

**Inaugural Address by Justice M.M. Kumar on the occasion of
Seminar on the subject of Judicial Activism and Judicial Overreach,
held by ILA, Punjab, Haryana, Chandigarh Chapter on May 17, 2008**

Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India, Hon'ble Mr. Justice Vijender Jain, Chief Justice, Punjab and Haryana High Court, Hon'ble Mr. Justice Radha Krishanan, Chief Justice, J&K High Court, Brother Judges of the Punjab and Haryana High Court and other High Courts, learned Senior Advocates, member of the legal fraternity and friends. It is my proud privilege to be amongst this august and elite gathering. I feel extremely privileged to inaugurate today's Seminar on the subject of Judicial Activism and Judicial Overreach. Before I delve upon the subject, I may first briefly apprise you that International Law Association, Punjab, Haryana and Chandigarh Chapter, has been reactivated in September 2007 by Hon'ble the Chief Justice Mr. Justice Vijender Jain. It is under his able guidance that ILA has already held three seminars. The first seminar was held on 26.10.2007 at Confederation of Indian Industry, Chandigarh (CII), on the subject of International Law and Foreign Direct Investment. The second seminar was held on 27.2.2008 at PHD Chamber of Commerce, on the subject of Renewable Energy and Climate Change-CDM. The third seminar was held on 21.3.2008 at Rock Garden, which was presided over by Lord Chief Justice of England and Wales Rt. Hon'ble Lord Addison Philips. It was in collaboration with Asia Pacific Jurists Association on the subject of Role of Courts in Alternative Disputes Resolution. It is the fourth seminal the ILA holding.

The Judicial Activism and Judicial Over-reach has always been a live subject which brings out wealth of literature, add to our learning and provoke our thoughts to delve deep as to why judicial activism has to be availed as a tool for curing the sufferings of the masses at large. It is significant to notice that in every debate on the subject, the theory of 'Separation of Power' of three organs of the State is necessarily discussed. The theory was given by a great French philosopher Charles Montesquieu in his 11th book 'Spirit of Law' (1748). Basically the theory of Separation of Power propounded by Montesquieu was the result of his conclusion that the citizens of Britain were enjoying better personal liberty than in France because England had declared itself a constitutional monarchy in the wake of its [Glorious Revolution](#). The constitutional monarchy as adopted by Britain in the late 17th Century in its very nature was entirely different than the Constitution we the people have adopted. The theory of Separation of power as given by Montesquieu is qualitatively different. It was given in different times and different backgrounds. The role of Legislature as understood in the present era was also different. The magnitude of legislation and various complicated statutes, which have been brought about during these 250 years has completely changed in comparison to what it used to be 250 years ago. What is true about legislation is true about executive and judiciary.

The question then is, are we going to depend on the theory of Separation of Power, which has demarcated the area of respective organs in watertight compartment or we are going to accept a ground reality that three organs

cannot work in unison. However, one factor which is common even today is that the theory of Separation of Power is for the optimum welfare of the common man. It has been commented about the theory of Separation of Power that it is no way an absolute theory nor Montesquieu ever meant it to be. The real import of the theory given by Montesquieu has been commented upon by Sabine and Thorson in their work titled as 'A History of Political Theory' (4th Ed.). In Chapter 28 under the topic France: the decadence of natural law, the learned authors have pointed out the Montesquieu addressed himself to two main points which had no intrinsic relationship. In the first place he undertook to develop a sociological theory of Government and law by showing that these depends upon their structure and functioning upon the circumstances in which a race of people lives, which include physical conditions such as climate and soil which has direct influence on national mentality, the state of the art, trade and the modes of producing goods, mental and moral temperaments and dispositions. In the second place the Montesquieu was haunted by the fear that the absolute monarchy had so undermine the traditional constitution of France that liberty had become far ever impossible for France. By the theory of separation of power he made an attempt to introduce a system of legal checks and balances between the various organs of the State. However, still he himself agreed that there cannot be absolute separation between the three organs. The aforementioned position has been summed up by Sabine and Thorson (supra) at page 514 and the same reads thus:-

“ So far as Montesquieu modified the ancient doctrine it was by making the separation of powers into a system of legal checks and balances between the parts of a constitution. He was not in fact very precise. Much of what his eleventh book contained, such for example as the general advantages of representative institutions or the specific advantages of the jury-system or a hereditary nobility, had nothing to do with the separation of powers. The specific form of his theory depended upon the proposition that all political functions must of necessity be classifiable as legislative, executive, or judicial, yet to this crucial point he devoted no discussion whatever. The feasibility of making a radical separation between legislation and the judicial process, or between the making of a policy and control over its execution, would hardly have commended itself in any age to a political realist. Montesquieu, like everyone who used his theory, did not really contemplate an absolute separation of the three powers: the legislative ought to meet at the call of the executive; the executive retains a veto on legislation; and the legislature ought to exercise extraordinary judicial powers. The separation of powers, as Montesquieu described it and as it always remained, was crossed by a contradictory principle-the greater power of the legislature-which in effect made it a dogma supplemented by an undefined privilege of making exceptions.” (emphasis added)

It is in this context that the Supreme Court as early as in 1955 in Ram Jawayas Kapoor's case had observed that strict doctrine of separation of powers does not apply to our written constitution.

