THE DOCTRINE OF ULTRA VIRES AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

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Introduction

The proposition that an administrative authority must act within the powers conferred upon it by the legislature may well be considered the foundation of Administrative Law. The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizens against their abuse.[1]

The juristic basis, on which courts exercise judicial review whenever there is an allegation of administrative authorities acting outside their conferred powers, is commonly referred to as the "doctrine of ultra vires". 'Ultra Vires' is a Latin phrase which simply means "beyond powers" or "without powers". However, the courts, with the view of curtailing abuse of power by administrative authorities and providing relief for the parties thereby affected, have developed 'Ultra Vires' as a firm doctrine of law, by extending and refining its scope [2] to embrace various types of abuse of power committed by administrative authorities.

The purpose of this article is to examine the theoretical basis of the doctrine of ultra vires, its expansion and, the jurisprudential arguments made in favour of the usage of the doctrine as the central

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[1] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, [10th ed.] Oxford: Oxford University Press, 2009 at p.4.

[2] Ibid., at p.30.

foundation of judicial review of administrative action and the counter arguments made with regard to such usage. This article will proceed to analyse the Administrative law in the United Kingdom and Sri Lanka.

The Ultra Vires Doctrine

The doctrine of ultra vires is said to have originated in Company law as a means of safeguarding the interests of the shareholders of companies.

In the past, it was a mandatory legal requirement for companies to have what is called a "Memorandum" which invariably included an object clause. This object clause reflected the object/s for which the company was formed. The company was always required to perform its activities within the purview of the objects clause included in the Memorandum. Any action which was outside the purview of the objects clause was ultra vires and, therefore, invalid. The aforesaid principle which was firmly established by the House of Lords in the decision of *Ashbury Railway Carriage and Iron Company Ltd v. Riche* [3]was later borrowed in to Administrative law as the courts found it difficult to question the power of the legislature due to the application

[3] [1875] LR 7 HL.

of principles such as separation of powers and parliamentary sovereignty. [4]

The doctrine of ultra vires as used in Administrative law implies that discretionary powers must be exercised for the purpose for which they were granted. At the inception, the application of the doctrine was designed exclusively to ensure that administrative authorities do not exceed or abuse their legal powers. If they did so, the courts declared such acts ultra vires and therefore, invalid.

Administrative power is generally derived from legislation. Legislation confer power on administrative authorities for specified purposes, sometimes, laying down the procedure to be followed in respect of exercise of such power. More often than not, these legislation stipulate the limits of such conferred power. If an administrative authority acts without power, in excess of power or abuses power, such act/s are liable to be rendered invalid on the ground of substantive ultra vires. When an administrative authority acts in contravention of mandatory rules stipulated in the legislation or does not comply with the principles of natural justice, such acts are liable to be rendered invalid on the ground of procedural ultra vires.

The aforesaid traditional ultra vires model is based on the assumption that judicial review is legitimated on the ground that the courts are

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

applying the intent of the legislature. In this regard Wade and Forsyth observe, in relation to the constitutional framework of the United Kingdom, that:

> ***"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."***[5]

[Emphasis added]

Thus, the general presumption is that the legislature, when conferring powers on administrative authorities, does not intend that those authorities should exceed or abuse that power. As, Lord Acton once said;

> **"*Power tends to corrupt, and absolute power corrupts absolutely*".**

Therefore, the presumed intention of the legislature discards the notion of absolute power conferred on administrative authorities. As such, courts may impute certain safeguards against abuse of power in

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

to the legislation which have conferred powers on administrative authorities, even in the absence of specific provisions to that effect.

The courts validate such imputation on the ground that, it is a general principle embodied in the broad notion of rule of law that legislature is not expected to incorporate such safeguards expressly in every piece legislation that is enacted.[6] Thus, the implied safeguards are taken as part and parcel of the legislation in concern, and violation of any such safeguard would render the whole action of the administrative authority unlawful.

