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**SEPARATION OF POWER: A CRITICAL ANALYSIS ON THE
JUDICIARY'S INVOLVEMENT WITH POLICY MATTERS OF THE
GOVERNMENT**- Anakha Hari¹**Abstract**

Separation of power is one of the key characteristics of the any democracy. The Indian Constitution also promulgates this and it is necessary to ensure that there is no arbitrariness. The concept of power separation is expressly not mentioned in the constitution but it can be interpreted from various provisions of the constitution. Article 50 talks about the division between the functioning of judicial branch and executive branch and Article 121 and 211, which talks separation of duties between judiciary and legislature shows the constitutional emphasis on division of power. The doctrine of separation ensures the mutual exclusiveness of the organs of the government. Each organ and authority of the government has different set of powers and functions. The constitution framers had entrusted the judiciary with duty of providing constitutional remedies and holding up the constitutional mandate. Policy matters was domain entrusted with the legislature and the executive. In a democracy, there is constitutional presumption the elected body which represents the people of the country has the power of policy making and the judiciary can only interfere with policy matters in case of arbitrariness or violation of constitutional mandate and basic structure. The judiciary should always exercise its powers on the grounds of rule of law and good conscience but it should always within the constitutional mandate. There are several instances that judiciary has intervened with the policy matters outside the ambit of arbitrariness and constitutional mandate. The concept checks and balances should never lead to overpowering the functions of any organ of the government. The recent judiciary's involvement with the farm laws and the central vista project all hint towards the trend of judicial overreach rather than judicial review. Hence it becomes a matter of great importance to understand to what extent the judiciary can involve with the policy matters of the government and also an analysis on the mandate and provisions

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under which judiciary passes policy matters and interferes with policy matters of the government. This paper tries to analyse the power of judiciary with regards policy matters in its framing, implementation and passing.

Keywords: Judiciary, policy matters, judicial review, judicial outreach, power

1.Introduction

Separation of power is a very dynamic concept which has been adopted by many democratic countries and constitutions. This significance with regard to the notion that power plays with people when there is no checks and balances and constraints attached to it. Political theory and sciences are considered as the study of power play. The constitution framers of democratic countries felt the need for separation of powers to avoid concentration of power and arbitrariness. No organ of the government is not given autonomy over the other.

Though in theory it seems very practical to have the doctrine of separation of power to be exercised to avoid arbitrariness and autonomy of institution, but it is a very utopian concept. The Constitution of India expressly does not mention separation of power, it can be inferred from the various provisions of the Constitution. In the Indian Constitution, the judiciary, executive, and legislative organs were assigned separate sectors and their tasks were delineated. The storey of their realms is told via several drawings of the Indian Constitution. It was up to the executive and legislative branches to uphold and advance the cause of basic rights. The Indian court has been tasked with maintaining the right to constitutional remedies, which is a difficult assignment. The question with regard to when the courts can dwell in to policy matters has always created issues. Policy matters are a matter and authority which comes under the compartment of the legislative and the executive. But there has been several instances of the judiciary intervening with policy matters in case of arbitrariness or violation of constitutional mandate. Judicial review of policy matters is considered as a part of the basic structure of the constitution and it is very necessary to ensure the process of checks and balances on the legislative and the executive. But the issue lies with the extent of this review and how far does the authority and power of the judiciary lies with regard to intervening with policy matters.

Another matter is with regard to the contravening concepts of constitutionalism and

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democracy. The decision-making process can be overridden by the Constitution. "Democracy," on the other hand, is founded on the idea that an elected group of people has the authority to make choices for the polity. This paper tries look in to the nuances of this with regard to separation of power, judicial review and the judicial intervention in the policy matters of the government.

2.Literature Review

Review of Literature plays an instrumental role in distinguishing the different sets of ideas and gaps in order to facilitate research. For the purpose of this research paper newspaper articles, commentaries and articles have been used.

The first work that has been reviewed for this research is titled 'Separation Of Powers: Does It Really Exist?' -by Nikhil Gupta and AdityaGogna. This paper primarily involves the study based on deciphering the theory of doctrine of separation of power and to understand whether this concept is an actually workable concept. This paper also looks even it to alternatives to the theory of separation of power and more of a workable concept which is based on division of function between the organs of the government. This paper uses a comparative study on the judicial interpretations to arrive at this conclusion. The paper primarily lack in understanding the exclusiveness of policy decisions and does not dwell in to power limitations.

