

ANALYSING PRESIDENTIAL REFERENCES IN INDIA & QUESTIONS WHICH FOLLOW

*Shivam Tripathii**

Abstract

India is the second largest democracy and has one of the lengthiest written constitutions. The Supreme Court of India is entrusted with the responsibility of proper implementation of the constitution. The framers of the constitution, therefore, empowered the Supreme Court with three different kinds of jurisdictions, viz., original jurisdiction, appellate jurisdiction and advisory jurisdiction. The current research focuses on advisory jurisdiction accorded to the Supreme Court under article 143 of the Constitution of India. The paper traces the history and origin of the principle of advisory opinion and its subsequent implementation in the country. An analysis is made to the limitations and effects of such powers being vested with the executive, through relevant case laws. A comparison is further made *via-a-vis* United Kingdom, United States of America and Canada, to substantiate how the implementation of presidential references differs in these countries. Finally, an inquiry is made into certain emerging questions which have started gaining traction in other countries and would soon require an opinion from Indian Courts in times to come.

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I. Introduction

THE SUPREME Court of India has been vested with a wide range of powers including the original and the appellate jurisdiction under article 32¹, 131², 136³ of the Constitution of India and article 132, 133, 134, 134 A of the Constitution of India respectively.⁴ The third type of

* Final Year Law Student, Maharashtra National Law University, Nagpur.

¹ The Constitution of India. It provides for the fundamental right of every citizen to move the Supreme Court, in case of violation of any fundamental right.

² The Constitution of India. The article states that the Supreme Court would have original jurisdiction on matters arising out of any dispute between two states, or centre and state.

³ The Constitution of India. It provides for Special leave petition, the court jurisdiction under this art. has power to sit on appeal from any judgement, decree or order etc. delivered in the territory of India.

⁴ H.M. Seervai, *Constitutional Law of India* (Universal Law Publication, 4th ed., 2015).

jurisdiction enjoyed by the Supreme Court is the Advisory Jurisdiction under article 143 of the Constitution of India. The concept of advisory jurisdiction in India arose from the Government of India Act, 1935. The Government of India Act, 1935 under section 213 stated that if the Governor- General thinks that a situation has arisen or may arise where a question of fact or question of law may come up, he may refer such a matter for advice to the federal court. The federal court was empowered to conduct proceeding on such matters as it deems fit, and furnish advice to the governor- general.⁵

The current article dealing with presidential references to the Supreme Court is based on the same principles as enumerated in the Government of India Act, 1935. Article 143 of the Constitution of India creates a dual obligation on the Supreme Court *i.e.* the court has to advise the President on both questions of fact and the question of law, which is already arisen or may arise in the future, furthermore the court also has to advise the President on any matter which the President thinks is of public importance.

The scope of the discretionary power vested in the Supreme Court was reduced in the present article as compared to the powers given under the Government of India Act, 1935. Under article 143(2) of Constitution of India, the Court is under an obligation to advise the President on issues relating to matters mentioned under the proviso of article 131, Constitution of India⁶.

II. Nature and Scope

The power of the president to refer any matter to the Supreme Court is not restricted by the principle of co-existence of legislative and executive power of the Central Government, *i.e.* the President can refer any matter to the Supreme Court under the advisory opinion, rather any matter relating to subjects mentioned under list I and III of the VII schedule.⁷ The President has the sole discretion to decide whether the matter referred to the Supreme Court is of such nature which needs urgent attention or not, further nobody is allowed to question such discretion.⁸ Even the Supreme Court cannot deny advice to the President solely on the

⁵ William D Popkin, "Advisory Opinion in India" *Articles by Maurer Faculty* 401 (1962).The section was included in the Government of India Act 1935, on the grounds of suggestions made in the White Paper Proposals.

⁶ Pooja Jha, "Supreme Court's Advisory Jurisdiction under art. 143" 42 *Journal of the Indian Law Institute* 458 (2000).

⁷ M.P. Jain, *Indian Constitutional Law* (Lexis Nexis, 8th ed., 2018).

⁸ Paras Diwan and Pam Rajput, *Constitution of India* (Sterling Publishers Pvt. Ltd, 2nd ed. 1979).

grounds that the matter so referred is not of urgent public attention. However, any matter already decided by the court cannot be referred to under article 143.⁹

Further as mentioned under article 74 of Constitution of India, the President shall act according to the advice of the Council of Minister, therefore it can be inferred that when any matter is referred to the Supreme Court, it is in turn made by the Council of Minister. However, the Supreme Court cannot examine such advice as the same is prohibited by article 74(2).¹⁰

While in the general parlance the advice so rendered by the court under article 143, is considered to be delivered under the advisory jurisdiction of the court. However, according to the definition of jurisdiction¹¹ suggested by Black's Law dictionary the essentials constitute jurisdiction are not fulfilled. Therefore by necessary implication, it can be said that the advice so rendered by the court will not be considered as a precedent that is binding in nature in any of the subsequent cases. The powers so accorded to the Supreme Court are merely for assisting to the executive and not to settle any dispute between two parties.

