

OBIER.....



by
viator

Impeachment of Judges

The impeachment of judges in the United States of America is governed by Article 1 of its Constitution. It provides that a federal judge with lifetime tenure may not be removed from office unless the House of Representatives issues a bill of impeachment, and the Senate tries the judge. A two-thirds majority vote of senators present is needed to convict.

Not a single federal judge was so removed for more than 50 years. However, this situation changed dramatically with the removal of three judges in the last six years.

The first federal Judge to be removed was Alcee Hastings of Florida who was appointed in 1979 and removed 10 years later. The impeachment was based on evidence showing that he conspired to solicit and accept a bribe.

The second Judge to be impeached was Judge Walter Nixon of Mississippi. A federal jury convicted him of perjury, and he served 20 months of a five-year sentence!

The last Judge to be removed was Harry Claiborne of Nevada. He was impeached for failure to pay income taxes.

Two Commissions have been appointed to look into impeachment procedures in the USA. (*ABA Journal, December 1992*)

In terms of the Supreme Court Act 59 of 1959 the Chief Justice, a judge of appeal or any other judge of the Supreme Court shall not be removed from office except by the State President upon an address from each of the respective Houses of Parliament in the same session praying for the removal on the ground of misbehaviour or incapacity. As far as Viator is aware, no such removal has ever taken place in South Africa, at least not since Union.

Breast implantations

Pamela Jean Johnson, 45, of Houston, Texas in the USA was awarded \$25 million in December 1992 for breast implant injuries – the largest award ever for this kind of claim. She had three sets of implants over a 16-

year period, and alleged that she suffered from silicone-induced autoimmune disease. As a result, she claimed to be prone to infections. She also suffered from flu-like illnesses, fatigue and aching muscles. More severe injuries alleged to have been caused by silicone include nerve damage, paralysis, muscle weakness and brain dysfunction. Johnson had none of those problems.

The award spurred the filing of hundreds of similar claims in Houston. In Harris County about 2,500 claims of this nature have been filed.

An unusual new case filed in Chicago on behalf of 93 plaintiffs claims that implants could harm children if they were conceived or breast-fed by women with implants. The suit also claims that implants could have caused miscarriages. (*ABA Journal, April 1993*)

As far as Viator is aware no such claim has ever been instituted in South Africa. However, if the claims filed in the USA continue to be successful it is not unlikely that similar claims will sooner or later be launched in this country.

° In Manitoba, Canada, the first “successful lawsuit against a plastic surgeon performing purely cosmetic surgery” has been concluded. A Manitoba woman who underwent cosmetic breast surgery when she was 31 years old has been awarded \$12,000 in damages because of the negligence of her plastic surgeon. (*The Lawyers Weekly*, Jan 29, 1993). Claims based upon medical negligence – also in relation to cosmetic surgery – are, of course, not uncommon in South Africa. But claims arising from silicone-induced diseases or injuries (such as those instituted in the USA) are unknown in South Africa – at least as far as *Viator* could establish.

Voters to decide on death penalty

In the second editorial contained in the previous edition of *Consultus* the proposition was made that the general public should decide on the continued existence of the death penalty and not the politicians or the courts. It was also indicated that *Consultus* did not agree with those who argue that the South African public is too ill-informed or unsophisticated to decide on the death penalty as a form of punishment. Reference was also made to the fact that in the November 1992 Presidential election in the United States of America some of the States also voted on the death penalty.

It is interesting to note the extent to which the ballot box is used in the States to determine the views of voters on a great variety of issues. According to the January 1993 issue of the *ABA Journal* voters during that election:

- Decided to impose certain term limits on Florida representatives in Congress;
- Adopted victims' bills of rights in Colorado, Kansas, Illinois, Missouri and New Mexico;
- Refused to ban abortions in Arizona and broadened abortion rights in Maryland;
- Allowed six-person civil juries in Maryland, but refused them in New Hampshire;
- Allowed the death penalty in New Jersey, but not the District of Columbia; and changed the method of execution from gas

chamber to lethal injection in Arizona;

- Adopted an equal rights amendment in Iowa;
- Agreed to shift court costs in New Jersey from counties to the state;
- Refused to establish an intermediate appellate court or change the method of selecting chief justices in Nevada;
- Rejected physician-assisted suicide in California;
- Passed campaign-financing reforms in Washington;
- Capped or reformed taxes in Arkansas, Colorado, Florida, Kansas and Oklahoma; boosted the cigarette tax in Massachusetts; and voided a California sales tax on snack foods;
- Refused to legalise certain forms of gambling in Utah, Idaho and Colorado; endorsed riverboat gambling in Missouri; approved state lotteries in Georgia, Mississippi and Nebraska; continued a video lottery in South Dakota; and approved bingo or other gaming for charity in Oklahoma, Kentucky and parts of Alabama; and
- Repealed an Iowa constitutional provision barring parties to a duel from holding public office.

