Confusion and Controversy over Reinstitution of the "1972" Constitution

The recent judgement on the Fifth Amendment is not as straightforward as it seems, argues ASIF NAZRUL.

THE Fifth Amendment case is a judicial annulment of both Fourth and Fifth Amendment of the Constitution of Bangladesh. In a sense, it has more emphatically negated the Fourth Amendment, as wherever the apex court has found any alteration of Fourth Amendment by Fifth Amendment, it has condoned the provisions of the latter amendment for the sake of public interest and state necessity. But no such condonation is made with regard to those provisions of the Fifth Amendment which have substituted or amended the provisions of the 1972 Constitution. The Supreme Court has observed that such provisions are *void ab initio* and not suitable for condonation as they have attacked the basic structure of the Constitution. It has therefore instructed reinstitution of the provisions of the 1972 Constitution altered by the Fifth Amendment.

Things are, however, not as simple as have been recapitulated above. The Fifth Amendment judgment has given rise to some confusion as well as controversy. These have perhaps made the amended provisions unsuitable for straightforward reinstitution or rendered the guidelines for such reinstitution imprecise and imperfect.

First: the apex court has not invalidated each and every provision of the Fifth Amendment which is inconsistent with the 1972 Constitution. For example, the authority of investigating complaints against the judges of the Supreme Court was granted to the Supreme Judicial Council (a body comprising the Chief Justice and two other most senior judges of the apex court) under the Fifth Amendment, although this authority belonged to the parliament under the 1972 Constitution. In this case, the Supreme Court has retained the Supreme Judicial Council which means going back to the 1972 Constitution would not apply to the concerning provisions enunciated in Article 96 of the Constitution. As this is a fundamental premise of the Fifth Amendment judgment, this is a serious departure from that premise, the reason for which has not been convincingly explained in the judgment.

Second: The Supreme Court, in the Fifth Amendment judgment, has not only "picked and chosen" the provisions to be retained or deleted from the Constitution, it has also placed the constitutional provisions in contradiction with each other on at least two accounts. It has retained Article 6 as modified by the Fifth Amendment according to which our nationality is Bangladeshi while the reinstated Article 9 of the 1972 Constitution has described us as Bangalee nation. Again, the reinstated Article 8 described secularism as one of the fundamental principles of state policy and Article 12 defines secularism, as a policy which, among other things, requires elimination of "granting by the State of political status in favour of any religion." These two Articles, therefore, should not and cannot coexist with Article 2A, which has unambiguously granted such political status to Islam by declaring it as the state religion. As long as Article 2A remains in the Constitution, it is doubtful whether automatic reinstitution of Article 8 and 12 of the 1972 Constitution is logical or sensible.

Third: The Fifth Amendment judgment is misleading with regard to Article 142 of the Constitution. The High Court has denied condonation of the changes in this article along with preamble and some other articles (Art 6, 8, 9, 10, 12, 38 and clause 1A, 1B, 1C of Article 142) of the Constitution and declared that these articles must "remain as it was in the original constitution." However, Article 142, which the High Court has described in the Fifth Amendment judgment as an Article of the original Constitution is not actually so; rather, it is an amended version done by the second amendment in 1973. The difference between these two versions is not at all trivial. Original Article 142,