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# Article 143 and the Judicial Dilemma: Reappraising the Power of Presidential Reference in a Fragmented Federalism

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## ABSTRACT

*This paper critically assesses the recent Presidential Reference under Article 143 of the Constitution of India, subsequent to the landmark judgement of the Supreme Court in State of Tamil Nadu v. Governor of Tamil Nadu (2025), dealing with the gubernatorial powers under Article 200 and 201 of the Indian Constitution. The recent reference reignited debates around the Supreme Court's advisory jurisdiction under Article 143 and its transforming role in upholding the constitutional principles of democratic governance and neutrality of the judicial forum. The paper provides an extensive historical and comparative analysis of the power of reference as provided under Article 143 of the Indian Constitution. Through critical analysis of the judicial precedents and prior advisory opinions, the paper examines the advisory and non-binding character of the opinion rendered under Article 143(1). It emphasizes the role of such advisory opinions in influencing significant legal developments in India, despite lacking formal binding authority under Article 141 and only carrying a persuasive value. The paper questions the use of Article 143 as a tool to reintroduce political conflicts as constitutional questions or delay the implementation of judicial decisions, undermining the doctrine of separation of powers and judicial neutrality. While Article 143 may be invoked to promote inter-institutional dialogue on crucial issues and seeking clarification, the author contends that it can be used by the executive for political purposes. The author proposes several procedural and regulatory safeguards to restrict politically inspired references and signifies the requirement for the Supreme Court to provide clear guidelines relating to the precedential value of these opinions. Finally, the paper advocates for a limited and legitimate invocation of Article 143 for preserving its significance as a legal tool for resolving issues of public importance.*

## I. INTRODUCTION

The Supreme Court of India, on 8<sup>th</sup> April, 2025, delivered a transformative and landmark

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judgement in the case of *State of Tamil Nadu v. Governor of Tamil Nadu*<sup>2</sup>, dealing with a constitutional dilemma between the Governor and the Government of Tamil Nadu over inaction by the Governor pertaining to Bills passed by the State Legislature.<sup>3</sup> The issue emanated from the Governor's conduct of withholding assent to various Bills passed by the legislature, and after they were repassed by the Legislative Assembly, reserving those Bills for consideration of the President.<sup>4</sup>

In its landmark decision, the court observed about the limited discretionary powers conferred on the Governors under Article 200 of the Indian Constitution<sup>5</sup>. It observed that the Governor cannot indefinitely withhold assent to Bills passed by the State Legislature, thereby exercising a pocket veto. He is bound to act upon the aid and advice of the Council of Ministers. It further observed that such delays not only violate the constitutional principles of responsible governance but also undermine the importance of the people's will.<sup>6</sup> Subsequent to this decision, the Indian President sought the advisory opinion of the Supreme Court on fourteen questions referred to it under Article 143(1) pertaining to the limits of the Governor's power, reasonability of dual reservations, and the scope of the President's discretion under Article 201.<sup>7</sup> This particular reference marked the latest invocation of the Supreme Court's advisory jurisdiction and ignited debates about the intention of the Union Government behind such invocation after a definite judgement by the Supreme Court.<sup>8</sup>

The Article 143 of the Indian Constitution enables the President to make a reference to the Supreme Court regarding any question of law or fact which is of such a nature and of such public importance that it is expedient to obtain the opinion of Supreme Court.<sup>9</sup> This Article confers a distinctive discretion upon the Supreme Court to advise not as a conflict resolver but as a constitutional guide. The Supreme Court's opinion under Article 143(1) is not binding on

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<sup>2</sup> *State of Tamil Nadu v. Governor of Tamil Nadu & Anr.*, 2025 SCC OnLine SC 770.

<sup>3</sup> Mathew Idiculla, *TN Governor Judgement: Constitutional history as an interpretive device*, Supreme Court Observer (May 13, 2025), <https://www.scobserver.in/journal/tn-governor-judgement-constitutional-history-as-an-interpretive-device/>.

<sup>4</sup> See generally, Aaratrika Bhaumik, *States vs Governors: Delay in assenting to Bills | What next if the same bill is re-adopted by the Assembly*, THE HINDU (Nov. 17, 2023), <https://www.thehindu.com/news/national/states-vs-governors-delay-in-assenting-to-bills-explained/article67520783.ece>.

<sup>5</sup> INDIA CONST. art. 200.

<sup>6</sup> *State of Tamil Nadu v. Governor of Tamil Nadu & Anr.*, 2025 SCC OnLine SC 770.

<sup>7</sup> Abraham Thomas, *14 questions President Murmu asked Supreme Court on timelines for clearing Bills*, HINDUSTAN TIMES (May 15, 2025, 11:42 AM IST), <https://www.hindustantimes.com/india-news/14-questions-president-murmu-asked-supreme-court-on-timelines-for-clearing-bills-101747289535317.html>.

<sup>8</sup> *Closing argument: On the Presidential Reference to the top court*, THE HINDU (May 16, 2025, 11:16 AM IST), <https://www.thehindu.com/opinion/editorial/closing-argument-on-the-presidential-reference-to-the-top-court/article69584260.ece>.

