

REVIEWING THE VIEWS

THE EC SEARCH COMMITTEE

Towards a "consensual" constitutional convention?

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THIS is the second consecutive time that the President has constituted a Search Committee to find some suitable candidates for the Election Commission of Bangladesh. The 2017 committee is different from that of 2012 both in formation and situation. The 2012 committee consisted mainly of the senior judges of the Supreme Court while that of 2017 has forged a combination of the judges, academics and career bureaucrats and thereby stretched its root within the wider social circle. The situational contrast between the two committees is also strikingly identifiable. The formation of 2017 committee has attracted more deliberation and consultation than the earlier one. Caretaker government being on the center of political discourse then, parties and civil society groups did not take the 2012 Committee as seriously as they take the present one. Also the Election Commission as an institution is much more suffocated now than it was in 2012. Caretaker government being out of the agenda now, the 2017 committee has much more to deliver than its predecessor.

While I share the prevailing doubt as to whether most of the members in the present committee would actually be able to shun down their perceived "leaning" and recommend names objectively and whether the Prime Minister would actually be "willing" to forgo her constitutional privilege of advising the head of state, the two consecutive search committees for the Election Commission have a very crucial thing to offer. It is the possible emergence of a constitutional convention of consultation and specialised committee system for appointment in constitutional bodies and other autonomous bodies of constitutional significance.

Appointments in the constitutional bodies like the Supreme Court, Election Commission, Public Service Commission, Comptroller and Auditor General and autonomous bodies like Anti-Corruption Commission and Human Rights Commission, etc have been widely debated in our recent political discourse. The judiciary sought, with a little success, to mitigate the

remaining thread of the pull by calling for the formation of a search committee to recommend judges in the High Court Division [Ragib Rouf Chowdhury v Secretary, Ministry of Law]. Very little could be achieved in relation to other constitutional and autonomous bodies however. This brings me to the fundamental issues surrounding a typical constitutional

believe that they were bound by a rule? Thirdly, is there a reason for the rule? Now in this search committee issue, answers to the first two questions are in the negative. We have seen only two committees so far and this makes the committee system a quite novice practice instead of being a long held and unbroken one. Also, nobody will even think of suggesting that the

committee system like this. While a constitutional convention is not "enforced" by the courts, it is "recognised" as aids to judicial interpretation [Attorney General v Jonathan Cape Ltd (1976) Q. B. 752]. The question then is - whether a novice practice with a good reason uncoupled with a sense of obligation could ripe into a constitutional convention.



Are the interests of transparency, credibility and legitimacy not convincing enough for forging and recognising a constitutional convention of appointing search committees for selection in constitutional and autonomous bodies?

To avoid a lengthy academic analysis, constitutional conventions may be created within shortest possible time through consensus or agreement of concerned parties. The agreement need not necessarily be imposing an "obligation" on the actors (Joseph Jaconelli, Do Constitutional Conventions Bind?, Cambridge Law Journal, 64(1), March 2005, pp. 149-176). It will only need a really convincing "reason" behind. David Hume, in his Treatise of Human Nature (1738), has justified the interest of mutuality and reciprocity as a convincing reason for a conventional norm. Professor Gilbert Harman in his book *Justice and Moral Bargaining* (1983) has further synthesised the behavioral explanation as one of mutual adjustment between members of society. German political system is abundant in ready-to-refer examples of consensual constitutional conventions emerging out of political agreements forged out of interest rather than obligation (Greg Taylor, Convention by consensus: Constitutional conventions in Germany, Int. J. Const. Law (2014) 12(2):303-329).

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"gravitational pull" of the Prime Minister's political advice by requiring constitutional consultation with the Chief Justice and ensuring a primacy for the judicial opinion [Syed Dastagir Hossain v Idrisur Rahman 15 BLC (AD) 49]. A writ petition pending before the High Court Division now seeks to remove

convention. Sir Ivor Jennings in his book *The Law and the Constitution* (1959) prescribes a three prong test to know whether a particular "practice" is a constitutional convention or not. First, Jennings would ask, what are the precedents? Secondly, did the actors in the precedents

incumbent government is acting under a belief in a binding obligation whatsoever. In contrast, Jennings' third question may have something to offer. Is there a reason for the practice? Of course, the ruling party and opposition parties have a very important reason for creating and nurturing a

