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# Doctrine of Procedural Ultra Vires: A Critical Analysis

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## ABSTRACT

*In the contemporary welfare state, burdened by the exigencies of extensive powers, the administrative officials has started delegating its powers to the subordinate bodies. This has further underscored the necessity for the formulation of safeguards to judiciously regulate the exercise of such delegated supremacies. The question of requirement of such necessity is important here so that the executives can ensure oversight in instances of misuse or abuse of powers. One such control that the law has by far evolved is the doctrine of procedural ultra vires that has emanated from the sphere of rule of law and natural justice and is dissected into two intricate branches of publication and consultation. This paper delves into exploring the crucial character played by the doctrine of procedural ultra vires as an instrument of control for delegated legislation in administrative setting. By tracing its evolution, examining its existing application, and disclosing various dimensions and viewpoints of procedural defects that needs to be cured for the efficient functioning of administration, the paper provide in-depth understanding of the doctrine.*

*Furthermore, the paper emphasize over the utmost significance of these procedural requirements by showcasing the delicate balance between mandatory and directory procedural requirements which determines the extent up to which a law made by delegated legislation is inter vires or ultra vires. Since its emergence the executives have been aggressively using it, which even more make it important to interpret the phrase “procedure prescribed by law” in its widest sense to provide that no authority, body or person can escape the essential procedures while exercising the power granted to them. The basic aim of the paper is to understand that under what circumstances the judiciary has applied this essential doctrine of ultra vires to control the excessive delegation of powers and critically examine its applicability.*

**Keywords:** *Procedural Ultra Vires, Administrative Rule Making, Judicial Control, Delegated Legislation, Natural Justice.*

## I. INTRODUCTION

In today’s day and age, delegated legislation have become the inevitable part of administrative bodies. With delegated legislation there comes a lot of powers and such powers are never

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founded alone, in fact it comes with a lots of duties, responsibilities and limitations. Therefore, there is a dire need of judicial control over the functions of administrative bodies to ensure fairness and transparency while delegating powers. For that purpose article 245 of the Indian Constitution limits the power of states and authorities conferred by the legislature and parliament to make laws. The reason why judicial control has become such an important part of administration and why every administrative rule-making comes within the scope of judicial review is because of the lack of control authorities' show in exercising self-restraint. That is why wrong happens when such authorities use their powers wrongly and break their limits. This act of doing things illegally without any authority is called **ULTRA VIRES**.

Ultra vires came from the Latin word meaning “**beyond the powers**” and was expounded by A.V. Dicey. In literal sense it means that when any person or body of persons exercise functions beyond the powers conferred upon them. It is further classified into two branches of substantial ultra vires and procedural ultra vires. While substantive ultra vires deals with going beyond the powers prescribed in parent act, on the other side procedural ultra vires deals with going beyond the process prescribed. **Procedural ultra vires** is one such branch which the courts apply while determining the validity of the delegated legislation. It is one of the most essential doctrine of administration and constitution which is acting as a guardian by ensuring that those in power should play under rules. It is concerned not only with what decisions are being made but also how they are being made. In this paper the author is concerned with the detailed understanding of the doctrine of procedural ultra vires as well as its contemporary application in administrative rule making and constitutional law.

## II. PROCEDURAL ULTRA VIRES: MEANING AND SIGNIFICANCE

If you simply see, its general definition is -“*When a subordinate legislation fails to comply with certain procedural requirements prescribed by the parent act or by the general law, it is known as procedural ultra vires.*”<sup>2</sup> It occurs when delegated legislation is created in a manner that violates procedural conditions laid out in the enabling Act or in violation of introductory principles of fairness and natural justice. Most of the time it became not so possible for the Parliament to exercise effective control over delegated legislation. Therefore, for that reason, certain relevant procedural safeguards (such as consulting with particular bodies or interests, publication of draft rules or bye-laws, laying procedure before Parliament, etc.) have been provided which acts as a watchdog over the exercise of this power by the administrative authorities.

