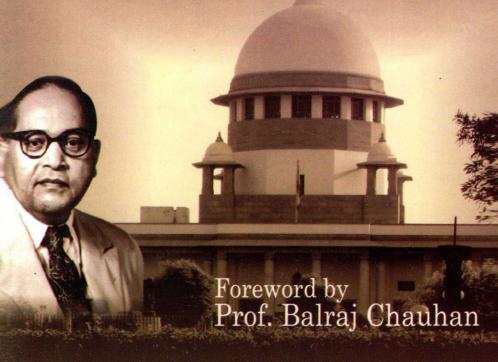
Consultative Jurisdiction of Supreme Court

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INSPIRATION

"Whenever there has been a conflict between my personal interests and the interests of the country as a whole, I have always placed the interests of the country above my personal claims.

This is certain, that if the parties creed above country, our independence will be put in jeopardy a second time.

This eventuality we must all resolutely guard against, we must be determined to defend our independence with the last drop of our blood."

A Great Patriot Dr. B.R. Ambedkar



Dedicated To

All those high or low, noble or pauper, known or unknown, who have worked selflessly to firmly ground The Philosophy of **The Constitution of India**

Foreword

I have gone through the chapters of this book. It gives me great pleasure to write this foreword especially as *Dr. Amit Singh* is my student since 1997 when he joined Lucknow University as law graduate.

Last decade witnessed many important political and constitutional developments. These developments naturally influenced not only judicial decisions of Supreme Court but also basic thinking on the constitution of India. A new jurisprudence is being envolved by the Honorable Supreme Court in many areas. The court has made significant contribution towards the development of law through its advisory opinion under Article 143.

The primary and immediate effect of an advisory opinion is that it helps in resolving the difficulty that leads to the request for it. But there are other remoter effects that necessarily flow from its authoritative character. The opinions produce effects upon the court and like judgment, they help in developing the law. The great majority of the opinions given by the Supreme Court were effective, several of them facilitated the work of the legal system in India and some led to the settlement of disputes which has given rise to requests.

For the sake of convenience author has divided the subject matter into seven chapters. The author has examined in the introductory chapter the historical precedents of such advisory opinion and the favorable as well as adverse criticism to which it has been subject by different authors. He has then

examined advisory opinion in international scenario, under which related provisions of various countries and organizations like U.N.O. and E.U. have been examined. In the concluding chapter the author has drawn some conclusions from the experience of the exercise of the advisory jurisdiction by the Supreme Court of India and has made valuable suggestions in regard to the scope and exercise of the jurisdiction.

The author being an academician has given the book a theoretical approach while at the same time he has incorporated practical aspects as well. Book has been written in a simple and lucid style and clubs the relevant topics and subjects under suitable heads. Author has used jurisdiction in a wider sense to include not only courts consultative jurisdiction as such but also all aspects of the court procedure and the nature, reception and effect of the consultative opinions.

Author has done complete justice to the subject by incorporating up to date case law and making the work comprehensive on all the important and relevant aspects. In compendium, I am sure it will not only be helpful to the bench and the bar of the Supreme Court, but also to the jurists, legislators, constitutionalists, political scientists and students as well.

So, I extend my congratulations to **Dr. Amit Singh** for making an honest endeavour in bringing out the present work, and I wish this book every success.

(PROF. BLARAJ CHAUHAN)

Vice-Chancellor

Dr. Ram Manohar Lohiya National Law University Lucknow (U.P.)

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Nothing can be as deep than the spiritual relationship between the 'Guru' and his 'disciple' it is something enternal. I feel great pleasure to evince my profound sense of veneration and gratitude to my respected teacher *Professor R.P. Singh*, Former Head of the Department and Dean, Faculty of Law, Lucknow University, Lucknow for his expert and peerless guidance, persistent encouragement, wise counseling and constant supervision during the course of present work. Prof. Singh has exercised enormous influence on my process of thinking and analysis. He has decisively moulded my career as a student, as a researcher and as a teacher. I shall remain indebted to him for his scholarly guidance.

I have paucity of words for expressing my utmost gratefulness and warmest regards to my respected teacher *Professor Balraj Chauhan*, Vice-chancellor, R.M.L. National Law University, Lucknow, who blessed, encouraged and advised whenever an opportunity occurred. Inspite of his busy academic commitments and heavy occupation, he spared his valuable time whenever I approached him. My interest in the present study could not have been sustained without the opportunity to work with him.

