



DOCTRINE OF ULTRA VIRES: APPLICATION IN ADMINISTRATIVE LAW

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Concept of the Doctrine and Its Origin

The memorandum of a company defines the scope and objectives of a company through an "Object clause". Any activity or action outside the purview of this is considered ultra vires and is a void act by the company and it cannot be ratified afterwards.

The need for the doctrine originated after the year of 1855 as till then the concept of a company merely was of multiple partnerships and no necessary need came to light in order to protect the investors. The law prior to 1855 suggested that any decision can be enacted on the consent of all the partners and that enactment came with a package deal of individual liability, liberating other partners from the liability of the decisions made by one. But, after the introduction of "limited liability" (company's debts are its own and individual assets of the agents won't be compromised), the need for the doctrine arose.

The doctrine can be defined in two ways. Primarily, as anything transcending the defined power radius of the company and secondarily, as anything that is beyond the delegated power of the majority to bind the shareholders and creditors or against illegality¹ with them. The initial meaning protects the public whereas the secondary meaning protects the creditors and shareholders of the company. The difference is clearly on the outside and inside of the company respectively.

In the legal literature of "**A Treatise on the Doctrine of Ultra Vires by Howard A. Street**"² Mr Street has showcased himself as a strong contender against corporations as a personality and sticks to the idea that a tort doer or a criminal must possess analogy and physical features. He believes that corporations should not be punished for the wrong done by their own agents. However, Mr Street makes an effort to restore the "true doctrine" as formulated in the case of "**Ashbury Railway Carriage Co. v. Riche**"³ with corporate tort responsibility. This reconciliation, whether it's genuine or not, he says has been brought about by changing the law of agency. He rejects the secondary meaning given to the phrase by "**Blackburn J. in Taylor v. Chichester and Midhurst Rly. Co.**"⁴ in order to achieve this reconciliation and instead relies on the secondary meaning of ultra vires, which is defined as "outside the special privileges of the corporation". Then

¹ As defined by Justice Grey, Supreme Court of The United States

² Stallybrass, W. T. S. (1931). The Doctrine of Ultra Vires [Review of *A Treatise on the Doctrine of Ultra Vires*, by H. A. Street]. *Journal of Comparative Legislation and International Law*, 13(1), 141–144. <http://www.jstor.org/stable/754091>

³ *Ashbury Railway Carriage Co. v Riche*, (1875) L.R. 7 H.L. 653.

⁴ *Taylor v Chichester and Midhurst Rly. Co.*, (1930) A.C.



he states the idea as stated - "Provided that the alleged act falls within the general purview of its constating instruments, even if the harm was incidental, consequential, or a result of the way in which the alleged act was carried out," Mr Street has taken the doctrine farther than the courts willingness to carry it and hence many of the decisions have been criticized. He fairly defends the rigorous interpretation of ultra vires on the basis of public policy, arguing that governing bodies and directors would be more circumspect if they were subject to personal liability. However, we believe "*Sir William Holdsworth*⁵" is correct when he asserts that practical convenience rather than theoretical considerations has dictated what activities are possible and what are not for a corporation. Mr Street in his book further propositioned the argument that a person cannot be said to commit a crime which is already prohibited by the law as the commission of such crime is prevented and hence remains incomplete. However, we cannot say that law always prevents the crime, there are crimes which are completed even when the law preventing it exists and such offenders must be punished according to such law. Mr Street has focused more on the secondary interpretation to the doctrine rather than the primary interpretation. However, for the development of the doctrine focus is required on both the interpretations.

This review raises the following questions which are needed to be answered -

- 1) How is one supposed to know when to apply the doctrine of ultra vires?
- 2) Is Judicial intervention a way of policing through the narrower concept of the

⁵ Supra note 2.

doctrine or is the doctrine acting as a vessel for justice?

To answer the questions the article has been divided into four parts. The First Part deals with the distinction between the Ultra Vires acts and illegal acts. Secondly, this article discusses the establishment of doctrine of Ultra Vires in the English and Indian jurisdiction and clarifies the present stance of the doctrine in both the contexts. Thirdly, the article criticizes the doctrine of Ultra vires and tries to define the boundary of the doctrine. Fourthly, the article discusses the application of doctrine of ultra vires in administrative law and the arguments given by two scholars Christopher Forsyth and Paul Craig.

Distinction between Ultra Vires Acts and Illegal Acts.

