MAKING THE JOURNEY OF CONSTITUTIONALISM SMOOTH: IS 'ADVISORY JURISDICTION' A CATALYST?

S. M. Masum Billah[*]

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

1. Introduction

The Appellate Division of the Bangladesh Supreme Court is endowed with 'advisory jurisdiction' under Article 106 of the Constitution of the People's Republic of Bangladesh. Though this Article has been placed under Part VI, Chapter I of the Constitution, dealing with the supreme judicial organ of the country, the wording of the Article leads us to treat it as a power of the President of the Republic. The utility of such provision, which is termed, as consultative function of the Court or Reference jurisdiction in some other common law countries is well perceived. This is a sort of constitutional curiosity paving the way of constitutional solution of particular legal question of national importance. In the journey of its constitutionalism, Bangladesh has witnessed and confronted with many grave questions of constitutional importance, but the provision of Article 106, it seems, remained unused. It is only for a single instance in 1995 in en

[*] Assistant Professor, Department of Law, Northern University Bangladesh.

masse Resignation of MPs Reference; the President took resort to Article 106 and the Appellate Division of the Supreme Court got the opportunity to render its advisory opinion. The nature, utility, effectiveness, theoretical basis and underlying philosophy of advisory jurisdiction have never come up for a serious discussion in Bangladesh. Whereas, in the backdrop of increasing role of the judiciary in the state-system, the constitutional significance of Supreme Court's Reference jurisdiction needs to be revisited and rejuvenated. The justification of writing the present paper can be explained from diverse broad standpoints: i. How can advisory opinions of the Supreme Court of Bangladesh contribute to the entrenchment of rule of law and constitutionalism in Bangladesh?; ii. Is invoking or rendering of advisory opinion more *a function* of the President than *a jurisdiction* of the Supreme Court?; and iii. Has the provision of advisory opinion best been explored and exploited by the Presidents of Bangladesh so far? Keeping these questions in concentration, the present paper advocates invocation of advisory opinion and argues in favor of making advisory jurisdiction of the Supreme Court more effective in order to find out a constitutional tool in the event of national crisis. This paper also focuses on the rationality of advisory jurisdiction exercised by superior Courts of different countries, especially of the USA, UK, Canada, Sri Lanka and India; and discusses how those examples can be of use in Bangladesh in nurturing its Constitution, democracy and the rule of law.

2. Unfolding Advisory Jurisdiction

2.1 Why Advisory Opinion?

Of late, exercise of advisory jurisdiction by the apex courts are desired as a means of promoting the rule of law. The nation, life of which is governed by rule of law contemplates many exigencies where question of law of grave importance may arise. So, it prescribes a mechanism in the form of seeking advisory opinion, as a last resort, from the highest judicial organ of the country. Article 106 of the Constitution of Bangladesh was designed to mitigate such exigencies. Certainty about the laws under which we live is a core element of the rule of law and indeed it might be considered an

important characteristic of non-arbitrary power, a significant facet of rule of law. How advisory opinion can contribute to certainty in this regard? In a curious way it can. Advisory issues usually engulf grave questions of public importance. Judiciary's role is necessary to get the nation rid of a deadlock under troublesome situation. From this viewpoint, the exercise of advisory jurisdiction is justified both under the constitutional provision and the doctrine of necessity.[1]

Constitutionalism facilitates a democratic political system by creating an orderly framework within which people may make political decisions. Indeed, constitutionalism and the rule of law are not in conflict with democracy rather they are complementary to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.[2] The principles of constitutionalism and the rule of law lie at the root of system of a government. According to McLaughlin, 'rule of law imports a sense of orderliness, subjects the people to known legal rules and makes the executive accountable to legal authority'[3]. The rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.[4]

The essence of the Bangladesh Constitution is rule of law. The Constitution is declared to be the supreme law of the land.[5] The Constitution has contemplated a system where democracy and rule of law

---

[1] Karzon, Sheikh Hafizur Rahman. 2007. 'Advisory Opinion the Way Out', available at: http://www.thedailystar.net/2007/01/12/d70112020536.htm, last accessed on 24 May 2008.

[2] The Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

[3] McLaughlin, H. Wade. 1997 "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" 76 *Can. Bar Rev.* 155 at p. 157.

[4] Canadian Supreme Court, In the *Manitoba Language Rights Reference*, at pp. 747-52.

[5] Article 7 of the Constitution of the People's Republic of Bangladesh.

would flourish.[6] Advisory opinion to be rendered by the Supreme Court can not be viewed in isolation from this consideration. Hence, being a part of this normative order (express constitutional provision for advisory opinion makes it a part of normative order); the advisory opinion entails a nexus with rule of law, constitutionality and peoples' aspiration.

2.2 Nature of Advisory Jurisdiction

Nature of Advisory jurisdiction has been viewed with a skeptical eye from some writers. According to Serve, "advisory opinion involves no *lies*, binds nobody because it affects nobody's rights, and therefore lacks all the essential characteristics of a judicial function."[7] Referring to *A-G for Ontario* and *A-G for British Columbia*,[8] Sir Zafrullah Khan, discusses the nature of Article 129(1) of Sri Lankan Constitution, which confers consultative jurisdiction upon Sri Lankan Supreme Court, in the following terms:

> "The attitude of the courts has been that advisory opinions expressed by the judiciary at the instance of the executive is not a judicial pronouncement nor is it a performance of a strictly judicial function. If one of the implications read into the separation of powers doctrine which is that functions alien to the judiciary cannot be vested in the judicial branch of government is accepted, then the vesting of the advisory jurisdiction in the Supreme Court of Sri Lanka means that the separation of powers is observed in the breach."[9]

This allegation of theoretical breach seems to have been discarded in Indian Jurisdiction. In *Re the Special Courts Bill*[10], it was pointed out by the Indian

---

[6] Article 11 read with the Preamble and Article 7 of the Constitution of the People's Republic of Bangladesh.

[7] Serve, H.M. 1991. *Constitutional Law of India: A Critical Commentary*. 4th end. Vol. 3. Bombay: N. M. Tripathi, at p. 2684.

[8] *A-G for Ontario* v. *Hamilton* (1903) AC 524; *A-G for British Columbia* v. *A-G for Canada* (1914) AC 153.

[9] Khan, Sir Zafrullah. 1981. Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine. Kuala Lumpur: University of Malaya Press, at p. 120.

[10] 1978 SCC 247.

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

> It would be strange that a decision given by this Court on a question of law in a dispute between two private parties should be binding on all courts in this country but the advisory opinion should bind no one at all, even if, as in the instant case, it is given after issuing notice to all interested parties, after hearing everyone concerned who desired to be heard, and after a full consideration of the questions raised in the reference. Almost everything that could possibly be urged in favor of and against the Bill was urged before this Court and to think that its opinion is an exercise in futility is deeply frustrating[11] (Emphasis supplied).

So, rendering of advisory opinion cannot be equated with a futile exercise. An advisory opinion, it is argued, prejudices nobody. The possibility of non-acceptance is not a premise with which the Court will start the exercise of an advisory role. Rather the Court will presume that the honor done to the Court by soliciting an opinion on some questions of law will be supplemented by its acceptance and adherence. The consideration of non-binding nature of the Courts decision never can deter the Court from exercising such power.[12] The nature of the advisory role of the Appellate Division of Bangladesh Supreme Court has beautifully been sketched out by Mustafa Kamal J. (as he then was, and later Chief Justice of Bangladesh):

> So far as the interpretation of any word or words of the Constitution is concerned the Supreme Court is the final arbiter. Let there be no mistake about it. I would rather describe the role of this court in such a situation of unparalleled nature not as wrecker but as a rescuer, not as an interloper but as a guide, not as a usurper but as a beacon light.[13]

---

[11] Bhagwati J., *In Re the Special Courts Bill*, (1978) SCC 247, available at: http://www.commonlii.org, at Para 6, last accessed on 12 May 2009.