The book titled 'Constitutional Law of India' by J N Pandey was very instrumental to understanding the constitutional mandate and provisions relating to the doctrine of separation of power and the constitutional take on the theory.

The next work which was used to understand role of judiciary and its importance in governance, upholding the constitutional mandate and all the more in welfare of citizens in the journal titled 'Role Of Judiciary In Good Governance' by Justice Y.K. Sabharwal. The paper talks about the judiciary's role in society's development and evolution in general, and in guaranteeing good governance by people in positions of authority in particular. Perhaps no two people can agree on the importance of the judiciary's role in achieving the aim of good governance in a free society. This paper is very inclining to the judiciary and fails to understand. The role and functions of the other organs of the government.

The article by 'Policy Initiatives and the Role of Indian Judiciary' by DrUday Shankar

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and Saurabh Bindal was a very prominent work in relation to understanding the role of judiciary in policy matters. The work focuses on the role and analyses the situations where the judiciary has involved with policy matters and framework outlined by precedent on this work. The article also talks about the denouement in which the judiciary has intervened with policy matters. The article is very informative and uses case law interpretation and analysis come to the conclusion. The article lacks in emphasis on the doctrine of separation of power in relation to the intervention of judiciary with policy matters.

The work 'Policy-Making and State Supreme Courts: The Judiciary as an Interest Group' by Henry Robert Glick is a work based on America. This work was used for a literature review of this paper to understand the theory of separation of power. The Indian constitution has taken the concept of separation of power from the declaration of rights of man of the Constitution of USA and the Constitution of USA has been the source for the principles of the Constitution of India.

Based the review of literature this area of study primarily lacks a corelated study of the doctrine of separation of power and judicial intervention on policy matters. The works reviewed have taken a pro judicial stance. This

3. Research Methodology

The research is doctrinal in nature. The research uses analytical and descriptive research methodology. The researcher has made use of facts on information already available and has analysed those facts to make a comparative evaluation of the material. Analytical research involves secondary data from various articles and journals. The research also includes case laws to validate and substantiate arguments.

Citation format: This research paper is cited in accordance with the bluebook 21st edition.

3.1 Hypothesis

The tendency of judicial examination of every major government move, as well as the executive's willingness to seek court adjudication of contested or controversial topics, may be exploited by the executive to evade accountability for its decisions at times. The judicial

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institution's reviewing of actions made by the other two arms of the State meets the mandate of a written Constitution as long as such action does not amount to writing off the Constitution's institutional architecture.

3.2 Research Questions

1. What is extend and power of judiciary in policy matters?
2. What are the provisions and constitutional mandate under which the judiciary intervenes with policy matters?
3. What is role that separation of power plays with regard to the constitution of India and the different organs of government?

3.3 Scope and Object of Study

- To understand and study to what extent the judiciary can involve with the policy matters of the government.
- To study and analyse the mandate and provisions under which judiciary passes policy matters and interferes with policy matters of the government.
- To understand and study the power of judiciary with regards policy matters in its framing, implementation and passing laws and policy matters.

3.4 Limitations of Study

- This study is limited to functioning and power play between the legislature and the judiciary and not executive.
- This study's research is very limited in providing alternatives and better governance methods.

4. Separation of Power

Montesquieu is an 18th century political thinker and philosopher who had devised the

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phrase "triaspolitica" or "separation of powers" in his publication titled 'Spirit of the laws', which is considered as one of the greatest works in political sciences, jurisprudence and acted as a source for the Constitution of USA.¹ The work gives great emphasis on the importance and the need of separation of power between authorities of the state- legislative, executive and judiciary. According to him liberty and free society can only be gained by exercising separation of power and a system of checks and balances. Under this one branch of the government is clearly distinguished from the functional authority of the other.

In most democratic countries, separation of power is key to the smooth and consistent working of the functionaries. During the French Revolution of 1789, while adopting the declaration of rights held that there is no constitution, if there is no separation of power. But does not mean these countries come in the ambit of a utopian concept. A system of government where there is absolutely no separation of power or absolute separation is not possible. Governmental powers and functions tend to interchange and overlay and it is very difficult to organize and compartmentalize these functionaries. Due to which there lies a lot of conflict and overlap of power between the organs of government. The main principle of separation of power is that power should not concentrate on a single entity which can lead to arbitrariness.

