1958

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Advisory Opinions in the Federal Judiciary — A Comparative Study†

W. J. Wagner* 

There is a general agreement that the essential function of the judiciary is to adjudicate disputes. In every legal system, however, tribunals have some duties in non-contentious matters. In the common-law countries, probate is a typical example. In some legal systems the courts are empowered to determine what the rights of the potential parties are prior to actual litigation, upon a request by one of them or even a third party.

This "advisory opinion" procedure was accepted in the field of international judicial proceedings. The "Statute" (Charter) of the only permanent international tribunal, the International Court of Justice, provides that "[t]he court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." Since the establishment of the Court in 1920, the advisory opinion procedure was often resorted to and resulted in "compulsory quasi-adjudication" of international disputes. In internal judicial systems, England may serve as an instance of a country where the courts frequently delivered opinions on legislative matters, although the problem of unconstitutional statutes does not exist in England.

In the United States, in Massachusetts and a few other States, the courts do deliver advisory opinions. But in the federal


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†Statute of International Court of Justice, Art. 65.

2For details, see Wagner, Is a Compulsory Adjudication of International Legal Disputes Possible?, 47 NW. U. L. REV. 21 (1952). For comments at the outset of the work of the Court, see Hudson, Advisory Opinions of National and International Courts, 37 HARV. L. REV. 970 (1924).

3Dubuque, The Duty of Judges as Constitutional Advisers, 24 AM. L. REV. 369, 380-383 (1890); Veeder, Advisory Opinions of the Judges of England, 13 HARV. L. REV. 358 (1900). For discussion of references to the courts that they might solve difficulties in applying administrative law, see Wade, Consultation of the Judiciary by the Executive, 46 L. Q. REV. 169, 177 (1930); for disadvantages of such a procedure, see Allen, Administrative Consultation of the Judiciary, 47 L. Q. REV. 43 (1931).

4For a list of advisory opinions delivered by the courts in Colorado, Massachusetts, Maine, New Hampshire, and South Dakota from 1780 to 1937, see Field, The Advisory Opinion—An Analysis, 24 IND. L. J. 203, 223-230 (1949).
judicial system, it was early settled that they should abstain from performing such duties. In 1793, Secretary of State Jefferson sent a letter to Chief Justice Jay and the Associate Justices of the Supreme Court, telling them that war, going on in Europe, produces transactions in American ports "on which questions arise of considerable difficulty." Frequently, answers to these questions "depend ... on the construction of our treaties, on the laws of nature and nations, and on the laws of the land," and the circumstances of the problems "do not give a cognizance of them to the tribunals of the country." Jefferson intimated that President Washington would like to submit such questions to the Supreme Court, should it be willing to deliver its advice upon the problems presented. It appeared that Washington had twenty-nine questions to ask the Court, dealing with the rights and duties of the United States, as a neutral country, with respect to the belligerent parties.

Although, as it seems, it was generally believed that the President had the right to ask the Justices for their opinion, the Court declined to comply with the request, emphasizing the principle of separation of powers which gives rise to "considerations which afford strong arguments against the propriety of ... extra-judicially deciding the questions alluded to" by the Court.

Therefore, for obtaining advisory opinions on legal matters, the government turns to a member of the executive branch: the Attorney General of the United States. As early as 1789, in its first Judiciary Act, Congress established this office and imposed upon the incumbent the duty "to give his advise and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." The opinions of the Attorney General are given great weight and are usually followed in the decisions of the courts. Obviously, advisory opinions may be also requested from "legislative" courts which were not established by virtue of Article III of the Constitution. Upon their functions, this Article cannot

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5 Warren, 1 The Supreme Court in United States History 109 (rev. ed., 1947). In the Constitutional Convention, Pinckney proposed, on August 22, 1787, adoption of the following provision: "Each branch of the Legislature, as well as the Supreme Executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law and upon solemn occasions." The proposal was based on the Constitution of Massachusetts. It was referred to the Committee of Detail but never reported on by it. Warren, The Making of the Constitution 505 (1937). On July 21, Gorham of Massachusetts suggested allowing the Executive to obtain opinions of the Supreme Court. ibid., n. 1 at 506.


7 1 Stat. 93 (1789).