It could be seen, therefore, that the doctrine of ultra vires has been gradually but, steadily extended by courts, to cover not only those orders or decisions made in excess of power, but also to cover numerous other heads of judicial review, such as, failure to observe rules of natural justice, irregular delegation of powers, breach of jurisdictional conditions, unreasonableness, irrelevant considerations, improper motives, and such other inconsistencies that can be considered as amounting to ultra vires. Wade and Forsyth observe thus;

> ***"The technique by which the courts have extended the judicial control of powers is that of stretching the doctrine of ultra vires. ..... They can readily find implied limitations in Acts of Parliament, as they do when they hold that the exercise of a***

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

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"[7]

[Emphasis added]

In the *GCHQ Case*, [8] Lord Diplock enumerated a new threefold classification of grounds of judicial review, any one of which would render an administrative decision and/or action in concern, ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality.[9]

What Lord Diplock meant by "Illegality" as a ground of judicial review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it to "unreasonableness" in *Wednesbury Case.*[10] By "Procedural Impropriety" His Lordship sought to include those heads of judicial review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

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

[8] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

[9] See, *R v Secretary of State for Home Department ex. p. Brind* [1991] AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future.

[10] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

In view of this new classification of the doctrine of ultra vires, Galligan observes that the doctrine has been extended and developed to mean "acting beyond principles of good administration".[11] Accordingly, when administrative authorities breach principles of good administration, incorporated in the extended doctrine of ultra vires, courts would be entitled to exercise juridical review and grant relief to the affected parties of such breach.

Criticism of the Ultra Vires Doctrine

Sceptical comments on the long established doctrine of ultra vires have been made by critics who justly observe that the restraints implied into legislation have in reality been largely created by the judges on their own initiative and owe little to any perceptible legislative intention.[12] Wade and Forsyth observe:

> ***"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,***

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[11] See, D. J. Galligan "Judicial Review and the Textbook Writers" [1982] 2 OJLS 257.

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

and asserting their little to promote fairness and justice in government under the rule of law."[13]

[Emphasis added.]

Advocates of common law model of legality, such as, Dawn Oliver,[14] S. A. de Smith, Lord Woolf, Jeffrey Jowell,[15] Sir John Laws,[16] P. Craig,[17] D Dyzenhaus[18] and N. Bamforth,[19] have challenged the presumption of intention of the legislature used in the doctrine of ultra vires and have argued that the doctrine as articulated as at present is indeterminate, unrealistic, beset by internal tensions, and unable to explain the application of public law principles to those bodies which did not derive their power from legislation.[20]

1. **<u>The Indeterminacy of the Ultra Vires Doctrine</u>**

The fact that the ultra vires doctrine is indeterminate can be exemplified by its application to judicial review of jurisdictional

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

[14] See, Dawn Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543.

[15] See, S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action*, [5th ed.] London: Sweet & Maxwell, 1995.

[16] See, Sir John Laws, "Illegality: The Problem of Jurisdiction" in M. Suppertone and J. Goudie [Eds.] *Judicial Review*, [2nd ed.] London: Butterworths, 1997.

[17] See, P. Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] 57 Cambridge Law Journal 63.

[18] See, D. Dyzenhaus, "Reuniting the Brain: The Democratic Basis of Judicial Review" [1998] 9 PLR 98.

[19] See, N. Bamforth, "Politics, Ultra Vires and Institutional Interdependence", A Paper presented at the Cambridge Conference on the Foundations of Judicial Review, May 22, 1999.

[20] P. Craig "Competing Models of Judicial Review" [1999] PL 428.

issues presented in cases such as *R v. Boltan*,[21] *Brittain v. Kinnaird*,[22] *Anisminic Ltd. v. Foreign Compensation Commission*,[23] and *R. v. Lord President of the Privy Council, ex. P. Page*.[24] The English Courts have adopted a number of different approaches to define jurisdictional error.

As Craig[25] points out, there are three main approaches which can be detected within the court's jurisprudence under which all relevant errors of law are open to challenge. They are; [i] limited review, [ii] the collateral fact doctrine and, [iii] the modern test of extensive review. The ultra vires doctrine does not provide any guidance as such, to which these standards of review ought to be applied.

2. The Lack of reality of the Ultra Vires Doctrine

The criticism that ultra vires doctrine does not accord with reality can be exemplified by considering the various controls, which the courts have imposed on the exercise of discretion. The approach has been to legitimate these controls by reference

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[21] [1841] 1 QB 66.

