



Resource Conflict Institute

RECONCILE

ARTICLE: ADVISORY OPINION

An Advisory Opinion is an opinion issued by a court or a commission like an election commission that does not have the effect of adjudicating a specific legal case but merely advises on the constitutionality or interpretation of law. It is nonbinding interpretation of the law and upon a legal question submitted by a legislature, government official, or another court. The opinion is meant to ensure that bodies run according to the law and helps steer these bodies into keeping with the letter and spirit of the law.

The Constitution of Kenya under **article 163 (6)** grants the Supreme court jurisdiction to give advisory opinions at the request of the National and County Government and State organs with respect to any matters concerning County Government(s). State organs are defined under **article 260 of the Constitution of Kenya**. On a normal advisory opinion level, advice is first given from the in-house counsel then external counsel this may include legal practitioners and consultants. The Attorney General can then provide such advice if in case of dissatisfaction. **Article 156 (4) & (6) of the Constitution provides:**

“(4) The Attorney-General— (a) is the principal legal adviser to the Government; (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President. (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.”

The question as to whether a matter concerns county government is to be determined by the court on a case-by-case basis as per article 163(6). A request may be made by the national government, a State organ or County government but at the same time a person or institution may be enjoined in the proceedings with leave as an interested party. Although there have been instances in which functions of the national government are said to overlap with those of county government, there must be more than a minor nexus between the subject matter and the operations and functions of the county government.

Otherwise, article 163(6) would have extended its functions at a very short lease. It would seem as if the Supreme Court’s advisory opinion jurisdiction will cover all matters concerning national government over and above the matters concerning county government. It ought to be noted that there was a reasonable need to have the fourth schedule under the Constitution. It indicates that not all national decision affect the county level functioning thus the distribution of functions. The Constitution under the same article has bestowed the Supreme Court with powers to make rules for the exercise of its jurisdiction.

Additionally, parliament, through legislation is mandated operationalise the court’s jurisdiction. This provision led to enactment of **Supreme Court Act. On advisory opinions, Section 13** provides that an advisory opinion by the Supreme Court as is to contain the reasons for the opinion and any judge(s) with different opinion of the majority (is) are to give their opinions and their respective reasons. It ought to be noted that an advisory opinion is to be delivered by the court in the form of a written statement. **Part eight rule 40 of the Supreme Court Rules** provides for the procedures on an advisory opinion.

The application is done by way of reference for an advisory opinion under article 163(6) of the Constitution. The reference form has been provided in the first Schedule in form E. It is to be signed by a duly authorized officer and specify the questions or issues for determination by the court. The reference is to be filled to the Registrar where he is to; give notice to the applicant to appear before the court for directions on the persons to be served with notice of such reference, give notice of the reference to all parties, if any inviting them to attend the court for directions on the mode and date of hearing.

A two judge Bench may after giving parties an opportunity to be heard reject a reference in whole or in part if; it is incompetent within the meaning of article 163(6), it considers that the applicant does not have or does not represent those who have sufficient interest in the opinion, the matter in respect of which the reference is made can be in the opinion of the Court be resolved by the Attorney-General and such advise has not been sought and it is satisfied that the applicant has habitually and persistently and without reasonable grounds:

- Instituted vexatious proceedings before the Court, whether against the same respondent or different respondent;
- Made vexatious applications in any proceedings before the court;
- Failed to comply with any rule, direction or order of the Court;
- It is materially incomplete or lacking in clarity and the applicant has failed to remedy the defects as directed by the court.

It is to be noted that there are instances where the two judge bench may fail to agree as to the admissibility of the reference. The matter is then to be referred to a five Judge Bench of the Court. A party aggrieved by the decision of the two Judge Bench may apply to the Court for review. The Court is to within 60 days after the close of hearing, deliver its opinion and the Registrar is to within 7 days transmit a certified copy to the parties. The Supreme Court has not been short of exercising its jurisdiction on advisory opinions. Examples of advisory opinions given so far are;

- In The Matter of the National Land Commission Advisory Opinion [2015]eKLR
- Speaker of the Senate & another v Attorney-General & 4 Others [2013]eKLR
- In The Matter of The Principle of Gender Representation in The National Assembly and The Senate [2012]eKLR

Article 159 provides that judicial authority is derived from the people and vests in them and will be exercised by the courts and tribunals established. Based on this fact, the Constitution being the supreme law has bestowed advisory jurisdiction powers upon the Supreme Court. This makes the advisory opinion authoritative hence cannot be rejected as mere advise as of the same level as an 'opinion' from legal officers.

To conclude the opinion guides the conduct of not just the organs that sought it, but all governmental and public action thereafter. To hold otherwise would be to reduce article 163 (6) of the Constitution to an "idle provision" of little juridical value. The advisory opinion is crucial and may be influential in legal, political, social and economic situations. Further into the effects of an advisory opinion, article 163(7) provides that the decision of the Supreme Court would be binding on all lower courts thus this makes the advisory opinion have a binding effect under the judiciary why not the Executive, Legislative or other State organs!