PRESIDENTIAL REFERENCE UNDER ARTICLE 143 OF THE CONSTITUTION : CURRENT ISSUES AND PERSPECTIVE[1]

- **Dr. Justice Vineet Kothari**

(A) INTRODUCTION

Besides original jurisdiction under Articles 32, 131 and 136 of the Constitution and appellate jurisdiction under Articles 132,133, 134 & 134A of the Constitution, the Supreme Court of India also has ***advisory jurisdiction*** under Article 143 of the Constitution of India which with its two sub-clauses has cast twin obligations or duty upon the Supreme Court to advise the President on the question of law or fact, which has arisen or is likely to arise of such nature and of such public importance that the President feels it expedient to seek the opinion of the Supreme Court upon it.

(B) DISCRETIONARY AND MANDATORY POWERS UNDER ARTICLE 143

While Article 143 (1) of the Constitution gives discretion to the Apex Court to report its opinion to the President upon such reference after such hearing as it thinks fit, Article 143(2) of the Constitution is couched in mandatory form and stipulates that Supreme Court shall report its opinion to the

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President of a dispute of the kind referred to under Article 131 Proviso of the Constitution. Article 131 of the Constitution, which enacts the original jurisdiction of the Supreme Court, by its Proviso stipulates that such original jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant etc. entered into or executed before the commencement of the Constitution and which continues after such commencement. Thus, on the issues where the Supreme Court does not have original jurisdiction for which the first part of the Article 131 provides for any dispute between the Government of India and one or more States; or between the Government of India and any State or States on one side and one or more States on the other; or between two or more States, then if such dispute arises with regard to any such treaty etc. and the President seeks the opinion of the Supreme Court, the Supreme Court is obligated to give such opinion.

(C) PROCEDURE FOR HEARING

Article 145(3) and (4) which prescribes Rules of the Court further provides that the minimum number of Judges to give such opinion shall be five and as per Article 145(3) & Article 145(4) provides that such opinion shall be delivered in open court.

(D) DECISION OF PRESIDENT TO REFER UNDER ARTICLE 143 FINAL

This advisory jurisdiction of the Hon'ble Supreme Court depends upon the formation of the opinion of the President upon 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, whether existing in *praesenti* 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 undoubtedly to be used sparingly and 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. So far as this power has been used by the President of India only sparingly and in exception cases only and there are as many as ***11 reported cases only of such references*** under Article 143 of the Constitution and ***02 references are stated to be pending*** before the Apex Court. The brief discussion of each of the 11 References opined by the Apex Court and two pending matters would be made hereinafter. The latest being in 2G Spectrum matter, which only few days before on 11/5/2012 to be precise, was admitted and registered as Special Reference No.1/2012 on the various questions arising out of the decision of Supreme Court dated 12.2.2012 in the

case of Centre of Public Interest Litigation vs. Union of India reported in (2012) 3 SCC 1, whereby, the two judges bench of the Apex Court quashed 122 controversial telecom licences granted during the period of Telecom Minister A. Raja in the year 2008.

(E) PARAMETERS OF ADVISORY JURISDICTION UNDER ARTICLE 143 OF THE CONSTITUTION

(i) The scope of Article 143 (1) is quite broad. There is no condition that the President can refer only such questions as pertain to his powers, functions and duties or those of the Central Government. The President can seek the opinion of the Supreme Court ***on any question of law or fact*** which appears to him to be of such a nature and of such ***public importance*** that it is ***expedient to obtain*** the Court's opinion. Of course, the President acts on the advice of the Cabinet in this behalf and thus questions relating to constitutional validity of the proposed legislation, powers, privileges and immunities of State Legislatures have been sought by the President.

(ii) Such questions of fact or law might have actually arisen or may even arise in future and, therefore, such reference can be even on the basis of a hypothetical situation and in such circumstances, the court has to act upon certain assumptions and hypothesis while giving its opinion after giving hearing, as it thinks fit. This proposition that ***questions referred are likely to***

arise in future was upheld by Supreme Court in ***Gujarat Assembly matter***[2] ***(AIR 2003 SC 8)***.

(iii) The ***Supreme Court cannot be asked to reconsider its earlier*** decisions by making reference under Article 143(1) of the Constitution of India and the President can refer such legal question as has not been decided by the Court earlier. The advisory jurisdiction, distinct from the adjudicatory jurisdiction, cannot be used as to convert the advisory jurisdiction into either appellate jurisdiction or review jurisdiction of the Supreme Court. The Court held in ***Cauvery Water Disputes case***[3] ***(AIR1992 SC 522)*** that otherwise it will cause serious inroad into the independence of the judiciary.

(iv) The Supreme Court cannot travel beyond the reference made by the President under Article 143(1) of the Constitution. However, the circumstance that the President has referred only some questions regarding the validity of a Bill or an Act, and not others which also appear to arise, is no good reason for declining to entertain the reference. In ***Kerala Education Bill's case***[4] ***(AIR 1958 SC 956)***, Chief Justice A.N.Ray opined that this Court is "bound by the recitals

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[2] (2002) 8 SCC 237 : (2002) 8 JT 389,

Decided on 28/10/2002

[3] 1991 (2) SCALE 1049 : 1993 SUPP (1) SCC 96 : (1991) SUPP 2 SCR 497,

Reference made on 17/7/1991, Decided on 22/11/1991.

[4] (1959) 1 SCR 995,

Reference decided on 22/5/1998.

in the order of reference under Article 143(1). We accept the statement of facts set out in the reference. The truth or otherwise of the facts cannot be enquired or gone into nor can this Court go into the question of bonafides or otherwise of the authority making the reference."

(v) In Special Reference No.1/93 in ***Ramjanmbhoomi, M.Ismail Faruqui vs. Union of India***[5] ***(AIR 1995 SC 605 : (1994) 6 SCC 360)*** the ***Apex Court even refused to answer the reference*** because the court found that the questions were too abstract or speculative or hypothetical and if a reference made to it is "vague and general" & the court considers it `not proper or possible' to answer the reference, the court may return it by pointing out the impediments in answering it.

