

AN EXAMINATION OF THE EXECUTIVE TOOLS USED TO INFLUENCE
JUDICIAL APPOINTMENTS TO THE SUPREME COURT OF INDIA AND THE
HIGH COURTS IN THE CONTEXT OF THE INDIAN EMERGENCY (1975-77)

A Thesis

Presented to the Faculty of the Graduate School
of Cornell University

In Partial Fulfillment of the Requirements for the Degree of
Master of Arts in Asian Studies

by

Jeh Rustam Gagrat

August 2019

© 2019 Jeh Rustam Gagrat

ABSTRACT

This thesis is an examination of the executive tools used to influence judicial appointments in the context of the Indian Emergency. The executive used tools such as the Supersession, punitive transfers and the non-confirmation of additional judges to influence judicial appointments during this period. This strategy was politically motivated in line with the executive establishing its control over the judiciary and thereby creating a 'committed judiciary' that would be sympathetic to executive policy. This process influenced judicial judgments in which executive interests were at stake in their favor, thereby enabling them to perpetuate the executive to exert control over the government.

BIOGRAPHICAL SKETCH

Jeh Rustam Gagrat is a 24-year old candidate for the Masters of Arts in Asian Studies (South-Asia concentration) program at Cornell University. His research interests include legal reform and judicial politics in India.

To Mum and Dad, without whose constant support none of this would have been possible.

To Professor Durba Ghosh for her constant advice and mentoring in her capacity as my graduate advisor in the MA program.

To Abhinav Chandrachud and his contribution to an understanding of the process of judicial appointments in India and without whose intellectual inspiration this project would not be a reality.

To Jehangir Gagrati, Nani Palkhivala, H.M. Seervai and all the other lawyers and members of the Indian judiciary who fought for judicial independence in one of the most uncertain times in post-independent Indian memory.

ACKNOWLEDGMENTS

My interest in this subject arose after reading Abhinav Chandrachud's book, *Supreme Whispers* and in particular its section on executive tools to influence judicial appointments in the context of the Indian Emergency. After consulting my advisor, Professor Durba Ghosh and seeking her guidance on this topic, the idea became clearer and it emerged first in the form of an annotated bibliography and later in the form of chapters and this thesis. I would like to express my eternal gratitude to Professor Ghosh for her support, encouragement, belief and invaluable comments throughout this project. This would not have been a reality without her constant mentorship over the course of my graduate degree. I also thank her for being invaluable in the process of reviewing and editing this thesis. I would like to also thank Professor Daniel Gold for his review of my thesis and assistance in improving on the thesis. I also owe a special debt to Mr. Chandrachud for his discussing the ideas with me and suggesting refinements to my work and most importantly for his contribution to this field as the inspiration behind this project. Finally, none of this could be a reality without my parents and their motivation in helping me get through this project and aiding me with getting several of the books that I have needed for this project.

TABLE OF CONTENTS

1. Introduction 4-14
2. The Supersession of Judges 15-40
3. Transfers and Non-Confirmation of Additional Judges 41-60
4. Conclusion 61-69
5. References 70-71

Introduction

In 2015, the conflict between the executive and the judicial branches of Indian government reached a pinnacle with the proposal for the establishment of the National Judicial Appointments Commission (NJAC) that would be responsible for the appointment and transfer of judges to the Supreme Court of India (SCI) as well as the High Courts of India. This would have replaced the collegium system of judicial appointments that is currently in place for judicial appointments to the higher judiciary in India and further devolved power in the judicial appointment process from being a decision that solely relies on senior members of the judiciary to one that would include members of the Law ministry as well as plausibly other member of the executive. Most significantly, in the *Fourth Judges*¹ case by a four to one majority, the Supreme Court deemed the NJAC unconstitutional and upheld the collegium system. The result of this outcome was executive interference in the form of the current executive, the National Democratic Alliance (NDA), disregarding recommendations made by the SCI collegium to the executive for elevation to the SCI. The rationale offered to disregard such recommendations seems weak at best and will be considered in more detail in the conclusion of this thesis. In understanding the pattern of executive interference in judicial appointments it becomes prudent to return to the past and consider the most compelling instance of such interference which arguably marks the very inception of executive interference in judicial appointments.

The inspiration behind writing this thesis is tied to my own professional goal of acting as an agent of legal reform in India. This desire stemmed from my own opinion

¹Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.

of the legal profession's deterioration due to a variety of factors. One of the factors that stood out the most to me was executive interference in the judiciary. It then became my goal to return to the period surrounding the Emergency and consider that in an already highly politicized period, how was the judiciary and that independent branch of government compromised as it came under the influence of executive interference. This is one of the central concepts that I have sought to explore in my thesis as limited by the scope that I have attached to it.

I will consider executive interference in terms of the executive tools used by the Indira Gandhi government (i.e. political strategies that were enacted through highly legalistic instruments in the judicial appointments process). The executive tools that this thesis will consider chronologically are: judicial supersession, punitive transfers and non-confirmation of additional judges in the context of the period prior to, during and after the Indian Emergency. A consideration of such tools destabilizes the way one traditionally considers the Emergency; effectively my argument could make the case that there were signs of an Emergency prior to its formal enactment and that some of the undue executive influence continued even after the Emergency upon Ms. Gandhi's return to power in early 1980.

The first executive tool, judicial supersession is the manner by which the executive rather than observing the 'seniority norm' that governed judicial elevations to the post of Chief Justice of India at the time, superseded the three seniormost judges of the court and instead selected their favored candidate, Justice A. N. Ray for politically motivated reasons as will be demonstrated in the thesis. The second executive tool, punitive transfers was that significantly in the 1970s judge were transferred from their

respective high court to another high court for nothing more than defending political opponents of the Gandhi government in judicial decisions and releasing them from preventive detention. It is significant that this marked a departure since neither were the transferred judges were never allowed to express their judicial consent to the transfer nor was there any significant reason cited in justifying their judicial transfers. The punitive transfers and the threat they posed to judges in the context of the Emergency constituted a significant challenge to undermine judicial independence. The third executive tool, non-confirmation of additional judges was implemented when the executive did not confirm the appointment of additional judges of the high courts (i.e. those judges who were additionally appointed to deal with the heavy volume of work in the court) as puisne judges of these courts. Instead their tenure as additional judges was increased for very short periods of time as a result of their judicial decisions that were against executive interests. It is thus in an examination of the most significant instance of executive interference that one can appreciate the reduced levels of interference today, while also understanding that conflicts between the executive and judiciary in India with respect to judicial appointments possess a legal and historical precedent.

In 1973, Justice Ajit Nath Ray, the fourth seniormost puisne judge of the Supreme Court was appointed to the post of Chief Justice of the Supreme Court of India in violation of the seniority norm. He was elevated to a post over Justices Shelat, Grover and Hegde due to undue executive influence that was used in his promotion. This executive tool also known as judicial supersession marked a watershed moment in Indian judicial politics. Since India's independence in 1947, the government has been comprised of three branches: the judicial, the legislature, and the executive. Each branch

is expected to function autonomously and without interference from the other two branches. In India, the Indira Gandhi governmental efforts to control the appointments made to the judiciary are noteworthy because they enabled her and the executive to maintain their dominance during one of the most infamous and highly politicized periods in Indian independent history, the Indian Emergency. The Indian Emergency is notorious because Indira Gandhi maintained her position as prime minister by curbing elections, suspending citizens fundamental rights, quashing the 'rule of law' as it was understood in India and by imprisoning most opponents to her political regime through the use of legal acts such as the Maintenance of Internal Security Act (MISA) and the Defence of India Act (DIR). This 21-month period from 25 June, 1975 to 21 March, 1977 was officially sanctioned by the President Fakhruddin Ali Ahmed under Article 352 of the Indian Constitution in the interests of alleged disturbances within the country. While there are several executive tools that were used to establish dominance during this period, this thesis will only consider the executive tools that were used to influence the appointments of the judiciary in the context of the Indian Emergency. The broad argument that will carry across both chapters of the thesis is that executive tools (such as Supersession of judges, punitive transfers of judges and the non-confirmation of additional judges) were used to pack the courts with judges who were compliant with executive interests, and could be relied upon to decide the outcome of cases in the executives favor and thereby engender the social and economic reform in line with the vision of Ms. Gandhi and the larger executive at the time.

Similarities or the lack thereof across International systems of Judicial Appointments

In justifying the Supersession in particular, the executive cited the examples of foreign countries and their systems of judicial appointments. These countries included the United Kingdom, the United States of America, Australia and Canada. However, the use of such a comparison to justify the executive interference in the case of the Supersession was nothing short of inappropriate. As Nani Palkhivala, an eminent Indian lawyer, comments on the executive's comparison to international systems of appointments, he notes,

“In those countries [i.e. the UK, the USA, Australia and Canada] the tradition is firmly established that high caliber and resolute independence are the essential pre-requisites in the Chief Justice, and the consideration whether his rulings would favor the executive or not is not only irrelevant but should be dismissed as pernicious. The exceptional breaches of this tradition only prove its existence. But the most significant fact is that **in those countries all major political parties believe in the human freedoms, and there has never been an occasion in this century when any party which aimed at abrogating civil liberties has been returned to power.** Therefore, the question of such a party wanting to appoint judges who would uphold the taking away of basic liberties has not arisen.” (98, my emphasis)

While the executive may have attempted to argue that judicial appointments in India should draw on foreign traditions, this would have been completely inappropriate given that the motivation behind executive interference in the Indian case was fundamentally flawed. Judicial independence is something that must be protected at all costs and in the executive's explicit attempts to influence the appointment process as will be discussed, they thereby compromised judicial integrity. Palkhivala further cites two examples of both the American and Australian judicial systems to elaborate on the differences in traditions between the Indian judiciary and other international systems.

Palkhivala notes, “When in the U.S.A. a republican or a democrat President chooses judges for the Supreme Court he may have in mind the racial problem or a New Deal programme, **but never the question of amending the American Constitution so**

as to abridge the Bill of Rights. On the contrary, but for the unyielding independence of Judge Sirica and the U.S. Supreme Court, the men who planned Watergate would have been today secure in their power and in their conviction that they were above the law.” (98, my emphasis) The reference to the amendment of the U.S. Constitution is none other than a reference to what Indira Gandhi sought to do during the Indian Emergency via packing the courts with judges that would accept her decision to fundamentally alter the nature of the Indian Constitution. This was attempted via the landmark judgment, the *Habeas Corpus* case and will also be discussed later in this thesis.

The second international example that Palkhivala cites to explain the differences in these traditions is the Australian case. He mentions that, “In 1913 a new judge, A. B. Piddington, was appointed to the High Court of Australia. The news leaked out that **before the appointment his views had been ascertained by Attorney-General Hughes on the issue of the powers of the Commonwealth as against the States.** When the newspapers splashed the story, such was the embarrassment that **the ‘committed’ judge resigned** without taking his seat on the bench.” (98, my emphasis) Again in this case we see that when executive interference did occur in the appointment process, the press and media did have the freedom to release the information and furthermore the judge himself resigned due to the fact that his appointment had been tampered with by the executive. Interestingly, the judge's own resignation also affirms the independence of the judiciary, unlike the incident with Chief Justice Ray in India agreeing to his own appointment by the executive and not having the impartiality himself to divest himself from a selection process that fundamentally relies on

impartiality and independence. This episode will be considered in much further detail in the chapter on the *Supersession*.

Justice M. Hidayatullah, a former Chief Justice of India, also notes these differences in appointment procedures between the Indian system of judicial appointments and international ones as they were cited by the executive. He speaks to the English Australian and Canadian examples of judicial appointments in light of the irregular appointment of the Chief Justice of India, Chief Justice Ray,

“It is not realized that in England, normally the office [of Chief Justice of the Supreme Court] is offered to the Attorney-General, and that has always been the case unless the Attorney-General declines to accept it...In Australia, the Chief Justiceship ordinarily goes either to the Attorney-General, if he is willing to take it,..., or to the youngest judge on the Bench. The idea is not to choose anybody who would be there for a short time, but to have a Chief Justice who would be in the Court for a sufficient length of time. It is no use saying that a judge was picked up at the fifth place. He would be, because **they follow their own convention and tradition and give effect to it**. In Canada, the position is very different. There are provinces and the claims of the French provinces have to be equated so that Canada may continue together; and sometimes one and sometimes the other is chosen. But it has no relation to the seniority of the judge who is picked out. Therefore, there also a tradition is followed.” (12, my emphasis)

It is clear to see that in each of these countries they not only follow a tradition that departs from the ‘seniority norm’² tradition governing judicial appointments in India at the time, but also that most importantly the tradition is respected and not interfered with to the extent that it was in India by executive interests in this period. Additionally, the source of authority for each of these traditions was the judiciary itself and plausibly they become pieces of positive law that work efficiently for each of these judicial systems. In the case of the Gandhi dispensation, it was clear from the rhetoric that the executive was disseminating in Parliament to justify the appointments that the judiciary should work with the executive and thus the right to influence the process of judicial

²This will be considered in much further detail in the course of this thesis.

appointments lay with the executive. This claim to being the source of authority for judicial appointments seriously compromised judicial integrity. This instance where the executive struck a serious blow to judicial integrity precipitated into nationwide protests from the larger legal community.

