

ULTRA VIRES AS FORM OF REGULATING GOVERNMENT ACTIONS

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Abstract:

*This paper aims to analyze how the doctrine of ultra vires becomes one of the most crucial forms in regulating the government action. When any administrative act or rule goes beyond the boundaries of power delegated by the statute it is considered to be ultra vires and is deprived of any legal effect. Power conferred on legislature and executives are very wide and are therefore subjected to be reviewed by judiciary. "The juristic basis of judicial review is the doctrine of ultra vires."*¹

Doctrine of Ultra Vires:

It is a well recognized fact that any administrative act which is unlawful is no act in law. The position is best summed up in the landmark judgment delivered by Lord Reid in Ridge V. Baldwin:

"Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in Wood v Woad (1874) LR 9 Ex I 90".²

And this proposition is the basis of administrative law. If an administrative authority acts beyond the powers delegated by legislature it will be unlawful and void. Through this proposition administrative law fulfills its fundamental principle of regulating government actions by keeping

¹ H.W.R. Wade, Administrative Law , [5thed.] Oxford: Clarendon, 1982 at p.315

² Wood v Woad (1874) LR 9 Ex I 90

it within the legal boundaries and at same time protecting its citizens from unfettered use of government's discretionary power. Therefore, the very basic tool left in the hands of courts is to confine the use of discretionary powers conferred by government through the Doctrine of Ultra Vires.

Talking about the use of discretion, it was well said by Justice DOUGLAS of the U.S Supreme Court that, "Law has reached the finest moments when it has freed man from the unlimited discretion of some ruler, some... official, some bureaucrat... Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions".³ Hence, it is a well established principal of law that even though at the very face of it a discretionary power may create the impression of being uncontrollable, like for instance, statute delegating power in subjective terms or giving finality to its discretionary decisions, but in reality the fact is that this discretionary power will be contingent to some limitations. These limitations are exercised through the doctrine of ultra vires to keep a check on the abuse of bureaucratic power. The basic principle is that "a body has no power except what the statute(or the constitution) has conferred on it, discretionary power flows from statutes, and thus are finite, and hence the doctrine of ultra vires".⁴

Ultra vires is derived from the Latin phrase *Ultra* means beyond and *vires* means power ,which ultimately means "beyond the powers". It means whenever administrative authorities are accused of acting beyond their delegated powers courts through doctrine of ultra vires exercises their judicial review. "The very basic function of court is to ensure that discretion is exercised by the authority concerned according to law. It is regarded as the first principle of jurisprudence based on Rule of Law that the administration should not exceed its power."⁵

Origin of the Doctrine of Ultra Vires:

³ H.W.R. Wade, Administrative Law , [5thed.] Oxford: Clarendon, 1982 at p.35

⁴ H.W.R. Wade, Administrative Law , [5thed.] Oxford: Clarendon, 1982 at p.37

⁵ H.W.R. Wade, Administrative Law , [5thed.] Oxford: Clarendon, 1982 at p.38

Origination of this doctrine can be traced back to 1855, when it was introduced to keep checks and balances on the powers of the originating companies. So, the doctrine came into existence through Company law, to limit the powers of companies and protect the interest of the company's shareholder. Before, the origination of ultra vires, to prohibit any power beyond the extent prescribed by the statute the proposition of *mala prohibita* was used. Soon it became necessary to define rules of law in order to limit the upcoming companies from the excessive use of their powers. It was the landmark case of Ashbury Railway Carriage and Iron Company (Limited) v Hector Riche which recognized the principle effectively. And the principle established in Ashbury Railways was later affirmed in the case of Attorney General v. Great Eastern Railway Co.⁴ where it was held that, "ought to be reasonable, and not unreasonable, understood and applied and whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not to be held, by judicial construction, to be ultra vires."⁶

The abovementioned principle "was later borrowed in to Administrative law as the courts found it difficult to question the power of the legislature due to the application of principles such as separation of powers and parliamentary sovereignty."⁷

Basic Features of Ultra Vires :

As we all know administrative law draws its control and power from the legislature. It is the legislation itself which empowers administrative authorities to exercise their power. The question which arises is not whether the powers delegated by legislation on the administrative authorities is desirable or not, but what matters is the factors responsible in controlling and protecting the Administration from exploiting or misusing its power. "Delegated legislation is bureaucratic legislation. It involves transfer of legislative power from the Legislature to the Executive. The democratic safeguards which apply to a legislature are absent in the case of delegated legislation".⁸

⁶ <http://www.caclubindia.com/forum/notes-doctrine-of-ultra-vires-effects-and-exceptions-129912.asp>

⁷ S.A. de Smith, *Judicial Review of Administrative Action*, [4th ed.] London: Stevens, 1980.

