

The Seventy Fourth Constitutional Amendment Act- An Analysis

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Abstract

It is revealed from the different literature that during independence and revolutionary movements in the countries like France, USA and India, the writings and sayings of the leaders were strongly in favour of the decentralized political system. Now worldwide, all most all the countries have been experimenting with the decentralization. It is believed that decentralized governance is a necessity to ensure efficiency in the functioning of the State in a modern civil society, but it must be kept in mind that the regulatory functions of the state should not be decentralized in the grassroots level. The decentralized democratic political ideology is that a government should try to devolve only the state- sponsored welfare activities to the local bodies as much as possible. In India since independence, there have been vigorous voices in favour of decentralization and local bodies where local decisions are taken by the people as much as possible. This has led to Seventy Third and Seventy Fourth Constitutional Amendment Acts with the aim to provide the uniform structure of the local institutions and to empower them. The Present article which relates to urban governance tries to explain and analyse the different provisions of the Seventy Fourth Constitutional Amendment Act.

KEYWORDS- Constitution, Seventy Fourth Amendment, Government, Decentralization.

Introduction-Till the time of our independence, about 90% of the total population resided in rural areas. So, Gandhiji concentrated his attention on democratic local self-government in rural India. In the Constitution, the supreme law of the land, under Article 40 the organization of village panchayats has been mentioned.ⁱ Article 40 reads: “The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self- government”.ⁱⁱ

So, based on this, it is found that there are several developments took place in the area of rural local administration after Independence. It is again found that, due to inadequate constitutional provision for urban local bodies, democracy in municipal governance has not been stable. Within the four decades after independence, the urban demographic character of our country has undergone a noticeable change. Though the concerned municipal acts of states provide for regular elections to municipal bodies, they are frequently suspended and superseded for indefinite period. In some cases, these suspensions have stretched to periods exceeding a decade. Frequent and indefinite suspensions or supersession erode the very basis of local government and have a deleterious effect on democracy at the urban grass-roots level.

It is true that till 90's; municipal bodies did not have any assured existence as they could be superseded at the will of State Government for indefinite periods. This meant that election to urban local bodies could not be held within a

specified time limit in case of supersession. The weaknesses were common in all the urban areas and from time to time suggestions were made to remedy these weaknesses by enlisting the legal guidelines for urban administration in the constitution itself through an amendment. The first ever initiative in this regard was taken in 1989. The P.V. Narasimha Rao Government, coming into power in 1991, it had committed to the people that it would introduce the requisite Bill on Nagarpalikas within the first hundred days of the Government. Government fulfilled that commitment and the Constitution (Seventy Third Amendment) Bill, 1991 pertaining to Municipalities was introduced in the Lok Sabha. The Bill was passed in the Lok Sabha on 22nd December, 1992 and in the Rajya Sabha on 23rd December, 1992. The Bill has been ratified by the resolution of at least half the number of State Legislatures. It received the assent of the President on 20th April, 1993. It was published in the Official Gazette of India (Extraordinary) Part II section 170 of 20th April, 1993 as the Constitution (Seventy Fourth Amendment) Act, 1992.

The Seventy Third and Seventy Fourth Constitution Amendment Acts are fellow legislation passed by the Parliament in 1992, the first provided guidelines for the creation of three tiers Panchayats in the rural areas and the latter gave directions for the creation of Municipalities in urban areas.ⁱⁱⁱ These two acts placed a broad framework for the establishment of Panchayats and Municipalities and are entrusted to the states. The legislations also set up a time limit within which the state governments were to legislate conforming legislations and enabled to form new set of Panchayats and Municipalities that is by the 1st of July 1994.^{iv} Prior to the legislation of these two acts, the functioning of the local bodies was totally dependent on the desires and wishes of the state governments. Actually 'local government' is a state subject under the Seventh Schedule of the Indian Constitution.^v The supersession of the local bodies was a very normal matter. Further, the necessary tools vital for the efficient functioning of the local bodies such as the Wards Committee, Gram Sabha, State Election Commission etc., were not in existence. The Seventy Fourth Amendment Act which relates to urban area provides specific criteria for constitution and composition of Municipalities; elections/removal of Mayor or Chairpersons, qualification/disqualification of membership, setting up of State Election Commission etc., but it left to the state governments to put the actual norms. This was done while keeping in mind the federal spirit of our political system and also since a minority government in centre introduced the Bill in the Parliament and was dependent on other regional parties for its enactment.^{vi}

