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# Advisory Jurisdiction of Supreme Court Under Article – 143

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## ABSTRACT

*The Indian Legal System is one of the oldest legal systems in the entire history of the world. It has amended as well as developed over the past few centuries to absorb required changes from the legal systems across the world. The Constitution of India is the fountainhead of the Indian Legal System. It demonstrates the Anglo-Saxon character of the judiciary, which is basically drawn from the British Legal System. India is a land of diversified culture, local customs and various conventions where every citizen have their own right, and others have the duty to respect others right. People of different religions, as well as traditions, are regulated by all the different sets of personal laws in order to relate to family affairs and to maintain peace within each other the legal system plays a very important role our legal system has a clear concept to settle or make such laws in which every citizen is comfortable, so this can never be an issue in India to take advice within or outside the country to make such laws.*

*As our Constitution also derived from the different constitutions of the world, which makes it clear that taking advice and working together is the basis and also our 3 important wings that is Executive, Legislation and Judiciary are working together at the same time they do not interfere in each other's sphere, but they are free to take advice whenever needed. The system of taking advice can be a choice but can also be the duty that gives the concept of "Advisory Jurisdiction". Basically, India consists of 3 kinds of jurisdiction i.e., Appellate Jurisdiction, Original Jurisdiction and Advisory Jurisdiction.*

*In this paper, the Advisory Jurisdiction of Supreme Court is widely discussed. The Supreme Court has special Advisory Jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution. In our Indian Constitution, Article 143 talks exclusively about Advisory jurisdiction*

*The judicial system is a unique feature of the Indian Constitution. It is an integrated system of courts that administer both state and union laws. The Supreme Court of India is the uppermost part of the Indian legal system. Under this, each state or a group of states consist of High Courts. There are several subordinate courts under these High Courts. Through judicial pronouncements and legislative action, laws are formulated in an appropriate manner.*

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## **I. INTRODUCTION**

The Advisory jurisdiction of the Supreme Court in the Constitution has its source in the Government of India Act 1935. It adopts the provision of Section 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.

Section 213 of the Government of India Act, 1935 laid down on the lines of the White Paper proposals that if at any time it appears to the Governor-General that a question of law 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 Federal Court upon it he may in his discretion, refer the question to that court for consideration and the court may, after such hearing as it thinks fit report to the Governor-General thereon. But with the time the changes take place as follows in this Act -

- On Clause 101 of his 30 October 1947 first Draft Constitution, the Constitutional Advisor very largely reproduced the provision of the 1935 Act after substituting “President” for ‘Governor-General’ and ‘Supreme Court’ for ‘Federal Court’.
- In February 1948, Article 119 of the Draft Constitution was prepared by Drafting Committee and replaced clause (2) of the Constitutional Advisor’s draft.
- On 27 May 1949, when the draft article came up for discussion in the Constituent Assembly, H.V.Kamath moved an amendment to the effect that in clause (2) for the word ‘decision’, the word ‘opinion’ and
- On the words ‘decide the same and report the fact to the president’, the words ‘submit its opinion and report to the President’ be substituted.
- At the revision stage, draft Article 119 was renumbered as Article 143 of the Constitution.

## **II. ADVISORY JURISDICTION**

In the Indian Constitution Article 143, the Supreme Court have the power of advisory jurisdiction. The President may seek the opinion of the Supreme Court on any question of legal query or fact of public importance on which he thinks it is a matter of serious concern to obtain such an opinion. On such reference from the President, the Supreme Court, after giving an appropriate hearing as it deems fit, may report to the President its opinion thereon.

In Keshav Singh's case,<sup>2</sup> a very important concern is given that is, the opinion is only advisory, which the President is free to follow or not to follow. However, even if the opinion given in the exercise of advisory jurisdiction may not be binding, it is entitled to great weight.

The first reference under Article 143 was made in the Delhi Laws case, (1951) SCR 747. In almost sixty years, only twelve references have been made under Article 143 of the Constitution by the President for the opinion of the Supreme Court:

1. In re the Delhi Law Act<sup>3</sup>
2. In re the Kerala Education Bill<sup>4</sup>
3. In re New India Motors Ltd. v. Morris<sup>5</sup>
4. In re Berubari (Indo-Pakistan Agreements)<sup>6</sup>
5. In re the Sea Customs Act<sup>7</sup>
6. In re Keshav Sing's Case.
7. In re Presidential Poll<sup>8</sup>
8. In re Special Courts Bill<sup>9</sup>
9. Re in the matter of Cauvery Water Dispute Tribunal<sup>10</sup>
10. Re in the matter of Ram Janamabhoomi<sup>11</sup>

<sup>2</sup> Keshav Singh vs. Speaker, Legislative Assembly on 10 March, 1965 (Equivalent citations: AIR 1965 All 349, 1965 CriLJ 170) Bench: J Takru, G Mathur and JUDGMENT G.C. Mathur, J.

