Approach and Contribution of Justice Hidayatullah to the Freedom of Speech and Expression

Harish Chandra Pandey[1]

Abstract

Justice Hidayatullah spoke with rare courage on delicate issues including restrictions of freedom of speech and expression in the interest of democracy, morality and contempt of court. In his opinions he consistently insisted upon the fullest protection being extended to individual rights. He delved deep into the foundation of the law and analyzed the underlying principles with clarity and precision. By his judgments he made priceless contribution to legal literature especially in the area of freedom of speech and expression.

Keywords: Freedom of Speech and Expression, Democracy, Administration of justice, Civil Liberty.

I. Introduction

Freedom of speech and expression lay at the foundation of all democratic organizations. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance.

In the field of freedom of speech and expression, the opinions of Mr. Hidayatullah, J., are characterized by, in addition to his usual literary flourish, a deep commitment towards western liberal thought, and the liberty of speech there under.

II. Freedom of Speech and Judicial Administration

*Naresh Sridhar Mirajkar*v. *State of Maharastra*[2] afforded him the opportunity to protest against extension of exceptions to the guarantee of free speech. In the

[1] Assistant Professor, Faculty of Law, DDU Gorakhpur University, Gorakhpur.
[2] AIR 1967 SC 1.

instant case the constitutionality of the order passed by a high court judge not to report the evidence of a person in newspaper was challenged.[3] The petitioner, who was a reporter of the 'Blitz contended that prior to the order of Tarkunde, J., he was reporting the proceedings in the suit in the column of 'Blitz' and but for the order he would have continued doing so. The order prohibited him from publishing the evidence of the witness thereby violating freedom of press which according to the court's decision[4] was part of the freedom of speech and expression guaranteed by Article l9(1)g.

The petition was heard by a bench of nine judges and was dismissed by majority judgment of the Court with Hidayatullah's J., dissent to it.

The first and the most important issue before the court was whether the judicial order could claim immunity from being challenged under Article 32. The implications of this question extend beyond freedom of speech as the principle laid down by the court would be applicable to other fundamental rights as well. Gajendragadkar, C.J., as well as Sarkar, J. constituting the majority, after explaining the true nature and character or judicial process and of judicial decisions added a pragmatic approach and held that the Supreme Court would

[3]The matter arose out of a sensational libel case, *K.M.D. Thakersay*v. *R.K. Karanjia*, in the Bombay High Court in which hearings had been held in public. One goda, who had been examined earlier was recalled for further examination, when he applied to Tarkunde, J., that his evidence should not be allowed to be reported because reports of his evidence on the earlier occassions had injured him in his husiness. Although the trial continued to be in public, the judge directed the Goda's further evidence should not be reported. The next day council for defendent contended that the fundamental principle in administration of justice was that it must be open to public and exception could be made only in case such as where a child was victim of sexual offence or in a case intimate relations between the spouce were likely to come out or in proceedings in regard to official secrecy. No withness could claim protection from publicity on the ground that if the evidence was published it might adversely affect his business. The council further submitted the order ought not to have been passed, and in any event the judge should pass a written order. The objection was rejected by the learned judge and afterwards by a Division Bench of the High Court on the ground that a judicial order was not amendable to a write under Article 226.

[4]Sakal Newspaper v. Union of India, AIR 1962 SC 303.

not issue writs to the High Courts. Since High Courts are courts of concurrent jurisdiction. In adopting this view, the Chief Justice drew support from the established practice in England.

In this dissenting judgment, Hidayatullah, J., strongly resisted the claim of courts and judges to immunity from the write jurisdiction of the Supreme Court. The learned judge observed that althogh Article 12 did not expressly mention the court, they were not expressly excluded either[5] He considered that the word 'state must obviously include courts because otherwise courts would be able to make rules which might take away or abridge fundamental rights. This apprehension, however, was well founded as the court had struck down such rules in the past.[6] In his considered opinion, a judicial decision based on such a rule was not any different and it could not claim any exception from judicial scrutiny as to its consistency with fundamental rights.[7] Referring to the content of sonic of the fundamental rights, he pointed out that Articles 20 and 22(1) were addressed to the courts and judges as mush as to other organs of government[8] and Article 32 made no exception in favour of the High Courts.[9]

Hidayatullah, J., explained away the rule of English Law on the ground that the Queen Herself was supposed to be present in the Court. As there was no real correspondence between the courts in the two countries, the question as to whether the High Courts were excluded or included within the jurisdiction of the Supreme Court under Article 32 had to be decided with reference to the provision of the Indian Constitution and not on the basis of English Law. This is one of the rare departures from English Law on the part of Hidayatullah, J. This approach is unexceptionable as the Indian Law is not hide bound to the English practice.

