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ADVISORY JURISDICTION OF THE SUPREME COURT OF INDIA- A CRITICAL ANALYSIS OF THE RELATED CASE LAWS

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CHAPTER 1

ABSTRACT

The largest democracy in the world, India also boasts one of the longest written constitutions. Effective constitutional implementation rests with the Indian Supreme Court. As a result, Supreme Court now has 3 distinct types of jurisdictions, namely “Original Jurisdiction, Appellate Jurisdiction, and Advisory Jurisdiction”.

The present research study encompasses on the advisory jurisdiction of the Supreme Court as provided by “Article 143 of the Indian Constitution”. The study explores the development and background of the functions of advisory opinion, as well as its subsequent use in the nation. Additionally, it looks at prominent cases where this provision has been invoked and the Court's responses to these references.

Through the use of pertinent case laws, an examination is also done of the restrictions and outcomes of the executive having such authority and the controversies associated with advisory jurisdiction including concern related to separation of power and it's potential for abuse Furthermore, a comparison is made with the United States of America, Canada and UK

to description of the differentiation of the application of presidential referrals is done in the aforementioned nations.

This research paper also assesses the impact of Article 143 on India's legal and political landscape, emphasizing its role in providing guidance to the executive and legislature on complex legal issues and discusses potential reforms or refinements that could enhance its effectiveness.

In conclusion, this research paper highlights the importance of Article 143 as a significant tool for interpretation of constitutional framework and for upholding of India's rule of law.

KEYWORDS: Advisory Opinion, Jurisdiction, Non-Binding, Legal Expertise, Consultative Role

INTRODUCTION

The highest court of India has extensive authority under the Indian Constitution, including appellate as well as original jurisdiction. Articles 32, 131, and 136, which deal with original jurisdiction, & Articles 132, 133, 134, & and 134A, which address appellate jurisdiction, grant these powers. As its third sort of jurisdiction, the Apex Court is granted advisory jurisdiction by "Article 143 of the Indian Constitution". This implies that the head of state of India is entitled to seek the Supreme Court's opinion on any legal matter or important public truth.

The President is not required to follow the Supreme Court's ruling, even if it is issued. Indian advisory jurisdiction was first introduced in the 1935 Government of India Act¹. The Governor-General may approach the federal court for advice in accordance with "section 213 of the Government of India Act, 1935²" if he thinks that a circumstance has developed or may exist in which a factual or legal question may emerge. The Government of India Act, which forms the basis for the current article, i.e. 143, also specifies the guidelines for presidential references to the Supreme Court. The Supreme Court is tasked with advising the President on

¹ Government of India Act, 1935

² Government of India Act, 1935 § 213.

both legal and factual matters that have arisen or may do so in the future, in accordance with Article 143 of the Indian Constitution.³

In comparison to the authority granted by the Government of India Act, 1935, the current article limits the Supreme Court's discretionary power, and the Court is required by article 143(2) of the Indian Constitution to make recommendations to the President on issues covered by article 131⁴.

RESEARCH QUESTION

1. Does the Supreme Court of India's authority under Article 143 affect the constitutional democracy's integrity and the theory of separation of powers?
2. What comparisons can be drawn between the Indian advisory jurisdiction while comparing with systems in other nations, and what conclusions may be taken from global practices?
3. What limitations and duties must the Court fulfill in order to exercise its advisory jurisdiction, and how do they affect the Court's position within the Indian legal system?

RESEARCH OBJECTIVES

The primary objective of this research paper is to comprehensively analyze the advisory jurisdiction in India's legal framework. Specifically, the research aims to-

- 1) To Examine the role of the historical evolution and development of advisory jurisdiction and trace its roots from colonial times to contemporary legal provision
- 2) To assess the constitutional and legal framework that governs advisory jurisdiction within India

³ Constitution of India, 1950 Art.143.

⁴ Constitution of India, 1950 Art.131

- 3) To evaluate the scope and limitation of advisory jurisdiction, including its applicability to different types of legal issue
- 4) To compare the authority of the President and Supreme Court with those of other nations in terms of advisory jurisdiction matter.

LITERATURE REVIEW

The article on “*The Nature Of The Discretionary Jurisdiction Of The Supreme Court Of India In Advisory References*⁵” showcases the advisory jurisdiction’s structure with all advisory references to a specified area which is made obligatory in a specified area of the constitution with reference to the non-binding effects. It further explains the usage of the interchangeable words “may” and “shall” adding the judicial characteristics of the function of the Supreme Court.

