

THE POWERS OF THE PRESIDENT UNDER THE CONSTITUTION *

A QUESTION of importance that will arise when India's Constitution comes into force is, "To what extent is the President under the Indian Constitution required, in the discharge of his functions, to act upon the advice of his ministers? In particular, to what extent is he required to do so in the matter of assenting to, or withholding his assent from, Bills passed by the Houses of Parliament?"

The relevant provisions of the constitution are:

Article 74 (1)—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.

(2)—The question whether any, and if so what, advice was tendered by ministers to the President shall not be inquired into in any court.

Article 75 (1)—The Prime Minister shall be appointed by the President and the other ministers shall be appointed by the President on the advice of the Prime Minister.

(3)—The Council of Ministers shall be collectively responsible to the House of the People.

Article 111—When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

* This is the text of an article by Sri B. N. Rau published in *The Hindu* (Madras), dated May 14, 1957.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

On one point the Indian Constitution leaves no doubt: article 74 (2) lays down that the question whether any, and if so what, advice was tendered by ministers to the President shall not be enquired into in any court. It follows that even if in any particular instance the President acts otherwise than on ministerial advice, the validity of the act cannot be challenged in a court of law on that ground. The constitution does not, therefore, impose any legal obligation—that is to say, any obligation that can be enforced in the courts—upon the President to act upon the advice of his ministers. The only question can be whether and to what extent it requires him to do so as a matter of convention.

In discussing this question, I shall make at the outset two assumptions, both of which are valid under normal conditions: first, that the advice tendered is that of the Council of Ministers as a whole and not merely of an individual minister; and, secondly, that the advice tendered reflects the views of the House of the People. If the advice is that of an individual minister, the President can always ask under article 78 (c) that the matter be first submitted for the consideration of the Council and the Council's decision submitted to him. The second assumption is justified by article 75 (3) of the constitution under which the Council of Ministers is collectively responsible to the House of the People.

The arguments in support of the contention that the President under the Indian Constitution is not bound, even as a matter of convention, to act upon the advice of his ministers may be summarised thus:

I. India has a written constitution, which expressly embodies some of the conventions of the British Constitution. Thus the convention that the ministers other than the Prime Minister must be appointed on the advice of the Prime Minister is expressly embodied in article 75 (1); that the ministers shall be collectively responsible to the Lower House, in article 75 (3); and so on. We must, therefore, infer that the conventions that have not to be included in this way were deliberately left out by the framers of the constitution.

By way of contrast, we may look at article 13 (9) and (11) of the Irish Constitution which provides that "the powers and functions conferred on the President by this constitution shall be exercisable and performable by him only on the advice of the government, save where it is provided by this constitution that he shall act in his absolute discretion, etc." and "no power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the government". Nothing similar to these provisions appears in the Indian Constitution. We must, therefore, infer that the omission was deliberate.

II. Article 111 of the Indian Constitution states first that the President shall declare either that he assents to a Bill passed by the Houses of Parliament or that he withholds assent therefrom, and then goes on to provide that when a Bill has been returned to Parliament for reconsideration and is passed by the two Houses with or without amendment and again presented to the President, he shall not withhold assent. Now it is unlikely, although conceivable, that ministers responsible to the House of the People would advise the President to withhold assent from a Bill passed by both Houses; but it is quite inconceivable that they would do so in respect

of a Bill which has been passed, reconsidered and re-passed by both Houses. Therefore, the provisions of article 111 are intelligible only on the supposition that the functions of the President thereunder are meant to be exercised, at least in some cases, irrespective of ministerial advice.

III. The Indian Constitution differs materially from the British, not only in being a written instrument but also in its contents. The head of the State in Great Britain is a hereditary monarch; in India he is an elected President who is eligible for re-election. He is, therefore, answerable to his constituents for his acts, which implies that he should have freedom to act as he thinks right. He should not, therefore, be held to be bound by any convention to act upon the advice of others even when he considers such advice unsound.

Again, the British Constitution contains nothing corresponding to our "Directive Principles of State Policy". These directive principles are expressly stated to be fundamental in the governance of the country and "it shall be the duty of the State to apply these principles in making laws". Suppose a Bill is passed by both Houses of Parliament which, in the opinion of the President, violates one of these principles, *e.g.*, the principle that the State shall endeavour to foster respect for international law and treaty obligations, and suppose the ministers advise the President to assent to it. If he acts on that advice, he will be doing something which in his own view will be a violation of the constitution and may even make him liable to impeachment. It follows that he must be free to exercise his own discretion in such matters notwithstanding any conventions evolved in other parts of the world. We cannot borrow a convention from Great Britain or any other country without examining the reasons which have led to its adoption in that country or the differing circumstances that prevail in our own.

Let me now state briefly the arguments on the other side:

I. It was well understood during the framing of the Indian Constitution that the President must act on ministerial advice.

(a) In justifying the provision relating to the mode of election of the President—indirect election by the elected members of Parliament and of the State Assemblies all over India instead of direct election based on adult suffrage (now article 54 of the constitution)—the Prime Minister said: "If we had the President elected on adult franchise and did not give him any real powers, it might become a little anomalous". In other words, the intention was to emphasise that real power was vested by the constitution in the Ministry and not in the President.

