

APEX COURT'S ADVISORY JURISDICTION

Written by Jasleen Kaur

3rd Year BA LLB Student, Rajiv Gandhi National University of Law, Patiala, Punjab

ABSTRACT

Article 143 of the Indian Constitution is one of the least used jurisdictions of the Supreme Court, which has been used under 15 times. The number of such cases needn't be necessarily huge but in important cases/ decisions even where the judiciary itself is involved it is not used. With the passage of time it has become a mere ornament of the Supreme Court. Consultation from judges is not a new thing and is a year old. From it, is derived the advisory jurisdiction or opinion of different courts. It was allegedly started by two Stuart Kings of England, though, this step was deeply condemned and disliked by many. Sir Edward Coke, quoted the taking of legal opinion from judges as "auricular taking of opinions".¹ In Countries like Canada and Australia too, the provision of advisory jurisdiction backs in the 1800s. The Permanent Court of International Justice famously known as the PCIJ was also vested with this power and now the International Court. The Advisory Jurisdiction of the Supreme Court of India has been only used 14 times in the history of independent India. With the least use and limited scope of advisory jurisdiction of the Supreme Court of India, its relevance has decreased. The researcher has tried to answer the question that what is the relevance and scope of Article 143 of the Indian Constitution? And is more frequent or infrequent use of such power useful?

Keywords: Advisory Jurisdiction, Apex Court, Article 143, Re Berubari, Re Indo-Pakistan Agreement, Re Kerala Education Bill, Supreme Court, Supreme Court Jurisdiction

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Before the inaugural date on October 1, 1937 (under the Government of India Act, 1935) of the Federal Court of India, neither the States of India nor the British India had experienced the jurisdiction of an indigenous, ethnic, All- Indian Judicial Tribunal ever. In the absence of such a judicial body, disputes between the Centre and the Provinces, between Centre and the states of India and Provinces and the States of India inter se were decided by the Government India, even in the cases where the Government of India was itself a party to the case. In addition to this, High Courts and the Courts of alike status, being independent of one another, were subject to no common court of appeal at all. As a result of which, the code, procedure and statutes which were applied throughout British India and the Princely India, might conceivably have been given as many different interpretations as there were courts which applied them.ⁱⁱ Though the federal court originally enjoyed the original, advisory and appellate jurisdictions, it also empowered cases from the different High Courts of India.

Ultimately, the Supreme Court, the highest temple of law, and final court of appeal under the Constitution of India, was all set to function on 28 January 1950, replacing the Privy Council (the Judicial Committee) and the Federal Court of India.ⁱⁱⁱ The unitary character or nature of the Legal structure is reflected in numerous Constitutional provisions which strengthen and highlight the authority of the Supreme Court. For example, Article 141 of the Indian Constitution provides that:

“The law declared by the Supreme Court of shall be binding on all courts within the territory of India”^{iv}

Under the power and authority of Article 142, the Supreme Court:

“May pass such decree or make such order as in necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India...”^v

Article 143 of the Constitution too says that all authorities be it civil or judicial, in the territory of India must act in the aid of the hon'ble Supreme Court. It has been said multiple time that the jurisdiction and powers of the Apex Court, in their character and extent are wider that those exercised by the Highest Court of any other country.^{vi} At Once, it is the Federal Court, the

Highest Court of appeal and guardian of our great Constitution and the law declared by the same, in exercise of any of its jurisdictions under the Constitution of India, is binding on all the Courts within the territory of India. The Foreign Authorities only and only have persuasive value in our country and are not binding on our Courts.^{vii} Any case where there is a conflict between two or more judgements of the Supreme Court itself, the judgement of the larger bench of the Supreme Court is followed.^{viii} According to the Encyclopaedia Britannica Dictionary, the word Jurisdiction means, “*Authority of a court to hear and determine cases.*”^{ix} Jurisdiction draws its substance from the authorities of the executive and legislative divisions of government to distribute means to best aid the requirements of humanity.

