BOOK REVIEWS

JUDICIAL STRICTURES: LIBERTY OF JUDICIAL EXPRESSION AND RESTRAINT (2001). BY T. N. Arora. Universal Law Publishing Company Pvt. Ltd. Pp. ix-xxxv + 180.

IT IS, indeed, a pleasure to review this wise book by a distinguished student, now holding a privileged position in the Supreme Court of India, which gives him, as it were, a ringside view of apex adjudicative process.

Dr. Arora addresses, in considerable depth, and from perspectives of comparative jurisprudence, a much-neglected dimension of judicial process and power. He brings to full view the wealth of discourse in the common law world, including the United States. This book should be compulsory reading for all Indian adjudicators and the Indian judicial academies, as well as the law schools, will find here excellent pedagogic material. This slender but significant volume amply explores comparative discourse concerning judicial power and responsibility in the exercise of adjudicatory liberty of expression.

Because the practice is so commonplace, judicial strictures are usually regarded as unproblematic. I sought to probelmatize the province and function of strictures as follows:[1]

> A stricture is the signature of disapproval and dissent. It is also a summons to constitutionally becoming behaviour. A stricture is not a sentence and yet enjoys the fecundity of a sanction. It stigmatizes without conviction... The activist judicial discourse symbolizes the slings and arrows of an outrageous fortune.

The author agrees with this view-point (p.30.) However, this provides an insufficient point of departure for him. It is the point of departure that matters, no matter the point of arrival.

Dr. Arora is concerned with the career and the future of judicial strictures. He invites us to understand the jurisprudence of strictures not just in terms of the canons of political correctness of judicial utterances. He enunciates the inherence of strictures in the realm of the freedom of speech and expression of judges, both *on* and *off* the bench. The underlying notion here is that of justices as citizens, possessed of rights as markers of citizenship. Jurisprudence of strictures becomes, on this perspective, not just a discourse of power but of rights of citizen-justices.

This raises at least several significant questions. First, are these 'rights' more or less compared with the rights of co-citizens? Second,

1. U.Baxi, "Judicial Discourse: Dialectics of the Face and the Mask" 35 *JILI* 10 (1993)

what jural relations are created by judicial strictures? May we describe them merely as right/duty or a privilege/no-right jural relation or as power coupled with immunity or coupled with duty (in a strict Hohfeldian sense)? Third, may incumbent justices have a less constrained order of rights to free speech and expression, when performing off the bench? Are justices *qua* citizens entitled to the same order of free speech off the bench as other citizens? Fifth, may 'fraternal' criticism of brother justices amount to 'strictures'? Sixth, what remedies other than expunction may be available for strictures? Though not so formulated, these questions form the central concerns of the book under review. The reviewer considers below only a few salient questions.

The first question invites several analytical and policy responses. Analytically, if we characterize (and therefore concede) a right to issue strictures, there arises a corresponding duty for strictures-recipients to respect the exercise of the right. If we conceive issuance of judicial strictures as a privilege, then 'no-right' (in the difficult Hohfeldian sense) of stricture-recipients may be 'violated'. If we were to conceive a power coupled with privilege, then co-citizen stricture – recipients remain liable. Put another way, these may not have any remedy. The remedy of seeking expunction of strictures by way of judicial review merely express a power coupled with privilege; justices are under no duty to expunge strictures; at best they may be said to be under a duty to hear grounds on which expunction is sought. And this duty corresponds to article 32 fundamental rights of Indian citizens (and other persons) to 'move' the Supreme Court. The same result ensures on a framework of power coupled with immunity.

If we ground the source of these jural relations in citizens' rights, then many questions concerning limits of the rights arise. Parliament has the power under article 19 to impose by law reasonable restrictions on citizens' rights. The broad idea here is that Parliament ought to have the power to enact laws that mediate conflicts of rights. If one has privacy or reputation rights, it would be reasonable for legislature to protect these, in ways that maximally respect freedom of speech and expression. Of course, the Indian Constitution goes beyond this and provides the security of state, including friendly relations with foreign states, as grounds that may be invoked for limiting rights to freedom of speech and expression. There is much that can be said against this power to censorship. The reviewer regards these grounds wholly unconstitutional. But a review article is scarcely the place to explore this important terrain.