III. Limitations of Advisory Jurisdiction

The following are the essential limitations of the advisory opinion sought from the Supreme Court-

- (i) As stated earlier the powers of the president under article 143 are very wide therefore the question referred to the Supreme Court need not be restricted to any specific issue relating to powers and functions of the Union Government.
- (ii) In cases where the matter referred has not arisen, the court has to presume certain conditions and accordingly conclude the hearing and advice President on the same.¹²

⁹ Lily Isabel Thomas, "Advisory Jurisdiction of the Supreme Court of India", 5 *Journal of the Indian Law Institute* (1963).

¹⁰ *Supra* note 4

¹¹ Cambridge Dictionary, available at: <https://dictionary.cambridge.org/dictionary/english/jurisdiction> (last visited on October 23, 2020). Jurisdiction in the Dictionary is defined as "The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favour of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient."

¹² Gujarat Assembly matters, (2002) 8 SCC 237 (The issue that the matter so referred has not actually arisen but may arise in future was considered).

- (iii) As stated earlier the advisory jurisdiction of the Supreme Court cannot be converted into appellate or review jurisdiction, where the court is made to advice on issues already decided by it.¹³
- (iv) The court under a reference application cannot go beyond the scope of issues referred to the court, i.e. the court cannot inquire about the matter which is not mentioned in the reference, and also the court cannot check the validity and truthfulness of the facts so mentioned in the reference.¹⁴

IV. Presidential References till Date

There have been several instances where the President has sought advice from the Supreme Court. For instance-

(i) *Delhi Laws Act, 1951 In re*¹⁵

This was the first reference ever made to the Supreme Court. The question was with regards to the power to delegate legislative power to other organs of the state machinery¹⁶. The matter was referred to a seven-judge bench, and all the judges gave a separate opinion on the matter in issue. However all the judges agreed to the basic contention that the legislature (the issue referred was only in respect of parliament) can delegate legislative powers to the executive for effective implementation of any law, but such delegation should not abridge the legislative powers vested with the parliament. They also agreed on the issue of delegation of any “essential legislative function”, they opined that such function can never be delegated to the executive.¹⁷

(ii) *Kerala Education Bill, 1958 In re*¹⁸

It is considered as one of the most important reference made to the Supreme Court. The reference saved the government from political embracement and massive public unrest. The issue was in regard to the constitutional validity of a

¹³ Dr. Dharmendra Kumar Singh and Dr. Amit Singh, “Consultative Jurisdiction of Supreme Court of India: Assessment and Critical Analysis”, 22 *IOSR JHSS* (2017).

¹⁴ *In the Kerala Education Bill, In re*, AIR 1958 SC 956, the court opined that the court is bound by all the recitals mentioned in the reference.

¹⁵ AIR 1951 SC 332.

¹⁶ *Id.*, at para 1, 2. S. 2 and 7 of the said law authorised the government of Ajmer-Marwar district to extend the application of law which were already on force in other parts of the nation.

¹⁷ *Krishna Prakash Sharma v. Union of India*, (2011) 5 SCC 212, and *State of Rajasthan v. Basant Nahata*, (2005) 12 SCC 77.

¹⁸ *Supra* note 14

bill. The importance of the reference can be gauged from the principles, laid down by the Supreme Court to be followed while interpreting the Constitutional provisions. Some of them are- (a) when a question of interpretation of any fundamental rights arises, the court cannot ignore the principles laid down in the directive principles of state policy. The Court must adopt a harmonious construction of the two provisions. (b) The protection under article 30 applies to every minority educational institution irrespective, of the fact that the institution was established before or after the commencement of the constitution, however under article 29(2) such institutions cannot deny access to any individual solely on the grounds of religion, caste or language. (c) The intention of article 30 is to protect the minority education institutions rather than equipping them with undue advantage.¹⁹

(iii) *In re, Berubari Union*²⁰

The primary issue was the implementation of a bilateral agreement between India and Pakistan concerning the cession of some parts of the Indian Territory to Pakistan. The main issue was whether a simple enactment by the parliament under article 3²¹ would be sufficient to implement the agreement or not? The Supreme Court opined that a simple enactment would not be sufficient and an amendment under article 368²² should be brought about to implement the agreement. There have been varied views with regard to the opinion of the Supreme Court in this reference. Some of the critics state that such an elaborate procedure was unnecessary and uncalled for, and a simple amendment under article 3 would have been enough.²³