M.V Pylee has pointed out that the Supreme Court of India has wider jurisdiction than any other superior court in any part of the world. Indian writers also point out that the jurisdiction of the Supreme Court of India is so wide that it will appear to be the most potent judicial organ in the world today.^x If we take a look at the formal jurisdiction of the Supreme Court as set by the Constitution of India, we would most likely agree with the Indian scholars for it is quite evident that the Court indeed possess a relatively broad jurisdiction as it serves as the apex and the final court of appeal not only on Federal and Constitutional matters, but also in criminal, civil and other matters.^{xi} What the Indian scholars neglect largely is the fact that having a broad jurisdiction does not necessarily means having enough ‘power’.^{xii} The Supreme Court has appellate, original and advisory jurisdiction, largely inherited from its predecessor, the Federal Court.^{xiii}

The advisory jurisdiction of the Supreme Court of India has been borrowed from Canada by the framers of the Constitution. The Supreme Court, as its predecessor is vested with an advisory jurisdiction or consultative jurisdiction. Article 143 of the Indian Constitution lays down that the jurisdiction of the hon’ble Supreme Court may be obligatory to express its opinion in two classes of problems, in its advisory ability.^{xiv}

The President of India feels that a question or fact of law has arisen which is of public importance and it is crucial to obtain the opinion of the Supreme Court upon it,^{xv} the President may refer the question to the hon’ble Court for consideration and the Court may report to the President its opinion if it deems fit.^{xvi} When the question arises of the binding nature of the Supreme Court’s advisory opinion is binding or not, under Article 143(1) of the Indian Constitution, the Court itself has opined that while it is always open to the Court itself to re-

examine a case or a question decided by it, and if necessary,^{xvii} overrule it and these advisory opinions do not have force of law whatsoever.^{xviii} Both clauses (1) and (2) of the Article 143 encourage and empower the President of India to take the opinion of the Supreme Court relating to the aspects contained therein. The question of the advisory opinion is entirely based on the President's satisfaction to a question in public importance or interest.^{xix}

The advisory opinion given by the Supreme Court of India is clearly not a binding decision. In ordinary terms if I take an advice from my friend, it is not necessarily binding. But the question is does non acceptance or denying the advisory opinion of the Supreme Court, undermine the prestige of the apex court or knock down the faith of people in the judicial system? A provision for the executive of judiciary has always been a subject to heavy criticism only because of this question. This opinion has been heavily interpreted as the executive having the possibility or chances of using this provision as a shield to protect itself from political and democratic shocks or from loss of reputation, prestige and status.^{xx}

The case of *Re Indo-Pakistan Agreement*^{xxi}, famously known as the *Re Berubari*, is often cited as one such case. In this case the doors of the apex court were knocked to advise the President as to how an agreement with a foreign nation which included giving up of land, could be executed while lodging over the matter, the Court well-thought-out the ambit and extent of Article 3 of the Indian Constitution.^{xxii} The opinion was considered as merely advisory and was criticised and was not accepted by the Calcutta High Court. The amendment of the First Schedule of the Constitution was completely unnecessary in the facts of the case. The opinion by the court was criticised and debated upon.

Dr Amit Singh and Dr Dharmendra Kumar Singh in their study conclude that the advisory opinion/ jurisdiction or Article 143 of the India Constitution must be used only to/in:

- “1. Enable the Govt. an authoritative opinion regarding the validity of a legislation before enactment or...before its enforcement.
2. Deal with problems of federalism.
3. Interpretation of constitution.
4. Situations where legal rights exist but no legal remedies are available”^{xxiii}

But the major question that arises from this is what about the matters where the judiciary itself is a party. Like the famous decision *Supreme Court Advocates-on-record Association v. Union*

of India (NJAC judgment) ^{xxiv} which involved the inclusion of political leaders and civil servants in the appointment of Supreme Court judges to bring more transparency against the collegium system, which allegedly was to actually dilute the supremacy and independency of the Indian Judiciary. The law was passed in the Parliament and no advice of the Supreme Court itself was taken even if it involved the whole judicial system^{xxv}. It was ultimately struck down in a case and was decided that it was unconstitutional as it compromised the basic structure of the constitution and the judicial independence in India.

