

# PRESIDENTIAL REFERENCES AND THEIR PRECEDENTIAL VALUE: A CONSTITUTIONAL ANALYSIS

Deepaloke Chatterjee\*

*This article discusses the precedential value of presidential references to the Supreme Court. The author analyses the history of presidential references in India, jurisprudence of the Supreme Court on this point, the practice in other jurisdictions and important constitutional law concepts which influence the binding nature of these references, such as the doctrine of stare decisis and the system of constitutional democracy prevalent in India. He then examines the arguments for and against treating presidential references as precedent and finally concludes by stating that while the advisory jurisdiction of the Supreme Court is significant, it is not to be considered as binding law.*

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## I. INTRODUCTION

Articles 141<sup>1</sup> and 143(1)<sup>2</sup> of the Constitution of India provide for the doctrine of precedent and for the presidential power to refer cases to the Supreme Court, respectively.<sup>3</sup> The interface between the advisory opinions, provided for by Article 143(1) of the Constitution of India, and the doctrine of *stare decisis*, has always been a problematic area of Indian constitutional jurisprudence. While the significance of Article 141 is beyond doubt, its importance with respect to reference cases

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\* 4<sup>th</sup> Year student at the West Bengal National University of Juridical Sciences, Kolkata. The author would like to acknowledge the encouragement and assistance that he has received from Mr. Shiju M. V., Ms. Vaneesha Jain and Mr. Arunaloke Chatterjee.

<sup>1</sup> Article 141 of the Constitution of India states as follows: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

<sup>2</sup> Article 143(1) of the Constitution of India states as follows: "If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that court for consideration and the court may, after such hearing as it thinks fit, report to the President its opinion thereon."

<sup>3</sup> Order XXXVII of the Supreme Court Rules provides the procedure for the consideration of a Special Reference under Article 143 by the Supreme Court.

cannot always be said to be so.<sup>4</sup> However, these apparently conflicting concepts are both fundamental to the proper governance of a polity. This necessitates a definite demarcation of these two concepts, while giving due regard to each of them.

The present paper investigates the parameters of the advisory opinions provided for by Article 143(1) *vis-à-vis* the binding nature of Supreme Court judgments as set out by Article 141 of the Constitution of India. While Part II mentions the significance of, and examines the debate surrounding, the application of Article 141, Part III consists of an analysis of the manner in which presidential references are made, and the method followed by the Supreme Court in pronouncing on such references. In Part IV, the numerous views which courts have taken on the interplay between Articles 141 and 143(1) is explored. The author will consider the practice adopted by the Supreme Court in dealing with these decisions in later cases, and determine whether advisory opinions are, indeed, used as a means (or even as a subsidiary means) for the determination of the applicable law.

During the course of this paper, the author will rely upon the work of certain highly qualified Indian jurists, while also taking into consideration the teachings of publicists from various other nations. No reliance will be placed on the views expressed by the Supreme Court in advisory opinions, about advisory opinions, as this would make the entire process circular. Finally, in Part V, an analysis of the provisions of certain foreign constitutions will be undertaken. The effect of the correlation between Articles 141 and 143(1) will be commented upon in an effort to answer the crucial question of whether advisory opinions are also, in themselves, binding on lower courts.

## II. THE CONFLICT WITHIN

The Constitution of India has enumerated several fundamental rights, and is based on the conception of justice, equality and liberty. These three concepts have a civilizing tendency, if followed in their spirit, and necessitate the exercise of restraint, as opposed to providing unbridled power to any particular organ. The delicate texture of our constitution is based on the concept of each organ checking the others, so that the dignity and freedom of the individual can always be ensured - adequately demonstrating that the dignity of the individual forms the cornerstone of our constitution. In a constitutional democracy like India's, the organs of the government - the legislature, the executive and the judiciary are all bound by the constitution which Bhagwati J. describes as "*the suprema lex, the paramount, law of the land, and there is no department or branch of government above or beyond it*".<sup>5</sup>

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<sup>4</sup> RAMANATHA AIYAR, *ADVANCED LAW LEXICON* 4456 (Chandrachud et al. eds., 2004) (stating that the doctrine of precedent emanates from the legal maxim *stare decisis et non quieta movere* which literally means to *stand by decisions and not to disturb what is settled*).

