Chapter 9

LORD DENNING’S PHILOSOPHY AND INDIAN SOCIO-LEGAL PROBLEMS: A PRAGMATIC APPROACH

‘( The Indian Soil ) has brought forth a System of Law, which after having spread over the whole subcontinent of India, has penetrated at an early period into Burma and Siam, and has become the foundation of the written law in those countries’.

Dr. Julius Jolly (1849-1932)

Principles of Hindu Law By N. H. Jhabwala. P-1

Illustration – 28
Lord Denning Addressing at Chitale Memorial Lectures (India)

Lord Denning had great respect for ancient civilizations and he always linked the modern laws with ancient customs. He had openly admitted the importance of historical jurisprudence as expounded by Dr. C. K. Allen from his landmark treatise ‘Law in the Making’. India is a miraculous ancient land having the heritage of ancient Sanskrit language and an antique religious culture based on the *Shrutis* (That which was heard) and the *Smritis* (That which was remembered). Dr. Julius Jolly always admitted the ancient legal spirit of the Indian people which was the base of South-East Asian culture. Lord Denning quoted Dr. Jolly in the very beginning of his lecture. In the 20th century, when the whole Indian peninsula was under the British Crown
many Indians went to the United Kingdom for education, jobs and even for mercantile activities. Indians are peace-loving people and they respectfully follow the laws of nation where they reside. When the Crown promulgated, the Indian Independence Act, 1947, the Indians automatically lost their right to enter in the United Kingdom without following a due procedure of law which is applicable to the foreigner. Fortunately we are the associated member of the Commonwealth and are not treated so aliens but are treated as the fellow Commonwealth citizens and are quite preferable to the rest of the citizens of the world. Most of the Indian people who went to the United Kingdom after 1947 exactly followed the rules and regulations of the British Immigration Policy. Lord Denning entered the judiciary in 1944 when India was a part and parcel of the vast British Empire. The immigration from India continued even after independence.

Lord Denning must be treated as one of the great judges, intellectuals and the writers of all times and above all, he was a great human being. In the preface of the discipline of Law, he has frankly admitted the maxim JUS NON DARE which compels the judges sometimes and injustice occurs. At such a crucial time the equity helps the parties to seek justice from the higher courts because the modern judges are only ‘the judicial officers’ and not ‘judges’ in the real sense of the term. The enacted legislation from the parliament is just to be executed and sometimes there is little scope for appropriate interpretation. Sikh Boy’s Turban Case (Mandla v Dowell Lee 1983 QB 1) is a landmark case which stresses the freedom of religion. It is capable enough to guide the complex religious problems which India is facing today. Living in relationship, immensely increasing cyber crimes, inter-state disputes, enforcement of the equality status, religious disputes, caste and racial problems, service jurisprudence, ministerial discretions etc. are the spheres in which the judgments delivered by Lord Denning are available. There are more than 2000 judgments and a number of investigation reports. They can guide the Indian judiciary and the legal fraternity of this country.

The Republic of India has admitted the people from all over the world. People come from various cultures and settle in India. Even in ancient times, the Greeks, the Romans, the Kushans, the Persians, the Turkish and even the Arabians made India their permanent home and many of them assimilated into Indian Culture. India faced innumerable invasions in the medieval period. The long history of the nation is full of religious controversies. Shaivism and Vaishnavism are
both parts and parcels of ancient Hinduism. The Lingayats, the Sikhs, the Arya Samajists are also evolved from the ancient Hindu Religion. Certain differences of traditions are found in the ancient religion and the various reformed forms. However, the Indians always regard the fellow citizens with sympathy irrespective of his faith. This very attitude is the base of Indian secularism now guaranteed under the Preamble of the Indian Constitution where the words SECULAR and SOCIALIST are added in 1976. Now the Preamble reads as follows- [25]

