LAW AND SOCIAL DYNAMICS*

INTRODUCTORY

A Foundation Day is a day of celebration. On the birthday of an institution, the best way to celebrate is to remember and remind ourselves of the cause for which it has been born – it has been founded. The Employees Welfare Association deserves greetings for arranging to talk about Law and Social Dynamics as a tribute to the performance of this premier law institution of the country.

At times we have unique co-incidence of events – not without significance. Yesterday, we have celebrated *Ram Navami*, the birthday of Lord Rama. Rama is a symbol of sacrifice, a model of brotherhood, an ideal administrator, a warrior unparalleled. The term "Rama Rajya" stands for the most exalted concept of a Welfare State. Rama was not only divine; he was invested with the highest values of an enriched tradition started by Raghu. The essence of Rama is, therefore, the essence of excellence in every pursuit[1]. Lord Ram was an ideal ruler and ideal judge. His reign in Ayodhya, his philosophy and his principles of dispensation of justice, all taken together are called "Rama Rajya". Today is the most appropriate day to discuss law and social dynamics.

While embarking upon any discussion on inter-relationship of law and social dynamics, it would be useful to conceptualise the law and the social dynamics.

Law

The most commonly accepted definition of law is given by Blackstone. According to him, a rule of civil conduct, prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong, is law. Jurisprudentially, law consists of rules prescribed by society for the governance of human action or conduct.

Social Dynamics

Social dynamics is matter, motion and mechanics of society and societal behaviour. A study of social dynamics consists of studying the prevailing state of culture and social behaviour in the society as also the extent and rate of change – prevailing and desirable. The society, collectively, believes in orderly persistence while the individual is prone to changes. Such changing patterns have multifarious bases. Dealing with social dynamics involves a study into small-scale and large-scale changes in the society and their inter-relationship with influences.

Social dynamics is also alteration of social structures, *i.e.*, of patterns of social action and inter-action, including consequences and manifestation of such structures embodied in norms (rules of conduct), values and cultural practice and symbols. Social dynamics would encompass within its meaning social changes, referable to actual human behaviour as also to cultural changes.

The most striking common characteristic of law and social dynamics is their dynamism. They are ever-changing. Both have material impact on each other; while social changes invite changes in law, law too dictates changes in society.

Law has many sources, such as custom, legislation and precedents. In the wider sense of legislation, Constitution – though fundamental law of land, may be included in legislation.

Customs are a source of law and Section 13 of the Evidence Act gives statutory recognition to customs. However, certain tests have been devised by judiciary in the interest of the welfare of the society. A custom to be recognized as law must have been in observance for a sufficient length of time. Yet, the courts will not recognize any custom which is unreasonable or immoral.

Constitution is the fundamental law of the land. Its binding provisions are the fountain source of law and remedies for its infraction. In any civilized society, based on constitutional democracy, the supreme authority vests in Constitution. The Parliament and the Legislatures, consisting of elected representatives gives expression to people's voice by enacting laws under the Constitution. One can begin with an assumption that the enacted law voices the popular will of the people.

The judiciary contributes to development of law by methodology which is four-fold. First, the judiciary interprets the laws in a manner to best serve the interest of the society; secondly, it identifies the areas where there is need for enacting laws and their proper implementation; thirdly, the judiciary provides valuable inputs to the other wings of governance so as to secure an ideal enactment and implementation of laws; and, fourthly, the judiciary not only irons out the creases left out by the Legislature in the texture woven by it, it also tries to fill in the gaps, if any, left by the Legislature and when detected.

Global Context

Article 51 of the Constitution obliges the State to endeavour to promote international peace and security and maintain just and honourable relations between nations. State shall foster respect for international law and treaty obligations. Even in the absence of legislation, while indulging into task of interpreting legislation, it is recognized that the international treaties and covenants have relevance. The courts will presume that Parliament does not intend to act in breach of international law. The Constitutional Courts have delivered landmark decisions in the interest of children, women, destitute and human rights, generally, by making extensive reference to international treaties, covenants and conventions so as to create a social order in conformity with the international dynamics. The guidelines laid down by the Supreme Court on adoption, beyond the borders of India, of orphans in India, is a classical example of social dynamics in global context.