<sup>5</sup> *Minerva Mills v. Union of India*, (1980) 3 S. C. C. 625 [S. C.] at § 104.

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It is important to remember that, in cases of conflict between opinions pronounced by the Supreme Court, the opinion expressed by the larger bench prevails.<sup>6</sup> As noted by the court,

It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, but also because, in doing so, they embody a declaration of law operating as a binding principle in future cases.<sup>7</sup>

Therefore, a decision by a constitution bench of the Supreme Court can, in no circumstance, be whittled down by a diametrically contrary interpretation provided by a division bench of the same court, thus ensuring consistency and stability in the law.<sup>8</sup>

The efforts towards consistency, made by the judiciary, are reflected in the approach taken with regards to Article 141:

Consistency is the cornerstone of the administration of justice. It is with a view to achieve consistency in judicial pronouncements that the courts have evolved the rule of precedents, principle or stare decisis<sup>9</sup> and "...to determine whether a decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision....The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the court in a given case.<sup>10</sup>

However, as has been reiterated by the judiciary, the doctrine of precedent should not be considered as one which is rigid, applied even at the cost of justice.<sup>11</sup> This has moved the court to also state that,

It is true that the Constitution does not place any restriction on our powers to review our earlier decisions, or even to depart from them, and there can be no doubt that in matters relating to constitutional points which have a significant impact on the fundamental rights of citizens, we would

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<sup>6</sup> N. K. Jayakumar, *Courts*, in 10 HALSBURY'S LAWS OF INDIA 339 (Venkatachaliah *et al.* eds., 2001).

<sup>7</sup> *Union of India v. Raghbir Singh*, A. I. R. 1989 S. C. 1933 [S. C.] at § 8.

<sup>8</sup> MAHABIR PRASHAD JAIN, *INDIAN CONSTITUTIONAL LAW* 324-328 (Wadhwa & Co. 2003)

<sup>9</sup> *State of Andhra Pradesh v. A. P. Jaiswal*, A. I. R. 2001 S. C. 499 [S. C.] at § 22.

<sup>10</sup> *Director of Settlements, Andhra Pradesh v. M. R. Apparao*, A. I. R. 2002 S. C. 1598 [S. C.] at § 8.

<sup>11</sup> *Minerva Mills v. Union of India*, (1980) 3 S. C. C. 625 [S. C.] at § 96.

be prepared to review our earlier decisions in the interest of public good. The doctrine of stare decisis may not strictly apply in this context and no one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this court to the detriment of general welfare.<sup>12</sup>

On the other hand, England has an unwritten constitution and a system of parliamentary supremacy, which Dicey defines as being a system “[I]n which no person or body is recognised by the laws of the U.K. as having the right to over-ride or set aside the legislation of the Parliament”.<sup>13</sup> However, the Constitution of India does not envisage absolute powers being vested in the legislature, the executive or even the judiciary:

The doctrine of legislative supremacy distinguishes the UK from those countries which have a written constitution, like India, which imposes limits upon the legislature and entrusts the ordinary courts or a constitutional court with the function of deciding whether the acts of the legislature are in accordance with the constitution.<sup>14</sup>

Therefore, it is indisputable that the sovereignty of these non-sovereign organs which are supposed to ensure the proper functioning of India is limited strictly to, and by, what is contained in the Constitution of India. Thus, individuals who merely refer to English authorities, or even the features of constitutions of other common law countries, to resolve the debate relating to advisory opinions and their binding nature commit an error. Quite interestingly, a particular reference made to the Supreme Court was not answered owing to the “unconstitutional” question raised by it.<sup>15</sup>

### III. THE PRACTICE OF THE SUPREME COURT

Article 143(1) confers upon the Supreme Court the power to give its opinion on questions unconnected with a pending case.<sup>16</sup> A similar power was conferred

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<sup>12</sup> Sajjan Singh v. State of Rajasthan, A. I. R. 1965 S. C. 845 [S. C.] at § 22.

<sup>13</sup> THE ENGLISH LEGAL SYSTEM 15 (Gary Slapper *et al.* eds., 2004).