(vi) There is a reason for dichotomy between Articles 143(1) and 143(2) of the Constitution. Whereas it may be possible to agitate before the courts the matter falling under Article 143(1) by adopting suitable procedures and techniques, the matter referred to in Article 143(2) are banned from judicial scrutiny of the Supreme Court, High Court or any other court because of the operation of Articles 131 and 363 and there is no other way to get a judicial verdict on these matters, if it ever becomes necessary, except through the machinery of Article 143(2). Hence, the Supreme Court is constitutionally obligated to give its

[5] (1994) 6 SCC 360 : (1994) SUPP 5 SCR 1

Reference made on 7/1/1993, Decided on 24/4/1994.

opinion, if ever it is sought on the type of questions referred to in Article 143(2) of the Constitution. However, so far no reference has been made under Article 143(2) of the Constitution of India.

(vii) Article 143(1) of the Constitution is a close replica of Section 213 of the Government of India Act, 1935 with one major difference being that while only a question of law could be referred to Federal Court under 1935 Act, both the questions of law or of fact can now be referred to Supreme Court for advice under Article 143 of Constitution of India.

(F) HISTORY OF REFERENCE PRIOR TO COMING INTO FORCE THE CONSTITUTION

In ***Re Levy of Estate Duty – 1944 FCR 317***[6], the Federal Court's opinion regarding levy of Estate Duty influenced the shaping and formulation of the entries regarding estate duty and succession duty in the Constitution.

In the said reference, dealing with the parallel provision contained in Section 213 of the Government of India Act, 1935, wherein, Governor General has power to refer and seek opinion of the Court, the Court opined that when Parliament has thought fit to enact section 213 of the said Act, the Court cannot insist on the inexpediency of the advisory jurisdiction. Nor does it assist

[6] 1944FCR 317 : AIR 1944 FC 73

to say that the opinions expressed by the Court on the questions referred "will have no more effect than the opinions of the law officers"

Referring to the objection as regards questions related to contemplated legislation and not to the validity or operation of a measure already passed, the learned Chief Justice observed at p. 321 :-

"The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection. Section 213 empowers the Governor-General to make a reference when questions of law are "likely to arise "..... In this class of cases, the reference should, in the very nature of things, be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force."

The Federal Court's opinion on the validity of ***Hindu Women's Right to Property Act,1937***[7] ***(1941 FCR 12)*** by interpreting it restrictively and confining its operations to such property as fell within the Central sphere, saved the great measure of social reform which had been achieved after years of hard toil on the part of the social reformers. Gwyer, C.J. in the said reference held as under:

> "*1. This is a special reference which His Excellency the Governor-General has been pleased to make to the Court*

[7] 1941 FCR 12 : AIR 1941 FC 72 : MANU/FE/0003/1941

Under Section 213, Constitution Act. The questions referred are:

(1) Does either the Hindu Women's Rights to Property Act, 1937(Central Act, 18 of 1937), which was passed by the Legislative Assembly on 4th February 1937, and by the Council of State on 6th April 1937, and which received the Governor-General's assent on 14th April 1937, or the Hindu Women's Rights to Property (Amendment) Act, 1938(Central Act, 11 of 1938), which was passed In all its stages after 1st April 1937, operate to regulate (a) succession to agricultural land? (b) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in Schedule 7, Government of India Act, 1935?

21. The Court is therefore of opinion that the answers to the questions comprised in the special reference are as follows:

(1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, (a) do not operate to regulate succession to agricultural land in the Governors' Provinces; and (b) do operate to regulate devolution by survivorship of property other than agricultural land.

(2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7

of List 3, the Concurrent List. The Court will report to His Excellency accordingly."

(G) REFERENCES SO FAR MADE TO SUPREME COURT IN 60 YEARS OF HISTORY OF CONSTITUTION

The following 11 references were made under Article 143(1) of the Constitution of India and no reference so far has been made by the President under Article 143(2) of the Constitution.

11.1 In ***Re the Delhi Laws Act, 1951***[8]***(AIR 1951 SC 322)***. The Supreme Court's pronouncement in the Delhi Laws Act case gave timely guidance to the Central Executive regarding the scope and extent of is legislative power under the Delhi Laws Act. It thus avoided embarrassment to the Central Government and difficulties to the people which might have arisen had any Act extended to Delhi or any other Part C State were to be declared ultra vires.

The said reference was made by the President of India under Article 143 of the Constitution for the Court's opinion on the three following questions:-

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[8] (1951) 2 SCR 747

Reference made on 7/1/1951

Decided on 23/5/1951

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

(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act ?

(3) Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament ?"

The questions referred in the reference related to the validity of Section 7 of the Delhi Laws Act and Section 2 of the Ajmer-Marwar (Extension of Laws) Act, 1947 giving power to the Government to extend to Delhi and Ajmer-Marwar, respectively the enactments already in force in other parts of the country with such restrictions and modifications as the Government thinks fit. The main issue involved in all the three questions referred for the opinion of the Supreme Court in the instant case related to the delegation of legislative power.

11.2 ***Kerala Education Bill, 1958***[9] ***(AIR 1958 SC 996)***, the Supreme Court's opinion was sought on constitutional validity of certain provisions of Kerala Education Bill, which had been reserved by the Governor for the

[9] AIR 1958 SC 996 (see also foot note 4 at page 6)

President's consideration. The public opinion in Kerala was greatly agitated because of the said Bill and reference of the matter to the Court saved the Central Government from political embarrassment as well as mollified such public opinion. The public agitation was on account of stringent control of the State over the management of Educational Institutions in the State, aided or recognised, in comparison to such control which would apply to recognised Institutions and, therefore, the width of the power of control of State thus sought to be assumed by the State by the said Kerala Education Bill evidently appeared to the President to be calculated to raise doubts as to the constitutional validity of some of the clauses of the said Bill on the ground of apprehended infringement of some of the fundamental rights guaranteed to the minority communities by the Constitution. Therefore, the reference was made under Article 143(1) of the Constitution and while entertaining the said reference, the Supreme Court also delineated the scope of Article 143(1) by (i) rejecting the contention that what was referred to the Court for its opinion was not a statute already put into force, but a Bill which was yet to be enacted. The Court held that Article 143(1) does contemplate the reference of a question of law that is "likely to arise" and (ii) that the reference cannot be said to be incomplete merely because question of validity of some other provisions of the Bill also arises but such questions were not referred to the Court and the Court held that it is for the President to determine what questions should be referred and if he

does not entertain any serious doubt on the other provisions, it is not necessary for him to refer such questions and the Court cannot go beyond the reference and discuss those problems.