The relevant issue here is this: if the right to issue strictures is an aspect of the right to free speech and expression, it remains analytically open to imposition of reasonable restrictions by law. An ordinary citizen remains liable to action in libel or contempt proceedings for acts of expression amounting to citizen strictures against co-citizens, including judicial co-citizens. This must logically remain so, were we to ground

judicial strictures as an aspect of their right to free speech and expression. On this view, even the statutory immunity, during and even after their tenure, of justices from civil and criminal action becomes problematic, even unconstitutional.

Any reason restriction regime on judicial utterances is an anathema to the doctrine of independence of judiciary, now firmly enshrined by the Supreme Court's affirmation of judicial review as being an essential feature of the basic structure of the Indian Constitution, beyond the reach of the amending power under article 368. The reviewer is not, of course, advocating any such regime. But the mere raising this question suffices to displace the learned author's attempt to ground strictures as an aspect of citizen-justices right to freedom of speech and expression. This freedom has its source elsewhere. One may locate this in a functional way (as Dr. Arora, in the main, does): justices may not effectively discharge their role-obligations in legal, constitutional, culture that restricts their free speech in judicial discourse, just as legislators may not, unless armed with parliamentary privileges. One may argue on the grounds of comity: the law of contempt may not reach legislative discussion on the conduct of justices and the law of legislative privileges may not (save in the rarest of rare situations) attract judicial review. Such acts in institutional deference is what governance is all about, even when this leaves citizens somewhat shortchanged! One may (as Dr. Arora does) invoke 'good faith' tradition in the doing of justice to justify strictures: after all, strictures are not routine but exceptional (though what makes this learned work possible is the ubiquity of strictures jurisprudence).

The point remains: there is no way in which we may ground the power to issue strictures as a right of citizen – justices and there is no way in which it can be grounded at all. The functional, comity, and good faith grounds do not justify outcomes where judicial stricture – recipients remain liable without redress (save that of discretionary power of expunction.) There is no way other than the acceptance of the brutal institutional fact that stricture-issuing justices exercise power of free speech not readily available to co-citizens.

This is not to say that the jurisprudence of strictures may not re-emerge through the Hohfeldian kaleidoscope of schema of jural relationships, as power coupled with immunity. Viewed thus, 'pious' exhortative discourse concerning the practical wisdom concerning stricture jurisprudence (both as the case law and doctrinal evaluation) becomes irrelevant. Concern for the institutional integrity of the judiciary may fashion practices of self-regulation among the justices. Dr. Arora's work is immensely valuable within this framework, because it provides discursive 'raw materials' for reflexive analysis. But justices, in the long haul, do not convert episodic bouts of self-restraint into any meaningful social mutation either of their powers or of immunities.

Reverting to the problem of defining (or describing) reasonable limits of the power to issue strictures, the author's general approach is clear enough: judicial free speech should be subject to 'minimal impairment' and restraint should be exercised 'for the most part in relatively light and informal manner' (p.12). In hierarchical judicial cultures, this mode is especially important, as otherwise regulation of issuance of strictures by courts of lesser jurisdictions may result in proliferation of strictures by the courts at the upper reaches of the hierarchy. These later, of course, retain the sovereign prerogative to issue their own strictures, in the course of expunging the original ones. Dr. Arora urges, generally, that justices ought to observe judicial and constitutional self-restraint in 'review' situations as well as in 'original' jurisdiction.

> But as he himself demonstrates in chapter 2, the Indian practice does provide *embarrassment de riches*, unconstrained by the proposed norms of rectitude. Increasingly, justices make sharp and sweeping generalizations concerning political, and at times, even judicial actors. The latter do not have much scope for reasoned response, when courts of superior jurisdiction issue strictures against them. In contrast, political actors raise hue and cry in legislatures against judicial strictures against the venality of political power. Since under the Constitution, justices may rarely be said to commit breach of parliamentary privilege, they have the option to ignore the political furore or to sculpt, through jurisprudence of strictures permissible restraints on the freedom of judicial expression. At the end of the day, the preferred modes of judicial response vary contextually and remained anchored in the sovereign prerogative justicing.