[12] Special Reference No 1 of 1995, 47 DLR (AD) (1995), 111 at para 92.

[13] *Id.* at Para 92.

Indeed, the situation of 'unparalleled nature' makes the sanctity of advisory opinion significant for the public at large. This aspect of extra-ordinary nature of advisory opinion differentiates it from other form of litigations. So, the compellability of carrying out Court's observations in advisory opinion matters emanates from the urge of public concern, not necessarily from a mere opinion of the court.

3. Origin and Development of Advisory Jurisdiction

The present Bangladeshi constitutional dispensation has conceded the historical legacy of advisory opinion since Indian Independence Act 1935. But the determination of Bangladesh's stand on advisory opinion precedes a discussion from other jurisdictions of the world. Below, the nature and position of advisory jurisdiction under some common law jurisdictions (USA, UK, Canada, India, and Sri Lanka) have been analyzed briefly.

3.1 The USA Practice and Jay's New Investigation

The Constitution of the USA has not expressly conceded the advisory role of the Supreme Court. The question did arise in 1793 when President Washington sought the advice of the judges of the Supreme Court on certain questions arising out of the Treaty with France. The judges declined to give an opinion on the ground that the Court could be called upon only to decide controversies brought before them in legal form, and are bound to abstain from any extra-judicial opinion on any points of law, even though solemnly requested by the executive.[14] Interestingly, the subject of advisory opinion has been dealt with in various ways by the state

[14] Federal position has remained same as it was in early days of the USA. This is evident from *Alabama State Federation of Labor* decision (325 US 450 at 461). In this case it was stated: "It has long been this Court's considered practice not to decide abstract, hypothetical or contingent questions, ... or to decide any constitutional question in advance of the necessity for its decision, ... or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, ... or to decide any constitutional question except with reference to the particular facts to which it is to be applied."

governments of USA.[15] Seven states have constitutional provisions requiring such opinions. Massachusetts, incorporating a provision in its Constitution in 1780, was the first state. It allows either branch of the Legislature or the Governor to exact opinions of the justices of the Supreme Court upon questions of law and on solemn occasions.

Against this state practice, the Federal position has been re-perused by legal writers. For example, Stewart Jay in a recent good work[16] on advisory opinion has discovered the other side of the coin. Jay has investigated the history behind the Court's refusal to advise President Washington and considered the issue in the light of ongoing political struggles of the USA in early days. Jay has argued that politics was a great factor at that time: "[t]he surrounding political climate and the ideological orientations of key political players, some of whom were on the Court, directly influenced the Justices' decision to refuse Washington's request for advice."[17] Thus, when constitutional scholars assert that the Supreme Court of the USA declined to give an advisory opinion based on the theory of the separation of powers, what we get is at best an incomplete picture. As Jay has submitted:

> "An advisory relationship [between the Court and President] was not inconsistent with the text of the Constitution or the views of the Philadelphia Convention. To understand why the Justices seemingly

[15] States presently exercising advisory opinions are: Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Rhode Island, South Dakota; States currently not exercising advisory opinions but previously did: Connecticut, Kentucky, Missouri, Nebraska, New Jersey, New York, Pennsylvania & Vermont. See, Rogers, James R. and Vanberg, George. 2002. "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective", Vol. 46, No. 2, *American Journal of Political Science*, Midwest Political Science Association, pp. 379-397.

[16] Jay, Stewart. 1997. *Most Humble Servants: The Advisory Role of early Judges*. New Haven: Yale University Press. For an internet review of the book see, Blakeman, Jhon C. April 1998. Vol. 8, No. *4 Law and Politics Book Review:* Department of Political Science, Baylor University, at pp. 218-221.

[17] *Id.* at p. 111.

> turned away from this aspect of the British legal heritage, a thorough investigation of the events leading to the refusal must be undertaken."[18]

Jay's analysis further unfolds that personality conflicts in the administration, the political ideology of the federalists and even the necessity of a pragmatic foreign policy in the face of British-French conflict, all contributed to the Supreme Court's refusal of advisory opinions. According to Jay, the 1793 Supreme Court produced a bright line against advisory opinions.[19] Jay has pleaded, though not straightly in favor of introducing advisory jurisdiction:

> "It is doubtful that we will ever know for certain whether the Justices in 1793 intended to foreclose all future consultations with the executive. The best that we can accomplish with available information is a reconstruction of the probable reasons by the Justices declined Washington's plea for advice"[20]

After Jay's new analysis it would not be unfair to say that advisory jurisdiction of the US Supreme Court needs to be rejuvenated. At least it is evident from Jay's findings that advisory opinion is not as a whole exiled from the USA jurisdiction. Hence, express absence of advisory jurisdiction of the USA Supreme Court cannot be convincingly pleaded against introduction of advisory jurisdiction in other jurisdictions like Bangladesh.

3.2 Canadian Practice

Canada is a good model of advisory jurisdiction exercised by the Supreme Court of Canada. There are no constitutional impedimenta to Canadian Supreme Court's reception of Advisory jurisdiction. In *Attorney General for Ontario Case*,[21] the Privy Council, in an appealed case from the Supreme Court of Canada, was called upon to determine the

---

[18] *Id.* at p. 112.

[19] Blakeman, Jhon C. 1998. 'Most Humble Servants: The Advisory Role pf the Early Judges', available at: http: //www. bsos. umd. edu/ gvpt/ lpbr/ subpages/ reviews/ jay.htm, last accessed on 19 February 2009

[20] *Ibid.* at Para 15.

[21] *Attorney General for Ontario v. Attorney General for Dominion of Canada (1912) AC 571.*

constitutionality of an Act of the Dominion Parliament which required the judges of the Supreme Court to give advisory opinions upon request of the Governor General. The British North America Act, 1867 granted Canada political autonomy with defined powers for the executive, legislative and judicial organs. The authority to demand advisory opinion was not expressly given in the Constitution, but section 91 of Act 1867 conferred on the Dominion Parliament the duty of making laws for the peace, order and good government of Canada and section 101 of the same authorized the establishment of the Supreme Court. Under this two sections Parliament enacted the Supreme Court of Canada Act 1875 which was again remodeled as Revised Statutes of Canada 1906 (R.S.C.) By section 60 of R.S.C. 1906, the Governor-in-Council was accorded power to submit questions of law or fact to the Supreme Court Judges, who were required to answer the same. In accordance with this provision, questions of law were submitted relating to the incorporation of companies within the Dominion. The Provinces raised the plea not to answer the question on the ground that the law requiring advisory opinions was unconstitutional. The Supreme Court of Canada held that the provision requiring advisory opinion under R.S.C. 1906 was constitutional. The Appellate Court affirmed the decision. The Appellate Court gave its opinion upon two grounds: first, that since 1875 the judge had on many occasions given advisory opinions under this statute, the validity of which had never before been questioned; second, that nearly all the Canadian Provinces had enacted laws requiring their Courts to answer questions not in litigation, in terms similar to that act which they seek to impugn.

Section 101 of the Canadian Constitution Act, 1867 gives Parliament the authority to grant the Canadian Supreme Court the Reference jurisdiction. In Canada, the Supreme Court acts as the exclusive ultimate Appellate Court in the country. If any conflict between Supreme Court's Reference jurisdiction and the original jurisdiction of the provincial superior Courts arises, any such conflict is resolved in favor of Parliament's exercise of its

plenary power to establish a General Court of Appeal.[22] A General Court of Appeal may also properly undertake other legal functions including rendering of advisory opinions. Exercise of advisory jurisdiction by Canadian Supreme Court can be an example for Bangladesh Supreme Court. In both the constitution advisory jurisdiction entails a written provision.

