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Comparative Analysis of Advisory Opinions of Court in Classical and Newer Democracies of the World

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Abstract: This research paper discusses the comparative position of advisory opinion of Courts in classical and newer democracies of the World. The research paper also searches the trend of advisory opinion in classical and newer democracies of the world. The study deals the pre and post constitutional era scenario of advisory opinion of Court in India. The study may facilitate to understand the role of the advisory opinion in classical democracies of the World like Canada, United States of America (USA), United Kingdom (UK), Australia and newer democracies like Malaysia, Pakistan, Sri Lanka, India and Bangladesh over the years.

Keywords: Advisory Jurisdiction, Classical democracies, Newer Democracies, Court

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I. INTRODUCTION

The institution of advisory jurisdiction established a channel between the Executive and the judiciary. The utility and propriety of the Institution of advisory jurisdiction is debatable [1]. The whole notion of consultation of the judiciary is, by hypothesis a contradiction. The judges do not sit in the seat of justice in order to be consulted but in order to decide an issue. The idea of judicial consultation traces its origin in the Anglo Saxon World. In British History up to the Middle Ages the Court was not a distinct institution as we see it today as distinct from the executive and the legislature, and there was no defined office of Judge [2]. The King reigned and governed with the aid of a big counseling body out of which the Courts of today have evolved. In course of time the functions of the King separated and became vested in distinct functional bodies viz., the legislature, executive and the judiciary.

The role of the Court which is nothing more than an institution of community life is fashioned as an answer to social need and it is not a matter of jurisprudential neatness. Even delivery of declaratory judgments was considered not the proper function of the Court [3] though such power is part of the Anglo-Indian and American legal systems now. Judicial consultation was the necessity of that time in Britain when law was in its fluid, formative and uncodified state. Owing to the power hunger of Kings and the subservience of the Judges this practice fell into great abuse for out of fear the Judges also gave such advice as were favourable for the extension of the King's prerogatives but adverse to the power of Parliament and welfare of the people.

Most of the democracies of the common wealth have made provision in their constitution for the highest courts to have an advisory or consultative jurisdiction. The rationale was to enable the court to render advice on crucial matters when other constitutional mechanisms are either inefficacious to resolve specific issues or when the constitution appear not to have provided any other mechanism. In order to have a clear insight into the working of the Institution of advisory jurisdiction, an assessment of the various countries on the point will not be out of place. The objective of this research Paper is to discuss the comparative position of advisory opinion of Apex court in classical and newer democracies of the World. The discussion of the research paper is divided into two parts, first the advisory jurisdiction of courts in the classical democracies, secondly, the advisory jurisdiction of courts in the newer democracies of the commonwealth.

II. ADVISORY JURISDICTION IN CLASSICAL DEMOCRACIES OF WORLD

Related Provision of Canada

Canadian Supreme Court Act 1952, contains the provision giving birth to the Institution of advisory jurisdiction. Section 55 of the Act empowers the Governor General-in-Council to refer to the Supreme Court for hearing and consideration 'important questions of law or fact touching … any matter. Governor General is the final authority on the question whether a matter so referred is an important question.

The Court is, under the statute, bound to answer each question so refer read:-

"When any such reference is made to court, it shall be the duty of the court to hear and consider it, and to answer each question so referred with the reason for each such answer."

Section 60 of the Supreme Court Act of Canada, 1906 (present Sec. 55 of the Supreme Court of Canada Act, 1952) was more explicit in this regard. It provided that it was the duty of the Court to hear and consider the references made on matters enumerated in Sec. 60 and that the court shall certify to the Governor in council for his information, its opinion each such question with the reasons for each such answer. The provision under Section 60 of the Canadian Supreme Court Act, 1906 is significant for at least two reasons.

First**,** the provision requires that such opinion shall be pronounced as in the case of a judgment upon an appeal to the court and that it shall be binding on all inferior courts in the like manner as an appellate judgment of the Supreme Court. The 1952 Act has thus removed any doubt[1] as to whether such opinion on a reference shall count as an 'opinion` because there is no 'lis` and no parties, or as judgment.