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LAW ANALYSIS

JUSTICE AGAINST SPONSORS OF TERRORISM ACT

An assault on state immunity

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ON 28 September 2016, ignoring the veto of the then US President Barack Obama, both houses of the US Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA). It confers US federal courts jurisdiction over civil claims against a foreign state for any death, physical injury, or damage to property occurring in the USA resulting from an act of international terrorism, and also for torts committed anywhere by an official, agent, or employee of a foreign country who acted within the course of their employment. It is bewildering that the passion and desire to respond to the demands of their constituencies could sway US lawmakers to forget international legal norms and JASTA's foreign policy imperatives. Compared to most other countries, the immunity of foreign states in the USA was already quite thin (even before JASTA, US nationals could sue

states. It is practically sensible because it allows one country's activities relating to functions of the state not to be assessed in the domestic courts of another which could needlessly heat up the political milieu. Logistically and politically JASTA may be problematic to implement. From the perspective of a judicial proceeding, it may be tough to collect evidence, subpoena documents held by a foreign state, depose officials of foreign countries (in foreign jurisdictions), and force the appearance of witnesses. Thus, it may cause a diplomatic quandary and lead to public outrage in the alleged terror-sponsoring country. A prototype of JASTA being enacted by too many other countries may be a far-fetched supposition because for such a law to have a real bite, the country must have a significant international clout and the alleged terrorism-sponsoring country must also have assets or commercial interests in that country. Countries having both these elements may

objectionable. When a corporate actor or individual does business in the US or has a nexus to the US, they are required to accept the jurisdiction of the US courts. However, it seems illogical that the same rationale should be applied to a foreign country. Moreover, a country that has been sued for sponsoring terrorism may plead other countries in the trial, thus denying state immunity to that country as well. With JASTA, the United States is truly poking the tiger with a very short stick because now all that is required to deny state immunity to a foreign country is a mere allegation by a plaintiff of an act of terrorism (which could very well be a controversial political act), and payment of the requisite court fees. The victims of 9/11 terror attack or any other acts of terrorism are fully within their rights to seek justice through legal means. But ways to achieve that end should be through the international legal regime, however challenging that may be.

A careful reading of JASTA would clearly convey that the prime objective of JASTA is not to punish the perpetrators of acts of terror per se, but it is rather to seek punitive damages from the states that aided or abetted the terrorists either explicitly by sponsoring them or implicitly through lax preventive measures. If this is the objective of JASTA, then the International Court of Justice (ICJ) may be the proper forum for such a legal proceeding, thereby not only preserving state immunity but removing any concern of bias. Considering the fact that the ICJ only allows for interstate disputes, some may argue that laws like JASTA empower the citizens; the actual victims of the acts of terrorism, to seek justice on their own disregarding any political expediency. This is a fair argument, in that case, a system along the lines of a Mixed Claims Commission may be a viable option, thus consequently not compromising on state immunity and allowing citizens to sue ideally without any interference from the state. Then, considering the present situation between US and Saudi Arabia, whatever political and/or economic imperatives that may persuade one to believe that Saudi Arabia will abide by judgements of the US federal courts, should also be applicable when arguing as to why Saudi Arabia might agree to establish a Mixed Claims Commission or accept the jurisdiction of the ICJ, in addition to the consequent preservation of its sovereign immunity. Hence, there may be no need to dismantle state immunity; one of the foundational principles of international law, and yet achieve the objective that JASTA seeks to achieve.

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foreign states for sponsoring terrorism provided that the US Department of State designated such a state as a sponsor of terrorism). Now, on matters pertaining to terrorism, JASTA would make the international legal doctrine of state immunity next to non-existent. The doctrine of state immunity, i.e. the immunity of foreign sovereign authorities from the jurisdiction of the courts in another country is based on some compelling moral and practical considerations. The moral justification for granting immunity to foreign countries from the jurisdiction of local courts is grounded in the doctrine of sovereign equality of

be relatively few in number. Having said that, JASTA would be likely perceived quite negatively by the international community (not just states affected by this law), as the undue localisation of a global concern by the United States. Such a perception may wane the case for a concerted global effort to fight terrorism. Some wide-ranging US laws such as the extra-territorial application of alien tort claims have for many years raised eyebrows in other countries. However, those laws mostly target corporate or private actors and not necessarily foreign countries (unless they are acting in a commercial capacity) and hence, JASTA can be more

