

CHAPTER III
ADMINISTRATIVE RELATIONS

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CHAPTER III
ADMINISTRATIVE RELATIONS

I. INTRODUCTION

3.1.01— The Constitution distributes executive power also between the Union and the States. “Executive power” defies a precise definition. Ordinarily, it connotes “the residue of governmental functions that remain after legislative and judicial functions are taken away”.¹ The exercise of the executive function “comprises both the determination of the policy as well as carrying it into execution....the maintenance of order, the promotion of social and economic welfare.....in fact, the carrying on or supervision of the general administration of the State”.¹ Though the authority to execute or administer the laws made by the Legislature is a primary component of “executive power”, yet its exercise is not necessarily dependent on prior legislative sanction.

3.1.02 Normally, the executive powers of the Union and the States are coextensive with their respective legislative powers. There are two exceptions to this rule provided in the Proviso to clause (1) and in clause (2) of Article 73. First, that the executive power in States with respect to matters in the Concurrent List shall ordinarily remain with the respective States unless the Constitution or Parliament by law expressly provides otherwise. Second, the executive power of a State or its officers and authorities existing immediately before the commencement of the Constitution even with respect to matters in the Union List, shall continue until otherwise provided by Parliament.

3.1.03 There are certain other provisions of the Constitution which expressly confer executive power on the Union and the States. For instance, Article 298 specifically extends the executive power of the Union and of each State to the carrying on of any trade or business and the acquisition, holding and disposal of property and (read with Article 299) making of contracts for any purpose.

3.1.04 The division of executive powers between the Union and the States even with reference to matters in List I and List II, is not sharp, hard and fast. The limits of their executive powers indicated by Articles 73 and 162 are flexible and extensible. In certain matters or situations, for example under Articles 72 (1)(c), 253 and 356 (1)(a), the executive power of the Union may project into the State field. Similarly, in some cases, as for instance, in the matter of any grant for any public purpose under Article 282, the division of powers with reference to the three Lists in the Seventh Schedule loses significance.

3.1.05 The administration of laws in a two-tier system can be secured either by the same or their separate agencies. In some countries, the Federal and the State Governments have separate agencies, parallel services and courts for the administration of their respective laws.

3.1.06 However, under our constitution, the position is different. Broadly, there is only one set of courts with the Supreme Court at its apex. Jurisdiction for administration of Union as well as State laws is conferred on the same hierarchy of courts through legislations enacted by the Union and the State Legislatures under the relevant Entries, *e.g.*, 46 of List III, 95 of List I and 65 of List II.

3.1.07 The Union has no separate instrumentalities of its own for execution of many of its laws. Only a few subjects in the Union List—such as Defence, Foreign Affairs, Foreign Exchange, Posts and Telegraphs, All India Radio and Television, Airways, Railways, Currency, Customs, Union Excise, Income-Tax, etc.—are administered by the Union directly through its own agencies. Administration of several matters in the Union List and most matters in the Concurrent sphere and the enforcement of Union laws relating to them, is secured through the machinery of the States.

3.1.08 The constitution enables the Union to entrust its executive power to the agencies of the States for administration of Union Laws. There are several matters in the Union List which have an interface with those in the State List. The Union may leave the administration of laws with respect to these matters to the States, subject to the former's directions. For instance, the Mines and Minerals (Regulation and Development) Act, 1957, enacted by Parliament by virtue of Entry 54, List I, and the Mineral Concessional Rules framed thereunder, leave the initial power to grant a mining licence to the State. But such grants made by a State, are subject to the orders of the Union Government in appeal or revision filed by an aggrieved party. Another example is of the Central Sales Tax Act enacted by Parliament by virtue of Entry 92A of List I read with Article 269(1)(a). Under this Act, tax on sale or purchase of goods, other than newspapers, which takes place in the course of inter-State trade, is levied by the Union but is assessed and collected by the States on behalf of the Union Government.

3.1.09 While exercising its legislative power in the Concurrent field, the Union may adopt any one of the following modes for enforcement of its laws :

(i) It may leave the administration of a Union legislation entirely to the States. A typical example of this mode is the Electricity (Supply) Amendment Act, 1956 which leaves the administration of this Act wholly to the States.

(ii) It may reserve to itself the whole responsibility for administration of all aspects of the subject-matter of the legislation. Forest (Conservation) Act, 1980 illustrates this technique.

(iii) It may assume the executive power with respect to some aspects of the legislation leaving the administration of the remainder to the States. The Essential Commodities Act, 1955 exemplifies this pattern. The Act provides for conferring of powers and imposing of duties on State Governments by the Union Government. Powers and duties so conferred vary from commodity to commodity and also from time to time, depending on their availability at fair prices, need for their equitable distribution, and similar other factors.