Analysis on Seventy Fourth Amendment Act- an analysis on the various provisions of the Seventy Fourth Amendment Act are discussed below:-

➤ There are variations in the standard for the constitution of different tiers of urban local bodies in different states. Demographic and other conditions, which are fixing factors for constituting a particular type of municipality, differ in wide point from one province to another. Moreover, the Constitution does not define what exactly would constitute 'larger urban area' or 'smaller urban area' or 'a transitional area from rural to urban'. It is the privileged of the state governments to fix their own criteria. In some states villages with less than 5000 population are upgraded as Urban Local Bodies. It is, therefore, in the paper suggested that this provision of the Constitution may be amended and at least a minimum size of population as a base may be prescribed.

➤ The Constitution also provides that a Municipality may not be established in an industrial township under some circumstances and the reason for which has not been clearly mentioned by the Constitution. In Assam, municipal law provides that no municipality shall include any military cantonment or part of a military cantonment.^{vii} This provision should be reconsidered as this is not in favour of the concept of decentralisation. It is, therefore, in the paper suggested that the Constitution may be amended and at least a minimum size of population as a base may be prescribed. It has also been felt that fresh delimitation of constituencies is a need and delimitation process is done once in every ten years after the census and at least six months before the municipal election is due.

➤ It is another important point that the provision of nominated members has been a matter of controversy since the very definition of 'having special knowledge or experience' is not unclouded and the nominations are made by the state government arbitrarily. It is suggested in the paper that the provision may be omitted, and elected transparent administrative machinery should get the sole authority in the local administration. Again, the provision for the representation of MPs and MLAs in Municipalities appear to go against the intention of the Constitution.^{viii} Article 101 of the Constitution specifically states that no person shall be a member of both the houses of Parliament and any of the houses of the state legislature. The matter of dual membership has been even rejected by the Indian Constitution itself. It reinforces political control and domination by the central and state legislators upon the local institutions which again goes against the intention of decentralization.

➤ The provision of reservation is also another issue that has been widely debated as the matter of reservation in local bodies is far more complex.^{ix} In the absence of actual population figures of Backward Classes, fixing the number of seats to be reserved for this social group remains a hotly contested issue. There is evidence of discrepancies regarding the reservation of a particular seat. To ensure transparencies and social justice, the thesis suggests that before every election the government should publish that on which ground the reservation has been made for particular ward of a municipal area.

➤ The Constitution (Article 243U) makes elections to the Municipalities mandatory for every five years.^x This Article stipulates that each Municipality shall enjoy a term of 5 years and not more. It also states that the state government through law can dissolve a municipality which is faulty in nature. But it also provides that before its dissolution, a municipality shall be given a reasonable chance of being heard. This provision clearly indicates the discretionary powers of State Government regarding dissolution of municipalities. It is felt that the party in power often misuse this provision.

➤ Under Article 243W the Constitution provides that the State by laws may entrust to the municipalities with the powers and authority which are necessary to enable them to function as institutions of 'self-government'. It also directs the State to transfer the functions to the urban local bodies incorporated in the 12th Schedule.^{xi} The Constitution provides that these functions are discretionary and not mandatory in nature. So, the transfer of functions along with others are totally depends upon the whims of the states. Again, it is highly desirable to making a distinction between functional responsibilities of municipal corporations, municipal boards and nagar

panchayats. Small local bodies with non- floating sources of revenue cannot be expected to discharge the same obligations as the larger ones.

➤ It reveals that the municipal functions (under 12th Schedule) not only enlisted in the State List (List II), but also in the Concurrent List (List III). It means that municipalities derive their functions not only from State Government, but also from Central Government. Functions like- prevention of cruelty to animals; urban forestry; planning for economic and social development; urban poverty alleviation; safeguarding the interests of weaker sections of society, handicapped, mentally retarded etc., are the items of the concurrent list.

➤ Local institution has no fiscal power of its own. The Constitution, even after the Seventy Fourth Amendment, does not suggest an independent set of taxes that the Municipalities can raise. The Constitution has not vested any strong extractive power upon the local bodies; rather the powers of extraction are clear cut under the jurisdiction of centre and States.^{xii} The paper insists to insert the clear cut domain of 'local taxes' in the Constitution under the State list of 7th Schedule. This will surely help to keep local institutions unaffected by changing moods of the State Government.

