CHAPTER-2

HISTORICAL BACKGROUND OF THE DOCTRINE AND ITS APPLICABILITY

1. HISTORICAL BACKGROUND

A. IN ENGLAND

The history and background of the doctrine of ultra vires in England can be studied in two different parts.

I. Before 1855 and
II. After 1855

I. HISTORY AND BACKGROUND OF THE DOCTRINE BEFORE 1855

a. CORPORATIONS IN ANCIENT TIMES

Corporations as such were not unknown to Ancient times in England and India also was no exception to this as is clear from Kautilya’s Arthashastra.

“Regulations concerning trade and industry in the Arthashastra have a surprisingly modern look. The trade and industry of the period were characterized by a highly developed organization. The institution called ‘sreni’ was a corporation of men following the same trade, art, or craft and resembled the guilds of Medieval Europe. Almost every important industry had its guild, which laid down rules and regulations for the conduct of members, with a view to safeguarding their interests. These rule and regulations were recognized by the law of the land. Each guild had a definite constitution with a President or a Head man and a small Executive Council. Some times the guilds attained great power and prestige and in all cases the head of the guild was an important patronage in court\(^\text{39}\). The guild some times maintained armies and helped the King in time of need, thought at certain occasions there were quarrels and fights between different guilds which taxed the power of authority to its utmost. One of the most important of these guilds was to serve as local banks. People kept deposits of money with them with a direction that the interest accruing there from was to be devoted to specific

39 Majumdar R.C. on Ancient India 1977 Ed. at Page 215-216 Cited from Book and Page at infra Note 40 page 125
purposes, every year, so long as the sun and moon endure. This is the best proof of the efficient organization of these bodies, for people would hardly trust them with permanent endowments if they were not satisfied with their working. Sometimes the guilds proved to be centers of learning and culture, and, on the whole, they were remarkable institutions of ancient India.\(^40\)

There were also other types of corporate organizations besides guilds. Trade was carried on joint-stock principles; there were Traders league and sometimes we hear even of ‘Corner or Trust’, viz. the Union of Traders with a view to cause rise and fall in the value of articles and make profits cent per cent.\(^41\)

This advance and prosperity was the very undoing by way of successive invasion and occupation of India and the ruthless strafing of its institutions by foreign hordes including the saga of the East India Company, till independence. If one concedes that there is visible progress in five and a half decades post-independence, it is a digitized bit of what was lost in two millennia of history of the ravaged country caught up as it was in the strange-hold of alternating alien and woefully divided and internecine plunders, which should inspire the younger generations to put forth their thrust with no stops for the advancement of our country to make it the promised land of their dreams.\(^42\)

All company legislation in India is more or less a close re-enactment of the English Acts, extensively adopting the very language, first on account of the British occupation of India, and secondly, their introduction into India both the Company and partnership firm modes of business by the Acts of 1850 and 1932, respectively, on their familiar models, together with big chunks of their Anglo-Saxon jurisprudence as well as English as the official language. Even after independence, it has not been possible to break free nor was it felt needed. Therefore the English connection in our Company law is obvious. The development of company as an instrument of business, economic and colonial power in UK extended over centuries of strife bound up with that country’s political economy quite unconnected with our country’s fortunes except the advent of East India Company, we should nevertheless have an idea of its outline,

\(^{40}\) Taxmann’s Company law by Krishnamurti D.S.R 2006 Ed. Page 125
\(^{41}\) Supra Note 39 ibid
\(^{42}\) Supra Note 40 Page 126
and, particularly the meaning of certain obsolete forms of the modern company’s earlier shapes as their names still figure in company law context, and it goes to help our fuller understanding of its nature.\textsuperscript{43}

As we know that the doctrine of \textit{ultra vires} is a judge made law and has been developed by the courts of law and its effect could be observed in the application, because as and when any matter of dispute came before the court when the court had given its own verdict in each case and did not allow any violation of the doctrine in the hands of those who used to run such organizations with whatever name these were called. Basically these groups were not given the proper names of associations etc. From the time immemorial these bodies, groups and the so called associations were treated like a natural person under the flag of common law domain. However, during that period as and when any corporation was created by the Charter or by statute, it was given certain powers for the purpose of attainment of their objects as per the activities which were undertaken by these corporations. Although there was no question of defining the purpose for which the company is created in the beginning. But still certain corporation who were either created by Charter or by Statute went outside the sphere of their working areas and adopted certain activities which were totally foreign to the main area of work, than certainly the need for defining the purpose was felt and the supervision by the common law available for the same. They imposed the limitation on the corporation to make their own buy-laws to effectuate such purposes. During that period the corporations were simply the old Borough committees, which were incorporated and the common law supervised the law administered in Borough and it pronounced the reasonableness of the buy-laws administered by these bodies. The idea that a company cannot act beyond the power was in existence in 1481, when BRAIN, C. J. gave the following dictum –

“If the King grants to men of Islington that they shall be discharged of toll, that is a good for this purpose, but it will not give them power to purchase etc”.\textsuperscript{44} Similarly in the year 1583, it was said that “If the Queen at the day would grant land by her Charter to the good men of Islington, without saying, to have to them

\textsuperscript{43} Ibid page 127
\textsuperscript{44} Holds-worth, A History of English Law Vol. IX, 49 (1926)
their heirs and successors sending a rent, this is a good corporation for ever to this intent alone and not to any other". 45

Further there is much contribution of C. J. HOLT, in favor of this doctrine of *ultra vires* when he said in 1700, “the corporation having power to make buy-laws for the well governing of the city, that ought to be the touchstone, by which their buy-laws ought to be tried” 46

Thus it is clear that during this period. The court was laying stress on the question whether their buy-laws came within the scope of these powers granted by the charter. In the 18th century both the chancery and common law courts have held that if the corporation has a power to make buy-laws granted by its charter, it could only make buy-laws granted by its charter, it could only make them in conformity with the charter. Prof. Holds-worth also holds the same when he says “We can say therefore, that a corporation hold their power and capacities subjects to what, in later law will be known as the doctrine of *ultra vires*. The germs both of law as to a corporation and of the supplementing doctrine of *ultra vires* have been implicit in the law from an early period”. 47

According to Gower 48, the early case of SUTTON’S hospital 49 has generally been taken to establish that chartered corporation has all the power of natural person in so far as an artificial entity is physically incapable of exercising them. If it misuses its power by exceeding the objects of the charter, it may be that proceeding in the nature of *Quo-warranto* could be taken to restrain it or in the nature of *scire facias* to forfeit the charter, but in the meantime its action will be fully effective. 50

In short, the *ultra vires* doctrine which applies to all corporations of the latter type, does not apply to chartered corporation. It can be followed from the above observation that chartered companies were free to do whatever they liked. There was no check and the *ultra vires* doctrine had no application to the chartered companies. According to this view, the limitation on the power and capacities of

46 Ibid
47 Supra Note 40 ibid
48 Pound Roscoe The Philosophy of Law Initial Ed.1954 Yale Uni. (Revised Ed. 1964) 47
49 (1613) 10 Co. Rep 1 23 Ca
50 Brown L J in Baroness Wen Lock V River Dee Co. (1883) 36 Ch. 674 n CA at 685n
the corporation were there from the time immemorial. As soon as a corporation is created by the charter, it is endowed with certain power for the attainment of its purpose. Although a charter could not derogate from the corporation’s plenary capacity with which the common law endowed the corporation, yet the King could impose conditions upon such recognition by limiting the objects of the corporation. And if these corporations acted beyond their objects, then charter could be forfeited. This authority of the Crown was actually applied and the charters of some of the companies were forfeited in 1720.\(^\text{51}\)

Other view is expressed by Prof. Holds-worth, and he is of the opinion that the corporation created by a Royal Charter cannot go beyond their objects. Accordingly, he observed “It followed there from that though a corporation has a general power of contracting and dealing with the property like a natural person, which cannot be restrained by Royal Charter, yet the fact that it is created for certain purposes, will limit its general power and capacities by avoiding acts done which are not in furtherance of those purposes”.\(^\text{52}\)

According to Percy T. Carden, “The charter may contain words modifying or excluding the common law power and if it does, such words are valid and effectual, provided they do not conflict with common law rules; words which do not conflict with common law are, but an ordinance and not binding in law save in so far they are ground for proceeding by \textit{scire facias}.\(^\text{53}\)

Although, there is difference between a statutory company and an association incorporated by charter, it does not follow that member of a chartered society cannot take legal proceedings for the purpose of preventing the society or its governing body from doing acts outside the purpose authorized by the charter which may lead to destruction of the corporation by the forfeiture of its Charter.

\(^{51}\) Ibid
\(^{52}\) Ibid
\(^{53}\) Carden, T. Percy- Limitation on Power of Common Law Corporation 26 LQR 325 (1910)
b. INCORPORATION BY ROYAL CHARTER

The issue of Royal Charter or the Letters Patent was equal to incorporation of the guild or company that amounted to the conferment of the personality of a body corporate. It also implied the conferment of the power of governance of the foreign lands in which the chartered companies established their bases acquiring the extent of land by any means, with the company being taken as a person in the eyes of the law separate and distinct from its members comprising it, endowed with perpetual succession, and importantly, the members being not liable to the company’s debts, unlike the partners who were always liable in full in partnerships. In this category there were some non-trading companies too like the Law Society and the Institute of Chartered Accountants, familiar to us.54

c. ENACTMENT AND REPEAL OF BUBBLE ACT

This phase continued from 1719-1720 and ended with repealing of the Bubble Act in the year 1825, when the South Sea Company launched its scheme, sanctioned by the Parliament, in a do or die tie with the Bank of England, another incorporated corporation got up by the Parliament in buying up the National Debts Notes of about 31 million sterling from the public at higher price in exchange for its share scripts, on the advertised proposition of it raising huge monies against the security of the interest bearing State Loans to be used for its trade. However, there was no trade to carry on while it ended up with nothing left in the company’s hands in the process of keeping the Bank of England out of race, and the scheme crashed sucking several other corporations, incorporated and unincorporated, into the deluge, calling for state intervention.