While holding that the provisions of sub-clause (5) of clause 3 read with clause 36 & clause 15 of the Kerala Education Bill do not offend the mandate of Article 14 of the Constitution of India, the first & third questions of the reference were answered in negative.

The question no.2 whether sub-clause (5) of clause 3, sub-clause (3) of clause 8 and clauses 9 to 13 of the Kerala Education Bill, or any provisions thereof, offend clause (1) of Article 30 of the Constitution in any particulars or to any extent, the Court opined as under:

> *"(i) Yes, so far as Anglo-Indian educational institutions entitled to grant under Art. 337 are concerned. (ii) As regards other minorities not entitled to grant as of right under any express provision of the Constitution, but are in receipt of aid or desire such aid and also as regards Anglo-Indian educational institutions in so far as they are receiving aid in excess of what are due to them under Art. 337, clauses 8(3), and 9 to 13 do not offend Art. 30(1) but clause 3(5) in so far as it makes such educational institutions subject to clauses 14 and 15 do offend Art. 30(1). (iii) Clause 7 (except*

sub-cls. (1) and (3) which applies only to aided schools), clause 10 in so far as they apply to recognised schools to be established after the said Bill comes into force do not offend Art. 30(1) but clause 3(5) in so far as it makes the new schools established after the commencement of the Bill subject to clause 20 does offend Art. 30(1).”

The fourth question relating to clause 33 of the said Bill, which provides that notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, ***no courts can grant any temporary injunction or make any interim order*** restraining any proceedings which is being or about to be taken under the Act, the Supreme Court negating the contention opined that since Article 226 is an over-riding power entitling the High court to issue writ, orders and directions to subordinate court, tribunals and authorities notwithstanding any rule or law to the contrary, ***clause 33 of the said Bill is subject to Article 226 of the Constitution***.

11.3 In ***Re Berubari’s case in 1960[10] (AIR 1960 SC 845)*** the Supreme Court gave timely guidance to the Central Government as to how it should implement the Indo-Pakistan Boundary Agreement between the Prime Ministers of India and Pakistan. Had the agreement been implemented in the way the government

[10] (1960) 3 SCR 250,

Reference decided on 14/3/1960.

was contemplating by enactment of an Act, a great embarrassment would have been caused to it had the Act been declared unconstitutional later, as it was bound to be in view of the Supreme Court's opinion.

The following three questions were referred in the said case:

> *(1) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union ?*
>
> *(2) If so, is a law of Parliament relatable to article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with article 368 of the Constitution necessary, in addition or in the alternative ?*
>
> *(3) Is a law of Parliament relatable to article 3 of the Constitution sufficient for implementation of the agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with article 368 of the Constitution necessary for the purpose, in addition or in the alternative?*

Answering these questions, the Supreme Court observed that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and the relevant part of

First Schedule to the Constitution as it would lead to diminution of the territory of India. The court further opined that a law of Parliament relatable to Article 368 of the Constitution would be competent and necessary for implementation of Agreement, whereas, similar law of Parliament relatable to Article 3 of the Constitution would be incompetent. The Supreme Court further clarified that law of Parliament relatable to both Articles 368 and Article 3 would be necessary only if Parliament chooses first to pass a law amending Article 3 and then follow it up with a law relatable to amended Article 3 to implement the Agreement.

11.4 In ***Re Sea Customs Act case in 1962[11] (AIR 1963 SC 1760)*** the Supreme Court forwarded its opinion regarding the validity of provisions of a draft Bill seeking to amend certain provisions of the Sea Customs Act, 1878 and the Court was thus able to clarify a knotty problem of Centre-State relationship.

The reference was made by the President under Article 143 of the Constitution of the following questions for the opinion of the Supreme Court:

> *"(1) Do the provisions of article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State*

[11] (1964) 3 SCR 787,

Reference made on 19/4/1962,

Decided on 10/5/1963.

used for purposes other than those specified in clause (2) of that article ?

(2) Do the provisions of article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and sub-section (1A) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of article 289 of the Constitution of India ?"

The Hon'ble Supreme Court while answering the question, opined as under:

"Art. 289(1) being in the nature of an exception to the exclusive field of legislation reserved to Parliament, the exception has to be strictly construed, and therefore, limited to taxes on property and on income of a State. In other words, the immunity granted in favour of States has to be restricted to taxes levied directly on property and income. Therefore, even though import and export duty or duties of excise have reference to goods and commodities, they are not taxes on property directly and are not within the exemption in Art. 289(1)".

".....For the reasons given above, it must be held that the immunity granted to the States in respect of Union

taxation does not extend to duties of customs including export duties or duties of excise. The answer to ***the three questions referred to us must therefore, be in the negative".***

11.5 In ***Re Keshav Singh's case in 1965[12] (AIR 1965 SC 745)*** the following questions were referred for the opinion of the Hon'ble Supreme Court:

1) Whether, on the facts and circumstances of the case, it was competent for the Lucknow Bench of the High Court of Uttar Pradesh consisting of the Hon'ble Mr. Justice N. U. Beg and the Hon'ble Mr. Justice G. D. Sahgal, to entertain and deal with the petition of Mr. Keshav Singh challenging the legality of the sentence of imprisonment imposed upon him by the Legislative Assembly of Uttar Pradesh for its contempt and for infringement of its privileges and to pass orders releasing Mr. Keshav Singh on bail pending the disposal of his said petition;

(2) Whether, on the facts and circumstances of the case, Mr. Keshav Singh, by causing the petition to be presented on his behalf to the High Court of Uttar Pradesh as aforesaid, Mr. B. Soloman, Advocate, by presenting the said petition and the said two Hon'ble Judges by entertaining and dealing with the said petition and ordering the release of Shri Keshav Singh on bail pending disposal of the said petition committed contempt of the Legislative Assembly of Uttar Pradesh;

[12] Reference made on 26/3/1964,

Decided on 30/9/1964.