Anything which falls outside the purview of the object clause is ultra vires and will stay ultra vires even if it is a legal act. In the same way if an act is illegal and it still falls inside the purview of the object clause then, the rule by the charter would prevail and would be termed illegal and not ultra vires. This distinction was pointed out in the case of State v Nebraska Distillery Co⁶., where the judge pointed out that an act done unlawfully need not be mala prohibitum or malum in Se. What is ultra vires is the use of excess power.

Establishment of The Doctrine:

In the English Context the Cohen Committee and Jenkins Committee set the pioneer pillars where the doctrine was subject to changes and questions. The committee demanded the abolition of the doctrine as the principle gave

⁶ State V. Nebraska Distillery Co. et. al., 29 Neb. 700



nothing good and highlighted the shortcomings of the doctrine.

The pioneer of all the reforms ever made in the doctrine was by the Cohen Committee. The power to change and amend one's own object clause was provided by the Parliament through the passing of Section 5 of the Companies Act, 1948. The credibility of such transactions by the company was controlled and limited by future alterations. This although could not help so much so into the security of the third party in such transactions but, it indeed proved to be very helpful when the question of future transactions was to be entertained. However, the recommendations of the Cohen Committee included more safeguard from the third party and stakeholders by the abolition of the doctrine for them. If that would have been followed then questions such as is a company responsible for the pension of a widow of the managing director of the company as in the case of "*Re Lee Bheren*" would have occurred.

The Jenkins Committee in 1962 tried to clear the water again by asking for the abolition of "Constructive Knowledge" which would have allowed the stakeholders and the third-party members to take in action any transaction with the Company until it goes against the object clause of that company. Full knowledge of the company's clause would have been provided to the stakeholder, but both the committees could not succeed as they lacked the consideration for the object clause of the company.

The failure of both the committees did result in the passing of the European Community Act 1972. The court also decided to bring down the rigidity of the doctrine. Through this the company was embraced with the power to perform its duties under the ambit of the company's act and such activity need not to mandatorily be under the object clause or memorandum of the company. According to the established principle in *Attorney General's Case*⁷, the object clause may also include any function which is a Necessity, Incidental or a combination of Consequential and Incidental.

As in the "*Evans Case*"⁸ "court acknowledged the need of the company for the time along with it's problems in hiring and acknowledged the liberty of the company to do whatever it demands to accomplish its duties embodied in it. The aspect of necessity overtook the doctrine.

Presently, in the English legal system the use of the doctrine is controlled by "**Section 9(1)**, *The European Committees Act 1972*", which states that any third party can impose the liability on the company if acting in good faith. But the same cannot be done by the company on a third party. The application of Ultra vires is controlled by the given act but the doctrine is still not abolished.

In the context of India "*Act No. XIX of 1857*", repealed the Act of 1850 and replaced it. The members of corporations formed for purposes other than banking or insurance

⁷ Attorney General v. Mersey Railway Co., (1907) 1 Ch. 81

⁸ Evans v. Brunner Mond & Company., (1921) Ch 359.



were finally permitted to restrict their responsibility thanks to this Act.

The act of 1857 was then repealed and in its place came the “*India Companies Act 1866*”⁹. In the aforementioned *Ashbury case* the *House of Lords* noticed the similarities between Sections 6, 8, 11 and 12 of the “*English Companies Act 1862*” and Sections 6, 8, 11, 12 of the “*Indian Companies Act 1866*”.

The case of *Jahangir Ratanji Modi v Shamji ladha*⁹ was the first ever case of ultra vires before the Indian judiciary. It was held that a company cannot do anything which is not authorized by the deed of settlement. And for such reason details of authorized transactions were also looked into and the court also went through the memorandum. The court came to a conclusion that the transactions in question were not authorized by the deed of settlement and hence the parties were found guilty.

*In Ashbury Railway Carriage and Iron Company Ltd v. Riche*¹⁰, the validity of the Contract was brought into question as it was outside the object clause of the company’s memorandum. And possibility of future ratification was also questioned in this case. *The House of Lords* held that if the company did not have the capacity to enter the contract, then it again cannot have the capacity to ratify it too. And the contract was considered void with no possibility of ratification. The doctrine was opposed by many people after the *Ashbury Case* as the doctrine was made to protect the people. But a company has its objectives and limits under the objection clause in its memorandum. The question that

an external person is lawfully believed to be aware of the company’s object whereas practically one may or may not be aware.

Presently, even now in the Indian legal system the doctrine is enforced as per the principles established in the *Ashbury case* and there is no legislation to restrict the application of the doctrine. The Ultra Vires acts are still regarded as void and hence, neither such acts can be enforced by the company over the third party nor vice - versa.