The passage of the Bubble Act in the year 1720 was designed to curb the development of unincorporated companies. The Bubble Act 1720 made it a criminal offence to act as a corporate body without the sanction of an Act of parliament or a Royal Charter.55 Although the Bubble Act of 1720 was passed by the Parliament, supposedly to end the public mischief, and with the intention of prohibiting the fraudulent companies but as it emerged as a law, it was found to be an epitome of

54 Supra Note 40 Ibid, Page 128
55 Section 18 of Bubble Act
ambiguity and an exercise in futility, for it achieved nothing but contrary to the intention, it promoted formation of illegal companies which proved to be a great set back to the trade and commerce, saving the South Sea Company and allowing unincorporated partner-ships with mutedly transferable shares under a clutch of legal artifices and firmly keeping away the heralding of incorporated company inexpensively by registration for a good 100 year long, during which period another round of scams of innumerable and fraudulent unincorporated partnerships with transferable shares combined in a gathered storm by 1825, when the Government was forced to repeal the Bubble Act, because it failed to achieve its objects and was found to be the cause of it all.56

d. THE PERIOD FROM 1825 TO 1844

The English Act of 1825 which repealed the Bubble Act provided that the members of a company should be liable for debts of the company to an extent the charter might provide. It is notable that the repeal of the Bubble Act was followed by disastrous slumps. Because of the repeal of this Act, the companies were once more left free to be formed by contracts and thereby the unincorporated companies once more came into existence in huge quantity. In law an unincorporated company was treated as a partnership and was not conferred the legal personality. Consequently, an unincorporated company was not entitled to sue or be sued in its own name. Thus it was very difficult to conduct a suit by or against an unincorporated company.

Besides, the members of such companies could not limit their personal liability. These companies were large fluctuating bodies and, therefore, the persons dealing with them were unable to locate the persons responsible to discharge the liabilities of the company. Because of these defects it was felt necessary to check the formation of such companies. For this purpose, various steps were taken. The first step was enactment of the Trading Companies Act of 1834, which required the public registration of its members and gave some of the privileges of incorporation of associations without their being actually incorporated. In 1837 a new Act was passed which contained certain regulations as to the formation and conduct of the business of companies. The parliamentary committee appointed to investigate the working of the

56 Supra Note 40 Page 130
Act, found that the Act of 1837 could easily be used to form fraudulent companies because no provisions was introduced in the Act for the periodical audit of the company and for holding directors and promoters liable for fraud. As a result of the parliamentary committee report, Two Acts were passed in 1844.\textsuperscript{57}

e. TWO IMPORTANT ACTS OF 1844

The first Act of 1844 was the Joint Stock Companies Act 1844. This Act provided for the registration of companies with more than 25 members or with shares transferable without the consent of all the members. It also provided for incorporation by registration. The Act first time created the office of the ‘Registrar of Companies’ and required particulars of the companies constitution, changes there-in and annual returns to be filed with the registrar so that there would be full publicity. Limited liability, however, was still excluded. Although the company became incorporated, the personal liability of the members was preserved, but their liability was to cease three years after they had transferred their shares by registered transfer and creditor had to proceed first against the assets of the company. Members could only escape personal liability by providing in its contracts, as unincorporated companies had formerly done, that only the company’s property and the amount unpaid on its membership shares should be answerable in default. Such a provision was effective if inserted in the contract on which the plaintiff sued, but not, if it was merely contained in the company’s deed of settlement, even if the plaintiff knew of it when he contracted with the company.\textsuperscript{58}

This Act laid down that a company might be formed and incorporated on compliance with certain regulations contained in the Act and thus it did away with necessity of special application to the Crown for incorporation. Thus, after the enactment of this Act, it was possible to form companies by mere registration under the Act without Royal Charter or special Act of Parliament.\textsuperscript{59}

\textsuperscript{57} Rai Kailash On Company Law 10th Ed. 2006 Page 12
\textsuperscript{58} Taxmann’s Company Law & Practice By Majumdar A.K. 1995 Ed. Page 3
\textsuperscript{59} Supra Note 57 ibid
The second Act of the year 1844 dealt with the winding up of the companies. It also provided remedies for the abuses by directors and promoters in the formation and management of the company.  

f. THE PERIOD OF QUAKERS

In the troubled decades before the modern company took its initial shape under the Gladstone’s Act of 1845, during the 18th century to early 19th Century, the economy of England was largely in the hands of Quakers. They were dissenters from the Church of England and for that reason barred from the professions and driven in to doing business, but they and with them the island nation flourished in it particularly metal-working, consumer goods, trade with America and more importantly banking, for they were the founders of both Barclays and Lloyds of London which made the British Capital to be one of the World’s premier centre of Money Markets lasting to this day represented by LIBOR. Their business first meticulously confined to themselves in common religious belief and mutual trust took in to it gradually many others of their countrymen outside their fold. Their success as businessmen was as famous as their acknowledged absolute honesty, rigorous and careful record-keeping, fixed prices and above all transparency in preference to sharp dealing. It was in brief their clean living and adoption of honesty as the best policy in their business dealings that paid off by and by and made them known for their reliability and trust. Indeed, they shine in contrast to the present day corporate scandals bred by greed, cynicism and selfishness of the chief operatives of the companies who heaped heavy losses on shareholders, creditors and the employees, which are often taken to paint them as excesses of capitalism by some who have been overtaken by the scams to remain in despair and pessimism.  

g. GLADSTONE’S ACT 1845

A major development was the passing of the Gladstone’s Companies Clauses Consolidation Act in 1845, which for the first time, set out the four legs of registered companies:

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60 Ibid
61 Supra Note 40 Page 126
(a) A minimum of 25 members holding 10 pound shares with 20% paid-up;
(b) 75% of nominal capital to be subscribed;
(c) The word ‘Limited’ added to the company’s name and
(d) The Board of trade empowered to appoint the company’s auditors;

This truly first companies Act was passed in the midst of the railway companies shares boom and repeated bank frauds in UK giving rise to the passing of three Winding Ups Acts in 1846, 1848 and 1849 for winding up of the failed companies.

It is pertinent to mention here that in India the Companies Act 1850 was the true copy of the Act of 1845 of UK.62

To conclude the historical background of the doctrine before 1855, it is pertinent to mention that nevertheless, in the 19th century the doctrine in this first sense was introduced in England and Sri Lanka in the year 1840 in colman V Eastern County Railway company63 and in the year 1851 in the case of East Anglian Railway Company V Eastern Counties Railway Company64 and there after to companies registered under the companies legislation. However, even if a registered company is acting within its capacity, a second and further question can arise, which is whether those who purported to act on its behalf were authorized to do so in accordance with the normal agency principle. Although the basis of the law here is the general law of agency, those rules applied to companies in somewhat special way.

II. HISTORY AND BACKGROUND AFTER 1855

a. LIMITED LIABILITY ACT

It was only in the year 1855 when limited liability Act was introduced in England, that for the first time there was a wide spread need for application of a strict rule of ultra vires in the interest of creditors. With the introduction the limited liability, it was deemed proper, that the use of the shareholders and the creditors funds with the company should be only for certain specified objects. The elaboration of such a rule was facilitated by the Act of 1856, which specified that a company should include an

62 Supra Note 40 Page 131
63 10 Beav 1.16, 16 LJ, Ch. 73
64 11 C.B. 775 21 LJ C.P.23
objects clause within its memorandum that would define the contractual capacity of the company.  

The doctrine was not paid due attention up to the year 1855. The reason appears to be this that doctrine was not felt necessary to protect the investors and creditors. The companies prior to 1855 were usually were in the nature of enlarged partnership and these were governed by the rule of partnership. Under the law of partnership, the fundamental changes in the business of partnership cannot be made without the consent of all the partners and also the act of one partner cannot be binding on the other partners if the act is found outside his actual or apparent authority, but it can always be ratified by all the partners. These rules of partnership were considered sufficient to protect the investors. On account of the unlimited liability of the members, the creditors also felt themselves protected and did not require any other device for their protection. Beside this, during early days the doctrine had no philosophical support.  

However insofar as the Act failed to stipulate any method by which the alteration of the objects clause could be achieved, the status of the clause and its effect on contractual capacity was unclear. For example, the omission of any alteration power in relation to the objects clause could, on the one hand, have been indicative of the legislature’s desire to prohibit any alteration to a company’s object clause subsequent to the company’s registration. Alternatively by failing to expressly state that the alteration of an object clause (following the consent of the company’s membership) in which case, any attempted restriction on corporate capacity would have been seriously weakened.  

b. ENGLISH COMPANIES ACT 1862  

Fortunately such a vexing question also did not arise clearly until after the passing of company’s Act 1862 which expressly provided that, no alterations shall be made by any company in the conditions contained in memorandum of association, but with two exceptions

65 Gower, Principle of Modern Company Law 4th Ed. 1979 page 85  
66 www.slideshare.net visited on 3rd Oct 2011  
67 National Capital Law Journal 2004 page 210
1. Re-organization of share capital and
2. with the consent of board of trade, alteration of name

The position in this regard was not finally settled until 1875 when The House of Lords decided the celebrated case of *Ashbury Railway Carriage & Iron Co. V Riche*. In this case the objects of the company were to carry on the business of manufacturers of railway carriages, wagons and railway plants, and fitting etc. and business of mechanical engineers and general contractors and further to work in mine and minerals etc. The company entered in to a contract in relation to financing the construction of railway line in Belgium, with Mr. Riche. The question arose about the validity of the contract. The House of Lord held that a contract that was *ultra vires* the company’s objects was altogether void.

Lord Cairns L.C. stating “that the subscribers are to state the objects for which the proposed company is to be established and then the company comes in to existence for those objects and for those objects alone” and after referring to the words at the end of section 12 (re-enacted in an amended form in section 4 of the English Companies Act of 1948) to the effect.

That “no alteration shall be made by any company in the condition contained in its memorandum of association”

**Further proceeded as follows:**

“If that is the purpose for which the corporation is established, it is a mode of incorporation that contains in it both, which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than, that which is so specified.”

Doctrine of *ultra vires* represents a single most archaic thinking in corporate law which goes back to the mid 1800’s. *Simpson V West minister Palace Hotel* appears to be the first case on the doctrine of *ultra vires*, apparently in terms of the joint stock companies. In that case the memorandum stated:-

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68 (1875) LR 7 HL 653
69 Ibid
70 (1860) 8 HLC 721
“The objects for which the company is established are the purchase of leasehold lands, the erection, furnishing and maintenance of a hotel thereon and the carrying on the usual business of hotel and tavern therein, and the doing of all such things as are incidental or otherwise conducive to the attainment of these objects”.

While the hotel was being built, the directors agreed to let off for a few years, a large portion of the building. The House of Lords held that the letting was not *ultra vires*, as it was temporary and preliminary and conducive to the attainment of these objects”.

The decision in *Ashbury Railway Carriage co. V Riche* which has been discussed above came after the Companies Act 1862. The principles of this case were followed in *Attorney General V Great Eastern Railway* where the wordings of Lord Halsbury L.C. “those two cases constitute the law upon the subject”. (However the doctrine is today greatly diluted by section 9 of the European Communities Act, 1972, which is further enacted as section 35 of English Act 1985 and under new section 35 of 1989 Act.)

c. HISTORICAL BACKGROUND OF DOCTRINE IN SRI LANKA

Half a century ago, Sir Ivor Jenning, in one of his lecture on local government in the modern constitution stated.

