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What the SIR Case says about the Supreme Court

By: Gautam Bhatia

The Supreme Court's ruling upholding the SIR crystallises key trends in contemporary constitutional adjudication: judicial evasion, executive constitutionalism, disregard of precedent through stealth, and "Franken constitutionalism"-an unaccountable process that is given blanket judicial imprimatur.

The 10-month long proceedings before the Supreme Court, involving the constitutional challenge to the Special Intensive Revision (SIR) of the electoral rolls in multiple Indian states, eventually ended with the Court [upholding](#) both the powers of the Election Commission of India (ECI) to conduct an SIR, as well as much of the manner in which it was done.

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While analyses of the SIR decision have focused on its cumulative effect-that of [mass disenfranchisement](#) and [precarity](#)-these legal proceedings also crystallised many of the elements of the present-day Supreme Court's approach to constitutional adjudication. At the time of writing, people whose names are not in the SIR face the threat of having their welfare support withdrawn, leading to possible destitution.

This essay will briefly discuss some of these elements, and how-in the SIR case-they came together to ensure that an unaccountable process, with far-reaching impact on people's rights, was given blanket judicial imprimatur. These elements are, in turn, judicial evasion, executive constitutionalism, disregard of precedent through stealth, and Frankenstein constitutionalism. I consider each in turn.

Escape by Judicial Evasion

I have previously defined [judicial evasion](#) as the Court "deciding by not deciding". Judicial evasion refers to a situation where, in a case where time is of the essence, the Court fails to return a verdict within a timeframe for it to actually make a difference. Judicial evasion is not neutral, because it entrenches and reifies the status quo and, therefore, benefits the party that, in turn, is benefiting from the status quo.

In cases where the Court does not grant a stay upon state action-which is most cases involving constitutional challenges-this, evidently, directly favours the executive. In some cases, the effects of judicial evasion go further. A *fait accompli* is created which cannot be undone, turning the eventual decision into a post-facto ratification of what are now facts on the ground.

In the last decade, most significant constitutional challenges before the Supreme Court have been met with judicial evasion. The most famous example is the Aadhaar challenge. Aadhaar was first challenged in 2012. It took six years for the Court to finally hear the case.

In the intervening period, ambiguous interim orders were passed that were then sketchily enforced, leading to contempt applications, which were not heard. A reference went up to a nine-judge bench to decide whether privacy was a fundamental right, causing a two-year delay. By the time the Court heard the case, Aadhaar had been made de facto mandatory for most of the population, and an entire infrastructure had been established that would, by that time, have become virtually impossible to dismantle.

The Court's eventual decision upholding the basics of the Aadhaar programme, thus, was an inevitability. Something similar happened with the abrogation of Article 370, where the Court evaded hearing the matter for more than four years after the events of 5 August 2019. On a smaller constitutional scale, judicial evasion resulted in multiple habeas corpus applications following 5 August 2019 becoming effectually infructuous. Similarly, the decision striking down the electoral bonds scheme came after six years, by which time extensive money had been collected and two general elections had taken place. Examples could be multiplied.

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The SIR case is a classic case of judicial evasion. The initial challenge was filed in early July, well before the forthcoming elections in Bihar, and involved the Bihar elections. The Court [refused to decide the case](#)-or issue any interim orders-and eventually, the Bihar elections took place.

The question then arises what the Court was doing during these many months, with several hearings conducted. It is this that brings us to the second element in our discussion, which is executive constitutionalism. Broadly speaking, executive constitutionalism refers to a situation where the Court speaks in the language and grammar of the executive, and begins to visualise-and internalise-its own functions through the lens of the executive.

I have elsewhere [noted](#) a corollary of judicial evasion, which is the Supreme Court's refusal not only to decide a matter in time, but also to have a substantive hearing on the question of stay, and to pass a reasoned judgment on whether or not a case has been made out for stay pending final adjudication. However, even after the Bihar election, there was no substantive judgment.

Meanwhile, the SIR process commenced for multiple other states, including West Bengal (where it was specifically contentious), Tamil Nadu, Kerala, and Pondicherry. It was only after the elections in these states had been completed that a judgment was finally delivered by the Supreme Court, legally upholding what had already been done.

Mantle of Executive Constitutionalism

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The origins of executive constitutionalism lie in the rise of public interest litigation in the 1980s, where state inaction was a ground-and trigger-for seeking judicial intervention. The Court responded to state and executive inaction by occupying the ground that the executive was supposed to occupy, and fashioning increasingly complex remedies that [blurred the line between judicial decisions and administrative supervision](#). At the time, these actions were justified-both by the Court and by [scholars](#)-as "necessary" in order to compensate for a vacuum in governance.

