

NAME: DEVANAND P.

PRABHU

ROLL-NO:

CLASS:F.Y.LLM SEM II

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JURISDICTION OF SUPREME

COURT WITH REFERENCE

TO CASES

INDEX

SR.NO	CONTENT	PG.NO
1.	Introduction	1
2.	Advisory jurisdiction of supreme Court	4
3.	Other Constitutions	5
4.	Clause-1	11
5	Binding force of advisory opinion	30
6	Clause-2	42
7	Presidential reference in 2G spectrum Case	44
8	Conclusion	46

**ADVISORY JURISDICTION
OF SUPREME COURT WITH
REFERENCE TO CASES**

I. INTRODUCTION

Articles 141 and 143(1) of the Constitution of India provide for the doctrine of precedent and for the presidential power to refer cases to the Supreme Court, respectively. The interface between the advisory opinions, provided for by Article 143(1) of the Constitution of India, and the doctrine of stare decisis, has always been a problematic area of Indian constitutional jurisprudence. While the significance of Article 141 is beyond doubt, its importance with respect to reference cases cannot always be said to be so.¹

Normally, the Court's function is to decide the controversy presented to it and render its judgment. Again, Courts do not take suo moto notice of a prevalent controversy and offer their opinions. The Court's Jurisdiction has to be invoked by the aggrieved party through appropriate means, But, Art.143 enables our Supreme Court to render Advisory Opinion in certain contingencies. Such Advisory Opinion of the Supreme Court rendered at the instance of the President of India may enable Parliament to pass appropriate Legislation or to introspect and effect suitable amendments to the existing law.

Art.143 enables the President to refer to the Supreme Court a question of law or fact which in the opinion of the President is of such nature and such public importance that it is expedient to obtain the Court's Opinion on it. It has to be noted that a question of law which the Supreme Court has already decided in a dispute presented to it cannot be the subject-matter of a reference by the President for Advisory Opinion, Because, the implication would be that the President would be inviting the Apex Court to act as an Appellate or Reviewing Authority over its earlier decision while seeking its Advisory Opinion under Art.143. On a

¹ <http://www.manupatra.co.in/newsline/articles/Upload/E7CF5329-8B0A-4648-9AFD-FDD593297BAB.pdf>

Presidential Reference for Advisory Opinion, the Attorney-General would be given notice and all concerned may also be served notices to appear as parties or as interveners. The Court, after hearing, reports to the President.²

The Advisory Opinion tendered need not, rather, should not bind the President. Conversely, the Supreme Court for germane reasons may decline to express its opinion, especially, when the reference is vague.³

² http://wiki.answers.com/Q/What_does_advisory_power_of_the_supreme_court_of_India_imply?#slide=1

³ <http://elearning.vtu.ac.in/P3/CIP71/9.pdf>

ADVISORY JURISDICTION OF SUPREME COURT

143. Power of President to consult Supreme Court

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon

(2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon⁴

⁴ <http://www.indiankanoon.org/doc/210155/>

OTHER CONSTITUTIONS

(A) **U.S.A.**-There is no provision in the Federal Constitution for seeking advisory opinion from the Supreme Court and the Supreme Court has steadily refused to pronounce any opinion save as to the legal rights of litigants in actual controversies. All judicial interpretation of the Constitution or the decision of constitutional problems has, therefore, to be made in the ordinary course of litigation between the parties, *i.e.*, only if there is a 'case or controversy'. The court will not express any opinion as to the validity or wisdom of any proposed legislation or of any proposed executive administrative action.⁵

Some of the State Constitutions (*e.g.*, Massachusetts), however, empower the Legislature and the Executive to seek the opinion of the Supreme Court of the State "upon important questions of law". The opinions so given are *not* treated as precedents in subsequent litigations relating to the same questions. It has also been supposed that though a federal court set up under Art. III of the

Constitution should not take up an advisory role, there is no bar to a court set up by statute to give an advisory opinion at the request of either the Legislature or the Executive. Thus, the Judicial Code of 1942 provides that the court of Claims shall have the jurisdiction to report-

(i) to either House of Congress on any Bill referred to the court by such House except a Bill for pension; and

⁵ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR .pg 6002

(ii) to any executive department as to any claim or matter involving controverted questions of law or fact.⁶

(B) Australia.- *The Australian High Court has also refused to give advisory opinions on the ground that the essential function of the judiciary is the decision of matters *inter partes* and not the consideration of abstract legal questions. Even the Legislature cannot require the court to exercise any such function. For, under the Constitution (Sec. 76), the court can only decide 'matters', i.e., judicial proceedings and not abstract questions, and a statute which requires the court to determine such questions must be held to be invalid.*

It was observed therein that the essential function of the judiciary was the decision of matters "inter parties" and not the consideration of abstract legal question was recognized of the High Court in refusing to give advisory opinion pursuant to statutory authority in *IN RE. JUDICIARY AND NAVIGATION ACTS*.⁷

(C) Canada.- *Section 55 of the Canadian Supreme Court Act, 1952, on the other hand, empowers the Governor-General in Council to refer to the Supreme Court for hearing and consideration "important questions of law or fact touching any matter" and the Governor General is the final authority on the question whether a matter so referred is an 'important question'.⁸*

⁶ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR ,pg.6002

⁷ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR

⁸ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR ,pg 6004

The most peculiar feature of this jurisdiction of the Canadian Supreme Court is that the statute of 1952 expressly requires that such 'opinion' shall be pronounced "as in the case of a judgment upon an appeal to the court" and that it shall be binding on all inferior courts in the like manner as an appellate judgment of the Supreme Court. The 1952 Act has thus removed any doubt as to whether such opinion (because there is no *lis* and no parties) or as 'judgment'.⁹

Another peculiar feature of this jurisdiction in Canada is that it is a statutory *obligation* of the Supreme Court to answer the questions under reference. This advisory jurisdiction of the Supreme Court is thus an exception to the general rule adhered to by the court that it will not decide abstract questions, and the Supreme Court itself has upheld the constitutionality of legislation providing for such reference on abstract questions.¹⁰

Nevertheless, since its establishment in 1875, the Canadian Supreme Court has so far pronounced advisory opinions in many cases:¹¹

(a) In most of these cases, the Government, seeking to introduce a Bill, has sought judicial opinion, being doubtful of its constitutional powers, *e.g.*, as to marriage, liquor, fisheries, or when similar questions have arisen in relation to a Provincial Bill reserved for the assent of the Governor-General.

(b) The Governor-General may also refer the question of constitutionality of a Dominion or Provincial statute after it has been enacted.

