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William D. Popkin

Indiana University Maurer School of Law, popkin@indiana.edu

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ADVISORY OPINIONS IN INDIA

WILLIAM D. POPKIN†

In a previous article* , "Prematurity and Obiter Dictum in Indian Judicial Thought", we examined the dangers of premature judicial decision. Two main problems emerged; the inadequate development of the facts in the light of which a case must be decided, and the intrusion by the judiciary into areas where private or political solutions might be more acceptable. The institution of "Advisory Opinions" presents these same problems and we now turn to a close examination of that institution in India.

I. INTRODUCTION

The standard criticism of an advisory opinion has been given in the Canadian case, Attorney-General for Ontario v. Hamilton Street Ry.:1

"They are questions proper to be considered in concrete cases only, and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. 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 upon 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 particular words when the concrete case is not before us."

As long as advisory opinions develop by analogy to opinions given by a lawyer to a client this criticism is likely to have great force. For it is normally the function of the lawyer to give advice in advance of concrete factual developments. The lawyer must then exhaust all possible situations in anticipation of some actual dispute or deal in a hypothetical way with some abstract proposition of law which it is feared may become applicable to his client's activities.

* Vol. IV, No. 2 (April-June 1962) of this journal.
However, the development by analogy to a lawyer's advice is not an intrinsic trait of this institution. The hypothetical nature of the problem presented to the court is not inevitable. A hypothetical or premature question can be presented to the Court for an advisory opinion in two ways. First, there may actually be a mature and concrete controversy prompting the reference but the question put will be stated in the hypothetical manner usually characteristic of premature controversies. Secondly, the fact situation may not be matured with the result that the counsel inadequately understand their case and the judges are unable to write concrete statements of the law.

Writers often speak as though the abstraction of the legal issues is essential in an advisory opinion or make it the foundation of their criticism. But there is no reason to suppose that the government must abstract a legal question from a concrete situation or that the reference will deal with premature fact situations. Indeed, this institution may develop so as to approximate closely a system of declaratory judgments dealing with concrete cases, rather than in the practice of legal advice to a client.

India has had a specific provision for advisory opinions since 1937. Under the Government of India Act, 1935, four opinions were given: In re C.P. Motor Spirit Act; In re Hindu Women's Right to Property Act; In the Matter of the Allocation of Lands and Buildings; In re Levy of Estate Duty. And under the 1950 Constitution, three opinions...
have been rendered: In re Delhi Laws Act; In re Kerala Education Bill 1957; In re Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves. It is the purpose of this article to examine the Indian experience with this institution to see the extent to which the dangers of prematurity have been avoided and to see what other disadvantages may be attendant upon such a practice. While the dominant theme of this critique will be to point out certain risks, he has no intention of reaching a negative conclusion. The purpose is only to suggest possible dangers and compensating advantages so that thought will be stimulated among those better able to reach a final evaluation.

II. HYPOTHETICAL QUESTIONS

There is no doubt that the Federal Court and the Supreme Court have always attempted to assimilate the court procedures in an advisory opinion to those of the usual adversary proceeding. This reduces the danger of hypothetically phrased questions remaining in their abstract state, provided that the situation prompting the reference to the Court is a concrete dispute. The 1950 Constitution, as well as the 1935 Act, required opinions to be given in open court, which encourages the care and deliberation that comes when public scrutiny follows. The Supreme Court rules provide that the procedure appropriate to the Court's original jurisdiction shall be followed where possible in a reference under Article 143. Under the Government of India Act cases, the Court always saw to it that interested parties were represented. There can be no doubt that the procedures of the Court will make a reference as close to a normal adversary case as is possible.

The intention to assimilate the advisory jurisdiction to the status of the normal adversary jurisdiction is also reflected in the widespread

9. A.I.R. 1951 S.C. 332 (hereinafter referred to as the Delhi Laws Act case); A.I.R. 1958 S.C. 956 (hereinafter referred to as the Kerala case); A.I.R. 1960 S.C. 845 (hereinafter referred to as the Berubari case).
12. Hindu Women's case, p. 73 (notify Advocates-General of Provinces though no notice to any other parties); Central Provinces case, p. 3 (notify other provinces in view of their contingent interest); Levy case, p. 74 (Government of India and Provinces notified and amicus brief for taxpayers required); In the Allocation case, the center and Punjab appeared as the most directly interested parties.
13. However, it should be noted that the International Court of Justice has retreated from its earlier strict requirements of adversary proceedings in an advisory opinion; see Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania 1950 I.C.J. Rep. 65, where the Court gave an opinion despite the unwillingness of a party to appear.
treatment of advisory opinions as binding precedent with full stare
decisis effect, 14 and the invariable compliance with the opinion by
political bodies 15. It is often said that advisory opinions are not
legally binding.16 However, as long as the procedures are chara-
ccteristic of the normal case, a primary reason for withholding stare
decisis effect is removed; for if the parties vitally interested in the
outcome of the litigation participate adversely, subsequent litigants
lose one basis for objecting to the application of the law established
in that case to themselves. Further evidence that such opinions were
meant to be as authoritative as normal judgments is in the provision
in the Constitution for five judges to sit out of the eight originally
required by the Constitution to be on the Court.17

While the use of adversary procedures and the giving of opinions
in open Court can go a long way in concretizing abstractly phrased
questions, no procedures can concretize a genuinely premature case.
There the danger of abstractness lies in the lack of concrete facts,
not in the phraseology of the question or the lack of adversary pro-
cedures. The safety valve for such situations remains the rule that
advisory opinions are not binding as well as the rule that the Court
has discretion to refuse to give an opinion in most situations.18

14. K. K. Chatterjee v. Union of India, Writ Petition No. 30 of 1960 (21-4-60)
(dismissed because the issues were covered by the Berubari opinion); State v. R. Tiwari
A.I.R. 1956 Patna 188, 190 (Delhi Laws Act case followed); Kadhi Bewa v. Bhagawon
Sahu A.I.R. 1951 Orissa 378, 396 (Hindu Women's case the highest authority on the
subject); Emperor v. Munnal Lat A.I.R. 1942 All. 156, 168 (duty to follow Central
Provinces case).

15. After the Levy case no estate duty was enacted. The British Parliament felt
it necessary to amend the Government of India Act, 1935 (see Statutes, 1945, Ch. 7,
p. 54) and the 1950 Indian Constitution also included a special provision for an
estate duty (List I, No. 87 of Schedule 7).

Following the Kerala decision, the state amended the bill to conform to the Court's
opinion; Moothedam, The Kerala Education Act, 1958, and Minority Schools, 1959
Ker. L.T. 55.

16. See e.g. Kerala case, p. 964.

17. Article 145(3) of the Constitution of India. It was even the intention of the
framers that a full bench sit; Report of the Committees to the Constituent Assembly
(First Series) 1947, Dec., 1946—July, 1947, p. 64, dated July 4, 1947. Seven judges sat in
the Delhi Laws Act and Kerala cases, eight in the Berubari reference.

18. Article 143(1) of the Constitution of India says that the Court "may" report its opinion. It is only in the special case of certain treaties under Article 143(2)
that the Court "shall" report to the President. The Constitutional Convention was
clear that "may" was intended to be permissive, "shall" compulsory; Constituent
supports this view, p. 964.
Advisory opinions will have the stare decisis effect to which they are entitled in the light of their compliance with the accepted norms embodied in the doctrine of prematurity.\textsuperscript{19}

The Federal Court on one occasion denied the stare decisis effect of an advisory opinion and completely reviewed the rationale of its prior opinion.\textsuperscript{20} It is interesting that the legal issue reviewed suffered from serious defects of prematurity in the case in which it originally arose, the Hindu Women's case. In that advisory opinion the Court even conceded that there was as yet no "opposite party" to the legal contentions raised by the government in the reference. The Court did see to it that the provinces were represented. This assured a vigorous argument against the encroachment of the center upon the provincial sphere of agricultural property. But the provinces did not care at all about the total invalidity of the statute.\textsuperscript{21} No dispute on this point had yet developed. Nonetheless, the question of total invalidity was raised. The bill had been considered by one house of the Parliament before the implementation of the Government of India Act and by another house after that Act became effective. The Court found that this did not disqualify it from becoming law. In the Umayal Achi case, supra, however, the litigants were genuinely concerned with this issue of total invalidity and the opinions of the judges reflect the difference. Each judicial statement is far more carefully worked out and each argument more fully weighed.