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In course of my research I have experienced that academic research is required to pass through many steps, i.e. identification of issues, analysis, interpretation of available facts, designing course of events for discovery of unknown facts, and shaping the write up of research. This all could have been possible due to my supervisor. I must impel my heartiest gratitude to my research guide *Dr. Chandra Prakash Singh*, Reader, Faculty of Law, Lucknow University whose guidance, advice and his venturesome attitude paved the way to accomplish my work. He is the person who made the project see the light of the day. I express my sincere thanks to *Dr. O.N. Mishra*, Reader, Faculty of Law, University of Lucknow who boasted my morale and provided a lot of help at each and every stage of my career.

I am deeply grateful to the Law Faculty of Dr. Ambedkar, Central University, Lucknow in particular *Prof. S.K Bhatnagar*, Dean of the Faculty, *Dr. Preety Saxena*, H.O.D. who always helped and encouraged me to achive my goal. My profound gratitude to *Prof. O.P. Tiwari*, *Prof. (Dr.) G.S. Tiwari* and *Prof. R.C. Srivastava* of Gorakhpur University, *Prof. J.N. Pandey* of Allahabad Central University and *Mr. Srinivas Gupta*, Reader, Department of Law, Jai Narain P.G. College Lucknow they all have been a source of constant inspiration to me.

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During the course of my work I met some influencing personalities like *Shri Dharm Raj Mishra*, Additional District Judge (A.D.J.), Allahabad, *Ms. Rekha Agnihotri*, Deputy

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While making the aforesaid acknowledgement I must not fail to express my gratitude to my family members. It was the desire of my father *Late Ramakant Singh* for me to do Doctoral Research in Law. He would say that, "my son I will feel privileged the day you will put the title of Doctor before your name." He was the first person who has seen a teacher inside me. By this book I pay my sincere homage to my loving father. I am highly indebted to express my profound regards to my mother *Kalawati Singh* for their untiring dedication, affection, silent wishes and blessings which is just beyond my capacity to express in words. In the process of preparing this task I have been sustained by the good will and moral support which I have received from my sister *Kavita Singh*, and my wife *Poonam Singh* who were always so indulgent and cooperative, will I feel, but a formality, and I would not like to be formal with them.

My friends are my assets. My heartfelt thanks to all my friends, seniors and juniors for their kind consideration, support and affectionate help received from them. It will be not fair if I do not list them all it is not lack of gratitude but for lack of space that I keep my pen down to them all. I convey my deep love and affection.

I must place on record my sincere thanks to the librarians and the staff of Indian Law Institute, The Institute of Constitutional and Parliamentary Studies, Supreme Court Judges Library, Indian Society of International Law Library, New Delhi, Dr. R.U. Singh Law Library, Tagore Library, Govt. Advocate Library, High Court Judges Library, Judicial Training

and Research Institute Library, R.M.L. National Law University Library, Dr. Ambedkar Central University Library, Lucknow for providing me access to the latest editions of books, research journals and study materials for writing the book.

My Publisher Deep & Deep Publications Pvt. Ltd., New Delhi deserves special compliments on accent of injecting 'adrenalin' into me by rendering encouragements. They have induced me to write this book and the painstaking cooperation and efforts in bringing it out of this excellent form.

Last but not the least, I am thankful to *Shri Asim Manohar* for taking keen interest in typing this manuscript speedily and timely.

DR. AMIT SINGH

Abbreviations

A.I.R. : All India Reporter

A.C. : Appeal Cases, House of Lords since 1890

(Law Report)

All E.R : All England Reporter
A.L.R. : Allahabad Law Reporter
Art (art) : Article (of the Constitution)

Bom. : Bombay Cal. : Calcutta

C.J. : Chief Justice (of H.C/S.C.)
Constitution : The Constitution of India

Ch or Ch.D. : Chancery Revision since 1890 (England)

(Law reports)

C.W.N. : Calcutta Weekly Notes
C.L.J. : Cambridge Law Journal
Cr. L.J. : Criminal Law Journal

C.P.C. : Civil Procedure Code, 1908 Cr. P.C. : Criminal Procedure Code, 1973

C.J. : Consultative Jurisdiction

D.B. : Division Bench (of H.C./S.C.)