⁹ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR .pg 6005

¹⁰ *ibid*

¹¹ *ibid*

- (c) Even the validity of subordinate legislation has been the subject of reference.
- (d) The respective powers of the Dominion and Provincial Legislatures with respect to particular matters may also be referred in the abstract, irrespective of any proposed or actual legislation.
- (e) A reference has been upon the very competence of the Canadian Parliament to abolish appeals to the Privy Council altogether.
- (f) Some of the references related to the interpretation of statutes, *e.g.*, which court had jurisdiction to perform certain statutory functions.

Section 56 of the Supreme Court Act, 1952, also empowers either House of the Dominion Parliament to refer any question to the Supreme Court for its advisory Opinion.¹²

(D) *England.*- Section 4 of the Judicial Committee Act, 1833, provides that His Majesty may refer to the Privy Council- "any such other matter whatsoever as His Majesty shall think fit." Under this provision, the Crown has power to refer to the Judicial Committee any legal issue on which it desires advice and the Judicial Committee "*shall* thereupon hear and consider the same and *shall* advise His Majesty thereon ". Use of this provision has been made mostly on issues outside the United Kingdom. Reference under this Section is confined to justiciable matters. In 1927, the Committee was asked to give an opinion on the Lahrader Boundary Dispute between Canada and Newfoundland and in 1924 on the interpretation of the provisions of the Anglo-Irish Treaty of 1921 regarding the settlement of the boundary between *Northern Ireland and Irish Free State*. It was called on to advise on the clement if

¹² DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6005

the international crime of piracy in RE PIRACY JURE GENTIUM. Its advice was also sought By the Commons, through the Attorney General, on whether a member was disqualified from sitting in the House, the law relating to Parliamentary Privilege.

In 1957, a vital question as to the interpretation of a statute relating to the privileges of Parliament was referred to the Judicial Committee by the Crown at the request of the House of Commons itself.

The House of Lords has refused to give any such advisory opinion.

"It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the *parties* a matter in *actual controversy* which the House undertake to decide as a live *issue*. " ¹³

(F) Japan. - *There* is no provision in the Constitution of Japan to give advisory opinions and Chief Justice Tanaka had announced that the Supreme Court of Japan will follow the American Supreme Court on this point.¹⁴

(G) Government of India Act, 1935.--Sec. 213(1) of the Act of 1935 was exactly similar to Cl. (I) of Art. 143 of *our* Constitution.

I. When the constitutionality of a legislative proposal to impose an estate duty was referred to the Federal Court under this provision, one of the Judges (Zafrullah Khan, J.) refused to give any opinion on the ground that advisory opinions are unsatisfactory and that courts of law should not deliver such opinions on inadequate materials, in the absence of interested parties

¹³ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6006

¹⁴ *ibid*

as in a contested litigation; but the other two Judges gave their opinion on the questions referred.

There were also references on Acts after they had been passed.(In one of these cases, on a question of construction of the statute was involved.)

One reference raised a question of interpretation of the Constitution Act, is without any statute being involved.

There were four references under this provision of the Government of India Act, 1935.

II. Under the above provision of the Government of India Act, 1935, as applicable to Pakistan, the Governor-General of Pakistan made Special Reference No. 1 of 1955, for the opinions of the Federal court on certain questions relating to the powers of the Governor-General *vis-a-vis* the Constituent Assembly.¹⁵

¹⁵ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg 6006

INDIA
CLAUSE(I)

Consultative Function of the Supreme Court

Advisory or consultative jurisdiction.-Normally the function of a court of law is to answer questions of law or fact when properly raised before it in a dispute between the parties. This article, however, confers a particular jurisdiction, commonly called the consultative or advisory jurisdiction, on the Supreme Court to give its opinion on questions unconnected with a pending case. A similar power was conferred on the Federal Court of India by Section 213 of the Government of India Act, 1935.¹⁶

Article 143 authorizes the President to refer to the Supreme Court a question of law or fact which in his opinion is of such a nature 'and of such public importance that it is expedient to obtain its opinion upon it. The words of Article 143 are quite wide and there is no condition that it is only in respect of matters falling within the powers, functions, and duties of the President that it would be competent to him to frame questions for the advisory opinion of the Supreme Court. The only conditions are: (i) that he should' be satisfied that a question of law or fact has arisen or is likely to arise; (ii) that he should also be satisfied that such a question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Court, The President may accordingly formulate for the advisory opinion of the Supreme Court questions relating to the validity of the provisions of existing laws or in regard to the validity of provisions proposed to be included in the litigation which would

¹⁶ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg.462

come before the legislature or in respect of any other question of constitutional importance. A question of law which has already been decided by the Supreme Court in the exercise of its judicial powers cannot be referred to the Court under Article 143. The Court cannot sit in appeal against its earlier decisions in the exercise of its advisory jurisdiction under Article 143.¹⁷

On receipt of the reference the Registrar gives notice to" the Attorney-General to appear before the Court and take directions of the court to the parties who will be served with notice of such reference. The Court also permits such persons and group of persons as may be interested to-appear as interveners.¹⁸

The Court is to report after such helping as it thinks fit. Every report shall be made in accordance with an opinion delivered in open Court with the concurrence of the majority of the judges present, with liberty to any judge who does not concur, to deliver a dissenting opinion. The procedure is similar to that followed by the Court in the exercise of its original jurisdiction.¹⁹

The advisory jurisdiction of the Supreme Court is analogous to that possessed by the Privy Council under Section 4 of the Judicial Committee Act, 1833, which provides that His Majesty may refer to the Judicial Committee, for hearing or consideration, any matter whatsoever as His Majesty may think fit, and that the Committee shall thereupon hear and consider the same, and shall advise His Majesty thereon. The procedure under the Judicial Committee Act differs from that under.

¹⁷ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg.462

¹⁸ *ibid*

¹⁹ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg.462

Article 143 in two respects, namely, (i) dissenting opinions are not delivered in the Privy Council, and (ii) it is made obligatory for the Judicial Committee to hear and consider the matter and advise His Majesty thereon. Similarly, Section 60, Canadian Supreme Court Act, empowers the Governor-General-in-Council to refer important questions of law touching certain matters to the Supreme Court for hearing and consideration. The Supreme Court is bound to entertain and answer the reference and the opinion of the Court upon such a reference is subject to appeal to His Majesty in Council. The Supreme Court of the Canadian Provinces and several of the State Supreme Courts in the United States have been invested with similar jurisdiction. But the Supreme Court of the United States has consistently refused to pronounce advisory opinions upon abstract questions of law on the ground that to do so would be incompatible with the position it occupies in the Constitution of the United States. In the Commonwealth of Australia Constitution Act too there is no provision similar to Article 143. The Permanent Court of International Justice was invested with the competence to deliver advisory opinions by Article 14 of the Covenant of the League of Nations.²⁰

The present clause adopts the provision of Sec. 213(1) of the Government of India Act, 1935, to confer an advisory function upon the Supreme Court as was possessed by the Federal court under the Act of 1935. I do not call it a 'Jurisdiction' because jurisdiction of a court means---

"the authority which a court has to decide matter; that are *litigated* before it or to take cognizance of matters presented in a formal way for its *decision*. The authority conferred by

²⁰ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg.463

Art. 143 is not the authority to hear any cause or complaint referred to the Supreme Court in the formal manner, but the *discretionary* power of the Supreme Court to give its opinion on any question or public importance that may be referred to it by the President. Herein the provisions of *our* Constitution differ from those of Sec. 4 of the Judicial Committee Act, 1833, and Sec. 55 OF the Canadian Supreme Court, 1952.

