RULE OF LAW

I) Rule of Law- The term "The Rule of Law" is derived from the Latin phrase "La legalite", which refers to a government based on principles of law and not of man. In this sense the concept of 'la legalite' was opposed to arbitrary powers. Edward Coke originated this concept when he said that the king must be under the God and Law and thus vindicated the supremacy of law over the pretensions of the executive.

The Expression "Rule of Law" plays an important role in the administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression 'rule of law' has been derived from the French phrase 'la Principle de legality'. i.e. a government based on the principles of law. In simple words, the term 'rule of law, indicates the state of affairs in a country where, in main, the law rules. 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 applied by the State in the administration of justice.

Rule of Law is a dynamic concept.

It does not admit of being readily expressed. Hence, it is difficult to define it. Simply speaking, it means supremacy of law or predominance of law and essentially, it consists of values. The concept of the rule of Law is of old origin. Edward Coke is said to be the originator of this concept, when he said that the King must be under God and Law and thus vindicated the supremacy of law over the pretensions of the executives. Prof. A.V. Dicey later developed on this concept in the course of his lectures at the Oxford University. Dicey was an individualist; he wrote about the concept of the Rule of law at the end of the golden Victorian era of laissez-faire in England. That was the reason why Dicey's concept of the Rule of law contemplated the absence of wide powers in the hands of government officials. According to him, wherever there is discretion there is room for arbitrariness. Further he attributed three meanings to Rule of Law.

(1) 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. **(The view of Dicey, quoted by Garner in his Book on 'Administrative Law'.)**

(2) The Second Meaning of the Rule of Law is that no man is above law. Every man whatever be his rank or condition. is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

(3) The Third meaning of the rule of law is that the general principle of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court.

The view of Dicey as to the meaning of the Rule of Law has been subject of much criticism. The whole criticism may be summed up as follows.

Dicey has opposed the system of providing the discretionary power to the administration. In his opinion providing the discretionary power means creating the room for arbitrariness, which may create as serious threat to individual freedom. Now a days it has been clear that providing the discretion to the administration is inevitable. The opinion of the Dicey, thus, appears to be outdated as it restricts the Government action and fails to take note of the changed conception of the Government of the State.

Dicey has failed to distinguish discretionary powers from the arbitrary powers. Arbitrary power may be taken as against the concept of Rule of Law . In modern times in all the countries including England,

America and India, the discretionary powers are conferred on the Government. The present trend is that discretionary power is given to the Government or administrative authorities, but the statute which provides it to the Government or the administrative officers lays down some guidelines or principles according to which the discretionary power is to be exercised. The administrative law is much concerned with the control of the discretionary power of the administration. It is engaged in finding out the new ways and means of the control of the administrative discretion.

According to Dicey the rule of law requires that every person should be subject to the ordinary courts of the country. Dicey has claimed that there is no separate law and separate court for the trial of the Government servants in England. He critcised the system of droit administratif prevailing in France. In France there are two types of courts Administrative Court and Ordinary Civil Courts. The disputes between the citizens and the Administration are decided by the Administrative courts while the other cases, (i.e. the disputes between the citizens) are decided by the Civil Court. Dicey was very critical to the separation for deciding the disputes between the administration and the citizens. According to Dicey the Rule of Law requires equal subjection of all persons to the ordinary law of the country and absence of special privileges for person including the administrative authority. This proportion of Dicey does not appear to be correct even in England. Several persons enjoy some privileges and immunities. For example, Judges enjoy immunities from suit in respect of their acts done in discharge of their official function. Besides, Public Authorities Protection Act, 1893, has provided special protection to the official. Foreign diplomats enjoy immunity before the Court. Further, the rules of 'public interest privilege may afford officials some protection against orders for discovery of documents in litigation.' Thus, the meaning of rule of law taken by Dicey cannot be taken to be completely satisfactory. Third meaning given to the rule of law by Dicey that the constitution is the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts is based on the peculiar character of the Constitution of Great Britain. In spite of the above shortcomings in the definition of rule of law by Dicey, he must be praised for drawing the attention of the scholars and authorities towards the need of controlling the discretionary powers of the administration. He developed a philosophy to control the Government and Officers and to keep them within their powers. The rule of law established by him requires that every action of the administration must be backed by law or must have been done in accordance with law. The role of Dicey in the development and establishment of the concept of fair justice cannot be denied.