Inter-relationship between law and society

Law not only lays down the norms which are acceptable to a given society; it also lays down the norms which the society ought to adopt in the interest of its own welfare. In the former sense, law is dictated by the society and in the latter sense the society is dictated by the law. The rules or code of conduct which a society develops by experience, shapes into law for the sake of uniformity, consistency, permanency and sanction. Acceptable norms, once they become the law, departure therefrom is considered to be a crime and hence condemnable – in the field of criminal law. In the field of civil law such as torts, contract, property and personal relationships, law becomes the code of conduct, regulating the society.

So long as the law follows the society and societal changes, its role is dormant and easily acceptable. However, when the law proposes to lead the society it often meets with resistance, criticism and, at times, revolt. Social ethos and moorings differ from place to place and region to region. These characteristics of law and society assume significance in the

context of globalisation. Universal brotherhood and free exchange of trade, commerce and relationship, beyond the natural and man-made borders, pose the most intricate questions as to inter-relationship of law and social dynamics. International treaties and conventions lay down new values and aspirations with the avowed object of creating a world order. Social and legal relationships are expected to undergo drastic changes, creating new norms. Such reforms benefit every society and the individuals but indirectly and in a longer run. Such international developments when sought to be given recognition and implementation through local laws, very often meet with strong resistance. It is only the mild legal action, accompanied by mobilization through education and awareness, which enables availing of a healthy relationship between law and society.

Within the scope of the topic for the day it is proposed – and considered advisable too – to deal more with social dynamics in its inter-relationship with the law as made by precedents, that is, the judge-made law.

Judge-made law

The common belief is – it is for the Legislature to frame the law and it is for the Judges to interpret the law. Theoretically, it is correct. However, the legal history bears testimony to the fact that tradition, dictated by necessity, has assigned the judiciary a role much beyond that of an interpreter merely. According to Patrick Devlin, the Judges are also lawmakers, law reformers, and even social reformers. But he warns the judges that, in exercise of their craft, they must be handymen, but they should not aim higher. It is their job to apply the law and they must try to make it fit; but new suits and new fashions should be designed by legislators.[2]

The Judges cannot afford to be those who preserve the status quo; else they will soon be discarded by the society as a limb of not much utility. There is always a host of new ideas, galloping around the outskirts of a society's thought. In a changing society, the law acts as a valve. New policies must gather strength before they can force an entry; when they are admitted and absorbed into the consensus, the legal system should expand to hold them, as also it should contract to squeeze out old policies which have lost the consensus they once obtained.[3] There are demands for a creative judiciary to operate upon subjects which governments shirk. The judicial wisdom founded on learning, enriched by training of the mind and experience gathered by deciding a variety of complex cases, guided by the impulsive desire to do justice, enables, and at times dictates, the judges to take decisions based on considerations of ethics, morality and societal relevance - Summed up into one word - being just. When the law fails to provide an answer the judge cannot afford to sit back and swing in an arm chair. His conscience calls upon him to get rid of the tight jacket of being a mere interpreter of law and be a discoverer of law, not only of law as it is but also of the law as it ought to be. He may assume the role of being an explorer breaking new grounds of innovation. In this process new rules of law come into being, which, with the lapse of time, get firmly rooted in social moorings. To quot N.C. Simonds:

> "The judges, sometimes, decide cases by reference to moral values or social policy considerations. It will be necessary for the judges to do this, according to the positivists, whenever the existing rules of law fail to give a determinate answer in the specific case. In claiming that law is separate from morality, the positivists are denying that moral judgments are necessary to discover what the existing law is: but discovering the

existing law is not always enough in itself to decide a case. Where the law does not give an answer, the judge must establish, by his decision, a *new* legal rule, and this he will do on the basis of extra-legal considerations of morality and social policy."[4]

The makers of the Constitution created two institutions to reflect the will of the people and the role of law separately. The legislature embodies the doctrine of popular sovereignty as it consists of elected people, answerable to popular opinion which may not necessarily coincide with the fundamental laws. Therefore, the Founding Fathers of the Constitution entrusted the task of being guardians of fundamental law and upholders of the rule of law to the judiciary. The two values could not have been entrusted to one. The consequence is: while the legislators derive their strength from their popularity amongst their electors, the judiciary derives its strength from the faith of the people. The return of the society to the two institutions is clear and is often perceptible. The legislators may not have the faith of the people and the judiciary may not enjoy the popularity.