**9.1 PREAMBLE**

*WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.*

In the famous case of *St. Xavier College v State of Gujarat (AIR 1974 SC 1389)*, the full bench of the Supreme Court directed the Union of India and accordingly the Preamble was amended. India was a secular country even before 1976 because the freedom of religion was already guaranteed to all the Indian citizens and India is a secular country even after 1976. India will also be a secular country in future. The Indians are the people following religious tolerance. No difference is made between the majority and the minority. The Muslim brothers can pray as per the directions of the Holy Quran. The Sikh brothers can follow the sacred Principles of ‘FIVE-K.’ (Kanga, Kirpan, Kesh, Kada and Kachera)[26] as per the direction of the Holy Guru Granth Sahib, which is the compilation of the immortal teachings of all the Great Gurus including Guru Nanak Devji and Guru Govind Singhji. Thus, in India, we find the Sikh soldiers wearing a specific Turban instead of the regular caps in the Armed Forces. The Sikh boys also have a small turban while in a school. It is of course the fundamental right. The Royal British Administration had allowed the Sikh community, full religious freedom, even from the Victorian times. Lord Denning was a highly learned man having in touch with the World history. His whole career is quite illustrious. However, as the beautiful Moon has also a small dot on it, in the same way, unfortunately, Lord Denning’s career is also blackened with some incidents. His opinion against the Black Juries as mentioned in the former editions of ‘What Next in the Law?’
shew his views to the world. Perhaps it was the spirit of chauvinism. In the same way his judgment in the famous case Mandla v Dowell Lee 1983 QB 1 (Appendix XX) made him very unpopular in the Asian community. Actually, it was not his personal opinion, but it was his legal interpretation of the Race Relation Act, 1976. In this Act of 1976 Parliament tackled the problem of racial discrimination. It made it unlawful to discriminate on ‘racial ground’s or against a ‘racial group’. ‘Racial’ is defined so as to prohibit discrimination on the grounds of colour, race, nationality or ‘ethnic or national orgins’. The ‘Ethnic’ is a word of uncertain meaning. It has changed its meaning from time to time. Lord Denning would expect that in using the words ‘ethnic origins’ Parliament had in mind particularly the Jews. There must not be any discrimination against the Jews in England. Anti-semitism must not be allowed. It has produced great evils elsewhere especially in Germany. It must not be allowed in Her Majesty’s Realm anywhere. On 29 July 1982, the Court of Appeal delivered a judgement in Mandla (Sewa Singh) v Dowell Lee (1982) 3 WLR 932. It was about a Sikh boy’s turban. Major issue in the case was whether a Sikh schoolboy can wear a turban at the British educational institutions? The Bench of Appeal consisting of Lord Denning unfortunately replied in Negative. However they kept full scope of appeal to the Hon. House of Lords, the Apex Court for all Her Majesty’s Realms. Let’s consider the facts of this most important case for India. Sewa Singh Mandla, the Plaintiff No 1 is a Sikh person practicing law in Birmingham. In 1978 he applied to send his son Gurinder [Age-13], the Plaintiff No.2 to a private school in Birmingham called the Park Grove School. It was a reputed school consisting of 305 boys of different races and religion. There were 200 English, 5 Sikhs, 34 Hindus, 16 Persians, 6 Negroes, 7 Chinese and about 15 from Continent. Mr. Mandla wanted to see the Headmaster. Both he and his son were wearing their turbans. The Headmaster wanted equality of uniform in school. He asked the father if he would consent to removing the turban and cutting the hair of his son. Mr. Mandla replied in negative. The Headmaster said that he would think about it. Them on 24 July 1978, he wrote: [27]

‘Thank you for bringing your son to see me. As I promised, I have given much thought to the problem and I have reluctantly come to the conclusion that on balance it would be unwise to relax the school rules with regard to uniform. At the moment I do not see any way in which it would be possible to reconcile the two conflicting requirements. May I wish you well in your efforts to promote harmony and peace, and I hope you find a suitable school for your son without difficulty.’
Mr. Mandla found another school for his son where he was allowed to wear his turban. But Mr. Mandla complained of the headmaster to the Commission for Racial Equality. The headmaster wrote this letter on 19/9/1978. [28]

‘To make my position quite clear, the boy was not rejected because he was a Sikh since we do not make racial distinctions and we have several Sikhs in the school. It was the turban that was rejected, and I believe your Acts cover people, not clothes.’