(3) Whether, on the facts and circumstances of the case, it was competent for the Legislative Assembly of Uttar Pradesh to direct the production of the said two Hon'ble Judges and Mr. B. Soloman, Advocate, before it in custody or to call for their explanation for its contempt;

(4) Whether, on the facts and circumstance of the case, it was competent for the Full Bench of the High Court of Uttar Pradesh to entertain and deal with the petitions of the said two Hon'ble Judges and Mr. B. Solomon, Advocate, and to pass interim orders restraining the Speaker of the Legislative Assembly of Uttar Pradesh and other respondents to the said petitions from implementing the aforesaid direction of the said Legislative Assembly; and

(5) Whether a Judge of a High Court who entertains or deals with a petition challenging any order or decision of a Legislature imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt of for infringement of its privileges and immunities or who passes any order on such petition commits contempt of the said Legislature and whether the said Legislature is competent to take proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities."

This case gave rise to a situation of complete deadlock between the U.P. Legislature and the Allahabad High Court over the relative Court-Legislature role in the matter of legislative privileges. The U.P.Legislature issued contempt

notices to one Keshav Singh, which order was stayed by the two Judges bench of Allahabad High Court and thereupon the two Judges by name were summoned to the State Legislature. Such resolution was stayed by the Full Court of Allahabad High Court and thus, a crises arose threatening the very basis of the Constitution and resort to the advisory opinion was adopted by the President as satisfactory way out of the impasse.

The Supreme Court was of the opinion that the Lucknow Bench of the High Court of Uttar Pradesh was competent to entertain and deal with the petition of Keshav Singh. It was also stated that the act of the said Judges and the Advocate (who filed the petition on behalf of Keshav Singh), does not amount to contempt of the Legislative Assembly of Uttar Pradesh.

11.6 In ***Re President Poll[13] – (AIR 1974 SC 1682)*** the President referred an important question for opinion as to whether the election of President should be held in the absence of an elected State Assembly, since the State of Gujarat was at that time under Presidential rule as its Legislature had been dissolved. The Central Government was of the opinion that on a true and correct interpretation of Articles 54, 55, 56 and 71 of the Constitution, the election of President could be held in such a situation but the Central

[13] (1974) 2 SCC 33 : (1975) 1 SCR 504,

Reference decided on 5/6/1974.

Government thought it fit to seek the advice of Supreme Court, so that all doubts might be set at rest, lest subsequent Presidential election was declared invalid on the ground of non-existence of a State Legislature.

The Hon'ble Supreme Court answered the reference in following manner:

> *"1. Only such persons who are elected members of both Houses of Parliament and the Legislative Assemblies of the States on the date of the election to fill the vacancy caused by the expiration of the term of office of the President will be entitled to cast their votes at the election.*
>
> *2. Subject to the aforesaid observation as to the effect of the dissolution of a substantial number of the Legislative Assemblies the vacancies caused by the dissolution of an Assembly or Assemblies will be covered by Article 74(4).*
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> *3, 4 and 5. The election to the office of the President must be held, before the expiration of the term of the President notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved. The election to fill the vacancy in the office of the President is to be held and completed having regard to Articles 62(1), 54, 55 and the Presidential and Vice-Presidential Elections Act, 1952.*
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> *6. Article 56(1)(c) applies to a case where a successor as explained in the foregoing reasons has not entered to his*

office and only in such circumstances can a President whose term has expired continue."

11.7 In ***Re the Special Courts Bill***[14] ***(AIR 1979 SC 478)*** after emergency during 1975-77, the newly installed Janata Government decided to try certain persons holding high political offices during the emergency and to expedite their trial, it decided to set up special courts. The Special Courts Bill was referred to the Court for advice on its constitutionality and the Court suggested that some modifications be made therein and these modifications were duly incorporated into the Bill when it was enacted into an Act later, which saved it from being declared unconstitutional. In the said matter, the Court rejected the contention like reference being premature and too general and vague and also the contention that since the Parliament was seized of the Bill, it was the exclusive function of the Parliament to debate the same.

The following question was referred to the Supreme Court for its opinion:

"(1) Whether the Bill i.e, THE SPECIAL COURTS BILL, 1978 or any of the provisions thereof, if enacted, would be constitutionally invalid ?"

The Surpeme Court suggested the following modifications in the Special Courts Bill, 1978.

[14] (1979) 1 SCC 380 : (1979) 2 SCR 476,

Reference made on 1/8/1978,

Decided on 1/12/1978.

a) That there is no provision in the Bill for the transfer of cases from one Special Court to another when the accused may entertain a reasonable apprehension on account of attending circumstances that he will not get a fair trial.

b) The provision for appointmnt of retired Judge may be violative of Article 21. The court expressed that a retired Judge would hold the office during the pleasure of the Government but the pleasure doctrine is subversive of judicial Independence.

c) Mere consultation with the Chief Justice of India in appointing the Judge is not a sufficient safeguard, because, through ordinarily, as a convention his advice is accepted, such convention may be broken.

Opining on the constitutionality of the Bill, the Supreme Court said that it does not violate Article 14 of the Constitution but the offences committed before proclamation of the emergency should not be included.

Further, opining on the contention regarding propriety of refering hypothetical questions, the Supreme Court said that answer by the Court would not be futile since Parliament is bound to take notice of the defects pointed out by the Supreme Court.

11.8 In ***Re Cauvery Water Disputes Tribunal's case 1992[15] (AIR 1992 SC 522)*** the main question referred to the Court was whether the Tribunal

[15] AIR 1992 SC 522 (see also foot note 3 at page 5)

established under the Inter-State Water Disputes Act,1956 has ***power to grant interim relief*** to the parties to the disputes. In this case the Court held that Tribunal has power to grant interim relief, however, the Court refused to express any definitive opinion on the point as to whether the opinion given by the Supreme Court on a reference under Article 143 is binding on all courts or not for two reasons: (i) the specific question did not form part of Presidential Reference in the instant case; and (ii) any opinion expressed by the Court in the instant case would again be advisory and the Court left the matter where at that.

The following questions were referred by the President for the opinion of Supreme court in the said reference regarding validity of Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991:-

> *"(1) Whether the Ordinance and the provisions thereof are in accordance with the provisions of the Constitution;*
>
> *(2) (i) Whether the Order of the Tribunal constitutes a report and a decision within the meaning of Section 5(2) of the Act; and*
>
> *(ii) Whether the Order of the Tribunal is required to be published by the Central Government in order to make it effective;*
>
> *(3) Whether the Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute."*

The Hon'ble Supreme Court by holding that the Ordinance in effect overrides the interim order made by the Tribunal constituted under the Parliamentary Law and same having extra territorial operation and runs counter to the binding decision of the Supreme court regarding Tribunal's power to grant interim relief and it also being against the principles of natural justice and basic rule of law, the court declared it unconstitutional while answering question no. 1 of the reference.