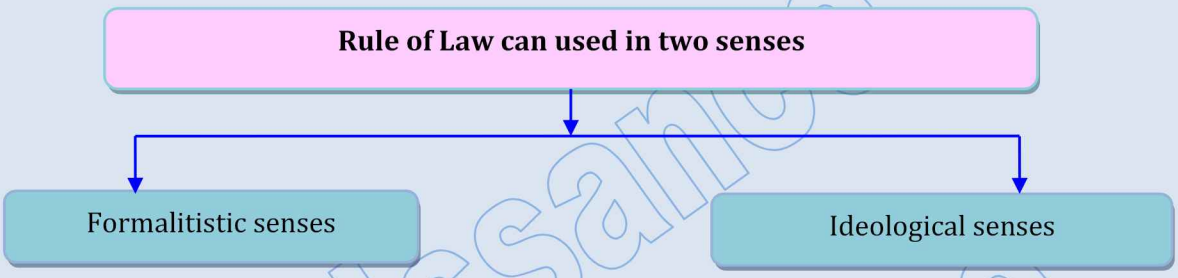
The concept of rule of law, in modern age, does not oppose the practice of conferring discretionary powers upon the government but on the other hand emphasizing on spelling out the manner of their exercise. It also ensures that every man is bound by the ordinary laws of the land whether he be private citizens or a public officer; that private rights are safeguarded by the ordinary laws of the land. Thus the rule of law signifies that nobody is deprived of his rights and liberties by an administrative action; that the administrative authorities perform their functions according to law and not arbitrarily; that the law of the land are not unconstitutional and oppressive; that the supremacy of courts is upheld and judicial control of administrative action is fully secured.

II) Basic Principles of the Rule of Law

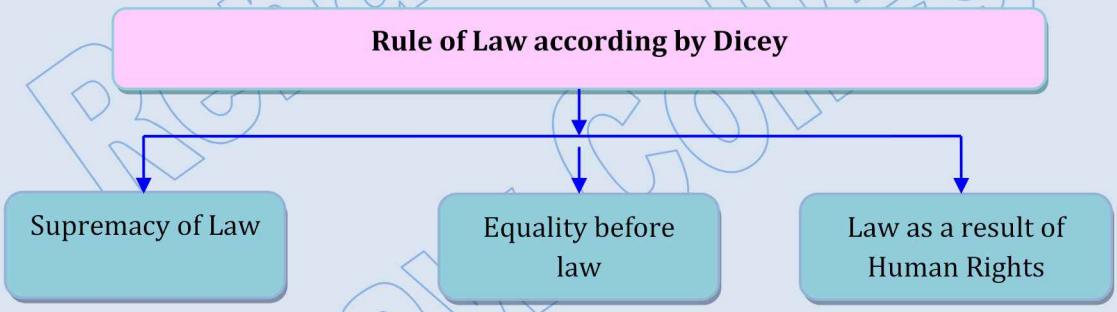
•= Law is Supreme, above everything and every one. No body is the above law.
•= All things should be done according to law and not according to whim
•= No person should be made to suffer except for a distinct breach of law.
•= Absence of arbitrary power being hot and sole of rule of law
•= Equality before law and equal protection of law
•= Discretionary should be exercised within reasonable limits set by law
•= Adequate safeguard against executive abuse of powers
•= Independent and impartial Judiciary
•= Fair and Justice procedure
•= Speedy Trial

III) Rule of Law and Indian Constitution

In India the Constitution is supreme. The preamble of our Constitution clearly sets out the principle of rule of law. It is sometimes said that planning and welfare schemes essentially strike at rule of law because they affect the individual freedoms and liberty in may ways. But rule of law plays an effective role by emphasizing upon fair play and
greater accountability of the administration. It lays greater emphasis upon the principles of natural justice and the rule of speaking order in administrative process in order to eliminate administrative arbitrariness.



