

An Analysis Of Advisory Opinion Delivered By Supreme Court: Present Scenario And Perspective

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Abstract: This research paper stresses the role of Supreme Court to provide advisory opinion to Union Government, how it has acted in the last six decades in India. This research paper deals with the analysis of Advisory Opinion delivered by the Apex Court of India. The study may facilitate to understand the role of the advisory opinion in chronological order, over the years, towards the various references which affect the citizens of the country through various judicial opinions.

Keywords: Advisory Jurisdiction, Article 143, Supreme Court, Constitution of India, President

I. INTRODUCTION

The primary and immediate effect of an Advisory opinion to resolve the difficulty that leads to the request by President of India for it. With the delivery and communication of an advisory opinion the task of the court is over. Thereafter it rests with the requesting organ to accept it and to implement it in action. The extent of this reception and the effect given to the opinions depends upon their nature, apart from political considerations. There upon depends also their effect on the court. The opinions are regarded by the requesting bodies by the court itself on being of equal authority with the judgments. The Court has made significant contribution towards the development of law through its opinions. The Court plays an important part in the development of law through its advisory jurisdiction as it does through its judgments in cases. A prominent law expert Solan once suggested that the president might use the court in helping to develop law through advisory opinions. But there are other long range effects that necessarily flow from its authoritative character. The opinions produce effects upon the court and, like judgments, are a means of developing law. The great majority of the opinions given by the Supreme Court were effective several of them facilitated the work of the legal system in India and some led to the settlement of disputes which has given rise to requests.

This Research paper deals with the propriety of the Advisory opinion conferred by Article 143 of the constitution

of India on the Supreme Court of India. Article 143 of the Constitution empowers the president to seek advice from the Supreme Court on questions of law or fact. The word 'consult' in the title of Article 143 has been used in a wider sense to include not only the courts advisory jurisdiction as such but also all aspects of the courts procedure and the nature, reception, and effect of the advisory opinions.

II. ANALYSIS OF ADVISORY OPINION DELIVERED BY SUPREME COURT OF INDIA

During the last sixty seven years, since the Constitution came into force, fourteen references have been made to the Supreme Court under Article 143 (1) in which court has given its advisory opinion.

A. IN THE DELHI LAW'S ACT REFERENCE

The In Re Delhi Laws Act case was the first one in which the question of delegation of legislative power was considered by the Supreme Court. It is worth nothing that each of the seven judges who participated in the decision gave separate opinion All of them were agreed on a few basic propositions, viz., from a practical point of view, the Parliament should have power to delegate legislative power to the executive. The judges, however, differed on drawing the limits which the

Parliament could delegate its legislative powers to the executive, and expressed mainly two views, (i) the Parliament is free to delegate its legislative power to any extent subject to the limitation that it must not efface itself or abdicate its powers. (ii) the Parliament could not delegate to another agency its 'essential' legislative function, which meant the formulation of policy and enacting it into a binding rule of conduct.

- ✓ In *Ramesh Birch vs. Union of India* Same provision relating to Chandigarh almost the same as in the Delhi Laws Act case regarding Delhi has been held valid. The similar in the Delhi Laws Act case was relied on later cases like *Krishna Prakash Sharma vs. Union of India* and in case of *State of Rajasthan vs. Basant Nahata*.

B. IN THE KERALA EDUCATION BILL REFERENCE

The In Re Kerala Educational Bill Reference was made in a politically heated situation. The Central Government made a skillful use of the provision of seeking advisory opinion of Supreme Court. The Reference saved the Central Government from political embarrassment as well as mollified public opinion and helped in the removal of the lacunae in the Bill as discovered by the Supreme Court.

The Court, in the course of the opinion, laid down certain important principles regarding the interpretation of the Constitution as follows:

- ✓ In determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body, the Court may not entirely ignore the directive principles of a state policy, but should adopt the principle of harmonious construction, and should attempt to give effect to both as much as possible.
- ✓ The protection of Article 30 (1) extends to the educational institutions or minorities, religious or linguistic, whether established before or after the commencement of the Constitution. It also extends to aided schools, where there are scholars from outside the minority community. For, Article 29 (2) precludes aided schools from denying admissions on the grounds only of religion, language, caste, race or any of them.
- ✓ The ambit of the right conferred by Article 30 (1) is to be determined from the point of view of the educational institutions itself. The Constitution does not lay down any restrictions as regards subjects to be taught therein.
- ✓ The true intention of Article 30 (1) is to equip minorities with a shield whereby they could defend themselves against attacks by the majorities, religious or linguistic and not to arm them with a sword whereby they could compel the majorities to grant concession.

This reference has been cited in many cases. In *St. Xavier's College Vs. state of Gujarat* Supreme Court followed the view of Kerala educational bill reference that the regularity measure by the State should not restrict the right of administration but facilitate it through the instrumentality of the management of the minority institution. In case of *Uni Krishnan Vs. State of A.P.* honorable court was agree with Kerala's reference that right to recognition or affiliation is not a fundamental right.

In a landmark decision in *T.M.A. Pai Foundation Vs. State of Karnataka* an 11 judge Constitution Bench following the reference of Kerala held that State Government and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities but state governments and universities can specify academic qualifications for students and make rules and regulations for maintaining academic standards again, in a landmark judgment of *P.A. Inamdar Vs. state of Maharashtra* Kerala reference has been cited. Supreme Court held that neither in the judgment of TMA Pai nor in Kerala Education Bill decision there is any thing which would allow the state to regulate or control admissions in the unaided educational institutions. Thus, the private unaided professional institutions (minority and non minority) cannot be forced to accept reservation policy of the State.

