

The Supreme Court on Wednesday, April 13, dismissed all petitions challenging the 17th Constitutional Amendment and the dual office of President General Musharraf. "If a parliament elected by 140 million people desired to see a President in military uniform, nothing can be done", observed Justice Javed Iqbal, ignoring the stark reality that parliament is cowed, timid, a virtual paralytic and does not represent the will of the people. In any case, the defence and protection of the Constitution is not the responsibility of the parliament.

The Constitution places that responsibility squarely on the shoulders of the Supreme Court which has the power to strike down any legislation enacted by the parliament. The Supreme Court cannot absolve itself of this responsibility by shifting the burden to a rubber stamp parliament. Be that as it may, the judgment came as no surprise. The judges were only following well-established traditions of Muslim history and were not innovating.

On the occasion of the deposition of Caliph Qahir, the Qazi, who was sent to attest the documents declaring the former's abdication, was very upset when the Caliph refused to submit. The Qazi said: "What use was it to summon us to a man who had not been forced to submit"? On hearing this, Ali Ibn 'Isa remarked, "his conduct is notorious and therefore he must be deposed". To this, the Qazi replied, "it is not for us to establish dynasties - that is accomplished by the men of the swords, we are only suited and required for attestation". The next morning, the Caliph was found blinded. It is a matter of deep regret that the performance of our judges ever since the creation of Pakistan has been no different and no better.

In Pakistan, as in all Federations, the Supreme Court plays a crucial role. It is the sole and unique tribunal of the nation. It is the guardian of the Constitution. The peace, prosperity, and very existence of the Federation rest continually in the hands of the Supreme Court judges. Without them, the Constitution would be a dead letter. The Supreme Court judges must therefore not only be good citizens and men of liberal education, starting

The role of the Judiciary

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without the Union perishing, for above the Congress there is the electoral body which can change its spirit by changing its members. But if ever the Supreme Court came to be composed of corrupt, weak or rash persons, the Confederation would be threatened by anarchy or civil war". Tocqueville wrote about the salient features of the American constitution, but his observations are equally applicable to present-day Pakistan.

Democracy and Rule of Law are the basic features of our Constitution. It not only makes the Supreme Court the final arbiter, it also gives it the responsibility of ensuring that every institution functions in accordance with the Constitution and the law. The judiciary has been expressly empowered to act as a check on the powers of the executive and legislature.

The court has the power to strike down legislation enacted by parliament and even constitutional amendments. Similarly, if the President is transgressing his powers and running riot, it is the duty of the courts to intervene. The Supreme Court is the guardian of the Constitution. The irony is that instead of guarding the Constitution, the Judges join hands with the usurper, validate the abrogation of the Constitution and legitimate his title to rule. Has any judge been prosecuted for colluding with the executive and subverting the Constitution?

From the country's first decade, our judges tried to match their constitutional ideals and legal language to the exigencies of current politics. It is our misfortune that judiciary has often functioned at the behest of authority and has been used to further the interests of the state against the citizens. Their judgements have often supported the government of the day. This was their chosen path through the 1950s; during the Martial Law period of the 1960s and 1970s; under the mixed constitutional rule of Zulfikar Ali Bhutto and persists till today.

The slide began with Chief Justice

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fellow Kakkezai, Governor-General Ghulam Mohammad in his hour of need and bent the reasoning to justify his act which was patently and palpably malafide. Qudratullah Shahab, who was Principal Secretary to Governor-General at the time, recounts in 'Shahabnama', that one of his assistants used to depart from the office in Karachi without his permission for days together around the time when Tamizuddin Khan's case was being heard by the Federal Court in Lahore. When Shahab called for his explanation for absence without leave or permission, the official submitted his written apology but orally stated that he was going on assignments to Lahore which were required to be kept secret. He used to deliver confidential messages in code words from the Governor-General to Chief Justice Munir!

Years later, the Supreme Court, led once again by Chief Justice Munir, upheld the first martial law imposed by Ayub Khan in October 1958. In the leading judgement, Chief Justice Munir held that a victorious revolution or a successful coup d'etat is an internationally recognized legal method of changing a Constitution. His judgement in Dossos's case, like that in Tamizuddin Khan's case, was retrogressive and set the clock back in the history of constitutional development in Pakistan.