8 Hart and Wechsler, supra note 6, at 85.
place any restrictions whatsoever. Thus, Section 1492 of the Judicial Code provides that the Court of Claims “shall have jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension,” and the next section empowers the Court to deliver similar advisory opinions on “any claim or matter involving controverted questions of law or fact,” referred to it by any executive department.

“Constitutional” courts take jurisdiction only if a “case” or “controversy” is presented to them. The Constitution uses both terms. The second one “had long been associated in legal thinking” with the first one, and they cover “all disputes that might come before federal courts for adjudication.” The construction of the constitutional terms was given a narrow interpretation by the courts. In the frequently cited case of *Muskrat v. United States*, the Supreme Court refused to examine the constitutionality of a congressional act before the rights which could be claimed by the plaintiff were impaired. It stressed its determination to refrain from expressing its opinion on legal problems where such an opinion would be delivered too early to grant relief and definitely to settle the reciprocal rights and obligations of the parties.

To have an actual controversy, the parties to the suit must honestly claim rights adverse to each other. Feigned cases, friendly suits, proceedings instituted collusively by the parties, will not be examined by the courts. Similarly, the courts will decline to take jurisdiction over “moot” cases, in which its decision would not help plaintiff, as he received what he claimed before the judicial determination of his rights, served his term in a penitentiary, or was refused the right to appear on a ballot in elections which were already held.

The courts decline to take jurisdiction over any question which they consider to have a character of administrative proceedings; the Supreme Court said that “[i]t cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or ad-

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9American Tire & Casualty Co. v. Finn, 341 U.S. 6, 11 (1951). In a few opinions the Supreme Court intimated that, if there is any difference between the two terms, it lies in that possibly the term “controversies” does not include criminal cases. *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419, 431-432 (1793); *Muskrat v. United States*, 219 U.S. 346, 356-357 (1911). The list of cases in which the Court construed both terms was given in *Ex Parte Bakelite Corp.*, 279 U.S. 438, 444 (1929).

10219 U.S. 346 (1911).


However, they can review administrative decisions as to questions of law, recognizing findings of fact by administrative agencies as conclusive if supported by substantial evidence, unless such findings are arbitrary and capricious.\textsuperscript{16} Such a review has all the characteristics of judicial proceedings.

For a long time, in the federal judicial system, no rights of the parties could be adjudicated before they were violated. The Supreme Court refused to take jurisdiction of cases in which there was just a threat that some rights would be infringed, or where some parties were uncertain as to their respective rights.\textsuperscript{17} In a few cases, the Supreme Court made statements indicating that its powers should be considered as not extending to deliver declaratory judgments\textsuperscript{18} and refused to take cognizance of cases appealed from state courts and decided on declaratory judgments statutes.\textsuperscript{19} The result was that in order to have his rights settled, the interested party had to violate a criminal statute or a contested civil obligation, and possibly become subject to either criminal prosecution or civil liability. Those unwilling to risk had to abstain from asserting rights to which possibly they were entitled.

This attitude of the Court changed little by little,\textsuperscript{20} and in 1933, it entertained an appeal over a state court declaratory judgment.\textsuperscript{21} Next year, Congress passed the Declaratory Judgments Act.\textsuperscript{22} As amended, it is incorporated into the Judicial Code of 1948, Section 2201 of which reads as follows:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a

\textsuperscript{17}However, in some classes of cases, the federal courts determined the rights of the parties in absence of controversy. E.g., they established title to real estate based upon adverse possession. Sharon v. Tucker, 144 U.S. 533 (1892). For other instances, see Anderson, Actions for Declaratory Judgments 4 (1940); Borchard, Declaratory Judgments 137 et seq. (2d ed., 1941).
\textsuperscript{18}By 1934, declaratory judgments statutes were in force in 32 states; by 1941, in 37 states. Borchard, supra note 17, at p. VII of the Preface. By 1949, in only four states there were no provisions for such a remedy. Note, Declaratory Judgments 1941-1949, 62 Harv. L. Rev. 787, 791 (1949).
\textsuperscript{19}It was observed that the attitude of the Court was caused by the fact it confused declaratory judgments with advisory opinions. Borchard, supra note 17, at 71-80.
\textsuperscript{20}The bill had been introduced in Congress as early as 1919. Borchard, The Federal Declaratory Judgments Act, 21 Va. L. Rev. 35, 36 (1934).
final judgment or decree and shall be reviewable as such.