(iv) *Sea Customs Act, 1962 In re*²⁴

In this case the matter for consideration was again a draft bill concerning imposing and authorising taxes by the central government. The main issue referred to the Supreme Court was whether or not the imposition of custom duty is

¹⁹ *St. Xavier's College v. State of Gujarat*, AIR 1974 SC 1389, *Uni Krishnan v. State of A.P.*, (1993) 1 SCC 645, *T.M.A. Pai Foundation v. State of Karnataka*, AIR 2005 SC 3286, *P.A. Inamdar v. State of Maharashtra*, AIR 2005 SC 3286, *State of Bombay v. Bombay Education Society*, AIR 1954 SC 561.

²⁰ AIR 1960 SC 845.

²¹ *Id.*, at para 3. Under the third clause, the Constitution talks about diminution of territory of any state.

²² The Constitution of India. The article establishes the power of the parliament to amend the constitution. Further the article also lays down the procedure to do the same.

²³ *Ram Kishore Sen v. Union of India*, AIR 1985 Cal. 282.

²⁴ AIR 1963 SC 1760.

exempted under article 289.²⁵ The court opined that where a limiting provision is to be interpreted, it has to be interpreted in the strict sense and nothing could be read into it. Therefore, the court held that the provision in the Constitution only bars the Parliament to impose a tax on property of the states and if such restriction is extended to the imposition of custom duty, this will adversely affect the Central government's power to regulate interstate commerce and foreign trade. The opinion rendered by the Supreme Court in this case settled the age old conflict between the centre and state in respect of the implementation of taxes.²⁶

(v) *In re Keshav Singh's case*²⁷

The reference was made in regard to a situation between the UP state legislature and the state High Court. Mr Keshav Singh was sentenced by the legislature for contempt of the legislature. Then a writ of Habeas Corpus was filed before the High Court to review the detention of Mr. Keshav Singh. The High court granted bail to him, till the matter was pending before the High Court. The assembly as a result of such bail, order contempt charges against both the judges dealing with the matter. Having regards to all the circumstances the President, referred the matter to the Supreme Court under article 143. The Supreme Court opined that High Court has powers to review the sentence, further the legislature did not have any power to initiate contempt proceedings against the judges of the High Court²⁸ and the legal representative of Mr. Keshav Singh.²⁹

(vi) *In re Presidential Poll*³⁰

The matter in issue was in regard to the interpretation of article 56, 62, 70 and 71 of the Constitution of India. The main issue was whether or not the election of President could be conducted while a substantial number of state assemblies are not in power. The court opined that article 62³¹ was mandatory in nature, and therefore the election to the President's office must be conducted before the term of the current President expires. Further, the court opined that while such elections

²⁵ The Constitution of India, art. 289 The article bars the parliament to impose any tax on the property of the states.

²⁶ Prof. Mahendra Pal Singh, *V.N. Shukla's Constitution of India* (Eastern Book Company, 13th ed. 2017).

²⁷ AIR 1965 SC 745.

²⁸ *Id.*, at para 208.

²⁹ Dr. Amit Singh and Dr. Dharmendra Kumar Singh, "An analysis of advisory opinion delivered by Supreme Court: Present scenario and perspective" 4 *International Journal of Law and Legal Jurisprudence Studies* (2017).

³⁰ AIR 1974 SC 1682.

³¹ *Id.*, at para 6. The Constitution of India, art. 62 talks about the procedure to be followed when the office of President is vacated due to the reasons mentioned in the article.

are conducted only the elected members of the legislature will be entitled to cast vote for the same. The court also opined that article 71³² was wide enough to cover a vacancy in the Electoral College due to the dissolution of the state assembly.

However, there has criticism for the opinion so rendered by the Supreme Court. The criticism mainly revolves around the issue that the court did not opine upon what will be the effective dissolution of the state assemblies with a malafide intention. Nonetheless, other scholars regard the opinion as perfectly sound, on the ground that no such issue was referred to the court and the court does not have the power to advise the President on any matter which is not being referred.

