India's New Constitutionalism: Two Cases That Have Reshaped Indian Law

Milan Dalal
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Abstract: As a nation of over one billion people and the world’s largest democracy, India is sometimes confronted with situations in which its democratic institutions clash. Under the Indian Constitution, legislation concerning land reform is placed in a special category designed to immunize it from judicial scrutiny. This scheme, known as the Ninth Schedule, has been abused by legislators seeking electoral benefit. Simultaneously, the country has been rocked by a series of public corruption scandals. As Parliament has sought to clean up its image by expelling disgraced members, its actions have been challenged as unconstitutional, leading to a constitutional showdown between the legislative and judicial branches. This Note analyzes two seminal decisions of the Indian Supreme Court, handed down in January 2007, which have the potential to transform Indian law by declaring the court the ultimate arbiter of the meaning of the Indian Constitution.

Introduction

India is often hailed as the world’s largest democracy. At the core of that democracy is a thriving, independent judicial system that has been an important engine of social change and development. Yet, despite possessing a well-developed system of law inherited from British colonial rule, for the first fifty years following independence

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2 Justices of the Indian Supreme Court are chosen on the basis of seniority and free of political considerations at the behest of the President with consultation from the Chief Justice. The Chief Justice is appointed by the President.

from Britain, the nation’s supreme court vacillated in exerting the full checks on the legislative branch requisite in modern democracies.\(^4\) Two recent cases involving the power of courts to review Parliament’s legislative and non-legislative functions—the *Coelho*\(^5\) and *Raja Ram Pal*\(^6\) cases—demonstrate the Indian Supreme Court is embarking on a new era of judicial review, asserting itself as a co-equal branch of government and a body dedicated to upholding principles of democratic government.\(^7\)

Part I of this Note examines the background of India’s Constitution with respect to judicial review, the Ninth Schedule laws, the 1973 ruling of the Indian Supreme Court on which type of laws could be challenged, political corruption, and the power of Parliament to expel members. Part II describes recent jurisprudence of the court, including detailed discussion of the *Coelho* and *Raja Ram Pal* cases. Part III critiques these cases in terms of their positive and negative implications.

## I. Background

### A. Background to Ninth Schedule Leading up to *Coelho*

India achieved independence from Great Britain in 1947.\(^8\) Shortly afterwards, India’s leaders crafted the Constitution of India (constitution), which came into effect on January 26, 1950.\(^9\) Authored by Dr. B.R. Ambedkar, it is the longest written constitution in the world.\(^10\) As with most constitutions, all laws passed by the legislative branch must conform to its provisions.\(^11\)

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\(^5\) I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu & Others, (2007) 2 S.C.C. 1 [hereinafter *Coelho*].

\(^6\) Raja Ram Pal v. Hon’ble Speaker, Lok Sabha & Others, (2007) 3 S.C.C. 184 (India) [hereinafter *Raja Ram Pal*].


\(^8\) Cambridge Illustrated History: British Empire 386 (P.J. Marshall ed., 2006).


Not long after the enactment of the constitution, Parliament found reason to amend it.\textsuperscript{12} India’s first prime minister, Jawaharlal Nehru, a self-described “democrat and socialist,”\textsuperscript{13} had campaigned for decades against British imperialism and, after independence, vowed to free India from the stranglehold of elites.\textsuperscript{14} Nehru was a staunch supporter of nationalization and expropriation of land from the elite for redistribution to the poor.\textsuperscript{15} Yet, India’s new constitution had guaranteed a right of property to its citizens, and therefore Nehru’s grand plans for equitable redistribution of zamīn (land) were soon confronted by the zamindars (landowners) in the courts.\textsuperscript{16} Early court rulings held the land reform laws “transgressed the fundamental right to property guaranteed by the constitution.”\textsuperscript{17}

As a result, Prime Minister Nehru introduced the First Amendment to the constitution of India on May 29, 1951, creating a famous scheme known as the “Ninth Schedule.”\textsuperscript{18} The First Amendment created article 31B,\textsuperscript{19} which described the Ninth Schedule and was inserted into part III of the constitution.\textsuperscript{20} Originally consisting of thirteen laws, the Ninth Schedule was narrowly crafted to immunize land reform laws from judicial review.\textsuperscript{21}