While the executive justified their interference in judicial appointments using the ideas of the Law Commission report or the State Reorganization Commission report, I argue that these motivations were disingenuous. Most members of the legal community and judiciary agreed that the executive wanted to tamper with the judiciary in order to create a ‘committed judiciary’ that could further their own agenda. These instances of interference and the executive tools used to influence the appointments of the judiciary are addressed along with a contextualization of the broader political environment during and around the Emergency.

Relevance of the executive tools to the Present system of Judicial Appointments

The current system of judicial appointments relies on the Collegium system for both the Supreme Court of India and the High Courts of India. In its essence, the five seniormost judges of the Supreme Court of India (including the Chief Justice of the Supreme Court since by convention he is the seniormost judge on that court) make a recommendation to the executive for elevation to the Supreme Court. The executive must appoint the judge of the high court to the Supreme Court if the collegium reiterates the judges appeal for a second time. On the other hand, the High Courts have their own collegiums headed by the Chief Justice of the High Court along with the four other seniormost judges on the court. However, names recommended by a High Court collegium are only sent to the executive after approval by both the Chief Justice of the

Supreme Court of India and the Supreme Court Collegium (along with the Chief Justice and the four other seniormost judges of the Supreme Court of India).

In the case of judicial appointments made during the Emergency the procedure that was to be followed was using the ‘seniority norm’ and made by a process of consultation between the Chief Justice of the Supreme Court of India, the other seniormost judges and the President. However, this was clearly not the case. As Palkhivala argues:

“So long as there is a judiciary marked by rugged independence, the citizen’s civil liberties are safe in the absence of any cast-iron guarantees in the Constitution. **But once the judiciary becomes subservient to the executive and to the ruling party’s philosophy, no enumeration of fundamental rights in the Constitution can be of any avail to the citizen, because the Courts of Justice would then be replaced by the Government’s Courts.**” (105-106, my emphasis)

This is a plausibly accurate description of how the executive tools impacted judicial appointments and consequently the citizenry could no longer be protected from the executive. The lessons learnt from the Supersession, punitive transfers and non-confirmation of additional judges are as relevant to the present system of judicial appointments when the executive and the judiciary are constantly at odds with one another. The judiciary and most importantly the Supreme Court of India, as the court of final appeal, cannot perform its function constitutionally as long as one allows the executive to dictate its terms. Furthermore, given the right-wing political trends in India with an increasing wave of ‘saffron politics’ in the country, it becomes increasingly important for judicial impartiality in defending the rights of minorities and citizens that feel threatened by the present National Democratic Alliance in India.

While the collegium system is flawed in that the executive still returns the recommendations of the collegium, it is worth noting that its evolution is a result of

landmark judgments (*First Judges*, *Second Judges*, *Third Judges* and *Fourth Judges* case) made by the Supreme Court of India in response to executive interference. The current system thereby owes a great deal to its legal and historical evolution. Thus, a consideration of the executive tools that arguably created the most divisive conflict between the executive and judiciary is important.

Historical Context of the Executive Interference

This thesis examines the use of executive tools prior to the Indian Emergency, during and after the Emergency. It also analyzes the Indira Gandhi dispensation, and several important historical moments. The Supersession took place in 1973 and struck a significant blow to the judiciary and violated the ‘seniority norm’ that was the convention in place in deciding the appointments of the Chief Justice of India. The supersession took place prior to the declaration of the Emergency and was met by the mass protests of the various Bar Councils within India. The legal community’s disapproval was symptomatic of the political protests and nationwide criticism of the Indira Gandhi dispensation during the Emergency. The punitive transfers took place during the Emergency from 1975-77, most significantly during May and June 1976. This moment, at the height of the Indian Emergency, was significant because the targets of the executive’s punitive transfers were judges who had been responsible for the release of political opponents to the executive that were under preventive detention. Apart from the punitive transfers, the first significant instances of non-confirmation of additional judges took place in January and February, 1976 and will be considered in greater detail in the chapter on *Punitive Transfers and Non-Confirmation of Additional Judges*. The next instances of non-confirmation took place later in the 1980s upon Indira

Gandhi and her executive's return to power. The significance of the use of executive tools at this moment was that the executive sought to get revenge at any judges who had decided against their favor and to attempt to restore the level of power that they held during the Emergency.

The structure of the thesis and the broader argument follows the use of these executive tools in chronological order and thus enables the reader to understand how executive interference in the judiciary was central to Gandhi's declaration of Emergency.

Chapter 1: The Supersession of Judges

The Supersession of Justices Shelat, Hegde and Grover by Justice A. N. Ray on the 26th of April, 1973 to become the Chief Justice of the Supreme Court of India was the chief political tool used by the executive in order to influence the appointment of Judges to the Supreme Court of India. Given that the position of Chief Justice is informally called “Chief Justice of India” one can begin to understand the power that is wielded by the Chief Justice not only in deciding the bench of judges to preside over the outcome of landmark judgements, but also in terms of the appointment of other judges to the Supreme Court. I would like to argue that of all the explanations offered for the supersession, the most plausible one is that it was a politically motivated act in order for the executive to establish its control over the judiciary. This argument is substantiated by considering the explanations offered by the executive, the appointed Chief Justice’s behavior in relation to the executive during his tenure, and the nature of appointments of other judges to the Supreme Court while he was acting Chief justice of India.

It is useful to consider the clandestine circumstances that surrounded his appointment as reported by Kunal Nayar in *Supersession of Judges*. This analysis contextualizes the situation surrounding the supersession. His analysis relies on anecdotal accounts of the other judges reacting to the news of Justice A. N. Ray’s appointment as well as their own accounts of what motivated the supersession. The first time the news was officially disseminated was on the Delhi Station of All-Indian News when it was reported that, “The President has appointed Mr. justice Ajit Nath Ray to be the Chief Justice of India.” (9) There was no prior intimation of what was to happen,

nor was the former Chief Justice Sikri consulted in this appointment. In many ways, the supersession was a premeditated attack by the executive against the judiciary and the strategizing behind the supersession was carried out in secret for fear of both judicial and public disapproval with the supersession. An equally important question to ask is whether the “progressive impact” that judges appointed to the Supreme Court of India after the act of supersession are seen as having was one that was in line with judicial independence or one driven by executive interests and an agenda consonant with executive reform policy.

Nayar mentions that, “Hegde, Shelat and Grover were sure that the supersession was the result of their judgment that Parliament had no right to abrogate the Fundamental Rights guaranteed by the Constitution. Hegde was furious with the Prime Minister – “It was all her [Indira Gandhi’s] work, he told me [Nayar] on 25 April [1973].” (11) The case in question refers to a landmark judgment known as the *Kesavananda Bharati* case where Judges Shelat, Hegde and Grover were among the concurring judges to limit the power of the Parliament to amend Fundamental Rights in India as long as it did not alter the foundation and structure of the constitution. This decision was in line with the *basic structure* doctrine provided by this judgment whereby Parliament could not destroy the basic or fundamental features of the Indian constitution. Notably, one of the dissenting judges was Justice A. N. Ray who superseded the aforementioned judges. Given the outcome of this case and parliamentary discontent with this decision, it seems prudent that executive interference played a hand in the supersession and the bastion of such interference was the Prime Minister of the Emergency years, Indira Gandhi.

The significance of the supersession was the fact that this was the first time in Indian history that the judiciary had succumbed to this level of executive interference. Although observers at the time did not know that an emergency would be declared, we can now see that the supersessions served as a precursor to the Indian Emergency from 1975-7. In both acts, unprecedented levels of executive interference and attempts to seize political power for the executive was met with nationwide criticism from civil society, the press as well as members of opposition parties. By convention, the most senior puisne judge on the court would be appointed following the end of the acting chief justice's tenure. However, in this case the seniority norm was clearly violated in appointing the fourth-most senior judge to this position. Until 1973, the process of appointment to the post of Chief Justice of India was based on the "seniority norm", however after the announcement of Ray as Chief Justice, few judges if any knew what would happen in terms of future appointments to the post of Chief Justice. As Nayar interestingly notes, "the Political Affairs Committee of the Cabinet (Mrs. Gandhi, Jagjivan Ram, Yashwant B. Chavan, Fakhrudin Ali Ahmed and Swaran Singh were its members) had decided in his [Chief Justice Ray] favor a few hours earlier. The Committee had met on the 24th at 10 a.m., before the judgment on Parliament's power over the Fundamental Rights was declared. By that point however, the Government knew that the judgment was "split", 7 to 6. The text of the unfavorable judgments was also in the hands of the Government." (13-14) This suspicion is confirmed later by the former Chief Justice Sikri to Nayar when he noted that the copies of the unfavorable judgment (i.e. the *Kesavananda Bharati* case) had reached the Government before Ray's appointment. These facts together clearly indicate that the outcome of the

judgment motivated the supersession and furthermore that even prior to the supersession judges of the Supreme Court of India were clearly prone to executive influence given that they transmitted the judgment to the executive before its official announcement. In my opinion, the reason that influenced judges of the most senior court would resort to this strategy could be very likely motivated by political patronage. One such way of providing political patronage would be promises of appointment to become the Chief Justice of India given the considerable power wielded in the position.

Another interesting point to note is that when Justice A. N. Ray was questioned why he reluctantly agreed to his appointment, he alleges that, “he was told [presumably by none other than Hari Ramchandra Gokhale, Minister for Law and Justice] that if he did not accept the office he himself would be superseded.” (13) This statement seems like nothing more than a way to suggest that he was helpless in his decision as opposed to respecting the traditions within the appointment of Chief Justices of the Supreme Court of India. Furthermore, the reactions of both the Home Minister as well as the Law and Justice Minister is noteworthy in this regard. In the days leading up to Justice A. N. Ray’s appointment as Chief Justice, both of them acted oblivious to any questions in regards to the supersession. For instance, when Justice Grover asked the then Home Secretary, Govind Narain about why there was no announcement regarding the next Chief Justice, Narain simply replied that, “it was expected ‘very soon’.” (10) This was the same response that the Supreme Court Registrar received upon contacting the Law and Home Ministries when inquiring about the case lists for the 26th of April, 1973. This level of apathy demonstrated by the government when questioned by senior members of the judiciary seems to be motivated by a desire to cover up the news. Ironically, the

incumbent Chief Justice Sikri who was to retire remembers how “cool and distant Swaran Singh, Foreign Minister, had been when he met him...on 16 April [1973]” (11). On considering these facts together, it again bolsters the case that the Supersession was premeditated and that several government officials were intentionally withholding the news from the judiciary given that they knew that it would be met with an adverse reaction.

Apart from the issues within the governmental reaction to the supersession, the reasoning provided to justify the act was vulnerable to nationwide criticism. The most important actor in this regard was S. Mohan Kumaramangalam, cabinet minister for steel and mines. Incidentally he was the advocate general of Madras and had appeared and lost in the *Golaknath* case heard before the Supreme Court of India. The case centered around a dispute between the Golaknath family and the Punjab government, where the government had limited the amount of land that the family could consider personal property. However, the majority judgment favored the family and effectively argued that the fundamental rights of the family could not be abridged or taken away from the family as protected under Article 19(1) (f) and Article 19(1) (g) by the amendment procedure enshrined in Article 368 of the Indian Constitution. The fact that the Supreme court had thereby prevented the executive from having any power to curtail a citizen’s fundamental rights could again be seen as a reason behind the growing discontent within the executive and a motivation behind their desire to influence the process of appointments within the Supreme Court of India. Kumaramangalam’s defense of the supersession was unique from the other more common arguments that proliferated at the time. The more common defenses provided included arguments by

Gokhale at a meeting of the Political Affairs Committee as well as Kumaramangalam to the Indian press that international practices of appointment of justices in countries like the US, Canada and the UK did not follow the seniority norm and significantly in the US according to Kumaramangalam, “appointments to the Supreme Court...are political.” (22) This justification of Indian Supreme court appointment procedure by an appeal to international practices seems weak at best and motivated by a clear desire on Kumaramangalam’s part to establish the executive’s influence over the judiciary.