The Asian community must consider certain limitations of Lord Denning. At that time, he had left the House of Lords, the Apex Court of the Commonwealth Realms and was working as the Master of Rolls, the second highest judicial designation in the United Kingdom. The judges are the interpreters of the law and they do not make it normally, as the Latin maxim says - (JUS NON DARE) [29]

Lord Denning had a great respect for the ancient Indian Civilization. However, he had failed to understand the Indian spirit of strict adherence to the sacred traditions and religious orders. A close observation of Lord Denning’s judgments in Sikh Boy’s Turban Case can reveal that there was full scope of appeal to the House of Lords which is not at all bound by the precedents and can even advice the Crown to promulgate new laws in its legislative capacity. Lord Denning was himself against the provisions of the Race Relations Act, 1976 which has defined the ethnic minorities and their rights in the United Kingdom. However, he knew his limitations because at that time he was not working in the House of Lords though he was a Life Peer. The ratio decidendi set by the Hon House of Lords in this case has still power to guide the administrative problems throughout the Commonwealth Realms.

Recently the Sikh brothers were facing certain problems in relation to wearing of the sacred turbans while working in Australia. They reported the same to the Commonwealth Premier the **Rt. Hon. Dame Mrs. Julia Gelard.** Her Excellency has assured the full religious freedom to all subjects of Her Majesty. The decision includes the overseas students and the business visa holders in all parts of the Commonwealth Realms. Her historic administrative decision has been
warmly welcomed by the **Chief Minister of the Punjab (India) Hon. Shri Prakash Singhji Badal.** Ref. ‘Sakal’ Dt. 28 May 2013. [30]

Modern India is unfortunately facing many acute problems especially after 1992. The religious differences are unfortunately increasing. The various castes and sub-castes under the Hinduism are engaged in suppressing each other. The Buddhism is divided into many sects. There are many differences in the Jainism also. In Islam too, the Shias and the Sunnis are propagating their different principles. The Indian Christians are also divided into the Anglicans and Roman Catholics. The political parties are constantly disuniting people for their selfish motives in election which they want to win by hook or crook. It becomes necessary to win at least 51% of the votes, by hook or crook, for a clear victory in a representative democracy based on territorial representation. Nobody cares for remaining 49% people and their opinions. In such scenario, it becomes necessary to follow principles set by the House of Lords. Those judgments can still guide us in our practical problems e.g. the judgment of House of Lords in Sikh Boys Turban case pronouncing the religious freedom to Sikhs and other minorities is very landmark for India. In addition, some members of the Commonwealth Realms treat subjects/citizens of other Commonwealth countries preferentially to the citizens of non-Commonwealth countries.

Britain and several others, mostly in the Caribbean, grant the right to vote to Commonwealth citizens who reside in those countries. Some states, such as Canada and New Zealand, have abolished such preferences. In non-Commonwealth countries in which their own country is not represented, Commonwealth citizens may seek consular assistance at the British embassy.

**9.2 ILLEGAL ENTRANTS**

**Gurubax Singh Khera’s Case 1974 AC 18**

Lord Denning gives us an interesting account of a typical case was of Gurbax Singh Khera. He was born in a village in the Punjab. His uncle arranged with agents in India to get him to England – on payment of Rupees 15,000. He travelled by air from New Delhi to Paris. Then by car to the French coast. Then at the time of night he dared to aboard on a small motor-boat with three other Asians. They crossed the English Channel and came to England. They were driven for six hours and they arrived at Wolverhampton UK. Gurubax came to his father’s house. He
soon obtained some work. Some years later he was arrested and detained as an illegal entrant. He applied for a writ of habeas corpus. Then he gives us an important account of **R v Home Secretary ex parte Bhajan Singh (1976) QB 198.** In this case one Mr. Bhajan Singh [Age 26] came into the UK illegally. He probably came from India, crossed in a little boat and made his way to the Midlands. Later, he was arrested and detained with a view to his removal and deportation. Then suddenly he said he wanted to marry Miss. Paramjit Kaur. [Age 16] Both of them said that they had not thought of marriage prior to his arrest. He asked to be allowed to marry her before he was deported. He relied on article 12 of the Convention which says: [31]

> 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing and exercise of this right'.