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} See Noorani, supra note 12, at 731.
\textsuperscript{18} See Constitution (First Amendment) Act, 1951; Noorani, supra note 12, at 731.
\textsuperscript{19} Article 31B reads: “Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.” India Const. art. 31B.
\textsuperscript{20} See Constitution (First Amendment) Act, 1951.
\textsuperscript{21} Noorani, supra note 12, at 731. Nehru himself commented on the narrow scope of laws belonging to the Ninth Schedule, stating, “It is not with any great satisfaction or pleasure that we have produced this long schedule. We do not wish to add to it for two reasons. One is that the schedule consists of a particular type of legislation [land reform laws], generally speaking, and another type should not come in. Secondly, every single measure included in this schedule was carefully considered by our president and certified by him.” Id.
From the moment of the First Amendment and the introduction of land reform laws under the Ninth Schedule, a long saga ensued in the courts. Between 1951 and 1967, property owners challenged the laws and constitutional amendments that placed land reform laws within the Ninth Schedule. Initially, the laws were challenged as violations of article 13(2) of the constitution, which provides against derogation of fundamental rights. Analogizing the constitutional amendments to laws, plaintiffs creatively argued in Sankari Prasad Singh Deo v. Union of India and Sajjan Singh v. Rajasthan that the amendments were abridging the fundamental right to property and therefore were invalid under article 13(2). Nevertheless, in both decisions, the Indian Supreme Court rejected the arguments and “upheld the constitutional validity” of article 31B.

In 1967, however, the supreme court reversed itself and held, by a slim six-to-five majority, that the amendments were “laws” within the meaning of article 13. This was a significant decision, for the court ruled for the first time that there were implied limitations on Parliament’s power to amend the constitution. The court held that “Parliament would have no power from the date of the decision (February 27, 1967) to amend any of the provisions of part III so as to take away or abridge fundamental rights.” The court further noted that, if Parliament wished to amend fundamental rights, it would have to convene a Constituent Assembly (constitutional convention).

Following this significant decision, the Government continued its “radical measures” on the social front, destined once again to clash with the courts. One goal of the new prime minister, Indira Gandhi, Jawaharlal Nehru’s daughter, was to eliminate payments the Government was required to make to princes. In consideration for the

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22 See id. at 731–33.
23 See id.
24 India Const. art. 13, § 2. Article 13(2) reads: “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” Id.
27 Nayak, supra note 17, at 2.
28 Id.
30 Nayak, supra note 17, at 3.
31 Noorani, supra note 12, at 732.
32 Nayak, supra note 17, at 3.
33 Id.
34 Katherine Frank, Indira 323 (2001).
peaceful accession of their territories to the Union of India at the
time of independence from Great Britain, the constitution mandated
annual payments, known as “privy purses,” to the displaced princes. These payments, however, were unpopular with the populace, and Mrs. Gandhi was determined to save to the treasury $6 million per annum through the elimination of the privileges. Hence, in September 1970, Gandhi muscled an amendment through the lower house of Parliament aimed at “rescind[ing] the privy purses.” Although the vote passed with significant margins in the lower house, it was defeated by one vote in the upper house. Following this parliamentary defeat of her amendment, Gandhi simply instructed her ally, President V.V. Giri, to “derecognize” the princes through a presidential proclamation, unconstitutionally stripping the royalty of their payments and titles.

The supreme court invalidated the derecognition of the princes as unconstitutional (along with a contemporaneously enacted measure nationalizing banks) in early December 1970. As one commentator described it, “[B]y now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the fundamental rights.”