The effect of the Act was that the parties were permitted to have their rights declared before they were infringed, and no enforcement of the decree was asked. A threat of invasion of rights is sufficient to invoke the jurisdiction of the courts. The constitutionality of the Act was upheld by a unanimous Court in *Aetna Life Insurance Co. of Hartford, Conn., v. Haworth*. Chief Justice Hughes pointed out, in his opinion, that the statutory requirement of the existence of an actual controversy satisfies the constitutional conditions for accepting jurisdiction. The effect of the Act was characterized as merely procedural. In many instances, actions were brought to have questions determined which fell short of being actual "controversies," plaintiffs invoking the Act. This was true particularly in requests addressed to the courts to declare statutes to be unconstitutional. The courts guard themselves against taking jurisdiction in these instances, and unduly extending the operation of the Act.

In *Alabama State Federation of Labor v. McAdory*, the Court said, citing many authorities:

The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions. . . .

Similarly to the United States, the High Court of Australia does not deliver advisory opinions. The Australian Constitution

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24 In *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, n. 40 at 572-573 (1946), the Court observed: "... [T]he procedure [of declaratory judgments] has been utilized to bring for decision challenges to an entire array of statutory provisions alleged to violate rights secured by an almost equal array of constitutional provisions. The strategic conception seems to have been that the declaratory judgment suit furnishes a ready vehicle for presenting and securing decision of constitutional matters, solely upon the pleadings, in highly abstract or premature, if not hypothetical states of fact, and en masse."
25 E.g., in *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 443 (1938), the Court said:

The District Court did not err in dismissing the cross bill. Defendants are not entitled to invoke the Federal Declaratory Judgments Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation.

does not speak about "cases" or "controversies," but about "matters." However, in the light of the constitutional interpretation by the High Court, the difference lies only in the terms used, not in the principle. As early as 1910, it could be asserted that in order to entertain a suit challenging the constitutionality of an act, there had to be an actual controversy between the parties, no friendly or test cases being admissible. However, this principle was not finally settled until 1921. In 1910, the Judiciary Act was amended by adding to it Part XII (Sec. 88-94) requiring from the High Court to deliver advisory opinions. The new Section 88 of the Act conferred upon the High Court "jurisdiction to hear and determine" questions "of law as to the validity of any Act or enactment of the Parliament" which "the Governor-General refers to the High Court for hearing and determination"; references were to be determined by a Full Court (Sec. 89), the decisions of which were to be final and conclusive (Sec. 93).

The validity of Part XII was challenged in *In re Judiciary and Navigation Acts.* By the majority of five to one, the High Court held the challenged provisions of the Act to be invalid. The Court did not answer the question of whether the legislature could require from it to deliver mere advisory opinions; but in enacting Part XII, "Parliament desired to obtain from this Court not merely an opinion but an authoritative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth." This judicial power extends to "matters" to be adjudicated by the Court. Rejecting the argument that "matter" meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which the High Court might be called on to interpret the Constitution by a declaration at large, the Court held that the word "matter," as used in Section 76 of the Australian Constitution, meant "the subject matter for determination in a legal proceeding." There is no "matter," said the Court, "unless there is some immediate right, duty or liability to be established by the determination of
The Court. The Parliament “cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law,” or “to determine abstract questions of law without the right or duty of any body or person being involved.” Part XII was left in Australian statute books for a few years, and was repealed in 1934.

However, the High Court does not decline to deliver decisions amounting to declaratory judgments. This power of the Court is exercised primarily in proceedings to check the validity of federal or state statutes after they have been enacted. Thus, in Attorney-General for Victoria v. Commonwealth, it was held that the Attorney-General of a state has a sufficient title to invoke the provisions of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the state whose interests he represents. Declaratory judgments may become an important means to delimit the power of public authorities, particularly when the problem of the borderline between public and private enterprise is involved.

