

THE 1972 CONSTITUTION OF BANGLADESH AND THE LOCAL GOVERNMENT

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Introduction

Local government, which is at the bottom of a pyramid of governmental institutions with the national government at the top and intermediate governments (states, regions, provinces) occupying the middle range¹, is much older than national government in many developed countries such as England, France, Italy, Spain and Germany.² It has now been established in almost all countries of the world as a vital component of a politico-administrative system composed of the members elected by the people of an area or locality to ensure local-level participation in the formulation, planning and implementation of development programmes and delivering prompt basic civil services (sanitation, public health, primary education, social welfare services etc.) to the local people within its jurisdiction through the better use of local knowledge, direct contact with citizens and greater ability to overcome communication problems. In England and Wales it "would be difficult nowadays to name any aspect of day-to-day life without a link with local government. There is no section of the community which it does not serve in some way and to many it ministers continuously from cradle to coffin."³

Local government is loosely defined, without making any reference to its financial and legal status and representative character, as "a public organization authorized to decide and administer a limited range of public policies within a relatively small territory which is a subdivision of a regional or national government."⁴ It is that "part of the administration of a state or nation which deals

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1. IX Encyclopedia of Social Sciences, 451 (New York, 1968).
 2. IV Encyclopedia Britannica, 644 (Chicago, 1981)
 3. New Age Encyclopedia, 4 (Sydney, 1983)
 4. Supra note 1, at 451

mainly with such matters as concern the inhabitants of a particular place or district, including those functions which the central government considers it desirable to be so administered. The bodies entrusted with these matters are known as local authorities and are, in the main, elective."⁵ in a similar way, Justice Shahabuddin Ahmed of the Appellate Division of the Supreme Court of Bangladesh commented in 1992 on the nature of the local government in the case of Kudrat-e-Elahi Panir v. Bangladesh⁶ : Local government "is meant for management of local affairs by locally elected persons. If government's officers or their henchmen are brought to run the local bodies, there is no sense in retaining them as local government bodies Local Government is an integral part of the democratic polity of the country."⁷ in relation to local government, local self-government, which sometimes implies the elective nature of such institution and, in a colonial rule, the prefix 'self' means that governmental institution at the local level is composed of natives, has been described in the Report of the Indian Statutory Commission, 1930 as a representative organization responsible to a body of electors, enjoying wide powers of administration and taxation, and functioning both as a school for training and a vital link in the chain organizations that make up the government of the country. The United Nations has defined 'local self-government' as "a political subdivision of a nation or state which is constituted by law and has substantial control over local affairs, including the power to impose taxes or extract labour for prescribed purposes".⁸ Thus "Local governments are not true sovereign governments. As such they possess no independent sovereign powers or authority, save those delegated to them by state institutions and laws. In brief, they remain subject to the sovereign authority of the national and state governments".⁹ Thus the essential features of a local government are: (a) it is established by law; (b) it is generally an elective body

5. Supra note 3, at 3

6. 44 DLR (AD) 319

7. *Id.* at 330, 336

8. Quoted in Siddiqui, Kamal, "Local Government in Bangladesh, 4 (Dhaka, 1995)

9. Valent, William, Local Government Law 2(American Case Book Series).

composed of members elected by the people of an area or locality; (c) it has the power of administration over a designated locality and the authority to manage the specified subjects; (d) it has the power to raise fund through taxation within its area; and (e) it is ultimately accountable and subordinate to the national government. In this connection, the observations made by Justice Mustafa Kamal of the Appellate Division of the Supreme Court of Bangladesh in the case of Kudrat-e-Elahi Panir are worth-quoting: "Local government as a concept and as an institution, was already known to have possessed certain common characteristics, namely, local elections, procedure for public accountability, independent and substantial sources of income, clear areas for independent action and certainty of powers and duties and the conditions under which they would be exercised.¹⁰ It should be stressed here that the quality and character of a local government are determined by a multiplicity of factors, for example, national and local traditions, customary deference patterns, political pressures, party influence and discipline, bureaucratic professionalism, economic resource controls, and social organization and beliefs.¹¹

However, the object of this paper is to examine the provisions of the original (1972) Constitution of Bangladesh concerning local government with reference to the Judgment of the Supreme Court of Bangladesh pronounced in Kudrat-e-Elahi Panir's Case (1992). The omission of the provisions of the Constitution relating to local government in 1975 and their restoration in 1991 shall also be discussed.

The Provisions of the Original Constitution of Bangladesh Concerning Local Government.

