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India and Pakistan: A Tale of Judicial Appointments

Shubhankar Dam

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In a moment of remarkable constitutional coincidence, two appointments were set aside in India and Pakistan last week. First, India's Supreme Court invalidated the appointment of P. J. Thomas to the Central Vigilance Commission (CVC). Days later, Pakistan's Supreme Court invalidated Deedar Shah's appointment to the National Accountability Bureau (NAB).

The CVC and the NAB have similar mandates; they are central to anti-corruption efforts in both countries. The allegations were similar as well. Sushma Swaraj, the Leader of the Opposition in India, objected to Thomas' candidacy. Criminal investigations were pending against him, and that, Swaraj argued, made him unfit for the post. And to Chaudhry Nisar, the Leader of the Opposition in Pakistan, Shah's long association with the ruling Pakistan People's Party made him unfit for an independent office. Eventually, both matters ended up in the respective Supreme Courts as public interest litigations, and both succeeded.

While judges in Pakistan are yet to offer their detailed reasoning, the short order when compared with the full decision in India suggests that largely similar issues were at stake. Without supposedly casting aspersions on Thomas' personal integrity, India's Supreme Court concluded that his appointment undermines the institutional integrity of the CVC. The CVC stands for certain values, and his past is not in consonance with the duties to be discharged by that office.

Much of the Court's focus was on the CVC, its independence and impartiality and how individuals fit into that scheme. And while a candidate may be technically qualified, larger questions of "fit" must be taken into account when making those appointments. "The institution and its integrity, including institutional competence and functioning, and not the desirability of the candidate alone," the Court said, must be looked into.

Though there are good reasons to applaud the Court's conclusion, the distinction between personal and institutional integrity is suspect; the two seem to go together. A person of impeccable integrity would be expected to uphold institutional integrity. Conversely, someone lacking in personal integrity is unlikely to further institutional integrity. The distinction merely seems to hint at a simpler idea: appointees to impartial offices must not only act impartially, but appear capable of doing so. And there are good reasons to wonder if Thomas' tarnished past brings into question that possibility.

Chaudhry Nisar, in his petition to the Supreme Court, made similar arguments in Pakistan. The NAB is investigating cases against President Zardari. Appointing an acolyte to the chairpersonship of that body undermines its institutional integrity; Shah's independence would be suspect in these circumstances. Or, to use the earlier language, while Shah's personal integrity may be matchless, his political association may appear to undermine the NAB's impartiality. To be sure, the Court hasn't declared its full reasoning yet, but given the uncanny factual and legal similarities, it will be worth watching if a similar personal-institutional distinction is relied upon in Pakistan.

Two things are worth pointing out here. While the zealous desire to guard these agencies from corrupt influences is intuitively appealing, getting the right people to the positions is only half the task. Presumably, what they do in those posts is equally important. And secondly, admirable as this "war" on corruption is, one would expect judges to exercise the same degree of intrusive probing in matters relating to their own appointments.

Judicial corruption, or at least allegations thereof, has reached epic proportions in India. There is an ongoing investigation against the relatives of the former Chief Justice for amassing wealth disproportionate to the known sources of income. This week, the Central Bureau of Investigation filed chargesheets against a sitting High Court judge on allegations of corruption. All this, barely weeks after a formal motion to impeach a former High Court judge was tabled in Parliament. The scene in Pakistan, one suspects, is not altogether different.

Judicial appointments, despite recent changes in Pakistan and proposed changes in India, remain monopolized: judges largely appoint themselves and if these self-appointing judges are to remain the guardians of constitutional values and good governance in South Asia, it is not too late to hold them to the same standards of probity as they have come to expect of other equal branches of government. The law, as judges often remind others, must apply equally.

The immediate appointment drama, however, continues. India's Prime Minister, Dr. Manmohan Singh, has apologized to an extent for his role in the appointment. Thomas himself, however, is in no mood to acquiesce. He has declared his intention to file a "curative" petition in the Supreme Court for a review of the decision. The reverse is true in Pakistan; President Zardari is in no mood to oblige and is exploring options to make the appointment retroactively valid. Despite this, Shah, the appointee in the middle of the controversy, has resigned, and stated that he has no intention of challenging the verdict.

The war on corruption is turning into a war between the courts and the executive. And there is surely more to come.

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