Using this test of a mature controversy as the basis for the binding effect of an advisory opinion, we find one other opinion seriously defective, the levy case. Here the issue was the central government's right to legislate an estate tax as opposed to an inheritance tax. No bill had been drafted in the legislature. The bill which the Court considered was the one which the parties agreed on, not one which the legislature had passed or even considered.\textsuperscript{22} It is difficult to find a more hypothetical question; the Court was being used simply as a government lawyer. No adversary atmosphere could

\textsuperscript{19} Res adjudicata effect is also denied. This rule, if it were applicable, would bar only those who participated in the case and their privies from raising the issues in another litigation. However, since the parties did not choose the issues and did not initiate the suit, this rule should not apply as long as the absence of stare decisis effect allows the rest of the world to challenge the opinion.


\textsuperscript{22} Levy case, p. 77; the Governor-General expressly invited an opinion on the assumption that the bill was the same as the English statute.
be generated since the parties before the Court were not directly involved as adversaries in an imminent controversy. The proof of this lies in the concession by the taxpayer's representative, who had been appointed by the government, of the right of the government to tax.\textsuperscript{23} No taxpayer could feel that his interests were adequately represented when such a concession is made.

The Court said that this case was not hypothetical since the Governor-General was seriously considering giving the central government the power to impose estate duties if the Court found that the legislature lacked such power at present. This completely misunderstands the function of the doctrine of prematurity. A legal issue is not made less hypothetical because there is intense concern about it. Where that concern springs from the imminence of an act which does not make the legal issues any more concrete, the problem remains hypothetical. Here the supposed imminence was with regard to the Governor-General's granting a power to the central government, not with regard to the passage of the bill and the levying of a tax, which alone might have made a question about the law concrete.

By contrast with the lack of adversary proceedings in the Hindu Women's and Levy cases, we may compare the Allocation reference. There the government's problem was much like that of a private landowner whose title is challenged at a time when he hopes to use the land. This case closely parallels a declaratory judgment to remove a cloud on title to realty. It is very strange, therefore, that the Court picked this case in which to voice its misgivings about the non-binding effect of an advisory opinion.\textsuperscript{24} This was the strongest case from that point of view.

The inadequate fact development in the Hindu Women's and Levy cases resulted in an inability to have fully developed adversary proceedings. This is the most extreme defect of a premature fact situation. More frequently, prematurity results in the inadequate understanding of the immediate impact of a challenged piece of legislation, though an adversary presentation is possible. In the Kerala case, the Court heard the reference before the rules had been promulgated under the statute. The threatened impact of a take-over of schools in that state was enough to ensure a very adversary proceeding. Nonetheless, an understanding of the full impact of such

\textsuperscript{23} Levy case, p. 76.

a take-over in all its details was lost to the Court as long as it did not have the rules before it. The lack of any administrative practice under the Kerala Education Bill meant a similar defect in understanding the immediate context in which the legal issue arose. Both rules and administrative practice may better reveal how a statute immediately affects individuals.

In the Central Provinces case we see a different type of factual deficiency from that so far discussed. The facts in that case were sufficiently developed to assure an adversary presentation by the parties; the bill was ready to be brought into effect but for the Court's decision. And the immediate impact of the central government's removal of the state's power to tax sales to consumers was reasonably clear without administrative practice; for, unlike the take-over of schools in the Kerala case, the immediate impact of a loss of revenue can be easily translated into meaningful quantitative terms. However, it is possible that greater long-term historical experience with the relationship between state and center concerning sales taxes and other revenue matters would have been of great assistance in determining the constitutional and legal resolution of this dispute. Practice can be an excellent guide to the proper solution of constitutional questions, and the Court forfeited this by deciding the reference at an early stage of constitutional development.

The Delhi Laws Act case presented a similar problem. An adversary proceeding and an understanding of the immediate impact of the challenged legislation was assured; the very issue before the Court had been presented two years earlier to the Federal Court in a


27. In *McCulloch v. Maryland* 4 L.Ed. 579, 602 (1819), Marshall, J. stated this view in the expression, it is a "constitution we are expounding." In that very case, Daniel Webster, as counsel, had stressed the long-standing acceptance by both the legislature and the executive as evidence of its constitutionality (p. 581).

In the Central Provinces case, however, the Court expressed doubt concerning the value of actual practice; p. 37. Especially was this thought to be true when the document being interpreted was a new one, differing radically from prior basic law. However, the very youth of the document urges awaiting further experience before attempting to interpret it.
concrete case. But, like the Central Provinces case, it came at the very beginning of the experience under the document to be interpreted. The doctrine of "delegation of legislative power", at issue in this case, is one that the experience of history can greatly clarify. The vacillation of U.S. courts on this question, and the working out of a legal solution by careful case by case development, suggest the importance of such experience.

Furthermore, the lack of administrative practice over a period of time in the Kerala case not only deprived the Court of an understanding of the immediate impact of the legislation; it also meant that the broader social background in the light of which the constitutional issues had to be determined was unknown.

The assumption behind the view suggested here is directly contrary to the approach which maintains that words of a statute or a constitution "mean what they say." Cold, hard facts, discovered through practice, may shed light upon the legal solution which judges and lawyers could never have anticipated. A deficiency of such historical facts may thwart a proper resolution of the legal problems arising out of an otherwise concrete and mature case. The idea expressed is that the immediate impact of a statute may be known, but the long term legal significance and interpretation of the statute or relevant Article of the Constitution remain uncertain. The terminology often used by U.S. legal writers to denote the distinction between facts required to illumine the immediate impact of a legal rule and those required to help interpret a legal rule is adjudicative facts for the former and legislative or historical facts for the latter.

Nor should the phrase "legislative facts" make courts wary of intrusion upon legislative functions. Judicial awareness of basic social trends is crucial and is not a usurpation of the political functioning of the legislature.

Whenever either type of factual development is inadequate, an advisory opinion should be considered less trustworthy and its stare

29. See the remarks of Bose, J. in Delhi Laws Act case, p. 437 (even American judges departed from their old rigid view of delegation under the pressure of the circumstances); p. 439 (this question must be left to case by case development).
decisive effect limited; although the lack of adjudicative facts is more serious because it prevents an understanding of whatever legislative or historical facts are available at the stage of history at which the case arises.

Furthermore, the inadequacy of legislative facts may be considered as a factor in refusing to give an advisory opinion, even though this could not be independently significant in deciding the narrower issue of prematurity. For a case will not be premature if the immediate impact of the relevant legal rule is apparent, however inadequate the historical experience with that legal rule may be. The most weight that the lack of historical experience can carry in a normal adversary litigation is to re-enforce a decision that other elements of prematurity warrant a denial of a judicial pronouncement. However, in an advisory reference the discretion to refuse an opinion, as well as the power to grant a hearing,32 is broader than in the normal adversary litigation. Any lack of historical experience may, therefore, legitimately be considered as an independent factor in deciding whether or not to render an opinion.

It may be said that the possibility of challenging a bill immediately after it becomes a statute makes our suggestion of the importance of legislative facts untenable. Apart from overlooking the benefit of the rules which come after passage, this argument begs the question. Why may it be challenged after passage? Has anyone been hurt? Has its application been threatened? All the questions of prematurity, i.e., the development of adjudicative facts, which we belaboured in the prior article recur.

The Delhi Laws Act case revealed another danger which is normally associated with prematurity, but which did not spring from such a defect in this case. Just as abstractness may result from the manner in which a legal question is phrased despite the maturity of the facts,33 so the atmosphere in a reference may prove conducive to the abstract treatment of the question referred. This may be so although the concrete facts are present, the procedures are the same as in a normal case, and the legal question is concretely put to the Court. In the Delhi Laws Act case, the question presented to the Court was treated as

32. The phrase "likely to arise" in Article 143(1) allows pending legislation to be examined in an advisory opinion (Kerala case, p. 964; Levy case, p. (75), although this is not allowed in normal litigation; Bhairabendra v. State of Assam A.I.R. 1953 Assam 162.