Likewise, Argentina followed the United States pattern. One of the early statutes of the united country stated expressly the rule that the courts will act only in cases of actual controversies. And in In re Francioni, the Supreme Court said that there may be a judicial suit only if there are adversary parties and justiciable questions presented, and so the Court will be able to render a judgment which will be judicially enforced. As early as 1885,

Ibid., at 265. On the basis of the above and some other decisions of the High Court, Wynes gives the following definition of "matter" in Australian law: "A 'matter' may be defined as the subject of a dispute between parties as to the existence of some legal right, duty, obligation or liability which is asserted to exist on the one hand and denied on the other; the question must directly affect the parties in some definite manner." Wynes, The Judicial Power of the Commonwealth, 11 AUSTL. L. J. 546, 547 (1937).

Ibid., at 267. Higgins, J., dissenting, said that it was "not necessary that a 'matter' should be between parties." Ibid., at 272.

The statement that recently the High Court has broadened its concept on this question does not seem to be supported by decisions. Riesenfeld and Hazard, Federal Courts in Foreign Systems, 13 LAW & CONTEMP. PROB. 29, n. 15 at 32 (1948), citing Rex v. The Commonwealth Court of Conciliation and Arbitration, 19 AUSTL. L. J. 169 (1945).


Ibid., at 247-248, by Latham, C. J., citing some previous cases.

FRIEDMANN, PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW 72 (1950). See pp. 73-74 for other instances in which declaratory judgments are available in Australia.

Law No. 17 (1862).

AMADEO, ARGENTINE CONSTITUTIONAL LAW 62 (1943).

110 S. C. N. 391 (1907).

AMADEO, supra note 41, at 70.
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the Supreme Court refused, in *Pintos v. Sosa*,⁴⁴ to render any
opinions on legal matters either to the executive or the legislative
branch of government.⁴⁵ And next year, in *Ex Parte Moores*,⁴⁶
the Court dismissed a petition to declare an act of Congress null
and void where there was no defendant, and no rights of anyone
have yet been violated. Said the Court:

The federal courts cannot make general declara-
tions, but must apply legal principles to a specific and
concrete controversy. The court that should declare a
law unconstitutional without reference to a specific
controversy would be acting outside of its sphere of ac-
tion and would invade that of the legislative power.⁴⁷

On the whole, the Court established a notion of "case and
controversy" very similar to that in the United States which is
quite understandable in view of the strong influence of the older
North American federal system over that of Argentina.

In the Swiss system there is nothing in the Constitution or
federal statutes which would empower the Federal Tribunal to
deliver advisory opinions. The general rule is that the Tribunal
will not take cognizance of any question submitted to it unless
there is an actual controversy between the parties. This rule is
applicable not only with respect to cases between individuals, but
also in relation to "[c]onflicts of competence between federal
authorities of the one part, and cantonal authorities of the other
part" (Art. 113 (1) of the Swiss Constitution), so that the de-
cision of the Tribunal may settle a real litigation instead of being
a mere expression of opinion.

However, the existence of a real controversy is found in a
somehow broader scope of situations than in the United States. A
case of 1939 between the Swiss Confederation and the Canton
Basel-Town is a good illustration. By two popular initiatives in
the Canton, an enactment of laws was promoted. Their purpose
was to prohibit the activity of Nazi and Fascist organizations.
The federal authorities requested those of the Canton to stop any
proceedings in the matter of those initiatives, on the ground that
they encroached upon the scope of powers of the Confederation.
The Canton refused to comply with the request, whereupon a
suit was instituted against it. This is what the Tribunal had to
say about the character of the situation and its own competence to deliver a decision:

The present conflict of competencies, raised by the Federal Council, involves the question of whether the Canton Basel-Town has jurisdiction to enact some statutory provisions. However, these provisions were not yet enacted. . . . It seems that the Great Council [of the Canton] is faced with formally valid initiatives. The Federal Council challenges the cantonal authority to enact the provisions in question. Empowered by the Great Council, the Governmental Council [of the Canton] claims this authority for the Canton. Therefore, there is a controversy in a concrete question of jurisdiction between a federal authority and a cantonal authority. . . . The decision of the Federal Tribunal has here not the effect of an expression of opinion in a mere virtually abstract position taken on their competences; it compels the Great Council, under these circumstances, to take a certain stand as to the handling of the [popular] initiatives.48

The Tribunal proceeded to discuss the merits of the complaint, reached the conclusion that the enactment of the statutes under consideration would be ultra vires of the Canton, and enjoined the authorities of the Canton from taking any further action on either of the two initiatives. Obviously, in the United States the complaint would be dismissed as premature.

