



COMPARATIVE ANALYSIS OF ADVISORY OPINIONS OF CLASSICAL AND NEWER DEMOCRACIES OF THE WORLD

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ABSTRACT:

Most of the democracies of the common wealth have made provision in their constitution for the highest courts to have an advisory or consultative jurisdiction. The rationale was to enable the court to render advice on crucial matters when other constitutional mechanisms are either inefficacious to resolve specific issues or when the constitution appear not to have provided any other mechanism.

KEYWORDS: consultative jurisdiction , common wealth , democracies.



INTRODUCTION

In order to have a clear insight into the working of the Institution of advisory jurisdiction, an assessment of the various countries on the point will not be out of place. The discussion in this chapter is divided into two parts, first the advisory jurisdiction of courts in the classical democracies of the commonwealth, secondly, the advisory jurisdiction of courts in the newer democracies of the commonwealth.

ADVISORY JURISDICTION IN CLASSICAL DEMOCRACIES OF COMMONWEALTH:

1. RELATED PROVISION OF CANADA:

Canadian Supreme Court Act 1952, contains the provision

giving birth to the Institution of advisory jurisdiction. Section 55 of the act empowers the Governor General-in-Council to refer to the Supreme Court for hearing and consideration 'important questions of law or fact touching ... any matter. Governor General is the final authority on the question whether a matter so referred is an important question. The Court is, under the statute, bound to answer each question so refer read:-

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

Section 60 of the Supreme Court Act of Canada, 1906 (present Sec. 55 of the Supreme Court of

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

First, the provision requires that such opinion shall be pronounced as in the case of a judgment upon an appeal to the court and that it shall be binding on all inferior courts in the like manner as an appellate judgment of the Supreme Court. The 1952 Act has thus removed any doubt¹

as to whether such opinion on a reference shall count as an 'opinion' because there is no 'lis' and no parties, or as judgment.

Secondly, this jurisdiction in Canada is a statutory obligation of the Supreme Court to answer the questions under reference. The jurisdiction is, thus, an exception to the general rule adhered to by the court that it will not decide abstract questions. The Canadian Supreme Court itself has upheld the constitutionality of legislation providing for such reference on abstract questions².

Although it has been made obligatory on the part of the Canadian Supreme Court to pronounce advisory opinion, the judicial committee has at times, on appeal from such opinions from Canada, expressed fears of the dangers of such advisory opinions. In *cf. A.G. of Ontario Vs. Hamilton Street Ry (1903)*, the committee observed that they would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient and inexpedient that opinions should be given on such questions at all. When they arise, they must arise in concrete cases, involving private rights, and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down and override the operation of the particular words when the concrete case is not before it³.

In *A.G. of British Columbia Vs. A.G. of Canada (1914)*, it was pointed out that under this procedure questions may be put which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form within reference but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied⁴.

In *Re-Regulation and control of Aeronautics (1932)* – The Committee held it undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual, with regard to parties who are not and who cannot be brought before it, i.e. foreign Govt⁵.

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

1. In most of these cases, the Government, seeking to introduce a bill has sought the judicial opinion on its constitutional powers e.g. as to marriage, liquor, fisheries⁶ on when similar questions have arisen in relation to a Provincial Bill reserved for the assent of the Governor General⁷.
2. The Governor General may also refer the question of constitutionality of a Dominion or Provincial⁸ statute after it has been enacted.
3. Even the validity of subordinate legislation has been the subject of reference⁹.
4. The respective powers of the Dominion and Provincial Legislatures with respect to particular matters also have been referred in the abstract, irrespective of any proposed or actual legislation¹⁰.
5. A reference has been made upon the very competence of Canadian Parliament to abolish appeals to the Privy Council altogether¹¹.
6. Some of the references related to the interpretation of statutes, e.g. which court had jurisdiction to perform certain statutory functions¹².

Section 55 of the Supreme Court Act 1952 also empowers either House of the Dominion Parliament to refer any question to the Supreme Court for the advisory opinion. Provincial Governor also can refer similar questions to the Provincial Appellate Court for opinion¹³.

2. RELATED PROVISIONS OF U.K.:

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

by their then statutory oath to lawfully counsel the king in his business. Such consultation was in vogue in Britain till the middle of 18th Century¹⁴.

On a proper understanding, one can safely conclude that judicial consultation was the necessity of times in Great Britain when law was in its fluid, formative and un-codified condition. But, owing to the power hunger of kings and the subservience of the judges this practice fell into great abuse. The judges, out of fear, were compelled to give such advice as were favorable for the extension of the King's prerogatives but adverse to the power of Parliament and welfare of the people.

The Long Parliament, by an Act to which Charles-I gave his approval in August 1641, prohibited the practice¹⁵. The Act of Settlement, 1700 which made the judges' tenure during good behavior instead of king's pleasure finally freed judges from the Crown's yoke and created environment for them to hold office without fear of the king's displeasure. But the idea of obtaining judicial opinions itself was not abandoned. Section 4 of the Judicial Committee Act, 1883 was enacted providing that His Majesty may refer to the Privy Council 'any such other matter whatsoever as his Majesty thinks fit'.

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

In 1928, an attempt to create the advisory jurisdiction was made by the English Parliament. Members of the House of Lords seriously opposed the provisions of the proposed clause 4(1) of the Rating and Valuation Bill of that year which sought to enable a minister to submit a question to the High Court for its opinion. It was branded as a 'piece of mischievous legislation.'¹⁶ It was argued that the proposed clause would 'make the Judiciary act in an ancillary and advisory capacity to the Executive, and confuse the working of the judicial system with the Executive administration; that it was no part of the business of the judges and never had been 'part of their business, at any rate since the Act of Settlement, to have advisory concern in the acts of the administration.'; that the natural effect of associating 'the judges with the administration and attaching to them the responsibility for conclusions which are put forward by the administration' would be to 'weaken the authority of the judiciary'; that there was no reason why the judges should be brought in 'by this side wind to help the Executive to carry on their business, to replace the Law Officers and to relieve the Executive of responsibility as to decisions they ought to arrive at upon the law'. In face of the strong opposition in the House of Lords, that clause had to be dropped.