In the words of Justice Krishna Iyer, the long haul from British Indian legal justice to Indian social justice makes the job of judiciary, at once, onerous and nationalist, creative and crusading. After all, to be the pall-bearers of the old order and the torch-bearers of the new order is the functional challenge to the lawyer and judge in the contemporary context of poignant change.[5]

Lord Denning stated in Foreword to 'The Supreme Court of India' – "Many of the Judges of England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is now being discarded everywhere. Every new decision – on every new situation – is a development of the law. Law does not stand still. It moves continually. Once this is recognized, then the task of the Judge is put on a higher plane. He must, consciously, seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect – thinking of the structure as a whole – building for society, a system of law which is strong, durable and just. It is on his work that civilised society itself depends." According to Justice Frankfurther –"the judges' *unconscious* plays an enormous role in the exercise of the judicial process, particularly where it closely touches contemporary economic and social problems."[6]

Benjamin N. Cardozo has acknowledged – "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.

…… for the peaceful progress of our people during the twentieth century* we shall owe most to those judges who hold to a twentieth century* economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions."[7]

[N.B. - *now, read twenty first century]

Tools of Social Engineering

A bad workman quarrels with his tools; an efficient, imaginative and pro-active workman makes the best use of his tools, and nay, he devises the tools to meet the challenge of the task before him. History is replete with record of events, showing the judicial ingenuity where it has devised tools and made use of them for ameliorating social and economic conditions of the society. To mention a few, with which the Indian society is well conversant, they are – the technique of public interest litigations, entertaining letter petitions

and administering the law with pro-activity called judicial activism. All these concepts are so well known to those who are conversant with Indian judicial system that they hardly need to be explained.

Law and Social Dynamics – a few illustrations

I would prefer to give a few instances to show how the judicial ingenuity has maneuvered changes also changed the flow of reforms and for better, in the society. These are the instances which have had far reaching implications in the field of political and social reforms.

The Constitution is the supreme law of the land and if there is anyone who can apparently claim to be more powerful than the Constitution it is the Parliament, for it has power to amend the Constitution itself. The Constitution, fallen into the hands of unscrupulous administrators, is capable of being so used as to give rise to dictatorial governance. The basic structure theory, propounded by the Supreme Court of India in *Kesavananda Bharati's case,* gave life to liberty and reinforced firm foundation to democracy in India. It is now well settled that even the Parliament shall not have power to amend the Constitution so as to deprive it of federalism, secularism, the power of judicial review, the principle of separation of powers, supremacy of the Constitution and the Rule of Law, and unity and integrity of the Nation. But for the doctrine propounded and pronounced in *Kesavananda Bharati's case*, it would not have been difficult to shake the foundation of the Constitution itself.

Quickly moving from *Kesavananda Bharti* to very recent times, I may just refer to some long leaps in the field of social dynamics which the judiciary has taken. To mention only a few out of many[8]:

(i) despite the most categorical bar to the jurisdiction of any court, imposed by the Constitution (para 6 of the Tenth Schedule) in respect of any matter, connected with the disqualification of a member of the legislature by the speaker, the Court held it can stay the disqualification ordered by the speaker;

(ii) municipality was ordered to provide drainage system, irrespective of its budgetary limitations and the subordinate court ordered to oversee the implementation of the scheme;

(iii) Central Government was ordered to reframe its scheme of increase of pensions to its retired employees, costing the Government at least Rs.51 crores per year;

(iv) a closed down industrial undertaking and its company in liquidation was transferred to be vested in a court-appointed administrator to revive it along with moratorium which contained directions akin to suspending the law of limitation, by judicial mandate;

(v) the President's prerogative of pardon was corrected by the Court on the ground that it was "vitiated by self-denial on an erroneous appreciation of the full amplitude of his power";

(vi) to save the Administrative Tribunals Act, 1985 from unconstitutionality, the Parliament was advised by the Court to make amendments in the statute;

(vii) directions issued from time to time, regulating admissions in educational institutions, allotment of seats, regulating the fees and chalking out the programmes in educational institutions; and

(viii) enlargement of the definitions of "State" and "authorities" so as to bring more and more institutions within arena of judicial review of the courts.