The research study on “*Advisory Jurisdiction Of The Supreme Court Of India*⁶” discusses the depth of the article providing case laws relevant to where the majority opinion was given and when the decision of the apex court became binding on the advice of the president. It focuses on the aspect of the question of law or factual instance being important for the public at large. It provided a detailed outlook of the exclusive functions and control of the body with respect to its nature.

The article on “*The Supreme Court and Advisory Jurisdiction*⁷” delves into the cases of Advisory Jurisdiction when so provided by the court in relation to the acts and judgments passed in the cases. The description of a case study has been asserted under

⁵ Pratap, D. THE NATURE OF THE DISCRETIONARY JURISDICTION OF THE SUPREME COURT OF INDIA IN ADVISORY REFERENCES. *Journal of the Indian Law Institute*, 22(2), 179–209. (1980)

⁶ Thomas, L. I. ADVISORY JURISDICTION OF THE SUPREME COURT OF INDIA. *Journal of the Indian Law Institute*, 5(4), 475–497. (1963).

⁷ Devi, S. The Supreme Court and Advisory Jurisdiction. *The Indian Journal of Political Science*, 25(3/4), 200–209. (1964).

the executive authority and its high importance giving merits and demerits of the power so granted to the legislation.

The article on “*Apex court’s advisory jurisdiction*”⁸ discusses the usefulness and limited area of Article 143 in the constitution and its usage in the constitution. It further encompasses the point of relevance in consonance with the power so vested under the umbrella of the jurisdiction of the apex court.

This article on “*The Advisory Jurisdiction of the Supreme Court of India: A Study*”⁹ showcases the system and features of the jurisdiction pertaining to the Supreme court mainly advisory jurisdiction. It determines the system and provides a reason for the need and requirement in the constitutional framework of India.

CHAPTER 2

ADVISORY JURISDICTION : ‘Article: 143’

The Supreme Court is given feature of an advisory jurisdiction under Article 143, which also grants the President the authority to consult with the Supreme Court. If the President determines that a legal or factual issue has arisen or will arise in the future that is of public significance and that it would be beneficial to get the Supreme Court's opinion, he may refer the issue for consideration. The Court would report its findings to the President after the hearing. The President may receive counsel from it under its advisory jurisdiction on matters for which he asks for guidance, provided that those matters are primarily of public concern. On cases of public importance or when the court has not previously made a decision on such a matter, the apex Court's advisory opinion could be requested.

⁸ Kaur, J. APEX COURT’S ADVISORY JURISDICTION. (2020).

⁹ Dhagamwar, A., & Dash, S. The Advisory Jurisdiction of the Supreme Court of India: A Study. *International Journal of Law and Legal Jurisprudence Studies*, 5(1), 158-174. (2010).

This provision is given under “Article 143 of the Indian Constitution”, which reads as under:

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(1) “A question of law or fact may be submitted to the Supreme Court for consideration if it appears to the president that it has arisen or is likely to arise, and that it is advisable to have the Court's opinion on it given its character and importance to the public. After holding any hearings it deems necessary, the court may notify the President of its judgement”.

(2) “A matter that, according to Article 131, is not within the Supreme Court's purview may be referred to it for review, and the court shall, after such hearing as it considers appropriate, submit its opinion to the President..”

ARTICLE 143 OF INDIAN CONSTITUTION AND ITS JUDICIAL INTERPRETATION-

The term "may" in clause (1) of Article 143 stipulating the Supreme Court is not compelled to offer an advisory advice or an opinion in every situation in which it is stated. Strong, convincing, and legitimate arguments may be used by the court to withhold its judgment.⁴ However, the word "shall" in subclause (2) indicates that the court is required to provide an advisory opinion whenever an issue that is not within the Supreme Court's purview under Article 131 is brought before it.

CHAPTER 3

NATURE AND SCOPE OF ARTICLE: “143”

The Apex Court of India enjoys advisory jurisdiction pursuant to Article 143, which also grants the President the authority to seek advice from the Supreme Court. In a scenario in which the President determines that a factual or legal issue of public importance emerged or with most probability does so in the future and that it would be desirable to have the Supreme Court's point of view, he may refer to such an issue for the account, and the Court can subsequently present its findings to the President.

