FILLING A LEGAL VACUUM

No matter how developed a legal system is, it can seldom keep pace with the socio-economic changes that occur in the society, thereby necessitating a continuous review of the legal system so as to modernise and update its provisions. Review and reform of the legal system is essential in order to make it effective and keep it operational. Notwithstanding such reform, there still remains some areas/situations which are not adequately covered by the existing legislation. Such an uncovered area/situation is referred to as legal void/vacuum/gap. It is not unoften when during the course of judicial proceedings the courts come across gaps - situations/circumstances uncovered or unaccounted for by any existing statutory, customary or general provision of law. In such an eventuality it is the duty of the court to fill the legal void/ vacuum through the exercise of their discretionary power, by either seeking guidance from a similar other provision of law on the subject or by applying the rules of equity, justice and good conscience to the situation. This is a universal phenomenon and is confronted by the judiciary in almost every jurisdiction. In the context of Pakistan, however, a peculiar situation exists. Here such legal void is caused by the operation of the Constitution itself. Article 203-D of the Constitution says that the Federal Shariat Court may strike down a certain provision of law if it considers that such provision is repugnant to the injunctions of Islam. As a result of this provision scores of laws/rules have been struck down by the Court but have not been substituted through legislative action, thereby causing legal void/vacuum in the system. The mechanism for filling such vacuum through legislative reforms has been very slow and hardly has any law declared repugnant by the Court, been substituted through legislation on time. This obviously causes uncertainty, chaos and confusion, and has been a source of great inconvenience to the State as well as general public. The superior judiciary has time and again deliberated upon this issue, and in the course of judgments, given certain proposals and guidelines for resolving the problem [1].

Inspired by the judicial dictum on the subject and feeling the urgent need for suggesting appropriate reforms in the area, the Pakistan Law Commission examined this issue and approved necessary reforms on the subject, suggesting appropriate changes in the relevant legislation i.e. General Clauses Act, 1897. The draft law having

already been approved by the Commission, has since been submitted to the Government.

The earlier history of Indo-Pakistan Sub-continent reveals that colonial masters sought to rule this area through their own system of laws and administration of justice. The Charter of East India Company (1661) provided that persons under the suzerainty of the Company shall be dealt with and judged, both in civil and criminal cases, in accordance with the British system of laws. This policy was implemented through various measures including newly promulgated statutes stating that Indian affairs shall be governed under the British law, in preference to Indian law on the subject. For instance, the Indian Divorce Act, 1869 provided that in divorce proceedings the courts should follow the principles which "are as nearly as may be conformable to the principles and rules on which the court for Divorce and Matrimonial Causes in England for the time being acts and gives relief". Due to such deliberate policy the judiciary, while filling vacuum, applied British laws and rules in preference to the Indian laws [2].

This trend, however, did not last for long as the application of English concepts and principles created many practical complications. For instance, the 1904 Privy Council decision in the case of Abdul Fata [3] by applying the British law to a subject (Waqf) covered by the Muslim Personal Law, created an embarrassing situation for the government, as the decision was severely criticised by the Muslims, it being considered as an interference in their religious affairs. Consequently, the resulting mischief had to be corrected through legislation [4]. Thus, in the subsequent cases, one notices a major shift in the attitude of the judiciary when the judges began to exercise their discretion more judiciously by also applying the Indian law and norms to the situation. In several cases the judges indeed applied the Indian norms and rules in preference to the British laws and principles. Syed Mehmood, Judge, (Allahabad High Court) in his dissenting opinion in the case of Seth Chitor Mal v Shib Lal [5], indeed warned of the inherent danger of applying the English law in an area essentially covered by the Muslim Personal Law. He observed that since the concept of equity, justice and good conscience are incapable of exact and exhaustive definition, therefore, while administering it to India, exceptional care must be taken and the Indian norms and rules on the subject should also be examined on the subject. Thus the subsequent judicial history of pre-independence India is replete with precedents

wherein in order to fill the gaps in law, rather than applying the English norms, the Islamic principles and rules of equity, justice and good conscience were applied to the situation [6]. It can thus be safely established that in pre-partition India Muslim law was applied as a residuary law in the form of rules of equity, justice and good conscience.