The reference has been used for interpretation of Anglo Indians under article 366 (2). In case of *State of Bombay Vs. Bombay Education Society* reference is followed. In this case an order of state government which prevented the Anglo Indian School to admit students of other communities was held unconstitutional on ground that it prevented the Anglo Indian School from performing this constitutional obligation of admitting at least 40% students of other communities. Under article 337 the State cannot impose any other obligation on the Anglo Indian Schools on a condition to receive grants.

The reference of Kerala educational bill is used in explaining the relationship between directive principles of state policy and fundamental rights. The Supreme Court observed that though the directive principles cannot override the fundamental rights, nevertheless in determining the scope and ambit of fundamental rights the court may not entirely ignore the directive principles but should adopt the principles of harmonious construction and should attempt to give effect to both as much as possible.

C. IN THE BERUBARI REFERENCE

By the In Re Berubari reference, the highest Court of the land was called upon to advice the President as to how an agreement with a foreign country which involved cession of territory, could be implemented while dwelling over the matter, the Court considered the scope and extent of Article 3 of the Constitution. Clause (c) of the Article deals with the diminution of the area of any State and this was the only clause relevant for the purpose of the reference. The Court rejected the Attorney General's contention that clause (c) of Article 3 was wide enough to cover even cession of Indian territory to a foreign State. It was held that when the Constitution did not expressly provide for acquisition of foreign territory, it must not have intended to provide for cession of Indian Territory to a foreign country by implication under Article 3 (c). The Court concluded that a part of the Territory of India could not be ceded by an ordinary Act of the Parliament, but it could only be done by an amendment of the Constitution under Article 368. As a result of this opinion, the Constitution (Ninth Amendment) Act was passed and the Agreement was implemented. Amendment was made in the First Schedule to cede some Indian territory to Pakistan as envisaged in the Agreement.

The opinion on the Reference came in for consideration in *Ram Kishore Sen's case*. In this case, the demarcation of boundaries which miserably affected a number of people residing in the demarcated areas of Berubari was challenged. It was contended that there must be a law passed by Parliament under Entry 14, List-I, Schedule VII of the Constitution or also Article 3 should be amended so as to exclude its operation in the case of cession of territory to a foreign power. The opinion of the Supreme Court in the Berubari Union's case was, it was argued, wrong and was not binding upon the Calcutta High Court, being an advisory opinion. But the Calcutta High Court did not agree with this contention and, upholding the opinion on the Reference, held that a Parliament's statute, in addition to amendment of the First Schedule of the Constitution was not necessary. The question of amending Article 3 did not arise. The opinion was considered and followed in Bhansali's case as well.

However, according to one commentator on Constitutional law this judgment was clearly wrong, and that an amendment of the Constitution was absolutely unnecessary, because a law under Article 3 would have been adequate to implement the Agreement. Again the opinion of the court is cited for interpretation of preamble of the constitution. In this context court has opined that the preamble of the constitution in a key to open the mind of the makers and shows the general purpose for which they made the several provisions in the constitution.

D. IN THE SEA CUSTOMS ACT REFERENCE:

The Reference, the fourth one under the present Constitution, dealt with a knotty problem of Centre State relationship in financial matters. The opinion nicely explained the word 'property' in Articles 285 and 289 to mean property itself, not the various aspects of property, i.e., manufacture, gift and import or export. The majority of the Judges propounded the theory that the Central Government could levy customs duty on goods imported or exported or an excise duty on the goods produced or manufactured by a State Government irrespective of whether it was used or not for purposes of trade or business. To exempt the export or import made by a State from customs duty would seriously impair the power of Parliament to regulate foreign trade by using its taxing powers. Similarly, exempting manufacture of goods by a State from union taxation would adversely affect the Central power to regulate inter-State commerce. Article 289, the majority opinion of the Court held, bars imposition of Central taxes on property and not those taxes which may indirectly affect or are in respect of income or property. The customs duty is a tax on 'import or export' and excise on 'production or manufacture' and none of these taxes are on property as such. Fortunately, majority opinion is almost in line with the position in other sister federation.

A principle that the Centre was under obligation to share its revenues with the States, was established by the Court in its opinion. All revenues occurring in the states from their taxes is exclusively used by them, but all taxes levied by the Centre are not meant for its exclusive use. The Centre is required to share some of its taxes with the States. Therefore, Union's revenue raising capacity should not be impaired by

interpreting the exemption in favour of the States broadly. The import and export duties were a well recognised mode of controlling trade with countries and the exclusive power to legislate in respect of foreign trade would be impaired if such duties could not be levied on goods imported or exported by States. In this opinion the majority evolved the norms that on a true interpretation of Article 289 (1) the immunity granted to the States in respect of union taxation could not be extended to the customs and excise duties intended to be imposed on the State Governments.