<sup>9</sup> INDIA CONST. art. 143(1).

the subordinate courts under Article 141 and is merely advisory in nature.<sup>10</sup> However, it carries significant persuasive value in establishing the constitutional principles with regard to referred issues.<sup>11</sup>

The Article 143 relating to the advisory jurisdiction of the Supreme Court traces its roots to the Government of India Act, 1935. Article 213 of the said Act empowered the Governor-General to refer the Federal Court for its opinion any question of law.<sup>12</sup> The major difference between the earlier provision and the Article 143 lies in their scope. While under Article 143 the scope is more broadened to include both questions of law and fact, under the Section 213 of aforementioned Act, the scope was limited to include the questions of law alone.<sup>13</sup> Further, while the section 213 of the Act empowered the Governor-General as a neutral and independent authority, the Article 74 of the Constitution of India provides that the president is obliged to act on the aid and advice of the Council of Ministers, apparently empowering the political executive with the power of Presidential Reference.<sup>14</sup>

In the past, the Article 143(1) has been invoked very rarely, signifying its extraordinary nature. Till date, only fifteen references have been dealt by the Supreme Court under Article 143(1). Some famous Presidential References include the *Re Delhi Laws Act (1951)*<sup>15</sup>, *Re Berubari Union (1960)*<sup>16</sup>, *the Re Special Courts Bill (1978)*<sup>17</sup>, *the Ramjanmabhoomi Reference (1993)*<sup>18</sup>, and some others. These references have highlighted significant constitutional questions such as the limitations on delegated legislation, or the power of Parliament to amend the Constitution. In some cases, the Supreme Court has refused to answer the questions referred to it under the clause (1) of Article 143 on the basis of they being political, vague, or formulated in a manner that posed a risk on the court's independence. The Supreme Court, in 1994, declined to answer regarding the ownership of disputed land in Ayodhya, observing that the reference favour one religious community and disfavour another; the purpose of the reference is, therefore, opposed to secularism. Besides, the reference does not serve a constitutional purpose.<sup>19</sup> Moreover, in *2G Spectrum* reference, the Supreme Court observed that it may decline to answer the questions referred if there's

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<sup>10</sup> The Ahmedabad St. Xaviers College v. State of Gujarat & Anr., (1974) 1 SCC 717. *Contra* Re Special Courts Bill, AIR 1979 SC 478.

<sup>11</sup> *Id.*

<sup>12</sup> Government of India Act 1935, 25 & 26 Geo. 5 c.42, §213.

<sup>13</sup> William D. Popkin, *Advisory Opinions in India*, 4 JOURNAL OF THE INDIAN LAW INSTITUTE 401, 402 (1962).

<sup>14</sup> INDIA CONST. art. 74.

<sup>15</sup> Delhi Laws Act, 1912, In re, 1951 SCC 568.

<sup>16</sup> Berubari Union (I), In re, (1960) 3 SCR 250.

<sup>17</sup> Special Courts Bill, 1978, In re, (1979) 1 SCC 380.

<sup>18</sup> Special Reference No. 1 of 1993, (1993) 1 SCC 642.

<sup>19</sup> *Id.*

already an authoritative judgement on the said issue.<sup>20</sup>

Notwithstanding the limitations highlighted earlier, the power of Presidential Reference and the Advisory Jurisdiction of the Supreme Court under Article 143 is a powerful constitutional instrument which may be used to resolve complex questions, prevent future contradictions, and uphold democratic principles. Various scholars have argued that the effectiveness of the Article 143 get jeopardized due to the non-binding character of the opinions rendered by court.<sup>21</sup> They also doubt whether the persuasive value of these opinions is enough in a democratic setup based on not so rigid separation of powers.<sup>22</sup>

In these circumstances, the Presidential Reference may be used in two forms alternatively- either as a constitutional tool for clarification or settling constitutional disputes or, as an instrument to avert or delay the judicial inquiry. The recent reference emanating after the Tamil Nadu judgement, raises something more than a constitutional deadlock. It's a moment of reassessment which requires the Supreme Court to revisit how it uses and understands the special advisory jurisdiction conferred upon it.<sup>23</sup>

The author endeavours to conduct a comprehensive analysis of the power of Presidential Reference and the Advisory Jurisdiction of the Supreme Court by delving into its historical roots and applying them in the contemporary situation. The author contends that while the power plays a significant role in upholding constitutional values and promoting inter-institutional dialogue, its recent application poses questions pertaining to democratic accountability, institutional transparency, and judicial neutrality especially when invoked during an era of political fragmentation and controversies relating to division of power between the Centre and States

## II. THE CONSTITUTIONAL STRUCTURE, EVOLUTION, PROCEDURE AND JUDICIAL PRACTICE IN RELATION TO ARTICLE 143

The Article 143 of the Indian Constitution provides for a distinctive feature of Indian Constitution by empowering the judiciary to advice the President on questions of law or fact of public importance. It is placed at the junction of democratic constitutionalism and judicial neutrality thereby enabling an institutional dialogue without adversarial proceedings.

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<sup>20</sup> In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1.

<sup>21</sup> Deepaloke Catterjee *Presidential References and Their Precedential Value: A Constitutional Analysis*, 21 NAT'L L. SCH. INDIA REV. 175, 183-185 (2009) [hereinafter Chatterjee].

<sup>22</sup> *Id.*

<sup>23</sup> Manu Sebastian, *Can Supreme Court's Judgment Be Altered In Presidential Reference? Article 143 & Advisory Jurisdiction Explained*, Live Law (May 17, 2025, 10:35 AM IST) <https://www.livelaw.in/top-stories/can-supreme-courts-judgment-be-altered-in-presidential-reference-article-143-advisory-jurisdiction-explained-292499>.