LAW LETTER



I dissent

A few weeks ago, I saw the photo of the newly sculpted Lady Justice in our Supreme Court Premises, Dhaka. There is something different about the particular depiction of Lady Justice that stands in front of the Supreme Court. The universal picture of Lady Justice is imbedded into all our minds. Her gown-clad blindfolded statue holds a sword and a scale in her hands. The depiction is quintessentially Greek for it stands as the Greek goddess Themis, an allegorical embodiment of the moral force in judicial systems.

However, the statue in our court premises is Shari-clad, conveying her to be a Bangladeshi prototype of Themis. There is a bold message resonating within it and I am hopefully not reading too much into it. I would like to commend everyone involved in letting this statue go up in the same time when our education board was busy taking us backwards by responding to the demands from few religious groups. They are now protesting to get Lady Justice removed from the court premises. Some are questioning the rationality of a female representation of justice. Adding an ingenious point of need for gender equality in the justice system, they are asking why there would only be the statue of a female and not of a male too. It is well settled that the universal exemplification of morality in judicial system is done through a Lady named Justice and we simply have abided by that, if anything moulded it to personalise it.

There are currently less than seven percent female judges in the Supreme Court. The legal profession is highly arduous, the formative years require putting one's best to the seniors. It is quite logically perceived that female newcomers will be unable to put in the same amount of hours as her male counterpart due to familial and societal constraints. Therefore, given the choice between a qualified female newcomer and a less qualified male one, most chambers will probably go for the latter. The number of female law students who graduate never materialise in the same percentage in profession. But female representation is of extraordinary significance in the age of Santa Clara Superior Court Judge Aaron Persky whose too lenient rape sentence for Brock Turner created public outcry.

The US President has signed an executive order as to what women can do with their reproductive organ without any female representation. The defences to rape even in the UK, i.e. 'belief in consent' are carefully nurtured loopholes in a system run by men; the infamous Two Finger Test for rape identification in Bangladesh (recently declared illegal by the Supreme Court) used to put the victims under unnecessary physical violation after she has allegedly gone through the ordeal of rape.

This brings me back to our representation of Themis. She is the epitome of our own home-grown feminism which has never bothered about any waves, it has simply been based on pulling women up in the socio-economic and political hierarchy. So while I see a flicker of hope in the masterwork of Sculptor Mrinal Haque, it shakes the interest of few religious groups. They have had their way in injecting patriarchal norms in children's minds, now they are demanding to get the statue removed. To that I would like to say in the same manner as my favourite pop culture icon, The Notorious Ruth Bader Ginsberg, Associate Justice of the Supreme Court of the United States, I dissent.

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GLOBAL LAW UPDATES

Lifelong anonymity to child offenders



Currently, under-18s are automatically granted anonymity in the UK when they appear in a youth court and are routinely granted the same if they appear at crown court. However, this expires when they become adults. The review of the youth justice system by Charlie Taylor, published in January this year, said: "Once the child turns 18 years of age their name may once again be reported, which risks undermining their rehabilitation as their identity could be established on the internet even though a conviction may have become spent for criminal records purposes."

The Just for Kids Law charity welcomed the recommendation, saying: "Being named and shamed for what they have done or accused of doing prevents them ever being able to move on."

But the Conservative MP for Kettering, Philip Hollobone, said the public had a right to know who had been convicted of serious offences. Child suspects are not legally entitled to anonymity but it is 'incredibly rare for media outlets to name them. Taylor said this situation could 'undermine' a future order banning identification and should also be changed.

The Ministry of Justice said it would 'engage with interested parties, including the Home Office, media and youth justice interest groups' on the recommendations, the Times reported.

CHILDREN charged with crimes should be given lifelong anonymity to reduce reoffending rates, the UK government-commissioned review has recommended. Ministers in the UK are considering introducing legislation to indefinitely ban the identification of offenders who commit crimes while under 18, the Times reported.