<sup>14</sup> Powers, Privileges and Immunities of State Legislatures, Re, A. I. R. 1965 S. C. 745 [S. C.] at § 39.

<sup>15</sup> In the matter of Ram Janmabhoomi, Re, (1993) 1 S. C. C. 642 [S. C.].

<sup>16</sup> The cases referred to the Supreme Court till date are - The Delhi Laws Act, Re, A. I. R. 1951 S. C. 332 [S. C.], Kerala Education Bill, 1957, Re, A. I. R. 1958 S. C. 956 [S. C.], Berubari Union and Exchange of Enclaves, Re, A. I. R. 1960 S. C. 875, [S. C.], Sea Customs Act, 1871, Re, A. I. R. 1963 S. C. 1760 [S. C.], Powers, Privileges and

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on the Federal Court of India by Section 213 of the Government of India Act, 1935.<sup>17</sup> The only conditions are – the President should be satisfied that a question of law or fact has arisen, or is likely to arise, and that such question is of such nature and of such public importance that it is expedient to obtain the opinion of the court on it.

However, the Supreme Court has to always confine itself to the questions referred to it by the President. It cannot travel beyond the reference. The fact 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,

This court is bound by the recitals in the order of reference. Under Article 143(1) we accept the statements of facts set out in the reference. The truth or otherwise of the facts cannot be enquired or gone into, nor can the court go into the question of the *bona fides* or otherwise of the authority making the reference. This court cannot go behind the recital. This court cannot go into disputed questions of fact in its advisory jurisdiction under Article 143(1).<sup>18</sup>

The President may formulate, for the advisory opinion of the Supreme Court, questions relating to the validity of the provisions of existing laws with regard to the validity of provisions proposed to be included in the Bills which would come before the legislature, or in respect of any other question of

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Immunities of State Legislature, Re, A. I. R. 1965 S. C. 745 [S. C.], Presidential Poll, Re, (1974) 2 S. C. C. 33 [S. C.], The Special Courts Bill, 1978, Re, (1979) 1 S. C. C. 380 [S. C.], The Matter of Cauvery Water Disputes Tribunal, Re, A. I. R. 1992 S. C. 522 [S. C.], Reference on the Principles and Procedure Regarding the Appointment of Supreme and High Court Judges in 1998, A. I. R. 1999 S. C. 1 [S. C.], Gujarat Assembly Election Case, (2002) 8 S. C. C. 237 [S. C.]. See also, JAIN, *supra* note 8, at 299.

<sup>17</sup> Government of India Act, 1935, §213 states - Power of Governor-General to consult Federal Courts:

(1) If at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may [in his discretion] refer the question to that court for consideration, and the court may, after such hearing as they think fit, report to the Governor-General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing to the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dis-senting opinion (omitted by the India (Federal Court Judges) Act, 1942 5 & 6 Geo. 6, c.7, §1).

<sup>18</sup> Kerala Education Bill, 1957, Re, A. I. R. 1958 S. C. 956 [S. C.]. See also, Presidential Poll, Re, (1974) 2 S. C. C. 33 [S. C.] at § 38, per A. N. Ray, C. J.

constitutional importance.<sup>19</sup> A question of law which has already been decided by the Supreme Court in the exercise of its judicial powers cannot be referred to the court under Article 143. The Supreme Court cannot sit in appeal against its earlier decisions in the exercise of its advisory jurisdiction under Article 143.<sup>20</sup> The Supreme Court can, however, refuse to express its advisory opinion if it is satisfied that the questions that have been formulated for its opinion are purely socio-economic or political in nature and do not have any constitutional significance.<sup>21</sup>

Certain general issues relating to the scope and extent of Article 143(1) were dealt with by the court in the reference of the *Special Courts Bill*.<sup>22</sup> Chandrachud J. even notes that an advisory opinion does not lay down the law and that it has no greater effect than that of the opinion of law officers: “[t]he question of the value of advisory opinions of the Supreme Court may have to be considered more fully on a future occasion.”<sup>23</sup>