The 1972 Constitution of Bangladesh, which was adopted on 4 November 1972 and given into effect on 16 December 1972,

10. Supra note 6, at 341-342

11. Supra note 1, at 451

declares Bangladesh as a unitary state. Although the original Constitution did not define the term 'Local Government', it contained a full chapter (i.e. Chapter III) in Part IV which provided for the composition and powers of local government institutions to be established in Bangladesh by an Act of Parliament. There were two Articles, 59 and 60, in the Chapter which laid down a framework concerning local government bodies. Article 59 provided that:

"Art. 59 (1). Local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law.

(2) Every body such as is referred to in clause (1) shall, subject to this Constitution and any other law, perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to

- (a) administration and the work of public officers;
- (b) the maintenance of public order;
- (c) the preparation and implementation of plans relating to public services and economic development."

Thus in order to be a local government an institution was required to fulfil under Article 59 of the Constitution two conditions: it was to be constituted in an administrative unit and was to be entrusted to a body composed of elected persons. An 'administrative unit' has been defined in Article 152 (1) of the Constitution as a "district or other area designated by law for the purposes of Article 59." Thus in the case of a district, a designation by law is not necessary, but it is necessary for other area to become an 'administrative unit.'¹²

However, the original Article 60 of the Constitution stipulated that:

12. This was done in the case of unions and municipalities by the Parliament through the enactment of Bangladesh Local Government Union Parishad and Paurashava (Amendment) Act, 1973. Section 2C of the Act provided that "the unions and municipalities shall be administrative units within their respective areas for the purposes of Article 59 of the Constitution of the People's Republic of Bangladesh." It was given retrospective effect from 22 March, 1973 and incorporated in P.O. No. 22 of 1973 as Article 2C.

"Art. 60. For the purpose of giving full effect to the provisions of article 59 Parliament shall by law, confer powers on the local government bodies referred to in that article, including power to impose taxes for local purposes, to prepare their budgets and to maintain funds."

Apart from these two Articles, which placed limitations on the power of the Parliament to make law regarding local government, original Article 11 of the Constitution provided as a Fundamental Principle of State Policy (which is not judicially enforceable) that "The Republic shall be a democracy in which effective participation by the people through their elected representatives in administration at all levels shall be ensured."

The provisions of Articles 11, 59 and 60 of the Constitution of Bangladesh concerning local government led Justice Mustafa Kamal of the Appellate Division of the Supreme Court to observe in the Kudrat-e-Elahi's case that:

"..... the constitutional provisions on local government namely Articles 11, 59 and 60 mark out the Constitution of Bangladesh as clearly distinctive from other Constitutions of the world. No Constitution contains any definitive provision on local government. In England the local government units, unlike the central government, are not products of constitutional design, but of historical development. Same is the case in the USA and India. In this sub-continent too local government developed along historical lines without following any constitutional pattern. It is the Constitution of Bangladesh which for the first time devised an integrated scheme of local government within a constitutional pattern. This is a most distinctive and unique feature of the Constitution of Bangladesh."¹³

Although the learned Justice has maintained that "no Constitution contains any definitive provision on local government," and it "is the Constitution of Bangladesh [adopted in 1972] which for the first time devised an integrated scheme of local government,"

13. Supra note 6, at 341

detailed and comprehensive provisions concerning local government are to be found in the Constitutions of certain European Countries (i.e. France, Italy and Germany) adopted in the 1940s. For example, the Constitution of the French Republic, adopted by the National Constituent Assembly on 28 December 1946, contains exhaustive provisions regarding local government. The entire Part (Titles) X of the Constitution, which contains five Articles, deals with local administrative units. The provisions of the Articles relating to local government are quoted below:

"Art. 85. The French Republic, one and indivisible, recognizes the existence of the local administrative units. These units shall be the communes, the departments and the overseas territories.

Art. 86. The framework, the scope, the eventual regrouping, and the organization of the communes, the departments, and the overseas territories shall be determined by law.

Art. 87. Local administrative units shall be governed freely through councils elected by universal suffrage. The execution of the decisions of these councils shall be ensured by their mayor or their president.

Art. 88. The co-ordination of the activities of government officials, the representation of the national interests, and the administrative control of these units shall be ensured within the departmental framework by delegates of the government appointed by the council of ministers.

Art. 89. Organic laws will extend the liberties of the departments and municipalities; they may provide, for certain large cities, rules of operation and an administrative structure different from those of small towns, and include special provisions for certain departments, they will determine the conditions under which Articles 85 to 88 above are to be applied.