This Article confers upon the President the power to consult the Supreme Court upon any question of public importance as the President may think fit, whether of law or of fact and whether or not such questions relate to the functions and duties of the President. The President's opinion as to the question being of public importance is not open to question.²¹

2. It is not necessary that the question on which the opinion of the Court is sought must have arisen *actually*. It is competent for the President to make a reference at an anterior stage, namely, when he is satisfied that such question 'is likely to arise'.²²

3. Clause (1) of Art. 143 empowers the President to refer to the Supreme Court a question of law -or- fact which has arisen or is likely to arise. In case, the Court has already pronounced a judgment on a question of law then it cannot be said that a doubt exists regarding that question. The President can refer a question of law only when the Supreme Court *has not decided it*. The advisory jurisdiction under Art. 143 is not an appellate jurisdiction of the

²¹Prof. M.P Jain Indian Constitutional Law, 5th edition, 2005, Wadhwa Nagpur, pg. 690

²² *ibid*

Supreme Court over its own decisions. The Executive has no power to ask the Supreme Court to revise its decision.²³

4. Till now, the President has referred questions of the following nature, under this Article.²⁴

- a) The constitutionality of an existing law.
- (b) The constitutionality of a Bill presented for the President's assent.
- (c) The implementation of an international agreement.
- (d) The constitutionality and *vires* of a draft Bill to be moved in Parliament. SO
- (e) The respective jurisdiction of the Legislature and the superior Courts in relation to the power of the formed" to punish for contempt.
- (f) Interpretation of Constitutional provisions relating to election of the President.
- (g) Powers of an inter-state water disputes tribunal and power of a State to legislate in regard to such *tribunal*.
- (h) Whether a Hindu temple or religious structure existed at a particular place.
- (i) Consultation between CJI and his brother Judges in the matter of appointments of S.C. and H.C. Judges and the transfers of the latter, etc.

5. While under Cl. (2), it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon, the Court has, under Cl. (1), a discretion in the matter and any, in a proper case, decline to express any opinion on the questions submitted to it, *e.g.*,

²³ Prof. M.P Jain Indian Constitutional Law, 5th edition, 2005, wadhwa Nagpur, pg.691

²⁴ *ibid*

- (i) Where the question referred to is a *political* one, as distinguished from the constitutional validity of a Bill or Act.
- (ii) Where it is incapable of being answered.
- (iii) Where the question is hypothetical or speculative or superfluous. But the mere possibility that a pending Bill may undergo changes in course of legislation, would not make the question of constitutionality of a pending Bill hypothetical.
- (iv) Where it is vague- unless the vagueness is cleared by the written briefs and submissions of the parties before the Court.
- (v) Where the Court considers that the question does not arise in the facts and circumstances Of the case.

6. It is for the President to determine what question should be referred, including a pending Bill, on the other hand, the Supreme Court cannot go beyond the questions referred and discuss other questions because any doubts may have arisen relating to them.²⁵

7. A reference on the question of constitutionality of a pending Bill neither encroaches upon the functions and privileges of the legislature, nor supplants Art. 32 of the Constitution.²⁶

8. If the reference raises a question of law or fact which is possible, the Court cannot refuse to give its opinion on the mere ground of expedience or propriety.²⁷

²⁵ Prof. M.P Jain Indian Constitutional Law, 5th edition, 2005, wadhwa Nagpur, pg.691

²⁶ *ibid*

²⁷ *ibid*

9. It is neither obligatory for the Supreme Court to give its opinion' under Cl. (1) whenever the President makes a reference, nor for the President to act upon the opinion pronounced by the Supreme Court.²⁸

10. In its advisory jurisdiction under Art. 143, the Supreme Court cannot go into disputed questions of fact, or inquire into the truth or otherwise of the recitals in the Order of Reference or the *bona fides* of the order of reference Binding force of opinion under Art. 143-1, The advisory opinion given under the present Article is not a judgments and does not, accordingly, furnish a good root of title such as might spring from a judgment of the Supreme Court. Nevertheless, so far as all Courts in the territory of India (other than the Supreme Court) are concerned, they would be bound by the opinion of the Supreme Court even though it has been given under advisory jurisdiction).

The Supreme Court itself would however remain free to re-examine and, if necessary, to overrule the view taken in an opinion under Art. 143(1).But it would not entertain argument on points covered by the Opinion on the Reference.²⁹

Article 143 is not part of administration of justice. It is part of an advisory machinery designed to assist the President (the Executive) in the discharge of his duties. When the President consults the Supreme Court, he is seeking its advice and not an adjudication of a dispute between parties. It is settled law that even if one is under an obligation to consult 'B' before taking any action, if there has been a proper consultation, 'A' is not bound by the advice given by 'B'. Art. 143 confers a power on the President, but does not impose an

²⁸ *ibid*

²⁹ Prof. M.P Jain Indian Constitutional Law, 5th edition, 2005, Wadhwa Nagpur, pg.692

obligation on him to consult the Supreme Court. He may consult the Attorney-General one of whose functions is to advise the President when asked to do so. Therefore, even if the President consults the Supreme Court, he is not bound to follow the advice rendered by the majority.³⁰

The advice cannot operate as *resjudicata* because *resjudicata* operates on the parties to the dispute and there are no parties to a Presidential Reference to the Supreme Court and there is no dispute about legal rights between the President and any other person. Just as the concept of *res judicata* is foreign to "consultation" on a President's reference, so is the concept of binding precedents. If advice given to the President on question of law does not bind the President, it can still less binds all the courts in India".³¹

The power to refuse to answer questions distinguishes proceedings on a President's reference from adjudication before a court. No court having jurisdiction can refuse to decide a matter in controversy between the parties if it is brought before the court in an appropriate proceeding.