Examining Articles 32 and 226 the learned judge came to the conclusion that "there is no sharing of powers to issue the prerogative writs" between the Supreme Court and the High Courts. The whole of the power is still with this Court ……..and only analogous powers for local enforcement are given to the

[5]Naresh Sridhar Mirajkarv. State of Maharastra ,*Supr*a, note 1 at 28.

[6]Pre Chand v. Excise Commissioner, AIR 1963 SC 996.

[7]*Supra,* note 1 at 28.

[8]I*d.*

[9]I*d*, at 30.

High Courts.' The conclusion of His Lordship, therefore, was that the subordination of the High Courts to the Supreme Court is not only evident but is logical.[10] Mr. Seervai has supported the view of Hidayatullah, J., while stating its effect.[11] The views of Hidayatullah, J., are sound indeed in theory but the practical implications of subjecting High Courts to the writ jurisdiction of the Supreme Court have to be fully considered, particularly when the Supreme Court has wide appellate jurisdiction to correct errors on the part of the High Courts.

The next question before the court was whether the order of Tarkunde, J., excluding publicity in respect of the testimony given by Goda violated the fundamental rights to freedom of press in so far as that order prevented the reporter of Blitz' from reporting the case.

Gajendragadkar, C.J. (for the majority) while conceding the importance of an open trial said that an open trial was a means, not an end, the end being the fair administration of justice. And hence where a conflict arose between the needs of fair administration of justice and the desirability of a public trial, the latter must be regulated or controlled by the former".[12] The learned Chief Justice further

[10]*Id*, at 33.

[11]The supreme Court has been given the right to issue the writs for the protection of fundamental rights, and there is no express exclusion to the exercise of that power, it must follow therefore that where there is a violation of fundamental rights by a court judicial tribunal a writ must prima facie lie. This conclusion is strengthen by the provision of Article 226. If the power to issue writs were conferred on the Supreme Courte alone it would be difficult for the Supreme Court to protect single handed the people from the violation of their fundamental rights and consequently, power to issue writs was given to all the High Courts in India. But Article 226(2) contained an express provision that nothing contained in Article 226 (1) should derogate from the power of the S.C. to issue writs, which must mean that the grant of this power to High Court did not is any way prevent the S.C. from issuing writs. This express exclusion supported that conclusion that the mere fact that the High Courts had power to issue writs of certiorari was not to affect the power of the S.C. to issue such writs for the purpose of enforcing fundamental rights. H.M. Seervai, Constitutional Law of India, p. 749.

[12]*Supra,* note 1 at 9.

observed that the encroachment on the fundamental rights of the press was but indirect and only an incidental consequence of the impugned judicial order.[13]

Hidayatullah, J., however, did not agree with this view and made the following observation:

> "attachment to an open trial is not a rule of practice with the English, but is an article of their great charter, and judges view with great concern any departure from it. Whenever a judge departed from it, he defined that 'field of exceptions' and stated the "overriding principles" on which his decision was based. No judge passes an order which is not recorded in the minutes and a question of this kind is not dealt with by the judge as within his mere discretion as to what he considers expedient or convenient."[14]

He further observed:

> "as the institution was to serve goda's business from harm, it is reasonable to think that the prohibition was perpetual and that is how the matter appears to have been understood……..because no report of his deposition has since appeared in any newspaper.''[15]

Referring to the fact that public hearing of cases before the courts is as fundamental as our democracy and system of justice as to any other country, Hidayatullah, J. held the order of Tarkunde, J., imposing suppression of the reporting of deposition of goda was illegal and without jurisdiction.

As to the claim that no action of a judge can ever be questioned on the ground of breach of fundamental rights, Hidayatullah, J., said:

> "The judges no doubt function, most of the time to decide controversies between the parties, in which the judge does not figure, but occasion may arise collaterally where the matter may be between the judge and the fundamental rights of any person by reason of the judge's action. It is true that judges, as the upholders of the Constitution and laws, are

[13] *Id*, at 12.

[14] *Id*, at 25.

[15] *Id*, at 24-25.