If Americans are seen as competent to decide on the abovementioned matters, then surely South Africans should be competent to indicate whether the death sentence may be imposed for a particular crime such as murder.

P.S. When going to press, the results of a proper survey recently carried out by Unisa were published. See *The Magistrate* of September 1993. They clearly show that the vast majority of all sections of the population is in favour of the retention of the death penalty in South Africa. Seeing that democracy is supposed to form the basis of the new constitution it is difficult to see how the feelings of the general public in regard to this form of punishment can be ignored. (See also the editorial).

Prokureur vermoor kollegas

Dit blyk dat Texas steeds wilde tonele oplewer. 'n Prokureur, George Lott (45), het homself verlede jaar

in die Fort Worthse hofsaal verskuil en twee van sy niksvermoedende kollegas, wat hy nie eens geken het nie en wat die hofsaal binnegekom het, oorval en vermoor (hoe, word nie gesê nie). As verskoning vir sy optrede het Lott aangevoer dat hy die aandag wou vestig op ongeregthede wat hy gelyk tydens sy egskedding en 'n aanklag van kindermolestering wat sy vrou teen hom aanhangig gemaak is.

Lott is skuldig bevind en gevonniss tot die doodstraf by wyse van 'n dodelike inspuiting. (*The Lawyers Weekly*, 16 April 1993)

Democratisation of the legal profession

Whilst much discussion on the question of “democratisation” of the Bar is taking place in South Africa at the present time (see for instance “Democratisation of the Bar and the Bench” by Essop M Patel (4 *Consultus* 134)) it is interesting to take note of the situation in the United States of America where efforts to remove inequalities in the legal profession have been in progress for the past 24 years.

In the February 1993 issue of the *ABA Journal*, under the heading “Unequal partners”, Steven Keava, an assistant editor of the Journal, points out that since September 1991, 14 minority (black) partners have left major law firms in the city of Chicago. With only 27 remaining, that represents a decrease of slightly more than one-third. Keava goes on to say that this phenomenon is troubling, particularly in Chicago where the local bar acted earlier than most to promote the hiring, promotion and retention of black lawyers. The legal profession, according to Keava, still remains highly segregated.

Keava explains that the great law firms in the States are one of the tried-and-true paths to the American dream. However, for minority partners at those firms, the dream seems to be slipping out of reach. Minority partners sum up their dilemma as follows: “They're required to get their own clients, but when they do, they are the wrong *type* of clients. But they can't get the right kind of clients because they don't have access to them.”

From Keava's article and other lit-

erature emanating from the USA it seems clear that attempts to democratise the legal profession in that country have thus far been a complete failure. However, in South Africa we cannot afford to fail in this field. The leaders of both the advocates' and attorneys' professions are therefore facing a formidable task to ensure that inequalities in these professions are removed in toto.

Sex with client

A woman in Providence, Rhode Island, who claimed that her lawyer forced her into a sexual relationship was awarded \$225,000 as punitive and compensatory damages against him and his firm. It appeared that the lawyer coerced the woman into having sex with him while he was handling her divorce by threatening to work actively to lose custody of her child if she refused. She moreover feared that if she lost custody of her child she would also lose permanent residency status. She alleged that she had sex with the lawyer about 200 times over their 18-month-long liaison, and over half of the encounters were in his office during business hours.

The outcome of the case indicated that the relationship did not adversely affect the legal work done for the client.

It is stated that the case is one of the first instances in the United States where a lawyer has been successfully sued on grounds of malpractice for a sexual relationship with a client. (*The Lawyers Weekly*, 12 Feb 1993)

As far as is known, no such action has ever been instituted in South Africa.

Damages for nervous shock

The Ontario Court of Justice (General Division) recently awarded a woman \$9,000 for nervous shock after she identified her sister's body following a car crash. Thereafter, in the British Columbia Supreme Court, a grief-stricken father who lost his 18-year-old son in a car accident was awarded \$20,000 for nervous shock after seeing the child dying in hospital. The Court found that the father "suffered from the emotional scar of seeing his child badly deformed and dying in the aftermath

of the motor vehicle accident". (*The Lawyers Weekly*, 12 Feb 1993).