(vii) *Special Courts Bill, In re*³³

The government wanted to enact a law, constituting a special court to entertain cases relating to offences committed by individuals holding high political offices during the time of emergency. Only one question was referred to the court, viz whether the implementation of the said bill will violative any of the Constitutional Provision? The court addressed the preliminary objections to the reference opined that the question referred had a very wide scope, but the court cannot reject the reference merely on such grounds.³⁴

The court in exercise if the power vested in it, examined the entire bill on various grounds, firstly the court examined the legislative competency of the Parliament to establish such special courts³⁵. Secondly, the court looked into the validity of the classification made by the parliament.³⁶ The court also pointed out the shortcoming in the bill³⁷, but held that the implementation of the said law with suggested alteration would be constitutional in nature.

(viii) *In re Cauvery Water Disputes Tribunal 1992*³⁸

³² *Supra* note 30, para 16. The article talks about all the procedure to be followed in all the matters relating to President and Vice-President Election. Under art. 71(1) states that such matter can only be decided by the Supreme Court, and all the decision taken by the Supreme Court will be final and binding.

³³ AIR 1979 SC 478; (1979) 1 SCC 380.

³⁴ *Id.*, at para 26-29.

³⁵ *Supra* note 33 at para 44. The court opined that under art. 246(2) read with entry 11A of List III the parliament was empowered to establish such special courts. .

³⁶ *Supra* note 33 at para 73, 77 and 78. The court applied the test under art. 14 of the Constitution, and held that such classification is in conformity with the provisions of the Constitution.

³⁷ *Id.* at para 95, 96. The court noted that there were no provision for transfer of cases from one court to another, further the bill suggested appointment of retired High Court judges which may be violative of art. 21 of the constitution.

³⁸ AIR 1992 SC 522.

The reference was made in connection with the oldest water dispute in the country. A water dispute tribunal was constituted to resolve the same, and the tribunal awarded an interim order. The main question in the reference was whether one party can deny implementing the said interim order by enacting an ordinance. The Supreme Court opined that such action cannot be taken by the parties as it is violative of rule of law and principles of natural justice³⁹. The court also examined the legislative competency of the State of Karnataka to issue such an ordinance⁴⁰.

Although there have been doubts about the implementation of the reference, the reference made under article 143 does not have the same binding effect as any other judgement delivered by the Supreme Court.⁴¹

(ix) *Special Reference No.1 of 1993*⁴² (*Ram Janma Bhumi- Babri Masjid Matter*)

The reference holds no ground today as the matter stands decided by the Supreme Court.⁴³ However, the matter was referred to seek the advice of the Supreme Court, on the factual issue of whether there existed a Hindu temple or Babri Masjid on the disputed land. This is the only reference till date which was returned unanswered by the Supreme Court. The court rejected the reference on several grounds such as- (a) the matter was already under litigation and the court is not empowered to any such question under article 143, (b) the court could foresee the reference opinion being misused by the government in the ongoing negotiation between the parties, (c) the reference was framed in a way that favored one of the parties to the dispute. Therefore the court found it apt to not answer the reference.

(x) *Special Reference no. 1 of 1998, re*⁴⁴

The reference was made in respect of the appointment of judges. The government did not agree with the recommendation of the Chief Justice, and after the decision

³⁹ *Id.*, at para 79. As the state of Karnataka has acted as judge in its own case, which is against the fundamental principles of natural justice.

⁴⁰ *Id.*, at para 78. The court held that as the effect of the ordinance would affect the flow of water in Tamil Nadu and Pondicherry, the ordinance has an extra-territorial operation rendering it ultra vires to the powers given under art. 245(1).

⁴¹ *Id.*, at para 45. Contentions regarding the binding nature of the reference were also raised, but the court did not answer such question, as it did not form part of the reference.

⁴² (1993) 1 SCC 642.

⁴³ *M. Siddiq v. Mahant Suresh Das*, (2020) 1 SCC 1.

⁴⁴ (1998) 7 SCC 739.

in the *Supreme Court Advocates case*⁴⁵, it was clear that the recommendation of the Chief Justice had a binding effect. To clear the impasse the government referred the matter to the Supreme Court. The court opined that the recommendation made by the Chief Justice cannot be made in isolation⁴⁶, but has to be taken into account the various opinion of judges.⁴⁷ Furthermore, the court said that the Chief Justice of India is under an obligation to follow the norms and procedure of the consultation process, and if the norms are not followed the recommendation so rendered by the Chief Justice would not be binding upon the Government.⁴⁸

(xi) *In the Gujarat gas case*⁴⁹

The state government enacted a law regulating the use and distribution of natural gas and liquefied petroleum gas (LPG). The president referred to the enactment of such law, because the supply and distribution of oil and gas was a subject under the union list. The President in the reference questioned the constitutional validity of the law. The court opined that the law was unconstitutional as the subject matter falls in the scope of the Union Government list. The reference is considered a guiding principle in a matter relating to union and state conflict. If the court would have held the act constitutional then it would have opened a can of worms, where all the other states would have also tried to exploit national resources according to their wishes.