“Under the British constitution as now we know it, local authorities have close relations with rest of authorities.

In the first place, they are subject to administrative jurisdiction of central government departments.

Secondly, they are subject to general legislative control by parliament.

Thirdly, they are kept within the limits of their jurisdictional proceedings in the court of law”.

The legislation power of the local authority is limited and their actions are circumscribed by statute. The only action that the local government institution can lawfully do, are those that are *intra vires* a properly construed statute. Hence it could

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71 (1990) 1 comp LJ page 34  
72 (1875) LR 7 HL 653  
73 (1880) 5 APP Case 473 H.L  
74 Sir Ivor Jennings, Local Govt. Modern Constitution, (Charles Knight & Co. Ltd.) 1931 page 1
be argued that as the construction of the statute, are the courts, they have the responsibility to prohibit certain local actions or provide redress to those who claim to have been affected by *ultra vires* decisions.  

Discussing the judicial interpretations of the legal limits of policy discretion in local authorities, Keith Davies points out that the *ultra vires* principle plays a main role in central-local relations.  

**According to his view**  

“If the application of (doctrine of *ultra vires*) becomes too lax, local authority will enjoy a wider power than parliament intended, they should have and if it were relaxed altogether than freedom of action would become absolute and then exercise of power would be quiet arbitrary. If on the other hand, the application becomes too strict, local authorities will enjoy a narrow power than parliament intended they should have, and ultimately they would exercise no independent power at all. Then the local government would be transformed in to the local arms of central govt. administration if it did not whither away completely.”  

Thus it could be said that doctrine of *ultra vires* is the basis of judicial control. Accordingly, the judiciary could be vitally important, especially after the devolution of the government in which a number of additional important functions would be in the hands of local authorities. Hence it could be essential to safeguard the interest of local authorities from unnecessary interference by the central government. As Lord Dennings, M.R. pointed out:  

“Local self government is such an important part of our constitution that the courts should be vigilant to see this power of the central government is not exceeded or misused.”  

Accordingly, an attempt is made in the article to analyze the development is the role of doctrine of *ultra vires* in central local relations. For this purpose it is proposed to examine first the legal statute of local authorities as corporations, followed by an examination of the applications of *ultra vires* and the development in this respect.  

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75 Michael Elliott, *The Role of Law in Central- Local Relations* SSR 1981 Page 31  
77 Ibid  
78 R.V. Secretary for Environment  *Exparte Northwich City Council* 1982 Q.B. 808 page 824
THE LEGAL STATUS OF LOCAL AUTHORITIES

The municipal council ordinance states:

Every municipal council shall be a corporation with perpetual succession and a common seal and shall have powers, subject to the ordinance, to acquire, hold and sell property and may sue and be sued by such name and designation as may be assigned to it under the ordinance.79

The urban councils, town councils, village councils and the development councils are established by similar provisions under the respective ordinances.80

This indicates that the local authorities in Sri Lanka are corporate bodies with the common characteristics of corporation which also could be identified as a common feature of the legal status even of the English local authorities.81 However it should be noted that prior to the enactment of the Local Government Act of 1972 in England, the Boroughs were creations of the Royal prerogative and not of statute.82

The chartered corporations which were created under the Royal prerogative were not bound by doctrine of ultra vires.83

Nevertheless this difference between statutory and chartered corporation is not important in England and now statutory corporations bound by the doctrine of ultra vires.

According to Kyd, a corporation is

“A collection of many individuals entered in to one body under a special denomination having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual particularly of taking and granting property of contracting obligations of suing and being sued”.

Therefore, it is apparent that the legal status of local authorities as corporations, have granted the opportunity of questioning any of the decisions. “The

79 Municipal council Ordinance section 34(1)
80 Urban council ordinance, sec 31, Town council Ordinance, sec 30, Village Council ord. sec 28, Development council ord. sec 2 (2) a
81 Cross C.A., Principles of Local Govt. laws 6th Ed. 1981 (By Sweet & Maxwell) page 2
82 Ibid
83 Ibid
features of local government law” said Buxton, “Which overshadows all others in that local authority are allowed to do only what the law permits:

Whenever a council wishes to take action or more importantly to spend money in the name of local authority, it must be able to produce statutory justification for its actions. Historically, this limitation springs from the legal status of a local authority as a corporation”. 84

Moreover it is also to be noted that the principle is applied on a similar basis in Sri Lanka, for example in Carimjee Jafferjee & Others V The Municipal Council of Colombo, a case decided as early as in 1904, where a rate-payer of the council challenged a decision of the municipal council.

Layard C.J. stated

“I have no doubt if the municipal corporation or any other similar body were to do or attempt to do any act in excess of the powers as conferred, the municipal corporation ordinance from which they derive existence and such acts are injurious to the interest of any rate-payer or tax payer, such tax-payer or rate-payer has the right to the protection of local courts by injunction or other appropriate relief”. 86

Consequently it is significant that according to the Municipal, Urban, Town and Village Councils ordinances and development council Act, a statutory body cannot act outside the ambit of the statute which created it. 87

The power of the statutory body as to their action, were clearly emphasized by Lord Watson in his speech in Baroness Wenlock V River Dec Co. 88

“Whenever a corporation is created by Act of Parliament with reference to the purpose of the act, and solely with a view to carrying these purposes in to execution, I am of the opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by the implications from its provisions.” 89

84 Buxton R. Local Govt. 2nd Ed. Penguin Education 1973 Page 98
85 (1904) NLR Vol. VIII page 292
86 Ibid
87 Suryawansa V The Local Govt. Service Commission 1947, 48 N.L.R. 433
88 (1885) 10 Appeal Cases 354
89 Ibid at page 362
Accordingly, as action certainly lies against a public incorporated body, if such corporation acts dishonestly, corruptly, with improper motives or acts outside the authority or power given by the statute which created the corporation.\(^9\) On such an occasion the courts may decide that the particular action is also *ultra vires* the statutory provisions of the respective ordinance. Hence, as has been pointed out already it could be said that the doctrine of *ultra vires* is the basis of the role of judiciary in central-local relations.

d. THE REDCLIFFE-MAUD COMMITTEE REPORT ON THE DOCTRINE OF ULTRA VIRES IN SRI LANKA

The Red-Cliff-Maud committee in its report stated:-

“Local authorities are dependent on Parliament for the basic legal powers to tax that is to raise money by the rates and to interfere with individual and public rights. In this country freedom is limited by the doctrine of *ultra vires*; is that they must be able to point to statutory sanction in general enabling legislation in special legislation or in private acts for every action taken by them. It is not sufficient that a course of action should seem to a local authority to be in public interest, it cannot embark on it without the authority of an act of parliament.\(^9\)

This reveals that the local authorities are liable to direction of special statutory authority for their each and every act, through the application of doctrine of *ultra vires*, and that at any time the doctrine of *ultra vires* may be invoked against the local authority.\(^9\)

However, as pointed out by Lord Selborne in *Attorney General V Great Western Railway*.\(^9\)

“It appears to me to be important that the doctrine of *ultra vires*….. should be maintained. But I agree…. that this doctrine ought to be reasonably and not unreasonably misunderstood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislation has authorized

\(^9\) Ibid page 433
\(^9\) Ibid
\(^9\) (1880) 5 Appeal Cases 473
ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*".  

Accordingly it could be argued that the constructionists of the statute are courts; therefore, the courts will on occasion be able to prohibit certain local action or provide redress to those who claim to have affected by *ultra vires* decisions.  

Thus it could be said that doctrine of *ultra vires* is the basis of judicial control. Accordingly, the judiciary could be vitally important, especially after a devolution of the government in which a number of additional important functions would be in the hands of local authorities. Hence it could be essential to safeguard the interest of local authorities from unnecessary interference by the Central Government.

e. **HISTORICAL BACKGROUND OF THE DOCTRINE OF ULTRA VIRES TRACED THROUGH DECIDED CASES**  

The early case of *Sutton’s hospital* is generally taken to have established that it also has no application to charted corporations despite the fact that they do have a legal personality distinct from that of their members.  

Thereafter the historic case of *The Director, & C., of the Ashbury Railway Carriage and Iron Company (Limited) V Hector Riche* was therefore in direct contravention of the provisions of the Company Act 1862.  

The doctrine of *ultra vires* has been developed to protect the investors and creditors of the company. This doctrine prevents the company to employ the money of the investors for a purpose other than those stated in the objects clause of its memorandum. Thus the investors and the company may be assured by this rule that their investment will not be employed for the objects and activities which they did not have in contemplation at the time of investing their money in the company. It enables the investors to know the objects in which their money is to be employed. This doctrine protects the creditors of the company by ensuring them that the funds of the company to which they must look for payment are not dissipated in unauthorized

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94 Ibid page 478  
95 Michael Elliot, op. cit p 63  
96 (1612) 10 co. Rep.la.23a  
97 British South Africa Co. V De Beers 1910 ,1 Ch 354  
98 (1874-75) L.R. 7 H.L. 653 Downloaded from http://Doc-00-94-docs viewer visited on 5th august 2011
activities. The wrongful application of the company’s assets may result in the insolvency of the company, a situation when the creditors of the company cannot be paid. This doctrine prevents the wrongful application of the company’s assets likely to result in the insolvency of the company and thereby protect the creditors. Beside this the doctrine of ultra vires prevents directors from departing from the objects for which the company has been formed.99

The historical development of the doctrine has been approved the decision of the Court of Appeal in Bell House Ltd V City Wall Properties Ltd.100 In this case a company’s objects clause authorized to carry on such trade or business which in the opinion of board of directors could be carried out advantageously with the existing business of the company. The facts of the case were as under-

The plaintiff company’s principal business was the acquisition of vacant sites and the erection thereon housing estates. But the object clause of the company included power “To carry on any other trade or business whatsoever which can in the opinion of board of directors, be advantageously carried on by the companies, in connection with or as ancillary to any of the above business or the general business of the company”. In the course of transacting the businesses, the company acquired knowledge of source of finance for property development and introduced the financier to the defendant company. Company claimed the agreed fee 20,000 pound for its services. Defendant contested that claim on the ground that the contract was ultra vires the plaintiff company and therefore void.

ISSUE INVOLVED
Whether the contract is ultra vires the company?