IS THE SUPREME COURT BOUND TO GIVE AN OPINION?

After holding whatever hearings it deems necessary, the court "may" then inform the president of its decision. In the last 50 years since the constitution's establishment, a number of matters have been sent to the Apex Court of India for its decision under Article 143(1), but none have been referred under Article 143(2). Of the twelve cases that were referred, the Supreme Court has already rendered judgment in nine of them, while two more are still pending.

According to Das C.J. in "*Kerala Education Bill Case 1958*"¹⁰, Supreme Court is required by Article 143(2) of the Constitution to respond to and express an opinion on any issue that is raised, but under Article 143(1), the court has discretion and may withhold that opinion for a good and valid reason. A contrasting viewpoint was expressed by Justice Chandrachud in the Special Courts Bill 26. He claimed that the hon'ble Court is not required to rule on the recommendations because of the Articles 143(1) and 143(2)'s straightforward phrasing, which includes the words "may" and "shall" in clauses 1 and 2, respectively. Even in accordance with clause 2, the court may reject the reference if there are good reasons. Chief Justice Gajendragadkar disagreed with Chandrachud's decision concluded that the SC could reject the case under Article 143(1) but not under Article 143(2).

The authors contend that the apex court is only required to articulate its advice when the president has referred the case for it. In furtherance with Article 143 Clause 2 of Constitution and once the Supreme Court has been consulted pursuant to Clause 1 of the Constitution, it is up to the Court to decide whether to respond or not. It may refuse to offer an opinion on the reference with good and adequate justification.

WHETHER THE PRESIDENT IS BOUND BY THE ADVISE OF SUPREME COURT OR NOT?

The Hon'ble Supreme Court is well within its authority to advise or respond to the President if the inquiries pointed out are likely to arise in the near future that are of high importance to the public at large, or if there isn't a Supreme Court decision that has already addressed the question referred with regard rendered pursuant to Article 143(1). On such President's

¹⁰ In Re Kerala Education Bill, AIR 1958 SC 956

referral, the Supreme Court may, following any hearing it deems just and fit, convey its recommendation to the President. The President may choose by obeying on the opinion or not depending on his discretion which determines the advisory function of the Hon'ble Court.

Despite, the opinion offered in the exercise of functions of the advisory is entitled to enormous importance even though it is not legally enforceable.

The apex Court ruled in "*Ismail Faruqui v. Union of India*¹¹" that reference of the president requesting the Supreme Court's consultation can decline in situations it does not deem reasonable, appropriate to exercise its discretion, it may choose not present an opinion as required by Article 143 by providing a reasonable excuse for denial of the same.

Under the article, it gives the power to consult the apex court which is an important power of the president, and he is not required to act on the recommendation. Therefore, such an opinion is not executed and is not a judicial pronouncement.

CHAPTER 4

NATURE & SCOPE OF 'ADVICE' UNDER ARTICLE "143"

ADVICE OF THE SUPREME COURT IN RELATION TO THE BINDING ON THE LOWER COURTS-

The Supreme Court ordinarily responds to matters of factual instances or law put forth by the parties, this Article offers the Supreme Court a special authority characterized as the consultative or advising jurisdiction that enables it to render its judgment on issues that are unrelated to any present proceedings. Additionally, the President does not have to abide by the apex Court's advisory opinion under the ambit of Article 143, despite the fact that it commonly does, and occasionally the Court obtains the President's promise through the Attorney General of India. The Supreme Court's recommendation is not enforceable against the authority submitting the request.

¹¹ *Ismail Faruqui v. Union of India*, (1994) 6 SCC 360

Article 141 stipulates the Supreme Court's rulings are binding on every court, its officers, and the State, but not on the court itself. Nevertheless, it may overtly or implicitly dismiss these rulings by failing to apply them to a circumstance that is distinct. These decisions would have to be comprehended as being held solely in relation to those cases and limited to the legal issues that arose out of the facts of that specific case, even if those arguments were accepted by the court held in "*SP Gupta vs UOI*"¹².

