Toppersnotes®
Unleash the topper in you

Bihar

Judicial Services Exam

Bihar Public Service Commission (BPSC)

Volume - 7

Administrative Law, Company Law, Law of Equity, The Arbitration and Conciliation Act & The Provincial Small Cause Court Act

SIERRA INNOVATIONS

INDEX

Unit I

Evolution and Scope of Administrative Law

a. Nature, Scope of development administrative law

Administrative law deals with the powers and functions of the administrative authorities, the manner in which the powers are to be exercised and remedies which are available to the aggrieved persons when those powers are abused by these authorities

According to Ivor Jennings "administrative law is the law relating to the administrative authorities".

This is the most widely accepted definition, but there are two difficulties in this definition.

(1) It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers. For example: - Legislation relation to public health services, houses, town and country planning etc.. But these are not included within the scope and ambit of administrative law, and

(2) It does not distinguish administrative law from constitution law. It is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. The American approach to administrative law is denoted by the definition of administrative law as propounded by Davis.

According to K. C. Davis, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action".

According to Professor Wade any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said "the law which concerns administrative authorities as opposed to the others".

There are some difficulties with this definition also. It fails to distinguish administrative law from constitutional law Like Jennings definition mentioned above; this is also very wide definition. It includes the entire legal field except the legislature and the Judiciary. It also includes the law of local government. It is also said that it is not possible to divide completely and definitely the functions of legislative, executive and judiciary.

It is very difficult to say precisely where legislation ends and administrative begins. Though enacting a law is functioning of the legislature the administrative authorities, legislate under the powers delegated to them by the legislature and this delegated legislation is certainly a part of administrative law.

Scope of Administrative law

The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties. In both civil and common-law countries, these types of functions are sometimes called —public law functions to distinguish them from —private law functions. The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the state, like relationship based on government contract. For instance, if a citizen works in a state owned factory and is dismissed, he or she would sue as a —private law function. Whereas, if he is a civil servant, he or she would sue as a — public law function. Similarly, if residents of the surrounding community were concerned about a decision to enlarge the state- owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as a —public law function. It is also to be noted that a contract between an individual or business organization with a certain administrative agency is a private law function governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules. So we can see that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function. Many definitions and approaches to administrative law are limited to procedural aspects of the

subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature.

According to Fox the trend and interaction between substance and procedure as is the unifying force of the administrative process – in dramatic contrast to the wide variety of substantive problems with which agencies deal- that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. So, to a wider extent, the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves. With respect to judicial review, the basic question asked is not whether a particular decision is —right, or whether the judge, or a Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? That power been exceeded, or otherwise unlawfully exercised? Hence, administrative law is not concerned with the merits of the decision, but with the decision making process.

Development of Administrative Law

Administrative law existed in India even in ancient times. Under the Mauryas and Guptas, several centuries before christ, there was well organised and centralised Administration in India. The rule of "Dharma" was observed by kings and Administrators and nobody claimed any exemption from it. The basic principle of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by Dharma, which was even a wider word than "Rule of Law" or "Due process of Law", Yet, there was no Administrative law is existence in the sense in which we study it today. With the establishment of East India company and event of the British Rule in India. The powers of the government had increased. Many Acts, statutes and Legislation were passed by the British government regulating public safety, health, morality transport and labour relations. Practice of granting Administrative licence began with the State Carriage Act 1861. The first public corporation was established under the Bombay Port Trust Act 1879. Delegated legislation was accepted by the Northern India Canal and Drainage Act, 1873 and Opium Act 1878 proper and effective steps were taken to regulate the trade

and traffic in explosives by the Indian Explosives by the Indian Explosives Act 1884.
In many statutes, provisions were made with regard to holding of permits and licences and for the settlement of disputes by the Administrative authorities and Tribunals.

During the Second World War, the executive powers tremendously increased Defence of India Act, 1939 and the rules made there under conferred ample powers on the property of an individual with little or no judicial control over them, In addition to this, the government issued many orders and ordinances, covering several matters by way of Administrative instructions. Since independence, the activities and the functions of the government have further increased. Under the Industrial Disputes Act 1947, the Minimum Wages Act 1948 important social security measures have been taken for those employed in Industries.
The philosophy of a welfare state has been specifically embodied in the constitution of India. In the constitution itself, the provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to sub serve the common good. The operation of the economic system should not result in the concentration of all these objects.