In 1928, the Nehru Report provided that the Supreme Court shall have original jurisdiction in all matters referred to it by the Governor-General-in-Council.<sup>24</sup> Subsequently, in 1948, the Draft Constitution of Indian Republic published by the Socialist Party also provided the President with the power to make a reference to Supreme Court on any question of law.<sup>25</sup>

The Article 143 of Indian Constitution is similar to section 213 of the Government of India Act, 1935, which provided the Governor-General with power to make a reference to the Federal Court on any question of law.<sup>26</sup> The section 213 was based on the Canadian Supreme Court Act, which enables the Governor in Council to make a reference to Supreme Court of Canada regarding any question of law or fact.<sup>27</sup> However, section 213 had a narrower scope as it allowed for referring only questions of law to the Federal Court but not the questions of fact arising therein.<sup>28</sup> The section 213 was invoked during the colonial times in case of *In re Hindu Women's Right to Property Act, 1941*<sup>29</sup> and *In re Estate Duty Bill, 1944*<sup>30</sup>. The Federal Court's advisory opinion, in these cases, potentially influenced the framing of Article 143 and future statutes. These instances influenced the drafting of provision relating to Presidential References during the Constitution Assembly Debates, wherein the members of Assembly imagined a flexible procedure to seek judicial opinion on matters of public importance which are non-adjudicated.<sup>31</sup> The Drafting Committee of the Constituent Assembly also provided for this power under Article 119 of its Draft Constitution of India which constituted the foundation of Article 143 of the Indian Constitution.<sup>32</sup>

The Article 143 of the Indian Constitution provides two different clauses, both conferring a different type of consultative jurisdiction. The Article 143(1) provides for a discretion to the Supreme Court in matter of exercising its advisory jurisdiction.<sup>33</sup> It's the Union Council of Ministers acting through the President of India under Article 74, who decide whether a

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<sup>24</sup> Saumya Singh, *The Supreme Court's Advisory Jurisdiction in Indian Constitutional History*, CONSTITUTION OF INDIA (Jun. 5, 2025, 21:08 PM IST), <https://www.constitutionofindia.net/blog/the-supreme-courts-advisory-jurisdiction-in-indian-constitutional-history/> [hereinafter Singh].

<sup>25</sup> *Id.*

<sup>26</sup> Government of India Act 1935, 25 & 26 Geo. 5 c.42, §213.

<sup>27</sup> SUPREME COURT ACT, R.S.C., 1985, c. S-26.

<sup>28</sup> Catterjee, *supra* note 20 at 179. *See also*, Shivam Tripathi, *Analysing Presidential References in India and Questions Which Follow*, IJI L. Rev. 2 (2020) [hereinafter Tripathi].

<sup>29</sup> *In re Hindu Women's Right to Property Act, 1941*, AIR 1941 FC 72.

<sup>30</sup> *In re Powers of Federal Legislature to levy estate duty, 1944* FC 73.

<sup>31</sup> Saumya Singh, *The 1944 Levy of Estate Duty Case: Early Judicial Concerns Regarding the Supreme Court's Advisory Power*, CONSTITUTION OF INDIA (Jun. 6, 2025, 22:34 PM IST), <https://www.constitutionofindia.net/blog/the-1944-levy-of-estate-duty-case-early-judicial-concerns-regarding-the-supreme-courts-advisory-power/>.

<sup>32</sup> Singh, *supra* note 23.

<sup>33</sup> INDIA CONST. art. 143(1). It provides as follows: "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."

question of law or fact is of such public importance so as to refer it to the Supreme Court. The use of word “may” in the clause (1) confers a discretion on the Court to render its opinion or not.<sup>34</sup> The second clause<sup>35</sup> casts a mandatory obligation in contrast to the first clause upon the Supreme Court to render its opinion to disputes referred under the said clause and which are not within the Court’s Original Jurisdiction due to the restriction provided under the proviso to Article 131.<sup>36</sup> Both the clauses, though similar in form, have different effects. While clause (1) provides a discretion to the Court, clause (2) provides for a mandatory constitutional obligation to render opinion when such questions are referred. However, till date no Presidential Reference has been made under clause (2).<sup>37</sup>

The clause (3) of the Article 145 provides that there shall be a minimum number of five judges to hear any reference made under Article 143.<sup>38</sup> The clause (4) further provides that the report under Article 143 shall be made by delivering an opinion in open court.<sup>39</sup> The clause (5) also provides that such opinion shall be delivered by the Supreme Court in concurrence with the opinion of majority of the Judges who are present at the hearing of the case, however, any of the judges may prefer a dissenting opinion.<sup>40</sup>

The Order XLII, Rule 1 of Supreme Court Rules, 2013, explicitly provides for a procedure in case of Special References made under Article 143.<sup>41</sup> Rule 3 of the Order XLII provides that when a reference is made under Article 143 of the Indian Constitution, the Court shall follow nearly the same procedure as applied in matters of original jurisdiction with appropriate variations.<sup>42</sup>

The purpose of including Article 143 in the Constitution is to prevent constitutional and legal

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<sup>34</sup> Dr. Dharmendra Kumar Singh & Dr. Amit Singh, *Consultative Jurisdiction of Supreme Court of India: Assessment and Critical Analysis*, 22 IOSR-JHSS 43, 44 (2017). [hereinafter Singh & Singh].

<sup>35</sup> INDIA CONST. art. 143(2). It provides as follows: “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.”

<sup>36</sup> INDIA CONST. art. 131. The proviso to Article 131 provides that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, named or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

<sup>37</sup> Dr. Justice Vineet Kothari, *Special Lecture on Presidential Reference under Article 143 of the Constitution: Current Issues and Perspective*, (May, 14, 2012, 4:00 PM IST), in Indian Law Institute, New Delhi [hereinafter Kothari].

<sup>38</sup> INDIA CONST. art. 145(3).

<sup>39</sup> INDIA CONST. art. 145(4).

<sup>40</sup> INDIA CONST. art. 145(5).