The opinion of the Supreme Court in the *Special Courts Bill* reference relating to advisory jurisdiction can be summarized as follows: *first*, the Supreme Court can decline to answer a reference under clause 1 of Article 143 owing to the use of the word ‘may’. *Secondly*, speculative opinions on hypothetical questions need not be provided.<sup>24</sup> *Thirdly*, the questions referred must be specific and not vague.<sup>25</sup> *Fourthly*, the Supreme Court, by answering the reference, does not encroach upon the functions and privileges of Parliament.<sup>26</sup> This is also in accordance with the system of checks and balances which the executive, legislature and the judiciary are expected to exercise upon each other, and which flows from having a constitution which is federal in nature with unitary leanings.<sup>27</sup> *Fifthly*, the Supreme Court does not abrogate Article 32 by answering references.<sup>28</sup> *Sixthly*, it should not do so on the ground of futility,<sup>29</sup> or that it raises a purely political question,<sup>30</sup>

<sup>19</sup> Powers, Privileges and Immunities of State Legislature, Re, A. I. R. 1965 S. C. 745 [S. C.].

<sup>20</sup> The Matter of Cauvery Water Disputes Tribunal, Re, A. I. R. 1992 S. C. 522 [S. C.].

<sup>21</sup> M. Ismail Faruqui v. Union of India, A. I. R. 1995 S. C. 605 [S. C.] . See also, Kerala Education Bill, 1957, Re, A. I. R. 1958 S. C. 956 [S. C.] at § 964, Powers, Privileges and Immunities of State Legislature, Re, A. I. R. 1965 S. C. 745 [S. C.] at § 747.

<sup>22</sup> The Special Courts Bill, 1978, Re, (1979) 1 S. C. C. 380 [S. C.].

<sup>23</sup> *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.], per Chandrachud J.

<sup>24</sup> *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.] at § 401.

<sup>25</sup> *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.] at § 403.

<sup>26</sup> *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.] at §§ 403-6.

<sup>27</sup> S. R. Bommai v. Union of India, (1994) 3 S. C. C. 1 [S. C.].

<sup>28</sup> *Special Courts Bill*, 1978, Re, (1979) 1 S. C. C. 380 [S. C.] at § 406-07.

<sup>29</sup> *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.] at § 408.

<sup>30</sup> S. R. Bommai v. Union of India, (1994) 3 S. C. C. 1 [S. C.] at § 17-21, *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.] at § 406.

and also not on grounds of expediency and propriety.<sup>31</sup> Finally, the Supreme Court has also noted that the power to give an advisory opinion has been provided only to it and not to the High Courts.<sup>32</sup>

#### IV. A QUESTION OF INTERPRETATION

On the question of the binding nature of an advisory opinion, under Article 143(1), the Supreme Court has always expressed the view that while it is always open to the Supreme Court to re-examine a question already decided by it and, if necessary, overrule it, these advisory opinions do not have the force of law.<sup>33</sup> Even in the matter of *Cauvery Water Disputes Tribunal, Re*,<sup>34</sup> a similar question arose which the court refused to clarify.<sup>35</sup>

In spite of what appeared to be a clear stand of the Supreme Court, that opinions expressed in exercise of its jurisdiction under Article 143(1) are not binding, there have also been cases such as *Vasantlal Maganbhai Sanjanwala v. State of Bombay*,<sup>36</sup> where the question that had arisen was one relating to excessive delegation, and where the court relied upon the reference case of *Delhi Laws Act*<sup>37</sup> to decide the matter. Another glaring example of reliance on a reference opinion by the Supreme Court, which gave a binding decision based on a non-binding reference opinion, is that of Bhagwati J. while delivering the majority opinion in the *Bearer Bonds* case.<sup>38</sup>

In the *Bearer Bonds* case,<sup>39</sup> Bhagwati J. stated that the latest and most comprehensive statement of certain legal propositions relating to Article 14 were to be found in the judgment of the *Special Courts Bill* reference.<sup>40</sup> Bhagwati J. stated that he took the legal propositions laid down in the *Special Courts Bill* reference<sup>41</sup>

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<sup>31</sup> *Special Courts Bill*, (1979) 1 S. C. C. 380 [S. C.] at § 407. See also, V. N. SHUKLA, CONSTITUTION OF INDIA 463-65 (M. P. Singh ed., 1998).