<sup>3</sup> In Re The Delhi Laws Act, 1912, The ... vs. The Part C States (Laws) Act, 1950 on 23 May, 1951 (Equivalent citations: 1951 AIR 332, 1951 SCR 747); Bench: Kania, Hiralal J. (Cj), Fazal Ali, Saiyid, Sastri, M. Patanjali, Mahajan, Mehr Chand, Mukherjea, B.K. & Das, S.R. & Bose, Vivian

<sup>4</sup> In Re: The Kerala Education Bill, ... vs. Unknown on 22 May, 1958 (Equivalent citations: 1959 1 SCR 995); Bench: S Das, B S Kapur, Bhagwati, S Das, J Imam, V Aiyar And JUDGMENT Das, C.J.

<sup>5</sup> M/S. New India Motors (P) Ltd. New ... vs K. T. Morris on 22 March, 1960 [Equivalent citations: 1960 AIR 875, 1960 SCR (3) 350] ;Bench: Gupta, K.C. Das

<sup>6</sup> In Re: The Berubari Union And ... vs Unknown on 14 March, 1960 (Equivalent citations: AIR 1960 SC 845, 1960 3 SCR 250); Bench: B Sinha, A S Shah, K Dasgupta, K S Rao, M Hidayatullah, P Gajendragadkar, S Das And JUDGMENT Gajendragadkar, J.

<sup>7</sup> In Re: The Bill To Amend S. 20 Of The ... vs Unknown on 10 May, 1963 (Equivalent citations: 1964 3 SCR 787) Bench: B Sinha, A S Shah, K Dasgupta, K Wanchoo, M Hidayatullah, N R Ayyangar, P Gajendragadkar, S Das And JUDGMENT Sinha, C.J.

<sup>8</sup> In Re: Presidential Poll vs Unknown on 5 June, 1974 (Equivalent citations: (1974) 2 SCC 33, 1975 1 SCR 504) ;bench: A Ray, D Palekar, H Khanna, K Mathew, M Beg, P J Reddy, Y Chandrachud and JUDGMENT A.N. Ray, C.J.

<sup>9</sup> BIn Re: The Special Courts Bill, ... vs Unknown on 1 December, 1978 [Equivalent citations: AIR 1979 SC 478, (1979) 1 SCC 380, 1979 2 SCR 476] Bench: Y Chandrachud, N Untwalia, P Bhagwati, P Shinghal, R Sarkaria, S M Ali, V K Iyer And JUDGMENT Y.V. Chandrachud, C.J.

<sup>10</sup> In The Matter Of : Cauvery Water ... vs Unknown on 22 November, 1991 [Equivalent citations: AIR 1992 SC 522, JT 1991 (4) SC 361, 1991 (2) SCALE 1049, 1991 Supp 2 SCR 497] Bench: R M I., K S Ahmadi, K Singh, P Sawant And Judgment Sawant, J.

<sup>11</sup> pecial Reference No. 1 Of 1993 vs Ram Janma Bhumi-Babri Masjid ... on 27 January, 1993 Bench: M.N. Venkatachaliah, A.M. Ahmadi, J.S. Verma, G.N. Ray, S.P. Bharucha

11. Re on Principles and Procedure regarding the appointment of Supreme Court and High Court Judges

12. Gujarat Assembly Election Matter, AIR 2003 SC 87

In August 2002, the then President Dr. Abdul Kalam sought the advice of the Supreme Court under Article 143 in connection with the controversy between the Election Commission and the Government on elections in Gujarat. The issues related to the limits on the powers of the Election Commission under Article 324, the impact of Article 174 on the jurisdiction and powers of the Commission and whether the Commission could recommend promulgation of President's rule in a state.

It was, however, held by the Supreme Court in *M. Ismail Faruqui v. Union of India*<sup>12</sup> that the reasons must be indicated, and the Supreme Court may decline to give its opinion under Article 143 in cases it does not consider proper or not amenable to such exercise.