<sup>41</sup> Supreme Court Rules, 2013, Gazette of India, pt. II sec.3(i), O. LXII Rule 1 (May 29, 2014). The rule provides that on the receipt by the Registrar of the Order of the President referring a question of law or fact to the Court under article 143 of the Constitution 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 such reference, and the Court may, if it considers it desirable, order that notice of such reference, shall be served upon such parties as may be named in the order.

<sup>42</sup> Supreme Court Rules, 2013, Gazette of India, pt. II sec.3(i), O. LXII Rule 3 (May 29, 2014).

ambiguity. This Article allows the Executive to obtain a clear constitutional clarity without instituting any future litigation. This is supported by the use of words “likely to arise” in clause (1) of Article 143.<sup>43</sup> The framers of the Constitution drafted this provision to resolve complex issues in executive governance without the need for adversarial proceedings and to act as preventative safeguard.<sup>44</sup> In *re Kerala Education Bill*, the court without affecting the constitutionality of any statute, provided crucial observations on constitutional rights and the legislative competence.<sup>45</sup>

However, in *re Cauvery Water Disputes Tribunal*, the Supreme Court observed that Article 143 is not an appellate power over judicial decisions, it cannot sit in appeals over its own decisions or the decisions of other bodies through a Presidential Reference. Allowing such a use of Article 143 would mean that the President could confer appellate power to the Supreme Court over its own decision which the Constitution does not permit.<sup>46</sup> But, in *2G Spectrum*, the Supreme Court observed that it can modify, clarify or explain the ratio decidendi of its previous judgement but cannot alter the final outcome of the case between the parties.<sup>47</sup> The Supreme Court observed that in *Keshav Singh*<sup>48</sup>, the bench clarified the observations made in *Pandit M.S.M. Sharma v.. Shri Sri Krishna Sinha*<sup>49</sup> case, regarding a proposition laid down in *Gunupati Keshavram Reddy v.. Nafisul Hasan*<sup>50</sup> case. Similarly, in *Third Judges reference*<sup>51</sup>, the Supreme Court clarified the observations in *Advocates-on-Record Association and Others vs. Union of India*<sup>52</sup> pertaining to the transfer of judges.

### III. JUDICIAL RECEPTION OF THE NON-BINDING AUTHORITY

The Article 143 carves out a distinctive mechanism for seeking the opinion of the Supreme Court on questions of public importance, however, questions are raised about its legal status and prescriptive authority due to the advisory nature of such opinions. The advisory opinions rendered under the Article 143 do not act as a binding precedent under the Article 141 unlike the ordinary decisions of the Supreme Court. Due to this non-binding character of advisory opinions, there have been numerous debates over its institutional value, precedential weight,

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<sup>43</sup> See, Kothari, *supra* note 36 at 3.

<sup>44</sup> *Id.* at 52.

<sup>45</sup> In *re Kerala Education Bill*, AIR 1958 SC 956.

<sup>46</sup> In *re Cauvery Water Disputes Tribunal*, AIR 1992 SC 522.

<sup>47</sup> Natural Resources Allocation, In *re*, Special Reference No. 1 of 2012, (2012) 10 SCC 1. The Supreme Court observed, “so long as it was only clarifying or explaining the ratio of the judgement in Centre for Public Interest Litigation v. Union of India (2012) case without interfering with the cancellation of the individual spectrum licenses, it will be acting within jurisdiction.”

<sup>48</sup> Powers, Privileges and Immunities of State Legislatures, In *re*, (1965) 1 SCR 413.

<sup>49</sup> Pandit M.S.M. Sharma Vs. Shri Sri Krishna Sinha, AIR 1959 SC 395.

<sup>50</sup> Gunupati Keshavram Reddy Vs. Nafisul Hasan, AIR 1954 SC 636.

<sup>51</sup> Special Reference No. 1 of 1998, Re, (1998) 7 SCC 739.

<sup>52</sup> Advocates-on-Record Association and Others vs. Union of India, AIR 1994 SC 268.



and the legitimate impact of these references.

The Indian Constitution under Article 141 provides that the law declared by the Supreme Court shall be binding on all Courts within the territory of India, but the advisory opinions rendered by the Supreme Court do not come under the conventional standards of a “law declared by the Supreme Court”.<sup>53</sup> They do not include conclusive pronouncements on the rights and liabilities of the parties, are not rendered in some adversarial judicial proceedings, are not enforceable through decrees, and therefore, not binding.<sup>54</sup> Moreover, the Supreme Court has frequently declared that the advisory opinions rendered by it under Article 143(1) are not binding, notwithstanding that they carry a great persuasive weight and are authoritative. It has observed that the advisory opinions are not “law declared” within the context of Article 141, but nevertheless, they are entitled to great value.<sup>55</sup> Also, it has sometimes observed that if a reference is too vague, general or politically motivated, it may even refuse to answer the said reference to protect judicial impartiality and integrity.<sup>56</sup>

This position is in consonance with the constitutional system of Canada. In Canada, the advisory opinion rendered by the Canadian Supreme Court under section 53 of the Canadian Supreme Court Act, are followed as a matter of institutional protocol but they are not legally binding.<sup>57</sup> In United States of America, the Supreme Court has consistently held that the provision under Article III<sup>58</sup> providing jurisdiction to Federal Court over actual cases and controversies before it, bars them from rendering advisory opinions.<sup>59</sup> It has further observed that the main reason for the prohibition on advisory opinions is the inherent principle under Article III and the separation of power doctrine which limits the federal courts to assess the reasonableness of actions of other branches of government only in actual cases and controversies.<sup>60</sup> It has observed that courts function more independently and efficiently when dealing with an adversarial matter assessing every aspect of the controversy before it.<sup>61</sup>

In India, the position is still not clear and requires a comprehensive deliberation by the

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<sup>53</sup> The Ahmedabad St. Xaviers College v. State of Gujarat & Anr., (1974) 1 SCC 717. The court observed that the opinion expressed in re Kerla Education Bill was not binding. *Contra* Re Special Courts Bill, AIR 1979 SC 478. Justice Y. V. Chandrachud observed that when the court renders an opinion under its advisory jurisdiction after hearing all interested parties, it's should be binding. *See also*, re Cauvery Water Disputes Tribunal, AIR 1992 SC 522 wherein it was observed that the advisory opinion should be given due respect and generally it should be followed.

