

Now rulers are free to elect their people

Supreme Court's order on SIR has laid the ground not just for the eventual deletion of nearly 10 crore voters through the country without any amendment in the Constitution, law or even rules

Yogendra Yadav



The ECI, and now by implication the BJP, is free to exclude anyone or any section of people from the voters' list. Bertolt Brecht had foreseen it — instead of the people electing their rulers, now the rulers are free to elect their people. (Illustration: C R Sasikumar)

The Supreme Court judgment in the ADR case is to our times what the ADM Jabalpur case was to the Emergency. To this day we do not know why some of the best legal minds of that time signed on an order that extinguished the citizen's right to life. What mattered was not the intention behind the judgment, but the signal that everyone read in it: The doors of the Supreme Court were shut for the rest of the Emergency.

That's the true significance of the Supreme Court's order on the SIR. It's not just that the Court has signed on the largest ever disenfranchisement in an electoral democracy. Not just that the order has "declined to name those bearing its costs, declined to reckon with who was excluded and what that exclusion meant", something Rudraksh Lakra's insightful legal scrutiny calls "the sin at the heart of this judgment". Above all, the ADR judgment will be remembered as the moment when the doors to the guardian of the Constitution were perceived to have closed for any attempt to seek lawful remedies in a "politically sensitive" matter.

While hearing the arguments in this case, Justice Joymala Bagchi observed that the “Court does not operate in a vacuum”. He was referring to what the Court perceived as the absence of popular protest against the SIR exclusions during the Bihar election. That momentary acknowledgment of the larger truth outside the courtroom that frames judicial proceedings helps us understand what else the Court could have noticed. It could have noticed a strange rush to carry out the SIR just before the elections the ruling party was desperate to win. It could have remembered its own remarks on how the government had dodged the Supreme Court to make appointments to the Election Commission. It could have noted the brazenly partisan conduct of the Chief Election Commissioner and the jugalbandi between the BJP and the ECI. It did not. On the contrary, the Court extended credulity, indeed deference, to this institution precisely when the ECI’s credibility is at its lowest.

Indeed, the Court did not operate in a vacuum. Therefore, you could be forgiven for reading a chilling signal into this order: Once the regime puts its foot down on any matter, shutters are down for constitutional remedies in the courts. You still have to approach the courts for emergency relief like bail. And hope you are lucky with the bench. You can still look for an occasional stirring judgment on matters of low salience to the present dispensation. But you would be naive to expect judicial checks on democratic dismantling. As during the Emergency, the apex judiciary has abdicated its constitutional responsibility at a moment when the republic needed it most.

The real signal was not just in the Court’s validation of the SIR exercise. As many commentators have pointed out, that was a *fait accompli*. The case was effectively decided when the Court allowed the ECI to rush through the Bihar elections and then proceed with the second and then the third phase of the SIR. Any remaining doubt disappeared when CJI Surya Kant warned everyone against obstructing the SIR and finally when Justice Bagchi asked the 27 lakh voters excluded in West Bengal to wait for the next election. So, no one expected the court to nullify the SIR. Yet the order was crucial to see if there were any ifs and buts, any safeguards, any mandatory SOPs, any concessions to the crores of persons excluded from the voters’ list. Eventually, there were none. This silence rings loud in the present judgment.

The real signal was in the Court’s willingness to suspend disbelief. The SIR faced a fatal legal flaw, as it did not follow any of the established procedures laid down by the law, the rules and the ECI’s own Manual on Electoral Rolls. Faced with this challenge, the ECI used a disingenuous, hyper-technical argument that it could invoke an exceptional clause that allowed it to deviate from standard procedures to address an extraordinary situation in a constituency or part of one. In a staggering display of credulity, the Court allowed this exceptional measure to be generalised, a provision meant for a constituency to be applied to the entire country, and for routine factors like migration and urbanisation to pass off as good reasons for an extraordinary remedy. The Court’s order outdid the ECI’s own pleading in taking an elephant through the needle’s eye.

The real signal was in what Vasudev Devadasan calls the Court’s “post-hoc rationalisation” in an order that “rests on misstated doctrine, avoidance of binding precedents, and outright denial of logic and facts”. Some of these facts were pretty stark. That the SIR would eventually delete about 10 crore persons from the existing voters’ list. That this massive pruning did not fit with the official data on the adult population. That the SIR brought down almost everywhere the already poor gender ratio in the voters’ list. That the post-SIR voters’ list in Bihar contained as many, if not more, inaccuracies, gibberish names and duplication as the list it sought to revise. Not a word about these inconvenient facts in the judgment.

The real signal was in the Court's refusal to constrain the ECI from curating the voters' list any which way. While upholding the SIR, the least the Court could have done was to make some procedures, from within the ECI's existing Manual on Electoral Rolls, mandatory. It could have stipulated a time-window when the SIR could not be carried out. It could have laid down a protocol for verification of documents. It could have provided a path for rectification of errors where existing voters were wrongfully excluded from the draft electoral rolls. It could have insisted on transparency, on public hearing, on publication of machine-readable lists at every stage of the SIR. It could have asked for the number of deletions of "illegal foreigners". All of this was in line with the norms the ECI had evolved over the last 75 years, which the SIR bypassed. Instead, the Court offered a blank, undated cheque to the ECI. The two orders touted as relief — access to courts for those wrongfully deleted and reference to competent authorities for those deleted on suspicion of being foreign nationals — are either harmless reiteration of existing law or a dangerous descent into a witch hunt.

This order has laid the ground not just for the eventual deletion of nearly 10 crore voters across the country without any amendment to the Constitution, law or even rules. It provides the toolkit needed to overturn the foundational principle of representative democracy. The ECI, and now by implication the BJP, is free to exclude anyone or any section of people from the voters' list. Bertolt Brecht had foreseen it — instead of the people electing their rulers, now the rulers are free to elect their people.

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