Other arguments included the fact that the Indian Law Commission had recommended a departure from the “seniority norm” in its 14th report. Significantly, they mention that,

“It may be that the seniormost Puisne Judge fulfills these requirements [those required at the time for the appointment to Chief Justice] If so, there could be no objection to his being appointed to fill the office. But very often that will not be so. It is, therefore necessary to set a healthy convention that appointment to the office of the Chief Justice rests on special considerations and does not as a matter of course go to the seniormost Puisne Judge. **If such a convention were established**, it would be no reflection on the senior-most puisne judge if he be not appointed to the office of the Chief Justice.” (20, my emphasis).

The first issue with the executive’s use of this report as a justification was that the report was very intuitively nothing more than a recommendation that the Law Commission offers in order to change an established tradition and convention in the appointment process. Furthermore, as several senior lawyers at the time argued, “in a democratic State healthy conventions were a great driving and sustaining force. If a convention was reasonable and intelligent it was as good as a piece of good positive law.” (17) This argument clearly makes the case to consider that the ‘seniority norm’ was an unwritten convention at the time, but in many ways given that it had been the procedure of

appointment since the 1950s, it had taken on the strength of law. Any deviation from this convention would therefore need to be established as a convention before it could be exercised in the appointment process. As three of the signatories to the Law Commission's report (Setalvad, Chagla and Palkhivala) argued in response to the supersession, "the convention of appointing the Chief Justice of India regardless of seniority should first be laid down before any such appointment can be made." (21) They alluded to the fact that the Indian Law Commission clearly mentioned this to be the case in their recommendation when they mandated that, "if such a convention were established" then the supersession would have been understandable.

Furthermore, their recommendation was restricted to cases where judges who lacked caliber, merit or suitability in comparison to the junior Puisne judge could be superseded and this was clearly not the case with Judges Shelat, Grover and Hegde. Even if a judge of the Supreme Court was superseded as per the Law Commission it would be ultimately motivated in Setalvad's opinion by, "their want of capacity in the circumstances to act as Chief Justice." (21) This recommendation does seem slightly dubious because if a judge is capable enough to act as Chief Justice and has established his reputation, is their ability to "act" in accordance with the duties of a chief justice defined by their ability to act independently and in a constitutional manner or is it defined by their ability to act as per the executive demands? In my opinion, while the duties of chief justice demand the former, the executive were desirous of a candidate that could perform the latter – they found such a candidate in Justice Ray. The executive never established that they would no longer follow the "seniority norm" prior to the

supersession and again reflects poorly on H. R. Gokhale, the Law and Justice Minister when he announced and tried to defend this change in parliament. (21)

Interestingly Kumaramangalam at the time was not only angered due to his and the executive's loss in the *Golaknath* case, but also the *Privy Purse* case. The case centered over the right of Indian royalty (in particular Madhav Rao Scindia) to receive governmental payments as per the practice of privy purses that had been abolished in 1970 by Indira Gandhi. However, the majority judgment that was delivered by the Supreme Court included Justice Hegde in its bench and quashed the President's order that it was inoperative in Scindia's case and upheld the royalty's fundamental rights that Article 291 conferred the right to privy purses on rulers and a commensurate obligation on the executive to pay the amount dictated by privy purses as per the law. This decision motivated Kumaramangalam's desire to end the conflict between the Executive and the Judiciary and make the executive appear to be a victim of circumstance in inciting the supersession given the adverse decisions handed down in *Golaknath*, *Privy Purse*, *Bank Nationalization* cases and most recently the decision in the *Kesavananda Bharati* case respectively. In light of these arguments as well as the anti-executive judgments handed down, Kumaramangalam gave his unique defense of the supersession that stirred nationwide unrest and also introduced the concept of "committed judges" to the Indian Supreme Court.

In a speech in parliament on the 12th of May, 1973 Kumaramangalam defended the supersession by arguing that,

"We had to take into account what was a Judge's basic outlook on life... In appointing a person as Chief Justice, I think we have to take into consideration his basic outlook, his attitude to life, and his **politics – not the party to which he belongs but what it is**

that makes the man... We, as a Government, have a duty to **take the philosophy and outlook of a Judge into account** in coming to the conclusion whether he should or should not lead the Supreme Court at this time. This is our own prerogative which the Constitution has entrusted to us.” (35, my emphasis)

This statement was the first instance where the supersession was explicitly defended by arguing that the political ideology of the Chief Justice must align with that of the executive. This implicitly meant that the supersession was politically motivated given that Kumaramangalam, a cabinet minister is appealing to a new criterion, a similarity in their philosophy and outlook and consequently judgments that were more likely to swing in the executive’s favor. Additionally, the emphasis on “what it is that makes the man” seems to suggest that Chief Justices must be people who fundamentally agree with the executive on all of their decisions and stand by their decisions rather than those who exercise their right to judicial review and protect civil liberties. Furthermore, his argument seems to imply that this criterion is constitutionally mandated to the executive and thus should be employed while simultaneously compromising judicial integrity and its very independence from executive decision making. The argument he employed clearly employs a controversial rationale behind it and sets a very dangerous precedent for the doctrine that could be employed not only in future appointments to the position of Chief Justice, but also sets a low bar for the kind of criteria that could be used in the future for such appointments. This defense marked a turning point in the supersession because it clearly assuaged most of the Indian Bars’ suspicion from Delhi, Bombay, Madras and Calcutta that the supersession was a politically motivated act by the executive to compromise judicial integrity.

This speech in the Lok Sabha introduced two important terms into the controversy surrounding the Supersession namely, the concepts of “Committed Judges”

as well as “Social Philosophy.” “Committed Judges” were those who shared the executive’s political ideology and consequently could be relied upon to have the executive interests in mind when deciding the outcomes of a case. However, this similarity of opinion is fundamentally in conflict with the role of a judge of the Supreme Court of India when judicial impartiality is a pre-requisite of any judge on any court! As Nayar aptly mentions, “A Judge’s commitment to the Constitution was understandable, but not his commitment to a political party’s philosophy or the Government programme.” (37) If such a commitment was expected by a judge then every judge in every state of India would have to decide a case with the interests of the state government in mind, which might be a government of a political party different from the central government and hence this would result in a clash between the demands of different political parties and destroy nationwide judicial impartiality.

The term “Social Philosophy” was laid down by Kumaramangalam in his speech as mentioned earlier and importantly meant that the political beliefs of a judge of the Supreme Court of India determined his appointment as Chief Justice. In fact, in a conversation that Nayar had with Kumaramangalam on the 25th of April, 1973 he explicitly said, “I make no bones about the appointment of Justice Ray...The social philosophy of the superseded Judges did not coincide with the thinking of the Government which had [supposedly but not as the widespread protests would suggest] won a massive mandate from the people.” (36) Additionally, during this interview, Kumaramangalam said that his chief objection to Hegde was that he had affiliations with the Congress (O) party, the Congress branch that formed post the expulsion of Indira Gandhi for violating party decorum, and that he kept in touch with the Congress

syndicate. The Congress syndicate was another name for the Congress (O) party led by Morarji Desai at the time that went on to become the Janata party and as of the current political situation has merged with the BJP. This term, 'Social Philosophy', that became popular at the time given that it seemed to be the only defense for the supersession that was in fact accurate shows the influence that the executive hoped to wield and did so successfully over the judiciary during these years. Interestingly in considering the meaning of this term during these times, Justice Shelat (one of the judges who was superseded) argues that, "It is strange that though this expression [social philosophy] is often bandied about, **no one has so far cared to define the expression in precise terms in the context** of our present day problems." (43, my emphasis) When being introduced into the discussion surrounding the motivations behind the supersession, the meaning of the term 'social philosophy' was left deliberately vague, which suggested that its impact was politically motivated. It almost seems as if Kumaramangalam and the executive wanted to be cautious in the way they introduced it to the rhetoric so as to not make it seem that the executive was either purely following the recommendations of the Law Report or were they intentionally trying to destroy any resistance to their power in terms of their ultimate influence. Ultimately as Justice Shelat aptly laid out the functioning of a Chief Justice, "the only social philosophy they can validly hold is the one contained in the Constitution, without regard to the ideology held by any particular party. Allegiance by him to any philosophy other than the one contained in the Constitution would be contrary to the oath solemnly taken by him." (44) This statement clearly demonstrates how fallacious the use of this criterion was to the appointment of

the Chief Justice and that in fact it was contrary to the traditions and very spirit of the highest level of the Indian judiciary.

Ultimately, the supersession was motivated by the desire of the executive to get back at Hegde and Shelat for their involvement in the *Fundamental Rights* case. As Hegde argues,

“the fact that the appointment was announced a day after Supreme Court delivered the judgment in the Fundamental Rights case shows the real motive behind the selection of the new Chief Justice. The whole purpose of the Government appears to have been to impress on the members of the judiciary **the price that they have to pay if they refuse to be subservient to the Government.**” (50, my emphasis)

His argument does have credence given that Kumaramangalam as well as the executive expressed their discontent with supreme court judgments that favored Indian citizens over the executive and that the executive played victim to their poor outcomes. In this way, the executive appeared to be helpless if to not make use of this revised criteria explicitly in the appointment process. In this way they appeared to be helpless if to not make use of it explicitly in the appointment process. By superseding Justices Shelat, Grover and Hegde a day after they gave an anti-executive judicial decision, the executive hoped to show these members of the judiciary the consequences of not deciding in their interests. Furthermore, this alleged disobedience to executive interests was plausibly the explicit reason that justified them choosing a pliant judicial candidate that would decide in the favor. In citing the adverse decisions of the judgments handed down against executive interests, the members of the executive make themselves seem like the victims of judiciary which according to the executive justified their explicit intention to supersede the other three seniormost judges.

While the executive may have strongly argued for the supersession to facilitate the end of a struggle between the executive and judiciary, Kumaramangalam's jocular comment at Chief Justice Ray's oath-taking ceremony is not far off the mark when he said, "Such posts are a reward for political services rendered." (32) Chief Justice Ray had offered his dissent on most of the judgments that Shelat, Grover had supported and protected citizen's rights while Ray had always dissented in favor of the executive. As Gadbois Jr. argues, "Ray had a record of supporting Mrs. Gandhi's policies said to be reformist and progressive. In the ten-to-one *Bank Nationalization* case, he was the sole dissenter. In the nine-to-two *Privy Purses* decision, he was effectively the lone dissenter, for Mitter's dissent was on narrow technical grounds. In the seven-to-six *Kesavananda* decision, he was the senior judge in the minority, supporting the governments arguments. In these same decisions, the superseded trio was in the majority upholding the right to property. Thus, there was sufficient evidence for Kumaramangalam to believe that Ray was likely to be supporting of Mrs. Gandhi's social and economic reform policies [i.e. her social philosophy.]" (193) Chief Justice Ray was the ideal match for Indira Gandhi due to his support for the executive evidenced prior to the supersession and could thereby be trusted to do the same during his tenure as a weak albeit "committed judge" to the executive.

Ray's behavior even during his tenure as Chief Justice raises some questions as to the true motivations behind the supersession. When judges of Ray's court commented on his tenure, "some of the judges, including some of his appointees, said that Ray was 'completely' or 'entirely' with the government, but some gave him credit for being open and honest about his belief that Mrs. Gandhi was the nation's savior and for not hiding

his support for the Emergency.” (202) Clearly his contemporaries saw very clearly that he was taken up by the executive and furthermore his “social philosophy” very clearly seems to reflect that held by the executive at the time. His implication in bringing other “committed judges” to the court during those times additionally suggests that he was grateful for the political favors granted to him by the executive. Interestingly, among the judges that he brought to his court, “seven of the ten were high court chief justices, including the last five, a higher percentage than any previous CJI [Chief Justice of India].” (199) Clearly in these appointments the “seniority norm” was followed and arguably this is striking when his own selection to Chief Justice defied this convention. His own relationship with Mrs. Gandhi during his tenure also raised some questions as discussed by Austin, “He made himself amenable to her influence by telephoning frequently...He would ask her personal secretary’s advice on simple matters, conveying the impression that the Prime Minister’s views might be heard concerning an ongoing case.” (290) It becomes clear to see that Chief Justice Ray’s behavior was irregular not only prior to the supersession, but also after it and that his relative ineffectiveness as Chief Justice was characterized by the extent to which he allowed himself to be influenced by the executive. When questioned after his tenure as to the supersession, “he chose not to tell his side of the story or to respond to any of the criticism.” (203) Clearly his inability to respond to such criticism against him or inability to account for the supersession is motivated by a desire to intentionally leave that legal history vague and seems to be a way to cover up the events of those times. It becomes clear then that Chandrachud was right in assuming that the 1970s marked a departure in the process of appointment to the Supreme Court of India, “the government started looking at whether

that person had identified himself, even in the most inconsequential manner, with an opposition party.” (191) Clearly this was a concern that mattered to the executive and can be well evidenced in not only the act of supersession, but also in the quality of judgments handed down prior to the suppression as well as judicial appointments made during that period. This is my next area of concern in this chapter.