The issue well deserved the Presidential Reference to the Supreme Court and the opinion given on it is a everlasting impact on the validity of the Indian federalism in Indian circumstances. In the older federation under the Government of India Act 1935, the Federal Court tried to give more and more autonomy to the Provinces. Unlike the Federal Court, the Supreme Court has declined to accept the doctrine of autonomous State rights because it would amount to weakening the Centre and the Constitutional fabric as well. Keeping in view the situation, circumstances and the peculiar federal set up in India the Supreme Court has contributed to establish certain norms to provide the federal structure with a strong bias towards the Centre.

E. IN THE KESHAV SINGH REFERENCE

While evaluating the opinion of the Supreme Court, a reference to the decision of the Allahabad High Court on the habeas corpus petition of Keshav Singh, will be fully relevant after its final hearing in 1965, dismissing the petition, the Allahabad High Court ruled that the U.P. Assembly had power to commit a person for its contempt like the House of Commons in England. It held that the detention of the petitioner did not violate the provisions of Article 22 (2) of the Constitution. Their Lordships remarked further, "Once we have come to the conclusion that the Legislative Assembly has power and jurisdiction to commit for its contempt and to impose the sentence, we can not go into the question of the correctness, propriety or legality of the Commitment. This Court can not in a petition under Article 226 of the Constitution sit in appeal over the power of the Legislative Assembly committing the petitioner for its contempt." But what is important is that the High Court went into the facts of the case which it found insufficient for arriving at the conclusion that the commitment of the petitioner for contempt was malafide. In fact, the High Court regarded the action of the Legislative Assembly as *justiciable* before a court of law.

This view of the High Court contradicts the view of the Supreme Court expressed in its advisory opinion delivered by it on September 30, 1964 and is in line with the *Searchlight* case and the minority opinion of Justice A.K. Sarkar. It would, however, be pointed out that a common trend runs through all these judgments and that is that the judiciary in India has not treated the question as beyond its pale and purview. It has reserved to itself the right to look into all cases of breach of privileges of the Legislature and decide them on merits while admitting the power of the legislature to commit for its contempt like the mother of Parliaments. It has also permitted the suppression of Article 19 (1) (a) by the privileges of the Legislatures. The difference of opinion among the judges has

been that some of them have regarded the punitive action taken by the Legislatures as being in conformity with the Articles dealing with fundamental right while others have regarded it as violative of them.

F. IN PRESIDENTIAL POLL REFERENCE

The problem related with the election to the highest office of the land deserved a Reference to the highest Court of the land for opinion. Articles 62, 56, 70 and 71 of the Constitution came in for interpretation by the Court. It was held that the fixed term of the office mentioned in Article 56 (1) as well as the mandate in Article 62 (1) require that the election to fill a vacancy caused by the expiry of the term of the office should be completed before the expiry of the term. A reliance was put on the *Khare's case*. Article 62, of the Constitution was held to be a mandatory one. The Court interpreted Article 71 (4) broadly and hold that the language of this clause was of a very wide amplitude. It was observed by the Court that the constitutional declaration under Article 71 (4) made it manifest that the existence of any vacancy for any reason whatever (including due to the dissolution of a State Assembly) among members of the Electoral College could not be ground for questioning the Presidential election.

The Court rightly declined to consider hypothetical questions posed before it during the arguments. What would be the position, it was asked, if there was malafide dissolution of a State Assembly or if there was malafide refusal to hold elections thereto within a reasonable time or what would be the effect of a substantial number of State Assemblies on the Presidential election? The Court declined to answer any of these questions at the stage. The Court also refused to consider the constitutionality of the Eleventh Amendment Act, 1961 because it was not a referred problem before the Court.

This opinion of the Supreme Court also got criticism from some sections of the society. The opposition parties and some jurists criticised the opinion. Though Mr. Palkiwala considered the opinion sound in law, he felt that the main issue remained undecided. According to him the unreferred and undecided questions were far more important than the simple issue which the Court decided. He felt that the Court had left open the problem as to what would be the position when a substantial number of State Assemblies were dissolved or even the Lok Sabha was dissolved. Secondly, the Court also did not consider the effect on the Presidential election of a malafide refusal to hold elections to a State Assembly where there was sufficient time to hold it before a Presidential election. When informed about the opinion, the Prime Minister, Mrs. Gandhi expressed her satisfaction that no constitutional deadlock would now be created, her prediction proved true and in the light of the Supreme Court's opinion the Presidential election took place peacefully without any further litigation or opposition.

G. IN THE SPECIAL COURTS BILL REFERENCE

By the In Re Special Courts Bill Reference the Government sought the Court's advice on a very sensitive issue. It had, on the one hand, made creation promises to the people and it had to live up to them. On the other hand, it had

the charge of being vindictive against itself. The Supreme Court by answering the Reference helped the Government in adopting a proper and constitutional course to deal with the high political offenders.

During the course of hearing, the Court examined the implications of Articles 14 and 21 in the context of special courts. The Chief Justice, who delivered the majority opinion of the Court observed that a State, in the exercise of its governmental power had, of necessity, to make laws operating differently on different groups or classes of persons to attain particular ends. The Court ruled that the classification must not be arbitrary but must be rational. In order to pass the test, two conditions must be fulfilled, namely – (a) classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (b) differentia must have a rational relation to the object sought to be achieved by the Act. By applying these tests, the Court concluded, that the classification provided for by the Special Court will was valid.