Now, have a look at the far-reaching implications and contributions to social dynamics made by judge-made law of very recent times.

In the case of Association for Democratic Reforms, (2002) 5 SCC 294, the Supreme Court made it obligatory for the Election Commission to secure, and for the candidates to make, disclosure of candidates' antecedents, the assets and liabilities and the educational qualifications. The consequences of the judgment were not palatable to the aspiring legislators. The effect of the judgment was sought to be undone, partially, by amending the Representation of the People Act. The Supreme Court in a later decision in *People's Union for Civil Liberties* v. *Union of India*, (2003) 4 SCC 399, struck down the amendment as unconstitutional and saw to it that in the interest of 'We, the People of India', still suffering from ignorance and poverty in majority, shall not be denied the benefit of earlier judgment of the Supreme Court which goes a long way in preventing criminalisation and degeneration of politics.

In *T.K. Rangarajan* v. *Government of T.N.*, (2003) 6 SCC 581, the Supreme Court has noticed the upsurge of irresponsibility and indiscipline amongst government employees, touching the height of misconduct and holding the society to ransom and paralyzing the administration by going on strikes. The Court noted that strikes affect the society as a whole and the entire administration comes to a grinding halt. Strike by teachers makes the entire education system suffer, preventing students from taking examinations, resulting in loss of valuable career years, which would never be compensated. Strike by doctors makes innocent patients suffer, resulting into the loss of life for some, which can never be given back. The Supreme Court declared, in no uncertain terms, that right to strike was not a fundamental right and a time had come to realize that the weapon of strike does more harm than justice even to those who go on strike. The Kerala High Court spoke of uncalled for *bandh* in a similar tone as has been spoken of by the Supreme Court in the case of strikes.

In *Javed* v. *State of Haryana,* (2003) 8 SCC 369, the Supreme Court upheld the two-child norm, which is consistent with the National Population Policy, to be in public interest. The arguments that the law was discriminatory or interfered with the personal liberty of citizens or encroached upon the freedom of religion were all turned down. 'Two-child norm' is a legislation in the interest of social welfare and reforms and, therefore, part and parcel of public order, national morality and the collective health of the nation. Bearing of more than two children may be permitted by any religion but is not a compulsory ritual to be performed nor an essential and integral part of any religion, and therefore, any argument based on religion has to be repelled.

In *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611, the Supreme Court highlighted the need for a Uniform Civil Code throughout the territory of India for its citizens as enshrined in Article 44 of the Constitution of India. This judgment has generated a debate bringing to the fore the failure of Parliament to fulfill the dream of the framers of the Constitution which they expressed in Article 44 of the Constitution.

In *Satya Ranjan Majhi* v. *State of Orissa*, (2003) 7 SCC 439, the Supreme Court clarified that right to propagate one's religion, the freedom guaranteed by the Constitution, does not include the right to convert a person belonging to one religion into another religion.

There are two typical cases in the field of family law, the law declared wherein, has not invited any resistance, much less any retaliation, and are illustrative of silent evolution achieved by the Supreme Court. One is *Daniel Latifi's case*, (2001) 7 SCC 740 and the other is *Shamim Ara* v. *State of U.P.*, (2002) 7 SCC 518. "The well known case of *Shah Bano* decided by a Constitution Bench led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In the words of a two judge bench of the Supreme Court "the Parliament enacted the Act to undo the effect of *Shah Bano*. But (surprisingly) later another Constitution Bench in *Daniel Latifi* came to the conclusion that Parliament has done nothing of that kind and the Act "actually and in reality codifies what was stated in *Shah Bano's case*". Both these decisions reflect the Court's desire to ameliorate the plight of Muslim women. As was stated in *Shah Bano* "the role of reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable." The same point of view was extra judicially expressed by Justice Young of Australia: "Our society is so structured that if judges do not on appropriate occasions grasp the mettle, no one will".[9]