The State is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the constitution. In Fact, to secure those objects, several steps have been taken by the parliament by passing many Acts, for example. The Industrial (Development and Regulation) Act 1951, the Requisitioning and Acquisition of Immovable Property Act 1952, the Essential Commodities Act, 1955. The Companies Act 1956, the Banking Companies (Acquisition and Transfer of undertakings) Act, 1969. The Maternity Benefits Act, 1961, The Payment of Bonus Act 1965, The Equal Remuneration Act 1976, The Urban Land (ceiling and Regulation) Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

Even the judiciary has started taking into consideration the objects and ideals social welfare while interpreting all these Acts and the provisions of the

Constitution. In the case of Vellunkunnel v. Reserve Bank of India, the Supreme Court held that under the Banking Companies Act, 1949 the Reserve Bank was the sole judge to decide whether the affairs of a Banking company where being conducted in a manner prejudicial to the depositors, interest and the court had no option but to pass an order of winding up as prayed for by the Reserve Bank.

Also, in the case of *State of Andhra Pradesh v. C. V. Rao*, the Supreme Court dealing with departmental inquiry, held that the jurisdiction to issue a writ of certiorari under Article 226 is supervisory in nature. In is not an appellate court and if there is some evidence or record on which the tribunal had passed the order, the said findings cannot be challenged on the ground the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal.

The Apex Court in *Shrivastava v. Suresh Singh* observed that in matters relating to questions regarding adequacy or sufficiently of training the expert opinion of public service commission would be generally accepted by the court.

The Supreme Court in *State of Gujrat v. M. I. HaiderBux* held that under the provisions of the Land Acquisition Act, 1994, Ordinarily, government is the best authority to decide whether a particular purpose is a public purpose and whether the land can be acquired for the purpose or not.

Hence, on the one hand, the activities and powers of the government and administrative authorities have increased and on the other hand, there is great need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the constitution. For that purpose, provisions are made in the statutes giving right of appeal, revision etc. and at the same time extra-ordinary remedies are available to them under Article 32, 226 and 227 of the constitution of India. The Principle of judicial review is also accepted in our constitution, and the order passed by the administrative authorities can be quashed and set aside if they are malafied or ultravires the Act or the provisions of the constitution.
And if the rules, regulations or orders passed by these authorities are not within their powers, they can be declared ultravires, unconstitutional, illegal or void.

b. Rule of Law and Administrative Law

The expression 'Rule of Law' has been derived from the French phrase 'la principle de legalite', i.e. a Government based on the principles of law. It is implied by the State in the administration of justice. According to Gamer, The Rule of law is used simply to describe the state le words, the term 'rule of law' indicates the state of affairs in a country where, in main, the law mules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and aloof affairs in a country where, in main, the law is observed and order is kept. It is an expression synonymous with law and order.

The basis of Administrative Law is the 'Doctrine of the Rule of Law'. It was expounded for the first time by Sri Edward Coke, and was developed by Prof. A.V.Dicey in his book 'The law of the Constitution' published in 1885.
According Coke, in a battle against King, he should be under God and the Lank thereby the Supremacy of Law is established.

Dicey regarded rule of law as the bedrock of the British Legal System. His doctrine is accepted in the constitutions of U.S.A. and India.

According to Prof. Dicey, rules of law contain three principles or it has three meanings as stated below:

1. **Supremacy of Law or the First meaning of the Rule of Law:**
   The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary courts in accordance with the ordinary procedure.

2. **Equality before Law or the Second meaning of the Rule of Law:**
   The Second meaning of the Rule of Law is that no man is above law. Every man whatever is his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Prof. Dicey states that, there must be equality before the law or equal subjection of all classes to the ordinary law of the land. He criticized the French legal system of droit Administrative in which there were separate administrative tribunals for deciding the cases of State Officials and citizens separately. He criticizes such system as negation of law

3. **Predominance of Legal Spirit**

The Third meaning of the rule of law is that the general principles of the constitution are the result of juridical decisions determining file rights of private persons in particular cases brought before the Court.