One point deserves notice here. It was for the first time that a whole Bill was referred to the Court for advice regarding its constitutional validity and no specific questions were formulated. The Chief Justice Y.V. Chandrachud observed that at one stage the Court was 'seriously considering the proposal that it should return the reference 'unanswered''. The Court was, indeed, asked to first find the 'technical lacunae' and then to help remove them. In a sense, the Court was expected to perform the combined functions of the law officers of the Union as well as of a Joint Select Committee. The point at issue was whether or not there should be limits at all to the process of institutional collaboration and accommodation between the Court and the Parliament.

The Court should have declined the Reference. In a society which so recently had claimed to having seen the restoration of rule of law, the Union Government should not simply be allowed the plea that it could not determine one its own what was fair and just procedure for expeditious trials of those ousted for power. Politicians of all shades insist that Parliament is supreme, that it represents the general will of the people and that it should have the final authority of changing the Constitution. If the claim is genuine, elected politicians can never publicly maintain in a democracy that they are unable to decide even the basic elements of a process of fair trial without prior advice from the Supreme Court. On principle, this reference was wrong. The Government should not have made it in the first place. For the Supreme Court to entertain it was equally wrong.

In spite of all this, it would be fair to think that the Reference was made in all honesty. The Bill was based on a broader policy of social justice. Such a law was long over due. Beyond the constitutional aspect of ensuring speedy justice in a special category of offences, the Court rightly addressed itself to the larger question of ensuring the integrity of public office in all circumstances. The Chief Justice, Mr. Chandrachud, expressed this concern in words which touched the heart of the matter. "Parliamentary democracy", he observed, "will see its halcyon days when the law will provide for a speedy trial of all offenders who misuse the public offices held by them. Purity of public life is a desired goal at all times and in all situations, emergency or no

emergency."But this wider principle, pointed out Justice Krishna Iyer, would not be adequately served by the 'truncated provision' of special courts to try emergency offences and it was to be hoped that the Government would turn its attention to placing on the statute book permanent legislation so that the "common man may know that when public power is abused for private profit or personal revenge, the rule of law shall rapidly run them down."

H. IN THE JAMMU AND KASHMIR RESETTLEMENT ACT REFERENCE

The Jammu and Kashmir resettlement Act was introduced during the regime of former Chief Minister Sheikh Mohammad Abdullah and came into effect on October 6, 1982. It was termed by then opposition parties as "notorious bill number nine". The bill was presented to the then Jammu and Kashmir Governor B.K. Nehru. He consulted Nani Palkhivala who took the view that the bill would not stand scrutiny in any court. However, the Jammu and Kashmir Assembly passed the act, and it was referred to the Supreme Court as Presidential reference No. 1 of 1982. In October 2001 the Supreme Court returned without comment a 1982 reference by the President seeking its opinion on the validity of the Jammu and Kashmir Resettlement Act. The President had asked the court to decide whether the Jammu and Kashmir Assembly was competent to pass the Act, which grants the right of return to State subjects who fled to Pakistan after the Partition riots of 1947. Almost all of the people were from the Jammu region, which unlike Kashmir, saw bitter violence during the days of partition. Ever since the Supreme Court chose to reopen the two-decade-old issue, both the BJP and the N.C. have been busy cashing in on it by fuelling communal anxieties.

Sheikh Mohammad Abdullah brought forward the Jammu and Kashmir Resettlement Act towards the end of his life, when he was seeking to reinvent the N.C. as a party of the Islamic Right. The Act allowed the refugees created by Partition to return to Jammu and Kashmir and reclaim their properties. While the idea of the Act is to offer an opportunity for communal reconciliation, its realisation could bring about exactly the opposite result. The reasons are not hard to see. Jammu and Kashmir continues to refuse to grant full State subject rights to the many Hindu and Sikh refugees who came from what is now Pakistan Occupied Kashmir (POK). Legally, their children cannot seek admission in government-run institutions or employment. Although almost all such refugees have found ways to bypass the law, the obvious discrimination still rankles. Hindu chauvinist groups in Jammu have been quick to make use of this volatile situation. For example, the BJP Member of the Legislative Assembly for the Hiranagar constituency, Prem Lal, has claimed that the State government is "hell bent on changing the demography of the Jammu region". In a petition filed before the Supreme Court on November 29, 2002 the Panthers Party has argued that the Act will allow in even the "Taliban, with fraudulent certificates as descendants of anyone". This kind of rhetoric is falling on receptive ears. "Will the Pakistan government give us back the land and the homes we left in 1947?" asks Mohinder Bakshi, whose family arrived in Kathua shortly after Partition.

Predictably, Hindu reaction has fuelled Muslim chauvinism. An N.C. politician from Rajouri, Tazeem Dar, made the typical, but bizarre claim that the Act will unite Muslims on both sides of the Line of Control (LoC) and thus end the conflict in Jammu and Kashmir. Chief Minister Farooq Abdullah, for his part, has flatly refused to listen to criticism of his decision to make the Act applicable to Muslims in the State. "Leaving aside the Act itself," says CPI (M) State secretary Mohammad Yusuf Tarigami, "its implementation has nothing to do with communal reconciliation and everything to do with the worst kind of communal opportunism. The BJP and the N.C. are showing themselves to be two sides of the same coin."

