogating victims and trying to shift the blame away from the offender. Former Sergeant Myla Haider of the Army Criminal Investigation Division recalls being asked to "*advise a victim of their rights to false statement*" and to interrogate her until "*the truth came out*". In other words, she was being asked to get a sexual assault victim to drop the case. Haider herself was assaulted during her time with the military and came forward to report her case.

Despite frequent attempts to silence victims, it has become well known in government that a fundamental issue exists. The Tailhook scandal of 1991 garnered media attention when U.S. Navy and Marine Corps aviation officers allegedly assaulted 90 victims, both male and female during a weeklong symposium.[8] The aftermath resulted in the formation of the Naval Criminal Investigative Service, thus beginning the slow process of addressing the issue.

There is no shortage of critics of the investigative process. In fiscal year 2010, there were over 2,410 reported cases of sexual assault, involving 3,230 perpetrators. Data shows that in 1,025 cases, action was taken. It led to 245 successful convictions, with 175 individuals receiving prison sentences.[9] That's only a 7.6% conviction rate, meaning there are a lot of offenders without any felonies on their criminal record. Consider the implications, not to mention the fact that the Department of Justice estimates that over 80% of cases may go unreported.[10] Individuals who do not face any repercussions for their actions are free to continue their predatory behaviour. A law that is not applied or enforced fails to be a deterrent and an environment where offenders are tolerated and victims silenced is cultivated.

The DoD to a large extent has been hopelessly ineffective. In an attempt to address concerns about these cases, it introduced a Sexual Assault Prevention and Response Office (SAPRO). The office focuses on media campaigns to help spread awareness, and assists with victim care. While well intentioned, it fails to address several issues at the root of the problem. The mentality of those who commit the crimes or cover them up should be a primary concern.

Until the President introduced changes in this fiscal year, potential recruits with felony sex abuse convictions were in some cases able to receive an enlistment waiver. The waiver was introduced as means to help sustain the number of active duty servicemen and women by allowing those who would not otherwise be eligible to enlist (e.g. due to medical conditions) to apply. They are usually only given selectively and after adequate scrutiny of the recruit, but it has in some cases been given to those with felony sex abuse convictions. Also commanders reporting a case would have to go to their direct superiors. Doing so could be seen as a failure on their part to maintain order in their unit. Thus for career soldiers, reporting a crime could negatively affect their progression up the chain so they would be less inclined to do so.

The changes introduced in the past year will no doubt improve the situation. However the onus will lie with those charged to uphold and enforce the law. There needs to be more accountability. The law is not in place to be abused. It exists for a reason and any potential offender who slips through the net and escapes due process equates to an injustice, which affects us all.

In the words of John Locke, "wherever law ends, tyranny begins"[11].

8 Department of Defence, *Tailhook 91: Part 1 – Review of the Navy Investigations*, http://www.dtic.mil/dtfs/doc_research/p18_5.pdf

9 *"Department of Defence Annual Report on Sexual Assault in the Military – Fiscal Year 2010"*, http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf

10 Priscilla Schulz, *"Sexual Assult in the Military"*, http://deploymentpsych.org/topics-disorders/sexual-assault-in-the-military.

11 John Locke, Two Treatises on Government, Cambridge University Press, 1824, 362.

Squatters and Finders:
An Examination of Possession in English Property Law

by Myles Kaufman

Possession has played a significant role in property law, or "*The Law of Things*"[1], since the inception of the English common law. This role has been as a root of title – a foundation for the approximation of ownership. Does this role attach too much significance to possession? In order to determine whether this is so, we must investigate two prominent ways in which possession alone can give rise to property rights: the finding of chattels and the adverse possession of land. It is submitted that too much significance on a legal doctrine exists where the doctrine leads to unjust or absurd outcomes. It is submitted, and will be demonstrated below, that the English law of property does not attach too much significance to possession because its reliance on possession as the root of title does not lead to injustice or absurdity in areas where possession is of the utmost importance.

Before the relevant areas of property law and cases within them can be discussed, a working definition of possession is required. Jeremy Bentham was suspicious of any attempt to define the word, speculating, "*if this image [of possession] is different with different men – if many do not form any image, or if they form a different one on different occasions – how shall a definition be found to fix an image so uncertain and variable*"[2]. Bentham's critique raises immediate concern over the use of this term in the common law. If possession cannot be defined precisely and accurately, how can judges be expected to apply laws that place *any* significance on it? Albert S Thayer, who concedes that attempts to define the term are "*necessarily futile*"[3], argues that the common law demands only a pragmatic conception of possession. Even if we cannot identify possession in its ideal form, we may say that possession exists where it is suitable to say so for practical purposes.[4] Lord Denman CJ's reasoning conformed to this methodology in *Young v Hichens* , in which he held that it would be impossible to say a fisherman had possession of fish "*until the party had actual power over the fish*"[6]. More recent English property cases have followed similar lines of reasoning, holding that possession exists when someone has factual possession (exclusive, physical control) and an intention to possess.[7] While this modern definition is adopted for the purpose of examining

1 Henry Smith, *"Property as the Law of Things"*, Harv L Rev (forthcoming) (2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012815.
2 Jeremy Bentham, *"A Complete Code of Laws"*, *Works of Jeremy Bentham*, Vol. 3, Part 1 (1839) 188.
3 Albert S Thayer, *"Possession"*, Harv Law Rev, Vol 18 No 3 (1905), 198.
4 ibid.
5 (1844) 6 QB 606.
6 ibid.
7 *Powell v McFarlane* (1977) 38 P & CR 452, 470.

possession's role in English property law, Bentham's suspicions still carry weight as the pragmatic conception of possession is increasingly put to the test by the common law.

English property law accords property rights in some cases to a person who finds lost or abandoned chattels merely because they have possession. In 1721, the Court of King's Bench held that the finder of a jewel, who thereby took possession of it, had a title to the jewel as against everyone "*but its rightful owner*"[8]. This rule was qualified more recently by the Court of Appeal in *Parker v British Airways Board* , in which it was held that the finder of lost or abandoned chattels, unattached to land, has a better possessory title to those chattels than everyone but their true owner (or another with a better prior possessory title) so long as the occupier of the premises in which they are found has not manifested an intention to exercise control over everything found within those premises.[10] It was also held in Parker that a trespasser who takes chattels with dishonest intent acquires a limited property right, inferior to the right of the occupier.[11] In these ways, a finder is able to gain an in rem property right in chattels simply by taking them.

In his opinion in *Parker*, Donaldson LJ stressed the need for such rules in order to prevent a "*free-for-all in which the physically weakest would go to the wall*"[12]. This is a valid concern but giving chattels to the person who finds them is not the only remedy. For example, property law could take the approach that in a dispute for chattels where the owner is unknown, the court will decide in favour of the party who will put them to the best use. John Locke, on the other hand, was emphatic about the requirement that, in addition to possession, one must mix in their labour in order to give rise to a property right.[13] Locke's account provides a sound basis for criticizing the decision in *Parker* and the general rule that taking something bestows a property right upon its finder. It is purely coincidental that a person happens upon an expensive necklace lost in an airport lounge or a jewel stuck in a chimney. At least where possession arises from the sale of goods or hunting of animals[14] the possessor has expended some funds or energy in order to gain the property right. However, we are ultimately left with the choice of what would be a more just or rational (but still *feasible*) rule to apply in such cases and one has yet to be put forth. If property law were to stipulate that chattels found were to be auctioned off for charity or given to the person who was able to make the most or best use of them, what may appear to be fair and just approaches, the courts would confront serious pragmatic difficulties in applying such doctrines equally in all cases. Even though there is no good justification for giving the finder right to the lost item apart from legal expedience and a reliance on tradition, it cannot be said that the rule is absurd or unjust. Therefore the English law of property does not accord too much significance to possession in the case of lost or abandoned chattels.