The Advisory Jurisdiction of the Supreme Court of India has been only used 14 times in the history of independent India. To quote Dr Amit Singh and Dr Dharmendra Kumar Singh again, the professors in their study about the advisory jurisdiction of India, mention that: “*The institution of consultative or advisory jurisdiction is good if used judiciously and infrequently.*”^{xxvi} In my opinion the Advisory Jurisdiction is a bridge between the executive and the judiciary. Keeping in view, the prestige and the honour of the apex court, the advisory opinion must be used frequently at least in the cases that involve the judiciary or the Indian Judicial system itself, directly.

In an ordinary proceeding of the Court, the substantial control is in the hands of the Supreme Court itself and new parties may be introduced, the proceedings maybe altered, etc. whereas in the advisory jurisdiction under article 143, the control of proceedings is actually in the hands of the President of India. In an ordinary legal proceeding the legal questions and issues are framed by the court itself and the court itself is a judge to the correctness of the given facts of the case, etc. whereas in an advisory opinion the President frames the questions for consultation in public interest.^{xxvii} Under Article 143, the Supreme Court neither awards a remedy nor sentences, hence it cannot be called a jurisdiction as under ordinary definitions of the word ‘jurisdiction’ in English, rather it is a power of the President of India.

The Supreme Court maybe approached by the President of India on the matters of public interest or concern when the court has not decided on such matters earlier. The court cannot be asked to revise or review its own pronouncement under the scope of Article 143 of the Indian Constitution. In *re Cauvery Water Dispute Tribunal’s Case*^{xxviii}, the court was probed with the question that does the tribunal under the Water Disputes Act, 1956 has authority to award interim relief to the parties in the dispute.^{xxix} The court denied giving any opinion on the question that whether the opinion/judgment was binding upon other lower courts or not mainly

because it was not a part of the Presidential reference in the case and because ultimately it is only advisory in nature. In the same case it has also been held that the advisory opinion even after being a mere opinion and is entitled to due respect and weight. Dr Justice Vineet Kothari opined this and also added that the opinion must be and should be followed.^{xxx}

The President turns to the Supreme Court for an advisory opinion. The Supreme Court has to restrain themselves to the queries upraised to it by the president; it cannot travel elsewhere than the mention of the reference which is made. In *re Kerala Education Bill*^{xxxix}, the President required the view and opinion of the hon'ble Apex Court on the Constitutional legitimacy of certain provisions of the Kerala Education Bill which had been set aside by the Governor for the view and opinion of President. In this case the reference of the President saved the state government from humiliation since Kerala's public was essentially agitating. Also, in the given case the apex court gave two points that emphasised the scope of article 143 of the Indian Constitution. In this case other question regarding the Bill arose which were not originally a part of the reference made by the President. The court rejected such arguments and adjudged that:

“It is for the president to determine what questions should be referred and if he doesn't entertain any serious doubt on other provisions it is not for any party to say that doubts arise also out of them”^{xxxii}

The Court in its concluding words quoted that it cannot go beyond the reference made by the President, however deeply interweaved the matters maybe.