> least likely to err, but the possibility of their action contrary to the Constitution cannot be completely excluded."[16]

Accordingly, Hidayatullah, J., came in full support of the contention of the petitioner when he observed that "a suppression of the publication of the report of a case conducted in open court, for a reason which has no merit, ex facie offends that freedom".[17] According to the learned judge, "denial of the rights to publish reports of a public trial is also to deny the freedom of press which is included in the freedom of speech and expression."[18]

The reasoning adopted by Hidayatullah, J., and the principles laid down byhim are in keeping with his deep concern to uphold the fundamental rights. At the same time when contrasted with the pragmatic approach of the majority's judgment it illustrates how a mere concern with abstract rights can lead to principles which may appear on the face attractive but lead to impractical situations.

III. Freedom of Speech and Political Dissent

Blackstone has rightly pointed out that "every free man has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy "the freedom of press'. The right to freedom of speech and expression is one of the most valuable rights guaranteed to a citizen which carries with it the right to propagate one's views, which may include a fair criticism of the system of judicial administration. It is not for any agency of the state to give its judgment on the ideology of any political party or its leader. It must also be recognized that free political discussion is essential for the proper functioning of democratic government to change political and social conditions and to advance human knowledge.

The usual concern for fundamental rights evident in the opinions of Hidayatullah, J., is unfortunately missing in his judgment in *E.M.S. Namboodiripad* v. *T.N. Nambiar*.[19] This case, arising out of contempt of court proceeding against an ex. Chief Minister and a prominent communist leader

[16] *Id*, at 29.
[17] *Id*.
[18] *Id*.
[19] AIR 1970 SC 2015.

raised certain basic questions. Does an alleged misinterpretation of the writings of a political thinker and criticism of the system of judiciary in general based on such misinterpretation amount to a contempt of courts? Does it make any difference if in fact the political thinkers did not hold the view which is attributed to them?

The power of the courts of punish for contempt is an essential judicial weapon to prevent interference with the administration of justice. However, it may at times conflict with freedom of speech. This conflict has to be resolved in such a way as to protect administration of justice at a minimum sacrifice of freedom of speech. But in the instant case, Hidayatullah, C.J., has missed the opportunity of striking a balance between the competing demands of freedom of speech and fair administration of justice by adopting a rather uncharitable view towards the criticism made by Namboodiripad.

In this case, Namboodiripad was convicted for contempt of court on the basis of the following utterances which he had made at a press conference:

> "Marx and Engels considered the judiciary as an instrument of oppression……. judges are guided and dominated by class hatred, class interest and class prejudices and where the evidence is balanced between a well-dressed pot belied rich man and a poor ill-dressed and illiterate person the judge instinctively favour the former…… judiciary is part of a class rule of the ruling class. And there are limits to the sanctity of the judiciary. The judiciary is weighed against workers-peasants and other section of working classes and the law and the system of judiciary essentially serve the exploiting class."

Namboodiripad made it clear that he was in no way questioning the integrity of an individual judge or casting reflection on any judgment. He further added that it was not an aspersion on the integrity of judges when he said that they were dominated by class hatred.

When Namboodiripad appealed against the decision of the high court to the Supreme Court, the court speaking through Hidayatullah, C.J., upheld the decision against him. The arguments in his defence were that:

(1) his observation did not more than give expression to the marxist philosophy and that was contained in the programme of his party i.e. the C.P.J. (M) Programme adopted in November 1964.
(2) they did not contain criticism of any particular judge or his judgment or conduct.
(3) they did not contain criticism of any particular judge or his judgment or conduct.
(4) he did so in pursuance of his duty to educate public opinion.
(5) he had always enforced the judgment of the courts and he never shown disrespect to the judiciary.
(6) the law of contempt of court ought to be interpreted so as to cause no encroachment upon the freedom of speech guaranteed by Article 19(l) (a) of the Constitution.
(7) the alleged harm done to the courts by his utterances was not apparent.

Referring to the sixth argument first, i.e. the law of contempt should be so applied that the freedom of speech and expression are not whittled down, the learned Chief Justice, accepting the contention observed:

> "The spirit underlying Article 19(1)(a) must have due place but we cannot overlook the provisions of the second clause of the Article. While it is intended that there should be freedom of speech and expression, it is also intended that in exercise of that right, contempt of court should not be committed."[20]

He further observed:

> "freedom of speech and expression will always prevail except where contempt is manifest, mischievous or substantial."[21]

Referring to the other arguments that observations about the judiciary were based on the teachings of Marx, Engels and other philosopher, such thoughts also formed part of the Communist (Marxist) Party's Programme which was approved in1964 and as such what Namboodiripad did at (he press conference were merely to expose these teachings, the learned Chief Justice made an

[20] *Id*, at 2019.