In response to this blow from the supreme court, Mrs. Gandhi dissolved Parliament and called for new elections to take place in February 1971. Campaigning on the popularity of her socialist and populist legislation, Mrs. Gandhi’s Congress Party was returned to power with a two-thirds majority, making her “the most powerful Indian prime minister since independence.” With this newfound power, the prime minister once again eagerly set to amending the constitution. Between 1971 and 1972, Parliament passed a number of important constitutional amendments, including, significantly, the Twenty-fourth Amendment (Parliament has the “absolute power to amend any part of the constitu-

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35 Id.
36 Id.
37 Id. The vote in the lower house was 339-154. Id.
38 Id.
39 Frank, supra note 34, at 323; Nayak, supra note 17, at 3.
40 Nayak, supra note 17, at 3.
41 Frank, supra note 34 at 323–24.
42 Id. at 327. The new majority in the lower house of Parliament gave the Congress Party 325 seats—seventy more seats than in the previous Parliament. Id.
43 Id. at 328.
tion, including Part III dealing with fundamental rights”), the Twenty-sixth Amendment (elimination of the princes’ privy purses), and the Twenty-ninth Amendment (inserting certain land reform laws from the state of Kerala into the Ninth Schedule, thereby placing the laws beyond judicial review).

Once again, legislation involving amendment of the constitution and land reform laws was challenged in the courts. In what became known as the *Kesavananda Bharati* case, a thirteen-judge panel of the supreme court issued a seminal opinion spanning nearly 800 pages and an entire volume of the Supreme Court Cases Reporter. The court adeptly issued a series of instrumental decisions.

First, the court overturned the *Golak Nath* case, which had held that Parliament lacked the power to amend fundamental rights in the constitution without a constitutional convention. Second, by a margin of thirteen-to-zero, the court upheld the Twenty-fourth Amendment, which stipulated that “Parliament had the power to amend any or all provisions of the Constitution.” Ruling seven-to-six, however, the court included one caveat: although no part of the constitution was beyond amendment, Parliament could not abrogate the “basic structure” of the constitution through simple amendments. Additionally, the court upheld the Twenty-ninth Amendment, holding the Kerala land reform laws were beyond judicial review, as they were contained in the Ninth Schedule.

Hence, the court, while upholding the amendments passed by Parliament, inserted the power of judicial review for itself by ruling that amendments, altering the “basic structure” of the constitution could not withstand judicial scrutiny. The court also reserved to it-

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50 See id.
52 NAYAK, *supra* note 17, at 4.
54 Id.
55 Id.
self the task of determining what exactly constitutes the “basic structure” of the constitution.\textsuperscript{56}

Although the government questioned the basic structure doctrine articulated in \textit{Kesavananda Bharati}, the ruling was re-affirmed in subsequent decisions.\textsuperscript{57} Thus, for over thirty years, Parliament was able to operate by amending the constitution so long as it did not erode the basic structure of the constitution.\textsuperscript{58}

\textbf{B. Background to the Raja Ram Pal Case}

Indian politicians have long been plagued by allegations of corruption.\textsuperscript{59} In 1989, Prime Minister Rajiv Gandhi’s squeaky-clean image was tarnished by allegations that he and a number of government officials had received kickbacks from a Swedish company named Bofors AB to provide India with howitzer guns.\textsuperscript{60} The “Bofors scandal” led to Mr. Gandhi’s defeat in the 1989 elections.\textsuperscript{61} One of Mr. Gandhi’s successors as prime minister, P.V. Narasimha Rao, also faced extensive accusations of impropriety.\textsuperscript{62} Most significantly, in 1993 Mr. Rao survived a no-confidence vote in Parliament only after he allegedly bribed several members of Parliament (MPs) to support him.\textsuperscript{63} And more recently, India’s foreign minister, Natwar Singh, resigned after being implicated in Paul Volker’s United Nations investigation of the oil-for-food scandal in Iraq.\textsuperscript{64}