(xii) *Special reference no. 1 of 2002*⁵⁰, (Gujarat assembly election matter)

The issue in this reference arose when the election commission taking into account various factors decided to conduct the election in late October of 2002. However, the state government was not happy with the decision and the house was dissolved in haste. The issue, therefore arose, as according. to the article 174. The president referred three questions namely:

“(i) Is article 174 subject to the decision of the election commission of India under article 324 as to the schedule of the election of the assembly? (ii) Can the Election Commission of India frame a schedule for the election to an assembly on the

⁴⁵ *Supreme Court Advocates on record v. Union of India*, (1993) 4 SCC 441.

⁴⁶ *Supra* note 43 at para 44(1).

⁴⁷ *Supra* note 7.

⁴⁸ *Supra* note 43 at para 12, 44(8), 44(9).

⁴⁹ (2004) 4 SCC 489.

⁵⁰ (2002) 8 SCC 237.

premise that any infraction of the mandate of article 174 would be remedied by a resort to article 256 by the President? (iii) Is the Election Commission of India under a duty to carry out the mandate of article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair election?”⁵¹

The court recognising the importance of the question and admitted the reference, but ended up not answering the question posed in the questions. However, the court analysed article 174 in great detail,⁵² the court further opined that the application of article 324 and article 174(1) are not interdependent in nature⁵³. The court opined that the election commission was under an obligation to conduct the election within six months, even when the assembly is dissolved hastily.

(xiii) *Natural Resources Allocation, In re, Special Reference no. 1 of 2012*⁵⁴

The reference was made in connection to the judgement awarded in the *2G spectrum case*⁵⁵. The court rejected the contention that such a reference is not maintainable under the scope of article 143, as it seeks to overturn the judgement delivered by the court.⁵⁶ The court opined that the court could answer the reference to the extent it does not over rule its judgement.⁵⁷

The court answered five out of eight questions referred. The court opined that the Constitution under article 39 (b) uses a very broad term⁵⁸ and limiting the meaning of such provision to auction only will violative of the constitutional framework.⁵⁹

(xiv) *Punjab Termination of Agreement Act, 2004, In re*⁶⁰

Another water dispute which lasted very long between Punjab, Haryana and Rajasthan was referred to the Supreme Court. The main issue for consideration was the constitutional validity of the Punjab Termination of Agreements Act.

⁵¹ *Id.*, at para 1.

⁵² *Supra* note 50 at para 84(b). The court opined that art. 174(1) is only applicable to existing legislative assembly and not to the dissolved assemblies.

⁵³ *Supra* note 46 at para 84.

⁵⁴ (2012) 10 SCC 1.

⁵⁵ *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1

⁵⁶ *Id.*, at para 52, 56 and 61.

⁵⁷ D.D. Basu, *Introduction to the Constitution of India* (Lexis Nexis, 23rd edn. 2018).

⁵⁸ The Constitution of India. The Constitution states that the method for “distribution” of natural resources must be in accordance with the principle of good faith.

⁵⁹ *Supra* note 50, para 113.

⁶⁰ (2017) 1 SCC 121.

Under the act the state government tried to overturn a judicial fiat, by enacting a law. The Act stated that the state government of Punjab is not under any obligation to share water with another state for maximum utilization of natural resources. The court opined that such an implementation is not constitutional. The government does have the power to overturn a judicial pronouncement with an act.

V. Effect of Advisory opinion

One of the major issues where an advisory opinion is rendered by the Supreme Court is whether such an opinion can be considered as the law of the land under article 141 of the Constitution of India. The Supreme Court while exercising its advisory jurisdiction is not involved in any adjudicatory proceedings, *i.e.* there is no *lis* involved in the matter, therefore it can be inferred that the opinion so rendered would not be considered the law of the land. Similar views were taken in a landmark case decided by the Canadian Supreme Court, *Attorney General for Ontario v. Attorney General for Canada*⁶¹, where the court stated the opinion rendered under article 143 will have similar value to the opinion rendered by any advocate. However, the Supreme Court of India *in re Cauvery water dispute tribunal*⁶² opined differently and states that reference under article 143 are law of the land under article 141 and should be generally followed.⁶³

Effect on President

The opinion so rendered by the Supreme Court is not binding on the President, and such a conclusion can be reached through two different reasons. Firstly, the article in the constitution merely talks about consultation from the Supreme Court, and secondly as discussed earlier the opinion under article 143 is not the law of land therefore it cannot be enforced in any court of law. *In Special Reference No. 1, 1998*⁶⁴ a question as to the binding effect of the opinion was raised. The state argued that the government is not bound by the opinion as it has not been submitted to the jurisdiction of the court and no two parties are

⁶¹ (1912) AC 571.