3.3 United Kingdom Practices

The practice in the UK of demanding advisory or consultative opinions by the Crown and Parliament dates from the reign of Richard II.[23] As of now, the practice of the Crown demanding advisory opinions has fallen into disuse, yet that power is still exercised by the House of Lords in a limited scope. The United Kingdom Parliament in 1928 refused to confer a consultative jurisdiction on the English High Court under the Rating and Valuation Bill but general consultative jurisdiction was conferred on the Judicial Committee of the Privy Council in 1833 and which has been exercised with little adverse criticism since that time. British Judges indirectly advise the Government on policy matters. For instance, much of the debate on a British Bill of Rights in the 1980s and on the War Crimes legislation in 1992 was conducted in the House of Lords (the legislative part) and the most active participants in the debate were appellate judges (who serve as judges & can also sit as legislators). Also, Appellate Judges have chaired several prominent government commissions, investigating topics such as criminal justice in Northern Ireland, the Brixton riots 1981 or law reform. Unlike Bangladesh Britain has an un-codified constitution. There is a fundamental difference between the two countries on the question of judicial review. In the UK the supremacy of parliament exists but in Bangladesh the constitutional supremacy is upheld. This basic

---

[22] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at Para 1, available at http://csc.lexum.umontreal.ca/en/1998/, 1998rcs2-217, last accessed on 24 May 2009.

[23] S. H. M. 1912. 'Advisory Opinions', *Michigan Law Review*, Vol. 11, No. 2, at pp.143-147, available at: http://www.jstor.org, last accessed on 12 December 2008.

postulate has put Appellate Division of Bangladesh Supreme Court in an advantageous position than the Courts of the UK for rendering advisory opinion to the executive, if so sought.

3.4 Advisory Jurisdiction in South Asia

Exercise of advisory jurisdiction is not something new in South Asian region. The Constitutions of Sri Lanka, Pakistan, India and Bangladesh do possess express constitutional provisions to that effect. The subsequent part of the paper discusses Sri Lankan and Indian Position first. Then Bangladesh position has been dealt separately. While dealing with Bangladeshi law on the point reference to Pakistani jurisdiction would necessarily come as Pakistan and Bangladesh inherits the same legacy on the point.

3.4.1 Consultative Role of Sri Lankan Supreme Court:

The Sri Lankan Constitution in Article 129 (1) deals with the consultative jurisdiction of the Supreme Court. This Article confers a right and imposes an obligation on the holder of the Office of the President of the country to make a Reference on any question which in his or her opinion is a question of public importance. The formation of an opinion to invoke the jurisdiction of the Supreme Court under Article 129 of the Constitution is certainly a matter for the President of the country. Once such a Reference is made the Supreme Court has a constitutional duty to make a determination in respect of the matter referred to the Supreme Court by the President.[24]

The Sri Lankan Supreme Court has made use of its consultative role in fostering and fashioning human rights jurisprudence in Sri Lanka. Perhaps the best use of advisory opinion has been made in Sri Lanka to clarify jolts in the event of obscurity in case decisions. In the historic case of *Nallaratnam Signoras* v. *Attorney General*[25], for example, the Supreme

[24] Statement of the Bar Association of Sri Lanka, 7 November 2003, Daily News, available at: http://www.dailynews.1k/2003/11/07/new04.html, last accessed on 22 February 2009.

[25] S.C. Sol. (LA) No 182/99 (Sri Lanka).

Court of Sri Lanka specifically determined the limits and scope of the application of International Covenant of Civil and Political Rights 1966 (ICCPR) as well as other international covenants to which Sri Lanka acceded. In this case, the review or revision application was made on the basis of and pursuant to the findings of the Human Rights Committee at Geneva established under the International Covenant on Civil and Political Rights, in communication No 1033 of 2000 made under the 1997 Optional Protocol to the Covenant. It was held:

> International treaties entered into by the President and the Government of Sri Lanka as permitted by and consistent with the Constitution and written law of Sri Lanka would bind the Republic, *qua state* but have to be implemented by the statute enacted under the Constitution to have internal effect.'[26]

Some points in the opinion were not clear which raised a debate over the ratification of Covenants relating to human rights by Sri Lanka. In view of those misunderstandings, the President invoked the consultative jurisdiction of the Supreme Court under Article 129 of the Constitution of Sri Lanka.[27] Discarding the obscurity, the Supreme Court headed by Sarah N Silva C.J. held that adequate recognition is given to the International Covenant on Civil and Political Rights by Sri Lanka and the state is duty bound to observe the international standards of human rights jurisprudence.[28] So, far as Bangladeshi position is concerned it can be argued that in case of obscurity of a case decision, for example, language question in the Supreme Court of Bangladesh,[29] invocation of the advisory jurisdiction may be of great utility.

---

[26] Per Sarah N. Silva, C.J. In *Nallaratnam Signoras* Case, S.C. Sol. (LA) No 182/99,available at: http://wwwruleoflawsrilanka.org/, last accessed on 17 February 2009

[27] Supreme Court Ref: No 01/2008.

[28] Rajasinghe, Thushara. 2008. 'The Role of the Judiciary in Strengthening Democracy and Protecting Human Rights in SriLanka', http: //www.thelibel.com last accessed on 15 February 2009.

[29] In *Hashmotullah v. Ajmiri Bibee* (1991) 44 DLR (HCD) 332, it was held that judiciary does not fall within the definition of 'state' as enshrined in the

3.4.2 Indian Practice:

The Indian Supreme Court is blessed with advisory jurisdiction under Article 143 of Indian Constitution. Article 143(1) of the same provides that if at any time it appears to the President that a question of *law* or *fact* has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may, refer the question to the Supreme Court for consideration and the court may after such hearing as it deemed fit, report to the President its opinion thereupon. Under Clause (2) of the same Article the President may refer to the Supreme Court of India for opinion on any matter which falls under Article 131 of Indian Constitution i.e. disputes involving questions law or fact between Union of India or State/s or States *inter se*. The Supreme Court, after such hearing as it deems necessary, is required to report to the President its opinion thereon. It is not necessary that the question on which the opinion of the court is sought must have arisen actually. The President is competent to make a Reference at an early stage, namely when he is satisfied that such question 'is likely to arise'. Use of the same phrase 'likely to arise' in both the Article 106 of Bangladesh Constitution and 143 of the Indian Constitution puts the power of Bangladesh President at par with the President of India. The exception is

---

Bangladesh Constitution. Hence, the 'State Language of the Republic shall be Bangle'—is not applicable in case of the language of the Supreme Court. So, there is nothing unconstitutional in using English as an official language of the Supreme Court. The decision is vague and misleading. See, Khan, Salimullah. 2006. 'Shorboccho Patio Adulate O Projatontrer Bhasha Niti', The Daily Somokal, 28 February 2006. Khan elsewhere argues that the decision in *Hashmotullah Case* holding that the judiciary does not fall within the definition of 'state' is liable to be set aside because of being volatile of the basic structure of the Constitution. For, in 1989, through *8th Amendment Case* it had been established that splitting the High Court Division (HCD) into six parts is the violation of the unitary character of the state, a basic structure of the Constitution. If the Supreme Court does not fall within the definition of the 'state', how splitting of HCD into six parts offend the unitary character of the state? Khan suggests that Advisory Opinion from the Supreme Court can unlock this jolt. See, Khan, Salimullah. 2006. "Echo Adaloter Bhasha· Keno 'RashtroBhasha' No", The Daily Amader Shomoy, 15 February 2006.

that question of fact can not be a subject matter of advisory opinion in Bangladeshi jurisdiction.