No one is quite certain just how many refugees left the Jammu province in the wake of the riots of 1947. Along with their legal heirs, the figure could be as high as 200,000. Nor is it clear just how the Resettlement Act would actually work. Ironically, the refugees' property has all been leased out by the State government for periods of up to 99 years. More important, the Act itself will not automatically allow refugees from India to return, since the visa restrictions of the Union government will still apply. People's Democratic Party leader Mehbooba Mufti said: "No one in their right minds will want to come to the State, when everyone who can afford to get out is doing so."

Under other circumstances, the Resettlement Act would have enabled many people to return to the homes and lands they left under the most painful circumstances. Many families in Jammu have relatives across the border who may wish to return to spend their last years in the country where they grew up, surrounded by the kin from whom they were sundered. But the Act, sadly, is not about healing the wounds of 1947; it is about exploiting that tragedy. The anger caused by the Act will allow the N.C. and the BJP to carve up neatly the votes of their respective communal constituencies. For the real victims of 1947, it will most likely do nothing at all.

I. IN CAUVERY WATER DISPUTE REFERENCE

The Cauvery water disputes one of the oldest dispute over water. The first dispute was in 1892 between the princely state of Mysore and Madras Presidency which imposed restrictions on Mysore to build storage reservoirs on the Cauvery. An agreement of 1924 was signed between two government formed the basis of all future negotiations since independence between the two states. Madras was definitely on a position of advantage in relation to Mysore since all major development projects in Mysore had to have the final approval of the Madras government.

Dispute comes into a new phase when on June 2, 1990 a tribunal known as "Cauvery Water Disputes Tribunal" was constituted by the central government. The tribunal gave an interim order in June 1991 directing the State of Karnataka to release a particular 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, hence the President made a reference to the Supreme Court under article 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 (The inter state water dispute Act, 1956) which has been enacted under article 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.

The Cauvery water disputes Tribunal was the country's first water tribunal to give an interim order. No other water tribunal, be it Narmada or Krishna had passed interim orders. The 205 TMC ft. Water that it awarded to Tamil Nadu was arrived at after taking into account the 10 year availability of water from 1981 to 1990. It ignored two good years and two bad years. The remaining six years were considered the base for arriving at the figure after the opinion delivered in 1992, on August 11, 1998 "The Cauvery River Authority (CRA)" was formed. It comprises the Prime Minister, and the Chief Minister of Tamil Nadu, Karnataka, Kerala and Pondicherry. It was to decide how to share the water in a distress year, aided by a monitoring committee consisting of officials and the Chief Secretaries and irrigation officials of four states.

After the opinion by the Supreme Court, the Cauvery Water disputes tribunal begins its working in 1992. The Tribunal chaired by N.P. Singh, with S.D. Agarwala and W.S. Roy as members. The cross examination of witness cited by the four parties to the dispute concluded in December 2001, after eight years when the opinion was delivered. During the cross examination, nine witness cited by Tamil Nadu tendered evidence on the sharp fall in the inflow of Cauvery water into Tamil Nadu from the early 1980s. Karnataka cited eight witnesses. They contended that Tamil Nadu's water reading were wrong. The witnesses cited by Kerala wanted diversion of water from Cauvery basin for the generation of electricity.

The Cauvery Water Disputes Tribunal announced its verdict on February 5, 2007. According to its verdict, Tamil Nadu gets 419 billion ft³ (12 km³) of Cauvery water while Karnataka gets 270 billion ft³ (7.6 km³). The actual release of water by Karnataka to Tamil Nadu is to be 192 billion ft³ (5.4 km³) annually. Further, Kerala will get 30 billion ft³ and Puducherry billion ft³. The government of Karnataka, unhappy with the decision, filed a revision petition before the tribunal seeking a review. Following the final award of the tribunal, violence against Tamil population was anticipated in parts of Karnataka and consequently the city of Bangalore was put on high alert. The Satluj Yamuna canal reference is pending before the Supreme Court. Cauvery reference will work as a guiding lamp post for it.

J. IN RAM JANAM BHOOMI REFERENCE

This was the first reference in which the President of India had referred a question of fact. Before this, all the ten references were related to questions of law. There was 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. The question of fact referred to the Supreme Court for its advisory opinion.

In Special Reference No. of 1993, the question referred to the Supreme Court for its advisory opinion was whether a Hindu temple or religious structure existed at a particular place in Ayodhya. The Supreme Court refused to give its opinion on this reference for several reasons. According to the majority opinion, the matter under reference was already the subject-matter of litigation in the lower courts, wherein the dispute between the parties would be adjudicated, and, therefore, the reference made under Art. 143 (1) became superfluous and unnecessary. Two of the Judges (AHMADI & BHARUCHA, J.J.) in a separate concurring opinion maintained that the Supreme Court could decline to answer a question referred to it under Art. 143 if it considers it to be not proper or possible to do so, but the Court must indicate its reasons. These learned Judges gave the following reasons for refusing to answer the reference in the instant case:

- ✓ The reference favoured one religious community and disfavoured another. The purpose of the reference was, therefore, opposed to secularism and was unconstitutional; the reference served no constitutional purpose.
- ✓ The Government proposed to use the Court's opinion as a springboard for negotiations. It did not propose to settle the dispute in terms of the Court's opinion.
- ✓ To answer the reference it would be necessary to take evidence of experts, such as, historians, archaeologists and have them cross-examined.
- ✓ The principal protagonists of the two stands would not appear in the reference. Any opinion expressed by the Supreme Court would be criticised by one or both sides. This would impair the Court's credibility and compromise the dignity and honour of the Court.