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<sup>2</sup> Takwani, C. K. Lectures on Administrative Law (7th ed., Eastern Book Company 2021).

But whether such procedural requirements are mandatory or directory in nature is the matter that needs to be taken care of. The parent act consisting of provisions uses words like shall (mandatory) and may (directory) while prescribing anything that needs to be followed. In case these formal requirements are mandatory in nature and are disregarded by the said authorities then such rules, bye-laws etc. so made would be invalidated by the Judiciary. But if they are directory in nature then non-compliance with a directory provision does not invalidate subordinate legislation until and unless it has been proved invalid by way of judicial review. Therefore, it is the well settled rule that “the mandatory enactment must be obeyed and fulfilled, and it is satisfactory if directory provision be obeyed or fulfilled substantially.”<sup>3</sup> But the point of importance here is that the authorities may be doing the right thing but invalidation results out of doing that right thing in wrong way.

### III. PROCEDURAL REQUIREMENTS

The requirements for the procedural control comes under two heads of: (a) publication; (b) consultation.

#### (A) Publication

The term Publication refers to the act of publishing anything and doing public disclosure of proposed rules, regulations, or statutory instruments for public scrutiny before them being coming into effect. In India, there is no general provision providing for the publication of delegated legislation in the official gazette but even then the courts of India have decided in numerous cases that it needs to be mandatorily published for its validity and if anything has not been published in the official gazette then such subordinate legislation becomes ultra vires.

It operates in two ways: (1) ante natal publication i.e. prior publication and (2) post-natal publication i.e. after publication. **M.P Jain**<sup>4</sup> rightly stated that “it is essential, therefore, that adequate means are adopted to publicize delegated legislation so that people are not caught on the wrong foot in ignorance of the rules applicable to them in a given situation” The simple concept behind this revolves around two important principles of “**ignorantia juris non excusat**” i.e. ignorance of law is not excuse and secondly “**people’s access to law as prescribed by natural justice**” because it is generally presumed that people are less aware about the rules, bye-laws etc. made through delegated legislation. This promulgation of statutes mandated by natural justice is justly held in the leading case of *Harla v. State of Rajasthan*,

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<sup>3</sup> Raja Buland Sugar Co. v. Ratanpur Municipal Council, 1 S.C.R. 970 (1965).

<sup>4</sup> Jain, M. P., & Jain, S. N. Principles of Administrative Law (9th ed., Vol. 1, Lexis Nexis 2021).

1951.<sup>5</sup>

In another case of *Narendra Kumar V. Union of India, 1960*<sup>6</sup> the court have had the same stance. In this case, according to Section 3 of the Essentials Commodities Act, 1955-every rule, bye-law, regulations made under the act needs to be published and notified in the official gazette. But the licensing order of the non-ferrous metal is not published anywhere. Therefore, the court opined that either the authorities should publish the said law or the court will pronounce it invalid. Additionally, the court while determining that whether procedural ultra vires is mandatory or directory to decide the validity of a statue shall consider following parameters as prescribed in the case of *Raza Buland Sugar Co. Ltd. V. Municipal Board, 1965*<sup>7</sup>:

1. The purpose and intention of the legislature
2. Nature of legislation
3. The inconvenience and injustice to person resulting from its interpretation
4. The relation of particular provision to another provision having same subject
5. The language of provision

### **(B) Consultation**

The term ‘consult’ implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or, at least satisfactory solution of a problem.<sup>8</sup> It is a process which requires meeting of minds between the parties to consultation on material facts to come to a right conclusion.<sup>9</sup> Consultation is a necessary measure to check and control the exercise of legislative power by the executive because it helps in making more effective laws. It provides an open space to people to have opinions and representations in case of any inconvenience caused to them by administrative action. The Administration not always possess wisdom in fact it in turn learns from the suggestions made by outsiders and get first-hand idea of the situation of area in which such legislation has been contemplated.