Appointments of puisne judges made to the Supreme Court of India during Chief Justice Ray’s tenure have been mired in controversy. While their appointments were allegedly recommended by Ray, who had the authority to appoint, the announcements were made by senior ranking members of the executive. This change from previous practice shows the level of executive involvement. This section of the chapter introduces my second broad argument for the chapter: In addition to the disappointment that the executive felt with unfavorable judgments that thwarted economic and social reform, supersession facilitated the appointment of a pliant Chief Justice and the appointments of other judges compliant with executive interests. In light of the Chief Justice’s considerable power in deciding the composition of benches to hear cases before the Supreme Court, the creation of a committed judiciary and executive attempts to ‘pack the court’ through the consideration of commensurate ‘social philosophy’ allowed for the passage of social and economic reform that was desirable to the executive and most importantly in line with Mrs. Gandhi’s vision to radicalize the country. This vision was her political agenda that would enable her to maintain her position as prime minister throughout the Emergency. This political agenda could plausibly display autocratic tendencies and be described as nationalistic in nature.

When Justice A. N. Ray began his tenure as Chief Justice, the Supreme Court had been reduced in size due to the retirement of Chief Justice Sikri, the resignation of Justices Shelat, Hegde and Grover in light of the supersession, as well as the retirement of Justices Vaidialingam and Dua due to the end of their Article 128-extended terms on the Supreme Court. Hence, the court was reduced from sixteen judges to ten judges and this situation, “provided an ideal opportunity for appointing judges who met Kumaramangalam’s criteria” (Gadbois, 194). During Ray’s tenure there were ten new appointments to the Supreme Court. Justice Bhagwati, his first appointee, was in Ray’s words his selection, “I brought Bhagwati to the SCI” (Gadbois, 194). However, the political motivations behind this appointment, make it seem like the executive had played a role in this appointment. Prior to his appointment on the 17th of July, 1973 his appointment had been considered, but subsequently removed twice over. The first time significantly was in late 1970 when he was recommended by Justice Shah, a fellow Gujarati, “The government did not say no. It simply did not respond.” (194) It is very plausible to consider that given Shah’s involvement in the rejection of executive interests in the *Golaknath*, *Bank Nationalization* and *Privy Purses* cases that they did not take his nomination seriously. Other justices argued that it was Justice Shelat’s resistance to Bhagwati as a former colleague on the Gujarat High Court that was most important in preventing his appointment to the Supreme Court of India. I would argue that Shelat’s resistance in terms of internal Supreme Court politics to have mattered little to the executive given that he was involved himself in rejecting landmark judgments discussed earlier that were against executive interests. If the executive had truly been supportive of Bhagwati’s appointment on the earlier occasion then they

would have responded and supported his appointment to the Supreme Court of India. Given that the executive approved the supersession in 1973 and that this appointment was initiated at the end of 1970, this could have been approved by the executive had they wanted him at the time. The second time Bhagwati was nominated in 1972, Bhagwati himself as well as other judges believed that, “resistance from Gokhale [the Law and Justice Minister] and P. B. Gajendragadkar, still in Delhi as chairman of the Law Commission, friends of Chandrachud and fellow Maharashtrians who wanted Chandrachud on the SCI first so that he would have a long tenure as CJI,” (195) While there was a degree of internal politics in this rejection, the influence of Gokhale in this rejection is important to consider and can be considered a form of executive interference in this appointment. Furthermore, Bhagwati, “did not have such influential patrons” (195) indicating that his lack of political connections deemed him insignificant at the time.

When Bhagwati was finally appointed, it was due to his caliber as Gujarat High Court Chief Justice, but also notably by 1973, Gadbois notes, “he had acquired a reputation of being a man with **‘progressive views’ especially in the area of promoting free legal aid for the poor.**” (195, my emphasis). The language of being a judge with ‘progressive views’ harkens back to Kumaramangalam’s speech in the Lok Sabha when he argued that, “We [The executive] are entitled to come to the conclusion that the philosophy of this Judge is **forward-looking** or **backward-looking** and to decide that **we will take the forward-looking Judge** and not the backward-looking Judge.” (192, my emphasis) Kumaramangalam speaks with the language of entitlement and the idea of progressive-views echoes the sentiment of a judge with a forward-

looking social philosophy. This similarity clearly indicates that on the third occasion of the judge's appointment his reputation did influence the decision and that his reputation of trying to promote free legal aid for the poor also echoed Indira Gandhi's political ethos at the time of '*Garibi Hatao*' ("Remove poverty"). Incidentally '*Garibi Hatao*' was the theme and slogan of Indira Gandhi's 1971 electoral campaign and famously part of the 5th Five-Year Plan to create programs aimed at poverty alleviation efforts. While I do not believe that promoting free legal aid for the poor was contrary to national and constitutional interests, I am trying to draw attention to the similarities in Justice Bhagwati's poverty alleviation efforts and Ms. Gandhi's political agenda of poverty alleviation as a political strategy to win the populist vote and to stay in power. This additional similarity between Justice Bhagwati and Ms. Gandhi could plausibly have been another reason for the executives support for his appointment on this third occasion. In the wake of the supersession, the time was ripe for Bhagwati's nomination. Bhagwati believed that Gokhale in 1973 pressed for his elevation given that Chandrachud was already on the Supreme Court and furthermore with Shelat's resignation in response to the supersession the Gujarat seat was vacant (a reflection of the geographic diversity that the Supreme Court is supposed to reflect in its composition) making the selection seem like an obvious one. Given the political obstacles and executive interference in his appointment prior to the supersession this makes the appointment seem much murkier than it was believed to be and there seem to be clear signs of executive interference in preventing his appointment on earlier occasions.

The second appointment of note was that of Krishna Iyer who was recommended in 1972 while Sikri was Chief Justice. The initiator of this request was none other than Kumaramangalam, a close friend of Iyer's, who was also responsible for persuading Gajendragadkar, chairman of the Law Commission to accept Iyer to become a member of the law commission in September, 1971. His appointment to the law commission was a strategic move to overcome Iyer's lack of seniority. As Gadbois mentions, "In late 1972, Gokhale informed Sikri that the government wanted Krishna Iyer appointed to the SCI. He had Gajendragadkar's support as well...and Hegde said that Gajendragadkar lobbied him to support the appointment of Krishna Iyer." (195) It is clear that the first attempt to secure Iyer's appointment to the Supreme Court was politically motivated, however while Sikri was Chief Justice the appointment was prevented by Shelat, Grover and Hegde (where Hegde's strongly anti-communist attitudes was significant in this regard) and persuaded Sikri to reject him. They painted him as a communist akin to Kumaramangalam in their rejection of his appointment given the fact that, "[Iyer] had many communist friends, had defended jail communists, had been a cabinet minister in the first communist-led government in Kerala, and had a reputation as a leftist." (196) It is significant that the earlier nomination that was explicitly supported by executive interests was rejected by Chief Justice Sikri and that furthermore, the judges behind the rejection were none other than the superseded judges of the Supreme Court of India. The fact that their supersession facilitated the appointment of Justice Iyer on 17 July, 1973 clearly notes that without any impediment to executive interests, the executive facilitated Iyer's appointment and furthermore Chief Justice Ray had no power to prevent the appointment himself or be concerned enough to consider the opinions of

judges in the Supreme court like Chief Justice Sikri had. Ultimately the second nomination was supported by Gajendragadkar and allegedly S.S. Ray, the then Chief Minister of Bengal given that he had explicitly issued his support for Iyer after Kumaramangalam's death in May 1973.

In commenting on both these appointments, Gadbois argues that, "Both came with an agenda and a mission which can be described as reformist and pro-weaker sections. Both sought to move the SCI in new directions which they described as progressive." (196) While this might seem like the appointment of these judges (although mired in political influence) brought two influential judges to the Supreme Court, one might argue that this seems to be a cause for concern given the executives political ideology that drove such reform. In considering the political environment at the time that was driven by economic reform in order for Mrs. Gandhi to maintain her position as prime minister, these judge's logic of being 'progressive' does seem suspect. It becomes prudent to question whether the 'progressive' impact that they envisioned having was one dictated by their own independent commitment to judicial independence or one that was consonant with the executive's demands and reform driven by maintaining one's own power. It is important to question the impact that they had on the Supreme Court of India since as argued earlier their appointments were a result of executive interference and thus their impact must be evaluated in light of the fact that they were ultimately the executive's candidates to the Supreme Court.

The third appointment that Ray initiated was of Justice P. K. Goswami on 10th September, 1973. While Ray strongly defended Goswami given the lack of a justice from Assam on the Supreme Court in its history, Goswami (the law and justice minister)

was known to Gokhale given their appearance against each in litigation cases before the Supreme Court. Furthermore, Goswami argued that, “it was Gokhale who wanted him on the court.” (196) Even in this case the rationale behind Goswami’s appointment seems to be strategically motivated by the executive. Given the appointment of Krishna Iyer, who had a reputation for being a communist, Goswami’s self-described, ‘conservative’ attitudes were viewed by both the media as well as by the Indian polity as a way of balancing the Supreme Court of India. However, the initiation of his appointment by the government makes it seem dubious whether this appointment would truly do much in the way of convincing the country of his truly ‘centrist’ nature. Executive discontentment with the judiciary prior to the supersession was well documented; this meant that even if there were a controversial judgment with executive interests at stake, the executive still had the power to control Chief Justice A. N. Ray and influence him to appoint a bench of judges who had political ideologies consonant with executive interests and were inclined to make judicial decisions in the executive’s favor.

The fourth appointment to consider was that of Justice R. S. Sarkaria on the 17th of December, 1973. While Ray again argued that Sarkaria was his candidate given the lack of Sikh representation on the Supreme Court, “Sarkaria’s account is very different.” (197) As Gadbois recollects, Sarkaria argued in 1973 that two prominent Sikhs, Zail Singh (the Punjab Chief Minister at the time) and Gurdial Singh Dhillon (the Lok Sabha speaker at the time) had convinced Mrs. Gandhi that it was time for a Sikh to be appointed to the court. In fact, Gokhale worked closely with Zail Singh on the search committee that eventually decided on Justice Sarkaria. Interestingly Gadbois notes that,

“It was no secret that Gokhale was shopping for what Sarkaria termed ‘**a suitable Sikh**’.” (197, my emphasis) While Gadbois does not elaborate on what this term would mean, one cannot help but speculate that the government hoped to appoint a Sikh High Court judge who would be compliant with governmental efforts at the time in exchange for the political favor of his elevation to the Supreme Court. In September, 1973, after Gokhale’s personal meeting with Sarkaria at a dinner attended by high court judges and notably, “after gaining Mrs Gandhi’s approval” (1973), Zail Singh invited Sarkaria to the Supreme Court. Eventually, Gokhale informed Chief Justice Ray, “that the government wanted Sarkaria on the bench.” (197). The fact that neither was Chief Justice Ray involved in the search for Justice Sarkaria nor had he met Sarkaria prior to the appointment indicates his lack of involvement in the appointment. Therefore, it is safe to infer that the executive was the primary force behind Justice Sarkaria’s appointment.

Arguably Supreme Court appointments at the time were highly influenced by executive influence. As Gadbois notes, “After agreeing to the first four government initiated nominees, [that] Ray become **more of a player in the selection process**.” (197, my emphasis) While Ray was undoubtedly more influential in subsequent appointments, this does not change the fact that he was compliant enough to accept the executive’s nominees plausibly as a way of extending his own gratitude for his elevation to Chief Justice. Ray’s appointees “were almost unanimous in saying that the first four were the executive’s choices and that Ray initiated the appointments of the remaining six.” (202), but given Ray’s attitudes as a sympathizer of the executive and Mrs. Gandhi’s later emergency this still makes it unclear whether his appointees would have

non-partisan interests in cases relating to the executive. In Ray's interview with Gadbois he claimed that, "the selection of judges was entirely his responsibility" (202), but the cases highlighted above would suggest otherwise.