[22] [1819] 1 B & B 432.

[23] [1969] 2 AC 147.

[24] [1993] 2 AC 682.

[25] P. Craig, "Ultra Vires and the Foundations of Judicial review" [1998] 57 Cambridge LJ 63 at pp.66-67.

to the intention of the legislature. There are two main problems with this rationalisation of judicial behaviour.

Firstly, the legislation, which is in issue in a particular case, will often not provide any detailed guidance to courts as to the application of these controls on discretion. Thus, courts will have to make their own judgement on such matters, referring that it is what the legislature has intended when enacting the legislation in concern. The argument is made that it would be unrealistic to impute the intention of the legislature by courts, where the legislature has not actually made provisions as to its intention.

Secondly, the approach to legitimate various judicial controls by reference intention of the legislature makes little sense, if any, when the development of various means of controls across the time is considered. The developments that have taken place such as, changes in judicial attitudes towards fundamental rights, the recognition of the doctrine of legitimate expectation, and the possible inclusion of proportionality as a head of judicial review, cannot plausibly be explained by reference to legislative intent.

As Dawn Oliver[26] logically points out, the presumption drawn by courts that the legislature has not intended an administrative authority to act outside its powers as laid down in the case of *Ridge v Baldwin*, [27] becomes, rebuttable, when the legislation conferring power on the administrative authority has clearly intended to the contrary.[28] This is plainly evident in relation to cases on ouster clauses, even though courts have shown reluctance to allow legislation to override the said presumption. In such situations, the employment of the ultra vires doctrine would certainly be unrealistic.

3. Tensions within the Ultra Vires Doctrine

The criticism that ultra vires doctrine is beset by internal tensions is more apparent in the context of legislative provisions, which seek to exclude the jurisdiction of courts from judicial review by preclusive or ouster clauses. Given the rationale for judicial review that the courts are implementing the legislative intention, this leads to a difficulty where the legislature has clearly stated that it does not wish the courts to intervene with the decisions/actions of administrative authorities.

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[26] See, Dawn Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543.

[27] [1964] AC 40.

[28] See for instance, *Congreve v. Home Office* [1976] QB 629; *R. v. Hillingdon London Borough Council, ex. p. Royco Homes Ltd.* [1974] QB 720.

It can be observed, however, that the courts have used a number of interpretative techniques to limit the effect of preclusive or ouster clauses. For instance, in *Anisminic Ltd. v. Foreign Compensation Commission*, [29] the court held that the relevant provision in the legislation did not serve to protect decisions which were nullities. Thus, it becomes apparent that courts while legitimating judicial review by employing the ultra vires doctrine, which gives precedence to the intention of the legislature, are using various means to exclude the expressed intention of the legislature, by giving preference to the presumed intention. This approach of the courts is conflicting per se.

4. The Ultra Vires Doctrine and the Scope of Public Law

In the modern arena of public law, courts have expanded the principles of judicial review to cover actions of bodies which are not public bodies in the traditional meaning of the term. For instance, trade associations, trade unions and corporations with de facto monopoly, which do not derive their powers from a specific legislation or from the prerogative, have been subjected to the same principles as are applied to public bodies in strict sense.[30]

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[29] [1969] 2 AC 147.

[30] See, P. Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] 57 Cambridge LJ 63.

Since, in the modern context, a considerable part of activities of the government is carried out by bodies having de facto or common law powers, Dawn Oliver[31] argues that it is not possible to analyse the exercise of such powers as being subjected to express or implied terms imposed by the donor of the powers; i. e. legislature. Thus, these bodies do not lend themselves to the language of ultra vires.

Dawn Oliver further argues that although the doctrine of ultra vires may be readily applied to bodies which derive their existence and authority from legislation, it would be less easy to apply the doctrine to bodies which do not derive their existence and authority from legislation. Oliver also submits that the doctrine is hard to apply in judicial review of royal prerogative. This fact had been implicitly recognised by courts until the decision in *GCHQ Case*.[32]

Owing to the aforesaid considerations the critiques of the ultra vires doctrine submit that the doctrine can no longer be regarded as the vehicle through which the courts effectuate the will of the legislature and that the modern notion of judicial review has moved away from

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[31] See, Dawn Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543.