DECISION

Although the object clause stated above comes close to saying that the company could carry on any business it chooses, but the court held that the clause was effective to empower the company to undertake any business which the directors bona-fide thought, could be advantageously carried on as an adjunct to its other business. The court held that since the directors honestly believed that the transaction

100 (1966), 2 Q.B. 656 C.A
could be advantageously carried on as ancillary to the company’s main objects, it was not *ultra vires*. The defendant company was held liable to pay the required amount.\(^{101}\)

The court held that since the directors honestly believed that the transaction could be advantageously carried on as ancillary to the company’s main objects, it was not *ultra vires*. The decision has been welcomed as a progressive development in the direction of the doctrine. Commenting on this case, P.V.B. says “it would tend to reduce the prolixity of modern memoranda of association, and to cure the injustice to third parties who enter in to contract, with companies which are afterwards discovered to be *ultra vires*, both these objectives were favored by JANKIN COMMITTEE”.\(^{102}\)

It is submitted that this approach is not very sound. The formula in the *Bell House Case* allows the directors to carry on any business which according to them can be carried on with the main business. The directors have been given too much discretionary powers and it is not necessary that their good faith will keep in view the wishes of the shareholders.\(^ {103}\) But the doctrine of *ultra vires* has great powers of resilience and it seems that those who hailed the *Bell House case* as the death of the doctrine may have been premature.\(^ {104}\)

In *Re Introduction Ltd*\(^ {105}\), a bank lent money to a company on the security of debentures, knowing that the money was for its main business, pig breeding, and that its stated objects did not include that business or any thing remotely similar. The objects did however, include a sub-clause empowering the company “to borrow or raise money in such manner as the company shall think fit”. A final paragraph in common form also stated that each sub-clause should be “construed independently and the objects there set out were each independent objects” of the company. The company borrowed money from its bank, and the question was whether the contract was *ultra vires*. Buckley J. refused to accept the sub-clause as separate object, and thus the bank loan was held *ultra vires* and the debentures were considered void. He held that it was impossible to treat the power to borrow money as an independent object, despite the provision to this effect in the memorandum, since this power could

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101 Ibid
102 Cochin Law Review (1979) page 309
103 The Bell House case has been followed by British Columbia Court of Appeal in H & H Logging CO. Ltd. V Random Services Corporation Ltd. (1967) 63 DLR (20) 6
104 Astiyah P.S , Annual Survey of Commonwealth Law , 532 (1968)
105 (1969) 1 All E.R. 887
not, in its nature be treated as independent of the company’s objects. Borrowing per se could not be an object and could therefore only be incidental to other objects, and since the only object for which the money was borrowed was the pig breeding business, the contract was held to be ultra vires.\(^\text{106}\)

It was held that this contract, being of nature not included in the memorandum of association, was ultra vires not only of the directors but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. The shareholders might have passed a resolution sanctioning the release, altering the terms in the articles of association upon which release might be granted. If they had sanctioned what had been done without the formality of the resolution, that would have been perfectly sufficient. Thus the contract entered into by the company was not a voidable contract merely, but being in violation of the prohibition contained in the company’s Act, was absolutely void. It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the almost it would have amounted to a sanction by the shareholders to the act of directors, which if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association.

Next to Ashbury’s case is Eley V The Positive Government Security Life Assurance Company Ltd\(^\text{107}\), it was held in this case that the articles of association were a matter between the shareholders inter-se, or the shareholders and the directors, and did not create any contract between the plaintiff and the company and article is either a stipulation which would bind the members, or else a mandate on the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff.

The application of doctrine of ultra vires was made applicable to the than existing Municipal corporations as early as in the year of 1855 and to non sovereign legislature in 1861\(^\text{108}\), but few authorities are having different opinions, for example

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106 Supra note 102 page 309-310
107 (1875-76) L.R. 1 Ex. D. 88
108 Osborne V Amalgamated Society of Railway Servants 1910, AC 87
Lord Atkinson and Lord Halsbury make it applicable to registered unions, where as Lord Mac Naughton and Lord Haldane remarked that factum of incorporation for the purpose of application of the doctrine is not material.  

According to H.A. Street the voluntary associations, co-operative societies, industrial provident fund societies, friendly societies which also include building societies and clubs make their own by-laws and rules and regulations, and act done against those by-laws will be treated as *ultra vires*. In case of friendly societies which may be formed for any purpose, hence such societies have no power to enlarge their objects. However they may convert themselves in to companies and enlarge their objects and after incorporation be governed by the respective companies Acts.  

Hence the doctrine of *ultra vires* applies to all those corporations which are registered under the respective companies Acts of the parent country. Every Act has laid down certain conditions for its incorporation mentioning various objects in the memorandum of association beyond which it will not operate failing which the doctrine of *ultra vires* will operate. However when the company derives its existence from the Act of Sovereign (Chartered Corporation), the doctrine of *ultra vires* does not apply.  

It is pertinent to note here that after incorporation the company becomes a legal person and an entity separate from its members but does not enjoy full legal personality at par with chartered companies, however its legal personality exists only for the particular purpose of its incorporation which is defined in the objects clause and any act done beyond objects clause shall be null and void in the same manner as an act done by local authority outside its statutory authority.  

In India the Bombay High Court for the first time applied the doctrine in *Jahangir R. Modi V Shamji Ladha*. The facts of the case were that the plaintiff was the registered shareholder of 601 shares in a company of which the defendants were the directors. The object of the association, as defined in the memorandum, neither

109 Sinclair V Brougham (1914) AC 398  
110 Blyte V Birtley 1910, 1 Ch D Page 228  
111 Charlesworth on Company Law, 8th Edition 1965 page 404  
112 Sutton Hospital’s Case 1613, 10 Co-Rep. La. 239  
113 Prescott V Birmingham Corporation 1954 3 W.L.R. 990  
114 (1866-67) 4 Bombay H.C. Reports page 185 cited from Cochin University Law Review 1979 page 310
included dealing in shares nor the purchase of company’s own shares; yet the
defendants (directors) did deal in shares, and thereby incurred losses on behalf of the
company, and did purchase 1422 shares of the company. Therefore, the plaintiff
contended that the defendants should account for such unauthorized dealings and
should pay all losses there by incurred to the company.

The commercial corporations are bound by their memorandum of association
that being the charter of the company, and it was remarked by Lord Cairn that
memorandum of association is the charter of the corporation, which must be adhered
to by the company and its members.\textsuperscript{115} The doctrine of \textit{ultra vires} is constantly
invoked in the cases of Railways, water, gas and other public undertakings. These
companies are invested by the legislature with very large and arbitrary powers
derogating from private rights and it is consequently most necessary that they should
not be allowed to exceed or abuse such powers.\textsuperscript{116}

The doctrine of \textit{ultra vires} was made applicable to the local governments and
it remained the main deciding factor and principle of so many cases. The doctrine also
applies to public bodies. It was further held by this doctrine that funds sanctioned for
one particular purpose could not be utilized for another purpose. In the same way
funds sanctioned for maintenance work could not be used for construction purpose.
Any oppressive or unnecessary procedure adopted by public bodies in assessment of
rates were set aside being \textit{ultra vires}. There was no power to do the acts claimed as
within incidental powers.\textsuperscript{117}

It is well established that doctrine of \textit{ultra vires} is main product of the
company law however its prominent role is also found in Administrative law and in
Constitutional laws. This doctrine is the jurisdictional principle of the administrative
law which determines the reviewability of an administrative action. In theory the
jurisdictional principle enables the courts merely to prevent the inferior courts from
acting in access of their powers, but in reality they have increasingly entered in to the
heart of the subject matter by interfering on ground of unreasonableness, bad faith,

\textsuperscript{115} Ashbury Rly. Carriage & Iron Co. V Riche 1875 L.R. 7 HL 653
\textsuperscript{116} Ultra Vires (Encyclopedia of laws of England) by Mason Vol. 14 Page 314
\textsuperscript{117} Dundee Harbour Trustees V Nicoll (1924) A.C.530
extraneous consideration unfairness and manifest injustice etc. All these heads of challenges have been grouped together under a single principle of *ultra vires*.\(^{118}\)

**III. APPLICABILITY OF THE DOCTRINE TO CERTAIN AREAS, SUCH AS**

**a. APPLICABILITY TO LIMITED LIABILITY PARTNERSHIPS**

The doctrine typically applies to body corporate, such as limited company, a government department or to a local council so that any act done by the body corporate which is beyond its capacity to act will be considered invalid. A question arose whether the doctrine should be made applicable to LLPs. The short version LLP is used for a “Limited Liability Partnership” and it combines the advantages of both, the company and partnership in a single form of organization. In a LLP, one partner is not responsible or liable for another partner’s misconduct or negligence; this is an important difference from that of unlimited partnership. LLP is not liable for any unauthorized act done by any partner of LLP. However LLP has the following characteristics namely

(a) LLP is an artificial person  
(b) LLP is a separate legal entity  
(c) Liability of partner is limited in LLP  
(d) LLP is governed by LLP agreement  
(e) LLP is not liable for unauthorized acts of partners

Hence to protect the interest of partners, creditors and other dealing with LLP, doctrine of *ultra vires* should become applicable to LLPs. It is therefore concluded that memorandum of association is charter of the company likewise LLP agreement is the charter of LLP. Company is an artificial person and in the same way LLP is also an artificial person. All the documents filed by the company with the registrar of companies are in public view and anyone can view the document of the company, likewise the documents of LLP are also available to public for scrutiny, so as to protect the interest of creditors and persons dealing with LLP. Hence, the doctrine of *ultra vires* should be made applicable to LLPs.\(^{119}\)

\(^{118}\) Judicial control of Administrative Action in India and Pakistan- A comparative Study (1969) page 37  
\(^{119}\) http://docs google.com visited on 6th august 2011
The court held that the purchase by the directors of a joint stock company, on behalf of company, and shares in other joint stock companies, unless authorized by the memorandum, was *ultra vires*. The court further held that a joint stock company, even though it be empowered by its memorandum to deal in the shares of other companies was not therefore empowered to deal in its own shares, and a purchase by the director of the company of its own shares on behalf of the company was therefore *ultra vires*. The court was aware that the decision would cause hardship but it rightly pointed out

“If joint stock companies are to flourish, more especially in country like this, it can only be by the public feeling assured that the court of law, while refusing to interfere with the director in carrying out the objects of these associations in to full and complete activity, will prevent the application of the funds of the company to other than legitimate purposes and objects of the association.”

The doctrine of *ultra vires* does not apply to partnership. Similarly Trusts and Ecclesiastical corporations are out of the scope of the doctrine.

**b. APPLICABILITY TO LEGISLATION/DELEGATED LEGISLATION**

In determining the validity of any delegated legislation, the court applies the doctrine of *ultra vires*. The doctrine is the basic doctrine of administrative law.