33. See fn. 3 and accompanying text.
opening up the entire issue of legislative delegation of power. However, the concrete question before the Court was the narrow one of delegation of legislating power in small areas where independent legislative machinery was impractical and expensive, rather than the usual one of a rule-making power to implement social welfare legislation. Only one justice noted the narrower implication of this question. The rest filled over one hundred pages with a resulting abstraction which proved confusing in subsequent cases. It may be that this tendency to dilate was due to an atmosphere generated in a reference proceeding, much as lawyers may sit around an office exhausting all the ramifications of a legal issue before venturing to advise a client.

This tendency to abstraction in an advisory opinion even when the reference is based on a concrete situation, can be seen in the practice of the International Court of Justice. There the abstraction does not occur at the stage of oral argument by counsel, as it did in the Delhi Laws Act case, but at the earlier stage of the framing of the question put to the Court. The issues must be abstracted from the underlying concrete fact situation, although this view is not without its dissenters. The feeling is that an opinion on a question of law is different from a settlement of a dispute. The former is abstract, the latter concrete. Such a view is directly contrary to what we would assert to be a question of law, i.e., the application of general rules to concrete fact situations, arising in an actual dispute. However, this

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34. This development is not a necessary one; see Central Provinces case, p. 3 ("question lies in a small compass"); and Kerala case, p. 992 (because this is an advisory opinion, the reference should be narrowly construed).


37. The taxpayer's concession in the Levy case (see fn. 23) may have sprung from the "friendly" atmosphere of a reference proceeding.

38. See fn. 3.

dichotomy has been maintained by the International Court and there is a danger that the tendency towards abstraction exerts a strong pull in advisory opinions.40

There is a further risk in advisory opinions, usually associated with a premature case, but which here arises from the manner in which a reference originates and not from the existence of a premature fact situation. A premature case may raise as the central issue what is really a tangential issue from the point of view of future litigation. Attention will be incorrectly focussed because the full implications of the legal issues are not understood. In an advisory opinion the "wrong issue" may be raised for another reason; the government may be interested in something which does not seriously concern the prospective litigants. This can happen because there is no requirement that the government be the party most interested in litigating the issues raised by the reference proceeding which it initiates.41 Legally, this danger is not great. Any issue not discussed in court cannot be precluded in a later case even if the advisory opinion were to have full stare decisis effect. This is due to the inapplicability of the rule of res adjudicata. However, the psychological effect may be staggering. In the Kerala case, the most prospective petitioner was not the central government, but the institutions of learning which feared control by the state.42 These parties felt that the main constitutional questions were not the points raised by the government.43

The Court refused to consider the objections raised by the parties since it was held that the President's interest in making the reference limited the scope of inquiry. But in upholding the statute, the Court

40. See fn. 13 on the International Court's retreat from a prior strict adherence to adversary procedures in advisory opinions.

41. It has been suggested, therefore, that an advisory opinion be given only when the government asking the question is concerned with the legality of its own action; "Advisory Opinions on the Constitutionality of Statutes", 69 Harv. L. Rev. 1302, 1307-08 (1956).

42. It is true that the central government was required to take "action" in the form of Presidential approval of this bill which had been reserved by the Governor for his assent (Article 200 of the Constitution). But the requirement that the referring government's own action be involved in the reference is designed to make it a natural litigant in the proceeding. This is possible only if it is directly affected by the challenged bill or if it is the source of the legislation, neither of which is true as a result of Presidential assent.

43. Kerala case, p. 965; Article 19(1)(g) (freedom to practice any profession or to carry on any occupation, trade or business) was urged on the Court, and it seems that Article 30(2) (no discrimination in monetary aid to educational institutions against religious minority) was also of great importence.
solidified public opinion around the belief that certain parts of it were valid as against all constitutional objections. Thus the psychological effect as well as the time and expense of further litigation discourage any future testing of this statute.

III. Judicial Intrusion in Political Affairs

The dangers we have so far discussed have all involved the problems of abstractness. There is, however, a second area of risk, broadly characterized as the intrusion of the courts into private and political affairs. We have already seen one aspect of this intrusion in situations where historical or legislative facts could have been of use in formulating legal rules. This was just another way of saying that the process of experience might offer solutions which were better than the accelerated judicial deliberation of a court. However, the more specific meaning of the injunction against judicial intrusion envisions the utility of specific institutional settlements of nascent disputes such as a contractual or political bargain, rather than the general advantages of historical experience.

With advisory opinions in India, this danger is most likely to take the form of totally by-passing the political arena. The phrase "likely to arise", which characterizes one type of question on which an opinion may be given, has been interpreted to allow pending legislation to come before the Court in a reference proceeding; although a pending bill cannot be challenged in a normal adversary proceeding. When pending legislation is examined judicially we lose the benefit of a political judgment on the social needs which prompted the legislation, i.e., on the legislative or historical facts which must contribute to the judicial solution of the problem.44 Nor can such political judgment be ignored, in its larger sense of an expression of the basic desires of the people, without running the risk of unnaturally isolating legal decisions from the deeper social and political trends of the society.45 The law does not lie on one side of a rigid line on the other side of which resides the political and private sector.

When a political judgment is by-passed we also run the risk of embracing difficult and controversial questions, although it may

\[\text{44. Frankfurter, "A Note on Advisory Opinions", 37 Harv. L. Rev. 1002, 1005 (1924).}\]

\[\text{45. The weight of this assertion is not as great in India as in the United States. The procedure for amendment of the Indian Constitution is simple (Art. 368) compared to the stricter requirements of the U.S. Constitution. It can be argued that the basic desires of the people in India have a relatively easy outlet if constitutional change is desired so that courts need not be too solicitous of this factor.}\]
never be necessary to do so if the legislature fails to pass the bill. The presentation of a draft bill does not really cure this defect. At best it is some evidence of the seriousness of the party in power to realize its legislative aims.

One of the reasons given by the Calcutta High Court in *Nirmal Bose v. Union of India* for refusing to decide the case at present seems to be based upon an awareness of the dangers of decision when the political process is incomplete. Here the incompleteness was not legislative, for a bill was not challenged; it was rather the uncertainty of executive action. The Court refused judicial relief for a claim that the executive department was acting unconstitutionally, because no definite decision to take action without consulting the legislature had been taken and no orders to the State of West Bengal to implement any decision had been issued. The court noted the political content of the arguments made to the Bench, which may have resulted from the lack of any final political judgment having been brought to bear on the subject. And yet this very volatile issue was referred to the Supreme Court in the *Berubari* case for an advisory opinion, though the same elements of prematurity persisted.

A danger closely related to that of by-passing political judgment is the lessening of legislative or executive responsibility for the constitutionality of its own decisions because it may feel free to consult the judiciary where such doubts arise. We are assuming that the real strength of a constitution must lie in the responsibility of the citizens and their elected representatives, however useful judicial vigilance may be. In India, however, there is every evidence that the legislature and executive still consider themselves separately responsible for the constitutionality of their own decisions; for the Attorney-General has the right to address the Parliament and his advice has been accepted.

47. Id. at p. 519.
48. In the *Central Provinces* case, only a bill was presented for an advisory opinion; but it appears that the the process of political judgment had stopped. The bill awaited only a notification which was itself dependent only upon the Court's decision; Hindustan Times, April 28, 1938, p. 14, col. 6. However, one can never be too sure what political factors may arise despite the conviction that only a Court's decision is relevant.
50. Under Article 88 of the Constitution of India, the Attorney-General has the right to address Parliament. The government accepted his advice that a law passed
One reason why this danger is not pressing lies in the present limited use of advisory opinions. The attitude among most people towards advisory opinions is one of approval if they are not used too often. This certainly was the intention of the framers of the Constitution, although it is never said why it is good in moderation but not if used frequently. It may well be that the fear of converting elected officials into petitioners in Court is a primary reason for encouraging a limited use of the reference proceeding.