The Supreme Court further opined that the order of the Tribunal constitutes report and decision within the meaning of section 5 (2) of the Inter-State Water Disputes Act, 1956, and therefore, the same is required to be published by the Central Government in order to make it effective and the said Tribunal is competent to grant interim relief upon a reference made by the Central Government, while answering the questions No. 2 and 3 of the said reference.

11.9 ***Special Reference No.1/1993 relating to Ram Janmabhum[16] (1993) 1 SCC 642*** is the only reference under Article 143(1) made by the President which was returned by the Supreme Court as superfluous and unnecessary. The question referred to the Court was:- "Whether a Hindu

[16] (1993) 1 SCC 642 (see also foot note 5 at page 6)

Temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi – Babri Masjid in the area on which the structure stood."

The Supreme Court refused to give its opinion on this reference for several reasons. According to majority opinion, the matter under reference was already subject matter of litigation in the lower courts, wherein, the dispute between the parties would be adjudicated and, therefore, the Reference under Article 143(1) of the Constitution was found to be superfluous and unnecessary.

The other reasons of refusal to give answer were:-

(i) Reference favoured one religious community and disfavoured another. The purpose of the reference was, therefore, opposed to secularism and was unconstitutional and reference served no constitutional purpose.

(ii) The Government proposed to use the Court's opinion as a springboard for negotiations. It did not propose to settle the dispute in terms of the Court's opinion.

(iii) To answer the question it would be necessary to take evidence of experts, such as historians, archaeologists and have them cross examined and

(iv) The principal protagonists of the two stands would not appear in the reference and opinion expressed by the Supreme Court would be criticised by one or both the sides. This would impair the dignity and honour of the Court.

11.10 In ***Re Principles and Procedure regarding appointment of Supreme Court and High Court Judges 1998*** [17]***(AIR 1999 SC 1)***. In Advocates-on- Record Association vs. Union of India (***1994 (4) SCC 441 = AIR 1994 SC 268)***, the Supreme Court had laid down the procedural norms for appointment of Judges of Supreme Court and High Court. The decision was rendered by 9 Judges bench and five judgments were delivered. As doubts arose about the interpretation of the law laid down by the Supreme Court in the above mentioned case, the President made a reference to the Supreme Court under Article 143(1) of the Constitution seeking clarification on certain points. Nine questions were referred to the Court for advisory opinion and these questions pertained to following three main points:-

[17](1998) 7 SCC 739 : 1998 (5) SCALE 36 : RLW 1999 (1) SC 168,

Reference made on 23/7/1998,

Decided on 28/10/1998.

(i) Consultation between the Chief Justice of India and other Judges in the matter of appointment of the Supreme Court and the High Court Judges;

(ii) Transfer of High Court Judges and judicial review thereof; and

(iii) The relevance of seniority in making appointments to the Supreme Court.

The following questions were referred for the opinion of Hon'ble Supreme Court:-

> *"(1) Whether the expression "consultation with the Chief Justice of India" in articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles;*
>
> *(2) Whether the transfer of judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that "such transfer is not justiciable on any ground" and its further observation mat limited judicial review is available in matters of transfer, and the extent and scope of judicial review;*
>
> *(3) Whether article 124(2) as interpreted in the said judgment requires the Chief Justice of India to consult*

only the two seniormost Judges or whether there should be wider consultation according to past practice;

(4) Whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment;

(5) Whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the concerned High Court refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other Court;

(6) Whether in light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the 'strong cogent reason' required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her;

(7) Whether the government is not entitled to require that the opinions of the other consulted Judges be in

writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views;

(8) Whether the Chief Justice of India is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India;

(9) Whether any recommendations made by the Chief Justice of India without complying with the norms and consultation process are binding upon the Government of India?"

The Hon'ble Supreme Court answered the reference in following manner:

"The questions posed by the Reference are now answered, but we should emphasise that the answers should be read in conjunction with the body of this opinion:

1. The expression "consultation with the Chief justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said Articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High

Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.

7. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.

8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India."

11.11 In ***Gujarat Assembly Election***[18] matter (***2002) 8 SCC 237*** reference under Article 143(1) arose as a result of ***premature dissolution of the***

[18] (2002) 8 SCC 237 (see also foot note 2 at page 5)

Gujarat Legislative Assembly and the main question raised in the reference was regarding ***time frame within which the election to the Assembly must be held.*** The Court opined that Article 174 and 324 of the Constitution operate in different fields and, therefore, Article 174 applies to only `Live Assembly' and not `Dissolved Assembly' and, therefore, the duty of Election Commission to hold fair elections under Article 324 of the Constitution is not a power curtailed by Article 174 of the Constitution, which provides that the gap between two sittings of Legislative Assembly may not be beyond the period of six months.

The Supreme Court opined with respect to the reference made as:-

> *"A plain reading of Article 174 shows that it stipulates that six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session. It does not provide for any period of limitation for holding fresh election in the event a Legislative Assembly is prematurely dissolved. It is true that after commencement of the Constitution, the practice has been that whenever either Parliament or Legislative Assembly were prematurely dissolved, the election for constituting fresh Assembly or Parliament, as the case may be, were held within six months from the date of the last sitting of the dissolved Parliament or Assembly. It appears that the Election Commission's interpretation of Article 174 that fresh elections for constituting Assembly are required to be held within six*

months from the date of the last sitting of the last session was very much influenced by the prevailing practice followed by the Election Commission since enforcement of the Constitution. At no point of time any doubt had arisen as to whether the interval of six months between the last sitting of one session and the first sitting of the next session of the Assembly under Article 174(1) provides a period of limitation for holding fresh election to constitute new Assembly by the Election Commission in the event of a premature dissolution of Assembly. Since the question has arisen in this Reference and also in view of the fact that Article 174 on its plain reading does not show that It provides a period of limitation for holding fresh election after the premature dissolution of the Assembly, it is necessary to interpret the said provision by applying accepted rules of interpretations".