3.1.10 The general provisions which have been grouped together in the same chapter of the Constitution under the caption, "Administrative Relations", are contained in Articles 256, 257, 258, 258A, 260 & 261. Articles 262 (Disputes relating to waters) and 263 (Coordination between States) have also been placed in the same Chapter. Apart from these Articles, there are special provisions in Articles 353(a) and 360(3) which, in the event of an Emergency, extend the executive authority of the Union to the State field. Article 356 enables the President to assume functions of the Government of the State and powers vested in or exercisable by the Governor or subordinate authorities.

3.1.11 These apart, certain other provisions also have an important bearing on Union-State administrative relations. Article 275(1), First Proviso; Articles 339(2) and 350A, for instance, cast special obligations on the Union for the welfare of Scheduled Tribes and development of Scheduled Areas or for providing adequate facilities for imparting instruction to the children belonging to linguistic minority groups, in their mother tongue at the primary stage of education.

3.1.12 Article 258 of the Constitution enables the Union to entrust functions to the State or its agencies. A complementary provision in Article 258A enables the Governor of a State to entrust, with the consent of the Government of India, either conditionally or unconditionally, to that Government or its officers, functions in relation to any matter to which the executive power of the State extends.

2. ISSUES RAISED

3.2.01— In the evidence before the Commission most State Governments have appreciated the need for the provisions contained in Articles 256 and 257. One of them has asked for deletion of Article 365. Another State Government is of the view that Article 365 adds nothing to the power available to the Union under Article 356 to proceed against an errant State. Another group of States criticises these provisions on the ground that they are anti-federal. Even so, one in this group has not asked for their deletion and has suggested that they must be "drastically amended" and "if any directive is to be issued to the States under Article 256 or Article 257, it should be issued only after adequate consultation with, and concurrence of, the Inter-State Council". It has urged that action under Article 365 should be taken only after the Inter-State Council has given its seal of approval.

3.2.02 One of them is of the view that the States are bound to comply with laws made by Parliament and any existing law and it is difficult to understand why a State Government normally may be unwilling to do the needful, particularly as payment of compensation for extra expenditure is also provided for in certain circumstances under Article 257(4). It has therefore suggested that Articles 256, 257, 339 and 350A be omitted "so as to remove an avoidable irritant and restore a more even balance between the Union and the States. In the event of refusal by the State Government to do the needful in these respects, with a view to disrupting national security and national defence, action could be taken under Article 356". The State Government has also criticised the powers available to the Union under Articles 339 and 350A on the

ground that the Union has hardly made any use of its power under these provisions for the benefit of the tribes and the minorities.

3.2.03 One State Government, however, has suggested deletion of these Articles, including Articles 365 and 356, on the ground that these provisions “by precept and practice have the tyrannical potential to cause serious inroads into the functioning of the States, vested both with the executive and legislative powers”. The “chain-reaction” between these provisions, it is argued, is “bound to intrude into the autonomy of the States”.

3.2.04 The same State Government has asked for the revision and modification of Article 258(2) so as to ensure—(i) that this Article does not enable Parliament to redelegate the legislative power delegated to it under the Constitution and (ii) that the power thereunder is exercised by Parliament only with the prior consent of the State.

3.2.05 Regarding the use of Article 258, some Union Ministries have referred to occasional difficulties which arise in the proper implementation by the States, of Union measures for lack of funds or infrastructural facilities, or on account of State rules and regulations. Clause (3) of Article 258 provides that the Government of India shall bear any extra cost that may be incurred by a State in the exercise of the powers and duties entrusted to it by the Union. It has also been recognised by the Union Ministries that, by and large, these problems are progressively sorted out through mutual consultations.

3.2.06 Some apprehensions have also been expressed in regard to the serious consequences that may follow, by virtue of Article 365 read with Article 356, in the event of non-compliance with the formal directions issued by the Union in the exercise of its executive powers.

3. DISCUSSIONS IN THE CONSTITUTENT ASSEMBLY

3.3.01— In the Constituent Assembly, there was some discussion on clause (3) of Article 257 dealing with protection of railways, but none on Article 256 and the remaining clauses of Article 257.² The provisions in Article 365, however, attracted criticism.³ Some members expressed an apprehension that the provisions of Article 365 might be invoked even in cases of minor infraction of a direction from the Union. The Chairman of the Drafting Committee, Dr. Ambedkar, pointed out: “Once there is power given to the Union Government to issue directions to the States that in certain matters they must act in a certain way, it seems to me that not to give the Centre the power to take action when there is failure to carry-out those directions, is practically negating the directions which the Constitution proposes to give to the Centre, Every right must be followed by a remedy.”⁴

3.3.02 The Constitution, as it emerged finally, incorporated provisions which enable the Union to give directions to the States under certain circumstances. It also provides in Article 365, a sanction to ensure compliance with those directions.

3.3.03 Matters relating to Articles 262 and 263 have been dealt with elsewhere in this Report. Articles 260 and 261 do not call for any special consideration in the context of Union-State relations. No criticism has been levelled before us with regard to the structural or functional aspects of Articles 258(1) and 258A. Articles 353 and 360 have been noticed in the Chapter dealing with Emergency Provisions. Issues raised in regard to Articles 256, 257, 258 (2) and 365 only are the main subjects of the present discussion.