Varied constitutional systems have different modifications and forms of this principle, which are tailored to their needs. As a result, the ideology is not immutable and may be sculpted to meet the specific circumstances of different governments. Nonetheless, the essence of this philosophy, in all of its iterations, remains intact and is widely held by most modern democracies - that all power should not be placed on a single institution, but rather split among numerous institutions.

4.1 Separation of Power in India

Prof K.T. Shah, in the constitutional assembly debates emphasized on the need for insertion of separate provision, Art. 40- A which talks about separation of power in the constitution of India.² According to him there should be complete separation between the

² Constituent Assembly of India Debates, Vol IVI (Pt II Friday, the 10th December 1948) ³ INDIA CONST. art.50.

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principal organs of the government. Though the idea was rejected, on the suggestion of Dr. B.R Ambedkar Art.50³ was inserted in the DPSP, which provided for the separation of power between the executive and judiciary. The constitution of India does not absolutely recognize the doctrine of separation of power, the parts, privileges and function are separated. There tends to be a lot of interplay, the executive, on one hand, can execute the powers of subordinate legislation that have been given to it by the legislature, and it can even perform limited judicial functions.

There are various provisions in the constitution of India which emphasis on the doctrine. Of separation of powers. Under Art.121 and Art.211 mentions about the separation of powers between judiciary and the legislature³. The article states that the judiciary cannot question the validity of legislative or parliamentary proceedings. It cannot be disputed that the Indian political system is influenced by and embodies separation of powers in some way. It distinguishes the composition and functions of its three branches sufficiently. The theory is regarded as a key feature of the Indian Constitution and has been claimed to be the foundation of the constitution.

4.2 Judiciary on Separation of Power

Justice Mukherjee in the case of Ram JawayaKapur v. State of Punjab⁴ said that Although our Constitution does not recognize the doctrine of separation of powers in its complete rigidity, the functions of different parts or arms of government have been adequately differentiated, and thus it could be said that Constitution of India does not envisage the assumption of functions that essentially belong to another organ or part of the state by one organ or part of the state.

The President of India and the governors of various states are given executive powers. On the advice and assistance of the council of ministers, the President executes his Executive powers in accordance with the Constitution's mandate. In exercising his vast legislative powers, which extend to all topics within the legislative competence of the Parliament, the president is also entitled to promulgate ordinances. As a member of the legislature, the President of India is

³ INDIA CONST. art.121 § 211 .

⁴ Ram JawayaKapur v. State of Punjab AIR 549 (SC.1955)

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not a member of either house.⁵

Similarly, parliament has judicial powers; it may determine whether or not a breach of its privilege has occurred, and if this is shown, the individual responsible can be punished. In this case, the parliament is the sole judge, and courts cannot normally overturn the houses' judgments.⁶ In a Supreme Court case involving a disagreement about the results of the Prime Minister election. It was concluded that the court's role in addressing a specific matter is only that of the judiciary, and that the legislature's modifying authority under Article 368 cannot be used. The elections for Prime Minister would not be cancelled, but they would be held in contravention of the separation of powers principle.⁷

Though India does not follow rigorous separation of powers in the American sense, the notion of checks and balances is a part of this basic structural philosophy to the point where any modification to the constitution, if attempted, will be struck down by the court as illegal.

5.Functional Overlap

Separation of powers is essential to the functioning of the government; no democratic system can claim to have an absolute separation of powers or a complete lack of it. Governmental authorities and duties are purposely overlapping because they are far too complicated and intertwined to be neatly divided. As a result, there is a natural level of competition and dispute among the government's branches. Such encounters show that determining where power rests is a natural component of the evolutionary process.

In terms of practical operation, each organ overlaps with the other two government organs in some way. This overlapping allows the organs to check on each other without interfering too much. As it is impossible to delimit duties in its public relations solely, each institution seems to meddle in the job of a specific official throughout its operations. As a result, even while acting within the sphere of their own forces, such organizations continue to play several roles.

Enabling power-sharing rules improve government accountability and equity The overlap prevents the other two government entities from acting arbitrarily; for example, the

⁵ INDIA CONST. art.123 § art.356.

⁶ INDIA CONST. art.105.

⁷ Indira Gandhi Nehru v. Raj Narain, AIR 2299 (SC.1975).

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Apex Court of India's judicial review power. The scope of dispute among government agencies is reduced by constitutional demarcations of overriding authorities. The overlapping roles encourage power sharing while simultaneously decentralizing power, guaranteeing that the three organs can work together to address issues more quickly.