The expression “*ultra vires*” literally means “beyond powers”. It is in regard to delegated legislation, simply denotes that delegation of legislative power goes beyond the scope of the express or implied limits, the limits may be found in the constitution, in the parent statute, in any other statutory provision or general principles regulating the administration. The rule thus requires that the subordinate legislation must confirm to the provisions of the statute or that the condition laid down therein, must be fulfilled.

The doctrine, simply envisages that an authority can exercise only so much power as is conferred on it, by law. Therefore, an action of the authority would be

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120 Ibid at page 198  
121 Supra Note 111 page 396  
122 Schwartz Administrative law (1976) 151  
123 State of U.P. v Renusagar AIR 1988 SC 1737
ultra vires if it falls beyond the parameters of the power conferred on it. It being ultra vires would be void.

An administrative agency is a creature of statute. The agency’s power to make rules, says Prof. Schwartz extends no further than the authority given by the relevant statutory delegation. The court would apply the doctrine of ultra vires to determine whether the challenged rules are within the power conferred.124

In Air Reduction Co. V Hickel125, a statute provided that “agencies of the Federal Government” should purchase all their major requirements of helium from the secretary of the interior and gave him power to make regulations to carry out the provision. One of the regulations promulgated by the Secretary forbade the government agencies and their contractors from purchasing their major helium requirements from any source, but the Secretary. This regulation was held invalid. The court said that the operation of the statute was limited to government agencies and Secretary could not extend its reach by including government contractors.

The doctrine of ultra vires is said to be the juristic basis of judicial review. The courts have, to a large extent, developed the subject by extending and refining this principle. The principle is said to have many ramifications, express or implied. These would be express when the limits are laid down in the statute. In that case the court’s enquiry would be confined to ascertaining that the limits are observed by the authority on which powers are conferred. The limits are implied, when they are not expressly incorporated in the statute which govern the interpretation of statute, e.g. bad faith, unreasonableness, no proper evidence etc. Such conditions are to be assumed and the courts extract these by reading between the lines.

Ultra vires may be considered as identical with “outside jurisdiction”. For an act which is ultra vires the authority is also said to be “outside the jurisdiction” of that authority. In the present context, my administrative act or order, which is ultra vires, or beyond jurisdiction is void i.e. deprived of the legal effects.126

In the context of Administrative Law, Schwartz explains the doctrine of ultra vires as follows:

124 Supra note 122 Page 151
126 Book at Supra Note 125 page 126
The jurisdictional principle is the root principle of administrative law. The statute is the source of agency authority, as well as of its limits. If an agency’s act is within the statutory limits (or *vires*), its action is valid. If it is outside then (*ultra vires*), it is invalid. No statute is needed to establish this. It is inherent in the constitutional positions of the agencies and courts.\(^{127}\)

The question of *ultra vires* is to be understood from two standpoints, i.e. substantive as well as procedural. The expression substantive connotes the extent, scope or duration of the power. While procedural refers to the circumstances in which or the manner in which the power is exercised. In the context of the subject under study, when a subordinate legislation goes beyond the scope of the authority conferred on the delegate to enact, it is known as substantive *ultra vires* and the rules are enacted without complying with the procedural requirements, it would be a case of procedural *ultra vires*. Procedural requirements may also be express or implied.

i. **SUBSTANTIVE ULTRA VIRES**

Commensurate with the doctrine of *ultra vires*, a piece of delegated legislation will be struck down because its substance infringes the parent Act or some other primary statute. Accordingly, although the local authorities are empowered to make by-laws, it could be said that, if the council purport to legislate outside the purview of the proper authority\(^{128}\) than the by-laws will consequently lack validity.

For example, according to Professor G.L. Peiris:

“One of the primary objects of the administrative law is to ensure that the administrative officials and tribunals act within the scope of their authority. If they act without authority or outside the ambit of their authority, a citizen whose rights are impaired may seek remedy in the courts. The doctrine relating to *ultra vires* however, has larger application, in that it seeks also to control the activities of bodies invested with subordinate powers of law making. For example, a local authority which is given power under a parliamentary statute to make by-laws in respect of certain matter and within certain limits may purport to legislate outside the purview of the proper


authority. In these circumstances the local authority acts in excess of its vires or authority and its acts consequently lack validity”. 129

Moreover, in England the celebrated judgment of Lord Rusell, C.J. in *Kruse V Johnson*, 130 clearly sets down the law that in no way are the courts relieved from the responsibility in questioning the validity of by-laws when they are brought in to the courts. 131

In *Kurse V Johnson*, the Kent county council claiming to act under their statutory power made the following by-laws.

“No person shall sound or sing in any public place or highway within 50 yards of any dwelling house after being required by any constable, or by an inmate of such house personally, or by his or her servant to desist.” 132

In this case it was proved that the appellant had violated this by-law by singing hymns within 50 yards of a dwelling house without taking any notice when required to desist. On behalf of the appellant it was contended that the by-law was invalid on the ground that it was unreasonable.

Lord Russel of Killowen, C.J. in a judgment of the divisional court, held that the by-law was valid, with regard to the decision, Lord Russel, C.J. pointed out:

“Section 16 of the local government Act 1888 provided that a county council shall have the same power of making by-laws in relation to their county as the council of borough have in relation to their borough. What are the checks or safeguards under which this very wide authority of making by-laws is exerciseable? The same section 23 further provides that no by-laws can be made unless two third of the whole number of the council are present, and when so made, it shall not come into force until the expiration of forty days, after a copy thereof has been fixed on the town hall; and it shall not come in to force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the secretary of the state; and if within those forty days the queen, with the advice of her privy council disallows proposed by-law or part thereof, such by-laws or such part, shall not come in to force, and the queen may

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129 Ibid
130 (1898) 2 Q.B. 91
131 Ibid at page 98
132 Ibid at page 92
with-in forty days enlarge the time within which the by-law shall not come in to force.\textsuperscript{133}

Furthermore, Lord Russel, C.J. stated that, although parliament had thought fit to delegate to representative public bodies in towns and cities and also in the counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their localities, that power is accompanied by certain safeguards.\textsuperscript{134}

As for example, Lord Russell C.J. pointed out that there must be antecedent publication of the by-laws with a view of obtaining public opinion of the locality upon it and that such by-law will not have force until after they have been forwarded to the secretary of the state.

Firstly: The Queen with the advice of her privy council, may disallow the by-law wholly or in part and may enlarge the suspensor period before it comes into operation.\textsuperscript{135}

Moreover, Lord Russell, C.J. after discussing safeguards, stated:

“I agree that the presence of these safeguards in no way relieve the court of the responsibility of inquiring in to the validity of the by-laws, when they are brought in question or in any way affects the authority of the court in the determination of their validity or invalidity.”\textsuperscript{136}

While the approach of the English courts in questioning local authority by-law remain moderate, the attitude of the Sri Lankan courts with regard to the questioning of the validity of local authority by-laws emphasizes the fact that the approach of the courts have diversified from a narrow sense of applicability to wider approach, according to section 267 of the municipal council ordinance.\textsuperscript{137}

“Every municipal council may from time to time make and when made may revoke or amend such by-law as may appear necessary for the purpose of carrying out the principles and provisions of the ordinance.”\textsuperscript{138}

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\textsuperscript{133} Ibid pp 97-98 \\
\textsuperscript{134} Ibid page 98 \\
\textsuperscript{135} Ibid \\
\textsuperscript{136} Ibid \\
\textsuperscript{137} Municipal Council Ordinance , No 29 of 1947 \\
\textsuperscript{138} Ibid section 267
\end{flushleft}
The urban councils, town councils, village councils and development council also have similar powers according to the relevant statutes.\textsuperscript{139}

Similar to English experience even in Sri Lanka, the local authorities are to follow the procedure set down in the respective ordinance, for the purpose of making by-laws. Correspondingly the municipal council ordinance provides:

“All every municipal council may from time to time make, and when made may revoke or amend such by-laws as may appear necessary for the purpose of carrying out the principles and provisions of the ordinance”.\textsuperscript{140}

Furthermore

“No by-law shall have effect until it has been approved by the minister, confirmed by the Senate and the House of representatives and notification of such confirmation is published in the Gazette. Every by-law shall upon the notification of such confirmation be as valid, and effectual as if it were here-in enacted.

The expression substantive as stated above refers to the extent, scope or range of the power delegated to the administrative authority. It denotes the limits within which the power may be conferred on the delegate. Substantive \textit{ultra vires} is the most common ground to challenge the validity of delegated legislation. It explains that the rules or orders made by the delegate must not go beyond the scope of power delegated by the Parent Act. It further requires that the delegated legislation must not be inconsistent with the provisions of the delegating statute, to be valid.

The Supreme Court of India in \textit{Additional District Magistrate (Revenue) V Sri Ram}\textsuperscript{141}, explaining the test of Substantive \textit{ultra vires} observed:

It is well recognized principle of interpretation of a statute that confinement of rule making power by an Act does not enable the rule making authority to make rules which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant there-to.

In the instant case, as a result of the amendment made by the government in rule 49, rule 63 of the Delhi Land Revenue Rules 1962 in the exercise of power conferred under the Delhi Land Revenue Act 1954, land in “extended abadi” or six

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\textsuperscript{139} Urban Council Ordinance, sec. 153(1), Town council ord. sec. 152(1), Village Council Ordinance, sec. 42, Development council ordinance section 69

\textsuperscript{140} Municipal council ordinance section 267(1)

\textsuperscript{141} AIR 2000 SC 2143
\end{flushright}
categories of lands mentioned in the new Rule 63 were excluded from preparation of record of rights and annual register which adversely affected rights of tenure holders occupying such land as their possession of the land in these areas would not be reflected in the record-of-rights and Annual Register. The amendments were held contrary to the provisions of the Act. Since the Act did not authorize the authority to exclude any area from the purview of section 16 of the Land Revenue Act, the authority was held to have acted beyond the power conferred on it and therefore acted ultra vires.

Further explaining the principles for the valid delegation of legislative power, the Apex Court, in Agricultural market Committee V Shalimar Chemical Works Ltd.\(^{142}\), observed:

The effect of these principles is that the delegate which has been authorized to make subsidiary Rules and Regulations has to work within the scope of the authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder:

The court further ruled that the delegate can not, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act.