The primary risk of advisory opinions in India, however, results from judicial involvement in political controversy. We have already seen that whenever the activity of a government is examined before its action has been finalized, the ebb and flow of political controversy is likely to continue to disturb the judicial calm. However, there is a special danger of such a disturbance in the Indian practice even if the governmental action is completed. For the requirement in Article 143 that the question referred be one of "public import" means that the controversy prompting the reference will be contemporary and likely to involve much political heat. Of course, the issue in an advisory opinion may not generate much heated controversy even if it is one of "public import", just as a normal case may frequently be the cause of a great political storm. However, the peculiar position of the instigating party as the head of the state, taking instructions from the political head of the government, makes the practice of giving hot political issues to the Court an easy one to develop, and there is evidence that such a trend is developing in the recent Kerala and Berubari references.

By "political issues" it is not meant to imply that the questions for the Court are political or policy questions. It only means that the atmosphere in which the litigation arises is one of heated political controversy.


52. Hudson, Advisory Opinions of National and International Courts, 37 Harv. L. Rev. 970, 975 (1924); Schwartz, American Constitutional Law (1955) pp. 150-51 (to decide the validity of governmental action before it is taken is to act in a "political manner").

53. The Court in the Kerala case noted its dislike of the extreme heat in counsel's arguments, p. 973.
Although political heat may be in the background of a normal litigation, this fact does not dismiss the danger of such a practice in advisory opinions. The Court's reserve of prestige is not inexhaustible. Courts must settle genuine private disputes, however charged the atmosphere. This is their job. But this does not mean that it is a good idea to encourage dipping into political controversy. The involvement in legal disputes with a political background is going to dissatisfy one of the parties, the one that loses. The greater the passions involved, the more likely it is that the displeasure will be vented on the Court. The inevitability of this in a normal litigation is no argument for providing another forum where it may occur, i.e., a reference proceeding. It may be that the limited use of advisory opinions is preferred for this reason as well.

This sense of the danger of involvement in political controversy even when a legal and not a political or policy question is involved is clearly reflected in the advisory opinion practice of the International Court of Justice. It was earlier noted, that the Court leaned towards abstract questions when "legal questions" arose in an advisory opinion.54 The context in which the Court made those statements may indicate that the judges did not actually consider legal questions to be abstract questions, but rather that only by abstraction could the Court avoid the political controversy which prompted the reference.55 This meaning of the word "political" is the sense in which that term is used here.

It is not suggested that the Indian Supreme Court should deal in abstractions. Such decisions are, as has been urged all along, poor guides to actions and inadequate solutions of disputes. Furthermore, the Court cannot really hope to avoid the heat of the political arena by dealing in abstractions,56 any more than the ostrich can effectively avoid his enemies by placing his head in the sand. If the situation is politically too volatile, that should honestly be considered as a factor in deciding whether or not to take the reference.57

This difficulty of intrusion into politically charged situations is more serious than the problems relating to lack of concreteness. For

54. See fn. 3 and accompanying text.
56. See cases in fn. 39.
57. Like the lack of legislative facts, volatility may not be an independent reason for refusing an otherwise mature case in a normal adversary proceeding. But the broader discretion in a reference proceeding allows an open consideration of this factor.
the latter defect can be cured by a judicious use of stare decisis, while
the former harm is irreparable.

The most recent advisory opinion, the Berubari case, affords a good,
example of the Court's involvement in a political controversy. The
issue was a purely legal one, "How does the government constitution-
ally cede territory if the situation was, in fact, one of cession?" How-
ever, this issue was one which had exacerbated public opinion for a
long time before.58 The real danger in this case becomes apparent
only if we assume that the opinion had favoured the central govern-
ment's position and allowed a mere executive order to cede territory,
instead of a constitutional majority in the legislature. The emotions
in West Bengal ran very high, and could only have been vented on the
Court.59 It cannot be said that this is raising imaginary evils.
Each case can go either way if we assume that the Court is giving an
impartial judgment on a doubtful legal question.

The alternative to West Bengal's displeasure is the dissatisfaction
of the center at an adverse decision. Once again, the potential measure
of this dissatisfaction is not apparent. Here the center did lose its
case but it easily controlled the constitutional majority which it needed.
However, the Court cannot proceed on the assumption that constitu-
tional decisions will be a rubber-stamp process for the ruling party or,
more significantly, that the political power to accomplish this will exist
in the years to come. Time will make the majority in the center a more
fragile thing and an averse opinion by the Court on a constitutional
question a far more serious matter.60

The danger discussed above involves the loss of prestige solely on
account of involvement in a political controversy. This may result
from the reaction to the Court's opinion. But there is a far more
serious danger, which is that the public will consider the use of an
advisory opinion to be a political weapon rather than a source of

58. Times of India, January 23, 1959, p. 6, col. 7 and April 7, 1959, p. 6, col. 7.
The Calcutta High Court, hearing the issue which the Supreme Court passed upon in
the Berubari case in A.I R. 1959 Cal. 506, noted the political content of the arguments
at p. 519.
59. See fn. 58; even after the opinion required two-thirds of the Parliament to
approve the executive decision, West Bengal was furious with the center; Times of
India, November 26, 1960, p. 1, col. 8 and December 14, 1960, p. 1, col. 2; the Court
would have received this invective if it had found against West Bengal.
60. It may be that the pressures for a disregard by the political powers of the
Court's opinion will emerge as a significant danger with this decline of the majority in
the center, however unlikely this is at present (see fn. 15).
resolving legal doubts. In *Berubari* it appears that the center was motivated by genuine legal uncertainty; in fact, West Bengal welcomed the reference. But in the *Kerala* case, the situation appeared very different. There it looked as though the government made use of an advisory opinion to support a position which it was politically unable to control. It is not asserted that the government's motives were impure. This we cannot know. But the appearances are there and they can be equally important when the prestige of the Court is of concern.

In the *Kerala* case, the political atmosphere was every bit as heated as in *Berubari*. But in addition, the purpose in raising the legal issue did not seem to be a genuine concern for the legality of the measure, as it had been in *Berubari*. The legal doubts, however real they may have been, seemed injected into the controversy as a means of carrying on the political struggle. The Kerala State government, whose legislation was challenged, was of a different party from the center and they opposed the reference. They accused the center of discrimination in not referring other similar measures to the Court and of using the advisory opinion for political ends. It looked as though, having lost the political battle in the state concerning the passage of an education bill, the ruling party in the center tried to win it in the Supreme Court.

It may be objected that the President is expected to pass on the constitutionality of state measures when the Governor reserves a bill for his assent. But such a practice of reservation should not be made in such a way as to give the appearance of discrimination. This is especially so when the constitutional issue is purely a matter between the state and its own residents, rather than one in which the state is affecting an all-India interest such as inter-state commerce. Most important of all, the Court should not make itself a party to such a practice even if the President insists on coming to a conclusion on these legal questions himself.

It is no answer to say that the Court cannot be used for political purposes since its opinion cannot be known in advance. If a battle is essentially political, however real the legal weapons in the battle may be, the party with one weapon in its arsenal denied to the other will be suspected of using it to its own advantage. The State of *Kerala*

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61. Times of India, April 7, 1959, p. 6, col. 7.
63. Times of India, March 18, 1958, p. 9, col. 4; Brief for State of *Kerala*, pp. 18-19.
could not get an opinion in the Supreme Court. It had a right to sus-
ppect that the center, in the face of political defeat, tried to win its
battle in the courts. The suggestion is not the perpetuation of uncon-
stitutional statutes. Private litigants may challenge the statute at some
point. But it is necessary to emphasize unwisdom of involving the
Court in a constitutional question which arises because of political
tactics not entirely free from suspicion.

It is not certain what effect this practice will have upon the Court.
All the anger at unfair treatment could be vented upon the central
government. However, this practice is a ready breeding ground for
cynicism as to the Court's impartiality and general aloofness from the
political arena, not in the sense of the broad social and political aims of
the people, but in the narrower meaning of particular political factions.
The specific charge of partiality to the executive is at present unlikely.64
However, the general charge of involvement with the world of politi-
cal factions has force. There may be no danger yet; the Court's
prestige is secure. But that prestige itself rests on a belief that they
stand beyond party politics. The danger is that the public image
upon which the Court relies in giving these advisory opinions, may be
eroded away by the very process of their issuance.