When the term Rule of Law is used in formalistic sense, it denotes to an organized power as opposed to a rule by one man. When it is used in ideological sense, it denotes to the regulation of the citizens and the government.



IV) Criticism of Dicey's View-

Dicey's views on Rule of Law have been criticized by the modern writers. It is observed that Dicey misconceived the administrative law in France. He ignored the realities in England and misinterpreted the situation in France. He was also not right when he saw that there is no administrative law in England because even during his time Crown and its servants enjoyed special privileges on the parts of the doctrine that "King can do not wrong."

Later on Dicey recognized his mistake by observing that there exists in England a vast body of administrative law.

V) Rule of Law in India-

(1) **In Kesavanand Bharati Vs State of Kerala**, the view was that the Rule of Law is a basic intent of the 'Constitution apart from democracy.

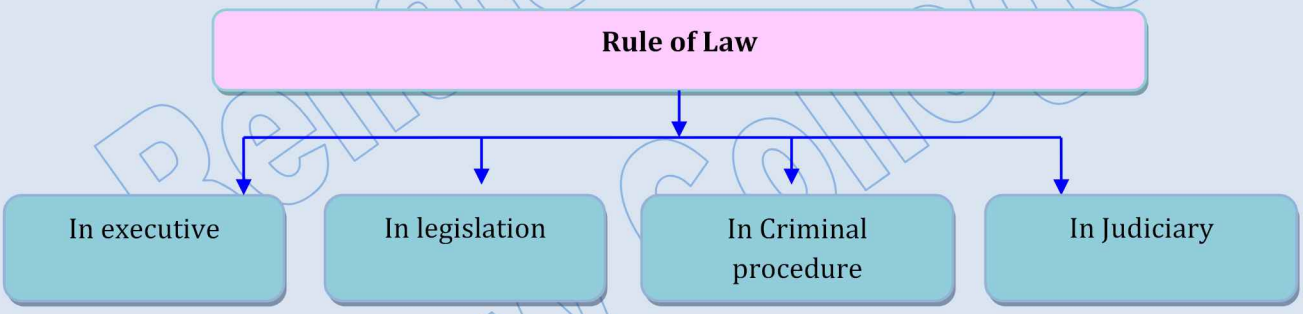
(2) **In Indra Gandhi Vs RAJ Narain. Mathew. J. observed:** 'The rule of law postulates the pervasiveness of the spirit of law that throughout the whole range of government is the sense of

excluding arbitrary official action in the sphere..... The provisions of the Constitution were enacted with a view to ensure the rule of law.

VI) Modern concept of Rule of Law is formulated by International Commission of Jurists-

The concept of Rule of Law formulated by International Commission of Jurists may be regarded as modern concept because it is in consonance with the need of Rule of Law in a modern welfare society. This concept is also known as Delhi Declaration 1959. It was later on confirmed as Lagos in 1961. The commission divided itself into certain working committees.

VII) Conclusion- The above discussion clearly shows that the recent judgments of the Highest Court of India as well as High Courts exhibit a new approach to the concept o rule of law by emphasizing the fair play and justice in every walk of administrative action and access to judicial remedies for all including socially and economically weaker sections of the society.



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DOCTRINE OF SEPARATION OF POWERS

The doctrine of Separation of Powers is of ancient origin. The history of the origin of the doctrine is traceable to Aristotle. In the 16th and 17th Centuries, French philosopher John Boding and British Politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois' (The spirit of the laws).