But he was met in with an exception in Article 5(1) (f) which expressly authorizes, 'the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Then Lord Denning has traced the case '**R v Chief Immigration Officer ex parte Bibi (1976) 1 WLR 979.** This is the case which guarantees the right to respect for family life. One Salamat Bibi, a Pakistani citizen, arrived at Heathrow Airport, London with two small children. She had stayed some days at Mecca and Medina before coming to Heathrow. She had no entry certificate. She could not speak English, but through an interpreter she said that she was coming as a visitor to be with her husband for a couple of weeks. She had about $ 700/- in cash with her and a return ticket to take her back to Karachi. She also produced what purported to be an affidavit declaring that she had been married to one Barkat Ali in 1952 in Pakistan. The certificates of Domicile, Birth etc were not in English, but were translated from Urdu for the understanding of the Royal Authorities. Mr. Barkat Ali wanted her in England. They were represented by the most experienced and the learned Advocate Mr. Louis Blom-Cooper. He compelled the Law-Lords to look at the European Community Law and the Conventions on Human Rights. Here Lord Denning declared that they cannot be implemented in toto in any Commonwealth Realm unless enacted by the Parliament. [32]

> "I am against a new bill of rights".

This declaration is capable enough to tell us the conservative views of Lord Denning in respect of Law and Judiciary in general. Lord Denning worries about the constants flux of the legal as
well as illegal entrants to England. Here he discusses the Common law about aliens. It had kept no restrictions on immigrants so that England became a liberal home for all countries of the world. Lord Denning has provided us an account of overseas students. Here he traces the case **R v N. Shah and others (1983) 2 WLR 16.** Here he tells us about the position of the overseas students in the Queen’s Realms. Hamid Akbarali was a Pakistani student. He was studying engineering at Chelsea, UK. He remained there for three years and then applied for the scholarship of the Local Self Government. According to them the Applicant must be ‘Ordinarily Resident’ of Chelsea for three years. Lord Denning had a great sympathy for the students from the under developed world. However he carefully interpreted **The Immigration Act 1971 read with The Education Act 1962.** He filled in the gaps which the Legislation has kept. According to him the overseas students are not qualified for any local scholarship inspite of living for many years in the UK. Lord Denning further tells us the position of immigration from the Crown Colonies at the time of 1772. The Crown had full jurisdiction over Virginia. The English land owners including Mr. George Washington {Afterwards President of the Republic from 1776} had a number of sugar plantations. The slaves used to work there as bonded labourers. According to Lord Chancellor Hardwick, a slave cannot become free even if he becomes of Christian. In those times slaves were purchased like chattels. James Somerset came from Virginia, a British Crown Colony. However, finally he was given freedom. In those times there were no passports or visas.

### 9.3 THE COMMONWEALTH CITIZENSHIP

Lord Denning then turns towards the concept of the Commonwealth citizens. It has been made a separate chapter because of its importance in the international perspective. The chapter is far more important to the Indian citizens because India is a respectable member of the Commonwealth even after 1947. Before 1962 the Commonwealth citizens could come to England as a matter of right. In the course of time, the British Parliament passed a number of Acts and Rules (**Immigration Act 1971**). Now Commonwealth citizens can be divided into two classes.
CLASS I  The countries where the Queen is regarded as Head of State. They include Australia, Canada, New Zealand and the rest of 13 small Royal Administrative Territories. The people living in these territories are the loyal subjects of Her Majesty.

CLASS II  The countries where the Queen regarded as the Head of Commonwealth only They include India, Pakistan, Bangla Desh, Lesotho, Swaziland, Tonga and rest of 30 countries. The people living in these independent countries are not the subjects of Her Majesty but are the Commonwealth citizens in the broad sense of the term. They are preferable to other aliens so long their countries of origin remain within the Commonwealth. The membership is purely voluntary.

This division must be carefully kept in mind before turning towards the following famous cases related to immigration. **R v Home Secretary exparte Phansopkar (1976) QB 606.** This is a Land mark case which elaborates the delicate concept of Commonwealth citizenship. In this case Mr. Phansopkar came to England from India in 1966. He lived there and worked there for several years. In 1974 he obtained a certificate by which he was registered as a subject of the United Kingdom. Here Lord Denning carefully interprets the provisions of the **Immigration Act 1971.**

Then Lord Denning describes the position of Illegal entrants in the United Kingdom, Here he discusses the case **R v Penton Ville Prison exparte Azam (1974 AC 18)** In this case one Gurubax Singh Khera, a Punjab born Indian came to England. His father was already living in England from many years. He came to Paris and by a small motor boat came to England along with three other Indians. He obtained some work. He was arrested as an Illegal entrant. He applied for writ of Habeas Corpus.