Explaining the principle of substantive ultra vires, the Supreme Court in State of Karnataka V H. Ganesh Kamath\(^{143}\) held:

Conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

In the instant case, section 7 (vii)(a) of the motor vehicle Act 1939 provided that a person who had passed the test in driving a heavy motor vehicle would be deemed also to have passed the test in driving any medium motor vehicle. Rule 5(2) of the Karnataka Motor Vehicles Rules 1963 provided that even though a person had passed the test for driving heavy motor vehicle, he could not obtain a license unless he had already possessed license for and had two years experience in driving a medium motor vehicle, which license, he could not obtain unless he had previously passed the

\(^{142}\) AIR 1997 SC 2502
\(^{143}\) AIR 1983 SC 550
test in driving a medium motor vehicle. Rule 5(2) was held to be in direct conflict with section 7(ii) (a), the enabling provision, travelled beyond the scope of enabling Act.

While applying the principle of ultra vires, the courts do not go into the question, whether there could be a better rule than the one framed. The courts in such cases, do not review the policy underlying a rule.\textsuperscript{144}

It has been ruled that a delegate cannot have more legislative power than the delegator. If delegated legislation is in conflict with the Parent Act, it must give way to the statute and so read in its context.\textsuperscript{145}

The Supreme Court in \textit{Indian Council of Legal Aid and Advice V Bar council of India}\textsuperscript{146} has explained that in the application of the rule of substantive ultra vires, the court would first interpret the relevant statutory provisions to determine the scope of the power delegated and then interpret the impugned delegated legislation and finally adjudge whether the same was within or without the statutory power conferred.

In the instant case, a rule made by the Bar Council of India barring qualified persons, beyond the age of 45 years from being enrolled as Advocates, was held to be ultra vires the power conferred on the Bar Council under section 49(1) of the Advocates Act 1961.

In determining the question as to substantive ultra vires of the delegated legislation, the court would consider the phraseology of the statutory provisions delegating rule making power. If the power is conferred in too broad terms, the efficacy of the doctrine would be very much diluted. In such a case, the courts find it extremely difficult to hold a rule as falling outside the scope of the power delegated. Besides, the judicial policy generally is to interpret the delegating provision rather too broadly.\textsuperscript{147}

\textsuperscript{144} Yassin V Town Area Committee AIR 1952 SC 115
\textsuperscript{145} ITW Signode India Ltd V State of Karnataka (2004) 3 SCC 48
\textsuperscript{146} AIR 1995 SC 691
\textsuperscript{147} Lohia Machines Ltd. V Union of India AIR 1985 SC 421
II. PROCEDURAL ULTRA VIERES:

Non-observance of the procedural norms by the rule making authority may make the rules so made ultra vires and hence void. It is as stated above, known as procedural ultra vires.

Ordinarily, the delegating statute requires the rule-making authority to follow certain procedures while making rules. These may include consultation with the affected interest, publication (anti-natal and post-natal) lying down of rules before the legislature, etc.

The question arises as to whether the observance of the procedural requirements is mandatory or directory. It is for the courts to determine the question finally. The courts take the view that while the directory procedural norms may be substantially complied with, the mandatory norms of procedure must be meticulously observed. While the non-observance of directory norms may not be fatal, the non-observance of the mandatory procedure renders the rules ultra vires.148

Since it is for the courts to determine the nature of the procedural norms, the matter depends on the fact as to how much significance the court attaches to the procedure prescribed in the enabling Act. While determining the question, various factors are taken in to account in arriving at the conclusion whether a particular provision is mandatory or directory such as-

The purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the facts of a particular case including the language of the provision.149

In Banwari Lal Agarwalla V State of Bihar150, Section 59(4) of the Mines Act 1952 laid down that before the draft regulations were published, the draft would be referred to every mining board and it should have a reasonable opportunity of reporting as to the expediency of making the regulations and their suitability. The Supreme Court held the requirement as to consultation with mining boards in making

148 Raza Buland Sugar Co. V Rampur Municipality AIR 1965 SC 895
149 Ibid.
150 AIR 1961 SC 845
the rules, as mandatory. The reference of draft regulations to every mining board was said to be a pre-requisite for the validity of the regulations. It was held immaterial as to whether the mining board made a report or not or send individual opinion of the members or a collective report of the board.

The requirement such as giving of a notice to the affected persons or providing to them an opportunity to file objections against the proposed rules, have been held mandatory. A rule made without complying with these requirements would be regarded as *ultra vires* and hence invalid. 151

Likewise, in *District Collector Chitoor V Chitoor Distt. Groundnut Traders Association*, 152 the central govt. in the exercise of its powers under section 3 of the Essential Commodities Act 1955, empowered the state govt. to make necessary orders with the prior permission of the central government. The orders issued without the prior concurrence of the central government were held *ultra vires* the procedure envisaged in to the above Act.

In *Union of India V Cynamide India Ltd*, 153 the supreme court referring to the types of conditional delegation broadly classified in *Tulsipur Sugar Co. V Notified Area Committee*, 154 said that in the third type of cases, the satisfaction of the delegate must necessarily be based on objective consideration and irrespective of whether the exercise of such power was judicial or quasi-judicial function, still it had to be treated to be one which required objective consideration of relevant factual data pressed in to service by one side which could be rebutted by the other side, who would be adversely affected if such exercise of power was undertaken by the delegate.

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151 Laxmi Narain V Union of India AIR 1976 SC 714  
152 (1989) 2 SCC 58  
153 AIR 1987 SC 1802  
154 AIR 1980 SC 882
IV. APPLICABILITY OF DOCTRINE TO CERTAIN COUNTRIES

a. ENGLAND

The applicability of the doctrine of ultra vires in England and as well in Sri Lanka dates from the 19th century. In England the doctrine has been prominently mentioned in *Colman V Eastern Counties Railway Co.* in 1840 and in *East Anglian Railway Company V Eastern Counties Railway Company* in 1851.

The English case law which was a confusion with regard to the principle was settled by the House of Lords decision in *Ashbury Railway Carriage & Iron Company V Riche*, it was held in this case that where there is an Act of parliament creating a corporation for a particular purpose and giving it powers for that purpose which it does not expressly or impliedly authorize it to be taken to be prohibited.

The company was incorporated under the Companies Act 1862, to make, sell or lend on hire all kinds of railway plants. The company entered into contract to construct a railway line. The act of the company in entering into contract was ultra vires, discussing this, the Lord Chancellor said “Now… if that is the condition upon which the corporation is established, it is a mode of incorporation which contain in it both, that which is affirmative and that which is negative.

It states affirmatively the ambit and extent of the vitality and power which by law is given to the corporation, and it states if it were necessary to state negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporation life for any other purpose than that which is so specified.

Furthermore, this jurisdiction was extended to local authorities. For instance, in *London County Council V Attorney General*, it was held that municipal corporation could not carry out objects not authorized by the Municipal Corporation Act 1882.

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155 www Acaglobal.com visited on 25th Aug 2011
156 10 Beav 1.16 , 16 LJ, Ch 73
157 11 C.B. 775, 21 LJ C.P.23
158 (1875) 7 HL 653
159 Ibid
160 Ibid at page 670
161 (1902) A.C. 165
It was not until the later part of the 19th century that it was clearly established that the strict type of *ultra vires* applied to the companies. Until 1844, the most type of company—the deed of settlement—had no corporate personality; that was enjoyed only by chartered companies (to which the strict doctrine did not apply) and by companies directly incorporated by statute (a rare breed until the railway boom). After the joint stock companies act 1856, deed of settlement companies became superseded by registered incorporated companies with limited liability and memoranda of association which had to specify their objects. Only than the court forced to decide whether or not the *ultra vires* doctrine applied. And in the landmark decision in *Ashbury's case*162 the House of Lords finally decided that it did.163

It was not, however, a decision that proved popular with the business world which, with the aid of its advisors, sought means of circumventing it. This was done by ensuring that the object clauses of memoranda of association did not follow the succinct models in the Tables to successive Companies Acts but instead specified a profusion of all the objects and powers that the ingenuity of their advisor could dream up. The courts sought to narrow the scope of the resulting *vires* by distinguishing between “objects” (in the sense of type of business) and “powers” and applying the EJUSDEM GENERIS rule of construction, ruling that the power could be used only in relation to the objects. But that too was circumvented by the device of ending the “objects” clause by stating that each of the specified objects or powers should be treated as independent and in no way ancillary or subordinate one to other164, and at a later date, by also inserting a power “to carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to any of the above business or the general business of the company165

The result of these devices was to destroy any value that the *ultra vires* doctrine might have had as a protection for members or creditors; it had become instead merely a nuisance to the company and a trap for unwary third parties. The

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162 (1875) L.R. 7 H L 653
163 Gower and Davies Principles of Modern Company Law 7th Ed. 2003 by Sweet & Maxwell page 132
164 Cotman V Brougham (1918) AC 514
165 Supra note 163 page 133
nuisance to the company was reduced somewhat when the companies Act 1948 made it possible for objects clauses to be altered without the need to obtain the court’s consent (because prior to that Act the objects clause could be altered for one or more of seven specific reasons by a special resolution subject to its confirmation by the court. Thereafter confirmation by the court was not needed unless dissenting members petitioned within 21 days). But all too often companies launched into new lines of business without realizing that changes in their objects clauses were needed and, as a result, wholly innocent people who had granted them credit might find themselves without a remedy. So might the company on contracts which it had entered in so far as a crowning absurdity, it seems that, such contracts being void, not only could the incapable company not be sued but it could not sue the other party.\textsuperscript{166}

A further complication was that although \textit{ultra vires} transactions were said to be void, the question whether a third party was affected by the voidness depended in some circumstances on the state of his knowledge. This, though perhaps difficult to justify in principle, was eminently reasonable. If for example, a company had power to borrow or to buy office furniture (as almost every company has, expressly or by implication) a third party can not be expected to check that the money of furniture is to be used by the company for an \textit{intra vires} object. Since the decision of the court of Appeal in \textit{Rolled Steel}\textsuperscript{167}, it may well be said that these cases, as well, should be viewed a turning on excess of authority rather than \textit{ultra vires} in the strict sense. Slade L.J. said in that case that “the court will not ordinarily construe a statement in memorandum that a particular power is exercisable for the purpose of the company, as a condition limiting the company’s capacity to exercise the power. It will be regarded as simply imposing a limit on the authority of the directors.”\textsuperscript{168}

On this approach the purpose of the company’s exercise of a power to borrow becomes irrelevant to an assessment of whether the exercise was \textit{ultra vires} and the third party’s knowledge or lack of knowledge of that purpose would appear equally irrelevant. However as we shall see that at common law the third party’s knowledge that the directors are exercising their power for a purpose beyond their authority

\textsuperscript{166} Ibid, page 133
\textsuperscript{167} (1986) Ch 246, CA
\textsuperscript{168} Ibid at page 295
prevents the third party from enforcing the contract against the company. Thus, whether these cases should be viewed as an amelioration of the strict ultra vires rules or as the decisions on directors power, the third party who knows is not a permitted one will not be able to enforce the transaction against an unwilling company. Even worse, the common law undermined the security of the third party’s transaction with the company not only where that third party actually knew about the improper purpose, but also where the third party had knowledge “constructively.” 169

The doctrine of ultra vires originated in the corporate cases in England and not in the context of exercise of statutory power by the public authorities. The doctrine was crystallized in the middle of the 19th century by the English courts in the cases arising out of acts done by Railways and other companies formed under the law of the parliament. Initially, railway companies alone had substantial quantum of public fund at their disposal and the joint stock companies were unknown. In old times in England corporations were considered to have most of the powers; the exercise of such powers was controlled through the imposition of certain formalities and making it subject to the greater part of the obligations of ordinary citizen. But with the emergence of the doctrine of ultra vires, these powers and obligations have been considerably curtailed. It has been laid down that some, if not all, the corporation exist for the attainment of certain objects only, and that if their powers are not expressly they are impliedly restricted to such only as may be necessary for the achievement of those objects. 170

Consequently they can not perform any act, enter into any transaction and incur any liability except those which are ancillary or incidental to the purpose for which they were created. The first case where the doctrine was clearly recognized by the court was Colman v Eastern Counties Railway Company. 171 Briefly stated, Eastern Counties Railway Company took a decision, for increasing railway traffic, to guarantee five percent dividend to the shareholders of an intended steam-packet company whose business was in connection with the railways.

