

## A Tribute to Mohammad Hidayatullah

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## A TRIBUTE TO MOHAMMAD HIDAYATULLAH

**My Own Boswell: Memoirs of M. Hidayatullah.** MOHAMMAD HIDAYATULLAH. AB/9 Safdarjang Enclave, New Delhi, 110016, India: Gulab Vazirani for Arnold-Heinemann Publishers (India) Pvt. Limited, 1980. Pp. viii, 304 (including Appendices and Index). 85.00 Rupees (cloth).

*Bertram F. Willcox\**

Judge Mohammad Hidayatullah lectured at the Cornell Law School in 1975. I believe it was during that visit that he noticed, in our library, and liked, Oliver Wendell Holmes's subtitle to the *Autocrat of the Breakfast Table*: "Every Man His Own Boswell." He adapted it, with a bow to Dr. Holmes, as the title for what was to become his autobiography.

For anyone wanting an introduction to the legal world of India—its atmosphere and its ways—or wanting a vividly readable and entertaining account of the life of a great judge and quiet statesman, there could be no more pleasant recommendation than reading these *Memoirs*. The author is outstanding in that legal world, genial and friendly and easy, but a benevolently powerful jurist nonetheless. He has been advocate; Government Pleader; law faculty member; law dean; Advocate General; High Court Judge and Chief Justice; Supreme Court Judge and Chief Justice of India; Acting President of India; and is now (since the book) the Vice President of India.

Although his life's work lay chiefly in Indian law, Mr. Hidayatullah has also been actively involved in international law as a member of the International Law Association, the Executive Council of the World Assembly of Judges, the International Commission of Jurists, and finally, through his association with World Peace Through World Law. Indeed, any jurist of Mr.

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Hidayatullah's scholarly bent, grappling with the complex warp and woof of Indian laws—British common law, statutes, customary, religious, and tribal laws—must work daily in what is almost an international law to itself. His judgments (we call them opinions in Anglo-American legal discourse) are constantly enriched by comparative references to the laws of many nations.

The *Memoirs* do not purport, of course, to expound the substance or sources of Indian or other laws. Nor do they discuss at any length India's history or its political problems.<sup>1</sup> In the *Memoirs*, Mr. Hidayatullah looks back from his seventies, and tells his story in a kaleidoscopic whirl of short, good-humored chapters that leave the reader somewhat breathless. The book is highly readable, with bits of intense drama, triumphs, defeats and misadventures that at times become hilarious—all recounted with good-natured gusto. Mr. Hidayatullah's wry, mischievous humor sparkles on many pages. There are occasional spots of hard going, particularly in the discussions of points of law where the author too easily assumes his reader's familiarity with the cases and personalities mentioned. But most of the book is filled with the excitement, rivalries, failures and accomplishments of the legal world of India, a system bequeathed by British rulers and forced to adapt itself to the needs of India's vast ethnic diversity and the concomitant legal complexities.

After completing his education at Trinity College, Cambridge, Mr. Hidayatullah returned to India to start practice as an advocate (barrister) in his native Nagpur, in 1930. The rigid British distinction between solicitors who deal with clients and barristers who represent clients in litigation before the court, however, does not hold very generally in India. Another difference between practice in India and practice in the United States is that law firms are scarce in India. Hence, Mr. Hidayatullah began his practice in a manner analogous to that of a new law graduate in the United States who hangs out a shingle and tries to make himself or herself as attractive as possible to clients. His early emphasis was on criminal law. Although this was less remunerative than civil law—his first year's fees totaled fifty rupees—criminal cases brought a quicker recognition to the fledgling lawyer.

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1. Mr. Hidayatullah's other writings range widely, and provide commentary on a variety of such issues. See *A JUDGE'S MISCELLANY, Third Series* (1982); *A JUDGE'S MISCELLANY, Second Series* (1979); *A JUDGE'S MISCELLANY, First Series* (1972); *THE CONSTITUTION: THE PARLIAMENT AND THE COURT* (1972); *JUDICIAL METHODS* (1970); *MULLA'S MOHOMEDAN LAW 16th, 17th, and 18th Editions* (M. Hidayatullah ed. 1968, 1972, 1977); *THE SOUTH-WEST AFRICA CASE* (1967); and *DEMOCRACY IN INDIA AND THE JUDICIAL PROCESS* (1966). At present, he is Editor-in-Chief of a series of volumes on Indian law along the lines of HALISBURY'S LAWS OF ENGLAND, the first volume being on Indian constitutional law.