These claims are covered by Canadian Family Compensation Acts. In South Africa, which does not have a similar law, claims for nervous shock fall under the common law (the *lex Aquiliae*). However, this part of the law (as will appear from a reading of relevant textbooks) is not quite satisfactory and the SA Law Commission might wish to make a study of the Canadian legislation (and similar laws in other countries) in order to decide whether appropriate law reform measures should not be introduced.

Judicial appointments in Britain

Since section 71 of the British Courts and Legal Services Act 1990 came into force on 1 January 1992, solicitors have been eligible for appointment to all senior judicial posts in Britain. However, no solicitor has yet reached the heights of the High Court bench.

On 1 October 1992 there were a total of 1866 assistant recorders, recorders, circuit judges and above. Of these, only 201 were solicitors and all of them were confined to the lower echelons.

Barristers make up only 10,88% of the practising profession but occupy 89,33% of the senior judicial posts.

The system of appointments in Britain operates largely by personal recommendations from judges. One reason given for so few solicitor appointments is that solicitors are often unknown to judges. (*Gazette*, 10 February 1993)

Video conferencing

The British Home Office has agreed to allow an experiment with video conferencing with prisoners. A room is to be provided at certain prisons with video conferencing equipment. Not only will the parties be able to confer in private but it will also be possible for papers to be put up on the screen and documentation to be passed by means of a fax.

Through this method it is hoped that more prisoners will have the opportunity of a conference pre-trial. Travelling time will therefore be cut down so that there will also be a saving of costs.

A Bar Video Conferencing facility for the taking of evidence from witnesses in other jurisdictions is already in operation in London. (*British Criminal Bar Association Newsletter*, June 1993)

Killing of fleeing suspects

An Ontario Court Judge has recently ruled that a Criminal Code provision allowing police officers to use lethal force to stop fleeing suspects was unconstitutional. The Judge concluded that the provision has "no place in civilized society." (Reliance was placed on section 7 of the Canadian *Charter of Rights and Freedoms* affording persons rights to "life, liberty and security"; also that the provision could afford "cruel and unusual punishment" to the recipient of a police bullet, in violation of section 12 of the Charter). - *The Lawyers Weekly*, 28 May 1993.

In terms of section 49(2) of the South African Criminal Procedure Act a policeman is also afforded protection for the killing of a fleeing suspect under certain circumstances. It seems highly probable that the provision will also be struck down by the courts once our own bill of rights comes into operation.

Senior Counsel status

Governments seem to be prepared to adopt strange and rather illogical measures to curb legal costs. In Australia, for instance, it was announced in December 1992 that the Government of New South Wales had decided to abolish the office of Queen's Counsel. The excuse given was that this would lead to senior practitioners charging smaller fees. (*The New Zealand Law Journal*, 21 January 1993)

In Britain the Queen's Counsel system has also been under attack - see the *New Law Journal* of 9 April 1993. The Chairman of the English Bar, JJ Rowe QC, however, defended the system. He writes that there is no doubt that the Bar wants the silk system. He also refers to the Blue Book which records that the system is useful for the following reasons:

- (a) it makes known to solicitors and others those independent practitioners who are recognised as of an acceptably high standard

in specialist advocacy (or in some instances of specialist expertise in a field of the law not requiring court advocacy);

- (b) it provides a pool of independent practitioners from whom the High Court judges can be drawn;
- (c) it provides the best training ground, coupled with work as part-time judges, for those who wish to be eligible for promotion to the High Court Bench.

Profile of a crooked lawyer

According to *Conferentia*, issued after the New Zealand Law Conference, March 1993, 99.9% of the Scottish legal profession, as in New Zealand, is suffering due to the dishonesty of the remaining few. And like New Zealand, levies for the Scottish Guarantec Fund for compensating clients' losses have risen sharply, from less than £1 (R5) to £445 (R2225) since its inception in 1951. Claims against the fund at present exceed £7 million (R35 million).