The position of the Communist state government in the Kerala
case may be a good sample of future developments; for the real impli-
cations of the misuse of advisory opinions will become apparent only
when the monolithic structure of the Congress party begins to crumble.
As states fall to the control of other parties, the public will become
more aware of the possibility that the center is not dealing fairly with
political opponents when a reference is made on issues of great politi-
cal concern.

It may be urged that the attempt to avoid these political battles
is illusory since the government is only going to refer questions of
great contemporary interest which would, in any event, be raised at
the first possible occasion by private litigants. First of all, this argu-
ment has no weight against a charge of unfairness by the center in
making the reference. Secondly, one can never be too sure in a pre-
diction of imminent litigation. It is true that the Kerala and Berubari

64. The original danger of advisory opinions was felt to be the subservience
which the judges would develop towards the executive based on a lack of tenure and a
desire to satisfy the questioner with the answer he would most like; Maitland, Consti-
tutional History of England (1948) p. 479. The lack of life tenure in India provides
some basis for the development of such a suspicion among the public, though no such
attitude is developing at present.
cases sprang from heated circumstances likely to give rise to private legal battles. But who can be so sure of foreign affairs as to predict what Indo-Pakistan relations might have led to in the Berubari case; or who knew for certain what a legislative debate on the Berubari cession in advance of the Supreme Court hearing would bring? And in the Kerala case, might not the passage of the unamended Education Bill have led to Emergency rule in the State; or might not the President have refused to give his assent if the Court had denied him an opinion? The point is that you never know for sure in political matters whether a legal question will get to the Court. The Court's willingness to hear a case despite the political background cannot be treated simply as bowing in the face of an inevitable adjudication, but a deliberate policy decision that the dangers of a politically charged atmosphere are not worth worrying about.

It is much too early to be certain that any trend in the direction of politically heated issues is firmly established. Other earlier advisory opinions do not seem to have partaken of such a background. The issue of delegation of powers in the Delhi Laws Act case arose in a context which could not cause too much excitement, i.e., the application of legislation to small areas without their own legislating bodies; though it might have been otherwise if the reference involved social welfare legislation. 65 What interest was shown appears to have been the result of its being one of the first major decisions by the Supreme Court. Of the Federal Court opinions only the Central Provinces case generated much excitement. 66 World War II and the struggle for independence made the other three cases, decided in 1941, 1943 and 1944, only of secondary public importance.

The use of advisory opinions since the commencement of the 1950 Constitution has been confined to questions of public import in accordance with the specific requirements of Article 143. But we must not suppose that "public import" is synonymous with "political volatility." The Delhi Laws Act case amply demonstrates that.

The responsibility at present for avoiding a reference involving heated political controversy must rest largely with the government seeking advice. Considering the broad discretion given to the Court

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65. The United States attempt to settle the "delegation" problem involved New Deal Welfare legislation; Panama Refining Co. v. Ryan 79 L. Ed. 446 (1934) 293 U.S. 388.

66. Hindustan Times, June 1, 1938, p 7, col. 2, indicates that the case was of great public import, though much of the interest probably arose from its being the first case before the new Federal Court.
in an advisory opinion, there is no reason why it could not consider such factors relevant in deciding whether or not to answer the questions posed; but they do not presently appear to do so. In the Kerala case the Court did not even note the State of Kerala’s objection to the reference based on the charge of unfair political tactics by the center. Certainly a volatile political background should lead the Court to note more carefully whatever factual prematurity may exist, such as the flux in the political situation in Berubari and the lack of rules in the Kerala case.67

IV. Arguments in Support of Advisory Opinions

A. Acceleration of Judicial Review

A more careful examination is necessary of the specific arguments made in favour of advisory opinions as they apply to the Indian context. It is frequently said that an advisory opinion save time. The fact which leads to this conclusion is the earlier point in time at which a case may reach the Supreme Court when an advisory opinion is obtained. But in order for an advisory opinion to save time, it must convincingly settle the dispute behind the reference. If it does not, more law suits will develop and the advisory opinion will have only added to the judicial workload. This may occur either because the specific dispute is not adequately laid to rest or, even if the dispute is settled, because the general proposition of law applied in the case raises future uncertainties. If the lack of concreteness which comes with premature suits or an abstract treatment of a concrete case occurs in a reference to the Court, the saving of time may, therefore, be an illusory hope. Indeed, it may be seriously questioned whether the Delhi Laws Act case or the Hindu Women’s reference lessened the litigation on the subject matter in dispute.68

Furthermore, the opinion may not generate just the same number of private litigations which would have occurred in the absence of a reference. It may create doubts and uncertainties which would not have arisen or would have otherwise been settled in a non-judicial manner. Lastly, the educational value of private litigation in different lower courts prior to a Supreme Court judgment should not be underestimated. The various legal positions may be elaborately

67. See text accompanying footnotes 46-48 concerning the Berubari case and fn. 25 regarding the Kerala case.

68. See fn. 36 concerning the Delhi Laws Act case (general proposition of law uncertain); and fn. 20 wherein is noted the Umayal Achi case, re-examining the Hindu Women’s case (specific dispute not settled).
explained and developed before the Supreme Court gets the question, thereby ultimately leading to a more considered judgment by the highest court in the country.

There is another aspect of saving time besides the conservation of time spent in litigation or "judicial time." When a legal decision comes much of the time and energy expended in reliance on an assumption contrary to the law as now revealed is wasted. An early opinion by the most authoritative court in the land may avoid such wastage. Once again, it must be remembered that this benefit comes only if the stare decisis effect of the opinion is trustworthy due to a mature dispute having been referred.

The problem of saving non-judicial time has two facets; one is the expenditure of time and energy by the government and the other involves the private sector. When the government passes a law, especially under modern economic conditions, a vast system of administration may come in its wake. If the law is unconstitutional, this may all be for naught. It has been suggested that the Central Provinces case afforded a good example of an advisory opinion having this salutary effect because of the administrative machinery that would have followed this new taxing statute. The Delhi Laws Act case may also present this situation, for the application of laws to a new territory may involve the creation of new administration.

But the assertion of wastage of time and energy in any given case, like all arguments for and against advisory opinions, must be examined in the light of the facts of the particular case. First, this advantage of a reference does not justify an opinion before a bill becomes law. Nor does it justify by-passing the promulgation of rules. Care should be taken that there is a real likelihood of administrative machinery being created in the future. The possible saving of time may be a reason for the existence of the institution of advisory opinions but it cannot justify its use in every case. It may even be possible that a law can be implemented by the use of present administrative facilities. No new printed forms may be necessary. Tax statutes will probably require new machinery if new taxes are imposed, but not if they simply add to the list of assesses.

Governmental action may proceed beyond the stage of setting up administration to the stage of altering the status quo, e.g., the

actual collection of taxes. Here both governmental and private time and energy may have to be expended to restore the status quo. Once again, the imminence of this possibility is a fact to be shown by an adversary debate in the reference itself. Not all governmental action alters the status quo. It may even require a maintenance of the present situation.\footnote{Kerala case, p. 968; clause 12 of the impugned statute fixed the teachers in their positions by securing tenure, although other sections altered the status quo.}

There may be a case where the government so alters the status quo that the unscrambling is practically or totally impossible. In the Berubari case there was fear that the cession of land to Pakistan would create an unalterable situation once accomplished. However, this is no argument for doing away with the imminence of that alteration which, in this case, meant a firm judgment by the executive to by-pass the consultation of the Parliament and to instruct West Bengal to implement the executive decision.

Injury to the private sector alone may be caused by private parties, reliance on some assumption concerning the law. The Hindu Women's case presents this problem, for the law in that case purported to change property rights. Title and interest in reality would depend on the validity of the statute involved.