Thus, the general rule is made flexible in some situations, and particularly when the validity of an act of cantonal authorities is challenged. By virtue of the Swiss Judiciary Act of 1943,49 the plaintiff's rights must have been impaired by the act before he can bring an action; but he must not wait until he is required to comply with the act. On the contrary, the interested person is to act promptly after the act should have been known to him.50 According to the decisions of the Federal Tribunal, in cases of legislative acts, this period does not run from the time of publication, but from the date when it became generally known.51 In the light of the statutory provisions and their construction by the

4995 BUNDESBLATT I, 167 (1943); 60 RECUEIL DES LOIS FEDERALES 269 (1944)
Sec. 88: "Individuals or collective bodies injuriously affected by decisions or acts that concern them personally or have general application have standing to institute the action."
50Article 89 of the Judiciary Act: "The complaint must be filed with the Federal Tribunal within thirty days after the announcement of the challenged act or decision, in accordance with cantonal law."
5166 BGE I 70 (1940), GER. 66 I 70 cited by Fleiner and Giacometti, SCHWEIZERISCHES BUNDESSTAATRECHT, note 68 at 896 (1949).
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Tribunal, it seems that every person affected in any way by the cantonal act is free to challenge the validity of the act in a stage where he would have no standing to sue in the United States.52 Said the Tribunal:

Whoever is affected, as to his personal legal rights, by the allegedly unconstitutional provisions . . . has standing to challenge such a statute of general application. It depends on whether the complainants actually fall within the rules enacted by the government; an actual legal interest in the declaration of invalidity is not required.53

Considering the liberality of the construction of justiciable controversy in Switzerland, it is not surprising that the Federal Tribunal developed the practice of delivering declaratory judgments even without being authorized by the Constitution to do so. In a few of the cantons, such judgments are authorized by legislative enactments; in some others, they are delivered by the courts even without any statutory basis.54

In Brazil, the principle that the judiciary cannot express its opinion on questions if there is no “justiciable” controversy between two or more parties is inapplicable, by virtue of Article 8 of the Constitution of Brazil, in cases involving federal intervention in the affairs of the states.

Article 8 requires the federal legislature to decree intervention in eight instances; in seven of them,55 its action must be preceded by a declaration by the Federal Supreme Court that the act of the state authorities was unconstitutional. The Court is to

52For a discussion of these rules, see Fleiner and Giacometti, supra note 51, at 893 and 896. The authors favor a procedure which would establish the invalidity of legislative acts before they become effective. In essence, it would be the advisory opinion device.
5465 BGE I 236, 241 (1939).
55Borchard, supra note 17, at 118-120.
56These instances arise when the following principles are violated:
   a) Representative republican form;
   b) Independence and harmony of powers;
   c) Temporality of the elective functions, the duration of these latter being limited to that of the corresponding federal functions;
   d) Prohibition of re-election of governors and mayors for the period immediately following;
   e) Municipal autonomy;
   f) Rendering of administrative accounts;
   g) Guaranties of judicial power.
It is hardly necessary to emphasize that some of these points are either vague or sweeping. Also, by virtue of Article 9, the President of the Union has the power to decree intervention in five instances. He is to act upon a requisition of the Federal Supreme Court if an obstruction is exercised against the judicial power and if execution of judicial orders or decisions is to be insured.
examine the problem when it is “submitted by the Attorney General of the Republic.”

The Canadian system is completely different from that in other federal states. In Canada, the duties of the courts are not at all limited to deciding “cases and controversies.” True, there is nothing about advisory opinions in the Canadian Constitution; but they were provided for by legislation. Provisions about “references” (advisory opinions) are found in Sections 55 and 56 of the Supreme Court Act of 1927 and repeat the rule embodied in Section 60 of the former Supreme Court Act. The Court is to serve as legal adviser of the two other branches of government, executive or legislative (Governor, Senate, or House of Commons). Section 55 (1) empowers the Governor in Council to refer “to the Supreme Court for hearing and consideration” any “important questions of law or fact touching (a) the interpretation of the British North America Acts; (b) the constitutionality or interpretation of any Dominion or provincial legislation; . . . (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof . . . or (e) any other matter . . . .”