A Weapon to Police or towards Justice? Criticism and Judicial review:

The doctrine of ultra vires is taken in a narrower way quite many times. It narrowly means to stop or put a finger on anything which goes outside the ambit of the powers of a company or the organization. Any power provided by the legislature is also limited by it. The job of the courts become limited to the policing of the organizations and as the guardians of the legislature when the applicability of the doctrine is in question. This doctrine itself invites the purpose for judicial intervention. This also ends up affecting the boundaries to the extent of whom the judiciary can interfere. One of the limits for example is drawing of a condition that the act must fit under the ambit of this narrow but conceived definition of the doctrine in order to invite the judiciary for intervention. When discussing the interference by the judiciary, many times the companies act under the ambit of the power assigned to them by the parliament where the Parliament has given certain specific areas to maintain discretion. Maintenance of

⁹ *Jahangir Ratanji Modi v Shamji Ladha*, (1868) 4 Bom. HCR 185.

¹⁰ *Supra* note at 3



discretion should be by the minds of the company and shall not be taken contrary to the Parliament. But, the Judiciary easily disguises their interference behind the idea of legislative intent. The Judiciary then may decide if the intentions of the parliament weren't to provide full discretion and then reasonable grounds and then reasonable restriction would enter in the name of legislative intent, which blurs the boundaries of the grounds of intervention of Judiciary and definition of discretion provided by the parliament causing the doctrine to be criticized.

The doctrine has also failed to provide any clear justification and image on the correct and most appropriate way of the re-examination of the Judiciary. The judiciary itself defines and re-examine itself through various ways of reviews such as the collateral fact doctrine where a line of difference is constructed between the case of a misinterpreted Statue and a case of a jurisdictional mistake which is also regarded as almost impossible to be drawn by Craig¹¹. To overcome this dilemma of choices the Judiciary came up with legislative intent as the foremost ideal to keep a check on the judiciary and to help it police the pied piper of a legislature. But, again the problem arises as it grants flexibility or we can say too much flexibility to the judiciary which indeed snatches the rationale out of any formal assurance.

The doctrine telling its own story of criticism does not align with the changing time and atmosphere. It lacks practical realism and is

more devout in nature. The kind of control Judiciary has put on the maintenance of discretion by the agency by the disguise of the legislative intent can be taken as a clear example. The legislature following its pied piper personality whenever questioned would generally never come up with any more guidelines to the judiciary. Moreover, the change of the time keeps modifying the need of controls. Keeping a rigid and following legislature older than half of the companies and finding their intent is hard and fast irrational. Evolution of judiciary with the society and the need of time is a very important aspect of law making in which the doctrine lacks.

The doctrine also suffers from internal friction from itself as it is working as a vehicle for policing not just for the companies or organizations which are Public or derive their powers from the legislature of the country. Privately, owned associations and monopoly, have also been exposed to public boundaries set by the parliament. The courts raise fingers on the basis of ethics and sometimes intention of the legislature. This thought can be rectified by making alterations to the doctrine but this will also result in the change or better called transformation of the doctrine as it would then not just become a police of power granted and power performed but Moral and justice vehicle of the society.

Doctrine of Ultra Vires and Administrative law:

Christopher Forsyth¹² while defending the doctrine of Ultra Vires provided that without

¹¹ Craig, P. (1998). Ultra Vires and the Foundations of Judicial Review. *The Cambridge Law Journal*, 57(1), 63–90. <http://www.jstor.org/stable/4508421>

¹² Id at 11.



the doctrine it would be difficult for the court's to interpret the errors protected by the ouster clauses in the legislation and how vague legislations can be challenged if the legislation explicitly or impliedly provides powers to the executive to make such legislations. Thus, showing that the doctrine of Ultra Vires concurs with Administrative law. On the other hand, Craig argues that doctrine of Ultra Vires is not important for the court to interpret the administrative functions. The reasoning of both the scholars are discussed below.

The first reasoning which he gives is if the doctrine is abandoned, it will be difficult for the judiciary to interpret the ouster clause. By ouster clause it is meant the clause which bars the judiciary to review certain clauses of a legislation. He bases his views on the case of *Staatpresident en andere v United Democratic Frint en'nander*¹³, where J. Rabie, while interpreting an ouster clause, which prohibited the judicial review about the information on "unrest" incases of emergency situation, held that the requirement that a subordinate legislation should not be vague is a requirement of the "Roman-Dutch" legal system and not that of doctrine of Ultra Vires. Thus, the rejection of doctrine of Ultra Vires made the clauses which were protected by the ouster clause still applicable. According to the view of Christopher if the reasoning given by J. Rabie is adopted it will deprive the judicial review from the very essence of it. If the court's are not allowed to interpret the ouster clause, the error in the legislation will prevail.