All of the above points have been considered under the heading of "saving of time", although several different problems have been mentioned. In reality the different problems of false reliances, wastage of administrative machinery, and creation of unnecessary litigation are all based upon a need for legal decision at an earlier point in time than could otherwise be expected. The rationale is the desire not to waste human energy. Framing the problem in this light may give us a better insight into the significance of advisory opinions in India. It is not just the envelopment of the individual by governmental machinery in the 20th century that urges the speedy resolution of legal doubts. It is the importance of time itself. The government cannot afford to allow time and money to be spent unscrambling events when the country is in urgent need of pushing events ahead as rapidly as possible. If a careful appraisal of the genuine risks be made before deciding to accept a reference, an advisory opinion may contribute to the conservation of the country's resources.

B. Creation of Judicial Review

There is another argument which urges the value of advisory opinions completely apart from the conservation of time and energy.
This view supports the institution because it may allow judicial review where none would otherwise be possible at any time. It is no longer a question of accelerating judicial scrutiny, but the existence of it at all. This argument assumes that there are cases where an individual's rights are infringed but for which there is no relief by the normal process of adjudication. The special utility of advisory opinions may be to create a remedy for a violation of legal rights which would otherwise go without redress.

We must first ascertain when legal rights exist but a remedy is denied. It is not necessary to open up the whole area of jurisprudential controversy which surrounds the "no legal right v. legal right but no legal remedy" debate. When we say that there is a legal right without a remedy we mean only that the reasonable lawyer or layman would consider some action illegal or unconstitutional but lacking in judicial relief. This concept of illegality or unconstitutionality is important because the present argument in favour of advisory opinions is based upon the need to vindicate claims of illegal action not normally heard in court.

In at least six situations the Constitution has created legal rights for which there is no remedy:

1. Articles 131 (Proviso) & 363—legal disputes arising out of treaties with the old Part B princely states or treaties which so provide shall not be within the jurisdiction of any court;
2. Article 31 (2)—no law shall be called into question in any court on the grounds that it provides inadequate compensation;
3. Article 359 (1)—in the case of a Presidential proclamation of emergency an order may be made that the right to move any court for the enforcement of Fundamental Rights may be suspended;
4. Article 329—a law relating to the delimitation of constituencies and the allotment of seats thereto shall not be called into question in any court;
5. Articles 109 (3) & 199 (3)—the decision of the Speaker of the House of the People or the State Legislative Assembly is final on the issue of whether or not a bill is a Money Bill and, therefore, to originate only in the House or Assembly;
6. Article 361—the President, Governor or Rajpramukh is not answerable in any court for action purporting to be in the exercise of his official duties.
The emphasis in all six examples is on the creation of a remedial bar to the effective enforcement of a legitimate legal claim. Article 131 or 363 does not gainsay the existence of a legal right arising from a treaty but simply removes such questions from the courts' jurisdiction; Article 362 specifically guarantees due regard for the rights arising out of the agreements with the old princely states. The fact that other treaties come within the courts' purview demonstrates that such issues are not beyond the general competence of the judiciary.\(^{72}\) Adequate compensation remains a constitutional requirement under the first sentence of Article 31 (2) as interpreted by State of West Bengal v. Bela Banerjee,\(^{73}\) although the last sentence removes the right to go to court on this issue. Article 359 suspends the right to move a court but does not suggest that the statute or other governmental action which cannot be challenged does not violate the Constitution. The delimitation of constituencies may clearly involve a violation of the Constitution if equal population, as nearly as is practicable, is not achieved in accordance with the requirement of Article 81 (2). And, similarly, a Money Bill cannot constitutionally be introduced in the upper house,\(^{74}\) even if a non-judicial statement is final on the question and the action of a Chief Executive can certainly exceed constitutional or legal limits even if a court cannot review the transgression.

These cases may be compared with other situations under the Constitution where the courts have been divested of the power to hear claims, but where the purpose appears to have been the denial of any substantive basis for a claim. The emphasis in all these latter cases is on the creation of legislative competence to deal with certain areas, rather than on the ouster of the courts from examining a claim of legal right. The following are examples where legislative competence has been created, i.e. legal rights extinguished:

1. Article 19 (2-6) (excluding 19 (6) (i & ii)—reasonable restrictions for the benefit of the public interest, morals and order shall not be affected by the freedoms listed in Article 19 (1);

2. Article 19 (6) (i & ii)—statutes for professional and trade qualifications and for state monopolies shall not be affected by the freedoms listed in Article 19 (1);

\(^{72}\) Article 131 of the Constitution of India gives original jurisdiction to the Supreme Court in disputes between governments over treaties to the exclusion only of specific types of treaties.


\(^{74}\) Articles 109(1) and 198(1) of the Constitution of India.
(3) Article 305—statutes validated by Article 19 (6) (i & ii) shall not be affected by Article 301, guaranteeing freedom of trade;

(4) Article 15 (4)—statutes for backward classes and Scheduled Castes and Tribes shall not be affected by this Article or Article 29 (2), dealing with discrimination on account of caste, race, sex or place of birth;

(5) Article 31 A—statutes dealing with certain state economic programs shall not be deemed void as against Article 14, 19 & 31;

(6) Article 122—no law shall be called into question because of any irregularity of procedure in Parliament.

In all of these examples except number six the Constitution makes a judgment that certain types of legislation are valid social objectives and are, therefore, not to be illegal. It has, in fact, been said that some of the Amendments to the Constitution, which are involved in examples 2-5, represented an attempt to clarify the original basic intention of the Constitution.75

Example six, dealing with parliamentary procedures, stands on a different footing and illustrates some of the difficulty with our analysis. It would have been easy to say that those examples which spoke in terms of a loss of procedural remedy were all cases of legal rights lacking a legal remedy. Indeed, it is still a good guide to that conclusion and all the examples we have given of a legal right without a remedy do speak in terms of a procedural bar i.e., "suspension of the right to move the court", "loss of jurisdiction", and "not call into question in any court". However, the example involving legislative procedures, which we placed in the "no right" section, also speaks of "not calling into question in any court". Thus, while verbal expression is a good guide, underlying policy must also be looked to. It appears that legislative rules are meant only for the convenience of the legislature, much as a club may set its own regulations. A violation of such rules does not involve an illegal act from the point of view of society, any more than a tennis club violates a legal right when it refuses membership without a quorum.

One of the examples of a loss of a procedural remedy may actually involve a loss of a legal right. Article 31 (2) prevents adequacy of compensation from being examined by a court. Because this provision came in with the Amendments to the Constitution which sought to

sustain broad state programs of social welfare, it may be that legislative competence was created rather than a mere removal of a remedy. However, unlike Article 31 A, it did not speak of a law not being deemed void, an expression which connotes the creation of legislative competence. Rather, it spoke of "not calling into question in any court" the adequacy of compensation, leaving untouched the clause which judicial gloss had read as requiring such remuneration. Furthermore, there is a basis for distinguishing the treatment in Article 31 A from 31 (2). Adequacy of compensation is still considered a cornerstone of a democratic constitution. Article 31 A may go so far as to make constitutional certain state programs which are socialist. But to legitimize inadequate compensation would be to go far beyond socialism. Hence, inadequacy of compensation remains unconstitutional, however inadequate the remedy may be.

It is obvious that one may argue with the categorization of various Articles of the Constitution in the above analysis. What is important for our purposes is the acceptance of the need to make such categories if we are to understand the argument which supports advisory opinions because they provide judicial review for otherwise neglected legal rights. It is clear that there may be legal questions arising out of those examples which involve a total extinction of legal rights. For example, one may want to know if a preventive detention Act violates Article 19 (1) (d), even if reasonable restrictions upon the freedom are constitutionally imposed; or if a statute for backward classes violates Article 15 (1) even though Article 15 (4) validates it. Similarly, the violation of parliamentary procedures may raise a typical legal question even though there are no legal rights vested, in the proper observance of the rules. However, such a use of advisory opinions could not be based upon the argument that the consultative function of the Supreme Court provides a forum for the protection of legal rights which would not receive attention anywhere else.

In fact, the use of advisory opinions for legal questions not involving legal rights might not even be justified by the Indian Constitution. The resolution of this issue depends upon the definition of a "question of law" in Article 143, which creates the authority for a reference proceeding.