The last clause is sweeping, and it covers all the other ones. It follows that the Court has to answer any question submitted to it even if there is no actual litigation on the point involved, the only limitation being that the problem be “important.” However, most significant advisory opinions were delivered by the Court in situations where the constitutionality of some legislative acts was doubtful. Many essential constitutional problems were settled by the Court by the way of “references,” and particularly the question of the scope of power of the Dominion and provincial legislatures. Section 55 (2) of the Supreme Court Act expressly requires the Court, upon receiving a request for an advisory opinion from the Governor in Council, “to answer each question so referred;” and the opinion of the Court “shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court.”

56The first provisions to that effect were enacted as early as 1875; they found their place in acts of 1891 and 1906.
57CAN. REV. STAT., c. 35 (1927); c. 259 (1952).
58CAN. REV. STAT., c. 139 (1906).
60It is the duty of the Court to answer each question submitted. It cannot refuse by saying it is not important enough. Section 55 (1) (e) of the Supreme Court Act expressly states that the Governor in Council himself is to decide whether the requirement of the importance of the question is met, the questions referred by him being “conclusively deemed” to be important.
Section 56 of the Act requires the Court to deliver advisory opinions also upon request of the Senate or House of Commons.

In Attorney General for Ontario v. Attorney General for Canada, it was contended that the Governor-General in Council had no power to refer to the Supreme Court questions which affect the interests of the provinces without obtaining their consent to such reference, and that the provision of the Supreme Court Act, if understood as authorizing such references, was ultra vires of the Dominion Parliament and void, as converting the Court into a "branch of the Executive Government, an advisory committee for the purpose of advising the Executive upon any question which the Governor-General sees fit to refer to it." The Supreme Court Act was attacked not only on the ground that it invaded the provincial rights, but also that it violated the Constitution by requiring the judiciary to perform non-judicial duties. However, the Privy Council affirmed the decision of the Supreme Court of Canada and held that although there was nothing in the Constitution expressly authorizing the Executive to ask the Court for its opinion, there was neither anything prohibiting it. Referring to the British practice where the House of Lords "possesses in its legislative capacity a right to ask the judges what the law is, in order to better inform itself how if at all the law should be altered," the Council held the challenged provision valid. It pointed out that by delivering advisory opinions, the Court does not cease to be a judicial body.

These opinions are usually called "judgments," and may be delivered, upon request of the Governor-General, not only as to federal, but also as to provincial legislation.

The provinces followed the example of the Dominion and enacted statutes providing for advisory opinions. Typical are the provisions of the Ontario Constitutional Questions Act and the Judicature Act, which regulate the question of "references" along the lines established by the Dominion. Section 6 of the first of these acts states that the opinion delivered by the court "shall be deemed a judgment of the court, and an appeal shall lie therefrom as from a judgment in an action."

Advisory opinions are delivered after hearing all interested parties, and practically they may be assimilated to declaratory
judgments. In theory, however, it was often stressed that they do not have the effect of a judgment. The Privy Council emphasized the fact that "the answers are only advisory and will have no more effect that the opinions of the law officers"; and the Canadian Supreme Court added that "[i]t has invariably been declared that they are not judgments either binding on the Government, on Parliament, on individuals, and even on the Court itself, although, of course, this should be qualified by saying that, in a contested case where the same questions would arise, they would no doubt be followed."

By now, the advisory opinions procedure is deeply imbedded, in Canada, and is an integral part of its legal system.

Whether the function of the courts, in federal as in other states, should be strictly limited to "cases and controversies," is a question which was and is being disputed. Unquestionably, the declaratory judgments device is included in the concept of "controversies," and there seems to be no good reason whatsoever for not exercising jurisdiction in cases where such a relief is asked. It it more difficult to weigh the advantages and disadvantages of advisory opinions. Some points raised by the critics do not discredit this function of the courts in any way. Such is, for example, the statement that advisory opinions infringe upon the principle of separation of powers. But there was never any perfect separation of powers in any country, and besides, this principle is not a goal in itself, but only a means to achieve a satisfactory system of government. Again, it was pointed out that the advisory opinion function is closer to judicial than legislative duties.