➤ According to the provisions of the Constitution, State Election Commissioner is appointed by the Governor of the concerned State. To make the selection impartial, it is necessary that a body should be made consisting of the State Chief Minister, Speaker of the Legislative Assembly, and the leader of the opposition party which can recommend a suitable person with adequate administrative experience to the Governor for appointment of State Election Commissioner.

➤ The constitution of District Planning Committees (DPCs) is mandatory under the Constitution, but the composition of the DPC has been left to the State Government as discretionary. The Deputy Commissioner as a chairman of the District Planning Committee (as it found in some of the states) is a violation of the spirit of the Constitution. Most state governments have formed DPCs, mainly because it is a constitutional requirement but this body has remained largely defunct. There is a necessity to build a concrete step for the DPCs which will be able to function as an independent and integrated planning body for both the rural and urban areas of the district.

➤ It is found that as many as 9 articles are nearly identical under Part IX and IXA. The 11th and the 12th Schedules containing the list of functions for Panchayats and Municipalities are again very similar. Therefore, in this paper the suggestion is provided for changes in the existing constitutional provisions in Part IX and Part IXA. Important consideration should also be taken on the issue that these two Parts should be integrated by omitting the provisions which are a duplication of each other and rationalising the arrangement of the other provisions.

Conclusion- With the passage of the Constitutional Amendment Act in 1992, the states passed their own conformity legislation. At its passage, especially now after 25 years of its working, some critical concerns have been observed which need to be noted and assessed. The major observations and findings of the paper are as follows:

The new phase of decentralized democracy in India begins with a paradox. A very centralized instrument – 'Constitutional Amendment' is used to empower a decentralized activity – 'Urban Local Governance'. Again, the state

government plays the mediator in the matter of decentralization of power; the Constitution does not directly empower the Local bodies.

It is argued in the paper that the local bodies in India are still not 'governments' in their own rights. They do not constitute a 'tier' of the Indian federal state. In a three level system of governance, the Union, the states and the local bodies in India, the Constitution prescribes the legislative, administrative and financial powers to the Union and the states only. It does not specify anything so far as local body is concerned. 'Local government' is extremely a state item, and the structure and functions of urban local bodies are defined by the concerned state municipal laws. The 12th Schedule merely indicates the permissible limit of functional areas in which the elected local bodies are entrusted with developmental work. The constitutional amendment has only ensured that these bodies have a right to exist, that they cannot be superseded or dissolved whimsically by the State Government as was the practice before the enactment of the Constitutional Amendment in 1992.

It is also felt that there is a shadow between precept and practice. The second vital observation is that the use of legal languages of 'shall' and 'may' in the Constitutional Amendment Act. These words indicate that some provisions being mandatory on the states when they frame their conformity acts, and some being discretionary. The situation makes confusion, having political democracy but not decentralization. There is a necessity to bring some changes in the articles of the Constitution from 'state may' to 'state shall' in order to bring mandatory nature in the Act for strengthening the local institutions.

Again, based on the issues that have emerged after the Seventy Fourth Constitutional Amendment, it can be said that now there is political decentralization but there are insufficient administrative and financial decentralization. By and large, such decentralization remains confined to ensure reservation of seats, setting up of State Election Commission to conduct regular elections, constituting State Finance Commission for periodically devolution of funds, and by prohibiting supersession and suspension, the said Constitutional Amendment Act has created new 'political platform' only.

It is found that the Seventy Fourth Amendment has brought substantial changes on at least three matters. First, the certainty of urban local institutions has been ensured. Now in all most all the states the uniform institutional set up of urban local governance is guaranteed. Second, the continuity of the institutions through elections every 5 years is also guaranteed. Third, the weaker sections including women have entered the power structure of urban grassroots politics through reservation provisions mandated by the amendment. It is observed that this constitutional amendment has fulfilled the objectives of political decentralization more than financial and functional devolution.

The process of decentralization in urban level got new impetus with the enactment of Seventy Fourth Amendment Act. The states have taken some measures to strengthen the urban institution in order to enable them to take up the task of local development. In the conclusion, it can be said that though the Constitution ensures that the urban local bodies will get the tremendous power by this amendment, while in reality the present state of functioning of these bodies are not up to the mark. In this very context, the paper has suggested measures that are vital for executing the Act. It has stressed in this paper that the success of democratization process in urban grassroots level will be to some extent determined by further amendments in the Central as well as State Acts.