Academic criticism against insertion of advisory opinion provisions in the Indian Constitution is not quite unfamiliar. One scholar from India, Portal Kumar Ghosh in 1966 condemned the insertion of provision of consultative jurisdiction into the Indian Constitution[30]. Nonetheless, the academic criticism of the conferral of consultative jurisdiction seems to have received little attention by the Supreme Court of India itself. Because, the Supreme Court of India has several times exercised its advisory jurisdiction and handed down many constitutional principles. Some recent examples are the issue of appointment & transfer of Supreme Court and High Court judges in 1999 and Issue of Gujarat Poll in 2002.[31]

In legal parlance, the opinion of the Indian Supreme Court is only 'advisory' in nature and is therefore 'not binding' upon the President. In actual practice, however, its opinion on serious controversies had a great binding force and constituted, insofar as the legal aspect is concerned, the last authoritative word. Even if a political and other consideration bars its acceptance by the government, the opinion of the Supreme Court has been held in high esteem.

---

[30] Ghosh, Portal Kumar. 1966. *The Constitution of India? How it has been Framed*, Calcutta: The World Press Private Ltd., at p. 250.

[31] Till now, the President of India has referred questions of constitutional validity issues to the Supreme Court on more than ten occasions. The nature of references has been: the constitutionality of an existing law, the constitutionality of a Bill presented for the President's assent, the implementation of an international agreement, the constitutionality and *virus* of a draft Bill to be moved in Parliament, the respective jurisdiction of the Legislature and the superior courts in relation to the power of the former to punish for contempt, interpretation of constitutional provisions relating to election of the President, powers of an inter-state water disputes tribunal and power of a State to legislate in regard to such tribunal, whether a Hindu temple or religious structure existed at a particular place and consultation between Chief Justice of India and other judges in the matter of appointments of Supreme Court and High Courts judges and the transfer of the latter.

4. Bangladesh's Position

It would be expedient to refer to Article 106 of the Constitution of the People's Republic of Bangladesh for a good starting point. Because, this would render a better concentration on the language of Article 106 as distinct from American, Canadian, Indian or Sri Lankan jurisdictions. Article 106 runs as follows:

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

Some elements of the above provision are to be noted, firstly; it will appear to the President that a question of law has arisen or is likely to arise, secondly; this may appear to the President "at any time", thirdly; the question should be of such a nature and of public importance that it is expedient to obtain the opinion of the Supreme Court, and lastly; the Appellate Division would render its opinion "as it thinks fit." The linguistic novelty of this Article is a temptation to unfold the interpretative horizon for strengthening the trends of rule of law and constitutionalism in Bangladesh.

4.1 The Pre-Constitutional Legacy

The advisory jurisdiction of the Appellate Division of the Supreme Court had its origin in the Government of India Act, 1935. Section 213 of this Act was almost in the same terms as in Article 106 of present Constitution of Bangladesh, which provided for a Reference to the Federal Court by the Governor-General. The Governor General was not bound to accept the opinion of the Federal Court which was given under Section 213 of Act 1935. Moreover, the Court was not bound to give its opinion in every Reference made to it. In *Levy of Estate Duty Reference* (1944) it was observed that "the real intention of this provision appears to be that the

Federal Court would not refuse except for good reasons."[32] The reason of flexibility and non-binding nature of advisory opinion may be attributed to the fact that the colonial masters did not want to fasten them by any uncertain ring of law. The Federal Court of India in those colonial days was called upon to give advisory opinion in four cases and in every case it gave its opinion.[33] However, it seems from the dissenting opinion of the Judges, Sir Zafrullah Khan in particular, that the Federal Court doubted about the utility and expediency of the consultative role of it.[34] Nonetheless, the advisory role of the Federal Court can hardly be overlooked. For example, it has contributed to develop certain principle of interpretation relating to judicial review of a law. In *Reference Hindu Women's Right to Property Act* [35] it was held that where the constitutionality of law is assailed and there are two possible interpretations, one of which would render the law constitutional while the other unconstitutional, the former interpretation is to be preferred.[36] In this case, the validity of Hindu Women's Right to Property Act (Act XVIII of 1937) was in question in which Hindu Women were given the right of succession to property. It was a Central Act which could not deal with agricultural property, a provincial subject under Government of India Act, 1935. Hence, if the law was interpreted to cover both agricultural and urban property, the law would be void for want of competence of the central legislature but the law would be valid if it was held that the central

---

[32] Re, AIR 1944 FC 43.

[33] The four cases were--- *Central Provinces and Berar Sales of Motor Spirit and Lubricant Taxation Act*, 1938, Re, 1939 FCR 18; *Hindu Women's Right to Property Act*, 1937, Re, & *Hindu Women's Right to Property (Amendment) Act*, 1938, 1941 FCR 12;*Allocation of Lands and Buildings in a Chief Commissioner's Province*, Re, 1943 FCR 20 and *Levy of Estate Duty*, Re, 1944 FCR 317.

[34] Gadbois, Jr. 1964. "The Federal Court of India", Vol. 6 *Journal of the Indian Law Institute* 253 at p. 280, as cited by Kulshreshtha, V.D. 1995. *Landmarks in Indian Constitutional History*. Seventh end. Luck now: Eastern Book Company, at p. 196.

[35] AIR 1942 FC 72.

[36] Islam, Mahmudul. 2003. *Constitutional Law of Bangladesh*, 2nd end. Dhaka: Mullica Brothers, at p. 440.

legislature intended to deal with urban property only. The second interpretation was accepted to hold the law valid. The principle is later followed in a series of Indian, Pakistani and Bangladeshi cases.[37]

The next development on Reference jurisdiction was made by the Federal Court in Pakistan's early life in Reference by the then Governor General of Pakistan, Ghulam Muhammad, although that invited lots of criticisms especially because of the invention of the so called doctrine of state necessity. By means of the Emergency Powers Ordinance, 1955 (Ordinance No IX of 1955), promulgated under section 42 of the Government of India Act 1935, the Governor-General sought to validate certain Acts by indicating his assent with retrospective operation. The Federal Court in *Us if Patel's' Case*,[38] however, declared that the Acts mentioned in the Schedule to the aforesaid Ordinance could not be validated under Section 42 of the Government of India Act 1935, nor could retrospective effect be given to them. A noteworthy fact was that the Constituent Assembly had ceased to function, having been already dissolved by the Governor-General by a Proclamation on 24th October, 1954 and no Legislature competent to validate these Acts was in existence.

In such a situation, the Governor-General made a Reference to the Federal Court under Section 213 of the Government of India Act 1935 asking for the Court's opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General could, by order or otherwise, declare that all orders made, decisions taken and other acts done under those laws, should be valid and enforceable. The reply rendered by the Federal Court to the *Réference by The Governor General*[39] was that in the situation presented by the Reference, the Governor-General has, during the interim period, the power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers

---

[37] For example, in Bangladesh this principle is well established in *Dr. Nurul Islam* v. *Bangladesh*, (1981) DLR (AD) 140, at Para 129.

[38] *Us if Patel* v. *Crown* PLD 1955 FC 387.

[39] PLD 1955 FC 435 =7 DLR (FC) 395.

Ordinance 1955, and all those laws, until the question of their validation was decided upon by the Constituent Assembly, were, valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

Provision of advisory opinion was incorporated in the Pakistan Constitution both of 1956 (Article 162) and of 1962 (Article 69). In *Reference by the President of Pakistan*[40] under Article 162 of the Pakistan Constitution the usurpation of power by the Chief of Army Staff was shadowed on the plea of mere 'constitutional deviation'. So, it can be pointed out that the advisory opinion during the said Pakistani regime was somewhat used as a camouflage of legalizing the absolute power. This was hardly desirable but not something astonishing. Because, the state that failed to enact a Constitution for 9 years after its birth, was not a good example of nourishing and cherishing constitutionalism.