[21] *Id*.

elaborate survey of writings of thinkers like Marx, Engels and Lenin. His Lordship conceded that they (judges) did view the : state "an instrument of exploitation of the oppressed classes." They thought in terms of ultimate withering away the state. It wits (he dictatorship of the proletariat established by the communists which misunderstood Marx and thought that the proletariat need the state. According to the Chief Justice "in all writings there is no direct attack on judiciary".[22] In fact "Engels regarded the court as one of the means adopted by the law for effectuating itself." He, however, accepted that Engels considered the courts "as an evil adjunct of the administration of class legislation".[23]

After a very painstaking survey of the writings of Marx and Engels, Hidayatullah, C.J., took further pains to controvert the interpretation which Mr. Namboodiripad had put upon these writings. His lordship over doubted whether Mr. Namboodiripad had read Marx and Engels and whether if he had read them he had fully appreciated the literature. The learned Chief Justice observed:

"We have summarized into a very small compass, many thousands of words in which this doctrine has been debated from Plekhanov to Lenin through the thoughts of Kants, Kerensky, Lesalle, Belinsky and others who attempted a middle line between revisionism of Berstein and the Bolsheire views of Lenin. We have done so because Mr. V.K. Krishna Menon sneered that many people learn about communism through Middleton Murry".[24]

Hidayatullah, C.J., thus, arrived at the conclusion that "in all these writings there is not that mention of judges which the appellant had made".[25] Front this his Lordship observed that "either he (Namboodiripad) does not know or has deliberately distorted the writings of the Marx, Engels, and Lenin for this own purpose."[26]

It to be noted that it was quite unnecessary for the learned Chief Justice, to make the excursion into the writings, of Marx, Engels and other communist writers, which has been aptly remarked by one writer.

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[22] *Id*, at 2022.

[23] *Id*, at 2023.

[24] *Id*.

[25] *Id*.

[26] *Id*.

> "An interpretation of the Marx or Engels work may form a good subject for a doctoral dissertation in politics or philosophy but is not appropriate in a Supreme Court judgment. Apart from the fact that it side tracks the main legal issues it unnecessarily involve the court in a political controversy".[27]

It we suppose that Marx and Engels really said that the judiciary was dominated by class prejudices, class hatred and all other communist clinches, would that have saved Namboodiripad from being found guilty of contempt? It there is contempt, committed in fact, one cannot get away, it is submitted, by quoting scriptures in support. It is further noted that the larger question whether a general criticism of the judiciary not directed against any particular court or class of courts or any particular judge would amount to contempt remains unanswered.

Hidayatullah, C.J., of course, observed:

> Whether he (Mr. Namboodiripad) misunderstood the teachings of Marx and Engels or deliberately distorted them is not to much purpose. The likely effect of his words must be seen and they have clearly the effect of lowering the prestige of the judges and courts in the eyes of the people.[28]

He further observed:

"It is clear that it is an attack upon judges which is calculated to raise in the minds of the people a general dissatisfaction.[29]

It is submitted that the effect of these observation has been considerably weakened by the finding that the teachings of Marx and Engels did not warrant the criticism made by Mr. Namboodiripad.

It is to be noted that Narnboodiripad's observations, if seen in the context of circumstances, they were made in, contained a criticism of the judicial system in general, and were expressed at a press conference before press correspondents so that were not likely to cause, even distantly, any interference with the

[27]S.P. Sathe, *Economic and Political Weekly,* V No. 42, October, 17, 1970, at 1741.
[28]*Supra*, note 19 at 2024.
[29]*Id*.

administration of justice. They were purely of academic nature so far as their effect on the listeners was concerned. The issue is not whether what Namboodiripad said was desirable or not. The question for court's determination should have been whether in the circumstances, freedom of speech needed to be restricted or not. If one has a freedom to propogate views of Marx, does not one have the freedom to give his own interpretation to these views. A dangerous implication of Hidayatulla's, C.J., opinions that one can only propogate the 'approved' version of a political thought. What distinguishes a free society from a totalitarian one is that there is freedom of speech in the former. This liberty provides guarantee to the people to say what they have to say concerning the governance of the country, including administration of justice. To suppress them as contempt of court because their views intend to lower the prestige of the judges and courts would destroy the very Inundation of the self government.

