

At the altar of speed

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VARIOUS quarters are promoting the idea of a new federal court that will oust the jurisdiction of the high courts in all commercial and tax matters. The proposal has been vehemently opposed by the bar councils across the country that see in it an attempt to create a parallel judicial set-up under the overbearing influence, if not control, of the federal government. The Law and Justice Commission, headed by the Chief Justice of Pakistan, has also expressed reservations and urged the government to explore other, more obvious reforms within the existing system.

While the justice system in Pakistan today stands accused, justifiably, of delay, the proposed remedy is nothing short of an assault. It perhaps needs reminding that deterioration in the quality of adjudication can never be made up by speeding up the disposal of cases. Delay apart, it is the quality of adjudication that has brought unwanted attention to the Pakistani judicial system around the world. The judgments in the cases of Rupali, Hubco and Westinghouse, the last delivered in double-quick time by the court concerned and subsequently raised as an issue by the US State department with the Pakistan government, are reminders of the unexpected hazards that foreign investment can face in Pakistan.

The practical argument, distinct from various constitutional objections, against the creation of the proposed federal court is simple but fundamental.

Firstly, no separate court is required given that each high court has on its bench judges who, prior to elevation, were leading commercial and tax lawyers and have distinguished themselves through their judgments in these matters. At present the special abilities and experience of these judges are not being fully utilized in so far as they are made to spend a large part of their time in dealing with civil, family or even criminal cases.

There is, however, no reason why dedicated commercial benches cannot be set up within the high courts. Whatever the federal court can achieve dedicated commercial benches within the high courts can achieve better. The federal court will attract as judges and lawyers largely the second and third tiers of the talent available, as is the case with the existing banking courts and the tax tribunals. This will necessarily lower the quality of adjudication with consequent damage to investment promotion and justice.

course, of this set of lawyers that commercial dispute resolution and the judicial system at large will derive strength and efficiency. The recent elevations to the Lahore High Court of three leading commercial lawyers of the day are a case in point.

Secondly, the creation of the federal court will leave unaffected disputes involving contract enforcement, arbitration and title to property that make up a large proportion of the disputes that must be considered commercial. Any attempt to transfer this jurisdiction to a specialized court will not only create serious problems in distinguishing commercial contracts and title disputes from those not considered commercial but will make that court largely indistinguishable from an ordinary civil court. It is perhaps for this reason that even the proponents of the federal court have not suggested that jurisdiction regarding contract enforcement or title determination be moved away from the

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ordinary civil courts.

Consequently, even after the creation of the federal court the need to improve the capacity and efficiency of the ordinary civil courts as well as the high courts will remain a matter of paramount importance. Higher salaries that attract better talent to the lower judiciary and additions to the numbers of judges at all levels are the only effective response to the problem of delay in the judicial system. The idea of the federal court is, at best, a diversion of focus and resources from the real issues that must be addressed.

Thirdly, the removal of commercial work from the high courts will mean that in the future judges elevated to the Supreme Court from the high courts will bring to the apex court no experience of commercial work. Yet they will be expected to act as the court of last resort in deciding appeals against decisions of the Federal Court.

In order to ensure the presence of judges with a background in commercial law, appointments to the Supreme Court will necessarily have to be made from outside the high courts and in numbers large enough to cater for commercial appeals from all across the country. This will mean fewer elevations from the high courts

will enjoy a status little above that of the customs tribunal, perhaps equivalent to that of the federal service tribunal. In addition, it will be the creation of a repealable statute and not of the Constitution.

The federal court bill provides for the appointment of retired judges of the Supreme Court and high courts below sixty-eight years of age as judges of the federal court. Also held eligible are other persons qualified to be judges of the high court — district judges and advocates of more than ten years standing — along with government officers in BPS 21 and above.

Given that at any one time only a very small number of retired judges of the Supreme Court below the age of sixty-eight, especially those with a reputation in commercial and tax law, are likely to be available it is clear that appointments to the federal court will be made largely from among the cadres of the lower judiciary, the bureaucracy and retired judges of the high courts. How are these categories of

possible appointees likely to fare?

If the proposed federal court is in fact set up, judges retiring from the high courts in the future will possess no experience of commercial work. Even at present there exists a sizable pool of retired judges whose main exposure as lawyers and also on the bench was mainly to criminal matters or general civil litigation. Retired judges with this background have often been appointed to the customs and sales tax tribunal as well as the lower banking courts. Those

appointed to the customs and sales tax tribunal have either adopted a policy of general deference to the views of the officer of the Central Board of Revenue on the bench or else have gone off on a limb with little understanding of the relevant laws.

Those appointed to the banking courts have scarcely done better. Not one case has been decided within the statutorily prescribed period of 90 days. When cases are finally decided leave to defend is generally refused to the borrower with even legitimate defences. Appointing retired judges with little exposure to commercial matters to the federal court and expecting them to re-invent themselves after the age of superannuation would be unfair both to the judges concerned and the litigants whose fate they will be called upon to determine. Will this state of affairs please the foreign investors?

The proposal to appoint government servants in BPS 21 and above to the federal court is probably inspired by the belief that tax collectors, public sector bankers and administrators will provide a complementary dose of ground reality to the presumably cloistered worldview of district court and retired high court judges. The fact that the attachment to the state of the officers to be appointed to the federal court might compromise their independ-

This will come at a time when changes in the legal profession are making greater human resources available than at any time in the past. Over the last decade an unprecedented number of young men and women with legal qualifications obtained from the better institutions of higher learning around the world have entered the side of the legal profession that has been dubbed 'commercial' by the proponents of the federal court.

Plans are also afoot to reform and upgrade the quality of local legal education. These young persons do not deserve to be banished from their practice to a second-rate specialized tribunal for the rest of their careers with only rare appearances before the high courts. The natural consequence of this will be the arrest of the present fluorescence at the litigation bar. More of the new entrants will gravitate towards non-litigation transactional work. This will serve to further depress the quality of the output of the courts.

It is through general procedural reform and induction into the judiciary, in due

unless the total strength of the Supreme Court is increased. Have these matters and the implications they generate been thought through? It appears not.

Justice is a function of three primary elements: intellectual capacity, integrity and speed of adjudication.

An assessment of the impact of the federal court on the intellectual capacity of those who will come to adorn the court may readily be made. Anyone who knows anything about the legal profession knows that hardly anybody from amongst the leading commercial lawyers of the country will agree to become a federal court judge, while over eighty per cent in the same group will accept elevation to a high court. The reasons are obvious. The high courts continue to wield great respect and authority.

High Court judges expect to be called upon to examine matters of vital constitutional and social import and to carry out judicial review of legislative as well as executive acts of the state. The federal court will be a specialized tribunal that

court might compromise their independence in a manner not permitted by the Constitution is a matter that does not appear to have bothered the proponents of the federal court. The visionaries behind the federal court have perhaps been emboldened by the fact that the tax tribunals have not been struck down so far despite the presence of serving CBR officers on the bench and despite several challenges before the high courts.

As serious as the lack of independence on the part of government functionaries will be their lack of legal training and professional experience. It is not for nothing that the world over the judicial function at a level as high as that of the proposed federal court, is invariably vested in those with legal training and experience. A judicious mindset is the result of years of honing. Not very long ago the Sindh High Court noticed, in *Philips Electrical Industries v. Pakistan*, the lawlessness that has often prevailed in the tribunal. Where is the need to re-enact tragedy on a larger scale?