

The unresolved constitutional issues in the Governors case: advisory opinions and binding law

The Court unsettles a new, legally enforceable ruling by virtually overturning the Tamil Nadu ruling under Article 143, but it does not specify whether its own advisory opinion will bind subsequent benches.

The Supreme Court's Constitution Bench issued its advisory decision on a Presidential Reference yesterday about the extent of the governor's authority when a bill passed by a state legislature is put up for assent.

The State of Tamil Nadu v. Governor of Tamil Nadu case, in which a two-judge bench established set deadlines for governor action and the concept of "**deemed assent**" in situations of protracted inaction, served as the impetus for the Reference.

The Constitution Bench, headed by Chief Justice of India BR Gavai, has now ruled that both directions—deemed assent and stipulated timelines—are unconstitutional and amount to a judicial rewriting of Articles 200 and 201. Two more fundamental issues need to be addressed, even though the decision will surely lead to new conversations about federalism, the Governor's role, and the boundaries of judicial intervention: whether the Court should have considered the Reference at all, and whether an advisory opinion under Article 143 can be used to overturn a legally binding precedent rendered just months earlier.

Should the Reference have been considered at all by the Court?

Any legal or factual dispute that has "**arisen, or is likely to arise**" and is of such a kind and importance that it is "expedient to obtain the opinion of the Supreme Court" may be referred to the Supreme Court by the President under Article 143(1). The clause goes on to say that the Court may "**report to the President its opinion thereon**" following any hearing it deems appropriate. The Constitution recognizes that the Court has discretion and is not

required to respond to every request made to it, so the choice of may is intentional.

There have been fifteen presidential references in the past, and the majority of them brought up unsolved constitutional issues. The current reference, however, is distinct. There was no legal doubt about it. Rather, the Tamil Nadu ruling, which addressed the Governor's options under Article 200, the impossibility of infinite delay, the opportunity for judicially prescribing timetables, and the penalties of inaction, had already decided the concerns raised just months prior. Regardless of one's opinion on the validity of that ruling, it qualified as "law declared" under Article 141.

In re: Special Courts Bill, 1978 and In re: Appointment and Transfer of Judges (1998) are two examples of previous cases where a Presidential Reference resulted in a reconsideration of earlier decisions. The Constitution Bench justifies entertaining the reference on two grounds: first, that the Tamil Nadu judgment's conclusions differed from previous rulings.

I'll start with the latter argument. The Court did not issue the aforementioned opinions so soon after the rulings they reviewed. In each of those decisions, the Court reexamined long-standing doctrine in light of more general constitutional conundrums. The Presidential Reference in *In Re: Appointment and Transfer of Judges* (the Third Judges Case) was made just five years after the Second Judges Case (*Supreme Court Advocates-on-Record Association v. Union of India*), according to some. That analogy is imprecise, though. The Attorney General made it clear in the Third Judges Case that the Union was not requesting a review or reconsideration of the previous rulings, which would remain enforceable. Therefore, the reference was not an attempt to make a new precedent but rather to get clarification on specific points without changing the established law.

In this case, however, the reference comes practically immediately after Tamil Nadu, which has the impact of reopening and ultimately overturning decisions made just months before. That immediacy implies the revisiting of a new precedent, which the Court often conducts through a review or by assembling a bigger Bench, rather than the slow emergence of constitutional ambiguity.

If the Court was concerned about doctrinal inconsistency—that is, that the Tamil Nadu ruling did not follow prior precedent—the Constitution and judicial practice offer a simple way to resolve it: either form a larger bench or take a review petition into consideration. This was the strategy used in *Sabarimala*, where several review petitions were filed following the five-judge court's ruling allowing women to enter the temple. In order to assure compliance with precedent, the case was eventually sent to a larger bench. The legal system was permitted to

function within its predetermined parameters.

However, the Court takes a different approach in this particular case. It argues that it is only elucidating more general constitutional principles rather than sitting in appeal over the Tamil Nadu ruling. However, this description is at odds with the result. The Tamil Nadu ruling's main conclusions regarding deadlines and implied consent have been overturned. The difference between "**overruling**" and "**clarification**" becomes more descriptive than substantive.

The Court's adoption of what it refers to as a "functional reference" presents an additional challenge. The Bench observes that this reference is "fundamentally of a different nature" because previous Presidential References did not address "constitutional mechanics," or the daily operations of the Governor, President, and State Legislature in the passing of bills. However, this is a completely new category with no connection to Article 143's text, and its boundaries are still unknown.

The category is broad and flexible in its formulation. The "day-to-day functioning" of constitutional actors may be relevant to many constitutional disputes, such as those concerning the appointment of judges, the operation of legislatures, or the use of executive discretion. There is little to stop future governments from using Article 143 whenever politically delicate issues come up if it is enough to classify a situation as a "functional reference." What makes a functional reference different from an ordinary one is not sufficiently explained by the Court.