⁸ MP JAIN & SN JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW* (6th ed. Lexis Nexis 2010) Pg. 106

Therefore, there is utter need of some control or safeguards to curb any abuse of power within this field.

Judicial review is one way by which judiciary keeps an eye on both legislative and administrative powers. Thus, the classic model of ultra vires lays on the belief that judicial review is justifiable on the grounds that, courts in their very true nature of justice are only applying the intent of legislature. This proposition can be best summed up by Wade and Forsyth observation with regards to United Kingdoms' constitution:

“Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires”⁹.

It needs to be kept in mind that ultra vires itself should be carefully exercised. The issue arises when the ultra vires is faced with the responsibility of answering the question that -whether the act which is challenged on the grounds of ultra vires is in accordance with the parent statute or is it violating it by going beyond it. Thus, the court should not look into the effectiveness or wisdom of the rules.

Instead, “it is for the rule-maker to decide, as a matter of policy, how to implement the provision of the statute and what measures to take to efficaciously achieve the objects and purposes of the Act. It is not for the courts to decide to examine the merits or demerits of such policy. In short, ultra vires is concerned with legality and not with the policy underlying the impugned rules”.¹⁰ An act can be challenged in the following ways:

- (a) If the enabling act is in ultra vires with any of the provisions of constitution in either implied or express form constitution then the act subordinated to it will also be considered to be unconstitutional and therefore void,
- (b) If administrative or delegated legislation is ultra vires with the constitution- this situation arises when the

⁹ H.W.R. Wade & C.F. Forsyth, *Administrative Law*, [10th ed.] Oxford: Oxford University Press, 2009 at p.31

¹⁰ MP JAIN & SN JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW* (6th ed. Lexis Nexis 2010) pg 111

subordinated or delegated legislation is in ultra vires with the provisions of the constitution and the parent act is not. Here, only the delegated act will be considered to be ultra vires and the parent or enabling act will be perfectly valid.

- (c) Substantive ultra vires -if the subordinate legislation to the parent act is in ultra vires with it. This situation arises when the subordinate legislation exercises its power beyond the limits prescribed by the parent act and act in contravention with it. Then that subordinate legislation becomes void and is liable to be struck down because it was in ultra vires with the parent act. The basic rule is that subordinate authority cannot enact rules which are not conferred by the parent act. This rule is adopted in many of cases like for instance in *State of Karnataka v. H. Gnaesh Kamath*, it was held that: “Delegation of rule-making power by an act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling act or which is inconsistent therewith or repugnant thereto.”¹¹ In another case of *Indian Oil Corporation V. Municipal Corporation, Jlandhar* the judgment clearly laid emphasis on the principle of substantive ultra vires. Supreme Court in the following court ruled that:” a delegate authority cannot have more legislative powers than the delegator itself”.¹²

Thus, the rule must comply with the following two conditions in order to protect itself from being invalid

- It must not violate any provision of the statute under which it is drafted
- It must exercise its power within the limits of the parent act which has framed it.

Violation of either of the two conditions will only lead to ultra vires of the act resulting only in the invalidity of the rule.

- (d) Procedural ultra vires - while enacting or framing of any rule the authorities or rulemaking bodies are required to adhere to certain procedural guidelines like laying of those rules or publications of them. Rules are rendered to be invalid on non-compliance with these procedural laws if they are binding and mandatory. In *Raza Buland Sagar* it was held that: “the question whether a particular provision of a statute is mandatory or directory depends upon the facts of each case and for that purpose the object of statute in making the provision is the determining factor.”¹³

¹¹AIR 1983 SC 550 para 7 : (1983) 2 SCC 402

¹² *Indian Oil Corporation V. Municipal Corporation, Jlandhar* (1993) 1 SCC 333 para 9 , p.338 :AIR 1993 SC 844

¹³ *Raza Buland Sugar Co. Ltd vs Municipal Board, Rampur* 1965 AIR 895, 1965 SCR (1) 970

Hence, the legality of the administrative action can be objected by objecting the validity or legality of the relevant rule. The whole of the act or even the specific subordinate parts of it can be challenged under ultra vires doctrine.

A rule is considered to be valid until and unless its invalidity is declared ultra vires by the courts. If there are two parts of the act one valid and the other invalid and they can be clearly distinguished from each other, then, the invalid part of the rule can be nullified and declared as ultra vires leaving the remaining part as operative. But the problem arises when both the parts are complicatedly interlinked and there is no way to separate them from each other then the whole rule should be struck down. It was held in *M.J. Sivani v. State of Karnataka* that “though the delegated authority under the act made a general order, it may well be that a part thereof is not applicable or is bad in relation to a particular trade or business but the delegated legislation cannot be condemned as a whole unless the invalid part is inextricably inter-connected with the valid parts”.¹⁴ And if the act places unreasonable restrictions as mentioned in the case of *Dwarka Prasad V Stat of U.P.* where it was held that : “the impugned rule laid down (under U.P. Coal Control Order) that the state coal controller can exempt any person from the license requirements is ultra vires to Article 19(1)(g) as it places unreasonable restrictions by giving arbitrary powers to the executive in granting exemptions”.¹⁵ Then also it is subjected be declared ultra vires.