One of his early cases smacks of Perry Mason.<sup>2</sup> The client was charged with having killed a pedestrian while driving on a lonely road. The truth was that the client had seen a body lying on the road, and had stopped his car to provide assistance. The pedestrian was already dead. A Police Inspector, arriving at that moment, arrested the client in the belief that his car had killed the victim.

Mr. Hidayatullah found no marks, nor any blood, on the client's car. But he did find a piece of glass near the body, curved and large, as if broken from the headlight of a bus or truck. The driver of the offending vehicle had obviously gathered up the other pieces, but had missed this one.

The nearest place for a headlight repair was Kamptee, a mile away and accessible only via a small road and a guarded bridge closed to trucks. The bridge watchman informed Mr. Hidayatullah that a green truck had recently defied him by crossing that bridge without permission. Getting the addresses of all motor-repair garages in Kamptee, Mr. Hidayatullah struck pay dirt at his first stop. The operator's bill-book yielded "the name of the driver (false) and the number of the truck (true)." The real offender was arrested, and the charge against the accused was dismissed.

Mr. Hidayatullah obviously studied hard in preparing his early cases. And he must have studied people as well as books. In one case, a railway clerk had, on May 19th (i.e., during one of the hottest parts of the Indian year), stolen one bottle of beer from a shipment.<sup>3</sup> He had been sentenced to a long prison term—a sentence that would also cost him his job and his employment benefits. Mr. Hidayatullah was to argue the appeal before a very stern British judge, temperamental and crotchety and made more irritable by his detestation of India's heat. The hearing was purposefully arranged by Mr. Hidayatullah for the 19th of May, the anniversary of the crime. The court room had no air-conditioning, and was sweltering as the trial began. The judge commented that "Breaking bulk is a serious matter." Mr. Hidayatullah noted that it was a hot day, and that "Come to think of it the offense was last year on the 19th May." The judge ruminated unhappily, and "kept repeating—It must have been a hot day. . . ." As Mr. Hidayatullah relates the story, the judge, quite transparently, was thinking how good that bottle of beer would have tasted on such a day. Then suddenly the judge asked whether a fine of 1000 rupees would do—the day, and the job, were saved.

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2. M. HIDAYATULLAH, *MY OWN BOSWELL: MEMOIRS OF M. HIDAYATULLAH* 92-94 (1980) (hereinafter cited as *Memoirs*).

3. *Id.* at 74-75.

In several of the cases recounted by Mr. Hidayatullah, legal skills were complemented by incredible strokes of luck—luck that makes one wonder whether it could have been pure blind chance.<sup>4</sup> In one of these,<sup>5</sup> he was representing his own uncle, very nervously. Opposing counsel was the most successful and the most feared of the local practitioners. True to form, this antagonist produced a totally unanticipated point of law, and supported it with a Calcutta ruling. The presiding judge remarked that this point would be decisive unless Mr. Hidayatullah could answer it. Mr. Hidayatullah begged the court to proceed with the rest of the argument, and promised to give a convincing reply thereafter, or to concede. The judge agreed, stipulating that the reply should take no more than five minutes. At intermission Mr. Hidayatullah rushed to the library. Colleagues had mentioned to him a certain Privy Council case at a certain page in a certain volume of the India Appeals “as possibly furnishing a reply.” By mistake, in his haste, he pulled out the wrong volume of the Privy Council reports. “Believe it or not, I found at the page mentioned by them a Privy Council case which was on all fours and furnished a complete answer. The Calcutta case had not noticed it and had taken a contrary view.” He sent this volume to the clerk. When the court reassembled, the presiding judge asked for the promised answer. Mr. Hidayatullah said he would surrender three of his five minutes, asking only that the court read two paragraphs of the Privy Council case. “Have you seen this case?” the judge asked opposing counsel. “I have seen it now” was the reply, “and have nothing further to say.”<sup>6</sup>

In addition to his practice as a rising young lawyer, Mr. Hidayatullah became, after only four years at the Bar, a part-time lecturer in law at Nagpur University. He continued in this post for eight years (1934-1942). Law teaching in India was modeled on the British system, consisting mainly of uninterrupted lectures, followed by examinations. The “Socratic” or discussion method, which we in the United States tend to think of as superior, was not used in India for another quarter century. From our viewpoint, it seems surprising that so many eminent practitioners and judges have been so well-

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4. See, e.g., A. KOESTLER, *ROOTS OF COINCIDENCE* (1972).