The contention that the purely judicial duties of the courts take so much of their time, and their dockets are so crowded, that they should not be additionally burdened with advisory opinions, seems without merit. First, overburdening of the courts is hardly a reason for limiting the scope of their duties, and should the advisory opinions device be found advantageous and proper as a task of the judiciary, trivial and technical considerations should not be decisive for rejecting the idea. Besides, the creation of additional justiceships can always improve the situation. Second, the practice in Canada and other jurisdictions, such as some States in the United States, shows that advisory opinions

67 MOORE, supra note 27, at 367.
69 Reference Re Validity of the Wartime Leasehold Regulations, 2 D. L. R. 1, 3 (1950).
70 Clovis and Updegraff, Advisory Opinions, 13 IOWA L. REV. 188, 196 (1928).
71 See the list of advisory opinions in the states, supra note 4.
are rarely and cautiously requested. The device is never open to the general public, as are the courts in cases of actual controversies. It is available only to the legislative or executive branch of government at the top level, or to both of them. In some jurisdictions, it can be resorted to only with respect to questions arising from pending legislation.\(^2\) Third, a request for an opinion on the constitutionality of an act, if not presented to the justices before the measure is taken, is almost certain to be directed to the court by interested parties after their rights are affected, and to take some time of the court in any event.

Some other arguments against advisory opinions are better founded. It was observed that there are less dissents in advisory opinions than in regular judicial opinions because of lack of strong argumentation of the parties directly affected by the result of the proceedings, in briefs of their counsel and oral discussions.\(^3\) Therefore, the judges are deprived of the opportunity to analyze the situation as deeply and thoroughly as they can do in contentious proceedings. Many of such shortcomings of the advisory opinions device do not lie in their nature, the situation could be improved by arranging representation of interested groups in the court during the consideration of the problem involved.\(^4\) It seems that in Canada much effort is made to give all those interested the opportunity to present their point of view, and to give the court the opportunity to examine the question in all its aspects, after hearing arguments of the counsel. Even so, it seems hardly possible to give the court the advantage of an actual "justiciable" controversy.\(^5\) There remains the difficulty that it is sometimes impossible to foresee all the effects and instances of application of a statute, and that the court is bound by the very terms of the reference which may be broad or narrow.\(^6\)

\(^2\)E.g., in \textit{In re Senate Resolution Relating to Senate Bill No. 65}, 12 Colo. 466 (1889), the Colorado Supreme Court said that advisory opinions must be limited, for obvious reasons, to questions of law; that they must be exclusively \textit{publici juris}, and connected with pending legislation.

\(^3\)Field, \textit{supra} note 4, at 216.

\(^4\)Ibid., at 220.

\(^5\)"However much provision may be made on paper for adequate arguments (and experience justifies little reliance) advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation... there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law." Frankfurter, \textit{A Note on Advisory Opinions}, 37 \textit{Harv. L. Rev.} 1002, 1006 (1924).

That advisory opinions have no authority of res judicata, except in a few jurisdictions, is perhaps their strength rather than weakness. In some jurisdictions (including Canada), requests to deliver advisory opinions are directed to the supreme courts; in others, to the justices of the courts. (The latter is the situation in most of the States of the United States.) Undoubtedly, in most jurisdictions, the most important function of advisory opinions is to help the legislative or executive branch of government to decide whether an intended act is constitutional or not. Obviously, the opinion of the justices is entitled to utmost weight, and in most instances, a measure disapproved by them will not be taken or will be changed to avoid provisions subject to attack. Should the advice of the justices be disregarded, the branch of government involved is warned about the fate which its act should be expected to meet. And usually, it is declared invalid. It was observed that this is due to the fact that the justices, having considered the question at the stage of delivering an advisory opinion, are biased and unwilling to change the position they have taken. But it is only natural that a person has a settled opinion on matters that he is asked to consider; and, should the judges see the problem in another light and change their mind after reconsidering the question arising this time not only from theoretical speculations, but from a concrete factual situation, the court is free to deliver a judgment contrary to the former advisory opinion. Although rarely, such instances do happen, and it does not seem that they should serve as an argument condemning the whole idea, as was done by some outstanding jurists. It must be remembered that even judgments having the full effect of res judicata may be overruled. The judicial opinion on the validity of an act in its preparatory stage has undeniable advantages. It does not eliminate the possibility of judicial review; but judicial review is resorted to in a fewer number of situations. Granting all the advantages of judicial review, it is clear that the less often acts are