Notes and References

ⁱ The debates in the Constituent Assembly on Panchayati Raj were more fundamentally grounded. There were two differing viewpoints -- that of Gandhi and of Ambedkar. The fundamental difference in philosophies of these two thinkers was on parliamentary democracy –Ambedkar believed the unit of development should be the Individual while Gandhi believed the unit of development should be the village. A Compromise was forged and in 1948, PRIs found a place in the non-justifiable part of the Constitution.

Gandhi in the issue of the Harijan of July 26, 1942: “My idea of village swaraj is that it is a complete republic, independent of its neighbors for its vital wants, and yet interdependent for many others in which dependence is a necessity. Thus the village’s first concern will be to grow its own food crops and cotton for its cloth. It should have a reserve for its cattle, recreation, and playground for adults and children... The village will maintain a village theatre, school, and public hall. It will have its own waterworks ensuring a clean water supply. This can be done through controlled wells or tanks. Education will be compulsory up to the final basic course. As far as possible every activity will be conducted on a co-operative basis. There will be no caste, such as we have today with their graded untouchability. Non-violence with its technique of satyagraha and non-cooperation will be the sanction of the village community. ... The Panchayat of five persons annually elected by the adult villagers, male and female, possessing minimum prescribed qualifications will conduct the government of the village. These will have all the authority and jurisdiction required. Since there will be no system of punishments in the accepted sense, this Panchayat will be the legislature, judiciary, and executive combined to operate for its year in office. Any village can become such a republic without much interference”.

Ambedkar’s in the Constitutional Assembly Debates in November 1948: “It is said that the new Constitution should have been drafted on the ancient Hindu model of a state and that instead of incorporating Western theories the new Constitution should have been raised and built upon village Panchayats and District Panchayats... They just want India to contain so many village governments. The love of the intellectual Indian for the village community is, of course, infinite if not pathetic... I hold that the village republics have been the ruination of India. I am therefore surprised that those who condemn provincialism and communalism should come forward as champions of the village. What is the village but a sink of localism, a den of ignorance, narrow mindedness, and communalism? I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.”

ⁱⁱ A uniform three-tier structure of panchayats at village (Gram Panchayat) at village level, intermediate or block level(Panchayat Samiti/ Anchalik Panchayat) and district (Zilla Parishad) level. All the seats in a panchayat at every level are to be filled by elections from respective territorial constituencies.

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^{iv}The Seventy Third and Seventy Fourth Constitutional Amendment Acts are the Union Acts to establish third tier of Government and the Conformity Acts are State legislations.

^v Entry 5 of State list says that ‘Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities, and other local authorities for the purpose of local self- government or village administration’

^{vi} The Rajiv Gandhi Government introduced the Constitution (Sixty Fifth Amendment) Bill in parliament in August 1989. The Bill was passed by the Lok Sabha but not by the upper house and thus it fell. The succeeding National Front Government under V.P. Singh introduced a revised Bill, namely the Constitution (Seventy Fourth Amendment) Bill, 1990 incorporating the provisions relating to panchayats (rural local government) as well as municipalities. This was done in September 1990. The Bill, however, lapsed on account of the dissolution of the then Lok Sabha. The P.V. Narasimha Rao Government, coming into power in 1991, drafted

the Constitution (Seventy Third Amendment) Bill, 1991, pertaining to municipalities and introduced it in Lok Sabha in September 1991. Shri G. Venkatswami minister of state for Rural Development introduced the Constitution (Seventy Second Amendment) Bill relating to Panchayati Raj Institutions and Mrs. Sheila Kaul, Minister for Urban Development introduced the constitution (Seventy Third Amendment) Bill pertaining to urban local bodies. The BJP members said that the Bills affected the basic federal structure of the constitution as these violated the state legislature power to legislate on 'Local Government' and maintained that after the Keshavanand Bharti judgment, the government could not change the basic structure of the constitution. The BJP had staged a walk out as a protest against the introduction of the Bills. But the Congress (I) (members 252), had claimed that by introducing the Bills, the government was trying to implement one of the Directive Principles of State Policy and federalism was not affected because powers of the state governments had been kept intact. It was passed by the Lok Sabha on December 1992 and by the upper house the same month. Following its rectification by more than half the state assemblies it received the assent of the president on 20th April 1993 and is known as the constitution (Seventy Fourth Amendment) Act, 1992. This Amendment, operative since April 1993, introduces a new part, namely part IX-A in the constitution, which deals with the urban local government.