This trend was not just retained but pursued more vigorously by the judiciary of Pakistan. Mr Justice Mohammad Afzal Zullah, Judge, Lahore High Court (as he then was) relying on the theme (dissenting view in Seth Chitor Mal v Shib Lal) of Syed Mehmood, Judge, observed that while filling the gaps the courts must not follow any foreign notion of justice, equity and good conscience in preference to Islamic norms on the subject [7]. Quoting extensively from the pre as well as post-partition judicial history of the country, he concluded that the Islamic principles, norms, jurisprudence and philosophy shall govern the discretion of judges, when called upon to fill any vacuum in law. This view was further elaborated by the Supreme Court judgment in the case of Mohammad Bashir v State [8]. The Court observed that when the statute is silent about a situation or there is a legal void to be filled, the Court shall apply the Islamic philosophy and jurisprudence on the subject [9]. This view was further reiterated by the Court in the case of Federation of Pakistan v Government of NWFP [10]. The Court held that in a state of vacuum the common Islamic law/injunctions of Islam shall be deemed to be the law on the subject and be applied accordingly.

The successive Courts while deliberating upon this issue were indeed influenced by the scheme of Islamisation of laws in our Constitution. Several provisions in the Constitution speak of Islamising the existing legal system in the country. The effect of various constitutional articles, such as Article 2, 2A, 31(1), 227 and 268(6) makes it obligatory for the State organs and its functionaries to follow and apply the Islamic provisions of law, in preference to any other (foreign) principles and laws. Thus, in consonance with the constitutional mandate and in line with the direction of the superior judiciary, the Commission proposes the following new section (Section 5B) to be added to the General Clauses Act, 1897:

"5B. Application of Injunctions of Islam on laws held repugnant to Holy Quran and Sunnah of the Holy Prophet.- Where any law or a provision thereof is held by the final competent Court to be repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah, and such law or provision thereof is not brought in conformity with such Injunctions within the period specified by such Court, the resulting gap, void, vacuum in legislation shall be filled by common Islamic law on the subject."

References

1. Haji Nizam Khan v Additional District Judge, Lyallpur,
   PLD 1976 Lah 930; Mohammad Bashir v State, PLD 1982 SC 139;
   Federation of Pakistan v Government of NWFP, PLD 1990 SC 1172;
   Fazle Ghafoor v Chairman, Tribunal Land Dispute, SCMR (1973) 1073.

2. Waghela v Masluddin (1887) 14 1A 89; Bireswar Gosh v Panchcouri Gosh,
   AIR 1923 Cal 538.

3. (184-95) 22 1A 76 = ILR 22 Cal 619

4. Waqf Validation Act, 1913

5. (1892) 14 All 273

6. Hamira Bibi v Zubaida Bibi, AIR 1916 PC 46;
   Bireswar Gosh v Panchcouri Gosh, op cit

7. Haji Nizam Khan v Additional District Judge, Lyallpur, op cit

8. PLD 1982 SC 139

9. Fazle Ghafoor v Chairman, Tribunal Land Dispute, op cit;
   see also Pakistan v Public-at-Large, PLD 1986 SC 240

10. PLD 1990 SC 1172

GENERAL CLAUSES (AMENDMENT) ACT, 1993

An Act further to amend General Clauses Act, 1897.

Whereas it is expedient further to amend General Clauses Act, 1897 (X of 1897) for the purpose hereinafter appearing.

It is hereby enacted as follows:

1. Short title and commencement.- (1) This Act may be called General Clauses (Amendment) Act, 1993.

(2) It shall come into force at once.

2. Insertion of a new Section 5B in Act X of 1897.- In the General Clauses Act, 1897 (X of 1897), after Section 5A, the following new Section 5B shall be inserted, namely,

"5B. Where any law or provision of law is declared by the Court to be repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah, and such law or provision of law is not brought in conformity with such injunctions within the period specified, the resulting gap, void, vacuum in legislation shall be filled by the common Islamic law on the subject".

STATEMENT OF OBJECTS AND REASONS

This recommendation of the Pakistan Law Commission seeks to amend the General Clauses Act to add a new Section 5B in the Act to provide for filling up gaps, voids, vacuum occurred in a law or a provision of law declared repugnant to Shariah by the Court.