<sup>32</sup> *Chandra Shekhar v. State of Orissa*, A. I. R. 1972 S. C. 486 [S. C.]. See also, H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA I 1677 (4<sup>th</sup> edn., 2004).

<sup>33</sup> *St. Xaviers College v. State of Gujarat*, (1974) 1 S. C. C. 717 [S. C.], Powers, Privileges and Immunities of State Legislature, Re, A. I. R. 1965 S. C. 745 [S. C.] at § 762-63.

<sup>34</sup> *The Matter of Cauvery Water Disputes Tribunal, Re*, A. I. R. 1992 S. C. 522 [S. C.].

<sup>35</sup> B. R. AGARWALA, SUPREME COURT PRACTICE & PROCEDURE 207-08 (2002).

<sup>36</sup> A. I. R. 1961 S. C. 4 [S. C.] (comprising a bench of B. P. Sinha, C. J., J. L. Kapur, K. Subba Rao, K. N. Wanchoo and P. B. Gajendragadkar, JJ.).

<sup>37</sup> *The Delhi Laws Act, Re*, A. I. R. 1951 S. C. 332 [S. C.].

<sup>38</sup> *R. K. Garg v. Union of India*, A. I. R. 1981 S. C. 2138 [S. C.].

<sup>39</sup> *R. K. Garg v. Union of India*, A. I. R. 1981 S. C. 2138 [S. C.].

<sup>40</sup> *The Special Courts Bill, 1978, Re*, (1979) 1 S. C. C. 380 [S. C.].

<sup>41</sup> *The Special Courts Bill, 1978, Re*, (1979) 1 S. C. C. 380 [S. C.].

opinion to be binding.<sup>42</sup> However, Chandrachud J., while delivering his opinion in the *Special Courts Bill* reference<sup>43</sup> had clearly stated that the propositions stated by the court in *Special Courts Bill*<sup>44</sup> were not to be considered as binding on other Indian courts.<sup>45</sup>

In 1992, the Supreme Court stated that “it has been held adjudicatively that the advisory opinion is entitled to due weight and respect - normally it will be followed. We feel that the said view which holds the field today may usefully continue to do so till a more opportune time”.<sup>46</sup> Such conflicting opinions have resulted in a great degree of confusion, and it is this confusion that the author will now seek to dispel.

The power to interpret and safeguard the Constitution of India lies with the Supreme Court,<sup>47</sup> even in the face of issues or questions of major political importance merely because a question has a political complexion, that by itself is no ground for the court to refrain from performing its duty under the constitution if it raises an issue of constitutional determination...merely because a question has a political colour, the court cannot fold its hands in despair and declare judicial hands off.<sup>48</sup>

The Supreme Court has noted that a court of law must gather the spirit of the constitution from the language used, and what one may believe to be the spirit of the constitution cannot prevail if not supplied by the language. Therefore, it must be construed according to well established rules of interpretation.<sup>49</sup> A mere reading of Article 141 of the Constitution of India indicates that the law declared by the Supreme Court is considered to be binding on all courts in the territory of India. This article provides for the law making role of the court and the use of the words ensures that it is not a reference to the law found or made.<sup>50</sup> A substantial question of interpretation of a constitutional provision does not arise if the law on the subject has been finally and effectively decided by the Supreme Court.<sup>51</sup>

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<sup>42</sup> R. K. Garg v. Union of India, A. I. R. 1981 S. C. 2138 [S. C.] at § 8.

<sup>43</sup> The Special Courts Bill, 1978, Re, (1979) 1 S. C. C. 380 [S. C.] at § 105.

<sup>44</sup> The Special Courts Bill, 1978, Re, (1979) 1 S. C. C. 380 [S. C.].

<sup>45</sup> SEERVAI, *supra* note 32, at 454 - 456 (criticising the opinion of Bhagwati J.).

<sup>46</sup> The Matter of Cauvery Water Disputes Tribunal, Re, A. I. R. 1992 S. C. 522 [S. C.] at 528.

<sup>47</sup> P. Kannadasan v. State of T. N., (1996) 5 S. C. C. 670 [S. C.].

<sup>48</sup> S. R. Bommai v. Union of India, (1994) 3 S. C. C. 1 [S. C.] at 661.