\textsuperscript{56} \textit{Id.}
\textsuperscript{57} See Smt. Indira Nehru Gandhi v. Raj Narain, 1975 Supp (1) S.C.C. 1 (India) (invalidating clauses of Thirty-ninth Amendment as inconsistent with basic structure of constitution); see also Minerva Mills Ltd. v. Union of India, 3 S.C.C. 625 (1980) (India) (striking down clauses 4 and 5 inserted into article 368 of the constitution by the Forty-second Amendment as inconsistent with basic structure doctrine).
\textsuperscript{58} See \textit{id.}
\textsuperscript{59} See infra notes 60–67.
A news team sting operation on December 12, 2005, uncovered an even deeper morass of corruption. In what came to be known as a "cash-for-query" scandal, ten members of the lower house and one member of the upper house of Parliament were captured on videotape taking bribes in exchange for asking questions in Parliament. The bribes ranged from $325 to $2400. Although politicians had been embroiled in corruption scandals before, such blatant dishonesty forced the government’s hand, culminating in the expulsion of MPs in December of 2005. With some of the MPs challenging the expulsion as unconstitutional, and claiming they had been entrapped, the scandal foreshadowed a constitutional showdown in the supreme court.

Article 105(3) of the Indian Constitution states: “In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the constitution [Forty-fourth Amendment] Act 1978.” This section is similar to Article I, Section 5, clause 2 of the U.S. Constitution, which states, “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” Although the U.S. Constitution expressly outlines a procedure for the House and Senate to expel members, the Indian Constitution does not explicitly mention expulsion. Instead, it could be interpreted as saying Parliament has the power to make laws to regulate itself. This ambiguity came to light in the Raja Ram Pal case.

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66 Id.
67 Id.
68 Id. The ten Lok Sabha (lower house) members expelled were from a variety of political parties, including five members of the BJP, three members of BSP, one from Congress, and one from RJD. The Rajya Sabha (upper house) member expelled belonged to BJP. Parliament Gets Supreme Stamp, HINDUSTAN TIMES, Jan. 11, 2007, available at http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=6fae6738-e4cf-4e5b-9c08-ebbbc0ea1503.
69 See MPs Expelled, supra note 65.
70 India Const. art. 105, § 3.
71 U.S. Const. art. I, § 5, cl. 2.
72 See India Const. art. 105, § 3.
73 Id.
Expulsion from Parliament is not unprecedented.\textsuperscript{75} The first person to be expelled from Parliament was H.G. Mudgal, in a situation remarkably similar to the recent cash-for-query scandal.\textsuperscript{76} While Mr. Mudgal complained he was denied due process, the Speaker of the Lower House, G.V. Mavlankar, stated, “The procedure of forming a special committee is a proper one and the House can expel any of its members,” and the issue was not pursued further.\textsuperscript{77}

In the period following the end of the dark days of the Emergency Period, even the legendary Indira Gandhi was herself expelled from the Lok Sabha (Lower House of Parliament).\textsuperscript{78} In December 1978, Mrs. Gandhi, having recently returned from a well-received trip to London, was found guilty by the Privileges Committee of Parliament for “obstructing four officials who were investigating Maruti Limited”\textsuperscript{79} and “intimidating officials of the Lok Sabha.”\textsuperscript{80}

What differentiates the 2005 expulsion of eleven members of Parliament from the prior expulsion cases of Mr. Mudgal and Mrs. Gandhi is that neither parliamentarian decided to fight their grievances through the courts.\textsuperscript{81} Hence, when the eleven expelled MPs pursued their cases through the judicial process, a case of first impression came before the Indian Supreme Court.\textsuperscript{82}

\section*{II. Discussion}

Two seminal cases came before the Indian Supreme Court in 2006.\textsuperscript{83} One, the Coelho case, would decide whether the court could review acts of Parliament within the Ninth Schedule, while the other, the Raja Ram Pal case, would pass judgment on whether Parliament’s internal procedures were justiciable.\textsuperscript{84}

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\item \textsuperscript{75} See Frank, supra note 34, at 435; Neeraj Mishra, Face Off, India Today, Oct. 30, 2006, at 2.
\item \textsuperscript{76} Mishra, supra note 75, at 2.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Frank, supra note 34, at 435.
\item \textsuperscript{79} Id. Mrs. Gandhi was not prime minister at the time, having lost the elections she called in 1977 after the Emergency. See id. Following her expulsion, Mrs. Gandhi was imprisoned under an act of Parliament. She was, however, released after a week and became more popular than ever. She eventually returned to power in 1980. See id. at 436.
\item \textsuperscript{80} Mishra, supra note 75, at 2.
\item \textsuperscript{81} See id.
\item \textsuperscript{82} Id.
\item \textsuperscript{84} Coelho, (2007) 2 S.C.C. 1; Raja Ram Pal, (2007) 3 S.C.C. 184.
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A. Justiciability of the Ninth Schedule