[32] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

the ultra vires rule to a concern for the protection of individuals and control of power.[33]

Defences to Criticisms

Christopher Forsyth while conceding that the ultra vires doctrine cannot explain all instances, in which courts exercise judicial review, submits however, that the ultra vires doctrine based on legislative intent should retain its central position so far as decisions made under statutory powers are concerned.[34] Craig argues that this contention does little service to a rational system of public law due to several reasons.[35] One is that the dividing line between bodies, which do and do not derive their power from legislation, is difficult to draw. In addition, the question arises as to whether if common law can be regarded as the legitimate basis for controls on bodies which do not depend on legislation for their powers, why cannot it be so regarded for bodies which derive power from legislation?

The Dangers of the Abandonment of the Doctrine of Ultra Vires

One of the primary arguments advanced by Forsyth is that if the doctrine of ultra vires is abandoned the courts will be unable to

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[33] See, Dawn Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543.

[34] C. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" [1996] 55 Cambridge LJ 122 at pp.129-133.

[35] P. Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] 57 Cambridge LJ 63 at p.71.

circumvent ouster clauses in the manner in which they have done in cases such as *Anisminic Ltd. v. Foreign Compensation Commission*.[36] This argument is based on the decision of the South African Court in *UDF Case*,[37] where the Court rejected the ultra vires doctrine as the basis of judicial review and reasoned that ouster clause should be protected. Forsyth contends that if the ultra vires doctrine is abandoned, the same result as in the decision of *UDF Case*[38]could occur and such reasoning could be applied even if the ground of challenge is illegality, irrationality or procedural impropriety. In Forsyth's words judicial review would be "eviscerated" and this would be "the inevitable consequence of abandoning ultra vires", even though it is not the intended consequence.

Craig accedes to the Forsyth's view on the consequence of abandoning the doctrine, limited only to that particular case. However, according to Craig, Forsyth has mistaken in contending that this is the "inevitable" consequence of abandoning ultra vires.[39] He argues that common law created doctrines and principles will include established heads of judicial review as well as other relevant principles of public law. Thus, a clause which would purport to exclude the inherent powers of the courts could be restrictively construed to overcome the

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[36] [1969] 2 AC 147.

[37] 1988 (4) SA 830.

[38] 1988 (4) SA 830.

[39] P. Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] 57 Cambridge LJ 63 at p.72.

issue of necessarily interpreting an ouster clause in the manner it was interpreted in the *UDF Case*.[40]

It is discernible that Forsyth seeks to argue that the rejection of the ultra vires doctrine based on legislative intent as the justification of judicial review means that the limits on powers of administrative authorities would inevitably alter. However, as Craig points out, this would not be so. Thus, the live issue in this context would be to ascertain whether such limits are derived from legislative intent or more honestly from judicial creation through the process of common law.

Modified Ultra Vires Doctrine

Supporters of the ultra vires doctrine, notably, Christopher Forsyth[41] and Mark Elliot[42] in their responses to the arguments levelled against the doctrine, have conceded that the legislature will rarely have any specific intent as to the content of the rules, which make up judicial review. However, they maintain that the doctrine of ultra vires must still be the central principle of judicial review on the argument that legislative intent must be found in order to vindicate judicial review,

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[40] 1988 (4) SA 830.

[41] See, C. Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" [1996] 55 Cambridge LJ 122.

[42] See, M. Elliot, "The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review" [1999] 115 LQR 119; M. Elliot, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" [1999] 58 Cambridge LJ 129.

and the abandonment of the ultra vires doctrine would entail strong challenges to parliamentary sovereignty and would also involve the exercise untrammelled power by the courts. They further maintain that legislative intent can be founded to legitimate the exercise of judicial power.

In consideration of the aforesaid, Forsyth and Elliot have put forwarded a modified doctrine of ultra vires, which is concerned with the general intention of the legislature as opposed to a specific intent. According to this modified doctrine, it is presumed that the legislature is deemed to have intended that its legislation conforms to the basic principles of fairness and justice, which operate in a constitutional democracy. The power is delegated to courts in order to fashion the application of these basic principles in accordance with the rule of law, since, the legislature itself cannot realistically workout the precise ramifications of these basic principles. At the same time, the legitimacy of the courts to impose the controls on bodies, which do not derive their powers from legislation, is also recognised by the doctrine.