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. There title cases are pending before the Allahabad High Court. Till the disposal of the dispute regarding the ownership of the land on which the Babri 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.

K. IN THE APPOINTMENT AND TRANSFER OF JUDGES REFERENCE

In *re Presidential Reference* a nine judges bench of the Supreme Court has unanimously held that the recommendation made by the Chief Justice of India on the appointment of Judges of the Supreme Court and the High Courts without following the consultation process are not binding on the Government. The Court also widened the scope of the Chief Justice's consultation process upholding the government's stand on consultation process, the Court gave its opinion on the nine questions raised by the President in his reference to the Supreme Court, under Art. 143 of the Constitution. The President had sought the Supreme Court's clarification on the consultation process, as laid down in *S.C. Advocates* case for the appointment and transfer of Judges following a controversy over the recommendation by former

Chief Justice of India M.M. Punchhi. The BJP Government did not agree with his recommendation and referred the matter for the Supreme Court's opinion.

The Court held that the consultation process to be adopted by the Chief Justice of India requires consultation of *plurality of Judges*. The expressions "consultation with the Chief Justice of India" in Articles 217 (1) and 222 (1) of the Constitution of India require consultation of with plurality of Judges in the formation of opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles. The majority held that in regard to the appointment of judges to the Supreme Court under Art. 124 (2), the Chief Justice of India should consult "*a collegium of four senior most Judges of the Supreme Court*" and made it clear that if "two judges give adverse opinion the Chief Justice should not send the recommendation to the Government." The collegium must include the successor Chief Justice of India. The opinion of the collegium must be in writing and the Chief Justice of India should send the recommendation to the President along with his own recommendations.

The recommendations of the collegium should be based on a consensus and unless the opinion is in conformity with that of the Chief Justice of India, no recommendation is to be made. In regard to the appointment of Judges of the High Courts, the Court held that the collegium should consist of the Chief Justice of India and any two senior most Judges of the Supreme Court. In regard to transfer of High Court Judge the Court held that in addition to the collegium of four Judges, the Chief Justice of India is required to consult Chief Justices of the two High Courts (one from which the Judge is being transferred and the other receiving him). The Court held that the appointment of the Judges of higher court can be challenged only on the ground that the consultation power has not been in conformity with the guidelines laid down in the 1993 judgment and as per opinion given in 1999 decision i.e. without consulting four senior most Judges of the Apex court. The decision of the Supreme Court has struck a golden rule. It has made the consultation process more democratic and transparent.

L. IN GUJRAT GAS REFERENCE

The Gujarat Government enacted a law entitled the Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act 2001 empowering the State to regulate transmission, supply and distribution of gas in the State and the laying of pipeline etc. This was avowedly done in the interest of general public and to promote gas industry in the State. But it was a strange law, which, in effect said that the Union Government had legislative competence to make laws on oil, but not on gas, The Centre was of the opinion that the State had usurped the powers of the Union and a reference was made for the opinion the apex court by the President. On president reference seeking the Supreme Court's opinion on who should have jurisdiction over the gas pipelines the centre or the states a five-judge constitution Bench issued notices to all states and union territories. The Court comprising chief justice-designate justice S.P. Bharucha, justice G.B. Patnaik, Justice S. Rajendra Babu, Justice S.S. M. Quadri and Justice

N. Santosh Hegde passed the order after the reference was made to it by Attorney General Soli Sorabjee.

Sorabjee also said that a writ petition was filed by Association of Natural Gas Consumer Associations on the fixation of gas prices for consumers. It issued notice to the association and oil and Natural Gas Corporation (ONGC) and Gas Authority of India Limited (GAIL). The reference has raised the core question "whether Natural Gas in whatever physical form, including liquefied Natural Gas (LNG), is a union subject and the union has exclusive legislative competence to enact law on Natural Gas." The controversy stemmed from the fact that though the centre had been exercising control over the pipelines issue, the BJP-ruled State of Gujarat in April 2001 enacted Gujarat Gas (regulation of transmission, supply and distribution) Act.

The reference said that act empowered the Gujarat government to "provide for regulation of transmission, supply and distribution of gas, to promote gas industry in the State and for establishment of the Gujarat Gas Regulatory Authority, which shall, inter alia, have powers to decide as to who would lay pipelines." It said thus Gujarat made it mandatory that the existing companies having pipelines would require permission of the regulatory authority for taking up expansion or utilisation of excess capacity. The reference also seeks an answer to the query: "whether states have legislative competence to make laws on the subject of Natural Gas and LNG under entry 25 of list II of the seventh schedule to the constitution." As a corollary to the second question, the reference seeks the apex court's opinion "whether the state of Gujarat had legislative competence to enact the Gujarat Gas (regulation of transmission, supply and distribution) act, 2001."

As per entry 53 of the union list, the Central Government has already enacted the Petroleum act, the oil fields (regulation and development) act, the oil industry (development) Act, 1974, and the petroleum and minerals pipelines (acquisition of right to use land) act. The reference says section 2 of the industries (development and regulation) Act, 1951, declares that it is expedient in the public interest that the union should take under control the industries specified in the first schedule. Striking down the Act insofar as the provisions relating to Natural Gas or Liquefied Natural Gas (LNG) are concerned, the apex court has prevented a major mischief from taking place. Had such a law come into effect, it would have opened a Pandora's box and different states would have passed different laws. Both oil and gas are mineral oil resources and trying to treat them separately was wrong, to say the least. The country requires balanced growth in supply, transmission and distribution of Natural Gas and LNG. This can be ensured only if the Centre alone has the legislative competence to enact such a law, as the court has opined. States would be competent to pass legislation only in respect of Gas and Gas-works for Industrial, medical and other similar purposes.