<sup>49</sup> K. M. Menon v. Bombay, A. I. R. 1951 S. C. 128 [S. C.].

<sup>50</sup> SHUKLA, *supra* note 31, at 460-62.

<sup>51</sup> State of Jammu & Kashmir v. Ganga Singh, A. I. R. 1960 S. C. 356 [S. C.], Bhagwan Swarup v. State of Maharashtra, A. I. R. 1965 S. C. 682 [S. C.].

Unfortunately, a unanimous interpretation to Article 143(1) with reference to Article 141 is yet to be provided. The Supreme Court even reviews its earlier decisions, if the decision has held the field for a considerably long time, only if it is satisfied of its error or the baneful effect which a decision would have on the general interest of the public or if it is inconsistent with the legal philosophy of our constitution.<sup>52</sup>

On the question of whether the opinions of the Supreme Court under advisory jurisdiction should be given equal weight as those decided otherwise, the author believes that although these opinions are entitled to a certain amount of weight and respect, there is overwhelming authority to suggest the contrary – opinions under advisory jurisdiction do not constitute law. In furtherance of this position, the author provides the following reasons -

First, as is evident from a literal interpretation of this Article, the law which is to be considered binding must be the law declared, and need not necessarily be the law decided. A decision is not considered to be binding because of its conclusion but because of its *ratio* and the principles laid down therein.<sup>53</sup> This is known as the doctrine of *stare decisis* or the doctrine of precedent. The author believes that it is the use of the word declared in the marginal note, as well as the main text of the constitution which is of considerable importance to the present debate.

At this juncture, the reader should note that marginal notes are not voted upon and are not considered to be an actual part of the constitution.<sup>54</sup> The term *stare decisis* means, to stand by that which is decided.<sup>55</sup> This would have to be the law decided amongst parties. In a reference case there are no parties – thus law in that case is not decided, but is merely an opinion from the judicial wing of the nation to the executive head of the country on certain matters which both consider important to the well being of the nation.

Article 141 ensures that the decisions of the Supreme Court are binding upon all courts,<sup>56</sup> the State and its officers,<sup>57</sup> but not itself. It may, however, overrule

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<sup>52</sup> Shambhu Nath Sarkar v. State of West Bengal, A. I. R. 1973S. C. 1425 [S. C.].

<sup>53</sup> B. Shama Rao v. Union Territory of Pondicherry, A. I. R. 1967 S. C. 1480 [S. C.], M. K. Sabha v. A. Faizullahai, A. I. R. 1976 S. C. 1455 [S. C.], Bachan Singh v. State of Punjab, (1979) 3 S. C. C. 727 [S. C.].

<sup>54</sup> G. P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 166-68 (2008).

<sup>55</sup> BLACK'S LAW DICTIONARY 1414 (Bryan Garner ed., 1990); RAMANATHA AIYAR, *supra* note 4, at 4456.

<sup>56</sup> B. M. Lakhami v. Municipal Committee, (1970) 2 S. C. C. 267 [S. C.], M. S. I. Hussain v. State of Maharashtra, A. I. R. 1976 S. C. 1992 [S. C.], A. S. Gauraya v. S. N. Thakur, A. I. R. 1986 S. C. 1440 [S. C.].

<sup>57</sup> T. K. N. Rajgopal v. T. M. Karunanidhi, (1972) 4 S. C. C. 267 [S. C.].

these decisions either expressly or impliedly, by not following them in another case.<sup>58</sup> Even the directions issued by the Supreme Court in a decision constitute binding law under Article 141,<sup>59</sup> but not the advisory opinions, as can be seen from numerous authorities and a plethora of landmark cases –

any discussion, even of reference cases, would have to be understood as being held purely in the context of those cases and limited to the legal questions that resulted from the facts of that particular case, even if those were arguments that were looked upon favourably by the court in that reference case.<sup>60</sup>

Secondly, while in certain cases, pronouncements of the Supreme Court under its advisory jurisdiction have been followed by the lower courts,<sup>61</sup> these have almost always been opinions where the Supreme Court has merely restated the proposition of law, and not really “made” the law in the relevant sense of the term.