⁶² *Supra* note 20.

⁶³ *Chhabildas Mehta v. Legislative Assembly, Gujarat State*, (1970) 11 Guj LR 729, and *Ahmedabad St Xavier's College Society v. State of Gujarat*, (1974) 1 SCC 717.

⁶⁴ (1998) 7 SCC 739.

involved in the matter concerned. The Supreme Court accepted the contention and held that the President or the government is not bound by the opinion under article 143.⁶⁵

Effect on the Supreme Court and other High Courts

As the opinion by the opinion court is not considered the law of the land, the precedential value of the opinion is also negated, i.e. the opinion is not binding upon the Supreme Court or on the other courts.⁶⁶ However, in *Ahmedabad St. Xavier's College Society v. State of Gujarat*⁶⁷, the court said that it would be anomalous if a decision rendered by the Supreme Court would not be relied upon while deciding a similar issue, only because the decision was in the form of advice to the President. Therefore, to maintain the sanctity of the institution, if a separate view is to be taken, the matter must be referred to a larger bench, the same was being done in the present case also.⁶⁸

With regards to High Courts and other lower courts, the same principles apply that the opinion of the Supreme Court has a very strong persuasive value, but as it is not law of the land it does not hold any precedential value.⁶⁹ Similar issues were also raised in the *Special Courts Bill 1978, In re*, although the opinion of the court was the same, Chandrachud C.J. raised serious concerns. He said that when the court renders an opinion it undertakes the elaborate procedure to include all parties, take into account all the contentions raised by such parties *etc.*, but still, the decision so arrived at by the Supreme Court is not binding on the mere fact that it was delivered under the powers of article 143.

VI. Comparison with other countries

United Kingdom

The origin of the concept of advisory jurisdiction is rooted in the United Kingdom. From the very beginning, the crown would consult the judicial committee before any law was enforced. After the formal recognition of the court, the practice of rendering advice to the executive and the king remained untouched. The Judicial Committee Act, 1833 under section 4 gave this power to the Privy Council, the highest court of appeal for all the kings' court outside the

⁶⁵ Dr. Amit Singh and Dr. Dharmendra Kumar Singh, "An analysis of advisory opinion delivered by Supreme Court: Present scenario and perspective" 4 *International Journal of Law and Legal Jurisprudence Studies* (2017).

⁶⁶ *Supra* note 7

⁶⁷ AIR 1974 SC 1389.

⁶⁸ Dharma Pratap, "The nature of the discretionary jurisdiction of the Supreme Court of India in advisory reference" 22 *Journal of Indian Law Institute* 179-209 (1980).

⁶⁹ *Supra* note 14

United Kingdom, but the House of Lords the highest court of appeal in the United Kingdom is not authorised to advise the government.⁷⁰

The scope and power of the Privy Council under the Judicial Committee Act was similar to the current article 143 in the Indian Constitution, *i.e.*, the advice given by the Privy Council was not binding upon the government. However, unlike the Indian Supreme Court, the Privy Council was not bound by its order; therefore, it could over-rule its judgement under an advisory opinion. In *Sun Life Assurance Co. v. Jerris*⁷¹, the court held that it would not render any opinion as the matter under consideration has not arisen, and it could not answer any hypothetical question.⁷²

USA

The US Constitution does not have a parallel provision of an advisory opinion. There is neither express power nor an express ban on the use of such power within the constitution. However, the US Supreme Court has maintained a consistent opinion that no such power could be exercised by the court because of two major reasons, the first one being the constitution of the US recognises the strict implementation of separation of power and if the judiciary is involved in deciding any executive action, this will violate such principle, and secondly, the judiciary is only empowered to decide on matter judiciously, the Supreme Court on various occasions has stated that if it renders any advisory opinion, there may be various legal objection to such opinion.⁷³

There have been a series of cases where the executive had sought advice from the judiciary, but the same was turned down by the Supreme Court. The first such incident was in *Hayburn's case*⁷⁴, the court in this case stated that it was prohibited to render such an opinion due to principles of separation of power enshrined in the constitution. Later, when the US and France had some differences while implementing an agreement, the executive looked upon the judiciary to negotiate the tussle. However, the Supreme Court turned down the request

⁷⁰ Oliver P. Field, "The Advisory Opinion- An Analysis" 24 *Indiana Law Journals* (1949).