<sup>54</sup> The Ahmedabad St. Xaviers College v. State of Gujarat & Anr., (1974) 1 SCC 717.

<sup>55</sup> Powers, Privileges and Immunities of State Legislature, Re, A. I. R. 1965 S. C. 745.

<sup>56</sup> M. Ismail Faruqui v. Union of India, AIR 1995 SC 605. *See also*, Re 2G Spectrum Allocation, Special Reference No. 1 of 2012, (2012) 3 SCC 1.

<sup>57</sup> *See* Supreme Court Act, R.S.C. 1985, c. S-26, § 53 (Can.). *See also* Chatterjee, *supra* note 20 at 186.

<sup>58</sup> U.S. CONST. art. III, § 2.

<sup>59</sup> Chi. & S. Air Lines v. Waterman S.S. Corp., U.S. 103, 113-114 (1948).

<sup>60</sup> Muskrat v. United States, 219 U.S. 346, 357 (1911).

<sup>61</sup> Flast v. Cohen, 392 U.S. 83, 96-97 (1968).

Supreme Court. Article 143 presents a constitutional anomaly- a jurisdiction exercised independent of conventional adjudication, whose authority depends upon institutional consideration rather than a constitutional obligation.

In spite of the non-binding nature of advisory opinions, they have been relied upon by the courts and the legislators as quasi-authoritative directions. The Supreme Court's opinion in *re Berubari Union*<sup>62</sup> on the limitation on Parliament's power to cede a territory to foreign nation influenced the Ninth Constitutional Amendment Act of 1960.<sup>63</sup> Similar was the case in *re Kerala Education Bill*<sup>64</sup>, where the court's opinion influenced reforms in the education sector.<sup>65</sup> Further, in some cases, the Supreme Court has also referred earlier advisory opinions such as *Delhi Laws Act*<sup>66</sup> reference and the *Special Courts Bill*<sup>67</sup> reference, as precedents with persuasive value.

The author believes that the Supreme Court, in effect, has provided a quasi-precedential position to advisory opinions, especially when they are not politically motivated, unanimous, and uphold constitutional values. Although Article 143 is seen as an instrument for authoritative guidance from the Supreme Court, it may be misused by the executive to jeopardise judicial neutrality and constitutional equilibrium. It becomes concerning when settled judicial pronouncements are sought to be reopened under the pretext of Presidential Reference. The Supreme Court in *re Ramjanmabhooni*, refused to answer whether a mosque could be considered essential to Islamic religious practices. The court observed that the reference was politically motivated and better suited for resolution through adjudication rather than an advisory opinion.<sup>68</sup> These pronouncements provide for a careful restraint by the Supreme Court in protecting the constitutional basis of Article 143.

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<sup>62</sup> See *In re Berubari Union*, AIR 1960 SC 845.

<sup>63</sup> INDIA CONST. sch. I, *amended by* The Constitution (Ninth Amendment) Act, 1960. The statement of objects and reasons of the Act provided as follows: "Agreements between the Governments of India and Pakistan dated 10th September, 1958, 23rd October, 1959, and 11th January, 1960, settled certain boundary disputes between the Governments of India and Pakistan relating to the borders of the States of Assam, Punjab and West Bengal, and the Union territory of Tripura. According to these agreements, certain territories are to be transferred to Pakistan after demarcation. In the light of the Advisory Opinion of the Supreme Court in Special Reference No. 1 of 1959, it is proposed to amend the First Schedule to the Constitution under a law relatable to article 368 thereof to give effect to the transfer of these territories."

<sup>64</sup> *In re Kerala Education Bill*, AIR 1958 SC 956.

<sup>65</sup> D. Dhanuraj, *Story of 1957 Education Bill in Kerala*, CENTRE FOR PUBLIC POLICY RESEARCH (2006).

<sup>66</sup> See *Vasantlal Maganbhai Sanjanwala v. State of Bombay*, AIR 1961 SC 4, where the question pertained to excessive delegation. See also, Catterjee, *supra* note 20 at 181.

<sup>67</sup> See *R. K. Garg v. Union of India*, A. I. R. 1981 S. C. 2138, where Bhagwati J. observed that the legal propositions rendered in Special Courts Bill reference are binding. See also, Catterjee, *supra* note 20 at 182.

<sup>68</sup> *M. Ismail Faruqui v. Union of India*, AIR 1995 SC 605. See also, *Kerala Education Bill*, *In re*, 1957 SCC 995, where it was observed that the Court may proper reasons decline to answer the questions in the reference. See also, *Special Courts Bill*, 1978, *In re*, (1979) 1 SCC 380, where the court opined that it may refuse to answer questions even under Article 143(2) if there are valid reasons and the questions are incapable of answering.