This brings up a more serious structural issue. The distinction between advising and adjudicatory roles becomes more hazy if Article 143 can be utilized to revisit a recently rendered judgment without using the safeguards of review (which has a higher bar) or a larger bench. Because of this, I believe that the reference's maintainability needed more examination than it eventually got.

Under Article 143, is an opinion legally binding?

This raises a second, equally significant issue with using Article 143: it is unclear if an advising opinion really qualifies as binding precedent law. In contrast to other jurisdictions where the Constitution utilizes the phrase "judgment," Article 143 solely refers to the Court reporting its "opinion." There are several places in the text where this disparity is evident: For example, the Constitution itself treats "judgments" and "reports and opinions under Article 143" separately in Article 145(3).

This ambiguity has previously been noted by the Supreme Court. The Court stated in re: Special Courts Bill, 1978 that it may be necessary to give further thought to the question of whether an opinion rendered under Article 143 qualifies as "law declared" under Article 141. There has never been a definitive answer to that question. Rather, several benches have tackled the matter in different ways, and in reality, advisory opinions are frequently regarded as binding or at least binding-in-effect.

In order to imply that all courts "ought to be bound" by an advisory opinion, the current ruling mainly draws from specific passages from Justice YV Chandrachud's opinion in the Special Courts Bill. The ruling states:

"Insofar as all other courts in India are concerned, they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution, even though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the earlier taken by it."

But the rest of Justice Chandrachud's argument is left out of the current ruling, which confuses and even contradicts the conclusion derived from the passage. The full text demonstrates that Justice Chandrachud acknowledged opposing viewpoints, pointed out conflicting High Court authority, and specifically left the binding-force issue open:

"We do hope that the time spent determining the concerns arising in this reference will not have been in vain, but the question may need to be considered more thoroughly on a future occasion. We are inclined to believe that, even though this Court is always free to reconsider a decision it has already made and to overrule, if necessary, its previous opinion, all other Indian courts should be bound by this court's opinion even when exercising its advisory jurisdiction under Article 143

(1) of the Constitution.

Additionally, we would want to highlight Ray, CJ.'s findings in St. Xaviers College (above) that an opinion rendered in the exercise of advisory jurisdiction is entitled to significant weight even though it may not be legally enforceable. It would be odd if this Court's ruling on a legal issue in a dispute between two private parties were binding on all courts in this nation but the advisory opinion was unbinding. While stating this, we take into consideration the judgment of a distinguished author that, despite the Supreme Court's advisory opinion's strong persuasive power, it is not a law as defined by Article 141.

The following few sentences make it clear that the problem was not ultimately resolved by the Bench in Special Courts Bill. The ruling references Seervai's argument that

advisory opinions are not declared laws under Article 141 and admits the doctrine's ambiguity.

In light of this, it is conceptually challenging to use Article 143 to overturn a decision rendered just months prior under Article 141, leaving open the question of whether the current ruling actually binds future benches. The standard appellate procedures, such as review or referral to a bigger bench, are in place for this exact reason. They enable the Court to make legal corrections or clarifications through well-established judicial mechanisms that clearly result in legally binding precedent.

However, it is important to recognize that advisory opinions have actually had an impact on the law as if they were legally binding. Justice PN Bhagwati specifically cited the Special Courts Bill reference in the Bearer Bonds case, characterizing it as the "latest and most complete exposition of the propositions relating to the applicability of Article 14." In a similar vein, the Third Judges Case, which was an advisory opinion in and of itself, expanded the Collegium's membership from the Chief Justice and two judges to the Chief Justice and four judges. This decision has been regularly upheld for more than twenty years.

These examples show that advisory opinions under Article 143 frequently serve as binding precedent, despite of doctrinal ambiguity. However, given the current situation, it is precisely this functional consequence that raises concerns. The Court essentially overturns a new, legally enforceable ruling by utilizing Article 143 to overturn the Tamil Nadu ruling, but it does not address whether its own advisory opinion will bind future benches. The Court could have—and possibly ought to have—directly addressed this jurisprudential issue.

In conclusion

The ruling does not specify the legal standing of its own opinion, but it treats its conclusions as authoritative enough to overturn a recent precedent. The outcome is an odd paradox: an activity designed to bring clarity has, on a crucial point, created more ambiguity.

What the Court decided not to address is equally startling. Important constitutional practice issues, such as the extent of the Court's authority under Article 142 and the makeup of benches making significant constitutional decisions, were brought up by the President's reference. These are instances where the law is still ambiguous and where a Constitution Bench's advice would have been helpful. However, the ruling ignores them, leaving open questions that have long sparked discussion in the legal profession and are frequently used to accuse the judiciary of going against the separation of powers.

Notably, the Court also finds that these issues do not fit into the recently defined category of a "functional reference" under Article 143. This finding essentially prevents similar issues from being investigated using the very method used in this instance.

Charkha, the Vidhi Center for Legal Policy's Constitutional Law Center, is headed by Swapnil Tripathi.

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