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

Although it has been made obligatory on the part of the Canadian Supreme Court to pronounce advisory opinion, the judicial committee has at times, on appeal from such opinions from Canada, expressed fears of the dangers of such advisory opinions. In ***cf. A.G. of Antario Vs. Hamilton Street Rly Co.*** [4] ***(1903)***, the committee observed that they would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient and inexpedient that opinions should be given on such questions at all. When they arise, they must arise in concrete cases, involving private rights, and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down and override the operation of the particular words when the concrete case is not before it.

In A.G. of British Columbia Vs. A.G. of Canada [5] (1914), it was pointed out that under this procedure questions may be put which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form within reference but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied.

In Re-Regulation and control of Aeronaut*ics* [6] (1932) – The Committee held it undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual, with regard to parties who are not and who cannot be brought before it, i.e. foreign Govt.

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

1. In most of these cases, the Government, seeking to introduce a bill has sought the judicial opinion on its constitutional powers e.g. as to marriage, liquor, fisheries [7] on when similar questions have arisen in relation to a Provincial Bill reserved for the assent of the Governor General [8].
2. The Governor General may also refer the question of constitutionality of a Dominion or Provincial [9] statute after it has been enacted.
3. Even the validity of subordinate legislation has been the subject of reference [10].
4. The respective powers of the Dominion and Provincial Legislatures with respect to particular matters also have been referred in the abstract, irrespective of any proposed or actual legislation [11].
5. A reference has been made upon the very competence of Canadian Parliament to abolish appeals to the Privy Council altogether [12].
6. Some of the references related to the interpretation of statutes, e.g. which court had jurisdiction to perform certain statutory functions [13].

Section 55 of the Supreme Court Act 1952 also empowers either House of the Dominion Parliament to refer any question to the Supreme Court for the advisory opinion. Provincial Governor also can refer similar questions to the Provincial Appellate Court for opinion [14].

Provision of United Kingdom (UK)

We find some attempts in British History to call upon the judiciary to give advisory opinions but the Lords have refused to exercise such function. Up to the middle ages, in Great Britain, the judicial organ was not a distinct institution as we see it today, from the executive and legislature and there was no defined office of Judge. The King reigned and governed with the aid of a big advisory body out of which the courts of today have evolved. In course of time and functions of the King separated and became vested in distinct functional bodies viz., the legislature, executive and the judiciary. Still the judges continued to function as 'concilium

Regis,' the King's Council, in matters of law and were bound by their then statutory oath to lawfully counsel the king in his business. Such consultation was in vogue in Britain till the middle of 18th Century [15].

The Long Parliament, by an Act to which Charles-I gave his approval in August 1641, prohibited the practice. The Act of Settlement, 1700 which made the judges' tenure during good behavior instead of king's pleasure finally freed judges from the Crown's yoke and created environment for them to hold office without fear of the king's displeasure. But the idea of obtaining judicial opinions itself was not abandoned. Section 4 of the Judicial Committee Act, 1883 was enacted providing that His Majesty may refer to the Privy Council 'any such other matter whatsoever as his Majesty thinks fit' [16].

The provision empowered the Crown to refer to the Judicial Committee any legal issue on which it desired advice and the Judicial Committee 'shall thereupon hear and consider the same and shall advise Her Majesty thereupon. The use of this provision was made mostly on issues outside the United Kingdom.

In 1928, an attempt to create the advisory jurisdiction was made by the English Parliament. Members of the House of Lords seriously opposed the provisions of the proposed clause 4(1) of the Rating and Valuation Bill of that year which sought to enable a minister to submit a question to the High Court for its opinion. It was branded as a 'piece of mischievous legislation' [17]. It was argued that the proposed clause would 'make the Judiciary act in an ancillary and advisory capacity to the Executive, and confuse the working of the judicial system with the Executive administration; that it was no part of the business of the judges and never had been 'part of their business, at any rate since the Act of Settlement, to have advisory concern in the acts of the administration.'; that the natural effect of associating 'the judges with the administration and attaching to them the responsibility for conclusions which are put forward by the administration' would be to 'weaken the authority of the judiciary'; that there was no reason why the judges should be brought in 'by this side wind to help the Executive to carry on their business, to replace the Law Officers and to relieve the Executive of responsibility as to decisions they ought to arrive at upon the law'. In face of the strong opposition in the House of Lords, that clause had to be dropped.

Related Provision of United States of America (USA)

The U.S. Constitution has no specific provision like Article 143 (1) in India authorising the President to make a reference to the U.S. Supreme Court seeking its opinion on any question. The U.S. Constitution is based on the doctrine of Separation of Powers. Art. III, s. 2 (1) of the U.S. Constitution provides that the judicial power vested in the Supreme Court shall extend to "cases" and "controversies".