### III. ARTICLE 143 OF THE INDIAN CONSTITUTION AND ITS JUDICIAL INTERPRETATION

Article 143 is not part of the administration of justice. It is part of an Advisory Machinery Designed to assist the President. Article 143(1) is couched in broad terms, which provide that any question of law or fact may be referred by the President for the consideration of the Supreme Court.

#### **Article 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 thereon.

The Supreme Court has held in *In re the Kerala Education Bill, 1957* that the use of the word “may” in Article 143(1), in contradiction to the use of the word “shall” in Article 143(2), shows that whereas in a reference under Article 143(2) the Supreme Court is under an obligation to

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<sup>12</sup> Dr. M. Ismail Faruqui Etc, Mohd. ... vs Union Of India And Others on 24 October, 1994 [Equivalent citations: AIR 1995 SC 605 A] Bench: M V Verma, G Ray, S Bharucha

answer the questions put to it, under Article 143(1) it is discretionary for the Supreme Court to answer or not to answer the questions put to it.

This advisory jurisdiction of the Hon'ble Supreme Court depends upon the formation of the opinion of the President upon the expediency of the situation requiring such opinion of the Supreme Court on constitutional issues or doubts as to question of law or question of fact or related to the public concern, whether existing in present or likely to arise in future, which may arise because of certain enactments of the Parliament already passed or likely to be passed or because of some judgment of constitutional courts or otherwise. The said power is undoubted to be used in exceptional circumstances and cannot be used as a political forum to settle political questions, and that is why Article 143(1) of the Constitution advisedly makes it a discretionary power of the Supreme Court to report such opinion to the President.

Supreme court always before giving the advice or giving the judgment concerned with every possible Rules Of Interpretation by giving a mere reading of Article 141<sup>13</sup> of the Constitution of India, which clears that the law declared by the Supreme Court is considered binding on all courts in the territory of India so this Article provides for the law-making role of the court, and the use of the words ensures that it is not a reference to the law found or made a substantial question of an interpretation of a Constitutional Provision does not arise if the law on the subject has been finally and effectively deciding by the supreme court it is a matter of a very serious concern that any word given by the Supreme Court has its own importance so basically Supreme Court plays a very vital role in providing a way of using a law given by Constitution in an appropriate manner.

Unfortunately, a unanimous interpretation to Article 143(1) with reference to article 141 is yet to be provided, but the Supreme Court even reviews its earlier decision if the decision has held the field for a considerably long time only if it is satisfied with its error effect which can be a decision of the general interest of the public or if it is inconsistent with legal philosophy of our Constitution and the question whether the opinion of the Supreme Court under advisory jurisdiction should be given the equal importance than the answer is very clear words can be that yes they advise holds very serious importance when it is given by the supreme court but as our Constitution clears that everybody or authority has its own limitation so on the other hand judiciary cannot force the Executive that is the President to follow the given advice only.

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<sup>13</sup>The Constitution Of India 1949 Article 141 -. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India

#### **IV. ABOUT THE JURISDICTION OF THE SUPREME COURT OF INDIA AND THE IMPORTANCE OF “THE ADVICE.”**

Article 124 of the Constitution provides that there shall be a Supreme Court of India consisting of one Chief Justice and not more than seven other Judges until the Parliament increases the number of Judges by law. Parliament by a special Act in 1956 increased the number to ten and by another in 1960 to thirteen. Act 22 of 1986 increased the number, and accordingly, now the Supreme Court consists of the Chief Justice of India and not more than twenty-five other Judges. According to Article 127, the Chief Justice of India, with the previous consent of the President, appoints ad-hoc Judges for such period as may, in his opinion, be necessary. Every Judge of the Supreme Court is appointed by the President of India. The President shall, in this matter, consult other persons besides taking the advice of the Council of Ministers. The Chief Justice of the Supreme Court is appointed by the President in consultation with the Union Council of Ministers. From the time of the appointment of the second Chief Justice of India, it has become a convention to appoint the senior-most Judge of the Supreme Court as its Chief Justice. But that convention was twice violated by the appointment of Justice A N. Ray and Justice M.H. Beg as the Chief Justice of India, superseding their seniors on both occasions. Another convention is that one of the Judges must belong to the Muslim community. These are conventions only that have no constitutional basis.