^{vii} The Governor of a state can provide, by a notification that a Municipality may not be created in an industrial township if the municipal services are provided by an industrial establishment. Another type of town which does not come within the scope of mentioned categories is the army cantonment. If any towns have come up around the army stations, the management boards for these towns are established and these are controlled by the Defence Department. These are known as Cantonment Boards. Cantonments, like cricket were given to India by the British. One unique feature of the institution of cantonment is that it came to India without taking root in the country of colonial rulers. Thus there are no cantonments in Great Britain. Not only does that, even outside the British Empire, cantonments not exist. In the United States, for instance there is no reference to cantonments as such in the *Lingua Franca* of that country. Instead, it has "Military bases" which are a lot different from cantonments. Thus except India (Pakistan and Bangladesh, which were earlier part of the Indian Territory do not have cantonments) cantonments have no parallel in the world.

The dictionary meaning of cantonment is 'place where soldiers live' or 'permanent military station'. Cantonments are inhabited not only by the army personnel but a size able civilian population also resides there. There are nearly 70 cantonments throughout the country. While other types of local bodies are under respective state governments, cantonment Boards are the only bodies that are centrally administered by the Ministry of Defense, Government of India. Apart from this, Cantonment Boards are like any other local bodies. The position of cantonments is left unaffected by the Seventy Fourth Amendment Act. ^{viii} Article 243-R(ii) provides that the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the municipal area, and Article 243- R (iii) provides that the members of the Council of States and the members of the Legislative Council of the State registered as electors within the municipal area shall represent the municipality.

^{ix}The issue of reservation in local bodies is far more complex than that for state and national elections. While at the national and state levels constituencies are reserved only for the SCs and the STs. The list of social groups for which constituencies are reserved for urban local bodies expand to include the Other Backward Classes (OBCs), women etc.. In the absence of actual population figures of OBCs, fixing the number of seats to be reserved for this social group remains a hotly contested issue. Moreover, the OBCs are a heterogeneous group and their relatively wealthier and better-educated members are not eligible for state-sponsored affirmative action policy. This dispute with regard to reservation of seats led to a deadlock and delayed the elections. Given the fact that conducting regular elections without delay and inclusion of the marginalized groups into mainstream electoral politics constitute the soul of

the decentralization policy. Leaving these issues to the discretion of the state governments appears to have impaired the functioning of the local bodies.

^x Though elections have been held in most states, the problem arises with regard to holding them regularly. In Uttar Pradesh, since the State Government claimed that the delimitation process had not been carried out, it promulgated an ordinance postponing elections. This ordinance was then challenged in the High Court through Public Interest Litigation (PIL) arguing that if elections are not held every five years then it is a violation of the Constitution. The ordinance was quashed by the High Court and the Supreme Court upheld the judgment of the lower court. Similarly, in Haryana, elections due in February 2000 were postponed due to the announcement of Assembly polls. The Supreme Court had to intervene and direct the State Government to hold election within a specific time. In Andhra Pradesh also election have been postponed either due to delay in delimitation of wards or complications in the procedure of reservation of seats for elections. In all cases the courts have had to intervene in response to writs or PILs to ensure timely elections.

^{xi} All the 18 subjects of Twelfth Schedule of our Constitution which are the responsibilities of the Municipalities, falling under the jurisdiction of either the State List or the Concurrent List of Seventh Schedule.

^{xii} The constitutional assignment of the tax powers in India follows the principle of separation i.e.; the tax handles are exclusively assigned either to the centre or to the states. Most of the broad based and the productive tax handles have been assigned to the centre, including-income tax, wealth tax from non agriculture sources, corporation tax, taxes on production (excluding those on alcoholic liquor, opium, and other narcotics) and custom duties (Such tax sharing systems exist in other federations like Australia and Canada). States taxes include taxes on agriculture income and wealth, taxes on the transfer of properties (Stamp duties and registration fees), taxes on motor vehicles, taxes on the transportation of goods and passengers, sales tax on goods, excises on alcoholic beverages, entertainment tax, taxes on professions, trades, callings and employment, properties tax and taxes on the entry of goods in to a local area for consumption, use or sale (Octroi). The centre has also been assigned all residual powers of taxation.