



4-1-2024

Slipping into Judicial Barbarism?

Pranav Verma

Follow this and additional works at: https://repository.nls.ac.in/nls_articles



Part of the [Courts Commons](#), and the [Legal History Commons](#)

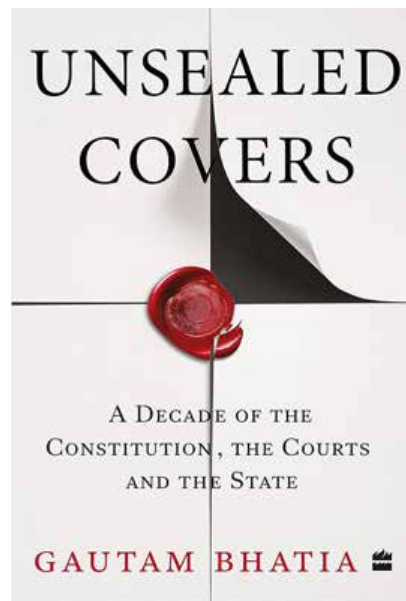
Judicial barbarism', is how political commentator Pratap Bhanu Mehta described, in a recent editorial, what the Supreme Court of India has been slipping into¹. The term, in his understanding, is characterised by "an overwhelming appearance of arbitrariness in judicial decision-making", translating into thin protection of civil liberties. Judicial processes are reduced to stamps of legitimisation of executive excesses, and the law becomes an instrument aiding and abetting oppression. This bleak diagnosis of an institution that is meant to be the last resort for every citizen foregrounds much of what Gautam Bhatia offers in *Unsealed Covers*.

Bhatia presents a collection of his blog posts between 2014-2024, arranged thematically, to offer us a snapshot of the Indian judiciary in this decade. It presents a measure of the health of the judiciary, through the metrics of consistency in adjudication and its role in standing up for civil liberties, in the face of a majority government and a brute executive. Throughout the chapters, one can't help but notice the presence of strong symptoms of judicial barbarism. The collection reveals a judiciary that has been inconsistent in the legal rationale supporting its decisions, and often seen as favouring the executive, with deleterious consequences for individual rights.

In Part One (Rights), Bhatia covers a range of chapters such as on personal liberty (bail hearings under the Unlawful Activities Prevention Act, 1967 or UAPA); privacy, equality, and dignity; social justice and reservations; socio-economic rights; rights of refugees and non-citizens; and the judicial treatment of rights claims from post-370 Kashmir. The UAPA is designed as a legislation that makes bail nearly impossible, by reversing the presumption of innocence. This is hardwired into the design of the law, and yet, Bhatia highlights, judges choosing to protect civil liberties have been able to do so within the confines of UAPA through constructive interpretation. Of course, judges whom Lord Atkin would describe as 'more executive minded than the executive', chose to narrowly interpret UAPA and keep personal liberty at the back foot. This has especially been the case where the law was invoked against citizens critical of the government.

The element of uncertainty in how a judge interprets a statute is not unique to UAPA alone. Disparate interpretations and orders in judgements concerning the right to privacy, reservations, housing rights, etc. mark the chapters in this section. In most cases, the courts favoured the executive, choosing to side with a rights-restricted view of the law, and in others, it couldn't consistently wade through the maze of its own contradicting precedents. For instance, in the chapter on reservations, Bhatia argues that inconsistent treatment of reservations can be traced to competing visions within judicial precedents about reservations as a tool to achieve equality. While that explains the labyrinth of precedents on reservations, often pulling in different directions, this could have been better situated in the larger context of judicial discretion. If a judge has precedent to draw on both ways between competing visions

Slipping into judicial barbarism?



Unsealed Covers: A Decade of the Constitution, the Courts and the State

By Gautam Bhatia

HarperCollins Publisher India, 2023, 473 pp., Rs 699

ISBN 978-93-5699-363-1

PRANAV VERMA

of equality, does their own view on reservations get guided meaningfully? Or, does it encourage them to judge by predisposition and personal inclinations, with judicial precedents being available for such views on both sides? To not highlight why internal tensions within judicial precedent have a direct bearing on the breadth

of discretion available to a judge in advancing their own predilections, is a missed opportunity.

Bhatia doesn't mince words in terming the Supreme Court 'Orwellian' for ignoring the evidence of 'eyes and ears' in dealing with petitioners knocking its doors when the State used demolition of their houses as reprisals

against protests. Its lukewarm response without meaningful directions to ensure accountability encouraged the State to continue its resort to illegal demolitions to single out protestors and members of minority communities in such reprisals. The Court ends up abetting the illegal executive action through its failure to hold the State accountable for these demolitions, sticking with Mehta's diagnosis of judicial barbarism. The Court's orders in National Register of Citizens (NRC) and other refugee-claim cases further saw it align with the ideological projects of the executive, even if at the cost of international law principles of non-refoulement.

The transformation into an executive court is complete in the post-370 Kashmir, where Bhatia highlights judicial deference in Anuradha Bhasin's case, where its order resembled a Home Ministry directive than a judicial pronouncement, coupled with the ushering in of the 'sealed cover' jurisprudence which turned settled principles of both law of evidence and judicial reasoning on its head. Any court watcher would share in Bhatia's frustration of well-reasoned and rights-expanding High Court judgements being stayed by the Supreme Court through poorly reasoned orders.