#### IV. PRESIDENTIAL REFERENCES IN PRACTICE: A CONSTITUTIONAL INVENTORY

Till date, only sixteen Presidential References have been made by the President under Article 143(1), including the recent reference subsequent to Supreme Court's judgement in *State of Tamil Nadu v. Governor of Tamil Nadu*<sup>69</sup>. These Presidential References are as follows:

*i. Re Delhi Laws Act, 1951*

This was the very first Presidential Reference and it referred questions pertaining to the limit to which the legislature could delegate its legislative functions. The court observed that the legislature cannot delegate its essential legislative functions to the executive. The legislature can only delegate ancillary legislative functions.<sup>70</sup>

*ii. Re Kerala Education Bill, 1958*

In this Reference, the questions referred were: (a) whether the Bill conferred power on the State government to give recognition to schools and start higher classes in private schools; (b) whether such power offends the right of minorities under Article 30(1).

The Supreme Court observed that the Bill violated rights of minorities under Article 30(1) by subjecting the aided educational institutions to conditions for grant of aid. It also observed that the Bill conferred unguided power on the State government to recognise schools. Regarding the Article 143(1), it observed that the President can also make a reference as to the questions which are "likely to arise" and the Court cannot travel beyond the questions referred and entertain questions not referred to it by the President.<sup>71</sup>

*iii. Re Berubari Union, 1960*

A question was referred by the President as to whether ceding territory to Pakistan under Nehru-Noon Pact required any legislative action. The Supreme Court observed that the Parliament cannot cede an Indian territory without making an amendment to the Constitution under Article 368. Parliament may choose to pass a law making an amendment to Article 3 respecting cession of territory to a foreign State and thereafter, execute the agreement under the amended Article 3. This opinion paved way for the Ninth Constitutional Amendment Act of 1960.<sup>72</sup>

*iv. In re: Sea Customs Act, 1964*

The question referred through reference in this particular matter was whether a property

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<sup>69</sup> State of Tamil Nadu v. Governor of Tamil Nadu & Anr., 2025 SCC OnLine SC 770 (Ind.)

<sup>70</sup> Delhi Laws Act, 1912, In Re, 1951 SCC 568.

<sup>71</sup> Kerala Education Bill, 1957, In re, 1959 SCR 995.

<sup>72</sup> Berubari Union (I), In re, (1960) 3 SCR 250.

owned by the State was exempted from Union taxation, specifically under the Sea Customs Act. The issue revolved around the interpretation of Article 289, which provides for exemption to States from Union taxation. The Court observed that Article 289 does not provide for absolute immunity and the Union has power to tax commercial transactions of State.<sup>73</sup>

v. *In re: Powers, Privileges and Immunities of State Legislatures (1965)*

The reference emanated from the imprisonment of Keshav Singh by the Legislative Assembly of Uttar Pradesh for its contempt. There emerged a legal conflict when the Allahabad High Court intervened and ordered the authorities to release Keshav Singh. The assembly passed a resolution requiring all the judges and Keshav Singh to be produced before them for committing contempt of the Assembly. The Supreme Court observed that they were not guilty of contempt. The Legislative Assembly cannot initiate proceedings against the judges in exercise of its powers and privileges. The power of a High Court under Article 226(1) can be used even against the legislature since they are State under Article 12 of the Constitution.<sup>74</sup>

vi. *In re: Presidential Poll (1974)*

This reference pertained to the conduct of President's election, especially when several State legislatures were dissolved. The Supreme Court observed that the election could be conducted if the minimum required membership of the electoral college as mentioned in Article 54 is present and any delay caused due to dissolution of a State Assembly did not invalidate the election.<sup>75</sup>

vii. *In re: Special Courts Bill, 1978*

A reference was made regarding the constitutionality of the Bill which provided for the establishment of special courts to try public officials associated with abuses during the Emergency period. The question pertained to constitutionality of the Bill with regards to Article 14 and 21 of the Constitution. The Court observed that the Bill is constitutionally valid but directed that there must be rationality in the classification of accused persons and these courts must guarantee fair trials.<sup>76</sup>

viii. *In re: the Jammu and Kashmir Grant of Permit for Resettlement in the State Bill, 1980*

This Bill provided for the return and permanent resettlement of persons who left J&K during the period between March, 1947 and 14 May, 1954 for some other areas which later became

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<sup>73</sup> Sea Customs Act, S. 20(2), *In re*, (1964) 3 SCR 787.

<sup>74</sup> Powers, Privileges and Immunities of State Legislatures, *In re*, (1965) 1 SCR 413.

<sup>75</sup> Presidential Poll, *In re*, (1974) 2 SCC 33.

<sup>76</sup> Special Courts Bill, 1978, *In re*, (1979) 1 SCC 380.

the territory of Pakistan. The President made a reference regarding the constitutionality of the Bill. However, the Supreme Court refused to answer as the Bill had already become an Act in 1982.<sup>77</sup>

ix. *In re: Cauvery Water Disputes Tribunal, 1993*

This reference was made after the Karnataka government refused to comply with the interim award of Cauvery Tribunal ordering release of fixed amount of water to the State of Tamil Nadu. The question referred was whether the interim award was binding on the parties. The Supreme Court observed that the award was binding under the Inter-State Water Disputes Act.<sup>78</sup>

x. *In re: Special Reference No. 1 of 1993*

After the Babri Masjid was demolished, the President referred the question whether a Hindu temple existed at the disputed site before the construction Babri Masjid. The Supreme Court in this matter refused to answer the question holding that the reference was political in nature and better suited for resolution through adjudication rather than an advisory opinion.<sup>79</sup>

xi. *In re: Special Reference No. 1 of 1998*

This reference is also known as the Third Judges Case. The reference in this matter sought the opinion of the Supreme Court regarding the consultation process for the appointment of judges to the Supreme Court and the High Courts. The Supreme Court opined that consultation must mean concurrence, and a collegium of four senior-most judges must be consulted by the Chief Justice.<sup>80</sup>

xii. *In re: Special Reference No. 1 of 2001*

A conflict arose between the Union government and the State of Gujarat over the legislative competence to regulate the use of natural gases. The Supreme Court observed that the subject of natural gas falls within Entry 53 of List I (Union List) and the State legislation was thus not valid.<sup>81</sup>

xiii. *In re: Special Reference No. 1 of 2002*

Post 2002 riots, the Gujarat Assembly was dissolved, due to which a constitutional question arose whether the elections to the Assembly must be held within six months of its dissolution.