4. CONSTITUTIONAL PROVISIONS AND THEIR SCOPE

3.4.01— Article 256 provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State shall as may appear to the Government of India to be necessary for that purpose. A plain reading of the provisions of this Article shows that the existence of a law made by Parliament or an 'existing law' which applies in that State is a condition precedent which must be satisfied for the issuance of a 'direction' under it. It shall not be a valid

exercise of the powers conferred if a direction is given in a situation where no enforcement of the law made by Parliament or an existing law applicable in that State, is involved.

3.4.02 Further, while the State Government is obliged to so exercise its executive power as to ensure compliance with the law made by Parliament or an existing law which applies in that State, the powers conferred on the Union are not unlimited. It has been observed by the Supreme Court that this Article does not empower the Union to issue a direction with respect to a matter, *e.g.* dissolution of the Legislative Assembly under Article 174, which is the exclusive concern of the State.⁵

3.4.03 Article 257(1) provides: “The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose”. Clause (2) of the Article specifically extends the executive power of the Union to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance. Clause (3) expressly extends the executive power of the Union “to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State”.

3.4.04 The words “for that purpose” in clause (1) of this Article limit its use to those situations only where some executive action of a State impedes or prejudices the valid exercise of the executive power of the Union. If the Union Government purported to give directions about the exercise of executive power in any field reserved for the State executive, which power does not collide with, or prejudice the exercise of, the Union's executive power, such a direction would be invalid.⁶

3.4.05 Even though clause (1) of Article 257 gives the Union full control over the exercise of the executive power of every State to ensure that it does not impede or prejudice the exercise of the executive power of the Union, the Constitution-makers, nevertheless, considered it necessary to make separate provisions in clauses (2) and (3) regarding means of communication and protection of railways. Clause (1) primarily emphasises the principle of federal supremacy. Clause (2) on the other hand, is intended to lay stress on the overall importance of well-coordinated effective executive action in regard to means of communications and railways which are so vital for the defence of the country, inter-State social intercourse, travel trade and commerce, and incidentally are conducive to national integration. Further, as the States have exclusive legislative and executive power in respect of 'land' (vide Entry 18 in the 'State List' read with Article 162), the Constitution-framers appropriately found it necessary in the national interest, for the Union to have control over the State executive to ensure availability of 'land' for purposes of communications and protection of railways.

3.4.06 Clause (4) recognises the fact that for carrying out any direction given to a State under clause (2) and (3), the State may incur extra costs. This clause therefore, provides that it shall be the obligation of the Government of India to pay to the State such sums as may be agreed upon, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India in respect of the extra costs so incurred by the State.

5. WHETHER ARTICLES 256 AND 257 ARE REPUGNANT TO FEDERAL PRINCIPLE

3.5.01— The demand for deletion or “drastic” amendment of these provisions, mainly rests on the theoretical premise that the provisions of Articles 256 and 257 are repugnant to the federal principle. The argument is that, in a 'federal polity', there is no place for provisions which confer powers on the Union to give directions to the States. It is pointed out that there is no precedent for these Articles in the Constitutions of United States of America and Australia.

3.5.02 For understanding the significance and necessity of these provisions, it is important to remember that there is no static, immutable format of a 'federal' constitution. Each country adapts and moulds the federal idea to its peculiar conditions and needs. Our Constitution-makers in their wisdom chose to secure execution of many Union laws through the enforcement agencies of the States. They had learnt from a study of the working of older federations, that the classical concept of federalism in which the government

powers are supposed to be divided into two watertight divisions, was no where a functional reality. They were also conscious of the transformation of 'classical federalism' into a dynamic process of cooperative action and shared responsibility between the Federal and State Governments. They preferred this cooperative arrangement as it was considered best suited to the social conditions, needs and aspirations of the Indian people. It is more economical and effective than the one in which the Union and the States have separate agencies for administration of their respective laws, often working at cross-purposes rather than in cooperation with each other. The State administrative apparatus in its day-to-day working remains in close touch with the people and is, therefore, capable of acting with greater efficiency in the local application of the legislative and executive policy of the Nation. Having provided for the execution by the States of the laws made by Parliament, the framers of the Constitution cast, expressly, an obligation on the States to secure compliance with them rather than leave it to their goodwill.

3.5.03 While it can be said that, in the Constitutions of older federations, there is no provision conferring on a Federal Government the power to issue executive directions to the States, the basic principle of Federal Supremacy underlying Articles 256 and 257 is recognised by them; only the technique or mode of carrying it into effect is different from the one adopted by our Constitution. The relevant constitutional provisions in the USA, Australia and West Germany are discussed below.

Federal Supremacy in USA Constitution

3.5.04 Section 2 of Article VI of the USA Constitution ordains:⁷

“This Constitution and the Laws of the United States which shall be made in pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, Shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the Contrary notwithstanding.” (emphasis added)

The import of the above provision known as the Supremacy Clause, has been considerably amplified through judicial interpretation.