Laws will likewise determine the conditions under which local agencies of central administrations are to function, in order to bring the central administration closer to the people."

Within next two years, Italy and Germany followed the example of France through the incorporations into their Constitutions detailed provisions concerning local government. The Constitution of the Italian Republic, approved by the Constituent Assembly on 22 December, 1947 and entered into force on 1 January, 1948, began with certain "Fundamental Principles" and one of the "Fundamental Principles" dealt with the reorganization and distribution of administrative functions among local bodies.¹⁴ The Constitution also contained provisions concerning the distribution of administrative functions among local agencies.¹⁵ The Basic Law (i.e. the Constitution) of the Federal Republic of Germany, promulgated by the Parliamentary Council on 23 May, 1949 and which is still in force, provides for the self-government for local authorities (counties and communes) in which the "people shall be represented by a body chosen in general direct, free, equal and secret elections."¹⁶

14. As Article 5 of the Constitution of the Italian Republic provides: "The Republic, one and indivisible, recognizes and promotes local autonomies. It effects in the state services the broadest administrative decentralization and adapts the principles and procedure of its legislation to the needs of autonomy and decentralization",

15. As Article 118 of the Constitution of the Italian Republic provides: "Administrative functions connected with . . . [certain] matters . . . are [to be] exercised by the region, with the exception of those of purely local interest, which may be assigned by law of the Republic to the provinces, communes, and other local agencies The region normally exercises its administrative functions by delegating them to the provinces, communes, or other local agencies, or by making use of their offices."

Article 129 states that ". . . Provincial areas may be subdivided into districts with exclusively administrative functions, as a form of further decentralization."

Article 130 provides that "An agency of the region, established in the manner prescribed by law of the Republic, exercises, also in a decentralized manner a control over the legality of the acts of the provinces, communes and other local bodies".

16. Article 28 of the Basic Law of the Federal Republic of Germany provides that "(1) The constitutional order in the Laender shall conform to the principles of republican, democratic and social government based on the rule of law, within the

Not only the Constitutions of certain European countries (adopted in the 1940s) contained detailed provisions concerning local government, elaborate stipulations in this regard are also to be found in contemporary Constitutions of some Asian countries. For example, the Constitution of Japan, promulgated on 3 November, 1946 and came into effect on 3 May 1947, devoted a full chapter, Chapter VIII (which contains four Articles), to local government. The provisions of the Constitution regarding local government are quoted below:

"Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

The Chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law applicable only to one local public entity cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law."

meaning of this Basic Law. In each of the Laender, counties (Kreise), and communes (Gemeinden) the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In the communes the communal assembly may take the place of an elected body.

(2) The communes shall be guaranteed the right to regulate, on their own responsibility, all the affairs of the local community within the limits set by statute. Within the framework of their statutory functions, the associations of communes (Gemeindeverbaende) shall also have such right of self-government as may be provided by statute.

(3) The Federation shall ensure that the constitutional order of the Laender conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

Omission of the Provisions Concerning Local Government from the Constitution in 1975

However, the integrated scheme of the Constitution concerning local government was abolished by the Constitution (Fourth Amendment) Act, 1975, passed on 25 January, 1975 during the then Government of the Awami League. This Amendment Act, which was a drastic amendment and undermined the spirit of liberal democracy in Bangladesh, omitted Articles 59 and 60 from the Constitution and the sentence concerning local government as contained in Article 11 was dropped.

Insertion of New Provision Relating to Local Government in the Constitution in 1977

Although Articles 59 and 60 of the Constitution were not restored by the First Martial Law Government (1975-1979), an Article for the promotion of local government institution was incorporated into the Constitution by the Proclamation (Amendment) Order, 1977 (Order No. I of 1977), issued on 23 April, 1977 by the President and Chief Martial Law Administrator Ziaur Rahman. This Article 9, which substituted for the provisions of original Article 9 concerning nationalism, provides that:

"The State shall encourage local government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women."

It may be mentioned here that the above provisions have exactly been reproduced from article 32 of the 1973 Constitution of Pakistan.