4.2 The Post-Constitutional Development

After the birth of Bangladesh in 1971, the founding fathers of the Bangladesh Constitution envisaged such an advisory role of the Appellate Division which will have some jurisdictional dimension. The difference between Advisory role of Bangladesh's Supreme Court and that of other jurisdictions is well sketched by Mustafa Kamal J. (as he then was) in the following terms:

> The makers of our Constitution, with their eyes and ears open, fully knowing (a) the hostile viewpoint of the US Supreme Court (b) some adverse observations of the House of Lords and (c) scathing criticism of Sir Zafrullah Khan in the minority judgment in Special Reference No 1 of 1944 AIR 1944 FC 73, not only decided to retain the advisory role of the Appellate Division, but also clothed it with an "advisory jurisdiction" in the marginal note unlike the Government of India Act 1935, the marginal note to section 213 of which reads "power of Governor General to consult Federal Court" and unlike the Constitution of India, the marginal

[40] 9 DLR (SC) 178.

> note to Article 143 of which reads " Power of President to consult Supreme Court".[41]

So, it is a jurisdiction by which the Appellate Division is conferred with and refusal should be only for such weighty reasons that the court has no option but to return the Reference "having regard to the jurisdictional dimension added to the advisory role in the Constitution."[42] Despite this strong constitutional exposure in favor of advisory role of the Supreme Court, such jurisdiction has not been invoked by the Presidents of Bangladesh, save in one maiden Reference made in 1995[43] when some 147 Members of Parliament resigned from their post and a constitutional vacuum did ensue. The Reference was first (and the last so far) of its kind and somewhat unique in character. The then President Abdur Rahman Biswas sought answers of some legal questions arising out of the continuous absence of some members of Parliament consequent upon their "walking out" of the House first and then resorting to "boycott" of Parliament.[44] The crux queries of the President were i) can the walk-out and consequent period of non-return by all the opposition members of the Parliament be construed as 'absent' from Parliament without leave of the Speaker occurring in Article 67 (1) (b) of the Bangladesh Constitution resulting vacation of their seats in Parliament? and ii) does 'boycott' of Parliament by all the opposition members without the leave of House do

---

[41] *Special Reference No 1 of 1995*, 47 DLR (AD) 11, at Para 84.

[42] *Id.* at Para 85.

[43] Popularly known as *en masse Resignation of Mps Reference*. The writer has taken help from Chancery Law Chronicles' website http:// www.clcbd.org/index.php to consult the decision. That is why in referencing, paragraph No. is resorted to.

[44] Syed Ishtiaq Ahmed, a leading jurist and lawyer of Bangladesh, has narrated the detail background of the Reference 1995 and its aftermath in his Papers. It appears that Ahmed was a bit skeptical about the necessity of the Reference 1995. To quote him, "In either event the Reference was made much beyond ninety days of absence. The Reference thus was like a joyride, or a merry go round. It was not a serious, much less a sensible or meaningful exercise". See, Ahmed, Syed Ishtiaq. 2008. *The Ishtiaq Papers*. Dhaka: The University Press Limited, at p. 13.

fall within the meaning of 'absent' resulting vacation of seats in Parliament? The Appellate Division answered both questions in the affirmative. Diverse issues of constitutional interpretation and the nature, implication and history of advisory jurisdiction came up for court's perusal in this leading Reference. These points are discussed and considered in the subsequent parts of this paper. One thing for sure, by this Reference the Appellate Division has made it clear that the Appellate Division is not at all reluctant in exercising such a widely dignified power of the apex court conferred by the Constitution, once invoked.

5. Legal Aspects of Advisory Jurisdiction

Evidently, advisory opinion has its role in making the rule of law meaningful and full-fledged. But various debatable aspects often surround the exercise of advisory jurisdiction. The courts and public minds are riddled with some questions on advisory role of the Supreme Court and the obligation of the President in resorting to such jurisdiction. Some of the points are discussed here under:

5.1 Is the President Constitutionally Free to Invoke Advisory Opinion?

It is often argued that the Constitution of Bangladesh in its present form has made the President a titular one. It has shrunk the role of the President in such a manner that the President has nothing to do.[45] In the sequence, it is often urged that in case of seeking advisory opinion under Article 106 the President can not go beyond the wish of the government i.e. the Premier. Thus, one critique, Sinha MA Sayeed, in the same line of public perception, writes:

> In the face of any necessity or compulsion of President's seeking any Reference to the Supreme Court of Bangladesh, the head of the state under the existing Parliamentary system of government is not

[45] Constitutionally, the President can perform two functions by himself, that of appointing the Prime Minister and the Chief Justice. Appointment of the majority party leader as Prime Minister is a conventional one; hence the President does not have too much latitude in appointing whoever else.

> constitutionally free to move on his own; rather his powers are subject to Article 48(3). In fact, Article 106 must be read with Article 48(3) which says that in the exercise of all his functions, save only that of appointing the Prime Minister pursuant to Clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of Article 96, the President shall act in accordance with the advice of the Prime Minister.[46]

Apart from this, it is further argued that under Parliamentary system of government, reintroduced in 1991 through 12th Amendment to the Constitution the President constitutionally cannot under any circumstance apply Article 106 even if it is unanimous call of the people in a given period of time. It is true that the 12th Amendment to the Constitution was passed unanimously by all the Members of Parliament belonging to different political parties in the fifth Parliament. Nonetheless, President's power of seeking advisory opinion under the present constitutional set up may be viewed from different perspectives. The reasoning put forwarded above, it appears, is based on fallacious assumption. The language of Article 106 is couched in wide terms which provide that any question of law may be referred by the President for consideration of the Appellate Division. ATM Afzal J. rightly observed in *en masse resignation of Mps Reference*:

> The discretion is entirely his [of the President] which can not be doubted or questioned. The expediency, or the motive, political or otherwise, or bonfires of making Reference can not be gone into by the Court. The President's satisfaction that a question of law has arisen, or is likely to arise, and that it is of public importance and that it is expedient to obtain the opinion of the Supreme Court justifies a Reference at all times under the Article.[47]

On this point, Shaukat Mahmood, a leading Pakistani constitutional commentator, may be a good authority. Mahmood observes: "The argument that it is only in respect of matters falling within the powers,

---

[46] Sayeed, Sinha MA, 2006. 'President's Use of Article 106: Necessity, Limitations and Non-limitations', availabl http:// www.thedailystar.net / law/ 2006/11/01/views.htm, last accessed on 15 March 2009.

[47] *Special Reference No. 1 of 1995*, 47 DLR (AD) 11 at Para 23.

functions and duties of the President that it would be competent to him to frame questions for the advisory opinion of the Supreme Court under Art. 186 (corresponding to Article 106 of the Bangladeshi Constitution) is misconceived."[48] The words of Article 186 of the Pakistani Constitution are wide enough to empower the President to forward to the Supreme Court for advisory opinion any question of law or fact which has arisen or which is likely to arise, provided it appears to the President that such a question is of such a nature or of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it.[49]

It is true that government's desirability is a factor in choosing the subject matter of Reference. But still we lack any precedent to the effect that any President of Bangladesh is rebuffed by the Supreme Court on the ground that he has not consulted with the Prime Minister and so on. In fact, here comes the point of institutionalization of the post of the President. In exercising the power of invoking advisory opinion in favor of the prejudiced nation, the question of qualification, desire, visionary leadership, integrity and commitment is much more important than that of alleged constitutional limitation of the President. It is to be remembered that the marginal note of Article 106 of the Bangladesh Constitution is 'Advisory Jurisdiction' not 'President's function'. So, the placement of the Article in the jurisdiction part of the Appellate Division of the Supreme Court puts the President in an advantageous position to be aggrieved for the cause of the countrymen, thereby invoking the advisory jurisdiction of the apex Court under Public Interest Litigation jurisprudence.

5.2 Public Interest Litigation (PIL) Syndrome in Advisory Jurisdiction

The focal point of statesmanship and the Constitution is the people.[50] So, when the fate of the people is at stake, when the Constitution is at peril, resort to the guardian (the Supreme Court) of the Constitution becomes

---

[48] Mahmood, Shaukat, and Shaukat, Nadeem. 1996. *Constitution of Pakistan*. Lahore: Legal Research Center, at p. 529.