Montesquieu's view Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ. This theory has had different application in France, USA and England. In France, it resulted in the rejection of the power of the courts to review acts of the legislature or the executive. The existence of separate administrative courts to adjudicate disputes between the citizen and the administration owes its origin to the theory of separating of powers. The principle was categorically adopted in the making of the Constitution of the United States of America. There, the executive power is vested in the president. Article the legislative power in congress and the judicial power in the Supreme Court and the courts subordinates thereto. The President is not a member of the Congress. He appoints his secretaries on the basis not of their party loyalty but loyalty to himself. His tenure does not depend upon the confidence of the Congress in him. He cannot be removed except by impeachment, However, the United
States constitution makes departure from the theory of strict separation of powers in this that there is provision for judicial review and the supremacy of the ordinary courts over the administrative courts or tribunals.

In the **British Constitution** the Parliament is the Supreme legislative authority. At the same time, it has full control over the Executive. The harmony between the Legislator and the (Executive) is secured through the Cabinet. The Cabinet is collectively responsible to the Parliament. The Prime Minister is the head of the party in majority and is the Chief Executive authority. He forms the Cabinet. The Legislature and the Executive are not quite separate and independent in England, so far as the Judiciary is
concerned its independence has been secured by the Act for Settlement of 1701 which provides that the judges hold their office during good behaviour, and are liable to be removed on a presentation of addresses by both the Houses of Parliament. They enjoy complete immunity in regard to judicial acts.

I) Doctrine of Separation of Powers- The doctrine of separation of power can be traced to Aristotle. But it was formulated for the first time by the French jurist, Montesquieu,
In India, we have three organs to function properly as below -
i) Executive = to implement the law
ii) Judiciary = to interpret the law
iii) Legislature = to make the law

> Separation of power means all this three organs should not interfere in the working of each other.

According to Wade and Phillips the theory of separation of powers signifies the following three different things;

Doctrine of Separation of Powers

- That the same person should not form part of more than one of the three organs of the government;
- That one organ of the government should not interfere with any other organ of the government;
- That one organ of the government should not exercise the functions assigned to any other organ.

II) Doctrine of Separation in India- In India, the doctrine of separation cannot claim any historical background. The doctrine of separation of powers has also not been accorded a constitutional status. In the constituent Assembly, Prof. K. T. Shah, who was a member of the Constituent Assembly made a proposal to incorporate the doctrine of separation of powers into the constitution, but the Assembly did not accept it.

Though, the doctrine of powers, in its absolute, rigidity, is not inferable from the provisions of the constitution, Article 50 of the constitution provides that the state should take steps to separate judiciary from the executive in all the states of the Union. But even then it cannot be said that Art 50 have incorporated the whole doctrine. Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidly but the functions of the differentiated parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our constitution does not contemplate assumption by one organ or part of the state of functions that essentially belongs to another.

III) Modern View- But now the trend of the Supreme Court regarding the doctrine of separation of powers has been change. In the historic case Kesvanand Bharati Vs. State of Kerala, 1973 the Court changed its view and held that both the supremacy of the constitution and separation of powers are parts of the basis structure of the Indian Constitution.

IV) Principles of Separation of Power –

Principles of Separation of Power

- Executive, legislature, judiciary should be independent of each other
- No one organ should perform function that belongs to other

In India, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers. Article 53 and 74 (1) He can be impeached by Parliament. Article 56 (1) (b) read with Art 61, Constitution. The Council of Ministers is collectively responsible to the Lok Sabha Article 75 (3) and each minister works during the pleasure of the President. Article 75 (2) If the Council of Ministers lose the confidence of the House, it has to resign.