In *Shamim Ara* in response to a Muslim wife's claim for maintenance under Section 125 Cr.P.C. complaining of desertion and cruelty on the part of the husband, the husband pleaded that he had already divorced his wife about two years prior to the initiation of the proceedings. No particulars of *talaq* were pleaded and the evidence fell short of proving the said *talaq*. The High Court held that although the alleged divorce was not proved to have been communicated to the wife, the communication stood completed when the copy of the written statement containing the plea of *talaq* was delivered to the wife and talaq was effectuated. Several authorities dealing with Personal Law were relied on by the High Court in support of the view taken by it. The Supreme Court upturned the finding of the High Court and held that in the absence of the *talaq* as pleaded having been proved, a mere delivery of the copy of the written statement, containing the plea of *talaq* on the wife would not be a communication of *talaq* and would not effectuate *talaq*. The Supreme Court agreed with the view that whimsical and capricious divorce by the Muslim husbands to wives are to be disapproved as bad in theology. Women cannot be treated as chattel. *Talaq*, even under Shariat, must be for a reasonable cause, preceded by an attempt at reconciliation and may be effected when such attempts fail.

In a landmark decision, the Supreme Court struck down the executive decision of the State of Karnataka to withdraw TADA charges and release certain associates of sandal-brigand, Veerappan. During the course of its judgment, the Supreme Court observed that the decision to withdraw from prosecution was a result of panic reaction by over-zealous persons without proper understanding of the problem and consideration of the relevant material. Nobody considered that if democratically elected governments give an impression to the citizens of this country of being law-breakers, would it not bring contempt for law? Would it not invite citizens to become a law into themselves? It may lead to anarchy.[*Abdul Karim* v. *State of Karnataka,*(2000) 8 SCC 710]

In *Vishakha* v. *State of Rajasthan,* (1997) 6 SCC 241 the guidelines laid down by Supreme Court have changed the work ethos, and to some extent employment pattern in offices. Women are now, increasingly, taking up employment and work with confidence. The judgment is almost a piece of legislation in disguise, enacting a Code by defining the offence, providing for punishment and laying down procedure. It has been widely hailed with encomiums showered on Supreme Court. But alas, though the Supreme Court had qualified its declaration of law by saying – "these directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field", and a period of more than six years has elapsed, the Parliament and State Legislatures are yet to act.

The question as to how far new technological advances can be accommodated within the existing laws and assimilated with the procedural laws, by the process of dynamic interpretation and judicial innovation by their interpretation has been considered in many cases. A recent, important, Indian case in this context is one which holds that evidence recorded in India with the help of video conferencing of a witness in America is evidence taken in presence of the accused, under section 273 of the Criminal Procedure Code, 1973. A seven judge bench of the Supreme Court decided that the Court cannot prescribe periods of limitation for termination of criminal cases and overruled a number of earlier cases.

I would close my citing of instances by referring to the case of *Rupa Ashok Hurra* v. *Ashok Hurra,* (2002) 4 SCC 388. The question arose – what happens if anyone feels aggrieved by a judgment of the Supreme Court itself and alleges that a judgment of Supreme Court violates the fundamental right of a citizen. Is there and remedy availabel or none? The Constitution Bench of the Supreme Court has ruled that a petition under Article 32 of Constitution does not lie against the decision by a Constitutional Court but at the same time devised a unique procedure of filing curative petitions before the Supreme Court itself, to take care of such rare situations where one can make out a case – within the parameters laid down by the Supreme Court – of injustice having been done or cause of justice having not been vindicated at the hands of Supreme Court itself, which is the apex guardian of the fundamental rights and justice.

Defective drafting and legislative obstinacy in continuing therewith in spite of the defects and need for correction having been pointed out is to be found in the facts of *Arnit Das* v. *State of Bihar,* (2000) 5 SCC 488. The Supreme Court pointed out a lacuna in the definition of 'juvenile' as contained in the Juvenile Justice Act, 1986 which defines 'juvenile' to mean a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years, without making provision for or giving any indication of the date, by reference to which the age is to be calculated. The vagueness in definition has given rise to several cases before the Supreme Court and High Courts, needlessly consuming judicial time and energy. The Supreme Court observed – "All these exercises would have been avoided if only the Legislature would have taken care not to leave an ambiguity in the definition of juvenile." During the pendency of the case, new Juvenile Justice Act came to be enacted by Parliament, replacing the old one but the deficiency in definition persists.