Ray's pro-governmental attitudes when considering appointments to the Supreme Court can be demonstrated by the following incident. In a telephone call in October, 1975, between Ray and R. S. Pathak, Chief Justice of the Himachal Pradesh High Court, to discuss Pathak's interest in being elevated to the Supreme Court, Pathak reported that the conversation abruptly ended upon his refusal to answer Ray's question of his attitude to the "basic structure" doctrine laid down in the *Kesavananda* judgment. This judgment was the final straw for executive discontentment that prompted the supersession and here, we have Ray, the Chief Justice, questioning a potential appointee to the Supreme Court on his views on this judgment. This line of questioning plausibly had to have been politically motivated. Even though there is no other reported evidence of Ray engaging this question with his other appointees, it still makes the claim of a lack of executive influence fairly weak. Interestingly Gadbois noted that a month later, in November 1975, Chief Justice Ray attempted to review the *Kesavananda* decision by convening a thirteen-judge bench, however, Nani Palkhivala aptly argued that *Kesavananda* did not in any way question the validity of "basic structure" in the Indian constitution. Ultimately, "Even judges inclined to reverse *Kesavananda* agreed with Palkhivala and Ray had no choice but to dissolve that bench three days later." (201) Although attempts to overturn the decision were unsuccessful, the timing of Ray's questioning of a potential appointee and its being brought up in court for discussion can be described as anything other than fortuitous. Plausibly Ray was looking to appoint a

judge who he could have on the bench and count on to decide in the executive's favor to reverse the outcome or at least alter the applicability of the "basic structure" doctrine to the Indian constitution.

While the effort to overturn *Kesavananda* was unsuccessful, two other judgments after the supersession warrant consideration as evidence of executive influence in the outcomes of judgments within which the executive had a vested interest. The first of these judgments was the *Election* case, where upon Raj Narain's initial petition the Allahabad High Court found Indira Gandhi guilty of electoral malpractices such as bribery and misuse of governmental practices. In a Supreme Court judgment on the 7th of November, 1975 the judges granted a stay on the verdict, and overturned the judgment of the Allahabad High Court. The bench that presided over the judgment significantly consisted of Justice A. N. Ray who delivered his own judgment while Justice K. K. Mathew (interestingly the first judge that Gokhale approached to invite him to the post of Chief Justice prior to Ray and the Supersession) gave a concurring judgment in this regard. The majority outcome in the case held that, "no privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act." (1) Essentially the verdict of both of these judges saved Indira Gandhi's political reputation and effectively absolved her and the executive of any political infamy.

The second case to consider was the *Habeas Corpus* case on the 28th of April, 1976 where the state governments had appealed to the Supreme Court to challenge the decisions of Indian High courts that had released the executive's political enemies. The bench presiding over this case also consisted of Chief Justice Ray and the majority outcome of four to one supported the state government and effectively succumbed to

executive influence in this regard. It denied the writ of *Habeas Corpus*, essentially denying the requirement that there was any need to justify the arrests of Indian citizens, during a state of Emergency. (Chandrachud, 94) Furthermore, executive safeguards (i.e. the imprisonment of political opponents) could not be challenged since the considerations forbid any proof of evidence for the conditions under which that preventive detention occurred. Significantly, the judgment also held that at that time the recently instituted Maintenance of Internal Security Act (MISA) was constitutional. This landmark judgment that decided in the executive's favor would aptly in Chandrachud's words, "go down as one of the low points of India's constitutional history." (94) The outcome not only affirmed the executive's regime over the citizenry in the state of Emergency, but also reaffirmed that the judiciary had been subjugated to executive control from judges who were compliant with executive interests.

In the next section, I will briefly consider the legacy of the supersession for the Emergency and how the executive sought to remove any judicial barrier that was not committed to its interests.

Legacy of the Supersession

The Supersession undoubtedly struck a significant blow to the judiciary and developed a precedent for the future of appointments in the Supreme Court. The only judge that dissented on the *Habeas Corpus* case was Justice H. R. Khanna and affirmed citizen's rights to life or liberty which they could not be deprived of without the authority of law. He was also one of the Judge's to argue against the government in the *Kesavananda* judgment prior to the Supersession. The executive kept these actions in mind and nine months after the *Habeas Corpus* decision announced via a presidential

order (ironically the same day as Chief Justice Ray's retirement) that the next Chief Justice would be Justice M. H. Beg. The executive again violated the "seniority norm" by superseding Justice Khanna who paid the price for his anti-executive position. The government justified this supersession through the short term that Justice Khanna would have had if he had been Chief Justice, but as Chandrachud argues, "a term of five months would not have been unusually short" (95). Until the *First Judges* case in 1981, the unprecedented influence of the executive on judicial appointments from the emergency was left to stand; in 1981, the judgment evolved into the principle of judicial independence. This principle would effectively argue that no other branch of the state (including the executive) would have any say in the appointment of judges. In comparison to the period of the emergency, from the early 1970s to 1977, when executive intervention shaped judicial appointments, since 1981, these interventions have been reduced and limited.

Chapter 2: The Threat of Transfers and Non-Confirmation of Additional Judges

The other executive tools used to impact the appointment process of the judiciary was both the threat of transfer of judges from their existing court to another court as well as the non-confirmation of additional judges. I argue that both tools to undermine judicial authority and independence, threats of transfer (often these threats were communicated by unofficial lists) and non-confirmation were as significant as the actuality of judges being transferred and their appointments being non-confirmed. The threat is significant to consider since this strategy indicates that the executive was powerful enough at the time to instill a sense of fear in judges who decided against the executive in cases relevant to Indira Gandhi and her cabinet during the Emergency. In order to understand the use of transfers and non-confirmation of additional judges, the history behind the use of judicial transfers and its inception in the process of appointments to both the Supreme Court of India and the High Courts is crucial.

As Chandrachud traces this history, he argues that, “In the 1950s, state boundaries in India were redrawn along linguistic lines...The States Reorganization Commission, in its report published in 1955, made recommendations for the re-division of state boundaries along linguistic lines. However, in order to arrest what it called ‘parochial trends’, the commission recommended that ‘at least one-third of the number of Judges in a high court should consist of persons who are recruited from outside that State.’ (155) This recommendation was an explicit attempt to promote national integration in the country post-independence, however the Law Commission in its 14th report did not pay much heed to these comments. It made three recommendations in response to the need for transfers. Firstly, it argued that lawyers could be appointed to

a high court from outside the state and for the creation of an all-India judicial service so that some judges on a high court could be appointed from outside of the state. However, the Law Commission did not endorse the States Reorganization Commission's suggestion for one-third of the judges in a high court to be recruited from outside of the state. It also did not favor the appointment of all of the chief justices of high courts from outside of the state, a recommendation that has significant implications when considering the ways in which appointments were influenced by the executive during the period post-1971. However, the most significant recommendation Chandrachud noted was that, "in a classified document, the Law Commission recommended that transfers of judges must take place only with the concurrence of the chief justice of India." (156) This is significant to consider given the supersession wherein Chief Justice Ray was ultimately the executive's choice and one who explicitly supported their political ideology as evidenced earlier. While this recommendation was deemed unconstitutional, ultimately as Austin argues under Article 222 of the constitution, the President may transfer a judge after consultation with the Chief Justice of India. This fact still meant that Ray as well as the President during the Emergency years, Fakhruddin Ali Ahmed (incidentally the President that initiated the Emergency upon Indira Gandhi's suggestion) had considerable power in initiating transfers, constituting a serious threat to transferring Indian judges who did not politically identify with the executive's social philosophy. Both Ray and Ahmed supported Indira Gandhi's declaration of emergency; as such, they went to great lengths to legitimize her regime and thereby established executive control over the judiciary.

As Austin argues, “The highly politicized and notorious transfers during the 1975-7 internal emergency and in the early eighties did have great **constitutional significance**, because they were perceived to be **calculated attacks on judicial independence.**” (137, my emphasis) Prior to this period from 1950-71, there were largely two types of transfers: routine transfers and punitive transfers. Routine transfers were not necessitated by a problem with the transferred judge. Typically, they were initiated when a puisne judge was transferred from one high court to the post of Chief Justice of another high court due to a lack of a better candidate. On the other hand, punitive transfers had to be made because of a problem with the judge who was being considered for transfer. The rationale for punitive transfers changed and their use was dramatically expanded after 1971. In Chandrachud’s opinion, punitive transfers were “used by the government as an **aggressive tool to intimidate the judiciary and undermine its independence.** While transfers of judges during this time were **justified by citing the report of the States Reorganization Commission**, the clear intent of the government was to harass and intimidate the judiciary into submission.” (158, my emphasis). Both Chandrachud and Austin agree in this regard and both of their claims are credible. Chandrachud and Austin’s agreement shows how an older recommendation was revived in order to consolidate executive authority over the judiciary. Their agreement is significant because it indicates that while the State Reorganization commission report was cited as a reason by the executive, the real motive behind the punitive transfers was executive control over the judiciary. In 1955 when the States Reorganization Commission had legislated that one-third of the judges in a high court should be recruited from out of the state, the Law Commission had

explicitly disagreed with the recommendation. By going against the Law Commission's explicit disregard for the States Reorganization Commission, the executive displayed its contempt for judicial independence and used an unreasonable rationale to justify transfers that were politically motivated as a way of seeking revenge against uncommitted judges and an uncommitted judiciary.

The manner in which both the transfers played out as well as the way in which the threat of transfer was deployed in the Emergency period is significant for showing how the executive exerted control over the judiciary. After the declaration of Emergency in June 1975, "sixteen high court judges (some of whom were chief justices) were arbitrarily transferred by the government without their **consent**." (158, my emphasis) Until 1975, the prevailing rationale had been to receive judicial consent in the case of routine transfers; the lack of consent showed the executive exercising unusual authority. By denying any agency to the judges in whether they would want to transfer or not, the executive clearly displays its contempt for the judiciary and due process that had been followed with transfers in general. Austin reported that, "in several instances, [the transfers went through] over their objections." (344) The first direct act of aggression by the executive was carried out by Indira Gandhi herself. As Austin argues, "she refused the continuation of two judges on the Bombay and Delhi high courts, U. R. Lalit and R. N. Aggarwal, **despite favorable recommendations** from among others, the chief justices of their respective high courts and her own Law Minister [Gokhale]." (344, my emphasis) These acts of aggression were carried out in quick succession with the refusal of the continuation of the tenures of Justice Lalit on the 12th of January, 1976 and Justice Aggarwal on the 24th of February, 1976. Despite recommendations made to

the contrary, Indira Gandhi directly interfered with judicial independence, exposing the extent to which she was determined to maintain executive control in the political dynamic of the emergency. Her interference in the non-confirmation and subsequent transfer of Justice Lalit was also noted by the Shah Commission³, who heard H. R. Gokhale's [the Law and Justice minister during the Emergency] testimony, but also saw her handwritten letter. Austin notes she clearly stated, "I do *not* approve..." (344) These punitive transfers were noteworthy for her clear dissent from the judiciary; perhaps more significantly, these transfers lacked the consent of the judges who were transferred. The presence of consent was hereunto an important prerequisite in legitimizing judicial transfers and its absence in this case marked a significant departure in due process that was followed in judicial appointments. The conclusions of the Shah Commission inquiry are also significant – "the Prime Minister's actions regarding Justice Lalit amounted to an 'abuse of authority and a misuse of power'." (344)

In the case of Justice Aggarwal, Indira Gandhi's motivation behind pushing for his transfer was due to his presence on the 'MISA bench' that quashed Kuldip Nayar's detention arrest issued on the 24th of July 1975 under the Maintenance of Internal Security Act (MISA). He was arrested because he published an article called "Scope of the Pre-Censorship Order" wherein he stated that despite the censorship orders delivered during the Emergency through the Defence of India Act (DIR), the press still had the right to comment on the justifications behind the Emergency and the censorship. (Noorani, 404 Kuldip Nayar's opposition to the emergency also documented the

³ The Shah Commission was an independent governmental commission that was appointed by the Government of India in 1977 to examine executive interference during the Emergency. Interestingly its head was Justice J. C. Shah, Sikri's predecessor as Chief Justice of India.

supersession discussed earlier as a problem of executive overreach. He was a vocal spokesperson against the Indira Gandhi dispensation during the Emergency years; thus, his arrest and subsequent release by these judges was unacceptable to the executive, resulting in their non-confirmation and subsequent transfer. Justice Aggarwal offered a concurring judgment to the majority judgment of Justice S. Rangarajan that accepted Mrs. Bharati Nayar's (Kuldip Nayar's wife) habeas corpus petition in the Delhi High Court on the 13th of September, 1975. They effectively argued that despite MISA and the DIR, there had been no suspension of the writ of Habeas Corpus in India and personal liberty was still to be regulated by law, which predated the Indian Constitution itself. Furthermore, the executive failed to produce material to justify Nayar's arrest and consequently lost the case. (403-4). Indira Gandhi and the executive probably viewed Justice Aggarwal's assent to releasing Kuldip Nayar as a threat to executive control and with this agenda in mind pushed for his transfer from the High Court. Justice Rangarajan was also transferred after this judgment from the High Court of Delhi to the High Court of Guwahati.