The U.S. Supreme Court has consistently refused to render advisory opinion on abstract legal questions as it does not wish to exercise any non-judicial function. Giving of such an advice, it has been feared, might involve the Court in too direct participation in legislative and administrative processes. The reluctance of the Court is formally based on the doctrine of separation of powers which forms one of the bases of the U.S. Constitution. In 1793, when Secretary of State Jefferson enquired of the Supreme Court whether it would give advice to the President on questions of law arising out of certain treaties, the Court refused saying that there was no such provision in the Constitution, and that it was not proper for the highest Court to decide questions extra-judicially[18], Again, in ***Muskrat v. U.S.*** [19], The Court refused to give an advisory opinion arguing that under the Constitution its jurisdiction extends to a 'case or controversy' and so it cannot give an opinion without there being an actual controversy between adverse litigants. The Court has consistently refused to decide abstract, hypothetical or contingent questions.

However, some of the State Constitutions (e.g. Massachusetts) empower the Legislature and the Executive to seek opinion of the State Supreme Court 'upon important questions of law'. The opinions so given are not taken as precedents in subsequent litigations relating to the same question.

It has only been supposed that a federal court set up under Article III of the U.S. Constitution should not take up an advisory role, there being no bar to a Court set up by statute to give an advisory opinion at the request of either the Legislature or the Executive. Thus the judicial Code of 1942 provides that the Court of Claims shall have the jurisdiction to reports (i) to either House of the Congress on any Bill referred to the Court by such House except a Bill for pension (ii) or to any executive department as to any claim or matter involving controversial questions of law or fact.

Related Provision of Australia

The Australian High Court has refused to give advisory opinion on the ground that the essential function of the Judiciary is the decision of disputes and not the consideration of abstract legal questions [20]. Even the legislature cannot require the Court to exercise any such function [21].

For under Section 76 of the Constitution, the Court can only decide 'matters', i.e. judicial proceedings and not abstract questions and a statute which requires the Court to determine such questions must be held to be invalid. But declaratory action lies at the instance of the Attorney General of the Commonwealth or of a State to test the validity of the statute even though no private individual has yet been affected.

Related Provision of Japan

There is no provision in the constitution of Japan to give advisory opinions and Chief Justice 'Tanka' had announced that the Supreme Court of Japan will follow the American Supreme Court on this point [22].

III. ADVISORY JURISDICTION IN NEWER DEMOCRACIES OF COMMENWEALTH

The newer constitutional system of the commonwealth, the precedent of Canada, rather than of Australia appears to have been followed. However, unlike Canada where the Supreme Court's advisory jurisdiction has been conferred by legislation, and Australia where the attempt was also to legislative, most of the constitutional systems of the 'New Commonwealth' entrench this jurisdiction in their respective Constitutions. In countries of South and South-East Asia, provisions for advisory or consultative jurisdiction are found in every Constitution. The common features are that the president, in most of the newer constitutional systems of the Commonwealth, or the Yand di-Pertuan Agong (King) in Malaysia is constitutionally empowered to ask the Supreme Court for an advisory opinion.

The grounds entitling the seeking of an advisory opinion vary from one jurisdiction to another. In Pakistan, India, Bangladesh and Sri Lanka acquisition of law or fact' of' public important' which has 'arisen' or 'likely to arise' can be the basis for seeking an advisory opinion. It is also specified that the ground of 'expediency' be also attendant. The respective provisions are as follows:

Provision Related to India

(a) Pre Constitutional Position:

The Government of India Act, 1935 was based on the Report of the Joint Committee on Indian Constitutional Reforms, 1933-34. To trace the objects of Section 213 a study has to be made of the Committee's recommendations. The White Paper of 1933 proposed [23] that the Governor General should be empowered in his discretion to refer to the Federal Court for hearing and consideration any 'justiable matter'. The Joint Committee accepted the proposals contained in the White Paper. The Chairman's Draft Report [24], which was submitted to the Joint Select Committee of Indian Constitutional reforms on June 18, 1934 proposed the institution of advisory jurisdiction. Exception was made to the words any 'justiciable matter' used in the White Paper, and the words 'any matter of law' were preferred. The Chairman's Draft Report also referred to the similar jurisdiction possessed by the Privy Council under Section 4 of the Judicial Committee Act, 1833, which provided that his Majesty might refer to the Committee for hearing or consideration any matters whatsoever as His Majesty might think fit, and the Committee would thereupon hear and consider the same, and advice His Majesty thereupon. On the point of the intentions behind proposing such jurisdiction, the Chairman's Draft Report expressed that 'this advisory jurisdiction may often prove of great utility. It was also mentioned that some of the British Indian delegates appeared to think of a private and confidential opinion being communicated by the Court to the Governor General. The Chairman's Draft Report was accepted and adopted by the Joint Committee. It said, "We concour generally in the proposal and we are of the opinion that this advisory jurisdiction may often prove of great utility."

Related Provision of the Government of India Act, 1935

A provision for judicial consultation in India was first devised in Section 213 of the Government of India Act, 1935. The provision was enacted to meet certain political needs of the time when India was to become a federation of British Indian province and native states under the 1935 Act. The Governor General was entrusted in his own individual responsibility with the security of India and various other matters and in the discharge of his functions he was empowered to exercise his own individual judgment and discretion even as to override the advice of the Council of Ministers. Besides, he was expected to maintain that delicate balance as it were between those who wanted more central and those who wanted more provincial powers [25].

In face of such circumstances the British Parliament made the Federal Court to assist the Governor General ‘when he could not rely on the opinion of the Attorney General [26]. Hence section 213 of the Government of India Act 1935 gave the Federal Court an additional role as legal consultant to the Governor General. The Federal Court pronounced only four advisory opinions. Almost in all cases it was called upon to interpret important constitutional provisions. They are as follows –

The ***C.P. Barar Motor Spirit Reference*** [27] was first reference case of pre Constitutional era, the Federal Court, firstly set principles of interpretation of the constitution. The opinion established the principle that in interpreting any particular provision of the Constitution due consideration, weight and importance should be given to the conditions, circumstances, particular environment of the time and needs of the changing society. The prevailing conditions could neither be enlarged nor be lessened when the question of interpretation was involved.

The Court, through this advisory opinion helped in evolving the norms of Federalism. It established a definite norm regarding the principle of provincial autonomy and gave a lead to make the provinces the maters

of their own houses. The Court opined that provincial autonomy without financial autonomy was a contradiction in terms. The judicial practice tells that the principle of constitutional interpretation propounded in this first reference case continues to figure prominently in even subsequent references of the Supreme Court.

The Second reference under Section 213 of the 1935 Act to the Federal Court was that of ***The Hindu Right to Property Act*** case [28]. The Court pronounced its opinion in 1941. The Hindu Rights to property act had given rise to several doubts and difficulties and the Court was called upon to define its ambit, importance and limitations. The reference aimed at asserting whether the Act was validly enacted and could constitutionally be implemented. The Court through the opinion upheld validity of the Act. Though the opinion could not end litigation on the subject and four years later, in a concrete case i.e., ***Umayal Achi case*** [29] the same court declined to accept the stare decision effect of the advisory opinion, in subsequent cases the opinion was followed by the Federal Court [30], High Courts [31] and the Supreme Court [32].

In Allocation of Lands and Buildings Reference [33] was the third reference made to the Federal Court for opinion. It was necessitated due to differences of opinion between the Union Government and the Punjab Government over the ownership of certain land. The Federal Court under this reference considered the scope of Section 213 of the 1935 Act and held that through under this Section it was not obligatory on the part of the court to entertain every reference, the court should always be unwilling decline to entertain a reference except for good reasons. The Court also observed that its sole concern had to be merely legalistic and juristic interpretation of the referred statute and the problems related thereto. The theory propounded by this opinion in respect of acceptance of reference has been followed by its successor, the Supreme Court in various reference cases.

The scope of Section 213 of the Act came in for consideration also in the Fourth ***In Re Levy of State Duty reference*** case [34]. The Federal Court laid down two principles contemplated and proposed legislation cannot be a good and reasonable ground for declining a reference. The advisory opinion, being advisory only, had no binding effect on the referring or giving authority. The principles laid down by this opinion have been continuously followed by the Supreme Court in various other reference cases. Though under the Government of India Act 1935, the center was within its powers to levy Estate duty in respect of succession of property, the court in its advisory opinion held that the entry did not authorize the center to levy Estate Duty. The opinion necessitated an amendment into the 1935 Act. Consequently, the Indian Estate Duty Act, 1945 was passed which provided for the imposition of Estate Duty.