5. *Memoirs*, *supra* note 2, at 81-82.

6. *Id.* at 82. Mr. Hidayatullah’s accounts of his many legal battles, and my own recollections of Indian law and law teaching as I touched them in the 1960’s, spotlight one major practical difference between legal research in India and the United States—the inadequacy, by our standards, of India’s library facilities. The refined tools for finding and tracing points of law, to which we have grown accustomed in the United States, were either rudimentary or non-existent in India. The high quality of the best Indian legal research and writing is truly remarkable when one considers the paucity of the facilities in so many Indian law libraries.

trained by the British system, not only in India, but also in the rest of the British Empire. Perhaps we legal educators should be less adamant in our allegiance to the Socratic method in view of those successes.

As Mr. Hidayatullah gained more recognition, he shifted his emphasis to appellate work. He soon became, in spite of his youth, a recognized leader of the Bar, and, as such, he was drawn into public service. In 1942, he was appointed Government Pleader, but this work lasted only nine months before he was made Advocate General of the Province.

Among the exciting and important cases which he handled as Advocate General, there was one that arose out of a series of riots during which the Treasuries of several Provincial Governments were looted.<sup>7</sup> The Reserve Bank of India claimed that the Provincial Governments, as bailees, were responsible for the loss of any of the Reserve Bank's currency deposited with the Provincial Treasuries. All the other Provincial Advocates General who were involved conceded the Reserve Bank's claim. Mr. Hidayatullah, however, did not concede. The case went to arbitration at Dehli. Exhaustive study, completed only on the Delhi train, had combed the law of bailments through Roman Law, Storey, Jones, as well as decided cases as far back as *Coggs v. Bernard*.<sup>8</sup> Mr. Hidayatullah and his associates triumphantly overwhelmed the arguments of the over-confident lawyers for the Reserve Bank, those based on absolute liability as well as those based on negligence. The hopeless case had been won! This victory naturally added to Mr. Hidayatullah's national recognition.

After three years as Advocate General, Mr. Hidayatullah became a Judge of the High Court at Nagpur for eight years (1946-1954), and later its Chief Justice for two more years (1954-1956). Madhya Pradesh, having become a State upon India's Independence, was "vivisected" in 1956. Its administration was divided between three cities, and the High Court was moved to Jabalpur.

In 1958, Mr. Hidayatullah was surprised by a telephone call from the Chief Justice of India, asking him to come to Dehli as a Judge on the Supreme Court. Mr. Hidayatullah accepted the invitation, and within one week took his oath of office. He was a member of the Supreme Court for over twelve years, and for the last two years of his tenure (1968-70) was India's Chief Justice.

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7. *Memoirs, supra* note 2, at 111-16.

8. 92 Eng. Rep. 107 (K.B. 1703).

For thirty-five days during his Chief Justiceship, in 1969, he was also the acting President of India. This came about because the revered President Zakir Husain had died, and the Vice President, V. V. Giri, had resigned in order to contest a forthcoming election for the Presidency. Under Indian law, the Chief Justice was the next to assume the office. After completing his temporary term as President, Mr. Hidayatullah returned to his position as Chief Justice of India. In late 1970, upon reaching the mandatory retirement age (65), he retired from the Supreme Court.

To attempt a survey of Mr. Hidayatullah's great Supreme Court cases would make this review too long and, in any case, would be beyond my competence. I shall make a brief exception, however, for what may be his most famous decision. It is certainly one of worldwide importance for all nations living under constitutional governments, and also one, perhaps, that may flash a warning to us.