Off the bench utterances by incumbent justices raise a whole *cornucopia* of questions, well addressed, in the Indian judicial, and juridical contexts. The issue here is complex, indeed. As *citizens*, justices, *off* the bench, remain entitled, as other co-citizens, to freely articulate their views concerning the state of adjudication and the state of the 'Nation'. When retired (non-incumbent) justices do so, they ought to remain free as *citizens* to their utterances, on the performances of their erstwhile and future brethren. This freedom may not, perhaps, extend to a public sharing of judicial going – ones. By this the reviewer means, the former judicial actors sharing, as it were, their 'carnal' knowledge of the judicial power; that is the trade offs (fraternal\ideological) in reaching specific judicial results\outcomes.

Judicial self-restraint, as Dr. Arora seems to urge, is not just a function of construction of judicial role-obligations. True, judicial bloodletting off the bench, nefarious during the Chandrachud-Bhagwati

era[2], where a sitting justice of the Supreme Court 'attacked' off bench an incumbent brother judge, is unedifying and violates in its core sense the notion of institutional fraternity. Outside such tempestuous contexts, however, the role-obligations of a judge vary enormously. But while these may be regarded as unusual occurrences in the Indian judicial culture, a sampling of the everyday vitriolic prose of the American Supreme Court justices (most notably Justice Scalia[3]) enables us to grasp the fact that only role-obligations that justices may recognize are ones they create themselves!

More often, Indian judicial strictures are altruistic. Dr. Arora details in chapter 7 the categories of these constitutionally hapless beings, upon whom the full force of judicial invective is regularly visited. How are we to judge this visitation of just constitutional fury? Dr. Arora's canons of self-restraint are indeed wise; but they are unlikely to abate the riot of strictures, in a contemporary judicial culture where justices assume God-like omniscient, omnipotent attributes to carry, institutionally, single handed the majestic burdens of good governance and re-democratization of Indian practices of politics. I am not wholly sure that the jurisprudence of 'Angry Old Men' (with apologies to minuscule Indian women justices!) is at all misplaced in the present Indian conjuncture although the reviewer repudiates any version of the judicial divine right to rule.

Put differently, no 'jurisprudence' concerning strictures may be put to work in the absence of an articulate understanding of social theory of power and resistance. Dr. Arora remains aware of this problem (chapters 6 and 7). But given his worldview (one that regards judicial strictures as an institutional and normative discourse, rather than one of domination and resistance) and given his position (as an official of the Supreme Court of India), his reticence in coping with the social context of anti-social practices\pathologies of Indian governance, administration, and politics is understandable. Although he does not frame it this way, the jurisprudence of strictures has less to do with judicial role and a whole lot more with the *politics of adjudicative desire.* Theories concerning the judicial process remain impoverished when they over-rationalize the role of judicial reason. Passion guides articulation of juridical and judicial discontent as much as reason. If we were to develop an adequate theory about constitutional adjudicative passion, we would come closer to sources of judicial rage and rhetoric manifest in the normative\institutional discourse concerning 'judicial strictures'. The American judicial civility codes (p. 132) may prove most helpful in the current Indian context, which border on anarchy. But judicial self-regulation in India on such

2 See, U Baxi "Judicial Terrorism: Some Reflections on Justice Tulzapurkar's Pune Speech" 40-41 *Mainstream*

matters seems to be already a lost cause. The reviewer sincerely hopes that his prognosis is utterly misplaced.