Colman filed a suit against the Railway Company assailing the decision. The judgment delivered by Lord Langadale, MR. in this case clearly spelt out that power

169 Supra Note 163 page 134
171 (1846) 10 Beav 1
conferred by an Act of Parliament on the company is limited and it does not exceed what is expressly stated in the Act and required for carrying out the purpose of the Act.\textsuperscript{172}

b. IN SRI LANKA

The doctrine of \textit{ultra vires} was applicable to consider the validity of an action taken by local authority in Ceylon in 1882.\textsuperscript{173} Consequently, it is apparent that the doctrine of \textit{ultra vires} has been applicable for a long period in England and as well in Sri Lanka. Although the principle according to which the courts are prepared to apply the doctrine of \textit{ultra vires} and review the exercise of the administrative, judicial or legislative acts of an administrative agency may be classified in to number of categories, attention of this decision will be focused mainly with regard to principles of substantive and procedural \textit{ultra vires}, as these demonstrate the recent tendency to widen the approach of the doctrine of \textit{ultra vires}. Hence, at the outset, it is intended to analyze the applicability of the doctrine of \textit{ultra vires} on substantial grounds followed by an examination of procedural \textit{ultra vires}.

c. IN UNITED STATES

The decisions of the English courts were followed by the courts in United States of America. In particular the decisions and judgments of House of Lords were admitted to be of paramount authority.

The case in which the doctrine of \textit{ultra vires} received the most careful consideration in the USA was \textit{Bissel V Michigan Southern & C.RR. Cos},\textsuperscript{174} In this case two corporations, chartered respectively by the state of Michigan and Indiana having power to construct and operate a railroad with its own state, jointly entered into a business of transporting passengers over another railroad which was beyond the limits authorized by the charter.

A passenger was injured following an accident in the operation of the third railroads, because of negligence on the part of corporation employees. It was held that

\textsuperscript{172} Supra Note 170 page 3
\textsuperscript{173} Gunawardene V Manik Kunambi Seda (1882) 5, S.C.C. 22
\textsuperscript{174} 22 NY 258
the contract of the corporations to carry the passenger was illegal and *ultra vires* the companies. The passenger was also entitled to the compensation since it could not be said that like an outlawed felon he was liable to be “knocked on the head like a wolf or to have his limbs broken with impunity”.

As stated by BRICE SEWARD\(^\text{175}\) in the United States, where all corporate capacities have been construed rather liberally, somewhat strangely, the general principle has, till recently, been stated more strictly against, and it has been considered that the presumptions are rather against, than in their favor, that they possess by implication, not all capacities not denied, but, only those capacities which are necessarily required for the due conduct of their enterprise.\(^\text{176}\)

d. **IN AUSTRALIA**

In Australia the doctrine of *ultra vires* was made applicable in *Sinclair v Brougham*,\(^\text{177}\) The facts of the case are simple, the Birkbeck Permanent Benefit Building Society, an unincorporated body decided to set up banking business, called the Birkbeck Bank, although it was not a separate legal entity and indulged in *ultra vires* banking activities, the building society became insolvent and there was much litigation on how its remaining assets, which included deposits by customers, were to be distributed. The issue of whether the depositors were entitled to recover their deposits arose in the context of an application to the court by the liquidator on how he was to distribute the Building Society assets in winding up. Because the banking business was held to be *ultra vires* the object of the Building society, the contract between the depositors and the Building Society were void. The depositors therefore could not recover their deposits in an action in contract. Instead they attempted recovery on the basis of a common law claim that the Building Society held their deposits as “money had and received” to the use of depositors. The House of Lords rejected this claim. Viscount Haldane LC said that a claim “*quasi ex contractu*” was effectively a claim based on a fictitious promise. Such a claim in this case would

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\(^{175}\) A Treatise on doctrine of Ultra Vires 2nd Ed. 1877 page 59  
\(^{176}\) Supra note 170 page 5  
\(^{177}\) (1914) AC 398
strike at the root of the doctrine of *ultra vires*, because no form of promise can be imputed when one of the parties to it does not have the capacity to conclude it.\textsuperscript{178}

**Lord Dunedin said**

“That the common law works by way of a fiction which becomes inapplicable when the “money has been received” under an *ultra vires* contract…the implied promise on which the action for “money had and received” is based would be precisely that promise which the company or the association could not lawfully make”.

**Lord Summer said**

“That a common law action for the money deposited would be indirectly sanctioned as an *ultra vires* borrowings.” But because the cause of action rested upon a notional or imputed promise to repay, the law can not *de jure* impute promises to repay, whether for “money had and received” or otherwise, which, if made *de facto*, it would inexorably avoid”

Lord Golf then stated his view on how *Sinclair V Brougham*\textsuperscript{179} should be dealt with in the context of the case, then before them, which was that of an interest rates swap agreement and so was not, therefore, a borrowing contract pure and simple.

Lord Golf emphasized this distinction. He also said that because *Sinclair’s* case did not intend to create any principle of general application, it had no relevance to the present case.

Lord Golf then said “why, in his opinion, it would not be right for the House of Lords in WLG to depart from *Sinclair V Brougham*. I think it is best if I quote the whole relevant passage of Lord Golf speech”:

“For present purpose, I approach this case in the following way-

First, it is clear that the problem which arose in this case that a personal remedy in restitution was excluded on grounds of public policy does not arise in the present case, which is not of concerned with a borrowing contract.

Second, I regard the decision in *Sinclair V Brougham*\textsuperscript{180} as being a response to that problem in the case of *ultra vires* borrowing contracts, and as not intended to

\textsuperscript{178} Doctrine of Ultra Vires- Australian Citation Dt. 25 Apr. 2011 cited at www.statutelaw.blogspot.com

\textsuperscript{179} Supra Note 177 ibid

\textsuperscript{180} Ibid
create a principle of general application. From this it follows, in my opinion, that this case is not relevant to the decision in the present case in particular, it can be relied upon as a precedent that a trust arises on the facts of the present case, justifying on that basis an award of compound interest against the council. But I wish to add this. I do not in any event think that it would be right for your Lordship’s House to exercise its power under the practice statement\textsuperscript{181} to depart from \textit{Sinclair V Brougham}\textsuperscript{182} I say this first because in my opinion, any decision to do so would not be material to the disposal of the present appeal, and would therefore be obiter. But there is a second reason of substance why, in my opinion, that course should not be taken. I recognize that now- a- days cases of incapacity are relatively rare, though the swap litigation shows that they can still occur.\textsuperscript{183}

Even so the question could still arise whether, in the case of a borrowing contract rendered void because it was \textit{ultra vires} the borrower, it would be contrary to the public policy to allow a personal claim in restitution. Such a question has arisen in the past not only in relation to associations such as the Birkbeck Permanent Benefit Building Society, but also in relation to infants contracts. Moreover there is a respectable body of opinion that, if such a case arose today, it should still be held that public policy would preclude a personal claim in restitution, though not of course by reference to an implied contract. That was the opinion expressed by Leggatt L.J. in the Court of Appeal in the present case as it had been by Hobliouse J. and the same view has been expressed by Professor Birks\textsuperscript{184}.

I myself incline to the opinion that a personal claim in restitution would not indirectly enforce the \textit{ultra vires} contract or such an action would be unaffected by any of the contractual terms governing the borrowing, and moreover would be subject (where appropriate to any available restitutionary defenses). If my present opinion were to prove to be correct than \textit{Sinclair V Brougham}\textsuperscript{185} will fade in to history, if not than recourse can at least be had to \textit{Sinclair V brougham}\textsuperscript{186} as authority for the proposition that in such circumstances the lender should not be without a remedy.

\begin{thebibliography}{9}
\bibitem{181} Judicial Precedent (1966) 1 W.L.R. 1234
\bibitem{182} (1914-15) All ER Rep 622
\bibitem{183} Ibid Supra note 177
\bibitem{184} An Introduction to the Law of Restitution (1985) Page 374
\bibitem{185} Supra Note 182 ibid
\bibitem{186} Ibid
\end{thebibliography}
indeed, I cannot think that English law, or equity, is so impoverished as to be incapable of providing relief in such circumstances.¹⁸⁷

e. IN INDIA

In India the doctrine of *ultra vires* dates back to 1866 when the Bombay high court applied it to a joint stock company and held on the facts of the case before it that “the purchase by the directors of the company, on behalf of company, of shares in other joint stock companies, unless expressly authorized by the company’s memorandum of association, is *ultra vires* of the company.”¹⁸⁸ Since then the rules have been applied and acted upon in number of cases.