If in the light of the decisions,[30] the law in relation to the defamation referred to in Article 19(2) should not be allowed to paralyze a citizen's right to free discussion of public conduct of officers or public organs, it is logical that the law of contempt of court should not prevent a citizen (torn expressing his views as to defects in the system of administration of justice.

It is submitted that while indirectly defining the scope of the power of the court in the context of the requirement of "reasonableness" under Article 19(2) of the Constitution, the dicta of Hidayatullah, C.J., that freedom of speech will prevail in all cases except where a contempt of court is 'manifest' or 'substantial' is a definite improvement over the past legal position held by courts in India. Unfortunately this wholesome principle laid down by the judge was not followed in its spirit while deciding the actual case.

IV. Freedom of Speech and Public Morality

[30]New York Times v. Sullivan, 376 U.S. 254: Garrison v. Louisiana, 379 U.S. 64; Curtis Publishing Company v. Butts, 388 U.S. 130.

Determination of the obscenity of an object is bound to be looked through a Constitutionally eye[31] which posed for Hidayatullah, J., in *RanjitUdeshi* v. *State of Maharastra*[32] a ticklish problem because he had to strike a balance not only between the freedom of individual in free speech and the power of state to impose reasonable restrictions, but also a balance between social interest in general morals[33] and social interest in cultural and political progress.[34] Further, obscenity and literature appear to be going hand-in-hand and may a times it becomes difficult to know whether to draw the line. That is why, Hidayatullah, J., in evolving a test took into consideration the prevailing conditions of the Indian Society, the need for growth of art and literature as also the individual freedom of speech and expression.

The facts of the instant case were that the appellant a Bombay Bookseller, was prosecuted under section 292 of the I.P.C. for selling and for keeping for sale the well-known book "The Lady Chatterley's Lover (unexpurgated edition) written by D.H. Lawrence. The Magistrate held that the book was obscene and sentenced the appellant. He field a revision in the High Court of Bombay. Having failed there, he approached the Supreme Court of India by special leave. The appellant in his defence challenged the validity of Section 292 I.P.C. and urged the court to reject the definition of obscenity as laid down in the Hicklin[35] case.

Hidayatullah, J., speaking for a unanimous court rejected the plea of appellant and upheld his conviction. Referring to the validity of Section292 I.P.C., his lordship held that Section 292 I.P.C. was not violative of Article19(1)(a) as it

[31]INDIA CONST, art 19(1)(a) guarantees freedom of speech and expression which is made subject to reasonable restriction in the interests of, among other things, the public decency and morality. Accordingly, writings of other things if absence may be suppressed and punished because such action would promote public morality and decency se such action would promote public morality and decency.

[32]AIR 1965 SC 881.

[33]Section 292, the IPC recognizes the social interest in general morals by penalizing the sale etc. of obscene literature and objects.

[34]*Supra*, note 30.

[35]Queen v. Hicklin, 1864, LR 3 QB 360.

was protected under clause 2 of the same article which permits imposition of restriction on the exercise of the right in the interest of decency or morality.[36]

In deciding when "Can an object be said to be obscene?", Hidayatullah, J., approved the test of obscenity as laid down by Cockburn, C.J., in Hicklin case in 1868. The test as enunciated was: "Whether the tendency of the matters charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" and "would suggest……..thoughts of a most impure and libidinous character".[37]

In addition to the above test Hidayatullah, J., also laid down a test of obscenity which runs as follows:

> "In our opinion the test to adopt in our country (regard being had to community mores) is that obscenity without a prepondering social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature or having that tendency."[38]

Applying the above principle, his lordship held the novel Lady Chatterley's Lover as obscene. The suggestion that the overall effect of the book should be seen and not the stray passages or words here and there which may be offensive to particularly sensitive persons, did not impress him. He observed:

> "an overall effect of the obscene matter in the setting to the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall."[39]

His Lordship further added:

> "the novel in question in treating with the sex the impugned portions viewed separately and also in the setting of the whole book passed the

[36] *Supra*, note 31 at 885.

[37] *Supra*, note 34 at 371.

[38] *Supra*, note 31 at 888.

[39] *Id*.