(b)Post Constitutional Position

The Constitution of India provides a provision of Advisory opinion in article 143 which confers consultative jurisdiction on the Supreme Court. Though article 143 confers advisory jurisdiction of the Supreme Court, it also empowers the President to consult the Supreme Court under Article 143 reads as follows:-

(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 think fit, report to the President its opinion thereon.

The above extract of Article 143 shows that clause (1) is general in nature subject to the fulfillment of the conditions Precedent prescribed therein. Clause (2) on the other hand, deals with a specific matter by referring to the proviso of article 131.

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

The President has been authorised by Article 143 to refer to the Supreme Court a question of law or fact which in his opinion is of such a nature and of such public importance that it is expedient to obtain its opinion upon it. The words of Article 143 are quite wide and there is no condition that it is only in respect of matters falling within the powers, functions, and duties of the President that it would be competent to him to frame questions for the advisory opinion of the Supreme Court. The only conditions are:

(i) that he should be satisfied that a question of law or fact has arisen or is likely to arise;
(ii) that he should also be satisfied that such a question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Court on it.Thus to ascertain the scope of clause (1) of article 143, the following points must be noted:-

(i) Question of Law or fact**:-** It is not necessary that the question referred for opinion must be of law. It may be question of law or of fact.

(ii) In respect of any matter**:** The opinion sought by the President may be in respect of any matter. It was contended that only in respect of matters falling within the powers, functions and duties of the President he was entitled to make a reference under Article 143. The Court rejected this contention and held that the words of Article 143 are wide enough to empower the President to refer to the Supreme Court for its opinion any question of law or fact in respect of any matter [35].

(iii) Questions arisen or likely to arise**:** - The power of the President under Article 143 is wide enough to get opinion on prospective issues. It is not necessary that the dispute must have arisen. Even where a dispute is likely to arise, the President may obtain the opinion of the Supreme Court in advance.

(iv) Public importance**:-** The question must be of such public importance that it is necessary to obtain the opinion of the Supreme Court. Whether the question is of such importance or not is a matter to be judged by the President. His satisfaction is sufficient. The necessity of such opinion is very well illustrated by the ***U.P. Legislative case*** [36].

During the last sixty seven years, since the constitution came into force, 14 references have been made to the Supreme Court under Article 143 (1) and one reference is pending.

1. In re the Delhi Laws Act, in 1951[37],
2. In re the Kerala Education Bill, in 1958[38],
3. In re the Berubari, in 1960[39],
4. In re the Sea Customs Act, in 1962[40],
5. In re the Keshav Singh's case in 1965[41],
6. In re Presidential Poll, in 1974[42],
7. In re the Special Courts Bill, in 1978[43],
8. In re the Jammu & Kashmir Resettlement act, in 1982[44],
9. In re the matter of Cauvery Water Disputes in 1992[45],
10. In re the matter of Ram Janamabhoomi in 1993[46],
11. In reference on the Principles and Procedure regarding appointment of Supreme & High Court Judges in 1998 [47],
12. In re the Gujarat Gas Regulation Act, in 2001[48],
13. In re Gujarat Assembly Election Matter in 2002[49],
14. In re the Satluj-Yamuna Link Canal, in 2004[50],
15. In re 2G Spectrum matter (Pending reference)

Related Provision of Pakistan

If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of Law which he considers of public importance, he may refer the question to the Supreme Court for consideration. The Supreme Court shall consider a question so referred and report its opinion on the question to the President (Article 186, Constitution of Pakistan, 1973, not it is article 209 of new Constitution.

The Governor-General of Pakistan after dissolving to constituent assembly (Provisional Parliament) and suspend the constitution on 24 October 1954, made a reference to the Federal Court of Pakistan under Section 213 of the Government of India Act, 1935. One of the questions so referred was "whether the Constituent Assembly was rightly dissolved"[51].

In this reference, the Governor-General had made the following three averments which, despite their being unproven according to judicial procedure by letting in evidence, the Pakistan Court made its assumptions.

