

THE PRESIDENT'S POWERS

The Statesman

15.5.75

Defender Of The Constitution

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IT was on July 21, 1947 that Mr Nehru moved for the consideration of certain draft principles concerning the powers of the President and the Governors. He did so in a speech which revealed the beginnings of the ambiguity and confusion which were to prevail on this subject and which still continue. "We want to emphasize", he said, "the ministerial character of the Government, that power really resides in the Ministry and in the Legislature and not in the President as such. At the same time we did not want to make the President just a mere figure-head like the French President. We did not give him any real power but we have made his position one of great authority and dignity. You will notice that he is also the Commander-in-Chief of the Defence Forces just as the American President is."

Mr Nehru's ambivalent attitude reflected in fact the consensus that emerged in regard to the rôle of the President. This was that he should not be a mere titular head of State like the British Crown on the one hand nor an executive President like the U.S. President on the other. The President we wished to create was to be midway between these two. While we decided for a Parliamentary as opposed to a Presidential form of government, the kind of office of President we contemplated was rather like what General de Gaulle created for himself when he took over as President at the end of the Fourth Republic.

The terms of the Constitution are clear and unambiguous. Article 74(1) says that "there shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President in the exercise of his functions". Article 75 goes on to provide that "the Prime Minister would be appointed by the President and the Ministers would hold office during the pleasure of the President".

One would have thought that the terms of the Constitution were clear enough. According to the Concise Oxford Dictionary, the term "to aid" means "to help" and the words "to advise" mean "to offer counsel to". The essence of advice is that it leaves the person advised free to accept or reject it. In a Parliamentary form of government, it is well understood that the head of State would normally be guided by the advice of the Cabinet or the Council of Ministers, but that does not take away his legal or constitutional right to override the Cabinet whenever he feels called upon to do so and to face the consequences. Indeed Dr Rajendra Prasad, the President of the Constituent Assembly, gave expression to this view as early as May 23, 1949, when he said that Article 74(1)—it was then draft

Article 61(1)—"does not lay down that the President is bound to accept advice".

It was not long after the Constitution was enacted that the issue came to a head. On September 18, 1951, President Prasad sent Mr Nehru a note in which he expressed a desire to act on his own judgment when giving assent to Bills, when sending messages to Parliament and when returning Bills to Parliament for reconsideration. The Prime Minister referred the matter to the Attorney-General, Mr M. C. Setalvad, for opinion and the latter on September 27, 1951, said that under Article 74(1) the President is required to act in all matters with the aid and advice of his Council of Ministers. Dr Prasad did not persist in his view.

RIVAL NOMINATIONS

Notwithstanding the fact that the President is designated by the Constitution as the Supreme Commander of the Defence Forces, Dr Prasad allowed himself to be ignored by the Prime Minister in a dispute between the Defence Minister, Mr V. K. Krishna Menon, and General Thimayya, Chief of the Army Staff. I sought an interview with Dr Rajendra Prasad whom I had known since 1934. I told him that I felt aggrieved about his not asserting his rights as the President and Supreme Commander. He pleaded his helplessness, but thanked me for my concern. Later, Dr Prasad was to raise the issue publicly. Addressing the Indian Law Institute on November 28, 1960, he said: "There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his ministers".

It was not till the Presidential elections of 1967 that I found myself involved again in this particular aspect. The Congress had put up Dr Zakir Hussain as true interpreter and defender of the Constitution. Another relevant development is the composition of the new Lok Sabha where your party enjoys only a slight edge and where situations similar to those which recently arose in certain States may well develop. A great deal will depend upon the judicious and democratic approach that the President brings to bear and the objective and dispassionate manner in which he acts in such circumstances.

The considerations then urged by me continue to apply with particular force to such acts of the President as the declaration of an emergency and the promulgation of ordinances. Article 352 lays down that, "if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threa-

tened, whether by war or external aggression or internal disturbance, he may, by proclamation, make a declaration to that effect".

Similarly, Article 123 lays down that, "if at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require".

The important question arises whether the satisfaction that has to be experienced by the President that certain circumstances exist which make it necessary for him to promulgate an ordinance or proclaim an emergency should be that of the President himself or that of his Council of Ministers. So far all Presidents have behaved as if they had no personal responsibility for judging the merits of the situation and they have acted as rubber stamps of the Prime Minister and the Cabinet. In my view this is a mistaken understanding of their responsibilities since the satisfaction has to be that of the President himself who should rely on his own judgment as to whether or not the advice of the Cabinet is sustainable on merits.

As it happened, an opportunity arose for me to do my bit to get this point tested in the Supreme Court when President Giri promulgated an Ordinance nationalizing 14 major banks on the afternoon of Saturday July 21, 1969, notwithstanding the fact that the Lok Sabha was due to meet on the morning of Monday, July 23. I felt that this was a fraud on the Constitution and a violation of the President's responsibilities. Mr N. A. Palikhvala, who agreed with me, drafted a petition challenging the validity of the Ordinance. It was filed in the Supreme Court on July 23, Mr Balraj Ma-

more than once occasion this power has been grossly misused by the President, being persuaded wrongly by the Prime Minister and Cabinet to continue a state of emergency long after the occasion for it has disappeared. It is clear that under the Constitution the proclamation of emergency should only last so long as the conditions prescribed in Article 352 of the Constitution obtain.

It is relevant to point out that one of the consequences of an undue prolongation of such a proclamation is that, under the proviso to Article 83 of the Constitution, the life of the House of People can be extended by Parliament for a period not exceeding one year at a time and such extensions may last six months even after a proclamation has ceased to operate.