The differences between the adjudication of a dispute by a court and giving an opinion to the President is accentuated by the total differences in procedure which vitally affects the result arrived at. In a legal proceeding between parties presented to the court for its decision, the court is in substantial control of its proceedings. Leave to amend the pleadings could be

³⁰ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg.6007

³¹ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg.6008

given at any stage, new parties may be added, and names of existing parties may be deleted; persons against whom no claim is made, but whose rights might be affected by the decision of the court, may be joined as proper parties.³²

Issues have to be framed by the court and may be amended at any time before judgment is delivered. If the correctness of facts is disputed, evidence must be led to prove the correct facts. Further, an 'ex parte' decision of the court would bind the parties if the party served with notice has chosen not to appear. And the judgment would operate as *res judicata* and equally operates as a binding precedent if it lays down rule of law. In a President's reference, it is the President and not the court who is in substantial control of proceedings. The President may formulate such question of law as he thinks fit for consulting the Supreme Court. Other question which may affect the result may not be formulated for the court's opinion. Again, the court must proceed on the facts as stated in the President's reference. The facts may be incorrect by omission or may be even untrue. But the Supreme Court must take the reference as it finds it.³³

As SARKAR, J. observed in *In re. Reference under Art. 143 of Constitution of India*: "We must however answer the question as to facts as stated in the order of reference and have no concern with what may be correct facts". Such a course would be rejected by a court deciding a dispute between parties as a travesty of justice. The difference arises from the fact that in making the Reference, the President desires to inform his own mind on certain question of fact and/or law, with a view to decide on his own course of action.

³² DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg.6008

³³ *ibid*

As neither the President nor the court have any control over the facts of the Bill, it may be withdrawn, dropped, amended or defeated. This only means that as we have seen, it is the essence of a President's reference that the questions put are hypothetical or abstract".³⁴

In a President's Reference, it is not possible to hear all the interested parties, because, all the persons who would be affected by the Bill, if enacted, are not known. Nor is anybody under an obligation to assist the court by spending time and money which would be thrown away if the Bill was not passed or was passed in a different form. To say that the law laid down in an opinion would be binding if the matter was fully argued might lead to unforeseen consequences of persons refusing to argue abstract -questions, reserving their attack, till the Bill becomes law.³⁵

Article 143 does not deal with jurisdiction of the Supreme Court, but with the "power "of the President. It does not refer to any adjudication at all, but with consultation. There is to be no judgment, decree or order, there is to be an opinion to be forwarded to the President in a report to him. Advisory opinion involves no *lis*, binds nobody because it affects nobody's rights and, therefore, lacks all characteristics of a judicial function. Although any opinion expressed by Judges of the Supreme Court in an advisory opinion would have high persuasive authority, it is law declared by the Supreme Court within the meaning of Art. 141³⁶

³⁴ ³⁴ DURGA DAS BASU, COMMENTERY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6008

³⁵ *ibid*

³⁶ ³⁶ DURGA DAS BASU, COMMENTERY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6009

Since the present clause of the Constitution practically reproduces Sec. 213 of the Government of India Act, 1935, the principles laid down by the Federal court relating to the exercise of this advisory power would be good also as regards the Supreme Court.

While under Cl. (2), it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon, the court has, under Cl. (1), a discretion in the matter and may, in a proper case, decline to express any opinion on the questions submitted to it, *e.g.* where the question referred to is a *political* one. But though it is *not* obligatory upon the court to strive an opinion, it will be unwilling to decline a reference except for good reasons.³⁷

Where the Government proposes to use court's opinion in the reference as basis for negotiation between parties and does not propose to settle the dispute on the basis of opinion and where the opinion may incur criticism of one or both the communities whose interests are involved in the issue on ground of not being heard or allowed to put in evidence, the court may refuse to answer the reference. It may also refuse to answer when the court is not competent to decide the question which would be based on expert evidence.³⁸

It is not proper for the Supreme Court nor it is desirable that it should be called upon to embark upon a roving enquiry into the constitutionality of Bill or an Act. Such a course virtually necessitates the adoption of a process of elimination with regard to all reasonably conceivable challenges under the Constitution. It is not expected of the Supreme Court while

³⁷ ³⁷ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg.6009

³⁸ *ibid*

answering a reference under Art. 143, to sit up and discover Article by article, which provision of the Constitution is most likely to be invoked for assailing the validity of the Bill if it becomes law. It was further held in that case that court may refuse to answer, if, by reason of the manner in which the question is framed or for any other appropriate reasons the court considers it is proper or possible to answer the question, it would be entitled to return the reference by pointing out the impediments in answering it. The right of the Supreme Court to decline to answer a reference does not flow merely nor of the different phraseology used in clauses (1) and (2) of Art. 143, in the sense that clause (1) provides that the court "may" report to the President, its opinion on the question referred to it, while clause (2) provides that the court "shall" report to the President its opinion on the question. Even in matters arising under clause (2), the court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered.³⁹

Where the court feels that it is inadvisable for it to express its advisory opinion, it may respectfully refuse to give any opinion. The court may, in a proper case and for good reason, decline to express any opinion on the question submitted to it. It was held therein that the circumstances that the President has not thought fit to refer other questions as to the Constitutional validity of some of the clauses of the Bill on the ground that they infringe other provisions of the Constitution cannot be good or cogent reason for declining to entertain reference and answer the question touching matters over or in respect" of which the President docs entertain some doubt. It was held that speculative opinion on hypothetical questions is worthless and it is contrary to principle, inconvenient and inexpedient that

³⁹ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6010

opinions should be given upon such questions at all. It was held therein that the Supreme Court ought not to go into the question of an Act or a provision in the Act unless it has been brought into force. Till such time the question would be academic. No person can be said that he is aggrieved by such a provision which is not in force.⁴⁰

The jurisdiction under Art. 143(1) cannot be used to reconsider any of its earlier decisions. That can be done only under Art. 137. It was observed that the Supreme Court does not enjoy appellate jurisdiction "over itself". The court cannot convert the advisory jurisdiction into an appellate jurisdiction and it is also not competent for the President to invest the Supreme Court over the said decision through a reference under Art. 143(1). It was observed that to interpret Art. 143(1) as conferring on the executive power to ask the Supreme Court to revise its own decision, would cause a serious inroad into the independence of the judiciary.⁴¹

While dealing with a Reference under Art. 143, the Supreme Court discards

of the vital principles which govern its regular jurisdiction, *e.g.*,

(a) That it does not deal with hypothetical questions;

(b) That it does not pronounce upon the constitutionality of a legislative measure until it has been enacted and brought into force and some individual is or is likely to be affected by its operation.

