

# DOCTRINE OF ULTRA VIRES

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The use of word *ultra vires* has now become frequent in Courts of law, particularly in Higher Courts. The Latin word, *Ultra Vires*, adopted in English Language means “beyond one’s legal power or authority”<sup>1</sup> or “not within the scope of powers”<sup>2</sup>. This doctrine as in England was the basis of judicial reviews and gradually the courts of law shedding its narrower scope, have extended it to other fields including that of administrative actions. From England this doctrine travelled to other countries and also to India, where the Britishers enforced laws made by them mostly on the pattern of laws in England. The laws so made the basis of what are laws in England and still continue to apply in this country, except where the same have been varied, modified or over shadowed by the Constitution of India, or by any other enactment, amendments and interpretation.

About hundred years ago when the scope of this was not so pervasive as it is today, S.R.Das in ‘Law of *ultra vires* in British India’. (Tagore Law Lectures) stated as under:

“In speaking of an ordinary citizen we do not speak of any action being *ultra vires*. To an ordinary citizen whatever is not expressly forbidden by the law, is permitted by the law. It is only when the law has called into existence a person for a particular purpose or has recognized the existence of a person for a particular purpose. Such as holder of an office, a body corporate etc. that the power is limited to the authority delegated expressly or by implication and to the object for which it was created. In the case of such a creation, the ordinary law applicable to an individual is some what reversed. Whatever is not permitted expressly or by implication by the instrument is

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<sup>1</sup>The concise Oxford Dictionary of Current English (Oxford University Press)

<sup>2</sup>Stroud’s Judicial Dictionary (Sweet and Maxwell). See also Brewer’s Dictionary of Phrases and Fables that *ultra vires* means “in excess of the power possessed”; “transcending authority”.

prohibited not by any express prohibition of the Legislature but by the doctrine of *ultra vires*."

Time gradually passed and political transformation took place, new development took place all round, new laws and Courts came into existence and India got its own written Constitution. New fields were open in this country. What was said then has also undergone appreciable change in as much as the scope of this doctrine also expanded and is now applicable to Legislative, Administrative and Judicial or quasi-judicial fields much more than what was said in Tagore Law Lectures above, when Legislative field was negligible, judicial field was limited and controlled in this country which was under British subjugation.

The word '*ultra vires*' is not synonymous with the word illegal. The word illegal comes in when the act done is opposed to public policy or prohibited by law. But the word *ultra vires* is with reference to the power or capacity of the person or authority of the doer. Such acts are necessarily illegal but could be illegal also.<sup>3</sup> Lord Cairns, L.C. in *Ashbury* case<sup>4</sup> has drawn distinction between the words illegality and *ultra vires* using two more words *extra vires* and *intra vires*. Therefore the essence of the doctrine of *ultra vires* is that it is applicable only to acts done in excess of the legal powers of the doer, as distinguished from want of jurisdiction and illegality.<sup>5</sup>

It is not only when the authority acting has done beyond powers or had no power to it or to the extent it was done, the act would be *ultra vires*, but in the broader sense also when it has abused its power or acted in bad faith or inadmissible purpose or on irrelevant grounds or considerations or with gross irresponsibility, as all these action or ways of action are directly relatable to the power and its exercise of power. *Ultra vires* acts are void unless a declaration to this effect is made by competent Court or authority, the same cannot be presumed to be void as presumption is otherwise. If power is given to certain specified person and the person or authority is to act in a particular manner and if it is not done by the said person and not in the manner provided it will be *ultra vires*. This applies even in the case of exercise of

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<sup>3</sup> The distinction between the two has been very lucidly expressed in *Bissell v. Michigan Southern & C. Railway Companies* (22 N.Y. 258, quoted by Brice on the Doctrine of *Ultra vires* 3<sup>rd</sup> Edition P. 44)

<sup>4</sup> *Ashbury Railway Carriage & C. Company V. Riche* (L.R. 7 H.L. 653)

<sup>5</sup> See *Law of Ultra Vires* by Satyanarayan Das (Tagore Law Lectures).

judicial or quasi-judicial powers. The Apex Court in *Supreme Court Employees Union*<sup>6</sup>, has laid down “an act is *ultra vires* because the authority has acted in excess of its power in the narrow sense, or because it has abused its power by action in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness”. If the act, whether administrative, legislative or quasi-judicial, is in conflict with the Constitution or governing Act or repugnant to the general principles of the laws of the land or it is arbitrary or unreasonable and no fair minded authority could ever have made it, would be *ultra vires*.

An enactment will be *ultra vires* if the legislature is not competent to legislate in respect of said matter; like State Government legislating in respect of a matter provided in Union list or if State enactment overrides the Central enactment in respect of matter provided in Concurrent List. The enactment would, in such event, be unconstitutional and *ultra vires*. The same will be the position if any enactment of Central or State legislature violates any constitutional provision like Articles 14, 19, 21 etc.

The doctrine of *ultra vires* is applicable to subordinate or delegated legislation like Rule and Regulations etc. If the parent Act is unconstitutional, the delegated legislation framed under it would become unconstitutional and *ultra vires*. This would be the position if the subordinate legislation is made not by the authority which alone has power to do or the delegatee has transgressed the limits or when the delegated legislation fails to take into consideration vital facts which expressly or by implication are required to be considered by Constitution of India or the enactment itself or that the same is in conflict with any other Statute or is so arbitrary that it could not be said to conform to the Statute or be violative of Article 14 of the Constitution of India.