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<sup>77</sup> Jammu and Kashmir Grant of Permit for Resettlement in the State Bill, 1980, In re, 2001 SCC OnLine SC 1493.

<sup>78</sup> Cauvery Water Disputes Tribunal, Re, 1993 Supp (1) SCC 96 (2).

<sup>79</sup> Special Reference No. 1 of 1993, (1993) 1 SCC 642.

<sup>80</sup> Special Reference No. 1 of 1998, Re, (1998) 7 SCC 739.

<sup>81</sup> Special Reference No. 1 of 2001, In re, (2004) 4 SCC 489.

The Court observed that the exclusive jurisdiction to schedule elections to the State Assembly is with the Election Commission of India under Article 324 and, six-months timeline provided under Article 174(1) is not applicable in case of a dissolved Assembly.<sup>82</sup>

*xiv. In re: Special Reference No. 1 of 2012*

Subsequent to the 2G spectrum scam and later, the cancellation of telecom licences, reference was made to the Supreme Court on the question whether the natural resources should always be allocated by holding public auctions. The Supreme Court observed that while the public auctions may be a preferable method but the Constitution does not mandate it. However, other methods shall be adopted only if they are non-arbitrary, ensure fairness, and serve the interests of public.<sup>83</sup>

*xv. In re: Punjab Termination of Agreements Act, 2004*

The reference pertained to the unilateral decision of the State of Punjab to terminate the water sharing agreements entered with the neighbouring States. The Court observed that the Punjab Termination of Agreements Act, 2004 was unconstitutional as it intended to invalidate the judgements and awards passed under the law. It stressed that States cannot take unilateral decisions in Inter-State matters and must be bound by the decision of courts and tribunals.<sup>84</sup>

## **V. ARTICLE 143 IN A POLITICIZED FEDERAL STRUCTURE: CLARIFICATION OR MANIPULATION?**

Article 143 was included in the Indian Constitution as constitutional tool for clarification on complex legal issues and promoting institutional dialogue rather than subjecting those issues to adversarial adjudications. However, with the passage of time, this power has been used not as a consultative mechanism, but as a strategic tool used by the executive to delay the governance of issues particularly those related to opposition led-State governments.<sup>85</sup>

The Governor has been placed in a distinctive and very controversial position in the Indian federal structure. He's appointed by the Union as the constitutional head of the State but acts on the aid and advice of the State Council of Ministers. Due to these partisan issues and the rapidly increasing use of Governor's discretionary powers especially in reserving Bills for President's consideration, delaying action, or withholding assent, the Centre-State tussle has

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<sup>82</sup> Special Reference No. 1 of 2002, In re, (2002) 8 SCC 237.

<sup>83</sup> In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1.

<sup>84</sup> Punjab Termination of Agreement Act, 2004, In re, (2017) 1 SCC 121.

<sup>85</sup> Alok Prasanna Kumar, *Presidential reference in TN Governor case puts a stark choice before Supreme Court*, THE INDIAN EXPRESS (May 19, 2025, 11:28 AM IST), <https://indianexpress.com/article/opinion/columns/presidential-reference-in-tn-governor-case-puts-a-stark-choice-before-supreme-court-10014728/>.

amplified.<sup>86</sup> The Tamil Nadu judgement has precisely dealt with this particular issue. The Supreme Court observed that the Governor's conduct and frequent reservation of re-passed Bills was in derogation of the constitutional principles. Subsequently, the Union Executive through the President's power under Article 143 referred a set of 14 legal questions as to the power of Governor regarding reservation of re-passed Bills and the time limit for the Governor's action.<sup>87</sup>

Although the questions were framed as legitimate legal issues, however, many of these questions reflect complex political issues and intentions of the executive to shift the onus from political or legislative authorities to the judicial forum, under the pretext of legal clarification.<sup>88</sup>

The present reference shows that how Article 143 may be invoked to delay political accountability. Rather than taking action on the pending Bills on the basis of the earlier decision, the executive might use Article 143 to seek clarification from the Court, creating a constitutional uncertainty and averting immediate responsibility.<sup>89</sup> A glaring example is the reference in the matter of *2G Spectrum*, where the Union sought advisory opinion of the Supreme Court on the matter of allocation of spectrum by auction subsequent to the declaration by the Supreme Court that the 2008 allocations were illegal. Although, the court refused to give any advice as to policy, it observed that there's a possibility of invocation of Article 143 for seeking clarification on settled issues.<sup>90</sup>

Similarly, this Presidential Reference may be seen as an attempt to balance the judicial criticism of the Governor's inaction by referring a set of open-ended constitutional questions. While such an attempt may not be fundamentally inappropriate, it reflects how Article 143 can be used not merely for legal clarification, but also as an instrument for political manipulation. These issues pose a risk of judicializing these political disputes.<sup>91</sup>

In such a situation, a pragmatic approach is needed to protect the significance of Article 143 while at the same time limiting its misuse by the executive. The Supreme Court must continue to provide clear directions as to what kind of questions are fit to be referred for advisory

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<sup>86</sup> Rifa N, *A Critical Analysis of the Office of Governor under the Indian Constitution*, 12 IJCR 297 (2024).