1. that though the Constituent Assembly functioned for more than 7 years, it was unable to carry out the duty of providing a Constitution and for all practical purposes assumed the form of a perpetual legislature;
2. that the Constituent Assembly was dissolved by the Governor-General because by reason of repeated representations form the resolutions passed by representative public bodies throughout the country, he formed the opinion that the Assembly had become wholly unrepresentative of the people; and
3. that the Constituent Assembly from the very beginning asserted the claim that the laws passed by it under sub-sec. (1) of S. 8 of the Indian Independence Act, 1947, did not require the assent of the Governor General [52].

The learned Chief Justice Muhammed Munir observed on the objection taken by the opposition as to the manner in which the reference was made: "...Whether, if the Governor-General had the authority to dissolve the Constituent Assembly, it was properly dissolved, is not a legal but a political issue which cannot be referred to Court for opinion." Mr. Pritt, however contends that the question must be answered in the form in which it has been framed and that the Court should go into the facts on which the propriety or impropriety of the dissolution may depend. He has, therefore, referred to the affidavits which were filed on behalf of the Government and the counter-affidavit put in by Mr. Tamizuddin Khan in an endeavour to show that the

dissolution was not justified on the facts and that it was ordered with more ulterior motives. We cannot, on this reference, undertake this enquiry or record any findings on the disputed question of facts because any such course would convert us into a fact finding tribunal which is not the function of this Court when its advice is asked on certain questions of law. The answer to a legal question always depends on facts found or assumed and since we cannot try issues of fact the reference has to be answered on the assumption of fact on which it has been made...The Governor-General has taken the responsibility of asserting certain facts and has merely asked us to report to him what the legal position is if those facts are true."

Relying on the three averments and without considering them on merits, the Court concluded that the dissolution was valid and legal. On March 9, 2007, President Parvez Musharraf filed a reference against the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhary, under Article 209 of the Constitution, on charge of misconduct. On the same day, the Chief Justice was rendered "non-functional" by presidential decree, which declared without citing any specific law, that the Chief Justice could not carryout the functions of his office while the reference was pending against him. On the same day, the President also appointed the next senior most available judge on the Supreme Court Mr. Justice Javed Iqbal as the Acting Chief Justice.

On July 20, 2007, the thirteen-member bench of the Supreme Court has set aside the Presidential reference against the Chief Justice. The Supreme Court has restored the Chief Justice of his post by declared invalid the presidential action of sending him on force leave.

Related Provision Bangladesh

If 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 of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may, after such hearing as it thinks fit, report to President its opinion thereon to the President (Article 106, Constitution of Bangladesh).

Related Provision of Sri Lanka

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 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, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon. Every proceeding under paragraph (1) of this Article shall be held in private unless the Court for special reasons otherwise directs (Article 129, Constitution of Sri Lanka, 1978).

Related Provision of Malaysia

In Malaysia, only a 'constitutional question' is fit for invoking the advisory jurisdiction of the Supreme Court. Also, expediency' is not named as a factor in the Malaysian Constitution. Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it (Article 131, Constitution of Malaysia).

IV. CONCLUSIONS

Despite the differences in phraseology, the important issue to note in regard to advisory opinion is that only the head of State, the President or the King or 'Governor of Council' is empowered to seek an opinion from the Court. The practical use of the advisory opinion in classical democracies of the world except Canada is not in the functioning at present. The USA Federal Court has consistently refused to decide abstract, hypothetical or contingent questions. After many attempts to create the provision of advisory jurisdiction in U K, after strong opposition in the House of Lords, the clause of Advisory opinion had to be dropped. The Australian Court had also refused to give advisory opinion on the ground that the essential function of the Judiciary is the decision of disputes and not the consideration of abstract legal question. In Canada the Dominion Parliament can refer any question to the Supreme Court for the advisory opinion. Provincial Governor also can refer similar questions to the Provincial Appellate Court for opinion

In Malaysia, the provision has not been utilised since Independence in 1957. A similar situation exists in Sri Lanka. In Bangladesh, the advisory jurisdiction was invoked only once and the Pakistan Supreme Court was called upon advice only on rare occasions. In India after Government of India Act 1935, Apex court has had to exercise its advisory jurisdiction four times in pre independent era and fourteen times in post independence era. 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 come 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. We can conclude that advisory jurisdiction of courts in the classical democracies of the world as well as in the newer democracies of the commonwealth have strengthened the status of the judiciary. The opinions establishing the independence of the higher judiciary 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.