⁷¹ (1944) All ELR 469 (HL).

⁷² *Supra* note 7

⁷³ Advisory Opinion, Legal Information Institution, available at: <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/advisory-opinions> (last visited on Feb. 06, 2020)

⁷⁴ *Hayburn's case*, 2 Dall (1792) 436.

because the executive did not have the power to call upon the judiciary answer any of its questions.⁷⁵

Again in the famous case of *Alabama State Federation of Labour v. Mc Adony*⁷⁶, the Supreme Court turned down the request stating that the court was only empowered to decide an existing controversy. The court could not decide a hypothetical case and decide constitutional principles broader than required to be applied to the case in hand. Later in *Powell v. McCormack*⁷⁷, the court said that it cannot decide upon any political matter. However various states have enacted special provisions empowering the courts to advise the executive through declaratory judgements.⁷⁸

Canada

Canada being a colony of British was influenced by the English Law, therefore there have been traces of advisory opinion from the very beginning. In 1875 when the Supreme Court Act was passed, the advisory jurisdiction of the court was recognised. When the Supreme Court Act was re-enacted in 1906, the power of advisory opinion remained untouched. The scope of the power so vested with the Supreme Court is similar to that of the Indian Supreme Court.⁷⁹ The court has to consider all the matter referred to the court as either question of law or question of fact. However, under this act the final authority of appeal was vested with the Privy Council. This was changed with the re-enactment of the act in 1952.⁸⁰ Similar to the Indian view, the Canadian constitution also provides that the governor general's decision to refer a matter to the Supreme Court or not is final, and no questions can be raised on this issue.

But, unlike the Indian law, the Canadian law states that the opinion so delivered by the court will be a binding judgement, further the court does not have any discretion to return the reference unanswered, *i.e.*, the Court is under a constitutional obligation to advise the

⁷⁵ *Ibid.* The court stated that the President was empowered to call upon the head of the states for their opinion, but no such power was vested in the president to do the same with the judiciary.

⁷⁶ 325 US 450.

⁷⁷ 395 US 486.

⁷⁸ *Aetna Life Insurance v. Haworth*, 300 U.S. 222; *Poe v. Ullman*, 367 U.S. 497 at 510. For detailed study refer Borchard, E., *Declaratory Judgments*, (1941), 25-81; Crawshaw, S. "The High Court of Australia and Advisory Opinion," 51 *Aust. L.J.* (1977).

⁷⁹ James L. Huffman and Mardilyn Saathoff, "Advisory Opinions and Canadian Constitution Development: The Supreme Court's reference jurisdiction" 74 *Minnesota Law Review* 1251 (1990).

⁸⁰ The Supreme Court Act, 1952, s. 55.

government. The power to render the advisory opinion is not limited to the Supreme Court; similar provisions are laid down for the provincial court.⁸¹

VII. Questions which Loom Ahead

Advice sought on State Subjects: Is it in tandem with the philosophy of Federalism?

The scope of article 143 is quite vast since it does not prescribe limits to what questions can be referred to by the President. It does not explicitly state that the President can only refer to questions involving powers, functions and duties of the Central Government. It therefore, becomes pertinent to mention here, that the Indian Constitution has adopted a federal structure of governance, an essential feature to which is the division of powers between the different tiers of government. An encroachment by one level of government on the area assigned to the other level of government is often considered to be against the basic tenets of a federal form of governance and hence unconstitutional.

Upon expanding the above stated principle to presidential references in India, it can be inferred that the President under article 143, should not ideally seek a reference from the Apex Court on matters which are enshrined under the state list. Interestingly, this has not been the case. *In re Keshav Singh's case*⁸² the questions which were referred by the President to the Supreme Court were related to powers, privileges, and immunities of a legislative assembly⁸³ for a particular state. Such encroachment by the President on the subject matter relating to the state list, raised concerns regarding the limits to exercise of power by the centre. Accordingly, the issue was also raised before the court to which no opinion was rendered.⁸⁴ However, Hon'ble Chief Justice P.B. Gajendragadkar⁸⁵ opined that a little more tact, restraint, and consideration must have been shown in such cases.

The overarching point that is being conveyed through this instance is that keeping in view the importance of advisory jurisdiction of the Supreme Court, a probable solution which could be employed for a more robust discussion on issues involving state list is that, a practice should be adopted wherein the President, before referring questions involving state list, should first seek consultation with the respective state. Introduction of such practice would ensure state

⁸¹ *Supra* note 79. Majority of the provinces have adopted such law.