In the United States this practice of prior consultations is very much common as according to **S. 553 of Administrative Procedure Act** the rule making authority requires consulting the

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<sup>5</sup>Harla v. State of Rajasthan, AIR 467 S.C. (1951).

<sup>6</sup> Narendra Kumar v. Union of India, 2 S.C.R. 375 (1960).

<sup>7</sup> Raza Buland Sugar Co. Ltd. v. Municipal Board, 1 S.C.R. 970 (1965).

<sup>8</sup> Takwani, C. K. Lectures on Administrative Law (7th ed., Eastern Book Company 2021).

<sup>9</sup> Union of India v. S.H. Sheth, 4 S.C.C. 193 (1977).

interested people likely to be affected.<sup>10</sup> But in India, there is no hard and fast rule. Wherever, consultation is required, words such as “the power to make rules shall be subject to the conditions of previous publication” are inserted in the parent Act. For example: **S. 33 of the Drugs And Cosmetics Act, 1940**<sup>11</sup> provides the power to the central government to make certain rules but only after consulting the technical drug advisory board.

If it is mentioned in the parent act then consultation is required to be performed otherwise the provision created by subordinate legislation will be declared ultra vires due to procedural deviance. As in the case of *New India Industrial Corporation Ltd. V. Union of India, 1980*<sup>12</sup> the court have held the provisions of Delhi Ice Control order (subordinate legislation) made under S. 3 of Essential Commodities Act (parent act) is violative of Article 14 and 19 as the interest have not been consulted before these provisions are being made even though it was mentioned in the parent act. But the catch here is that, the word ‘consultation’ does not equals to ‘concurrence’ ,rather it states that the views and opinions of the authorities and people interested will just only help the authorities in shaping the decisions. The authorities are not bound by the consulted views. This was rightly held by the court in the case of *L & T McNeil Ltd. V. Government of Tamil Nadu, 2001*<sup>13</sup>

#### IV. EVOLUTION AND LANDMARK JUDGEMENT

Although the ultra vires doctrine was the creation of England, it is also been followed by India and helped in the development and empowerment of administrative law. Its ambit is much wider in India as it does not apply to the acts done by the state, but also to the Local Governments, Local Authorities, Tribunals and Companies etc.<sup>14</sup>

In recent context of ultra vires principle, the procedural doctrine have emerged as a unique surveillance. The emergence of procedural fairness can be traced back up to 17<sup>th</sup> century when the importance of procedural fairness have been realized. As a result during the 19<sup>th</sup> century, the rise of administrative tribunals and commissions also led to increased scrutiny of their procedures by courts to ensure fair decision-making. After all these years, the gradual shift to delegated legislation further elevated the need for ensuring fair procedures in rule making process by striking a balance between flexibility to administrative bodies and ensuring fair exercise of delegated power. Therefore, in the Indian landscape there were several cases which

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<sup>10</sup> Jain, M. P., & Jain, S. N. Principles of Administrative Law (9th ed., Vol. 1, Lexis Nexis 2021).

<sup>11</sup> Drugs and Cosmetics Act, Act No. 23, § 33 (1940).

<sup>12</sup> New India Industrial Corporation Ltd. V. Union of India, 1980 AIR 277 (Del).

<sup>13</sup> L & T McNeil Ltd. V. Government of Tamil Nadu, 3 SCC 170 (2001).

<sup>14</sup> Vakil, K. D., Procedural Deviance of Delegated Legislation from Parent Act, Georgia State University College of Law Library (2011), available at <https://ssrn.com/abstract=1877247> .

have put notable contribution in the development of procedural ultra vires doctrine from its emergence to its current stand in the administrative field of law. Though the phrase procedural ultra vires may not have been explicitly used at places, but it clearly showcased the challenges faced as far as the administrative rule making is concerned.