The power to put laws out of the reach of the judiciary under article 31B led Parliament to enact several laws and place them within the Ninth Schedule, which had originally been created by Prime Minister Nehru to help protect progressive land reform laws from judicial scrutiny. The scheme, which originally comprised of thirteen laws in 1951, had mushroomed to include 284 laws by 2006, many unrelated to land reform or ending feudalism. The proliferation of laws included within the Ninth Schedule led to much public consternation, and in 2006, the constitutional bench of the Indian Supreme Court finally agreed to take up a case challenging laws under the grounds that they “could not have been validly inserted in the Ninth Schedule.”

On January 11, 2007, Chief Justice Y.K. Sabharwal handed down the case of *I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu & Others*. The Chief Justice began by stating the broad question to be considered by the court: “[W]hether on and after [April 24, 1973] when [the] basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court?”

The Chief Justice first traced the development of the law, citing the major cases that had been decided by the court with respect to interpretation of some articles of the constitution and challenges to the Ninth Schedule. Thus the court found occasion to focus on the *Golak Nath* case, which had “held that [a] constitutional amendment is ‘law’ within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void,” and *Kesawananda Bharati*, which had overruled *Golak Nath* and held that “Article 368 [the amendment clause of the Constitution] did not enable the Parliament to alter the basic structure or framework of the Constitution.”

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85 Noorani, *supra* note 12, at 731.
88 *Id.* at 1.
89 *Id.* at 70.
90 *See id.* at 69–75.
91 *Id.* at 73.
Next, the court dove into a discussion on the importance of fundamental rights. Quoting the Nobel laureate and economist, Dr. Amartya Sen, the court noted “the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.” Furthermore, the court noted that “fundamental rights occupy a unique place in the lives of civilized societies and have been described . . . as ‘transcendental,’ ‘inalienable’ and ‘primordial.’” Moreover, noting the importance of fundamental rights in providing checks and balances, the court stated:

[T]he jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.

Noting the nature of fundamental rights in providing a check against actions of Parliament, the court then stated that “separation of powers is part of the basic structure of the Constitution.” This led the court to examine the central question of “whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights.”

The court disposed of the question of its ability to conduct judicial review of legislation under the Ninth Schedule by stating that it would be contrary to the check that article 32 confers: “It cannot be said that

93 Id. at 79–80.
94 Id. at 79.
95 Id. at 80.
96 Id. at 82.
98 Id. at 88.
99 Article 32 provides:

Remedies for enforcement of rights conferred by this Part—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to
the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution.”

Additionally, the court again looked to its previous jurisprudence in the Kesavananda Bharati case and pointed out that although “Parliament has [the] power to amend the provisions of Part III so as to abridge or take away fundamental rights . . . that power is subject to the limitation of basic structure doctrine,” and “at least some fundamental rights do form part of basic structure of the Constitution.” The supreme court thus held it could strike down any law inserted into the Ninth Schedule if it were contrary to the basic structure of the constitution and passed after the Kesavananda Bharati case was decided.

B. The Power to Review Non-legislative Procedure

The case of the expelled MPs, Raja Ram Pal v Hon’ble Speaker, Lok Sabha & Others, rapidly made its way to the supreme court. The case was heard by a constitutional bench of five justices of the supreme court, including Chief Justice Y.K. Sabharwal.