Some States tendency to view national resources as their exclusive wealth has been the bane of Indian polity. The most glaring example of it is the brazen waste of river waters which flows to the sea and the neighbouring countries while various States quibble about their claim on it. The emotive issue has been politicized to such an extent that it is almost impossible

to enforce a reasonable solution. Sooner or later, a way will have to be found to treat such resources as belonging to the country and not any particular State.

M. IN GUJARAT ASSEMBLY ELECTION REFERENCE

In the rapidly unedifying scenario in Gujarat, we have a political contretemps where constitutional functionaries are in avoidable operational conflict. The Election Commission has the plenary jurisdiction to decide on free and fair elections. After making a careful study and acting within its powers, the Commission has come to the conclusion that the conditions in the State warrant a date for the polls beyond early October, 2002. This decision being within Article 324 is prima facie valid. But a jurally bizarre impossible situation has been created by the astute action of the Chief Minister, with a majority in the House, to advise a pliant Governor to accept his hasty resignation and dissolve the Assembly.

This having been accomplished, a conundrum confrontation has sprung up because of Article 174 which lays down that six months shall not intervene between its (House) last sitting in one session and the date for its first sitting in the next session. This six months span- a parliamentary parameter – is the maximum gap between two sitting of the House and inevitably the House having been dissolved, the newly-elected House has to become functional by October – an impossible feat since the Election Commission declines to hold Election within the period.

The only obvious constitutional solution would be to bridge the gap by the imposition of President's rule by proclamation under Article 356. Such a proclamation must have constitutional foundation on the score "that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution." The Central Cabinet, on whose advice alone the President can act, is politically hesitant to exercise the powers under Article 356. There was perhaps political, communal mileage and vantage in hasty hosting, the very motive for the dissolution of the House. But the Commission, after an on-the-spot study conscientiously, was not in a mood to agree.

The opinion tendered by the five-member Constitution Bench of the Supreme Court on October 28, 2002 begin with a lengthy reasoning on why the presidential reference under Article 143 on the scope of Article 174 *vis-a-vis* Article 324 should be answered and not returned unanswered, as was urged by several Senior Counsel in their arguments. The questions posed in the reference, the Court said, were likely to arise in future and were of public importance. However, as the Court ended up not answering any of these questions in its opinion, it would seem as though the Court saw merit in the plea to return the reference unanswered, without actually admitting it. While Article 174 deals with the interregnum between two sessions of a State legislature, Article 324 empowers the Election Commission (E.C.) to superintend, direct and control elections.

In his reference sent to the Supreme Court on August 19, President as advised by the Union Cabinet, had posed three questions to be resolved by the court. First, is Article 174 subject to the decision of the E.C. under Article 324? Secondly, can the E.C. frame a schedule for elections to an

Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by resort to Article 356 by the President? Thirdly, is the E.C. under duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections? These questions were based on the premise that Article 174 (1), which stipulates that six months shall not intervene between the Assembly's last sitting in one session and the date appointed for its first sitting in the next session, would determine the date of the first sitting of a yet-to-be-constituted Assembly, following the holding of elections after the dissolution of the previous Assembly.

The Court justified its response to the reference on the grounds that a doubt had arisen in the mind of the President in regard to the interpretation of Article 174 (1) of the Constitution, and that there was no earlier judgment by the apex court on the issue. But, it would seem that the Union government, which advised the President, was indeed convinced that the Article applied to a live as well as a dissolved. As after explaining why it could not answer any of the President's three questions, the Court, however, sought to answer a hypothetical question, which was not posed in the reference but was articulated during the hearing of the case. The Court found that the Representation of the People Act, 1951, has not provided any period of limitation to hold elections to constitute a fresh Assembly in the event of a premature dissolution of an Assembly. The Court appears to have been carried away by imaginary concerns expressed by counsel for one of the national political parties and one of the States that in the absence of any period provided either in the Constitution or in the RPA, the E.C. may not hold elections at all and that in the event it would be the end of democracy. Examining related provisions in the Constitution and the RPA, the Court concluded that upon the premature dissolution of an Assembly, the E.C. was required to initiate immediate steps to hold elections in order to constitute a legislative Assembly within six months from the date of such dissolution. "Ordinarily, law and order or public disorder should not be occasion for postponing the elections and it would be the duty and responsibility of all concerned to render all assistance, cooperation and aid to the E.C. for holding free and fair elections." the Court concluded.

The fixing of the "outer limit" by the Court for holding of elections by the E.C. in the case of a premature dissolution of an Assembly, has dismayed observers. The Court did not hear such a plea being advanced by any counsel, although Kapil Sibbal, representing the Congress (I), had suggested that in response to a specific query from the Court. Within an hour of the opinion being tendered by the Court, the E.C. announced the schedule for the Assembly elections in Gujarat. The State had have a one-day poll on December 12 and the counting of votes had taken on December 15. However, grim the law and order situation in the State, with the Supreme Court fixing an outer limit for holding elections, the E.C.'s hands appear to be tied.