There may be a tendency to overlook the importance of possession in relation to land today because most transactions are made in writing. Nevertheless, possession remains the root of title in land. Possession alone can give rise to title in land and extinguish the paper owner's title once an adverse possessor has had possession for the requisite amount of time. The ability

8 *Armory v Delamirie* (1721) 93 ER 664.
9 [1982] QB 1004.
10 ibid, 1017-18.
11 ibid. 1017.
12 ibid, 1009.
13 John Locke, *First Treatise of Government*, II (1689) para 27.
14 *Pierson v Post* (1805) 3 Cai. R. 175 (New York Supreme Court).

"Even though there is no good justification for giving the finder right to the lost item apart from legal expedience and a reliance on tradition, it cannot be said that the rule is absurd or unjust."

for possession of land to give rise to a property right travels back to the days of Henry de Bracton, when a disseisor could oust a landowner for four consecutive days and thereby receive legal protection against future trespassers.[15] Later on in *Asher v Whitlock*[16], Cockburn CJ upheld the decision of Lord Tenterten in *Doe dem Hughes v Dyeball*[17] in which the plaintiff's possession of land for one year was held to give him a property right good against all others. In *Asher*, Mellor J held that "*the fact of possession is prima facie evidence of seisin in fee*"[18]. The acquisition of title through adverse possession carried on throughout the 20th century under a combination of the *Land Act 1925* and the *Limitation Act 1980*, as in *JA Pye (Oxford) Ltd v Graham*[19], and into the present century with the more stringent rules of the *Land Registration Act 2002*, observed in *Zarb v Parry*[20].

Adverse possession prevents those with distant titles in land from claiming against its current title owner. Yet unlike the rules governing possessory title in lost or abandoned chattels, adverse possession serves a social purpose distinct from its practical legal purpose: it can provide unused land to those who need it by giving those people a means of securing that land against its owner and future squatters. This might even accord with Locke's requirement that possessors mix their labour, though there is no legal requirement for this.[21] Furthermore, the Grand Chamber of the European Court of Human Rights confirmed in *JA Pye (Oxford) Ltd v United Kingdom*[22] that rules regulating adverse possession in the 1925 and 1980 Acts complied with *Article 1 Protocol 1* of the *European Convention of Human Rights*. Based on this interpretation, adverse possession has a sufficient moral and pragmatic purpose; therefore it cannot be said that too much significance is given to possession in this case either.

It has been shown that two areas of law in which possession alone gives rise to title do not produce outcomes that are either unjust or absurd. Since this is the most fundamental way in which possession may exert its influence, English property law does not attach too much significance to possession.

15 Frederic William Maitland, *The Beatitude of Seisin* (1911).
16 (1865) LR 1 QB 1.
17 (1829) Mood. & M. 346.
18 *Asher* (n 17) (Mellor J) 6.
19 [2002] UKHL 30.
20 [2011] EWCA Civ 1306.
21 *Perry v Clissold* (1906) 4 CLR 374. Also *Pye* (n 19).
22 (2008) 46 EHRR 45.

M&A in Germany for Anglo-Saxons

by Jack Schiffer and Miranda Meades**

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* Miranda Meades is a law student and an intern at Beiten Burkhardt

With globalisation on the rise mergers and acquisition (M&A) contracts under German law nowadays look very similar to the Anglo Saxon standards for transactions where UK or US law applies. In particular, the representations and warranties are usually given by way of an independent promise of guarantee (*Unselbständiges Garantieversprechen*) under the exclusion of any statutory provisions (such as the German Civil Code – *BGB*). Nevertheless, there is a number of obstacles and difficulties that an Anglo Saxon party will have to face – particularly on the buyer side – when entering into a transaction involving a German target. Some of those most frequently encountered are summarised hereinafter.

The Asset Deal

Acquisitions can be made by way of a share deal or an asset deal. In the case of an asset deal the principle of specificity (*Bestimmtheitsgrundsatz*) is to be observed. This means that all of the assets that are to be acquired must be very clearly and unambiguously described in detail – usually in annexes to the asset purchase agreement. This requires a great deal of diligence both on the side of the seller as well as the attorneys representing the seller in the preparation of these annexes. If the description of the assets is incorrect or incomplete the purchaser runs the risk that he does not acquire ownership of the respective assets.

The Abstraction Principle

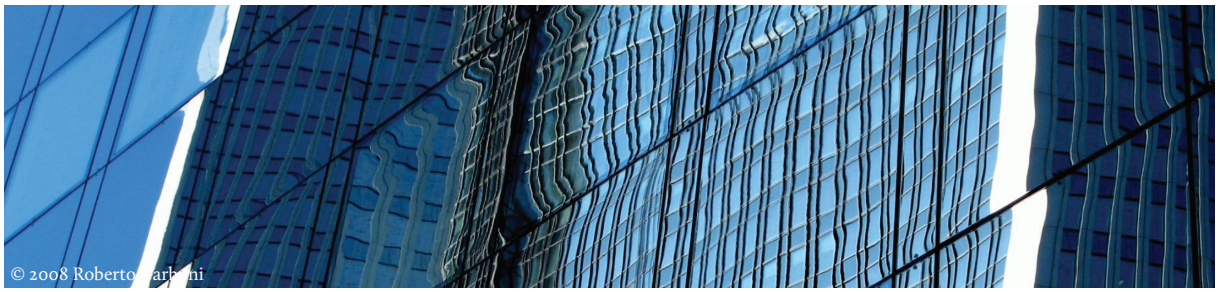
One major difference between German law and common law is the so-called abstraction principle (*Abstraktionsprinzip*) which basically consists of the distinction between the sale and the transfer (handover) of the shares or assets. These are two separate legal transactions whereby the sale is governed by the law of obligations (*Schuldrecht*) and the transfer (handover) by the law of the right in rem (*Sachenrecht*). Thus, the sale constitutes only the obligation to transfer the share or asset whereas the transfer or handover constitutes the actual transfer of ownership. Specific provisions on how such transfer or handover is to be carried out have to be set forth in the share or asset purchase agreement. Usually the transfer or handover is subject to the fulfilment of the closing conditions such as merger clearance, payment or financing of the purchase price and others.

The Notary

Notaries play an important part in German M&A transactions.

Any agreement involving the transfer of shares in a limited liability company (*GmbH*) or real property must be notarised. This means that the share or real property purchase agreement itself and any ancillary agreement must be read aloud by a notary in the presence of the parties or their representatives.