An authoritative pronouncement on the binding value of advisory opinions as precedent may still come.<sup>62</sup> In this period, it can, however, be argued by those favouring the use of opinions in the exercise of advisory jurisdiction as binding, that, as a matter of law and practice these opinions are given after similar proceedings as in other matters before the court and are expressed in the same manner, including the dissents, as any other judgement of the court. Therefore, except for the absence of contesting parties, no good reason exists for not treating them like any other judgement of the court.

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<sup>58</sup> Dwarka Das Shrinivas v. Sholapur Spinning and Weaving Company Ltd., A. I. R. 1954 S. C. 119 [S. C.], Bengal Immunity Co. v. State of Bihar, A. I. R. 1956 S. C. 631 [S. C.], State of West Bengal v. Corporation of Calcutta, A. I. R. 1967 S. C. 997 [S. C.].

<sup>59</sup> Khedat Mazdoor Chetna Sangath v. State of Madhya Pradesh, A. I. R. 1995 S. C. 31 [S. C.], Visakha v. State of Rajasthan, A. I. R. 1997 S. C. 3011 [S. C.] at § 12 (Holding that the guidelines and norms laid down would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of working women; that these directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field and that a writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention, as the violation of fundamental rights of this kind is a recurring phenomenon).

<sup>60</sup> S. P. Gupta v. Union of India, A. I. R. 1982 S. C. 149 [S. C.] at 758-759 (subsequently overruled but not on the point of presidential reference).

<sup>61</sup> See, Ram Kishore Sen v. Union of India, A. I. R. 1965 Cal. 282 [Calcutta High Court], Chhabildas Mehta v. Legislative Assembly, State of Gujarat, (1970) 2 Guj. L. R. 729 [Gujarat High Court].

<sup>62</sup> The Special Courts Bill, 1978, Re, (1979) 1 S. C. C. 380 [S. C.]. See also, The Matter of Cauvery Water Disputes Tribunal, Re, A. I. R. 1992 S. C. 522 [S. C.].

This debate however provides a third ground, and further buttresses the argument for not considering advisory opinions as binding. The author wishes to highlight for the reader the fact that the Supreme Court has the power to refuse to answer the questions put before it, thus quite easily distinguishes proceedings on a President's reference from adjudication before a court of law. No court having jurisdiction can refuse to decide a matter in controversy between the parties if it is brought before the court in an appropriate proceeding.<sup>63</sup>

Fourthly, in a reference placed before it, the Supreme Court must always assume that the facts stated before it are correct, even though the facts may be untrue, which once again differentiates it from any ordinary proceeding before the court where quite often, the dispute as to the determination of the correct facts constitutes the most important question. In addition, such an opinion of the Supreme Court is merely in the nature of advice, and not binding upon the President.

## V. IN CONCLUSION

The advisory jurisdiction of the Supreme Court appears to be analogous to that possessed by the Privy Council under Section 4 of the Judicial Committee, 1833, with two minor distinctions.<sup>64</sup> Similarly, Section 60 of the Canadian Supreme Court Act, empowers the Governor General-in-Council to refer important questions of law, touching certain matters, to the Supreme Court for hearing and consideration. The Supreme Court is bound to entertain and answer the reference, and the opinion of the court upon such a reference is subject to appeal to Her Majesty-in-Council.

The Supreme Court of the Canadian Provinces, and several State Supreme Courts in the United States, have been invested with similar powers of advisory jurisdiction.<sup>65</sup> However, the Supreme Court of the United States has consistently refused to pronounce advisory opinions upon questions of law on the ground that it would be incompatible with the position it occupies in the hierarchy of the United States of America.<sup>66</sup>

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<sup>63</sup> H. M. SEERVAL, *CONSTITUTIONAL LAW OF INDIA* III 2688 (4<sup>th</sup> edn., 2004) (stating that although a Court may decline to decide disputed questions of fact in a writ petition on certain grounds, it cannot refuse to decide these questions).

<sup>64</sup> First, dissenting opinions are not delivered in the Privy Council. Second, it is made obligatory for the Judicial Committee to hear and consider the matter and advise Her Majesty thereon.

<sup>65</sup> See, <http://www.uscourts.gov/outreach/resources/judicialindependence/worldview.html>. Also see, [www.sisis.nativeweb.org/clark/snake.html](http://www.sisis.nativeweb.org/clark/snake.html).