The Bhartiya Janta Party is pleased that the court's opinion did not go into the merits of Narendra Modi continuing as Chief Minister beyond six months without facing the State Assembly. The party is relieved that the coalition government headed by it at the Centre does not have

to impose President's Rule in the State, as demanded by the Opposition, to meet the constitutional crisis following the earlier perceived infraction of Article 174. For those who expected the court to pronounce on the non-accountability of the Modi regime since April 3, 2002 the last sitting of the dissolved Assembly, the opinion is bound to be a huge disappointment.

The Gujarat imbroglio brings to mind of Dr. Ambedkar's pensive caution about the Constitution; "I feel that it is workable, it is flexible and it is strong enough to hold the country together both in peace time and in war time. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile."

N. IN SATLUJ YAMUNA LINK CANAL REFERENCE

On July 22, 2004 President referred Punjab's controversial Termination of agreements Act 2004 to the Supreme Court, starting what could prove to be the last legal round in India's largest running and most complex water dispute.

Upon enactment of Punjab Termination of Agreements Act, 2004, terminating and discharging the Government of Punjab from its obligation under the agreement dated 31/12/1981 entered into by the States of Punjab, Haryana and Rajasthan for optimum utilisation of waters and reallocation of waters of rivers Ravi & Beas, the reference was made by the President for the opinion of Hon'ble Supreme Court.

The court has provided its opinion on 10.11.2016 of the question the Punjab Termination of Agreement Act, 2004 is constitutional and whether Punjab must obey 2002 order mandating that the Satluj Yamuna Link Canal (SYL) be completed in a year. The questions referred to Supreme Court are answered in the negative. The court opined that the Punjab Act cannot be said to be in accordance with the provisions of the Constitution of India and by virtue of the said Act the State of Punjab cannot nullify the judgment and decree referred to herein above and terminate the Agreement dated 31st December, 1981.

The Punjab Termination of Agreement Act, 2004 is unprecedented. It is the first time a State Government has sought to overturn a Supreme Court order through legislative means. Even the Karnataka assembly, which passed legislation on how much water it would release to Tamil Nadu from its reservoirs on the Cauvery. Sought to overturn only an award of a water disputes tribunal not a Judicial fiat.

O. PENDING REFERENCES: 2G SPECTRUM MATTER

The need of referring the 2G Spectrum matter for the opinion of Hon'ble Supreme Court arose after the judgment of Hon'ble Supreme Court in the case of *Centre for Public Interest Litigation vs. Union of India decided*³³ whereby, 122 licences were cancelled by the Supreme Court on the ground that the policy of the Central Government in granting such licences was not fair and reasonable. The *Office report dated 9th May, 2012* of the Registrar placed for the directions of Hon'ble the Supreme Court.

III. CONCLUSION AND SUGGESTION

From its inception the apex court has had to exercise its advisory jurisdiction fourteen times. All the references involved important issues of constitutional significance and the Supreme Court by answering all these have served a very useful purpose. If we try to find out any general trend in the opinions given we came to the conclusion that no general principles can be inferred. The opinions of the Supreme Court established a channel between the executive and the judiciary. All fourteen references are now the law of the land. Advisory opinions have strengthened the status of the judiciary. The opinions establishing the independence of the higher judiciary in India and affirming the right of the citizens to enforce his fundamental rights even against the action of the legislature has been welcomed by the public and the media generally.

Its importance as a constitutional pronouncement has been appreciated throughout the Anglo-Saxon world. It can doubtlessly be said that the advisory opinion of the Supreme Court have never come in the way of the Independence of the judiciary. By observing fourteen opinions of references we can infer that advisory opinions should be used in four circumstances only.

- ✓ To enable the Govt. of India an authoritative opinion regarding the validity of a legislation before enactment or an executive action before its enforcement.
- ✓ To deal with the problems of federalism.
- ✓ Interpretation of the constitution.
- ✓ The constitution creates some situation where legal rights exist but no legal remedies are available. The framers of the constitution through of providing an opportunity of judicial consideration by enacting Article 143.

Consultative jurisdiction of the Supreme Court of India as an institution is useful and should be continued. It is, in no way defective but problems arise only when the data-based and factual questions are sent for consultative jurisdiction. In such cases, it is often seen that the Supreme Court is not at ease. Therefore, the justification for its use must be carefully examined and weighed in the context of each case. The responsibility is of both the government as the questioner and the court in its capacity as guardian of the efficient working of the judicial system to see that its use does not become more of a danger to the long term interests of justice than a benefit. The institution of consultative or advisory jurisdiction is good if used judiciously and infrequently.

To conclude we may come to the conclusion that advisory opinions has done allot in the development of constitutionalism of India through the opinion delivered by the Hon'ble Supreme Court of India.

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- [3] Per Fazal Ali, Shastri and Das, JJ.
- [4] Per Kania, Mahajan and Mukherjea JJ.
- [5] AIR 1990 SC 560
- [6] (2011) 5 SCC212
- [7] (2005) 12 SCC 77

- [8] A.I.R. 1958 SC 956
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[12]AIR 2005 SC 3286.
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[18]Navshirvan H. Jhabvala "The Constitution of India", at 226.
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[32](2002) 8 SCC 237: (2002) 8 JT 389.
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