Restoration of Original Provisions Concerning Local Government in the Constitution in 1991

However, later the Constitution (Twelfth Amendment) Act, 1991, passed on 18 September, 1991 during the Civilian Government of the Bangladesh Nationalist Party, restored Articles 59, 60 and the

sentence of Article 11 to the effect that "and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." Two months six days after the restoration of these Articles in the Constitution regarding local government, on 23 November, 1991, the Upazila Parishad (which had been established by the 1982 Martial Law Administration) was abolished through the promulgation of the Local Government (Upazila Parishad and Upazila Administration Reorganization) (Repeal) Ordinance, 1991. Although the Government constituted in November, 1991 a high powered "Local Government Structure Review Commission" to review and study the local government of Bangladesh and recommend a suitable, effective, responsible and accountable local government structure for the country, the Constitutional validity of the Ordinance was ultimately challenged before the Appellate Division of the Supreme Court in the case of *Kudrat-e-Elahi Panir v. Bangladesh*. With regard to the continuity of the system of local government institutions, the then Chief Justice of Bangladesh, Justice Shahabuddin Ahmed observed (in 1992) in that case:

"The system of Local Government Institution may be altered, reorganized or restructured, and their powers and functions may be enlarged or curtailed by Act of Parliament, but the system as a whole cannot be abolished."¹⁷

Then he bitterly criticised the steps taken by various autocratic regimes both before and after the independence of Bangladesh regarding local government institutions thus:

".... since Independence from the British rule, these institutions fell victim to party politics or evil designs of autocratic regimes, passed through the ordeal of suppression, dissolution or management of their affairs by official bureaucrats or henchmen nominated by Government of the day."¹⁸

17. *Supra* note 6, at 336

18. *Id* at 329-330

He considered it necessary to give direction to bring the existing local government bodies in line with the provisions of the Constitution concerning local government. As he said:

"But there are other local bodies constituted by, and functioning, under different statutes. With the reappearance of Articles 59 and 60 with effect from 18 September, 1991, on which date the Twelfth Amendment of the Constitution was made, these local bodies shall have to be updated in conformity with Articles 59 and 60, read with Article 152(1) for the lawful functioning of the said local bodies. The areas in which these bodies other than the Zilla Parishads have been constituted shall have to be designated as administrative units by amending these statutes. Designation afresh of the union and municipalities is also necessary in view of the fact that Act No. IX of 1973 along with the President's Order No. 22 of 1973, was itself repealed by Ordinance No. XC of 1976 — Local Government Ordinance, 1976 in the case of Unions and Paurashava Ordinance, 1977 — Ordinance No. XXVI of 1977 — in the case of municipalities. Required designations by amending the relevant statutes with effect from the date on which the Twelfth Amendment of the Constitution was made should be provided as soon as possible – in any case within a period not exceeding four months from date. The other constitutional requirement for these local bodies is that they shall be entrusted to bodies "composed of persons elected in accordance with law." The existing local bodies are, therefore, required to be brought in line with Article 59 by replacing the non-elected persons by election keeping in view the provision for special representation under Article 9. Necessary action in this respect should be taken as soon as possible — in any case within a period not exceeding six months from date. In the suggested amending statutes, all actions taken by the local bodies concerned since 18 September 1991 should be ratified.¹⁹

Thus the local government institution unmistakably interwoven in the democratic fabric of the Constitution of Bangladesh. "It is to be remembered however that local government is a part of the constitutional system and therefore Chapter III of Part IV of the

19. *Id.* at 336-337

Constitution containing Articles 59 and 60 cannot ever been kept as a dead letter. Local Government cannot be abolished altogether. It must exist in some form, in some tier or tiers at any given point of time to give a meaning to Chapter III of Part IV and to justify its rationale, validity and existence. It is not a mere adornment in the Constitution.²⁰

Conclusions

The foregoing discussion shows that a full chapter, Chapter III, of Part IV of the original Constitution of Bangladesh, 1972, contained elaborate provisions concerning composition and powers of local government bodies to be established by an Act of Parliament. It provided that local government was to be constituted in an administrative unit and was to be composed of elected person. This comprehensive recognition of local government in the Bangladesh Constitution showed the position it enjoyed in the body politic of the country. But the provisions of the Constitution concerning local government were omitted by the Constitution (Fourth Amendment) Act, 1975. These provisions have later been restored by the Constitution (Twelfth Amendment) Act, 1991. Thus local government has again become a distinctive feature of the Constitution. It is obviously interwoven in the democratic fabric of the Constitution which "must exist in some form, in some tier or tiers at any given point of time" to make the constitutional provisions meaningful. Local government, as a tier at the bottom of a pyramid of governmental institutions consisting of elected members, should be established and maintained in Bangladesh so that local level participation in the formulation, planning and implementation of development programmes and delivering prompt basic civil services to the people of the locality can be ensured.

20. Kamal, Mustafa J in id., at 343