CHAPTER 5

EVALUATION OF THE SYSTEM OF ADVISORY OPINION

Not everyone agrees that using advisory judicial opinions is a good idea. A significant argument against it is that opinions are sought on hypothetical issues in the absence of specific factual circumstances and without a valid dispute already in play, and that it would be inconvenient and inefficient for the courts to do so. Many legal issues can best be understood in the context of specific factual situations; yet, since a request for the court's opinion does not include any specific facts, the court is unable to see the issue in the context of an actual dispute between the parties. Because the court relies on presumptions, its advisory opinions are only "speculative" views on hypothetical issues. Without knowing how a principle relates to the specific facts to which it can be applied, the judge cannot establish it in a way that is adequate and secure.

Thus, advisory opinions may circulate in a surreal setting. The court's decision-making process may potentially damage the interests of pending litigants. They could find it difficult to stir up controversy when there isn't one now.

It is further argued that when an actual controversy and all relevant facts are presented to a court, the court has the freedom and flexibility to decide the issues raised. However, when clear-cut questions are presented to the court for advice, the court is forced to operate within the confines of the questions, and its freedom of approach to legal issues is constrained and constrained by the manner in which the questions are framed. However, advisory jurisdiction

¹²SP Gupta & Ors. v. Union of India, AIR 1982 SC 149

has a number of benefits as well. For example, it can advise the government on matters pertaining to its legal authority and quickly clear up any doubts the public may have regarding the legality of any legislation or other governmental activity.

The Supreme Court has received several requests for advice from the President.

Act on *Delhi Laws, 1951*¹³ marked the ability of the Court to delegate legislative powers to other state apparatus bodies was the focus of the discussion¹⁶. A seven-judge bench was assigned to hear the case, and every one of them offered their own distinct viewpoint. However, all of the judges did concur on the fundamental tenet that, while the legislature (the matter at hand was only in relation to the parliament) can transfer legislative authority to the executive for the objective of ensuring the efficient execution of any law, such delegation shouldn't be permitted to restrict the legislative authority granted to the executive. They agreed that no "essential legislative function" could ever be delegated to the executive and that delegation is a problem.

Case in point in the matter of "*In re Keshav Singh*¹⁴" Case, mentioned that the issue included the Uttar Pradesh state legislature and High Court. Mr. Keshav Singh was punished by the legislature for disobeying it. A habeas corpus petition was subsequently made, asking the High Court to reevaluate Mr. Keshav Singh's detention. He was granted bail by the High Court while the legal proceeding was still ongoing. The assembly decides to file contempt proceedings against the two judges hearing the case as a result of this bail.

CHAPTER 6

WHETHER AN OBLIGATION UNDER ARTICLE 143 IS IN CONFLICT WITH THE IDEA OF SEPARATION OF POWER?

Both judicial independence & the separation of powers, in the researchers' opinion, are being hampered in various ways. The court must first answer to any inquiries that the President refers, in accordance with Article 143(2)¹⁵. Because Article 143 is separated into two parts,

¹³ *In Delhi laws*, AIR 1951 SC 332.

¹⁴ *In re Keshav Singh*, AIR 1965 SC 745.

¹⁵ Constitution of India, 1950 Art.143(2).

Article 143(1) addresses the President's authority to refer to the Supreme Court of India any factual or legal matter of public importance. However, pursuant to “Article 143(1), the Supreme Court of India” is not required to provide the president with an opinion.

The article 131 requirement is overridden by paragraph (2) of article 143¹⁶. The *Special Courts Bill*¹⁷, for instance In this case, the highest court in the nation was questioned whether enacting the Bill or any of its features would render it ineffective under the Constitution. Such measures demonstrate that the court was requested to fulfill the role of the legislature. In addition, the court noted that the Indian Constitution grants the Indian Judiciary the power to declare any law invalid for constitutional reasons. The court neglected to mention that this jurisdiction is only exercisable once a legislation has been approved by the legislature, not before. It is intended to show through this example how courts assume a quasi-judicial role.

Further, even under Article 143(2)¹⁸, the court should retain its discretion and not be required to express an opinion.

CHAPTER 7

COMPARATIVE STUDY OF ADVISORY JURISDICTION WITH OTHER COUNTRIES

ADVISORY JURISDICTION & United Kingdom

The United Kingdom serves as the country of origin for the idea of advisory jurisdiction. The judicial committee was always consulted by the crown before any statute was implemented.

In accordance of the Judicial Committee Act, the Privy Council had similar authority to that of Article 143 of the Indian Constitution¹⁹, meaning that the

¹⁶ Constitution of India, 1950 Art.131.