Apart from the personal motivations behind the transfers of these two judges there were more general motivations demonstrated by the executive. As Austin notes:

“At least one individual in the Prime Minister's house apparently had it ‘in for’ the high courts from the beginning. An order was given on 25 June 1975 ‘**to lock up the high courts**’. Om Mehta [Minister of State for Home, Personnel and Parliamentary Affairs] reported hearing this to S. S. Ray [West Bengal Chief Minister], who reacted that this was not possible, and he would speak to Mrs Gandhi about it. He did, and the order was rescinded, but not before Sanjay Gandhi ‘met him in a highly excited and infuriated state of mind and told him [S. S. Ray] quite rudely that he did not know how to rule the country.’” (344, my emphasis)

From this series of decisions, the executive had the explicit intention of ‘packing the courts’ with judges who were compliant with executive interests. Any threat (real or

perceived) was met with executive disapproval and was dealt with in the most severe manner possible. While Indira Gandhi here did not execute the order for the non-continuation of the tenure of these judges on the advice of S. S. Ray, her confidant, she did approve of the transfer of several other judges in May and June of 1976. The similarity between all of these transfers was that the high court judges to be transferred were those who decided against executive interests in judgments concerning the executive and the Emergency; instead of being protected for performing their judicial duties to the Supreme Court, these judges were punished through transfers for their defence of civil liberties in their judicial decisions as an attempt to protect citizens from executive excesses during the Emergency.

Apart from Justices Lalit and Aggarwal, judges of the High Courts of Karnataka and Madhya Pradesh High Courts were also transferred during May and June 1976 (Austin, 344). Judges D. M. Chandrashekhar and M. Sadananda Swamy both played a role in the Division Bench⁴ on the High Court of Karnataka responsible for quashing the detention of political party leaders that were against the Emergency. These leaders included eminent BJP leaders such as A. B. Vajpayee and L. K. Advani. In response to the judges' opposition to political detentions, Justice Sadananda Swamy was transferred to the Guwahati High Court and Justice Chandrashekar who headed the bench was transferred to the Allahabad High Court (Hindustan Times). The other judicial transfer that warrants consideration is that of Justice A. P. Sen, the judge that gave the controversial decision protecting the petitioners Right to constitutional remedy under

⁴ A term in the Indian judiciary in which a case is heard and judged by at least two judges of the court as per the requirements of the case.

Articles 32 and 226 of the Constitution on the *Shiv Kant Shukla v. ADM Jabalpur* case on the 1st of September, 1975 in the Madhya Pradesh High Court. The executive eventually won its appeal to this judgment in the Supreme Court of India, in a judgment⁵ that would forever stain the reputation of the Supreme Court, yet Justice A P Sen was transferred from Madhya Pradesh to become the Chief Justice of Rajasthan. These three transfers were politically motivated attacks and despite Indira Gandhi's announcement that, " 'national integration' was the purpose of these transfers." (344), in keeping with the rhetoric of the State Reorganizations Commission, one cannot help but suspect that the real reason was to establish executive control and undermine judicial independence simultaneously.

Executive interests as the primary motivation behind judicial transfers is further substantiated by two reasons. Firstly, as Austin argues, "[the lists of judicial transfers] were discussed in the Home and Law ministries and sent to Chief Justice Ray—who '**had to sign the transfers or resign**', recalled a senior Law Ministry official friendly with Mrs Gandhi." (344, my emphasis) While it is unclear whether the Law ministry official was honest in his assessment of Chief Justice Ray and while he as well as others argue that he was unable to disagree with the executive, there is no doubt that Ray was the executive's choice as Chief Justice and his supersession as discussed earlier proves that fact. Austin notes that Justice Divan, retired Chief Justice of the Gujarat High Court, (who himself was transferred to the Hyderabad Court) in reminiscing on the transfers mentioned that, " 'The transfers were a threat: agree with us [the executive] or else...They could be made because **A. N. Ray was a pliant judge**. I know of judges

⁵ *ADM Jabalpur case*

asking not to sit on a case because they feared transfer.” (345, my emphasis) Appointing Ray as Chief Justice proved to the executive’s favor in approving the transfers since his appointment was facilitated by executive interference and consequently he had no ability to defend judicial independence in this regard. The second reason to substantiate the claim that executive interests were the primary motivation behind the transfers is provided by an analysis of the reaction of both the Law Commission as well as the Law and Justice Minister to the transfers. As Austin notes, “Senior officials in the Law Ministry did not favor the transfers, but there was no higher-level dissent because the issue had already been decided, according to a member of the Prime Minister’s staff.” (345) The executive acted explicitly against the wishes of the judiciary in this instance and even against resistance by members within the executive. For instance, B. N. Tandon, a member of the Prime Minister’s staff, noted that the note supporting the transfers did not include the ex-Law Minister’s Ashoke Sen’s assurance to Parliament in 1963 that judges would not be transferred without their consent. (Austin, 345) In elaborating on the same point Chandrachud notes:

“Sen [the Law Minister under Prime Minister Nehru from 1957-66] told Parliament in 1963 that the **rule that a judge’s consent was always taken prior to transferring him had evolved into a constitutional convention.**” (158, my emphasis). The fact that the issue of consent in sanctioning transfers had by this time affirmed the strength of constitutional law, makes the absence of consent in the judicial transfers that were sanctioned by Indira Gandhi and the prime minister’s office all the more unsettling. It could plausibly make the case that in permitting the transfers of sixteen judges across two months Indira Gandhi herself broke the law and used such underhand means to compromise judicial integrity while abrogating civil liberties in the country. The other

opponent to the transfer was the chairman of the Law Commission, Gajendragadkar who in fact was very unhappy with the transfers and in Austin's account, "at the time he had argued 'passionately' to Mrs. Gandhi against the transfers." (345) This lack of support from within the judiciary as well as members of Mrs. Gandhi's government herself proves that it was her interests and consequently executive interests that were being protected through the transfers.

While these transfers were critical in affirming the executive's power, it is equally important to note the threats of transfer as they played out in the period. Chandrachud notes that, "A list of fifty-six judges who had either been transferred or whose names were being considered for a transfer was prepared and leaked to the press in order to intimidate the judiciary." (158-9) The threat of transfer had a significant impact in scaring judges of the various high courts from appearing on the bench of a case that was in conjunction with preventive detention and the Emergency. As Austin discusses this idea, he mentions that:

"But that the prospect of transfer—acknowledging its inconvenience—could intimidate a judge indicates individual and the judiciary's collective honor were cheaply held." (347)

It is significant that Ms. Gandhi and other members of her office would go so far as to publish a list of judges to be actually or potentially transferred and thereby indicates that the threat of transfers for judges was one that could not be taken lightly. Furthermore, some of those judges were actually transferred for quashing preventive detention orders of the executive's opponents, which further indicates that the executive was not intimidated by the repercussions of this course of action. The second reason why the threat of judicial transfers was significant was that Ms. Gandhi was ready to violate the

constitutional convention of seeking a judge's consent prior to their transfer and acted in violation of the wishes of both the Law Commission as well as several members of the Law Ministry including Minister Ashoke Sen himself.

Several accounts allege that a list of fifty-six to seventy judges were being considered for transfer, but aside from the initial sixteen transfers, additional transfers never took place. (Austin, 345) Austin offers several explanations: The first reason was that Law Commissioner Chairman Gajendragadkar believed that he deserved credit for preventing the additional transfers since he wrote to Ms. Gandhi on the 13th of November, 1976 soon after the first lot of transfers advising against this second round of transfers and his advice seems to have been heeded on this occasion. The second explanation and arguably the most important one was Justice S. H. Sheth's protest when he received his transfer notification on the 27th of May, 1976. He filed a writ petition in the High Court of Gujarat against both the Union of India and the Chief Justice of India, even though the censor rules during the Emergency specifically prevented the reporting of transfers that made this case highly contentious at the time. The rationale he presented was that under Article 222 of the constitution, "transfers may only be in the public interest and cannot be used to punish and to inflict public and private injury on a judge. Also, transfers without consent violate judicial independence and the basic structure of the constitution." (Austin, 346) This event was very incendiary at the time given that the petition had been filed by a member of the judiciary and his position as a judge gave him the authority to be taken seriously by not only the High Court hearing his case, but also by the Indian judiciary itself. Public opinion, which is an important constitutional criterion in judicial transfers, was also important here given that this was yet another

justice being punished for protecting citizens from the executive. Furthermore, because the issue of consent had taken on the strength of constitutional convention and made lack of consent a violation of the basic structure of the Indian constitution Sheth's protest was a serious attack on Ms. Gandhi and other members of the executive that favored the transfers. On the other hand, the Government presented the rationale of unquestionable authority of the president to sanction transfers that went above even the Constitution itself. Ultimately, the High Court of Gujarat on hearing the arguments in August, 1976 decided in Justice Sheth's favor and filed a writ ordering the executive not to implement the transfer, while having the opportunity to appeal their decision to the Supreme Court. This decision was appealed to the Supreme Court of India on the 26th of August, 1977 but quickly rejected by the Supreme Court of India on the grounds that the newly formed Janata government found no justification for his transfer given that in Justice Chandrachud's majority opinion, "Sheth's transfer had been ordered 'without effective consultation with the Chief Justice of India'." (Austin, 346) While Justice Sheth was vindicated, the dissenting opinions that came in this opinion continued to agitate the judiciary for a long time after as to the procedure to be followed in judicial transfers.

The third explanation offered was that H. M. Seervai, an eminent member of the India judicial community and an anti-Emergency advocate, argued in an interview with Austin that he informed the press of the second round of transfers that caused close confidants of the Prime Minister to stop the transfers. This explanation seems plausible, but the most cogent argument seems to be the writ petition of Justice Sheth protesting his own transfer. The final explanation cited by Chandrachud in his analysis of the

transfers is that of Justice P. M. Mukhi, a prominent judge of the High Court of Bombay, who had a heart attack soon after hearing his transfer order to the High Court of Calcutta within thirty days of this notification. When Ms. Gandhi and the executive came to hear of the news, they were sufficiently intimidated to annul his transfer order. The annulment order came from none other than H. R. Gokhale, cabinet minister of Law and Justice, when he learnt of Justice Mukhi's delicate condition. In fact, Justice Mukhi died soon after and Austin notes that, "Former Bombay High Court Chief Justice, M. C. Chagla, attributed Mukhi's death to the transfer order and said he had fallen victim to **'the most brutal and inglorious period of our history'** " (346, my emphasis) Justice Chagla's comment indicates that the punitive transfers as an executive tool to intimidate the judiciary had severe repercussions for judicial independence and also served as a direct violation of constitutional precedent. Ultimately, the disputes that surrounded judicial transfers were only compounded by the non-confirmation of additional judges, which is the other executive tool that I will consider in this chapter as a means of intimidating the judiciary.

Non-confirmation of Additional Judges

The non-confirmation of additional judges was an executive tool wherein 'additional judges'⁶ were not made into puisne judges of the High Court, but instead they were given very minimal tenure increases as temporary judges of the court in question. The use of non-confirmation was often a result of these judges providing to decide against the executive in important judgments as well as their alleged ideological

⁶ These were judges appointed by the president of India to a high court due to a 'temporary increase in the business of a High Court', or if there are 'arrears of work' at a high court as mandated by Article 224 of the Indian Constitution. (Chandrachud, 103)

leanings or counsel provided to political opponents of the executive. This argument will be substantiated later in this section.