In the notable case of *Maneka Gandhi V. Union of India, 1978*<sup>15</sup> the term procedure established by law as mentioned under article 21 have been given a wider interpretation. Earlier the term procedure prescribed by law used to be construed in its literal sense as held in A.K Gopalan's case but later on it has given the synonymous application to due process of law similar to that of American constitution and was held by SC that along with right procedure, the legislature should also ensure that the procedure so followed is fair, reasonable and just as well.<sup>16</sup> Procedural fairness is due process of law in its primary sense and it is so rooted that it has to be followed and obeyed by the authorities and marked as fundamental<sup>17</sup>

## V. CRITICAL ANALYSIS

The doctrine of procedural ultra vires serves as a critical tool in the administrative law setting as it keeps a check on the exercise of administrative power, ensuring that authorities adhere to the established processes. At one hand it is of paramount importance during rule making where procedural fairness and compliance with statutory procedures are crucial, whereas on the other hand it faces challenges and criticism from scholars in its application on several grounds.

At its core, the doctrine seeks to prevent arbitrary administrative actions by holding the public authorities accountable for their actions and answerable in case of procedural deviance. It emphasise on fairness of procedure and due process. By censuring the activities of authorities and limiting their boundaries of exercising powers it safeguards the arbitrary decision making and unjust laws by declaring them ultra vires to the parent act. Procedure control of delegated legislation also maintainins separation of powers by preventing encroachment into areas reserved for the judiciary or the legislature and as a result abuse of power is prevented. The main argument in favour of rulemaking procedures is that they improve the quality of administrative decisions by providing access to evidence and arguments and encouraging the interested stakeholders to participate who may otherwise be not consulted.<sup>18</sup>

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<sup>15</sup> Maneka Gandhi V. Union of India, AIR 597 SC (1978)

<sup>16</sup> Hawaldar, M. A. H., "Evolution of due process in India," Manupatra (October-December 2014), available at <http://docs.manupatra.in/newsline/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf>.

<sup>17</sup> McCubbins, M. D., Noll, R. G., & Weingast, B. R., "Administrative Procedures as Instruments of Political Control," 7 J.L. Econ. & Org. 3, 243-277 (1987), available at <https://www.jstor.org/stable/764829>.

<sup>18</sup> Craig, P., "Ultra Vires and the Foundations of Judicial Review," 57 Camb. L.J. 1, 63-90 (1998), doi: 10.1017/S0008197300134397.

But if we dive deeper we will disclose various challenges the doctrine faces while determining the threshold for procedural irregularities that would declare a decision procedurally ultra vires. Courts often find themselves grapple with questions of whether a deviation from a prescribed procedure is significant enough to invalidate a decision. It is because there is no proper guidance provided by the parent act or legislation in question to the courts in determining as to how to apply these controls and constraints. Furthermore, the doctrine's application also varies across jurisdictions. Different legal systems possess different approaches to interpret procedure defect, leading to diverse outcomes. Jurisdictions with stricter approach invalidate decisions even with minor procedural defects, while those who takes into the broader view may consider the extent of severity of the defect and its impact on the fairness of the process. Therefore, in such situations it becomes crucial for the courts to assess whether these deviations significantly affected the fairness of the administrative process. Also there is a demanding need to strike a balance and keep an eye, when these discretion in decision making by authorities are crossing their circumscribed limits leading to ultra vires procedure.

## **VI. CONCLUSION**

In the end, I can conclude that doctrine of procedural ultra vires is our legal sword and an intricate part of judicial control of delegated legislation, but keeping things crystal and clear is not an easy job. While its application requires a careful balance to avoid abuse/misuse, the doctrine remains a critical tool for protecting individual rights, maintain separation of powers, and defend the rule of law. It's like fighting a relentless battle against legal complications, slow processes and political pressures and providing a positive law of fairness. It is evident from its rigorous use in present day functioning of administration, that the application of this doctrine is not going to be done away with any time soon, since it still possess a scope of development with the growing horizons of powers of authorities.

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