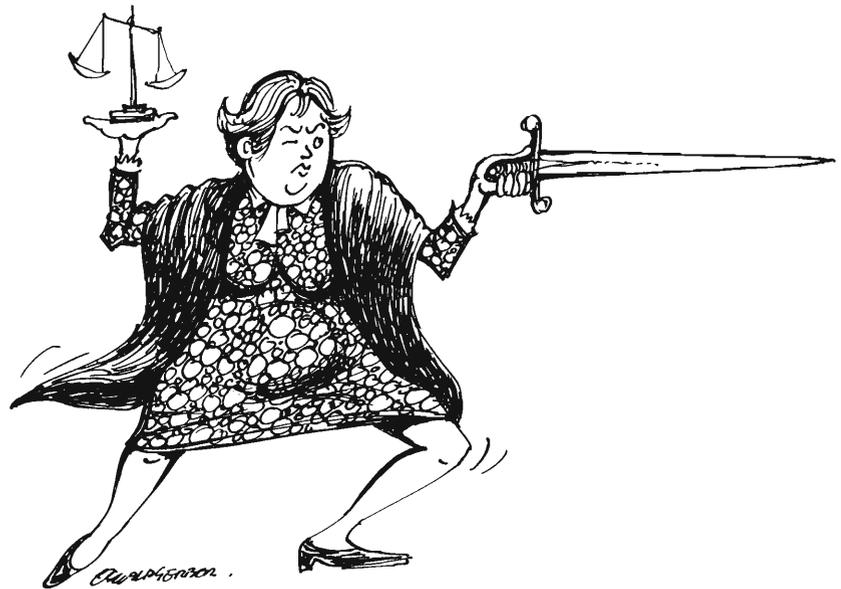
The Law Society has constructed a profile of the potentially crooked lawyer: "He is a white male, 35-45 years of age, married, with a big house and even bigger mortgage, two children in private education, at least one car and at least one set of personalised number plates, a holiday house in Spain, and property interests in pubs and coal mines. In short, the Law Society has identified as potentially problematic solicitors those who want to be property developers."

In South Africa attorneys make no contributions to their Attorneys Fidelity Fund. In fact, the Fund is exclusively funded by interest earned by attorneys on clients' moneys paid into their trust accounts. Such interest is also used for purposes other than the reimbursement of amounts stolen by attorneys from trust funds eg. the financing of their monthly journal De Rebus. In December 1992 the Fund amounted to R165 million (De Rebus, Dec 1992).

Bedreiging vir mans?

Die tyd mag weldra aanbreek dat die langbroekdraende deel van die bevolking sal moet opstaan en 'n "Mansregte-vereniging" in die lewe roep. Want dat vrouens - veral

sedert Margaret Thatcher se fenomenale suksesse in Engeland - nou vinnig na vore tree en 'n bedreiging vir mans word, ly geen twyfel nie. Onlangs in ons eie land is Sheila Camerer - 'n regsgeleerde dog iemand wat kennelik betreklik min praktiese ervaring van die regspleging het - as Adjunk-minister van Justisie aangestel. Dit het vele wenkbroue laat lig. Was daar regtig niemand anders ('n man byvoorbeeld) wat beter toegerus was om die huidige misdaadgolf die hoof te bied nie? Mooi vrouens is altyd 'n bate vir enige organisasie - selfs Kabinette, wat gewoonlik maar bra bar vertoon - maar werklik! in huidige omstandighede is 'n deurwinterde, taai, hardebaard regsman nodig om die moordenaars, rowers, verkragters



en ander misdadigers wat die hele land teister, aan te vat, is om teetafels en elders geredeneer.

Maar kyk wat het in Ontario gebeur! In hierdie provinsie van Kanada is Marion Boyd in Februarie 1993 as Prokureur-generaal (maw provinsiale Minister van Justisie) aangestel. Sy is nie alleen 'n vrou nie; sy is boonop 'n nie-regsgeleerde (die eerste maal dat so iemand in die betrokke amp aangestel is). Volgens *The Lawyers Weekly* van 26 Februarie 1993 word dié aanstelling gesien as 'n "clear message that the justice system is not the prerogative of the legal profession only." Marion Boyd is 'n toegewyde feminis en het onder andere ses jaar ondervinding as direkteur van 'n kliniek vir mishandelde vroue agter die rug.

En in die VSA was die nuwe President (Bill Clinton) van die begin af daarop uit om juis 'n vrou as Prokureur-generaal aan te stel - in so 'n mate dat hy nie eers 'n onderhoud met 'n man vir die pos wou voer nie. Sy eerste twee keuses (Zoë Baird, 'n regsadviseur van Actna Life and Casualty Co en daarna Kimbo Wood, 'n federale regter) het albei die stof gebyt, waarna Janet Reno, 'n aanklaer van Florida, die paal gehaal het. Dit moes dus - afgesien van meriete - 'n vrou wees, en dit is dan ook 'n vrou wat as Prokureur-generaal aangestel is.

Die meeste Suid-Afrikaanse regsgeleerdes is waarskynlik bevrees dat 'n uitgesproke kommunistiese Minister van Justisie sal

wees. In die lig van die bostaande sal hulle na verwagting egter heel verlig voel indien dit net nie een van die kwaai, welgeboude leke-vrouens wat deesdae so dikwels op TV se besprekingspanele te sien is, is wat dié pos sal beklee nie. ■

Hofverslae

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Tel: (012) 664 5656(W)
(012) 642 079 (H)

Mev Smal