So before giving the final judgment on such delicate measures court should only be concerned with the legality of the act and best measure which can be taken to achieve the main purpose of that act.

Difficulty while exercising the Doctrine of Ultra Vires:

Most of the times, it becomes next to impossible while practicing the doctrine of ultra vires. Power conferred by the delegated legislation on the executive is usually broad and this is the reason why there is lesser number of cases found in which the courts may end up holding delegated legislation as ultra vires. So in its basic terms if there is broader the delegation of power there is lesser the chance of court while controlling its exercise. Like sometimes the “the powers are usually delegated in broad language, courts interpret the provision rather broadly or the courts adopt a deferential, rather than a critical, attitude towards delegated legislation and thus lean towards upholding the same”.¹⁶

¹⁴ *M.J. Sivani v. State of Karnataka* ,(1995) 6 SCC 289 : AIR 1995 SC 1770 para 28, p. 1776

¹⁵ (AIR 1954 SC 224)

¹⁶ MP JAIN & SN JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW* (6th ed. Lexis Nexis 2010) pg 111

Criticism:

“Power tends to corrupt, and absolute power corrupts absolutely” – Lord Acton. This phrase best summarises the fact that absolute power can corrupt to both legislature as well as judiciary. Legislatures presumed intention of having absolute power is discarded by the ultra vires power given to courts. But now the question arises whether the power of ultra vires given to courts is exercised in a right way or not. Gradually the courts have started widening the doctrine of ultra vires to even those fields which cannot be in reality governed by the doctrine. “The technique by which the courts have extended the judicial control of powers is that of stretching the doctrine of ultra vires. They can make the doctrine means almost anything they wish. They can readily find implied limitations in Acts of Parliament, as they do when they hold that the exercise of a statutory power to revoke a license is void unless done in accordance with the principles of natural justice. For this purpose they have only one weapon, the doctrine of ultra vires”¹⁷. And they use this weapon without any fear because of the very fact there is no written constitution to keep a vigilance of their actions. Criticism of the doctrine of ultra vires is largely based on this proposition only that judges apply their own discretion by designating it as the intent of parliament. And there are no written guidelines to control or check these discretionary powers of judges. Thus, making them act beyond the principles of good administration. It is well observed by Wade and Forsyth that: “Eminent judges, writing extra-judicially, have described the doctrine as a ‘fairy tale’ and a ‘fig-leaf’ serving to provide a façade of constitutional decency, with lip-service to the sovereign Parliament, while being out of touch with reality. The reality, it is argued, is that the judges are fulfilling the duties of their constitutional position, acting in their own right independently of Parliament, adjusting the balance of forces in the constitution and asserting their little to promote fairness and justice in government under the rule of law .”¹⁸

The argument put forth by many critics of ultra vires is that courts are acting unrealistic and impractical while assigning the intention of the legislature where in reality legislature has made provision with no such intention as interpreted by the courts. Courts are exercising their

¹⁷ H.W.R. Wade, Administrative Law, [5thed.] Oxford: Clarendon, 1982 at p.38.

¹⁸ H.W.R. Wade & C.F. Forsyth, Administrative Law , [10th ed.] Oxford: Oxford University Press, 2009 at p.33

uncontrolled amount of discretionary power and in reality it is the judiciary which is acting beyond its limit not legislation or executive.

Conclusion:

The very basic feature of judicial review is its accountability and transparency towards public. Public power is the most delicate one, if exploited can disturb the whole mechanism of the country. Hence, it should be exercised carefully according to the procedures and norms laid down in the constitution. Any abuse of power will be subjected to judiciary but it is also equally important that judiciary is also using its discretion wisely. Ultra vires is like the heaviest weapon given in the hands of judges. Therefore, judges must act cautiously and should act within the limits prescribed by constitution while exercising this valuable power. Judges derive their flexibility and freedom through ultra vires doctrine. In fact it is well established in our Indian court now that ultra vires is the next widely used provision giving judges and advocating the freedom and flexibility to give support and protect our traditional common law model of judicial review. But at the same time this discretionary power given in the hands of judges should not be used in an unfettered way. Lastly, I would like to conclude with the phrase “A citizen is entitled to live under the rule of law and not under the rule of discretion”¹⁹ which precisely summarizes the whole mechanism of citizen’s right and the exercise of discretionary powers

¹⁹ H.W.R. Wade, Administrative Law , [5th ed.] Oxford: Clarendon, 1982 at p.315