<sup>87</sup> Thomas, *supra* note 6.

<sup>88</sup> Kaleeswaram Raj, *Presidential Reference has echoes of a review petition*, Hindustan Times (May 16, 2025, 8:13 PM IST), <https://www.hindustantimes.com/opinion/presidential-reference-has-echoes-of-a-review-petition-101747406582406.html> [hereinafter Raj]. See generally, V. Venkatesan, *Does the Presidential reference raise questions which the Supreme Court did not answer earlier?*, Supreme Court Observer (May 19, 2025), <https://www.scobserver.in/journal/does-the-president-reference-raise-questions-which-the-supreme-court-did-not-answer-earlier-tamil-nadu-governor/>.

<sup>89</sup> *Id.*

<sup>90</sup> In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1.

<sup>91</sup> See generally, Raj, *supra* note 87.

opinion.

As Dr. B. R. Ambedkar once remarked:

*“The Constitution is not a mere lawyers’ document, it is a vehicle of life, and its spirit is always the spirit of Age.”*

This statement reflects the dynamic nature of the Constitution, stressing that it must be interpreted in consonance with the principles of justice and impartiality, and not used for political manipulation.<sup>92</sup>

Similarly, in *Ram Jawaya Kapur v. State of Punjab*<sup>93</sup>, it was observed that “our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another”, emphasizing the need to maintain separation of power and to restrain the executive from pushing political matters into the judicial domain.

## VI. COMPARATIVE CONSTITUTIONAL INSIGHTS

The Article 143 of the Indian Constitution is very similar to the section 53 of the Canadian Supreme Court Act which empowers the Governor-in-Council to make a reference to the Federal Court regarding its advisory opinion on any question of law or fact. The court is bound to respond to those questions.<sup>94</sup> In Canada, these advisory opinions are not legally binding, however, they carry a de facto authoritative value, with governments almost consistently complying with them.<sup>95</sup>

The United Kingdom operating under the principle of parliamentary sovereignty, does not provide for an advisory jurisdiction. The House of Lords does not have the power to give opinions to the government. Most constitutional questions are dealt through conventions, negotiations, or parliamentary advice rather than judicial opinion.<sup>96</sup> However, in 2019, the UK Supreme Court’s ruling on the legality of Prime Minister Boris Johnson’s prorogation of Parliament demonstrated that the UK courts do occasionally intervene in serious political matters but they focus on procedural irregularities rather than political righteousness.<sup>97</sup>

Interestingly, the US Constitution provides the Federal Courts with power to only decide

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<sup>92</sup> Rishika Singh, *This Quote Means: ‘Constitution is not a mere lawyers’ document... its spirit is always the spirit of Age’*, THE INDIAN EXPRESS (Nov. 27, 2023, 10:03 AM IST), <https://indianexpress.com/article/explained/this-quote-means-ambedkar-constitution-day-living-document-9043254/>.

<sup>93</sup> *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

<sup>94</sup> Supreme Court Act, R.S.C. 1985, c. S-26, § 53 (Can.).

<sup>95</sup> PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 8-18 (Carswell 2011).

<sup>96</sup> See, Tripathi, *supra* note 27 at 13.

<sup>97</sup> *R (Miller) v. Prime Minister* (No. 2), [2019] UKSC 41.



actual cases and controversies.<sup>98</sup> The US Supreme Court has outrightly rejected any opinion based on advisory jurisdiction. The US Supreme Court, in the case of *Muskrat v. United States*<sup>99</sup>, observed that it does not have the power to entertain abstract questions or issues not connected to actual cases or controversies before it. Similarly, in 1793, in a letter to the President of United States, Chief Justice John Jay refused to advice on questions arising from neutrality proclamation, citing constitutional restriction on advisory opinions.<sup>100</sup>

## VII. CONCLUSION

Considering the current form of Article 143, it may be strategically abused to delay the implementation of judgements, validate executive actions, and portray political issues as constitutional questions. Currently, the Constitution does not provide any substantive criteria for when the President may make a reference to the Supreme Court. Due to this constitutional silence, there's possibility of politically motivated and vague references that may not involve any substantial question of public importance. The Supreme Court must evolve some criteria either through its rules or through a decision on advisory jurisdiction. These standards may include the following requirements<sup>101</sup>:

- a. The reference must clearly specify a question of law or fact.
- b. The issue must substantially involve implications pertaining to rights, governance and structure.
- c. It must not be speculative.
- d. There should not be any attempt to overturn the judgement pronounced earlier.

Moreover, the Supreme Court must clarify the precedential value of these non-binding opinions as there have been situations where the court itself has cited some opinions in subsequent judgements, thereby providing them de facto authority. Finally, Article 143 must neither be apprehended as an instrument of executive overreach nor glamorized as a catholicon. It should be treated with all seriousness as a tool to strengthen India's democratic structure.

*"The Article 143 must remain extraordinary, but when used, it must be rigid."*

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<sup>98</sup> U.S. CONST. art. III, § 2.

<sup>99</sup> *Muskrat v. United States*, 219 U.S. 346 (1911).

<sup>100</sup> "To George Washington from Supreme Court Justices, 8 August 1793", FOUNDERS ONLINE, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Washington/05-13-02-0263>.

<sup>101</sup> Singh & Singh, *supra* note 33 at 47.