The modified doctrine of ultra vires is able to overcome many of the problems associated with the traditional ultra vires doctrine and give a fair response to the criticisms levelled against the traditional doctrine. This is because the reasoning underlying the modified ultra vires doctrine is very much similar to the reasoning underlying the common law model. The idea of general legislative intent in the modified

doctrine gives the courts freedom and flexibility to read between the lines of the concepts such as rationality, fairness etc. which, in turn, would unlock the doors for the courts to develop the scope of judicial review as they seem fit.

Despite the plus points of the modified doctrine of ultra vires vis-à-vis the traditional doctrine of ultra vires, the modified doctrine too has been criticised by many academics due to various reasons. Paul Craig argues that there is no warrant for the claim that general legislative intent in the modern doctrine can be regarded as the foundation of judicial review, in terms of the substance of review itself. According to Craig, as long as the doctrine of parliamentary sovereignty is retained, the modified doctrine fails in its logical foundation. He maintains that grounds of judicial review as laid down by courts over the past three hundred years were based on the common model, and that it continues to provide a fitting picture of the true relationship between courts and the legislature.[43] Jeffery Jowell also prefers the common law justification of judicial review subject to the final modification that judicial review by no means should be unbounded and exercised allowing the judiciary the freedom to impose unconstrained standards.[44]

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[43] P. Craig "Competing Models of Judicial Review"[1999] PL 428 at p.447.

[44] J. Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448 at p.459.

Judicial Review of Administrative Action in Sri Lanka

In Sri Lanka, judicial review of administrative action is exercisable broadly on two sets of criteria:

[1] Writ Jurisdiction under Articles 140 & 154 [P] [4] [b] of the Constitution;

[2] Fundamental Rights Jurisdiction under the procedure laid down in Article 126 read with Article 17 of the Constitution.

Writ Jurisdiction

Article 140 of the Constitution provides that:

> ***"Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo. mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person: Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal."***

[Emphasis added]

Article 154 [P] [4] [b] of the Constitution provides that:

> ***"Every such High Court shall have jurisdiction to issue, according to law***
>
> > ***[b] order in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against any person exercising, within the Province, any power under***
> >
> > ***(i) any law; or***
> >
> > ***(ii) any statutes made by the Provincial Council established for that Province."***

[Emphasis added]

Thus, Article 140 of the Constitution confers writ jurisdiction on the Court of Appeal. Article 154 P] [4] [b] of the Constitution confers a limited writ jurisdiction on the Provincial High Courts. In *Weragama v. Eksath Lanka Kamkaru Samithiya and Others*,[45] the Supreme Court held that the writ jurisdiction of the Provincial High Court is confined only to circumstances involving exercise of powers under a law or a

[45] **[1994] 1 SLR 293.**

statute covered by a matter in the Provincial Council List of the Constitution.

It is pertinent to note that, even though the emergence of the writ jurisdiction has been viewed essentially as a development of the English common law, the Constitution of Sri Lanka, in the present day, explicitly recognises the same. In this regard Dr. Jayantha de Almeida Gunaratne observes that:[46]

> ***"Given the historical and constitutional ties Sri Lanka has had with England, our Appellate Courts have proceeded on the basis of similar thinking. Both before and after Independence, our Appellate Courts have held that, writs of Certiorari, Mandamus and Prohibition are issued according to English Law. Even after the country acquired Republican status in 1972 with the promulgation of the first Republican Constitution followed by the second Republican Constitution in 1978 both the Court of Appeal and the Supreme Court have taken a similar stance.***
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> ***Although, where appropriate, being guided by English precedents bearing persuasive value cannot be faulted, departure from English precedents may also be warranted, taking in to consideration the significance of the Constitution of Sri Lanka***

[46] **J. de. A. Gunaratna, "New Vistas for Judicial Review in the Sphere of Employment and Other Contractual Relationships" [2005] Sri Lanka LCL Rev. 3.**