Functionally, the President's or the Governor's assent is required for all legislations. (Articles 111,200 and Art 368). The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. (Articles 123 and 212). This is legislative power, and an ordinance has the same status as that of a law of the legislature. (**AK Roy v Union of India AIR 1982 SC 710)** The President or the Governor has the power to grant pardon (Articles 72 and 161) The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege (Articles 105 (3) 194 (3) Thus, the executive is dependent on the Legislature and while it performs some legislative functions such as subordinate it, also performs some executive functions such as those required for maintaining order in the house. There is, however, considerable institutional separation between the judiciary and the other organs of the government. (**See Art 50)**

The Judges of the Supreme Court are appointed by the President in consultation with the Chief justice of India and such of the judges of the supreme Court and the High Courts as he may deem necessary for the purpose. **(Article 124 (2))**

The Judges of the High Court are appointed by the President after consultation with the Chief Justice of India, the Governor of the state, and, in the case of appointment of a judge other than the Chief justice, the Chief Justice of the High Court(Article 217 (1).) It has now been held that in making such appointments, the opinion of the Chief justice of India shall have primacy. (Supreme Court Advocates on Record Association.) The judges of the high Court and the judges of the Supreme Court cannot be removed except for misconduct or incapacity and unless an address supported by two thirds of the members and absolute majority of the total membership of the House is passed in each House of Parliament and presented to the President Article 124 (3) An impeachment motion was brought against a judge of the Supreme court, Justice Ramaswami, but it failed to receive the support of the prescribed number of members of Parliament. The salaries payable to the judges are provided in the Constitution or can be laid down by a law made by Parliament. Article 125 (1) and Art 221 (1). Every judge shall be entitled to such privileges and allowances and to such

rights in respect of absence and pension, as may from time to time be determined by or under any law made by Parliament and until so determined, to such privileges, allowance and rights as are specified in the Second Schedule. Neither the privileges nor the allowance nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. Appointments of persons to be, and the posting and promotion of, district judges in any state shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such state (Article 233) . The control over the subordinate courts is vested in the acts of the Legislature as well as the executive. The Supreme Court has power to make rules (Article 145) and exercises administrative control over its staff. The judiciary has power to enforce and interpret laws and if they are found in violation of any provision of the Constitution, it can declare them unconstitutional and therefore, void. It can declare the executive action void if it is found against any provisions of the Constitution. Article 50 provides that the State shall take steps to separate the judiciary from the executive. Thus, the three organs of the Government (i.e. the Executive, the Legislature and the Judiciary) are not separate. Actually the complete demarcation of the functions of these organs of the Government is not possible.

V) Case Laws –

For reference –

i) Delhi Laws Act, 1951
ii) Rama Javaya Vs. State of Punjab, 1955
iii) Ramkrishna Dalmiya Vs. Justice Tendulkar, 1959
iv) Indira Gandhi Vs. Rajnarayan Singh, 1973

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DROIT ADIMINISTRATIF

I) Droit Adiministratif- Droit Administrative can be defined as a body of rules which determines the organization and the duties of public administration and which regulate the relations of administration with the citizens of the State.

Droit Administratif

Meaning of Droit administratif French administrative law is known as *Droit Administratif* which means a body of rules which determine the organization, powers and duties of public administration and regulate the relation of the administration with the citizen of the country. *Droit Administrative* does not represent the rules and principles enacted by Parliament. It contains the rules developed by administrative courts.

Napoleon Bonaparte was the founder of the *Droit administrative*. It was he who established the Conseil d'Etat. He passed an ordinance depriving the law courts of their jurisdiction on administrative matters and another ordinance that such matters could be determined only by the Conseil d'Etat.

Waline, the French jurist, propounds three basic principles of *Droit administrative:*

1. the power of administration to act *suo motu* and impose directly on the subject the duty to obey its decision;

2. the power of the administration to take decisions and to execute them *suo motu* may be exercised only within the ambit of law which protects individual liberties against administrative arbitrariness;

3. the existence of a specialized administrative jurisdiction.

One good result of this is that an independent body reviews every administrative action The ***Conseil d'Etat*** is composed of eminent civil servants, deals with a variety of matters like claim of damages for wrongful acts of Government servants, income-tax, pensions, disputed elections, personal claims of civil servants against the State for wrongful dismissal or suspension and so on. It has interfered with administrative orders on the ground of error of law, lack of jurisdiction, irregularity of procedure and *detournement depouvior* (misapplication of power). It has exercised its jurisdiction liberally.