Notarisation is also required for certain corporate acts (e.g. amendment of articles of association, capital measures) for a GmbH or stock corporation (*AG*) and in relation to certain reorganisation measures under the Transformation Act (*Umwandlungsgesetz*).



If the notarisation requirement is not duly satisfied, the legal act will typically be void and cannot be implemented in public registers such as the Commercial Register (*Handelsregister*) or the Land Register (*Grundbuch*).

The notary is a fully trained lawyer, who in some regions can only act as a notary whereas in other regions can at the same time be a practicing attorney. The notary has the responsibility of advising the parties on the legality and appropriateness of the documentation and may suggest changes to already negotiated documentation in order to ensure its legality and expedient implementation. The notary shall always be neutral and will attempt to balance the interests of the parties and to make sure their intentions are properly reflected in the notarised documentation. Furthermore, the notary may supervise the fulfilment of the closing conditions and, in particular, in the case of real property transactions may notify the buyer when the payment of the purchase price is due. The notary may also monitor payments and set up escrow arrangements.

Any violation of the obligation to notarise the transfer documents is likely to void not only the part left out but also those parts of the documentation which were notarised.

For this reason, a share or asset purchase agreement would usually contain a provision stating that the agreement and its annexes include all agreements between the parties on the subject matter of the agreement and that there are no written or oral side agreements.

The fees of the notary are based on a statutory fee schedule and are not negotiable, although there may be some flexibility in how to properly calculate the value of the transaction for the purpose of assessing the notary fees.

In view of the fee issue, there exists a practice of using foreign, particularly Swiss notaries in lieu of a German notary for the notarisation of share purchase agreements involving a German GmbH. Due to recent court decisions and also in view of legislative changes this practice has become questionable as to the validity of such foreign notarisation.

It is always a good suggestion, in particular where the documentation is in English or another foreign language, to find a German notary with ample experience and – as notarisation in a foreign language is generally admissible for share transactions – excellent foreign language skills who can handle the process swiftly and will limit any suggestion for changes to the absolute minimum rather than causing an (unwanted) renegotiation of the documentation. Agreements, however, on the acquisition of real property in Germany can only be concluded in German.

In addition to the notarisation requirement of the documentation any corporate changes that require registration in the Commercial Register such as appointment and removal of managing directors (of a GmbH) or members of the management board of an AG must be applied for in publicly certified form, i.e. the signature of the applicant (managing director, board member) must be certified by a notary. Such certification can also be handled by a foreign notary but such certification may require an *Apostille* (a state legalisation), particularly in the case of non EU countries. The same applies for any powers of attorney issued in favour of third parties (attorneys) to file such applications on behalf of the managing directors or board members with the Commercial Register.

Section 613 a BGB

While in the case of a share deal the target company and its staff remain unchanged employees' rights need to be carefully observed in an asset deal. Section 613 a BGB contains the following regulations:

- In the case of a sale of a business or a part thereof all employment relationships of the selling entity automatically transfer by virtue of law to the purchaser.

- Any rights and obligations set forth in a tariff contract (*Tarifvertrag*) or shop agreement (*Betriebsvereinbarung*) may not be changed within one year after the transfer.

- Any notice of termination of an employee based on the sale of a business or a part thereof is invalid. A notice for other reasons remains possible.

- The selling entity or the purchaser must inform the employees of the intended transfer of their employment relationships indicating the date of the transfer, the reasons herefor, the legal, social and economic consequences of the transfer for and any measures contemplated with respect to the employees.

- Every employee has a right to file a written opposition against the transfer of his/her employment relationship within one month after receipt of the above information. In this case, the employee remains with the seller and does not transfer to the purchaser. The seller may terminate the employment relationship with such employees for business reasons (*betriebsbedingte Kündigung*) as, generally, as a result of the sale of the business there will be no workplace available to such employees.

"Une pétition est un poème, et un poème est une pétition" Why the United States of America is no Country of 'Poets'.

by Mattia Benassi

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In November 2012, talks of secession were resurrected in the United States. The reason behind this universally uncomfortable resurgence, in so far as the political ambit is concerned, was the appearance of multiple petitions, each requesting the 'peaceful withdrawal' of a particular state, on the White House website "We the People". Coincidentally these petitions appeared subsequent to Barack Obama's presidential re-election for a second term. To say that all petitions were drafted for reasons further than a sore response to what has been termed "*the irreversible triumph of a new, 21st-century America*"[1] is outright speculative. With hindsight, a majority of the individuals advancing and signing empty and redundant petitions might be more properly considered as vesting the roles of the proverbial monkeys who see and, just for the sake of some action, do. The text of the first of the two Alaskan petitions, drafted by John Doe is exemplary:

> "*ALLOW ALASKA TO SECEDE FROM A DYSFUNCTIONAL UNION.*
> *As an American Veteran*[sic] *on behalf of the U.S. Constitution, the Republic, the Rule of Law, and equal justice for all freedom loving citizens of the United States of America hereby declare that the Federal Gov-*

1 Howard Fineman, *Barack Obama Reelection Signals Rise Of New America*, http://www.huffingtonpost.com/2012/11/06/barack-obama-reelection_n_2085819.html (November 2012).

ernment allow Alaska to peacefully secede from a dysfunctional Union that is run by corrupt politicians who buy the votes of individuals who can no longer be seen as American citizens but rather, slaves to a tyrant. We who took the oath to protect and defend the Constitution of the United States of America against all enemies, foreign and domestic, now declare Washington D.C. to be the domestic enemy to the freedom and liberty of all Alaskans and indeed, 50% of the free citizens of the USA. Therefore, we declare our secession in support of the U.S. Constitution. LET MY PEOPLE GO!"[2].

On a side note, that is not the case with the Texan petition. As documented by the U.S. Department of Commerce's Bureau of Economic Analysis in 2011, that same year Texas registered a current-dollar GDP of $1.308 trillion, second in the United States of America and twelfth in the whole world, – falling just short of Australia's 2011 GDP of $1.379 trillion – and a real GDP growth of 3.3%, the national average being 1.5%.[3] Owing to its solidity, particularly in trade, the state of Texas would not necessarily suffer from financial unsustainability of a secession which would probably be a very real truth for the majority of the applicant states.

Nonetheless, whether grounded on abstract and generalised policy disappointments or the loss of a wet t-shirt car wash business by hand of the government[4], the initial popular response to the appearance of such petitions was inordinately strong. On November 15, 2012, eight days after Romney's concession speech in Boston, it was announced that all fifty states had submitted a petition (or more, the total being 69) to secede from the federal constitutional republic. On November 16, 2012, 'Super Nerd' Lance Ingle analysed the statistics (http://lanceingle.com/playground – although the data is partially incomplete, it suffices for present purposes) which testified to the definitely rapid and seemingly widespread support the submissions were receiving: approx. 800,000 digital signatures.

But that was it. Surprisingly, on December 12, 2012, Ingle posted his last update owing to 'stagnate' data, thus 'prematurely' ending his analysis. "It's been fun". The quasi-ominous, and now fixed, imposing six digit figure: 932,367. Definitely less ominous when calculated as a percentage of the national population: approximately 0.003% – based on the United States' Census Bureau estimate for 2012 of 313,914,040 residents[5] and rounding up. A 'butthurt'.