> permissible limits judged from our community standards and as there was no social gain to the public which could be said to preponderate, the book must be held to satisfy the test of obscenity."[40]

Although it has been rejected in the country of its origin, Hidayatullah's J., refusal to discharge the Hicklin rule, has been criticized by many writers[41] on various grounds.[42] The Hicklin test has no doubt been rejected in U.S.A.[43] and England and substituted by statutory definitions in England[44] and Canada.[45] This cannot be decisive for India for the simple reason that the socio-economic and cultural and other conditions are quite different in the Indian Society. In an affluent Society highly educated and industrialized, where science and technology have become part and parcel of man's daily life, the attitude towards sex relations and consequently towards the problem of obscenity naturally differs from countries in which these things are conspicuous by their absence. This accounts for the fact that in U.K. and U.S.A., "Lady Chatterley's Lover" has been held not to be obscene whereas in India and Japan it has been held to be otherwise.

On a closer scrutiny of the standard, Hidayatullah, J., set for himself to determine the obscenity of the book, it appears that the Hicklin rule is on its way

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[40] *Id*, at 891.

[41] The Supreme Court has erred in not rejecting the Hicklin rule which has become obsolete. It also lays down a vague arid arbitrary standard for judging obscenity and has a tendency to curtail the guaranteed right to freedom of speech. V.N. Shukla, 'The Constitution of India' (1972) p. 69.

[42] By undermining the importance of expert opinion and by leaving the dividing line between the pureart and obscenity to be drawn by the courts, the S.C. may have introduced an element of uncertainty which may not have as happy an impact on the literary development in the country as the court intended. R.K. Misra, 'Judicial Process', A.S.I.L. (1965) XII.

[43] *Walker* v. *Popenoe*, 149 Feb 2nd. 511, *U.S.* v. *Denott 39* Feb 3rd564,*American Civil Liberties* v. *Chicago* 121 WE 2nd585, *U.S.* v. *Book called Lilysses* 72 Feb. 2nd705, *Ratt* v. *U.S.* 354 US 476.

[44] Section (1) of the Obscene Publication Act, 1959.

[45] Section 150(8) of the Criminal Code.

out.[46]The court has defined obscenity' as "treating with sex in a manner appealing to the carnal side of human nature or having that tendency". Similarly he has tried to indicate when it will have constitutional protection by putting forward the theory of "prepondering social purpose or profit". Therefore, the approach in any given case would be to find out,

First	:	Whether there is obscenity,
Second	:	If there is obscenity whether side by side there is socialpurpose or profit and
Third	:	If there is such social purpose or profit, is it of prepondering nature.

It is submitted that the test correctly tries to balance the interests of the individuals in freedom of speech and expression against the interest of the society in preserving public morals. It is further submitted that the test evolved by Hidayatullah, J., is more logical than the Hicklin test. For example, in U.K. one may come across a case in which the court finds that there is obscenity but the person concerned would be acquitted if proper evidence is not forthcoming. In India, if the court finds that there is obscenity and there is no social purpose to counterbalance it, whether or not it created depravity of mind in another will have no value, and the person concern would be convicted.

For another reason, the test evolved by Hidayatullah, J., may be said to be more natural and precise. It is always a more difficult task for a judge to determine the subjectivity of minds of somebody else than to give the subjectivity of minds of his own-self. The test evolved by Hidayatullah, J. requires the judge to come to a decision subjectively, whereas Hicklin test calls upon the judge to decide the subjectivity of another person's mind which is certainly a more difficult task.

The greatest merit of the test is its flexibility. Hidayatullah, J., has also taken care not to make the test a rigid one by pointing out that each case will have to be considered on its own and no inference has to be drawn before-hand. This flexibility of the test will enable us to adopt it in the changing times and needs of society in future.

[46]R.K. Misra, Judicial Process, A.S.I.L. 1965 XI.

Thus, on the whole test evolved by Hidayatullah, J., is a positive step in the direction of the substitution of along established judicial test and is further adequate and in keeping with our fundamental laws as well as our moral and ethical standards.