[and relevant provisions contained therein] where sovereignty resides in people".[47]

[Emphasis added]

The writ jurisdiction in Sri Lanka is a constitutional remedy. Constitution being the supreme law of the land, the provisions of the Constitution will prevail over any other ordinary law. In *Atapattu v. Peoples Bank*,[48] His Lordship Justice Mark Fernando observed that:

"*While generally a Constitutional provision, being the higher norm, must prevail over statutory provision, there are some constitutional provisions which enable pre-Constitution written law to continue to apply. The first is Article 16(1), which is inapplicable here, because that deals only with inconsistency with fundamental rights. The second is Article 168(1), which provides:*

"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the Constitution, shall, mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force."[49]

[Emphasis added]

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[47] **J. de. A. Gunaratna, "New Vistas for Judicial Review in the Sphere of Employment and Other Contractual Relationships" [2005] Sri Lanka LCL Rev. at pp.3-4.**

[48] **[1997] 1 SLR 208.**

[49] **[1997] 1 SLR 208 at 221.**

However, His Lordship concluded that where there is a conflict between an ouster clause and Article 140 of the Constitution, the latter must prevail over the former.

> ***"Articles 17 and 126 constitute "express provision", because they directly confer jurisdiction; although they make no specific mention of the ouster clause in section 8, the language used is broad enough to confer an unfettered jurisdiction. The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause.***
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> ***But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it [see also Jailabdeen v. Danina Umma (1962) 64 N.L.R. 419]. But no such***

presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws, which are kept alive by Article 168(1)". [50]

[Emphasis added]

Similarly in *Sirisena Cooray v. Tissa Dias Bandaranaike*,[51] the Supreme Court observed that the writ jurisdiction of the Superior Courts conferred by the Constitution cannot be restricted by provisions of ordinary legislation containing ouster clauses and that the writ jurisdiction conferred by Article 140 is unfettered.

Fundamental Rights Jurisdiction

Judicial review of administrative action can also take place by means of fundamental rights applications under the Constitution. Article 126 of the Constitution read together with Article 17 entitles a person to invoke the jurisdiction of the Supreme Court in respect of infringement or imminent infringement of fundamental rights enshrined in Chapter III of the Constitution, if such infringement or

[50] [1997] 1 SLR 208 at 222-223.

[51] [1999] 1 SLR 1.

imminent infringement has occurred as a result of executive or administrative action.

It is pertinent to note that Sri Lankan Courts have interchangeably used principles in Administrative law jurisprudence in fundamental rights jurisprudence, which has substantially enriched the scope of judicial review in Sri Lanka. This is implicit in the observation of the Supreme Court in *W. A. C. Perera v. Prof. Daya Edrisinghe*,[52] that:

> ***"The fact that by entrenching the fundamental rights in the Constitution the scope of the writs has become enlarged is implicit in Article 126(3), which recognises that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right."*** **[53]**

[Emphasis added]

Dr. Gunaratna states that the aforesaid judicial pronouncement must be regarded as a major jurisprudential advance, in that, it has brought into focus the significance of the phrase "orders in the nature of writs" in Article 140 of the Constitution, in the context of a Constitution that vests sovereignty in the people as opposed to "prerogative writs" known to English law.[54] It has also signified a

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[52] [1995] 1 SLR 148.

[53] [1995] 1 SLR 148 at 156.

[54] J. de. A. Gunaratna, "Judicial Response to the Concept of Sovereign Power of the People" in S. Marsoof and N. Wigneswaran [Eds.], *In Pursuit of Justice, Corde Et Amino With Heart and Soul, A Collection of Legal Essays in Memory of K. C. Kamalasabayson, P. C.*, Colombo: Kamalasabayson Foundation, 2008 at p.204.

welcome departure from the traditional vires based judicial review of administrative action to a right based system of review.[55]

In *Heather Mundy v. Central Environmental Authority and Others*,[56]His Lordship Justice Mark Fernando observed that:

> ***"The jurisdiction conferred by Article 140, however, is not confined to "prerogative" writs, or "extraordinary remedies", but extends - "subject to the provisions of the Constitution" - to "orders in the nature of" writs of Certiorari, etc. Taken in the context of our Constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power: mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents.*** **[57]**
>
> **[Emphasis added]**

His Lordship Justice Fernando further remarked that the Supreme Court in Sri Lanka itself has long recognized and applied the "public trust" doctrine which proclaims that powers vested in public authorities are not absolute or unfettered, but are held in trust for the public, to be exercised for the purposes for which they have been

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[55] S. Marsoof, "The Expanding Canvass of Judicial Review" [2005] XI BALJ 18.