Why? Obviously, the very diplomatically prolonged silence advanced by the White House in the act of responding to each petition, might have weighed on the ardent(ly publicized) flame of protest fuelling the recent pseudo neo-secessionism. But said flame clearly burnt out too quickly for it to be attributable to the White House's 'neglect'. History has a tendency to answer such questions.

As soon as Michael E. petitioned on November 07, 2012 for the State of Louisiana to "peacefully withdraw from the United States of America", it was hard to not be reminded of the American Civil War of 1861. That year, on April 12, following the decision of eleven of the fifteen 'American' states to secede, began a quadrennial conflict, which ended only after

2 John Doe, *"Allow Alaska To Secede From A Dysfunctional Union"*, https://petitions.whitehouse.gov/petition/allow-alaska-secede-dysfunctional-union/hz9dc6H8 (November 2012).

3 Bureau of Economic Analysis, *BEA Regional Fact Sheet for Texas*, http://www.bea.gov/regional/bearfacts/action.cfm?geoType=3&fips=48000&areatype=48000, (March 2013).

4 Cavan Sieczkowski, *"Derrick Belcher, Man Behind Alabama Secession Petition, Mad About Losing Topless Car Wash"*, http://www.huffingtonpost.com/2012/11/16/derrick-belcher-alabama-secession-petition-topless-carwash_n_2143456.html (November 2012).

5 United States Census Bureau, *Estimates of Resident Population, Population Change, Percent Distribution, and Population Density for the United States, States, and Puerto Rico: April 1, 2010 to July 1, 2012*, http://www.census.gov/popest/data/maps/2012/MAPS_EST2012-01.csv (July, 2012).

"The Constitution may open with "We the People", but it is an enumeration of the rights and powers of a belligerent federation."

the South, in the persons of General Robert E. Lee and the 28,000 soldiers of the Army of Northern Virginia, surrendered at Appomattox on April 9, 1865. The sheer brutality of the conflict resulted in an estimate of 1'037'200 casualties[6], approx. 2.5% of the estimated American population then. That is: 259'300 per year; 21'609 per month; 4'987 per week; 2'850 per day; 119 per hour; two men, women or children per minute. All and any initial preoccupations aroused by talks of secession would seem rather self evident. However, it might be unreasonable to believe that in 152 years of societal, scientific and philosophical progress, a nation's reaction to a secession would or could be similar. And if the fear for a modern civil war, admittedly a direful fantasy, would appear to provide with a weak, barely plausible pretext for the failure of the political movement, few remember the importance of the judicial aftermath of the 1861 Civil War in the form of *Texas v White*[7].
The Supreme Court case stands as the extant reason for why in November 2012, the news documented the support for 'mere' petitions to secede in the first place. Briefly summarised: in 1861, Congress authorized the transfer of United States bonds to the State of Texas, which were made payable to the State (or bearer) and later redeemable. At the outbreak of the civil war, to the finality of purchasing war supplies, the insurgent legislature in Texas allowed for the sale of said bonds and accordingly repealed an act which required, for a sale to be considered legal, prior endorsement by the governor of Texas. Four years later, the reconstruction government reclaimed the bonds, which were then in possession of citizens in different states. The defendants, who had purchased the bonds without prior endorsement by the governor and had later attempted to redeem them, raised a jurisdiction-centred contention; namely that, owing to Texas' 'secession' – its acquisition of the status of 'territory held over military conquest' following the loss of the civil war being a corollary of said withdrawal – the State had no right to bring any suit in the Supreme Court against any body, given the purported inapplicability of federal law. Chief Justice Chase in delivering the opinion of the Supreme Court held that the State of Texas had not, in fact, ever seceded. The sole action of unilaterally seceding from the Union was not, on a holistic interpretation of the *Constitution* and of the character of the Union itself, legal:

> "*Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States... The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States*"[8].

The decision borders on artistic licence. It was then and now challenged on grounds echoing Alexis de Tocqueville's observations in 1835 in his *Democracy in America* on the nature of the Union and the inability of the Federal Government "*of maintaining its claims directly either by force or right*"[9], in terms of 'express' authority. These thoughts were elaborated in

6 John W. Chambers, *The Oxford Companion to American Military History*, Oxford University Press, 1999, 849.
7 (1868) 74 U.S. (7 Wall.) 700.
8 Ibid, 725.
9 Alexis De Tocqueville, *Democracy in America*, 413.

1859 by Mackay who rather harshly justified the existence of the Union on patient endurance only, writing:

> "*Any state may at any time constitutionally withdraw from the Union and thus virtually dissolve it... they have no obstacle in the Constitution*"[10].

Scrutiny of the constituent Articles will reveal that the *Constitution* did not, and presently does not, include any provision expressly dealing with the legality of a threat of 'secession'. Nor are there any unequivocal words which, on a literal interpretation, warrant the legality of a Union that cannot be estranged, therefore allowing the pre-emptory abatement of the idea of secession, as recently done by Supreme Court Justice Antonin Scalia. An absence that is inadequately mitigated by seldom allusions in the *Constitution*'s language, as with the first words of the *Preamble*: "*We the People of the United States, in Order to form a more perfect Union*", *Article One, Section Ten*:

> "*No State shall enter into any Treaty, Alliance, or Confederation;... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts*",

or *Article Six, Section Two*:

> "*This Constitution... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*",

this being a non-exhaustive list. And even though unvoiced express prohibition cannot mean inferential permission, the obvious ambiguity of the *Constitution*'s words cannot justify any prompt dismissal of the right of self-determination.

Indefinite phraseology is not the only way in which the *Constitution* fails the United States. Blind praise of the *Constitution* is almost absurd, it being praise of a collection of late eighteenth century hostile ideologies established in federalism. The *Constitution* may open with "*We the People*", but it is an enumeration of the rights and powers of a belligerent federation. Arguably, a Constitution safeguarding the "*right to bear arms*" (hardly functional towards the *Declaration* rights "*to Life, Liberty and the pursuit of Happiness*") before acknowledging any constitutional standing to the right to Education, cannot be justly defined as a Constitution. The term 'amendment' is required.

It is no doubt the easiest solution, under *Article Five*[11]; but it is not the simplest. Whereas amendability exists as a doctrinal possibility, *Article Five* gives effect to a firm procedural entrenchment. The doctrine thus operates in two stages. First, an amendment may be proposed either by a national convention called by two-thirds of the state legislatures, or by two-thirds of both Houses of Congress, if they shall deem it necessary. Second, Congress may decide to ratify an amendment by either offering the ratification to three-fourths of the state legislatures, or by ordering state ratifying conventions to be held in three-fourths of the states. The difficulties inherent in the 'amendment' device are clear and it isn't too hard to see how, regardless of the breadth of the doctrine, it is exercisable subject to the caveat "*for 'popular' ratifications only*". Passing

10 Donald W. Livingston, *"The Secession Tradition in America"*, in David Gordon, ed., *Secession, State and Liberty*, Transaction Publishers, 1998.
11 Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, Little, Brown and Company, 1898, 15.

a controversial amendment is a tiring endeavour. History has shown that it is easier to win a war.