But this functional overlap leads to many issues. The most serious issue with overlap may be that a specific organ cannot be held liable for its decisions, such as the Judicial Decision in the 2G Case and the Coal Block Case. In such a complicated and dynamic democracy, the public's confidence in government institutions is extremely important. People's trust in the quality, effectiveness, and integrity of the organs is eroded as a result of their continuous interference in others' decisions. It stifles democracy's spirit, just as too much concentration of power in government institutions stifles the notion of check and balance. Excessive infringement on each other's jurisdictions can stymie government operations, public service, and general progress

6. Judiciary and Policy Decisions

The citizens place a considerably greater value on the judiciary than they do on any other government organ. This is due to the judiciary's status as the "land of last resort." When the Indian Constitution's luster has begun to fade, the judiciary has always indulged itself. When carried out in accordance with the Constitution of India, judicial review brings millions of people's hopes and dreams to reality. Power transfer does not come without limitations. Judicial restraint is an essential component of judicial review. Unless the Court is convinced that the rule-making authority acted arbitrarily or in contravention of the basic rights provided under Articles 14 and 16, a policy decision made by the government is not subject to interference.⁸

The judiciary cannot overturn a policy made by the State Government just because it believes that a different policy option would have been fairer, smarter, more scientifically sound, or rational. Only if the policy choice is clearly irrational, unfair, or mala fide may the court intervene. The court's role is to ensure that legitimate power is not misused, not to take on the duty that has been assigned to it. It is generally established that a public body having statutory powers must use caution in not exceeding or abusing its authority. It must stay within the

⁸ K. Narayanan v. State of Karnataka, AIR 55 (SC.1994).

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bounds of the authority that has been

delegated to it. It must behave in good faith and in a reasonable manner. Courts must refrain from interfering with monetary strategy, which is the responsibility of experts. It is not the role of the courts to pass judgement on concerns of economic policy; instead, professional organizations must be consulted. Even professionals might have severe and unquestionable disagreements in such cases. When it comes to judicial intervention in administrative matters, the fundamental rule is that if the government considers all relevant issues, avoids irrelevant variables, and acts appropriately within the confines of the law, courts will stay out of it.⁹

6.1 Legislative v. Judiciary

The doctrine separation of power is impliedly the pillar of democracy. The organs of the government perform separate functions and are separate entities. The legislature has the authority to pass laws. The judiciary is in charge of resolving disputes. The doctrine is an element of the Constitution of India's basic structure.¹⁰ These agencies and functionaries of the government do the play the role of checks and balances but cannot trespass in to each other's domain. On the account of checks and balances, the judiciary imposes judicial review on the legislations and policies implemented by the legislative and the legislative examines the functioning of the executive.

There have been several instances where the judiciary has involved with policy decisions. The courts have delivered laws, regulations and policy related decisions through various judgements. Like in the Vishaka case¹¹ which laid down guidelines on sexual harassment or the. Court order directing the redistribution of food grains¹² and etc. When Justice Bhagawati, emphasised on the importance of PIL in the BandhuaMuktiMorcha case¹³ ; Justice Pathak warned against the overpassing the boundaries and limits of the functions and powers of legislature and exexutive. According to Justice Katju, Judiciary cannot confer new

⁹ Federation of Railway Officers Assn. v. Union of India, AIR 1344 (SC. 2003).

¹⁰KeshavanandaBharti vs. State of Kerala AIR 1461 (SC.1973).

¹¹Vishaka& Ors vs State Of Rajasthan & Ors AIR 3011 (SC.1997).

¹²Harit Recyclers Association v/s Union of India & Others RCR 7 (Civil.2011).

¹³BandhuaMuktiMorcha v. Union of India AIR 802

(SC.1984). ¹⁵Aravali Golf Club vs. Chander Hass 1

SCC(L&S) 289 (2008).