[49] *Id.* at p. 529.

[50] Kamal, Mustafa, J. in *Dr. Mohiuddin Farooque v. Bangladesh* (1997) 49 DLR (AD) 1 at p. 13.

the most desired option. It is submitted that the Supreme Court has the responsibility of ensuring that a Constitution, however flawed it may be, is given an interpretation that promotes the working of the Constitution in a manner that is consistent with constitutionalism. N.S. Bindra[51] emphasizes the *suit generic* character of constitutional interpretation. To quote N. S. Bindra:

> A democratic Constitution cannot be interpreted in a narrow and pedantic (in the sense of strictly literal) sense. It is the basic and cardinal principle of interpretation of a democratic Constitution that it is interpreted to foster, develop and enrich democratic institutions. To interpret a democratic Constitution so as to squeeze the democratic institutions of their life giving essence is to deny, to the people or a section thereof the full benefit of the institutions which they have established for their benefit.[52]

Among the 'democratic institutions' mentioned by Bindra certainly the post of the President precedes first. So, there is no reason why the President's power under Article 106 should come within the vicious circle of Article 48(3) of the Bangladesh Constitution, which has restricted the exercise of the President's function subject to the Prime Minister's consent.[53] It is high time to think whether President's power of invoking advisory opinion can be forged and developed as an extension and isomer of Public Interest Litigation. It can be said that that seeking advisory opinion of the Appellate Division is a sort of President's PIL. Metaphorically, this can be termed as the only original jurisdiction of the Appellate Division of the Supreme Court.

---

[51] *N S Bindra's Interpretation of Statutes*. 1997. 8th end. Luck now: Eastern Book Company, at p. 521.

[52] *Ibid.* at p. 871.

[53] Billah, S. M. Masum. 2008. 'Article 106: A Constitutional Curiosity', available at: www.thedailystar.net/law/2008/08/04/index.htm, last accessed on 12 April 2009.

5.3 Is Opinion Rendered under Advisory Jurisdiction a 'law declared by the Supreme Court'?

In *en masse Resignation of MPs Reference*[54] ATM Afzal J. apart from recognizing that advisory opinions are entitled to due weight and respect and normally to be followed, laid down that advisory opinion is not a 'law declared' and therefore is not binding on the High Court Division or subordinate courts. Even the sequence of Article 106 and 111 (binding precedent) in the Constitution can not be taken as a convincing clue to hold that advisory opinions should entail binding force in subsequent cases. As the learned Judge puts it rather vigilantly:

> The sequence in which Articles 106 and 111 appear in the Constitution can not be regarded a crucial consideration in favor of holding that an opinion given by the Supreme Court has the status of a law declared. Nothing turns on the scheme or arrangement of the sequence of the articles.[55]

In his enlightened observations in *the en masse resignation of MPs Reference* the learned Judge interpreted various provisions of the Constitution. But his Lordship remained silent in explaining why such opinion rendered under Article 106 would not be a 'law declared' by the Supreme Court. For example, the meaning of 'absent' under Article 67 (1) (b) for the purpose of vacation of seats in Parliament was authoritatively settled as not remaining present for whatever reasons like illness, walkout, boycott, traveling out side the country etc.[56] If an advisory opinion does not hold

---

[54] *Special Reference No. 1 of 1995*, 47 DLR (AD) 111 at Para 23.

[55] *Ibid.* at Para 21.

[56] In response to the contention that the meaning of 'absent' (for the purpose of computation of 90 days consecutive absence resulting vacation of seats) should not be applicable in case of political *en masse* boycotting of Parliament the court held that, "the term 'absent' can not receive different interpretations in different circumstances because that will bring an element of uncertainty in the interpretation of Constitution and will make the door open to provide for the longest longitude as well. If we hold that there can be two meaning of absent one under Article 67 (1) (b) and the other not falling under that, the concept of supremacy of Constitution would suffer a serious jolt".--per ATM Afzal J., at Para 97.

the status of a 'law declared' under Article 111, can the subordinate courts in later cases deviate from such interpretation of the word 'absent'? The point of binding effect of an advisory decision can well be illustrated by Reference to Canadian experience. Canadian Court unhesitatingly relied upon their previous advisory opinions in subsequent cases. In the *Reference re Secession of Quebec*,[57] the Court describing the utility of previous decision observes that "this Reference requires us to consider momentous questions that go to the heart of our [Canadian] system of constitutional government." To that effect, efficacy of advisory opinion reaches at par with the binding judgment of the highest Court when legal and constitutional questions of utmost subtlety and complexity are involved with it. So there are weighty reasons why the observation of the Court apex should at times be a 'declared law' under the constitutional scheme of a country. Bangladeshi constitutional dispensation can not be an exception in this regard.

5.4 The Grounds of Refusal to Exercise Advisory Jurisdiction

Is the Appellate Division bound to render its opinion once such opinion is sought? A direct answer in the affirmative or negative can not satisfy the demand of the question. Afzal J. has responded to the question by saying:

> "The giving of opinion is not obligatory as it is under Judicial Committee Act, 1833 or under the Canadian Supreme Court Act, 1906 or as under Pakistan Constitution, 1962. But though it is not obligatory upon the Court to give an opinion, the Court will be unwilling to decline a Reference except for good reasons."[58]

So, the theoretical objection against Court's consultative function is today academic for when the Constitution provides for advisory opinion; it is not for the Court to refuse to entertain any Reference on the ground of jurisprudential inexpediency.[59] The makers of the Constitution must be deemed to have considered and rejected the objection against conferment

---

[57] (1998) 2 SCR 217.

[58] 47 DLR (AD) (1995) 111 at Para 23.

[59] Justice ATM Afzal, *Special Reference No. 1 of 1995, Id.* at Para 21.

and exercise of advisory jurisdiction. Exercise of advisory jurisdiction has been mainly attacked on the principles of inexpediency, inconvenience, unfruitfulness, embarrassment and prejudice to the rights of future litigants.[60] Sir Zafarullah Khan J. of Federal Court is often quoted as defense in favor of non-maintainability of a Reference, as he observed quoting Professor Flex Frankfurter, "It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay."[61] But Zafrullah ultimately conceded the necessity of such jurisdiction when he said:

> "Nevertheless, in 1935 Parliament thought it wise to incorporate Section 213 (Providing advisory jurisdiction) in the Constitution Act. We must take it therefore that in the opinion of the Parliament in spite of the criticism to which provision of this nature had been subjected, it was desirable that the Governor General should be enabled to refer to the court any question of law...."[62]

Rather, Spena J. was clearer in admitting: "When Parliament has thought it fit to enact Section 213 of the Government of India Act (corresponding to Article 106 of now Bangladeshi Constitution) it is not for the Court to insist on the inexpediency of the advisory jurisdiction."[63] From the rule of inexpediency it has been exacted that advisory jurisdiction is such a jurisdiction which needs to be exercised as a matter of delicacy and caution. Afzal J., after considering series of decisions, in *en masse Resignation Reference* has summed up the principles that govern the discretion of the Court in declining the answer to a Reference made by the President, a. the question is framed on broad, general and vague terms, b. speculative opinion on hypothetical question or abstract questions c. validity of an entire Act and d. nature of the question considering the facts and circumstances suggest that the question should not be answered provided

---

[60] Dr. Kamal Hossain submitted the jurisprudential objection against advisory jurisdiction in line with these consideration in *en masse Resignation of MPs Reference 1995.*

[61] (1944) Federal Court 173.

[62] *Id.* at 173.

[63] *Ibid.* at p. 173.

true reasons are recorded.[64] Doctrine of judicial self-restraint and doctrine political question deserves a bit detailed treatment.