Once every organ of the State legislature, executive and judiciary have been allocated their respective functions then Montesquieu proceeds on the assumption that everybody would perform its duties to achieve optimum welfare of the masses and granting them maximum personal liberty. If anyone of the organ is to exceed its power then checks and balances have been created from within. However, those who advocates complete adherence to the separation of power theory end up exhorting the judiciary that it should not exceed its power. In other words, if the industry is polluting a river by discharging its effluent in the river and the executive is not implementing various legislations or the legislature is not passing any adequate law then the judiciary should remain a meek spectator and allow the people to suffer. Montesquieu never contemplated such a situation and nor he could have answered the same. The delicate constitutional balance which needs to be maintained by keeping everyone in their respective sphere would not necessarily be a remedy in a situation like the one prevalent in our country. Therefore, either at the instance of a public spirited NGO or Court on its own motion start protecting the fundamental rights of the citizens of this Country. In a illuminating article (The Tribune, Chandigarh, December 17, 2007) by an eminent jurist F.S. Nariman this area of inference by the court has been accepted, which reads, thus:-

“ When elected bodies and governments perform these strictly governmental functions there can be no reason and no occasion for

interference by the courts. But it is when they don't so perform, or perform badly, that an occasion arises for invocation of Article 14 (the Equality Clause) and Article 21 (the Life and Liberty Clause)- contained in Part-III of the Fundamental Rights Chapter of our constitution. When these Articles are invoked by individuals or groups, the Judges who grant relief are not "running the government"; they are remedying acts of non-governance or misgovernance. Article 21 says that "no person shall be deprived of his life or personal liberty except according to procedure established by law"; literally this only means that no one can be put to death without a proper trial according to law, and that no one can be deprived of his freedom except in accordance with the law. But this is only a narrow textual interpretation of Article 21.

Over the years, the Judges have read far more into the Article – and after they did so, Members of Parliament in their constituent capacity have accepted the court's generous interpretation of Article 21, and have declared that this Article, above all other Articles in the Constitution, can never be suspended, even during an emergency! The wide and liberal interpretation of Article 21 has thus received legislative approval."

Similar views were also expressed by Shri P.P. Rao by observing that separation of power cannot be kept in a straight jacket recognizing the power of the higher judiciary, Mr. P.P. Rao in his erudite article (The Tribune, December 19, 2007) has stated as follows:-

“ Traditionally, Judges declare the law, but do not make it. However, the constitutional mandate of Articles 32 and 226 to enforce the Fundamental Rights constrains the judiciary, at times, to formulate and issue binding directions which will operate till the legislature enacts a law. The Supreme Court has resorted to interim legislation in a few cases in areas not covered by any Act or executive instructions, e.g. sexual harassment of women at work places, adoption of abandoned children by foreign or Indian parents, arrest and detention of persons, etc.

In Vineet Narain’s case, the court observed, “it is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field.” The court added: “It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions (Article 32 read with Article 142) to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.”

The legislature and the executive have accepted such interim legislation made by the judiciary by not enacting laws till now to replace judicial legislation. The doctrine of implied powers is well recognized.

The power to enforce the Fundamental Rights includes the power to employ all the means that are necessary to the exercise of the power.

Moreover, Article 142 of the Constitution empowers the Supreme Court in the exercise of its jurisdiction to pass any order for doing complete justice in a case. Over the years, the Supreme Court has expanded the scope of the Fundamental Rights liberally.”

Therefore, I would like to conclude that the theory of separation of power cannot be invoked to curtail the judicial activism by painting it with the brush of judicial over reach. Judicial activism is well entrenched in the Indian jurisprudence and is a living reality. It is because of judicial activism that the river Sutluj in Ludhiana and river Yamuna in Delhi have been cleaned up. The pollution free automobiles have been introduced on the roads of Delhi, which use CNG fuel.

A cognate issue, which arises for consideration, is as to how the laws are framed by the legislatures. According to the Constitution, framing of law is necessarily to have the voice of the people. It is achieved by ensuring that the people elect their own representatives to the legislature who carry with them the aspirations of the people. It is truly said that the pulse of the people beat in the Parliament. However, if the laws are not framed by active participation of the representatives of the people then could it be said that laws are in accordance with the pulse of the people. Once the laws are not in accordance with the pulse of the people then such laws will not seek its justification by their natural obedience by the masses. The tension in the society would be on the increase because such laws

would be disobeyed which may result into tension between the establishment and the people leading to violent and undesirable results. Mr. F.S. Nariman in another article published on April 10, 2007 (The Tribune) has spoken of such situations in his illuminating thoughts. The question which I pose to myself is whether the judiciary should maintain silence when people are suffering or it should fulfill the expectations of citizens as per the norms laid down in the Constitution. I wish and pray that all organs of the State should perform their duties to the satisfaction of the people of this great country.

I am grateful to the organizers, especially Senior Advocates Mr. S.D. Sharma, Arun Palli and R.L. Batta, who have made tireless efforts for organizing this seminar. Mr. Akshay Bhan and Mr. Sanjeev Sharma also deserve special thanks. I also express my gratitude to the organizers for providing me this opportunity to share my few thoughts with this august gathering. In the end, I am grateful to Mr. Carver and the management of St. Stephen School for extending excellent facilities of their school.

(Justice M.M. Kumar)