3. RELATED PROVISIONS OF UNITED STATES

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

The U.S. Supreme Court has consistently refused to render advisory opinion on abstract legal questions as it does not wish to exercise any non-judicial function. Giving of such an advice, it has been feared, might involve the Court in too direct participation in legislative and administrative processes. The reluctance of the Court is formally based on the doctrine of separation of powers which forms one of the bases of the U.S. Constitution.

In 1793, when Secretary of State Jefferson enquired of the Supreme Court whether it would give advice to the President on questions of law arising out of certain treaties, the Court refused saying that there was no such provision in the Constitution, and that it was not proper for the highest Court to decide questions extra-judicially,¹⁷ Again, in *Muskrat v. U.S.*, The Court refused to give an advisory opinion arguing that under the Constitution its jurisdiction extends to a 'case or controversy' and so it cannot give an opinion without there being an actual controversy between adverse litigants. The Court has consistently refused to decide abstract, hypothetical or contingent questions.

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

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

4. RELATED PROVISIONS OF AUSTRALIA:

The Australian High Court has refused to give advisory opinion on the ground that the essential function of the Judiciary is the decision of disputes and not the consideration of abstract legal questions¹⁸. Even the legislature cannot require the Court to exercise any such function¹⁹.

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

5. RELATED PROVISIONS OF JAPAN:

There is no provision in the constitution of Japan to give advisory opinions and Chief Justice 'Tanka' had announced that the Supreme Court of Japan will follow the American Supreme Court on this point.²⁰

ADVISORY JURISDICTION IN NEWER DEMOCRACIES OF COMMONWEALTH:

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

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

1. RELATED PROVISIONS OF PAKISTAN:

If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of Law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

The Supreme Court shall consider a question so referred and report its opinion on the question to the President (Article 186, Constitution of Pakistan, 1973, not it is article 209 of new Constitution

REFERENCE OF 1954:

The Governor-General of Pakistan after dissolving to constituent assembly (Provisional Parliament) and suspend the constitution on 24 October 1954, made a reference to the Federal Court of Pakistan under S. 213 of the Government of India Act, 1935. One of the questions so referred was "whether the Constituent Assembly was rightly dissolved."²¹

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

1. that though the Constituent Assembly functioned for more than 7 years, it was unable to carry out the duty of providing a Constitution and for all practical purposes assumed the form of a perpetual legislature;
2. that the Constituent Assembly was dissolved by the Governor-General because by reason of repeated representations from the resolutions passed by representative public bodies throughout the country, he formed the opinion that the Assembly had become wholly unrepresentative of the people; and
3. that the Constituent Assembly from the very beginning asserted the claim that the laws passed by it under sub-sec. (1) of S. 8 of the Indian Independence Act, 1947, did not require the assent of the Governor General.²²

The learned Chief Justice Muhammed Munir observed on the objection taken by the opposition as to the manner in which the reference was made: "...Whether, if the Governor-General had the authority to dissolve the Constituent Assembly, it was properly dissolved, is not a legal but a political issue which cannot be referred to Court for opinion." **Mr. Pritt**, however contends that the question must be answered in the form in which it has been framed and that the Court should go into the facts on which the propriety or impropriety of the dissolution may depend. He has, therefore, referred to the affidavits which were filed on behalf of the Government and the counter-affidavit put in by Mr. Tamizuddin Khan in an endeavour to show that the dissolution was not justified on the facts and that it was ordered with more ulterior motives. We cannot, on this reference, undertake this enquiry or record any findings on the disputed question of facts because any such course would convert us into a fact finding tribunal which is not the function of this Court when its advice is asked on certain questions of law. The answer to a legal question always depends on facts found or assumed and since we cannot try issues of fact the reference has to be answered on the assumption of fact on which it has been madeThe Governor-General has taken the responsibility of asserting certain facts and has merely asked us to report to him what the legal position is if those facts are true."

Relying on the three averments and without considering them on merits, the Court concluded that the dissolution was valid and legal.

Presidential Reference against the CJI of Pakistan:

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

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

2. RELATED PROVISIONS OF BANGLADESH:

If any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may, after such hearing as it thinks fit, report to President its opinion thereon to the President (Article 106, Constitution of Bangladesh).

3. RELATED PROVISIONS OF SRI LANKA:

If at any time it appears to the President that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.

Every proceeding under paragraph (1) of this Article shall be held in private unless the Court for special reasons otherwise directs (Article 129, Constitution of Sri Lanka, 1978).

4. RELATED PROVISIONS OF MALAYSIA:

In Malaysia, only a 'constitutional question' is fit for invoking the advisory jurisdiction of the Supreme Court. Also, expediency' is not named as a factor in the Malaysian Constitution.

Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it (Article 131, Constitution of Malaysia).

Despite the difference in phraseology, the important issues to note in regard to these constitution is that first, only the head of state, the President or the king like the "Governor of Council" in Canada is empowered to seek an opinion from the Court. Secondly, the practical use of the advisory jurisdiction in the other constitution system. In Malaysia, the provision has not been utilised since Independence in 1957. A similar situation exists in Sri Lanka. In Bangladesh, the advisory jurisdiction was invoked only once and the Pakistan Supreme Court was called upon advice only on rare occasions.

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