The marginal note of Article 143 of the Indian Constitution clarifies that the President is not bound by the advisory opinions of the Supreme Court. The marginal note reads as: “*Power of President to consult the Supreme Court.*”^{xxxiii} The word clearly suggests that the President is not bound to give effect to the opinion.^{xxxiv} In “the famous case of *Ismail Faruqui vs. Union of India*^{xxxv}, which took in concern the Ayodhya dispute, the President looked forward to the advisory opinion of the Supreme Court that whether a Hindu shrine which initially prevailed at the location where *Babri Masjid* consequently stood was unessential and conflicting to secularism. It was held in this case that the Supreme Court can may refuse giving its advisory opinion under Article 143 in circumstances it does not think of to be proper or not agreeable to such implementation by giving and showcasing appropriate purpose for such denial.^{xxxvi} It is

also interpreted that the court after hearings ‘may’ report to the President its opinion. In less than 50 cases of advisory opinion referred to the Supreme Court of India, since independence, cases under 143(1) have been referred to the hon’ble court and none under article 143(2).

Das C.J in *Kerala Education Bill*^{xxxvii}, cited that it is mandatory for the Supreme Court to reply and give its outlook and opinion on any circumstances which is brought up under Article 143(2) of the Indian Constitution, but under Article 143(1) it is the preference and discretion of the hon’ble apex court and for respectable and lawful cause may refute giving its view or advisory opinion.^{xxxviii} Justice Chandrachud, in a dissenting opinion in Special Courts Bill, quoted that the use of word ‘shall’ in 143(2) does not bounds the Supreme Court to give opinion on this reference. The matters which are of a political significance the Apex Court can reject to give its opinion.

In the United States, the provision of the advisory opinion has been heavily criticised. The Federal Court of the United States refuse to advice the government instead they give their outlook and view only in deciding live cases and ongoing judicial cases.^{xxxix} Article III of the US Constitution provides the same.

The bar on such advisory opinion has be opined and typically justified as separation of the executive, legislature and judiciary and stop the blurring of the lines in their work efficiency.^{xl}The job of the legislative wing of the state is to make the laws for the state, whereas the job of executive branch is to enforce the laws made by the legislature and the job of the judicial wing is to interpret the laws. When the jobs are intermingled the separation of the wings becomes blurred.^{xli}

This view was given by John Jay, the first Chief Justice of the Supreme Court refused to offer judicial advice to the then President George Washington. Later Justice William R. Day gave his opinion and views to not offer advisory opinion, in *David Muskrat v. United States*^{xlii}that:

“The result will be that this court, instead of keeping within the limits of judicial power... will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution.”^{xliii}

In 1968 too, in famous *Cohen's case*,^{xliv} Chief Justice Warren quoted:

"... that the oldest and most consistent thread in federal law of justifiability is that the federal court will not give advisory opinions."^{xlv}

The bar on advisory opinions today is today an immovable attribute of the American Constitutionalism. The judgment and view of the Jay court that the federal judiciary need not give its advice-giving judgments/ opinions to the elected (legislature) wings is the design of the American institution that echoes the ability of the American Supreme Court to depart from the will of the elected wings.^{xlvi}

The American opinion of the advisory jurisdiction is way too different than the Indian opinion. In the Indian Constitution, there is a separate provision for the Advisory opinion whereas the American judicial system believes in keep the lines un-blurred and as sharp as possible.

The Constitution of Australia does not provide any specific provision for advisory judgments or opinions. All attempts either through constitutional amendments or legislative acts prove to be futile in bringing about the provision of an advisory jurisdiction to the High Court of Australia. The first Attorney-General, *Alfred Deakin*, prepared a provision for advisory opinions in the Judiciary Act, 1903 (S.88) but it was not recognised and accepted by the Parliament, and ultimately the practice of American Supreme Court had to be followed.^{xlvii} It has been highlighted practice that it is not a part of the judicial bodies to give advisory opinions.^{xlviii}

The Australian provision of the advisory jurisdiction is much more similar to the American one that is the courts are not really empowered to give advisory jurisdictions.