The Supreme Court is the protector of the fundamental rights of the citizens. So, the Supreme Court has the jurisdiction to entertain an application under Article 32 for the issue of constitutional writs, the form of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari for the enforcement of Fundamental Rights. Any disputes regarding these rights come within the original jurisdiction of the Supreme Court; in this respect, the State High Courts, too, have been given the same powers.

#### **V. POWER AND FUNCTIONS OF THE SUPREME COURT WITH THE PERSPECTIVE OF OTHER COURTS AND THE IMPORTANCE OF ITS ADVICE**

- 1) The Supreme Court is the defender of the Constitution. The interpretation of the Constitution given by the Supreme Court was considered final.
- 2) The Supreme Court is the guardian of the Fundamental Rights of the citizens. Any citizen can approach it in case of infringement of any of his Fundamental Rights by the Government.
- 3) The Supreme Court is a court of record; as mentioned earlier, It means that the decision of the Supreme Court must be accepted by all other courts in India. The ruling of the

Supreme Court will be upheld and accepted by all High Courts and Lower Courts as precedents. The decision of the Supreme Court is regarded as law

- 4) The Supreme Court enjoys partial power of judicial review. It can declare void a law passed by Parliament or a state legislature if it contravenes any provision of the Constitution or if the law is passed in exercise of jurisdiction which Parliament or the state legislature does not, in fact, possess.
- 5) Article 137 has empowered the Supreme Court to review its own orders or judgements given earlier. It can review its decisions if you have some
  - a. new facts or evidence come to light,
  - b. a fact is found according to its records,
  - c. there are sufficient reasons for review

The Supreme Court itself observes, “There is nothing in the Indian Constitution which prevents the Supreme Court from departing from its previous decisions if it is convinced of its error or its baneful effects on the general interest of the public”.

- 6) The Supreme Court also has the power to make rules for regulating its practice and procedure.
- 7) Article 146 authorises the Supreme Court to appoint its officers and servants. Accordingly, the Chief Justice of India or such other Judges or officers of the court appointed by him can appoint the officials and the servants of the Supreme Court.
- 8) Article 129 deals with contempt of court., passing derogatory remarks against the court and refusing to abide by the decisions of the court constitutes contempt of court.
- 9) The Supreme Court enjoys the power to withdraw cases pending before a High Court, or more than one High Court, for disposal by itself. This can be done if
  - a. cases involving the same or substantially some question of law are pending before the Supreme Court and one or more than one High Court, and
  - b. The Supreme Court is satisfied on its own opinion or on the application made by the Attorney-General of India or by one of the parties that the case involves a substantial question of general importance
- 10) Appeals also lie to the Supreme Court under the Peoples Representation Act. Thus the Supreme Court of India controls the entire judicial system in the country and occupies a very significant place as it stands at the apex of the integrated judicial system of India.



## **VI. SUPREME COURT OF INDIA AND THE COMPARISON WITH OTHER COUNTRIES**

### **COURT: ADVISORY JURISDICTION**

The power of a court does not depend not only upon its functions but also upon the utility and uses of these functions. The Supreme Court of India is said to be the most powerful court in the world as it has the largest jurisdiction. In India, the Supreme Court is the defender of the Constitution. The interpretation of the Constitution given by the Supreme Court is considered final. In England, the courts do not have any power to interpret the Constitution. Therefore, the Supreme Court of India can be compared with the highest judiciary of the U S A the Commonwealth of Australia and Canada. But the U.S. Supreme Court enjoys limited jurisdiction in civil and criminal matters. There are two sets of Courts in the U.S.A., which are the Federal Courts and the State Courts. No appeal lies to the Supreme Court from the state High Courts in matters concerning the exclusive jurisdiction of the states. But the Constitution of India provides one uniform set of courts for all purposes. In the U S A and in Australia, the courts have no advisory jurisdiction. The Irish Court and the Japanese Supreme Court have the power to enforce Fundamental Rights. But they have no federal jurisdiction. But the Supreme Court of India enjoys jurisdiction in four ways, and it has the power to enforce Fundamental Rights as well. That is why our Supreme Court is said to be more powerful than any other court of the world.