3.5.05 As early as in 1819, the US Supreme Court enunciated that the acts of the Federal Government done in pursuance of the Constitution are operative as Supreme Law throughout the Union and, as a basic consequence of this supremacy, the States have no power to impede, burden or in any manner control the operation of the laws enacted by the Government of the nation.⁸ In 1824, the principle underlying the Supremacy Clause was articulated by the Supreme Court thus: “Federal action in any administrative, legislative or judicial form, if itself constitutional, must prevail over State action inconsistent therewith even when the State action was taken within a sphere in which it might otherwise act”.⁹ In *Re Eugene Debs* (158 US 564), the Supreme Court affirmed that “the entire strength of the nation may be used to enforce in any part of the land, the full and free exercise of all national powers and security of all rights entrusted by the Constitution to its care”.

3.5.06 The Supremacy Clause of Article VI is considered the very key-stone of the arch of Federal power. “Without the Supremacy Clause”, observes Schwartz, “there would be no real federal system, but only a moral union between the states, Draw out this particular bolt, and the federal machinery falls to pieces”.¹⁰

3.5.07 Section 3 of the Article II of the USA Constitution confers on the President the duty and power *inter alia* to “take care that the Laws be faithfully executed”. Further Section 8(18) of Article I empowers the Congress “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”. Section 8(15) of Article I authorises the Congress “to provide for calling forth the Militia to execute the Laws of the Union suppress. Insurrections and repeal Invasion”.

3.5.08 By virtue of the above provisions, the Congress enacted the Enforcement Act, 1795 delegating this power to the President. This was supplemented by a statute of 1807 authorising the President to use the regular armed forces to supplement the Federal Militia for law enforcement purposes. The scope of Presidential authority was further enlarged when an Act of the Congress of April, 1871 conferred on the President the right and the duty to take such measures by the employment of the militia or the land or naval forces of the United States or of either, or by other means, as he may deem necessary, for the suppression of any insurrection, domestic violence, or combinations in a State which hinder the execution of the laws, state or national.

3.5.09 Thus, the Constitutional provisions, Supreme Court Judgments and Federal Statutes have combined to invest the Federal Government, i.e., the President with the paramount duty and power to secure enforcement of Federal action through the use of force, if necessary. Among the few occasions that the U.S. Presidents had to invoke this power, two are typical and are briefly described below.¹¹

- (i) Disregarding the orders of the Supreme Court on racial de-segregation in schools, the Governor of Arkansas, in 1957, used the State National Guards to bar prospective Negro students from entering the high schools for whites at Little Rock. The guards were later withdrawn when the Attorney-General obtained an injunction against such action by the Governor. However, a large unruly mob prevented the students from entering the school. Thereupon, President Eisenhower despatched several companies of the U.S. Army to Little Rock on September 25, 1957. Mob resistance disappeared and the Negro students were able to enter the schools without interference.
- (ii) In September 1962, the Governor of Mississippi was convicted for contempt by the Court of Appeals for defying an order of the Supreme Court and using State and local police to prevent James Meredith, a Negro student, from registering at the State University. President Kennedy, through a proclamation, warned the State against resisting Federal authority. Thereupon, the University agreed to register Meredith. However, riots broke out in and around the University Campus when Meredith, accompanied by a big force of United States marshals, went to the University to register himself. President Kennedy sent several thousand US Army troops and several units of the State's National Guards to put down the riots. Resistance then collapsed. Meredith registered at the University and began attending classes.

Commonwealth Supremacy in Australian Constitution

3.5.10 Section 61 of the Australian Constitution states that the executive power of the Commonwealth extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. One important aspect of this executive power is the protection of the Constitutional organs of Government viz., the Executive, the Legislature and the Judiciary. This Section in conjunction with Section 51 (XXXIX) (which speaks of matters incidental to the execution of any power vested by the Constitution), is the basis for Commonwealth legislation establishing a police force to carry out this function, as well as to enforce the laws of the Commonwealth, either directly, or by coming to the aid of the judicial power. The State authorities also have the duty of enforcing Commonwealth laws.¹²

Federal Supremacy in West German Constitution

3.5.11 Article 83 of the West German Constitution provides that the Laender (i.e. the States) shall execute Federal laws as matters of their own concern, except where the Constitution itself provides otherwise. Article 84 of the Constitution enables the Federal Government to exercise supervision to ensure that the States execute the Federal laws and, for that purpose, to send Commissioners to the States. A Federal law which has been passed with the consent of the Upper House of the Federal Parliament (the Bundesrat) may provide that the Federal Government may issue individual instructions to State authorities for the execution of that law in particular cases.

Rule of Union Supremacy—Article 257(1) an executive Counterpart of Articles 246 and 254.