(H) PENDING REFERENCES

Presently, two references are pending before the Hon'ble Supreme Court; (i) ***2G Spectrum matter*** & (ii) ***Punjab Termination of Agreements Act, 2004***.

(i) The need of referring the 2G Spectrum matter for the opinion of Hon'ble Supreme Court arose after the judgment of Hon'ble Supreme Court in the case of ***Centre for Public Interest Litigation vs. Union of India decided on 02.02.2012***, whereby, 122 licences were cancelled by the Supreme Court on the

ground that the policy of the Central Government in granting such licences was not fair and reasonable.

The ***Office report dated 9th May, 2012*** of the Registar placed for the directions of Hon'ble the Supreme Court containing the questions raised in the said Reference reads as under:-

"OFFICE REPORT FOR DIRECTIONS

The President of India has in exercise of the powers conferred upon her under Article 143(1) of the Constitution of India referred the following questions to this Court for consideration and report thereon:

(1) Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auction?

(2) Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?

(3) Whether the enunciation of broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling poi.cy decisions forumulated and approaches taken by various successive governments over the years for valid considerations; including lack of public resources and the need

to resort to innovative and different approaches for the development of various sectors of the economy?

(4) What is the premissible scope of interference by courts with policy making by the Government including methods for disposal of natural resources?

(5) Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?

(6) If the answers to the aforesaid questions lead to an affirmation of the judgment dated 02.02.2012 then the following questions may arise, viz.

> *(i) Whether the judgment is required to be given retrospective effect so as to unsettle all licences issued and 2G spectrum (800, 900, and 100 MHz bands) allocated in and after 1994 and prior to 10.01.2008?*
>
> *(ii) Whether the allocation of 2G spectrum in all circumstances and in all specific cases for different policy considerations would nevertheless have to be undone?*
>
> *And specifically*
>
> *(iii) Whether the telecom licences granted in 1994 would be affected?*

(iv) Whether the telecom licences granted by way of basic licences in 2001 and licences granted between the period 2003-2007 would be affected?

(v) Whether it is open to the Government of India to take any action to alter the terms of any licence to ensure a level playing field among all existing licensees?

(vi) Whether dual technology licences granted in 2007 and 2008 would be affected?

(vii) Whether it is necessary or obligatory for the Government of India to withdraw the Spectrum allocated to all existing licencees or to charge for the same with retrospective effect and if so on what basis and from what date?

(7) Whether, while taking action for condut of auction in accordance with the orders of the Supreme Court, it would remain permissible for the Government to:

(i) Make provision for allotment of Spectrum from time to time at the auction discovered price and in accordance with laid down criteria during the period of validity of the auction determined price?

(ii) Impose a ceiling on the acquisition of Spectrum with the aim of avoiding the emergence of dominance in the market by any licensee/applicant duly taking

into consideration TRAI recommendations in this regard?

(iii) Make provision for allocation of Spectrum at auction related prices in accordance with the laid down criteria in bands where there may be inadequate or no competition (for e.g.there is expected to be a low level competition for CDMA in 800 MHz band and TRAI has recommended an equivalance ratio of 1.5 or 1.3x1.5 for 800 MHz and 900 MHz bands depending upon the quantum of spectrum held by the licensee that can be applied to auction price in 1800 MHz band in the absence of a specific price for those bands)?

(8) What is the effect of the judgment on 3G Spectrum acquired by entities by auction whose licences have been quashed by the said judgment?"

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

"PRESIDENT

REPUBLIC OF INDIA

WHEREAS the Indus basin comprises the rivers Indus, Jhelum, Chenab, Ravi, Beas and Sutlej;

WHEREAS the Indus Waters Treaty 1960 was entered into between the Governments of India and Pakistan on 19th September 1960, under which India is entitled to the free, unrestricted use of waters of Ravi, Beas and Sutlej till they finaly cross into Pakistan.

WHEREAS while at the time of signing the said Treaty, the waters of Sultlej had already been planned to be utilised for the Bhakra-Nangal Project, the surplus flow of rivers Ravi and Beas, over and above the prepartition use, was allocated by the Agreement in 1955 (Annexure I) between the concerned States as follows, namely:

Punjab	*7.20 MAF (including 1.30 MAF for PEPSU)*
Rajasthan	*8.00 MAF*
Jammu & Kashmir	*0.65 MAF*

	15.85 MAF

WHEREAS after the aforesaid allocation, there was a reorganisation of the State of Punjab under the Punjab Reorganisation Act, 1966 (31 of 1966) as a result of which successor States namely, State of Punjab and State of Haryana were cerated and it became necessary to determine the respective shares of the successor States out of the quantum of water which could have become available in accordance with the aforesaid allocation for use in the erstwhile State of Punjab and

when the successor States failed to reach an agreement, a Notification dated 24th March 1976 (Annexure II) was issued by the Central Government under Section 78 of the Punjab Reorganisation Act, 1966 under which the State of Haryana was allocated 3.5 MAF quantity of water;

WHEREAS to give effect to the allocation of 3.5 MAF of water to the State of Haryana under the said 1976 Notification, construction of the Sutlej Yamuna Link Canal (hereinafter called SYL Canal) was started by the State of Harayana in their portion after the 1976 Notification. The construction of SYL Canal was also started by Punjab in their portion in early eighties;

WHEREAS the States of Punjab, Haryana and Rajasthan entered into agreement dated 31.12.1981, a copy whereof is annexed hereto as Annexure III, by which the States of Punjab, Haryana and Rajasthan, in view of the overall national interest and optimum utilisation of the waters, agreed on the reallocation of the waters among the States as follows:

Share of Punjab	*:*	*4.22 MAF*
Share of Harayana:	*3.50 MAF*	
Share of Rajasthan:	*8.60 MAF*	
Quantity earmarked for Delhi water supply	*:*	*0.20 MAF*
Share of Jammu & Kashmir	*:*	*0.65 MAF*

Total		*17.17 MAF*

WHEREAS it was also agreed under the aforesaid 1981 agreement that the SYL Canal Project would be completed in a time bound manner within a maximum period of two years from the date of signing of the agreement so that the State of Haryana is enabled to draw its allocated share of water. This agreement is in use for deciding the periodical distribution of water among the concerned States by the Bhakra Beas Management Bord;

WHEREAS an accord called the 'Punjab Settlement' was signed on 24th July, 1985 to resolve the issues relating to the State of Punjab which is annexed as Anexure IV;