DPSP : Directive Principles of State Policy

E.U. : European Union

ECHR : European Convention for the Protection of

Human Rights and Fundamental Freedom

E.C. : Executive Council

e.g. : For example (exempts gratia)

F.B. : Full Bench (of High Court)
GDP : Gross Domestic Product

GATS : General Agreement on Trade ir Services

H.L. : House of Lords

Harv.L.R. : Harvard Law Review

H.C. : High Court H.R. : Human Rights

Ibid : Ibidem (at the same place)

i.e. : that is

IJIL : Indian Journal on International Law

ILI : Indian Law Institute

Infra : Below

ILO : International Labour Organization

IPR : Intellectual Property Rights

ICSSR : Indian Council of Social Science Research J./JJ. : Justice/Justices (Judge/Judges of H.C./

S.C.)

K.B. or K.B.D. : Kings Bench Division (England Law

Reports)

Mad. : Madras

NGO : Non-Governmental Organization N.H.R.C. : National Human Rights Commission

L.Ed. : Lawyers Edition, United States Supreme

Court Reports

L.Q.R. : Law Quarterly Review

P.C. : Privy Council

P.I.L : Public Interest Litigation

Q.B./Q.B.D. : Queens Bench Division (England)

R. : Rex

S/Sec : Section (of the Act)
S.C. : Supreme Court of India

S.C.C. : Supreme Court Cases (Law Reports)

S.L.R. : Supreme Court Law Report S.C.J. : Supreme Court Journal

Supra : Above

U.N.O. : United Nations Organization
U.G.C. : University Grants Commission

U.O.I. : Union of India

Abbreviations

V. : Versus (Meaning Against)

Viz. : (Vidilicat) Namely w.e.f. : with effect from

W.L.R. : Weekly Law Reports (English Law Reports)

W.T.O. : World Trade Organization

u/s : Under Section Yale L.J. : Yale Law Journal

Author's Caveat

"Research is to see what everybody else has seen, and to think what nobody else has thought".

—Albert Szent Gyoergi

The present work deals with the propriety of the Consultative/Advisory jurisdiction conferred by Article 143 of the Constitution of India on the Honorable Supreme Court. The word jurisdiction in the title has been used in a wider sense to include not only the courts consultative jurisdiction as such but also all aspects of the courts procedure and the nature, reception and effect of the consultative opinions.

The primary function of a Court is to give a judicial verdict in a dispute which may arise between individuals *inter se* or between an individual and the State. To tender advice on controversial issue is not its normal function. There are countries like the U.S.A. and Australia where the highest tribunal of the land is not invested with advisory jurisdiction. Issues which may be referred to the Supreme Court for its advice are often matters of lively political controversy. It is debatable whether the highest tribunal in the country should be involved in such matters. The consultative jurisdiction, however, is often very beneficial if it is exercised with complete detachment. Several references have been made to the Supreme Court of India, since the promulgation of the constitution in 1950 and all those references were dealt with by the court in a dignified and non-partisan manner.

The present book aims at evaluating the working of the system of consultative jurisdiction in India and to record the impact it has on the process of constitutional development and also to study whether the institution has been successful in removing doubts relating to important Constitutional provisions. This work is exhaustively arranged in different topics carrying explained case laws and juristic views and approaches. Book has been divided into seven chapters under which the subject is tried clearly to elaborate.

Chapter one is introductory, it introduces the concept of Article 143 which incorporates the consultative jurisdiction in Indian Constitution. The scope and nature of advisory jurisdiction has been discussed in detail. The phraseology of the constitutional provision is quite broad to cover all types of references. The court has stated that it is well within its jurisdiction to answer the President in a reference under article 143, if the questions referred are likely to arise in future or such questions are of public importance or there is no decision of this court which has already decided the question referred.

Chapter two deals with the historical development of consultative jurisdiction. In order to evaluate the working of the institution of consultative or advisory jurisdiction an indepth study of the constitutional intent behind the provision is necessary. It was the Adhoc committee on Supreme Court which recommended the Constituent Assembly for the conferment of advisory jurisdiction upon the Supreme Court. Next heading deals with the related provisions of Government of India Act, 1935. Article 143 is a close replica of section 213 of Government of India Act, 1935. Before the advent of the Supreme Court, the Federal Court exercised advisory jurisdiction under this section. The Federal Court pronounced only four opinions all of which are discussed in the heading. The significance of the four pronouncements can be measured by the fact that they are cited in cases and various articles not only in India but also in other leading judicial systems of the world as well.

Next part of chapter is criticism and advantages of consultative jurisdiction. Firstly, the criticism of the system have been dealt with. A provision for executive consultation of the judiciary has always been subject to severe criticism mainly