Petitioners asserted five significant contentions with respect to the unconstitutionality of their expulsions. First, petitioners argued that India’s Parliament could not expel the MPs because it did not inherit such “power and privilege of expulsion” from the British House of Commons through the constitution. Petitioners argued that

expulsion is necessarily punitive in nature rather than remedial and such power vested in [the] House of Commons as a result of its power to punish for contempt in its capacity as a High Court of Parliament and since this Status was not accorded to [the] Indian Legislature, the power to expel could

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101 Id. at 100.
102 Id.
104 Id. at 184.
105 Id. at 242–43.
106 Id. at 242.
not be claimed by the Houses of Parliament under Article 105(3).\textsuperscript{107}

Second, they stated article 105(3) could not be the basis for expulsion, as it “would come in conflict with other constitutional provisions,” namely articles 101 and 102, which deal with disqualification of members of Parliament.\textsuperscript{108} Third, they argued there was a “denial of principles of natural justice in the [Parliamentary] inquiry proceedings,” which cannot be exempt from judicial review.\textsuperscript{109}

The petitioners’ final two arguments involved the scope of judicial review.\textsuperscript{110} They argued that the supreme court “is the final arbiter on the constitutional issues and the existence of judicial power” and “that the constitutional and legal protection accorded to the citizens would become illusory if it were left to the organ in question to determine the legality of its own action.”\textsuperscript{111} Furthermore, the expelled MPs claimed it is the function of the judiciary to review the “the exercise of power by the executive or any other authority” to ensure its compliance with the constitution.\textsuperscript{112}

Representatives from the two Houses of Parliament did not appear before the court, viewing the matter as a political question and therefore not justiciable.\textsuperscript{113} Their positions, however, were represented by the Union of India, which argued “[t]he actions of expulsions are matters within the inherent power and privileges of the Houses of Parliament.”\textsuperscript{114}

In what can be regarded as a seminal opinion in the annals of Indian constitutional law, the supreme court deftly disposed of the petitioners’ arguments regarding the unconstitutionality of their expulsion from Parliament while simultaneously upholding the principles of judicial review.\textsuperscript{115} The court began by stating that the constitution was in fact the “\textit{supreme lex in this country}” and cited the famous \textit{Kesavananda Bharati} case as support for this principle.\textsuperscript{116}
First, the court addressed the petitioners’ claim that because Parliament did not inherit the power of expulsion from Britain’s House of Commons, it lacked the power to expel them.\(^{117}\) The court began examining this issue by citing its decision in the 1964 \textit{UP Assembly} case, where it noted that although “[i]n England, Parliament is sovereign,” India had a federalist system whereby “the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other,” and therefore the characteristics of the (unwritten) British Constitution could not be compared to that of the Indian Constitution.\(^{118}\)

To establish whether other constitutional provisions dealing with the disqualification of MPs clashed with a power to expel alleged in article 105(3), the court looked to the specific meaning of the words “vacancy,” “disqualification,” and “expulsion.”\(^{119}\) Article 101 specifically deals with vacancies; article 102 with disqualification for membership.\(^{120}\) The court held these provisions all served different purposes: “While disqualification operates to prevent a candidate from re-election, expulsion occurs after the election of the member and there is no bar on re-election. As far as the term ‘vacancy’ is concerned, it is a consequence of the fact that a member cannot continue to hold membership.”\(^{121}\) Hence, the court ruled the power of expulsion did not conflict with any other constitutional provisions.\(^{122}\)

Based on this analysis, the majority stated it was unable to find any reasons why Parliament “should be denied the claim to the power of expulsion arising out of remedial power of contempt.”\(^{123}\) Furthermore, in his concurring opinion, Justice Thakker cited an Australian case for support of the principle that Parliament also possessed the power to expel a member because “the need for removal and replacement of a dishonest member may be . . . imperative as a matter of self-preservation.”\(^{124}\)

In tackling the petitioners’ final three contentions, the court made certain to address the relationship between the co-equal branches of government and, simultaneously, discussed how it had

\(^{117}\) \textit{Id.} at 249–51.

\(^{118}\) \textit{Id.} at 246–47.

\(^{119}\) \textit{Id.} at 284.

\(^{120}\) \textit{Id.}


\(^{122}\) \textit{Id.}

\(^{123}\) \textit{Id.} at 323.

\(^{124}\) \textit{Id.} at 403 (Thakker, J., concurring) (citing Armstrong v. Budd, (1969) 71 S.R. 386 (NSW) (Austl.)).
jurisdiction in this case. To this extent it stated, “Parliament is a co-
ordinate organ and its views do deserve deference even while its acts
are amenable to judicial scrutiny . . . mere co-ordinate constitutional
status . . . does not disentitle this Court from exercising its jurisdiction
of judicial review.”