76. Basu, Shorter Constitution of India (2d. Ed. 1959) p. 131 (quoting Select Committee recommendation that the quantum of compensation be for the legislature, not the courts). This certainly sounds more like the creation of legislative competence than a procedural bar.

77. See fn. 73.
Article 131 of the Constitution sets the limits of the Supreme Court's original jurisdiction as a question (whether of law or fact) in which the existence of a legal right depends. Though Article 132 speaks only of a question of law without mentioning legal rights, this article deals with appeals from High Court orders which must, of necessity, involve legal rights. Thus the pattern of the Constitution in using the phrase "question of law" seems confined to those situations in which a legal question arises in the context of a legal right.

Nor can the inclusion of "questions of fact" in Article 143 within the range of matters which may be referred to the Court include legal questions not relating to legal rights. The kind of "fact" about which there can be inquiry must be a fact relevant to those issues which arise within the scope of a "question of law". Otherwise the word "fact" will have a wayward meaning which could include anything and everything.

Were the use of advisory opinions allowed for legal questions not arising in the context of a legal right, we would be likely to encounter the dangers of premature intrusion into sensitive political questions. Thus to ask if a Preventive Detention Act violates Article 19(1)(d) although there is no question of unreasonableness and, therefore, no question of the violation of a legal right, is to grapple unnecessarily with a crucial issue. Likewise, the normal functioning of a legal advisor may be displaced as when the parliamentarian's conclusions on Lok Sabha rules is disregarded in favour of an advisory opinion. This urges an interpretation of "question of law" in Article 143 which includes only legal questions relating to legal rights. But, even if a broader interpretation be given in the interests of allowing the Court discretion, that discretion should normally be exercised to prevent premature involvement in questions of law not pertaining to individual rights.

Before we proceed to examine the merits of the argument favouring the use of advisory opinions to create a judicial remedy for legal rights not otherwise protected, we must make sure that the Constitution allows such a practice. The language of the Constitution might be considered ambiguous. The procedural bars to judicial review in the Articles we have noted might exclude even the Supreme Court in its advisory capacity. Thus "no jurisdiction" might include a reference proceeding and an advisory opinion might be considered to "call

78. Of course, this legal question did come up in a case where unreasonableness was also asserted and, therefore, a legal right allegedly violated; A. K. Gopalan v. Madras A.I.R. 1950 S.C. 27.
into question” that which was forbidden to be judicially heard. However, the Constitution nowhere speaks of the advisory “jurisdiction” of the Supreme Court; it is more properly referred to as the consultative function to which a term like “jurisdiction” does not apply. Indeed, in the very case where jurisdiction is denied by Article 131, the Constitution requires an advisory opinion from the Court (Article 143(2)) if the President so requests. Nor can an advisory opinion be considered to “call anything into question” in any court, for only the advice of the Court is sought.

A similar analysis is applicable to the other Articles where a procedural bar is imposed. The finality of a Speaker’s decision is not impaired by seeking advice which does not technically detract from the finality of that judgment. And the right to move the Court in a writ petition which is suspended by Article 359(1) can refer only to suits brought in the normal course of litigation; for advice sought in consultation does not move the Court to apply any remedy.

It is not suggested that the procedures and practices of the normal jurisdiction are not to be closely approximated in a reference. Many of the dangers of advisory opinions spring from failing to observe the rules of prematurity applicable in a normal suit. We refer to the historical distinction between advisory opinions and normal proceedings as an aid to interpreting the meaning of the sections which forbid a judicial hearing. That historical distinction may be validly used to interpret an instrument which is the product of history as allowing advisory opinions where another type of judicial hearing is denied. At the same time we reject that distinction as a good guide for determining the practice which the Court should follow in a reference.

Whatever ambiguity may remain in this matter should be resolved in favour of allowing advisory opinions where there is a procedural bar to normal litigation. This is more consistent with the flexible and discretionary approach of Indian courts in all matters of declaratory relief for infringed legal rights. Each case can then be individually scrutinized to see if an advisory opinion should be given.

It remains vital in deciding how this discretion should be exercised to discover why the jurisdiction was withheld in the normal adversary proceeding. For the reasons for such a withdrawal of jurisdiction do not magically slip away because the case arises in a reference. Some light

79. It is so described in Basu, _Shorter Constitution of India_ (3rd Ed. 1960) p. 300; and in the title of an article in _Trivandrum Law College Journal_, March 1955, Vol. I., p. 17 (Consultation of the Judiciary with Special Reference to India).
may be shed on this question by examining the instance where no discretion is left to the Court to refuse an opinion if requested, although all other judicial relief is denied. The fact that the Court lacks discretion does not make such an inquiry irrelevant for the government, in referring the question, should still be guided by those factors which normally preclude judicial review. The reason why Article 131 withholds normal jurisdiction where treaties with the unions of the old princely states are concerned is their enormous political significance and background. The integration of these ancient feudal states involved every method of persuasion available. No event could arouse greater political heat than the absorption of one territory into another. However, even with these treaties there may arise disputes which are genuinely legal and in which the legal issues are not tools in an essentially political struggle. Hence the exception in Article 143(2) providing for an advisory opinion. The other forbidden area of jurisdiction in Article 131 involves treaties which provide that they shall not be reviewed in the courts. It may be presumed that the reasoning here is also based on a predominance of the political background in which the treaty originated. The exception in Article 143(2) remains for those disputes which do not partake of this atmosphere.

The other areas where courts are deprived of jurisdiction but where legal rights persist may be analyzed in the same way. Adequate compensation given after the government's exercise of eminent domain powers is not justiciable under Article 31(2). The background of this amendment to the Constitution suggests that the political branch of the government resented interference by the judicial branch in programs of social reform. As long as the center and the state are of the same party, a reference by the center is unlikely to arise in an aura of political controversy. However, if the state's social experiment is referred to the Court by a politically hostile centre, the reasons for the

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80. Explicit reference to these old princely states in the Constitution was removed in 1956 since the abolition of the separate category for the Part B States. Treaties with such states are still covered by Article 131 (Proviso), however.


82. The opinion is made compulsory in the case of the old princely states in the interest of giving them some tangible assurance that they were not totally without judicial relief. The compulsion with regard to other treaties whose terms removed them from normal adjudication is probably an accident due to their being mentioned in the same paragraph which withholds jurisdiction where treaties with the old princely states are concerned (Article 131, Proviso).

83. See fn. 76.
original withdrawal of jurisdiction are as applicable as when a hostile private litigant challenged social reform legislation.

Similarly, in the case of a suspension of a remedy for Fundamental Rights under Article 359, the policy must be that the events are too volatile for a court to interfere due to the emergency prompting the suspension. However, there may be cases where the particular individual's Fundamental Right is affected in connection with some law or governmental activity unrelated to the emergency although the President's suspension order forbids all petitions. Such a case could properly be referred to the Court though care would have to be taken to assure that there is no appearance of discrimination in favour of those who stand to benefit by the advisory opinion.

The courts are not allowed to examine the delimitation of constituencies and the allotment of seats thereto. Once again, it is likely that the drafters of the Constitution did not want the political passions aroused by the issues of representation to be vented in the courts.

In the case of Money Bills, the policy is not based on the volatile nature of the dispute. It is the desire to get a quick decision which will be free from interference where any other rule would delay the process of legislation. And the protection of the Chief Executive is based upon an obvious need to preserve his dignity and prevent harassment.

The discretion to give an advisory opinion and the decision to ask for one must be made in the light of these reasons for withholding judicial scrutiny in the usual case; the absence of the factor normally precluding review must be the test. Usually this will mean the absence of a politically volatile background. But where political heat is not the main reason for precluding judicial review, as with the final decision of the Speaker on Money Bills and the immunity of the Chief Executive, the other considerations outlined above must prevail. If this principle is not observed, an advisory opinion will hurl the Court into the very difficulties which the Constitution sought to avoid when the right to a hearing was taken away. If soundly used, however, an advisory opinion may dispel charges of unfairness in those situations where the government is most vulnerable i.e., where the alleged unfairness is in an area where judicial review is also precluded.