Compare this with an English instance. Lord Denning often chose to hear such cases, the law laid down wherein would be setting the future course. He was often at war with the House of Lords and sometimes with Parliament. In a series of cases, he said that a husband who deserted his wife could not turn her out of the house just because it was in his name.

This was called 'a deserted wife's equity'. The House of Lords repudiated that and said it was all nonsense, that there was no such equity in a deserted wife. The Legislature within a year put it into a statute book.[10]

Why people go to Court? Answering the question, the eminent jurist Prof. S.P. Sathe assigns many reasons: (i) they have access to no other grievance redressal system, (ii) the powerless minority prefers the judicial process as a catalyst or a complimentary aid as it cannot have its grievances redressed by political process alone, (iii) against violations of fundamental rights, the Courts are the best bet, (iv) against State lawlessness, the Courts are more willing to respond, (v) people believe that the Courts are fair and do justice. These expectations of people impel the Courts to strive continuously to sustain and maintain such legitimacy. This effort can also be described as being accountable to the people or the judicial accountability. Accountability is not subversive of the independence of the judiciary. Since the power of the Court is derived from its social legitimacy, a Court sustaining its legitimacy amounts to being accountable to the people.[11]

A Critical Evaluation of Judicial-Social-dynamics

The judicial creativity in the field of social dynamics is not free from criticism by some jurists.

Eminent jurist Justice G.P. Singh's appreciation of judicial creativity is accompanied by a note of caution. In his inimitative style, he juxtaposes 'creation' and 'usurpation' and draws a dividing line between the two by suggesting that the former is the privilege of the judges and the later is in the domain of people's representatives sitting in legislature. He says—

> "There can be no doubt that the interpretative function of judges is imbued with creativity but only in the sense that whenever the court decides a real question of interpretation, the decision adds to the law, especially, in cases where application of the statue could not have been comprehended by the legislature or where the statute refers to broad concepts as in a constitution. But there is a limit to creativity, known in the current fashion as judicial activism, for there exists a dividing line between legitimate interpretation and usurpation of legislative function. The line is crossed when judges, who assume office to 'uphold the constitution and the laws', "in the guise of interpretation provide their own preferred amendments to statutes". The same point was recently stressed by the Chief Justice of Australia, Hon. Murrary Gleeson. Speaking in the context of 'creativity' the Chief Justice said : "Judges whose authority comes from will of the people and who exercise authority upon trust that they will administer justice according to law, have no right to subvert the law because they disagree with a particular rule. No judge has a choice between implementing the law and disobeying it."[12]

Prof. S.P. Sathe employs the expression "Judicial Excessivism" while speaking of certain landmark instances of judge-made law leading to social dynamics. In his opinion, laying down of guidelines in lieu of legislation by State, flies in the face of the doctrine of separation of powers. The Court has neither filled in the gaps, nor supplanted but has supplemented the legislature. He says—

> "The Court has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Its decisions clearly violated the limits that the doctrine of separation of powers had

imposed on it. A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of government. Its institutional equipment is not adequate for undertaking legislation or administrative functions. It cannot create positive rights such as the right to work, the right to education, or the right to shelter. It does not have the equipment for monitoring various steps that are required for the abolition of child labour. It cannot entirely stop environmental degradation or government lawlessness. Its actions in these areas are bound to be symbolic."[13]

The creativity on the part of the Supreme Court of India has invited a pungent observation by T.R. Andhyarujina, former Advocate General of State of Maharashtra. He quotes Chief Justice Pathak who had said, "the range of judicial review recognized in the superior judiciary of India is perhaps the widest and most extensive known in the world of law", Andhyarujina then goes on to say – "The Indian Supreme Court is today the most powerful of all apex courts in the world. It has surpassed in its power even the United States Supreme Court which Lord Bryce and Tocqueville thought in their times was the most powerful of all courts in the world."[14]

The great visionary Pandit Jawaharlal Nehru in his memorable speech in the Constituent Assembly, stressing the need for independent judiciary to correct government and at the same time stressing the limits of judicial power said:—

> "Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and judiciary can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. If we go wrong here or there it can point it out but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way ultimately the whole Constitution is a creature of Parliament."[15]

Jurists and thinkers are clearly not in favour of judiciary appropriating to itself the function which essential belongs to legislature howsoever it may justify itself in doing so. For a successful functioning of the Constitution, each of the organs created by it must confine its functioning within the limits laid down in the Constitution and in case overstep the dividing lines and usurp the territory meant for others. And, if this done the dangers are writ large. The Constitution will refuse to protect the one who does not protect and uphold the constitution.