A written constitution, of course, incorporates a society's agreement on the why and how of government, stating objectives, apportioning powers, and setting forth procedures. The Indian Constitution (1949)<sup>9</sup> may be the world's longest and most intricate. It was well researched and crafted, in general, by the Constituent Assembly, but it suffered from one disastrous weakness: an apparent invitation to hasty and misguided amendment. The Preamble to the Constitution stresses its purpose of bringing justice, liberty and equality to India,<sup>10</sup> and a later part contains a bill of Fundamental Rights that are protected by a power of the Supreme Court to annul any law that infringes upon those rights.<sup>11</sup> There also is a list of humane Directive Principles which are not justiciable.<sup>12</sup>

The founding fathers evidently believed that the Federal (bicameral) Parliament could be trusted with constituent power to amend the Constitution. All that is required by the express language of the Constitution is that a bill be passed in each House by the normal voting majority—except that that majority must be not less than two-thirds of the total membership of that House—and that the amendment be approved by the President. In those cases affecting the judiciary or the States, however, one-half of the States must also ratify the amendment.

Through this hole in the dikes, amendments immediately commenced to pour. Most of these amendments attacked and reversed particular interpretations of the Constitution by the

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9. For the text of and amendments to the Indian Constitution, see VII Constitutions of the Countries of the World, India, 1-207 (A. Blaustein and G. Flanz eds. 1981).

10. *Id.* at 1.

11. *Id.* arts. 12-35, at 4-15.

12. *Id.* arts. 36-51, at 15-18.

Supreme Court. This flood continued for the better part of two decades. With sparse dissents from Judge Hidayatullah and one other Supreme Court Judge, the Court sanctioned these legislative efforts, regardless of subject matter and in spite of the havoc some wrought with the Constitution's carefully designed fabric.

Then, in 1967, came the case of *Golaknath v. State of Punjab*.<sup>13</sup> A Special Bench of eleven Supreme Court Judges sat for this case. Five agreed with the earlier cases upholding all amendments; five others disagreed, the opinion being written by Chief Justice Subba Rao. Judge Hidayatullah concurred with Subba Rao, in a separate opinion,<sup>14</sup> thus exercising a swing vote in a decision which has been momentous for India's constitutional history and for her future prospects.

The six prevailing judges argued that although the article concerning amendments set forth the *procedure* which must be followed for a valid amendment, it did not thereby confer a plenary *power* to amend in any way and on any and all subjects. Consequently, mere compliance with proper procedures would not make valid an amendment that conflicted with other clauses or with the spirit of the Constitution.

In a long and scholarly opinion, Judge Hidayatullah traced the history of India's nationalist movement since 1885, and showed that it had been a struggle throughout for human rights, a struggle not against British rulers alone but against all oppressors and all oppressions. Mr. Hidayatullah relied heavily upon the views of Jawaharlal Nehru in his discussion. Constitutions of many nations came under an intensive review, including our own nation's document which makes ill-considered amendments reasonably difficult to enact,<sup>15</sup> as well as the evanescent British Constitution which has no document but derives stability from the immemorial customs sanctified by centuries. Each of these constitutions, however, as Mr. Hidayatullah pointed out, was a unique document which could be properly understood only upon an historical examination of the milieu in which each document was forged.

In India, in the light of such an examination, the Fundamental Rights emerge as paramount, even transcendent. Judge Hidayatullah regretted that the Fundamental Right involved in *Golaknath* happened to be a property right, because he thought that

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13. 1967 A.I.R. (S.C.) 1643, [1967] 2 S.C.R. 762.

14. [1967] 2 S.C.R. at 855.

15. For a masterful study of limits on substantive amendments to the United States Constitution under Article V, see Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717-33 (1981).

property rights should never have been included in the list.<sup>16</sup> But the list had to be accepted in its entirety. The main thrust of the list was in harmony with the unanimous Declaration of Human Rights by the General Assembly of the United Nations, issued just before the establishment of India's independence. Such rights, Judge Hidayatullah reasoned, could not be abridged, even by a unanimous vote in both Houses, because the Indian Parliament has no *constituent* power to rewrite or alter the very Constitution by and under which Parliament is constituted. Viewing the Constitution, then, in its totality, as forbidding changes in the Fundamental Rights (other than the few changes expressly permitted by certain constitutional clauses), the statement in the article on amendments<sup>17</sup> must be read as including an implied condition that the amendment does not violate the letter or spirit of the Indian Constitution.

As for the earlier amendments which had been wrongly adopted, Judge Hidayatullah did not now impugn their validity, because they had been so long and so confidently accepted. He was apparently recognizing what British constitutional lawyers must believe; namely, that the legitimation of legal rules is largely a function of societal recognition of those rules as proper guides for conduct.