77Thus, the Colorado Supreme Court, considering the constitutional amendment adopted in 1886 (Art. 6, Sec. 3), reading that “the supreme court shall give its opinion upon important questions upon solemn occasions, when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of the court,” reached the conclusion that responses to such questions have all the force and effect of judicial precedents. In re Senate Resolution Relating to Senate Bill No. 65, 12 Colo. 466 (1889). The Supreme Court of Maine took a similar view of the effect of advisory opinions. However, “the weight of precedent, as well as the better reason and wisdom, is in favor of holding such opinions merely advisory.” Willoughby, I THE CONSTITUTIONAL LAW OF THE UNITED STATES § 18 (2d ed., 1929).

78Field, supra note 4, at 213-214; Clovis and Updegraff, supra note 70, at 192.

79Hudson, supra note 2, at 983.

80For discussion, see Clovis and Updegraff, supra note 70, at 195.

81Field, supra note 4, at 221.

82See, e.g., Frankfurter, supra note 75, at 1006-1007.
held unconstitutional and invalidated by the courts, the better. The ideal of certainty of law would be best served if there were no “bad” acts whatsoever. Innumerable complications may arise after a statute, treated for some time as good law, is declared unconstitutional. Although in theory, such a statute is said to be considered as if it never were enacted, in many instances its application results in creating situations which are impossible to reverse. For millions of people it is vital to know as soon as possible whether a statute is constitutional or not; for a final determination of this question in the Supreme Court, in a regular judicial procedure, months or years are necessary. It is an unfortunate situation when time is of utmost essence. In many instances, the problem is too pressing and too important to depend on the bringing of a suit by an individual affected by the act, with the result that great constitutional questions may be answered in cases having the character of being accidental; the branch of government whose measure is under attack is unable to defend the general effect of its action, and the decision of the court may be the result of pre-determination.

In federal states, advisory opinions might have a particularly advantageous function to fulfill in preventing the enactment of federal legislation which could infringe upon state rights, or state legislation undermining the federal scope of power. Such situations are likely to engender state-federal tension to a greater or lesser degree. The experience of Canada is rather encouraging. To some the advisory opinion is an “apparently ... excellent preventive instrument,” and “it is to be hoped that progress will not stop with the establishment of that noteworthy improvement in governmental machinery” which is the declaratory judgment, but will extend to acceptance of advisory opinions. To others, however, such opinions “are ghosts that slay.” And, in spite of the few weaknesses and many advantages of the device, there seems to be no indication of a trend to accept advisory opinions in federal countries which do not yet recognize this procedure. Many jurists in the United States, even though they do not advocate the adoption of advisory opinions, feel that an intermediate device

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83It did happen that before the question reached the Supreme Court, federal acts were held good by some District Courts, and were enforced in some States, while they were invalidated by others. Doubt, confusion, and economic cost followed. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 303-304 (1941).
85MOORE, supra note 27, at 365.
86JACKSON, supra note 83, at 365.
87Clovis and Updegraff, supra note 70, at 198.
88Frankfurter, supra note 75, at 1008.
between them and the present system of judicial review should be figured out. The requirement of a “case,” as understood today, has too many defects to be considered satisfactory; and as applied to instances involving constitutional questions, it gives only a few advantages. Therefore, “a more expeditious, orderly, and centralized procedure” is needed, such as would “give to judicial review more extensive advisory and preventive possibilities,” and if necessary, should be accomplished by constitutional change.

The possibility of abusing the device for delay does not have much to do with the advantage of advisory opinions. Most rights can be abused.

89FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 306-312 (1935).
90Ibid., at 323.
91JACKSON, supra note 83, at 309.
92FIELD, supra note 89, at 325.
93DOUGLAS, WE THE JUDGES 47 (1956).
THE UNIVERSITY OF KANSAS CITY LAW REVIEW

VOLUME XXVII WINTER, 1958 NUMBER 2

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