Conclusion

All said and done, it cannot be denied that social dynamics, influenced by judicial creativity has come to stay. People have extended their implicit recognition to judicial activity as a source of social dynamics as they feel that the legislature takes too long to act and even if it acts, how it acts may not necessarily be in conformity with the fundamentals of law and aspirations of that section of the society which is interested in welfare, though it may not necessarily be in majority. In democracy, often the section of the society which genuinely feels concerned about the welfare and future of the society is found in minority. The Indian experience shows that in matters involving conflict between the institutions of democracy, the courts are better arbiters than the legislature which is ruled by political players. Soli Sorabjee, the Attorney General for India, has recently said – "Constitutional decisions of the apex court can have an impact on a nation's development. Reasons for the

decision reveal the thinking and approach of the judges, and in case of dissenting judgments, the areas of difference."[16] That is the transparency and openness.

The beauty of social dynamics, through judge-made law, is that it aims at evolution and not revolution and so long as it is evolving it is generally accepted. John F. Kennedy once said that if you do not permit the process of evolution, you are making a violent revolution inevitable. The great social service done to the society by the judiciary is that the people of India would not think of violent or bloody revolution so long as the judiciary continues to be independent, vibrant, active and responsive.

I have, by reference to the authorities, made an humble attempt at demonstrating and illustrating the interplay between social dynamics and law, concentrating more on the judge-made law as an oral birthday gift by way of tribute to this august institution for which I wish a long life – full of health and prosperity. The contribution made by the research scholars and employees of this institution deserves to be gratefully acknowledged today. However, all that I have said is nothing but a truism sought to be proved by evidence. I am reminded of an anecdote recorded by Peter Murphy. The anecdote is an exchange between Bench and Bar, witnessed by him. Counsel having objected to the tendering by his opponent of a piece of documentary evidence, which appeared to be relevant to the case but inadmissible in law, the judge asked : 'Am I not to hear the truth?, an enquiry which sounds reasonable enough, but which attracted the somewhat startling answer: 'No, Your Lordship is to hear the evidence.'[17]

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1. Speaking Tree, T.O.I., 30.03.2004.
2. The Judge, Preface at p. vii.
3. The Judge, p. 1.
4. *Central Issues in Jurisprudence (Justice, Law and Rights)*, N.E. Simmonds, pp. 86-87.
5. *Human Rights and the Law*, Justice V.R. Krishna Iyer, p. 205.
6. *Human Rights and the Law*, Justice V.R. Krishna Iyer, p. 213.
7. 'The Nature of the Judicial Process', pp. 163 and 171.
8. *See* T.R. Andhyarajina, *Judicial Activism and Constitutional Democracy in India*, Chapter I.
9. *Principles of Statutory Interpretation* by G.P. Singh, Preface to the Ninth Edition.
10. *Judging the World*, Garry Sturgess & Philip Chubb, pp. 175-176.
11. Judicial Activism in India, 2002, at p. 307.
12. *Principles of Statutory Interpretation* by G.P. Singh, Preface to the Eighth Edition.
13. Judicial Activism in India, p. 251.
14. *Judicial Activism and Constitutional Democracy in India*, T.R. Andhyarujina, p.1
15. *Constituent Assembly Debates*, Vol. 7, pp. 1195-96, quoted in Judicial Activism and Constitutional Democracy in India, T.R. Andhyarujina, p. 5.
16. Soli Loquies *The Sunday Express*, March 28, 2004, at p. 7.
17. *A Practical Approach to Evidence*, Peter Murphy, 2nd Edn. 1985, p. 1.