Having dispatched the question of whether it had jurisdiction,
the court then examined the scope of its jurisdiction. Significantly,
the court departed with the established jurisprudence of English
courts. In particular, the court held that although the British House
of Commons had a “broad doctrine of exclusive cognizance” of its
internal proceedings, this principle was displaced in India by arti-
cles 122(1) and 212(1) of the constitution. Furthermore, the court
acknowledged that although it may not question the “truth or cor-
rectness of the material . . . [nor] substitute its opinion for that of the
legislature,” proceedings of Parliament “which may be tainted on ac-
count of substantive or gross illegality or unconstitutionality” could
still be reviewed by the judiciary.

III. Analysis

The two recent decisions of the Indian Supreme Court, in Coelho
and Raja Ram Pal, can be heralded as significant victories for Indian
constitutional law and democratic government. The court’s decisions
were seminal because they re-evaluated the conduct of Parliament and
the scope of judicial review in which the court could engage with re-
spect to Parliament’s legislative and non-legislative functions.

The Coelho case held that laws and constitutional amendments that
altered the basic structure of the constitution, by violating fundamental
rights, could be invalidated. This decision is significant for a variety
of reasons.

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125 Id. at 371.
127 Id. at 372.
130 Id.
131 See Tipping the Scales, supra note 115.
132 See id.; India Court Opens, supra note 86.
134 See id.
First, the unanimous opinion in *Coelho* can be viewed as a victory for fundamental rights.\(^{135}\) Given the prior action of Parliament in dumping hundreds of laws into the Ninth Schedule, it was unclear whether the fundamental rights advanced by the constitution would be subject to simple amendment or dissolution by Parliament.\(^{136}\) In light of the court’s decision, however, it is now clear that rights such as “equality,” “freedom,” and “life” are considered “fundamental” and therefore “are not bamboos that will bend to accommodate passing political winds.”\(^{137}\)

Related to the first point is the concept of political accountability.\(^{138}\) In the past, politicians have been tempted to abuse the structure of article 31B and the Ninth Schedule to include laws unrelated to land reform or ending feudalism as a means of scoring political points with constituents; they will now no longer be able to evade the scrutiny of a watchful judiciary.\(^{139}\)

Third, this decision restores a balance of power between the legislative and judicial branches.\(^{140}\) At the core of any democracy is an independent, thriving judiciary.\(^{141}\) Part-and-parcel of such a system is the ability of courts to engage in judicial review and strike down laws that do not conform with the basic charter of governmental power.\(^{142}\) By ruling that the court could strike down any law that altered the basic structure of the constitution, the court defended the constitution and placed an essential check on Parliament.\(^{143}\)

At the same time, the *Coelho* opinion cannot be viewed as only having a positive impact.\(^{144}\) It has opened the court to considerable avenues of criticism.\(^{145}\) For example, one could argue the decision gives the judiciary an inordinate amount of power, countering the “restoring balance” argument offered above.\(^{146}\) The case could be

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\(^{136}\) See *id*.

\(^{137}\) See *id*.


\(^{139}\) See *id*.

\(^{140}\) See *India Court Opens*, supra note 86.

\(^{141}\) See *id*.

\(^{142}\) See *id*.

\(^{143}\) See *id*.


\(^{145}\) See *id*.

\(^{146}\) See Jaising, supra note 133.
made that the supreme court has gone too far and established itself as the most powerful branch of government, as it has essentially given itself the power to be the “final arbiter of what is in the public interest.”147 In fact, one commentator stated that Coelho makes the “Supreme Court one of the most powerful courts in the world.”148

In a sense, the decision could also be criticized as allowing an unelected judiciary to usurp and negate the power of the people instilled in their elected representatives.149 Although this argument about judicial activism is nothing new to India, this decision is likely to feed more pronounced attacks on the court, perhaps jeopardizing its credibility.150