Regardless, the romanticisms offered by Chief Justice Chase are from a practical and historical viewpoint reasonably comprehensible. Any other decision might have been 'imprudent'. For one, and for many, it would undermine the victims of the Civil War of 1861 and so uncomfortably void Horace's "*decorum est pro patria mori*" (loosely translated: "it is right to die for your country") of any meaning. This only partially justifies the insipidity with which Justice Antonin Scalia, 137 years later, reiterated a purposive approach to the *Constitution*: "*[The] answer is clear... there is no right to secede. Hence, in the Pledge of Allegiance, "one Nation, indivisible.""*[12]. Undoubtedly, when compared to the *Commentaries*[13] or the judgment in *Texas v White*, it resembles an empty affirmation of 'good' law. A crystal instance of legal positivism, lacking in vibrancy.

A more recent opinion is also of interest. In *Reference re Secession of Quebec*[14], the Supreme Court of Canada answered the Governor in Council's queries concerning any right of the National Assembly of Quebec to 'unilaterally' secede, firstly, under the *Constitution of Canada* and, secondly, under international law.

On answering the first question, the Court refused to confine the extent of their inquiry to a merely literal reading of the *Constitution*, realising that a constitutional authority, 'in order to endure over time', cannot exist exclusively within its four corners. Thus "*in the process of constitutional adjudication, the court may have regard to unwritten postulates which form the very foundation of the Constitution*"[15]. The Court identified four such tacit constitutional principles, comprising federalism, democracy, rule of law, and respect for minorities and considering each one found that a lawful secession could not be effected unilaterally; unilaterally meaning 'aggressively' and without 'principled negotiations' between the 'parent' and 'aspiring' states. Interestingly, the Court closed emphasising that the validity of its opinion extended only insofar as the scenario of a unilateral secession was concerned, thus potentially opening to a plausible theory of 'secession'.

On answering the second question, while appreciating the focus that international law placed on territorial integrity[16], the Court acknowledged that 'in exceptional circumstances' a right of secession may arise, grounded on a people's right of self-determination. However the Court held that the right of self-determination extended only to those people whose physical and intellectual integrities were compromised to the extent that they could not be considered to be a 'free people' any longer.

The opinion delivered by the Supreme Court of Canada in *Reference re Secession of Quebec* is not just more elaborate than the judgment in *Texas v White*. The opinion of the nine Supreme Court Justices is, while lengthy, definitely more plausible and persuasive, particularly in its answer to the first question referred on the interpretation of the Constitution. Whereas Chief Justice Chase's judgment could be described in terms of mere inferences purported to be constitutional truths, the Supreme Court of Canada rejected a literal approach to the idea of Constitution and grounded its exercise on true facts. Furthermore it gave a detailed analysis of all the relevant arguments both for and against the legality of a unilateral secession. Simply put, their dismissal of a 'unilateral secession' as a constitutional possibility is more justified.

12 Antonin Scalia, *Letter to Daniel Turkewitz*, 2006.
13 Joseph Story, *Commentaries on the Constitution of the United States*, 1883.
14 [1998] 4 LRC 712.
15 *Manitoba Language Rights Reference* [1985] 1 SCR 721, 752.
16 Conference on Security and Co-operation in Europe, *Final Act*, 14 ILM 1292 (1975).

In conclusion, it must be true that state independence is a mere formalism. Arguably whimsical, but, nonetheless rooted in strong theories of philosophy and much too valuable to be determined by the outcome of an armed conflict. Whilst being a painful realisation, no figure can be allowed to weigh indelibly on the sovereignty of a state. The Declaration of Independence itself, mistaken by the 69 petitioners as something of a platitude, reads:

> "*Governments long established should not be changed for light and transient causes... But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is [the people's] right, it is their duty, to throw off such government.*"

In such light, one can but question the validity of precedent. Following the *Texas v White* ruling, secession must surely remain, whether justly or (more controversially) legally, or neither, a legal myth and a political delusion. 'Somewhat' in Justice Antonin Scalia's words, rarely "poetic license can overcome all that"[17]. Surely the inspired exhortation by American veteran John Doe in the petition for Alaska to secede, does not.

On yet another brief 'aside', if, defying all odds, any, let alone all, of the States had succeeded, would there have been any benefit? In the United States, a secession, on a caeteris paribus assumption, would mean the end of all bodies, public and private, regardless of social standing, presently relying for their sole subsistence on federal aid. These are: formula grants, project grants, direct payments for specific use, direct payments for unrestricted used, direct loans, guaranteed loans, insurance, sale, exchange or donation of property and goods, use of property, use of facilities, use of equipment, provision of specialised services, provision of advisory services, provision of counselling, dissemination of technical information, training, investigation of complaints, federal employment; in total a benefit and an investment adding up to "over $600 billion dollars"[19] per year – just gone. Nugatory speculation?

17 Antonin Scalia, *Letter to Daniel Turkewitz*, 2006.
18 Danny Werfel, *A Proposal for Better Management of Federal Grants* (February 2013).

Regulating the Phenomenon of Online Social Media

by Shrene Shergill

Social networking and its nearly limitless boundaries provide users, businesses and companies an enormous platform to reach the world. Real-time connection and unlimited audiences allow users to communicate with anyone, anywhere, at any time. Accordingly, Internet users are in a better position to exercise their right to freedom of expression than ever before. However, the age-old dichotomy between the freedom to express and its surrounding legal limitations has once again been brought to the forefront of our daily lives. With the potential to cause real harms online, restrictions and limits are being justified in the interests of the public.

Recently, we have seen prosecutions for online speech via s.127(1)(a) of the *Communications Act 2003* and s.1(1) of the *Malicious Communications Act 1988*, both condemning speech that is of "*gross offence*". The former and more predominantly used Act was originally intended for telephonic communications, as was outlined in *DPP v Collins* [2006] UKHL 40. The Act was then applied to "*public electronic communications networks*"[1] or Internet communication. According to s.127(1)(a) of the *Communications Act 2003*, the condemned communication pertains to communication which is "*grossly offensive or of an indecent, obscene or menacing character*". The *Malicious Communications Act 1988*, which covers speech sent via electronic communications, is contravened where speech is "*indecent or grossly offensive; a threat; is false and known or believed to be false by the sender*". This Act goes further than s.127(1)(a) in that it also requires "*distress or anxiety*" to be intended.[2]

The guidelines

Keir Starmer QC, Director for Public Prosecutions (DPP), released guidelines in mid-December 2012 on how prosecutors and the police should deal with allegations of online social media offences and further released a public consultation on the matter.

Part of the initial assessment involves distinguishing communications between what may constitute i) credible threats of violence; ii) harassment or stalking; iii) in breach of a court order; iv) or anything else considered "*grossly offensive, indecent, obscene or false*"[3]. Anything that falls within the first three categories is advised to be prosecutable under relevant legislation where the test is satisfied.

The final category focuses on "*grossly offensive*" communication within s.127(1)(a) of the *Communications Act 2003* and s.1(1) of the *Malicious Communications Act 1988*. This entails a high threshold test here to protect the public interest and the 'right to be offensive'[4].