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[2] Constitutional History, Maitland 4th ed: "The further back we trace our History," says Maitland, "the more impossible is it for us to draw strict lines of demarcation between the various functions of the State: the same institution is a legislative assembly, a governmental council and a Court of law;....." (p. 05) "Besides the general Council, the King had a permanent council in constant session.....the King can take advice in whatever quarter he pleases.....Both in his Parliament and his Council, the King legislates, taxes and judges....." (p. 91) when in course of time the functions of the King separated themselves as executive, legislative and judicial and became vested in different bodies, ".....the word

[3] S.A de Smith, Judicial Review of Administrative Action (1959) p. 368.

[4] (1903) A.C. 574

[5] (1914) A.C. 155

[6] (1932) A.C. 54

[7] In Cf. A.G. for Canada Vs A.G. for Provinces (1898) A.C. 700

[8] In re Alberta Statutes (1938) S.C.R. 100 (Can.)

[9] Cf. Ref re Alberta Debt Adjustment Act S.C.R. 31 (Can.)

[10] Ref. Re validity of Wartime Le asehold Regulations (1950) S.C.R. 124 (Can.)

[11] Cf. Ref. Re Waters and Water Powers (1929) S.C.R. 200 (Can.)

[12] Cf. A.G. of Antario Vs A.G. of Canada (1947) 51 C.W.N. 886 (P.C.) A. 1947 P.C. 1999.

[13] Ref re Adoption Act (1938) S.C.R. (Can.)

[14] Ref. Re validity of the orderly Payment of Debts Act (1959), (1960), 23 DLR 2nd Ed., 449 (Can.)

[15] Constitutional History, Maitland, 4th Ed.

[16] Broom's Constitutional Law, 2nd Ed. 1885, P. 143

[17] The parliamentary debates, official report, Vol. 70, H.L. 19th April, 1928, Col. 760.

[18] Douglas, "Marshall to Mukharjee" at p. 25-26, Thayer Legal essays, (1923) at p. 53.

[19] 219 U.S. 346 (1911)

[20] In re judiciary and Navigation Acts, 29 C.L.R. 25 (1921)

[21] Attorney Gen. for Victoria Vs Common Wealth, 71 C.L.R. 237 (1945)

[22] Supra no. 18.

[23] Proposals for Indian Constitutional Reforms (Published originally as Camb. 4268) p. 336, para 161, "161 The Governor General will be empowered in his description, to refer to the Federal Court, for hearing and consideration any justiciable matter he considers of such a nature and such public importance that it is expedient to obtain the opinion of the Court upon it."

[24] The Chairman's Draft report p. 147, para 314. The Marquess of Linlithgo in the Chair.

[25] Parliamentary Debates, Official Reports 5th series, Lords 1934-35, cd. 97c 1245-56 per Earl Peal C 1248

[26] Per Lord Rankeillor C. 1247

[27] AIR 1939 F.C. 1.

[28] AIR 1941 F.C. 72

[29] AIR 1943 F.C. 8 at p. 11

[30] Narain Vs. Province of Bihar, A.I.R. 1942 F.C. 8 at p. 11.

[31] Nagappa Narain Vs. Nukamba, 53 Bom. L.R. 177 Rodha Ammal.

[32] Angarahala vs. Debarata, A.I.R. 1951 S.C. 293.

[33] AIR 1944 F.C. 73

[34] 1944 FCR 317

[35] In re Kerala Education Bill 1957 (1959) SCR 995 at P 1015

[36] In the U.P. Legislature case, 1965 S.C.745

[37] A.I.R. 1951 SC 332

[38] A.I.R. 1958 SC 956

[39] A.I.R. 1960 SC 845

[40] A.I.R. 1963 SC 1760

[41] A.I.R. 1965 SC 745

[42] A.I.R. 1974 SC 1682
[43] A.I.R. 1979 SC 478
[44] Sp. ref. no. (1) of 1982.
[45] A.I.R. 1992 SC 522
[46] (1993) 1 SCC 642
[47] A.I.R. 1999 SC 1
[48] SCC (2004) 4 at p. 489.
[49] (2002) 8 SCC 237 : (2002) 8 JT 389
[50] MANU/SC/1450/2016
[51] All-Pakistan Legal Decision 1955 (I) 455.
[52] Ibid, p. 461.

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