⁴⁰DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg. 6010

⁴¹DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg. 6010

Hence, if a reference has been made regarding a Bill in existence, the reference about its constitutionality cannot be declined on the ground that the Bill may be withdrawn;" or that it may undergo extensive amendments of a fundamental nature before it is passed, or that the opinion of the Supreme Court may be *futile* inasmuch as whatever be the opinion of the Supreme Court, Parliament was free to proceed with the Bill or pass it in such form as it liked; or that the question referred to is of a 'political' nature, provided there is a constitutional question involved in the reference; or that the privileges of Parliament would be encroached upon by the court's opinion, provided the reference raises a question as to the constitutional validity of the Bill as it stands, on the ground of violation of constitutional limitations; or that the reference is of an omnibus character; or that the reference is *vague*, provided it is not so abstract as to be incapable of answering.⁴²

So far the President has used this power in the matter of⁴³

(a) Constitutionality of an *enactment*.

In the *Delhi Laws Act Case*,⁴⁴ the following question was referred to:

"Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act?"

Section 7 of the Delhi Laws Act, mentioned in the question, was as follows:

⁴² DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6012

⁴³ *ibid*

⁴⁴ *ibid*

"The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification."

(b) *Constitutionality of a pending Bill.*

In the ***Kerala Education Bill*** reference,⁴⁵ it was a State Bill which was involved. The Bill, after it had been passed by the State Legislature, was reserved by the Governor for the consideration of the President. Doubts as to its constitutionality having arisen, the President referred the following questions to the Supreme Court-

"(1) Does sub-clause (5) of clause 3 of the Kerala Education Bill, read with clause thereof or any of the provisions of the said sub-clause, offend Art. 14 of the Constitution in any particulars or to any extent?

(2) Do sub-clause (5) of clause 3, sub-clause (3) of clause 8 and clauses 9 to 13 of the Kerala Education Bill, or any provisions thereof, offend clause (1) of Art. 30 of the Constitution in any particulars or to any extent?

(3) Does clause 15 of the Kerala Education Bill or any provision thereof, offend Art.14 of the Constitution in any particulars or to any extent?

(4) Does clause 33 of the Kerala Education Bill; or any provisions thereof, offend?

Art. 226 of the Constitution in any particulars or to any extent? Reference was also made for an opinion regarding the Constitutionality of the Special Courts Bill 1978⁴⁶.

⁴⁵ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6013

⁴⁶ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6013

(c) Constitutionality and vires of a *draft Bill* to be moved in Parliament.

(d) Questions of law involved in the implementation of an *international agreement*.

The Prime Minister of India entered into an Agreement with the Prime Minister of Pakistan, in 1958, for the settlement of disputes relating to Indo-Pakistan Border Areas. The implementation of this Agreement required an exchange of enclaves between the two countries. Doubts arose as to whether legislation or amendment of the Constitution was required to effect this purpose, as it meant the giving over a part of the Indian territory (Berubari Union) to a foreign State. The President referred the following questions to the Supreme Court-

"(1) Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?

(2) If so, is a law of Parliament relatable to Art. 3 of the Constitution sufficient for tile purpose or is an amendment of the Constitution in accordance with Art. 368 of the Constitution necessary, in addition or in the alternative?

(3) Is a law of Parliament relatable to Art.3 of the Constitution sufficient for implementation of the agreement relating to the exchange of Enclaves or is an amendment of the Constitution in accordance with Art. 368 of the Constitution necessary for the purpose, in addition or in the alternative?"

(e) The respective jurisdictions of the Legislature and the superior courts in relation to the power of the former to punish for contempt.

(t) Interpretation of the constitutional provisions relating to the election of a President.⁴⁷

Reference was also made under this Article in the matter of *Cauvery Water Disputes Tribunal 1992*.⁴⁸

Even though the President is Competent to refer any question he pleases to the Supreme Court, it is judicially acknowledged that the chief utility of an advisory judicial opinion is to enable the Government to secure an authoritative opinion as to the validity of a measure before initiating it in the Legislature. Article 143 gives express power to the President to have the opinion of the Supreme Court to guide himself by and when disputes of public importance arises and was being agitated by member of Parliament and in the Cabinet. In such cases, the President has not only a right but a duty to consult the Supreme Court under this Article. For this purpose, it is essential that the questions referred to should be as precise and specific as possible.

It was held that when the court deals with a reference, it is not withdrawing any matter from the schism of the Parliament and it does not lift the Bill from the Lok Sabha. The President has made a reference to the court and the court is under constitutional obligation to consider the reference and report thereon to the President.

In doing so, the court does not encroach upon any function of Parliament or privileges of Parliament. (*Special Court Bill, in re.*, AIR 1979 SC 47R : (1979) 1 SCC 380: (1979) 2 SCR 476)⁴⁹

⁴⁷ ⁴⁷ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWRTHS WADHWA, NAGPUR, pg.6013

⁴⁸ *ibid*

The proceedings under Art. 32(1) being of an entirely different nature from the proceedings contemplated under Art. 143(1), there is neither supplanting nor abrogation of Art. 32(1) if the Supreme Court pronounces upon the question referred to it by the President.

Though the counsel on behalf of the Government may be allowed to interpret the questions referred to, he cannot be allowed to supplement them: The Reference should be construed narrowly than broadly.

Order XXXVII of the Supreme Court Rules, 1966.⁵⁰

The Supreme Court has made the following rules, laying down the procedure for hearing a reference under the present article:

1. "On the receipt by the Registrar of the order of the President referring a question or law or matter to the court. the Registrar shall give notice to the Attorney-General for India to appear before the court on a day specified in the notice to take the directions of the court as to the parties who shall be served with notice of the Special Reference, and the court may, if it considers it, desirable, order that notice of the Special Reference shall be served upon such parties as may be named in the order.

2. Subject to the directions of the court the notice shall require all such parties served therewith as desire to be heard at the hearing of the Special Reference to attend before the Registrar on the day fixed by the order to take the directions of the court with respect to statements of facts and arguments and with respect to the date of the hearing.

⁴⁹ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg.6014

⁵⁰ Supreme Court Rules, 1966., ibid

3. Subject to the provisions of this Order, the court shall follow as nearly as may be the procedure in proceedings before the court in the exercise of its original jurisdiction, but with such variations as may appear to the court to be appropriate and as the court may direct.

4. After the hearing of the Special Reference, the Registrar shall transmit to the President the Report of the court thereon.

5. The court may make such order as it thinks fit as to the costs of all parties served with notice under these Rules, and appearing that the hearing of the Reference under Art. 143 of the Constitution."

The court may issue notice upon persons or institutions interested in the question under reference and may also grant them, leave to appear at the hearing. Though the opinion of the court does not operate as a judgment, the procedure with respect to a reference has, as far as possible, been approximated to a judicial hearing and determination of the questions referred.

But since all the facts and materials may not be before the court and the court cannot enter into a finding of facts as in a contested litigation, it may have to answer the questions on certain assumptions and to make its report with such reservations as may be found necessary.