¹³ *Staatpresident en andere v United Democratic Frint en'nander*, 1988(4) S.A. 830A.

However, Craig's view on abandonment is contradictory to that of forsyth. He argued that evisceration of judicial review cannot be said to be an inevitable consequence of ignoring the doctrine but it is one of the consequences. The judiciary can remove the error in legislation through the principles of common law. The courts need not necessarily stick to the intent of the parliament, the legislation can be interpreted according to the needs of the society and the current situation in the legal system.

The second reasoning given by Christopher is that how will the court interpret the legislation which are vague and are not made according to the power conferred on the ministers. The idea of delegation of power by the parliament to ease the parliament's burden however, if the executive formulates the legislation vague how will this ease the working. What the parliament allows the executive has to be expressly mentioned or should be implied by the power conferred. And in certain situations if the legislature provides power to the executive to make vague legislation on what grounds can such legislation be challenged in the courts.

Craig reasons that what needs to be seen is the legislative intent while interpreting the delegated powers to the executive. The judicial review of vague legislations can be done on the basis of doctrines of common law. He reiterates the case of *Kruse v Johnson*¹⁴, where it was held that the power of the legislature to delegate is limited to formulations of legislations which are not too vague or inherently unreasonable. Further, he

¹⁴ *Kruse V Johnson*, (1898) 2 Q. B. 91

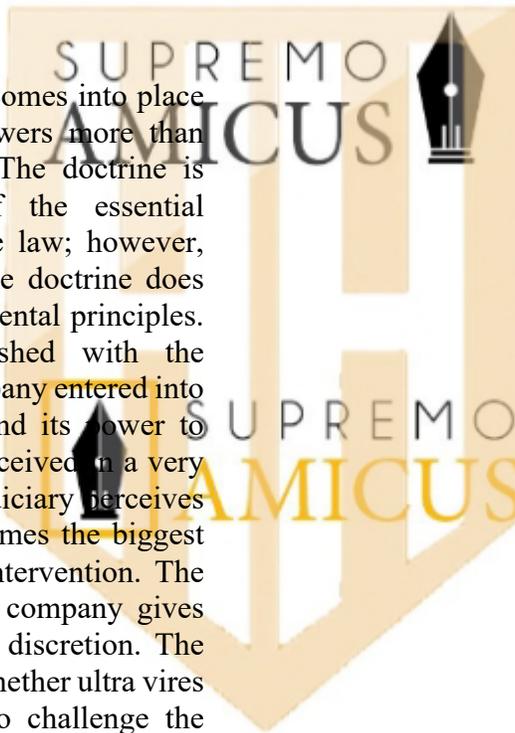


stated the case of R v Secretary of State for Home Department¹⁵, where the court opined that the power conferred should be as such as it does not infringe the fundamental rights of the citizens. Thus, according to him, what needs to be checked is the “judicial creation” that is derived from common law. And if the “judicial creation” is used to challenge the vague legislations, the basic common law principles can be used to conclude that the executive cannot have the power to make vague legislations and also the legislature cannot delegate the said power.

to use his power more than with what he is conferred with. And in case of vuse of excess power the right for the judiciary to interfere and challenge such power comes into place. This forms a part of the administrative law which cannot be ignored.

Conclusion

The doctrine of Ultra vires comes into place when one exercises his powers more than what one is conferred to. The doctrine is considered to be one of the essential principles for administrative law; however, some scholars argue that the doctrine does not make one of the fundamental principles. The doctrine was established with the Ashbury case when the company entered into a contract which was beyond its power to enter into. Ultra vires is conceived in a very narrow way and thus the judiciary perceives it the same. Thus, this becomes the biggest ground for the judiciary's intervention. The legislation that governs the company gives them the power to exercise discretion. The question that arises here is whether ultra vires really helps the judiciary to challenge the legislation. The fourth part answers to this question in the form of the forsyth and craig’s debate and reach to the conclusion that judicial review has been established on the doctrine of Ultra vires and it remains as an indisputable fact. No one should be allowed



¹⁵ R v Secretary of State for Home Department, (1993) 4 All E.R. 539