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rights, and neither can they continue to issue orders that are unenforceable or contradict other legislations or established legal principles. To ensure that judicial activism does not devolve into judicial adventurism, courts must exercise care and restraint. It's important to remember that the courts can't run the government. The judicial should simply serve as a warning system, ensuring that the executive is awake and ready to discharge its tasks.¹⁵

There have also been instances of legislature using its authority and power to converse the judgements and the precedents of the judiciary. Some of the provisions of the Customs Act¹⁴ which dealt with the authority and acts of the customs officials in the case of Commissioner of Customs vs. Sayed Ali in 2011¹⁵. The imposition of responsibilities by unauthorised authorities was declared unconstitutional by the Supreme Court. By enacting the Customs Bill in 2011, Parliament overturned the court's decision and changed the Act to allow certain officers to impose charges retroactively, even those that the Supreme Court had ruled were unconstitutional. The Essential Commodities (Amendment) Ordinance, 2009, which was added in the act, was another example of the legislature overturning a Supreme Court judgement. The Supreme Court had decided that the rate at which the Centre would purchase sugar from the mill should include the statutory minimum price (SMP) as well as a portion of the mills' earnings shared with farmers.¹⁸ These incidents demonstrate how the legislature has intervened to overturn court decisions.

In a number of cases, the judiciary has operated in the black zones that separate its duty from that of the government and legislative. The separation of powers theory is not enshrined in the Indian constitution explicitly. It may be difficult to draw a clear line between the two areas. However, each pillar of the State may need to develop a healthy convention that respects the jurisdiction of others.

7.Recent trends

The recent conclusion on the judicial intervention in policy matters was done in the central

¹⁴ The Customs Act of 1962, 52 Acts of Parliament (India).

¹⁵ Commissioner of Customs vs. Sayed Ali 3 SCC 537 (2011) ¹⁸Mahalakshmi Mills vs. Union of India 16 SCC 569 (2009).

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vista project.¹⁶ The case was filed to conduct a thorough and thorough judicial review of the Central Vista Project of the Government of India's legality. The developmental and infrastructure developments is sole policy matter of the legislature and does not come under judicial functions. The courts while entering in to this domain did come under the conditions for intervening with policy matters- i.e.; arbitrariness and violation of constitutional mandate and hence the question and speculations on when the judiciary can intervene with policy matters were questioned. This became a question when courts took *Suo motto* cases in covid protocols and guidelines.

The main contention for dealing with such intervention was *Sui generis*. *Sui generis* is a Latin phrase that refers to something that belongs to its own category or is unique. The judiciary held that dealing with matters of policy is *sui generis* and it tends to change with circumstances and the violation of legal rights of the citizens in terms of policies of the government.

8. Analysis and Conclusion

When freedom is not self-regulated, it becomes a form of abuse. Each State organ has its own mandate within which it exercises its authority. Subversion of other's fields leads in utter contempt for India's Constitution. As a result, the judiciary's ability to examine policy must be grounded on the superstructure upon which the Constitution's framework is built. The study agrees with the hypothesis. Judicial intervention is necessary in policy matters when the question is raised in the court and not *Suo motto* appearances.

The goal of the theory of separation of powers is to bring clarity to the three bodies' functioning. No organ should take on different roles that are the responsibility of another. Though the notion of separation of powers was good in theory, it was met with a barrage of criticism when it was attempted to be applied in reality. Certain activities are impossible if this philosophy is adopted in its totality. As a result, if the legislature can only legislate, it cannot punish anyone who violates its entitlement, nor can it designate any legislative function even if it does not understand the details of the particular subject of the legislation and the executive power has expert knowledge in it, nor can the courts set procedural rules to be followed by them in deciding cases. As a result, power separation can only be subjective, not complete.

¹⁶Rajeev Suriv. Delhi Development Authority and Ors. Manu 001 (SC.001)

Separation of powers is a doctrine that has received a lot of attention. This Doctrine's concept is quite admirable. Because concentrating authority in the hands of a single person can lead to corruption or arrogance. Thus implies a violation of public rights, and no choice will be in the public interest in such a situation. As a result, the government's powers are divided among the three different organs. Despite the fact that each organ is granted separation powers, these organs nevertheless exercise the powers of other organs. The exercise of one organ's functions by another organ does not constitute a breach of the separation of powers. Delegated legislation is the term for this type of procedure.

From the notion of separation of powers, this principle provides flexibility to the Constitution.

Delegated legislations play a significant part in the constitution since it is sometimes necessary to make decisions with the assistance of other organs or under special circumstances, such as when parliament is not in session and an emergency arises. As a result, delegated legislation is critical in these instances.

It might be claimed that government exists for the benefit of the people and for the welfare of the people. But, unlike welfare or justice, which can only be felt, it can also be seen. Not only must justice be carried out, but it must also appear to be carried out.

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