Comments made must be ***more*** than offensive, disturbing, rude or an unpopular opinion; even where it may be distasteful or painful to those subjected to it. This threshold is given in the interests of balancing our *Article 10 European Convention of Human Rights* right to freedom of expression. Accordingly, citizens are guaranteed a wide-ranging freedom to hold, receive and impart opinions without interference amongst geographic frontiers; yet, any limitations must be "*prescribed by law*" and to be proportionate with what is in the "*public interest*"[5]. This interest includes those of national security or public safety, prevention of disorder of crime and protection of others reputation etc.[6] According to the guidelines, the test is unlikely to be met where:

"*a) the suspect has swiftly taken action to remove the communication or expressed genuine remorse;*

b) swift and effective action has been taken by others, for example service providers, to remove the communication in question or otherwise block access to it;

c) the communication was not intended for a wide audience, nor was that

1 *Chambers v DPP* [2012] EWHC 2157 (Admin) (DC) at [21]
2 *Malicious Communications Act 1988* s.1(b)
3 *CPS Guidlines*, <http://www.cps.gov.uk/news/press_releases/dpp_launches_public_consultation_on_prosecutions_involving_social_media_communications/> accessed on 24 December 2012
4 *Jersild v Denmark* [1995] 19 E.H.R.R. 1
5 Article 10 *European Convention on Human Rights*
6 Article 10(2) *ECHR*

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the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or
d) the content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression"[7].

Age and maturity are now taken into account, particularly with regards to children and users under the age of 18, highlighting the attitude against prosecuting children, in the public interest.

The guidelines: an attempt to solve these issues?... Or a failure?

The DPP aimed to balance our Article 10 Convention right with protecting victims of online abuse. However, the question remains, are social media users being prosecuted for minuscule, or 'non credible threats' which fall somewhere in between offensive and grossly offensive?

Internet users are given little guidance regarding what is ***more*** than "*grossly offensive*", Charon QC highlighted[8]. Adam Wagner, a human rights blogger and lawyer, however, is concerned with part d) of the 'public interest' element and questions whether the police know what is "*tolerable*" in today's society[9]. With guidelines not being binding, the CPS has wide discretionary powers in determining these factors. These powers led to the conviction of Paul Chambers in what is commonly known as the "*Twitter Joke Trial*".

The Paul Chambers trial outlined the first conviction for using Twitter to tweet what the court at first instance deemed as one of "*menacing charac-*

7 Article 10(2) *ECHR*
8 *'Podcast with John Cooper QC on the CPS guidelines on social media' Charon QC Blog*, <http://charonqc.wordpress.com/2012/12/22/tour-lawcast-14-john-cooper-qc-on-the-cps-guidelines-on-social-media/> accessed on 23 December 2012
9 *'New prosecution guidance on offensive speech online: sensible but...' Adam Wagner UK Human Rights Blog*, <http://ukhumanrightsblog.com/2012/12/19/new-prosecution-guidance-on-offensive-speech-online-sensible-but-the-law-is-still-out-of-date/> accessed on 19 December 2012

ter" and therefore, contrary to *s.127* of the *Communications Act 2003*.[10] Mr. Chambers had sent a message claiming he was going to blow the Robin Hood Airport "*sky high*" if it wasn't reopened within the week. Mr. Chambers was arrested and convicted on suspicion of making a hoax bomb threat.

The senior colleague at the airport judged it to be a "*non-credible threat*" and the High Court thought it was no more than a "*foolish comment*". As such, after a long legal battle, the conviction was quashed and justice was served on appeal.

There is a need for clarification of "*menacing character*" within *s.127(1)(a)* of the *Communications Act 2003*, as shown by the *Twitter Joke Trial* and as pointed out by John Cooper QC who represented Chambers in the trial.[11] The trial judge's reasoning is no longer followed nor has the DPP address the issue.[12]

Nonetheless, Adam Wagner, believes the guidelines to be "*sensible*" but still believes the laws which predate the modern social networking phenomenon are problematic.[13] Even within the Chambers' judgment the courts recognised the laws were dated with respect to Twitter.[14] However there is hope. The application of the guidelines to a user who posted an unpleasant comment about Olympic Diver, Tom Daley, led to a satisfactory result. As the user had removed his comment and had shown remorse, the DPP found it not to be a public interest matter to pursue the claim any further. Interestingly, this comment could have alternatively fallen under *s.4(a)* of the *Public Order Act 1986*, as it included homophobic abuse which is protected under this legislation.

The "*post-comment*" allowance to remove a comment and show remorse are positive steps forward as well, as pointed out by Wagner. This is similar to what American States use in relation to newspaper publishing and mainly civil offences of defamation; these are known as Retraction Bills. Currently, Texas is proposing a Retraction Bill, which will include online speech, thereby encouraging disputes to be resolved out of court.

The future...

As the UK has sunken its teeth into the regulation of online social media, a more concrete and clear law is necessary. Due to the global use of the Internet, there is a far greater risk of comments being seen by others when unintended to reach wide audiences. Defamation, contempt and harassment, not handled within the above mentioned guidelines are causing further problems and putting additional strains on the courts. Although guidelines are a step in the right direction, the battle appears to have only just begun. The law is lacking any merit in terms of enforcing these guidelines, however the true effects are yet to be seen. Nevertheless, it is clearly advisable to act with caution before publishing anything controversial online.

10 *Chambers v DPP* [2012] EWHC 2157 (Admin) (DC)
11 *'Podcast with John Cooper QC on the CPS guidelines on social media' Charon QC Blog*, <http://charonqc.wordpress.com/2012/12/22/tour-lawcast-14-john-cooper-qc-on-the-cps-guidelines-on-social-media/> accessed on 23 December 2012
12 Mora, P and Savage, A *'Chambers v DPP: credible threat or a joke in bad taste?'* [2012] ELR 255
13 *Ibid*
14 *Chambers v DPP* [2012] EWHC 2157 (Admin) (DC) at [27]

A Law Degree with Nowhere to Go

by Hayley Silvertown

The path is seemingly transparent; survive law school, graduate with a law degree and then a job offer will await. Sadly, securing a career with a law firm is no longer as simple as it once was, and the end goal has been thwarted by hundreds of other law graduates also competing for the minimal training contract vacancies.

It has become a well-known feature of the recession that Universities have opened more places for students, thereby turning out too many graduates for the employment market to handle. This unsettling trend is all too apparent for law schools as well, and law students have begun to bear the brunt of this disadvantage. The increase in admissions has led to fewer possibilities after graduation and while law firms are recognized as one of the highest paying graduate employers, City Careers' prospectus of the 2013 Graduate Market highlights that 1 in 5 graduates are still out of work, with unemployment being at a record high of 21.4%[1]. For the past few years, the Law Society has been warning potential applicants of the obstacles and risks to obtaining a career in law and the limited prospects that await them. However, any possible benefit that the campaign could confer is counteracted by the continual yearly increase in the number of acceptances for each graduating class. The Associate of Graduate Recruiters (AGR) published a statistic based on the 2012 graduating year, that an average of 44.5 students are competing for the same training contract vacancy[2]. The expansion is only fueling the fire, as law schools are turning out more graduates yearly, with dozens of students across the country, and even beyond, to compete for the same positions.