WHEREAS paragraph 9.1 of the 'Punjab Settlement' provide that farmers of Punjab, Haryana and Rajasthan will continue to get water not less than what they are using from the Ravi-Beas System as on 1.7.1985, though waters used for consumptive purposes will also remain unaffected and the quantum of usages claimed shall be verified by the Tribunal referred to in paragraph 9.2 of the Settlement under which the claims of Punjab and Haryana regarding their shares in the remaining waters will be referred for adjudication to a Tribunal;

WHEREAS to give effect to paragraphs 9.1 and 9.2 of the 'Punjab Settlement', Section 14 was inserted in the Inter-State Water Disputes Act, 1956 under which Eradi Tribunal was constituted for verification of the quantum of usage of water claimed by the farmers of Punjab, Haryana and Rajasthan from the Ravi-Beas System as on 1st July, 1985 and to adjudicate on the claims of Punjab and Haryana regarding shares in their

remaining waters. The Tribunal forwarded a report in January 1987. References of the States of Punjab, Haryana and Rajasthan and the Central Government seeking clarifications/guidance on certain points of the report was made to the Tribunal in August 1987 under relevant provisions of the Inter-State River Water Disputes Act, 1956. These references are under the consideration of the Tribunal at present;

WHEREAS it was also agreed under paragraph 9.3 of the 'Punjab Settlement' that the construction of the SYL Canal shall continue and it shall be completed by 15th August 1986;

WHEREAS the SYL Canal could not be completed as the works came to a halt following the killings of the Chief Engineer and a Superintending Engineer of the project in July, 1990 and were not resumed by the Government of Punjab subsequently and the State of Haryana filed Suit No.6 before this Hon'ble Court praying for early completion of the SYL Canal in Punjab territory;

WHEREAS the said Suit was decreed by this Hon'ble Court by its order dated 15.01.2002, a copy whereof is enclosed as Annexure V, by relying on the 31.12.1981 agreement and the State of Punjab was directed to make the SYL Canal functional within a period of one year;

WHEREAS the State of Punjab filed a Suit (O.S. No.1 of 2003) seeking discharge/dissolution of the obligation to construct the SYL Canal as directed and the Suit O.S. No.1 of 2003, was dismissed by this Hon'ble Court by its Judgment &

Order dated 04.06.2004, a copy whereof is enclosed as Annexure VI. The Union of India was directed in the said Judgment & Order dated 04.06.2004 to mobilise a Central Agency to take control of the canal works within a period of one month and the State of Punjab was directed to handover the works to the Central Agency within two weeks thereafter;

WHEREAS on 12th July, 2004, the State of Punjab has enacted the 'Punjab Termination of Agreements Act, 2004' (Annexure VII) (hereinafter called Punjab Act 2004) terminating and discharging the Government of Punjab from its obligations under the agreement dated 31.12.1981 and all other agreements relating to waters to Ravi-Beas;

WHEREAS on 15th July, 2004, the Union of India has filed an application for taking on record subsequent facts and developments after the passing of the Order of the Hon'ble Supreme Court dated 04.07.2004 and requesting the Hon'ble Court to pass such other and further orders as deemed fit in the interest of justice;

WHEREAS doubts have been expressed with regard to the constitutional validity of the Punjab Act 2004 and its provisions and also whether the agreement dated 31.12.1981 can be said to have been validly terminated by the State of Punjab and whether the State of Punjab has been lawfully discharged from the said agreement.

AND whereas in view of the aforesaid, it appears that there is likelihood of the constitutional validity of the provisions of the

Punjab Act 2004 being challenged in courts of law involving protracted and avoidable litigation, that the differences and doubts have give rise to a public controversy which may lead to undesirable consequences and that a question of law has arisen which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Hon'ble Supreme Court of India thereon;

NOW, THEREFORE, in exercise of powers conferred upon me by clause (1) of Article 143 of the Constitution, I A.P.J.Abdul Kalam, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely;

"(i) Whether the Punjab Termination of Agreements Act, 2004 and the provisions thereof are in accordance with the provisions of the Constitution of India.

(ii) Whether the Punjab Termination of Agreements Act, 2004 and the provisions thereof are in accordance with the provisions of Section 14 of the Inter-State Water Disputes Act, 1956, Section 78 of the Punjab Reorganisation Act, 1966 and the Notification dated 2th March, 1976 issued thereunder;

(iii) Whether the State of Punjab has validly terminated the agreement dated 31.12.1981 and all other agreements relating to the Ravi-Beas waters and is discharged from its obligation under the said agreement(s); and

(iv) Whether in view of the provisions of the Act, the State of Punjab is discharged from its obligation flowing from the

Judgment & Decree dated 15.01.2002 and the Judgment and Order dated 04.06.2004 of the Supreme Court of India.

New Delhi *Sd/-*

Dated 22/7/2004 *(A.P.J.Abdul Kalam)*

PRESIDENT OF INDIA"

(I) ADVISORY JURISDICTION IN OTHER COUNTRIES

UNITED STATES OF AMERICA

The U.S. Constitution has no specific provision as Article 143 (1) authorizing the President to make reference to U.S.Supreme Court on any question. The U.S. Constitution is based on the doctrine of Separation of Powers and Article III of the U.S. Constitution provides that judicial power vested in the Supreme Court shall extent to "cases" and "controversies". Thus the U.S.Supreme Court has adjudicatory jurisdiction and no advisory jurisdiction based on the doctrine of Separation of Powers.

In 1793, when the Secretary of the State, Jefferson enquired of the Supreme Court whether it would give advice to the President on the 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. Again in ***Muskrat vs. U.S.(219 US 346),*** the Court refused to give an advisory opinion on the ground 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 U.S. Supreme Court has, thus, consistently refused to decide the abstract, hypothetical or contingent questions.

AUSTRALIA

The Australian Constitution has also no parallel provision to Article 143(1) of the Indian Constitution. However, to some extent, a similar purpose is served by permitting an Attorney General to bring proceedings in the High Court to secure a determination of the validity of National or State Legislation after its passage by the Legislature whether before or after it has come into force.

CANADA

In Canada, the Governor-General in Council is empowered to refer important questions of law touching the validity or interpretation of the Dominion or Provincial legislation (***Section 60 of the Canadian Supreme Court Act, 1960)***. The practice of obtaining advisory opinions from the Judiciary has been very extensively used in Canada and it has almost become a strategy for determining constitutional issues.