Dicey states that many constitutions of the states (countries) guarantee their citizens certain rights (fundamental or human or basic rights) such as right to personal liberty, freedom from arrest etc. According to him documentary guarantee of such rights is not enough. Such rights can be made available to the citizens only when they are properly enforceable in the Courts of law, For Instance, in England there is no written constitution and such rights are the result judicial decision.

Application of the Doctrine in England: Though, there is no written constitution, the rule of law is applied in concrete cases. In England, the Courts are the guarantors of the individual rights. Rule of law establishes an effective control over the executive and administrative power.

However, Dicey's rule of law was not accepted in full in England. In those days, many statutes allowed priority of administrative power in many cases, and the same was not challenged better the Courts. Further sovereign immunity existed on the ground of King can do no wrong'. The sovereign immunity was abolished by the 'Crown Proceedings Act, 1947. Prof. Dicey could not distinguish arbitrary power from discretionary power, and failed to understand the merits of French legal system.

Rule of Law under the Constitution of India: - The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble.

The Constitution of India has been made the supreme law of the country and other laws arc required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid.

Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(l) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provision of Part ill dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to life and personal liberty. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall he convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted tinder the law in for cc at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it. The Constitution provided for encroachment of one organ (for instance Judiciary) upon another

(for example Legislature) if its action is mala fide, as the citizen (individual) can challenge under Article 32 of the Constitution.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It's also regarded as a part of natural justice.

In *Kesavanda Bharti v. State of Kerala*, the Apex Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure. The Supreme Court in *Menaka Gandhi v. Union of India*, observed that Article 14 strikes against arbitrariness.
In *Indira Gandhi Nehru v. Raj Narain*, Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution.

In *A.D.M Jabalpur v. Shivakant Shukla* (popularly known as Habeas Corpus Case), the question before Supreme Court of India was, whether there was any rule of law in India apart front Article 21 of the Constitution. The Supreme Court by majority held that there is no rule of law other than the constitutional rule of law. Article 21 is our rule of law. If it is suspended, there is not rule of law.

Rule of law and Administrative law

Introduction: Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century. Dicey Rule of Law: The concept of rule of law backs to the time of Aristotle. Aristotle ruled out the concept of rule under discretion by all means and tried to convey his followers that given the choice it is always rule of law that scores over rule of discretion.

In Modern times the rule of law was propounded by the Albert Dicey, a British jurist and Philosopher. He gave following three postulates of rule of law:

1. Everyone is equal before the law.
2. Sanctions have to be backed by law.
3. Courts are the ultimate body and supremacy of court is ambivalent in civilized society.

He was firm proponent of the concept and very influential thinker of his times.

Though the first two principles still exist in almost every legal system of world, the third principle was protested many of jurists of that time. The Dicey in particular opposed the principle of French system of Droit Administratif. England at that time was in fact propounding some quasi legislative and quasi judicial processes which were taken cognizance of English thinkers of that time; still the whole common law system of country was blindfolded with the Dicey's philosophy of "rule of law."

Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasn't sustainable on other. Most of the modern legal system implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion.

c. Separation of Powers and Its Relevance

In the context of separation of powers, judicial review is crucial and important. We have three wings of the state, judiciary, Legislature and Executive with their function clearly chalked out in our Constitutions. Article 13 of the constitution mandates that the "state shall make no law, which violates, abridges or takes away rights conferred under part III". This implies that both the Legislature and judiciary in the spirit of the words can make a law, but under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the Legislature.

Montesquieu: The foundations of theory of separation of powers were laid by the French Jurist Baron De Montesquieu in his great work Espirt De Lois

(the spirit of Laws) published in 1748. The conclusions of Montesquieu are summarized in the following quoted passage. "When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be have with all the violence of an oppressors" To obviate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. The decline of separation of powers requires that the functions of legislations, administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the district or separate bodies of persons.

