

Law & Justice
Daily
15/6/01

Need for privatisation of justice

PRIME MINISTER SHAUKAT AZIZ AND HIS ministers claim that Pakistan is an investment haven and is on its way to becoming another Asian Tiger. While there is no doubt about the country's potential for rapid economic growth, attracting foreign investment requires a competent, efficient, trust worthy and fair judicial system that gives an individual the confidence that his rights, duties and liabilities shall be determined purely in accordance with law. Unfortunately, the general impression is that our judicial system is tainted with corruption and that business disputes are decided sometimes by judges who are not competent in commerce and investment matters.

One of the first issues raised by any foreign investor is whether, in the light of allegations of corruption, their rights will be protected, and their contracts implemented in letter and spirit through courts. It is a widespread belief that judgments are sometimes rendered for dishonest reasons.

A white paper published by the Bar Councils of Pakistan made serious allegations of dishonesty that remain un-rebutted. Certain judgments appear to have no basis other than ulterior motives. I believe that the black sheep are exceptions rather than the rule and that the judicial system is generally free from dishonesty. However, the general perception abroad — and in Pakistan — is that there are indeed corrupt judges at all levels. One cannot just brush the issue under the carpet.

The competence of the judges is as serious an issue as their integrity. It is important for a court dealing with a business dispute to have the mindset of a commercial court. The decisions have to be not just legalistic but also prompt and effective. A judge who lacks the basic knowledge of various aspects of commercial law should not judge commercial disputes. In most advanced countries, judges of the commercial courts have specialised commercial background. If the judge is not aware, for example,

of the basic concept of letters of credit, import and export transactions, taxation issues, matters relating to erection, procurement and installation of plants and mills then he is not fit to decide these matters.

Incompetence of judges is and can continue to be a serious setback to the investment climate. In a recent case a closed-down mill was sold by the company judge of the Lahore High Court in an open and transparent auction. In five years, the investor changed the machines and put the mills on its feet. However, the Supreme Court decided by majority to set aside this auction. It did not even provide a mechanism to protect the investor's contribution. The case is under review and I hope that the Supreme Court will re-examine and revisit the matter but this is an example of the genuine investor's predicament.

Dishonesty and incompetence at any level in the judiciary is harmful in many ways. It cause people to lose faith in the judiciary; the binding nature of contracts, commitments and obligations is eroded; fearing that their legitimate rights would not be protected investors shy away from investment; and the dishonest and powerful do not respect their contractual obligations while the honest businessman is involved in unending litigation. The government suffers directly when cases involving disputes relating to taxes and duties are judged against it for the wrong reason. Ultimately, the entire economy suffers.

For these reasons the government made a serious attempt to establish federal courts to try all matters relating to companies, insurances, patents and copyrights, banking, customs, monopolies, sales tax, telecommunication laws, and oil and gas matters as well as labour laws. In my opinion, however, federal courts are not the answer to the problem, particularly since the proposed bill called for appointment of judges directly by the president. This would not allow the federal courts to be independent and hence free of corruption and incompe-

VIEW

Federal courts are not the answer to the problem, particularly since the proposed bill called for appointment of judges directly by the president. This would not allow the federal courts to be independent and hence free of corruption and incompetence. This would not solve anything

SYED ALI ZAFAR

tence. This would not solve anything.

One way out is to eradicate corruption and remove incompetence in a slow and steady process. Removing a dishonest judge should be made easier by suitably amending the Constitution. Restricting the removal process to reasons of corruption only, can ensure that the independence of the judiciary is maintained.

To improve competence, the process of appointment has to be made more open and transparent. This, too, may require amendment to the Constitution. One way to ensure that the judges are competent and honest is to increase their salaries. On-job training, particularly in commercial law, would also help.

Although work should begin in this direction, it is obviously a long-term process. The easiest short-term solution is to privatise justice by establishing a

privately-owned Arbitration Centre where disputes are resolved through reconciliation, mediation and arbitration. I am sure the courts as well as the government will welcome this.

Dispute resolution through mediation and arbitration is now the norm in many countries. Others are moving to adopt it. Most countries in which the system operates have their own arbitration centres. These include the Paris-based International Chamber of Commerce (ICC) and Singapore Arbitration Centre.

These arbitration centres project themselves to be — and are generally accepted as — independent, effective, efficient and decisive. If two parties agree to refer the matter to arbitration, instead of going to court, under the rules of a given institution, these institutions take it upon themselves to complete the entire process from the appointment of the arbitrators till the award is rendered. In many countries these awards now have the status of a court judgment.

I am not advocating that we should adopt the ICC rules. (In fact, I have already advised against it on account of an inherent feeling of bias against Third World countries in the ICC system.) However, there is no reason why a similar system cannot be introduced in Pakistan.

Pakistan has the Arbitration Act, 1940, but no independent arbitration centre that can take the responsibility for completing the process. It should set up an independent organisation known as the Pakistan Arbitration Centre (PAC) which should be in private hands. It should be allowed, by law, to make or adapt rules similar to, for example, the ICC Rules of Arbitration. The PAC should have, on its panel, specialised, honest and competent arbiters who are experts in their fields.

It will have to build its reputation for independence from government, as well as for providing

ice

s prompt justice. The arbiters should be empowered by
1 law to render judgments in the form of awards. Since
- arbitration is voluntarily, once a dispute is referred to
1 arbitration, there should be no interference from a
court until the award is rendered. This will require
some amendments in the Arbitration Act, 1940.

1 The arbitration awards should not be challenge-
- able in any court of law, and the determination of
1 facts should be final. In case of a questions of law
1 that has been wrongly decided, an appeal should lie
; before a three-member tribunal. There should be no
- appeal against the tribunal's order. Alternatively, an
- appeal only on matters of law could lie directly
1 before the Supreme Court of Pakistan. The Chief
Justice of Pakistan should ensure that the right kind
of judges sit on the panel reviewing such awards. The
law should limit the challenge to the awards to alle-
gations of corruption or questions of law only.

In my view this is a simple, straightforward
solution. Voluntary mediation and arbitration in
commercial matters should be made the norm and
protected by law. The Arbitration Act, 1940, has
been a failure because, after an award is rendered,
the litigation process — from the lower courts to
the Supreme Court — starts afresh and it takes
years before the award is implemented — if at all.
Commercial management will ensure that the PAC
does its best to build and protect a reputation for
fair and just decisions. The few awards where an
illegality occurs can be rectified on appeal.

It will be possible then to convince the
investors that their disputes will be resolved justly
and quickly. A gigantic practical step will have
been taken towards improving the investment cli-
mate. This will also lessen the burden of litigation
on the superior courts.

*The author is an advocate of the Supreme Court
of Pakistan*