That the common law “works by way of a fiction which becomes inapplicable when the money “had and received” under an *ultra vires* contract”. Lord Parker of Waddington said that a claim for money “had and received” could not succeed because “the implied promise on which the action for money “had and received” is based would be precisely that the promise which the company or the association could not lawfully make”

The doctrine has been affirmed by the Supreme Court in its decision in *A. Laxamanswamy Maudaliar V Life Insurance Corporation of India.*¹⁸⁹ The facts of the case were that a life insurance corporation on July 15 1955, at an extra ordinary general meeting of shareholders passed a resolution sanctioning a donation of Rs two Lac out of the shareholders dividend account to certain memorial trust proposed to be formed with the object of promoting technical or business knowledge in insurance and authorizing the director to pay this sum to the trust. In pursuance of the above resolution the director of Insurance Company made an initial payment of Rs 5000 to the trustee and the balance was paid on December 5, 1955

Thereafter on 1st July 1956 Life Insurance Act came in to force and by virtue of section 7 of the Act, all assets and liabilities of the Insurance co. stood transferred to and vested in the Life Insurance Corporation. On September 30 1957, the LIC called upon the trustees of the trust to refund the amount of Rs.2 Lac received by

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¹⁸⁷ Supra Note 183, ibid
¹⁸⁸ Jehangir R. Modi V Shamji Ladha (1866-67) 4 Bom HCR 185
¹⁸⁹ AIR 1963 SC 1185
them as donation from the Insurance Co. On their denial of their liability, the LIC applied to the Life Insurance Corporation Tribunal. It was contended before the tribunal that the director of the company were authorized by the Articles of association of the company to make such donations towards any charitable or benevolent object and the amount of Rs. Two Lac was paid out of shareholders dividend account which was distinct and separate of the general assets of the company, and under Articles of association money standing to the credit of the shareholders dividend account being the exclusive property of the shareholders and not of the company, was held by the company for and behalf of the shareholders and not of the company and in trust for them, and the shareholders had absolute right of disposal over the said account and the shareholders of the company having resolved to donate Rs. two Lac to the trust account in the exercise of their absolute ownership and power of disposal of the said fund, the payment could not be called in question by the company or by anybody purporting to act on behalf of the company, for if the company had not been taken over by the corporation, the payment could not have been challenged as ultra vires and the power of the LIC was not larger in scope and ambit than that of the company.

The Supreme Court after considering the facts came to the conclusion that the LIC could demand the amount from the trustees and made the following observations.

“A company was competent to carry out its objects specified in the memorandum of association and could not travel beyond its objects. Power to carry out an object in the memorandum of association undoubtedly included the power to carry out what was incidental or conducive to the attainment of the main object. The memorandum has to be read with articles of association where the terms are ambiguous or silent. The articles of association might explain the memorandum of association, but could not extend its scope.190

The primary object of the company was to carry on the life insurance business in all its branches, and donation of the company’s fund for the benefit of the trust for charitable purpose was not incidental or conducive to the main object. Therefore, the resolution donating the funds of the company was not within the object mentioned in memorandum of association, and on that account ultra vires. Where a company did

190 Gauhati Law Times Vol. – 1, 2000 page 15
not act *ultra vires*, no legal relationship or effect ensued there-from, such an act was absolutely void and could not be ratified even if the shareholders agreed.

The above Supreme Court decision is an authority for two propositions-

Firstly, that a company’s fund cannot be diverted to every kind of charity even if there is an unrestricted power to that effect in the company’s memorandum.

Secondly, that object must be distinguished from powers. The power, for example, to borrow, or to make a charity is not an object. Object have to be stated in the memorandum, but not powers. Even if powers are stated in the memorandum, they can be only used to effectuate the objects of the company. They do not become independent objects by themselves. In order to find out whether the powers are exercised to effectuate the objects of the company, such exercise must be tested by the answer to three pertinent questions.\(^{191}\)

1. Is the transaction is reasonably incidental to the carrying on of the company’s business?
2. Is it bona-fide transaction?
3. Is it done for the benefit and to promote the prosperity of the company?

From the above cases illustrating the doctrine of *ultra vires*, the following principle with regards to the scope and the application of this doctrine of *ultra vires* can be deduced:

i. A company incorporated under the companies Act had power only to do those things which were authorized by the memorandum of association. Anything which was not expressly implicitly authorized was *ultra vires* the company and could not be ratified or been made effective even by the unanimous agreement of the members.

ii. The doing of an act which was expressed in the memorandum of association of a company rather than by mere power which was ancillary or incidental to a substantive object could not be *ultra vires* the company, because by definition it was something the company was formed to do.

iii. A company cannot exercise beyond the scope of the objects mentioned expressly in the memorandum of association, even though such

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\(^{191}\) Ibid page 15-16
exercise has been done for the benefit and best interest of the company itself and in addition it has been approved by all the members.

iv. Where a company did not act *ultra vires*, no legal relationship or effect ensued there from such an act was absolutely void and could not be ratified even if the shareholders agreed.

v. The doctrine of *ultra vires* ought to be reasonably and not unreasonably understood and applied and that whatever be fairly regarded as incidental to the objects authorized ought not to be held as *ultra vires*, unless it is expressly prohibited.\(^{192}\)

f. **The doctrine of *ultra vires* in Ireland.**\(^{193}\)

The doctrine of *ultra vires* is central to company law in Ireland. It limits the capacity of directors to carry on the business of the company. The object clause of a company's memorandum of associations identifies the type of business which a company must undertake under Section 6 (1) of the Companies Act 1963. If the company does something beyond the scope of its objects clause, this is said to be *ultra vires* (beyond the powers of the company).

The doctrine of *ultra vires* developed under the common law. One of the most important early cases is *Ashbury Railway Carriage and Iron Company v Riche*\(^ {194}\), in which case, Lord Cairns L.C stated that ‘no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association’. If such transactions are undertaken in violation of the objects clause they are considered void and cannot be ratified retrospectively even if the company’s objects are changed afterwards.

The doctrine of *ultra vires* was originally designed as a means to protect the interests of shareholders and creditors as what the company directors could and could do is systematically laid out in the memorandum of association. This is clear in *Ashbury Railway Carriage case*\(^ {195}\) where the Court made it clear that shareholders of a company should be aware of the purposes to which their funds are being put. Also

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192 Attorney General V Great Eastern Railway Co (1874-80), All ER Rep Ext 1459  
193 http://www.cpaireland.ie visited on 26 August 2011  
194 (1875) L.R. 7, H.L. 653  
195 Ibid
for creditors, it made it public and clear what the nature of the business of the company to which they are giving credit actually is? It is important to note that the objects clause in a memorandum of association may be changed or altered using a special resolution under Section 12 of the Ireland Companies Act 1963. Since the inception of the doctrine, drafters of memorandums of association have become very good at broadening the wording of objects in the memorandum to incorporate nearly any form of business transaction that the company directors may seek to become involved in. This has meant that the central reason for having an objects clause has been defeated since very broad clauses that are usually inserted into memorandums of association. Often there is an all-inclusive clause which could cover nearly all eventualities.

The courts are quite conservative when interpreting objects clauses so that the doctrine of ultra vires still has important applications. This is particularly important in relation to the doctrine of powers. The court will not permit a power to be changed into an object as per Re Introductions Limited196 (No.1) and this has limited the ability of company directors to circumvent the objects clause.

One of the problems with the doctrine of ultra vires is that prior to the introduction of Section 8(1) of the Companies Act 1963 in Ireland, creditors were caught by the enforcement of the doctrine of notice, however the statutory exception provided in section 8 that a person doing business with the company who was not “actually aware” of the company's lack of capacity to enter into a transaction.

Section 8(1) states “the act shall be effective in favor of any person relying on such act or thing who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company”.

Under S.8 (2) of the Companies Act 1963, directors who cause a company to act outside their powers are liable to the company for resulting losses; this section also allows shareholders to take action against a director who is found to have acted ultra vires.197

The doctrine of ultra vires no longer has the potency that it once had. This is the result of both the action of drafters to broaden the objects clause and the statutory

196 (1969) 1 All E.R. 887 CA
197 Supra Note 190 Ibid
there are now other methods of protecting both shareholders and creditors and this has meant that the objects clause no longer needs to be relied upon and thus the doctrine of ultra vires is no longer as necessary as it once was in Ireland.\textsuperscript{198}

V. COMPARISON INDIA/ UNITED KINGDOM

Although the doctrine of ultra vires born in English Courts is followed in India, there is, however, some difference between the ambit of applicability of the law as it prevails in the U.K. and India. In the U.K. parliament is supreme and, therefore, the courts do not have any authority to entertain any question raising the legality of any Act made by the parliament. The situation is quiet different in India where the constitution alone is supreme. The constitution is the law of laws, the paramount and the supreme law of the country. In historic judgment in Kesavananda Bharati case,\textsuperscript{199} the Supreme Court discussed the basic feature of the constitution for the first time and held that parliament can not enact any legislation to alter the basic feature of the constitution.

The high courts and the Supreme Court in the country have since than decided many questions regarding the constitutional validity of many Acts made by the legislature and struck down either the whole or parts of those declaring them to be ultra vires the constitution. The ambit of the applicability of the law of ultra vires in India is thus very wide as in the U.S.A. The doctrine is applicable to an Act done not only by the state but also by agents and/or instrumentalities, local governments, local authorities, corporations, commissions, Tribunals, Companies, Clubs etc. i.e. to an authority clothed with legal powers to do an act. The doctrine has helped the development of administrative law. Whenever any Executive, administrative, quasi-judicial authority or the legislature ignores or by-passes in manner which is colorable or otherwise, any provision of the constitution, statute, principles of natural justice or acts in a grossly arbitrary manner, the doctrine of ultra vires is attracted.\textsuperscript{200}

\textsuperscript{198} Ibid
\textsuperscript{199} AIR 1973 SC 1461
\textsuperscript{200} Supra Note 170, page 11
For example in one case in which the State Govt. of Kerala granted exemption from the operation of Kerala Building Rules 1984 for the construction of a high rise building in Cochin without recommendation of Greater Cochin Development Authority and Chief Town Planner as provided in the rules, the Supreme Court held that the order was *ultra vires*.\(^{201}\)

It is to be mentioned here that all *ultra vires* actions are void but all void actions are not *ultra vires*. An erroneous act is void but not *ultra vires*. The law of *ultra vires* does not apply to the acts done by the private citizens but only to those done by authorities or persons clothed with legal powers. Power enables an authority to do what would otherwise be illegal or ineffective.\(^{202}\)

The development of the doctrine of *ultra vires* has now significantly departed from the initial and old concept, of only lack of legal power to do an act. The doctrine now refers to not only the lack of power to do any act, but also to any situation, like improper or unauthorized procedure, purpose or violation of law of natural justice in exercising the power that is lawfully conferred on the authority concerned. As the Supreme court observed in *SS Sugar Company case*,\(^{203}\) is a repository of power acts *ultra vires* either when he acts in excess of his power in the narrow sense or by acting in bad faith or for an inadmissible purpose or for irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Any act of the repository of power, whether legislative, administrative or quasi-judicial, is open to challenge if it violates the provisions of the constitution or the governing Act or the general principles of law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

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202 Supra Note 170 Page 13
203 Shri Sitaram Sugar Company Ltd. V Union of India (1990) 3SCC 223