Binding force of advisory opinions

Since the opinion pronounced by the Supreme Court under Art. 143 is not a judicial pronouncement, and is not binding on any party, it would seem that the opinion is not binding upon the courts in India under Art 141, though it may have great persuasive force. Hence, no advisory opinion given under the present provision can furnish a good root of title such as might spring from a judgment of the Supreme Court.

Strictly speaking the advisory opinion of the Supreme Court is not binding on the President though the President normally honours it and sometimes the court also take an undertaking through the Attorney General that it will be honoured. (*In re. Presidential Reference*, AIR 1999 SC 1)⁵¹

Of course, in *India*, the Supreme Court has provided for hearing interested parties and counsels. Nevertheless, it remains questionable whether 'law can be declared' by the Supreme Court within the meaning of Art. 141 when there is no 'judicial pronouncement'. It is to be noted that the location of Art. 143 is similar to that of Sec.213 of the Government of India Act, namely, that it is placed sub-sequent to Art. 141 which concludes the different classes of 'jurisdiction' of the Supreme Court, -original or appellate, and lays down that law declared by the Supreme Court (under the preceding

Articles) shall be binding on all courts. Art 142, which follows, speaks of the enforcement of the judgment and orders of the Supreme court. Art. 143 deals with the 'power of the President to *consult*' the Supreme Court and enables the Supreme Court to give its 'opinion' on the

⁵¹ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg 6016

questions referred to. It is evident that Art. 141 cannot be attracted to an opinion given under Art. 143.⁵²

It should be pointed out, however, that the principles of law laid down in the opinions under Art. 143 which the Supreme Court has so far delivered have been freely relied upon by the High Courts in subsequent cases. In fact it has been held that "though it has been stated in several decisions and by jurists that the opinion expressed by the court in exercise of its advisory jurisdiction under Art. 143(1) is not binding, it would be strange that a decision given by the Supreme Court on a question of law in a dispute between two private parties should be binding on all courts in the country, but the advisory opinion should bind no one at all, even if, it is given after hearing everyone concerned who desired to be heard and after full consideration of the question raised in the reference. CONSTITUTIONAL LAW OF INDIA by H.M. SEERVAI, 4th Edn. (2007) Re-print, Vol. III, p. 2684.

But it was declared that the report which may be made to the President in a reference under Art. 143, is not binding on the Supreme Court in any subsequent matters wherein a concrete case the infringement of the rights under any of the analogous provision may be called in question, though it is entitled to great weight. The opinion expressed under this Article cannot override the opinion subsequently expressed by the Supreme Court in the contested cases. It is the law declared by the Supreme Court in the subsequent contested case which would have a binding effect. Earlier the Supreme Court had expressed the view that the advisory opinion does not have the force of law. According to learned author H.M. SEERVAI: "although any opinion expressed by the Judges of the Supreme Court in an

⁵² D. J. De, the constitution of India, 2nd edition, Asia Law House Hyderabad, pg 1701

advisory opinion would have persuasive authority, it is the law declared by the Supreme Court within the meaning of Art. 141 ".

The Supreme Court itself would however remain free to re-examine and if necessary to overrule the view taken in an opinion under Art. 143(1). But it would not entertain arguments on points covered by the opinion on the Reference. In a later case, the Supreme Court expressly refrained from recording an opinion on the question as to the binding nature of its opinion.⁵³

The opinion in the *Delhi Laws Act case* has also been followed in almost all subsequent cases on the subject.

Analogous Provisions.- Cls. (3) -(5) of Art. 145 are to be read in connection with Art. 143 of Cl. (3) requires that at least five Judges must sit for hearing a reference under Art. 143; Cl. (4) requires that the opinion must be delivered in open court; Cl. (5) requires that the report must be the opinion of the majority of the Judges present at the hearing.⁵⁴

But *In re Special Courts Bill* case, AIR1979SC448 the Supreme Court has held that the views expressed by it in exercise of its advisory jurisdiction are binding on all courts in the territory of India. In that case the question referred to the Court for its opinion was whether Parliament was empowered to establish Special Courts for the trial of emergency offences. A seven member bench of the Supreme Court by 6 : 1 majority held that Parliament has power to establish Special Courts for trial of emergency offences subject

⁵³ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg 6017

⁵⁴ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg 6017

to certain procedural safeguards. The three procedural changes suggested by the Court were- (1) that only sitting and not retired High Court Judges should be appointed to the Special Court; (2) appointments must be made with "the concurrence of" and not simply "in consultation with" the Chief Justice; and (3) the accused must be given right to apply to Supreme Court for transfer of his case from one Special Court to another if he alleges Bias. If these changes are made in the Bill it would render the procedure 'fair and just'. Since all these amendments were acceptable to the Government it was held that the bill was constitutionally valid. It also held that the Court is under duty under Art. 143 to give its advisory opinion if the questions referred to it are not vague and of a political nature. The Court also made it clear that the view of the Court expressed in the exercise of its advisory jurisdiction is binding on all courts. The Judges said. "it would be strange that a decision given by this Court on a question of law in a dispute between two private parties should be binding on all courts in this country but the advisory opinion should bind no one at all even if, as in the instant case, it is given after issuing notice to all interested parties, after hearing everyone concerned who desired to be heard, after the full consideration of the questions raised in the reference." The Court, however suggested that the reference should not be vague and general but must be made on *specific questions*. Otherwise the courts would not be bound to answer.⁵⁵

In the matter of *Cauvery Disputes Tribunal*. AIR 1992 SC 522

a Tribunal was appointed by the Central Government to decide the question of waters of the river Cauvery which flows through the States of Karnataka and Tamil Nadu. The Tribunal gave an interim order in June 1991 directing the State of Karnataka to release a particular

⁵⁵ Dr. J.N.pandey, the Constitutional Law of India, 48th edition, central law agency, pg.529

quantity of water for the State of Tamil Nadu. The Karnataka government resented the decision of the Tribunal and promulgated an Ordinance empowering the Government not to honour the interim Order of the Tribunal. The Tamil Nadu government protested against the action of the Karnataka government. Hence the President made a reference to the Supreme Court under Art. 143 of the Constitution. The Court held that the Karnataka Ordinance was unconstitutional as it nullifies the decision of the Tribunal appointed under the Central Act (*viz.* the Inter State Water Dispute Act. 1956) which has been enacted under Art. 262 of the Constitution. The Ordinance is also against the principles of the rule of law as it has assumed the role of a Judge in its own cause.⁵⁶

Ayodhya Dispute & Advisory opinion.-

In a landmark judgment in *Ismail Faruqui v. Union of India*⁵⁷ (1994) SCC360 the five judge bench of the Supreme Court comprising (N.M. Venkatachaliah CJ, A.M. Ahmadi, J.S Verma, G.N. Ray and S.P. Bharucha JJ.) held that the Presidential reference seeking the Supreme Court's opinion on whether a temple originally existed at the site where the Babari Masjid subsequently stood was superfluous and unnecessary and opposed to secularism and favored one religious community and therefore, does not require to be answered. There had been a long standing dispute relating to the disputed structure in Ayodhya which led to the communal tension and violence resulting in loss of many lives and destruction of property throughout the country. With a view to maintain communal harmony and fraternity amongst the people of India the Union Government issued an ordinance acquiring certain areas at Ayodhya which subsequently became an Act.