<sup>66</sup> *Muskrat v. U. S.*, 56 L. Ed 246, 252 (1911). (However, numerous constitutions such as the Australian Commonwealth Act and the Republic of South Africa Constitution do not have any provisions that are analogous to the power under Article 143).

It has been argued by scholars<sup>67</sup> that the Australian constitution has no provision parallel to Article 143(1) of the Constitution of India. However, to some extent, a similar purpose is served by permitting the 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. Similarities emerge between the American and Australian courts as both have consistently refused to decide upon abstract, hypothetical questions of law which may or may not gain significance in the future.

Even 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.<sup>68</sup> The practice of obtaining the advisory opinions from the judiciary has been very extensively used in Canada. It has almost become the normal strategy for determining constitutional issues.

There was a certain amount of debate in the constituent assembly when a question arose as to whether the power to refer cases should actually be present in the Constitution of India,

There has been a considerable difference of opinion amongst jurists and political thinkers as to the expediency of placing on the Supreme Court an obligation to advise the head of the State on difficult questions of law. In spite of arguments to the contrary, it was considered expedient to confer advisory jurisdiction upon the Federal Court under the existing constitution by Section 213 of the Act. Having given our best consideration to the arguments' pros and cons, we feel that it will be, on the whole, better to continue this jurisdiction even under the new constitution. It may be assumed that such jurisdiction is scarcely likely to be unnecessarily invoked and if, as we propose, the court is to have a strength of ten or eleven judges, a pronouncement by a full court may well be regarded as authoritative advice. This can be ensured by requiring that references to the Supreme Court for advice shall be dealt with by a full court.<sup>69</sup>

Consensus was reached when it was agreed that there would have to be at least 5 Judges on the bench to decide a case involving substantial questions of law as to the interpretation of the constitution, and for the hearing of a reference by the President under Article 143. While certain advisory opinions of the Supreme Court have been criticised very greatly, had it not been for this provision allowing

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<sup>67</sup> JAIN, *supra* note 8, at 258-261.

<sup>68</sup> Canadian Supreme Court Act, 1960, §60.

<sup>69</sup> See <http://parliamentofindia.nic.in/ls/debates/vol4p6b.html>.

for the reference of matters, some disputes would never have been resolved, owing to the deadlock between the legislature and the High Court.<sup>70</sup> Although these opinions of the Supreme Court have been held to be not binding,<sup>71</sup> and confined only to the facts of the case,<sup>72</sup> these cases have also been of some importance as is evident from the examples cited previously.

In almost sixty years, only ten references have been made, of which nine have been answered and only one not entertained as it would involve choosing between two communities of the nation and itself involved questions as to constitutionality.<sup>73</sup> Presidential references have always been made only when the issues have become clarified and crystallised by discussion amongst the general public and it has actually been possible for the courts to express an opinion.

Thus, in light of the arguments put forth in this paper, the author wishes to conclude by reiterating that opinions expressed by the Supreme Court, in exercise of advisory jurisdiction under Article 143(1), is not to be considered as law. The impact of this position, however, is that proceedings which take place in an *unreal atmosphere* may sometimes prejudice the interest of certain future litigants. That said, it is also high time that the Supreme Court decides, either through unambiguous practice or in a judgement, the position that is to be adopted in this regard, and also ensures that, in the process, the significance of advisory opinions is not undermined.

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<sup>70</sup> Powers, Privileges and Immunities of State Legislature, Re, A. I. R. 1965 S. C. 745 [S. C.]. For a contrary view, see, H. M. SEERVAL, CONSTITUTIONAL LAW OF INDIA II 2168-70 (4<sup>th</sup> edn., 2004).

<sup>71</sup> In Implementation of the Indo-Pak Agreement, Re, A. I. R. 1960 S. C. 845 [S. C.], In the matter of Duty on Non-Agricultural Property, (1946) 49 C. W. N. 9 (F. R.).

<sup>72</sup> See, SEERVAL, *supra* note 70, at 2175.

<sup>73</sup> In the matter of Ram Janmabhoomi, Re, (1993) 1 S. C. C. 642 [S. C.].