3.5.12 The essence of the rule embodied in Article 257(1) is that, in case of conflict, the valid exercise of Union executive power must take priority over the valid exercise of State executive power. Indeed, it is an 'executive' facet of the principle of Union Supremacy. We have already noted the legislative facet of the same principle in the Chapter on "Legislative Relations".¹³

3.5.13 The rationale of the principle of Union Supremacy in the executive field is that, in every constitutional system having two levels of government with demarcated jurisdictions, contests in respect of power are inevitable, even if each government is unmotivated by any desire to trespass upon the competence of the other. Application of the rule of executive supremacy of the Union resolves such conflicts and ensures harmony in the exercise of their respective powers by the two governments.

3.5.14 Articles 256 and 257 cast a mandatory duty on the States in regard to the exercise of their executive powers. The Calcutta High Court has observed:

“The authority and the jurisdiction of the State Government to issue administrative directives are limited, firstly by the Constitution and, secondly, by the laws of the land. There is no law which authorises the State Government to issue directives to officers in charge of maintenance of law and order not to enforce the law of the land upon certain conditions being fulfilled and complied with. The provisions in Article 256 of the Constitution, which require that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, are mandatory in nature.....”¹⁴

3.5.15 Our Constitution, as already noted, envisages a single judiciary for enforcing both the Union and State laws. It has been pointed out that:

“Having regard to this unified system of administration of justice, it became essential to provide for the obligations and powers enacted in Articles 256 and 257 in order to ensure effective compliance with the Union laws and the due execution of the Union Executive powers.”¹⁵

3.5.16 We have already noted that one State Government has stated that these Articles (256 and 257 read with Articles 365 and 356) 'by precept and practice have the tyrannical potential to cause serious inroads into the functioning of the States.' The various instances of 'misuse' of Article 356 cited by them, have nothing to do with Articles 256 and 257.

3.5.17 Apart from Articles 256 and 257, there are other provisions in the constitution which give authority to the Union to give directions to the States, Article 339(2) also expressly extends the executive power of the Union to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction, to be essential for the welfare of the Scheduled Tribes in the State. No instance of such direction having been given has come to our notice. The President has also been empowered to give directions under Article 344(6) in regard to official language of the Union, under Article 347 with regard to the language spoken by a section of the population of a State and under Article 350A for providing adequate facilities for instructions in the mother tongue at the primary stage of education to children belonging to linguistic minority groups. There is some divergence of opinion whether non-compliance of directions issued by the President by virtue of these provisions would attract Article 365. The better opinion appears to be that these provisions also, by inevitable implication, extend the executive power of the Union to the giving of these directions to the States in the exercise of its executive power. Any direction given by the President under any of these provisions is intended to be complied with and not ignored by the State concerned. These provisions would be rendered futile if any direction issued thereunder by the President or the Union Government were to be disobeyed or ignored with impunity. In sum, if any direction issued by the Union under any of the provisions, namely, Articles 256, 257, 339(2), 353, 360, 344(6), 347, 350A, 371C(2) and para 3 of the Fifth Schedule, is not complied with, then Article 365 will be attracted.

3.5.18 In a two-tier system of government, with a single judiciary, where the administration of Union law is largely secured through the machinery of the States, differences are bound to arise between the Union and the States in regard to the manner of implementation of Union laws and the exercise of Union's executive powers, specially if they conflict with the exercise of the executive powers of the State. Articles like 256 and 257 are essential to ensure harmonious exercise of the executive power by the Union and by the States, in keeping with the principle of Union supremacy and to enforce this principle, by giving appropriate directions, in the event of irreconcilable differences on vital issues.

3.5.19 The factual position is that the power to give directions under Articles 256 and 257 has never been invoked and no proclamation has been made so far under Article 356 by the application of Article 365. Normally, as hitherto, differences between the Union and the States, in this context, would be sorted out by mutual consultation so as to maintain a healthy and constructive relationship between them, without resorting to the issue of formal constitutional directions. However, such provisions, to be used as a measure of last resort, are necessary to cope with situations of irreconcilable differences. The scope and limitations of these articles as discussed above and the fact that they have not been resorted to all these years clearly show that the objections to these provisions are hardly warranted. They rest mainly on hypothetical rather than empirical basis.

Scope of Article 365

3.5.20 Article 365 provides : “Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution”. Without this provision, there would have been no sanction to ensure enforcement of the directions issued by the Union under any provision of the constitution in the exercise of its executive power. Article 365 can be validity invoked, only if :—

- (i) any direction is given by the Union in the valid exercise of its executive power under any of the provisions of the Constitution; and
- (ii) such direction has not been complied with or given effect to by the State.

Misuse of Article 365—Judicial Review

3.5.21 If either of these pre-conditions is not satisfied Article 365 cannot be invoked. As has been rightly observed, “the power conferred by Article 365 is not absolute; it is subject to the conditions mentioned in Article 365 and is therefore open to judicial review”.¹⁶ If a direction from the Union did not fulfil the preconditions laid down for the exercise of the power in the constitutional provision under which it was purportedly issued, or was given for a purpose extraneous to the one for which the power has been conferred by that provision, it would be invalid and open to challenge on that ground in Court.