According to City Careers' 2013 Graduate Market Survey, graduate applications to legal employers are up 14%[3], stressing that the competition is at an all-time high. As a result, spending countless hours in the library, striving to be in the top percentage of the class, is no longer sufficient for law school, and instead, time is now split between studying and searching for opportunities to build your CV in an attempt to separate yourself from all those other students with that same law degree. Those rare opportunities that arise for pro-bono work or volunteer projects are quickly scooped up and searching for that extra element to 'boost' your CV becomes yet another competition. As a result, it has become the status quo to have any element of legal experience on your CV prior to applying for training contracts; otherwise you will be at a disadvantage. The recent AGR survey concluded that half of the training contracts offered by the top-tier law firms were likely to be to those graduates who had already completed some work experience with that specific employer. In recent years, the number of LPC candidates has risen by nearly 70%[4], far surpassing the availability of training contracts, with approximately only 500 pupillages being offered to 1700 BPTC candidates.[5]

Furthermore, as law school used to be regarded as an investment in one's future, the looming probability of student debt is no longer soothed by the impending prospect of a legal career. The Higher Educa-

1 *Graduate Market in 2013. City Careers, 1 Jan. 2013. <http://www.city-careers.com/thegraduatemarket/>*
2 *All About Law. All About Law, n.d.<http://www.allaboutlaw.co.uk/index.php/careers/training-contracts/what-are-my-chances-of-getting-a-training-contract/>.*
3 *ibid 1*
4 *Legal Training System Failing Law Students. Guardian News, 13 July 2010. <http://www.guardian.co.uk/law/2010/jul/13/legal-training-law-students>*
5 *Health Warning for Prospective BPTC Students. BSB, Bar Council, 24 Jan. 2012. <https://www.barstandardsboard.org.uk/media/1363162/final_health_warning_for_bsb_website_24_jan_2012.pdf>.*

"Students become quickly discouraged as the time spent unemployed after graduation grows, and the process becomes increasingly stressful for those graduates who are drowning in debt and eager to pay off their student loans."

tion Statistics Agency (HESA) published statistics in 2012, revealing that 61.5% of law graduates in the UK were employed in the previous year[6], a number that seems almost promising. Nonetheless, the Bar Standards Board issued a "*health warning*" for prospective applicants, detailing the grueling, and costly, process in hopes of painting a realistic picture of the legal employment market[7]. It is possible that the nature of the law degree is changing, sadly welcoming only those who can afford to qualify.

Seeking to add the credentials to your CV is essentially compiling the building blocks to a structural foundation, with a competitive CV being only the first of many steps towards securing a career in law. The days of just getting "*good grades*" are apparently over, and the new game that students must play is that of "*networking*"; this phenomenon, not strictly related to the legal profession, is crucial to getting ahead of other peers in the hunt for a training contract and is solely predicated on the premise of "*whom do you know*". Now, networking has become an essential skill – a gruelling task to identify that potential connection with a lawyer at any firm, regardless of how distant, and for those graduates who haven't yet mastered this, they are once again, at a disadvantage. Students become quickly discouraged as the time spent unemployed after graduation grows, and the process becomes increasingly stressful for those graduates who are drowning in debt and eager to pay off their student loans. The idea of law school and conversion courses being regarded as a down payment on your future, and spending a few extra months searching for a job seems like a short-term pain for a long-term benefit, however that simply is not the case any longer. The countless hours spent building your resume to outshine other law graduates, is just a sliver of the actual effort required. Looking for a job after graduation becomes, essentially, a job in itself, a gruelling and rigorous process that doesn't end with building your CV and preparing your cover letter.

Given the increasingly onerous and difficult nature of the process of securing a job after law school, the average student may very well see fit to ask if it is wise to pursue such a career. While this information may be disheartening, the possibility of improvement is in the horizon. According to a recent study published by the Law Society, an annual growth of 4% out of the recession was forecasted for the legal services market[8]. Granted this low number hardly seems encouraging, it, nevertheless, indicates the potential hope for graduates as the majority of the UK's leading employers are aiming to expand their graduate recruitment in the upcoming years. At this point in time, all that can be expected is for students to make the best of the current career climate with the information provided and utilize all the available resources to become the best possible candidate for future employers.

6 Destinations of Leavers from Higher Education. Higher Education Statistics Agency, 28 June 2012. <http://www.hesa.ac.uk/index.php?option=com_content&task=view&id=1899&Itemid=239>.

7 Ibid 5

8 Law Society. The Law Society, 6 Feb. 2013.<http://www.lawsociety.org.uk/news/press-releases/growth-forecast-for-global-legal-services-but-tough-times-for-high-street-lawyers/>.

Miscarriages of Justice

by Nimra Ehsan

Rumblings of dissatisfaction with the English Legal system began to grow in the 1980's. If we assume everyone who is accused of being guilty is in fact guilty, then a miscarriage of justice has already occurred. The phrase "*miscarriage of justice*" was brought into the spotlight with two-landmark decisions: the *Birmingham Six* and the *Guildford Four*. Both stemmed from IRA outrages against civilian targets at the height of the bombing campaign. The police quickly accused, and wrongfully convicted. It was only due to the determination and investigation of a TV documentary team and MP Chris Mullin that the injustice suffered by the Birmingham Six came to light. When the *Six* were released in 1989, it appeared that there was hope for prisoners who had been pleading their innocence in vain. Over the next eleven years many first instance decisions would be overturned. including the *Guildford Four*, Judith Ward, the *Cardiff Three* and the *Bridgewater Four*.

A miscarriage of justice can result from non-disclosure of the evidence by police or prosecution, fabrication of evidence, poor identification and unreliable confessions due to police pressure, or misdirection by the judge during the trial. Since 1984 two key legislations have been introduced in to prevent further miscarriages. The *Police and Criminal Evidence Act 1984* gave Police Officers rigid rules on how long they could question suspects for and also insisted that the interviews should be taped in order to ensure that there was no mistreatment or undue intimidation. The *Criminal Procedure and investigation Act in 1996* was also introduced to make sure that the police or Crown Prosecution Service disclose to the defence everything that could be considered relevant to their

case.

Therefore, the question is that to what extent does the law achieve justice? The answer is far less encouraging than one might hope for regardless of the many safeguards that have been implemented. This can be seen in a number of areas such as sentencing policy or the means of assessing quantum of damages in civil law. However, the need to give justice to meet the individual's situations or at least to avoid injustice is one of the principles behind the introduction of the *Practice Statement (1966)*. The decisions made in *B R Board v. Herrington*[1] and *R v. R*[2] are two examples of it being used for this purpose. There have also been cases of injustice being created by failing to give credence to the individual's situations, as in *R v Ahluwalia*[3].

In criminal law, the pursuit of justice is displayed in a number of ways. Crimes are graded according to their seriousness, factors such as *mens rea*, the extent to which the crime in question damages social benefits or interferes with personal rights. Furthermore the gravity of the crime in question must be taken into account. For instance murder will always be considered to be the worst crime and infinitely more serious than charges of assault. The sentencing policy must reflect both the seriousness of crime and factors such as whether it is the defendant's first offence or a repeated one. For example, retribution directs to most serious crimes whereas rehabilitation seeks to reform the criminal if possible. Sentencing focuses on the view that if the criminal is to reform, he must be dealt with fairly and proportionately, based on the nature of crime committed. Furthermore, the use of strict liability in crimes illustrates the fact that Parliament recognises the standard of proof is not appropriate to achieve justice in every situation. In contrast, it may lead to injustice in certain cases for example *Sweet v. Parsley*[4].