¹⁷ *Special Courts Bill*, (1979) 1 SCC 380.

¹⁸ Constitution of India, 1950 Art.143(2).

¹⁹ Constitution of India, 1950 Art.143.

council's recommendations were not legally enforceable by the government. The court ruled in *Sun Life Assurance Co. v. Jerris*²⁰ that it would not express an opinion since the issue at hand had not yet arisen and it could not provide a hypothetical response.

ADVISORY JURISDICTION & THE U.S.A

Unlike article 143 in the Indian Constitution, the U.S. constitution does not contain any particular provisions. Despite the fact that the Supreme Court has judicial authority in cases and controversies under Article III S(1) of the US Constitution²¹.

In the case of *Hayburn Case*²², the Supreme Court reviewed the issue of providing advisory opinions for the first time, and it commented that such an action "encroached on the jurisdiction of the others." Even, In the *Muskrat case*²³, the apex Court once again declined to issue an advisory opinion on the grounds that "constitutionally, courts cannot provide their opinions on hypothetical or contingent issues, i.e., without the existence of an actual controversy."

The highest courts in some states, including Massachusetts, have made it possible for governors to request counsel. In the *Board of Education decision*²⁴, the U.S. Supreme Court determined that state courts have the authority to express opinions on issues of federal constitutional law and genuine controversies concerning state law. However, the legitimacy of the advisory opinions in accordance with state constitutions cannot be adjudicated by the federal courts.

ADVISORY JURISDICTION & THE CANADA

The Canadian Supreme Court Act of 1952 establishes advisory jurisdiction. Any issue of law or factual matter could be referred to the apex Court by the Governor General in Council. In

²⁰ Sun Life Assurance Co. v. Jerris (1944) All ELR 469 (HL).

²¹ Constitution of US. Art III S(1).

²² Hayburn's case, 2 Dall (1792) 436.

²³ David Muskrat v United States (1911) 219 U.S. 346.

²⁴ Dormus v Board of Education 342 U.S. 429 at 434.

Canada, unlike India, the legislature is also allowed to refer to the Supreme Court for guidance²⁵.

The Supreme Court Act of 1875²⁶ stipulated that the court's opinions could only be "Advisory." However, after 1912, trends altered and court decisions were regarded as binding. The Act expressly states that the advisory opinion issued by the Court must be delivered in the same way as a judgement. In addition, the Constitution of Canada mandates that the Supreme Court of Canada to issue an opinion on the issue that was put forth to it.

CHAPTER 8

LIMITATION OF ADVISORY JURISDICTION

The advisory jurisdiction of courts has several limitations, including:

Not binding: The seeking authority is not required to abide by advisory opinions. This indicates that the authority has the option to follow or reject the court's guidance. Also according to learned author *H.M SEERVAL*: “that Although an advisory opinion issued by justices of the Supreme Court will not be legally binding, it will have persuasive power because it is a law that the Supreme Court has declared within the meaning of Article 141²⁷”. In the case of *Cf. Umayal V Lakshmi*²⁸ In this case it was held that the Supreme Court's opinion issued pursuant to Article 143 is not a judicial pronouncement and is not binding on any party, although the court determined that it may have persuasive power.

Limited scope: Advisory jurisdiction is often restricted to legal issues rather than factual ones. This is so because judges are not as qualified to look into and evaluate facts as they are to interpret and apply the law.

Discretion of the court: The court has the option to decline to respond to an advisory request, especially if it is hypothetical, abstract, or politically sensitive.

²⁵ Supreme Court Act, 1952, § 55.

²⁶ Supreme Court Act of 1875

²⁷ H.M. Seervai on Constitutional Law of India, 4th Edn., Vol.III (2007 Reprint) at p.2411-2412.

²⁸ Cf. Umayal V Lakshmi 1951 ALLMR ONLINE 83 (S.C.)

Resource Allocation Concerns: The time and resources spent on issuing advisory opinions could divert the attention of the court from other pressing cases and issues, potentially causing delays in the resolution of cases with more immediate legal consequences.

In essence, Article 143 i.e. Advisory Jurisdiction stands as a testament by providing a mechanism for resolving legal dilemmas and ensuring the constitutional spirit of justice and fairness prevails in the nation's governance.

CHAPTER 10

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