Hidayatullah, J., seems to have been influenced by certain pernicious trends in contemporary Indian literature. A vast amount of literature in shape of novels, fairytales, murder stories and other fictions are being produced at an alarming rate and the books mostly discuss matters concerning sex relations in a way which is not in keeping with good taste. Through these books appeal is made to the baser instincts in human nature and the cumulative effect of this form of the literature on the society cannot be anything but disastrous. The danger which this kind of literature poses to the moral foundations of the society has become the matter of anxiety from being "perverted" under the influence of literary determined limits of decency. The learned judge has observed:

> "Emulation by our writers of an obscene book under the aegis of this court's determination is likely to pervert the entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such a caution."[47]

The opinion of the learned judge is characterized by his ambivalent attitude towards English principle and his awareness of the problems of the Indian Society and the need to encourage development of healthy trends in the literature. Last, but not the least, his opinion is further characterized by a certain literary quality which may be said to be his specialty. His exposition of what constituted obscenity in literary works can itself be said to be a piece of literature.

The greatest contribution of his decision in 'the instant case, in the field of constitutional law is that although this case involved the obscenity of a book under Section 292 IPC, the principles evolved there from "apply mutatis mutandis to film and other areas besides obscenity.[48] The Khosla Committee also adopted them and recommended for the guidance of the film censors.

[47] *Supra*, note 31 at 889.

[48] K.A. Abbas v. Union of India, AIR 1971 SC 481.

Hidayatullah, C.J., was again called upon to define the limits of free expression in a slightly different context in *K.A. Abbas* v. *Union of India*,[49] where constitutionality of the prevailing scheme of film censorship was seriously questioned. In this case, K.A. Abbas produced a documentary film entitled "Tale of Four Cities" depicting the contrast between the rich and the poor. There were some scenes of the red districts of Bombay showing the life of the prostitutes and their exploitation by pimps. The film was given "U" certificate provided certain cuts were made in the film containing the scenes in the red light districts. Mr. Abbas challenged this order on the grounds that,

1. the pre-censorship exercised by the film censors violated the fundamental rights to freedom of speech and expression,
2. even if pre-censorship was legitimate restraint, it must be exercised on the basis of definite principles which preclude arbitrary action,
3. there must be a fixed reasonable time limit for the decision of the film censors, and
4. final appeal in the process should lie to the court of law and not to the central government.

Hidayatullah, C.J., who delivered the judgment dispensed with the latter two contentions because the Solicitor General conceded their validity and assured the court that the government would take step to effectuate these policies at the earliest.

After delineating the history, organization, procedure and substantive rules of film censorship in India, the Chief Justice went on the consider the central issue of whether pre-censorship of films was a valid constitutional restraint on freedom of speech and expression. To this end, his lordship established two premises which foreordained the courts conclusion that pre-censorship of film is constitutionally permissible.

First : He pointed out that such prior restraints are not qualitatively different from another forms of censorship, the only distinction being the stage at which the state imposes its regulations between the individual and his freedom.

[49] *Supra*, note 47.

Secondly: He held that motion pictures, because of their unique ability to portray realism and arouse the senses, must be treated on a different footing from other forms of art and expressions.

Thus, his lordship observed:

> "…the art of cameraman with trick photography, vista vision and three dimensional representation……..has made the cinema picture more true to life than even the theatre or…… any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect practically on children and adolescent is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in picture and try to emulate or imitate what they have seen…… It is for this reason that motion pictures must be regarded differently from other forms of speech and expression."[50]

On the basis of these reasons, the learned Chief Justice concluded that classification of films, prior to their exhibition into "U" and "A" categories is not an unreasonable restriction within the dictates of the Constitution. It is to be noticed that by assuming that precensorship is merely an aspect of censorship in general and films are subject to different and by implication more rigorous scrutiny than other medium of expression, the court narrowed the issues to one more readily resolvable: whether films require any censorship at all.[51]

In this regard, Hidayatullah, C.J., gave a cursory review of the major U.S. Supreme Court decisions on freedom of speech and expression and film censorship and a brief summary of recent British obscenity law. He concluded that minority opinion expounded by Black and Douglas, J.J., i.e., that film censorship of any nature is constitutionally impermissible is in applicable to Indian experience because unlike the first amendment of U.S. Constitution which guarantees the right of freedom of speech and expression in absolute terms, Article 19(2) of the Indian Constitution, clearly envisages legitimate

[50] *Id*, at 489.