V. CONCLUSION

The basic justifications for the settlement of cases of doubtful maturity, discussed in a prior article, are also persuasive arguments in favour of the institution of advisory opinions. They are two: (1) the
vital importance of avoiding the wastage of time and energy due to a paralysis born of legal uncertainties and to the unscrambling of reliance based on incorrect legal views; (2) the inability to trust a private or political solution of disputes which may become too volatile.

There is strong evidence in Article 143 itself that these justifications were part of the rationale for the existence of the advisory opinion system in India. The provision of Article 143 that questions which are "likely to arise" may be referred may indicate some willingness to depart from the stricter norms of maturity applicable in a regular case in the interests of preventing wastage of human energy. And the requirement that a question be of public import suggests that some political heat may be tolerable in the interests of a judicial settlement of an otherwise unmanageable dispute. Both these provisions certainly demonstrate that advisory opinions are not meant to be as circumscribed in scope as the normal declaratory judgment.

Furthermore, the use of advisory opinions to protect rights withdrawn from normal judicial examination because of political volatility may inevitably involve some commitment by the judiciary to the settlement of politically charged disputes. While, ideally, only those legal rights arising in a non-political atmosphere will be referred, the interests of averting a charge of unfairness against the government may outweigh whatever risks exist.

Thus, our criticism of the Berubari case may have been too hasty. Whatever doubts there may have been about the imminence and firmness of the government's decision may be outweighed by the irreparability of the harm to the residents of the areas in question, the importance to the country of soothing the wound inflicted upon West Bengal, and the need to assure the country of the government's intention to act legally. The importance of this was heightened by the degree of harm to the refugees in the disputed areas who might have found themselves back in Pakistan; and the mistrust of a political solution due to the widespread dissatisfaction in West Bengal, a state never known for political calm.

It remains true, however, that each justification for an advisory opinion carries its own danger. Anticipation of a dispute may result in vagueness and the creation of more doubts than are settled, thus causing a greater wastage of time and energy. And, regardless of the inadequacy of a non-judicial solution, the courts also have a limited capacity to prevent nascent disputes from erupting due to the very volatility which the court hopes to dispel. The withdrawal of protection for certain legal rights involving heated political issues from
judicial cognizance is evidence that the Indian Parliament shares this view in certain cases. Nor will the pressures arising from discontent with the Court's conclusions be so easily released when the government does not command a majority capable of amending the Constitution.

In the Indian context one over-riding factor makes the dangers less serious and the utility of an advisory opinion greater. That is the immense prestige which the opinions of the higher courts carry. The predominating willingness to obey the courts' judgments means that greater risks may be taken with the goodwill which the judiciary possesses. More especially, the Court's role as advisors fits in readily with a traditionally non-litigious society accustomed to resort to the opinion of elders rather than to allow a controversy to grow completely out of hand.

It is certainly too early to reach any definite conclusion about the functioning of this institution. The Allocation case seemed a harmless example of its use; but, because it brought to the Court a case which could have been there under the original jurisdiction, none of the advantages are illustrated. If this case had allowed the government to by-pass lower courts and get a judgment more quickly, time would have been saved. Or if it had allowed a declaratory judgment, which would not otherwise have been available, a form of judicial scrutiny would have been created which might have advantages over actions for coercive relief being sought by the government or being awaited from the injured party. However, under the Government of India Act, 1935, the Federal Court could give only declaratory judgments.

The problem of abstractness in the extreme form of the Levy case does not seem a serious threat at present. Since that case, the lack of factual development has been the failure to allow history to provide those facts which shed light on the proper legal rule, rather than a failure to have sufficient facts for an adequate adversary proceeding or an understanding of the immediate impact of the relevant legal rule.

86. Hindustan Times, April 26, 1944, p. 3, col. 1 (observations by the judges should assure greater consideration by the government in the future on the issue of prematurity); in fact, no instance of the reference of a question not yet in the stages of a draft bill has recurred.
87. Delhi Laws Act and Kerala cases; see paragraphs accompanying footnotes 26-31 wherein we have labelled this distinction as one between legislative or historical and adjudicative facts.
The danger recently has been the volatileness of the case, as evidenced by the Kerala and Berubari cases. These cases cannot be defended on the rationale that they were creating a judicial review which would not otherwise have been forthcoming. Jurisdiction over the subject matter was not forbidden the courts nor could it be said that the litigants involved were legally inarticulate or unconscious of their legal rights. These cases are examples of the acceleration of judicial review, in which the Kerala reference exhibited the dual danger of involvement in political controversy and an appearance of political discrimination in the use of an advisory opinion.

Our criticism of the various advisory opinions must not, however, be taken as a disapproval of the decision to request or give an opinion. We have rather tried to bring out the shortcomings as well as the advantages of this institution by examples drawn from the Indian experience. In reserve, the institution may serve useful purposes. But the justifications for its use must be carefully examined and weighed in the context of each case to see if they are really applicable. It rests with both the government as questioner and the Court in its capacity as guardian of the efficient working of the judicial system to see that its use does not become more of a danger to the long-term interests of justice than a benefit. If the stricture that the institution is good if used infrequently is true, there must be some reasons for that being so. It is hoped that the analysis in this article and a prior one on prematurity may serve to aid in furthering an examination of those reasons.

88. In the Berubari reference, an attempt had already been made to get a judgment in the Calcutta High Court; Nirmal Bose v. Union of India A.I.R. 1959 Cal. 506. And in the Kerala case, the Anglo-Indian, Christian and Muslim communities cannot be considered politically or legally unawares.

89. In the Kerala case, the bill had not yet become law and so was unchallengeable by private parties at this early stage.

In the Berubari case, the Calcutta High Court had expressed doubt as to the maturity of the case (see paragraphs accompanying footnotes 46-48). Furthermore, the time necessary for perfecting an appeal to the Supreme Court was avoided by a reference (the Calcutta case was reported on April 8, 1959; the reference requested on April 7, 1959; and an opinion given less than a year later, on March 14, 1960). And lastly, the time needed to bring a new case in the jurisdiction of Delhi where the Government of India would be subject to the Court's writ was dispensed with (Nirmal Bose v. Union of India A.I.R. 1959 Cal. 506 had held that the Calcutta High Court did not have the power to issue a writ against the center in this case, at p. 512).
THE NEED FOR RESEARCH IN LAW

Whether law be looked upon as a pure imperative, deriving its authority from the command of some superior, or whether it be viewed as a form of "social engineering" that plays a creative role in the building of a good society, it is concerned first and foremost with human behaviour and human relations in a given social context. Many new sciences are now studying this behaviour and these relations, and in the light of their findings old legal rules and procedures need re-examination. As society changes, so its law must change, either in response to the underlying movement or in an attempt to prevent or canalize the movement. Some parts of the law, particularly private law, may endure for centuries with little alteration; even here there is a constant need to rationalize the law, to make it more certain and more easily discoverable. Beyond this the fields are increasing in which amendments and reforms are required. The judge, lawyer and teacher must not only understand and apply the existing law, with its daily increment of new statutes, administrative regulations and court decisions, but as members of an organized profession they must take part in the law-making process by promoting needed legal change and giving to legislatures from time to time their informed and expert opinion.

The law is peculiarly a field in which this need for research should be recognized, for law is responsive to every new human activity and embraces the whole of society. The lawyer has always claimed to belong to a learned profession. While the life of the law is, as Holmes said, not logic but experience, it is learning or scholarship, that records that experience, draws lessons from it, and makes them available to the practitioner. Without learning there cannot exist those qualities of mind which make the great jurists and the leading counsel. Research, and learning or scholarship, are inseparable concepts, perhaps not capable of differentiation; research involves fact-finding, fact ordering and correlating, but does not exclude the thanking about the facts and the observation of trends which are more exclusively the role of the scholar. The multiplicity of facts in contemporary society, including the startling fact, basic to the practising lawyer, that reported cases and statutes are increasing at an unconscionable rate each year, makes fact-gathering research and legal writing more than even essential to orderly progress in the law, and to the validity of the scholarship which largely depends on the accuracy of this research. So among lawyers we should find the keenest interest in research.