5.4.1 Principle of Judicial Self-Restraint

There is a contention that a principle of judicial self-restraint should be developed in entertaining or not-entertaining a Reference if particularly the question does not fall within the ambit of judicial competence. The contention holds substance but it is important that such self-restraint should not be used a camouflage to dilapidate advisory jurisdiction. In *en masse resignation of MPs Reference* it was contended that whether the Parliament seats have fallen vacant or not is a matter between the Members of Parliament and the Parliament itself i.e. the Speaker. So, principle of judicial self-restraint should be maintained not to interfere in the 'internal proceedings of the Parliament '. In favor of this contention *Fazlul Kader Chowdhury*,[65] was cited wherein it was held that:

> "By asking the Court to answer, the Court is required to encroach on the field of a co-ordinate organ i.e. the Parliament, which has the primary exclusive jurisdiction, which if exercised within the bounds of the Constitution is immune from judicial review, and therefore, beyond the competence and jurisdiction of this Court to question."[66]

The Appellate Division found no difficulty in rejecting this contention. The Court observed:

> The questions referred to us relate to interpretation of few words which are in connection with the Parliament including Article 67 (1) (b), but it

[64] *Special Reference No 1 of 1995*, at Para 25. Some times, material omission of facts or factual slips may render the purpose of advisory role of the Appellate Division nugatory. It has been settled by a series of judicial decisions that the Court has no capability to swim beyond the representation made to it for answering. Material omissions in the statements of facts or factual gaps can render the task of the court hazardous, if not impossible. Conceding this proposition it can be said that if the fundamental question is well traced not rendering the total purpose void, the Reference should not be remanded on the ground of factual omissions.

[65] (1966) 18 DLR (SC) 62.

[66] *Id.* at p. 78.

> thereby does not become an exclusive business of the Parliament to disentitle the Court to pronounce upon the questions or return the Reference on the ground of judicial self-restraint.[67]

So, it is submitted that judicial self restraint is necessary especially in the event when political or legislative power is challenged. But judicial self restraint is to be applied for the best of reasons. For, judicial authority to nullify legislation or to exercise advisory jurisdiction has been viewed with a protective eye because it serves to foster the full play of the democratic process.

5.4.2 Doctrine of Political Question

Doctrine of political question is considered to be an extension of judicial self-restraint on which Court should not ponder over in entertaining advisory jurisdiction. In his submission in *en masse resignation of MPs Reference*, Dr. Kamal Hossain seemed to be skeptical about the Reference as he thought that the political situation alluded in the Reference suggested a life-threatening blockage in the constitutional process in the country which needed an urgent political by-pass which could only be achieved by a political goodwill of the people concerned but the President has asked from the Supreme Court merely a cure for the political headache of the authority while the constitutional process itself is in jeopardy.[68] At this submission the Court was confronted with doctrine of political question. There is no the supernatural thing in the phrase 'political question'. While maintaining judicial self-restraint, the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question.[69]

Dr. Kamal Hossain & Syed Ishtiaq Ahmed argued in *en masse resignation Reference* that: "the political storm which has given rise to this Reference will pass away but the honor and dignity of this Court is too precious to

---

[67] *Special Reference No 1 of 1995*, at Para 33.

[68] *Ibid.* at Para 11.

[69] *Id.* at Para 31.

be risked and/or whittled down by any side-wind.[70] In response ATM Afzal J. observed:

> It is well settled that the opinion given under Article 106 is not a *judgment* or *a law declared* giving rise to binding effect; at least it does not bind the Court giving the opinion. It has never been the practice of any jurisdiction that a Court has refused to answer a Reference mere because the question of law has arisen out of facts which have political overtones. The Jurisdiction conferred on this court being a constitutional one it will require far more weighty reasons than have been advanced for not acting according to the terms of the Constitution (Underlined by the author).[71]

The conclusion is that constitutionalism can not be kept in isolation every time from the winds of politics. Doctrine of political question can be good ground of judicial self-restraint, but ultimately the Court is prudent enough to make a sluice-gate to dismantle the political flavor of constitutional questions.

6. Horizons of Article 106: Unexplored?

Where the makers of a democratic Constitution like Bangladesh's had envisaged the culture of advisory role of the apex Court, perhaps as a last resort to adhere to constitutionalism, we need to extract the best benefit from it. But from the instance of only a maiden Reference of 1995, it can be deduced that the use of Article 106 has remained as a decorative Article in Bangladeshi Constitution. There are many instances in which the President of Bangladesh could have sought advisory opinions in order to avoid tumult clash between conflicting claims in the State function. This is particularly true for the interregnum government that assumed the power for two years (October, 2006-December, 2008) claiming to ensure smooth transition to democracy and the rule of law. Advisory opinion of the Appellate Division of the Supreme Court can be used to find out a constitutional solution of a problem and to avoid legal battle and unnecessary maneuver in the corpus of the Constitution. Some of the

---

70 *Id.* at Para 37.

71 *Id.* at Para 38.

issues are illustrated below. It is not that the instances can satisfactorily be solved through advisory opinion; rather the points are given to argue that the constitutional device of advisory jurisdiction could have been or could be opted to exhaust the constitutional solution of a particular problem of highest public importance.

6.1 The Chief Advisor Options for a Caretaker Government

After the dissolution of the 8th Parliament on October 27, 2006, President Professor Dr. Iajuddin Ahmed, by virtue of the constitutional provisions, could have used Article 106 to seek advisory opinion of the Supreme Court to settle the opposing approaches to the interpretations of Article 58C (3) and (4) and Article 58C (7) (b) of the Constitution in particular. Instead, after assuming the office of the Chief Adviser, he in a live broadcast told the nation that he had taken advice from the Attorney General on constitutional interpretations of those Articles. In the event of utmost necessity of the countrymen, evasion of Article 106 gave rise to huge criticism.[72] Such bypass had in effect kept the interpretation of the provisions of the Constitution relating to appointment of the Chief advisor of the Caretaker taker Government, finally unresolved which in future may be a big problem for the next President while deciding the constitutional choice for the office of the Caretaker Government,[73] provided caretaker Government system survives up to that time.

6.2 Holding Elections within 90 days of the Dissolution of Parliament: Mandatory or Directory?

[72] For a critique on the point see, Ziauddin, Dr. Ahmed, 'Somersaulting the Constitution: Bangladesh President Becomes Chief Advisor', available at: www.mukto-mona/Article.

[73] Ziauddin, Dr. Ahmed, 2006. 'Somersaulting the Constitution: Bangladesh President Becomes Chief Advisor', www.mukto-mona.com/ Article, last accessed on 2 June 2008.

[74] 'HC surprised as CA declared poll timing: EC censured for not holding election within 90-day timeframe', available at, http://nation. ittefaq.com /issues/2008/05/23/news0412. htm, last accessed on 18 January 2009.

The constitutional justification of deference of national election, even after the judicial pronouncement to the effect that the Election Commission has failed to comply with its constitutional obligation by not holding election within 90 days, could have been asked to the apex Court by resorting to Article 106. In early, 2008 a Division Bench of the High Court Division held that Election Commission's failure to hold general election within 90 days after the dissolution of Parliament, was a derogation from constitutional obligation.[74] However, upon submission of an affidavit the Court allowed the Election Commission to hold election by December of that year on the ground of expediency. The Court left the matter to next Parliament to decide on the fate of holding election beyond stipulated time by the Constitution. It seems that considering the situation, the decision was encouraging but the decision promoted a jurisprudential debate. At that time, a legal debate stirred up the public thought if it is a derogation of constitutional obligation not to hold election by 90 days after the Parliament had dissolved, how far is it constitutional for the Caretaker Government to remain in power beyond three months? A constitutional vacuum ensued. To mitigate this constitutional vacuum and to forge out a constitutional tool it was widely urged to the President to take resort to Article 106 of the Constitution, which did not take place at last. The result was that an interesting constitutional question remained unanswered. This point may haunt the nation at some future point of time once again.