In Reference ***re Secession of Quebec***[19]***, [1998] 2 S.C.R. 217,*** the Supreme Court of Canada opined regarding the legality, under both Canadian and international law, of a unilateral secession of Quebec from Canada. The Supreme court held that Quebec cannot secede from Canada unilaterally; however, a clear vote on a clear question to secede in a referendum should lead to negotiations between Quebec and the rest of Canada for secession. However, above all, secession would require a constitutional amendment.

The Governor in Council (effectively, the Cabinet of Canada) submitted the request for an advisory opinion on the following three specific questions:

> *(1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?*
>
> *(2) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?*

[19] [1998] 2 S.C.R. 217 : 1998 CanLII 793 (S.C.C.) : (1998) 161 D.L.R. (4th) 385 : (1998), 55 C.R.R. (2d) 1

> *(3) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?*

The Supreme Court of Canada opined in answering the first question that under the Canadian constitution unilateral secession is not legal.

The answer to the second question, which concerned Quebec's right under international law to secede, the Supreme court gave the opinion that the international law on secession was not applicable to the situation of Quebec. The court pointed out that international law "does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state."

The court did not consider it necessary to answer the third question.

PAKISTAN

Pakistan has Article 186 of the Constitution akin to Article 143 of our Constitution and recently there, the Pakistan Supreme Court is seized of the Reference No.1/2011 under Article 186 about validity of death sentence awarded to their Prime Minister Zulfikar Ali Bhutto.

(J) PITFALLS & STRENGH OF ADVISORY JURISDICTION

The great weakness of a opinion in advisory jurisdiction is that it is rendered in vacuo and many legal experts have said that since the reference to the court seeking its advice does not present actual facts, the court is unable to see the problem in the background of an actual controversy between the litigants and the court depends upon assumptions and its advisory opinions are nothing more than **`speculative opinions on hypothetical questions'**.[20] The interests of future litigants may also be prejudiced by the Court's opinion in advisory jurisdiction and it may be inconvenient to agitate the matter later when an actual controversy arises.

On the other hand, there are a few advantages of advisory jurisdiction. It can provide guidance to the Government on a question of its legal powers and may promptly remove any cloud of uncertainty in the public mind, regarding the validity of any legislation or governmental action. An advance judicial opinion may avoid embarrassment and unnecessary litigation also.

(K) CURRENT ISSUES & PERSPECTIVE:

Two current pending references before the Apex Court of India in ***Re. Validity of Punjab Termination of Agreements Act, 2004*** and in ***Re. 2G Spectrum*** matter in the light of aforesaid background of parameters of Article 143 of the Constitution and history of references decided so far and one

[20] Earl Halsbury in Attorney General for Ontario vs. Hamilton Street Rly. [(1903) A.C. 524] also see Pylee, The Federal Court of India, 1966).

returned unanswered, it will be a matter of great fine legal debate in two pending references and erudite arguments touching the interrelation between the governance and judicial review, particularly in the sphere of policy making & decision by Government are likely to be convassed before the Supreme Court. The sensational 2G matter which already had so many fallouts and litigation spilling into criminal jursidiction also, like CBI Investigation and trial of highly placed people like the then Telecom Minister, from the questions formulated and placed before the Supreme court in Special Reference No.1/2012 is likely to give rise to the debate about the route of public auction for distribution of natural resources of the country to the various private or corporate contenders and also the extent of court's interference in the policy making of the Government is likely to generate and regenerate the debate which has been going on as a tug-of-war between the Executive and the Judicial wing of the State ever since the Constitution came into being.

It may have been criticized by various authors in Articles published in 2G reference case that it is being done to seek an indirect review of judicial verdict or to lay down `Lakshman rekha' for judiciary to enter into realm of policy making by the Government, but the truth is that some well defined parameters should be laid for both or rather all the organs of the State to avoid any possible conflict, which alone is in the larger interest of “We the People” for which the document known as Constitution exists.

Similarly, the ***Reference No.1/2004*** in ***Punjab Termination of Agreements Act, 2004*** is like to take all of us into the legal debate of Centre and State relationship and interpretation of Constitutional entries regarding legislations with regard to sharing of water of rivers in the federal State of India where some of the States have tried to express a sort of their superior authority over the natural resources in the form of flowing water in the rivers like Karnataka in `Cauvery Water Dispute Case and Punjab in Ravi – Bias rivers. Already our country has undertaken mammoth project of interlinking of rivers to achieve the objective of even distribution of water all over the country but that project is also running in rough weather on account of various practical, scientific and political skirmishes between the regional parties and parties in power in Centre, in a coalition.

Hopefully in the said reference regarding Punjab Termination of Agreement Act, 2004 the Supreme Court will have an opportunity to define through its advisory jurisdiction, such relationship between States and Union for which otherwise also it has original jurisdiction under Article 131 of the Constitution of India.

These matters are not only of high importance for our country but a definite larger bench opinion of the Supreme Court is likely to settle so many disputes and even pending litigations with regard to these two controversies.

(L) CONCLUSION

Thus, there are both the sides of the coin and the advisory jurisdiction of the Apex Court in our constitutional frame work is not only a constitutional method of solving the constitutional problems & saving the Government from embarrassment on certain legal questions or questions of fact and law on which the Court's opinion can mould public opinion and likely litigation at future point of time, but it is also a constitutionally permissible method of seeking authentic legal opinion from the Highest Court of the land.

Based on the principle of `a stitch in time saves nine', such advisory jurisdiction which gives wide powers to the Apex Court and discretion also to render its opinion or not, is a great constitutional power of the judicial organ of the State, namely; the Supreme Court and possible disadvantages of such advisory jurisdiction can always be taken care by the Court itself. This power has so far been used only sparingly and well advisedly. However, the recent controversy about reference under Article 143(1) of the Constitution in 2G spectrum matter has generated a debate as to whether this jurisdiction can be invoked in such cases. The other pending reference regarding Punjab Termination of Agreement Act, 2004 are the two cases which will be worth watching in near future in this domain of the Apex Court and as law students, we would be enlightened by the opinion of the Supreme Court in this regard.

DR.JUSTICE VINEET KOTHARI