The first instance of non-confirmation has already been discussed earlier in the chapter with Indira Gandhi's explicit intent to prevent Justice Lalit of the Bombay High Court and Justice Aggarwal of the Delhi High Court from continuing to serve the judiciary due to their anti-executive judicial decisions. The reason I have considered them earlier in the chapter is to maintain the chronological order of events as they took place during the Emergency and to now subsequently consider the next use of this executive tool in a historical context after the Emergency. The next instances of non-confirmation took place in the 1980s soon after Indira Gandhi came back to power. In 1980, Justice R. C. Srivastava had resigned in opposition to the judicial transfer policy that proposed two significant changes at the time. Austin notes the first of these changes, "the government intended to appoint the chief justice of each high court from outside its jurisdiction. **Law Minister Shiv Shankar tended to confirm this when he told the Lok Sabha that, although the government had no such policy, it believed 'the proposal merits favorable consideration in the interests of sound judicial administration and also the independence of the judiciary.'**" (517, my emphasis) The second change Austin notes was that, "Government officials at this time also were thinking in terms of one-third of all judges on a high court coming from outside of the state, although this would emerge as policy only in the summer of 1981. **The Parliament's Consultative Committee for the Law Ministry favored both courses of action, according to a then senior Department of Justice official. Judges could come from out of state by initial appointment as well as by transfer. Mrs. Gandhi**

believed that many people thought ‘that there should be greater movement of judges because if they stay in one place they get involved with something or somebody’” (518, my emphasis) Both these changes had explicit executive support and ironically justify the new policy as a way to ensure greater judicial independence, while the executive had been compromising judicial integrity using non-confirmation of additional judges as well as transfers. Justice Srivastava also justified his resignation because the executive did not want to confirm his appointment to the Allahabad High Court and the extension of his tenure as an additional judge was only given for four months due to his alleged connections with Raj Narain (Ms. Gandhi’s political opponent).

During the *Election* case, Justice Srivastava had acted as Raj Narain’s counsel where Mr. Narain alleged that Ms. Gandhi had engaged in electoral malpractices. Furthermore, interestingly Austin notes that in his resignation letter to President Reddy he makes mention of the constant questioning by the Chief Justice of the Allahabad High Court as to, “ ‘whether I was a member of the Socialist Party,’ whether he had received telephone calls from Raj Narain, and whether he had worked in the January Lok Sabha elections” (518). It is also worth noting that the non-confirmation of Justice Srivastava was one of two cases of non-confirmation during the Indian Emergency. It is clear to see that in this instance the brief tenure continuation that he was granted apart from his non-confirmation as a puisne judge of the High Court was politically motivated, informed by his ideological leanings. This rhetoric also motivated the supersession of the Chief Justice. While this argument was never explicitly stated as a justification for his non-confirmation, questions posed by the Chief Justice to Justice

Srivastava showed that his allegiances clearly impacted his appointment to the High Court. Austin's analysis substantiates this position:

“The governor of Uttar Pradesh had written to the Law Ministry that Justice Srivastava's extension was **not desirable** because he ‘**might be susceptible to political bias and pressure**’. Doing this, the **governor had bypassed the normal procedure** of consulting the court's chief justice.” (518, my emphasis.)

Srivastava's ideological leanings motivated the non-confirmation on the court as well as the brief tenure that had been given to him. Furthermore, the fact that due process was not followed in reporting on a judge's conduct demonstrates the executive's disregard for the judiciary; considerations irrelevant to Justice Srivastava's judicial decision making were used as a reason to justify his non-confirmation.

The second instance of non-confirmation after the Emergency took place in February and March 1981, when rather than extending the tenure for a substantial period of three additional judges of the Delhi High Court or confirming their appointment as puisne judges, they were given very brief tenure extensions. The three judges included Justices Kumar, Vohra and Wad and as Chandrachud mentions, “As the two-year terms of three ‘additional’ Delhi High Court judges...were about to expire, the government only extended their terms by three months.” (103) In particular, one of the judges implicated, Justice O. N. Vohra, was instrumental in deciding a case against Sanjay Gandhi. The case in particular was informally referred to as the *Kissa Kursi Ka* (the story of the chair (of power)) case.⁷ *Kissa Kursi Ka* was a movie made by Amrit Nahata, a member of parliament and former member of Ms. Gandhi's Congress Party. The *St. Petersburg Times* noted in a review of the film that, “It satirized Mrs. Gandhi's government and her son's auto manufacturing ventures.” (7) In this regard, Sanjay

⁷ *State Through Delhi v. Sanjay Gandhi*, AIR 1978 SC 961.

Gandhi and V. C. Shukla, former minister for information and broadcasting during the Emergency were instrumental in destroying the film. They were ultimately convicted for the destruction of the film and Sanjay Gandhi's tampering with witnesses; the prosecution stated that, "the film...was destroyed at an automobile factory run by her son [Sanjay Gandhi] outside New Delhi." (7) The St. Petersburg Times also mention that, "The verdict ended an 11-month legal battle marked by adjournments, delays and radical shifts in testimony by several prosecution witnesses. Last May [May 1978], Gandhi was **sent to prison for a month** after the Supreme Court ruled he had tampered with some of the witnesses." (7, my emphasis.) The fact that Sanjay Gandhi was sentenced to jail as a result of Justice O. N. Vohra and the bench's initial judgment that was later overturned would make a strong case for why Justice Vohra's tenure extension was so minimal and the fact that he was never confirmed as a puisne judge of the High Court. Furthermore, Justice Vohra himself in his judgment stated that, "I find the accused guilty of criminal conspiracy, breach of trust, mischief by fire, dishonestly receiving stolen property, concealing stolen property and disappearance of evidence." (7) This judgment was noted by the executive and Justice Vohra was seen as a political enemy who would have been detrimental to executive interests.

While these are three of a series of incidences of non-confirmation that are considered here, they clearly indicate the lengths to which the executive sought to undermine judicial authority, violate constitutional conventions in the judicial appointment's procedure and to instill a sense of fear and unrest in members of the judiciary and members of their own executive as well.

Legacy of the Transfers and Non-Confirmation of Additional Judges

In the wake of the punitive transfers as well as a series of non-confirmations, a dangerous precedent was set in the judicial appointments process. As Chandrachud argues, “what the transferred judges were being penalized for **was not any misconduct on their parts but their independence of judgment and courage to decide against the government.**” (159, my emphasis). Before the emergency was declared, the executive viewed any adverse decision to their interests as a politically motivated attack by a judge and consequently his or her presence in the judiciary was a threat that warranted serious action. Most importantly in the wake of the punitive transfers and non-confirmation the issue of seeking a judge’s consent prior to his transfer or non-confirmation was dramatically changed via the important judgment informally referred to as the *First Judges* case.⁸

The event that precipitated in the landmark judgment was the Law Minister, Shiv Shankar’s circular on the 18th of March, 1981 addressed to the Governor of Punjab and the chief ministers of other states (except for the north-eastern states), a copy of which was also sent to the chief justice of each state that outlined the new transfer policy (104). As Chandrachud notes, “The letter requested that consent be sought from additional judges and from persons who were going to be appointed additional judges of the high courts—consent to be appointed to be appointed or transferred to another high court. The letter outlined the goal of the government’s new transfer policy, a goal which was ostensibly in keeping with the recommendation of the States Reorganization Commission several decades ago” (104) In this way, the executive essentially undermined the power of the Chief Justice of India in recommending transfers of

⁸ *S.P. Gupta v. President of India*, [1982] 2 SCR 365

subordinate High courts. In response to this weakening of the judiciary, lawyers across the country filed writ petitions challenging the government's policy.

However, the outcome of the *First Judges* case saw a weakening of the discretionary powers of the Chief Justice of India in deciding on judicial transfers in two different respects. The first of these was that, “the Chief Justice’s opinion was not to be given ‘primacy’ by the President of India...it was upto the president to decide what to do if any of the three constitutional functionaries⁹ disagreed.” (108) The only exception made was that the Chief Justice of India’s recommendation would be given slightly more weight than that of the Chief Justice of the High Court to be considered. This outcome of the judgment did mean that the President and by extension the executive enjoyed more power in the transfer process and consequently judicial appointments as a result of the judgment. The second and most troubling aspect of the judgment was that, “it was held that the President of India was not bound by the advice of the Chief Justice of India, and that ‘consultation’ did not amount to ‘concurrence’...If the chief justice’s opinion were not binding on the president, **then the executive could ride roughshod over the judiciary once more, as it had done during the Emergency. The Court would be unable to assert its independence and control over its own composition, facing a daunting executive with a large two-thirds majority in Parliament.**” (108-9, my emphasis) It is clear to see that the outcome of the transfers and non-confirmation process had already damaged the judicial appointments process. The *First Judges* case was one of several judgments that would attempt to remedy the

⁹ These were the members consulted by the president in making appointments to the High Courts and included the Chief Justice of India, the Chief Justice of a High Court and the state governor.

transfer process, but as one can see from the outcome of the *First Judges* case it seems to have done nothing more than to strengthen the executive upon Ms. Gandhi's return to power after the Emergency. It is only in understanding the chronology of the punitive transfers and non-confirmation as they took place during the Emergency, their consequent impact on landmark judgments that one can truly begin to appreciate the ways in which our contemporary collegium system has remedied executive excesses.

Conclusion

This thesis has sought to serve as an examination of the executive tools used to influence the appointments of the judiciary before, during and in the aftermath of the Indian Emergency. The reason that these executive tools warrant consideration is in understanding the serious power imbalances as they existed between the executive and the judiciary during this period. These imbalances set a dangerous precedent for the appointment procedure in the judiciary and thus a re-examination of this period makes us appreciate the appointment procedure as it is followed today. The collegium system, the current system of judicial appointments, as discussed in the introduction of the thesis, relies on the opinion of the five seniormost judges of the court in concern which recommends appointments to the executive. In the case of the Supreme Court, this includes the Chief Justice of India and the four seniormost judges of that court who would make a recommendation for elevation of a judge of the high court to the Supreme Court. In the case of the High Courts the Chief Justice of the High Court along with the four seniormost judges makes a recommendation for appointment. However, this is only sent to the executive after it has been approved by the Chief Justice of India and the Supreme Court Collegium. Critics of this system suggest that the judicial branch has too much control over judges' appointments. I argue, however, given the history of the judiciary and the executive under the Emergency, that the collegium system protects the judiciary's independence.

The first chapter on *The Supersession* sought to examine the chain of events that led to the first time that the executive explicitly and directly interfered with judicial appointments. This event is noteworthy for its judicial implications because of the ways

that executive excesses that took place in the years before the Emergency shared similarities with the way that events during the Emergency played out. While the supersession was an explicit act of control over the judiciary, the Emergency became an act of control by the executive on the nation at large. The main motivation behind explaining the Supersession was executive discontent with the judiciary for judicial judgments that seemed to reduce executive power. The Supersession was a politically motivated act that served as a means of control for the executive to establish their power over the judiciary via compromising the process of judicial appointments. This argument was substantiated by not only analyzing executive explanations for the supersession, but also relying on the nature of appointments made by the superseded judge himself that were more often than not politically motivated.

The second broader argument is that executive intervention corresponded with unfavorable judgments (*Golaknath*, *Privy Purses*, *Bank Nationalization* and *Kesavananda*) that thwarted economic and social reform desirable to the executive. The supersession facilitated Chief Justice Ray's appointment and the judges subsequently appointed to the Supreme Court whose appointment and 'social philosophy' was in line with the executives. It was with both of these considerations in mind as well as the Chief Justice of India's power in deciding the composition of benches to hear a particular case that the executive created a 'committed judiciary' and were relatively successful in attempts to 'pack the court'. Ultimately, these processes facilitated the passage of social and economic reform that was desirable to the executive and most importantly in line with Mrs. Gandhi's vision for establishing control over the country. This vision was in line with her own political agenda which she managed to enact during the sixteen

months of the Emergency while maintaining power through her control of the executive, judiciary and by silencing any opponents (political or otherwise) to her control of the country via MISA and DIR (two legal acts that infamously legalized preventive detention without any warrant and effectively compromised citizen's fundamental rights).

While the first chapter sought to consider the executive influence in judicial appointments on the Supreme Court of India in particular, the second chapter, *Transfers and Non-Confirmation of Additional Judges* has sought to consider this process at a much broader level by considering the impact of executive tools at the level of the various High Courts of India. Interestingly while the supersession is often seen as the event that irrevocably altered judicial independence, the effect of the punitive transfers and non-confirmation was a significant blow to judicial independence. This claim is substantiated by the series of landmark judgments aimed at remedying the process of judicial transfers and non-confirmation after the punitive transfers took place and for how they have subsequently had serious repercussions for the process of judicial appointments.