Article 365 Does not impose an obligation

3.5.22 The words “it shall be lawful for the President to hold”, do not impose an obligation. They only confer a power, the exercise of which is a matter of discretion with the President. On every non-compliance with a Union direction, irrespective of its effect, extent and significance, the President (in effect, the Union Council of Ministers) is not bound to hold that a situation has arisen in which the government of the non-complying State cannot be carried on in accordance with the Constitution. The President should exercise this drastic power in a reasonable manner with due care and circumspection, and not mechanically. He should give due consideration to all relevant circumstances, including the response, if any, of the State Government to the direction. In response to the direction, the State Government might satisfy the President that the direction had been issued on wrong facts or misinformation, or that the required correction has been effected. The President should also keep in mind that every insignificant aberration from the constitutional path or a technical contravention of constitutional provisions by the functionaries of the State Government, would not necessarily and reasonably lead one to hold that the government in the State cannot be carried on in accordance with the Constitution.

3.5.23 Thus, Article 365 acts as a screen to prevent any hasty resort to drastic action under Article 356 in the event of failure on the part of a State Government to comply with or give effect to any constitutional direction given in the exercise of the executive power of the Union. The extraordinary powers under Article 365 are therefore necessary but should be exercised with great caution and in extreme cases.

Citizen can seek Judicial Redress if State does not perform the Constitutional duty under article 256

3.5.24 Even a private citizen whose interests or rights are jeopardised or affected by the failure of the State Government to discharge the obligation imposed upon it by Article 256, can seek relief from court requiring the State Government to exercise its executive power to ensure compliance with the laws made by Parliament and existing laws. (The decisions in *Jay Engineering Works vs. State of West Bengal*, AIR 1968 Calcutta 407 and *Deputy Accountant General vs. State of Kerala*, AIR 1976 Kerala 158, Full Bench—ILR Kerala 492 are in point).

3.5.25 We would like to reiterate the caution sounded by the Administrative Reforms Commission that before issue of directions to a State under Articles 256 and 257, the Union should explore the possibilities of settling points of conflict by all other available means.¹⁷ A direction under these provisions and the application of the sanction under Article 365 in the event of its non-compliance, is a measure of last resort. It is required to be administered with utmost caution after all other available alternatives to resolve the deadlock or conflict had been tried and failed. Indeed, in certain sensitive areas, a directive issued for correction of an aberration from the constitutional course, without prior ascertainment and consideration of

the views of the State Government and the feelings of the interest groups, may itself produce a strong reaction, precipitating a constitutional crisis of grave magnitude.

3.5.26 We have given our anxious consideration to the suggestion that before issuing a formal direction under the provisions of Articles 256 and 257, the Union Government should consult the proposed Inter-Government Council and seek its good offices in settling the points of conflict. We are unable to support this suggestion because it will dilute the accountability of the Union Government for its actions to Parliament.

3.5.27 In the light of what has been said above, the conclusion is inescapable that Articles 256 and 257 which give power to the Union Executive to issue directions to the State and Article 365, without which there would be no sanction for securing compliance with those directions, are vital for ensuring proper and harmonious functioning of Union-State relations in accordance with the Constitution. They do not derogate from the federal principle, rather give effect to it.¹⁸ They provide a technique for ensuring effective inter-governmental cooperation and maintaining the Rule of Law which are the fundamental values enshrined in our Constitution.

6. SUGGESTION FOR DELETION OF ARTICLES 339 AND 350A

3.6.01— We have referred in para 3.2.02 *ante* to the view put forward by one of the State Governments that the powers available under Articles 339 and 350A have hardly been made use of by the Union for the benefit of the Scheduled Tribes and linguistic-minorities, respectively, and that these two Articles could well be deleted. ‘This would remove an avoidable irritant, viz. the power of the Union under these Articles to issue directions’.

Article 339

3.6.02 The Constitution envisages special attention being paid to the educational and economic interests of the weaker sections and, in particular, of the Scheduled Castes and the Scheduled Tribes (*vide* Article 46). This responsibility is shared jointly by the Union and the States. (*vide* Article 36 read with Article 12). In recognition of the importance of development of the Scheduled Tribes, specific provision has been made in the first Proviso to Article 275 for the payment, out of the Consolidated Fund of India, as grants-in-aid of revenues of the States to enable them to meet the costs of schemes under-taken by them, with the approval of the Government of India, for promoting the welfare of scheduled Tribes. Article 339 (1) provides for the appointment of a Commission to report on the administration of Scheduled Areas and the welfare of Scheduled Tribes in States. A Commission was accordingly set up in 1960, and it gave its report in 1961. Article 339 (2) provides that the Union Executive may, if necessary, give directions to a State as to the drawing up and execution of schemes essential for the welfare of Scheduled Tribes in the State.