Chapter 8 indeed provides the wherewithal for future reasoned discourse, in raising the issue of the 'liability' for 'unwarranted' judicial strictures that stigmatize, even penalize, stricture-recipients. The rationale for 'absolute' immunity for justices at work has a crucial bearing on our cherished dogma of the independence of judiciary. At the same time, judicial words that weld a society into a rule of law polity summon respect for judicial utterances that wound, often mortally, conscientious co-citizens. Dr. Arora is right to contest the viewpoint that insists in on a 'derationization of absolute judicial immunity' a view that justifies absolute freedom for a 'judicial officer to be free to act on his convictions, without personal consequences to himself (p.173.) Accordingly, he would perforate the judicial power to the extent of providing a regime of liability for negligent or *mala fide* strictures. The difficulty, as he well realizes, lies (outside the benign goodwill of justices) in the proof of such averments. Dr. Arora, at the end of the day, counsels judicial self-restraint.

The *talismanic* quality should, in an ideal world solve all our problems. But it falls short in the non-ideal world. What in this world would approximate co-citizen redress against judicial malice? One way would be to empower stricture recipients to agitate expunction. But this does not remedy (as the author himself acknowledges) strictures that live on in public memory, like Justice A.N. Mulla's characterization of the Indian police as a lawless uniformed group, or of corruption reaching the shores of judicial performance. Such strictures, even when expunged, serve as repositories of social memories that stigmatize, beyond redress, entire processes of legal interpretation and enforcement. Are these to be viewed as democratic resources or as group libel? If the latter, may be the structuring justices be held accountable? And, how may we structure this and in what precise ways, consistent with the doctrine of free speech of adjudicators and the independences of judiciary?

This issue becomes aggravated in two situations: [1] when incumbent justices may be said to issue strictures against their brethren and [2] when retired justices castigate their erstwhile brethren. As to [1], should co-structuring brethren be subject, howsoever, to contempt proceedings? This issue assumes a complex character in the Indian jurisprudence. The Supreme Court of India in *Antulay*, rather dubiously, held that a constitutional bench violated the petitioners' right to fair trial under article 21 of the Constitution[4]. The best argument for such judicial feat is

3 See generally, Edward Lazarus, *Closed Chambers The Rise, Fall, and the Future of the Modern Supreme Court* (1990; New York, Penguin Books)

4. See, Upendra Baxi, *Liberty and Corruption The Antulay Case and Beyond'* (1990, Lucknow, The Eastern Book Co.).

provided by the politics of judicial desire to 'do complete justice' under article 142 of the Constitution. But there is nothing in the text or intendment of the Constitution that remotely suggests that [a] this power may be hierarchically exercised, so that the court sitting in benches of three or five justices may not seek to achieve 'complete justice' against the opinion\decision of a larger bench and [b] the latter is immune from contempt proceedings by their overruled brethren, publicly held as constitutionally defective to protect and promote fundamental rights. The argument from institutional integrity applies co-equally to both these situations, scarcely justifying the immunity of *contumacious* larger benches.

Retired justices, often in an *après moi, deluge genre,* critique apex judicial performance. Justice P.N. Bhagwati, rightly condemned in the national press, the Supreme Court Bhopal performance. And Justice Krishna Iyer is a folk hero for the missiles fired, with deadly accuracy, from Ernakulam, that hit the soft underbelly of apex adjudicatory performances in New Delhi. Incumbent justices have turned the other cheek, and sometimes chosen to respond (as did Justice O. Chinnappa Reddy to Justice Hidyatuallh's sharp critique of 'public interest litigation'). The question of limits on free speech rights of superannuated citizen – justices is thus conveniently *Narmada* case, among others, reveals in fullness.

This inequality of deference (or incomplete plain words, hostile discrimination) is undemocratic and calls for a more even handed judicial policy.

The reviewer believes that Dr. Arora's work will gain in significance when read in the context of equality of esteem for all co-citizens' free speech rights.

Whatever be the authorial intention, and our deference to it, the book under review highlights pathologies of judicial power and culture in India, unredeemed by appeals to judicial restraint. If canons of judicial restraint were firmly in place, there would be scarcely any need for their poignant re-articulation, with which this book is replete. The point of this review is to suggest, despite an earlier concession to the contrary, that there is no way in which they could be put firmly in place in a judicial world where justices remain figures of power, unbounded by common ties of co-citizenship.

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