II) Main characteristic features of droit administratif. The following characteristic features are of the *Droit Administratif* in France:-

1. Those matters concerning the State and administrative litigation falls within the jurisdiction of administrative courts and cannot be decided by the land of the ordinary courts.

2. Those deciding matters concerning the State and administrative litigation, rules as developed by the administrative courts are applied.

3. If there is any conflict of jurisdiction between ordinary courts and administrative court, it is decided by the tribunal des conflicts.

4. *Conseil d'Etat* is the highest administrative court.

Prof. Brown and *Prof. J.P. Garner* have attributed to a combination of following factors as responsible for its success

i) The composition and functions of the Conseil d'Etat itself;

ii) The flexibility of its case-law;

iii) The simplicity of the remedies available before the administrative courts;

iv) The special procedure evolved by those courts; and

v) The character of the substantive law, which they apply.

Despite the obvious merits of the French administrative law system, *Prof. Dicey* was of the opinion that there was no rule of law in France nor was the system so satisfactory as it was in England. He believed that the review of administrative action is better administered in England than in France.

III) **THE SYSTEM OF *DROIT ADMINISTRATIF*** according to Dicey, is based on the following two ordinary principles which are alien to English law—

Firstly, that the government and every servant of the government possess, as representative of the nation, a whole body of special rights, privileges or prerogatives as against private citizens, and the extent of rights, privileges or considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French law; stand on the same footing as that on which he stands in dealing with his neighbor.

Secondly, that the government and its officials should be independent of and free from the jurisdiction of ordinary courts.

It was on the basis of these two principles that *Dicey* observed that *Droit Administratif* is opposed to rule of law and, therefore, administrative law is alien to English system. But this conclusion of *Dicey* was misconceived. *Droit Administratif*, that is, administrative law was as much there in England as it was in France but with a difference that the French *Droit Administratif* was based on a system, which was unknown to English law. In his later days after examining the things closely, *Dicey* seems to have perceptibly modified his stand. Despite its overall superiority, the French administrative law cannot be characterized with perfection. Its glories have been marked by the persistent slowness in the judicial reviews at the administrative courts and by the difficulties of ensuring the execution of its last judgment. Moreover, judicial control is the only one method of controlling administrative action in French

Administrative law, whereas, in England, a vigilant public opinion, a watchful Parliament, a self-disciplined civil service and the jurisdiction of administrative process serve as the additional modes of control over administrative action. By contrast, it has to be conceded that the French system still excels its counterpart in the common law countries of the world.

IV) CLASSIFICATION OF ADMINISTRATIVE ACTION

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process is a by-product of intensive form of government and cuts across the traditional classification of governmental powers and combines into one all the powers, which were traditionally exercised by three different organs of the State. Therefore, there is general agreement among the writers on administrative law that any attempt of classifying administrative functions or any conceptual basis is not only impossible but also futile. Even then a student of administrative law is compelled to delve into field of classification because the present-day law especially relating to judicial review freely employs conceptual classification of administrative action. Thus, speaking generally, an administrative action can be classified into four categories:

i) Rule-making action or quasi-legislative action.
ii) Rule-decision action or quasi-judicial action.
iii) Rule-application action or administrative action.
iv) Ministerial action

i) Rule-making action or quasi-legislative action – Legislature is the law-making organ of any state. In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to III and 196 to 201 is that the law making power can be exercised for the Union by Parliament and for the States by the respective State legislatures. It is the intention of the Constitution-makers that those

bodies alone must exercise this law-making power in which this power is vested. But in the twentieth Century today these legislative bodies cannot give that quality and quantity of laws, which are required for the efficient functioning of a modern intensive form of government. Therefore, the delegation of law-making power to the administration is a compulsive necessity. When any administrative authority exercises the law-making power delegated to it by the legislature, it is known as the rule-making power delegated to it by the legislature, it is known as the rule-making action of the