The Indian Constitution has borrowed its own Advisory Jurisdiction from Canada. The Canadian Courts have the power to give advisory opinions unlike the American Federal Court and it has proved that it can prove to be very beneficial at times.^{xlix} In this way the warning conclusions rendered by the Canadian Supreme Court have been a helpful instrument for permitting the legal executive to discard various sorts of entangled established issues. In setting obligation on such issues where it appropriately has a place and in restricting the legal executive to the references just, the arrangement of warning assessments has yielded an entirely profitable administration. The various sorts of sentiments attest that the legal executive by the idea of its consultative capacity might be a valuable organ for the genuine improvement of the constitution.¹ The advisory jurisdiction/ provision of the Canadian courts is much more similar

to the Indian judicial system as we have borrowed this provision from them. This provision of the courts has been proved to be much useful and beneficial to build a bridge between the elected branch and the judicial branch of a state.

An advisory opinion is provided by the International Court of Justice famously known as the ICJ, in accordance with Article 96 of the UN Charter to the United Nations itself or any specialized agency of the same. An advisory opinion may be requested by the Security Council or the General Assembly of the United Nations itself on any “legal matters”. Specialized agencies or any other organs of the United Nations may also request an advisory opinion on questions of legal nature arising within their scope of activity.^{li} The proceeding for an advisory opinion begin with a written application/ complaint. The opinions of the ICJ too are not binding on the party states.^{lii}

“Despite having no binding force, they... carry great legal weight and moral authority. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States.”^{liii}

The provision of advisory jurisdiction of the ICJ too is similar to that of the Indian provision. The difference is that the parties are mostly states or International Actors in case of the ICJ and in the India the advisory opinion is mostly in the cases of public interests and concerns.

CONCLUSION

The concept of advisory power/ jurisdiction of the Court has been a subject prone to heavy criticism, globally. In words of Professor Carleton Kemp Allen “*The whole notion of ‘consultation’ of judiciary is exhypothesi, a contradiction which requires exceptional justification*” he also adds “*The judge does not sit in the seat of justice in order to be consulted but in order to decide an issue.*”^{liv} Somewhat similar are the believes of the Courts of The States and Australia, where the Constitutions do not provide this provision and the judges are not encouraged to advice the elected branch of the state so as to keep the powers and work of both the wings separate and lines between them un-blurred.

The advisory jurisdiction or the provision of advisory opinion by the Supreme Court of India is provided in Article 143 of the Indian Constitution and is borrowed from the Canadian Constitution. This jurisdiction of the Supreme Court has been used less than 15 times after the formation of the Supreme Court in 1950. As said earlier the number of cases under this Article need not be high and here I would like to quote Dr Amit Singh and Dr Dharmendra Kumar Singh again, the professors in their study about the advisory jurisdiction of India, mention that: “*The institution of consultative or advisory jurisdiction is good if used judiciously and infrequently.*”^{lv} In my personal opinion such jurisdiction must be put to use at least in the cases where the judiciary itself is concerned like the NJAC decision, as discussed in chapter 2 of this research project.

The answer to the question that what is the relevance and the scope of Article 143 of the Indian Constitution, it would be totally safe to say that the scope of the scope of Article 143 or the advisory jurisdiction of the Supreme Court is wide enough. The thing that makes it more beneficial is that it is a legit constitutional provision and the President may or may not consult the Supreme Court. Unlike in American and Australian courts where the Courts are not at all empowered to given advisory opinions. “...It is not just a constitutional framework to reach to a solution to problems and answering a question regarding question of law and fact but also a permissible legal method to seek authentic legal opinion from the Apex Court...”^{lvi}

Since the question of relevance of Article 143, arises, this fact cannot be denied that not much heed was paid to the general and specific interpretations and implications of this article was paid during the Constituent Assembly debates. It is not even a jurisdiction of the Supreme Court; it rather is more of a Presidential power. Therefore, it is concluded that the relevance of the advisory opinions may have been less but this provision is still an integral and a very important part of the Indian Judiciary.

Also, “it is also high time that the Supreme Court decides, either through unambiguous practice or in a judgement, the position that is to be adopted in the regard of the that advisory opinions are not considered as law, and also safeguards that, in the procedure, the importance of advisory opinions is not undermined.”^{lvii}

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