(b) It will be remembered that the draft of the Indian Constitution originally contained a schedule of instructions to the President and an article one of whose clauses provided that, in the exercise of his functions under the constitution, he must be generally guided by these instructions. These instructions provided *inter alia* that he must act on ministerial advice. The relevant instruction ran: "In all matters within the scope of the executive power of the Union, the President shall in the exercise of the powers conferred upon him be guided by the advice of his ministers". Ultimately, the instructions as well as the clause were omitted as unnecessary. A number of members objected to the omission because they thought that it was not at all clear how far the conventions of the British Constitution would be binding under the Indian Constitution. But the Law Minister was emphatic that they would be. He was specifically asked, "if in any particular case the President does not act upon the advice of his Council of Ministers, will that be tantamount to a violation of the constitution and will he be liable to impeachment?" His answer was: "There is not the slightest doubt about it". That the convention about acting on ministerial advice ought to be the same in India as in England no one appears to have

doubted; the only doubt voiced was whether this was sufficiently clear in the Indian Constitution. The Constituent Assembly, on the assurance of the Law Minister that the point admitted of no doubt, agreed to omit the schedule and the clause. (*Constituent Assembly Debates*, Volume 10, 1949, pp. 268-271.)

II. It is clear from article 74 (1) that it is the function of the Council of Ministers to advise the President over the whole of the Central field. Nothing is left to his discretion or excepted from that field by this article. By way of contrast, see article 163 which is the corresponding provision for Governors and which expressly excepts certain matters in which the Governor is, by or under the constitution, required to act in his discretion. There is no such exception in the case of the President.

Moreover, article 75 (3) makes the Council of Ministers responsible to the House of the People. If, therefore, the President acted contrary to advice, the ministers would either resign or, since the advice tendered reflected the views of the House of the People, they would be thrown out of office by the House of the People. For the same reason, no one else would then be able to form a government. The President would, therefore, be compelled to dissolve the House. Apart from the technical difficulty of carrying out the many details of a general election in such a situation—the President might have to dismiss the Ministry and instal a “caretaker” government to co-operate with him in ordering a general election—the consequences of the election might be most serious. If the electorate should return the same government to power, the President might be accused of having sided with the Opposition and thrown the country into the turmoil and expense of a general election in a vain attempt to get rid of a Ministry that had the support of Parliament and the people. This would gravely impair the position of the President.

III. If we hold that in a conflict between the Ministry and the President, the President's voice should prevail in the last resort, either generally or even in a particular class of cases, this would mean the elimination to that extent of the authority of a Ministry which is continuously subject to control or criticism by the House of the People, in favour of the authority of a President who is not so subject. It would thus result in a reduction of the sphere of "responsible government". So important a subtraction must be justified by some express provision of the constitution. There are a few such express provisions in our constitution.

IV. If the President, in a particular case where his own views differ from those of his ministers, ultimately accepts their advice in deference to a well-understood convention, then even if the act should result in a breach of some "fundamental right" or "directive principle" enunciated in the constitution, the responsibility will be that of the ministers and not of the President.

The considerations mentioned above in the second group of arguments seem to be decisive in favour of the proposition that, in the last resort, the President should accept the advice of his ministers as in England. We are not concerned here so much with what is legally permissible as with what is politically wise; for, whether the President acts upon ministerial advice or not, the validity of his acts cannot be challenged in the law courts.

There may, however, be exceptional or border-line cases in which the President can or has to act otherwise than on ministerial advice. For example, in the choice of a new Prime Minister, he is not obliged to consult the outgoing Prime Minister: such is the position under the British Constitution also. This can hardly be called an exception, because he has necessarily to consult the incoming Prime Minister, who, as soon as he accepts office, makes himself responsible for the choice. But there may be other

exceptions too, expressly mentioned in the Indian Constitution. Thus article 103 requires that if any question arises whether any member of Parliament has become subject to any of the disqualifications mentioned in article 102, the President must obtain the opinion of the Election Commission and decide the question accordingly; and that decision is final. Here there is hardly any room for ministerial advice. Article 111 affords another illustration: in certain circumstances, the President is debarred from withholding his assent to a Bill; the bar obviously applies even if the ministers should advise refusal of assent, which is hardly conceivable. But apart from a few exceptions of this kind, resting on express provisions of the constitution, the safest rule to observe appears to me to be as stated in the last paragraph.

A difficult question may sometimes arise in practice in deciding whether a particular provision of the constitution is to be construed as an express exception. By way of illustration, take the kind of case to which I have already referred: I take it, because it is of a type which has not yet occurred in practice and, therefore, need not embarrass anybody. Suppose the Houses of Parliament pass a Bill which, in the President's opinion, infringes certain treaty obligations of India. Article 51 requires "the State" to foster respect for treaty obligations; under article 36, "the State" includes the Parliament of India, of which, under article 79, the President is a component part. Article 37, therefore, requires him to apply these provisions in the making of laws. Is this to be read as an express direction ruling out any ministerial advice to the contrary? In other words, is he to refuse assent even if his ministers advise assent? The answer to my mind is this: Whether the Bill infringes treaty obligations is a matter of opinion. Presumably, the advice of the ministers is based on their considered opinion that the Bill does not infringe treaty obligations. In accepting their opinion in preference to his own, the President does not violate the constitution; therefore,

he should in the last resort accept their advice. The responsibility for the result is theirs.

Does this reduce the President under the Indian Constitution to a figurehead? Far from it. Like the King in England, he will still have the right "to be consulted, to encourage and to warn". Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he should accept their final advice. It has been observed that the influence of the Crown—and of the House of Lords as well—in England has grown with every curtailment of its legal powers by convention or statute. A similar result is likely to follow in India too; for, as has been well said, "the voice of reason is more readily heard when it can persuade but no longer coerce". One can conceive of no better future for the President of India than that he should be more and more like the monarch in England, eschewing legal power, standing outside the clash of parties and gaining in moral authority. ✓