Tracing the causal line between the rise of public interest litigation and modern-day executive constitutionalism a few decades on is too great a task for this essay. But there can be little doubt that the judicial takeover of executive functions has its origins there. Initially, the Court saw its role as stepping in for executive failure, whereas now it often sees its role as executive validation. The issue, though, is less about the specific nature of these cases, and more to do with the nature of the powers the Court has become accustomed to using, and the language it has become accustomed to speaking while using them.

More importantly, the more the Court acts like the executive, the more problematic it becomes, because it is essentially the first and final tribunal.

In brief, the problem lies in the fact that over the years, this form of executive constitutionalism is no longer visualised as simply complementing the Court's primary role of being a constitutional adjudicator, but is treated as a parallel form of adjudication. Going further, it is now treated as the Court's primary form of adjudication, taking the place of assessing and judicially reviewing questions of constitutionality.

Once again, Aadhaar is a classic example of this, where the Court spent years debating, expanding, and contracting lists of what Aadhaar could be made mandatory for, over the course of multiple hearings, instead of hearing and deciding the constitutional question. Indeed, it was almost as if the administrative wrangles over what Aadhaar could be made mandatory for was the real issue, and not the constitutional challenge itself.

The SIR case presents a classic example of this phenomenon. As [multiple commentators](#) have written, even as the Court refused to hear and adjudicate the constitutional issue, it embarked on an increasingly complicated set of administrative manoeuvres to deal with the actual fallout of the SIR. While it began straightforwardly enough with the question of whether or not Aadhaar could be admitted as a document in the SIR (something that, itself, took up multiple hearings and extensive wrangling), it ended with the Supreme Court setting up an entire administrative machinery from scratch.

In West Bengal, it set up an entire system of appellate tribunals, to be staffed by judicial officers (many of whom were conscripted from nearby states), which would hear the cases of people who had been excluded from the SIR. Notably, these tribunals were entirely the creation of the Supreme Court out of thin air. They were also, evidently, cosmetic. When the West Bengal elections came about, only a minuscule percentage of people actually had had their appeals decided (and an overwhelming number had been simply left in limbo, unable to vote, newly precarious).

Executive constitutionalism is perilous for democratic constitutionalism. Creating an entire adjudicatory machinery is emphatically not the province of the Court. More importantly, the more the Court acts like the executive, the more problematic it becomes, because it is essentially the first and final tribunal.

At the heart of a constitutional democracy is a system of checks and balances where, for example, executive action can be reviewed by Courts for constitutionality. However, from the decisions of the Court itself, there is no appeal. Thus, when the Court blurs its functions into that of the executive, there is a frightening concentration of power that defeats one of the pillars of constitutional democracy.

In the SIR case, executive constitutionalism was compounded by executive language. During oral hearings, the Court aggressively told the petitioners that nothing would stop the SIR from going ahead, thus suggesting that it saw its primary role not as adjudicating and reviewing the constitutionality of the SIR, but as responsible for its efficient implementation. Thus, we are back to the blurring of executive and judicial functions, which raises serious questions for constitutionalism.

Bypassing Doctrine of Precedent

In a common law legal system—that India inherited at the time of Independence—one of the most important constraints on unchecked judicial discretion (and, thereby, a constraint on political control of the judiciary) is the doctrine of precedent. Previous decisions of the Court are binding on future benches of coordinate or smaller sizes, and if the court wishes to depart from precedent, it must either distinguish it, or—through a fairly onerous process—refer it to a larger bench for reconsideration.

The polyvocal character of the Indian Supreme Court—where panels of two judges sit for the most part, out of a total strength of 38—has meant that for a while now, the gravitational force of precedent has weakened. Of late, however, it has been seen that often, courts simply ignore inconvenient precedent, rather than taking the trouble to distinguish or refer it.

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The SIR case demonstrated two clear examples of this. One of the key questions in the case was whether the Election Commission had the power to order sweeping, wholesale revisions of the electoral rolls. The text of the Representation of People Act appeared to suggest that the purpose of revision was to deal with errors or problems that had crept into voter rolls in specific areas.

More importantly, in a case called *Lal Babu Hussein & Others vs Electoral Registration Officer & Others*, the Supreme Court had previously held that it could not simply be assumed—without probable cause—that the citizenship status or elector status of an entire area was doubtful, and that entire area was required to prove its citizenship (the Court in *Lal Babu Hussein* was particularly aware of the fact that such a power could be easily used to stereotype).