Additionally, the claim could be made that, given this newfound power the judiciary could enact its own agenda.151 Indira Jaising, a practicing attorney before the supreme court, has already warned that “[w]e live in times when the Supreme Court believes that liberalisation, privatisation and globalisation are good for the country and any law that hinders these will violate fundamental rights and hence, the basic features of the Constitution.”152

As explained in Part I, the power to expel MPs had never before been challenged in a court.153 Therefore, in accepting and settling the Raja Ram Pal case, the Indian Supreme Court issued a seminal opinion reinforcing the power of Parliament to expel its members under its “privileges and immunities” power as set forth by article 105(3) of the constitution.154 Thus, similar to the decision in Coelho, the decision in Raja Ram Pal is also controversial for its implications.155

First, it can be argued the decision was necessary to clarify a contentious point of law.156 Similar to the manner in which the U.S. Supreme Court resolves disputes between circuit courts of appeal, here, the Indian Supreme Court cleared up confusion between divided

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147 Id.
148 Id.
149 See Back to the Drawing Board, supra note 144.
150 See id.
151 See Jaising, supra note 133.
152 Id. Jaising provides a hypothetical example of such policy, posing that a pharmaceutical company, faced with “compulsory licensing of life saving drugs,” could challenge such a law placed in the Ninth Schedule as violating “freedom of trade.” Id.
153 See Mishra, supra note 75.
154 INDIA CONST. art. 105, § 3.
155 See Parliament Gets Supreme Stamp, supra note 68.
156 See id.
high courts. Regardless of the outcome of the case, there is now an element of finality to a previously open question of law.

A second argument in favor of Raja Ram Pal follows the argument from proponents of the Coelho decision, which is that the opinion holds politicians accountable for their actions. No longer can they exercise decisions regarding membership and hope to hide behind the cloak of parliamentary immunity. And furthermore, it is clear the public is behind the judiciary, which is viewed by many as the “last post of hope” in a very corrupt country.

Of course, this interpretation is subject to challenge by the view that the decision has negative implications in terms of strengthening both the power of Parliament and the judiciary. Parliament’s powers have been vastly expanded (or “clarified”) such that it may expel members at will, as it has the power to determine its own procedures according to the court’s interpretation of article 105(3). The court limited this power by noting that “proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny.” In other words, the court granted itself expanded power of judicial review over parliamentary expulsion. One could, however, still imagine politically motivated expulsions. As one commentator wrote, “[A] majoritarian government could well use brute strength and terminate memberships” of the political opposition.

The strongest implication of the Raja Ram Pal case is that the court will now be able to exercise scrutiny over non-legislative proceedings, not just those proceedings dealing with parliamentary expulsion. Because the court did not limit its language to proceedings dealing with expulsions, but rather noted it could review proceedings tainted with “substantive or gross illegality,” it leaves open the floodgates to challenges of parliamentary procedure. This, no doubt, will be a

157 See id.
158 See id.
159 Mishra, supra note 75, at 4.
159 See id.
160 See id.
161 See id.
162 See Tipping the Scales, supra note 115.
163 See id.
164 See id.
165 See id.
166 See Mishra, supra note 75, at 2–3.
167 Id.
168 See Tipping the Scales, supra note 115.
169 Id.
source of contention between Parliament and the court in the future.  

**Conclusion**

The Supreme Court of India is clearly more assertive today than it was just thirty years ago, when it held in the *Kesavananda Bharati* case that it had limited ability to conduct judicial review of laws placed in the infamous Ninth Schedule, thus shielding them from review. Recent decisions in the *Coelho* and *Raja Ram Pal* cases show the court is more willing to undertake judicial review, by permitting examination of both Parliament’s legislative and non-legislative roles. Such action has allowed the court to tackle issues ranging from invalidating laws that have nothing to do with land reform, to stemming political corruption. The court’s decisions are not without controversy, as various sides see them as expanding accountability, and others see them as usurping the role of the legislature. Given the seminal nature of these Indian Supreme Court decisions, however, the cases are likely to have a lasting impact on not only Indian constitutional law, but also the way Parliament crafts laws and constitutional amendments in the future.

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170 See id.