3.6.03 It is evident that the Union Government has an important role to play in regard to the development and welfare of the Scheduled Tribes, not only by providing the necessary funds but also by way of effectuating the needed coordination among the various Union and State agencies for the successful implementation of the various schemes undertaken for the purpose. Further, the members of many a Scheduled Tribe live in areas which fall under two or more States and, in their case, inter-State coordination of welfare and development scheme is important. The Union should therefore have the power to issue directions, if necessary to States in order to ensure proper planning, implementation and coordination of schemes for Scheduled Tribes. Although, the Union has not invoked this power so far, it would be incorrect to assume that the need for it will never arise. Hence, we cannot agree that Article 339 should be deleted.

Article 350A

3.6.04 The State Reorganisation Commission had observed¹⁹ that the scheme of redistribution of State territories which it was recommending would, in many cases, result in bringing together people speaking a common language and, to that extent reduce the number of linguistic minorities. However, the problem of such minorities would remain, notwithstanding the safeguards embodied in the Constitution, e.g. Articles 29 and 30 relating to cultural and educational rights and Article 347 relating to the use of minority languages in the administration. The Commission observed that the Union should be responsible not only

for prescribing policies governing important matters, such as, the education of minority groups and use of minority languages for official purposes, but also for due observance of such policies.

3.6.05 The said Commission viewed the right of linguistic minorities to instruction in their mother-tongue and the use of minority languages in the administration as constituting the core of the problem of these minorities and therefore a positive duty should be cast on the State to provide for facilities to the minorities for education in the mother-tongue at the primary school stage. The Commission recommended that constitutional recognition should be given to this right and the Union Government should be empowered to issue appropriate directives for the enforcement of this right. The above recommendation was accepted and Article 350A incorporated in the Constitution in 1956.

3.6.06 We consider education in the mother-tongue as of fundamental significance for a child's development. The responsibility for providing all necessary facilities for such education should rest primarily with a State Government. But the Union Government should continue to be the overall authority for ensuring that this right of every linguistic minority is fully protected. It is therefore important that the Union Government should have the power to give directives to a State Government for the purpose.

3.6.07 None of the State Governments has advanced any argument to show that the exercise of the power of the Union to issue directions to a State under Article 350A, would result in hardship to a linguistic minority or cause an impediment to a State Government in providing facilities for instruction in the mother-tongue at the primary stage. We do not, therefore, see any valid reason for deleting this important Article.

7. SUGGESTION FOR REVISION OF ARTICLES 154(2) (b) AND 258(2)

3.7.01— The suggestion put forth by one State Government is that the provisions of Articles 154(2)(b) and 258(2) be revised to ensure that the powers thereunder are exercised only with the consent of the State Government. Before dealing with this suggestion it will be useful to notice these provisions:

154. “(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Nothing in this Article shall—

- (a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or
- (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.”

Scope of Article 258

3.7.02 Article 258(1) contemplates a situation where notwithstanding anything in the Constitution, the President may, with the consent of the State, entrust conditionally or un-conditionally to the State Government or its officers, functions in relation to any matter to which the executive power of the Union extends. It has been observed by the Supreme Court that “the effect of Article 258(1) is merely to make a blanket provision enabling the President by notification to exercise the power which the Legislature could exercise by Legislation, to entrust functions to the officers to be specified in that behalf by the President and subject to the conditions prescribed thereby”.²⁰ It is significant that the entrustment takes place with the consent of the State. The functions which may be entrusted under clause (1) or Article 258 should relate to a matter with respect to which the executive power vested in the Union either under the general provision in Article 73 or any specific provision (e.g. Article 298) in the Constitution. It does not authorise the President to delegate those powers and functions with which he is, by the express provisions of the Constitution, invested as *President*.²¹ Functions of the Union in relation to a Union Territory, in respect of matters in the Union, State or Concurrent List can also be entrusted to a State under this provision.

3.7.03 Article 258(2) empowers Parliament to enact a law providing for conferring of powers and imposition of duties or for authorising the conferring of powers and imposition of duties upon the State or its officers and authorities, notwithstanding the fact that it relates to a matter with respect to which the legislature of the State has no power to make laws. Thus, it covers a situation where without a State's consent, powers can be conferred and duties imposed by a law made by Parliament within its competence, even if the State legislature has no power to make a law with respect to the subject matter of the Union law.

Powers conferred on Parliament by the Constitution are plenary and not delegated

3.7.04 The argument advanced is that these provisions offend against the fundamental maxim *Delegata potestas non potest delegari*, because Parliament is not competent to redelegate the powers delegated to it by the Constitution. The argument appears to be misconceived. It is based on the assumption that the powers allocated to Parliament by the Constitution under Article 246, read with List I of the Seventh Schedule, are delegated powers; and the Act of Parliament conferring powers and imposing duties under Clause (2) of Article 258 would amount to redelegation of its delegated powers by the delegatee. This assumption is fallacious the legislative powers of Parliament entrenched in the Constitution, are plenary powers and not delegated powers. Reference to the said maxim is entirely misplaced. The maxim contains a kindred principle which limits the operation of the maxim *qui facit per alium facit per se*, so that one agent cannot lawfully appoint another to perform the duties of his agency. This is not the position here.

