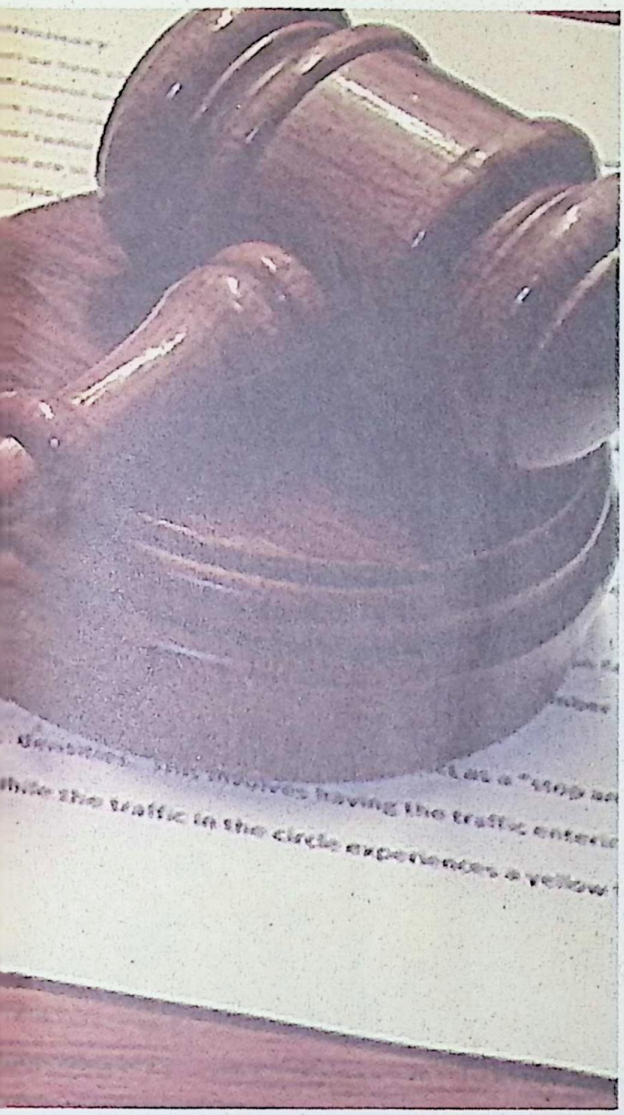


approved the amended 116, and rather it has urged the parliament to restore 116 of the original Constitution. Such departure by the Law Ministry, which is now reprinting the Constitution for implementing the Fifth Amendment judgment, from the actual dictates of the very judgment would thus lead to confusion in the minds of the people and chaos in the country. Given the presence of the Parliamentary Committee, the rationale of assigning the Law Ministry with this task is also debatable.

Some of us, however, have different views. While justifying reprint of the Constitution in the light of the Fifth Amendment judgment, they invariably cite the example of the Eighth Amendment case. But we have to take into account that the Eighth Amendment case focused on a very narrow area and decided the fate of an amendment of a single article of the Constitution. It had declared the amendment of Article 100 invalid and ordered restoration of the original version of Article 100 in the Constitution. The rest was a clerical job capable of being performed by a computer operator by deleting the paragraphs inserted in Article 100 by the Eighth Amendment. In comparison, the Fifth Amendment has touched upon dozens of articles and has declared reinstitution of original articles, some of which contradict existing articles and at least one of which does not have any clear meaning. It has also condoned amended articles, one or two of which are inconsistent even with the original Constitution! Even the logic of such condonation is not always coherent in the text of the judgment. The Appellate Division has observed that condonation should be done "in order to avert the resultant evil of illegal legislations;" although in condoning Article 44 substituted "illegally" by the Martial Law Proclamation, it also observed that the substitution was done to "advance rule of law and the welfare of the people!"

Replication and reflection of the Fifth Amendment judgment in the Constitution therefore is not at all as straightforward as the Eighth Amendment judgment. It requires application of a legislative mind, which belongs only to the legislature.

The apex court's judgment was, in a way, aware of the role of legislature upon a number of important issues, including maintaining independence of the judiciary. It has refrained from restoring Article 115 of the original Constitution which required consultation with the Supreme Court in appointing judges of the subordinate judiciary and also Article 116 which empowered the Supreme Court to deal with posting, promotion and grant of leave of those judges. Among these two articles, as Article 116 was amended by both Fourth and Fifth Amendment, the Court had the scope to intervene and restore this article. The court rather stated that "it is our earnest hope that Article 115 and 116 will be restored to their original position by the Parliament as soon as possible."

In an ideal world, the restoration of all other provisions of 1972 as well should have been done by the parliament; the Supreme Court's judgment could have been taken into account as instructions and guidelines for discharging that responsibility and the controversy would been avoided in that way. But the truth is that we do not live in an ideal world and the controversy over the Fifth Amendment judgment will continue for many years.

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