[56] SC Appeal 58/2003, SC Minutes of 20th January 2004.

[57] Ibid.

conferred, and that their exercise is subject to judicial review by reference to those purposes.[58] His Lordship also noted that the executive power in Sri Lanka is necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. Therefore, administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable.

As His Lordship has observed, the powers of review and relief of the Supreme Court in Sri Lanka under its writ jurisdiction would not be confined to the old "prerogative" writs as in the case of English Courts. The Constitutional principles recognised by the Supreme Court of Sri Lanka such as, the 'public trust' doctrine together with the provisions in the Constitution relating to fundamental rights and the jurisdiction of the Supreme Court in relation to violations of fundamental rights, have shrunk the area of administrative discretion and immunity, and have correspondingly expanded the nature and scope of the public duties amenable to Mandamus and the categories of wrongful acts and decisions subject to Certiorari and Prohibition, as well as the scope of judicial review and relief.[59]

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[58] *de Silva v Atukorale* [1993] 1 SLR 283 at 296-297, *Jayawardene v Wijayatilake* [2001] 1 SLR 132 at 149 & 159 & *Bandara v Premachandra* [1994] 1 SLR 301 at 312.

[59] *Heather Mundy v. Central Environmental Authority and Others* SC Appeal 58/2003, SC Minutes of 20th January 2004.

Conclusion

Judicial review, at fundamental level, is concerned with public accountability. It seeks to ensure that public power is exercised according to certain well-established norms and principles. The modern ultra vires doctrine caters to this requirement.

It is also equally important that judicial standards do not become a fetter on progressive administrative decision-making. As Lord Scarman once cautioned: [60]

> **"*Judicial review is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system on their exercise of this beneficent power*".[61]**
>
> **[Emphasis added]**

Abandonment of the ultra vires doctrine would give the judges more flexibility and freedom in using their judicial discretion. In fact, it is the said judicial flexibility and freedom that is used by advocates in support of resorting to the common law model of judicial review. However, it needs to be noted that in a constitutional democracy, the rationale that administrative discretion should never be unfettered,

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[60] See, *R.* v. Secretary *of State for the Environment, ex. p.* Nottinghamshire County Council [1986] 1 AC 240.

[61] *R.* v. Secretary *of State for the Environment, ex. p.* Nottinghamshire County Council [1986] 1 AC 240 at 250-251.

should equally be applicable to judicial discretion, as well. As Wade has very correctly pointed out:

> **"*A citizen is entitled to live under the rule of law and not under the rule of discretion.*"[62]**
>
> **[Emphasis added]**

The modern ultra vires doctrine could be perceived as a mechanism that seeks to maintain a delicate balance between retaining judicial discretion and accountability at the same time. The doctrine employs established norms and principles of good administration as the yardstick of judicial review. This would undoubtedly confer discretion on judges as to determine what are the norms and principles of good administration. Yet, such discretion would always be controlled by the generally accepted standards.

In Sri Lanka the basis of judicial review and the nature of administrative remedies available have been constitutionally recognised. Thus, the writ jurisdiction conferred on the superior courts cannot be considered as a prerogative remedy anymore. The Supreme Court has in many cases recognised ensuring the rule of law as a fundamental requirement of the Constitution. Moreover, the scope of judicial review has largely been enlarged owing to the fundamental rights jurisdiction of the Supreme Court and the link

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

created by Article 126 (3) of the Constitution, between the writ jurisdiction of the Court of Appeal and the fundamental rights jurisdiction of the Supreme Court. Therefore, a tide of departure from the traditional vires based judicial review of administrative action to a right based system of review is evident in Sri Lanka, especially after the promulgation of the present Constitution.