In Part II, Bhatia clubs his essays within the theme of 'Constitutional Structure', including chapters on federalism, anti-defection, and fourth branch institutions. The Delhi Government-LG dispute and the de-operationalisation of Article 370 stand out as crucial essays under federalism. The Court stands up to the executive and the Union Government in giving primacy within the constitutional scheme pertaining to the NCT of Delhi, to its elected government. It is not, however, without prevarication when a subsequent two-judge Bench splits over services. To its credit, however, the Court stands up to the Union again in the second Constitution Bench case handing over control of services to the elected government, even as the Union Parliament has now sought to overturn its decision with a challenge to such move pending. Bhatia focuses only on the first Constitution Bench case and not the subsequent two cases dealing with services. A look at all three cases – the first Constitution Bench giving primacy to the elected government, the second two-Judge Bench case splitting over services, and the third Constitution Bench case handing services to the elected government but only to be overruled by Parliament – together present the complete picture of the contestation between the powers that be in NCT of Delhi. That entire picture is not painted in the collection of essays in this book.

Even as the Court stands up for electoral representation in the Delhi Government vs Lieutenant Governor dispute almost consistently, it does a volte-face on Article 370. In its judgement which came after Bhatia's book, it holds in favour of incredible powers to the President, leaving open room for the President to unilaterally alter the status of a State when its assembly is suspended. Judicial uncertainty is, after all, a hallmark of judicial barbarism, but Bhatia does more and places this uncertainty in the deeper institutional context of a polyvocal court.

There is perhaps another context

●

Even as Bhatia rightly presents a Court that largely rules in favour of a strong executive on sensitive matters, what explains the occasional anti-government rulings which receive encomiums from those holding out hope for an independent judiciary? Take the recent pronouncements in the electoral bonds and the Chandigarh mayoral elections cases. Pratap Bhanu Mehta argues that the latter "victories" might be part of careful calculations to maintain the court's public standing of independence, but he warns that welcome as these individual victories are, "they ought not to merely be an episodic legitimisation of the façade of constitutionalism. They need to be part of a pattern that challenges the consolidation of authoritarianism and communalism wherever it matters". The lack of that pattern defines judicial barbarism of this decade, and it would have been useful for the book to not just highlight the inconsistencies in the court's legal rationale across cases, but also situate such contradictions in the context of the "episodic legitimisation" of constitutionalism

to situate these uncertainties which doesn't explicitly emerge from this book. Even as he rightly presents a Court that largely rules in favour of a strong executive on sensitive matters, what explains the occasional anti-government rulings which receive encomiums from those holding out hope for an independent judiciary? Take the recent pronouncements in the electoral bonds and the Chandigarh mayoral elections cases. Mehta argues that the latter "victories" might be part of careful calculations to maintain the court's public standing of independence, but he warns that welcome as these individual victories are, "they ought not to merely be an episodic legitimisation of the façade of constitutionalism. They need to be part of a pattern that challenges the consolidation of authoritarianism and communalism wherever it matters"². The lack of that pattern defines judicial barbarism of this decade, and it would have been useful for the book to not just highlight the inconsistencies in the court's legal rationale across cases, but also situate such contradictions in the context of the 'episodic legitimisation' of constitutionalism.

Bhatia's account of the state of the Indian judiciary puts its finger on the nerve in the final part of the book on the larger theme of courts. He presents accounts of judicial evasion in both adjudication and protection of rights on its judicial side (demonstrated through cases such as Aadhar hearings and Demonetisation); and on the administrative side by Chief Justices in listing – or not listing at all – important matters for hearing and deciding which judge decides what matters. This part of the book brings into sharp focus the unbridled powers of the Chief Justice of India as the master of the roster, and the impact of this seemingly administrative power on judicial outcomes. It covers an eclectic range of themes — from the court's response to the rights claims during the pandemic, and accounts of individual Judges and Chief Justices and the contested legacies they left behind.

Unsealed Covers is an overview of a beleaguered Indian judiciary in the face of a strong and assertive executive, and a comment on how the court fairs on several metrics during these contestations. The book, however, remains largely a collection of the author's previously published posts that are freely accessed on his blog. Bhatia, however, justifies the anthology's utility as "over time, patterns emerge" when the essays are read together. Each section of essays is preceded by a very brief introductory paragraph which does not necessarily do the job of contextualising what follows too well. In these, Bhatia does not always spell out the patterns he sees in the chapters which follow, apart from what the individual chapters argue in response to specific judicial orders or particular judgements. That lack of contextualisation remains the Achille's heel of an otherwise comprehensive account of the choices made – or not made – by our courts in responding to a strong executive in this decade. ■

REFERENCES

1. Pratap Bhanu Mehta: 'SC was never perfect, but the signs are that it is slipping into judicial barbarism', *Indian Express*, 18 November 2020.
2. Pratap Bhanu Mehta: 'On recent Supreme Court verdicts, hold the celebrations', *Indian Express*, 23 February 2024.