⁵⁶ Dr. J.N.pandey, the Constitutional Law of India, 48th edition, central law agency, pg.530

⁵⁷ *ibid*

The Court upheld the validity of the acquisition of 67 acres of land in Ayodhya. But it allowed revival of the title suit pertaining to the disputed site. These title cases were disposed by the Allahabad High Court. Till the disposal of the dispute regarding the ownership of the land on which the Babari Masjid stood the government would act as a receiver of this portion of the land. It cannot transfer this part of the acquired land to any third party and would return it to whoever was found to be the original owner by the Allahabad High Court. As regards undisputed land the acquisition is absolute and the Government can transfer it to any organization or Trust.

The main features of the judgment are as follows :

1. The Presidential reference is not maintainable.
2. Pooja to continue at the make shift Ram Lala temple that had been erected on disputed site following demolition of Babri Masjid structure on Dec. 6. 1992.
- 3 . The judgment is no reflection on the President of India.
- 4 . The title suits regarding disputed structure pending in Allahabad High Court revived.
5. Land of disputed structure cannot be transferred to a third party.
6. The Centre is permitted to settle dispute through negotiation.
7. Acquisition of 67 acres of land upheld except disputed area.
8. Centre under duty to handover land to the real owner after final verdict by Allahabad High Court.
9. Surplus land must be restored to the undisputed owners.
10. Land other than disputed structure can be transferred to trust or to a third party.

11. Mosque does not enjoy a special position as a place of worship in Muslim Law and can be acquired and shifted like every immovable property.

12. A mosque is not an essential part of the practice of the religion of *Islam* and *Namaz* can be offered anywhere even in open. Accordingly its acquisition is not prohibited under the Constitution of India.

In *Special Reference No. of 20024 AIR 2003 SC 87*

The Court held the Supreme Court was well within its jurisdiction to answer or advise the President in a reference made under Article 143 (1) if the questions referred are likely to arise in future or such question are of public importance or there is no decision of the Supreme Court which has decided the question referred the question which was referred to the Court for its advisory opinion was whether the Election Commission was bound to hold election of the Gujarat Assembly which was dissolved before the expiry of its five year term. within 6 months as mandated by Art. 174 of the Constitution. On behalf of the Election Commission it was contended that the Court need not answer the reference. The Supreme Court held that Art. 174(1) neither relates to elections nor does it provide any outer limit for holding elections for constituting Legislative Assembly. Art. 174(1) and Art. 324 operate on different fields and neither Art. 174(1) is subject to Art. 324 nor Art. 324 is subject to Art. 174(1) of the Constitution Art. 324 vests power and the Election Commission to hold elections. Art. 174(1) applies to a dissolved house and the 'living' house. However, the Election Commission is bound to hold elections as early as possible but within 6 months.⁵⁸

⁵⁸ Dr. J.N.pandey, the Constitutional Law of India, 48th edition, central law agency, pg.531

The Special Courts Bill,

In *The Special Courts Bill, 1978*,⁵⁹ *1978, Re*, (1979) 1 SCC 380, 401: AIR I 979 SC 478. *Re*, the question referred by the President to the Supreme Court was whether the Special Courts Bill, 1978, or any of its provisions, if enacted, would be constitutionally invalid. On the general issues relating to the extent and scope of Article 143(1) the Court expressed the following opinion:

(a) Whether the Supreme Court can decline to answer a reference.-

Article 143(1) is couched in broad general terms which provide that any question of law or fact may be referred by the President for the consideration of the Supreme Court. It is not necessary that the question on which the opinion is sought must have arisen actually, and it is a matter essentially for the President to decide whether it is expedient to obtain the opinion of the Supreme Court. The plain duty and function of the Supreme Court is to consider the question on which the President has made the reference and report to the President its opinion. If for some reason, the Court considers it not proper or possible to answer the question, it would be entitled to return the reference by pointing out the impediments. The right of the Supreme Court to decline to answer a reference does not flow merely out of 'may' in clause (1) of Article 143. Even in matters arising out of clause (2), the Court may be justified in returning the reference unanswered for a valid reason.

(b) Propriety of referring hypothetical questions and duty of court to answer.-

It is competent for the President to make a reference at an anterior stage, namely, when the President is satisfied that the question is likely to arise. The satisfaction whether the question

⁵⁹ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg. 464

has arisen or is likely to arise and whether it is of such a nature and of such public importance- that It is expedient to obtain the opinion of the Supreme Court, is a matter essential for the President to decide. The assumption of every reference under Article 143(1) has to be the continued existence of a context or conditions on the basis of which the question of law or fact arises or is likely to arise. The possibility of a change, even of a fundamental character, cannot make the exercise of presidential jurisdiction speculative or hypothetical.

However, speculative opinions on hypothetical questions are worthless and it is contrary to principle, inconvenient and inexpedient that opinion should be given in such questions at all.⁶⁰

(c) Reference should be specific and not general and vague.-

Whenever a reference is made to the Supreme Court under Article 143, a care should be taken frame specific questions for the opinion of the Court. A reference in broad and general terms, such as whether the Bill or any of its provision thereof would be constitutionally valid, is difficult to answer because it gives no indication of the specific points on which the opinion is sought. A kind of a roving inquiry into the constitutionality of a Bill virtually necessitates the adoption of a process of elimination with regard to all reasonably conceivable challenges under the Constitution. Such an inquiry is not expected of the Supreme Court under Article 143.⁶¹

⁶⁰ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg., pg.464

⁶¹ ibid

(d) The Supreme Court by answering the reference does not encroach upon functions and privileges of Parliament. –

The principle is firmly and wisely embedded in the Constitution that the policy of law and the expediency of passing it are matters for the legislature to decide while interpretation of law and questions regarding their validity fall within the exclusive advisory or adjudicatory functions of courts. When the Court deals with a reference, it is not withdrawing any matter from the session of Parliament and it does not lift the Bill from Parliament. The President is empowered to make a reference to the Supreme Court for its opinion, and the Supreme Court is under constitutional obligation to consider the reference and report thereon to the President. In doing so, it does not encroach upon any particular function or privilege of Parliament.⁶²

(e) The Supreme Court by answering a reference does not abrogate Article 32.-

A proceeding under Article 32(1) is of an entirely different nature from the proceeding contemplated by Article 143(1), and there is neither supplementing nor subrogation upon the question referred to it by the President. In the proceedings before the Supreme Court under Article 143(1), the question under reference is whether the Bill pending before Parliament is open to constitutional challenge. If the Bill is found valid Parliament may proceed with it, or otherwise if the Bill is found invalid Parliament may not spend any time over passing a constitutionally invalid Bill.⁶³

⁶² Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg.464

⁶³ *ibid*

(f) The Supreme Court should not decline to answer the reference on ground of futility.