As I showed, when the executive used both of these executive tools, the threat of transfer (as communicated in the list of transfers) and non-confirmation of additional judges, the threat was as significant as its actuality. (Judges were both transferred and the appointments of several additional judges was non-confirmed during this period while many more were threatened by these consequences). These threats are significant to consider because it clearly indicates that the executive was powerful enough to create an atmosphere of fear in judges who decided against executive interests. The executive

interests referred to here are those of Ms. Gandhi, members of her household such as Sanjay Gandhi and other members of her cabinet.

The general argument that carries through both of these chapters is that while the executive may have referred back to the Law Commission Report in the case of the Supersession and the State Reorganization Commission in justifying their transfer policy, the real motivations behind these executive interferences were far more insidious than strategic attacks leveled at the judiciary. In both periods (prior to, during, and after the Emergency) when Mrs. Gandhi served as Prime Minister, the executive had a specific agenda to render all opponents to their governance powerless in the country. The judges who were superseded or transferred or non-confirmed were in all cases those who had decided against the executive in judgments pertaining to executive interests and thereby threatened their control; this argument makes the case that these were calculated attacks to weaken the judiciary. The use of these executive tools in turn allowed the executive to retain judges and appoint judges who were committed to the executive's social philosophy. Judges, such as Chief Justice Ray, were weak judges who could not stand up to the executive for fear of being removed from the judiciary altogether. The executive posed a very serious threat to the judiciary on two fronts: violations of the 'seniority norm' in the supersession and violation of the issue of judicial consent in the case of transfers and non-confirmation. The violation of both of these judicial procedures in the appointment process challenged the tradition of constitutional conventions until the 1970s.

Directions for Future Research

While this thesis has relied on a mixture of primary sources, judgments and secondary sources, there are a lot of important circulars and notes issued by the executive that were disseminated at the time and not released to the public for fear of drawing attention to the executive's attempts to compromise judicial integrity. A worthwhile avenue of research then might be to get access to these documents as well as the original texts of interviews with judges conducted by Austin, Chandrachud or Gadbois Jr. in order to arrive at a more definitive opinion on the level of executive interference during this period. Furthermore, it might be interesting to think of a comprehensive project that covers executive interferences from the very inception of the judiciary in Indian history and look at the ways in which these have changed until the present moment. While Chandrachud has focused on informal norms that govern the appointments of judges across the Supreme Court and High Courts in India, a project that focused on instances of executive interferences and how that has impacted the judiciary in terms of the quality of judgments produced would be fascinating.

The current work in the field is fairly comprehensive and covers a lot of the instances of executive interference, however I believe that a wider context to appreciate executive interference on appointments would allow for an observation of significant trends in the process. In the present Indian political climate, it might be compelling to consider the saffronization of the judiciary (i.e. the effect of "saffron politics" in India given the dominance of far-right Hindutva politics in India on the composition of the judiciary.) This analysis might include an examination of the way the Modi government and the executive look to appoint judges on the basis of a religious similarity (i.e. a

bench predominantly consisting of Hindu judges); a future investigation might involve examining those committed to the present ‘social philosophy’ of the executive and whether judges more receptive to executive views in deciding judgments are privileged in the appointment process. This would make for a very interesting piece of analysis given the resounding majority that the Bharatiya Janata Party (BJP) has won in the recent 2019 elections and its consequent impact on judicial independence.

This last project that I have suggested ties into the way that I would like to argue for the relevance of my thesis – in the current situation we constantly complain¹⁰ of how the present system of judicial appointments is flawed, but it is far better than the previous system discussed in my thesis wherein the executive could interfere with the appointments and foment mass disorder within the judiciary. In many ways to appreciate the present system there is a need to remind individuals of how the judiciary has been weakened in the past and presently the collegium system corrects a lot of the flaws of those earlier systems.

Relevance to the Present System of Appointments and Executive Interferences

While in the current system of appointments there have been few instances of Supersession, there have been several instances of non-confirmation of several members of the judiciary to the Supreme Court of India under the present collegium system. A recent instance of non-confirmation was in the case of Justice K. M. Joseph. As the *Indian Express* notes, “Justice KM Joseph’s name was recommended by the Supreme Court Collegium on January 10 [2018] ... [however] it returned the file for Justice

¹⁰ Consider here newspaper articles written by Suhrith Parthasarathy, practicing advocate in the Madras High Court, on the *Collegium and Transparency in the Hindu*, and Pratap Bhanu Mehta, a noted Indian intellectual, on the *Supreme Court, diminished* and *Judicial Quicksand* in the *Indian Express*.

Joseph's elevation, citing Joseph's 'lack of seniority'...and Justice Joseph's elevation would be against the principle of regional representation." This decision was highly controversial given that the executive had effectively turned down the Collegium's proposal for Justice Joseph's elevation and thereby rejected the judiciary's independent recommendation for a candidate. Furthermore, the idea of a 'lack of seniority' seems implausible given that Justice Joseph had been a judge of the High Court of Kerala for ten years and subsequently Chief Justice of the High Court of Uttarakhand for another four years. A claim of 'lack of seniority' for a practicing member of the judiciary for fourteen years prior to being elevated to the Supreme Court of India thus seems highly suspect. It was only on the 4th of August, 2018, almost six months later, that his elevation to the Supreme Court of India was approved. Interestingly, the *Indian Express* also reported that, "The Congress attacked the government for allegedly being vindictive towards Justice Joseph and accused the government of not clearing Justice Joseph's name due to a ruling he gave in 2016 against the BJP government in Uttarakhand when he had cancelled President's Rule in the state and brought back to power the Harish Rawat-led Congress government." The executive in this case appears to have interfered with his judicial appointment due to the adverse decision of a judgment against executive interests. This clearly echoes the ways in which the executive interfered with the appointment process of judges during the Indian Emergency. In this manner, the relevance of executive interferences in the judicial appointment process is as relevant today as it was then and it still continues, but under a far subtler guise.

Recently this executive interference was repeated by the executive when they returned the collegium's recommendation on the 12th of April, 2019 to elevate the High Court of Jharkhand Chief Justice Bose and the High Court of Gauhati Chief Justice Bopanna asking them to rethink their decision. As the *Hindustan Times* reports on the same, "On May 8, however, the collegium...reiterated its April 12 recommendation to appoint them. Following the government's objection, the collegium said in its resolution that it kept in mind the twin parameters of seniority and merit while recommending names." This move by the executive to ask the collegium to rethink a recommendation for judicial appointment seems dubious at best given that both the judges in question met the necessary criterion. It is increasingly suspect when one considers that the executive allegedly cited a lack of seniority as the reason behind returning the collegium's recommendation even though as the *Times of India* reports, "Justice Bose...stood at number 12 in the all-India seniority of HC [High Court] judges...[and] Justice Bopanna stood at 36 in the seniority list." This lack of seniority seems to be an ineffectual reason to return a recommendation and furthermore plausibly displays that these justices might be contrary to executive interests. The executive only approved the elevation of these judges on May 22nd, 2019, more than a month after the initial request was not approved. The *Hindustan Times* reported that, "The SC [Supreme Court] and the government have been sparring over appointments ever since the apex court [i.e. the Supreme Court of India] struck down the National Judicial Appointments Commission (NJAC) bill in 2015 that said all appointments to the higher judiciary would be made by the NJAC." This account explains the executive's failure to approve the collegium's

recommendation due to the fact that the Supreme Court of India offered an unfavorable judgment in remedying the process.

Both of these instances clearly indicate that while the collegium system has improved the appointment process, there are still ways in which the executive tacitly interferes with judicial appointments. It is then in this light that the examination of the most compelling instances of executive interferences holds relevance even today given that executive and judicial conflicts exhibit a pattern that could plausibly be traced back to the very inception of the judiciary itself.

REFERENCES

- A.D.M. Jabalpur v. Shivkant Shukla.* (1976 AIR 1207, 1976 SCR 172). [1976].
- Austin, G. (1972). *The Indian Constitution*. 1st ed. Oxford: Oxford University Press.
- Austin, G. (1999). *Working a democratic constitution*. 1st ed. Oxford: Oxford University Press.
- Chandrachud, A. (2018). *Supreme Whispers*. 1st ed. Haryana: Penguin Books India.
- Chandrachud, A. (2014). *The Informal Constitution*. Oxford: Oxford University Press.
- Chinnappa Reddy, O. (2012). *The court and the Constitution of India*. Oxford: Oxford University Press.
- Dua, B. (1983). A Study in Executive-Judicial Conflict: The Indian Case. *Asian Survey*, 23(4), pp.463-483.
- Executive, J. (2019). *Justice KM Joseph appointed as Supreme Court judge after months of tussle between Judiciary and Executive*. [online] The New Indian Express. Available at: <http://www.newindianexpress.com/nation/2018/aug/04/justice-km-joseph-appointed-as-supreme-court-judge-after-months-of-tussle-between-judiciary-and-exec-1852906.html> [Accessed 25 May 2019].
- Gadbois, G. (2011). *Judges of the Supreme Court of India, 1950-1989*. New Delhi: Oxford University Press.
- His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973 4 SCC 225) [1973].
- <https://www.hindustantimes.com/>. (2019). *Centre backs down on appointment of judges, clears 4 names recommended by SC*. [online] Available at: <https://www.hindustantimes.com/india-news/govt-clears-names-of-4-judges-for-elevation-to-supreme-court-report/story-qgjdaK6R6f0ReNEOIHGn0H.html> [Accessed 25 May 2019].
- IAS Express. (2019). *Collegium System in India - The Controversy of Judicial Transparency vs. Independence*. [online] Available at: <https://iasexpress.net/collegium-system-of-appointment-of-judges-in-supreme-court-and-high-court-upsc-ias/> [Accessed 25 May 2019].
- L.C. Golaknath and Ors. v. State of Punjab and Anr.* (1967 AIR 1643, 1967 SCR (2) 762)[1967].
- Mahapatra, D. (2019). *Ranjan Gogoi: Centre returns names of two high court CJs mooted for Supreme Court* | India News - Times of India. [online] The Times of India. Available at: <https://timesofindia.indiatimes.com/india/centre-returns->

names-of-two-high-court-cjs-mooted-for-supreme-court/articleshow/69225651.cms [Accessed 25 May 2019].

- Nayar, K. (1973). *Supersession of Judges*. 1st ed. New Delhi: Indian Book Company.
- Nayar, K. (1978). *The judgment*. 1st ed. New Delhi: Vikas Pub. House.
- Noorani, A. (1978). The Judiciary and the Bar in India During the Emergency. *Verfassung in Recht und Übersee*, [online] 11(4), pp.403-410. Available at:
https://www.jstor.org/stable/43108733?seq=1#metadata_info_tab_contents.
- Palkhivala, N. (1973). *A judiciary made to measure*. Bombay: M.R. Pai.
- Palkhivala, N. (1974). *Our Constitution defaced and defiled*. Delhi: Macmillan Co. of India.
- Palkhivala, N. (1984). *We, the People India - The Largest Democracy*. Bombay: TATA PRESS Limited.
- Ranjan, S. (2016). *Justice, judocracy and democracy in India*. 1st ed. New Delhi: Routledge Taylor & Francis Group.
- Rustom Cavasjee Cooper v. Union Of India*. (1970 AIR 564, 1970 SCR (3) 530) [1970].
- S. P. Gupta vs President Of India And Ors*. (AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365). [1982].
- Seervai, H. (1978). *The Emergency, future safeguards and the habeas corpus case ; a criticism*. 1st ed. Bombay: N.M. Tripathi.
- SEERVAI, H. (1970). *The position of the judiciary under the Constitution of India. Sir Chimanlal Setalvad lectures*. 1st ed. Bombay: University of Bombay.
- Sengupta, A. and Sharma, R. (2018). *Appointment of judges to the Supreme Court of India*. 1st ed. New Delhi: Oxford University Press.
- St. Petersburg Times (1979). Sanjay Gandhi guilty in film case. [online] Available at:
<https://news.google.com/newspapers?id=401SAAAIBAJ&sjid=OnwDAAAIBAJ&pg=3654,2919971&dq=amrit+nahata&hl=en> [Accessed 25 May 2019].
- State of Uttar Pradesh v. Raj Narain*. (1975 AIR 865, 1975 SCR (3) 333). [1975].