The Twenty-fourth Amendment (1971) purported to reverse the holding of *Golaknath* that no Fundamental Right could be infringed by a law of Parliament. Two years after that amendment, however, the Supreme Court, while agreeing that the Fundamental Rights were not sacrosanct, simultaneously rescued and enormously broadened *Golaknath*. In *Kesavananda Bharati v. State of Kerala*,<sup>18</sup> the Court announced, seven votes to six, a broader, though much vaguer, test: no constitutional amendment can be validly made which alters the "basic structure" of the Constitution.

In 1975, early in Mrs. Gandhi's term as Prime Minister, the Thirty-ninth Amendment sought to withdraw litigation over the validity of her election as Prime Minister from the jurisdiction of the Supreme Court. The Court decided, on the facts, that the election was valid, but elaborating on the holding in *Kesavananda*, it

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16. One should recall our own courts' struggles with the property aspects of "due process of law." It may be interesting to note that in the recent preparation of Canada's *Constitution Act* 1982, attempts to insert an explicit protection for property rights failed. The question remains, however, whether such protection is implied. See A. Aggarwal, *Fundamental Rights in the New Canadian Constitution: A Charter of New Hopes and New Directions* 23-28 and n.58 (Confederation College, Thunder Bay, Ontario, Canada 1982) (unpublish manuscript, available in office of Cornell International Law Journal).

17. Namely, that mere adherence to the stipulated procedures would produce valid amendments to the Constitution.

18. 1973 A.I.R. (S.C.) 1461, [1973] Supp. S.C.R. 1.

nonetheless rejected the amendment.<sup>19</sup>

The Forty-second Amendment (1976) was a drastic and sweeping attempt to revise the Constitution so as to strengthen Mrs. Gandhi's rule. The battered Constitution was partially resuscitated by the Forty-third (1977) and Forty-fourth (1978) Amendments, as Mrs. Gandhi temporarily fell from power.<sup>20</sup> But the amendments continue, and they purport to deny the courts the power to question and limit the legislature, and the courts continue to assert their constitutional power to do so. Although the depredations and the tug-of-war probably will continue, I suggest that the power of the courts to review such legislation will prevail over these efforts to limit the proper constitutional role of the judiciary.

I hope, fervently, that the people of India may some day win to the vision held out to them by the "sublime part" of the Constitution.<sup>21</sup> The Indian people are not docile, and they know what they want. Admittedly, they are a diverse and inconstant people, forty percent illiterate and caste- and tradition-ridden, and yet they have confounded their skeptics again and again with their commitment to a democratic rule of law. The Thirty-ninth and Forty-second Amendments have certainly demonstrated that Mr. Hidayatullah's fears regarding an unrestricted Parliamentary power to amend the Constitution were not hobgoblins, but were fears well-founded. One can only hope that Mr. Hidayatullah's views concerning constitutional change will receive the continued support of the Indian people and Parliament.<sup>22</sup>

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19. *Indira Nehru Gandhi v. Raj Narain*, 1975 A.I.R. (S.C.) 229; [1976] 2 S.C.R. 347.

20. *See, e.g.*, K.P. CHAKRAVARTI, *THE CONSTITUTION OF INDIA; ANALYSIS AND INTERPRETATION* 498-99 (1980).

21. *Id.* at 21-23. Mr. Chakaravarti thus characterizes the Preamble, the Fundamental Rights, and the Directive Principles, provisions promoting secularism, establishing a socialistic pattern of society, and fostering respect for international law and order.

22. In the United States, we are better protected from hasty amendments to our Constitution than are the Indian people. *See, e.g.*, Linder, *supra* note 15. But we are not immune from such actions, and pressures appear to be mounting on a variety of fronts. For example, the Congress has considered spending less money for the protection of constitutional rights. It also has considered limiting the jurisdiction of the lower federal courts. I suspect that our courts would hold such efforts invalid, because inaction, of course, can be as unconstitutional as proscribed action, *e.g.*, the discriminatory nonadmission of a student to a college. If these legislative actions ever occur, the basic reasoning of Judge Hidayatullah's pioneering opinion in *Golaknath* may prove to be as helpful to us as it has been to India.