3.7.05 The question why unlike Clause (1), the entrustment of Union power under Clause (2) of the Article can be made without the consent of the State, is to be answered not in terms of abstract legal aphorisms but on pragmatic considerations of the functional viability and necessity of these provisions. We have noticed that the Constitution-makers instead of having the more expensive and conflictprone arrangement of securing enforcement of Union and State laws through separate agencies, opted to have the Union laws and policies enforced through the machinery of the States. Article 258 provides two alternative courses for securing the implementation of the laws and policies of the Union. Under Clause (1), the President may entrust, with the consent of the State, any of the functions to which the executive power of the Union extends, Under Clause (2) the entrustment is by law enacted by Parliament. While executive action to confer powers and duties requires consent of the State Government, Parliament has the power to determine the appropriate instrumentalities, whether these belong to the Union or a State or both, for enforcing its laws, entrustment of powers and duties on a State Government or its officers of authorities by law by Parliament does not therefore require any consent by the State Government.

3.7.06 The entire scheme illustrates the close interdependence of the Union and the State in their executive functioning. A special feature of such functioning is that the administrative powers and duties which a State or its officers authorities are called upon to exercise in implementing Union laws, are closely allied to and often inter-mingled with the normal activities undertaken by the State in running its own administration. If such administrative powers and duties were to be undertaken by the Union instead of by a State there would be two parallel agencies undertaking almost similar functions. Such an arrangement would not only be more expensive and less efficient but also could lead to conflict between the two sets of agencies.

3.7.07 Thus, clause (2) of Article 258 gives unqualified power to Parliament to enact a law conferring powers and imposing duties on a State or its officers/authorities, notwithstanding that the law relates to a matter with respect to which the State has no legislative competence. The only valid objection to such statutory delegation of powers and imposition of duties could be that it may result in extra financial burden on the State exchequer. Clause (3) of the Article imperatively requires that "there by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties".

3.7.08 In practice, whenever the assistance of States is required for enforcing a law of Parliament, the enactment itself makes provisions for the exercise of the requisite powers and duties by States, or enables the Union Government to delegate or entrust such powers and duties to them. (An enactment of Parliament may contain both these types of provisions). However, a law of Parliament or an "existing" law applicable in a State may make it the responsibility of the Union to exercise certain powers/duties and may not specifically provide for their delegation or entrustment to States. At the same time, any such law may not prohibit such delegation or entrustment. In that event, the Union may entrust any of these powers and duties to a State with its consent, by invoking clause (1) of Article 258. Also, executive powers and duties of the Union which are not governed by either a law of Parliament or an "existing" law may be entrusted by the Union to a State, again with its consent, by invoking clause (1). 3.7.09 No specific case has been brought in evidence before us to show that there has been any problem between the Union and the States in the operation of clauses (1) and (2) of Article 258 or that the mechanism provided in clause (3) has been found

inadequate to compensate a State for the extra costs incurred by it in connection with the exercise of its delegated powers and duties.

3.7.10 Federalism is more a functional arrangement for co-operative action, than a static institutional concept. Article 258 provides a tool, by the liberal use of which, co-operative federalism can be substantially realised in the working of the system. We, therefore, recommend a more extensive and generous use of this tool, than has hitherto been made, for progressive decentralisation of powers to the Governments of the States and/or their officers and authorities.

8. INTER-GOVERNMENTAL CO-ORDINATION AND CO-OPERATION

3.8.01— The diffused pattern of distribution of governmental functions between the Union and the States, and the manner in which the administration and enforcement of most Union laws is secured through the machinery of the States, postulate that the inter-governmental relations under the Constitution have to be worked on the principles of cooperative federalism. Several other features of the Constitution reinforce this conclusion. For ensuring inter-governmental coordination and cooperation, the Constitution envisages several institutions or bodies. The most important of them is the forum of Inter-State Council contemplated by Article 263. We have dealt with this aspect in Chapter IX.

9. RECOMMENDATIONS

3.9.01— Articles 256, 257 and 365 are wholesome provisions, designed to secure coordination between the Union and the States for effective implementation of Union laws and the national policies indicated the rein. Nonetheless, a direction under Articles 256 and 257 and the application of the sanction under Article 365 in the event of its non-compliance, is a measure of last resort. Before issue of directions to a State or application of sanction under Article 365, utmost caution should be exercised and all possibilities explored for setting points of conflict by all other available means.

(Paras 3.5.25 & 3.5.27)

3.9.02 Federalism is more a functional arrangement for cooperative action, than a static institutional concept. Article 258 provides a tool, by the liberal use of which, co-operative federalism can be substantially realised in the working of the system. A more extensive and generous use of this tool should be made, than has hitherto been done, for progressive decentralisation or powers to the Governments of the States and/or their officers and authorities.

(Para 3.7.10)