In another case **R. v Immigration officer exparte Thakrar (1974) QB 684 Mr. Pravinlal Thakrar** an Indian came to London. He was detained. His Advocate Sir Dingle Foot QC was the most experienced lawyer in matters relating to Commonwealth citizenship. He submitted that Mr. Thakrar had a right to enter in England because he was a Commonwealth citizen and British protected person. Lord Denning considered the provisions carefully and stated that Mr. Thakrar
was expelled from Uganda (British Africa) for his no fault. That African territory was now under the autocratic rule of Maj-Gen. Idi Amin.

The New Regime expelled many Indians and other foreigners from Uganda. Thakrar had a legal right to enter to a country to which he belongs. In 1947, India had become independent. It is a member of the Commonwealth but not a Commonwealth Realm. Thus Thakrar was only an associated Commonwealth citizen as India regards QMEM Elizabeth II as the Head of the Commonwealth only and not as the Head of the State. The Apex Court did not consider him as one of Her Majesty’s subjects. In the Obiter Dicta he stated his sympathy for Thakrar and his plights. He advised Thakrar to go to India where his wife, his two children and his parents were living. According to Lord Denning [33]

“It might be better for him to join them in that great country, where there may be more scope for him than here. This country is not large enough to take in all those whom we would gladly accept…”

Thakrar’s case throws ample light upon the position of international immigration especially within the Commonwealth. It also shows how Lord Denning had a great respect towards India which is described in obiter as a great country. Further he exactly knew the geographical limitations of England and the other British Isles countries which are considerably small if compared to the other vast Commonwealth Realms under Her Majesty. The researcher has a high respect towards His Lordship. But instead of keeping bare sympathy for the plights of the poor Indian citizens and ordering them to return to their native country seems quite to be unjust especially, when they are the fellow Commonwealth citizens and are not at all treated as foreigners. It would have been far better if ‘The Right Honourable’ (These designated personalities can directly approach Her Majesty and Her Crown Ministers and can further advise them on important issues.) Lord Denning would have advised the QMEM Elizabeth II to allow and to fully accommodate (or at least to allow them on a small time limit permit) the fellow Commonwealth citizens especially from the over populous and consequently poor countries into one of Her vast Realms under Her High Progative Power. Most of the Realms are thinly populated and thus are economically prosperous. Some of them are three to four times of India,
albeit, some of their area may not be fit for human habitation. The researcher has put a frank opinion in the academic interest only.

9.4 THE RIGHT TO FREEDOM OF RELIGION

Ahmad v Inner London Education Authority [IELA] 1978-1- QB 36 Mr. Ahmad was a full time teacher. This meant that he had to attend the school and teach the children on the five days, Monday to Friday. There was a lunch break between 12.30 p.m. to 1.30 p.m. Mr. Ahmed was a devout Muslim. By his religion it was his duty to attend prayers at the nearest mosque on every Friday. The time for these prayers was 1 p.m. to 2 p.m. and the mosque was about 15 to 20 minutes away. So due to conflicting time a small delay was inevitable on every Friday. According to the Headmaster of the school, his absence disrupted the classes too much. According to Mr. Ahmed, he was fully entitled to do so and that, he was also entitled to full pay. Various compromises were suggested to him but were not accepted. He resigned in protest. He gave as his reason: [34]

'I was exploited and humiliated by the ILEA'. He put in a claim for unfair dismissal, saying that his employers conduct 'forced me to resign'.

During the argument attention was drawn to Article 9 of the Convention was very carefully interpreted which had clearly stated thus-[35]

'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom ..... to manifest his religion or belief in worship, teaching, practice and observance'.

Lord Denning favoured the full time contract of service stating that the Convention was advisory. Lord Scarman strongly dissented.

Lord Denning has earlier stated that he had a great respect for Indian tradition. He visited India officially for two times. In 1964, he has discussed the matter of religious controversies with our late beloved Prime Minister Pandit Nehru who was also a Barrister from the United Kingdom and was a senior to Lord Denning by a decade. In 1969, Lord Denning came for second time upon the invitation from Dada Chitaley Memorial Lectures. Here, he was warmly welcomed by Hon’ble M. Hidayatullah, the then Chief Justice of Supreme Court of India and also acting
President of the Republic. He was also a U.K. Barrister and close friend of Lord Denning. The visits of Lord Denning to this ancient land and his lectures in India in which he glorified the ancient customs and traditions, and also advised Indians to throw away customs which are against the spirit of law and the equity were greatly appreciated by the Indian community. These incidents show the great respect which Lord Denning had for India and her people.