The argument that it is futile for the Supreme Court to consider the constitutional validity of the Bill because whatever view the Supreme Court takes, it will still be open to Parliament to discuss the Bill and to pass or not to pass as it pleases, proceeds upon an unrealistic basis, its assumption being that Parliament will not act in a fair and proper manner. True, that nothing that the Supreme Court says in its opinion can deter Parliament from proceeding with the Bill in any manner.⁶⁴

But since the constitutionality of the Bill is a matter which falls within the exclusive domain of the judiciary, the Supreme Court trusts that Parliament will not fail to take notice of the Court's opinion.⁶⁵

(g) The Supreme Court should not decline to answer the reference on the ground that it raises a purely political question. -

The policy of the Bill and the motive of the mover may be to ensure a speedy trial of persons holding high public or political offices who are alleged to have committed certain crimes during emergency. But the question whether the Bill or any of its pronouncements are constitutionally valid is not a question of political nature and the court should not refrain from answering it.⁶⁶

(h) The Supreme Court should not decline to answer a reference on grounds of expediency and propriety. –

⁶⁴ ibid

⁶⁵ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg., pg.465

⁶⁶ ibid

It will not be correct to say that in the interests of expediency and propriety, the Supreme Court should decline to answer the reference considering the repercussions of the exercise of this jurisdiction. It is of no consequence if the Bill might eventually emerge from the Legislature in a shape which is very different from the one considered by the Supreme Court. The opinion of the Supreme Court will be read with reference to the question referred to it in the reference and not with reference to the form which the legislation finally takes. Article 143(1) confers advisory jurisdiction on the Supreme Court and it is not for the Supreme Court to refuse to answer the reference on the ground that it is generally inexpedient to exercise the advisory jurisdiction.⁶⁷

⁶⁷Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg., pg.465

CLAUSE (2)

Article 143(2) deals with cases in which the President may refer a dispute to the Supreme Court, notwithstanding the prohibition prescribed by the proviso to Article 131. If such a reference is made, the Court shall after such hearing as it thinks fit, report to the President its opinion thereon. It will be noted that while under Article 143(2), it is the constitutional obligation of the Supreme Court, to make a report on that reference embodying its advisory opinion, in a reference under Article 143(1) there is no such obligation.⁶⁸

Reference as to pre-Constitution Agreements with Indian States

The Proviso to Art. 131 *ante*, read with Art. 363(1) excludes disputes arising out of agreements to which the Ruler of an Indian State was a party, from the original jurisdiction of the Supreme Court. But the present clause authorizes the President to refer such disputes to the Supreme Court and to get its 'opinion'. The difference between the two courses lies in this that the opinion of the Supreme Court under Art. 143 would not be *binding* upon the President; nor would it be executable under Art.142(1). Because the cause of action in such dispute is *political* in nature, the remedy provided for the settlement of such dispute is not adjudication, but executive action after consultation of the opinion of the Supreme Court.⁶⁹

While it is optional with the Supreme Court to answer a reference made under Cl. (1); it is *obligatory* to answer a reference made under Cl. (2) relating to a dispute arising out of a pre-Constitution agreement with an Indian State.

⁶⁸ Dr. V.N. Shukla, Constitution of India, 10th edition, Eastern Book Company, pg., pg.465.

⁶⁹ DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, 8TH EDITION 2009, VOL 5, LEXIS NEXIS BUTTERWORTHS WADHWA, NAGPUR, pg 6017

But even in cases under Art. 143(2) the court may be justified in returning the reference unanswered, if it finds for valid that the question is incapable of being answered.

PRESIDENCIAL REFERENCE IN 2G SPECTRUM CASE

On receipt of the Reference, vide order dated 9th May, 2012, notice was issued to the Attorney General for India. Upon hearing the learned Attorney General, it was directed vide order dated 11th May, 2012, that notice of the Reference shall be issued to all the States through their Standing Counsel; on Centre for Public Interest Litigation (CPIL) and Dr. Subramanian Swamy (petitioners in the **2G Case**); as also on the Federation of Indian Chambers of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII), as representatives of the Indian industry. On the suggestion of the learned Attorney General, it was also directed (though not recorded in the order), that the reference shall be dealt with in two parts *viz.* in the first instance, only questions No. 1 to 5 would be taken up for consideration and the remaining questions shall be taken up later in the light of our answers to the first five questions. At the commencement of the hearing of the Reference on 10th July, 2012, a strong objection to the maintainability of the Reference was raised by the writ petitioners in the **2G Case**. Accordingly, it was decided to first hear the learned counsel on the question of validity of the Reference.⁷⁰

It was urged that maintainability and the discretion to decline to answer a reference are two entirely different things. The question of maintainability arises when *ex facie*, the Presidential reference does not meet the basic requirements of Article 143(1), contrastive to the question of discretion, which is the power of the Court to decline to answer a reference, for good reasons, once the reference is maintainable. In support of the proposition, reliance was placed on *In Re: The Kerala Education Bill, 1957* (supra), *Keshav Singh* and *In Re: The Special Courts Bill, 1978* (supra). According to the learned counsel, the question as to whether the

⁷⁰ www.zeenews.com/2G spectrum case

reference is to be answered or not, is not an aspect of maintainability, and is to be decided only after hearing the reference on merits.⁷¹

⁷¹ www.zeenews.com/2G spectrum case

CONCLUSION

In almost sixty years, only ten references have been made, of which nine have been answered and only one not entertained as it would involve choosing between two communities of the nation and itself involved questions as to constitutionality.

Presidential references have always been made only when the issues have become clarified and crystallised by discussion amongst the general public and it has actually been possible for the courts to express an opinion. Thus, in light of the arguments put forth in this paper, the author wishes to conclude by reiterating that opinions expressed by the Supreme Court, in exercise of advisory jurisdiction under Article 143(1), is not to be considered as law. The impact of this position, however, is that proceedings which take place in an unreal atmosphere may sometimes prejudice the interest of certain future litigants. That said, 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 this regard, and also ensures that, in the process, the significance of advisory opinions is not undermined

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