⁸² AIR 1965 SC 745.

⁸³ The Constitution of India, List II, entry 39.

⁸⁴ *Supra* note 82 at para 207. The court however recognised that the contentions were not entirely unfounded.

⁸⁵ *Id.* at para 208.

participation, and thereby improve centre-states coordination significantly which will further nourish the roots of federalism enunciated under the constitution.

Whether an obligation under Article 143 impedes the principle of separation of power?

The principle of separation of power and judicial independence are being impeded in two ways. Firstly, under article 143(2), where the court is under an obligation to answer the questions referred by the President. Article 143 is divided into two provisions, article 143(1) deals with the power of the President to refer any question of fact or question of law or public importance to the Supreme Court of India. However, under article 143(1), the Supreme Court is not bound to render its opinion.⁸⁶ Article 143(2) creates an exception to the proviso under article 131. It empowers the President to refer matter excluded from the jurisdiction of the Supreme Court under article 131. Here, the Supreme Court is bound to render its opinion.⁸⁷ Such an obligation could be argued, adversely affects the judicial independence⁸⁸.

Secondly under article 143(1), when certain questions referred to by the President are vague in nature, the court inadvertently is even required to perform a legislative function.⁸⁹ For instance, in *Special Courts Bill, In re*⁹⁰, when the question referred to the Supreme Court was whether the Bill or any provision, if enacted would be constitutionally invalid? The Court here was therefore asked to examine the entire legislation for any constitutional violations. Such actions means that the court was requested to perform the function of the legislature. When similar contentions were raised, the court rejected them on the ground that the contenders were unable to pin point any specific power or privilege which was being encroached upon.⁹¹ Further, the court also stated that the Constitution of India empowers the Indian Judiciary to nullify any legislation on the grounds of constitutional invalidity.⁹² However, the court failed to take into account that such power is only available when the law has been enacted by the legislature and not before.⁹³ The point that is being conveyed through this instance is that when courts decide legal questions outside of a legal dispute-resolution process, they reach beyond the judicial role and assumes a quasi-judicial role.

⁸⁶ *In re Special Reference No. 1 of 2012*, (2012) 10 SCC 1. The court held that the Supreme Court could refuse to render its opinion for strong, compelling and good reasons. However, the court did not clarify what reasons would be considered strong, compelling and good reasons.

⁸⁷ *Supra* note 14. The conclusion is drawn from the used of the word "shall".

⁸⁸ The Constitution of India, art. 50.

⁸⁹ Hugh Evander Willis, *Constitutional Law* 157 (Prentice Hall Inc., New York).

⁹⁰ AIR 1979 SC 478; (1979) 1 SCC 380.

⁹¹ *Id.*, at para 32.

⁹² The Constitution of India, art. 13.

⁹³ Art. 13(2) defines what can be considered as law, and it does not include 'bill'; *Chotey Lal v. State of UP*, AIR 1951 All 228.

Therefore, to simply put to maintain separation of power, the questions referred to the Supreme Court should not be vague. Furthermore, the court should not be obliged to give its opinion, even under article 143(2) and that it should be left to the discretion of the court.

VIII. Conclusion

The advisory jurisdiction of the Supreme Court acts as a link between the government and the judiciary. The opinion rendered by the Supreme Court is very important for it is the only way through which judicial opinion can be sought in certain circumstances. Taking into account the non-binding nature of the opinion, it can be said that it does not violate the principles of separation of power at the very outset. Further, after an analysis of the Presidential references made till date, it can also be inferred that the power is used sparingly by the executive, which has thereby significantly reduced the chances of being misused.

Additionally, by a comparison of the concept with the UK, USA and Canada there are certain key takeaways *viz.*, the UK has been the source of origin of the concept of the advisory opinion. The US, however, being a common law country has time and again reiterated that the power to render advice to the executive, is not within their “judicial powers”. Countries like Canada and India, on the other hand, have followed the common law tradition, and have enacted special provisions granting their courts the power to advise the executive. Having analysed both perspectives, it can be concluded that such advice not only saves the government from embarrassment but also mitigates future litigation possibilities.

However, a pertinent issue that would gain significant traction, in times to come, pertains to a category of cases where the executive seeks advice on matters relating to state list under schedule VII, without consultation with the state in the issue. Such use of the advisory opinion could arguably raise concerns of misuse of power by the centre for it tends to impede the quasi-federal structure. Therefore, as argued through the course of this paper, some form of practice must be established whereby the president should first seek consultation with the respective state, before referring a matter enshrined under state list to the Supreme Court for its reference to further nourish the federal structure which has been envisaged under the Constitution of India.