The SIR represented exactly the kind of exercise that *Lal Babu Hussein* had proscribed. Without probable cause—and without any cause that it could satisfactorily explain—the Election Commission had compelled entire states to undergo the SIR. The only basis for this could be a generalised “jurisdiction of suspicion”, where now every individual from those states was, by default, deemed to be outside the electoral rolls unless they could prove, afresh, that they belonged.

This flipped the normative script entirely, from a default position of revising the rolls if there was probable cause in a given, localised area, to compelling everyone to prove, with documentary evidence, that they belonged. The logic of such a position was irreconcilable with *Lal Babu Hussein*, but the Court simply ignored this inconsistency.

A second, critical issue was that of discrimination. In recent years, the Indian Supreme Court has purportedly evolved its discrimination and equality jurisprudence to take into account indirect and intersectional discrimination. That is, discrimination that is the result of rules that might be neutral in their wording, but have a different impact on communities due to existing material circumstances.

For example, in decriminalising same-sex relations, the Supreme Court went beyond the neutral language of Section 377 of the Indian Penal Code (that only referred to certain "acts"), and examined its impact upon already vulnerable and marginalised people. Similar analysis can also be found in its judgments decriminalising adultery and-most significantly-in the Court's [judgment](#) invalidating policies in the army that had the effect of denying permanent commissions to women officers.

In the SIR case, it was argued in some detail that the documentary requirements had a discriminatory effect, specifically along caste and gender lines, as one's access to documents is mediated through these lenses of identity. However, as with *Lal Babu Hussein*, the SIR court did not even attempt to analyse the question of indirect discrimination and what role it might play in the constitutional enquiry. Both precedent and doctrine were simply ignored and treated as irrelevant.

Frankenstein's Monster

Finally, the siloed approach of the Supreme Court in the SIR case reflects what I have referred to elsewhere as "Franken constitutionalism". The concept is inspired by the term "Frankenstate", coined by the political scientist Kim Lane Scheppele.

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The Frankenstate refers to a constitutional arrangement whose individual parts might be unexceptionable, but which, when combined, make up Frankenstein's monster. Scheppele takes the example of Germany's Weimar Constitution, and its provisions regarding emergency powers and dissolution of Parliament.

Under the Weimar Constitution, the president had the power to dissolve the assembly in case of a deadlock (Article 25). The President also had the power to pass emergency decrees, subject to a parliamentary veto (Article 48). Individually, these provisions might be unexceptionable. However, when they were combined, the president could first dissolve the assembly and then pass decrees with no parliament to veto them-effectively sanctioning the use of dictatorial powers within the constitutional scheme.

How does Franken constitutionalism apply to the SIR case? To understand this, we must look at a parallel set of proceedings. In 2023, in *Anup Baranwal vs Union of India*, the Supreme Court held that the independence of the Election Commission was a part of the basic structure of the Constitution. Until such time as Parliament passed a law securing independence through a statute, the Supreme Court set out an "interim arrangement", whereby a committee comprising the prime minister, the leader of the opposition, and the chief justice would appoint election commissioners.

This interim arrangement never took effect. Parliament did enact a law, not to secure the independence of the Election Commission, but to place it even more firmly under executive control. It stipulated a committee consisting of the prime minister, a minister nominated by the prime minister, and the leader of the opposition would select election commissioners. In this context, it is also important to note that under Indian constitutional structures, Parliament is entirely subordinate to the executive.

As I have written [elsewhere](#), a combination of the anti-defection law and the absence of any internal checks on the executive mean that the prospect of Parliament ever defeating an executive-sponsored legislative bill, under conditions involving a majority or close-to-majority party, is non-existent.

Summing up

When we think of the SIR, therefore, we cannot think of it in isolation. We must understand it as emanating from a body that is structurally under executive control-and continues to be so by virtue of judicial evasion when it comes to hearing the constitutional challenge to the law regulating its composition. It is this body, then, that conducts and oversees a process with deep political consequences.

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The absence of considering this design issue in the SIR judgment is an instance of Franken constitutionalism: the Court considers issues in silos, with the SIR challenge and the challenge to the appointment of the Election Commissioners coming under formally separate

legal proceedings. But the very act of splitting up these proceedings means that the linkages between them-which is what effectively leads to Franken constitutionalism-are ignored.

To sum up, then, the SIR case is at the confluence of a number of modern-day judicial trends in India. These include judicial evasion, executive constitutionalism, stealth overruling, and Franken constitutionalism. Elements of these have been present in separate cases, but it is SIR that allows us to consider them as a totality, and as characteristic of the contemporary Supreme Court of India.

Gautam Bhatia is a Delhi-based constitutional lawyer and writer, who has authored The Indian Constitution: Conversations with Power (HarperCollins, 2025) and The Sentence (Westland 2024).