In the Asma Jilani case, the Supreme Court traced the history of the events from March 24, 1969, and observed that Ayub had no power under the Constitution of 1962 to hand over power to anybody. He could have

machinery to come into effect. Instead, he usurped the functions of government and started issuing all kinds of martial law regulations, Presidential orders and even ordinances. The judgement in Asma Jilani's case was certainly a departure from the past, and was widely appreciated. It was also criticized because it was given after the overthrow of the usurper. It was easy for the Justices to vent their decade long frustration. Yahya could be vilified. He was under detention in Abbotabad.

When Nusrat Bhutto's case against the imposition of martial law and detention of Mr Bhutto by General Zia came up for hearing, the Supreme Court realized that it had landed itself in a predicament which found appropriate expression in an extract from the judgement of Justice Qaiser Khan in Begum Nusrat Bhutto's case. The extract is reproduced verbatim as under:

If we hold that on the basis of legality, the legal order is no order, then this court would be signing its death warrant for then there could be no government at all. For argument sake, if the judges do not rely on the new norms then what norms are available for them to proceed with? In a revolutionary situation like the present one, they have either to quit or to accept the new norms.

When the Supreme Court reassembled on September 25, Justice Anwarul Haq had taken over as Chief justice. After considering the arguments of the parties, the Chief Justice concluded that the extra-constitutional step taken by the Armed forces of Pakistan was justified by requirements of State necessity and welfare of the people. As a consequence of this judgment, the act of Chief of the Army Staff, General Zia, ousting Bhutto from power was declared to be valid in the name of 'State necessity'. This was undoubtedly the worst period in the judicial history of Pakistan. An unholy alliance between the military and the judiciary had come into being.

confidence in the independence and integrity of the court. Of course, "no Constitution", Dicey said long ago "can be absolutely safe from revolution or from a coup d'etat", and there is nothing the courts can do about it. What is difficult to understand is why the judges collaborate with the usurper and validate the act of usurpation? Why do they accept the new norms? Why don't they follow the honorable course and quit?

It is ironic that the judiciary, manned by people whose appointments have generally been made on considerations other than merit, are called upon to decide basic questions relating to the state structure or the future of the state itself. Today, the independence, integrity and impartiality of the judges is no longer beyond dispute. The independence of judiciary is a myth. Nobody believes in it. Its role has been relegated from that of a pillar of the state to that of a department of government.

What would have happened had the Supreme Court decisions been different. It is idle to speculate but I have no doubt that the history of Pakistan would have been different. The democratic forces would have been considerably strengthened. Democracy would have taken roots in this country. Looking back, keeping the courts open for business, not as a matter of right but as a privilege, under strict limitations imposed by military rulers, and tailoring judgments for expedience, or simple survival, has done the country or the superior judiciary no good. On the contrary, it has done incalculable harm and undermined the confidence of the people in the independence of the courts.

When the history of our benighted times comes to be written, it will be noted that Supreme Court, the guardian of the Constitution, failed the nation in its hour of greatest need. A timid and spineless judiciary has plunged the country into a constitutional and political black hole from which there is no escape. In the words of Palkhivala, so long as there is a judiciary marked by rugged independence, the citizen's liberties are safe even in the absence of cast iron guarantees in the Constitution. But once the judiciary becomes subservient to the executive and to the

and men of liberal education, sterling character and unimpeachable integrity; they must also understand the spirit of the age. An awesome responsibility rests on the shoulders of the Supreme Court. "The President may slip", Tocqueville wrote in 1837, "without the state suffering, for his duties are limited. Congress may slip

The slide began with Chief Justice Munir. The judgement of the Federal court in Tamizuddin Khan's case paved the way for future justification by the judiciary of patently arbitrary, malicious, and capricious acts of the executive on technical grounds or self-serving theories or concepts. Munir is accused of standing by his friend and

Constitution of 1962 to hand over power to anybody. He could have resigned and the Speaker of the National Assembly could have taken over as Acting President. After making a detailed examination of the events and circumstances leading to the handing over of power to Yahya, the court came to the conclusion that Yahya did not allow the constitutional

judiciary had come into being.

In every period of political turmoil, men must have confidence that superior judiciary, the guardian of the Constitution, will be fiercely independent and will resist all attempts to subvert the Constitution. This, I regret to say, is not the case in Pakistan today. The credibility of the court is badly impaired. People have lost

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