The issue of impartiality in the jury is another factor that can lead to injustice. There are many examples of case law in which the jury was shown to be everything but impartial such as in *Gregory* and *Saunders* in which it was accused of racial bias against the defendant. Other issues include the secrecy of the jury room, as shown by the decision made in *R v Young*[5] and the influence the media can have upon a jury. All of which can result in injustice.

In tort, before Lord Atkin's opinion in *Donoghue v. Stevenson*[6], the "*contact fallacy*" rules there was no generally duty of care and little chances of remedies. The case not only did secure a remedy for claimant but the "*neighbour principle*" also helps to identify other D.O.C situations and the development of tort of negligence leading to justice in many individual cases. The tort of nuisance allows for protection and justice against the unreasonable use of land and etc. Nevertheless, one-way in which Tort very often produces injustice or not real justice is in the remedies available. Sometimes, money is not an appropriate way to bring justice. Indeed, remedies such as injunctions are clearly aimed at representing justices in certain cases. This is also true with Contract law in the case of *Hadley v. Baxendale*[7] or *Victoria Laundry v. Newman Industries*[8].

It is true that the most important aim of the law is to ensure justice for both society and individuals. However, like all things in this world, nothing is ever perfect and that sadly includes the law.

1 *B R Board v. Herrington* (1972) 1 All ER 749
2 *R v R* [1991] 3 WLR 767
3 *R v Ahluwalia* (1992) 4 AER 889
4 *Sweet v Parsley* [1970] AC 132
5 *R v Young* [1995] QB 324
6 *Donoghue v. Stevenson* (1932) All ER Rep 1
7 *Hadley v Baxendale* [1854] EWHC J70
8 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528

Diversity within the Judiciary

by Nivetha Yoganathan

Are judges representative of modern and diverse society? Or are they all 'pale and male'? These are some of the questions which have arisen of late regarding to the diversity of the judiciary.

According to published data, in 1998, 1.6% of judges were from Black, Asian and Minority Ethnic (BAME) backgrounds and 10.3% of judges were women. By 2011 the percentage of judges from BAME backgrounds and women increased to 5.1% and 22.3% respectively. This shows that there has been some improvement to the diversity of the judiciary.

It should also be noted that other branches of the judiciary are more diverse, for example, just over half of all Magistrates are women; and fewer than 10% are from a BAME background.

However, we are still left with the question whether these figures reflect our current society. Recent data from the Office for National Statistics (ONS) shows that is not the case, as the total population of women in England and Wales is 50.8%, whereas, the non-white population is 12.1%.

On the issue of gender, assuming that this trend continues, it will take us roughly another thirty years to get a gender balanced judiciary. A comprehensive study by the Council of Europe on female professional judges over the forty seven Member States showed that UK was lagging behind most other nations, with only Azerbaijan (9%) and Armenia (slightly fewer than 23%) employing fewer female professional judges than the UK. However, in some other countries such as Slovenia (78%) and Greece (65%), women make up the majority of professional judges.

Why is it so important that we have a diverse judiciary?

The obvious reason would be that the society and the people who live in it will be better represented, and the judgments made by those judges will reflect the views of the current society. Another reason would be, as the House of Lords concluded in their recent report on Judicial Appointment, '*a more diverse judiciary would improve trust and confidence in the justice system*'.

In 1995, 80% of Lords of Appeal, Heads of Division, Lord Justices of Appeal and High Court judges were educated at Oxford or Cambridge and 8% of judges who were appointed since 1997 were educated at a public school. Can all of those judges relate to a defendant who comes from a 'less privileged' background? This narrow background of judges means that they can be very out of touch with the world in which they are working.

A perfect example would be Mr Justice Harman who resigned in 1998; he said in three different cases that he had not heard of the footballer Paul Gascoigne, the singer Bruce Springsteen and the rock band Oasis. Maybe knowing these 'celebrities' is not very important but shouldn't the judges be aware of other cultures, religions, and viewpoints if they wanted to make a sound judgment which is not only compatible with the law of this country but also one which reflects our diverse society?

In the words of Lady Hale: '*a diverse judiciary is an indispensable requirement of any democracy*'. Therefore, it would seem that for the UK to be a more democratic country, the diversity of the judiciary has to be certainly increased.

1 www.guardian.co.uk: *"UK among worst in Europe for employing female judges"* by Owen Bowcott
2 www.opendemocracy.net: *"Diversity in the British judiciary – on the backburner for too long"* by Samir Jerai & Heather Mcrobie
3 www.guardian.co.uk: *"White and male – diversity and the judiciary"* by Simon Rogers
4 www.guardian.co.uk: *"UK among worst in Europe for employing female judges"* by Owen Bowcott
5 *English Legal System*, 12th edition, 2011, by Catherine Elliott & Frances Quinn, page 161

"The qualities required in a good judge are 'wisdom, integrity, patience, independence of mind…and a passionate desire that justice should be administered according to law'."

What is being done to improve the diversity of the judiciary?

The House of Lords Constitution Committee has published its report on Judicial Appointments earlier this year and set out a number of recommendations to improve the diversity of the judiciary. One of the main recommendations was that while appointments based on merits is vital and should continue, the Committee supported the application of *Section 159* of the *Equality Act 2010* to judicial appointments.

Section 159 relates specifically to recruitment and promotion and allows an employer to choose the candidate from the less represented background in cases where there are two equally qualified candidates. It should be noted, however, that the option is only available where the person in question is 'as qualified as' the other applicant to be recruited; the employer does not have a policy of treating persons of the particular disadvantaged group more favourably than persons of more advantaged group. The more favourable treatment is seen as a proportionate means of achieving the aim of minimising the disadvantage faced by minority groups. As matters stand, this section does not apply to judicial appointments.

Another recommendation to encourage applications from women and others with caring responsibilities is to increase the availability of flexible working hours and career breaks.

Moreover, the Committee also came up with a rather controversial recommendation, to the introduction of quotas for BAME and women judges that should be appointed to the judiciary. This can be seen as controversial because it would mean that an inferior judge may be appointed just to tick the box, therefore reducing the quality of judges in the judiciary. According to Lord Judge - head of the judiciary, the qualities required in a good judge should be '*wisdom, integrity, patience, independence of mind... and a passionate desire that justice should be administered according to law*'. Therefore, some people would prefer to have a judiciary that has all those qualities rather than one that is not but diverse.

While this recommendation has not been implemented yet, the Committee said that maybe it should be looked at it again in five years if significant progress has not been made. The House of Lords Constitution Committee also said that greater diversity meant boosting the number of gay and disabled judges.

The House of Lords reform is still in process and it might take us a while until we can see any improvements in the diversity of the judiciary if at all – but at least the process has begun and it is only a matter of time until we can see whether the future of the judiciary is less 'pale and male'.

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