[51] B.M. Boyd : Film Censorship in India. A reasonable restriction on freedom of speech and expression, J.I.L.I. 1972 (523).

restrictions on this right.[52] Such restriction in the interest of decency and morality are justified, he adds in a philosophical note, because in general, the "social interest of the people override individual freedom".[53]

He further added:

> "Whether we regard the state as the *parenpatriae* or as guardian and promoter of general welfare, we have to concede that these restrains on the liberty may be justified by their absolute necessity and clear purpose……. The larger interest of the community require the formulation of policies and regulations to combat at dishonesty, corruption, gambling, vice another things of immoral tendency and things which affect the security of the state and the preservation of public order and tranquility."[54]

The learned Chief Justice, then, proceeded to consider the petitioner's next argument that the substantive censorship rules are unconstitutional for being vague. Holding that 'void for vagueness' doctrine is wholly inapplicable to the litigation involving an enforcement of one of the fundamental rights,[55]Hidayatullah, C.J., followed an intermediate approach, noting:

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[52]*Supra*, note 47 at 494. Douglas, J., himself recognized this position where he stated in *Kingsley Intt Picture Corp*. v.*Regents* that if we had a provision in our constitution for 'reasonable' regulation of the Press, such as India has included in her, there would be room for argument that censorship in the interest of morality would be punished, (1959) 360 SC, 648 (concurring opinion). In the K.A. Abbas case, the Supreme Court however seems to have correctly observed that despite its absolute working of the first amendment, the U.S., Constitution has long attempted to read the words 'reasonable restriction' or something very much like that into the Amendment.

[53]*Supra*, note 47 at 495.

[54]*Id*.

[55]In doing so the court appears to have overruled *Amritsar* v. *State of Punjab*, (AIR, 1969 SC 1100) which held that while a law may be declared invalid by the courts on the ground that it was ultravires the legislatures or infriage upon a fundamental right, it may not be so invalidated on the ground that it is vague or offends some motion of due process. The *Amritsar* case however, may have been an exceptional case outside the mainstream of Indian jurisprudential thought because it is clear that legislation had

> "The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction that construction which accords best with the intention of the legislature is to be preferred."[56]

He further added:

> "Where however the law admits of no such construction and persons applying it are in a boundless sea of uncertainty and the law primafacie takes away a guaranteed freedom, the law must be held to offend the constitution…….. This is not the application of the doctrine of due process, the invalidity arises from the probability of the misuse of law to the detriment of individual."[57]

Based on this standard, Hidayatullah, C.J., declared the general principles of the censorship directions, being merely a restatement of Article 19(2) of the Constitution, could not be said to be impermissibly vague. The application of the general principle, however, presented more of a problem. In adjudging whether these directions were unconstitutionally vague, the court formulated one ancillary test to the "boundless sea of uncertainty" standard. The words used are "within the common understanding of the average man."[58] In applying the test Hidayatullah, C.J., said "if the average man can understand the meaning of 'rape' set down in the Penal code, he can doubtless comprehend the meaning of expression such as "sedition", "immoral traffic" in woman, "soliciting prostitution or procuration""indicate sexual situation", "suggestive of immorality", seences, "traffic and use of drugs", "class hatred", and "blackmail associated with immorality". He further said, "If the average man can understand such term, then a fortiori the members of the censorship board would comprehend the nuances of these expressions." Hence it could be said,

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been declared void for vaguness previously. See e.g.*State of M.P*. v. *Baldeo pd*. AIR 1961 SC. 48.

[56]*Supra*, note 47 at 496.

[57]*Id*.

[58]*Id*. at 497.

Hidayatullah, C.J., held that such rules or directions are not unconstitutionally void on account of vagueness.

Despite the above assurances, Hidayatullah, C.J., declined to endow the code with its complete impremature of approval. Rather as the learned Chief Justice noted:

What appears to us to be the real flaw in the scheme of the directions is a total absence of any direction which would tend to preserve art and promote it. The artistic appeal or presentation of an episode robs it of its vulgarity and harm and this appears to be completely forgotten. Artistic and inartistic presentations are treated alike and also what may be socially good and useful and what may not.[59]

These observations show the concern of the learned Chief Justice for the preservation of an artist's freedom and creativity. It is submitted that though they may sound extraneous to the legal issues involved, they doubtless lay down valid guidelines for further censorial policy.

Conclusion

While considering a volatic constitutional issue by way of first impression, opinion of Justice Hidayatullah, provides that degree of penetration and lucid analysis which is essential for the development of sound constitutional doctrine in the area of civil liberty and fundamental rights. His opinions taken together constitute a tract for our times. His powerful and fertile opinions afford to contemporary Indians ‘a guide to the perplexed’ in the human battle ground between the liberty and authority.

[59] *Id.*