Comparison of the powers of the Supreme Court of India with that of the American Supreme Court: It is opined that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest court of any other country. It is at once a federal court, a court of appeal and a guardian of the Constitution, and the law declared by it, in the exercise of any of its jurisdiction under the Constitution, is binding on all other courts within the territory of India (Art. 141)

Our Supreme Court possesses larger powers than the American Supreme Court in several respects. Firstly, the American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But our Supreme Court is not only a federal court and a guardian of the Constitution, but also the highest court of appeal in the land, relating to the interpretation of the Constitution. Secondly, our Supreme Court has an extraordinary power to entertain an appeal, without any limitation upon its discretion from the decision not only of any court but also of any tribunal within the territory of India (Article 136).

No such power belongs to the American Supreme Court. Thirdly, while the American Supreme

Court has denied to itself any power to advise the Government and confined itself only to the determination of actual controversies between parties to litigation ou' Supreme Court is vested by the Constitution itself with the power to deliver an advisory opinion on any question of fact or law that may be referred to it by the President (Article 143). Thus the Supreme Court of India is in many respects the most powerful institution of its kind in the world. It has more "powers than any other Supreme Court in any part of the world".

## **VII. CONCLUSION**

The relation between the two is two-fold: first, judicial powers of the Executive and its control over the judiciary; second, administrative powers of the judiciary and its control over the Executive.

The Executive exercises a certain control over the judiciary because it not only appoints members of the judiciary in most cases but also enforces judicial decisions. Promotion and transfer of judges are controlled by the Executive. Besides, the Executive exercises power to pardon, reprieve and commute the sentences given by the judiciary. The court martial is another example of an executive court. The judicial powers of the Executive are extensively found in countries of continental Europe where a separate law (administrative law) is administered by administrative courts for administrative personnel. Such function is known as 'administrative adjudication'.

The judiciary also exercises a good amount of control over the Executive. Judiciary has administrative functions, as noted earlier. Excepting the Chief Executive, all other members of the Executive can be asked by the judiciary to appear before it. Executive actions can be subjected to judicial review. Where there is the separation of powers, the judiciary serves as a check upon the Executive.

In modern welfare states, perfect harmony and coordination are to be maintained among the three primary organs of the state for the effective implementation of social security and social welfare measures. The collective good of the community should be the primary goal of all branches of Government. Hence any theory of complete separation of powers is neither desirable nor practicable. A limited form of checks and balances is to exist among different organs for the sake of efficiency of governmental functions as well as for guaranteeing fundamental freedoms of people. The balance between the authority of the state and the liberty of individuals is to be maintained for the common purpose of realising the general good of the community.

Justice is the need of any civilised society. No society can survive unless it provides an efficient

Justice delivery system that can alleviate the concern of the people within a reasonable time frame. Former Chief Justice R.C. Lahoti argues, 'The Judiciary has assumed only such roles as would enable it to fulfil the ideas of the Constitution. The role of the court is not just to interpret laws but to safeguard the rights that legitimately belong to the people. It must be independent, efficient and active if democracy has to have a meaning for the people of India'.

In modern nation-states, which have adopted the idea of constitutionalism and limited government, an independent judiciary has become one of the essential requisites of a democratic government. Any government based on a written constitution, which clearly sets limits on governmental powers and defines the rights of citizens, requires a neutral agency to decide disputes among citizens or between the individual and the state. Therefore, besides applying laws to particular cases and upholding the Constitution, the judiciary is also responsible for safeguarding the rights of the people against encroachment by other individuals, institutions or the state itself.

In the constituent Assembly (est. in 1946), the framing of draft provisions establishing the Supreme Court was done by an ad-hoc committee of five members-B.N. Rau, K.M. Munshi, M.L. Mitter, Varada Chari and Alladi Krishnaswamy Ayyar. The objectives of the framers of the Indian Constitution were to provide an independent and strong judiciary, which would work within the framework of the Supremacy of Constitution, and a formal parliamentary democracy in India.

The Supreme Court of India, however, is more than a federal Supreme Court. Under Article 32, it is made the protector of all the Fundamental Rights embodied in the Constitution, and it has to guard these rights jealously against every infringement at the hands of either the Union Government or the State Governments. It is also an all India Supreme Appellate court having both criminal and civil jurisdictions. It gets not only the opportunity to interpret the Constitution and the laws enacted by Parliament but also the laws passed by the state legislatures.

It stands at the apex of India's judicial hierarchy, with the effective power to supervise and control the working of the entire system and to ensure the realisation of the high judicial standards that it might set as an integral part of the democratic system of Government to be established by the Constitution. The writ of the Supreme Court runs not only all over the country but also within all fields of law, constitutional civil and criminal.

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