Principles of Checks and Balances

The Doctrine of Separations of Powers May Be Traced Back to an Earlier Theory Known as The Theory of Mixed Government from Which It Has Been Evolved. That Theory Is of Great Antiquity and Was Adumbrated in The Writings of Polybius, A Great Historian Who Was Captured by The Romans in 167 BC and Kept in Rome as A Political Hostage for 17 Years in His History of Rome Polybius Explained the Reasons for The Exceptional Stability of Roman Government Which Enabled Rome to Establish a Worldwide Empire.

He Advanced the theory that the Powers of Rome Stemmed from Her Mixed Government. Unmixed Systems of Government That Is the Three Primary Forms of Government Namely, Monarchy, Aristocracy and Democracy – Were Considered by Polybius as Inherently Unstable and Liable to Rapid Degeneration. The Roman Constitutions Counteracted That Instability and Tendency to Degeneration by A Happy Mixture of Principles Drawn from All the Three Primary Forms of Government.

The Consuls, The Senate and The Popular Assemblies Exemplified the Monarchical, The Aristocratic and The Democratic Principles Respectively. The Powers of Government Were Distributed Between Them in Such a Way That Each Checked and Was Checked by The Others So That an Equipoise or Equilibrium Was Achieved Which Imparted a Remarkable Stability to The

Constitutional Structure. It Is from The Wok of Polybius That Political Theorist in The 17th Century Evolved That Theory of Separation of Powers and The Closely Related Theory of Checks and Balances.

Separation of Powers- Indian Constitution

Indian constitution is a very well built document. It assigns different roles to all the three wings of government the Legislature, Executive and the Judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping. The judiciary versus the Executive or Legislative is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point. Justice Mukherjee observed, "it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of Government that Indian has at the present day". The theory of checks and balance has been observed in the Indian constitution. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus, the Indian constitution has not applied the doctrine of separation of powers in its strictest form.

Importance of Judiciary

An endeavor is being made to highlights the judicial functioning in India, in the context of increasing cases of judicial corruptions and delays in administration of justice. The Indian judiciary has so far, gained the public confidence in discharging its constitutional functions. As an institution, the judiciary has always commanded considerable respect from the people of country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. The judiciary in a democratic polity governed by the rule of law stands as a bull work against abuse or misuse of excess use of powers on the part of the executive and protects the citizens against the government lawlessness. The Indian judiciary is considered as Guardian of the Rights of the citizens of India, explained, argued and emphasized in several contexts.

Independence of Judiciary

The independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external factor. So the independence of the judiciary can be understood as the independence of the institution of the judiciary and also the independence of the judges which forms a part of the judiciary. The courts have gone well beyond ensuring that laws are implemented. The Supreme Court has invented its own laws and methods of implementation, gained control of bureaucracy and threatened officers with contempt of court if its instructions are not complied with. The question is not whether some good has come out of the all this. The issue is whether the courts have arrogated vase and uncontrolled powers of themselves which undermine both Democracy and Rule of law, including the question is no undermine both Democracy and Rule of Law including the powers exercised under the doctrine of separation of powers.

Administration of justice is a divine function. In fact the rank of a country in the civilization is generally determined according to the degree in which s justice is actually administrated. This sacred functions to be an institutions manned by men of high efficiency, honesty and integrity. Justice delayed is Justice denied. This phrase seems to be tune in so far as the administration of justice in India is concerned. While the people have reasons to feel disappointed with functioning of the legislatures and the executive, they have over the years clung to the belief that they can go to the courts for help. But unfortunately, the judiciary is fast losing its credibility in the eyes of the people for one of the main reasons that justice delivery systems have become costlier and highly time consuming. It is needless to say that the ultimate success of a democratic system is measured in terms of the effectiveness and efficiency of its administration of justice system. Lord Bryce observed, "There is no better test of the excellence of a Government than the efficiency of its judicial system".

d. The Relationship of Administrative Law to Constitutional Law and other Concepts

Constitutional Law and Administrative Law

Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of

constitutional law. Therefore, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended without a basic knowledge of constitutional law. As Justice Gummov aptly observed —The subject of administrative law cannot be understood or taught without attention to its constitutional foundation.

This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative and constitutional law. Therefore, Keitch observed that it is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.

However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power.

Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground shared by constitutional and administrative law.

Administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law. An effective system of administrative law actually implements and gives life to these principles. By providing rules as to the manner of exercising power by the

executive, and simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights. In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms.

Similarly, the interdependence between these two subjects can be analyzed in light of the role of administrative law to implement basic principles of good administration enshrined in the Constitution of Ethiopia. The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration. As explained above, the presence of a developed system of administrative law is sine qua non for the practical realization of these principles.

Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted and flourished.

Judicial review, which is the primary mechanism of ensuring the observance of rule of law, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope. In most of the countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution. The constitution is the supreme document, which confers the mandate on the ordinary courts. Most of the written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts. A basic issue commonly for administrative law and constitutional law is the scopeof judicial review. The ultimate mission of the role of the courts as custodians of liberty', unless counter balanced against the need for power and discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration and endangering the

basic constitutional principle of separation of powers. This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

Administrative and constitutional law shares a common ground, and supplements each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law. It ultimately tries to attain administrative justice. Sometimes, the constitution may clearly provide right to administrative justice. Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

Constitutional law needs to be understood to include more than the jurisprudence surrounding the express and implied provisions of any constitution. In its broader sense, constitutional law connotes the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state. Professor Wade has observed that administrative law is a branch of constitutional law and that the connecting thread is the quest for administrative justice.

f. Classification of Administrative Law

Pure administrative function can be divided into three categories:

- Administrative discretion
- Ministerial action
- Administrative instruction

Administrative Discretion:

In Layman's language, discretion means choosing from amongst the various available alternatives without reference to nay predetermined criterion, no matter how fanciful that choice may be. A person in his will has discretion to dispose his property in any manner, no matter how arbitrary and fanciful that may be. But when the word discretion is qualified by the word 'administrative' has somewhat different overtones. 'Discretion' in this sense means choosing

from amongst the various available alternatives but with reference to the rules or reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular.

The problem of administrative discretion is complex. It is true that in any intensive form of government cannot function without the exercise of some discretion by the officials. It is necessary not only for individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventuality in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Hence, there has been a constant conflict between the claims of administration to an absolute discretion and the claims of subjects to a reasonable exercise of it.

Ministerial Action:

Ministerial function is that function of agency which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definite duty in respect of which there is no choice, no wish and no freedom. In this, the high authority dictates and lower authority carries out. Collection of revenue may be one such ministerial action. In addition, if the statute requires that the agency shall open a bank account in a particular bank or shall prepare the annual report to be placed on the table of the minister, such action of opening the bank account and the preparation of the annual report shall be classified as ministerial.

When an administrative agency is acting ministerial it has no power to consult its own wishes but when it is acting administratively its standards are subjective and it follows its own wishes.

Administrative Instruction:

Administrative instruction means power to issue instruction flow from the general executive power of the administration. In any intensive form of government the desirability and efficacy of administrative instruction issued by the superior administrative authorities to their subordinates cannot be over emphasized. 'Administrative instruction' is a most efficacious technique for achieving some kind of uniformity in administrative discretion and to manipulate in an area which is new and dynamic. These instructions also give a desired

flexibility to the administration devoid of technicalities of the rule-making process.

Administrative instruction may be specific or general and directory or mandatory. Its type depends largely on the provisions of the statute which authorizes the administrative agencies to issue instructions. The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory and hence are unenforceable not having the force of law.

If administrative instructions have no force of law but if these are consistently followed for a long time government cannot depart from it at its own sweet will without rational justification.

UNIT-II

Legislative Functions of Administration

a. Meaning and concept of delegated legislation

Delegated legislation (also referred to as secondary legislation or subordinate legislation or subsidiary legislation) is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority. Often, a legislature passes statutes that set out broad outlines and principles, and delegates authority to an executive branch official to issue delegated legislation that flesh out the details (substantive regulations) and provide procedures for implementing the substantive provisions of the statute and substantive regulations (procedural regulations). Delegated legislation can also be changed faster than primary legislation so legislatures can delegate issues that may need to be fine-tuned through experience.

Legislation by the executive branch or a statutory authority or local or other body under the authority of the competent legislature is called Delegated legislation. It permits the bodies beneath parliament to pass their own legislation. It is legislation made by a person or body other than Parliament.