In *Supreme Court Employees Welfare Association*<sup>6</sup> the Court observed: “The true position thus appears to be that, just as in the case of an administrative action, so also in the case of subordinate legislation (whether made directly under the Constitution or Statute), its validity is open to question

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<sup>6</sup> *Supreme Court Employees Welfare Association v. Union of India*, AIR 1990 SC 334

<sup>6</sup> *Supreme Court Employees Welfare Association v. Union of India*; AIR 1990 SC 334, Para 106; (Hon’ble Mr. Justice T.K. Thommen, referring to the text adopted by Lord Russel in *Kruse v. Johnson* (1898) 2 QB 91 and by Lord Green M.R. in *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* (1948) 1 KB 223, and several other decisions.

if it is *ultra vires* of the Constitution of India or the governing Act or repugnant to the general principles of the laws of the land. This would be the position if the law is so arbitrary or unreasonable that no fair minded authority could ever have made it."

If the rules do not tend in same degree to the accomplishment of the objects for which power has been delegated to the authority the Court will declare them to be unreasonable and therefore void. The Court, in *S.C. Welfare Association*, further observed: "this is so even if it were to be assumed that rules made by virtue of power granted by a provision of the Constitution are of such legislative efficacy and amplitude that they cannot be questioned on grounds ordinarily sufficient to invalidate the generality of Statutory instruments." However, these principles, are subject to the overriding consideration, as to the amenability of the impugned subject matter to judicial review.

If the subordinate Legislation viz. Rule, Regulations etc. is within the scope of powers conferred on it, the same will be *intra vires* and beyond the domain of the Court to enquire whether the purpose of the Statute can be served better by adopting a policy different from that what is laid down by legislature as its delegate. If the delegate has exceeded power or has wrongly exercised it, the exercise of power will be *ultra vires*. Even if the subordinate legislation like any enactment provides that it shall be 'conclusive evidence' or shall not be called in question in any Court i.e. exclusion of judicial review, yet its validity or *vires* even then is open to challenge as *vires* of a legislation or delegated legislation can not be affected by such provisions. In the absence of any such conferment of power delegated legislation can have no retrospective effect.

The old maxim *delegatus non potest delegare*, (a delegate cannot further delegate) still holds good. Any departure or deviation from the same invokes the doctrine of *ultra vires*. If delegation is in favour of a particular body or authority, it is to be exercised by that body or authority and they can not sub-delegate their power and authority unless they are authorised to do so expressly or by necessary implication by the delegated legislation itself.

The doctrine of *ultra vires* has got applicability also in the manner power is exercised by the body or authority on when it is conferred. If the power conferred has been exercised in a *malafide* manner or in bad faith, the same would be *ultra vires*. If an enactment also suffers from the same vice it would also be *ultra vires* and can be challenged as such. Thus an act in

broader sense is *ultra vires* either because the authority has acted in excess of its power or in narrower sense it has abused its power by acting in bad faith, inadmissible purpose or on irrelevant grounds or without regard to the relevant considerations or with gross unreasonableness, is exercised in bad faith motivated by personal animosity towards those who are directly affected by its exercise. It is equally abused even when it is exercised in good faith but for an unauthorized purpose or on irrelevant grounds.<sup>7</sup>

Summarising the entire concept the Supreme Court of India in *Sri Sitaram Sugar Company*<sup>8</sup> observed: "The true position therefore is that any act of repository of power, whether legislative, administrative, or quasi-judicial is open to challenge if it is in conflict with Constitution or the governing Act or the general principles of the Law of Land or if it is so arbitrary or unreasonable that no fair minded authority could have ever made it."

Statutory corporation and public undertakings also, being creation of Statute cannot travel beyond the Statute and if they exceed the powers conferred upon it the act becomes *ultra vires*. If an act is not provided expressly or by necessary implication in the Statute creating it, the same is to be taken to be prohibited but incidental and consequential powers of Statutory Corporation would not be *ultra vires*. The acts of Administrative authority exercising powers under Statute too can be struck down being *ultra vires*.

The doctrine of *ultra vires* applies both in the matters of substantive as well as procedural laws. Where procedure is prescribed power is to be exercised accordingly. If certain procedural requirements are prescribed and there is noncompliance with the same, it will be a case of procedural *ultra vires*. If before making rules or bye laws the requirement is prior publication of draft rules or bye laws or requirement is mandatory to consider some authority or body, failure to do so would invalidate the rule, bye-laws etc. as the same suffers with the vice of procedural requirement.

The principles of estoppel, waiver or acquiescence are not applicable in the matter of *ultra vires* acts. Similarly the plea of approbate and reprobate too is inapplicable in such acts. Even though subordinate Courts have not much to do with the doctrine of *ultra vires*, yet it is a doctrine which requires them also to be conversed with its principles and application.



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<sup>7</sup> See, *S.C. Employees Association case (Supra)*

<sup>8</sup> *Sitaram Sugar Company Ltd. v. Union of India*; AIR 1990 SC 1277