6.3 Constitutionality of a Bill for the Purpose of a Reformation in Law

The Caretaker Regime 2006-2008, in absence of Parliament, was over-burdened with Ordinances. In consequence, the new government elected under 9th Parliamentary election in late December 2008, is bewildered with legalizing the large number of Ordinances. In abnormal absence of Parliament the extent of President's power to promulgate Ordinance might have been demarcated through advisory opinion by the Apex Court.[75] An analogy may be deduced from Ireland experience.

---

[75] One way to conceive of the advisory mechanism is as a mechanism that permits legislatures (and society) to economize on the distributive costs of judicial

The standing of early review of a proposed Bill receives support in Pakistani jurisdiction in the writings of Shaukat Mahmood & Nadeem Shaukat:

> It may be competent to the President to formulate for the advisory opinion of the Supreme Court questions of fact and law relating to the validity of impugned provisions of existing laws; it may be open to him to formulate questions in regard to the validity of provisions proposed to be included in the Bills which could come before the legislatures, it may also be open to him to formulate for the advisory opinion of the court questions of Constitutional importance..." [76]

Resort may also be had to Indian Jurisdiction. In *Re the Special Courts Bill*[77], it was held by the Indian Supreme Court that there is no harm in adopting the method of entertaining some suggestions from the Court which may obliterate a possible constitutional attack upon the virus of a Bill.[78] It may not be necessary or even advisable to adopt such a course in all References under Article 143 of the Constitution. But if in some cases it becomes expedient to do so, it saves a lot of public time and money to remove any technical lacuna from the Bill if the Government thinks that it

---

review. Through the advisory mechanism a legislature can ask a Court whether it approves of a proposed law. If the Court does not, the advisory opinion communicates its opposition to the proposed law early, preventing the legislature from wasting time and resources considering the bill any further. In addition to saving legislative resources, early review economizes on administrative costs and prevents reliance costs from being imposed on society at large. See, Rogers, James R. and Vanberg, George. 2002. "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective", Vol. 46, No. 2, *American Journal of Political Science*, Midwest Political Science Association, pp. 379-397.

[76] Mahmood, Shaukat, and Shaukat, Nadeem. 1996. *Constitution of Pakistan*. Lahore: Legal research Center, at p. 529.

[77] (1978) SCC 247.

[78] For example, in the Reference made by the Indian President under Article 143 (1) of the Constitution of India about the Gujarat State Legislature's power to enact Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001; Justice BAL Krishnan held that the legislation falls within the central Parliament's province. See, *Gujarat Gas Bill Reference* (2004) SCC 202.

can agree to do so. The advantage of seeking advisory opinion at the Bill stage of a law receives support from American writers too. Thus, James & Van berg write:

> Early judicial review is the advantage of advisory opinions. When legislatures solicit judges' opinions on pending legislation, it reduces the number of enacted laws that courts will have to strike down in the future. As a result, advisory opinions decrease transaction and reliance costs created by the length of time-often many years-it takes legislation in ordinary litigation to reach high courts for a decision. [79]

Instances mentioned above can be of immense help to Bangladeshi polity. Prerequisite of such a culture is the existence of a true democratic polity. A competent judiciary is of course an element in this venture.

7. Aid of Article 106: Reasons of Reluctance and its Rationality

In an enfeebled democratic polity like Bangladesh, possible reasons of reluctance in invoking the aid of Article 106 may be traced from different standpoints among which perceived constitutional limitation and contradiction of advisory jurisdiction to the theory of Separation of Powers may be placed first. The constitutional limitation is much more imaginary than real. As to separation of powers, it can be said that absolute separation of power is neither possible, nor feasible nor desirable. It can hardly be denied that constitutional scheme, without intending to taint the institution of separation of powers, has devised the advisory opinion mechanism. Another theoretical pretext against advisory opinion is that if it is frequently invoked there may be an uncertainty to the rule of law domain. As far as the invocation does not become frequent and abusive such apprehension bears little substantiality. Actually, too much allegiance of the President to partisan governments and non-institutionalization of Post of the President in Bangladesh has contributed to turning Article 106 into a mere buzz word. The individualistic introduction of the President in

[79] See further, Rogers, R. James and Van berg, George, above note 75.

desertion with the democratization process is not less responsible for such situation. With this, has been added the lack of available previous instances of seeking advisory opinions by the Presidents of Bangladesh. The much commended 12th amendment of the Constitution, re-introducing parliamentary democracy, unopposed paved the way of disempowerment of the President. The precarious possible effect of invoking consultative opinion from the Court in politics is also another factor thwarting journey of constitutionalism. Lastly, the allegedly non-binding nature of advisory opinion has acted as the important impedimenta to extract the best possible outcome from advisory role of the judiciary. Equipment of Supreme Court by Judges essentially of a scrupulous ideology than the government of the day may also be a factor in this regard. At least the public opinion is not well formed and convinced about judiciary's capability to play an effective role in dismantling the Constitution from the grab of politics. In such a Bangladeshi polity it is always dangerous to argue in favor of advisory jurisdiction of the court of law. But given the circumstances, especially evaluating the advisory-opinion-worthy instances occurred in the two years regime of Caretaker Government (2006-2008); it would be fallacious to say that the Court is devoid of politics. Excogitate, coherent and systematic exercise of collective wisdom of the Supreme Court definitely can foster a more dependable constitutional pattern from the shadow of politics. Needless to mention all the above grounds do not hold weighty reasoning, although some of them are not devoid of substance. As has been argued above, when the makers of a democratic Constitution like Bangladesh's, did envisage such a culture, perhaps as a last adherence to constitutionalism and the rule of law, we need to extract the best benefit from Article 106 of the Bangladesh Constitution.[80]

8. Conclusion

[80] Billah, S. M. Masum. 2008. 'Article 106: a Constitutional Curiosity', available at: www.thedailystar.net/law/2008/08/04/index.htm, last accessed on 25 May 2009.

Constitutional jurisprudence shows that democracy exists in the larger context of constitutional values. Democratic institutions of a state should necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each catalyst to make constitutional journey smooth. Advisory opinions could in this journey become more than rhetoric. The conclusions for resorting to advisory jurisdiction under Article 106 of the Bangladesh Constitution in the light of above discussions may succinctly be put as thus:

a. As a last resort for adherence to rule of law and constitutionalism, in matters of public importance, seeking advisory opinion of the Appellate Division of the Supreme Court should be an option. The utility of Article 106 of Bangladesh Constitution has not been extracted to the best extent possible.

b. The experience of other jurisdictions like India, Sri Lanka & Canada can be a guide to effective exercise of advisory jurisdiction in Bangladesh. The UK and the USA position regarding advisory jurisdiction can not be a barrier in seeking advisory opinion from the Appellate Division of the Supreme Court, the point being expressive and unequivocal in Article 106 of the Bangladesh Constitution.

c. The provision for advisory jurisdiction is superficially contradictory yet complementary to the theory of separation of powers.

d. In order to make advisory jurisdiction more fruitful, the President is required to be more vigilant of the rights of the citizenry. The institutional orientation of the post of the President can make the seat more people-empathetic. The public interest centric mentality may lead to develop a new dimension of native constitutional jurisprudence. Hence, the best use of Article 106 may germinate a broadened horizon of Public Interest Litigation which, it is offered, to be termed as President's PIL.

e. The wording of Article 106 is such that seeking advisory opinion from the apex court is the *suit generic* power of the President. It is more a question of function than a question of jurisdiction. But once the Court's opinion is invoked it should become a Court's jurisdiction having all of its significance. That means an opinion should entail the status of '*a law declared by the Appellate Division*' and hence binding upon all inferior Courts but not necessarily upon itself.